



American Psychology-Law Society

STUDENT COMMITTEE

WHAT IS FREE SPEECH AND WILL I KNOW IT WHEN I SEE IT?

BASICS OF CONSTITUTIONAL ANALYSIS FOR THE LAW OF FREE SPEECH AND OBSCENITY

AP-LS STUDENT COMMITTEE

4TH ANNUAL LEGAL WORKSHOP

MARCH 14, 2019

TODAY

- **Constitutional and Legal Analysis**
 - IRAC
 - Con Law Toolbox
- **Introduction to the First Amendment**
 - What is “speech”?
 - What is protected?
 - Rules for unprotected categories of speech
 - Law of Obscenity
 - Children and Obscenity

BASIC LEGAL ANALYSIS

Issue: Statement of the legal issue being considered

Rule: Statement of the relevant rule of law

Analysis: Application of the relevant rule of law to the facts of the case

Conclusion: An answer to the legal issue



BASIC LEGAL ANALYSIS

HOW TO IRAC



BASIC LEGAL ANALYSIS

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CONSTITUTIONAL LAW: TOOLBOX



- 1. MODES OF CONSTITUTIONAL INTERPRETATION**
- 2. AS APPLIED VS. FACIAL CHALLENGES**
- 3. TIERS OF SCRUTINY**

CONSTITUTIONAL INTERPRETATION

- **Constitutional text**
- **Historical argument**
- **Structural argument**



TIERS OF SCRUTINY

1. Strict scrutiny:

- ✓ **compelling** governmental interest &
- ✓ **narrowly** tailored to that interest

2. Intermediate scrutiny:

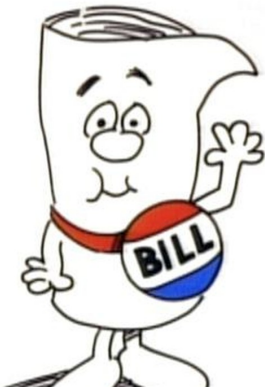
- ✓ **important** governmental interest &
- ✓ **substantial** relation to that interest (not least restrictive means)

3. Rational basis:

- ✓ law achieves some **legitimate** interest
- ✓ Means are **rational** or **reasonably** related

CON LAW CHALLENGES

FACIAL



AS APPLIED

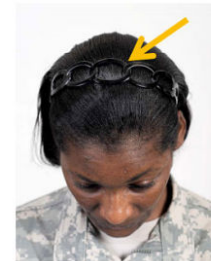


FEMALE UNAUTHORIZED HAIRSTYLES

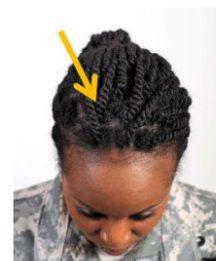
3 Braids



Multiple braiding
(more than 2 braids)
must be small



Headband is not
plain



Twists are not
authorized

BASIC LEGAL ANALYSIS

ISSUE

RULE

ANALYSIS

CONCLUSION



CONSTITUTIONAL LAW: TOOLBOX



THE FIRST AMENDMENT

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”



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THEORIES OF FREE SPEECH

- To further democratic self-governance
- To discover or advance truth
- To advance individual autonomy
- To promote tolerance

IS THE 1TH AMENDMENT **VIOLATED?**

KEY QUESTIONS:

1. IS THE **GOVERNMENT** ACTING?
2. IS IT **SPEECH**?
3. IS IT **PROTECTED**?

SITUATION 1A:



✓ YES ✓



OR

✗ NO ✗



STATE ACTOR DOCTRINE

No, the First Amendment only protects you from Government Action, and **Kate** is not a “government actor.”



OR



SITUATION 1B:



But what if **Kate** is a police officer?

✓ YES ✓



OR

✗ NO ✗



SITUATION 1B:



✓ YES ✓



OR

✗ NO ✗



SITUATION 2:



OR



SITUATION 2:



OR



WHY?

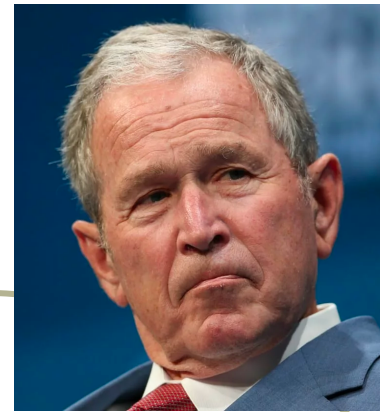


Theories of free speech:

- Democratic self-governance?
- Advance truth?
- Individual autonomy?
- Promote tolerance?



SITUATION 2:



We are “ashamed
the President is
from Texas!”



IS THE 1TH AMENDMENT **VIOLATED?**

KEY QUESTIONS:

1. IS THE GOVERNMENT ACTING?
2. IS IT **SPEECH**?
3. IS IT **PROTECTED**?

WHAT COUNTS AS “SPEECH”?

- Written words
- Spoken words
- Expressive conduct
 - actions that contain a message



IS THE 1TH AMENDMENT **VIOLATED?**

KEY QUESTIONS:

1. IS THE GOVERNMENT ACTING? ✓
2. IS IT SPEECH? ✓
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IS THE 1TH AMENDMENT **VIOLATED?**

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WHAT IS UNPROTECTED SPEECH?

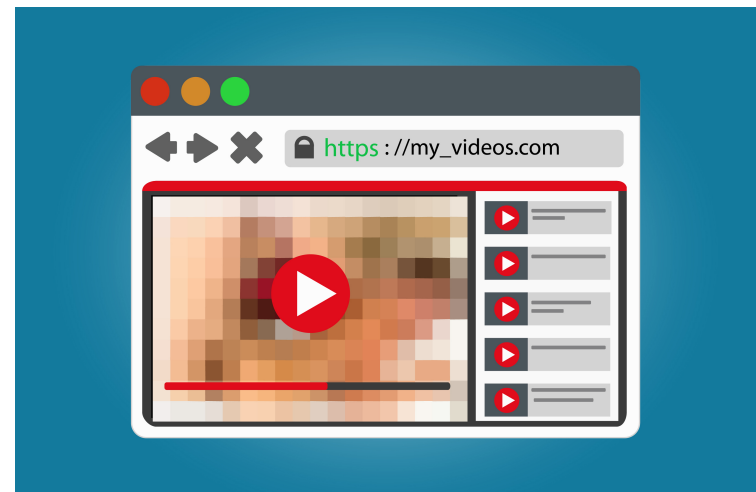
WHAT IS PROTECTED SPEECH?

- Some types of speech are **unprotected** or **less protected** by the First Amendment
 - If unprotected → can be prohibited and punished
 - Must fit within established exception:
 - e.g., Obscenity
 - If less protected → government has increased latitude in regulation them
 - Does not meet criteria for exceptions but...still?
 - e.g., sexually explicit expression that is not obscene

WHAT IS

CATEGORIES OF UNPROTECTED SPEECH

OBSCENITY



IS THIS OBSCENE?



WHAT ABOUT THIS?



WHAT ABOUT THIS?

Game of Thrones: Season 4 Episode 10 (Breaker of Chains)

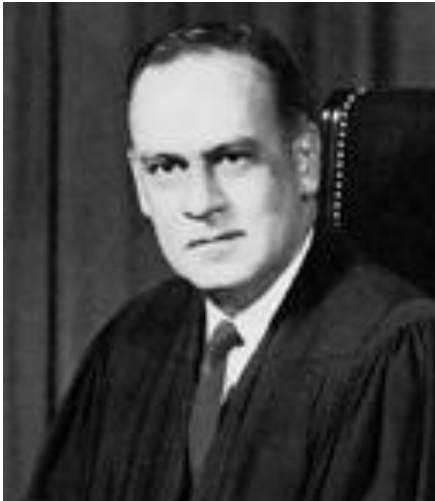


HOW DO YOU KNOW?



HOW DO YOU KNOW?

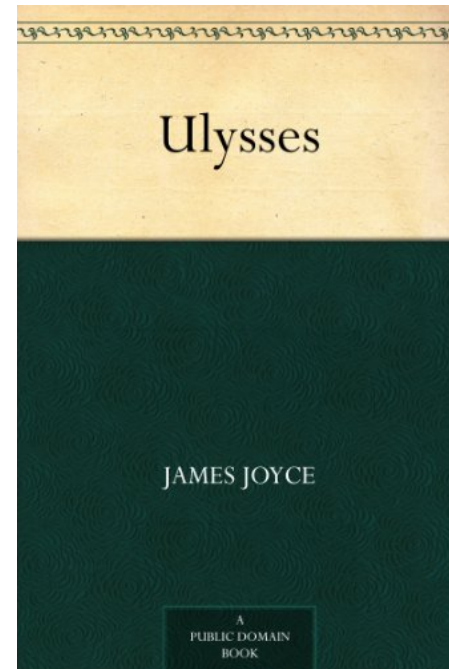
I cannot define it, “but I know it when I see it.”



Justice Potter Stewart

EARLY OBSCENITY LAW

- **Hicklin Rule**



ROTH V. UNITED STATES

MOVIE DAY AT SCOTUS



MILLER V. CALIFORNIA (1973)

Set out a three part test (Miller Test) as a guideline for determining **whether speech or expression is obscene**:

1. Would the average person applying contemporary community standards find that the material, taken as a whole, appeals to prurient interest (an immoderate, unwholesome, or unusual interest in sex)?
2. Does the work depict or describe, in a patently offensive way, sexual conduct specifically outlawed by applicable state law?
3. Does the work, taken as a whole, lack serious literary, artistic, political, or scientific value?

GET INTO GROUPS!

ACTIVITY TIME

YOUR TASK

- **Step 1: Craft your identity.**
- **Step 2: Elect a group leader.**
- **Step 3: Pretend to be a juror!**
- **Step 4: Apply the Miller test (in character) to determine whether each defendant should be convicted.**

TEST FOR OBSCENITY

- 1. Appeals to “prurient interest” (causes lust)**
- 2. “Patently offensive” description of defined sexual conduct**
- 3. No serious literary artistic, political, or scientific value**

STATE V. PIETRUSZKA

AP-LS Chair Elect

**Endorsement speech for
AP-LS current President
Kevin Douglas last year...**



TEST FOR OBSCENITY

- 1. Appeals to “prurient interest” (causes lust)**
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STATE V. BREAU

Bookstore owner



"#IFYOULIKETHISITMEANSYOU'REGAY"



by Gray Wilbank

STATE V. POTTS

T-shirt Designer





STATE V. SIMMONS

Movie Theater Owner

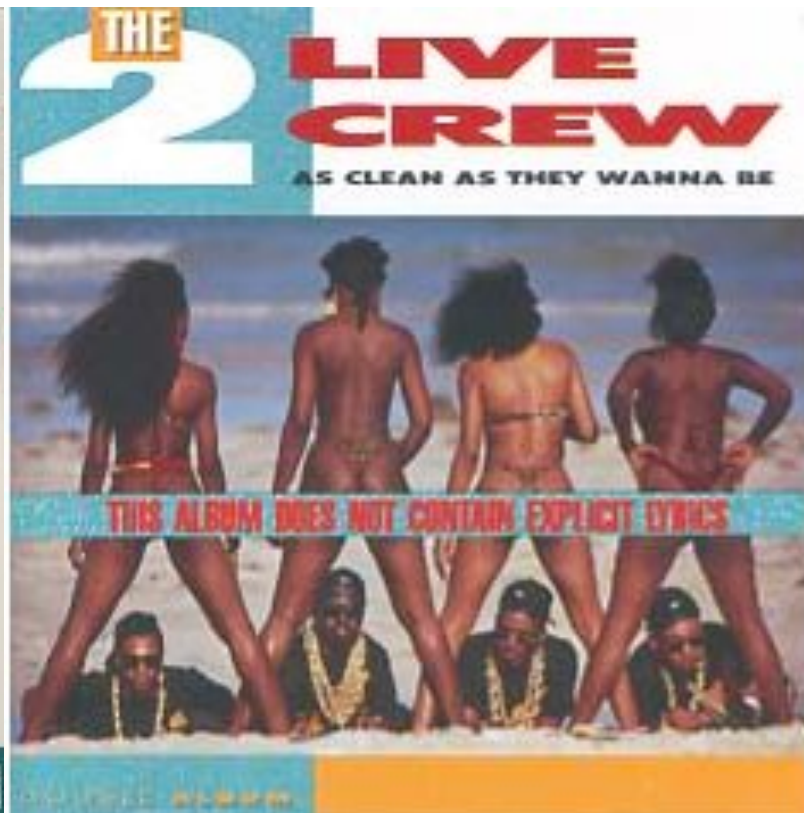
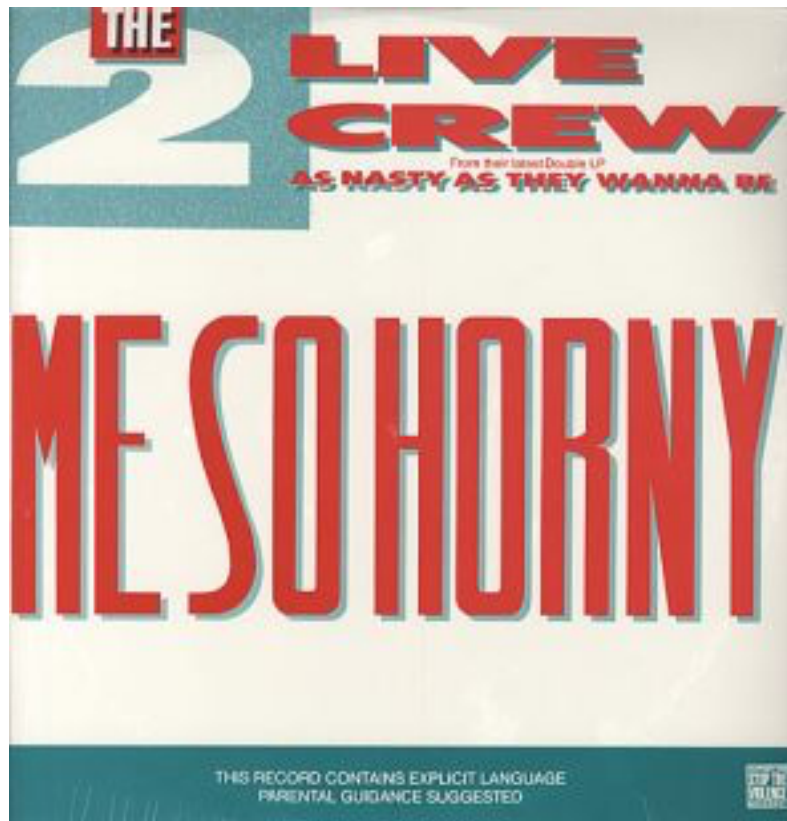




STATE V. DEL POZZO

Record Store Owner



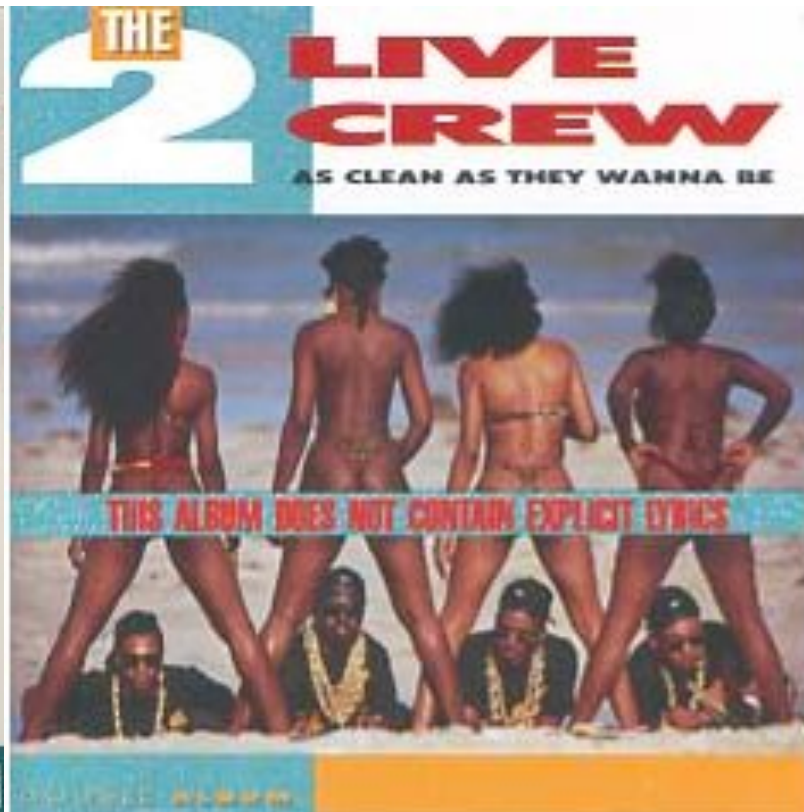
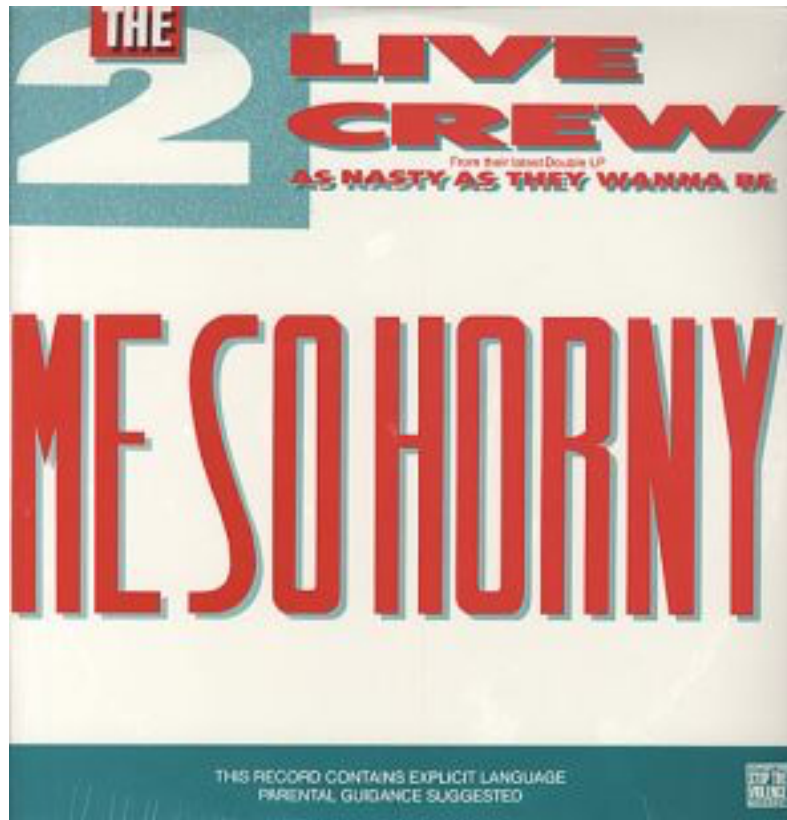




OBSCENITY AND RAP MUSIC



POP CULTURE, CHANGING NORMS AND OBSCENITY



OBSCENITY AND CHILDREN



OBSCENITY AND CHILDREN



OBSCENITY AND CHILDREN



*Frontal nudity
is allowed in the
Art categories
when the item is
considered fine
art, such
as...nude
cherubs*

OBSCENITY AND CHILDREN

*..mission is
to...collect,
study, conserve,
and present
significant
works of art
across all times
to connect
people to...ideas*

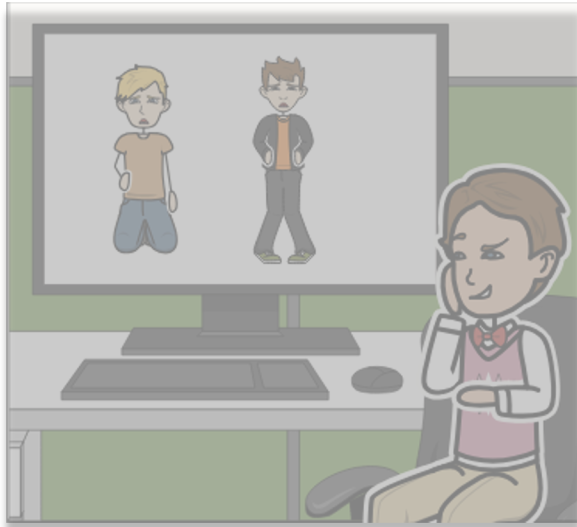


NEW YORK V. FERBER (1982)

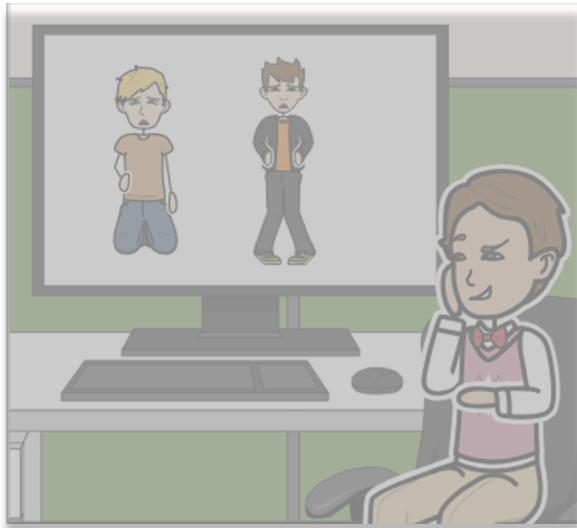
NEW YORK V. FERBER (1982)



NEW YORK V. FERBER (1982)



NEW YORK V. FERBER (1982)



OBSCENITY AND CHILDREN

Does this apply to written word?

OBSCENITY AND CHILDREN



OBSCENITY AND CHILDREN



OBSCENITY AND CHILDREN



OBSCENITY AND CHILDREN

Psychological implications?

ASHCROFT V. FREE SPEECH (2002)

The Child Pornography Prevention Act of 1996 prohibits:

"any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or ***appears to be***, of a minor engaging in sexually explicit conduct," and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that ***conveys the impression***" it depicts "a minor engaging in sexually explicit conduct."

ASHCROFT V. FREE SPEECH (2002)

***Does the Child Pornography Prevention Act of 1996
abridge freedom of speech?***

ASHCROFT V. FREE SPEECH (2002)

Yes: inconsistent with both Miller and Ferber

OBSCENITY AND CHILDREN

Is this decision overbroad?

OBSCENITY AND CHILDREN

- **LEGAL STANDARD:** is the pornography obscene or does it involve children?
- **Hypothetical:** Several months ago, a sex tape of Ashton Kutcher and Demi Moore on their honeymoon surfaced and it was purchased by Sketch Productions, Inc., which altered Ashton's face in the video to make it look like Demi was having sex with an 8-year-old boy. The U.S. Government brought charges against Sketch for displaying child pornography. Is Sketch Productions, Inc.'s video protected speech?

OBSCENITY AND CHILDREN

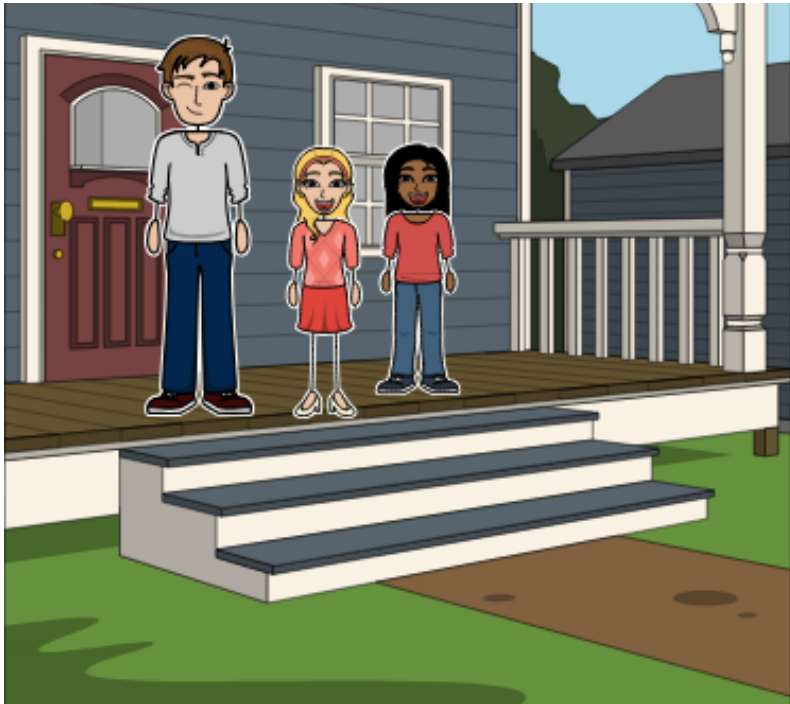
- **LEGAL STANDARDS:** Is it obscene or does it involve children?
- **Hypothetical:** Sketch Production's "Ashton Kutcher and Demi Moore" tape of Ashton Kutcher and Demi Moore soon surfaced and it was purchased by a 13-year-old, which altered Ashton's face in the tape like Demi was having sex with an 8-year-old. The government brought charges against Sketch Production for obscenity and pornography. Is this speech?



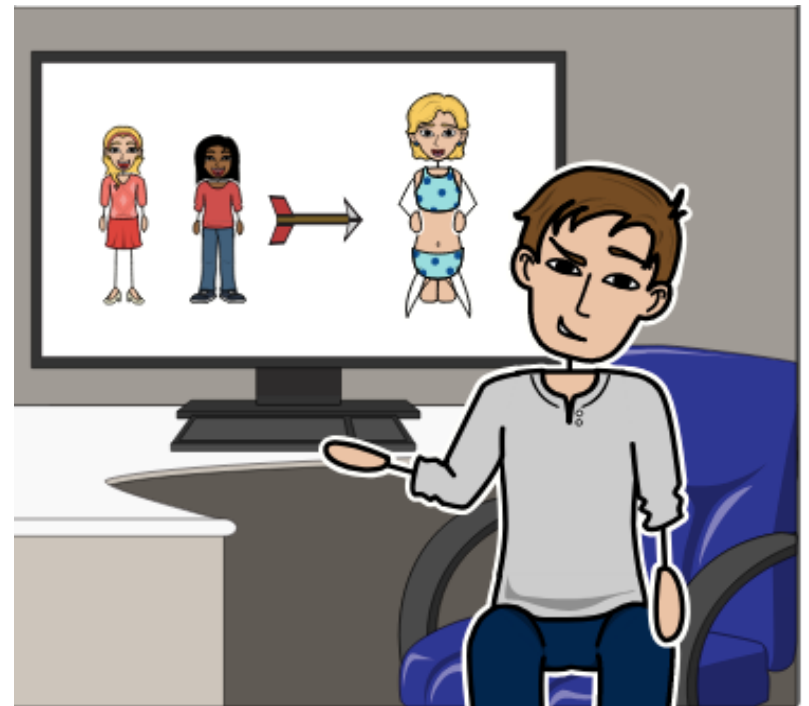
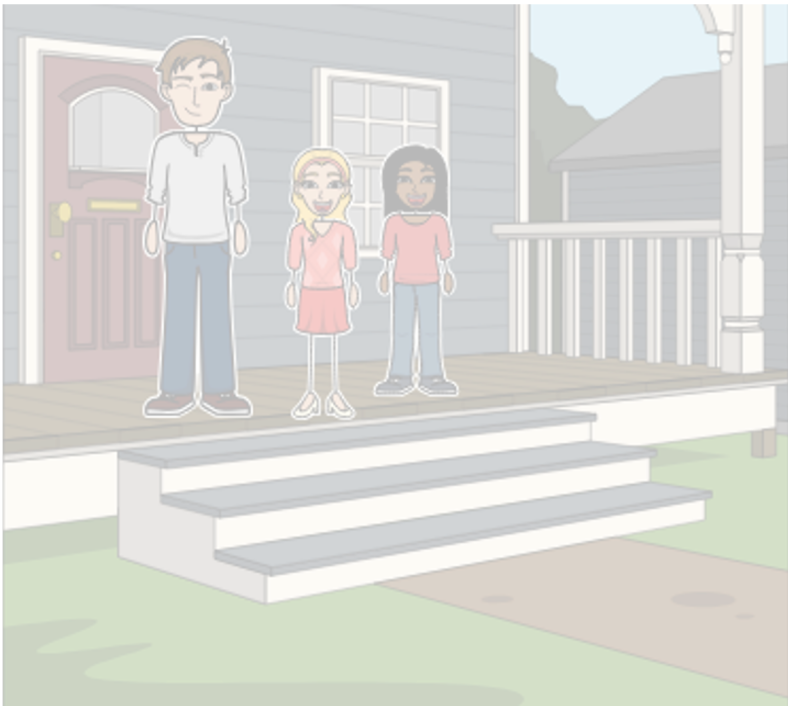
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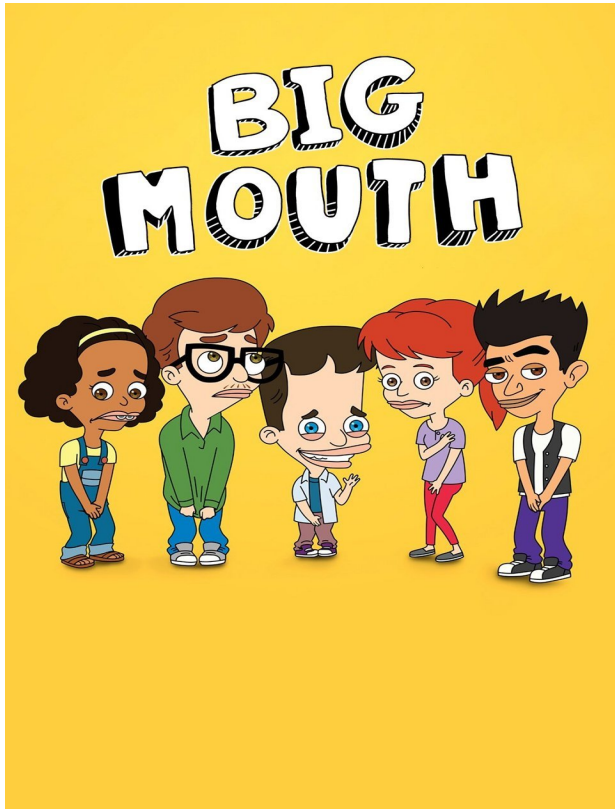
UNITED STATES V. HOTALING (2011)



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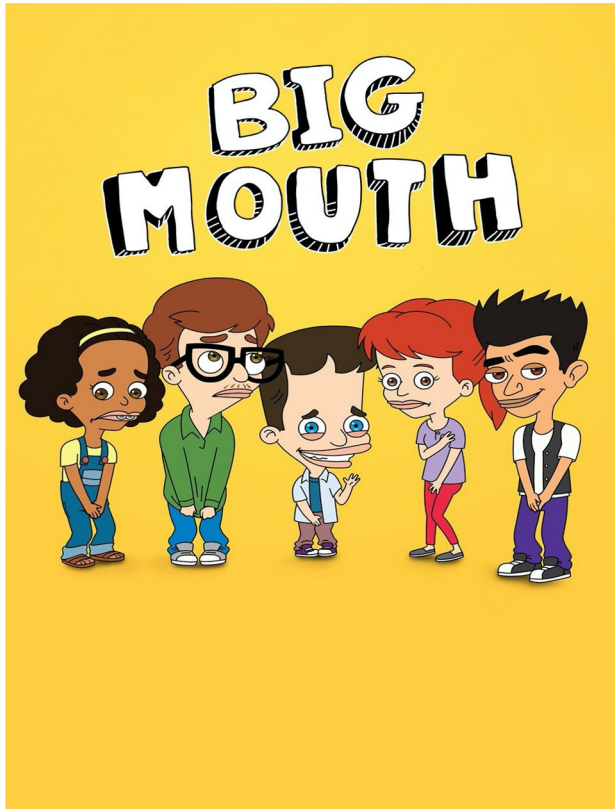
OBSCENITY AND CHILDREN



*By using real
life stories,
[Kroll] hopes it
will allow
others to be
more open
about their own
experiences
with puberty*

OBSCENITY AND CHILDREN

OBSCENITY AND CHILDREN



VS



Petition- Netflix Big Mouth

“Big Explicit Mouth” – Stop Sexually Exploiting Our Children!



OBSCENITY AND CHILDREN

*It cannot be
disputed that
content on
the episodes
is really soft-
core porn*



Petition- Netflix Big Mouth

"Big Explicit Mouth" – Stop Sexually Exploiting Our Children!



OBSCENITY AND CHILDREN

*Is Big Mouth more consistent with Ashcroft or
Hotaling?*

*Craft a statute designed to capture the current
obscenity laws in relation to Big Mouth's legality.*