

Definitions

Obscenity - from Latin, *obscenus* - *not said*.

Beyond First Amendment protection.

*Obscenity includes pornography, but also includes **blasphemy** and **profanity**.*

Pornography - from Greek *pornographos* - *writing about prostitutes*. Material whose **primary purpose is to cause sexual arousal**; *not all pornography is obscene.*

Obscenity Originally Restricted to Blasphemy

First known pornography prosecution, *Rex v. Read* (England, 1708) involved author of *The Fifteen Plagues of a Maidenhead*

Acquitted. Court found book "bawdy stuff," but not criminal because it did not libel either the King or Religion.

Obscenity Originally Restricted to Blasphemy

First known successful pornography prosecution, *Rex v. Curl* (England, 1727) involved author of *Venus in her Cloister, or the Nun in her Smock*

Court found Curl guilty of “offence to religion” as the action involved clergy in sexual situations that mocked religious rituals.

Obscenity Originally Restricted to Blasphemy

Massachusetts had only colonial statute condemning what today might be called pornography, but law required works be “in imitation of preaching or any other part of divine worship.”

Changes law in 1835 to replace religious requirement with “tending to corruption of the morals of youth.”

Burstyn, Inc v. Wilson (1952)

Involved “The Miracle” by Roberto Rossellini, in which a man claims to be St. Joseph and impregnates a woman who believes she is Mary.

Catholic Church condemns as blasphemous, 100s of letters sent to NY State Board of Regents protesting exhibition, which the Board then bans.

***Burstyn v. Wilson* (1952)**

Supreme Court finds that provisions of the New York Education Law allowing a censor to forbid the commercial showing of any non-licensed motion picture film, or revoke or deny the license of a film deemed to be "sacrilegious," was a "restraint on freedom of speech."

Arguments against Pornography

Porn focuses on body, not complete person

Sexual gratification outside marriage is wrong (or illegal)

Pornography undermines gender equality

Pornography increases sex crimes and/or reduces sympathy for victims

Porn contributes to a more vulgar society

Porn harms “performers”

Arguments against Censorship

Pornography is a harmless outlet for exploring sexual fantasies

No one has moral authority to determine what may be perverted or “prurient”

No proof that pornography increases sex crimes

Problem of defining pornography to include sexual discourse serving other values

Queen v. Hicklin (1868)

“whether the tendency of 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.”

Comstock Act of 1873

Made it illegal to send any "obscene, lewd, and/or lascivious" materials through the mail, including contraceptive devices & information.

Used to ban works by Gustav Flaubert, Honore Balzac, James Joyce, D.H. Lawrence, Henry Miller, and Leon Tolstoy

Comstock Act of 1873

Ban on contraceptives devices and info ended by appellate court decision (*U.S. v. One Package of Japanese Pessaries*, 2nd Circuit, 1936)

Comstock standards in place until modified by *Roth v. U.S.* in 1957

Butler v. State of Michigan (1957)

Michigan made it a misdemeanor to sell or distribute to the general reading public any book containing obscene language "tending to the corruption of the morals of youth"

Court found that it violated the Due Process Clause because of significant overbreadth.

Butler v. State of Michigan (1957)

According to Justice Frankfurter in *Butler*, the effect of the *Hicklin* test was "to reduce the adult population of the United States to reading only what is fit for children."

Roth v. US (1957)

- a. "whether to the average person, applying contemporary community standards,**
- b. the dominant theme of the material, taken as a whole, appeals to the prurient interests,"**
- c. the work is without redeeming social value."**

Memoirs of a Woman of Pleasure (Fanny Hill) v. Mass. (1966)

- 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.**

Miller v. California (1973)

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,**
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and**
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.**

Prior Restraint on Obscenity

Must meet all three requirements:

- 1. the burden of instituting judicial proceedings, and of proving that the material is unprotected, rests on the censor;**
- 2. any prior restraint can be imposed only for a specified brief period and only to preserve the status quo;**
- 3. A prompt final judicial decision on the merits must be assured.**

Freedom v. Maryland, [380 U.S. 51](#) (1965)

Young v. American Mini Theaters (1976)

Court upheld a Detroit zoning ordinance that forbade adult motion picture theaters from locating within 1,000 feet of any two other regulated uses or within 500 feet of residential areas.

Regulated uses referred to 10 different kinds of establishments in addition to adult theaters.

Child Pornography Prevention Act prohibited

- A.** "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."
- B.** "any sexually explicit image that was advertised, promoted, presented, described, or distributed in such a manner that conveys the impression it depicts a minor engaging in sexually explicit conduct."