

MODULE 6

Sexual Speech, and a Category the Court Refused to Create

Miller · Ferber · Free Speech Coalition · Pacifica · Cohen · Reno · Stevens · Brown

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Where we are on the map

The last of the disfavored categories — and the Court closing the list.

MODULE 1

First Amendment Values

Truth • democracy • autonomy • tolerance

MODULE 1

Speech vs. Conduct

Pure speech • expressive conduct • government speech

MODULE 2

Content-Based vs. Content-Neutral

Strict against intermediate — and the exceptions

MODULES 4-6

Disfavored Categories

Incitement • solicitation of crime • threats • fighting words • defamation • commercial • sexual speech

MODULE 7

Place of Speech

Public forum doctrine. Where it happens does the work.

MODULE 3

Four Facial Failures

Prior restraint • vagueness • overbreadth • compelled speech

THROUGHOUT

Related Protections

Press • assembly → association • petition — and the religion clauses

Old categories narrowed; new ones refused.

Obscenity: Roth, and “I know it”

Unprotected since 1957. Defined, for years, by nobody.

ROTH, 1957

- Obscenity is not protected.
- The test: an appeal to prurient interest.

THE PROBLEM

- Not very well defined.
- Sixteen years without a majority test.

Justice Stewart, 1964: “I know it when I see it.”

Miller: the test today

Three questions, each asked of the work taken as a whole.

1

Prurient interest

Community standards.

2

Patently offensive

Conduct defined by state law.

3

No serious value

A reasonable person.

EACH ASKED OF THE WORK AS A WHOLE

- Not Maine or Mississippi held to the standards of Las Vegas or New York.

Stanley: possession at home

Obscene films found in a bedroom during a search for something else.

THE HOLDING

- Private possession at home: protected.
- Selling and distributing: still not.

THE REASON

- Freedom of thought.
- The State may not control the mind.

A State “has no business telling a man, sitting alone in his own house, what books he may read.”

Ferber: child pornography

A separate category, for a separate reason.

WHY IT IS UNPROTECTED

- Its production involves and harms children.
- Distribution is “intrinsically related” to the abuse.

NOT MILLER

- It need not be obscene.
- The harm is in how it is made.

The evil “so overwhelmingly outweighs the expressive interests, if any.”

Possession, and virtual images

Two limits on Ferber, pointing in opposite directions.

OSBORNE, 1990

- Possession may be punished.
- Stanley does not reach it.

FREE SPEECH COALITION, 2002

- Images with no real child: protected,
- unless obscene under Miller.

Ferber turned on “how it was made, not on what it communicated.”

Indecency: FCC v. Pacifica

George Carlin's "Filthy Words," on the radio at 2 p.m.

WHY BROADCAST

- A “uniquely pervasive presence” — in the home.
- “Uniquely accessible to children.”

THE HOLDING

- Indecent, not obscene.
- The FCC may still regulate it on the air.

“A right thing in the wrong place — like a pig in the parlor.”

Vulgarity: Cohen v. California

A jacket in a Los Angeles courthouse corridor, 1968.

THE JACKET

- “Fuck the Draft.”
- In a courthouse corridor.

THE COURT

- Protected.
- Viewers could avert their eyes.

“One man's vulgarity is another's lyric.”

Cable and the Internet

Not as invasive as broadcasting — so full protection.

CABLE: PLAYBOY, 2000

- Households can block channels.
- Strict scrutiny. Struck down.

INTERNET: RENO, 1997

- Not as “invasive” as radio or TV.
- No reason to lower the level of scrutiny.

My board: “complete protection.” Read: full protection — strict scrutiny.

Free Speech Coalition v. Paxton

2025: age verification for online sexual material. New since my board.

THE LAW

- Texas: sites more than a third sexual material harmful to minors.
- Verify every user's age.

THE COURT, 6-3

- Only an incidental burden on adults.
- Intermediate scrutiny. Upheld.

THE DISSENT

- A content-based burden on adults.
- Strict scrutiny, as in Reno.

“[A]dults have no First Amendment right to avoid age verification.”

Where it happens sets the rule

The same words, sorted by medium.

A courthouse corridor

Cohen, 1971

Protected: avert your eyes.

Broadcast radio and TV

Pacifica, 1978

Indecency may be regulated.

Cable

Playboy, 2000

Strict scrutiny: households can block.

The Internet

Reno, 1997

Strict scrutiny: not invasive.

Age checks online

Paxton, 2025

Intermediate scrutiny.

Stevens: no new category

Depictions of animal cruelty — and a test the Court called dangerous.

THE GOVERNMENT

- Balance the speech's value against its costs.
- Low value: no protection.

THE COURT, 8 - 1

- No new categories by balancing.
- Overbroad: struck down.

As a test for First Amendment coverage, balancing is “startling and dangerous.”

Brown: violent video games

California tried obscenity-for-minors, applied to violence.

THE LAW

- No violent games sold to minors.
- Modeled on obscenity for minors.

THE COURT, 7-2

- Violence is not obscenity.
- No tradition of restricting it for children.

“Grimm's Fairy Tales, for example, are grim indeed.”

Ferber in 1982, Stevens in 2010

The same category, explained two different ways.

FERBER, 1982

- The harm “overwhelmingly outweighs” the expression.
- It reads as balancing.

STEVENS, 2010

- Ferber was “a special case.”
- Integral to a crime — not balancing.

The categories come from history and crime, not from weighing value against harm.

For discussion: the minors package

A hypothetical. Every case in this module is in play.

THE PACKAGE

- Lifelike computer-made images of minors.
- Age checks for adult sites — and social media.
- No violent VR games for minors.
- Streaming profanity at 3 p.m.
- No profane clothing in the Capitol.

QUESTIONS FOR DISCUSSION

1. Free Speech Coalition, or Ferber?
2. Does Paxton reach social media?
3. Is virtual reality different from Brown?
4. Pacifica, Playboy or Reno?
5. Cohen at the Capitol?

The review board: disfavored

Modules 4 to 6 on one board. Each category, and its case.

PART I

- Incitement: Brandenburg.
- Fighting words: Chaplinsky.
- Obscenity: Miller.
- Indecency: Pacifica.
- Child pornography: Ferber.

PART II

- True threats: Virginia v. Black.
- Solicitation: integral to a crime.
- Contract terms: integral to a deal.
- Defamation: actual malice.
- Commercial speech: intermediate scrutiny.

The review board: fully covered

What looks like a category, and is not.

FULLY COVERED

- Advocacy and criticism of government.
- Offensive public protest: Snyder.
- Possession at home: Stanley.
- Indecency off the air: Cohen, Reno.

ALSO FULLY COVERED

- Virtual images: Free Speech Coalition.
- Hate speech: Skokie.
- Violent speech: Stevens, Brown.
- False speech: Alvarez.

And inside any category: no viewpoint lines (R.A.V.).

Module 6 on one slide

One line per rule.

THE LINE, ONE RULE AT A TIME

- Obscenity: the three Miller questions (Miller).
- Possession of obscenity at home: protected (Stanley).
- Child pornography: unprotected for how it is made (Ferber).
- Indecency: regulable on the air, not online (Pacifica; Reno).
- Age checks for minors online: intermediate scrutiny (Paxton).
- No new categories by balancing (Stevens; Brown).

Next — Module 6A: speech and participation in elections.

Next: Module 6A — Speech and Participation in Elections; then Module 7 — Place of Speech.