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This selective bibliography on censorship and the nature of obscenity lists 19 lower and Supreme Court decisions (1727-1967) and 21 articles published in law reviews from 1938 through 1967. The Judges' opinions in the court cases are quoted to suggest the direction in which the courts are moving in regard to the interpretation of obscenity. (SW)

bulletin

CENSORSHIP AND THE ENGLISH TEACHER

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COURT DECISIONS AND LEGAL ARGUMENTS ABOUT CENSORSHIP AND THE NATURE OF OBSCENITY

English teachers interested in the multi-faceted problems of censorship and the nature of obscenity should explore the areas of (1) court decisions, both lower and Supreme Court, and (2) legal arguments in various law reviews. Readers interested in greater detail and longer bibliographies than that given below should consult books by Ernst, Gardiner, Hogan and Frank, Hutchinson, and Rembar (cited elsewhere in this issue) or the extensive study of James C.N. Paul and Murray Schwartz, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL (NY: Free Press of Glencoe, 1961), both for the text and some remarkably extensive appendices (Appendix I has nearly 80 pages of court decisions and legal documentation for the text; Appendix II is an extensive bibliography; and Appendix III lists and briefly annotates significant court decisions). Both the court decisions and law articles listed below are, of course, highly selective. The brief quotations for the Judges' opinions may suggest to the reader the movement of the courts in their interpretations of those two key questions--What Is Obscene? and How Far Must The Court Go In Protecting The Public From Material Which Is Obscene Or Supposedly Obscene?

COURT DECISIONS:

1727--DOMINUS REX v. CURL (2 Str. 789, 93 Eng. Rep.) Curl had written VENUS IN THE CLOISTER or THE NUN IN HER SMOCK. The court ruled that an obscene book can be punished as a common law crime. "Destroying the (morality) is destroying the peace of the Government, for government is no more than publick order which is morality. My Lord Chief Justice Hale used to say, Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offence of a publick nature."

1821--COMMONWEALTH v. PETER HOLMES (16 Mass. 335) Conviction of Holmes for publishing a "lewd and obscene print, contained in a certain book entitled MEMOIRS OF A WOMAN OF PLEASURE, and also for publishing the same book."

1867--THE QUEEN v. HICKLIN (3, Q.B., 359) Henry Scott, a member of an anti-Catholic group, sold copies of a pamphlet called THE CONFESSIONAL UNMASKED: SHOWING THE DEPRAVITY OF THE ROMISH PRIESTHOOD, THE INQUITY OF THE CONFESSIONAL, AND THE QUESTIONS PUT TO FEMALES IN CONFESSION. In this famous decision, Judge Cockburn announced a test of obscenity which was to persist for nearly 100 years. ". . . I think the test of obscenity is this, 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."

1896 and 1897--ANDREWS v. UNITED STATES (162, U.S. 420) and PRICE v. UNITED STATES (165, U.S. 311) Two of the many cases tried under the omnibus and rigid Comstock Act of 1873.

1913--UNITED STATES v. KENNERLY (209 Fed. 119, S.D.N.Y.) Kennerly published a novel entitled HAGAR REVELLY, a realistic novel of a sensuous young woman. Judge Learned Hand, using the test of obscenity in the HICKLIN case, found the novel obscene, but Hand added an important note, ". . . I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, 'obscene, lewd, or lascivious.' I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library

in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature."

1922--HALSEY v. NEW YORK SOCIETY FOR SUPPRESSION OF VICE (234 N.Y. 1, 136 N.E. 219) Halsey sold a copy of Gautier's MADEMOISELLE DE MAUPIN to John Sumner, Anthony Comstock's successor in the New York Society for Suppression of Vice. Sumner charged the book was obscene as a whole and for specific passages. Judge Andrews wrote, "No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even the BIBLE. The book, however, must be considered broadly, as a whole. So considered, critical opinion is divided."

1930 and 1931--UNITED STATES v. DENNETT (39 F. 2d 564, 2d Cir.); UNITED STATES v. ONE OBSCENE BOOK ENTITLED MARRIED LOVE (48 F. 2d 821, S.D.N.Y.); and UNITED STATES v. ONE BOOK, ENTITLED CONTRACEPTION, BY MARIE C. STOPES (51 F. 2d 525, S.D.N.Y.) All 3 cases found for the defendants and all concerned pamphlets on sex instruction.

1933 and 1934--UNITED STATES v. ONE BOOK CALLED ULYSSES (5 F. Supp. 182, S.D.N.Y.) and UNITED STATES v. ONE BOOK ENTITLED ULYSSES BY JAMES JOYCE (72 F. 2d 705, 2d Cir.) The famous ULYSSES decisions, the former by Judge Woolsey and the latter by Judge Augustus N. Hand. Woolsey, after studying the various tests of obscenity and after consulting 2 friends whose opinions of life and literature he valued, wrote, "I was interested to find that they both agreed with my opinion: That reading ULYSSES in its entirety, as a book must be read on such a test as this, did not tend to excite sexual impulses or lustful thoughts, but that its net effect on them was only that of a somewhat tragic and very powerful commentary on the inner lives of men and women. It is only with the normal person that the law is concerned. Such a test as I have described, therefore, is the only proper test of obscenity in the case of a book like ULYSSES which is a sincere and serious attempt to devise a new literary method for the observation and description of mankind." Note Woolsey's extension of the test laid down by Andrews in the HALSEY decision.

1945--COMMONWEALTH v. ISENSTADT (62 N.E. 2d 840) Isenstadt was convicted of selling Lillian Smith's STRANGE FRUIT in Massachusetts since, as Judge Qua noted in his decision, the incidents in the book ". . . had a strong tendency to maintain a salacious interest in the reader's mind and to whet his appetite for the next major episode," and the book ". . . even in this post-Victorian era, would tend to promote lascivious thoughts and to arouse lustful desire in the minds of substantial numbers of that public into whose hands this book, obviously intended for general sale, is likely to fall. . ."

1949--COMMONWEALTH v. GORDON, ET. AL. (66 D.&C. 101) Defendents Gordon et.al. were acquited of the charge of selling obscene books (among them Farrell's STUDS LONIGAN TRILOGY, Faulkner's SANCTUARY and WILD PALMS, Caldwell's GOD'S LITTLE ACRE, and Willingham's END AS A MAN). Judge Curtis Bok wrote a lengthy opinion, giving background of tastes and ideas which had been censorable and suggesting a test for obscenity based on its clear and present danger. But Bok adds, "Who can define the clear and present danger to the community that arises from reading a book?. . . How is it possible to say that reading a certain book is bound to make people behave in a way that is socially undesirable?"

1949--ROTH v. GOLDMAN (172 F. 2d 788, 2d Cir.) A long and readable concurring opinion by Judge Frank arguing that there is no provable need for obscenity statutes.

1953--BESIG v. UNITED STATES (208 F. 2d 142, 9th Cir.) Besig, owner of two books by Henry Miller TROPIC OF CANCER and TROPIC OF CAPRICORN seized by the Customs

people, appealed. Judge Stephens affirmed the action of the Bureau of Customs, in part because "Practically everything that the world loosely regards as sin is detailed in the vivid, lurid, salacious language of smut, prostitution, and dirt . . . The author conducts the reader through sex orgies and perversions of the sex organs, and always in the debased language of the bawdy house. Nothing has the grace of purity or goodness."

1957--ALFRED E. BUTLER v. STATE OF MICHIGAN (352 U.S. 380 2d 412) A Michigan statute codifying the Hicklin decision of Judge Cockburn was overruled by the Supreme Court of the United States. Justice Frankfurter held that the statute violated the 14th amendment and he further commented, "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."

1957--ROTH v. UNITED STATES (354 U.S. 476, 2d 1498) Justice Brennan commented on the previous court tests of obscenity and suggested a test, ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

1959 and 1960--GROVE PRESS, INC. v. ROBERT K. CHRISTENBERRY (175 F. Supp. 488) and GROVE PRESS, INC. v. ROBERT K. CHRISTENBERRY (276 F. 2d 433) Two court cases concerning the action of Christenberry (Postmaster of the City of New York and acting for the Postmaster General of the United States) in denying the U.S. mails to the Grove Press unexpurgated edition of D.H. Lawrence's LADY CHATTERLY'S LOVER. The courts criticized the Postal System for using the outdated practice of isolating passages as the test of obscenity, rather than taking the work as an entity.

1964--NICO JACOBELLIS v. OHIO (378 U.S. 184, 2d 793) Justices Brennan and Goldberg "stated that (1) the constitutional test for obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest; (2) under this test the community standards are a national standard; (3) in applying this test the Supreme Court must make an independent constitutional judgment on the facts of each case, and cannot merely decide whether there is substantial evidence to support a finding that certain material is obscene. . ."

1964--GROVE PRESS v. GERSTEIN (378 U.S. 577) The Supreme Court found TROPIC OF CANCER not obscene.

1966--A BOOK NAMED JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE v. ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS (383 U.S. 413, 1) Fifty-five pages of material, all worth reading, on a successful appeal of an earlier conviction in Massachusetts. Justice Brennan's opinion reaffirmed the Roth decision test of obscenity, and noted "Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

1967--RALPH GINZBURG v. UNITED STATES (383 U.S. 463, 31) Ginzburg was convicted of using the mail to distribute obscene literature by a Pennsylvania District Court and the conviction was upheld by the Supreme Court, not because the material was (or was not) obscene, but rather because "the defendants engaged in the sordid business of pandering, that is, the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of defendants' customers. . . The 'leer of the sensualist' also permeates the advertising for the three publications." The case is interesting for both the decision of the majority of 5 and the dissenting opinions of Justices Black (a good discussion of the problems involved in the current tests of obscenity), Douglas, Harlan, and Stewart.

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