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# It's Not the Thought that Counts: A Political Economy of Obscenity

Karen M. Markin
*University of Rhode Island Research Office*

# IT'S NOT THE THOUGHT THAT COUNTS: A POLITICAL ECONOMY OF OBSCENITY

KAREN M. MARKIN, PH.D.*



## I. INTRODUCTION

Obscenity remains an anomaly in our system of freedom of expression in that it receives no First Amendment protection, despite the expansion of such protection for many other types of speech. Content-based restriction of speech is generally considered repugnant in our constitutional scheme, yet the government continues to restrict obscene communication.

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* Director of Research Development, University of Rhode Island Research Office. Ph.D., mass communication, University of North Carolina-Chapel Hill, 1993.

Some observers employing a traditional legal analysis may not be alarmed by the government's power to restrict obscenity. The legal definition of obscenity is content with no "literary, artistic, political, or scientific value."[1] From this perspective, government control of obscene content is little cause for concern. But viewing the problem through a wide-angle lens, so to speak, tells a different story. That lens is political economy.

Mass communication scholar Denis McQuail defined political economy as a view of media and society in which economic factors "play a determining role and in which politics is primarily about economic power."[2] A political economy of communication examines the relationship between the media "and the broader social structure of society," specifically with respect to the interplay of economics and politics.[3] Political economy of communication also examines how ownership and government policies affect media behavior and content, and how media support or challenge prevailing class relations.[4]

American media are overwhelmingly commercial entities, and the government is empowered to regulate commerce, among other public activities. The vast majority of obscenity cases that have reached the United States Supreme Court have involved a mass medium. The law has continued to control obscenity by framing it not as an idea that is being silenced, but as a commodity whose distribution the government can legitimately regulate. This approach to the control of obscenity has allowed government to wield great power over the individuals and businesses that trade in obscenity. Commodification of obscenity fits into a broader legal trend toward propertization of speech, which commentators have warned is dangerous for freedom of expression precisely because of the wide latitude government has to control property.[5]

This Article analyzes United States Supreme Court decisions from the perspective of political economy to examine the legal means the government has used to control obscene content. Methods of control have varied by medium. Print media, which receive full First Amendment protection, have been controlled through restrictions on the distribution of their end product. First, government has brought criminal charges against those operating a point of sale for obscene material. Second, it has attempted to curb the dissemination of obscene material by exercising its legitimate control of the mail and interstate commerce. Third, state and local governments have used their control of land use zoning and other regulatory powers to restrict brick-and-mortar vendors of obscene material. Similar approaches have been taken for other tangible products and brick-and-mortar points of sale, such as videotapes and movie theaters. Broadcasters and common carriers

1. Miller v. California, 413 U.S. 15, 24 (1973).

2. DENIS MCQUAIL, MCQUAIL'S MASS COMMUNICATION THEORY 501(4th ed. 2000).

3. Robert McChesney, *Making a Molehill Out of a Mountain: The Sad State of Political Economy in U.S. Media Studies*, *in* TOWARD A POLITICAL ECONOMY OF CULTURE 41, 43 (Andrew Calabrese & Colin Sparks eds., 2004).

4. *Id.*

5. *See* Matthew D. Bunker, *Trespassing Speakers and Commodified Speech: First Amendment Freedoms Meet Private Property Claims*, 77 JOURNALISM & MASS COMM. Q. 713 (2000).

fall under the regulatory purview of the Federal Communications Commission, which exerts powerful control through licensure. On the Internet, the government has attempted to control the flow of obscenity through commercial speech regulation and its spending power.

Part II of this Article briefly reviews First Amendment theory, examining why freedom of expression is valued in the United States and is important for the mass media. Part III discusses the rationale behind the government's control of obscenity. Part IV examines political economy and communication, discussing the forces outside of the First Amendment that affect freedom of expression in the media. This discussion leads to the notion of the "propertization" of speech, a trend toward using property law rather than the First Amendment to control expression. Using this broader shift toward propertization as a point of departure, Part V analyzes the Supreme Court's opinions in obscenity cases, grouping them according to the type of law restricting the material. Part VI discusses the Supreme Court decisions allowing social class structuration to play a role in the obscenity cases. The Article concludes in Part VII that the government's view of obscenity as a commercial product sets dangerous precedent for freedom of expression.

## II. FREE EXPRESSION VALUES AND THE FIRST AMENDMENT

The freedom of expression guaranteed by the First Amendment has long been considered essential to the functioning of a democratic society. Thomas Emerson identified four values underlying freedom of expression doctrine that are familiar to every student of the First Amendment: individual self-fulfillment, attainment of truth, self-governance, and a "safety-valve" function.[6] These values are worth reviewing in some detail because they provide the rationales for limiting government control of speech.

Individual self-fulfillment is an important value underlying the American system of freedom of expression. The principle arises from Western society's view of according the individual the right of self-realization; suppression of beliefs and expression is an "affront to the dignity of man."[7] Emerson argued powerfully for the centrality of this value:

> [T]hought and communication are the fountainhead of all expression of the individual personality. . . . Freedom at this point is essential to all other freedoms. . . . [T]he power of society and the state over the individual is so pervasive, and construction of doctrines, institutions and administrative practices to limit this power so difficult, that only by drawing such a protective line between expression and action is it possible to strike a safe

6. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963).

7. *Id.* at 879.

balance between authority and freedom.[8]

In this view, freedom of expression helps to protect the individual from societal power. The attainment of truth, the second value Emerson identified, involves the advancement of knowledge.[9] It accrues to both the individual and society.[10] The free flow of knowledge enhances the ability of individuals to discover truth, while also enhancing collective decisionmaking. This value promotes "a rethinking and retesting of the accepted opinion."[11] The third value, participation in decisionmaking, is an "open discussion" to which all citizens of the democratic society are invited.[12] Although this value is clearly related to the political process, it applies to other fields of endeavor as well. According to Emerson, this theory "embraced the right to participate in the building of the whole culture, and included freedom of expression in religion, literature, art, science and all areas of human learning and knowledge."[13]

The fourth and final of Emerson's values underpinning freedom of expression is that it serves a safety-valve function by helping to maintain a balance between stability and change.[14] The airing of ideas allows for "political legitimization"[15]: those who have the freedom to express their ideas are more likely to support a decision they previously opposed if they believe in the legitimacy of the process through which the decision was made. Although such freedom for disagreement and discord is potentially risky, Emerson stressed that the state retains the power to regulate action should any danger arise.[16]

Emerson approached freedom of expression as a right to speak that inheres within and benefits the individual. He also framed it as an information-exchange process essential to a democratic society because it facilitates the search for truth and collective decisionmaking. In so doing, freedom of expression is valuable to society because it provides a crucial means to maintaining balance between social order and change.

The obscenity cases have used a different frame of reference, which has allowed the government more leeway in controlling such content. First, the right to express oneself discussed by Emerson has been distinguished from the right to receive information. The latter is a corollary of the First Amendment, and there is "no consensus view on the scope of the right to receive information or the standard of review that will apply to the right."[17] As this Article will show, the Supreme Court has typically viewed obscenity cases from the perspective of the person

8. *Id.* at 881.
9. *Id.*
10. *Id.*
11. *Id.* at 882.
12. *Id.*
13. *Id.* at 883.
14. *Id.* at 884.
15. *Id.* at 885.
16. *Id.* at 886.
17. Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIB. J. 175, 187 (2003).

distributing or receiving the message, rather than the person creating it. By taking this perspective, the Court has further curtailed the protection available for obscene content. Second, the Court has framed many obscenity cases in terms of commercial speech, although it seldomly explicitly acknowledged this. Commercial speech has traditionally received less protection than speech about matters of public concern.[18] Also, in these cases the freedom to circulate publications was seen not as a personal civil liberty with the requisite First Amendment protection, but as a commercial transaction.

## III. RATIONALE FOR CONTROL OF OBSCENITY

Regulation of speech based on content has been anathema to the American system of freedom of expression for years,[19] yet the exclusion of obscenity from First Amendment protection continues.[20] This can be attributed to historical and political factors. A brief overview of the history of obscenity in the United States follows to provide context for the subsequent analysis.

Government has sought to control obscenity because of the presumed harmful effects of such content. Roots of this assumption can be traced to mid-seventeenth century English law. A test for obscenity emerged from *The Queen v. Hicklin*,[21] a case dealing with an anti-Catholic pamphlet: "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[22] This test, which emphasized the effect of the message on susceptible individuals rather than the general public, "had a significant effect on the development of American obscenity law."[23] In colonial America, the regulation of obscenity unfolded in a similar fashion.[24] All colonies had statutes that criminalized blasphemy or heresy.[25] Laws against obscenity began to appear in the early eighteenth century but focused primarily on religious speech.[26] In 1815, the first conviction for the common law crime of obscene libel was reported.[27] While other types of content restriction fell away as democracy developed, control over

18. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 457 (1978)) (stating that the United States Constitution provides "lesser protection to commercial speech than to other constitutionally guaranteed expression").

19. *See, e.g.*, Police Dep't v. Mosely, 408 U.S. 92, 94, 95–96 (1972) (holding a city ordinance unconstitutional because it made an exception for peaceful picketing).

20. *See, e.g.*, Ashcroft v. ACLU, 535 U.S. 564, 566–67, 574 (2002) (quoting Miller v. California, 413 U.S. 15, 24 (1973)) (analyzing the applicability of the *Miller* test to determine whether material on the Internet was obscene, thus receiving no First Amendment protection).

21. (1868) 3 L.R.Q.B. 360.

22. *Id.* at 371.

23. FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 8 (1976).

24. *Id.*

25. *Id.*

26. *Id.* at 9.

27. *Id.* (citing Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 104–105 (Pa. 1815)).

obscenity remained.[28]

Obscenity has provided a convenient soapbox issue for government officials. Anthony Comstock was a well-known crusader against obscenity who pushed in the late nineteenth century for postal restrictions on obscenity.[29] The result was what is known as the Comstock Act, legislation that prohibited the mailing of obscene publications.[30] Police efforts to control obscenity have often been proactive sting operations rather than responses to citizen complaints.[31] More recently, former United States Attorney General John Ashcroft waged a battle against Internet child pornography.[32]

## IV. POLITICAL ECONOMY AND COMMUNICATION

Vincent Mosco defined political economy as "the study of the social relations, particularly the power relations, that mutually constitute the production, distribution, and consumption of resources."[33] When applied to communication, this approach examines the relationship between media and communication systems vis-a-vis their relationship to the broader structure of society.[34] Political economy also explores how media ownership and government policies contribute to the development of media systems and communication technologies, and how these factors affect media behavior and content.[35] The political economy perspective recognizes that communication media are "embedded in larger macro-structures of power,"[36] and that forces such as hypercommercialism, rather than commitment to First Amendment values, are shaping their content.[37] Political economy also takes note of the transformation of a message into a marketable product—the commodification of media content.[38]

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28. *See id.* at 10.

29. *See* Michael Grossberg, *Does Censorship Really Protect Children?*, 54 FED. COMM. L.J. 591, 592–93 (2002) (book review).

30. 18 U.S.C. § 1461 (2000 & Supp. 2003).

31. *See infra* note 65 and accompanying text.

32. *See* Torsten Ove, *Child Porn Sweep Nets 100; National Probe of Web Site Finds 500 Subscribers Here*, PITTSBURGH POST-GAZETTE, Aug. 9, 2001, at A1; Wayne Washington, *Web Child Porn Raids by FBI Yield Arrests, Ashcroft Announces*, BOSTON GLOBE, March 19, 2002, at A2.

33. VINCENT MOSCO, THE POLITICAL ECONOMY OF COMMUNICATION 25 (1996) (emphasis omitted).

34. *See id.*

35. McChesney, *supra* note 3, at 43.

36. David Skinner et al., *Mapping the Threads*, *in* CONVERGING MEDIA, DIVERGING POLITICS: A POLITICAL ECONOMY OF NEWS MEDIA IN THE UNITED STATES AND CANADA 7, 10 (David Skinner et al. eds, 2005).

37. Mark Cooper, *Hyper-Commercialism and the Media: The Threat of Journalism and Democratic Discourse*, *in* COVERING MEDIA, DIVERGING POLITICS, *supra* note 36, at 117.

38. MOSCO, *supra* note 33, at 146.

### *A. Commodification and Propertization*

The concept of commodification originated in Marxist theory.[39] Marx drew a distinction between "use-value" and "exchange-value."[40] Use value is an object's capacity "to satisfy a human want or need."[41] Exchange value is the price that can be commanded in return for the object.[42] The transformation of use values to exchange values is commodification.[43] In applying these concepts to communication, political economists have studied the "significance of those structural forms responsible for the production, distribution and exchange of communication commodities and for the regulation of these structures, principally by the state."[44] Political economists also have examined commodification in communication by focusing on media content. "[F]rom this point of view, the process of commodification in communication involves transforming messages, ranging from bits of data to systems of meaningful thought, into marketable products."[45]

The use value of a media message can be construed as the self-fulfillment its author derives from its creation, or as the satisfaction of an audience member's need or desire for the information. Commodification transforms obscene messages into products with exchange value. In other words, a thought about obscenity is transformed into a message in a tangible medium of expression. The message is typically disseminated by mass media, which in the United States are commercial entities. These message-products are distributed to retail establishments and sold to audience members. It is this chain of production over which government is able to exert control.

Outside the realm of political economy, a growing body of legal literature has taken note of the apparent commodification of speech. This commodification has been viewed as part of a larger trend toward the preeminence of property rights. Lawrence Lessig commented more than fifteen years ago on society's growing and persistent belief in the alchemical power of property rights as a cure-all for contemporary societal problems.[46] This is cause for concern in the realm of First Amendment law, because the government is able to exert more control over property than over speech. Diane Zimmerman explained:

> [D]espite large areas of peaceful coexistence between the values protected by the Speech and Press Clauses and those defended by

39. *See id.* at 140.
40. W.A. SUCHTING, MARX: AN INTRODUCTION 78 (1983).
41. *Id.*
42. *Id.*
43. MOSCO, *supra* note 33, at 141.
44. *Id.* at 145.
45. *Id.* at 146.
46. Lawrence Lessig, Professor, Harvard Law School, Keynote Address at the Fordham Intellectual Property Media & Entertainment Law Journal Symposium: Commons and Code (Feb. 9, 1999), *in* 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 405, 405 (1999).

> property doctrines, conflict between the two is serious. What seems to have happened in the course of this conflict is that an ever-expanding array of new or reconstructed property theories is cannibalizing speech values at the margin. In large part, this has occurred not because speech claims are inherently weaker than property claims, but because courts fail to think critically about the justifications for, functions of, and limitations on property rules in the sensitive area of speech.[47]

In fact, some have argued that speech receives greater legal protection than property rights:

> Under U.S. constitutional law freedom of speech and press get greater protection than do economic freedoms. If the government regulates ordinary market processes, such as contracting or use of property, the regulations will be sustained as long as there is some rational basis for the legislation, and the regulations implement the rational basis to some minimal degree.[48]

In contrast, "when the regulations seem to violate the guarantees of freedom of speech or press the Court engages in far more searching review. . . . [C]ontent-based regulations must pass the very demanding 'compelling state interest test' to survive."[49]

Thus, commodification of speech can result in grave consequences for First Amendment freedoms. When courts view obscene messages as commodities, they open the gates to the use of the lower standard of review used for economic freedoms. That is precisely what the Supreme Court has done. The duration and breadth of this control have been remarkable, but it has met only lukewarm opposition, probably because of the low social value ascribed to obscene content. Regardless of the value ascribed to obscenity, its control is cause for concern as property theories come to dominate the legal arena. Obscenity can be viewed as the archetype of what might happen to First Amendment freedoms when media messages are treated as property rather than the expression of ideas.

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47. Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 667 (1992) (footnotes omitted).

48. Matthew L. Spitzer, *Turner, Denver, and Reno*, *in* A COMMUNICATIONS CORNUCOPIA 172, 198 (Roger G. Noll & Monroe E. Price eds., 1998).

49. *Id.* at 199; *see also* Bunker, *supra* note 5, at 713 ("[P]roperty rights hardly have the same cachet as First Amendment freedoms."); Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 950 (1995) ("[E]ven content-neutral laws face stricter tests of rationality than do general regulations of the economic market.")

### *B. Structuration*

Structuration, "the process of constituting structures with social agency,"[50] like commodification, is critical to political economy. Its outcome "is a set of social relational and power processes organized around class, gender, race, and social movements that both correspond to and oppose one another."[51] Social class has played a role in the Court's obscenity jurisprudence, beginning with the legal definition of obscenity itself.[52] Repeated use of the definition has reinforced the notion that elite or high culture is generally not considered obscene.

## V. LEGAL APPROACHES TO THE CONTROL OF OBSCENITY

Political economy recognizes the centrality of power in the analysis of communication.[53] The law codifies government's power. With regard to communication, the government's power is limited by the First Amendment. This protection may prevail when the communicator is an individual and is expressing ideas that conform to the hegemony. But when the communicator stands to gain financially from expressing an idea, and the idea is not accepted by the hegemony, First Amendment protection is compromised. Most obscenity cases reaching the Supreme Court do not require the justices to wrestle with whether the content at issue in a particular dispute was legally obscene, scouring it for any redeeming social value. Rather, other legal issues are in the forefront of obscenity cases. The government has used legitimate powers that are not limited by the First Amendment to control the dissemination of obscene content. The next subparts review these legal means of control and are organized by the level of government enforcing the law: state, local, and federal.

### *A. State Controls*

State governments use a variety of powers in their efforts to control obscenity. Criminal law is most common, followed by several other means which are discussed in detail below.

#### *1. Criminal Statutes*

Criminal law is a very powerful method of government control. According to John C. Klotter, "A crime is a public wrong in that it affects public rights and is an injury to the whole community."[54] Criminal law emphasizes the prevention of

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50. MOSCO, *supra* note 33, at 138.
51. *Id.* at 139.
52. *See infra* Part VI.
53. MOSCO, *supra* note 33, at 257.
54. JOHN C. KLOTTER, CRIMINAL LAW 17 (Elizabeth Roszmann Ebben ed., 6th ed. 2001) (citing Huntington v. Attrill, 146 U.S. 657, 668–69 (1892)).

undesirable conduct by imposing punishment for it.[55] In criminal law, the action is initiated by the state, rather than an individual,[56] and the punishment can be a fine or imprisonment.[57] In the cases identified for this Article, criminal law was the most common method used by the government to control obscenity.[58] The states[59] and the federal government[60] have statutes that criminalize the sale, distribution, and exhibition of obscene material. Generally, in the Supreme Court obscenity cases involving criminal law, the conduct at issue was the sale of obscene material. The obscene material was treated as a commodity in a commercial transaction, rather than as the expression of an idea.

About one-third of the obscenity cases identified for this Article involved state criminal law.[61] In these cases, police targeted brick-and-mortar points of sale for

55. *Id.* at 5.

56. *Id.* at 4.

57. *Id.* at 16–17.

58. *See infra* note 61 and accompanying text.

59. ALA. CODE §§ 13A-12-130 to -200.12 (LexisNexis 2005 & Supp. 2006); ARIZ. REV. STAT. ANN. §§ 13-3501 to -3513 (2001 & Supp. 2006); ARK. CODE ANN. §§ 5-68-201 to -503 (2005); CAL. PENAL CODE §§ 311–312.7 (West 1999 & Supp. 2007); COLO. REV. STAT. §§ 18-7-101 to -106 (2006); CONN. GEN. STAT. ANN. §§ 53a-193 to -210 (West 2001 & Supp. 2007); DEL. CODE ANN. tit. 11 §§ 1361–1366 (2001 & Supp. 2006); FLA. STAT. ANN. §§ 847.001–.202 (West 2000 & Supp. 2007); GA. CODE ANN. §§ 16-12-80 to -105 (2003 & Supp. 2006); HAW. REV. STAT. ANN. §§ 712-1210 to -1219.5 (LexisNexis 2003 & Supp. 2006); IDAHO CODE ANN. §§ 18-4101 to -4116 (2004 & Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/11-20 to -20.1 (West 2002 & Supp. 2006); IND. CODE ANN. §§ 35-49-1-1 to -3-4 (LexisNexis 2004 & Supp. 2006); IOWA CODE ANN. §§ 728.1–.15 (West 2003 & Supp. 2007); KAN. STAT. ANN. §§ 21-4301 to -4301c (1995 & Supp. 2005); KY. REV. STAT. ANN. §§ 531.010–.370 (LexisNexis 1999 & Supp. 2006); LA. REV. STAT. ANN. §§ 14:106–106.3 (2004 & Supp 2007); ME. REV. STAT. ANN. tit. 17, § 2911–2913 (2006); MD. CODE ANN., CRIM. LAW §§ 11-101 to -211 (LexisNexis 2002 & Supp. 2006); MASS. GEN. LAWS ANN. ch. 272, §§ 28–32 (West 2000 & Supp. 2006); MICH. COMP. LAWS ANN. § 600.2938 (West 2000); MINN. STAT. ANN. §§ 617.241–.299 (West 2003 & Supp. 2007); MISS. CODE ANN. §§ 97-29-101 to -109 (2006); MO. ANN. STAT. §§ 573.010–.100 (West 2003 & Supp. 2007); MONT. CODE ANN. § 7-31-4101 (2005); NEB. REV. STAT. § 28-808 to -829 (1995); NEV. REV. STAT. ANN. §§ 201.235–.254 (LexisNexis 2006); N.H. REV. STAT. ANN. §§ 650:1–6 (LexisNexis 1996 & Supp. 2006); N.J. STAT. ANN. §§ 2C:34-2 to -7 (West 2005); N.M. STAT. ANN. §§ 30-37-1 to -38-2 (LexisNexis 2004 & Supp. 2006); N.Y. PENAL LAW §§ 235.00–.24 (McKinney 2000 & Supp. 2007); N.C. GEN. STAT. §§ 14-190.1 to -190.15 (2005); N.D. CENT. CODE §§ 12.1-27.1-01 to .1-12 (1997 & Supp. 2005); OHIO REV. CODE ANN. §§ 2907.31–.37 (LexisNexis 2006); OKLA. STAT. tit. 21, §§ 1021–1040.80 (2002 & Supp. 2007); ORE. REV. STAT. § 167.060–.100 (2005); 18 PA. CONS. STAT. ANN. § 5903 (West 2000 & Supp. 2006); R.I. GEN. LAWS §§ 11-31-1 to -13 (2002); S.C. CODE ANN. §§ 16-15-305 to -445 (2003 & Supp. 2006); S.D. CODIFIED LAWS § 22-24-25 to -37 (LexisNexis 1998 & Supp. 2003); TENN. CODE ANN. §§ 39-17-901 to -920 (2006); TEX. PENAL CODE ANN. § 43.21–.27 (Vernon 2003 & Supp. 2006); UTAH CODE ANN. §§ 76-10-1201 to -1233 (2003 & Supp. 2006); VT. STAT. ANN. tit. 13, §§ 2801–2813 (1998 & Supp. 2006); VA. CODE ANN. §§ 18.2-372 to -387.1 (2004 & Supp. 2006); WASH. REV. CODE ANN. §§ 9.68.015–.140 (West 2003 & Supp. 2007); WIS. STAT. ANN. §§ 944.20–.25 (West 2005 & Supp. 2006); WYO. STAT. ANN. §§ 6-4-301 to -304 (2005 & Supp. 2006). Alaska does not have general obscenity statutes; however, the state has the power to limit juveniles' access to obscene material. Hanby v. State, 479 P.2d 486, 497–98 (Alaska 1970).

60. 18 U.S.C. § 1460–1470 (2000 & Supp. 2004).

61. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563–64 (1991); Osborne v. Ohio, 495 U.S. 103, 106–07 (1990); Massachusetts v. Oakes, 491 U.S. 576, 578–79 (1989); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 53 (1989); Virginia v. Am. Booksellers Ass'n., 484 U.S. 383, 386–87 (1988);

obscenity rather than the creators of the obscenity. Most of these cases arose from incidents at bookstores or newsstands,[62] video stores,[63] and theaters[64]—physical locations that police could easily visit. Indeed, many of the cases originated as police sting operations,[65] some of which resulted in seizure of the allegedly obscene material.[66] Occasionally, a vendor was accused of selling obscenity to a minor.[67] In other cases, the distributor[68] or publisher[69] of the allegedly obscene material was

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Pope v. Illinois, 481 U.S. 497, 499 (1987); New York v. P.J. Video, Inc., 475 U.S. 868, 869 (1986); Maryland v. Macon, 472 U.S. 463, 465 (1985); New York v. Ferber, 458 U.S. 747, 752 (1982); Wood v. Georgia, 450 U.S. 261, 263 (1981); Lo–Ji Sales, Inc. v. New York, 442 U.S. 319, 324 (1979); Ballew v. Georgia, 435 U.S. 223, 225 (1978); Ward v. Illinois, 431 U.S. 767, 770 (1977); Splawn v. California, 431 U.S. 595, 596 (1977); McKinney v. Alabama, 424 U.S. 669, 672–73 (1976); Bucolo v. Adkins, 424 U.S. 641, 641 (1976); Hicks v. Miranda, 422 U.S. 332, 335 (1975); Jenkins v. Georgia, 418 U.S. 153, 155 (1974); Roaden v. Kentucky, 413 U.S. 496, 497 (1973); Heller v. New York, 413 U.S. 483, 485 (1973); Kaplan v. California, 413 U.S. 115, 116 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 51 n.1 (1973); Kois v. Wisconsin, 408 U.S. 229, 229 (1972); Rabe v. Washington, 405 U.S. 313, 314 (1972); Cohen v. California, 403 U.S. 15, 16 (1971); Byrne v. Karalexis, 401 U.S. 216, 217 (1971); Dyson v. Stein, 401 U.S. 200, 201 (1971); Stanley v. Georgia, 394 U.S. 557, 558 (1969); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 636 (1968); Rabeck v. New York, 391 U.S. 462, 462 (1968); Ginsberg v. New York, 390 U.S. 629, 631 (1968); Redrup v. New York, 386 U.S. 767, 768 (1967); Mishkin v. New York, 383 U.S. 502, 503 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 415 (1966); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 206–07 (1964); Jacobellis v. Ohio, 378 U.S. 184, 185–86 (1964); Marcus v. Search Warrant of Prop. at 104 E. Tenth St., 367 U.S. 717, 718–19 (1961); Mapp v. Ohio, 367 U.S. 643, 643 (1961); Winters v. New York, 333 U.S. 507, 508 (1948); *see also* Motion for Leave to File Brief and Brief for Citizens for Decency Through Law, Inc. as Amicus Curiae Supporting Respondent, Splawn v. California, 431 U.S. 595 (No. 76-143), 1977 WL 205324, *5–6 (indicating the obscene material was sold from a bookstore); Appellant's Brief in Response to Petition, Rabeck v. New York, 391 U.S. 462 (No. 611), 1967 WL 129503, *4 (indicating the obscene material was sold from a candy store).

62. *Fort Wayne Books, Inc.*, 489 U.S. at 50; *Am. Booksellers Ass'n*, 484 U.S. at 388 n.3; *Pope*, 481 U.S. at 499; *Macon*, 472 U.S. at 465; *Ferber*, 458 U.S. at 751–52; *Lo–Ji Sales, Inc.*, 442 U.S. at 321; *McKinney*, 424 U.S. at 672; *Kaplan*, 413 U.S. at 116; *Ginsberg*, 390 U.S. at 631; *Redrup*, 386 U.S. at 768; *Winters*, 333 U.S. at 508.

63. *P.J. Video, Inc.*, 475 U.S. at 869.

64. *Ballew*, 435 U.S. at 224; *Hicks*, 422 U.S. at 334–35; *Jenkins*, 418 U.S. at 154; *Roaden*, 413 U.S. at 497; *Heller*, 413 U.S. at 485; *Slaton*, 413 U.S. at 50; *Rabe*, 405 U.S. at 313; *Byrne*, 401 U.S. at 217; *Lee Art Theatre, Inc.*, 392 U.S. at 636; *Jacobellis*, 378 U.S. at 185.

65. *Pope*, 481 U.S. at 499; *P.J. Video, Inc.*, 475 U.S. at 870; *Macon*, 472 U.S. at 465; *Ferber*, 458 U.S. at 751–52; *Ballew*, 435 U.S. at 224–25; *Ward*, 431 U.S. at 770; *McKinney*, 424 U.S. at 672; *Roaden*, 413 U.S. at 497; *Heller*, 413 U.S. at 485; *Kaplan*, 413 U.S. at 116; *Slaton*, 413 U.S. at 52; *Rabe*, 405 U.S. at 314 (1972); *Lee Art Theatre, Inc.*, 392 U.S. at 636; *Redrup*, 386 U.S. at 768; *Butler*, 352 U.S. at 381.

66. *P.J. Video, Inc.*, 475 U.S. at 870; *Ballew*, 435 U.S. at 224–25; *Roaden*, 413 U.S. at 497–98; *Heller*, 413 U.S. at 485; *Lee Art Theatre, Inc.*, 392 U.S. at 636.

67. *Rabeck*, 391 U.S. at 462; *Ginsberg*, 390 U.S. at 631.

68. A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 208 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 (1963); Marcus v. Search Warrant of Prop. at 104 E. Tenth St., 367 U.S. 717, 721 (1961).

69. Bucolo v. Adkins, 424 U.S. 641, 641 (1976); Kois v. Wisconsin, 408 U.S. 229, 229 (1972); Dyson v. Stein, 401 U.S. 200, 201 (1971); Mishkin v. New York, 383 U.S. 502, 503 (1966); *see also* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 415 (1966) (regarding book publisher's intervention in civil proceedings brought by the state attorney

prosecuted. In a few instances, authorities prosecuted people for possession of obscene material in a private home.[70] Despite prosecution of the sale, distribution, publication, or possession of obscene material, police did not pursue the authors of lurid novels or the producers of prurient films.

A political economy perspective recognizes the social power of local law enforcement in relation to the accused. Political economy is concerned with the power relations among actors. It "examines how media and communication systems and content reinforce, challenge, or influence existing class and social relations. It does this with a particular interest in how economic factors influence politics and social relations."[71] In the vast majority of the criminal law obscenity cases examined for this article, the government was not pursuing large multinational corporations, but rather small businesses that likely had limited resources with which to fight a criminal prosecution. The Court was aware that police action against small businesses could be quite effective in silencing obscene discourse. In *Dyson v. Stein*, police raided the offices of a bi-weekly newspaper.[72] In his dissent, Justice Douglas described the raids as "search-and-destroy missions"[73] that resulted in the newspaper being "effectively put out of business."[74] Additionally, *Fort Wayne Books, Inc. v. Indiana*[75] involved the seizure of "literally thousands of books and films."[76] The Court stated, "It is incontestable that these proceedings were begun to put an end to the sale of obscenity at the three bookstores named in the complaint."[77]

Law enforcement officials' frequent seizure of the disputed material as if it were contraband further supports the notion that obscene messages were commodified.[78] In one case, "literally thousands of books and films were carried away and taken out of circulation."[79] Yet the court has held on several occasions that obscene publications are not contraband[80]: "The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure . . . ."[81] In

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general against an allegedly obscene book).

70. Osborne v. Ohio, 495 U.S. 103, 107 (1990); Stanley v. Georgia, 394 U.S. 557, 558 (1969); Mapp v. Ohio, 367 U.S. 643, 644–45 (1961).

71. McChesney, *supra* note 3, at 43.

72. *Dyson*, 401 U.S. at 204–06 (Douglas, J., dissenting).

73. *Id.* at 204.

74. *Id.* at 205.

75. 489 U.S. 46 (1989).

76. *Id.* at 67.

77. *Id.* at 65.

78. *See* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 321–24 (1979); Byrne v. Karalexis, 401 U.S. 216, 218 n.2 (1971); Stanley v. Georgia, 394 U.S. 557, 558 (1969).

79. *Fort Wayne Books, Inc.*, 489 U.S. at 67.

80. Roaden v. Kentucky, 413 U.S. 496, 505 (1973); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 211–12 (1964); Marcus v. Search Warrant of Prop. at 104 E. Tenth St., 367 U.S. 717, 730–31 (1961).

81. *Roaden*, 413 U.S. at 502 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 472 (1971)) (citation omitted).

another incident, state authorities seized 1,715 copies of allegedly obscene paperbacks from a distributor with the intent to burn them.[82] The Court stated, "It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband."[83]

In several cases, law enforcement officials arrested whatever employees happened to be on duty at these small businesses, which further supports the notion that the government focuses on the less powerful actors. The arrestees included bookstore clerks and proprietors,[84] a theater cashier,[85] a film projectionist and "ticket taker,"[86] as well as theater managers or owners.[87] Court opinions indicate that some of the criminal defendants faced fines and jail time.[88] In *Mishkin v. New York*,[89] the claimant, convicted of publishing obscene books, was sentenced to three years in prison and $12,000 in fines.[90]

In the cases examined for this Article, only in rare circumstances was the originator of the message targeted for prosecution; however, these cases did not involve the mass media.[91] In these cases, the message was not commodified, but rather cast as something other than expression. In *Oakes*, a photographer was charged under a state criminal statute that attempted to curtail child exploitation by forbidding anyone to pose a child in a "state of nudity" for reproduction in visual material such as a photograph.[92] In *Cohen*, a man with an expletive on his jacket was arrested for disturbing the peace through offensive conduct.[93] The nude dancers in *Barnes* ran afoul of the state's public indecency statutes, which were intended to

82. *A Quantity of Copies of Books*, 378 U.S. at 208.

83. *Id.* at 211–12.

84. Pope v. Illinois, 481 U.S. 497, 499 (1987); Maryland v. Macon, 472 U.S. 463, 465 (1985); McKinney v. Alabama, 424 U.S. 669, 672–73 (1976); Kaplan v. California, 413 U.S. 115, 116 (1973); Lo–Ji Sales, Inc. v. New York, 442 U.S. 319, 322 (1970); Redrup v. New York, 386 U.S. 767, 768 (1967).

85. Ballew v. Georgia, 435 U.S. 223, 225 (1978).

86. Heller v. New York, 413 U.S. 483, 485 (1973).

87. *Ballew*, 435 U.S. at 224–25; Jenkins v. Georgia, 418 U.S. 153, 155 (1974); Roaden v. Kentucky, 413 U.S. 496, 497 (1973); *Heller*, 413 U.S. at 485; Rabe v. Washington, 405 U.S. 313, 313 (1972); Byrne v. Karalexis, 401 U.S. 216, 217 (1971); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 636 (1968); Jacobellis v. Ohio, 378 U.S. 184, 185–86 (1964).

88. *See, e.g.*, Ward v. Illinois, 431 U.S. 767, 770 (1977) (vendor sentenced to one day in jail and fined $200); *Jenkins*, 418 U.S. at 156 (theater manager sentenced to one year of probation and fined $750); Kois v. Wisconsin, 408 U.S. 229, 229 (1972) (newspaper publisher sentenced to two years of incarceration and fined $2,000); *Jacobellis*, 378 U.S. at 186 (theater manager fined $2,500 and sentenced to a workhouse if fines were not paid).

89. 383 U.S. 502 (1966)

90. *Id.* at 503–04.

91. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 562–63 (1991) (involving nude dancers); Massachusetts v. Oakes, 491 U.S. 576, 580 (1989) (involving a man who took partially nude photographs of a fourteen-year-old child); Cohen v. California, 403 U.S. 15, 16 (1971) (involving a man who wore a jacket bearing the words "Fuck the Draft" in a courthouse).

92. *Oakes*, 491 U.S. at 578–80 (citation omitted).

93. *Cohen*, 403 U.S. at 16–17 (citations omitted).

protect societal order.[94] The Court noted that the dancer wanted to perform nude not to express herself, but because she thought she would make more money that way.[95]

State criminal statutes have been used to shut down retail outlets that sell obscenity through seizure of their inventory and arrest of their staff. This tactic takes advantage of the commercial nature of the media in the United States. The possibility of raid and arrest makes the sale of obscenity through brick-and-mortar shops a risky business. Thus, the proliferation of obscenity on the Internet should come as no surprise.[96]

### 2. *Civil Statutes*

Another way states sought to control purveyors of obscene content was through civil nuisance statutes.[97] As with the criminal statutes, these laws were aimed at "'the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material.'"[98] In *Vance v. Universal Amusement Co.*, the Court viewed the situation at issue—the imminent closure of an adults-only motion picture theater under a public nuisance statute—as regulation of commercial activity.[99] However, a regulation affecting freedom of expression required special consideration: "[T]he regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance."[100]

The facts of the nuisance statute cases indicate that these civil enforcement actions threatened the viability of the targeted businesses. In one instance, officials sought "confiscation and destruction of all merchandise" at a bookstore that was alleged to carry some obscene material.[101] In another case, state law permitted a one-year closure of any place deemed a nuisance, and the law defined establishments that exhibited obscene films as nuisances.[102] In yet another case, officials sought to enjoin the continued operation of an adult theater for violation of local obscenity laws.[103] Sometimes, business people fought back. In *Brockett v. Spokane Arcades, Inc.*,[104] plaintiff sellers of adult books and movies challenged the

94. *Barnes*, 501 U.S. at 562–63, 569.

95. *Id.* at 563

96. *See, e.g.*, Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681–736 (1998) (codified as amended at 47 U.S.C. § 231 (2000)) (restricting minors' access to harmful material on the Internet).

97. *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 493–94 (1985); California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 90–91 (1981); Vance v. Universal Amusement Co., 445 U.S. 308, 309–10 (1980); MTM, Inc. v. Baxley, 420 U.S. 799, 799 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592, 595–96 (1975); Speight v. Slaton, 415 U.S. 333, 333–34 (1974).

98. *Vance*, 445 U.S. at 310 (citation omitted).

99. *Id.* at 315 n.12 (quoting Freedman v. Maryland, 380 U.S. 51, 56 (1965)).

100. *Id.* at 315.

101. *Speight*, 415 U.S. at 333.

102. *Huffman*, 420 U.S. at 595–96 (citations omitted).

103. MTM, Inc. v. Baxley, 420 U.S. 799, 799 (1975) (citations omitted).

104. 472 U.S. 491 (1985).

constitutionality of a state moral nuisance statute that provided penalties for those who deal in obscenity.[105] However, the Court held that the state moral nuisance statute in question should not be completely invalidated.[106]

*3. Other State Controls*

States occasionally use other regulatory powers in their efforts to control adult-oriented businesses. At issue in a 1972 case were California's State Department of Alcoholic Beverage Control regulations prohibiting certain sexually oriented live entertainment, such as topless and bottomless dancing, in licensed bars and nightclubs.[107] The Court held that the "broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals."[108] It upheld the constitutionality of the regulations, making clear the regulations did not outlaw the performances; it simply prohibited them in businesses licensed to serve liquor by the drink.[109]

The state of New York used civil public health law to crack down on an adult bookstore at which undercover officers observed illicit sexual activity, as well as solicitation of prostitution.[110] Following the undercover investigation, the state sought to shut down the establishment.[111] The Court rejected the respondents' argument that such closure posed an impermissible burden on their protected bookselling activities,[112] noting that they were "free to sell the same materials at another location."[113]

In one instance, a state university unsuccessfully tried to use its student conduct code, which required adherence to a standard of decency, to expel a student over publication of an allegedly obscene political cartoon in a campus newspaper.[114]

*B. Municipal Controls*

Adult bookstores and theaters, as well as nude dancing establishments, are businesses that operate from a brick-and-mortar point of sale. Municipalities have exercised considerable control over the expression of obscenity in these venues through traditional powers such as zoning ordinances and business licensure.[115]

105. *Id.* at 494.
106. *Id.* at 507.
107. California v. LaRue, 409 U.S. 109, 110–11 (1972).
108. *Id.* at 114.
109. *Id.* at 118.
110. Arcara v. Cloud Books, Inc., 478 U.S. 697, 698–700 (1986).
111. *Id.* at 699.
112. *Id.* at 705–06.
113. *Id.* at 705.
114. Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 667 (1973).
115. *See, e.g.*, City of Littleton v. Z. J. Gifts D–4, L.L.C., 541 U.S. 774, 776–77 (2004) (zoning and licensure of adult businesses); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 430 (2002) (zoning of adult businesses); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986) (zoning of adult movie theaters); Young v. American Mini Theatres, Inc., 427 U.S. 50, 52, 62 (1976)

They are able to do so because mass media are businesses that seek to sell their wares—commodified forms of obscene expression.

Municipal ordinances represent state action.[116] The Court upheld the validity of zoning ordinances and licensure of adult-oriented businesses as recently as 2004 when it decided *City of Littleton v. Z.J. Gifts D-4*.[117] In that case, the Court affirmed the constitutionality of a municipal ordinance that restricted adult businesses to specific areas of town and required them to get special adult business licenses.[118] According to the Court, the ordinance did not try to censor material; rather, it applied "reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display."[119] The ordinance was not likely to drive all adult material out of town, the Court said.[120] Framing the issue in terms of a business transaction, it stated that "the community will likely contain outlets that sell protected adult material. A supplier of that material should be able to find outlets; a potential buyer should be able to find a seller."[121]

Zoning ordinances aimed at controlling the location of so-called adult businesses have been justified based on the "secondary effects" of these businesses on their vicinities.[122] These secondary effects were summarized well in *Young v. American Mini Theatres, Inc.*,[123] which considered the constitutionality of Detroit's "Anti-Skid Row Ordinance."[124] Urban planners and real estate experts in *American Mini Theatres* believed that a concentration of adult businesses "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."[125] Similarly, city planners in *City of Los Angeles v. Alameda Books, Inc.*[126] determined that groups of adult businesses were associated with increased crime.[127] The Court accepted those arguments.[128] In his concurrence in *Alameda Books, Inc.*, Justice Kennedy likened adult businesses to factories and slaughterhouses—land uses that have "undesirable externalities" that a municipality can control through the "traditional exercise of its zoning power."[129]

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(zoning and licensure of adult movie theaters).

116. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (citations omitted).

117. 541 U.S. at 776.

118. *Id.* at 776–77.

119. *Id.* at 783.

120. *Id.*

121. *Id.*

122. *See, e.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–50 (1986).

123. 427 U.S. 50 (1976).

124. *Id.* at 52–54.

125. *Id.* at 55.

126. 535 U.S. 425 (2002).

127. *Id.* at 430.

128. *See, e.g.*, *id.* at 442; Renton v.Playtime Theatres, Inc., 475 U.S. 41, 51 (1986).

129. *Id.* at 445–46 (Kennedy, J., concurring). In one instance, the Court indicated that a drive-in theater's status as a for-profit entity would give the owner an incentive to minimize the visibility of any onscreen nudity from the street. Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 n.6 (1975) "Appellant manages a commercial enterprise which depends for its success on *paying* customers, not

Several mid-1900s cases dealt with municipal and state motion picture licensing laws.[130] Commercial interests were in the forefront of these cases. The petitioners were exhibitors and distributors of allegedly obscene films and had been enjoined from showing them in particular locations. The licensing laws at issue spoke to the commercial nature of the activity. In what was perhaps the earliest such case, *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, the Court deemed unconstitutional a state law that made it unlawful "'to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business'" any film that was obscene or contained other objectionable content as proscribed by law.[131] In addition, the Court said the vagueness of one municipal ordinance could have a powerful impact on the quality of future motion pictures, due to the films' commercial nature: "[O]ne who wishes to convey his ideas through [film], which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film . . . is within the terms of classification schemes such as this."[132] The Court indicated that fear of financial risk or failure could result in exhibitors showing "only the totally inane."[133]

Nude dancing was at issue in several cases, but the law of obscenity was not always invoked. Rather, public indecency laws were applied, and the situations were handled in several ways. Some nude dancing was construed as expressive conduct.[134] However, in other situations regulation of nude performance was treated as a prior restraint[135] or analyzed as a time, place, and manner restriction.[136] The state interests at issue in these cases were the protection of morality and social order,[137] as well as prevention of the negative secondary effects of adult-oriented

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on freeloading passersby. Presumably, where economically feasible, the screen of a drive-in theater will be shielded from those who do not pay." *Id.*

130. In each of the following cases, the Court found the motion picture licensing law impermissible: *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141 (1968) (per curiam); *Freedman v. Maryland*, 380 U.S. 51, 60 (1965); *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 688–90 (1959).

131. 360 U.S. at 684–685 (citation omitted).

132. *Interstate Circuit, Inc.*, 390 U.S. at 684.

133. *Id.*

134. City of Erie v. Pap's A. M., 529 U.S. 277, 285 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565–66 (1991). These government restrictions on public nudity were examined under the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). *Pap's A. M.*, 529 U.S. at 289 (O'Connor, J., plurality opinion); *Barnes*, 501 U.S. at 566–67. The test sets forth the following requirements:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*O'Brien*, 391 U.S. at 377.

135. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 550, 552 (1975).

136. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75 (1981).

137. *See, e.g.*, *Barnes*, 501 U.S. at 568 (stating that the purpose behind the state's public nudity statute was apparent from the statute's text and legislative history).

businesses.[138]

Each of these nude dancing cases dealt with commercial establishments offering this type of entertainment.[139] The commercial nature of the expression was noted in *Barnes v. Glen Theatre, Inc.*[140] Writing for the Court, Chief Justice Rehnquist stated that one of the respondents, a nude dancer, wanted to "dance nude because she would make more money doing so."[141] Similarly, in *Southeastern Promotions, Ltd. v. Conrad*, a lower court contended that the petitioner, who had been denied use of a municipal theater for a production of the musical *Hair*, had not shown irreparable harm because the issue was "'purely a matter of financial loss or gain' and was compensable."[142] In *Schad v. Borough of Mount Ephraim*, the respondent framed the matter as one of commercial district zoning.[143] The borough contended that exclusion of commercial live entertainment was based on a desire to avoid the problems it might bring, such as trash, a lack of parking, and a need for police protection.[144] However, the Court indicated that the borough presented no evidence that live entertainment posed worse problems than other permitted uses in the commercial zone.[145]

In sum, when exerting control over obscenity through zoning or licensure, municipalities emphasized protection of property values. They said adult businesses brought crime, trash, and transients. The nature of the expression offered for sale by these businesses, and whether it deserved constitutional protection, did not figure into the Court's decisions.

### *C. Federal Controls*

The federal government uses several of its powers, including regulation of the postal service and the Commerce Clause of the Constitution, to control obscenity by commodifying it.

#### *1. Postal Service*

The federal government has sought to limit obscenity by exercising its control

138. *See, e.g.*, *Pap's A. M.*, 529 U.S. at 291 (O'Connor, J., plurality opinion) (stating that the ordinance was not aimed at regulating people who watch nude dancing, "but rather the secondary effects, such as impacts on public health, safety, and welfare").

139. *Id.* at 284 (concerning Kandyland, an establishment featuring totally nude erotic dancing performed by women); *Barnes*, 501 U.S. at 563 (concerning the Kitty Kat Lounge, which featured go-go dancing by dancers who wore pasties and G-strings); *Schad*, 452 U.S. at 62 (regarding an adult bookstore that provided the opportunity to watch a live dancer, usually nude, perform behind a glass panel); *Conrad*, 420 U.S. at 547 (regarding performance of the musical *Hair* in a municipal theater). *Barnes* involved a state statute, but the other cases involved municipal regulations.

140. 501 U.S. at 563.

141. *Id.*

142. 420 U.S. at 549–50.

143. 452 U.S. at 63.

144. *Id.* at 73.

145. *Id.*

over the mails. Federal statutes declare obscene publications to be nonmailable matter—matter that "shall not be conveyed in the mails or delivered from any post office or by any letter carrier."[146] This approach relies on the commodification of obscene material; the emphasis is on restricting dissemination of the tangible expression of an idea, rather than on suppressing the idea itself. Cases relying on the federal mail statutes involve both print and video materials—tangible items that need to be physically transported.[147]

Use of the postal service is considered an essential part of First Amendment freedoms. The Court has stated, "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ."[148] But the postal service cases generally construed the exchange of obscene material as a commercial transaction rather than as an exchange of ideas. In *United States v. Reidel*,[149] the Court rejected a lower court's argument that if *Stanley v. Georgia* conferred a right to possess obscene material in the home,[150] then "someone must have the right to deliver it to him."[151] The Court scoffed at this idea: the respondent's argument was based "squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process,"[152] but "obscenity and its distribution [are] outside the reach of the First Amendment."

The Court, in *Ginzburg v. United States*,[153] said "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment,"[154] but said that the case involved "sales of illicit merchandise, not sales of constitutionally protected matter."[155] Yet the commercial nature of an

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146. 18 U.S.C. § 1461 (2000); *see also* 18 U.S.C. § 2252 (2000 & Supp. 2003) (prohibiting the mailing of sexually explicit material involving minors); 39 U.S.C. § 3006 (repealed 1999) (prohibiting acceptance of payment for obscene material through the mail).

147. *See, e.g.*, Jacobson v. United States, 503 U.S. 540, 542 (1992) (magazines); Pinkus v. United States, 436 U.S. 293, 295–96 (1978) (books, magazines, and films); Smith v. United States, 431 U.S. 291, 293 (1977) (magazines and film); Hamling v. United States, 418 U.S. 87, 91 (1974) (book and advertising brochure for book); Blount v. Rizzi, 400 U.S. 410 (1971) (magazines); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (concerning mail order services' challenge to statute that allows addressees to opt out of mailed advertisements they believe to be "sexually provocative"); United States v. Reidel, 402 U.S. 351 (1971) (illustrated booklet); Redmond v. United States, 384 U.S. 264 (1966) (undeveloped film); Ginzburg v. United States, 383 U.S. 463 (1966) (book, magazine, and newsletter); Manual Enters., Inc. v. Day, 370 U.S. 478 (1962) (magazines); Roth v. United States, 354 U.S. 476 (1957) (advertising circulars); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (non-obscene magazine); Dunlop v. United States, 165 U.S. 486 (1897) (newspaper); Price v. United States, 165 U.S. 311 (1897) (book); Rosen v. United States, 161 U.S. 29 (1896) (twelve-page paper)..

148. Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (quoting United States *ex rel.* Milwaukee Soc. Democratic Publ'g. Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting)).

149. 402 U.S. 351 (1971).

150. 394 U.S. 557, 559 (1969).

151. *Reidel*, 402 U.S. at 355.

152. *Id.* at 356.

153. 383 U.S. 463 (1966).

154. *Id.* at 474.

155. *Id.* at 475.

exchange of obscene material continued to figure in the Court's decisions. Despite the Court's disclaimer, it said *Ginzberg* was decided "against a background of commercial exploitation of erotica solely for the sake of [the publications'] prurient appeal."[156] In another case, the Court noted that the federal mail statutes were intended to "deny use of the mails to commercial distributors of obscene literature."[157]

Some of the mailings at issue were advertisements in addition to films or printed material;[158] federal law prohibits the mailing of obscene ads as well as products.[159] The commercial speech doctrine only began to develop during the last twenty-five years of the twentieth century, so many of these cases were decided long before the Court established any protections for this type of speech.[160] Corporations and business people were well represented among the respondents in the mail-related cases.[161] As noted in one case, the respondents were concerned about the mail statute because their "business activities [were] affected."[162]

The Court was more lenient in the cases involving individuals' mailing of obscenity—cases in which the respondent was not making a profit. In one case, the government prosecuted the recipient of obscene material under the Child Protection Act of 1984[163] because the material depicted minors engaged in sexually explicit conduct in violation of that law.[164] The conviction was overturned based on the government entrapping the defendant.[165] In another case, the Court vacated the conviction of a couple who "mailed undeveloped films of each other posing in the nude."[166]

The federal mail cases do not arise from complaints of unwilling recipients of obscene mailings. One might infer that they are initiated by zealous officials in the tradition of Anthony Comstock rather than by officials responding to a public

156. *Id.* at 466.

157. Blount v. Rizzi, 400 U.S. 410, 416 (1971).

158. *See* Pinkus v. United States, 436 U.S. 293, 295–96 (1978); Hamling v. United States, 418 U.S. 87, 91 (1974); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 731 (1970); Roth v. United States, 354 U.S. 476, 480 (1957); Dunlop v. United States, 165 U.S. 486, 489–90 (1897).

159. 18 U.S.C. § 1461 (2000).

160. The Court established that commercial speech was entitled to some protection in *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975).

161. *See, e.g.*, *Hamling*, 418 U.S. at 91 (corporations); United States v. Reidel, 402 U.S. 351, 353 (1971) (businessman); *Blount*, 400 U.S. at 410 (retail magazine distributor); *Rowan*, 397 U.S. at 728 (publishers, distributors, owners, and operators of mail-order houses, mailing list brokers, and owners and operators of mail service organizations); *Ginzburg*, 383 U.S. at 464 (corporations); Manual Enters., Inc. v. Day, 370 U.S. 478, 480 (1962) (magazine publishing corporations); *Roth*, 354 U.S. at 480 (businessmen); Hannegan v. Esquire, 327 U.S. 146, 149 (1946) (publisher); *Dunlop*, 165 U.S. at 488 (newspaper publisher).

162. *Rowan*, 397 U.S. at 729.

163. Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–2253 (2000 & Supp. 2004)).

164. Jacobson v. United States, 503 U.S. 540, 542 (1992).

165. *Id.* at 554.

166. Redmond v. United States, 384 U.S. 264, 264 (1966).

demand for action.[167]

*2. Commerce Clause*

The Commerce Clause of the U.S. Constitution grants Congress the power to regulate interstate commerce.[168] This indisputably legitimate federal power has been used to control the distribution of obscenity. The government is able to exercise such power because the primary purveyors of obscenity, the mass media, are businesses, and the government treats their messages as commodities to be sold in the market. By shifting the perspective in these Commerce Clause cases to one of property rather than expression, the government calls into play a set of laws that places fewer limits on its authority. Use of the Commerce Clause to control obscenity is an archetypal example of the commodification of obscene content.

At issue in these cases was the transportation of tangible obscene materials across state lines,[169] which is criminalized by federal statute.[170] In *United States v. Orito*, the Court spoke strongly in favor of government's ability to control this transportation.[171] Orito was accused of sending eighty-three reels of film by air from San Francisco to Milwaukee.[172] It did not matter, the Court said, that a private common carrier transported the obscene materials.[173] Rather, the court stated, "the Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce."[174] The fact that *Stanley v. Georgia* established the right to possess obscenity in the home[175] did not create a correlative right to receive, transport, or distribute such material.[176]

*United States v. Thirty-Seven Photographs*[177] and *United States v. 12 200-Ft. Reels of Super 8mm. Film*,[178] cases involving the importation of obscene material, also emphasized the commercial nature of obscenity. The very names of the cases speak to the commodification of the expressive material involved. *Thirty-Seven Photographs* concerned the importation of photos to be used in a book for

167. *See supra* notes 29–32 and accompanying text.
168. U.S. CONST. art. I, § 8, cl. 3.
169. United States v. X-Citement Video, Inc., 513 U.S. 64, 66 (1994) (videotapes); Alexander v. United States, 509 U.S. 544, 546, 547 (1993) (magazines and videotapes); Walter v. United States, 447 U.S. 649, 651 (1980) (film); Marks v. United States, 430 U.S. 188, 189 (1977) (medium unclear); United States v. Orito, 413 U.S. 139, 140 (1973) (film); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973) (slides, photographs, and films); United States v. Thirty-Seven Photographs, 402 U.S. 363, 365 (1971) (photographs); United States v. Alpers, 338 U.S. 680, 681 (1950) (phonograph records).
170. 18 U.S.C. § 1462 (2000).
171. 413 U.S. at 143.
172. *Id.* at 140.
173. *Id.* at 143.
174. *Id.*
175. Stanley v. Georgia, 394 U.S. 557, 559 (1969).
176. *Orito*, 413 U.S. at 141.
177. 402 U.S. 363 (1971).
178. 413 U.S. 123 (1973).

commercial distribution,[179] which was prohibited by section 305 of the Tariff Act of 1930.[180] The Court upheld the power of customs officers to exclude illegal articles from the country, including obscene materials.[181] "Congress may declare it contraband and prohibit its importation,"[182] the Court stated, in apparent contradiction of its holdings regarding obscenity as contraband in the state criminal law cases.[183] In *12 200-Ft. Reels of Super 8mm. Film*, the respondent contended that the materials at issue were for his private use only, but the Court rejected that argument[184]: "To allow such a claim would be not unlike compelling the Government to permit importation of prohibited or controlled drugs for private consumption as long as such drugs are not for public distribution or sale"[185] Here again, the Court likened obscene materials to contraband, essentially commodifying this form of expression.

Transportation of obscene material in interstate commerce was the basis for charges under the Racketeer Influenced and Corrupt Organizations Act (RICO)[186] in *Alexander v. United States*.[187] Petitioner Alexander had been in the adult entertainment business for thirty years and had thirteen retail stores throughout Minnesota from which he sold magazines and videos that the jury deemed obscene.[188] The jury found him guilty of RICO violations, and he was sentenced to six years in prison.[189] In addition, the Court ordered Alexander to forfeit his wholesale and retail businesses, as well as nearly $9 million acquired through racketeering activity.[190]

*Alexander* provides a particularly clear example of the commodification of obscenity. RICO was intended to attack the "economic roots of organized crime."[191] It prohibits dealing in obscene matter, among other activities, and requires "mandatory forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise."[192] Thus, the law aims to stop the dissemination of obscenity through the control of businesses that deal in obscene materials. The statute makes no exception for assets with expressive value. "[B]ooks, sports cars, narcotics, and cash are all forfeitable alike . . . . [A] contrary scheme would be disastrous from a policy standpoint, enabling racketeers to evade

179. 402 U.S. at 366.
180. Pub. L. No. 361, 46 Stat. 688 (codified as amended at 19 U.S.C. § 1305(a) (2000 & Supp. 2004)).
181. *Thirty-Seven Photographs*, 402 U.S. at 376–77.
182. *Id.*
183. *See supra* notes 78–83 and accompanying text.
184. 413 U.S. at 128.
185. *Id.*
186. Pub. L. No. 91-452, 84 Stat. 922, 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2000)).
187. 509 U.S. 544, 547 (1993).
188. *Id.*
189. *Id.* at 547–48.
190. *Id.* at 548.
191. *Id.* at 562 (Kennedy, J., dissenting).
192. *Id.* at 551.

forfeiture by investing the proceeds of their crimes in businesses engaging in expressive activity."[193] The court rejected Alexander's argument that the forfeiture, which put him out of business, was an unconstitutional prior restraint on speech.[194] Writing in a separate opinion, Justice Souter stated that the First Amendment forbids the forfeiture of Alexander's expressive material in the absence of an adjudication that the material was in fact obscene.[195] Justice Kennedy added:

> What is at work in this case is not the power to punish an individual for his past transgressions but the authority to suppress a particular class of disfavored speech. The forfeiture provisions accomplish this . . . in an indirect way by threatening all who engage in the business of distributing adult or sexually explicit materials with the same disabling measures.[196]

The specter of financial ruin, then, was used to discourage businesses from trading in this category of expression. The commercial nature of the obscenity industry clearly left it vulnerable to government control.

*3. Telecommunications Regulation*

The government has regulated broadcasters practically from their inception, and common carriers nearly as long. It has viewed the electromagnetic spectrum as a scarce natural resource and initially sought to regulate radio to prevent technological cacophony.[197] But the government's control has crept beyond that. The Radio Act of 1927, in its original version, stated that, although the government was not empowered to censor broadcast content, obscenity was nonetheless prohibited on the airwaves.[198] Regulation of common carriers appeared in the Communications Act of 1934.[199]

The older electronic media in the United States have been described as "predominantly privately owned and commercially viable though regulated, and characterized by particular corporations confined to providing particular communication services."[200] Corporations, rather than mom-and-pop operations, were involved in the electronic media cases. Of course, because government wields much power over the electronic media, few disputes over obscene content have

193. *Id.* at 551–52.
194. *Id.* at 552–54.
195. *Id.* at 560 (Souter, J., concurring in judgment, dissenting in part).
196. *Id.* at 574 (Kennedy, J., dissenting).
197. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399 (1969) (noting the scarcity of the resource).
198. Pub. L. No. 632, 44 Stat. 1162 (repealed 1934). 47 U.S.C. § 326 (2000) currently forbids censorship of broadcast material, however there is no clause prohibiting obscenity over the radio waves.
199. Pub. L. No. 416, 48 Stat. 1091 (codified as amended at 47 U.S.C. § 326 (2000)).
200. Robert B. Horwitz, *U.S. Media Policy Then and Now*, *in* CONVERGING MEDIA, DIVERGING POLITICS, *supra* note 36, at 25, 29.

made their way to the Supreme Court. We see a case dealing with sexually explicit content each time a new electronic medium of communication developed.

Perhaps the most well known of the regulatory cases dealing with sexually explicit material is *FCC v. Pacifica Foundation*, decided in 1978.[201] It was in this case that the Court confirmed the government's right to control indecent as well as obscene broadcast content.[202] Following this case, the Court found ways to accommodate sexually explicit material on the electronic media.

The transmission of sex-related material on cable television was at issue in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[203] Federal law restricts indecent content on cable in several ways. First, if a cable operator permits the broadcast of sexually-related material, it must segregate and block the indecent programming.[204] Second, it permits cable operators to prohibit public access channels from airing programming dealing with obscenity, sexual content, or the promotion of unlawful conduct.[205] Both provisions were declared unconstitutional.[206] The claimants in this case were several major organizations, rather than sole proprietorships, and the Court accommodated them to a certain extent.

In *Sable Communications of California, Inc. v. FCC*,[207] the Court considered the regulation of content transmitted by common carriers.[208] The Communications Act of 1934, as amended in 1988, prohibited both indecent and obscene interstate *commercial* telephone communications.[209] The Court also emphasized the commercial nature of the messages at issue: "Dial-a-porn is big business. The dial-a-porn service in New York City alone received six to seven million calls a month for the 6-month period ending in April 1985."[210] The Court upheld the government's power to ban obscene commercial telephone communications, but not indecent communications.[211] Here again, the petitioner was a big business—an affiliate of Los Angeles-based Carlin Communications, Inc.—and the Court allowed it to stay in business.[212]

Sexually oriented programming transmitted on cable television was at issue in *United States v. Playboy Entertainment Group, Inc.*[213] Playboy Entertainment Group, a subsidiary of Playboy Enterprises, Inc., "owns and prepares programs for

201. 438 U.S. 726 (1978).
202. *Id.* at 745, 748–49.
203. 518 U.S. 727, 732 (1996).
204. *Id.* at 735.
205. *Id.*
206. *Id.* at 733.
207. 492 U.S. 115 (1989).
208. *Id.* at 117.
209. Pub. L. No. 100-690, sec. 7524, 102 Stat. 4181, 4502 (1988) (codified as amended at 47 U.S.C. § 223(b) (2000)).
210. *See Sable Commc'ns*, 492 U.S. at 120 n.3 (citing Carlin Commc'ns, Inc. v. FCC, 787 F.2d 846, 848 (2d Cir. 1986)).
211. *Id.* at 131.
212. *Id.* at 117.
213. 529 U.S. 803, 807 (2000).

adult television networks."[214] Section 505 of the Telecommunications Act of 1996[215] required cable operators to scramble or block transmission of the audio and video signals so that nonsubscribers would not be exposed to the programming. Alternatively, the programming distributor could "limit the access of children to the programming . . . by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it."[216] Cable television operators provided the content to customers who paid either a monthly subscription fee or on a pay-per-view basis.[217] Because scrambling technology was imperfect, many cable operators restricted adult content to the overnight safe harbor period.[218] This meant subscribers could not receive such content for two-thirds of the day.[219] Playboy complained this was too restrictive, and the Court agreed that the government failed to devise the least restrictive means of protecting unsuspecting children from signal bleed, keeping the enterprise in business.[220]

Most recently, under its power to regulate telecommunications, Congress has sought to criminalize indecent communication on the Internet. It initially passed the Communications Decency Act (CDA) as part of the Telecommunications Act of 1996.[221] The relevant legislation prohibited the computer transmission of obscene or indecent communications to minors.[222] The Court was highly critical of the act, stating, "The breadth of the CDA's coverage is wholly unprecedented. . . . [T]he scope of the CDA is not limited to commercial speech or commercial entities."[223] The Court ultimately deemed the CDA violative of the First Amendment.[224]

The notion from political economy of communication being embedded in a macrostructure of power is relevant here. In *Reno v. ACLU*, the Court noted that transmission of obscenity and child pornography was already prohibited by existing criminal laws.[225] In fact, according to the Court, during Congressional consideration of the CDA, a representative of the Department of Justice "expressed its view that the law was unnecessary because existing laws already authorized its ongoing efforts to prosecute obscenity, child pornography and child solicitation."[226] It is plausible that Congress continued to pursue such legislation more for publicity and

214. *Id.* Playboy Enterprises, Inc. is publicly traded on the New York Stock Exchange. *See* Playboy Enterprises, Inc., Investor Relations, http://phx.corporate-ir.net/phoenix.zhtml?c=100055&p=irol-IRHome (last visited June 7, 2007).

215. Pub. L. No. 104-104, 110 Stat. 56, 136 (codified as amended at 47 U.S.C. § 561(a) (1994)).

216. *Id.* § 561(b).

217. *Playboy Entm't Group, Inc.*, 529 U.S. at 807.

218. *Id.* at 806.

219. *Id.* at 812.

220. *Id.* at 827.

221. Telecommunications Act of 1996, tit. 5, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (2000 & Supp. III 2003)).

222. 47 U.S.C. § 223(d) (2000).

223. Reno v. ACLU, 521 U.S. 844, 877 (1997).

224. *Id.* at 874.

225. *Id.* at 877 n.44.

226. *Id.* (citing 141 Cong. Rec. S8434 (daily ed. June 14, 1995)).

self-promotion than for practical reasons.

Following the Court's rejection of the CDA, Congress passed section 1403(a) of the Child Online Protection Act (COPA), which was more narrowly focused, prohibiting the knowing posting, *for commercial purposes*, of content harmful to minors on the Internet.[227] Nonetheless, the Court ultimately let stand a preliminary injunction against the law's enforcement on the ground that the government had not shown that the law used the least restrictive means in accomplishing its goals.[228]

Court discussion of online child pornography framed it as a vice industry rather than as a form of expression. In its attempt to ban pornography involving "virtual," as well as real children, the government said its objective was to eliminate the market for pornography depicting real children.[229] The government argued that virtual child pornography increased demand for images using real children.[230] The Court disagreed, stating that if virtual child pornography were equivalent to real child pornography, real images would disappear from the market as pornographers sought to avoid the risk of prosecution.[231]

*4. Spending Power*

The federal government is empowered to attach conditions to and exercise discretion in its funding allocations. It has exercised this power in efforts to control obscenity; the Court has upheld its use in at least two instances. In the first example, the Court held that Congress can condition federal assistance to public libraries on the libraries' installation of software that blocks obscenity.[232] In addition, the National Endowment for the Arts can deny funding for obscenity without artistic merit.[233]

Government at several levels has employed an array of legal controls over obscenity. It has avoided First Amendment issues by treating obscenity as a tangible product rather than protected expression. Government is able to control the sales and distribution of this product through its legitimate power over commercial activity, the postal service, and other affairs. This discussion has also shown that government has targeted small, vulnerable businesses that are said to attract unwelcome transients. The desirability of transients touches on the matter of social class differences. The role of social class in the control of obscenity is explored in more depth in Part VI.

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227. Pub. L. No. 105–277, 112 Stat. 2681–736 (1998) (codified as amended at 47 U.S.C. § 231(a) (2000)).

228. Ashcroft v. ACLU, 542 U.S. 656, 673 (2004); *see also* Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) (holding that CAPA was not facially overbroad for using community standards to determine what material should be banned from the Internet).

229. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 254 (2002).

230. *Id.*

231. *Id.*

232. United States v. Am. Library Ass'n, 539 U.S. 194, 199 (2003).

233. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 576 (1998) (quoting 20 U.S.C. § 954(d)).

## VI. SOCIAL CLASS DIFFERENCES

In addition to commodification, the process of structuration is important to political economy. Structuration is a "process by which structures are constituted out of human agency, even as they provide the very 'medium' of that constitution."[234] Structuration allows us to further examine the notion of power and to understand social relations. Political economy has emphasized class structuration as a means of understanding social life, such as the process of elite rule.[235]

Social class structuration has played a role in the Supreme Court's obscenity decisions. While this is not surprising, it is nonetheless worth examining in greater depth as part of a political economy analysis. The obscene material at issue in these cases usually could be described as popular, rather than elite culture. Elite or "high" culture has been described as having two key characteristics: "(1) it is created by, or under the supervision of, a cultural elite operating with some aesthetic, literary, or scientific tradition . . . [and] (2) critical standards independent of the consumer of [the] product are systematically applied to it."[236] Mass or popular culture refers to "products manufactured solely for the mass market."[237]

The Court's definition of obscenity essentially singles out high culture for protection. The three-part test put forth in *Miller v. California*[238] considers the following: (1) "whether the average person, applying contemporary community standards, would say that the work, taken as a whole, appealed to the prurient interest"; (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[239] The third prong arguably protects works of high culture but not necessarily mass culture.

Dicta in *California v. LaRue*,[240] decided in 1972, illustrate the Court's protection of high culture. The case stemmed from a state Alcoholic Beverage Control Department regulation prohibiting "topless" and "bottomless" dancers, and the showing of films displaying sexual acts, in establishments that serve liquor by the drink.[241] The Court rejected the respondents' claim that the regulations ran afoul of the First Amendment.[242] Writing for the Court, Justice Rehnquist distinguished the cultural significance of the regulated performance and other artistic presentations:

> [W]e would poorly serve both the interests for which the State

234. MOSCO, *supra* note 33, at 212 (emphasis omitted).
235. *See id.* at 217.
236. MCQUAIL, *supra* note 2, at 43 (citation omitted).
237. *Id.* (emphasis omitted).
238. 413 U.S. 15 (1973).
239. *Id.* at 24.
240. 409 U.S. 109 (1972).
241. *Id.* at 111–12.
242. *Id.* at 118–19.

> may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.[243]

Justice Marshall dissented, but his dissent was based on the regulation's failure to require proof of a lack of redeeming social value.[244] "The regulations thus treat on the same level a serious movie such as 'Ulysses' and a crudely made 'stag film.' They ban not only obviously pornographic photographs, but also great sculpture from antiquity."[245] Marshall continued, quoting an article from the *National Observer*: "Context is the essence of esthetic judgment. . . . There is a world of difference between Playboy and less pretentious girly magazines on the one hand, and on the other, *The Nude*, a picture selection from the whole history of art, by that fine teacher and interpreter of civilization, Kenneth Clark."[246]

Indeed, most of the material at issue in the obscenity cases was, like the dancers in *LaRue*, a far cry from a pas de deux in *Swan Lake*. A survey of some titles suggests that most would not be considered high culture. These include films such as *It All Comes Out in the End*,[247] *Blue Movie*,[248] *Lust Campus*,[249] *Passion Bride*,[250] *Debbie Does Dallas*,[251] and *Terrorized Virgin*.[252] Some of the businesses involved in the cases were the "Pussycat Adult Theater,"[253] "Harem Bookstore,"[254] "Kitty Kat Lounge,"[255] "Kandyland,"[256] "Playtime Theaters,"[257] and "X-Citement Video."[258] Books at issue included *The Housewife's Handbook on Selective Promiscuity*,[259] *The Sinning Season*, *Backstage Sinner*, *Sin Hotel*, *Sex Circus*, and *The Wife-Swappers*.[260] The latter's back cover touted "[e]ight of the most lusty, passionate women in town, each with her different desires, her peculiar sex habits."[261]

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243. *Id.* at 118.
244. *Id.* at 127 (Marshall, J., dissenting).
245. *Id.*
246. *Id.* at 127–28 n.6 (quoting Edmund Fuller, *Changing Society Puts Taste to the Test*, NAT'L OBSERVER, June 10, 1972, at 24).
247. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 51 (1973).
248. Heller v. New York, 413 U.S. 483, 485 (1973).
249. Ward v. Illinois, 431 U.S. 767, 770 n.3 (1977).
250. *Id.* at 772 n.3.
251. New York v. P. J. Video, Inc., 475 U.S. 868, 870 n.2 (1986).
252. Smith v. United States, 431 U.S. 291, 293 (1977).
253. MTM, Inc. v. Baxley, 420 U.S. 799, 800 (1975).
254. Speight v. Slaton, 415 U.S. 333, 333 (1974).
255. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563 (1991).
256. City of Erie v. Pap's A. M., 529 U.S. 277, 284 (2000).
257. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986).
258. United States v. X-Citement Video, Inc., 513 U.S. 64, 66 (1994).
259. Ginzburg v. United States, 383 U.S. 463, 466 (1966).
260. A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 215 n.1 (1964) (Harlan, J., dissenting).
261. *Id.* at 216 n.1.

Additionally, the Court found the Child Pornography Protection Act violative of the First Amendment[262] because it prohibited depictions of teenage sexual activity even if the work had serious literary or artistic value.[263] The Court noted that Shakespeare's enduringly popular *Romeo and Juliet* concerns this theme.[264] In considering postal regulations that allowed a second-class rate for works devoted to the sciences or the arts, the Court said the rules still required the uncensored distribution of literature, given the wide variety of tastes that exist concerning good art.[265] "There doubtless would be a contrariety of views concerning Cervantes' *Don Quixote,* Shakespeare's *Venus and Adonis*, or Zola's *Nana.*"[266] Furthermore, in assessing whether the book commonly known as *Fanny Hill* was obscene, the Supreme Judicial Court of Massachusetts heard testimony from five English literature professors from the Boston area who characterized it as a "minor 'work of art' having 'literary merit' and 'historical value.'"[267] However, in a latter case the Supreme Court pointed out, "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication."[268]

The Court has acknowledged that some works that today we consider serious literature were at one point alleged to be obscene. For example, a film of D. H. Lawrence's *Lady Chatterley's Lover* was denied a license for exhibition in New York.[269] Justice Frankfurter noted in his concurrence that Lawrence "knew there was such a thing as pornography, dirt for dirt's sake, or, to be more accurate, dirt for money's sake."[270] He quoted Lawrence as saying that "genuine pornography is almost always underworld, it doesn't come out in the open."[271] Other literary works that have been challenged as obscene include Theodore Dreiser's *An American Tragedy*[272] and James Joyce's *Ulysses*.[273]

## VII. CONCLUSION

The U.S. Supreme Court's decisions in obscenity cases, analyzed through the lens of political economy, reveal that obscene content has been controlled largely by restricting commerce in it rather than by attempts to quash the expression of erotic ideas. By viewing obscenity as a commercial product, government has

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262. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002).
263. *Id.* at 246.
264. *Id.* at 247.
265. Hannegan v. Esquire, Inc. 327 U.S. 146, 158 (1946).
266. *Id.* at 157–58.
267. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 415–16 n.2 (1966).
268. Kois v. Wisconsin, 408 U.S. 229, 231 (1972).
269. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684, 685, 692 (1959).
270. *Id.* at 692 (Frankfurter, J., concurring).
271. *Id.* at 692 (quoting D. H. LAWRENCE, PORNOGRAPHY AND OBSCENITY 12–13 (1929)).
272. *See* Commonwealth v. Friede, 171 N.E. 472, 472–73 (Mass. 1930).
273. *See* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 706 (2d Cir. 1934).

commodified it, allowing it to perpetuate content-based restrictions over sexually explicit material even as other content-based restrictions have fallen away. Because our legal system gives government more control over commerce than over the expression of ideas, this commodification has proved to be a very powerful means of controlling speech. The American media system is overwhelmingly commercial and therefore has lent itself to this form of control. Governments at the local, state, and federal levels have used various legitimate powers over commerce to restrict or eliminate trade in obscene content. This sets a dangerous precedent for freedom of expression. Those concerned about First Amendment freedoms would do well to carefully monitor the propertization of speech and the control of the business processes of the mass media.