

Problems of Prurience and Principle

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“The line between protected expression and punishable obscenity must be drawn at the limits of a community's tolerance rather than in accordance with the dangerous standards of propriety and taste.”

[Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1029 \(5th Cir.1981\), cert. denied sub nom, Theatres West Inc. v. Holmes, 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 \(1982\)](#)

Our Constitution is a thing that emerged from oppression, resistance, struggle, war, and the experience of a generation of brave men and women in contending with the ever-expanding power of colonial government. During the period of time leading up to and including the American Revolution, our Patriot ancestors were regarded by their British colonial overlords as criminal terrorists. Ben Franklin's often quoted admonition, that the Patriots must hang together or they would surely hang separately, was not a baseless jest but reflected a real fear of the consequences should the Patriots have failed. For their own part, the Patriots thought that they were acting by force only to preserve the civil rights to which they – as Englishmen - were entitled under the Magna Charta, the Common Law, and the unwritten Constitution of England. The British government took extreme measures to suppress the American Insurgency and the scope of these extreme measures is described in much of the text of the Declaration of Independence. As the resistance to unjust laws became more focused, the British reacted with ever more draconian measures to quell the Insurgency and to preserve their control and restore public order in general. Those measures, in turn, incited more bold resistance. It was obvious to the generation of Patriots that founded the American Republic on these shores that the authority and power of government must ever be mistrusted, challenged and limited because, unless the scope of governmental power is held under control, it will expand, eroding personal and social liberty until absolute government is the result. The founders trusted democratic governments no more than monarchies; Their first attempt at national government failed because so little real power was given to the United States. When it became obvious that the Articles of Confederation had failed, a Constitutional Convention was called to write and propose a model for a viable but limited government. But before that document would be ratified, anxious about the power of the new United

States government and affected by the lively dialogue in the Federalist Papers, the people of this Nation demanded and obtained a charter of freedoms (that we now know as the Bill of Rights) that went to the State ratification conventions together with the Constitution itself. The Bill of Rights – and in particular, the First Amendment, protecting freedom of expression, association and religion and prohibiting a state religion – is largely a *counter-majoritarian* instrument – meaning that many of its provisions protect the liberty of individuals *from the power of majorities* that have seized control of government. It seemed to the Founders to be a cornerstone-bedrock principle that individual liberty was a natural right of persons, that a good measure of such liberty promoted the success of a society, that the power of government was antagonistic towards individual liberty, and that individual rights, including expressive rights, must be enduringly protected from government for reasons important both to individuals and society as well. The word “Liberty”, appearing on all U.S. coins, represents the collective historical judgment of this society that the freedoms of its members must be protected *from government*, even from a democratic government whose officers are elected by this society itself, and perhaps most especially from a government that claims good intentions: “The road to Hell is paved with ‘good intentions’”.

But the protections of the Bill of Rights – indeed the words of the First Amendment itself - are nothing more than dried ink on parchment until or unless they are enforced in a court of law.

The confusing and thorny patchwork of conflicting issues and principles and cynical rationalizations which make up obscenity law has largely come about, in my opinion, because the development of obscenity law is an aberration, a deviation from the traditional foundations of American law regarding expression. Insofar as “community standards” work in part to establish the boundary between that expression which is protected by the Constitution and which works may be criminally proscribed, the First Amendment and its countermajoritarian protections for individuals have become significantly attenuated in the context of erotic speech.

The 1956 holding in *Roth v. United States* determined that *some speech* was simply *outside* the protection of the First Amendment - including obscene matter. In taking this position, the Supreme Court looked at history a bit and noted the existence of colonial and early state criminal laws concerning libel and blasphemy and profanity, including those utterances which mocked or satirized sermons. (It is my opinion that such ancient ordinances justify the existence of contemporary obscenity laws about as much as they would justify contemporary blasphemy laws.) In establishing the law of punishable obscenity under the First Amendment, the Supreme Court permitted the jury to determine whether a work, taken as whole, offended “the common conscience of the community”. With respect to “prurience”, the jury instructions at issue and approved in *Roth* permitted the jury to convict if the jury concluded that the matter tended to “*excite lustful thoughts*” or corrupted the audience by “*arousing lustful desires*” in an average person. (The *Roth* Court necessarily thought that these words did not significantly vary in their meaning from the Model Penal Code provisions which based obscenity on a “shameful or morbid” interest in sex. It would seem that the *Roth* court felt that lust itself was shameful or

morbid.). The court also justified the punishment of the obscene by noting that it was approving the proscription of only valueless speech: “All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.” This sentiment was amplified in 1966 in *Memoirs v. Massachusetts* which limited the criminal obscenity sanction to works “utterly without redeeming social value”.

More substantial and enduring harm was done to our personal liberty by the Supreme Court in *Miller v. California* in 1973. We still live with the principle laid down in that case which permits obscenity conviction when the trier of fact determines (a) that the average person *applying contemporary community standards* would find the work, taken as a whole, appeals to the prurient interest, (b) depicts or describes in a patently offensive way, hard core sexual conduct specifically defined in a statute, and (c) the work or thing taken as a whole lacks *serious* literary, artistic, political, or scientific value. (*Miller* approved the exclusion of a work from the protections of the Bill of Rights even if the work had *some* value less than “serious”. But didn’t *Roth* and *Memoirs* tell us that the justification for excluding obscenity from First Amendment protection was that it had *no* value, anyway? What *now* is the basis for excluding matter of *some, but little value* from constitutional protection?)

While some courts have found serious value in nudist publications because they sincerely aim to affect social change, and while there is some considerable hope that erotica emerging from the gay and swinger movements will also enjoy protection for the same reason, the “serious value” fork in the Miller Test may provide little cover or protection to run of the mill pornography presented for entertainment. The heightened barrier of the Value Fork of Miller propels the prurience and patent-offensiveness forks to the main stage in the trial defense of such matter, and take with them to the forefront the “contemporary community standards” that define them.

As late as 1980, the Fifth Circuit in *Penthouse International v. McCauliffe* determined that issues of Penthouse and Oui magazines appealed dominantly to a prurient interest in sex – though they showed little more than attractive young women, sometimes in poses that suggested or simulated masturbation or gay sex – and that, despite the articles, cartoons, satire, and letters, “possessing some literary merit”, the magazines did not possess serious value and were accordingly obscene.

In 1987, the Supreme Court in *Brockett v. Spokane Arcade* revisited the core of obscenity law and nudged it in a positive direction by distancing the law from the criminalization of representations inducing ordinary sexual lust. The court held that “prurience” should not be “read to include ... those materials that appeal to only normal sexual appetites”. This markedly changed the landscape of obscenity law; As a consequence of *Brockett*, in *Goldstein v. Allain* the Mississippi obscenity statute was invalidated as unconstitutionally overbroad because it permitted a finding of guilt if the material appealed to a “lustful” interest in sex; The Louisiana Court of Appeal reversed a conviction in which the jury instructions mentioned “lust” in defining prurience in *State*

v. LeBlang. By 2000, the Third Circuit in *United States v. Loy* was affirming the right of a parolee to view nonobscene adult pornography that was not narrowly related to his rehabilitation, a result that would have been impossible under the former understanding of “prurience”.

The decision in *Brocket* provides a realistic defense for porn materials that appeal to mainstream sexual practices and interests, but it is questionable whether extreme content will benefit much from the contemporary understanding of prurience. It may not be easy to defend much extreme content under a test that relies on communitarian notions of prurience and patent offensiveness, leaving the Value Fork as its best hope: It is difficult or impossible to categorically judge the social value of extreme content, though websites and other materials can frequently be designed in a manner that enhances their social importance and ultimately, their defensibility.

In the end, though, American society must come to terms with a body of law that predicates the lawfulness of expression on the tolerance or acceptance of others – and abandon it. It is my view that the right to publish should never depend on the reaction of society in opposition or acceptance of the publication.