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Tanenbaum Prize Paper Submission

Note to Reader: This paper was written in a Political Science Seminar titled: The U.S. Supreme Court led by Professor Wendy Martinek. This legal memorandum was based upon the hypothetical that appears at the beginning of this paper. Each student was assigned to be one of the following: Justice, Appellee, or Appellant. For this specific memorandum, I am writing in the voice of a Supreme Court Justice attempting to settle the dispute between the Appellee and Appellant. Specifically, I was assigned Justice Sandra Day O'Connor. The hypothetical is completely fictional and the opinions are not necessarily my own.

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PLSC 414 The Supreme Court

Hypothetical Legal Scenario

Decision-on-the-Merits Simulation II

Simone Virago was a devote Roman Catholic who ultimately came to believe that the Catholic Church purposefully hid the truth about the relationship between Mary Magdalene and Jesus Christ. Simone considered herself a true apostle of the Church and fervently wished the Church to acknowledge and celebrate the fact that Mary Magdalene and Jesus Christ had wed, that Mary Magdalene was Christ's truest disciple, and that Mary had born a child, the descendents of which were alive and well in contemporary times. After a decade of proselytizing on behalf of her belief, Simone decided that she could better fulfill her religious calling if she obtained a divinity degree. Accordingly, she enrolled in the Binghamton University School of Divinity.

Simone's course of study required a semester-long project devoted to the design of a community outreach program. Through her prior experience proselytizing, Simone had discovered she had a theatrical flair to which people responded well. She thought of it as a gift from God that helped her bring the Word of God to others. Simone decided that, for her community outreach program, she wanted to use her dramatic skills to bear. Accordingly, Simone developed a multi-media show to be held on the Binghamton University campus in the Anderson Center, open free of charge to all students, faculty, staff, and members of the community. The show was advertised widely on campus and throughout the community.

The centerpiece of the show was a performance dance piece involving individuals dressed in tight-fitting leotards that gave the appearance to the casual observer that the dancers were nude. The leotards did not depict the genitalia of the dancers but were form-fitting enough to make the silhouette of the dancers' genitalia apparent to observers within 50 feet of the performers. Five large-screen monitors were arrayed around the dance space, with each monitor broadcasting a different vignette from the lives of Mary Magdalene and Jesus Christ. One of the monitors played a vignette of Christ's birth. Other monitors played vignettes of his crucifixion and his resurrection. The former was quite graphic in its violence. A fourth monitor played a vignette depicting the marriage of Mary Magdalene and Christ and included very explicit scenes of sexual activity that, though not depicting the sex act itself, left little to the imagination. A fifth and final monitor played a vignette depicting Mary Magdalene giving birth to her child with Christ. It, too, was very explicit, providing close up shots of a live birth, including the exit of a newborn from the birth canal. As the dancers were performing on stage and the monitors were broadcasting their various vignettes, other performers, also dressed in form-fitting leotards, walked slowly among the audience members, moving in a lyrical but not suggestive manner. They were intended to represent the apostles of Christ.

The publicity for the event resulted in an overflowing crowd. To accommodate the much larger than anticipated attendance, the Anderson Center opened the external back wall to permit seating on the grassy area abutting the performance space. Several religiously-oriented student groups, aware that the

performance would include depictions of a marriage between Chris and Mary Magdalene, planned on holding protests outside the Anderson Center during the performance. When the seating area was extended to include the grassy incline in front of the Anderson Center, campus police advised the protestors that they would have to move their protest activities to the Events Center. They were unhappy but complied with the directions of campus police.

Among the attendees were a group of sixteen- and seventeen-year old members of the First Church in Grace Methodist youth group, chaperoned by Rev. Bert Beuthene, the youth group minister. En route to the performance, the van in which the youth group was traveling experienced engine trouble, finally breaking down near the Denny's on the Vestal Parkway. Rather than have the youth group members miss what would surely be an extraordinary performance, Rev. Beuthene stayed with the van to wait for the tow truck but sent the youth group members on by foot to the performance.

The youth group members were truly fascinated by the multi-media show. They had not known that the organizer, Simone Virago, intended to portray the marriage of Jesus Christ and Mary Magdalene or the purported birth of their child. Being normal teenagers, they also found the suggestive attire of the dancers and actors of interest, not to mention the depiction of sexual congress between Jesus Christ and Mary Magdalene played on one of the television monitors. By the time Rev. Beuthene arrived, the multi-media show was well underway. Rev. Beuthene was not at all pleased by what he observed. He immediately hustled the members of his youth group away.

The next day, Rev. Beuthene held a meeting with the parents of the youth group members and Rev. Nancy Neary, the head minister for the church. The parents Rev. Neary did not hold Rev. Beuthene responsible but were outraged that the University permitted such an obscene performance on its campus, especially one that was open to children as well as adults. Rev. Neary and Rev. Beuthene carefully reviewed the flyer that had announced Ms. Virago's show and noted that, while it did include information about the fact that it would portray the marriage of Jesus Christ and Mary Magdalene, it did not include any warnings about the explicit nature of the costumes or the vignettes played on the monitors. They then went to campus so that Rev. Beuthene could show Rev. Neary exactly where things had transpired. Rev. Neary was particularly troubled by the fact that anyone passing by could have seen the revealingly clad dancers and observe the vignettes playing on the monitors.

After contemplating the situation for several days, Rev. Neary decided that she had to confront the University about what she saw as its blatant disregard for community standards and sensibilities. Accordingly, she made an appointment to meet with University officials. At that meeting, Rev. Neary took the University to task for authorizing the performance on three counts. First, the University should not have permitted the performance to take place on campus because it was insulting to traditional religious groups. Second, the University should not have permitted the performance to take place on campus parts of it were obscene. And, third, if the University exercised poor judgment and permitted the performance to take place, it should have more closely regulated access. At the very least the University should not have opened up the back glass wall to permit seating on the grass since it exposed any passer by to the offensive performance. The University officials, ever mindful of maintaining cordial

relations with the community, attempted to placate Rev. Neary but were unsuccessful in convincing her that they could not forbid the performance because it would have represented viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. They were equally unsuccessful in persuading Rev. Neary that the performance was not obscene but, instead, part of artistic expression protected under the Free Speech Clause of the First Amendment.

Rev. Neary left the meeting angrier than she had been when she came to the meeting. After considering the matter further, she brought suit against the University seeking to enjoin it from permitting future performance of the multi-media show developed by Ms. Simone. At trial in the New York Supreme Court, Rev. Neary, in her capacity as head of the First Church in Grace Methodist Church and with the assistance of legal counsel, made two arguments. First, Rev. Neary asserted that the performance piece was offensive to traditional Christians who eschewed the idea of Jesus Christ marrying Mary Magdalene and having a child with her. While Rev. Neary acknowledged that the University is a forum for varying perspectives, the fact that the University denied religious groups the right to protest the performance except from a far-removed distance indicates, according to Rev. Neary, that the University was engaging in viewpoint discrimination and, hence, violated the Free Speech Clause of the First Amendment. Second, Rev. Neary asserted that the performance was not simply in poor taste but obscene and, hence, unprotected by the Free Speech Clause of the First Amendment. The University, in Rev. Neary's view, behaved especially carelessly by not providing some sort of control over who could view the performance.

The University countered that, as it had explained in its meeting with Rev. Neary, to have prohibited the performance would have been to engage in viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. The fact that the student protestors were moved to another location was not evidence of antipathy on the part of the University toward those who objected to the message embedded in the multi-media performance but, rather, a simple matter of regulating the time, place, and manner of the protestors' speech. The University also asserted, again as it had in its prior meeting with Rev. Neary, that the performance was not obscene but part of artistic expression falling under the protective auspices of the Free Speech Clause of the First Amendment.

At trial, the University prevailed in convincing the court that prohibiting the performance would have been viewpoint discrimination and that it was not obscene. Rev. Neary appealed but was unsuccessful in the state court system. She was successful, however, in securing a writ of certiorari from the United States Supreme Court. The case is now before that court.

Notes

- The student protestors are not parties to this case. Accordingly, there is no legal question as to whether the University has infringed on the Free Speech Clause protections afforded the student protestors.
- Rev. Neary is not claiming that the University's actions (by permitting the performance) represent a violation of her or her parishioners' rights to the free exercise of religion protected under the Free Exercise Clause of the First Amendment. Nor is she claiming that the University's

actions have the effect of endorsing one religious view, thereby violating the Establishment Clause of the First Amendment. Accordingly, there are no legal questions pertaining directly to either of the two religion clauses of the First Amendment.

- Simone Virago is not a party to the case. Accordingly, there is no legal question pertaining to her right to the free exercise of religion protected under the Free Exercise Clause of the First Amendment.

Neary v. State University of New York at Binghamton

In the present case, *Neary v. State University of New York at Binghamton* (referred to as University), it is the objective of the Court to determine whether the Anderson Center, a performing arts theater on the University's campus, is a public forum. Further, the Court must determine whether the University engaged in viewpoint discrimination by forcing protestors to relocate. The Court is then required to determine whether the University violated the Free Speech Clause of the First Amendment by allowing an arguably obscene performance to take place. Finally, the Court will determine whether the University is at fault for not adequately controlling who is able to view the performance. However, before the Court can begin to determine the validity of the claims set forth by the appellants, it must revisit and define a multitude of terms. It is imperative for this Court to discuss the details of the First Amendment, specifically the Free Speech Clause, and determine what constitutes free speech and what forms of expression the First Amendment protects. To determine whether the performance deserved the same level of protection as other areas used for expression, the Court must discuss the different kinds of public forums and their nature. Further, a long-standing acceptance of regulation pursuant to time, place, and manner must be analyzed in reference to the present case to determine if it was validly used or if the University engaged in viewpoint discrimination. Lastly, this Court has long held that obscene expression is not granted protection by the First Amendment and thus it is imperative that the Court determine whether the performance in the Anderson Center was obscene.

In *Street v. New York*, the Court concluded that free speech cannot and must not be curtailed due to the ideas presented or the possibility of listeners finding that speech offensive (394 U.S. 576, 592, 1969). The importance of this precedent allows for this Court and for the people of the United States to continue to abide by the fundamental democratic principles that this country was founded upon. Free speech is amongst those bedrock principles and thus protected with only few exceptions. An expression of an idea with which members of society may disagree or which they find offensive does not give authority to the government to prohibit that speech (Texas v. Johnson, 491 U.S. 397, 414, 1989). Rather, those who disagree with the message have the liberty to speak their opinion while also protected by the First Amendment. In the case of *Police Department of Chicago v. Mosley*, the Court concluded, "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" (408 U.S. 92, 95, 1972).

Importantly, this Court has found that speech is not limited to words, but can also include a variety of different forms of expression. Speech under the First Amendment constitutes any form of symbolic expression; however, the Court has found that not every form of expression is protected and one cannot say that every form of conduct is expression (Stromberg v. California, 283 U.S. 359, 1931). As such, the Court found in *United States v. O'Brien* that "an apparently limitless variety of conduct cannot be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (391 U.S. 367, 376, 1968). The Court has maintained, however, that courts must be sensitive to areas of expression

through the means of literature, art, political persuasion, and/or scientific arguments (Miller v. California, 413 U.S. 15, 22-23, 1973).

In order to determine whether a form of expression can be considered protected under the First Amendment as speech, one must ask whether an "intent to convey a particularized message was present, and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it" (Spence v. Washington, 418 U.S. 405, 410-411, 1974). For example, the Court may not agree with certain forms of expression or the content of that expression, nevertheless, if the expression is a perceivable message it is protected by the Free Speech Clause of the First Amendment. In the case of *Texas v. Johnson*, the respondent Gregory Lee Johnson lit the American flag on fire (491 U.S. 397, 1989). While this Court finds this kind of conduct repulsive, the message the respondent was conveying was indeed perceived and understood. The right of individuals to express themselves is inherently protected by the First Amendment.

The Court has also found that certain kinds of speech can be restricted. In *Chaplinsky v. New Hampshire*, the Court found that there are instances in which speech can be restricted without any violation of the First Amendment (315 U.S. 568, 1942). Such instances include "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words those which by the very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (Chaplinsky v. New

Hampshire, 315 U.S. 568, 571-572, 1942). That is to say that this Court has affirmed that speech is not limitless or without any form or kind of restriction.

To determine the validity of a governmental restriction one must analyze the governmental interest at stake, not just the verbal or nonverbal nature of the expression (Texas v. O'Brien, 491 U.S. 397, 406-407, 1989). In other words, the government cannot restrict speech based on the content of that speech. Rather, this Court has found four justifiable reasons for governmental regulation. In the case of *U.S. v. O'Brien,* this Court found that "government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (391 U.S. 367, 377, 1968). This Court has long agreed that infringement upon the basic rights of individuals is abhorrent to the "workings of a free society" (Speiser v. Randall, 357 U.S. 513, 521, 1958). Therefore, it is essential for the government, when imposing restrictions, to be subject to strict scrutiny to ensure that these restrictions are not violating the First Amendment rights of free speech.

When an individual's speech encroaches on the right of another individual, government regulation and interference is necessary. The Court has continuously found that the government cannot place restrictions on free speech due solely to the fact that some viewers may be offended or disagree with the speech. However, this Court has also agreed that listeners must not be held captive to speech (Rowan v. United States Post Office Department, 397 U.S. 728, 738, 1970). In other words, viewers and listeners must be able to avoid the

unwanted speech if they so choose (Hill v. Colorado, 530 U.S. 703, 716, 2000). Similarly, the government cannot place restrictions on expression because government officials find the expression offensive or disagree with the message. In order for a government to impose restrictions, the decision must be made on a content-neutral basis (Consolidated Edison Company v. Public Service Company, 447 U.S. 530, 536, 1980).

Next, the Court will discuss the various kinds of forums and the protection each are afforded. The Court will then determine which kind of forum the Anderson Center should be considered. The Court has found that three types of forums exist that offer more or less protection pursuant to the First Amendment. In the case of *United States Postal Service v. Council of Greenburgh Civic Association*, the Court found that the three kinds of forums are: 1) the traditional public forums, 2) the public forum created by the government, and 3) the nonpublic forum (453 U.S. 114, 45-46, 1981). The traditional public forum is one which has fundamentally and traditionally been used for expression, such as a sidewalk or street (453 U.S. 114, 45, 1981). A public forum created by the government is one that the state or government has created to be used for the purpose of expression (453 U.S. 114, 45, 1981). Lastly, the nonpublic forum is one that is not traditionally or designed to be used for expression (453 U.S. 114, 46, 1981). It is important to note that while the government may designate an area to be used as a public forum, officials cannot thereby restrict participants based upon their views (453 U.S. 114, 45, 1981). The First Amendment gives most protection to individuals who are using a traditional public forum and the least protection to individuals who choose to express their views in a nonpublic forum.

In reference to the present case, this Court finds that the Anderson Center Theater, in which the performance took place, is a public forum that has been created by the government. This Court has held on numerous occasions that a university is essentially an area for thought experiment and serves as "the center of our intellectual and philosophic tradition" (Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 835, 1995). The infamous case of *Tinker v. Des Moines Independent Community School District* established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (393 U.S. 503, 506, 1969). In other words, university officials are not permitted to curtail speech based on its content or based upon other students who may be offended or disagree with the expression.

The appellants have asked this Court to find the University responsible for allowing speech to take place that may offend traditional Christians who disagree with the purported relationship between Mary Magdalene and Jesus Christ. The appellants, pursuant to *Hazelwood School District v. Kuhlmeier*, may argue that forums within a public school differ from the traditional public forums such as streets and sidewalks, and therefore are less protected by the First Amendment (484 U.S. 260, 267, 1988). This Court has maintained that traditional public forums hold the greatest First Amendment protection and the forums created by the government do not merit the same protection. For this reason, the Court has agreed that expression may be prohibited when class is disturbed or when those expressing their views fundamentally violate the rules of the university (Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 1969). The appellants may argue that the First Amendment rights of students must be considered in respect to an academic environment. Pursuant to

Bethel School District v. Fraser, the appellants may argue that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" (478 U.S. 675, 682, 1986). This Court has not disagreed with the fact that certain aspects of the academic setting must be considered, hence the prohibition of speech that interrupts school in a way that would fundamentally change the school environment (Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 1969). Lastly, the appellants may argue that the University did not abide by the acceptable editorial control established in *Kuhlmeier*, whereby the Court found that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (484 U.S. 260, 272-273, 1988). In contrast, this Court does not find that the application of editorial control found in *Kuhlmeier* is applicable to the present case. The University was not endorsing the speech; rather the University was allowing the performance to take place in a designated public forum. Pursuant to *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court found that just because a university allows forms of expression to take place does not mean that the university is purposely promoting that message (515 U.S. 819, 834, 1995). Rather, the university is encouraging a variety of views from a variety of individuals (515 U.S. 819, 834, 1995).

Quite contrary to the appellant's argument, this Court finds that the University maintains much of the same protections as the traditional public forum. In the case, *Widmar v. Vincent*, the Court found that the First Amendment protection granted to other citizens is also granted to students of college campus (454 U.S. 263, 268-269, 1981). More importantly, the

Court found that just because the University allows religious groups to use the public forum, does not mean that it is promoting religious worship (Widmar v. Vincent, 454 U.S. 263, 273, 1981). Rather, the University, if it restricted a religious performance, would be violating the Free Speech Clause of the First Amendment by creating exclusions to particular users of the public forum on the basis of content. Similarly, the Court found in *Rosenberger*, that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious one are broad and diverse" (515 U.S. 819, 839, 1995). The Court in *Widmar* also realized that there may be some benefits of religious groups using a public forum, as in advancing religious worship, however, the Court found that "merely 'incidental' benefits" does not thereby make the restriction required (454 U.S. 263, 273, 1981). In addition, in the case of *Good News Club v. Milford Central School*, the Court concluded that because speech may be in the form of a religious viewpoint does not indicate that the speech can be suppressed (533 U.S. 98, 2001). The Court went on to say, "What matters for the purpose of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations" (Good News Club v. Milford Central School, 533 U.S. 98, 111-112, 2001). There is a distinction between government speech endorsing religion that violates the Establishment Clause, of which this Court is not concerned with, and private speech endorsing religion, which is protected by the Free Speech Clause of the First Amendment. The University has created a public forum to use for student expression, including religious expression, and for the

University to create restrictions it must show that it is not based upon content (Widmar v. Vincent, 454 U.S. 263, 277, 1981).

If the University restricted the use of the Anderson Center based upon the religious content of the performance and its possibility for offending traditional Christians, the University would have been engaging in viewpoint discrimination. The Court in *Tinker* found that "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" (393 U.S. 503, 509, 1969). This Court finds that had the University prohibited the performance from using the Anderson Center they would have been guilty of viewpoint discrimination. Moreover, the Court found in *Papish v. Board of Curators* that "the mere dissemination of ideas - - no matter how offensive to good taste - - on a state university campus may not be shut off" (410 U.S. 667, 669-670, 1973). In other words, the fact that students may be offended by a possible rise in the belief in the relationship between Mary Magdalene and Jesus Christ does not mean the performance could have been prohibited without violating the Free Speech Clause of the First Amendment.

In addition, the Court has held that censoring publications prior to their distribution is a violation of the First Amendment. In the case of *Cohen v. California*, the Court reasoned that the First Amendment is intended to "remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise

of individual dignity and choice upon which our political system rests" (403 U.S. 15, 24, 1971). To force every possible form of expression to undergo censorship would fundamentally change the Free Speech Clause of the First Amendment. The University would violate the First Amendment rights of the performers if the officials required the performance to be performed first for officials in order to be allowed to use the theater. In *Schneider v. State (Town of Irvington)*, the Court held that officials cannot "require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried" (308 U.S. 147, 164, 1939). In other words, prior restraint would create a non-content-neutral basis for allowing various forms of expression to occur.

Next, the appellants argue that the appellees engaged in viewpoint discrimination by forcing student protestors to relocate themselves. To accommodate the overwhelmingly large crowd, the Anderson Center opened the back walls of the theater, which would allow for more seating on the grass area behind the theater. As a result, University officials advised student protestors to move themselves to the Events Center. The appellees argue that they did not engage in viewpoint discrimination, but on the contrary, adhered to the regulation of time, place, and manner. In, *Consolidated Edison Company v. Public Service Company*, the Court found that a permissible use of the time, place, and manner restriction must not "be based upon either the content or subject matter of speech" and it must allow for "alternative channels for communication" (447 U.S. 530, 535-536, 1980). The Court, however, has realized that valid time, place, and manner restrictions must still be strictly scrutinized. In the case, *Thomas v. Chicago Park District*, the Court realized that time, place, and manner restrictions

can, at times, appear to be content-neutral but, in actuality, are not (534 U.S. 316, 323, 2002). For this reason, this Court has agreed to strictly analyze the time, place, and manner restriction the University asserts it validly applied to the student protestors.

The appellants may argue that the University did not abide by the content-neutral decision basis for applying the time, place, and manner restriction upon the student protestors. Pursuant to the case, *Hill v. Colorado,* the appellees may argue that the University officials required the student protestors to relocate themselves because the University found their speech offensive (530 U.S. 703, 716, 2000). The protestors were located right outside the Anderson Center where the performance was taking place. Forcing the protestors to relocate suggests the possibility that the University engaged in viewpoint discrimination. The protestors did not disturb the peace or break the code of conduct of the University, nor did they interfere with classes occurring at that time. In *Consolidated Edison Company* the Court found that time, place, and manner regulations are necessary whereby there are legitimate concerns with traffic regulation and public order (447 U.S. 530, 535-536, 1980). The appellants may argue that the lack of disorderly conduct by the protestors must, therefore, conclude that the relocation was based on the content of the expression.

This Court, however, does not find that the University officials engaged in viewpoint discrimination. As previously established, free speech is protected as long as it does not encroach on the rights of others. Had the officials not required the protestors to move, the performance would have been disturbed. Based on the location of the protestors, immediately outside the Anderson Center, the officials needed to advise the protestors to relocate due to the opening of the external walls. This opening would have resulted in the audience and

performance becoming directly affected by the protestors who were located right outside. Further, it has been long established that time, place, and manner restrictions are permissible as long as the there are other forums or areas readily available to the protestors (Heffrom v. International Society for Krishna Consciousness Inc., 452 U.S. 640, 654, 1981). As is the case in *Hill* where a piece of legislation required all kinds of protestors to be at least 1000 feet away from an entrance to any health care facility in order to preserve the right for patients to enter the health care facility without interference (530 U.S. 703, 2000). The Court found that this was an appropriate time, place, and manner regulation because it did not curtail the protesting but rather required the protestors to be farther away from the entrance (530 U.S. 703, 2000).

An important distinction is made in the case of *Cornelious v. NAACP Legal Defense and Education Fund, Inc.*, whereby the Court found that "even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government to freely grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be cause by the speaker's activities" (473 U.S. 788, 799-800, 1985). This Court finds that neither the fact that the protestors were present at the performance nor the content in which the protests included influenced the University officials from advising them to relocate themselves. Rather, the protesters right to protest must also be considered with the performance and its right to continue without interruption. Pursuant to *Ward v. Rock Against Racism*, the Court found that time, place, and manner restrictions must be "narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so" (491 U.S. 781, 798, 1989). Therefore, the

officials required the protestors to relocate, and giving them alternative forums to continue their protest does not suggest that the University was engaging in viewpoint discrimination.

Lastly, the appellants' argue that the performance was obscene and thus not protected by the First Amendment. In contrast, the appellees argue that the performance was an artistic expression, long protected by the First Amendment. The Court has defined obscenity in the case of Roth v. United States (354 U.S. 476, 1957). The Court found that obscenity is any "material which deals with sex in a manner appealing to prurient interest" (Roth v. United States, 354 U.S. 476, 487, 1957). While *Roth* has noted that the First Amendment protects the portrayal of sex, it has also noted that the First Amendment does not protect the portrayal of sex that serves to the lustfulness of people. It is the objective of this Court to determine whether the sexually explicit performance is considered obscene, and therefore not protected by the Free Speech Clause of the First Amendment.

A test for obscenity was established in the case *Miller v. California* whereby the Court found that three guidelines must be met in order for a form of expression to be considered obscene (413 U.S. 15, 1973). The first is whether the average person would, taking the expression at its full value, consider the expression to be appealing to a prurient interest (Miller v. California, 413 U.S. 15, 24, 1973). Second, the Court must determine "whether the work depicts or describes, in a patently offensive way, sexual conduct" (Miller v. California, 413 U.S. 15, 24, 1973). Last, the Court must determine if the expression lacks "serious literary, artistic, political, or scientific value" (Miller v. California, 413 U.S. 15, 24, 1973). *Miller* gives examples of the second guideline, which includes offensive depictions of sexual acts and/or offensive depictions of masturbation, excretion, or genitals (413 U.S. 15, 24, 1973). It is important, and

the Court will continue to refer to, whether the entirety of the performance is obscene thus making the central theme to be obscenity. This distinction was made in *Kois v. Wisconsin* whereby the Court made clear that each expression "must be considered in assessing whether or not the 'dominant' theme of the material appeals to prurient interest" (408 U.S. 229, 231-232, 1972).

The appellants, pursuant to *Roth*, may argue that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained. We hold that obscenity is not within the area of constitutionally protected speech or press" (354 U.S. 476, 484-485, 1957). This Court is not disagreeing with the fact that obscenity is not within the realm of the constitutionally protect speech of press. In fact, this Court maintains that obscenity cannot be constituted as part of the protection served by the First Amendment. However, despite the obscene images presented throughout the performance, this Court cannot conclude that the dominant theme to this performance was one of a prurient nature.

This Court maintains that the performance was one of artistic expression regarding the relationship between Mary Magdalene and Jesus Christ. Pursuant to *Ashcroft v. Free Speech Coalition*, the Court found, "The artistic merit of a work does not depend on the presence of a single explicit scene. The First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive" (535 U.S. 234, 248, 2002). While the performance exhibited multiple scenes of sexual behavior,

this Court does not find that the performance, as a whole, falls within the first guideline set forth in *Miller*. In respect to the second guideline, this Court finds that the performance did not show perverted and distorted sexual conduct or genitalia. This Court finds that the performance was a form of artistic expression regarding the relationship between Mary Magdalene and Jesus Christ. Moreover, this Court finds that the performance was not intended to serve the prurient interest of the audience nor did it portray sexual behavior in such a way to be offensive. The fact that traditional Christians may find the representation of the relationship between Mary Magdalene and Jesus Christ offensive does not mean that the entirety of the performance is one that is offensive. The Court has recognized that the sensitivity in dealing with artistic, literally, political, and scientific expression. Specifically, *Miller*, affirms that "the courts must always remain sensitive to any infringement on genuinely serious literally, artistic, political, and scientific expression. This is an area in which there are few eternal verities" (413 U.S. 15, 22-23, 1973). For this reason, it is imperative for the Court to recognize when artistic expression is taking place.

Due to the appellant's view that the performance was obscene, they also maintain that the University should have exhibited more control over who was permitted into the performance. Specifically, the appellants are referring to the minors that were allowed into the theater. In accordance with the case, *Denver Area Educational Telecommunications Consortium v. FCC*, the Court found that there is a "need to protect children from exposure to patently offensive sex-related material" (518 U.S. 727, 743, 1996). To support the appellants argument they may present the *Fraser* case in which the Court has "acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech

is sexually explicit and the audience may include children" (478 U.S. 675, 684, 1986). While this Court agrees that children need to be protected from obscenity and lewd speech, this Court also finds that it cannot require all speech to be prepared with such caution due to the fact that children may come in contact with it. This Court agrees with the reasoning established in *Reno v. American Civil Liberties Union*, in which the Court stated, "It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults" (521 U.S. 844, 875, 1997). While minors were present, it cannot be expected that the performance had the intention of having an audience overwhelming made up of children.

It is the opinion of this Court that the University did not engage in viewpoint discrimination by advising the student protestors to relocate themselves to the Event Center. In contrast, this Court agrees that the University validly used the time, place, and manner restriction in order to adhere to the right for the performance to continue as well as the right for the protestors to continue their protest. This Court affirms that the Anderson Center Theater is a designated public forum that is granted a high level of protection from the First Amendment. The designated public forum is required to maintain a content-neutral basis for allowing various forms of expression to take place. The allegation that the University should not have permitted the performance to take place because it may be offensive to traditional Christians is one the Court does not agree with. This Court has long found that the fact that some viewers/listeners may be offended or disagree with forms of expression does not give the government the ability to curtail that expression. Rather, and as this Court has emphasized, the unwilling listeners must be able to avoid the form of expression taking place. This Court finds

that the traditional Christians who may have found the performance offensive were able to avoid the performance by not attending or leaving if they so chose. In contrast, this Court has found that had the University not permitted the performance to take place they would have violated the First Amendment and engaged in viewpoint discrimination. This Court has found that the mere presence of a religious connotation neither leads to the conclusion that the University endorses the speech nor that religious worship is occurring. Rather, religious groups and religious speech is equally protected by the Free Speech Clause of the First Amendment and the University could not have prohibited the performance without violating the First Amendment. Moreover, if the University required the performance to be presented to officials before it would be given permission to use the Anderson Center the University would have been engaging in prior restraint. Lastly, this Court finds that the performance was not obscene. This Court holds that the performance was a form of artistic expression, which equally is protected by the Free Speech Clause of the First Amendment. The fact that explicit scenes were depicted on the media screens does not mean that the dominate theme of the performance was one that served a prurient interest.

Case List

1) Ashcroft v. Free Speech Coalition (535 U.S. 234, 2002)
2) Bethel School District v. Fraser (478 U.S. 675, 1986)
3) Chaplinsky v. New Hampshire (315 U.S. 568, 1942)
4) Cohen v. California (403 U.S. 15, 1971)
5) Consolidated Edison Company v. Public Service Company (447 U.S. 530, 1980)
6) Cornelious v. NAACP Legal Defense and Education Fund, Inc. (473 U.S. 788, 1985)
7) Denver Area Educational Telecommunications Consortium v. FCC (518 U.S. 727, 1986)
8) Good News Club v. Milford Central School (533 U.S. 98, 2001)
9) Hazelwood School District v.Kuhlmeier (484 U.S. 260, 1988)
10) Heffrom v. International Society for Krishna Consciousness (452 U.S. 640, 1981)
11) Hill v. Colorado (530 U.S. 703, 2000)
12) Kois v. Wisconsin (408 U.S. 229, 1972)
13) Miller v. California (413 U.S. 15, 1973)
14) Papish v. Board of Curators (410 U.S. 667, 1973)
15) Police Department of Chicago v. Mosley (408 U.S.92, 1972)
16) Reno v. American Civil Liberties Union (521 U.S. 844, 1997)
17) Rosenberger v. Rector & Visitors of the University of Virginia (515 U.S. 819, 1995)
18) Roth v. United States (354 U.S. 476, 1957)
19) Rowan v. United States Post Office Department (397 U.S. 728, 1970)
20) Schneider v. State (Town of Irvington) (308 U.S. 147, 1939)
21) Speiser v. Randall (357 U.S. 513, 1958)
22) Spence v. Washington (418 U.S. 405, 1974)
23) Street v. New York (394 U.S. 576, 1969)
24) Stromberg v. California (283 U.S. 359, 1931)
25) Texas v. Johnson (491 U.S. 397, 1989)
26) Texas v. O'Brien (491 U.S 397, 1989)
27) Thomas v. Chicago Park District (534 U.S. 316, 2002)
28) Tinker v. Des Moines Independent Community School District (393 U.S. 503, 1969)
29) United States v. O'Brien (391 U.S. 367, 1968)
30) United States Postal Service v. Council of Greenburgh Civic Association (453 U.S. 114, 1981)
31) Ward v. Rock Against Racism (491 U.S. 781, 1989)
32) Widmar v. Vincent (454 U.S. 263, 1981)