Indecency and Obscenity

Indecency and obscenity deal with words or images concerning sexuality that are considered so offensive, inappropriate, or harmful, that they should be legally banned or restricted. *Obscenity* is the legal term for content that is judged so offensive because of sexual or excretory content that it must be banned and criminalized. The exclusion of obscenity from protections under the First Amendment to the U.S. Constitution is one of the *de facto* cornerstones of American freedom of expression policy. Many of the major censorship battles of the 19th and 20th centuries were fought under the banner of obscenity. *Indecency* is a newer legal concept, covering material not meeting the obscenity threshold, yet viewed as inappropriate or harmful for minors. *Pornography* is a broader term, referring to writing and images designed primarily to arouse sexual desire; pornography may or may not be determined to fall within the narrower categories of obscenity or indecency.

Obscenity and indecency laws often highlight cultural conflicts. For example, indecency battles in the late 20th and early 21st centuries, involving attempts to restrict what children might see or hear, reflected and arose from fundamentalists' frustration with increasing explicitness of television and the Internet. Those indecency conflicts in turn echoed the obscenity battles that began in the late 19th century, as Anthony Comstock and others sought to impose Victorian morality on increasingly bold and unconventional writers and artists. Changing social mores and the freedom of expression principles of the First Amendment have often, but not always, prevailed over restrictive laws.

Censorship and Obscenity in Western Traditions

Throughout Western civilization, people have been concerned about whether certain literary or artistic content was so inappropriate or harmful that it should be censored. In the Republic, Plato suggested that it was the duty of parents to "expose their children to good material and shield them from bad material" and the duty of the state to do the same for its citizens. American civil liberties lawyer Morris Ernst, who fought many censorship battles in the early 20th century, took the position that censorship is inappropriate because morality is internal, citing Paul's Epistle to Titus in Christian Scriptures: "To the pure, all things are pure; but to the defiled and unbelieving, nothing is pure. Indeed both their minds and their consciousness are defiled" (Titus 1:15).

Sexual content in art and literature was common in antiquity, and strict laws on obscenity are products of the age of printing. In his *Areopagitica*, John Milton explained that he found no

evidence of the suppression of any book in antiquity solely based on obscenity. Prior to the printing revolution of the 1500s, state censorship, if any, generally focused on other areas. As Judge Curtis Bok described it in his 1949 decision in *Commonwealth v. Gordon*,

> Censorship, which is the policeman of decency, whether religious, patriotic, or moral, has had distinct fashions, depending on which great questions were agitating society at the time. During the Middle Ages, when the church was supreme, the focus of suppression was upon heresy and blasphemy. When the State became uppermost, the focus of suppression was upon treason and sedition. The advent of technology made Queen Victoria realize, perhaps subconsciously, that loose morals would threaten the peace of mind necessary to the development of invention and big business; the focus moved to sexual morality.

Modern obscenity laws can be traced to the Puritan demand for strict sexual standards. Initial efforts by Puritans in England to restrain *licentious* and *hurtful* publications failed in 1580. A century later, the case of Charles Sedley of Kent initiated the legal thinking that led to obscenity laws. Sedley, after a long bout of drinking, appeared naked on a tavern balcony in London and pantomimed a series of indecent proposals to the passing public. He was prosecuted in 1663 for breach of the peace, and this theory was later used against printers of allegedly indecent materials. The law's development was slow, with the obscenity theory rejected in 1708. In 1727, however, anti-Catholic parodist Edmund Curll was convicted for what might be considered a modern obscenity offense, based on his book explicitly describing licentious behavior in a convent.

Even after Curll's case, however, obscenity prosecutions were rare and sexually explicit writings were commonplace. For example, John Cleland's book, *Fanny Hill: Memoirs of a Woman of Pleasure*, which many years later became the subject of obscenity prosecutions in the United States, was published and distributed in England in 1749 with only a mild judicial slap on the wrist for the author, and no restraints on its wide and profitable distribution.

Early American Practices

In colonial America, censorship initially focused on theater. It is not clear whether sale of obscene literature was even a crime in America prior to the Revolution. Colonial intellectuals freely read books like Henry Fielding's *Tom Jones*, Laurence Sterne's *Tristram Shandy*, Ovid's *Art of Love*, and the works of François Rabelais. Washington Irving called one of the popular books of the early federal era, Susanna Rowson's *Charlotte Temple*, a case of *licentious ribaldry*—an indication that licentiousness in books was tolerated.

By the early 1800s, however, several states adopted obscenity statutes, other states recognized obscenity as unlawful under common (judge-made) law, and these laws were applied to books and other written content. A few states, like Massachusetts, set up censorship boards and retained draconian censorship standards well into the 20th century (until 1930, the Massachusetts obscenity statute forbade the sale of any book "*containing* obscene, indecent language").

By the mid-1800s, obscenity prosecutions focused on pornography and overt discussion of sexual matters. Prosecutions were generally aimed at works viewed as exploitive but not recognized writers. Massachusetts banned *Fanny Hill* in 1821. Artists and recognized writers were often effectively given more leeway. Some of Walt Whitman's passages in Leaves of Grass shocked American Puritans and English Victorians, and some of those passages were challenged by authorities. However, the controversy only helped Whitman in the public eye and his book was eventually published.

Comstockery in America

In British law, obscenity first developed under common law, but in 1857, Parliament enacted the Obscene Publications Act, also known as Lord Campbell's Act, which provided for seizure and summary disposition of obscene and pornographic materials. The 1868 case of *Regina v. Hicklin*, concerning an anti-Catholic pamphlet, brought that act before the courts. In *Hicklin*, Chief Justice Cockburn of the Queen's Bench held the material within a publication was obscene under the law if it "had a tendency . . . to deprave and corrupt

those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

The *Hicklin* test, which judged works by their possible effect on the most vulnerable, rather than a work's probable audience, favored prosecutions. It focused on the challenged portions, not the entirety of the work. Thus, under *Hicklin*, if any portion of a work was judged to be obscene, the entire work could be outlawed. It created a subjective standard, leaving each judge or juror to their own judgments as to depravity, corruption, and immorality. Finally, it included no consideration of the author's intentions.

After *Hicklin*, more and stricter obscenity laws were enacted throughout the United States, particularly after Anthony Comstock began his censorship efforts. In 1873, Comstock, a moral crusader with narrow Victorian and Puritanical views, founded the New York Society for the Suppression of Vice, which became his platform for encouraging and aiding obscenity prosecutions and other means of policing public morality. In doing so, he followed the model of the Society for the Suppression of Vice formed earlier in London, and he in turn inspired the Watch and Ward Society in Boston. Comstock and his cohorts lobbied for and drafted statutes (popularly known as *Comstock Acts*) that criminalized explicit sexual material. New York passed such a law in 1868, and the federal Comstock Act of 1873 made illegal the delivery by U.S. mail, or by other modes of transportation, of "obscene, lewd, or lascivious" material, as well as materials dealing with birth control and abortion. The law authorized severe penalties and empowered the Post Office to censor and confiscate objectionable materials. Comstock boasted that within a year, several hundred thousands of pounds of books were destroyed.

Comstock societies were not mere advocacy organizations. They acted as a kind of auxiliary police force, actively searching for materials they deemed objectionable and building cases on their own. Comstock became a special agent of the United States Post Office, and he and leaders of other societies for the Suppression of Vice served in a sense as *de facto* prosecuting attorneys. Their threats alone often suppressed publication or distribution of materials they deemed objectionable. The activities of these societies became known as *Comstockery*, and they continued vigorously even after Comstock's death in 1915.

As various Comstock laws were tested in the courts, they were upheld, with U.S. Courts generally following the *Hicklin* precedent from England. In 1896, the U.S. Supreme Court, in *Rosen v. United States*, approved the *Hicklin* test, finding it "quite as liberal as the defendant had any right to demand." Comstock and his cohorts had the green light to actively enforce censorship well in to the early 20th century. As one judge noted, between 1870 and 1930, obscenity law was "on the social anvil."

The first publication of a portion of James Joyce's *Ulysses* in the United States illustrates the climate under Comstockery. A literary journal, *The Little Review*, published two excerpts from *Ulysses*. The New York Society for the Suppression of Vice obtained a copy of the journal, declared it obscene, and effectively forced a criminal prosecution of the two editors of the journal, Margaret Anderson and Jane Heap. Their lawyer, perhaps recognizing the perilous legal standard and social hostility to his clients' publication, argued that the passages were not obscene because they were too difficult to understand. The editors were found guilty, and the two issues of the journal banned.

Emergence of Free Speech Concerns

When American obscenity law first developed in the 19th century, the First Amendment was relatively dormant and undeveloped. When First Amendment defenses were raised in obscenity cases, they were quickly dismissed, with obscenity deemed outside the scope of free speech protection. Even within a First Amendment model hostile to obscenity, however, libertarians began fighting in the early 20th century for more liberality in what was allowed, and meaningful procedural protections. Judge Learned Hand questioned the *Hicklin* test in 1913, noting it reduced the treatment of sex "to the standard of a child's library." Anti-censorship lawyers began litigating vigorous defenses, forcing courts to at least consider evidence of the need for discussion and resources on such important topics as sex education and contraception.

The second *Ulysses* case, litigated in 1933 before U.S. District Judge John Woolsey in New York City, represented a turning point. The literary-minded judge, armed with expert approvals of the work (craftily inserted into the case by Ernst, the publisher's lawyer), cleared the book of obscenity and in so doing propounded a standard quite different from *Hicklin*. Judge Woolsey considered the sincerity and artistry of the author, evaluated the book as a whole, and judged it not according to possible effects on the "least vulnerable" but upon "a person with average sex instincts—what the French would call *l'homme moyen sensuel*." He found nothing in *Ulysses* to constitute "dirt for dirt's sake" and therefore concluded that the book was not obscene. The court of appeals affirmed, similarly finding that the book did not "promote lust or portray filth for its own sake." The victorious publisher, Random House, then published *Ulysses* as part of its Modern Library series and included Judge Woolsey's decision in the front matter of the book for more than 50 years. Many U.S. courts followed Woolsey's standard.

By the mid-20th century, obscenity law was effectively out of control. Standards were unclear, prosecutions were inconsistent, and prejudice and political pressure continued to create chilling effects and influence decisions by judges and juries. Some works that have later become accepted as classics, like Theodore Dreiser's *An American Tragedy* (1925), were found obscene and banned, and other literary landmarks, like Allen Ginsberg's *Howl* (1955), were severely threatened by prosecutions. Comedian Lenny Bruce endured four prosecutions on obscenity charges, and he was ultimately convicted. Throughout the century, civil liberties lawyers, including Ernst, Charles Rembar, Martin Garbus, and Edward de Grazia, regularly defended challenged works, and while they won some and lost some, their challenges raised important literary, policy, and constitutional defenses. Their work chipped away at the absolutism of the Comstock era, and led courts to recognize both procedural and substantive defenses, and the need for a narrower understanding of obscenity with more room for literary freedom. Finally, U.S. Supreme Court Justice Potter Stewart's statement in *Jacobellis v. Ohio* in 1964—"I know it when I see it"—highlighted both the difficulty of line-drawing and the marginal legitimacy of Victorian obscenity law in an increasingly creative and pluralistic society.

Supreme Court Sets Standards

The U.S. Supreme Court began addressing many obscenity cases in the mid-20th century. A key decision in 1952, *Joseph Burstyn Inc. v. Wilson*, recognized that motion pictures were a legitimate artistic medium, with the same First Amendment protection as traditional literature and art. The case involved a New York law that allowed a censor to forbid the commercial showing of a motion picture film that the censor deemed *sacrilegious*. Although the case did not involve obscenity, it led to the demise of state motion picture censorship regimes, which most often relied on obscenity determinations.

In *Roth v. United States*, in 1957, the Supreme Court for the first time tackled a definitional standard for obscenity. The case involved two booksellers convicted of obscenity, under a standard similar to those in the *Ulysses* case, with the works judged as a whole, based on community standards applied to likely readers. Writing for a court divided in several ways, Justice William J. Brennan, Jr. reaffirmed that obscenity fell outside First Amendment protection, since by definition it is "utterly without redeeming social value." At the same time, he recognized that "sex and obscenity are not synonymous" and that "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind throughout the ages." As a result, the "standards for judging obscenity" must "safeguard" publication and receipt of allowable sexual content.

The *Roth* ruling laid bare the difficulties of judging obscenity and the divisions on the court. Justice Brennan defined obscenity as material that dealt with sex in a manner "appealing to prurient interest," meaning "a tendency to excite lustful thoughts" and create "lascivious longings." But lustful thoughts were closely connected to sex, that "great and mysterious motive force in human life." Chief Justice Earl Warren's concurrence warned that obscenity prosecutions could be used to suppress "great art or literature, scientific treatises, or works exciting social controversy," and

"the line dividing the salacious or pornographic from literature or science is not straight or unwavering." Justices William O. Douglas and Hugo Black warned of making legality "turn on the purity of thought which a book or tract instills in the mind of the reader."

Consistent with *Roth's* focus on safeguarding free speech, later decisions created procedural protections against censorship. In *Smith v. California*, in 1959, the Court held that a bookseller who did not know, or has reason to know, of obscene materials on his shelf could not be found guilty of knowingly selling obscene materials. In *Freedman v. Maryland*, in 1965, the court prohibited censorship of films without due process.

The court continued to struggle with defining obscenity. In *Jacobellis v. Ohio*, in 1964, it overturned an obscenity conviction based in showing of an acclaimed French movie. In a trio of cases decided in 1966, including one which overturned a Massachusetts finding that *Fanny Hill* was obscene, the court settled on a three-part test: "the dominant theme of the material taken as a whole" must appeal to prurient interest in sex, it must be "patently offensive" under contemporary community standards, and it must be "utterly without redeeming social value." The new standard failed to provide clarity. Eventually, beginning with its ruling in *Redrup v. New York*, in 1967, the Supreme Court began deciding cases solely based on the tally of a majority of justices, each applying his own standard.

Miller v. California

In 1973, the Supreme Court, with a far more conservative cast due to the appointments of President Richard M. Nixon, created a new obscenity standard in *Miller v. California*. Both *Miller* and its companion case, *Paris Adult Theatre v. Slaton*, dealt with explicit pornography, with sexual activity with genitals prominently displayed. The new standard focused on (a) the average person, applying contemporary community standards, (b) whether that person would find that the work depicts sexual conduct in a patently offensive way, and (c) whether the work, taken as a whole, lacked "serious literary, artistic, political, or scientific value." The two big changes were *community* standards, and the requirement of *serious* social value (a much higher standard than the utter absence of redeeming social value).

The *Paris Adult Theater* case, concerning a theater that admitted only adults and fully warned of the sexual content within, gave the court the opportunity to expand the privacy right recognized in *Stanley v. Georgia*, which in 1969 the court had held that "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his home, what books he may read or what films he may watch." But the court determined instead that the *Miller* standard would apply to all commercial exploitation of pornography.

The *Miller* test was no panacea, however. The very next year, in *Jenkins v. Georgia*, the Supreme Court reversed the determination of courts in Georgia that a mainstream movie, *Carnal Knowledge*, was obscene. The court cautioned that the showing of that film "is simply not the 'public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain' which we said was punishable."

Commissions and Social Science

One might think that obscenity policy could be settled through scientific investigation of what, if any, sexual content, leads to harmful consequences in readers or viewers. But this judgment can only be made by people, and people (perhaps especially those appointed by politicians to fact-finding commissions) tend to bring their own preconceptions to any study. The Commission on Obscenity and Pornography, appointed by President Johnson in 1970, found no harm to society or individuals from the consensual distribution of sexual materials to adults. But a similar commission appointed by President Ronald Reagan, known as the Meese Commission, reached the contrary result in its 1986 report, concluding that the nation was "pervaded by sexual explicitness" that inflicted psychological harm on children and caused violence against women.

Special Concerns and Rules for Children

Supplementing basic obscenity law, U.S. courts have adopted special rules applying to children as recipients or subjects. In *Ginsberg v. New York*, in

1968, the Supreme Court recognized a category of "obscenity as to minors," in which the standard obscenity test is adjusted to material suitable for minors, and lacking value for minors. Even more significantly, in 1982, in *New York v. Ferber*, the Supreme Court recognized a new exception to the First Amendment in the case of child pornography—pornographic works in which children were used as actors. The Court found special protections against child pornography necessary because the creation of such works abused children and needed to be disincentivized. In subsequent years, child pornography became the primary focus of pornography prosecutorial efforts, particularly after general obscenity prosecutions dropped off because of increasing public acceptance of pornography.

Indecency

Indecency was a latecomer on the legal scene, but by the late 20th century, it became the primary tool for those seeking to limit sexual and vulgar content from electronic communications, in the interest of protecting children. The federal Communications Act regulating broadcasting always contained a provision allowing regulation of *indecent* material. The Federal Communications Commission (FCC) enacted rules banning indecent material (material judged inappropriate for children) from the broadcast airwaves when children were likely to be watching. The Supreme Court in 1978 upheld those rules in *Federal Communications Commission v. Pacifica Foundation*, a case involving a radio broadcast of comedian George Carlin's "seven dirty words" routine.

The Internet became an indecency battleground when it opened up to widespread commercial use in the 1990s. In 1996, Congress passed a Communications Decency Act, extending *Pacifica*-like restrictions to Internet content. The American Civil Liberties Union (ACLU) and American Library Association promptly challenged it in court, and the Supreme Court in 1997, in *Reno v. ACLU*, struck down the law as too vague, overly restrictive on a promising new medium, and incompatible with society's "interest in encouraging freedom of expression." (One unrelated law, codified within the Communications Decency Act, Section 230 covering intermediary liability, remained on the books after *Reno*.) A later attempt at indecency regulation of the Internet, the Child Online Protection Act, similarly was held unconstitutional in 2004.

The indecency battleground shifted back to the television set in the early 21st century, as cable television (not covered by the indecency rules because cable signals do not enter homes involuntarily over the airwaves) carried more and more explicit content. Broadcast shows liberalized their own content in response. But fundamentalist groups, including particularly the American Family Association led by Rev. Donald Wildmon, directed thousands of complaints to the FCC. In 2001, that agency enacted rules that defined indecency to cover even fleeting nudity or fleeting expletives. A rift developed between these conservative FCC rules and the content being created by many TV producers (and the appetite of the television audience for more cutting-edge and explicit content).

A number of incidents testing the new limits arose in the early 2000s. One case involved a fleeting showing of the singer Janet Jackson's breast during the halftime show of the 2004 Super Bowl. Another arose out of the musician Bono's extemporaneous utterance, "This is . . . fucking brilliant," upon the announcement in a televised 2003 ceremony that he had won a Golden Globes award. A scene on the TV show NYPD Blue showed the nude buttocks of an adult woman for about seven seconds and for a moment the side of her breast. Yet, another case involved a so-called teenage orgy scene in the show Without a Trace, which involved hardly any nudity, but a lot of suggestiveness. The FCC judged the scene indecent and fined the TV stations that broadcast it during the forbidden pre-10 p.m. time period. Because the program was broadcast at 10 p.m. in the Eastern and Pacific time zones, and 9 p.m. in the Central and Mountain time zones, fines fell only on stations in the less populated middle of the country—a result that highlighted the arbitrary applications of many FCC indecency judgments.

When several of the test cases on fleeting nudity and fleeting expletives were appealed, the restrictive FCC rules were ultimately overturned by the Supreme Court, in *FCC v. Fox*, in 2012, on the grounds that they were unconstitutionally vague. The Court, however, left little guidance for

creating sufficiently clear indecency rules that could be applied to an entertainment culture accustomed to explicit content. The issue reverted to the FCC, but that agency was reluctant to reopen this culturally divisive issue. Even by 2020, there were no new FCC indecency rules, and *Pacifica* remained the sole substantive precedent. Because neither cable TV nor the increasingly popular streaming services like Netflix were covered by the broadcast indecency rules, those rules became increasingly irrelevant to the 21st-century video consumer.

Interplay With Other Laws

Several feminist scholars have sought to cover discrimination or violence against women under the umbrella of obscenity law, but such a law was struck down in 1985 by a circuit court in *American Booksellers Association v. Hudnut*. In the early days of obscenity law, books judged obscene were left unprotected by other laws, including copyright, but under a 1979 precedent, even obscene movies may enjoy copyright protection.

Changes in Technology and Public Acceptance

While moralists (like Comstock) believe that prescripts against obscenity and indecency follow from natural law, the empirical evidence suggests that legal developments follow changes in social outlooks. Liberalization of obscenity law in the late 20th century followed the sexual revolution, represented by the birth control pill, women's liberation, and overall increasing sexual freedom in society and sexual explicitness in popular art. By the 21st century, new technologies like videotapes, digital cameras, and the Internet (including its streaming video services) further dramatically changed acceptance of the taking, viewing, and sharing of explicit sexual content.

Modern Americans have been regularly exposed (from videos and the Internet) to material far more explicit than those involved in landmark cases like *Roth* and *Miller*. The commercial success of the pornography industry, and its infiltration into mainstream businesses like hotels, indicates that many Americans actively consume pornographic content. Law follows social reality, albeit with some delay; and as a result of these realities, obscenity prosecutions have become more infrequent, and convictions, even in conservative communities, usually occur only for the most extreme content, such as content involving children or extreme deviant practices. By the early 21st century, technological and social changes had effectively made adult obscenity obsolete.

Final Thoughts

The changes in obscenity and indecency law in the United States over the centuries illuminate tensions within American society, the difficulties inherent in enacting morality into law, the consequences of censorship, and the influence of social, artistic, and technological currents. While First Amendment freedom of expression principles are key elements in determining obscenity and indecency policy, religious, avant-garde, and majoritarian thinking, and commercial activity, all significantly affect both laws and practices. While battlegrounds (e.g., theater to books to movies), and theories of censorship (obscenity *vs.* indecency), shift over time, the inherent cultural conflict between control and liberality may be inherent in human nature. Obscenity and indecency laws are likely to continue to evolve together with the influences that create and oppose them.

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See also American Civil Liberties Union (ACLU); Censorship; Criminal Justice and Journalism; First Amendment; Free Expression, History of

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