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Pornography/Obscenity and the Law
Nine Landmark and Influential Cases

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The following nine landmark cases are important for their judicial influence on subsequent cases. For example, in Roth v. U.S., 1957, Justice Brennan who wrote the majority opinion alluded to lower court and state court decisions on obscenity. For example, Ulysses v. One Book Called Ulysses, noted for Judge Woolsey's famed canonical eloquence, was one of the most influential lower court decision.

1.) 1815 - The first reported obscenity case in the U.S.: a Pennsylvania court declared it an offense at common law to exhibit for profit a picture of a nude couple. (Commonwealth v. Sharpless).

2.) 1868 - From England, the "Hicklin test." Regina v. Hicklin held that the test of obscenity is "whether the tendency of the matter is to deprave and corrupt those whose minds are open to such immoral influences." (NOTE: Chicago Episcopal bishop's comments on "Let's get the flock out of here").

3.) 1933 - Although not a Supreme Court case, United States v. One Book called "Ulysses" is considered by many lawyers and jurists as a pivotal case. A U.S. Court of Appeals upheld the finding that "Ulysses" was not a dirty book. The government did not appeal further.

U.S. District Court Judge John M. Woolsey's canonical eloquence and judicial scholarship were so persuasive that his decision was frequently annotated in other Supreme Court cases. He wrote, inter alia:

"It must always be remembered that his locale was Celtic and his season Spring....I have not found anything that I consider to be dirt for dirt's sake. Each word of the book contributes like a bit of mosaic to the detail of the picture which Joyce is seeking to construct. I do not detect anywhere the leer of sensualist. I hold therefore that it is not pornographic." (my emphasis).

Woolsey rejected the Hicklin test and instead focused on defining "obscene" - "tending to stir the sex impulses or to lead to sexually impure and lustful thoughts..."

"Joyce has attempted -- it seems to me, with astonishing success -- to show how the stream of consciousness with its ever-shifting kaleidoscopic impressions carries, as it were on a plastic palimpsest, not only what is in the focus of each man's observation of the actual things about him, but also in a penumbral zone residua of past impressions, some recent and some drawn up in association from the domain of the subconscious."

Then, Woolsey wrote: "Whether a particular book would tend to excite such impulses and thoughts must be tested by the Court's opinion as to its effect on a person with average sex instincts - what the French would call l'homme moyen sensuel"- or in American courts, the "reasonable man."

After reading the book in its entirety, he concluded that it did not tend to excite sexual impulses.

Subsequently, there were three Supreme Court cases dealing with obscenity -- Hannegan v. Esquire magazine, 1946 --- Burstyn v. Wilson, 1952 (motion picture, "The Miracle") and Butler v. Michigan, Feb. 25, 1957.

The first landmark obscenity case, Roth v. U.S., that attempted to establish a new standard for obscenity to replace the Hicklin standard was decided on June 24, 1957, four months after Butler.

4.) 1957 - Written by Justice William Brennan, Roth v. U.S., which rejected the old Hicklin test defined obscenity as "utterly without redeeming social importance" and not within the area of constitutionally protect speech or press. [NOTE. This is known as the "low" value theory of speech from the dictum of Justice Murphy for a unanimous court in Chaplinsky v. New Hampshire, 1942 and which places outside of First Amendment protection, "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words.'"]

But Brennan also tried to clarify some of the courts' murky thinking by the caveat, "Sex and obscenity are not synonymous."

In an acknowledgment of the influence of Woolsey and other lower court judges, Brennan wrote that American courts have rejected Hicklin and substituted this five-part test: "whether to the average person, applying community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

5.) 1964 - Jacobellis v. State of Ohio. This case is noteworthy for Justice Potter Stewart's obiter dictum (as differentiated from stare decisis which means having legal precedent): "I can't define pornography, but I know it when I see it."

After his Roth decision, Brennan had begun to develop second thoughts. He tried to maintain that community standards must be determined on the basis of a national standard. "It is after all, a national Constitution we are expounding."

Chief Justice Warren angrily disagreed and his view prevailed - "There is no national standard and perhaps there should be none." Community standards mean exactly that - community standards.

In this decision, however, Brennan enunciated the doctrine of obscenity as being "utterly without redeeming social importance" and attempted to protect some aspect of free speech in the pornography controversy by writing that sex could be portrayed in art, literature or scientific works without fear of punishment.

This was a prelude to the LAPS test, delineated in the 1973 case of Miller v. California.

6.) 1969 - Stanley v. Georgia - Justice Marshall wrote the unanimous decision for six justices with three justices concurring. The importance of Stanley is that the Supreme Court reversed the Georgia Supreme Court upholding a conviction of Stanley for possession in his home of three eight millimeter film as obscene. The Court distinguished Stanley from Roth because Roth was a case of public distribution

Police had obtained a search warrant to enter Stanley's home to look for evidence of gambling. In a desk drawer in Stanley's bedroom, they found the alleged obscene material.

Marshall wrote that the "right to receive information and ideas, regardless of their social worth [is] fundamental to our free society..."[I]n the context of this case -- a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home -- that right takes on an added dimension," [for] "also fundamental is the right to be free, except in very limited circumstances from unwanted governmental intrusion into one's privacy..."Mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties." [If] the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."

7.) 1973 - Miller v. California - Chief Justice Burger delivered the opinion and summed up three guidelines for defining obscenity:

"The basic guidelines for the trier of fact must be:

a.) whether 'the average person', applying community standards would find that the work, taken as a whole, appeals to prurient interests. (Roth test).

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. (LAPS test)."

8.) 1966 - Coming between Jacobellis (1964) and Miller (1973), Ginsburg v. United States is a rare obscenity case because it introduced the factor of "pandering." Justice Brennan who wrote the 5-4 decision found "abundant evidence to show that each of the accused publications was originated or sold in stock in trade of the sordid business of pandering (my emphasis)....

"This evidence ...was relevant in determining the ultimate question of obscenity....Commercial exploitation of erotica solely for the sake of their prurient appeal [may] support the determination that the material is obscene even though in other contexts the material would escape condemnation." (Compare Brennan's reasoning to Woolsey's reasoning in Ulysses that nowhere did he "detect the leer of the sensualist."

9.) 1982 - New York v. Ferber - Justice White wrote the opinion for a unanimous court in upholding a child pornography statute, which prohibits any person from producing, exhibiting or selling any material depicting any "performance" by a child under the age of 16 that includes "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals."

While not a landmark case in the judicial history of pornography (compared to the other seven cases), this case, nonetheless, is critical for Dworkin-MacKinnon ordinance advocates who contend that if the court can spell out in precise detail and ban what constitutes child pornography, the court should apply the same test to pornography:

"The prevention of sexual exploitation and psychological well being of a minor is 'compelling.' The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (my emphasis.)

9.) 1986 - American Booksellers Association v. Hudnut - After U.S. Court of Appeals Judge Easterbrook found in 1985 an Indianapolis ordinance based on the Drowkin-MacKinnon model to be unconstitutional, the Supreme Court summarily affirmed Easterbrook's decision without comment.

Easterbrook's decision is noted for its eloquent logic and mastery of philosophical antecedents (John Stuart Mill and John Milton are quoted). But Chief Justice Burger and Justices Rehnquist and O'Connor dissented and had urged that the case be set for oral argument.

American Booksellers currently remains, however, the final judicial determinant on obscenity and pornography.

Attached are:

Key excerpts from Easterbrook's decision.