

American Jurisprudence, Second Edition
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Lewdness, Indecency, and Obscenity

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II. Obscenity [§ § 3-30]

A. In General [§ § 3-16]

2. Procedural Matters [§ § 12-16]

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§ 13. --CRIMINAL STATUTES AND PROSECUTIONS

The creation and distribution of obscene material may be punished criminally, [\[FN98\]](#) and various criminal statutes, federal and state, proscribing or regulating obscenity have been upheld. [\[FN99\]](#) Applied under the proper constitutional standards, the term "obscene" is generally viewed as being sufficiently definite to preclude a criminal statute or ordinance dealing with obscenity from being held invalid on the ground of vagueness, and statutes which comply with the Miller standard [\[FN1\]](#) in defining material as obscene are not unconstitutionally overbroad. [\[FN2\]](#) However, some such criminal statutes or ordinances have been struck down as being impermissibly vague or overbroad. [\[FN3\]](#)

A statute or ordinance which, without requiring scienter, makes it a criminal offense to possess or distribute obscene materials, is invalid as a matter of federal constitutional law. [\[FN4\]](#) On the other hand, the courts have upheld criminal antiobscenity legislation which, although not specifically requiring scienter, was construed by the courts to require scienter as an element of the offense. [\[FN5\]](#)

A state obscenity statute which imposes criminal sanctions upon the mere knowing private possession of obscene material, except for material constituting child pornography, is unconstitutional. [\[FN6\]](#) However, the First Amendment right to possess obscene material in the privacy of one's home does not create a correlative right to transport such material, [\[FN7\]](#) or to acquire, sell, or import such material, even though for private use only. [\[FN8\]](#) Thus, [18 USCA § 1462](#), which prohibits any person from knowingly transporting obscene material in interstate or foreign commerce is not unconstitutionally overbroad on First Amendment grounds in proscribing "non- public" transportation as well as "public" transportation of such material. [\[FN9\]](#) Similarly, [19 USCA § 1305\(a\)](#), which prohibits the importation from any foreign country of any obscene articles, and which provides that such articles are subject to seizure and forfeiture, has also been declared not to be unconstitutionally overbroad. [\[FN10\]](#)

CUMULATIVE SUPPLEMENT:

Research References:

Contract provision--Inspection of operations--Instructions to representatives of owner. 12 Am. Jur. Legal Forms 2d, Levees and Flood Control § 162:34.

Article 1, section 8, clause 3--Commerce Clause--State's criminal statute proscribing use of the Internet to transfer sexually explicit material to minors violates the Commerce Clause [[American Libraries Ass'n v. Pataki](#), 969 F. Supp. 160 (S.D.N.Y., 1997)], 8 Seton Hall Const LJ 3:945 (1999).

Constitutional law--Obscenity--Application of existing obscenity laws to computer transmissions [[United States v Thomas](#), 74 F3d 701 (6th Cir. 1996)], [64 Tenn LR 1:215 \(1996\)](#).

Statutes:

[18 U.S.C.A. § 1462](#), amended in 1996, adds interactive computer service, as defined, to prohibited methods of communicating obscene material.

Cases:

Where the images are themselves the product of child sexual abuse, the State has an interest in stamping them out without regard to any judgment about their content, and the fact that a work contains serious literary, artistic, or other value does not excuse the harm it causes to its child participants. [Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 152 L. Ed. 2d 403 \(U.S. 2002\)](#).

Employing, using, persuading, inducing, or coercing a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, with knowledge that such visual depiction will be transported in interstate or foreign commerce, is an activity that substantially affects interstate commerce, so that statute proscribing such activities was within the power of Congress under the Commerce Clause, even where defendant has been unsuccessful in his attempt to actually produce a visual depiction of his sexually explicit conduct with a minor. [U.S. v. Buculei, 262 F.3d 322 \(4th Cir. 2001\)](#).

Child pornography statute prohibiting receipt or distribution of child pornography in interstate or foreign commerce clearly apprises individuals of nature of conduct proscribed, and, thus, did not violate due process clause of Fifth Amendment due to vagueness, despite defendant's arguments that statute did not define lascivious, what knowledge was required, how to determine age of child or how to tell if photographs are graphic. [U.S. v. Marcus, 193 F. Supp. 2d 552 \(E.D. N.Y. 2001\)](#).

[FN98]. [Roth v United States, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, 14 Ohio Ops 2d 331, 1 Media L R 1375](#), reh den [355 US 852, 2 L Ed 2d 60, 78 S Ct 8](#).

Comment Note.--Validity of procedures designed to protect the public against obscenity, [5 A.L.R. 3d 1214](#) § 3[a].
[Obscenity--Motion Pictures, 18 Am. Jur. Proof of Facts 465](#) § 36.

[FN99]. [Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, 1 Media L R 1441](#), reh den [414 US 881, 38 L Ed 2d 128, 94 S Ct 26](#) (holding that the inability to define regulated materials with ultimate god-like precision does not remove the power of the states or Congress to regulate pornography); [United States v Reidel, 402 US 351, 28 L Ed 2d 813, 91 S Ct 1410](#), reh den [403 US 924, 29 L Ed 2d 703, 91 S Ct 2223](#).

As to statutes regulating the distribution of obscene material to minors, see § [29](#).

Comment Note.--Validity of procedures designed to protect the public against obscenity, [5 A.L.R. 3d 1214](#) § 3[a].

Supreme Court's views as to validity of laws restricting or prohibiting sale or distribution to minors of particular types of goods or services otherwise available to adults, 52 L. Ed. 2d 892.

[FN1]. § [4](#).

[FN2]. [United States v Friedman \(CA8 Ark\) 506 F2d 511](#), cert den [421 US 1004, 44 L Ed 2d 673, 95 S Ct 2407](#), reh den [423 US 885, 46 L Ed 2d 116, 96 S Ct 160](#) (the proscription by [18 USCA § 1465](#) of knowing transportation of obscene, lewd, lascivious, or filthy materials is not unconstitutionally vague under the Miller standard); [State v Manzo, 58 Hawaii 440, 573 P2d 945, 3 Media L R 1660](#); [People v Hobbs \(2d Dist\) 59 Ill App 3d 793, 17 Ill Dec 83, 375 NE2d 1367](#), cert den [440 US 976, 59 L Ed 2d 795, 99 S Ct 1547](#) and (ovrld in part on other grounds by [People v Hart \(2d Dist\) 101 Ill App 3d 343, 56 Ill Dec 806, 427 NE2d 1352](#)); [State v American Theater Corp., 194 Neb 84, 230 NW2d 209](#); [State v Haig \(Utah\) 578 P2d 837](#); [Eckstein v Cullen \(1992, ED Va\) 803 F Supp 1107](#).

Topless or bottomless dancing or similar conduct as offense, [49 A.L.R. 3d 1084](#) § 6.

Comment Note.--Validity of procedures designed to protect the public against obscenity, [5 A.L.R. 3d 1214](#) § 3[b].

[FN3]. [ABC Interstate Theatres, Inc. v State \(Miss\) 325 So 2d 123](#) (statute prohibiting the exhibition of any motion picture that was "obscene, indecent, or immoral" was overbroad in violation of the First Amendment); [State v Walker \(Okla Crim\) 568 P2d 286](#) (statute prohibiting conduct outraging public decency held unconstitutional).

A state statute making it a gross misdemeanor to exhibit an obscene motion picture with knowledge of its contents is impermissibly vague as applied to a drive-in theater operator for exhibiting a film which would not be obscene if shown to adults in an indoor theater, and was obscene only because children could see the film over the theater fence, since the statute failed to give the drive-in theater operator full notice that criminal liability was dependent on the place where the film was shown. [Rabe v Washington, 405 US 313, 31 L Ed 2d 258, 92 S Ct 993](#), reh den [406 US 911, 31 L Ed 2d 822, 92 S Ct 1604](#).

[FN4]. [Smith v California, 361 US 147, 4 L Ed 2d 205, 80 S Ct 215, 14 Ohio Ops 2d 459](#), reh den [361 US 950, 4 L Ed 2d 383, 80 S Ct 399](#); [State v Bumanglag, 63 Hawaii 596, 634 P2d 80](#) (statute making dissemination of pornographic material prima facie evidence of knowledge of disseminator's knowledge of character and content of such material was unconstitutionally overbroad); [State v Kuebel, 241 Ind 268, 172 NE2d 45](#); [People v Villano, 369 Mich 428, 120 NW2d 204](#); [State v Burton \(Mo\) 349 SW2d 228](#); [St. Louis v Williams \(Mo\) 343 SW2d 16](#); [Cincinnati v Marshall, 172 Ohio St 280, 16 Ohio Ops 2d 1, 175 NE2d 178](#); [State v Thompkins, 263 SC 472, 211 SE2d 549](#).

Comment Note.--Validity of procedures designed to protect the public against obscenity, [5 A.L.R. 3d 1214](#) (§ 3(d) superseded by Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, [93 ALR3d 297](#)) § 3[c].

Supreme Court's development, since *Roth v United States*, of standards and principles determining concept of obscenity in context of right of free speech and press, 41 L. Ed. 2d 1257 § 3a.

[Obscenity--Motion Pictures, 18 Am. Jur. Proof of Facts 465](#) § 35.

[Obscenity Litigation, 10 Am. Jur. Trials 1](#) § 39.

[FN5]. [Tallman v United States \(CA7 Ill\) 465 F2d 282, 17 ALR Fed 892](#); [State v Locks, 91 Ariz 394, 372 P2d 724](#), related proceeding [94 Ariz 134, 382 P2d 241](#), related proceeding [97 Ariz 148, 397 P2d 949](#); [State v Andrews, 150 Conn 92, 186 A2d 546](#); [Tracey v State \(Fla\) 130 So 2d 605](#); [Demetropoulos v Commonwealth, 342 Mass 658, 175 NE2d 259](#); [State v Oman, 261 Minn 10, 110 NW2d 514](#); [People v Tannenbaum, 18 NY2d 268, 274 NYS2d 131, 220 NE2d 783](#), on reh [23 NY2d 753, 296 NYS2d 798, 244 NE2d 269](#) and app dismd [388 US 439, 18 L Ed 2d 1300, 87 S Ct 2107](#), reh den [389 US 892, 19 L Ed 2d 204, 88 S Ct 15](#); [People v Finkelstein, 9 NY2d 342, 214 NYS2d 363, 174 NE2d 470](#).

Comment Note.--Validity of procedures designed to protect the public against obscenity, [5 A.L.R. 3d 1214](#) (§ 3(d) superseded by Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, [93 ALR3d 297](#)) § 3[c].

[FN6]. [United States v Thoma \(CA7 Ill\) 726 F2d 1191](#), cert den [467 US 1228, 81 L Ed 2d 878, 104 S Ct 2683](#).

[FN7]. [United States v Orito, 413 US 139, 37 L Ed 2d 513, 93 S Ct 2674](#).

[FN8]. [United States v 12 200-Ft. Reels of Super 8mm Film, 413 US 123, 37 L Ed 2d 500, 93 S Ct 2665](#).

[FN9]. [United States v Orito, 413 US 139, 37 L Ed 2d 513, 93 S Ct 2674](#).

[FN10]. [United States v 12 200-Ft. Reels of Super 8mm Film, 413 US 123, 37 L Ed 2d 500, 93 S Ct 2665](#).

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