

Judges Promote Pornography

JUDICIAL SUPREMACISTS ARE TO BLAME for allowing a torrent of obscenity to engulf the movies, television, the theater, books, and even classroom curricula. Robert Bork observes that “the suffocating vulgarity of popular culture is in large measure the work of the Court. The Court did not create vulgarity, but it defeated attempts of communities to contain and minimize vulgarity.”

The Court’s virulent judicial activism repeatedly and aggressively defeats the people’s attempt to maintain a decent society. The courts stole the legislative function in violation of the separation of powers. The courts have used the First Amendment to carry out a massive attack on public decency.

It wasn’t always so. Many Americans can remember when movies contained no obscenity or even profanity. The high level of sex, violence, and profanity in movies started during the era of the Warren Court.

The core of the First Amendment's speech clause is the protection of political speech and, as late as 1942, a unanimous Supreme Court ruled in *Chaplinsky v. New Hampshire* that prohibiting obscene, profane, or insulting words was never thought to raise any constitutional problem because those utterances are not political speech. Now, the Court limits political speech in campaigns and religious speech in schools, but elevates pornography and other assaults on decency to the level of a First Amendment right.

In the landmark case on obscenity, *Roth v. United States* (1957), the Supreme Court ruled: "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . We hold that obscenity is not within the constitutionally protected speech or press." *Roth* meant that obscenity has no redeeming social importance whatsoever and is not protected by the First Amendment. A pudding that contains arsenic has no nutritional value.

One of the highly paid lawyers for the smut publishing industry, Charles Rembar, bragged in his book *The End of Obscenity* that he gave the activist judges on the Supreme Court the rationale to reverse convictions under state laws until they were no longer enforceable against obscenity. As the lawyer for *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts* (1966), known as the *Fanny Hill* case, Rembar persuaded the Court to make two subtle changes in *Roth's* language which looked minor at the time, but which wiped out the laws against obscenity.

The Court changed *Roth's* "social importance" to *Fanny Hill's* "social value," and transposed the word "utterly" to

another part of the sentence. With that bit of semantic chicanery in *Fanny Hill*, the new rule became “A work cannot be proscribed unless it is found to be utterly without social value.” The book *Fanny Hill* was held not to be obscene because the prostitute reformed on the last pages of the book.

“Social value” quickly became a password to pornography; all a smut peddler had to do was to insert a few social or literary passages, and his obscenity was clothed with the Constitution. The obscene Swedish movie *I Am Curious—Yellow* was defended on the ground that although it pictured intercourse explicitly and in public, it was protected by the First Amendment because the couple did their act on the balustrade of the royal palace in Stockholm as a protest against social institutions.

After the *Fanny Hill* decision, the pornographers increased the volume of their output many times over—and they matched it with lavish funds for legal talent to carry dozens of cases to the Supreme Court and overwhelm the justices with their sophisticated arguments.

By October 1966, the obscenity racket was in full swing. The dealers flooded the Supreme Court with twenty-six appeals from lower court convictions. The mere existence of twenty-six cases on one subject at one time shows the great financial resources of the obscenity industry, its determination to change our laws that had been in existence for nearly two hundred years, and its optimism that this could be accomplished by the Warren Court with activist liberal justices Earl Warren, William Brennan (who wrote the *Fanny Hill* opinion), Abe Fortas (who had represented

pornographers before he went on the Court), Hugo Black, and William O. Douglas adopting the pornographers' most extreme arguments.

The obscenity dealers were not disappointed. From 1966 to 1970, the Warren Court handed down a truly revolutionary series of thirty-four decisions that turned the law of obscenity upside down. These decisions gave extraordinary victories to the pornographers, reversing all the judges, juries, appellate courts, and law enforcement officials connected with those cases. Those thirty-four reversals made laws against obscenity almost impossible to enforce, thereby drastically lowering community decency standards throughout America. (See Notes for a list of these cases.)

All those thirty-four decisions were per curiam (by the Court), making them a major legacy of the Warren Court. More significantly, all thirty-four decisions were anonymous; no justice had the nerve to put his name on any of the decisions. Most of these decisions were only a sentence or two, an unusual tactic which enabled the Court to conceal from public debate the substance of what the Court was approving. One has to search out the lower court decisions to see what gross obscenities the Court was wrapping in the First Amendment.

Typical of these thirty-four anonymous, short, pro-pornography Supreme Court opinions is *Mazes v. Ohio* (1967), which reversed the decisions of the Ohio supreme court, the Ohio court of appeals, the trial judge, and a jury in one sentence: "The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Ohio is reversed. *Redrup v. New York*, 386 U.S. 767."

That is the entire unsigned Supreme Court opinion. The Court couldn't defend the obscenity it was clothing in the First Amendment. *Mazes v. Ohio* entailed the conviction of a merchant for displaying in his open racks *The Orgy Club* in the midst of other obscene works. The Ohio supreme court had noted that "the obscene material found between the covers, viewed from any standpoint, is utterly without redeeming social value," and the arresting officer testified that "there were several young boys in the store" looking at the rack. The Court's silence about the facts of the case tended to obscure the enormity of its transformation of our laws protecting Americans against obscenity.

Hollywood got the message from the Supreme Court. In 1966, the Motion Picture Association of America stopped enforcing its old Production Code, which Hollywood studios had imposed on themselves since 1930. In 1968, the Association's president, Jack Valenti, proudly declared that movie makers were now free "to tell their stories as they choose to tell them."

This new freedom brought obscene language, near-total nudity, graphic sex scenes, and sadistic violence to neighborhood movie theaters. The abrupt change was reflected in the Academy Awards. In 1965, the Best Picture was *The Sound of Music*; in 1969, the Best Picture was *Midnight Cowboy*, an x-rated film about a homeless male hustler.

SUFFOCATING VULGARITY CONTINUES

Those Warren Court decisions completely changed pornography law in America, and some lower federal courts are

now even more extreme than the Supreme Court. The evil fruits of the Supreme Court's endorsement of pornography as a First Amendment right are everywhere apparent, and the pro-pornography bias of the federal courts continues to this day.

In a 2 to 1 ruling in *Finley v. National Endowment for the Arts* (1996), the Ninth Circuit U.S. Court of Appeals held that it is unconstitutional for a government agency to consider "decency and respect" for American values when it doles out the taxpayers' money. The winners in this case were Karen Finley (the woman who became famous by parading on stage dressed in nothing but a layer of chocolate), three others whose nude performances centered on homosexual themes, and, of course, the ACLU. The losers were the American taxpayers. Too late to make any difference in the funding, the Supreme Court reversed this decision in 1998.

Another federal judge ruled that *Penthouse* magazine and other sexually explicit magazines and videos have a First Amendment right to be available in subsidized stores on military bases. By the ruling in *General Media Communications v. Perry* (1997), the military was enjoined from obeying the Military Honor and Decency Act of 1996, which forbade such materials on military bases. This was too outrageous for the Second Circuit U.S. Court of Appeals, which reversed, declaring the Act a reasonable regulation of speech in a non-public forum.

Continuing its campaign of using the First Amendment to protect pornographers, the Supreme Court in 2000 struck down a federal statute that required cable operators to stop

sending unwanted and never-requested pornographic images into the homes of subscribers during daytime hours (*U.S. v. Playboy Entertainment Group*).

In 2002, the judicial supremacists invalidated half of the Child Pornography Prevention Act of 1996, despite the fact that it had passed Congress with overwhelming majorities and was signed by Bill Clinton (*Ashcroft v. Free Speech Coalition*). This decision knocked out Congress's ban on computer-generated child pornographic images even before the law had a chance to be enforced. Justice Kennedy spent part of his opinion reassuring Hollywood that the Court would never put any limits on the gross sex and violence in current movies.

The following year, the Court nearly invalidated the Children's Internet Protection Act of 1999 based merely on the possibility that adult patrons of public library internet terminals might be inconvenienced by having to ask a librarian to turn off the pornography filter installed to protect children. This decision assured adults that they can continue to enjoy pornography at taxpayers' expense at their local public libraries (*U.S. v. American Library Association*, 2003).

“THE END OF ALL MORALS LEGISLATION”

In 2004, the Supreme Court invalidated the Child Online Protection Act, which banned the posting for “commercial purposes” on the World Wide Web of material that is “patently offensive” in a sexual manner unless the poster takes reasonable steps to restrict access by minors. The law was

badly needed, as filth plagues the internet, incites sex crimes, and entraps children. Minors are an intended audience for the highly profitable sex industry. This law did not censor a single word or picture. It merely required the purveyors of sex-for-profit to screen their websites from minors, which can be done by credit card or other verification.

But decency lost again in 2004 when five justices knocked out this new law in *Ashcroft v. ACLU*. Justice Kennedy declared it unconstitutional for Congress to do almost anything to stop porn flowing to teens. He shifted the burden to families to screen out the graphic sex rather than imposing the cost on the companies profiting from the porn. His reasoning is as absurd as telling a family just to pull down its window shades if it doesn't want to see people exposing themselves in the street.

The next blow against decency came in Washington State, where a federal judge wrapped the First Amendment around video and computer games that show teenagers how to kill policemen. The state legislature had imposed a fine on the sale or rental to minors of video or computer games containing "realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted . . . as a public law enforcement officer."

Determined to overturn the new law, the Video Software Dealers Association sought out an activist judge who would bend the First Amendment to cover these videos. The dealers found their man in a federal district court judge appointed by President Clinton, Robert S. Lasnik.

In *Video Software Dealers Association v. Maleng* (2004), Judge Lasnik nullified the state statute and prohibited its enforcement. He admitted that the videos are “filth,” yet insisted that the First Amendment safeguards them. Judge Lasnik went overboard in his extreme defense of violent video games. He said: “Whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the First Amendment, we are obliged to recognize that they are as much entitled to the protection of free speech as the best of literature.” So a video showing how to kill policemen deserves the same constitutional protection as Shakespeare and Herman Melville.

The 1996 Ensign Amendment prohibited the use of federal funds by the U.S. Bureau of Prisons to “distribute or make available any commercially published information or material to a prisoner . . . [when] such information or material is sexually explicit or features nudity.” That surely sounds like a reasonable and necessary law because criminals are in jail for punishment, not to pursue vices partly at our expense.

Three judges on the Court of Appeals for the Third Circuit overturned the Ensign ban on porn for prisoners and held in favor of pornography in *Ramirez v. Pugh* (2004). The judges said the law was too broad in that it denied pornography to prisoners who had not been convicted of sex-related crimes. But prisons are maintained by our tax dollars, and only Congress is authorized to make spending decisions. The idea of the taxpayers having to pay for distribution of pornography to prisoners, no matter what

they are convicted of, is ridiculous. This is one more example of supremacist judges telling us how we must spend our own money.

Just when we thought the pro-pornography bias of the federal courts couldn't get any worse, it did. In 2005, another Clinton-appointed judge essentially declared federal obscenity laws to be unconstitutional and unenforceable. In *U.S. v. Extreme Associates*, he threw out an indictment against defendants who sold material over the internet which all sides agreed was obscene.

U.S. District Judge Gary Lancaster explained that his decision was a result of *Lawrence v. Texas* (2003), the sodomy case: "The *Lawrence* decision, however, is nevertheless important to this case. It can be reasonably interpreted as holding that public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality. Such is the import of *Lawrence* to our decision." Justice Scalia's dissent in *Lawrence* was prophetic: "This effectively decrees the end of all morals legislation."

The Third Circuit overturned the *Extreme Associates* ruling, but it stands as an example of the pro-pornography bias of many life-tenured judges and of the continuing mischief of *Lawrence v. Texas*.

The pornographic sea continues to rise in Hollywood movies, and even daily newspapers complain about the "ratings creep" that allows more and more violent and sexually explicit content.

Although the public won't patronize x-rated movies in respectable movie theaters, the x-rated and xxx-rated video business has become a multi-billion-dollar industry, turning out about four thousand movies a year under protection of the First Amendment as defined by the Supreme Court.

The courts are not *interpreting* the First Amendment; they are *rewriting* it to guarantee the profits of pornographers. The judicial supremacists have made the First Amendment a traffic signal that flashes green to pornographers but red or yellow to religious and political speech. From Hollywood movies, to primetime and cable television, to dirty books and songs, "the suffocating vulgarity of popular culture" is all around us.

We can't hope for any revival of civility and morality in the entertainment industry until Congress clips the power of the Imperial Judiciary to overturn legislative attempts to maintain decency.

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- Judge Bork's statement about the "vulgarity of popular culture" is from his book *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003), 64.
- The decision by Justice Brennan that opened the floodgates to pornography in 1966 was *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*. That was followed by thirty-four per curiam (anonymous) decisions overturning

lower court decisions, and another signed decision covering two additional cases. These decisions, all issued between 1966 and 1970, awarded victories to the pornographers.

Per curiam decisions:

1. *Redmond v. United States*, 384 U.S. 264 (1966)
2. *Potomac News Co. v. United States*, 389 U.S. 47 (1967)
3. *Conner v. Hammond*, 389 U.S. 48 (1967)
4. *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967)
5. *Chance v. California*, 389 U.S. 89 (1967)
6. *Keney v. New York*, 388 U.S. 440 (1967)
7. *Friedman v. New York*, 388 U.S. 441 (1967)
8. *Ratner v. California*, 388 U.S. 442 (1967)
9. *Cobert v. New York*, 388 U.S. 443 (1967)
10. *Sheperd v. New York*, 388 U.S. 444 (1967)
11. *Avansino v. New York*, 388 U.S. 446 (1967)
12. *Aday v. United States*, 388 U.S. 447 (1967)
13. *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967)
14. *Rosenbloom v. Virginia*, 388 U.S. 450 (1967)
15. *A Quantity of Copies of Books v. Kansas*, 388 U.S. 452 (1967)
16. *Schackman v. California*, 388 U.S. 454 (1967)
17. *Books, Inc. v. United States*, 388 U.S. 449 (1967)
18. *Mazes v. Ohio*, 388 U.S. 453 (1967)
- 19-21. *Redrup v. New York*, 386 U.S. 767 (1967) (three cases)
22. *Felton v. Pensacola*, 390 U.S. 340 (1968)
23. *Rabeck v. New York*, 391 U.S. 462 (1968)
24. *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968)
25. *Robert Arthur Management Corp. v. Tennessee*, 389 U.S. 578 (1968)
26. *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968)
27. *Henry v. Louisiana*, 392 U.S. 655 (1968)
28. *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968)
29. *Carlos v. New York*, 396 U.S. 119 (1969)
30. *Von Cleef v. New Jersey*, 395 U.S. 814 (1969)
31. *Bloss v. Dykema*, 398 U.S. 278 (1970)
32. *Cain v. Kentucky*, 397 U.S. 319 (1970)

33. *Walker v. Ohio*, 398 U.S. 434 (1970)
34. *Hoyt v. Minnesota*, 399 U.S. 524 (1970)

Signed decision:

Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) (two cases)

- The Supreme Court had long upheld laws against obscenity until President Lyndon B. Johnson appointed his personal lawyer Abe Fortas to the Court as an associate justice in 1965. Fortas then voted for pornographers in the series of Court decisions in 1966 and 1967 that changed U.S. law on pornography and flooded the country with lewd materials that previously had been available only on the black market. In one of his decisions in favor of pornographers, Fortas voted to reverse the conviction of a corporate publisher of pornography, William Hamling, who had been a Fortas client. Hamling had paid Fortas a fee to get a valuable second-class mailing permit for his lewd magazine. Hamling once bragged that he had hired Abe Fortas as his attorney because Fortas “could fix anything no matter who was in power.” When Chief Justice Earl Warren announced his resignation on June 26, 1968, LBJ nominated Fortas to be Chief Justice. In a dramatic confirmation battle that fall, the Senate rejected Fortas’s promotion to Chief Justice primarily because of his conflicts of interest involving pornographers. The revelations during the confirmation process resulted in Fortas’s resignation as Associate Justice of the Supreme Court on May 14, 1969.

Warren’s announcement of his resignation (which was to become effective only on confirmation of his successor) was planned so that President Johnson could appoint the new chief justice, rather than Richard Nixon who was expected to be elected in November 1968 (and whom Warren hated). After the Senate refused to confirm LBJ’s choice of Fortas, Warren served another term, and Nixon appointed Warren Burger in 1969.

- The Supreme Court entertained so many obscenity cases that Bob Woodward’s 1979 book, *The Brethren*, described a regular

“movie day,” when the justices and clerks would watch pornographic movies related to cases under consideration.

LESSON SIX

JUDGES PROMOTE PORNOGRAPHY

QUESTIONS FOR DISCUSSION:

- ★ Why did Judge Robert Bork say, “[T]he suffocating vulgarity of popular culture is in large measure the work of the Court”?
- ★ How did supremacist judges change the First Amendment from protection of our religious rights to protection for pornographers?
- ★ How did pornography interests carry out a coordinated campaign to get the Supreme Court to redefine pornography and open the floodgates to porn?
- ★ Discuss the radical change in Supreme Court decisions about pornography that was carried out by the Warren Court in the 1960s, and how Hollywood reacted.
- ★ Discuss the recent cases that knocked down restrictions on internet porn and violent video games sold to teens.
- ★ How did we get judges who rule that violent video games that show teens how to kill policemen are “as much entitled to the protection of free speech as the best of literature”?
- ★ Do you think the Framers intended to protect pornography when they wrote the First Amendment?