***Roth v. U.S.* (1957)** (Justice Brennan, for the majority)

F: Roth, a New York publisher and seller, was convicted of mailing obscene advertising and an obscene book in violation of a federal statute barring the mailing of "obscenity." The Supreme Court upheld his conviction.

"This Court has always assumed that obscenity is not protected by the freedoms of speech and press.... All ideas having the slightest redeeming social importance ... have the full protection of (these) guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.

Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature, and scientific works, in not in itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.... It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.*

*(Footnote in opinion) I.e., material having a tendency to excite lustful thoughts. Webster's ... defines prurient in pertinent part as follows: "Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity or propensity; lewd."

The ALI Model Penal Code states that "a thing is obscene if, considered, as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description in representation of such matters."

***Miller v. California* (1973)** (Chief Justice Burger, for the Court)

F/P: Miller conducted a mass mailing campaign to advertise the sale of illustrated books, called "adult material." In the Chief Justice's words, "sexually -explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials." Afte a jury trial, Miller was convicted of violating a provision of the California Penal Code making it a misdemeanor "knowingly to distribute obscene matter." He sought review from the Supreme Court.

I: What standard are judges or juries to use to identify obscene material that a State may regulate?

H: "The basic guidelines for the trier of fact must be:

a) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

We emphasize that it is not our function to propose regulatory schemes for the States. It is possible, however, to give a few plain examples of what a state statute could define regulation under part (b), above: 1) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. 2) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

R: Although Justice Brennan says the Court has failed to provide an adequate definition of obscenity, he agrees that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, even though he fails to provide a more precise standard for distinguishing obscene from non-obscene material than does the majority.

**Fromm/Great Free Speech Cases/Carcieri/Session 5, cont'd**

***Miller,* cont'd**

R: "If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of government to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby, and consenting adult alike …."

R: It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of … Mississippi accept public depiction of conduct found tolerable in Las Vegas …."

R: Although "the dissenting justices sound the alarm of repression … to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the struggle for freedom."

***Paris Adult Theatre I v. Slaton* (1973)** (Chief Justice Burger, for the Court)

"We hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity …. These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and possibly the public safety itself. (A recent Obscenity Commission report) indicates that there is at least an arguable correlation between obscene material and crime. Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel: "it concerns the tone of the society, the mode, or … the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there. We should respect his privacy. But if he demands the right to obtain the books and pictures he wants in the market, and to foregather in public places – discreet, if you will, but accessible to all – with others who share his tastes, then to grant him is right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly seen and heard and done intrudes on us all, want it or not."

***Erzoznick v. Jacksonville* (1975)** (Justice Powell, for the Court)

F: A city ordinance prohibited drive-in movie theaters with screens visible from public streets from showing films containing nudity. In order to "protect its citizens against unwilling exposure to materials that may be offensive," the law banned exhibitions of "the human male or female bare buttocks, human female bare breasts, or human bare pubic areas."

I: Whether this law is unconstitutional on its face, nevermind as applied. H: Yes

R: The law discriminates based on content, and those offended by such content can avert their eyes.

R: "When government, acting as a censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. (Neither of those facts is present here).

R: "Appellee attempts to support the ordinance as an exercise of the city's undoubted police power to protect children. Assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed at sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. Clearly all nudity cannot be deemed obscene even as to minors."

## *Erzoznick*, cont'd

R: "Appellee also claimed that nudity on a drive-in movie screen distracts passing motorists, thus slowing the flow of traffic and increasing the likelihood of accidents. Nothing in the record or in the text of the ordinance suggests that it is aimed at traffic regulation. By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is striking underinclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorists. Even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions."

## *Young v. American Mini Theaters* (1976)

F: A Detroit ordinance distinguished between theaters that showed "adult" movies and those that showed other fare, and required dispersal of adult theaters and bookstores. It stated, for example, that an adult theater may not be located within 1000 feet of any two other "regulated uses" (such as bars, billiard halls, and cabarets) or within 500 feet of a residential area. The impact of this "erogenous zoning" law was to channel the display of sexually explicit (but not necessarily obscene) materials into limited portions of the city, not to ban the display from the city entirely.

I: Whether this law violates the free speech rights of adult theater operators.

H: No

R: "The ordinances draw a line on the basis of content without violating the Government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message the film may be intended to communicate .... What is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content."

***New York v. Ferber*** **(1982)** – Child pornography (i.e., the depiction of children engaged in sexual conduct) is a completely unprotected category of expression, whether or not it is obscene.