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From: Robert M. O'Neil

Re: University System of Maryland Policy on Displaying Obscene Material

In early April, 2009, the Maryland General Assembly expressed its concern "about the use of higher education facilities to display or screen materials and films that are defined as obscene by the United States Supreme Court for purely entertainment purposes." The resolution which codified that concern directed the University System of Maryland, Morgan State University, St. Mary's College of Maryland and the Baltimore City College to submit to the General Assembly's budget committees by September 1, 2009, "policies adopted by their respective governing boards on the use of those public higher education facilities for the displaying or screening of obscene films and materials."

Soon after the passage of that resolution, the Thomas Jefferson Center for the Protection of Free Expression offered to the Chancellor of the University System of Maryland and the Office of the Attorney General its services in helping to frame a response to the legislative mandate. The Center has previously offered such counsel to various municipalities that faced challenges in balancing expressive rights against the demands of security or other needs in the conduct of governmental affairs. The Center has in each case sought to recognize, and eventually accommodate, such conflicting interests by proposing a responsive policy. Helping to shape a similar accommodation for Maryland public higher education is the goal of this memorandum. Before offering a specific proposal, several inevitably implicated issues must be addressed.

What is the legal meaning of the term "obscene"? The Supreme Court has defined "obscene" and "obscenity" through a series of decisions since its declaration in 1957 that obscenity did not enjoy the full protection of the First Amendment. Specifically, in *Miller v. California*, 413 U.S. 15 (1973), the Court established a constitutional standard, from which it has not departed in the ensuing years: In order to find that accused material is obscene, the trier of fact (either a judge or jury) must apply "contemporary community standards" to determine that the work (a) "taken as a whole appeals to the prurient interest," (b) "depicts or describes in a patently offensive way, sexual conduct specifically defined by applicable state law," and (c) "that the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

What is the legal status of material that may be perceived as "pornographic" but is not legally obscene? The word "pornography" is not a legal term of art. Indeed, the Supreme Court has made clear that displaying or exhibiting material that is sexually explicit or might popularly be thought "pornographic," but which has not been found to be legally obscene under the definition stated above, may not be criminalized. Specifically, the high Court ruled in 1974 that a film portraying "normal adult sexual relations" and "mere nudity" could not be found to be legally obscene because (despite its manifestly explicit sexual content) it did not involve the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, which we said was punishable in Miller." *Jenkins v. Georgia*, 418 U.S. 153 (1974).

How does "child pornography" differ? The Supreme Court has consistently recognized as a separate category of unprotected expression material that is defined under state law as child pornography, whether or not such material had been or could be found to be legally obscene. Under *New York v. Ferber*, 458 U.S. 747 (1982) such material typically involves the display or distribution of images of "any minor engaged in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." Recently, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) the Supreme Court made clear, in striking down a federal ban on "virtual child pornography," that only material which "depict[s] an actual child" may be made criminal under the Ferber ruling since only such images "involve, let alone harm, any children in the production process."

What is the legal status of motion pictures as an expressive medium?
Curiously, motion pictures have never been deemed by the Supreme Court to enjoy the same level of unqualified First Amendment protection as newspapers, books, magazines, and most recently the Internet. From the first ruling in 1915, which broadly sustained the power of Ohio's film review board, to much later decisions, motion pictures have always been viewed as a "distinctive" medium. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) the high Court overruled earlier cases that had categorically denied First Amendment protection to film. Yet in that and later rulings, the Justices stopped short of saying what in 1997 it said about Internet communication, and had earlier declared with regard to newspapers, books and magazines. (Licensed broadcasters and more recently cable systems have also found their First Amendment freedoms less than fully protected.) Cautioning that recognition of constitutional protection for film "does not . . . require absolute freedom to exhibit every motion picture or every kind at all times and all places," the Court noted simply that "each method [of communication] tends to present its own peculiar problems." Thus, on one hand, motion pictures clearly do enjoy First Amendment protection, though on the other hand film has never received the unqualified deference to which fully protected media are entitled.

What films have been "defined as obscene by the U.S. Supreme Court"?
There appear to be only a handful of cases in which the Supreme Court has sustained on its merits a ban on the exhibition of an allegedly obscene motion picture. In *Landau v. Fording*, 388 U.S. 456 (1966) the Justices agreed to review a California Court of Appeals' ruling that the film "Un Chant d'Amour" was legally obscene; without oral argument, the Justices summarily affirmed the lower court's ruling. Despite the paucity of Supreme Court precedent, lower courts have on occasion found that judges and juries properly applied the Miller criteria in finding a charged film to be legally obscene. The Maryland Court of Appeals, for example, many years ago upheld a finding of obscenity with regard to the film "I Am Curious Yellow", *Wagenheim v. Maryland State Board of Censors*, 255 Md. 297, 311 (1969), a judgment that was affirmed by an equally divided Supreme Court in *Grove Press, Inc. v. Maryland State Board of Censors*, 401 U.S. 480 (1971). More recently, the Court of Special Appeals reached a similar conclusion with regard to the film "Soap Suds", *Purohit v. State*, 99 Md. App. 566 (Md. Ct. Spec. App. 1994). Along the way, Maryland courts, applying the Miller standards (which were first recognized as controlling in *Mangum v. Maryland State Board of Censors*, 273 Md. 176, 192 (1974)) has

several times reversed rulings or findings that sexually explicit material was legally obscene.

May States Require Submission and Review of Motion Pictures Before Screening? Maryland was the last state to require (until 1981) the submission and review of motion pictures prior to their screening. The Court of Appeals consistently sustained the exercise of that power by the State Board of Censors, for example as late as 1970 in *Hewitt v. Maryland State Board of Censors*, 256 Md. 358 (1970). The United States Supreme Court never addressed the ultimate question of a state's power to compel such review, though in *Freedman v. Maryland*, 380 U.S. 51 (1965) the high Court did impose substantial procedural safeguards on that process. Specifically, the *Freedman* decision required that in "a system of prior restraint" the censor must bear "the burden of instituting judicial proceedings, and of proving that the material is unprotected; . . . any restraint prior to judicial review can be imposed only for a specific brief period and only for the purpose of preserving the status quo [and] a prompt and final judicial determination must be assured." Although such strictures emerged from a challenge to Maryland's film review procedure, they were clearly applicable to any such system (including that of the Dallas Film Board, which continued to operate for several years after the Maryland Board had expired). Because its rulings were confined to procedural matters, the U.S. Supreme Court never definitively answered the issue of substantive power posed here.

Does the Rating System of the Motion Picture Association of America (MPAA) afford legal guidance? Both the courts and the Association itself have made clear that such ratings reflect the judgment of a private industry group and have no legal force. Indeed, MPAA has strenuously resisted occasional efforts by cities sand counties to incorporate these ratings into local ordinance, or even impose criminal sanctions for disregard or flouting of these standards. MPAA's goal since the 1930's has been to inform viewers and families of potential content concerns, without empowering government to enforce the judgments reflected in its film ratings. Moreover, the ratings do not precisely parallel recognized legal standards such as the definition of obscenity.

What other Procedural Safeguards May Affect the Review of Motion Pictures? At least one other Supreme Court ruling bears mention here. In *McKinney v. Alabama*, 424 U.S. 669 (1976), the Justices ruled that a party who has been charged with distributing or exhibiting allegedly obscene material must have an opportunity in court to challenge official reliance in a later case on a previous judicial determination that the material in question was legally obscene. Since the defendant in the later case had not been a party to the earlier special proceeding that found the charged material to be obscene, the Supreme Court established an opportunity to relitigate that central issue, at least where the interests of the two distributors or exhibitors differed substantially. While *McKinney*'s bearing upon an administrative system has never been fully clarified, this judgment reflects the Supreme Court's strong concern for procedural safeguards in drawing the often elusive line between material that is First-Amendment protected and that which is unprotected.

What law governs state college and university regulation of controversial films? There appears to be little case law regarding the power of state-supported institutions of higher learning to restrict the use of campus facilities for the display or exhibition of controversial material. On one hand, there should be little doubt that any activity which is clearly unlawful may be denied access to such facilities. Thus a student organization could be denied permission to use a meeting room or auditorium for the sale or distribution of illegal drugs or other unlawful objects. On the other hand, when it comes to expressive activity such as films, there is little legal guidance. The most closely analogous case involved a state university ban on campus exhibition of a film deemed "sacrilegious" by prominent critics including public officials. When the ban was challenged in federal court, the judge ruled that the university had engaged in unlawful censorship since the content of the film, though it may have offended many citizens, was not unlawful. Thus, he concluded, "actions taken by an arm of the state merely to avoid controversy from the expression of ideas is an insufficient basis for interfering with the right to receive information." *Brown v. Board of Regents*, 640 F. Supp. 674 (D. Neb. 1986). One other case, also involving a state university's attempt to regulate the campus showing of a religiously contentious film, gave no substantive guidance because the sponsoring group's lawsuit was ultimately dismissed on procedural grounds, *Cummins v. Campbell*, 44 F.3d 847 (10th Cir. 1994).

In what ways may state universities regulate the use of campus facilities for exhibition of films and other purposes? The meeting rooms and auditoriums on a state college or university campus differ in important ways from public sidewalks and parks, and their use may thus be regulated more extensively. Regulations may reflect the primarily educational mission of an academic institution, as well as the scarcity and desirability of such facilities. Some such limitations are obvious and not likely to be controversial – as long as they are uniformly and consistently applied in ways that do not reflect either content or viewpoint bias. For example:

-- The scheduled use of such scarce facilities may be restricted to recognized student, faculty, and staff groups, though alumni and community groups may also be granted such access in ways that are consistent with immediate campus needs. Thus an outside speaker may not simply demand a campus forum, but may appear only when invited by a member of the campus community.

-- Registration may be required a certain length of time prior to the requested use, at least to guard against conflicting claims for a particular date and site.

-- To protect the primacy of the university's educational mission, access to certain facilities may be denied or limited at certain times, and noise levels may be imposed to ensure sufficient quiet for academic pursuits.

-- The applicant for such a facility may be required to provide certain basic information – for example, the probable duration of the event, likely audience size, and general nature of the planned program,

-- A modest fee may be charged for actual costs incurred in connection with the event and for any special services or equipment that may be required.

-- Registration forms may also seek information about possible security needs, and the institution may insist upon the exclusive use of campus or local police even if the applicant proposes to provide its own security

-- Save for most unusual circumstances (e.g., discussion of a highly sensitive and confidential matter) open and unrestricted public access to any such event may be required, thus precluding restrictions based on such grounds as race, religion, gender, political affiliation, etc.

-- The university should be able to issue its own media release about the event should it wish to do so, and may list it on a campus calendar of upcoming activities, although the institution may not ban separate publicity by the sponsoring organization.

-- The university might also require the sponsoring organization to provide in any publicity or release about the event certain information designed to avoid potentially misleading prospective participants – specifically avoiding an inaccurate attribution of institutional sponsorship -- and may specify information that would serve to link a specific use of campus facilities with the institution's educational mission.

-- Conversely, certain types of limitations would probably be inconsistent with a state college or university's First Amendment obligations - for example, requiring that a controversial speaker submit an advance copy of a proposed text, or agree to a debate format involving a proponent of a contrasting view.

Any such list of permissible and/or questionable restrictions is merely illustrative, and hardly definitive. Moreover, the absence of applicable case law leaves some uncertainty regarding the legality or even the constitutionality, of many restrictions a state college or university might wish to impose.

What options do Maryland public post-secondary institutions face in meeting the General Assembly's directive? The options theoretically available to the University System of Maryland and the several other state-supported institutions span a broad spectrum:

At one extreme, these institutions could essentially replicate the now defunct Maryland State Board of Censors by establishing (system-wide or on each campus) a comparable agency charged with reviewing particular films proposed for campus screening. Apart from several potentially

daunting practical problems that such a step would present, serious constitutional issues would surely arise in the event that a particular film were barred on the basis of suspect content. The Supreme Court never declared categorically that Maryland or Dallas or any other governmental entity could compel review of motion pictures consistently with the First Amendment – only that in doing so, they must respect *Freedman*'s (and *McKinney*'s) rigorous procedural safeguards. Moreover, meeting those criteria would be even more difficult for a campus-based film board than for the statewide agency that was for decades part of Maryland's government; for example, it is far from clear how a campus entity could "institute judicial proceedings" or could "prove that the material is unprotected" in ways that would satisfy the Supreme Court's *Miller* criteria. Thus we would urge no further consideration of this theoretically available option.

At the other extreme, Maryland public higher education could in theory circumvent the General Assembly's mandate by proclaiming that all motion pictures are presumptively First Amendment protected, so that no arm of state government may challenge their screening, even in campus facilities. Apart from political realities, such a response would disregard a complex and somewhat confusing constitutional context. The public display of films that are legally obscene or contain child pornography may not only be barred, but may warrant criminal sanctions that have been imposed in full compliance with due process and Miller criteria. Thus, while no other state seems to have demanded such action by its public colleges and universities, no further consideration of this second and theoretically available option, is recommended.

Attention now turns to such options as may remain between these two extremes. We recognize two unique features of the current task – the distinctive nature and especially the educational mission of state college and university facilities on one hand, and on the other hand the singular nature of motion pictures. What would be most desirable, and also fully responsive to the General Assembly's concern, would be a set of policies reflecting these two distinctive elements. Such policies should enable or equip those who allocate use of Maryland's state university facilities to respect the expressive interests of those who use these facilities, while also protecting perceived needs and interests of the university and broader communities. The specific policy proposals that follow seek to accommodate those values:

The Board of Regents of the University System of Maryland should resolve roughly as follows:

Each campus/institution within the University System of Maryland should, by January 1, 2010, develop and submit to the Chancellor proposed amendments to its current policies governing the use of its campus facilities, specifically covering the exhibition of motion pictures in those facilities. Such policies should acknowledge the concerns of the General Assembly in the resolution of April, 2009. Such amendments will be reviewed and approved by the Board of Regents.

The Boards of Trustees of Morgan State University and St. Mary's College of Maryland [and the Baltimore Community College System] should amend their current facilities use policies by adding language along one of the following several lines (key differences marked in red):

(a) After [effective date] any faculty, student or staff organization that requests the use of a meeting room, auditorium or other facility in which to exhibit a motion picture purely for entertainment purposes may be asked to design and propose an educational program to accompany the screening of the film, such program to precede or follow the screening of the film, and to be advertised both by the institution and by the sponsoring organization. If the sponsoring organization fails or refuses to develop such an educational program, the university shall do so.

(b) After [effective date] any faculty, student or staff organization that requests the use of a meeting room, auditorium or other facility in which to exhibit a motion picture purely for entertainment purpose may be required to design and propose an educational program to accompany the screening of the film, such program to precede or follow the screening of the film, and to be advertised both by the institution and by the sponsoring organization. If the sponsoring organization fails or refuses to develop such an educational program, the university shall do so.

(c) After [effective date] any faculty, student or staff organization that requests the use of a meeting room, auditorium or other facility in which to exhibit purely for entertainment purposes a motion picture that has not received a rating from the Motion Picture Association of America may be

required to design and propose an educational program to accompany the screening of the film, such program to precede or follow the screening of the film, and to be advertised both by the institution and by the sponsoring organization. If the sponsoring organization fails or refuses to develop such an educational program, the university shall do so.

Comment: Concluding Observations

First, even the most carefully conceived policy affords no guarantee either that concerned public officials will deem it satisfactory, or that it will withstand constitutional challenge in the courts – much less that no such challenge will in fact be filed.

Second, however, the policies proposed here avoid any designation of potentially objectionable or controversial content or viewpoint as the catalyst for university regulation of film screenings. Whatever may have been the content-based catalyst for undertaking this process, the absence of content differentiation in the resulting policies and their implementation should go far to bolstering their validity.

Third, the suggested policies contemplate in each case the possibility of administrative action being taken only at some time in the future, if and when certain films are proposed to be exhibited or displayed. The action recommended for the Regents of the University System would merely direct each campus to fashion policy changes reflecting its unique needs and interests. The policies recommended to the freestanding institutional boards also envision only that administrative intervention might occur at some future time. Thus a successful facial challenge to any of the proposed policies prior to its invocation or application would seem highly unlikely.

Fourth, while primary responsibility for planning and developing an educational program to accompany a film screening falls upon the sponsoring organization, the university administration would assume that task in the event that the sponsoring group failed or refused to do so.

Fifth, any administrative intervention would be authorized only with respect to films proposed to be shown “purely for entertainment purposes,” a designation that does not deprive the would-be exhibitor of constitutional protection, but would diminish the potential force of such a claim.

Finally, the only action specifically authorized by the proposed policies would be one wholly compatible with the unique mission of an institution of higher learning – specifically, requiring that an educational program (to be designed and proposed by the film's sponsor) accompany the screening of the film – such a program to be arranged by the sponsoring organization or by the university itself. Courts consistently recognize and pay substantial deference to the assertion of such an interest by public colleges and universities. Such deference should be no less likely in the current context, where the allocation of scarce campus facilities is the focus of the proposed focus of potential regulation. The likelihood that most such film events would be extracurricular in no way undermines the importance of a college or university's educational mission.