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Is There Adequate Supreme Court Precedent to Protect Minors From Sexually Explicit
Material In a Rapidly Changing Virtual World?

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Abstract

This thesis conducts a legal analysis of relevant First Amendment Supreme Court cases to determine whether free speech precedents permit states to legally regulate a minor's access to video games that contain computer generated sexually explicit material [such as Grand Theft Auto Five, (GTA5)]. That analysis will center on whether Ginsberg v. New York 390 U.S. 629 (1968), which upheld Ginsberg's conviction under the state law that regulated the access of minors to sexually explicit material remains controlling. The types of existing unprotected speech will be detailed including defamation, fighting words, incitement and obscenity. Special attention is paid to obscenity rulings since the *Ginsberg* decision, including cases regarding child pornography and depictions of violence. The rationales and holdings of these cases provided the contemporary legal backdrop, from which it can be concluded that Ginsberg v. New York provides states with the legal ability to restrict access of minors to sexually explicit computer-generated materials like those found in GTA5.

Introduction

The First Amendment to the United States Constitution provides that "...Congress shall make no law... abridging the freedom of speech, or of the press." However, for many years it has been explicitly understood that the freedom of speech is not absolute, and certain types of speech and expression did not enjoy First Amendment protections. This thesis will examine how free speech under the First Amendment addresses efforts to restrict access of minors to sexual material in computer-generated video games.

First Amendment case law must be examined in order to determine whether free speech precedents constrain regulating a minor's access to video games that contain computer generated sexually explicit material and narratives [such as Grand Theft Auto Five, (GTA5)]. This thesis conducts a legal analysis of relevant United States Supreme Court cases. That analysis will center on whether Ginsberg v. New York 390 U.S. 629 (1968) remains controlling. *Ginsberg* upheld the conviction under the state law that regulated access of minors to sexually explicit material before newer rulings about obscenity and before computer-generated images and narratives became available.

Before engaging in the legal analysis, the thesis surveys the kinds of sexually explicit material (both depictions and descriptions) that are contained in GTA5 to provide context. It is important to know the kinds of "speech" that are involved when analyzing how much free speech protects access by minors to these materials (if at all). After that review, the legal analysis introduces the areas of unprotected speech, including obscenity, which can be regulated. It then proceeds to review Miller v. California 413 U.S. 15 (1973) to understand the current test for obscenity. The legal analysis also considers

cases about child pornography (including one about computer-generated materials) and cases about violence (including one about depictions of animal cruelty and one based on efforts to restrict minors from access to computer-generated violent video games). The rationales and holdings of these cases provide the contemporary legal backdrop for considering whether or not Ginsberg v. New York, which upheld a conviction under the state law that defined obscenity differently for minors, remains the standard for assessing current laws that seek to restrict access of minors to sexually explicit computer-generated materials like those found in GTA5. In the course of analyzing *Ginsberg*, the conviction upheld under the New York law will be reviewed to consider how that law would reach computer-generated material like that found in GTA5. The legal analysis will conclude by taking a position on the precedential value of *Ginsberg*.

After the review of free speech cases and the conviction under the New York law at the time of *Ginsberg*, Florida's current legislation is reviewed (especially Ch. 847.0133 of 2016 Florida Statutes, with a legislative history dating to 2008). The goal is to discuss how a modern statutory scheme updates and addresses more specifically the challenges that sexually explicit computer-generated materials pose for restricting access to minors. The closing discussion also identifies other areas for further study, including challenges for enforcement and implications for noncommercial parties who may allow access to minors of computer-generated explicit material like those in GTA5.

Grand Theft Auto Five

Grand Theft Auto Five, (GTA5), is an example of a newer form of computer-generated sexually explicit material that, as shall be seen below, is accessible to minors, especially 17 year olds. GTA5 is a best-selling, interactive, virtual reality video game with its newly introduced first person mode. This new option allows the player to become more intricately involved in the video game as the player goes on missions to steal, rob, and kill. The depiction of sexually explicit content in GTA5, along with the first person mode, has altered the game's interaction with players, giving them more auditory and visually stimulating access to the game's seductive and barely clothed prostitutes. The addition of the first person mode was an instant hit for many reasons, but one of the primary reasons was the angle change and life-like experiences it now offered during the sex with the game's many prostitutes. Now players can watch at any angle while their "virtual self" presses down the head of their hooker during a \$50 blow job, or they can grope her as she slides up and down their avatar's "giant cock" as it is referred to numerous times by the game's prostitutes (GTA5). *Grand Theft Auto Five* is currently rated "M" for mature, which technically requires merchants to verify that a person is 17 years of age before selling them the game. Note that this limitation on merchants does not restrict private individuals from giving even younger individuals access to the game. There appear to be few other restrictions prohibiting minors from playing this game, which is laden with sexually explicit visual material and sexually explicit audio narrative.

IMDb Reviews of GTA5

A review of GTA5 on IMDb's website 'Parents Guide' says that, "GTA5 surprisingly, is not even the most sexually explicit game on the market"(IMDb.com). IMDb is an acronym for *Internet Movie Database* and is a subsidiary of Amazon.com. It is an online database of information related to films, TV programs, and video games. Its website includes cast, production crew, fictional characters, biographies, plot summaries and reviews. (IMDb.com) IMDb describes scenes from the game's strip club, marked on the game's map with a woman's stiletto shoe, where the player can request private dances from **bare breasted strippers**. Players can "touch" the strippers when the bouncers disappear and if played correctly, this "flirting" can lead to simulated sex. The strip club is not a "required" stop for the player, but the makers of **GTA5 do not limit visits to the strip club** either, in which IMDb describes scenes of a man having a woman **bent over the table** engaged in vaginal sex "**doggie style**", while the male participant is naked from the back view and can be heard grunting and panting (IMDb.com).

Other sexually graphic missions, however, are required, such as the "**sex tape mission**" which requires the player film two 'celebrities' having sex. The female 'celebrity' is described as being bent over a piece of lawn furniture while on her phone and **being penetrated from behind** by a rear naked 'co-celebrity.' IMDb describes the scene as having graphic content and sexually explicit language throughout this 30-plus second required "sex tape mission" (IMDb.com). IMDb went on to say that other scenes in the game depict **masturbation**, and even **necrophilia** (IMDb.com).

YouTube Reviews of GTA5

After reading about the sexually explicit content in GTA5 on a number of parental “watchdog” sites, I decided to search for footage on YouTube to verify these characterizations about the game. Upon searching simple phrases such as ‘how to pick up prostitutes on GTA5’ or ‘how to kill your prostitute on GTA5’, thousands of directional and “how to” videos appeared with detailed footage of the game. After over an hour of searching videos, I stopped due to the gruesomeness of some of the videos’ content.

A. Sexually Explicit Depictions on GTA5

YouTube subscriber *Yearley Diamond* posted a video, which received 4,868,980 views as of October 11, 2016, illustrating the games mandatory “sex tape” mission of filming a mock celebrity having sex. (GTA5 via YouTube) In this scene, the game portrays the player peering through binoculars, while a man bends a brunette ‘celebrity’ over a lawn table. Her skirt is pulled up mostly over her butt and his butt and legs are completely exposed. As described on IMDb’s website, the girl is on her cell phone during the encounter and makes a few crass statements such as “oh you’re so big” while the player on the “sex tape” mission is prowling through the yard armed with a sniper rifle. The player then takes a “selfie” with the fornicating celebrities in the background and relocates himself to obtain a better view.

On yet another video, posted by *DJ He’s Lets Play*, which received 1,046,220 views as of October 11, 2016, strippers are shown at the GTA5 strip club being solicited for private dances and, once in the private room, they become topless and grope not only themselves but also the other female strippers in the room. They speak in a sexually

provocative manner and the more the client “flirts” with the stripper the better chance the player has to take her home for a free sexual encounter with her on screen. The options range from touch, stop touching, leave with the stripper, leave the room, flirt, and so on. The game encourages the player to pick up the stripper for sexual encounters. During stripping sessions, dancers press their **bare breasts close to the screen**, bend over **exposing G-String bulges**, provocatively rub their butts and breasts and attempt to “motor boat” the other stripper during the dance (GTA5 via YouTube post).

This post also illustrates another feature of what can happen with first person mode. This player **seemed obsessed** with beating or **killing a stripper**, repeating that he was going to “**fuck her up**”. Once he was able to convince her to leave with him, he tried numerous methods of killing her. At first he assumed the stripper was not killable, but the player became inventive by running her over multiple times with his car and eventually **pinning her** with his front right **tire**. The player exits the car and **shoots her in the stomach**, then **shoots** her in the **vagina**, and finally, **mocking the slack look** of her mouth, **the player shoots her in the mouth**. One of the features of GTA5 is that it mixes and allows players to mix sex with violence.

These kinds of depictions in GTA5 are sexually explicit. The game is sold to 17 year-olds and there are few restrictions to prevent private parties from providing access to younger children. The question is raised as to whether the case law on obscenity restricts efforts to regulate access to a larger extent than currently occurs.

B. Sexually Explicit Narratives on GTA5

The language in GTA5 is also sexually explicit. Consider the “traditional” methods of soliciting prostitutes on GTA5. They consist of finding their hunting grounds, honking at a willing hooker and then finding a private location. The buyer can choose from oral, vaginal, or presumably anal sex, as the price increases with each respective service (GTA5 via YouTube post). Some of the typical language that can be expected from a prostitute during sex or a blow job ranges from “your cock is so big”, “cum in my mouth”, “you’re gonna make me cum”, “my pussy is so wet”, “I love sucking your giant cock”, “You like my tight wet pussy?” “Oh yeah fuck my pussy baby” and numerous other sexually explicit comments (GTA5 via YouTube posts).

The mandatory sex tape mission involving “celebrities,” displayed on YouTube, quotes the game as making statements such as: “Poppy Mitchell gettin’ the dirt box,” “gettin’ it in the bung hole,” “one shot of that dirty little slut monkey and we’re in the money homie” (GTA5, via YouTube <http://youtu.be/xwBvpLoyHc4>, 2013). The male sex participant refers to the female involved as a virgin, but she dispels the rumor and informs the man that ‘she does this frequently’ and as long as she showers and jumps up and down it doesn’t count as sex. (GTA5 via YouTube post)

Similar to the graphic depictions, these kinds of narrative descriptions in GTA5 are sexually explicit. It bears repeating that the game is sold to 17 year-olds and there are few restrictions to prevent private parties from providing access to younger children. The narratives also raise the question as to whether the case law on obscenity restricts efforts to regulate access to a larger extent than currently occurs.

Legal Analysis

Protected Speech Exceptions

For many years it has been understood that the freedom of speech is not absolute. The current Supreme Court may not interpret the First Amendment in the same way it was interpreted when the previous case law was established. There are currently only a few exceptions to the protected speech clause. (For a basic overview on free speech, see Feinman 2014: 62-76.) We will discuss each form of unprotected speech below.

A. Defamation

According to The Legal Dictionary, Defamation is defined as: “A false statement that is made by one person about another person and shared with a third party or persons. It is usually a damaging statement” (Thelegaldictionary.org). The tension between free speech and defamation found its way to the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Although the case was narrowly focused on what is required for a public official to prevail in a defamation suit, the unprotected status of defamation cannot be doubted. In the case, the Court determined that public officials had a higher standard to prove defamation; they had to **prove** that the speaker knowingly made the false statement with “**actual malice**” and with the **intent** to do damage to the recipient’s reputation. The Court states, “...[h]e proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not” *id.* at 280. Jay Feinman, the author of *Law 101*, states, “The Court refused to create an exception to the principle of content neutrality for false speech. Certain kinds of false speech can be prohibited or punished, such as speech that is

defamatory or that has adverse consequences such as making false statements to a public official” (Feinman, pg. 67).

B. Incitement

Some incitements are also unprotected speech, specifically those that would bring about imminent lawless actions (Feinman at 75). This could include falsely yelling “fire” in a crowded theater causing mass panic or chaos. Feinman describes this example of speech as “...having all the effect of force”...and whether the words “create a clear and present danger of harm” (Feinman, pg. 74).

The pivotal case was Brandenburg v. Ohio, 395 U.S. 444, 447-449 (1969), which involved a rally at which “the leader of a Ku Klux Klan [who] advocated violence or unlawful methods of terrorism... *id.* at 445. The “White” rally, however, was not a context where violence against racial groups (who were not present) was likely to break out. The Court asserted, “[f]reedom of speech is not protected if speech is used to ‘produce imminent lawless action and is likely to incite or produce such action’” *id.* at 447. Feinman states that in *Brandenburg* the Court held that it would be unconstitutional “to forbid or proscribe advocacy of the use of force of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions” (Feinman, pg. 75).

C. Fighting Words

The fighting words exception to protected speech follows a similar rationale that focuses on provocation rather than incitement. The seminal case was Chaplinsky v. New

Hampshire 315, U.S. 568,572, (1942). This differs from “incitement” in that, incitement is meant to rally a crowd to imminent violent or lawless action, whereas “Fighting Words” can be the provocation of violent action by a speaker using ‘offensive, derisive and annoying words or names’ aimed toward one person. In *Chaplinsky*, “The statute... including ‘classical fighting words’, words in current use less ‘classical’ but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats” *id.* at 770. One man called another a “God damned fascist” and a “God dammed racketeer”, which the Court declared “Fighting Words” and said “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” *id.* at 769. Note that both “incitement” and “fighting words” have the ability to **incite immediate** violence or a breach of the peace. There appear to be very subtle differences between the two cases, however, the Court felt that one case (*Brandenburg*) possessed the ability to incite a large group to violent or terrorist type activities and the other case (*Chaplinsky*) had the power to still breach the peace and incite violent activity, but could take place between two people on a public street.

D. Speech That Is Part of the Criminal Act

“One form of unprotected speech that is so obviously not entitled to constitutional status that it rarely appears in the cases is speech that is part of an act the law traditionally would consider criminal” (Feinman, pg. 69). One example would include the misrepresentations that constitute a fraud. Another is the threat that is posed by the robber who waves a gun in front of someone and demands, “your money or your life.”

E. Obscenity

Roth v. United States, 354 U.S. 476,483, (1957) was the initial case that declared obscenity as an unprotected area of speech. The Supreme Court states in *Roth*: “We hold that obscenity is not within the area of constitutionally protected speech or press” *id.* at 1309. The Court continues by saying, “...[w]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest” *id.* at 1311. An accepted definition of “Prurient Interest” is: A morbid, degrading and unhealthy interest in sex, nudity and obscene or pornographic matters, as distinguished from a mere candid interest in sex (thelawdictionary.org). Possibly one of the most profound legal statements was quoted in *Law 101*, “Perhaps the most famous definition of any legal concept came from Justice Potter Stewart, who said he could not define what it means to be obscene but ‘I know it when I see it’”(Feinman, pg. 72).

Miller v. California 413 U.S. 15, 37 (1973)—The Current Test for Obscenity

Roth did not settle the challenges in defining obscenity and new standards for judging obscenity were set by the Court in Miller v. California 413 U.S. 15, (1973). The court established the “Miller Test” to define obscenity for adults. To understand the additional exceptions and the challenges being made in this paper, we must first look at *Miller* to gain the Court’s interpretation of *obscenity* and the requirements the material in question must meet to be deemed obscene.

Miller v. California was a Supreme Court case in which the appellant was found guilty of mass mailing obscene material as a campaign to sell illustrated books containing adult

material. One set of his unsolicited mailed materials were received and opened by the manager of a restaurant and his mother who had not requested the brochures and called the police. *Miller* addresses the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such material" *id.* at 2612.

While *Roth* established that obscenity was not a protected area of speech, in the years following *Roth*, no Court could obtain a majority opinion on the exact test for obscenity until *Miller v. California*. *Miller* was significant due in part to the fact that a majority Court decided that it was no longer necessary to require that material be 'proved utterly without redeeming social value' because the Court felt this was an impossible task. As a result, the *Miller* holding yielded a three-prong test that the Supreme Court established to measure all obscenity for adults.

The basic guidelines for the trier of fact as laid out in the new three-prong test, established in *Miller* 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. *id.* at 2605.

The Court went on to say, "...to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion" *id.* at 2615.

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of genitals *id.* at 2615.

“At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection” *id.* at 2616.

In the *Miller* holding, the Supreme Court referenced *Ginsberg* a number of times. It reiterates the importance of *Ginsberg* in several quotes and footnotes. One in particular states “This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode...carries with it a significant danger of offending...juveniles” (Miller, pg. 2612)

Since the holding in *Miller*, there have been more cases brought before the Supreme Court that address additional issues surrounding free speech. We will analyze some of these cases to determine their effects, if any, on how the law will address the content in GTA5.

There are other relevant First Amendment Cases on Free Speech subsequent to *Miller*. The sexual depictions and descriptions in GTA5 suggest that several other kinds of free speech cases are relevant. GTA5 mixes explicit sex with violence; it uses computer-generated images to do so. There are cases dealing with child pornography and violence that may address the extent of protection explicit video games like GTA5 receive from regulations.

A. Child Pornography

The *Miller* test leaves protected materials that are merely erotic or pornographic but do not rise to the level of obscenity. For example, a video of an adult masturbating as part of a sex manual may be explicit but is unlikely to be obscene. That distinction needs to be kept in mind when considering child pornography.

The Supreme Court dealt with child pornography in New York v. Ferber, 458 U.S. 747 (1982). This case was brought to the Supreme Court when the appellant sold two videos to undercover police that contained footage of young boys masturbating and was subsequently arrested for violating the New York statute on disseminating child pornography. Upon review of the case, the Supreme Court **determined that material produced using actual minors is not constitutionally protected speech**. Note that this rationale was somewhat different and focused on the harm to the children being used in the videos even though they were not engaged in intercourse with another and even though masturbation is a behavior that is common during adolescence. The Court said, “The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment” *id.* at 758.

The import of the *Ferber* rationale was brought home in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). This case dealt with computer-generated images and considered whether the Child Pornography Prevention Act of 1996 (CPPA) abridged the freedom of **speech**. The CPPA was attempting to extend the federal prohibition against child pornography to sexually explicit images that appear to depict **minors but were**

produced without using any real children. According to the holding, the Act CPPA constructed “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... does not depend at all on how the image is produced... [s]ometimes called “virtual child pornography,” which include computer-generated images, as well as images produced by more traditional means” *id.* at 241.

The CPPA was not attempting to ban this speech using the *Miller* test. Had CPPA attempted to use the *Miller* test to establish obscenity, the results in *Ashcroft* may have been different, but as the Court stated, “Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. The CPPA, however, is not directed at **speech** that is obscene... [L]ike the law in *Ferber*, the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller* standard... [t]he statute would reach visual depictions, such as movies, even if they have redeeming social value. The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of **speech** that is neither obscene under *Miller* nor child pornography under *Ferber*” (Ashcroft, pg. 241). Once again, the Court was being asked to establish a new precedent for free speech exceptions, rather than extending an already established precedent such as *Miller* or *Ferber*.

In *Ashcroft*, the Court was concerned with the effect of overbreadth if it upheld this section of CPPA. The Court was only concerned with the harm caused to the child victims that were used in the production of pornography and as *Ashcroft* was attempting

to prevent images that only depicted minors, but used adults to portray youth via computer adjustments, no victims could be determined and so the law was too broad and captured some expression that was not obscene that would be protected. The Court said this in its holding in *Ashcroft*, “In contrast to the **speech** in *Ferber*, **speech** that itself is the record of sexual abuse, the CPPA prohibits **speech** that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children” *id.* at 250.

The focus in both *Ferber* and *Ashcroft* on children in the presentations does not apply to GTA5. Neither *Ferber* nor *Ashcroft* has an effect on GTA5 because they deal specifically with children being harmed in the production of pornography (regardless of whether it rose the level of obscenity). The Court was expressly concerned with the existence of an actual child victim and the effects would be far reaching enough to censor adult viewing. This paper is not concerned with the issue of adult censorship of GTA5.

B. Depictions of Violence and Cruelty

In recent years, the Supreme Court has had occasion to consider free speech implications of governmental regulations of violent descriptions and depictions. In United States v. Stevens, 130 S. Ct. 1577 (2010) Robert J. **Stevens** ran a business, "Dogs of Velvet and Steel," and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960's and 1970's” *id.* at 1583. Mr. **Stevens** was

prosecuted for being in violation of a United States legislation that made it a criminal act to create depictions of animal cruelty. The Supreme Court overturned the legislation saying, “Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them” *id.* at 1586.

That rationale was brought into a case that dealt with depictions of violence in video games distributed to minors. In Brown v. Entertainment Merchants Association, 131 S.Ct. 2729 (2011) merchants challenged California legislation imposing restrictions on the sale or rental of violent video games to minors. The law also sought to impose labeling requirements. The law sought to cover games that offered the player such options as; “killing, maiming, dismembering, or sexually assaulting an image of a human being” *id.* at 2732. The law only sought to restrict a minor from purchasing what the State considered to be harmful material, but allowed for a parent or extended family member to permit usage of the game. Although there was some mixture of sex and violence in the video games, the California law was focused on violence and California used that frame, rather than explicit sexual material, to try to defend its law.

The Supreme Court overturned the California law, declaring it unconstitutional using several rationales. First, it refused California’s request to assert “violence” as a new category of unprotected speech for minors. California then attempted to classify violence as a form of obscenity. To do so, the state would have to lay out a compelling interest that could withstand strict scrutiny by the court. California could not do that in part because its law allowed family members beyond parents to give access to violent videos.

It seemed incongruous to the court that a state so concerned with damaging nature of the violence could allow a noncustodial uncle to provide the allegedly damaging material but not others. The Supreme Court, citing both *Miller* (the more recently announced test of obscenity for adults) and *Ginsberg* (the older case allowing a different obscenity standard for minors), refused California's claim reiterating that obscenity is well defined and violence is not part of that definition.

The issues addressed in both *Stevens* and *Brown* focus on depictions of violence. Violence against neither humans nor animal cruelty is an unprotected area of speech, but both cases were attempting to have the Court declare a new category of unprotected speech. The issue being addressed in *GTA5* is its descriptions and depictions of sexually explicit material and narratives, (not its violent content) which are areas of unprotected speech. For that reason, *Stevens* and *Brown* also have no ability to regulate the dissemination *GTA5*.

To this point, the legal review has established that the current test for obscenity was announced in 1973 in the *Miller* case before computer-generated sexual images like those found in *GTA5* were available. Subsequent to *Miller* Supreme Court cases have dealt with computer-generated images in both child pornography and violence. The relevant child pornography cases were decided on different rationales and fact from that which apply to *GTA5*. The effort to regulate violence (both animal cruelty and computer-generated violence against humans) were unsuccessful because violence is not obscenity, efforts to regulate violence are overly broad and impinge on protected speech, and exceptions in laws make it hard to articulate a compelling state interest that will survive strict scrutiny. The *Ginsberg* case, decided in 1967, upheld a conviction under the New

York state law that defined obscenity differently for minors. It warrants careful analysis to see whether or not it remains sufficient to govern a minor's access to new forms of computer-generated sexually explicit materials like those found in GTA5.

Ginsberg v. New York—Obscenity Is Different for Minors

Sam Ginsberg owned a shop that sold, among other things, “girlie magazines” on Long Island. He sold two of these magazines to a sixteen-year-old boy and was found guilty of violating a section of the New York law prohibiting the dissemination of harmful material to a minor. The magazines contained images of female nudity, including “buttocks with less than full opaque covering or the showing of any portion thereof below the top of the nipple” *id.* at 1276. The Supreme Court [390 U.S. 629 (1968)] upheld the conviction under the New York Statute and declared that material does not have to be considered obscene to an adult to be considered obscene to a minor. The Court also acknowledged a government interest to protect the welfare of minors.

The Court explicitly says there is a difference between the definitions of obscenity for minors than the definition of obscenity for adults, so that material that cannot be regulated for adults can be regulated for minors; it legally falls outside of protected speech. “This case presents the question of the constitutionality of a New York criminal obscenity statute which prohibits the sale, to minors under 17 years of age, of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults” *id.* at 631. The Supreme Court found the New York State Penal Law under which *Ginsberg* had been convicted to comport with free speech requirements. The case set precedent as to what is obscene material for minors and on the dissemination

of that obscene material to minors. This law gave states the authority to police its distribution and dissemination and to set fines and punishments for those who did not abide by the law. According to the Court and the New York Penal Code, the following is a portion of the legal guidelines for determining obscenity to minors.

§ 484-h. **Exposing minors to harmful materials**

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a.) any picture, photograph, drawing, sculpture, motion picture film, or **similar visual representation** or image of a person or portion of the human body **which depicts nudity, sexual conduct** or sado-masochistic abuse and which is harmful to minors,
or

(b.) any book, pamphlet, magazine, printed matter however reproduced, **or sound recording which contains any matter enumerated** in paragraph (a) of subdivision two hereof, or **explicit and detailed verbal descriptions or narrative accounts** of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

*(For the entire New York Statute from *Ginsberg*, see appendix A)

The review of the relevant free speech case law that has occurred since *Ginsberg* showed that no case has over-ruled *Ginsberg*, and several key cases, (*Miller* and *Brown*) have referred to it. *Miller* points the way for understanding *Ginsberg*. It is important to note that *Ginsberg* was decided in 1968 and the “Miller Test” was not established as presiding guidelines for overall obscenity until 1973. *Miller* was specifically redefining the standards for obscenity as a whole and specifically to adults. The fact that the Court

referenced *Ginsberg* more than once in the opinion and the fact that the issue before the *Miller* court was not regarding a minor's rights to or protections from obscenity is further evidence that *Miller* had no effect on *Ginsberg* except for the single criteria that obscene material no longer had to be **proven** as "utterly without redeeming social value/importance". Arguably, when the Court removed that requirement through Its holding in *Miller*, It actually made the requirements in establishing material to be obscene to minors more easily done through *Ginsberg*.

Discussion

The legal analysis indicated that *Ginsberg* is still good law, at least to the extent that obscenity can be defined differently for minors. Accordingly, *Ginsberg* and the New York law that was used to gain the conviction can provide guidance for thinking about computer-generated sexual material like that found in GTA5. The thesis can turn to a discussion of the fit between the way obscenity can be defined for minors and the content of GTA5.

GTA5 Under the Ginsberg Precedent

The content in GTA5 seems to contain almost all of the requirements in (2.) paragraph (a) of the New York law§ 484-h, that was used to gain the conviction: similar visual representation, or portion of the human body, which depicts nudity, sexual conduct or sado-masochistic abuse. Recall detail from the earlier review of GTA5 that related "scenes of a man having a woman **bent over the table** engaged in vaginal sex **'doggie**

style', while the male participant is naked from the back view and can be heard grunting and panting."

Sado- masochistic abuse, prohibited in the New York law, (deriving sexual pleasure from inflicting torture or extreme pain on the other person) is also contained in GTA5: "pinning her with his front right tire. The player gets out of the car and shoots her in the stomach, then the player shoots her in the vagina, finally, mocking the slack look of her mouth, the player shoots her in the mouth."

The New York law has a separate section that deals with narratives rather than visual images. Paragraph (b) (2.) of § 484-h, covers a sound recording which contains any matter enumerated in paragraph (a) or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct. Paragraph (b) of New York's law would cover the following description of GTA5: "Some of the typical language that can be expected from a prostitute during sex or a blow job ranges from "your cock is so big", "cum in my mouth", "you're gonna make me cum", "my pussy is so wet", "I love sucking your giant cock", "You like my tight wet pussy?" "Oh yeah fuck my pussy baby."

Ginsberg appears to be a model to regulate the dissemination of sexually explicit materials such as GTA5 to minors. Although the language in the New York law used to uphold the conviction in *Ginsberg*, appears to anticipate technologically advanced forms of computer-generated material despite the age of the precedent, that law was probably not as precise as it could be, given modern forms of sexually explicit material. Modern state statutes, such as the 2016 Florida Statutes, demonstrate how that language can be

updated in ways that appear to fall within the scope of the ruling in *Ginsberg*. Florida's effort will be discussed next.

A Modern State Statute Consistent with Ginsberg

The Florida Statutes (chapter 847) provide a more detailed and in-depth law based on *Ginsberg*'s holding and also provides for **harsher punishments** for violators of the law. The heart of Florida's law can be found in **847.012**. This section indicates that: **A person** may not knowingly sell, rent, **loan, give away, distribute**, transmit, or **show any obscene material to a minor**. This statute reaches much further than merely restricting or holding criminally liable commercial dealers. A person, as noted above would be considered **any adult** over 18 years of age, including parents, siblings, friends, neighbors or extended relatives. The Florida statutes therefore expose all adults to potential criminal liability rather than just commercial retailers.

A few examples of language in the Florida law that is borrowed from *Ginsberg* and expanded upon are referenced below to relate how obscenity is defined for minors.

Florida Statute 847.012:

- (10) "**Obscene**" means the status of material which:
 - (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
 - (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
 - (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

(6) “**Harmful to minors**” means any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to a prurient, shameful, or morbid interest;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

847.012 of the Florida Statutes detail the types of materials fall into the category of obscene material for minors:

- (a) Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or **similar visual representation** or image of a person or portion of the human body which **depicts nudity** or **sexual conduct, sexual excitement**, sexual battery, bestiality, or
- (b) Any book, pamphlet, magazine, printed matter however reproduced, or **sound recording** that contains any matter defined in statute 847.001, **explicit and detailed verbal descriptions or narrative accounts of sexual excitement**, or sexual conduct and that is harmful to minors.

These definitions of obscenity and examples of materials that are considered harmful or obscene to minors in the Florida Statutes are in line with the sections of the New York law that upheld the conviction in *Ginsberg*. The definitions below (found in Florida Statute 847.001; Definitions, and are also consistent with those in the New York law that upheld the conviction under the law from *Ginsberg*) illustrate

how stringent and detailed the Court was in establishing what obscene material is for minors.

(9) “Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state.

(13) “Sadomasochistic abuse” means flagellation or torture by or upon a person or animal, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction, or satisfaction brought about as a result of sadistic violence, from inflicting harm on another or receiving such harm oneself.

(16) “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

(17) “Sexual excitement” means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

(19) “Simulated” means the explicit depiction of conduct described in subsection (16; Sexual Conduct) which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

*(For Full Florida Statute on Obscenity and Minors, see Appendix B.)

Need For Future Analysis and Legislative Requirements

It may be necessary to examine current laws governing the dissemination of sexually explicit material to be sure they are in line with all the Constitutional guidelines. It is imperative that states draft legislation that is in line with the Constitution. *Brown* was an example of how a poorly drafted, yet potentially well-intentioned law was struck down because it was constitutionally impermissible. It may also be useful to explore ways that the laws regarding the distribution and dissemination of games such as GTA5 can be better enforced.

Potential Labeling Issues

Currently there are labels on video games that apply to commercial vendors and also serve to assist parents in making informed choices. Ironically, the label on GTA5 does not prevent the distribution of the game to 17 year olds, which is inconsistent with the Florida Statute 847.012 (1), which states a minor is anyone under 18 years of age. According to The Entertainment Software Rating Board (ESRB), “the non-profit, self-regulatory body that assigns ratings for video games and apps so parents can make informed choices. The ESRB rating system encompasses guidance about age-appropriateness, content, and interactive elements” (esrb.org). GTA5 is labeled “M” for mature, which according to esrb.org describes as, “‘MATURE’ Content is generally suitable for ages 17 and up and may contain intense violence, blood and gore, sexual content and/or strong language”, whereas “‘ADULTS ONLY’ Content is suitable **only**

for **adults ages 18** and up and may include prolonged scenes of intense violence, graphic sexual content and/or gambling with real currency” (esrb.org). Going forward, it may be necessary to address the game labeling system applied to games such as GTA5. Sexually explicit games such as GTA5 may require additional labeling with explicit and noticeable warnings for purchasers, retailers, minors and parents. The current labeling for games like GTA5 are not in line with Florida State Statute or New York Statute that upheld the conviction in *Ginsberg*. Notice that the Florida law also addresses non-commercial distributors, which would include parents, friends, siblings or any other adult over 18 years of age. The “M” rating fails to cover the criminal regulations within the state of Florida, so both commercial and non-commercial distributors disseminating obscene material such as GTA5, to minors, do so at their own risk.

Increasing Public Awareness

Recall that under Florida Statute 847.012, there are prohibitions to showing obscene materials to minors against **any** person. There are concerns about whether the general public (consumers, parents, minors, commercial suppliers) thoroughly comprehends the current criminal statutes or the prevailing legal precedent on the dissemination of sexual explicit material to minors. If non-commercial suppliers (parents, friends and other legal adults) are unaware of the criminal charges they could face for providing minors with games such as GTA5, they may do so unknowingly. Affirmative action steps need to be taken to get the word out to the general public that criminal statutes exist and punishments are severe for those in violation of the statutes.

Conclusion

The question was raised at the start of this paper as to whether there was adequate Supreme Court precedent to regulate and restrict a minor's access to sexually explicit material in computer-generated video games such as GTA5. An in depth analysis of GTA5's content was conducted and reviewed. Free speech was defined by the Constitution and it was understood that free speech is not absolute. The Free Speech exceptions were listed and analyzed including those cases covering defamation, incitement, fighting words, and obscenity. We took a detailed look at obscenity from its start in the *Roth* case to the new standards (termed the Miller Test) set forth in the *Miller* holding. Subsequent to *Miller*, relevant First Amendment Cases on Free Speech were presented to the Supreme Court. Those cases, including child pornography cases such as *Ferber* and *Ashcroft* and violent content cases such as *Stevens* and *Brown*, were analyzed to determine whether any of them had regulatory effects on GTA5.

Ginsberg v. New York, the prevailing case law regarding a minor's access to sexually explicit material was detailed and analyzed to determine whether it was still adequate law and if it could legally cover the computer-generated material contained in GTA5.

Discussions on potential future policies and legislation were discussed to identify any areas of law or enforcement that need to be improved or addressed. Florida criminal statutes and the conviction under the New York State Statutes that were upheld through the ruling in *Ginsberg* were also discussed.

Finally, through considerable analysis of several free speech cases including *Ginsberg* itself, it was determined that *Ginsberg* is still good law. Though *Ginsberg* is dated, it

contains adequate wording to believe it will cover the dissemination of sexually explicit material contained in GTA5 and deem it both harmful and obscene to minors. Such a determination means Florida Statutes on the dissemination of sexually explicit material includes GTA5 and can be constitutionally upheld, regulated and violators can be legally punished.

References

Feinman, M. J. (2014). *Law 101*. New York, New York: Oxford University Press.

Supreme Court Cases:

Miller v. California 413 U.S. 15 (1973)

Brown v. Entertainment Merchants Association, 131 S.Ct. 2729 (2011)

Chaplinsky v. New Hampshire 315, U.S. 568 (1942)

Roth v. United States, 354 U.S. 476 (1957)

Brandenburg v. Ohio, 395 U.S. 444, 447-449 (1969)

Ginsberg v. New York, 390 U.S. 629 (1968)

United States v. Stevens, 130 S. Ct. 1577 (2010)

New York v. Ferber, 458 U.S. 747 (1982)

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

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

Appendix A and B**Appendix A:**

New York Penal Law § 484-h:

§ 484-h. Exposing minors to harmful materials

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

*646 (c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

- (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
- (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
- (iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and
- (ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

*647 2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

Appendix B: Florida State Statute

847.001 Definitions.—As used in this chapter, the term:

(1) “Adult” means a person 18 years of age or older.

(2) “Adult entertainment establishment” means the following terms as defined:

(a) “Adult bookstore” means any corporation, partnership, or business of any kind which restricts or purports to restrict admission only to adults, which has as part of its

stock books, magazines, other periodicals, videos, discs, or other graphic media and which offers, sells, provides, or rents for a fee any sexually oriented material.

(b) “Adult theater” means an enclosed building or an enclosed space within a building used for presenting either films, live plays, dances, or other performances that are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specific sexual activities for observation by patrons, and which restricts or purports to restrict admission only to adults.

(c) “Special Cabaret” means any business that features persons who engage in specific sexual activities for observation by patrons, and which restricts or purports to restrict admission only to adults.

(d) “Unlicensed massage establishment” means any business or enterprise that offers, sells, or provides, or that holds itself out as offering, selling, or providing, massages that include bathing, physical massage, rubbing, kneading, anointing, stroking, manipulating, or other tactile stimulation of the human body by either male or female employees or attendants, by hand or by any electrical or mechanical device, on or off the premises. The term “unlicensed massage establishment” does not include an establishment licensed under s. 480.043 which routinely provides medical services by state-licensed health care practitioners and massage therapists licensed under s. 480.041.

(3) “Child pornography” means any image depicting a minor engaged in sexual conduct.

(4) “Computer” means an electronic, magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility or communications facility directly related to or

operating in conjunction with such device. The term also includes: any online service, Internet service, or local bulletin board; any electronic storage device, including a floppy disk or other magnetic storage device; or any compact disc that has read-only memory and the capacity to store audio, video, or written materials.

(5) “Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

(6) “Harmful to minors” means any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to a prurient, shameful, or morbid interest;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

A mother’s breastfeeding of her baby is not under any circumstance “harmful to minors.”

(7) “Masochism” means sexual gratification achieved by a person through, or the association of sexual activity with, submission or subjection to physical pain, suffering, humiliation, torture, or death.

(8) “Minor” means any person under the age of 18 years.

(9) “Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or

the depiction of covered male genitals in a discernibly turgid state. A mother's breastfeeding of her baby does not under any circumstance constitute "nudity," irrespective of whether or not the nipple is covered during or incidental to feeding.

(10) "Obscene" means the status of material which:

- (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
- (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

A mother's breastfeeding of her baby is not under any circumstance "obscene."

(11) "Person" includes individuals, children, firms, associations, joint ventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

(12) "Sadism" means sexual gratification achieved through, or the association of sexual activity with, the infliction of physical pain, suffering, humiliation, torture, or death upon another person or an animal.

(13) "Sadoomasochistic abuse" means flagellation or torture by or upon a person or animal, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction, or satisfaction brought about as a result of sadistic violence, from inflicting harm on another or receiving such harm oneself.

(14) "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, "sexual battery" does not include an act done for a bona fide medical purpose.

(15) “Sexual bestiality” means any sexual act, actual or simulated, between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other.

(16) “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”

(17) “Sexual excitement” means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

(18) “Sexually oriented material” means any book, article, magazine, publication, or written matter of any kind or any drawing, etching, painting, photograph, motion picture film, or sound recording that depicts sexual activity, actual or simulated, involving human beings or human beings and animals, that exhibits uncovered human genitals or the pubic region in a lewd or lascivious manner, or that exhibits human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(19) “Simulated” means the explicit depiction of conduct described in subsection (16) which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

(20) “Specific sexual activities” includes the following sexual activities and the exhibition of the following anatomical areas:

- (a) Human genitals in the state of sexual stimulation or arousal.
- (b) Acts of human masturbation, sexual intercourse, sodomy, cunnilingus, fellatio, or any excretory function, or representation thereof.
- (c) The fondling or erotic touching of human genitals, the pubic region, the buttocks, or the female breasts.
- (d) Less than completely and opaquely covered:
 - 1. Human genitals or the pubic region.
 - 2. Buttocks.
 - 3. Female breasts below the top of the areola.
 - 4. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

847.012 Harmful materials; sale or distribution to minors or using minors in production prohibited; penalty.—

- (1) As used in this section, “knowingly” means having the general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:
 - (a) The character and content of any material described in this section which is reasonably susceptible of examination by the defendant; and
 - (b) The age of the minor.
- (2) A person’s ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief of a minor’s age, or a minor’s consent may not be raised as a defense in a prosecution for a violation of this section.

- (3) A person may not knowingly sell, rent, or loan for monetary consideration to a minor:
- (a) Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
 - (b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording that contains any matter defined in s. [847.001](#), explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and that is harmful to minors.
- (4) A person may not knowingly use a minor in the production of any material described in subsection (3), regardless of whether the material is intended for distribution to minors or is actually distributed to minors.
- (5) An adult may not knowingly distribute to a minor on school property, or post on school property, any material described in subsection (3). As used in this subsection, the term “school property” means the grounds or facility of any kindergarten, elementary school, middle school, junior high school, or secondary school, whether public or nonpublic. This subsection does not apply to the distribution or posting of school-approved instructional materials that by design serve as a major tool for assisting in the instruction of a subject or course by school officers, instructional personnel, administrative personnel, school volunteers, educational support employees, or managers as those terms are defined in s. [1012.01](#).

(6) Any person violating any provision of this section commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(7) Every act, thing, or transaction forbidden by this section constitutes a separate offense and is punishable as such.

847.0133 Protection of minors; prohibition of certain acts in connection with obscenity; penalty.—

(1) A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor. For purposes of this section “obscene material” means any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose. The term “obscene” has the same meaning as set forth in s. [847.001](#).

(2) As used in this section “knowingly” has the same meaning set forth in s.

[847.012](#)(1). A “minor” is any person under the age of 18 years.

(3) A violation of the provisions of this section constitutes a felony of the third degree, punishable as provided in s. [775.082](#) or s. [775.083](#).

