

Thomson Reuters Law for the Layperson

THE LAW OF OBSCENITY
AND PORNOGRAPHY

Second Edition

Margaret C. Jasper

Legal Almanac Series

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THE LAW OF OBSCENITY AND PORNOGRAPHY

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Revised and Updated by
Margaret C. Jasper

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Thomson Reuters' Law for the Layperson

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To My Husband Chris

Your love and support
are my motivation and inspiration

To My Sons, Michael, Nick and Chris

-and-

In memory of my son, Jimmy

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You've Been Fired: Your Rights and Remedies

INTRODUCTION

"I know it when I see it." Referring to obscenity, these famous words were spoken by U.S. Supreme Court Justice Potter Stewart in *Jacobellis v. Ohio* (1964). If only it were as easy as Justice Potter stated, the courts would not be continually called upon to intervene and make such determinations.

The law of obscenity has evolved considerably since the first cases appeared in the courts. In part, this is due to the "new morality" that emerged in the late 1960s. Prior to that time, there were strict controls on the print and broadcast media. Censorship of images and language deemed obscene was the norm, particularly when there was a risk of exposure to minors. In fact, children of the 1950s were rarely exposed to anything remotely "indecent." For example, the parents on popular sitcoms slept in twin beds (e.g., *I Love Lucy* and *The Dick Van Dyke Show*), and profanity was virtually non-existent.

This Legal Almanac explores the law of obscenity and pornography. It sets forth the evolution of the relevant case law, including constitutional considerations and the various tests that the U.S. Supreme Court has devised to balance the regulation of obscenity and the First Amendment right to free expression. Related issues, such as child pornography, and the relationship between pornography and violence are also discussed.

Further, this Almanac sets forth the tools available to parents who are concerned about the availability of harmful subject matter in the media, including program blocking devices, and ratings systems developed by the motion picture, television, music, and videogame industries. In addition, the regulation of broadcast media by the Federal Communications Commission (FCC) is also discussed.

The advent of the computer age has presented new and novel issues to be addressed, as it is a difficult medium to monitor and control. This Almanac

discusses the status of the current law, including the most recent legislation affecting materials available through the Internet and various on-line services, and the government's attempt to restrict material that is harmful to minors.

The Appendix provides resource directories, applicable statutes, and other pertinent information and data. The Glossary contains definitions of many of the terms used throughout the Almanac.

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CHAPTER 1:

AN OVERVIEW OF OBSCENITY LAW

IN GENERAL

Throughout history, courts have struggled to define pornography and obscenity. The term “pornography” has generally been used to describe sexually explicit material. The term “obscenity” refers to the legal definition of whether such materials are protected under the First Amendment guarantees of free speech and free press.

Material that is deemed obscene is not constitutionally protected. However, the definition of obscenity has been narrowly construed. In general, to be considered obscene, the material must: (1) appeal to the prurient interest; (2) be patently offensive to the average person in society; and (3) lack serious value.

Many believe that First Amendment freedoms are presently under attack by the government as it seeks to regulate the Internet, music lyrics, and other forms of art and entertainment that are viewed as predominant factors in the “downfall” of morals and the increase in youth violence in the United States. They argue that the very purpose of the First Amendment is to protect the most controversial forms of expression from such government suppression and regulation. Their opponents argue that the framers of the Constitution were intent on protecting political speech, not every form of explicit or offensive expression now claiming constitutional protection.

Nevertheless, as discussed below, the simple language of the First Amendment leaves much to interpretation. Thus the United States Supreme Court has been called on to set standards and guidelines to resolve these disputes and determine whether particular forms of expression are obscene.

The Court has attempted to formulate certain tests to make this determination, usually basing their decision on contemporary moral standards.