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A Historical Analysis of Written Obscenity and the First Amendment Freedom of Speech

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THE CARL AND WINIFRED LEE HONORS COLLEGE

CERTIFICATE OF ORAL EXAMINATION

Jaime Willis, having been admitted to the Carl and Winifred Lee Honors College in 1994, successfully presented the Lee Honors College Thesis on April 29, 1998.

The title of the paper is:

"A Historical Analysis of Written Obscenity and the First Amendment Freedom of Speech"

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A Historical Analysis of
Written Obscenity and the
First Amendment Freedom
of Speech

Jaime Willis

**“The very aim and end of our institution is just
this: that we may think what we like and say
what we think.”**

Oliver Wendell Holmes, Sr.

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Introduction

The *unalienable* rights delineated in the first ten amendments of the United States Constitution, our Bill of Rights, has sparked many noteworthy legal, political and moral debates in the short history of America. The freedom of speech noted in the First Amendment is no exception.

The United States has recognized many separate distinctions of speech, some of which are more protected than others. In addition to many types of oral speech, the Supreme Court has distinguished the various protections afforded to the written word, “symbolic” speech (i.e. flag burning), speech on television, radio and, most recently, the internet. In an effort to narrow the scope of my thesis, I have chosen to focus

exclusively on the written word, specifically on the topic of obscenity in relationship to written text.

Freedom of speech is not a new concept, rather, it has had a long past dating back to the rulers in many ancient civilizations. In ancient China, the Emperor Chi Huang Ti ordered the destruction of the *Analects* of Confucius.¹ The concept and criminalization of slander² is noted in fifth century Athens.³ In the most commonly accepted translation of the Twelve Tables from fifth century Rome, the crime of slander

¹ Alec Craig, Suppressed Books: A History of the Conception of Literary Obscenity (New York: World, 1963), 7.

² Slander is defined in Webster's Collegiate Dictionary as "The utterance of false charges or misrepresentations which defame and damage another's reputation." While slander specifically deals with oral speech (libel expresses the same concept for written text), in ancient civilizations there were not many written texts. Those texts that the civilizations did have were the property of the elite class; even if the lower classes had access to books, most could not read. Therefore, the origins of free speech in ancient civilizations dealt mostly with oral speech.

³ Philip P. Wiener, ed., "Freedom of Speech in Antiquity," Dictionary of the History of Ideas (New York: Charles Scribner's Sons, 1973), 258.

was punishable by death.⁴ Historians believe that the loss of the literary heritage of the pagan times is due, in part, to the deliberate destruction of their literature after the Christianization of the Roman Empire.⁵ In AD 1120, Peter Abelard's *Introductio ad Theologium* was condemned as heretical and burned by the Synod of Soissons.⁶ The threat of the written word became real with the invention of printing in the fifteenth century.⁷ The Roman Catholic Church, terrified by the threat of general access to knowledge, tightened her reign over the printed word through the creation of the *Index Librorum Prohibitorum* in 1557;⁸ no one was allowed to read or possess any book placed on the Index (which would be

⁴ Wiener, 261.

⁵ Craig, 18.

⁶ Craig, 18.

⁷ Craig, 18.

⁸ Craig, 18.

revised periodically by the Pope). Just two years later, Queen Elizabeth of England ordered that all books be licensed before they could be printed.⁹ The inherent censorship of licensing lasted until 1640 when it was abolished by Parliament. But the refreshing freedom of literary thought lasted a scant three years before the practice of licensing was reintroduced to evaluate religious and political writing. The Licensing Act fully formalized the process in 1662, but expired without being replaced in 1695.¹⁰ The confusion over the legalization of censorship transferred from English Common Law to the newly developing United States.

America is a country with a unique mix of diametric opposites; our value of individual freedoms can only be

⁹ Craig, 19-20.

¹⁰ Craig, 22.

paralleled by our equal adurance of puritan morals.

Consequently, the obscenity debate has teetered between these two ideals throughout our history.

The Beginning of Obscenity Laws

On December 15, 1791, the first ten amendments to our constitution, known as the Bill of Rights, became part of the United States Constitution. These Amendments were introduced to protect the people of the United States from the tyranny witnessed in other political systems; as such, they delineated the 'unalienable' rights of America's people. The First Amendment, probably one of the most well known amendments of the Bill of Rights, reads (in part): "Congress shall make no law . . . abridging the freedom of speech." This simple sentence has become the foundation for two hundred

years of protection and controversy concerning the censorship of thoughts.

The first case of any real significance to free speech history actually occurred in England. Regina v. Hicklin (1868),¹¹ created the first test to distinguish protected from unprotected speech: “Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”¹² Adopted by the United States and standing as precedent until 1957, it formed the basis of all laws prohibiting obscenity by creating three main principles. First, obscenity was judged by its effect on susceptible individuals,¹³ shifting the focus from the text itself to

¹¹ Regina v. Hinklin, L.R. 3 Q. B. 360 (1868).

¹² <http://pw1.netcom/~nolc/Weaver/chap2.html> 1.

¹³ <http://pw1.netcom/~nolc/Weaver/chap2.html> 1.

the character of the person who may read such text[s].

Secondly, the test allowed the court to judge obscenity based on isolated sections in the text, rather than the text as a whole.¹⁴

Finally, using this guideline, the focus was on the effect of the text on its readers, instead of the intent of the author.¹⁵

Although this test did not include every incident of obscenity, it did dilute the power of the First Amendment by allowing a broad, discretionary range of texts to be legally banned.

Soon after the Hicklin case, Anthony Comstock joined the controversy on free speech. Comstock, the Secretary for the Suppression of Vice, lobbied for the Comstock Act of 1872 which prohibited the 'mailing of obscene literature,'¹⁶ and

¹⁴ <http://pw1.netcom/~nolc/Weaver/chap2.html> 1.

¹⁵ <http://pw1.netcom/~nolc/Weaver/chap2.html> 1.

¹⁶ Carnuth, Gordon. What Happened When (New York: Penguin 1991), 464.

became one of the most important people in the fight over censorship. Comstock's crusade was so auspicious that one author noted, "The mere discussion of sexual themes, or the implication of sex or nakedness, was enough to have a book altered by a publisher for fear of censorship."¹⁷

In addition to lobbying for the Comstock Act, Comstock also fought for the suppression, prohibition or ban of any literature related to contraception. He was the major force behind legislation in New York (and many other states that subsequently followed suit) that made those persons conveying contraceptive information criminally liable.¹⁸ But, for every

¹⁷ Goodman, Michael. Contemporary Literary Censorship: The Case History of Burroughs' Naked Lunch (Meluchen: The Scarecrow Press 1981), 2.

¹⁸ Craig, 129.

action there is an equal and opposite reaction, and Anthony Comstock's crusade was no exception.

Margaret Sanger became *the* spokesperson for the birth control movement, taking any and every opportunity to foil Anthony Comstock and his puritanical notions of human sexuality. She began her crusade soon after she had children of her own; she realized through her personal experiences in a large family, as a mother, and a registered nurse, that the ability to time the birth of children is essential to ensure the healthy, quality lives of both the children and the family. Outraged that someone would deny people access to medical information, Sanger took it upon herself to educate. By writing pamphlets, books, and lecturing she came directly under fire from Comstock and others who sought to prohibit the publication and distribution of such material.

Although Comstock dearly wanted to be able to arrest Sanger, he was unable to do so until she personally violated the Comstock Act in August 1914. Two federal agents presented Sanger with an indictment for transporting copies of her *Woman Rebel* magazine that included articles and information on conception.¹⁹ Before her trial, however, she fled to France.²⁰ In the meantime, Comstock set Sanger's husband up by asking to buy some of his wife's banned pamphlets.²¹ When he gave in, Comstock arrested him.²² William Sanger went to trial in September 1915 and conducted his own defense. Although Sanger felt that "the law is on trial here, not I," the presiding judge felt differently, convicting him of having "obscene, lewd,

¹⁹ Craig, 130.

²⁰ Margaret Sanger. My Fight for Birth Control. (New York: Farrer & Rinehart, 1931) 93.

²¹ David M. Kennedy. Birth Control in America: The Career of Margaret Sanger. (Yale University: New Haven, CN, 1970) 32.

lascivious, filthy, indecent and disgusting” literature and sentencing him to \$150 fine or thirty days in jail.²³ Sanger chose to fulfill his penance in jail, during which time the family nemesis, Anthony Comstock, passed away.²⁴

Even though the legislature in New York and many other states continued to follow in Comstock’s path, the courts were slowly chipping away at the obscenity statutes, carving a niche in legislation for instructional literature on sex for specific medical purposes. One of the first Supreme Court cases that indirectly tackled the birth control/obscenity issue would come in 1896.

²² Kennedy, 32.

²³ Kennedy, 73.

²⁴ Kennedy, 73.

The Supreme Court Enters the Obscenity Dispute

In Swearingen v. United States (1896),²⁵ the defendant wrote and mailed a newspaper article in *The Burlington Courier* that contained matter violative of the Comstock Act. Swearingen was indicted and convicted of attempting to mail an “obscene, lewd and lascivious” article. He appealed to the Supreme Court of the United States, who ruled in his favor, stating that the intent of the matter needed to be “calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.”²⁶ The courts next tackled an obscenity case directly dealing with contraceptive pamphlets.

²⁵ Swearingen v. United States, 161 U.S. 446 (1896).

²⁶ Edward De Grazia, ed. Censorship Landmarks (New York: R.R. Bowker, 1969) 47.

Mary Dennett, another sex education crusader, published a pamphlet outlining sexual physiology to children. Her defense, in accordance with Swearingen, was that the pamphlet was intended to educate, not debauch children. In her case, United States v. Dennett (1930),²⁷ the Court of Appeals tweaked the Swearingen decision in the majority opinion, qualifying the “motive” of the defendant as immaterial. Rather, the obscenity must be found in the text itself, applying the “rule of reasonable construction.”²⁸ Under this rule, the court found that the Comstock law “must not be assumed to have been designed to interfere with serious instruction regarding sex matters unless the terms in which the information is conveyed are clearly indecent.”²⁹ While this ruling gave a rather murky

²⁷ United States v. Dennett, 39 F. 2d. 564 (1930).

²⁸ Kennedy, 244.

²⁹ Kennedy, 244.

definition of obscenity, a much clearer definition would emerge from a set of rulings on a novel.

James Joyce's novel *Ulysses* described people in lower middle classes in Dublin in 1904 and using a stream of consciousness style, detailed their lives moment for moment and thought for thought--in an eighteen hour period.³⁰ This approach first reached its claim to fame not for its literary value, but as a censored book.

In spite of this, the book was first published in its entirety in Paris in 1922 and copies of it kept finding their way into the United States.³¹ It had been reported that Ernest Hemingway asked a friend to smuggle *Ulysses* across the Canadian border by hiding copies in his trousers while crossing

³⁰ Richard H. Kuh. Foolish Figleaves? Pornography in--and out of--Court. (New York: Macmillan, 1967) 24.

³¹ Craig, 134.

by ferry.³² The book smuggling continued, as well as unauthorized copies made on the sly, until Random House, Inc., who had begun to publish the American edition, challenged a seizure of the U.S. Customs of an imported copy of Joyce's book³³ in United States v. One Book Called *Ulysses* (1933).³⁴

Federal District Court Judge Woolsey ruled in favor of Joyce, writing one of the most significant court opinions on obscenity in America's history. He assessed the literary character of the work as a whole and held that "*Ulysses* is a sincere and honest book, and I think that the criticisms of it are entirely disposed of by its rationale."³⁵ Woolsey offered two

³² Craig, 134.

³³ Craig, 135

³⁴ United States v. One Book Called *Ulysses*, 5 F. Supp. 182 (1933)

³⁵ De Grazia, 95.

pieces of precedent that had an enormous effect on future obscenity rulings.

First, Woolsey wrote that a book can only be found obscene if the author wrote the book with the “purpose of exploiting obscenity.”³⁶ In answering his own question, Woolsey replied, “Although it contains, as I have mentioned above, many words usually considered dirty, I have not found anything that I consider to be dirt for dirt’s sake.”³⁷ This element of Woolsey’s ruling brought back the idea of a “work as a whole” aspect to obscenity, taking the American court farther away from the more restrictive Hicklin test decided sixty-five years earlier.

³⁶ Craig, 135.

³⁷ De Grazia, 95.

Second, Woolsey added insight to the legal definition of obscenity; a work was obscene if it tended to “stir the sex impulses or to lead to sexually impure and lustful thoughts.”³⁸

He added that he felt that

whether a particular book would tend to excite such impulses and thought must be tested by the Court’s opinion as to its effect on a person with average sex instincts. . . . who plays, in this branch of inquiry, the same role of hypothetical reagent as does the “reasonable man” in the law of torts. . . . It is only with the normal person that the law is concerned.³⁹

Judging *Ulysses* by the significantly less restrictive standard he had set, Woolsey found that Joyce’s book was not obscene and consequently lifted the customs ban. The Plaintiff’s appealed

³⁸ Craig, 135.

³⁹ Craig, 135.

and three judges from the US Court of Appeals now had their turn in making legal obscenity history.

The appeal, United States v. One Book Entitled *Ulysses* (1934),⁴⁰ went to the Second Circuit Court of Appeals, who handed down an even more detailed definition of obscenity. In addition to agreeing with Judge Woolsey, Judge Augustus Hand offered two other thoughts on the topic of obscenity.

The first was to explicitly state what written works were *not* a part of the obscenity ban found in the Comstock and Tariff Acts. Judge Hand wrote:

It is settled at least so far as this court is concerned that works of physiology, medicine, science and sex instruction are not within the statute, though to some extent and among some persons they may tend to promote lustful thoughts. We think the same immunity should apply to literature as to science where the

⁴⁰ United States v. One Book Entitled *Ulysses*, 72 F. 2d 705 (1934).

presentation, when viewed objectively, is sincere and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication. The question in each case is whether a publication as a whole has a libidinous effect.⁴¹

Hand covered even more explicitly than Woolsey the notion of judging the work as a whole. In deference to the eloquence of Judge Hand, I will simply quote from his opinion:

We believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past if it is ancient, are persuasive pieces of evidence, for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.⁴²

⁴¹ Craig, 135.

⁴² Craig, 136.

This opinion followed in the footsteps of United States v. Dennett and other state rulings that began to narrow the scope of obscenity and slowly dismantle the Comstock ideals present in state and federal legislation and court precedent.

Narrowing the Scope of Obscenity Doctrine

While no significant change in precedence occurred in the 1940's, neither did the courts backslide from their stance. The next major obscenity case did not occur until 1953, but courts around the country spent the preceding ten years keeping Customs, the Society for the Suppression of Vice, and similar groups from unduly trampling on the freedom of speech via obscenity regulation.

Three cases that are representative of the decade are Parmelee v. United States (1940),⁴³ Attorney General v. Forever Amber (1948),⁴⁴ and Attorney General v. God's Little Acre (1950).⁴⁵ In Parmelee, the defendant was indicted when illustrations were included of sexual organs in his book on nudism. The American Civil Liberties Union assisted in Parmelee's defense, and won on appeal to the United States Court of Appeals for the District of Columbia.⁴⁶ The opinion denied the prosecution's assumption that nudity is obscene per se, stating that "the picturization here challenged has been used in the libeled book to accompany an honest, sincere, scientific and educational study, and exposition of a sociological phenomenon and is, in our opinion, clearly permitted by

⁴³ Parmelee v. United States, 113 F. 2d 729 (1940).

⁴⁴ Attorney General v. Forever Amber, 81 N.E. 2d 663 (1948).

⁴⁵ Attorney General v. God's Little Acre, 93 N.E. 2d 259 (1950).

present-day concepts of propriety.”⁴⁷ That this notion seems so obvious today as to be taken for granted is testament to our progress in protecting free speech rights.

The next two cases were both prosecuted by the Massachusetts State Attorney General in 1948 and 1950. The first, Attorney General v. *Forever Amber*, was quickly cleared as the result of overly puritanical zeal. In a satirical opinion, the judge wrote “the book, by its very repetitions of Amber’s adventures in sex, acts like a soporific rather than an aphrodisiac. While conducive to sleep, it is not conducive to a desire to sleep with a member of the opposite sex.”⁴⁸

But not all courts were quite so willing to give up puritanical notions in the interest of free speech rights. The trial

⁴⁶ Craig, 137.

⁴⁷ Craig, 137.

⁴⁸ Craig, 140.

of *God's Little Acre* is a testament to the inconsistency of state courts on the matters of obscenity. In 1949, Judge Bok of Philadelphia dismissed charges against this book and eight others, adamantly stating that an obscene text contains "a calculated enticement to sexual desire. . . mere coarseness or vanity is not obscenity."⁴⁹ One year later, the Supreme Court of Appeals of Massachusetts upheld a conviction of the same book.⁵⁰

Another ruling that added to the confusion in obscenity law was that in Jacobellis v. Ohio (1964).⁵¹ In this case, Justice Potter Stewart interpreted the First Amendment as only applying to hard-core pornography. In his concurring opinion,

⁴⁹ Craig, 141.

⁵⁰ Craig, 142.

⁵¹ Jacobellis v. Ohio 378 U.S. 184 (1964)

he specifically neglected to define pornography, saying, "I know it when I see it."⁵²

It became obvious that the precedent these courts were setting would cause many problems for booksellers, publishers and authors. The Supreme Court needed to take a concrete stand on obscenity and offer the lower courts a way to follow a precedent. The Supreme Court had that chance in 1957 when they decided one of the most important obscenity cases in United States history, Roth v. United States.⁵³

The Supreme Test of Obscenity in Roth

Samuel Roth, a publisher in New York, was convicted in the lower courts of mailing obscene circulars, advertising

⁵² <http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=378&invol=184>

⁵³ Roth v. United States 354 US 476 (1956)

matter, and an obscene book, which was prohibited by the current federal obscenity statute. The Supreme Court decision, which upheld the lower courts decision, changed the precedent in obscenity cases forever.

First, the high Court held for the first time that obscenity is not protected by the First Amendment.⁵⁴ “Implicit in the history of the First Amendment,” the Court stated, “is the rejection of obscenity as utterly without redeeming social importance.”⁵⁵ It is important to note that the legal justification for non-protection in this case was wildly different than the reasoning in past precedence; in this case, the Court saw that the social worth of the material itself was the main factor in determining protection, whereas before the determining factor

⁵⁴ Synder, 41.

⁵⁵ Synder, 41.

was the moral character of those who had access to the material.

Secondly, the Supreme Court determined that the official test for obscenity would be “whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal[ed] to the prurient interest.”⁵⁶ This meant that any material would be classified as obscene if it:

- appealed to prurient interest
- was patently offensive under current community standards
- was utterly without any redeeming social value.

Justice Brennan stated, “All ideas, having even the slightest redeeming social importance- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion-

⁵⁶ Synder, 42.

have the full protection of the guarantees of the First Amendment.”⁵⁷ This opinion finally gave courts a specific systematic formula to use in obscenity cases. Over the next sixteen years, the test would be used in widely different circumstances but always with the same goal; to prevent limitations of free speech, while protecting the people from obscenity.

Another problem the Supreme Court clarified in the obscenity debate was the idea of variable obscenity; adults should not be subjected to the same obscenity standards as children. The Supreme Court made this point in the historic case, Butler v. Michigan (1957).⁵⁸ Butler was convicted of violating a Michigan obscenity statute by selling a copy of John

⁵⁷ Synder, 42.

⁵⁸ Butler v. Michigan, 352 U.S. 380 (1957).

Griffin's *The Devil Rides Outside*.⁵⁹ The Michigan statute defined obscenity as any book or other publication which 'might tend to incite minors to violent or depraved or immoral acts' or 'might tend to the corruption of the morals of youth.'⁶⁰ By unanimous vote the Supreme Court set aside the conviction, Justice Frankfurter explaining:

"The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.... We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested

⁵⁹ Gleason, Marian. The Leaflet: Censorship (The New England Association of Teachers of English, 1969) 19-20.

⁶⁰ Gleason, 19.

as the indispensable conditions for the maintenance and progress of a free society.”⁶¹

The Butler case illustrates one of the first major Supreme Court decisions in which the ‘least restrictive’ Roth test is applied in a censorship case.

The Roth test was also used to help clarify the exception the Supreme Court made for obscene material with scientific, literary or artistic value in another significant case involving Professor Alfred C. Kinsey, founder of the Institute for Sex Research at Indiana University.⁶² United States Customs were fond of seizing many of the mailings intended for the Institute from overseas sources. Many of these mailings involved his famous Kinsey Reports, which offered frank scientific

⁶¹ Gleason, 20.

⁶² Craig, 143.

discussion, evaluation and inquiries into the sexual facets of human beings. His first report, *Sexual Behavior in the Human Male*, was heralded as both one of the greatest scientific discoveries in human sexuality, as well as one of the most egregious examples of obscenity in our history. This dichotomy of public opinion would again be decided by the courts. Judge Edmund Palmieri ruled in U.S. v. 31 Photographs, (1957)⁶³ against the government saying that the material is obscene in the hands of the general public but not obscene when for scientific inquiry.⁶⁴ The US Customs did not appeal the decision, saying they would change their censorship policy to reflect the ruling.⁶⁵ This case is indicative of the disputes on scientific work being classified as obscenity in the twenty years after Roth. While

⁶³ U.S. v. 31 Photographs, 156 F.Supp. 350 (1957)

⁶⁴ Craig, 144.

⁶⁵ Craig, 144.

almost all courts seemed to have a firm grasp on the exclusion of scientific material in the obscenity definition, their views on what literature was “utterly without redeeming social value” varied dramatically. This struggle is best exemplified in the trials of D.H. Lawrence’s *Lady Chatterley’s Lover* and Henry Miller’s *Tropic of Cancer*.

Lady Chatterley’s Lover involved explicit descriptions of a female aristocrat’s sexual excursions with a gamekeeper and allowed the characters to express themselves frankly with vulgar sexual vocabulary.⁶⁶ The text was first published in

⁶⁶ *Lady Chatterley’s Lover* was written in three separate versions in between 1926 and 1928 by D.H. Lawrence. Mark Schorer summarizes the book like this: Constance Chatterley, the frustrated wife of an aristocratic mine owner who has been wounded in the war and left paralyzed and impotent, is drawn to his gamekeeper, the misanthropic son of a miner, becomes pregnant by him, and hopes at the end of the book to be able to divorce her husband and leave her class for a life with the other man. D.H. Lawrence. *À Propos of Lady Chatterley’s Lover and Other Essays*. (Harmondsworth, Middlesex: Penguin Books, 1961) 137.

Florence in 1928 and was pirated immediately in expurgated and unexpurgated editions.⁶⁷ Lawrence attempted to combat the pirates, but unfortunately they received the bulk of the proceeds from the book.

Thirty years later, Lawrence's widow had the book legitimately reprinted but the post office detained the copies, declaring the book obscene and therefore, unmailable.⁶⁸ The decision was challenged on two grounds; that the book was not obscene within the current definition of the statute (via the Roth test), and secondly, that if the book was declared obscene then the statute was unconstitutional because it violated the First and Fifth Amendments to the Constitution.⁶⁹

⁶⁷ Craig, 147.

⁶⁸ Craig, 148.

⁶⁹ Craig, 148.

In the resulting case, Grove Press v. Christenberry (1960),⁷⁰ federal Judge Frederick van Pelt Bryan ruled in favor of Lawrence, arguing for the books literary merit. Judge Bryan offered this reasoning:

The book is replete with fine writing and with descriptive passages of rare beauty. There is no doubt of its literary merit. . . These passages [describing sexual intercourse] and this language understandably will shock the sensitive minded. Be that as it may, these passages are relevant to the plot and to the development of the characters and of their lives as Lawrence unfolds them. . . The dominant theme, purpose and effect of the book as a whole is not an appeal to prurience or to the prurient minded. The book is not "dirt for dirt's sake." . . It is essential to the maintenance of a free society that the severest restrictions be placed upon restraints which may tend to prevent the dissemination of ideas. . . All such expressions must be freely available. . . To exclude this book from the mails on the grounds of obscenity would fashion a rule which could be applied to a substantial portion of the classics of

⁷⁰ Grove Press v. Christenberry 276 F. 2d 433 (1960)

our literature. Such a rule would be inimical to a free society.⁷¹

This decision was upheld unanimously by the Court of Appeals and the prosecution decided not to appeal their case to the Supreme Court. Following this great victory, in 1961, an edition of Henry Miller's *The Tropic of Cancer*, a similar work of literature, was issued. Again the US Post Office banned the book; this time, however, the ban was lifted without litigation.⁷² Miller's sequel, *The Tropic of Capricorn*, was released the following year without any interference.⁷³

The Longevity of the Roth Test

Two final cases should be mentioned that were instrumental in ensuring the validity and longevity of the Roth

Craig, 151.
Craig, 152.
Craig, 153.

test in American courts. In the first case, A Book Named *John Cleland's Memoirs of a Woman of Pleasure* v. Attorney General (1966),⁷⁴ the Supreme Court found that the work had very little redeeming social value, but it added to the Roth test with a new twist; unless a text could be declared *utterly without any social redeeming value*, the book was protected under the First Amendment.⁷⁵

The Supreme Court solidified this last addition to the Roth test in Mishkin v. The State of New York (1966).⁷⁶ Mishkin was convicted 'for selling over fifty books dealing with fetishism, sadism, and masochism.'⁷⁷ The last segment of the

⁷⁴ A Book Named *John Cleland's Memoirs of a Woman of Pleasure* v. Attorney General, 86 S. Ct. 975 (1966)

⁷⁵ A Book Named *John Cleland's Memoirs of a Woman of Pleasure* v. Attorney General, 86 S. Ct. 975 (1966)

⁷⁶ Mishkin v. The State of New York 86 S. Ct. 958 (1966).

⁷⁷ Goodman, 3.

Roth test, “utterly without any social redeeming value,” was found to include fetishism, sadism and masochism, as the court upheld his conviction, finding the materials obscene.

While these two decisions were instrumental in legitimizing the Roth test, the Court realized a need to clarify the test so it could be successfully applied at the lower court level. At this point, every obscenity case was being brought to the Supreme Court. The Supreme Court took the chance to do just that in Miller v. California (1973).⁷⁸

The Progeny of Roth

In Miller, the defendant argued that the obscenity law in California, which banned the distribution of obscene materials through the mail,⁷⁹ was automatically in violation of the First

⁷⁸ Miller v. California, 413 U.S. 15 (1973).

⁷⁹ Synder, 44-45.

Amendment. The Supreme Court, in a 5-4 vote, ruled that obscenity laws do not always violate the First Amendment.⁸⁰

The Court tweaked the Roth guidelines and the resulting Miller test is still precedent today. They set the following final standards for determining obscenity:

- Whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest.
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁸¹

The Court distinguished between a ‘national’ community standard, as interpreted in Roth, and turned it into a ‘local’

⁸⁰ Synder, 44-45

⁸¹ Synder, 44-45

community standard. One author commented, “What happened, in effect, was that the Supreme Court could not decide nationally what was obscene, so it told the communities to decide for themselves.”⁸²

Today the precedent on free speech in the United States allows for just about anything to be ‘said’ unless there is a safety risk or the speech is without some social value. The only types of speech that are not protected under the First Amendment are libel/slander, false advertising, “fighting words,” words that create a clear and present danger, immediate national security and safety risks. Other than these exceptions, almost every other type of speech is protected, including political speech against the U.S. government and

⁸² Synder, 45.

indecent speech (e.g., that which may appeal to prurient interest, but has some, however slight, socially redeeming value).

While the legal standard for the freedom of speech is well-outlined through case law and statute, the theory of obscenity continues to be hotly disputed by judges, legislators and the general population. While there are many people who feel like Anthony Comstock, there is a surprising number of people who feel that the current standard is still too restrictive on our freedom.

Why Protect Obscenity

One of the major areas of contention between free speech and anti-obscenity factions is *why* obscenity must not be protected by the First Amendment. Anti-obscenity factions

believe that obscenity can lead to anti-social sexual behavior, sexual deviance and/or misconduct. They also see the permission of obscene (e.g. *any* sexually related text) literature as encouraging sexual misbehavior, such as pre-marital sex, adultery, single-parent pregnancy, etc. One author described this sentiment in this manner:

It was a dogma of “Victorian morality” that sexual misbehavior would be encouraged if one were to acknowledge its existence or at any rate to present it vividly enough to form a lifelike image of it the reader’s mind; this morality rested on a faith that you could best conquer evil by shutting your eyes to its existence.⁸³

Justice Jerome Frank believed that the theory of punishing anything that could *possibly* cause sexual misconduct was, simply, ridiculous. He illustrated his point saying,

⁸³ Clor, 5.

one will suggest that therefore Congress may constitutionally legislate punishment for mailing perfumes.”⁸⁴ Judge Frank also debunked the anti-obscenity myth that obscenity incites sexual misconduct. He believed that Congress could punish obscene publications if there was “moderately substantial reliable data”⁸⁵ showing a definite correlation between obscenity and misconduct; he emphasized, however, that there is “no such data.”⁸⁶

Judge Frank took a very liberal standard for obscenity, believing that the right of American people to speak their minds was an unconditional one. In the lower court’s decision of Roth, one of his most notable opinions, he stated:

To vest a few fallible men--prosecutors, judges, jurors--with cast powers of literary or artistic

⁸⁴ Clor. 7.

⁸⁵ Clor. 7.

⁸⁶ Clor. 7.

ensorship, to convert them into what Mill called a “moral police,” is to make them despotic arbiters of literary products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too plentiful, should be cherished, not stifled.⁸⁷

Justice Douglas sided with Judge Frank in believing that the freedom of speech should be taken at its most literal face value.

Douglas, in his dissent in Roth, said:

The Court’s contrary conclusion in *Roth*, where obscenity was found to be “outside” the First Amendment, is without justification. . . . The censor is always quick to justify his function in terms that are protective of society. But the First Amendment, written in terms that are absolute, deprives the States of any power to pass on the value, the propriety, or the morality of a particular expression.⁸⁸

⁸⁷ United States v Roth 237 F. 2d 796 (2d. cir., 1956).

⁸⁸ Richard F. Hixson. Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem (Carbondale, IL: Southern Illinois University, 1996) 56-7

Hugo Black agreed in his opinion in Ginzberg v. United States (1966),⁸⁹ saying “Sex is a fact of life. Though I do not suggest any way to solve the problems that may arise from sex or discussions about sex, of one thing I am confident, and that is that federal censorship is not the answer to these problems.”⁹⁰

Whether anti-obscenity or free speech proponents prevail is unclear. One reason is the growing complexity of the issue. Anti-obscenity proponents have argued, most recently, for a more moderate restriction that distinguishes between a two-tiered standard; that is, where the concept of obscenity is based on who has access to the material in question, adults or children.⁹¹

⁸⁹ Ginzberg v. United States 86 S. Ct. 969 (1966).

⁹⁰ Hixson, 61.

⁹¹ Hixson, 77.

Justice Fortas believed that the idea of variable obscenity was constitutional, but he stated in his Ginzberg dissent that the Court must first define the term explicitly. He said, “We must know the extent to which literature or pictures may be less offensive than Roth requires in order to be ‘obscene’ for purposes of a statute confined to youth.”⁹²

Just recently, this theoretical debate was given practical application in Reno v. ACLU (1997).⁹³ The introduction of an entirely new communications medium, the internet, sent Congress clamoring for new legislation to control the access children have to pornography on the web. The resulting legislation, the Communication Decency Act, was immediately

⁹² Hixson, 77.

⁹³ Reno, Attorney General of the United States v. American Civil Liberties Union. 000 U.S. 96-511 (1997).

challenged by the American Civil Liberties Union as being overly restrictive by hindering adult's freedom of speech as well. In a seven-two ruling, the Supreme Court found that the CDA was indeed too "overbroad" and "vague," violating both the First and Fifth Amendments. This decision is only the beginning of the struggle between Congress and the Courts in trying to implement ways to sufficiently regulate the internet.

Conclusions

The idea of completely free speech is a complicated one. While I think that literature and art should have no restrictions, I am opposed to allowing people to injure others physically with their freedom of speech (for example, shouting fire in a crowded theater). I also think that children should have a more restrictive standard than adults; while they are not necessarily

more susceptible to sexual deviance as a result of obscenity, I think a more mature person is needed to fully process the material. I do not mean to include books that are frequently banned in the educational setting. If I were to give adults a freedom of speech right conditional only on the physical harm of others, I would give children a free speech right similar to the test described in Roth and Miller.

Overall, however, I believe that the freedom to speak one's mind is an American protection that helps distinguish between a dictatorship and democracy. Our freedom to speak allows the minority groups within our nation to express their viewpoint without fear of retribution.

Another advantage of free speech is the ability of each individual to choose what is right for oneself. If we allow a more restrictive method of free speech in this country, who

cannot approve of censorship because I do not trust anyone, including myself, to be able to decide what 'needs' to be censored. I do not think that one person, one group, one organization, and especially the government should ever be able to make a decision for such a diverse group of people as the United States. Even after reading many books and court cases on the subject, I still am unable to explicitly define obscenity in a manner that could possibly encompass the morals and values of the entire United States. Rather, I much prefer Voltaire's comment, "I disapprove of what you say but I will defend to the death your right to say it."⁹⁴

The First Amendment freedom of speech battle is hardly over. With the internet confounding the courts and legislatures,

⁹⁴ Hixson, 135.

there will certainly be more litigation in the future. While it is impossible to predict the outcome of future cases, the trend continues to be in line with the current ruling precedent. John Stuart Mill exemplified this view by stating, "If all mankind, minus one, were of one opinion, and only one person was of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."⁹⁵

⁹⁵ Rhoda Thomas Tripp, ed. The International Thesaurus of Quotations (New York: Harpers, 1970) 232.