

The Ability to Communicate Moving Past Censorship

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Abstract

In this paper, the reader will see how censorship in America has changed since the first Amendment was ratified. The reader will also see how obscenity is defined and be able to see what of the material that we see censored is obscene and what is merely offensive. This paper will look into the Supreme Court Case FCC v. Pacifica amount others and what that meant for censorship in the late 1970s and how that applies today. It will also examine some of the occurrences that have happened in the last forty-five years as a result of that landmark case and the inevitable escalation.

Keywords: Carlin, Seven Dirty Words, Censorship, Obscenity, Escalation.

The Ability to Communicate Moving Past Censorship

Human Beings have a fundamental right as well as a want and desire to be able to communicate their thoughts and ideas from one to another. This not just a human trait, as we see communication throughout the animal and plant kingdoms as well. We have long tried to express ourselves through various forms of communication. Looking all the way back to the paleolithic era, even in the observational art that has survived from that time, humans were trying to express themselves through various forms of communication.

For as long as there has been something to say, there has also been someone saying that you shouldn't say something for some reason. Censorship is the suppression of symbols, words, or ideas that you deem to be negative or harmful in nature for some reason. The three most common reasons communication messages are censored is that they are damaging to the morals of a group, the political government of the group, or as a threat to the security of the group. And while these are all right and just reasons for which to censor material, in the United States due to our Freedom of Expression, we often have the belief that censorship infringes on our right to express ourselves. Where do we draw the line for the common good of the people, and is it equally offensive to draw the line too early as it is to draw that line too late? Should the First Amendment protect all forms of expression, even when they are obscene? There are a lot of hard questions with varied answers when we as a people try to judge what is best for the rest of the group. A study of obscenity, and how the people have reacted to it will help us understand where we have been in order to get a glimpse of where we are going.

The First Amendment and Early Obscenity Law

The First Amendment of the Constitution of the United States of America is often referred to as the "Freedom of Expression Amendment", as all of its clauses are ensuring the citizens of the United States with the freedoms to express ourselves in various ways. Each of the clauses of the First Amendment have been argued in various Supreme Court Cases. Focusing on

the second clause, “Congress shall make no law... or abridging the freedom of speech” (U.S. Const amend. I), raises the question, what is free speech and how does obscenity factor into it? The first Supreme Court case that established that the First Amendment did not protect obscenity was *Roth v. United States* (1957) which was the companion case to *Alberts v. California* (1957). In these cases, it was determined that “Obscenity is not within the area of constitutionally protected freedom of speech or press either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States” (*Roth v. U.S.*, 1957). Both of those cases were about individuals mailing material that was considered obscene to advertise for places that contained obscene material. While that case established that the First Amendment did not protect obscenity, it has been harder to define what obscenity is. One of the earliest attempts to define what should be censored in our courts was in *Schenck v. United States*, 249 U.S. 47 (1919). In that case which dealt with the Espionage Act of 1917, it was determined that if the speech that a speaker gave was intended to result in a crime, and there was a clear and present danger of a crime being committed as a result of the speech, that the speaker was not protected from the government as it pertained to the speech. This set up one of our first forms of censorship but did not speak to obscenity. But it does show the movement away from the First Amendment being interpreted as absolute because it did not protect the speaker from the repercussions of a politically charged speech. At that time, you could speak against the government in public, but if your speech called the listeners to action and that action would be considered illegal, you were not protected. As Pember notes in his book *Mass Media Law*, there were several important events that take us from the adoption of the 1st Amendment in 1791 up till we had the Miller test in 1973. Some of which included the first recorded case of obscenity prosecution in 1815, followed by the first federal obscenity law in 1842. Another important event in obscenity law was the Comstock Act in 1873, it determined that all obscene material was un-mailable and was named after the man that pressured Congress

to pass the law. The Comstock Act played a part in why it was illegal to mail things that were deemed obscene once we got to Roth and Alberts. Many years later there was the emergence of the Roth test in 1957, like the Miller test, the Roth test eventually consisted of three parts. Those three parts were:

First, the dominate theme of the material taken as a whole must appeal to prurient interest in sex.

Second, a court must find that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.

Third, before something can be found to be obscene, it must be utterly without redeeming social value.

Several years after that the first Presidential obscenity commission was appointed in 1967 Pember (2001). Over those years many speeches and even works of art have been censored and, in some cases, removed from censored lists. In the article *Judigial Rhetoric And Ulysses In Government Hands*, it states “The famous decision by District Judge John Woolsey lifting the ban on the publication of James Joyce’s novel *Ulysses* in the United States changes the nature of obscenity law when it appears in 1933” (Ferguson, 2012). In this article Ferguson talked about how Judge Woolsey lifted the ban on the great literary work *Ulysses*, but he did not necessarily do it in the right way. He sited how critics of Woolsey said that he used statements in his decision that were palpably false, full of well-intentioned lies, and that it was not recognizable as law. It also further confused obscenity law while doing a good thing of lifting a ban on a novel. Despite the fact that his argument may not have been accurate or truthful, he was not overturned but was corrected by some other judges in appellate court.

The Supreme Court case that set up the Miller test was *Miller v. California* (1973), in that case it was decided that:

Speech that is obscene and thus lacking First Amendment protection must be without serious literary, artistic, political, or scientific value. It also must appeal to the prurient interest in the view of an average person according to community standards, and it must describe sexual conduct or excretory functions in an offensive way (Miller v. California, 1973).

In the Miller case Chief Justice Warren Burger and four other justices agreed that material was obscene if the following standards were met:

1. An average person, applying contemporary local community standards, finds that the work, taken as a whole, appeals to prurient interest.
2. The work depicts in a patently offensive way sexual conduct specifically defined by applicable state law.
3. The work in question lacks serious literary, artistic, political, or scientific value.

(Miller v. California, 1973).

The Federal Communication Commission and the Enabling Act that Created it

The Federal Communication Commission is a federal commission with authority over the various forms of public communications in the United States of America. It was created by The Communications Act of 1934. At the time the methods of communication message delivery to the masses was limited to telephone, telegraph, and radio transmissions, so that was what the Communications Act aimed to regulate. It has been amended and now also includes television broadcasts as well. The act has seven subchapters regulate virtually all aspects of the communications and broadcasting industry. Some of those aspects include the assignment of frequencies, rates and fees, standards, competition, terms of subscriber access, commercials, broadcasting in the public interest, government use of communications systems. The Act also provides for more detailed regulation and oversight via the establishment of the FCC. (The Communications Act of 1934)

The Seven Dirty Words

George Carlin, an American comedian born in 1937, had started off as a traditional “straight comedian” as he started his career and wrote funny bits that were in line with the conservative audience that he was performing for in his early career. Carlin was however drawn more so to the counter-culture of the time as he started to write bits that touched on topics of drugs and alcohol. Carlin however was a very talented linguist and studied with great focus language and words. His comedy bits started to explore the nature of words and how we use and misuse the words of our language in interesting and funny ways. This exploration led him to develop his bit called “The Seven Dirty Words” and he included the bit in his Stand-Up comedy special that was recorded at the Santa Monica Civic Auditorium called *Class Clown*. The recording of this special was released as an album of the same name in 1972. This segment of his show made him infamous as he was arrested for Disturbing the Peace when he performed it at the Summerfest in Milwaukee in 1972. As Carlin explained in various interviews over the years, he started the bit in the attempt to get an actual list of what he couldn’t say on the air. He comprised his own list of seven words that were apparently too obscene to say on the air. (Apatow & Bonfiglio, 2022). In his next recorded comedy special called *Occupation: Foole* recorded in 1973, he revised his bit and referred to it as “Filthy Words”. It was when WBAI FM Radio station (owned by Pacifica) played a portion of his album that included the bit “Filthy Words” that it sparked the landmark Supreme Court case: FCC v. Pacifica Foundation (1978).

FCC v. Pacifica Foundation started when WBAI played part of *Occupation: Foole* at 2pm on afternoon. A father, who had his fifteen-year-old son in the car with him, heard the broadcast and filed a complaint with the FCC. The Federal Communication Commission then did not fine the station for a violation but said that an order would be associated with the station’s file, which in essence was giving the station a formal warning that could be used if they continued to violate the standard of not broadcasting obscene material over the airwaves.

The FCC found a power to regulate indecent broadcasting, *inter alia*, in 18 U.S.C. § 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications." The FCC characterized the language of the monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to the law of nuisance, where the "law generally speaks to channeling behavior, rather than actually prohibiting it." The FCC found that certain words in the monologue depicted sexual and excretory activities in a particularly offensive manner, noted that they were broadcast in the early afternoon, "when children are undoubtedly in the audience," and concluded that the language, as broadcast, was indecent and prohibited by § 1464. *FCC v. Pacifica Foundation* (1978).

The Supreme Court eventually sided with the FCC in this case. They found that the material used in the satirical monolog was "vulgar," "offensive," and "shocking," and thus is not entitled to absolute constitutional protection in all contexts; but it was not obscene by the Miller test as it lacked "prurient interest".

This was important because it made a distinction between obscene and offensive and gave the FCC the ability to keep either off of the public airwaves. This case was important because it stated that the Federal Communications Commission did not exceed their mandate by giving the station that played the bit an official warning in their file. This established their ability to censor material that was deemed offensive and public viewers or in this case listeners would not have to be subjected to offensive material without their consent. It was also important because of what it did not do. This case did not overturn the ruling of *Miller v. California* which constitutes our Miller Test that we use to determine if something is obscene or not. The Miller Test is used in local obscenity law as well as the national level and determines what is illegal to say in public, regardless of its level of artistic expression. If you use words that are obscene and direct them at a person or group you can be charged with verbal assault, or saying them out loud

when they are not directed at a person or group can have an individual facing charges of disturbing the peace, if the local law enforcement is in proximity to witness such an event. However, if they are being used as a form of artistic expression, and if they pass the Miller Test and thus they are not obscene and the right to say them is protected. But even still you can not transmit them on the publicly owned airwaves such as radio and television broadcasts. So as that applied to this case, Carlin had the right to say those words and even record them onto an album, but the segment can not be aired on public broadcast. Things of this nature would be reserved for private broadcasts, such as privately-owned subscription services like HBO and now satellite radio, or in his case at that time, customers who wished to subject themselves to that kind of offensive language could purchase the album to listen to in the privacy of their own residence.

After Effects

It is readily observable that society becomes numb to the boundaries of the social norms of the time and as society adapts to each change in the present norm, it seems to push those boundaries as soon as it can to keep moving forward. Most men and women would most likely be imprisoned for indecency if we somehow teleported ourselves in our modern clothes to the colonial times. This evolution in what society feels is acceptable can be seen in most aspects of society. It would be a safe assumption that a smaller percentage of Americans would be offended by the use of Carlin's Seven Filthy Words today than would have been offended twenty years ago and there would be an even further difference in percentage than those offended forty-five years ago in 1978. This is a type of escalation. Escalation is the unpredictably variable aspect of how the past influences the future. A different type of escalation is referred to as the "Streisand Effect". According to Jansen & Martin in their study, Barbra Streisand's attempt to restrict online views of her residence on a public website had a paradoxical effect. The attempt led to many more views than if she had done nothing. "Subsequently, attempts at censorship that end up being counterproductive have been dubbed the 'Streisand effect'" (Jansen & Martin, 2015).

We often see this manifest itself as wanting to see something that we should not, curiosity leading us to the taboo, or our own want to rebel from the establishment and do things because we are told not to, just because we are told not to do them. One of the most famous examples of this was when Tipper Gore took on the record companies and their distributors for releasing and distributing music with graphic and obscene lyrics. A similar campaign lead by Broward County Deputy Sheriff Mark Wichner who intimidated county record distributors with the threat of fines if they sold the album *As Nasty As They Wanna Be* by 2 Live Crew after Broward County Circuit Court judge, the Honorable Mel Grossman deemed it to be obscene by Florida law (*Skywalker Records, Inc. v. Navarro* 1990). These events lead to the warning stickers on albums that contain obscene lyrics which had the adverse reaction of increasing their record sales. This is an example of both types of escalation happening in the same event as most people would find the lyrics of *As Nasty As They Wanna Be* to be far more offensive than Carlin's *Seven Dirty Words* and as it drew national attention for the court case that ensued, the sales of the album reached platinum status as it sold more than a million copies. 2 Live Crew also released a clean version of the album called *As Clean As They Wanna Be* but it was met with far lower sales. However, the release of the cleaner version helped the record sales of the dirtier version as the original was not suitable for being played on the radio and the Federal Communication Commission would not allow it to be aired so the highly edited version from the clean album was able to get air play which boosted both record sales. At that time, song writers were getting bolder in what they felt that they could say without is being viewed as obscene because it lacked obscene words. This was a slower type of escalation but one that has continued over the last thirty years. In the 1960s and into the 1970s the song writers had to use code to be able to get suggestive lyrics past the censors. At the same time that 2 Live Crew was writing stuff that definitely would not make it past any censor, Salt-N-Pepa released "Let's Talk About Sex". This song did not actually go into detail about sexual relations, it primarily said the title over and over again as the chorus, but it

got that phrase onto the radio and past the censors. This has caused an escalation over the years to make more and more topics acceptable to be discussed on the publicly owned airwaves without crossing the line into obscene.

Conclusion

Censorship is a slippery slope. Where should we draw the lines for the sake of decency, or should we even draw one? Had the ban on Ulysses not been lifted, Americans would not have been able to enjoy that literary classic, because of the sexual descriptions that were within. As discussed in escalation, some people will find things for more offensive or obscene than other would. The most compelling argument for the censorship of obscene material is the attempt to keep that material from corrupting children. Adults in general always look for ways to protect those who are too young and impressionable to make intelligent decisions for themselves. It is truly an attempt, because if obscene material is out there, the young and impressionable will try to find a way to get a hold of that material. It is sad how many young children know the extremely obscene lyrics of Cardi B's song "W.A.P.", which is probably one of the most offensive songs written since 2 Live Crew wrote the songs for their most controversial album, but what was even more disturbing was seeing the small children doing the explicit dance that went along with the vulgar song. It's no different today than it was for the 12-year-old in the 1990s, or the 12-year-old in the late 1970; they are drawn to listen to and to see what they know that they shouldn't. As technology develops further and further, it becomes harder and harder to keep material out of their hands. If a parent allows their child to have a smart phone and they are not closely monitoring its usage and if they do not put various levels of content controls on that device, they are quite literally giving their child a window into the world of the obscene. However, technology just makes it easier to have access and a variety of access to material. From the time that adult magazines were first published until the internet made them obsolete, young boys and girls would always find a friend's parent that had a subscription to one of those

magazines, or find an older kid to pass one down. They were going to find obscene material out there. Since there is no saving anyone from the obscene, other than locking them in a room with no outside exposure, should we move to everyone being their own censor? If you like what you hear, listen. If not, turn the channel. Have we gotten to the point in society that censorship has become pointless? If so, where will we go from here?

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