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"Sex, Drugs, and Books":

Controversial Literature versus the Obscenity Statutes

Though childhoods are as various as are the children that live them, most adolescents would identify the oft-invoked parental elegy for the death of American culture as a common thread uniting the unique experiences of youth. Though assailed as we are with garishness and vulgarity of the current era, we are as abundantly besieged by the recriminations of modern-day culture, hurled from the bastion of a previous generation's political and social mores. Outrage at the mutation of ethical standards and convictions is perhaps a rite of passage, a token of adulthood handed down from generation to generation. Fearing constantly for the loss of national couth, we criticize and deride the increasingly explicit and seemingly tasteless images that dominate television and other outlets of the media. In the ascension of technology, however, we generally entrust the more traditional mediums of art and communication--books, for example--with the vestiges of our social and intellectual pride. Yet, literature has not always been exempt from controversy or so far removed from the collection of our cultural anathemas. In fact, Americans in particular have a long history of protesting to literature with unsavory themes or discomforting content. Surprisingly, those protesting have not always been stodgy, conservative types, but fairly 'normal' members of the public with moderate political views—while those who defended literature's right to push the envelope have not been renegade youth but, in fact, the legal practitioners often associated with the former archetype.

Though equivocal obscenity standards would have seemingly enabled hidebound judiciaries to subjectively censor controversial literature, they had, in fact, by removing a degree of power

from the public, entrusted the fate of many of the present day's most lauded literary works to more capable, and ultimately more open-minded, individuals.

The obscenity definition, in all its various incarnations, facilitated legal proceedings that many would think restrictive of free speech and potentially crippling for controversial literature. From 1868 to 1957 an obscenity definition imported from England, known as the Hicklin Test, had been in effect, whereby obscenity was defined as "whether the tendency of the matter charged is to deprave and corrupt those minds who are open to such immoral influences."[1] The problem with this definition, as Charles Rembar, the defense lawyer in the seminal obscenity trials for *Lady Chatterley's Lover*, *Tropic of Cancer*, and *Fanny Hill*, explains, is that one needs not "demonstrate that harm will occur, or even that it is likely--all that is needed is a 'tendency'."[2] A 'tendency' is an abstraction--and there cannot be a concrete method for identifying an abstraction. The result is that the obscenity definition is more a guideline than a set of criteria of which the accused may be determined guilty or innocent, and a guideline is inherently flexible and subject to interpretation. Consequently, the obscenity statute has always been established on uncertain ground--the conclusions and interpretations of imperfect, inconsistent human minds.

In the nature of the court system, those human minds belong to judges, of whom it is the duty to interpret the law and whose interpretation is the deciding factor in the cases where it is required. The definition of obscenity, in its essential vagueness, demands a level of interpretation that exceeds that in cases where the crime is more concrete, and by doing so commits an uncomfortable degree of power to the judiciary. In light of this, it would be easy,

[1] Theodore Shroeder, "Varieties of Guilt in Obscenity Cases," *The Central Law Journal,* 2 September 1910, 16. http://jstor.com (accessed February 20, 2008).
[2] Charles Rembar, *The Death of Obscenity,* (New York: Random House, 1968), 6.

and perhaps natural, to conclude that America's obscenity controversies have been the result of dictatorial judges. However, this has not been the case. Even authors who defended the 'obscene' works in court agree that judges, on the whole, tended to be the allies, as opposed antagonists, of controversial literature. Charles Rembar, for instance, though his defense of *Lady Chatterley* and other titles required arguing with judicial decisions in precedent cases, nevertheless posits in his autobiography that "Government, long regarded as the oppressor, is in [freeing the country of legal restraint] ahead of those it governs...The judiciary, particularly the upper courts, have led the way, and we now have a degree of freedom equaled only in a few other countries—so far as literature is concerned, almost nowhere."[3]

Such a statement is inherently a defense of the power imbalance instituted by the obscenity definition, and a convincing one, considering its source. While the definition may promote an undemocratic manner of operation, in which the voice of the judiciary drowns out the voice of the people, that manner of operation has not injured literature. In fact, censorship has been more a practice of the public than of the court.

Often, literature has met the most resistance from an assortment of policemen, customs officials, and postal workers: public servants who do not possess any true bureaucratic power. The Federal Court and State Courts have usually intervened on literature's behalf in determining the legality of these public servants' suppressive actions. Perhaps the most eminent and successful censorship proponent among private citizens was Anthony Comstock, a sententious postal worker who helmed the movement to suppress purportedly 'pornographic' material despite possessing no real legal authority. In the puritanical intensity of his crusade against vice, he even went so far as to demand censorship of immemorial works like *The Decameron* in 1927.

[3] Charles Rembar, *The Death of Obscenity*, (New York: Random House, 1968), 11.

Though any actions to censor a work of such standing seem outrageous and doomed to failure, one can understand from the obscenity definition why Comstock foresaw success in the endeavor: all that Comstock needed to detect in the work was a 'tendency to incite lustful thoughts'. While the absurdity of Comstock's actions may seem to address a fundamental flaw in the definition, it is necessary to recall that interpretation of that definition was not Comstock's prerogative, but the Supreme Court's. The court responded to his motion by holding that "if [*The Decameron]* were to be excluded the Bible and Shakespeare would have to be suppressed."[5] It was the Court who demonstrated a moderate and practical perspective on obscenity while Comstock, a member of the public whose rights would seem compromised by an equivocal definition that entrusted so large a degree of interpretative power to he judiciary, was the most dedicated in his attempt to smother obscenity and hinder free speech.

Similarly, much of the work that has encountered censorship difficulties has done so not at the mandate of the court but by the scruples of police officers and other legal practitioners, as opposed to judges. One article recounts how in 1927 police officers removed a shipment of 40 potentially obscene books and delivered them to a judge for legal inspection, "the sale of which has been forbidden under the prosecution of District Attorney Foley."[6] The policemen went to Judge Murray of the Boston Municipal Court and requested a court summons for the books' seller and were refused, the article explains, because they could not provide more obscene passages for the Judge to examine, as "they had not read the entire book."[7]

Murray's response captures the latent function of the obscenity definition. In order for a

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[5] "'Decameron' Held by Customs Office," *New York Times*, 8 May 1927, 27. http://proquest.com (20 February 2008).

[6] "Publishers Test Boston Book Ban," *New York Times*, 14 April 1927, 2. http://proquest.com (19 February 2008).

[7] Ibid.

'tendency to incite lustful thoughts' to be detected, the book must be scoured for prurient passages, and all people have varying ideas of what constitutes prurient material. The policemen's ideas of prurience were evidently not Judge Murray's, and accordingly, he refused to concede that passages he found "unobjectionable" were grounds for censorship -- thereby dismissing the opinion of a group of people when he decided to "read the book himself" and make the decision alone, disregarding the sentiments of others. This essentially undemocratic process, however, did not do a disservice to the books charged. Had Murray not taken the matter into his own hands, he would instead be taking into the account the opinions of people who had not even a thorough knowledge of the books, or literature in general—people when their literary knowledge was questioned, couldn't say with certainty whether "Smollet…was still alive".[8] By this light, restriction of determining power to the judiciary, as effected by the obscenity definition, cannot incur many objections from literature's standpoint. To appraise a crime like literary obscenity requires a body of knowledge more vast and recondite than that required, for instanced, to assess a robbery—and this knowledge, appurtenant to legal study, is more likely to be possessed by a judge than men like Comstock or even the police force.

This matter of qualification arose in a vehement congressional debate over the proposed Smoot Amendment of 1930 which reads: "All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, picture, or drawing containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States or containing any threat to take the life or inflict bodily harm upon any persons in the United States, or any book which, taken as a whole, offends the moral sense of the

[8] Ibid.

average persons."[9] Smoot's amendment, the article explains, would allow Customs officials to forbid literature they suspected of obscenity from entering the U.S., as had been the status quo, proposed instead of an amendment which would require that a judge and jury reaffirm the Customs officials suspicions in court. Smoot insisted that Customs workers didn't need the supervision of the court to determine literature obscene, and that "knowledge of world affairs and literature reposes in [them]"[10]—a claim on which Senator Cutting, elaborated in his response: "Yes, the knowledge most of them have is how to get from Bowery to the piers, and to open trunks and leave them in confusion. And this, Senator Smoot says, qualifies them to be the judges of world literature!"[11]

While Cutting's words betrayed am elitist mentality, his message remains intact: the right to read is too precious to place it in the hands of people who have not the knowledge or experience to give it its due. His argument, though it is in opposition to censorship, is ultimately undemocratic--and captures why the obscenity standards, by relying so heavily on the judges' interpretations, were successful. Though the definition removed a degree of power from the hands of the people, the rights of those people were ultimately protected, in that the authority was restricted to individuals who were best equipped to measure obscenity not by personal convictions but a serious legal and social understanding--men such as Judge Woolsey, in the *Ulysses* trial, as opposed to the customs official Senator Cutting denounced.

Equally often, books were taken off shelves not because the Court imposed bans on them, but because booksellers were wary that the distribution of even potentially obscene material would incur prosecution. This has less to do with the criteria delineated in the obscenity

[9] "Senators Debate Book Censorship," *New York Times*, 8 March 1930, 5. http://proquest.com (27 January 2008).
[10] Ibid.

definition than obscenity legislature passed by congress and the suppressive measures taken by other legal practitioners, particularly the District Attorney's office. The aforementioned policemen who seized 40 books in 1927 to be tested for obscenity were working in conjunction with Boston's District Attorney Foley, whom one article reports sent back "unopened a package containing forty-nine books which the booksellers had submitted for his opinion", declaring "that he would not permit his office to set up a literary censorship."[12] While this declaration would have seemingly enabled booksellers to sell literature without consideration for the Massachusetts obscenity statutes, he also announced, "to make his decision more emphatic", that "in the future he will ask all the Courts to impose jail sentences rather than fines when a conviction is obtained."[13]

Such a threat inevitably engendered a sizeable amount of paranoia among booksellers, who began removing controversial books from their shelves rather than face the possibility of prosecution. Their circumspection, however, owes little to the actions of the Court, despite Foley's threats—there is no evidence that he truly persuaded the court to prosecute convicted booksellers more severely. Rather, as previously recounted Judge Murray, the judge to whom the policeman brought the books for inspection, would dispute the obscenity allegations made by Foley and the policeman enforcing his mandate, deciding to read the books on his own. This ordeal highlights the disparity between the Court's relationship with censorship and that of the community: while it would seem that all censorship would result from the actions of the judiciary, as the equivocality of the obscenity definition demanded so much judicial interpretation, often suppression was enforced on a local, as opposed to federal, level.

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[11] "Court Censorship on Foreign Books Adopted By Senate," *New York Times,* 19 March 1930, 1. http://proquest.com (13 February 2008).

[12] "Gives Jail Warning on Books in Boston," *New York Times,* 14 April 1927, 20. http://proquest.com (19 February 2008).

The trial that most clearly demonstrates the undemocratic mechanics of obscenity cases is also the most famous of its kind: the trial of James Joyce's *Ulysses*. The book became the center of a whirlwind of controversy after a number of its episodes, particularly *Nausicaa*, in which Joyce alludes to his main character Leo Bloom masturbating, were serialized in a publication called *The Little Review* in 1918.[14] The resultant outrage and allegations of obscenity, while initially obstructing the book's importation into the United States, engendered a considerable amount of interest from publishers intent on profiting from inevitable popularity of stigmatized literature. Random House attempted to smuggle it through Customs in the hopes that it would be seized, thus giving them the opportunity to appeal it in court and earn the rights to publish it legally; they were particularly hoping that the book would be tried by one Honorable Judge Woolsey, who was known for his love of literature and his philosophical opposition to censorship as a whole.[15] I

The court system works in such a way that, though defendants are all guaranteed the right to a trial by jury, a jury is only assigned at the defendant's request. If no request is made, is the judge's prerogative to decide whether a jury would be better suited to try the case or to handle it himself. That Random House parlayed *Ulysses* on the chance that Woolsey might choose to try the case testifies that obscenity trials were not, or could not, be entirely democratic – that judges played a critical, even over critical, role in the outcome of the verdict.

"The Monumental Decision of the United States District Court Rendered December 6, 1933, By Hon. John M. Woolsey Lifting the Ban on 'Ulysses'" details the process Woolsey underwent in determining that *Ulysses*, contrary to longstanding popular and legal opinion, was

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[13] Ibid.

[14] Michael Moscato and Leslie LeBlanc, eds., *The United States of America v. One Book Entitled Ulysses by James Joyce*. (Frederick: University Publications of America,) xx.

not obscene. Woolsey states first in his opinion his understanding that he must serve a legal objectivity, meaning a primary consideration of the sensitivities of the "normal man" or "reagent", that may or may not be in keeping with his own (rather laudatory) formulations on Joyce's patent "literary technique."[16] Woolsey posits that the length and difficulty of reading Ulysses rendered a jury trial 'extremely unsatisfactory' apparatus to entrust with the decision; and yet, the method he employs in ensuring the objectivity of his ruling entailed consulting "friends", who he then goes on to describe as "literary assessors", to validate his assertion that the novel is a work of serious ambition and literary merit.[17]

Woolsey's course of action suggests that he considered the authority to investigate allegations of obscenity was best restricted to the Federal Court system: judges themselves, or those the judges deemed capable. While this suggestion has undemocratic implications, there is nevertheless validity in the possibility that such a system profited the publication of literature, even if it failed to protect more delicate sensibilities of the public. As aforementioned, the vagueness of the obscenity definitions, and perhaps the nebulousness of 'obscenity' itself, means that there is no set of concrete criteria that literature must have met in order to be determined obscene-- and thus upon the reasoning of a disinterested, human party. Judge Woolsey was certainly desirable, from literature's standpoint, to assume the duties of that party: he remarked to the press on one occasion that he's "against censorship" altogether. [18] Had a jury trial been employed, with all the outrage over its depictions of female sexuality, *Ulysses* may never have

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[15] Michael Moscato and Leslie LeBlanc, eds., *The United States of America v. One Book Entitled Ulysses by James Joyce*. (Frederick: University Publications of America,) xx.

[16] John M. Woolsey, "The Monumental Decision of the United States District Court Rendered December 6, 1933, By Hon. John M. Woolsey Lifting the Ban on 'Ulysses.'": included in James Joyce: *Ulysses* (New York: Random House, 1961).

[17] Ibid.

[18] "Court Undecided on 'Ulysses' Ban," *New York Times*, 26 November 1933, 16. http://proquest.com (13 February 2008).

achieved publication in the U.S. However, the fact that the obscenity standards are so reliant on human interpretation placed *Ulysses* in the hands of Woolsey, and consequently America.

The question does arise, however, as to how literature would be effected had these judges whom the obscenity definition favors betrayed more conservative sensibilities– had an adamant censor taken on the case instead of Woolsey. Admittedly, in such a circumstance, its hard to think that *Ulysses* would have won such a seemingly easy victory. Yet, the present scarcity of censored material speaks to the effectiveness of such a system. Even if , by empowering judges, the obscenity definition creates a liability, it is one overshadowed by a general tendency to promote the publication of controversial literature.

The very nature of a jury trial over which a judge presides suggests that juries are not adequately prepared to determine matters of obscenity. After Theodore Dreiser's *American Tragedy* was found obscene, its publisher, Donald S. Friede, was tried for violating the obscenity statutes. However, "Thomas D. Lavelle, who assisted Arthur Garfield Hays and Clarence Darrow in the defense, sought to have the verdict set aside on the ground that the jury might have been prejudiced by the forum meeting at Ford Hall Tuesday night, at which, he contended, Boston's censorship was held up to ridicule"[19]. The ease with which jury's ability to maintain objectivity becomes suspect supports Woolsey's rejection of a jury trial; while everyone is subject to influence, legal practitioners have more experience and more expertise in considering a legal matter with an unbiased mind.

This became apparent when Judge Hayes delineated to the jury the protocol of an obscenity trial and, in the process, demonstrated his understanding of the law as it applies to obscenity: "The only question before you," the court declared, 'is Are the pages read to you set

[19] "Boston Jury Convicts New York Publisher For Selling Dreiser's 'An American Tragedy'," *New York Times*, 19 April 1929, 2. http://proquest.com (2 March 2008).

forth in the amendment to the complaint impure, indecent, and obscene and manifestly tending toward the corruption of youth? If that is so, it is not necessary to find the words alone indecent. You must determine if the thoughts aroused by those words are offensive to morality and to chastity and manifestly tend to corrupt youth."[20] Though such coaching is standard court procedure, it nonetheless indicates that understanding of the obscenity standards, is more or less singularly possessed by the judiciary, while the jury must be counseled to remain objective in their verdict. From this perspective, Woolsey's dismissal of a jury's reasoning seems less a blatant arrogation of power than a logical decision made in the best interest of literature. Rather than entrust the fate of the book to a group of people who, likely as not, had never and had no intention of ever reading it, like the police officers working under District Foley, he nominated himself, a judge familiar with the workings of the obscenity statutes, to determine the matter fairly.

We are as Americans dedicated always to the preservation of the democratic principles that have been the basis of our country's philosophy since its inception, and hand-in-hand with that dedication travels the instinct to defend it from those who might compromise it. Yet, in performing our presumed civic duty—championing free-speech, or the like, and condemning its detractors—we are liable to accuse those who only *seem* to threaten it, owing perhaps to a certain social preeminence, or immoderate wealth, or, equally unfairly, considerable political or public influence. For such reasons the judiciary often has been seen as furthering its own agenda—presumed, and perhaps misconstrued, as largely conservative—at the cost of the nation. It is imperative to remember that just because one is accorded power doesn't necessarily mean that they abuse it, and that the Court occupies its position because we put it there: to protect us

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"Boston Jury Convicts New York Publisher For Selling Dreiser's 'An American Tragedy'," *New York Times*, 19 April 1929, 2. http://proquest.com (2 March 2008).

and our country's principles.

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Harrison, Maureen and Steve Gilbert, ed. *The End of Obscenity: Obscenity and Pornography Decisions of the United States Supreme Court.* Carlsbad: Excellent Books, 2000.

This book gives an in-depth examination of the most significant Supreme Court decisions in the United States, including both primary sources, such as the court opinions from these historic trials, along with summaries, contextual information, and commentary on these decisions.

Moscato, Michael and Leslie LeBlanc, ed. *The United States of America v. One Book Entitled Ulysses by James Joyce*. Frederick: University Publications of America, 1984.

This book is an extensive collection of contemporary and retrospective commentary on *Ulysses*, containing such valuable sources as the personal letters of Joyce's lawyer and of Joyce himself concerning the trial, along with a wealth of newspaper articles and editorials examining the controversy of the book. In addition to this great primary source material, the book is prefaced both with an extremely informative introduction explaining the circumstances of *Ulysses'* trial and eventual publishing, and numerous articles looking back on the controversy from as recent as 1982.