SIN, LIBERTY AND LAW:

An Introduction and Commentary

By

John L. Kane

United States Senior District Judge

When I became a United States District Judge for the District of Colorado thirty-three years ago, I approached my new life as judge with eager anticipation. As an attorney I had focused on trial practice with a special interest in First Amendment issues. Though economic reality made me spend much more time on construction cases, commercial disputes and an occasional criminal case, I paid close attention to the Supreme Court decisions in constitutional law, particularly freedom of speech and the press, the law of libel and defamation, and the so-called right of privacy. It was, so to speak, my passion.

I was privileged to represent radio and television stations, a couple of newspapers, a movie theatre operator, a film distributer and a wire

service. I developed close friendships with some of the more eccentric people in our society generically referred to as journalists. It takes an exceedingly tolerant interpretation of that word to call some of them journalists, but similar to those who become political junkies, I was a First Amendment groupie.

I must confess, however, that I represented only one defendant in an obscenity case. The movie theater operator had exhibited the uncut French version with English subtitles of Bernardo Bertolucci's "Last Tango In Paris", which was alleged to be pornographic and therefore obscene. An American edition had been severely edited to meet the censors' demands and was rated "R." Because my client also owned and operated a small string of radio stations, he was concerned that a conviction might result in loss of his broadcaster's license, a far more important consequence than any fine that could have been imposed for exhibiting the film. He wasn't in the business of showing porno movies. Because of its "R" rating, he did not regard Last Tango as an "X" rated

film, but rather as an art film by an Italian director. I remember him plaintively asking, “Who would have thought that watching Marlon Brando have sex could get me into this much trouble?”

I wish I could tell you that my brilliant arguments swept my client to victory, but, like most cases, we settled out of court with a dismissal and a promise by my client not to show dirty movies ever again. In its way, the settlement was an effective form of censorship, but not a shameful one.

Sin

Censorship has been with mankind far longer than the word we use to describe it. As long as man has been drawing on the walls of caves or telling stories over campfires on the savannas, I am sure there have been restrictions on modes of expression. Not all restrictions are negative or bad. Military censorship is well taken, especially when people such as Geraldo Rivera broadcast the exact location of our combat troops. In World War II we lived with the censorious slogan “loose lips sink

ships." Removing the blueprints of banks, jails and nuclear plants from the Internet doesn't trigger a deep sense of deprivation or infringement of the right to know. Child pornography, which I will address later, is much more than an illegitimate form of expression. But when we come to our assigned topic, "Banned Books," the tide turns and we speak of political repression, violation of individual rights, invasion of liberty and mindless regulation.

The term "censorship" dates from about 440 B.C.E. when the Romans appointed two officials called Censors to preside over the registration of citizens for the purpose of determining what duties they owed to the community. Those duties included speaking well of the governors and not speaking ill of the state. Writings easily fell into the ambit of the Censors' authority. The use of censorship to maintain peace and public stability went along without much controversy until Christians took control and the late Roman Empire saw the emergence

of a persecutory mentality used to insure the church's moral authority for secular purposes.

Shortly after Constantine the Great converted to Christianity, the Empire began to impose personal beliefs by the sword. What had previously been confined to ecclesiastical notions of sin became crimes. Faith was used to bolster ambitions for empire with the result that orthodoxy and heresy became "essentially matters of power politics." Constantine was willing to let the people of the empire exercise the freedom to choose their religion, but his successors were not so tolerant. A hundred years after Constantine, the Christian emperor Theodosius II took the logical step of banning pagans and heretics from the imperial army and obliged all his soldiers to participate in Christian worship. Inevitably, books and tracts by apostates, heretics and pagans were destroyed and banned. Only the official "truth" was permitted. Religion had been a matter of personal preference, but gravitated into a political

obligation, the neglect of which would be more than sinful. It would be treasonous.

The book most often banned in western civilization, in its various iterations, is the Bible. During the reign of Henry VIII, that celebrated Man For All Seasons, Sir Thomas More, was instrumental in having dissidents burned alive for daring to translate the Bible from Latin into English.

With the merger of church and state, belief took on the force of law. Sin, defined as an act that violates a known moral rule, meant that belief, however internalized it might be, would be policed. And what better way to secure belief than to require it to be expressed? On the other hand, what better way to prevent dissent than to prohibit its expression? Colloquially speaking, any thought, word or act considered immoral or alienating from the orthodox canon could be termed "sinful." Thus sin was considered rebellion against or resistance to the direction

of authority which was officially divine. With this merger of the divine with the secular, sinful words and deeds became criminal as well.

It is interesting to note that it is the expression and not the performance of the sin that receives the law's attention. As the late First Amendment scholar Charles Rembar has suggested, consider the Seven Deadly Sins: Legislatures do not prohibit fast food outlets or "All You Can Eat" buffets that provide more than ample facilities for Gluttony. Television provides constant opportunities for Sloth. Gathering assets and ostentatious wealth stimulates Envy. Wall Street investments in derivatives and tax breaks for the rich do a good job of promoting Greed, and what are fashion magazines doing other than catering to Pride? Admittedly, we do outlaw road rage, but what else does professional wrestling do but make a spectacle out of Anger and Revenge?

The only one of the Seven Deadly Sins ubiquitously opposed by governments is Lust and, for the most part, novels are banned because they are obscene. Uniquely, in the law, it is the idea rather than the act

that is proscribed as sinful. One can think or talk about money, or food or idleness without penalty, but not so with eroticism.

The term “obscenity,” derived from the Latin *obspenus* meaning “foul, repulsive or detestable,” means any statement or act which strongly offends the morality of the time. The term also applies to an object that incorporates such a statement or displays such an act as, for example, sculpture, paintings, photographs and videos. The expression of obscenity is prohibited without any requirement of harm to anyone. The term “pornography” was cobbled together. First used in 1858, it combined the Greek words for Prostitute and Writing. Its intended use is to describe any writings or pictures that stimulate sexual excitement and erotic behavior.

Liberty

Censorship in the United States extends to children’s literature, textbooks and other educational materials, adult literature, music, art, theatre, film, television, the news media and, indeed, the Internet. In

colonial times sex, and earthy comments about it, were tolerated, but writing about it was fiercely condemned. Early American censorship had more to do with telling the truth about politicians than with being bawdy. It took a while to focus on sex.

Mary Hull observes in her reference handbook, Censorship In America, that one of the earliest censorship cases involved John Peter Zenger. Zenger was imprisoned in 1734 for publishing a satirical commentary in the *New York Weekly Journal* concerning the New York governor's pocketing of probate fees. Not that it would happen today, but Zenger could not find a lawyer in all of New York to defend him. He hired Andrew Hamilton of Pennsylvania, thus giving us the memorable expression: "It would take a Philadelphia lawyer to get him off." A jury acquitted him.

The First Amendment, which protects the freedoms of speech, religion, and the press as well as the rights to assembly and to petition the government, was added to the Constitution in 1791. Yet, seven years

later, in 1798, Congress passed the Sedition Act, which prohibited people from criticizing the government. The Sedition Act was designed by Federalists to suppress opposing political parties. The Act clearly violated the First Amendment, and though it was later repealed, it illustrates the ever-present tension in U.S. history between freedom of expression and censorship.

As president, John Adams enthusiastically enforced the Sedition Act. It is ironic that this champion of unpopular causes, this defender of British soldiers following the Boston Massacre, would have persecuted dissent with such energy. While he said he regretted doing so in correspondence with Thomas Jefferson much later in life, Adams nevertheless believed that enforcement of the Sedition Act was for a greater good -- the preservation of a very precarious union of the former colonies. Adams was neither the first nor the last to sacrifice principle on the franticly perceived excuse of necessity. Nor was the Sedition Act

the only or latest action of the federal government to curtail liberty when faith in the concept was tested.

In 1962, in the case of *Engel v. Vitale*, Justice Hugo Black wrote "The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." For this reason the Framers of the Bill of Rights forbade the establishment by the federal government of any particular religion. It cannot be supposed that those Framers would have agreed that a book should be censored because it contained profane or dissident statements. Even more so, the very notion of punishing blasphemy as a federal crime was anathema.

One religion's orthodoxy is another's blasphemy. The Founding Fathers were not theocratic sectarians. An influential number of them were Deists and probably closet agnostics. They were, moreover, avid

students of John Locke and, though sharply divided on many other issues were united in a rational libertarian philosophy -- particularly as applied to the federal government rather than the several states, most of which had their own state religions and their own active censorship of books and ideas deemed unacceptable to their dominant religious establishments.

Each of the original thirteen states prosecuted libel and all had laws criminalizing blasphemy or profanity or both. But there was no national consensus; what was profane, blasphemous or obscene in one state was not necessarily so in another.

It was not until 1925 in the case of *Gitlow v. New York* that the Supreme Court decided the First Amendment's protections and guaranties would apply to the individual states as well as the federal government. The balance between restraint of expression and liberty would thereafter have a federal constitutional bedrock.

The Framers' libertarian philosophy was perhaps best expressed by John Stuart Mill is his essay *On Liberty*. According to Mill's conception, liberty refers primarily to a condition characterized by the absence of coercion or constraint imposed by others. A person is said to be free or at liberty to the extent that he or she can choose goals or courses of conduct, can choose between available alternatives, and is not compelled to act or think or speak or prevented from acting, thinking or speaking by the will of another, of the state, or of any other authority. In Mill's apt phrase, no individual should be a victim of "the tyranny of the majority." It is perhaps noteworthy that Mill's notorious and lengthy adulterous relationship with a married woman prompted his essay.

While these aspects of personal freedom have gained a secure toehold in our jurisprudence, obscenity has been excluded by the simple expedient of asserting that it is not protected at all. The goal of the courts has not been to legitimize obscenity, but rather to define it in such a way that it is not regarded as speech, thereby circumventing the First

Amendment. Precisely what constitutes obscenity has bedeviled both the strongest and weakest juristic mentalities for more than a century. In fact, some have argued that obscenity should not be condemned because of the impossibility of formulating a definition that is not impermissibly vague or overly broad.

In a moment we shall consider the landmark case of *Roth v. United States* by Justice Brennan, but his comment in a dissenting opinion in the *Paris Adult Theater* case describes his own sense of failure. Brennan wrote, "I am convinced that the approach initiated 16 years ago in *Roth*. . . cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values."

Law

I have never presided over an obscenity case as a judge because such cases are now rarely filed. My next remarks will shed some light on why that is so. Before 1973, obscenity cases were brought with some regularity. More than one crusading district attorney saw the political

advantages in representing the morally upright and pursuing obscenity cases with a vengeance. Now we need to trace the development of the law that put the quietus to such campaigns.

The 1868 English case of *Regina v. Hicklin* judged obscenity by the mere effect of an isolated excerpt upon particularly susceptible persons. Typical of English cases, these concerns were class based. What was suitable reading for the lord of the manor had to be shielded from the valets and chambermaids. Tradesmen simply couldn't be exposed to livid sexuality which would endanger their mortal souls.

American courts initially adopted this standard, but later decisions, being more egalitarian, rejected it and substituted a test of whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. "Prurient interest" was defined as "material having a tendency to excite lustful thoughts." Or, as Charles Rembar, who successfully

challenged the banning of *Lady Chatterly's Lover*, *Tropic of Cancer* and *Fanny Hill*, said: "Pornography is in the groin of the beholder."

Theodore Dreiser's *An American Tragedy*, published in 1925, was held to be "lewd and obscene" in Massachusetts in 1930. The Commonwealth's highest court held that "even assuming great literary excellence, artistic worth and an impelling moral lesson in the story," the book must still be banned. There are no lurid sex scenes in Dreiser's novel, but a young working class man impregnates a fellow assembly line worker and when she insists that he marry her though he has abandoned the relationship for another with a wealthy socialite, he takes her on a boating trip and she drowns. He is tried, convicted and sentenced to death. The Massachusetts court did not address the issue, but one has the lingering suspicion that Dreiser's socialist commentary was the elephant on the courtroom floor. The decision could be dubbed "*Regina v. Hicklin Revisited*."

Four years later, the federal courts in New York held that James Joyce's *Ulysses* was not obscene. *Ulysses* carries certain distinctions. Many literary critics consider it to be the greatest novel of the 20th century. Other than the Bible, it is probably read less and quoted more than any other book. Reading it is a daunting undertaking and the casual reader will not find it worth the candle, but for the literati, one who reads it walks on holy ground once more.

There are two classic judicial opinions in *United States v. Ulysses*. The first, at the district court level by Judge Woolsey, is the most famous and the second, in the court of appeals written by Judge Augustus Hand, is the better reasoned. Both were able to conclude that *Ulysses* was not really lustful. Judge Hand wrote, "The erotic passages are submerged in the book as a whole and have little resultant effect." Judge Woolsey opined that the book was "emetic, not aphrodisiac." As Charles Rembar observed, "The implication, of course, is that the book was not likely to promote sin. Nausea is not immoral." The significance

of the *Ulysses* opinions is that they are based on literary analysis of the novel in its entirety rather than the previous Pecksniffian method of selecting isolated parts and instances of ostensibly obscene descriptions.

After *Ulysses*, courts employed various standards to determine exactly what was obscene. *People v. Weplo,* a 1947 California case, held that if the material has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousal of lustful desires, it is obscene.

In *Butler v. Michigan*, a 1957 decision by Justice Frankfurter, Michigan attempted to outlaw all printed matter that would "corrupt the morals of youth." An adult sold a book containing sexually explicit material to an undercover police officer. Justice Frankfurter noted the purchaser was also an adult and children had nothing to do with the transaction. In overturning Michigan's law, he described it as having the practical effect of limiting adults to reading only what was fit for children. That, he wrote, "was to burn the house to roast the pig."

The seminal case of *Roth v. United States* was also decided in 1957. Two booksellers, Roth in New York and Alberts in Los Angeles, had been convicted under state and federal obscenity laws of mailing obscene flyers and advertisements through the U.S. mail. The Supreme Court upheld their convictions, ruling that obscenity was not protected by the First Amendment.

Exacting in his analysis, Justice Brennan held that obscenity had never been protected by the First Amendment. Speaking for the majority, he held that the criteria for judging obscenity should be "contemporary community standards." He said, "[T]his Court has always assumed that obscenity is not protected by the freedoms of speech and press…. Implicit in the history of the First Amendment," he continued, "is the rejection of obscenity as utterly without redeeming social importance." Remember that phrase, "utterly without redeeming social importance." Though Brennan wrote it as dicta (a mere observation) it eventually became the lynchpin of obscenity criteria.

Brennan noted that “profanity and obscenity were related offenses” and, in keeping with the legal tradition established in 18th century England and the even longer tradition regarding blasphemy from which the secular crime of obscenity derived, he held that “convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct.”

The difficulty in defining obscenity was expressed by Justice Potter Stewart in 1964 in his now famous dictum in *Jacobellis v. Ohio:* “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.”

Other justices apparently agreed, because starting in 1967 in *Redrup v. United States*, and for the next six years, the Supreme Court

overturned 30 obscenity cases without written opinion. Unarticulated rulings are not the high-water mark of an enlightened jurisprudence.

My own view is that Justice Stewart and his colleagues had such great difficulty defining obscenity because they were reluctant, perhaps intentionally averse, to employing the aesthetic standards of literary criticism and felt obliged instead to announce a formulaic legal criterion or, failing that, no standard at all. It is not that literary criticism standards were unknown to them. They were obviously familiar with the *Ulysses* opinions, and the 1958 New York decision concerning *Lady Chatterley's Lover*.

Most of the obscenity trials starting with *Regina v. Hicklin* had included expert testimony from recognized authorities in the field. The test which could have been embraced by Justice Stewart is this: Does the offending material contained in the work serve any purpose other than or in addition to inciting lascivious thoughts? If the answer is "yes," it is protected expression because its other purpose has social

value. This is perhaps an unduly elitist view which was succinctly stated by the Harvard mathematician and songwriter, Tom Lehrer, in his song "Be Prepared" when he wrote "Don't write naughty words on walls, if you can't spell."

I must digress to tell you about my first contact with *Lady Chatterly's Lover*. In 1956 one of my undergraduate majors was English Literature, and I was writing a paper about D.H. Lawrence and his treatment of social classes in England. Most of Lawrence's novels and short stories were readily available, but *Lady Chatterly* was kept in the rare books room of the Norlin Library at Boulder and special permission was required to enter that sanctum santorum. I obtained the necessary note from my professor, who sneered at all forms of censorship, and marched in with a sense of authority and importance. The librarian looked at the note and said, "Very well, but why couldn't you write a paper about T.E. Lawrence instead of D.H. Lawrence? You seem like such a nice boy." That was the first I had ever heard of T.E. Lawrence.

In 1973, the Supreme Court of the United States decided *Miller v. California* and established a three-tiered test to determine what was obscene (and thus not protected), versus what was merely erotic and thus protected by the First Amendment.

In *Miller* the Supreme Court confirmed Brennan's statement in *Roth* that obscene material is not protected by the First Amendment and formulated the test, still in use, that reduces the category of such material to a near nullity. "The basic guidelines for the trier of fact," wrote Chief Justice Burger, "must be: (a) whether 'the average person, applying contemporary standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

In other words, under *Miller*, three requirements must be met for material to be deemed obscene. First, the material must appeal to the

average person's prurient interest, applying contemporary community standards. Second, it must be "patently offensive." But what is "patently offensive," as distinguished from, say, "subtly offensive?" Of one thing we can be fairly sure: the community standards of Las Vegas, assuming there are any, would not be the same as those of Des Moines or Paducah. If this sort of local option were the only criterion, it would be impossible to publish a book that would not be banned someplace in this country. But adding the third prong of the test, that the work taken as a whole lacks serious literary, artistic, political or scientific value, as a practical matter renders anti-obscenity laws incapable of enforcement. This prong, as indicated by Chief Justice Burger, requires the prosecution to prove a negative. That is a daunting task at best and, for logical purists, an impossible one.

In a spirited dissent, Justice Douglas wrote that, fortuitously, the protections of the First Amendment are not limited to tasteful and intelligent utterances. In 1985, in the case of *Brockett v. Spokane*

Arcades, Inc., the Supreme Court declared a Washington obscenity law unconstitutional because it failed to distinguish between a "normal" interest in sex and a "shameful" or "morbid" interest. The Court held that only the latter was a prurient interest, but it left to anyone's guess how to draw this distinction.

Miller v. California has not been overruled, but later cases chewed away its edges. In the 1974 case of *Jenkins v. Georgia,* for example, the Court ruled there are limits on what a state may deem to be patently offensive. The movie involved was *Carnal Knowledge*, starring Jack Nicholson and Ann Margaret, not exactly a "Debbie Does Dallas" sort of pornographic film. The Court held the film could not be considered obscene because "[t]here is no exhibition whatever of the actors' genitals, lewd or otherwise . . . . There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards." It continued, "The film could not, as a matter of constitutional law, be found to depict sexual content in a

patently offensive way, and is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene." I respectfully suggest that exhibiting Jack Nicholson in the nude might be patently offensive.

Finally, according to the *Miller* doctrine, for material to be obscene, it must be taken as a whole, and lack serious redeeming artistic, literary, political, or scientific value. In *Pope v. Illinois*, a 1987 decision, the Supreme Court held that social value is to be determined, not by a particular community's standard, but by a national standard. A fortiori, the same national standard would necessarily have to be applied to scientific value and to artistic, literary and political values as well. The Court said that "the value of [a] work [does not] vary from community to community . . . . The proper inquiry [is] whether a reasonable person would find such value in the material."

Postscript

Early on I indicated I would add a few comments about child pornography. Its manufacture, distribution, or possession constitute serious crimes not because of the focus on prurient interest or even that child pornography is obscene, which it mst certainly is by any standard. Rather, in *New York v. Ferber,* a 1982 case, the Supreme Court held that the government may prohibit the exhibition, sale or distribution of child pornography even if it does not meet the test for obscenity because "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' . . . . [T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." The Court said that child pornography is closely related to child abuse because children are harmed by the permanent record of their involvement in pornography and they are exploited in the making of pornography.

These criminal statutes relate to the depiction of children, whether by photograph, drawing, cartoon, sculpture, painting or video. Legislation also proscribes computer-generated human images, and states it is not a required element that the minor depicted actually exist. As such, obscenity is not the basis or, as we say in law, the gravamen of the offense. Rather, it is the violence and permanent damage inflicted on children that is so pernicious as to warrant criminal sanctions. The distinction is clear.

While I have never been assigned an obscenity case, I have had numerous child pornography cases. Even for a First Amendment groupie, child pornography cases present no challenge to the freedom of expression. In the arena of legislation, adult pornography in films may be the next frontier where actual victims rather than tasteless thoughts are given primary consideration.

Judicial banning of books seems to have run its course. Banning books by school boards, religious and evangelical organizations, will

continue and literary works such as *Huckleberry Finn* and *Uncle Tom's Cabin* will be clobbered by those who insist their taste and judgment is paramount, however ill-considered. Balances will still need to be struck and outrage expressed, and the sinister hand of the censor will continue to place his imprimatur on the work of others. We are in a time, however, when the banning of books will not be afforded the unwarranted dignity of justice. For that we can be grateful.

Potter Stewart summed it up well: "Censorship reflects society's lack of confidence in itself. . . . So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance."

BIBLIOGRAPHY

1. Paul Vanderham, James Joyce and Censorship: The Trials of Ulysses(N.Y.U. Press, 1998) [This book is out of print and I spent some time on the internet finding a copy. It is by far the best book I've ever read for combining legal scholarship and literary criticism.]

2. Mary E. Hull, Censorship in America (ABC-CLIO, Inc., CAL. 1999) [Excellent reference handbook with loads of facts and statistics]

3. Harry White, Anatomy of Censorship: Why the Censors Have it Wrong (Univ. Press of America, Inc., N.Y., Md. 1987) [A somewhat peevish treatment of censorship as class based, which is true, but jejune. There is some appeal to a mordant sense of humor.]

4. James Alexander, The Case and Trial of Peter Zenger (Notable Trials Library, Gryphon Editions, N.Y. 1989) [Seditious libel in 1735 and the birth of freedom of expression in the U.S.]

5. Wolfgang Iser, The Art of Reading: A Theory of Aesthetic Response (Johns Hopkins Press, 1978) [Not directly on point of censorship and obscenity, but an excellent theoretical basis for understanding the philosophical objections to restrictions on individual perceptions.]

6. Charles Rembar, The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer and Fanny Hill (Notable Trials Library, Gryphon Editions, N.Y. 1968) [I don't believe there is a lawyer, living or dead, who has written with the elegance of expression of Charles Rembar.]

7. Erwin Chemerinsky, Constitutional Law (3d ed.) (Aspen Pub. N.Y. 2006) [A few might quibble, and there is a later edition, but most readers would agree that this is the best treatise on constitutional law currently

available. I have referred to it throughout my writing of this lecture, especially the analysis of *Miller v. California* and the postscript on child pornography.]

I have also look at various reference books, reviewed Plato's Republic, checked the O.E.D. and Morris L. Ernst's Foreward to the Random House edition of Ulysses. That edition also includes the full text of Judge John Woolsey's decision lifting the ban on Ulysses rendered on December 6, 1933, the watershed legal judgment on censorship of literature.