Obscenity:
Perverting the First Amendment

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THE FREEDOM OF EXPRESSION

Today, it is not uncommon to hear Americans claim a right to freedom of expression when defending everything from homosexuality to pornography to abortion. These Americans believe this right is given to them by the First Amendment of the United States Constitution.

Like the phrase, "separation of church and state," however, "freedom of expression" is not found in the text of the First Amendment which reads:

> *Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances.*

Notwithstanding the absence of "freedom of expression" from the constitutional text, the United States Supreme Court uses the term in almost every First Amendment case involving the freedom of speech and the freedom of the press. In doing so, the Court has perverted the original meaning of those First Amendment guarantees.

The history of the Court's use of "freedom of expression" is recent and explosive. Until 1945, "freedom of expression," "free expression," and "liberty of expression" were used sparingly - only fourteen times - and, thus, without significant impact. Between 1945 and 1965, one or the other of the three terms was used in approximately sixty cases. Then, beginning in 1965, the number jumped dramatically so that by the end of 1995 the Court had invoked the term (or one of its variants) in well over two hundred cases. From 1970 to 1974 alone, the phrases were used in more than sixty Court opinions.

More important than the increased frequency of use was the employment of the term as an analytical tool to determine if the First Amendment applied to a case and, if so, the level of constitutional protection to be afforded the activity. While the term was not originally utilized in that way, the seeds for its eventual use were planted in the 1920's.

Original Uses

The phrase, "free expression" popped up first, in two cases - one in 1871 and the other in 1912. Neither case involved a First Amendment or related issue. See *Virginia v. West Virginia,* 78 U.S. 39 (1870) and *Hyde v. United States,* 225 U.S. 347 (1912).

In 1920, "free expression" found its way into a First Amendment case, but only in a footnote and only as a quote in a report purporting to state the position of the United States Attorney General regarding free speech in war time. *Gilbert v. Minnesota,* 254 U.S. 325, 340, n.4 (1920) (Brandeis, J. dissenting).

One year later, "freedom of expression" was used by Justice Louis D. Brandeis in a dissenting opinion, but only to describe a First Amendment right:

> *... [T]o carry newspapers generally at a sixth of the cost of the service and to deny that*

> *service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge serious freedom of expression. Milwaukee Social Democratic Publishing Co. v. Burleson,* 225 U.S. 407, 431 (1921).

The constitutional protection that Justice Brandeis described here was, in reality, protection afforded by the freedom of the press. See Titus, *The Freedom of the Press: An Introduction*. But he offered no explanation why he preferred "freedom of expression," over the constitutional text.

Four years later, Justice Edward T. Sanford introduced "liberty of expression" and, for the first time, the new term appeared to influence the outcome of a First Amendment case. "The precise question," wrote Justice Sanford, "and only question presented ... is whether the statute ... deprived the defendant of his liberty of expression ...." *Gitlow v. New York*, 268 U.S. 652, 664 (1925).

The statute in question was a New York law making it a felony to publish, edit, issue, circulate, sell, distribute, or display any writing "advocating, advising, or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means ..." *Id.,* 268 U.S. at 655.

Justice Sanford expressly assumed that the Fourteenth Amendment applied to the States the First Amendment protections of "freedom of speech and of the press," but he engaged in an analysis that did not even remotely relate to the historic purpose of those two clauses. *Id.,* 268 U.S. at 666-70.

At issue, Justice Sanford proclaimed, was whether the State had the right of "self-preservation." Having so established that it did and that such a right was of the highest priority among a state's police powers, the claim of right was quickly dismissed.

Had Justice Sanford engaged in an historical analysis of the meaning of the freedom of speech, he would have found that the defendant had been convicted for having advocated a political philosophy similar to that of America's founders and for violating a statute akin to the historically discredited laws prohibiting "stirring up sedition." See Titus, *The Freedom of Speech: An Introduction*.

What the term, "liberty of expression," enabled the Court to do is to give lip service to the constitutional text, but not be bound by it. Later the term would give the Court license to substitute what it thought ought to be protected by the First Amendment without regard to its original meaning.

Current Use

For years, the Court stated that "the right of free speech ... did not include the lewd and obscene, the profane, the libelous, and the insulting or fighting words ...." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

By 1957, however, the Court had changed its mind. It extended First Amendment protection to writings that at common law were obscene, imposing a newly minted constitutional definition of pornography and imposing it upon all the states. *Roth v. United States; Alberts v. California,* 354 U.S. 476 (1957).

Second, beginning in 1964 it initiated a transformation of libel law so that, by 1974, the Court had extended the First Amendment in such a way that the common law of libel had been thoroughly constitutionalized. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Finally, beginning in 1971 it undermined the traditional assumption that the First Amendment did not protect the lewd and the profane. *Cohen* v. *California*, 403 U.S. 15 (1971).

None of these developments would have been possible if the Court had not abandoned the historic textual meaning of the freedom of speech and substituted its own notions of freedom of expression for the original meaning of the constitution.

Not until recently has the Court awakened to this truth, but it has yet to give up in its quest for First Amendment legitimacy for freedom of expression. A case in point is *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 115 L.Ed 2d 504 (1991).

In *Barnes,* two "adult entertainment" businesses - one appropriately named "The Kitty Kat Lounge" - and several nude dancers employed by them sought an injunction against the enforcement of a state "public indecency law," claiming that it violated "the First Amendment's guarantee of freedom of expression." The Court ruled five to four in favor of the state, thereby rejecting the constitutional claim.

Writing for a plurality of three, Chief Justice William Rehnquist conceded that "nude dancing performed for entertainment is expression protected by the First Amendment." In support, the Chief Justice cited "[s]everal of our cases [which] contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment." *Id.*, 115 L.Ed 2d at 510-11.

While the Chief Justice was willing to give nude dancing an aura of constitutional legitimacy, he was unwilling to give it much constitutional protection. He concluded that nude dancing was only "within the outer perimeters of the First Amendment," not entitled to as much constitutional safety as activities lying at its core. *Id.*

Thus he and his two colleagues decided that the State of Indiana could insist that the dancers at the Kitty Kat lounge keep on their G-strings and pasties solely for the purpose of maintaining public order and moral decency. *Id.*, 115 L.Ed 2d at 513.

Concurring Justice David Souter was not so sure. He went along, he wrote, only because he thought that the kind of nude dancing at the Kitty Kat lounge could be linked to "prostitution, sexual assault, and other criminal activity." *Id.*, 115 L.Ed 2d at 522.

Presumably, Justice Souter required this "higher standard" because he believed that nude dancing generally was closer to the core of the First Amendment:

> *...[D]ancing as a performance directed to an actual or hypothetical audience gives expression ... to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed is eroticism ... [and] when nudity is combined with expressive*

> *activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a strip-tease, are integrated into the dance and its expressive function. Id.,* 115 L.Ed 2d at 521.

Justice Souter's eloquent peroration on the expressive virtues of dancing in the nude got him into trouble with dissenting Justice Byron White who claimed that the state opposed the dancers in this case because the Kitty Kat lounge, so to speak, was on the "wrong side of the tracks":

> *Petitioners ... state that the evils sought to be avoided by applying the statute in this case would not obtain in the case of theatrical productions, such as Salome or Hair. Id.,* 115 L.Ed 2d at 527.

In effect, Justice White ruled that if the state was not enforcing its public indecency law against "high art," it could not do so against the Kitty Kat dancers either.

Only Justice Antonin Scalia did not get caught up in these niceties. He found no use for the kind of threshold expressive conduct analysis engaged in by his eight colleagues:

> *... [V]irtually every law prohibits conduct, and virtually any prohibited conduct can be performed for an expressive purpose .... It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law pass normal First Amendment scrutiny. Id.,* 115 L.Ed 2d at 518.

While Justice Scalia' s appeal was to the illogic of freedom of expression as a First Amendment analytical tool, his reasoning led him back to the historic purpose of the freedom of press clause, *i.e.*, to prohibit government editorial censorship. See Titus, *The Freedom of the Press: An Introduction.* He decided that the Indiana law was constitutional because "suppressing communication was not the object of the regulation of the conduct." *Id.,* 115 L.Ed 2d at 518-19.

No doubt, Justice Scalia came to this understanding because he, and he alone in *Barnes,* recalled the constitutional text:

> *The First Amendment explicitly protects the freedom of speech [and] of the press - oral and written speech - not expressive conduct. Id.,* 115 L.Ed 2d at 518.

Future Use

The future of freedom of expression in First Amendment jurisprudence depends primarily on the willingness of the Court to allow the constitutional text to govern its decisions. So far there is little indication that even the conservative wing of the court is inclined in that direction. For example, Chief Justice Rehnquist admitted in *Barnes* that "freedom of expression" was of little use to the Court in its effort to sort out those "expressive" activities that deserved First Amendment protection from those that do not. *Id.,* 115 L.Ed 2d at 514. To do so would lead to the repudiation of a number of prior court opinions which he and others are loathe to do.

Moreover, if the Court should make a move in the First Amendment area, it would undermine a

number of precedents in other areas, including abortion. For as Justice Hugo Black wrote, in his prophetic dissent in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965):

> *One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words more or less restricted in meaning. Id.,* 381 U.S. at 509.

In Griswold, the issue was whether there existed a constitutional "right of privacy." Justice Black recognized, however, that to find such a right would open the door to other rights found nowhere in the constitutional text:

> *Privacy is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than [those found in the text]. I have expressed the view many times that First Amendment freedoms, for example, have suffered from failure of courts to stick to the simple language of the First Amendment in construing it, instead of involving multitudes of words substituted for those the Framers used. Id.,* 381 U.S. at 509.

What Justice Black called for in Griswold was a return to the constitution as Chief Justice John Marshall understood it in *Marbury v. Madison,* 1 Cranch 137 (1803) - a written instrument to govern the court. Indeed, the Chief Justice staked the very legitimacy of judicial review upon the self-evident fact that a written constitution is law, because it was written.

To disregard what is written, the court has undermined its own legitimacy and will continue to do so until it chooses to return to the true legacy of judicial review. The First Amendment would be a good place to start. In the next several issues of the Forecast we will outline a constitutional blueprint for a return to the constitutional text in a number of areas where "freedom of expression" has led the court astray.

PERVERTING THE FIRST AMENDMENT

On March 9, 1942, a unanimous United States Supreme Court pronounced that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Among these classes, the Court observed, was "the lewd and the obscene ...." *Chaplinsky v. New Hampshire,* 315 U.S. 571-72 (1942).

Fifteen years later, another unanimous Court - including three justices who were on the Court in 1942 - concluded otherwise. In *Roth v. United States,* 354 U.S. 476 (1957), the Court ruled for the first time in history that the Constitution required that obscenity be defined in such a way as to protect First Amendment freedoms.

Prior to *Roth,* the Court had always left the definition of obscenity either to the common law or to statute. In *Swearingen v. United States,* 161 U.S. 446 (1896), for example, the Court decided that the question of the meaning of the words, "obscene, lewd or lascivious" in a federal statute was "the same ... as is given them at common law in prosecutions for obscene libel." *Id.*, 161 U.S. at 451. At common law the three terms meant "anything ... calculated to corrupt or debauch the mind and

morals of those into whose hands it might fall." *Id.*

Thirty-six years later, in 1932, the question arose whether the word, "filthy," which had been added to the federal anti-obscenity statute, meant anything in addition to what had been earlier stated in *Swearingen.* Justice Louis D. Brandeis concluded in the affirmative stating that "filthy" was a popular term that needed no further defining and clearly applied to letters containing "foul language," that is, "coarse, vulgar, disgusting, and indecent" words "plainly related to sexual matters." *United States v. Limehouse,* 285 U.S. 424, 425, 427 (1932).

The language of the federal statute remained unchanged when it came before the court once again in 1957 in the *Roth* case. This time, however, the Court could not keep its constitutional hands off the words and their meaning.

Writing for a solid majority, Justice William J. Brennan went out of his way to rule that one common law definition of obscenity did not meet the test of the First Amendment. That definition was the one laid down by the English courts in *Regina v. Hicklin* [1868] LR 3 QB 360. The *Hicklin* test provided that a book or other matter could be found to be obscene if any passage in it was calculated to debauch the mind and morals of "particularly susceptible persons." *Roth, supra,* 354 U.S. at 488-89.

This definition, Brennan opined, "must be rejected as unconstitutionally restrictive of the freedoms of speech and press." Those constitutional freedoms, he ruled, demanded a higher test for obscenity, namely, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.,* 354 U.S. at 489.

In laying out this brand new requirement, Justice Brennan referred neither to the constitutional text nor the First Amendment's history. To the contrary, he had, just a few pages previously, admitted that the common law definition of obscenity had peacefully coexisted alongside the First Amendment, and comparable state constitutional protections, for nearly two centuries. Indeed, he had, on the basis of this evidence, even reaffirmed the *Chaplinsky* dictum "that obscenity ... was outside the protection intended for speech and press." *Id.,* 354 U.S. at 483.

Had Justice Brennan stuck with this historical precedent, he could not have justified his new ruling that the First Amendment demanded a definition of obscenity from which no legislature could deviate. He was enabled to do so by embracing a pragmatic philosophy of free speech and press that had first been suggested by the Court in the *Chaplinsky* opinion itself.

Opening the Marketplace

Although the *Chaplinsky* Court had denied all constitutional protection for obscenity, Justice Murphy had not relied upon either case precedent or constitutional text for his conclusion. Rather, he had relied upon the works of Zechariah Chafee, a law professor at Harvard, who had crafted a new constitutional approach to the First Amendment based upon an evolutionary view of the constitution, that enabled him to embrace the pragmatic "philosophical speculations of John Stuart Mill." Chafee, *Freedom of Speech* 32 (1920).

From Chafee' s works Justice Murphy crafted a brand new rationale for the constitutional exemption for obscenity. He wrote, citing Chafee:

> *It has been observed that such utterances (the lewd and the obscene) are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Chaplinsky, supra,* 315 U.S. at 572.

In his 1957 *Roth* opinion, Justice Brennan adopted this reasoning as the foundation for crafting his new constitutional definition of obscenity. If the First Amendment is designed to promote the "unfettered interchange of ideas," Brennan asserted, then all ideas "even (those) with the slightest redeeming social importance ... have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." *Roth, supra,* 354 U.S. at 484.

This balancing approach led Justice Brennan to conclude that the First Amendment requires a definition of obscenity so as not to exclude from public discourse "portrayals of sex ... in art, literature and scientific works [that address] vital problems of human interest and public concern." *Id.*, 354 U.S. at 487.

Thus, Justice Brennan forged a new role for the Court to supervise and control a First Amendment marketplace of ideas. The Court would define obscenity in order to make sure that no ideas of "social importance" would be excluded from the free marketplace of ideas. *Id.,* 354 U.S. at 484, 484. Second, the Court would make sure that the constitutional definition was correctly applied in each case. *Id.,* 354 U.S. at 489-90.

The *Roth* decision opened a floodgate of litigation until the Court became mired in an avalanche of pornography. For the next few years the justices sought to refine the constitutional definition of obscenity, and conscientiously to make sure that only constitutionally defined obscenity was being excluded from the constitutional marketplace.

In 1964 - just seven years after *Roth* - the Court found itself in complete disarray. In *Jacobellis v. Ohio,* 378 U.S. 184 (1964), the majority of six in *Roth* had melted to two, Justice Brennan and Justice Goldberg.

While two others on the Court continued to support the basic *Roth* approach, Justices Black and Douglas persisted, sniping at the Court's new role as "super-censor" and arguing for absolute protection for obscenity. *Id.,* 378 U.S. at 196. Chief Justice Earl Warren and Justice Tom Clark began to have second thoughts. *Id.*, 378 U.S. at 199-203. And Justice John Marshall Harlan kept to his idiosyncratic ways, refusing to apply the new definition to state obscenity prosecutions. *Id.*, 378 U.S. at 203-04.

As for the constitutional definition of obscenity, Justice Brennan insisted that it must be understood in such a way as to exclude only that which is "utterly without social importance":

> *It follows that material dealing with sex in a manner that advocates ideas ... or that has literary or scientific or artistic value or any other form of social importance, may not be*

branded as obscenity and denied constitutional protection. Id., 378 U.S. at 191.

The Chief Justice refused to put this new gloss on the *Roth* definition, asserting that if something met the *Roth* test of appeal to the prurient interests, then by definition it was of no social importance. *Id.,* 378 U.S. at 199-200.

Justice Brennan also insisted that whether or not matter appealed to the prurient interest was determined by a "national standard," not to be varied from local community to local community: *It is, after all, a national Constitution we are expounding. Id.,* 378 U.S. at 192-95.

Again, the Chief Justice demurred. *Roth* meant, he wrote, "community standards - not a national standard" which, he opined, was nonexistent. *Id.,* 378 U.S. at 200. As if to refute this very point, Justice Brennan adamantly defended the right and the duty of the Court to decide each case on the law and the facts. He rejected the notion that the Court's review would be limited to whether the trial judge or jury had sufficient evidence to justify a finding of obscenity. Such a standard would be an "abnegation of judicial supervision ... inconsistent with our duty to uphold the constitutional guarantees." *Id.,* 378 U.S. 187-88.

Having viewed the film, "The Lovers," which was the "matter" before the court, Justice Brennan and his concurring colleague concluded that it was not obscene. *Id.,* 378 U.S. 196. Apparently Justices White and Stewart also came to the same conclusion, for both of them concurred, Justice White without opinion and Justice Stewart with one of the most memorable opinions in the annals of constitutional adjudication.

Justice Stewart, concurred, he explained, because - while he could not define obscenity other than that it was "hardcore pornography" - *I shall not attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that. Id.,* 378 U.S. at 197.

Freeing the Marketplace

With such bedlam infecting the *Roth* approach, it did not take long for the pornography entrepreneurs to exploit the Court's new definition of obscenity. Ralph Ginzburg put out three publications, EROS, Liaison, and The Housewife's Handbook on Selective Promiscuity. Each was explicitly pornographic, but strategically sprinkled with scientific discussions of sex and political commentaries on sex education and gender equality. *Ginzburg v. United States,* 383 U.S. 463 (1966).

Justice Brennan, however, was not fooled. He agreed that the three publications did not fit the definition of obscenity, but concluded that the context in which they were marketed placed them in the "sordid business of pandering" and, consequently, outside the marketplace of ideas. In support of his conclusion, Justice Brennan noted that "EROS early sought mailing privileges from the postmasters of Intercourse and Blue Ball, Pennsylvania ... only for the value their names would have in furthering ... efforts to sell the ... publications on the basis of salacious appeal." *Id.,* 383 U.S. at 467.

Overall, Justice Brennan observed, none of the marketing strategies were designed to appeal to the intellect, but only to erotically arouse. *Id.,* 383 U.S. at 470. Thus, they lost whatever constitutional protection that they might have enjoyed had they been marketed differently.

Likewise, Justice Brennan ruled that, some materials not otherwise obscene, could not be marketed to minors. In *Ginsberg v. New York,* 390 U.S. 629 (1968), the Court upheld convictions of a man and his wife for selling "girlie magazines" to minors. This time Justice Brennan stressed the interest of parents and of society in the proper moral upbringing of children.

This ruling set off another protest from Justices Black and Douglas who took the opportunity to rail against Anthony Comstock and his turn-of-the-century efforts to save America's youth from "Traps of Satan." *Id.,* 390 U.S. 650-59.

Beginning with their opinions in Roth, Justices Black and Douglas had mapped out a marketplace of ideas completely free from any censorship. They based their position upon the ground that the First Amendment guaranteed "freedom of expression" and that obscenity prosecutions were concerned only with thoughts, not with antisocial conduct. *Roth, supra,* 354 U.S. at 512-13.

Neither were deterred from the lack of historical or textual support for their position, nor by their having agreed in 1942 that the First Amendment affords no protection to obscenity. "The question remains," Justice Douglas wrote, "what is the constitutional test of obscenity?" *Id.*, 354 U.S. at 509.

They contended that the constitution required complete and absolute "freedom of thought":

> *The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. Id.,* 354 U.S. at 513.

This laissez-faire approach led Justices Black and Douglas to dissent from every application of Roth, unless it favored acquittal, and to reject Justice Brennan's efforts to stop market pandering and exploitation of youth.

Justices Black and Douglas never succeeded in persuading any of their colleagues until Justices Brennan, Marshall, and Stewart finally succumbed to the conviction that the *Roth* test just did not work, abandoning it in 1973. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 73-101.

By this time, however, the composition of the Court had dramatically changed. Justice Black had been replaced by Justice Lewis Powell, Chief Justice Warren by Chief Justice Warren Burger, Justice Harlan by Justice William Rehnquist, and Justice Abe Fortas by Justice Harry Blackmun who had not yet turned liberal.

With this conservative shift in the Court, steps were steadily taken to cut back, rather than to expand, the marketplace for obscenity in America.

Confining the Marketplace

The first step towards contraction came in 1973 in *Miller v. California,* 413 U.S. 15 (1973). In an

opinion by Chief Justice Burger, the Court restated the *Roth* test, eliminating any requirement that "to prove obscenity it must be affirmatively established that the material is utterly without redeeming social value." *Id.,* 413 U.S. at 21-24.

According to *Miller*, obscenity is defined as a work that, when taken as a whole and applying contemporary community standards, it appeals to the prurient interest, and it depicts or otherwise describes in a patently offensive way sexual conduct, and it lacks serious literary, artistic, political or scientific value. *Id.,* 413 at 24.

As for contemporary community standards, the Chief Justice firmly rejected a "fixed, uniform national standard," adopting instead varying local and regional standards:

> *It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. Id.,* 413 U.S. at 32.

The second step came on the same day in *Paris Adult Theatre I, supra.* Again Chief Justice Burger wrote the opinion, this time rejecting the claim that the First Amendment protects the publication of hard-core pornography so long as it is limited to consenting adults in areas not open to, and out of view of, the general public. *Id.,* 413 U.S. at 57.

The Chief Justice asserted that the state has a legitimate interest in protecting the "quality of life and the total community environment," including moral decency. *Id.,* 413 U.S. at 58-59. As for the latter, he argued that the state did not have to show a causal connection between the distribution of pornography and crime or other antisocial behavior. It was enough to show that obscenity has a "tendency to exert a corrupting and debasing impact leading to antisocial behavior":

> *The sum of experience ... affords ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Id.,* 413 U.S. at 63.

While the Court reaffirmed its prior decision that the Constitution protects the right of a person to possess obscene materials in his private home, it refused to extend that right "to watch obscene movies in places of public accommodation." *Id.,* 413 U.S. at 66.

Not surprisingly, three years later the Court upheld a local zoning ordinance confining "adult theaters" within certain geographic areas removed from residential and other places where children and offended adults might congregate. *Young v. American Mini-Theatres,* 427 U.S. 50 (1976).

Notwithstanding these cut-backs, the Court continues to play a significant role in administering obscenity laws, overseeing primarily the enforcement of laws against child pornography. *New York v. Ferber,* 458 U.S. 747 (1982); *Osborne v. Ohio,* 495 U.S. 103 (1990). And it has yet to prove that it has taken its hands off the case-by-case review of obscenity generally.

Just one year after the Court decided *Miller v. California, supra,* affirming the right of local

communities to set their own standards of obscenity, the Court unanimously overturned an Albany, Georgia obscenity conviction for showing the film, "Carnal Knowledge." *Jenkins v. Georgia,* 418 U.S. 154 (1974).

Justice Rehnquist wrote the opinion, concluding that Carnal Knowledge is not obscene under the *Miller* standards. After a careful factual review of the movie storyline and an inventory of the sex scenes, both explicit and implicit, the Court found that the film could not "be found to depict sexual conduct in a patently offensive way." *Id.,* 418 U.S. at 161.

Hanging onto *Roth,* and with it the right to define obscenity as a matter of constitutional law, inevitably invites the Court to legislate and retry obscenity cases. There is nothing in the text of the First Amendment that authorizes such law making and fact finding. What is needed is a reexamination of the premises of *Roth,* not a reformation of its definition of obscenity. Otherwise, there will be no restoration of a First Amendment rule of law to the obscenity cases.

OBSCENITY: REVERSED AND REMANDED

From 1791, the date of the ratification of the Bill of Rights, until 1957, the United States Supreme Court had never found the First Amendment even remotely relevant to the constitutionality of a federal or state obscenity law. See *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72.

This 166-year history was turned on its head by the Court when it ruled that the First Amendment actually commanded that obscenity must be defined by Congress and the fifty state legislatures in a way that was consistent with the Constitution. *Roth v. United States,* 354 U.S. 476 (1957).

Not only was this decision by the Court contrary to precedent, but *Roth* and its progeny defy the text of the First Amendment, its history and its purpose. In addition, the Court's obscenity decisions violate the role of the Court as dictated by Article III of the Constitution. Finally, the Court's constitutional formulation of obscenity law is both lawless and ludicrous, being both self-contradictory and meaningless.

The Original Text

The First Amendment commands that Congress "shall make no law ... abridging the freedom of speech, or of the press ...."

By this simple language, the Constitution's framers contemplated a constitutional negative on legislative power. To be an effective legal limit on that power, the constitutional limitation was phrased in the negative, not the positive, and phrased as a legal term, not a factual one.

The task of the reader of the text is to determine the content of the legal terms and determine whether, in particular instances, the constitutional norm has been violated. This calls for an understanding, initially, of the meaning of "the freedom of speech" and of "the freedom of the press." At the time the Constitution was written, both terms had fixed meanings. Freedom of the press meant that no civil government had any authority to license the publication of anything, written or oral. Only the people had that authority, for only the people had the authority to function

as editors. See Titus, *The Freedom of the Press: An Introduction*.

The civil government could function as an editor only incidentally to some other grant of power. For example, because the civil government could establish a military defense force, it could create a military newspaper, incidental to its authority to discipline the armed forces. But the civil government could not establish a literary publishing house to screen the publication of all novels, because no civil government has any jurisdiction whatsoever over literature.

The purpose of the First Amendment Press Clause is to prohibit the civil authorities from assuming jurisdiction over literature, as incidental to a claim of authority to perform the task of Editor-in-Chief of the people. Having no such jurisdiction, the civil government is powerless, under the Press Clause, to exercise editorial judgment. It may act only to punish after the people have exercised their rightful editorial power.

Thus, the Press Clause is not relevant to the enforcement of criminal laws prohibiting obscenity, unless the law is so loosely and unartfully drawn as to grant to civil authority editorial power. In that event, the law is to be struck down as an unconstitutional grant of licensing authority. See *Lovell v. Griffin,* 303 U.S. 444 (1938).

As for the freedom of speech, that term meant that the civil government had no authority to enact any law the purpose of which was to protect the sovereignty of the nation by protecting the security of the current form and structure of the civil government. At the heart of the principle of the freedom of speech was that a nation's civil sovereignty remained in the people. See Titus, *The Freedom of Speech: An Introduction*.

The central purpose of the Speech Clause, then, is to stop civil authorities from wrapping themselves with the cloak of political sovereignty. Laws protecting the reputation of the government or striking preemptively against the people so as to prevent political unrest or insecurity are prohibited by the First Amendment. *See, e.g.*, *New York Times v. Sullivan,* 376 U.S. 254. 276 (1964) and *Terminiello v. Chicago,* 337 U.S. 1 (1949).

Given these historic definitions of the freedoms of speech and of the press, there is no doubt why - for over 165 years - the United States Supreme Court never applied the First Amendment to a federal or state criminal prosecution of obscenity.

By definition, criminal prohibitions are not licensing statutes. Therefore, they do not implicate the Press Clause.

Nor do such criminal statutes "abridge" the freedom of speech. The policy or purpose of criminal prohibitions against obscenity have nothing to do with the protection of the sovereignty of the nation by preserving the current political order. Rather, they are designed to protect the moral decency and social order of the community. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 59-61 (1973).

How that moral decency and social order is defined and protected is not the business of the Speech Clause. That is left to the civil legislative authorities, limited only by the prohibition against any law the policy of which is to wrest the nation's political sovereignty from the people.

By expanding the Speech Clause to include a command to the Congress and the state legislatures on how they must define the social moral order, the Court has actually undermined the political sovereignty of the people, the very thing that the Speech Clause was designed to protect. A people exploited by pornography loses its moral fiber and, consequently, its fortitude and will to resist political tyranny.

Ironically, the Court has in the name of the freedom of speech actually contributed to the undermining of the very freedom that it has purported to protect. By inviting the pornographer to wrap his wares in the First Amendment, the Court has given legitimacy to gross sexual pandering that has directly contributed to a severe moral breakdown in society. The people are so busy indulging their sexual appetites that they have become political eunuchs.

This could not have been possible except for a transformation of the meaning of law in America and of the role of the Court under the Constitution.

Remaking the Constitution

The Court's obscenity rulings from 1957 to date are rooted in a definition of law totally foreign to that contemplated by the Constitution. When the First Amendment was written to prohibit any "law ... abridging the freedom of speech, and of the press," law meant a pre-existing rule fixed as to time, uniform as to situation, and universal as to application within the jurisdiction of the lawmaker.

The Court's obscenity decisions were planted in quite a different legal soil. By the time that *Roth* reached the Court in 1957, the Court was thoroughly imbued with an evolutionary view of law pragmatically tailored to meet the changing needs of society. The notion that the freedom of speech or the freedom of the press had been frozen by the text of the Constitution was anathema both to liberals and to conservatives.

Justice Felix Frankfurter, a political liberal, but a judicial conservative, put the case as well as anyone when he wrote:

> *As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is "a constitution we are expounding," so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century. Adamson v. California,* 332 U.S. 46, 66 (1947) (concurring opinion).

In order to escape from this constitutional "straitjacket," Justice Frankfurter read the constitutional text as open-ended. That is, he found all but the most technical, language adaptable to changing times. Indeed, he believed that the very nature of constitutional law and judicial review demanded such flexibility.

In his concurring opinion in *Dennis v. United States,* 341 U.S. 494, 518-56 (1951), Justice Frankfurter had occasion to apply his constitutional philosophy to "the freedom of speech." In that opinion, he made absolutely no effort to determine the meaning of the phrase as it was contemplated by the Constitution's drafters.

Rather, he began with his own view of political sovereignty and the authority of a nation to protect itself from its enemies, both from within and without:

> *... [T]he United States has the powers inseparable from a sovereign nation .... The right of government to maintain its existence - self-preservation - is the most pervasive aspect of sovereignty. Id.,* 341 U.S. at 519.

From this premise, Justice Frankfurter proceeded to repudiate the very legal foundation of the American Revolution and the very constitutional premise of popular sovereignty embraced in the First Amendment. He wrote that speech advocating "the overthrow of the Government by force or violence ... ranks low" on any scale of values, lower than "the lewd and obscene, the profane, the libelous ..." *Id.,* 341 U.S. at 544.

That may be true for Justice Frankfurter, but it was certainly not true of America's founders. Not only did they claim the right to overthrow the government of George III, but they claimed the right to advocate the overthrow of any tyrannical government, past, present or future. Thus, the peoples of Virginia, Pennsylvania, Delaware, Maryland, Vermont, Massachusetts, and New Hampshire - just to name a few - affirmed in their state constitutions "the indubitable, inalienable, and indefeasible right" of the people "to reform, alter, or abolish" any government "in such manner as shall be judged most conducive to the public weal." *Sources of Our Liberties* 311, 329, 338, 347, 365, 375, 383 (Perry ed. 1972).

Having castrated America's founders, Justice Frankfurter limits the American people's right to change their system of government to "nonviolent constitutional process." *Id.,* 341 U.S. at 547. Because "no government can recognize a 'right' of revolution or a 'right' to incite revolution," then the freedom of speech clause cannot possibly protect against any law prohibiting the serious and passionate advocacy to apply such a political doctrine. Only if revolutionary doctrine is discussed, like it might be by professors and students in the academic classroom, would such "speech" be protected. *Id.,* 341 US. at 549.

Having repudiated the founders' constitutional philosophy, Justice Frankfurter set about formulating his own, substituting his views for those contained in the constitutional text and history. First, he transliterated "the freedom of speech" into "freedom of expression" and, then, rewrote the First Amendment accordingly:

> *Freedom of expression is the well-spring of our civilization - the civilization we seek to maintain and further by recognizing the right of Congress to put some limitation upon expression. Id.,* 341 US. at 550.

Second, he justified transforming the First Amendment's "categorical" demand that Congress enact no law abridging freedom of speech, into one with certain exceptions. ln *Dennis,* Congress was entitled to enact a law that, Frankfurter himself agreed "restrict[ed] the exercise of free speech," because the threat of communism to the political stability of the current government was sufficiently grave to allow for it. *Id.,* 341 US. at 521, 542, 547-48.

Third, he excused his having amended the First Amendment's absolute proscription because of his

relativistic view of the meaning of words:

> *The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed? Free Speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument. Id.,* 341 U.S. at 523.

Finally, Justice Frankfurter rationalized his having amended the constitutional text as demanded by the reality of the world as he sees it:

> *Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved. Id.,* 341 U.S. at 524-25.

Having extracted the First Amendment from its textual and historical soil, the Court was ready to transplant it to a constitutional garden of its own making. Six years after Frankfurter tilled the ground in *Dennis,* the Court began its work of pruning and grafting in the area of obscenity.

Constitutionalizing Obscenity

Having already transformed the meaning of the freedom of speech in *Dennis,* it did not take much for the Court to do the same in the seminal obscenity case, *Roth v. United States,* 354 U.S. 476 (1957). Following Frankfurter's lead, Justice William J. Brennan substituted "freedom of expression" for the First Amendment text. *Id.,* 354 U.S. at 482.

Having done so, he immediately acknowledged that the First Amendment "gave no absolute protection for every utterance." Hence, the Court could not take the "unconditional phrasing of the First Amendment" literally. *Id.,* 354 U.S. at 482, 483.

Because the First Amendment's language was not taken literally, the Court was free to open the door to its philosophy of the freedom of speech and substitute it for that of the Constitution's authors. Justice Brennan echoed Justice Frankfurter:

> *The protection given speech and press was fashioned to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people .... 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. Id.,* 354 U.S. at 484.

From this substitution of philosophy came the grafting of new language onto the First Amendment so that the Court could now, in the name of the Constitution, define obscenity for Congress and the fifty states.

First, Justice Brennan stated that obscenity, to be obscenity, must be "utterly without redeeming social importance." This became part of a number of justices' formulation of the obscenity definition required of all anti-pornography legislation, until repudiated in *Miller v. California,* 413 U.S. 15 (1973) by Chief Justice Warren Burger who, then, substituted his view of obscenity as requiring only that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.,* 413 U.S. at 24.

Whether conservative or liberal, neither formulation can be found anywhere in the constitutional text or history. Nor can any of the other constitutionally required ingredients. In *Roth,* Justice Brennan opined that obscenity is "material which deals with sex in a manner appealing to the prurient interest." *Roth, supra,* 354 U.S. at 487.

Again, Justice Brennan found nothing in the Constitutional text to support this view. Rather, he scurried to the dictionaries and to the American Law Institute's Model Penal Code as his authorities. *Id.,* 354 U.S. at 487, n. 21.

So the Court grafted onto the 18th century Bill of Rights, a definition of obscenity found in 20th century writings, none of which had anything to do with the writing of the constitutional document.

Chief Justice Burger did not disagree with this part of the obscenity definition laid down in *Roth. Miller, supra,* 413 U.S. at 24. Rather, he affirmed the *Roth* formulation that obscenity to be obscenity must "to the average person, applying contemporary community standards" appeal to the "prurient interest." He just modified the formula a bit to allow a jury to determine "prurience" according to local or regional "contemporary community standards." *Id.,* 413 U. S. at 30-32.

Such varying standards were also applicable, the Chief Justice wrote, when applying the third part of the constitutionally required obscenity definition - that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by ... law." *Id,* 413 U.S. at 24, 30.

Thus, the constitutional "law" now governing obscenity is thoroughly relative, relative as to time, person, and place. Indeed, as the Chief Justice has candidly admitted, the questions of constitutional protection of obscenity have become "essentially questions of fact":

> *...[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation ... [it] would be an exercise in futility. Id.,* 413 U.S. at 30.

But this has not deterred the Court. It still imposes its political will upon the people to conform to its view of the meaning of the freedom of speech and of the press. *See, e.g., Jenkins v. Georgia,* 418 U.S. 153 (1974). Whether conservative or liberal, that is not constitutional law, it is judicial tyranny.

CONCLUSION

As is true of any tyrannical reign, the Court's venture into obscenity has proved ludicrous as well as lawless. If a work is so disgusting as not to appeal to an average person's prurient interest, does that mean that it is not obscene? Indeed, the more patently offensive a work in depicting sexual conduct, the less likely it will arouse sexual lust in the average person. So the first two prongs of the Court's constitutional test appear to be on a collision course with themselves.

And what of the third prong. If a work appeals to the prurient interests of the average person - that is, to lustful, lascivious and morbid interest in sex, then how can such a work have any serious literary, artistic, political or scientific value?

Likewise, how can a work have serious value, if it is patently offensive. Aren't these two standards endangered by some expert who testifies that there is some societal value for the works? If so, then contemporary community standards may be constitutionally trumped by some sociologist or psychologist who finds value in "kinky sex."

Until the Court retreats completely from the obscenity area, the First Amendment will continue to be perverted and the people exploited. True freedom of speech - the kind exercised by our founders and preserved in the Constitution to protect the people from political tyrants - will shrivel up and die.

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