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OFFENDED SENSIBILITIES
A LOOK AT OBSCENITY, CENSORSHIP AND FREE SPEECH

In 1951 the proprietor of the Hi Hat Lounge in Nashville, Tennessee, purchased a life size photograph of a naked young woman lying on a fluffy rug and proudly hung it behind his bar. Even by the relatively chaste standards of the day, it was not a terribly revealing picture - only her posterior was exposed to view - and probably nothing more would have come of it except that one day an electrician arrived to do some work and recognized the woman in the photograph as his wife, which surprised him because she had never mentioned that she was doing nude modeling for a local photographer.

The electrician took the Hi Hat to court and for a short while the matter became first a local and then a national sensation. With the eyes of America on him, Judge Andrew Doyle, ruled that as art the photograph was perfectly acceptable, but that as a bar room decoration it was "unquestionably obscene." He suggested - apparently seriously - that one of the city's art galleries might like to take it over. In other words, if displayed in a darkened bar where it would be seen by no one but grown up drinkers, the picture was held to be salacious and corrupting. But if placed in a public forum where anyone of any age could view it, it could be regarded as a local treasure. No one anywhere appears to have thought this odd.

I bring this up here to make the point that America's attitude toward questions of public and private morality have long been a trifle confused. What is art and what is obscene? I guess

we all know what art is - it is the sculpture and paintings that are in museums and art galleries. But how can a painting by a master which depicts nudity be acceptable when a photograph of that same subject in a magazine is considered by some to be obscene.

The spoken word has always been subject to censorship and the language of every country was and is regulated by the morals of the time.

The very first amendment to the Constitution of the United States clearly states that Congress shall pass no law which abridges the freedom of speech. This only applies to federal law. From colonial times to the present, various states and municipalities have passed statutes prohibiting certain speech.

Early on, speech meant just that - spoken words. And quite obviously the framers of the Constitution meant for there to be no restrictions concerning what we might call political speech.

But this protection has come to include the dissemination of ideas whether spoken, written or visual.

Obscenity, however, has never had constitutional protection, but here we come to see the real dilemma. What is obscenity? How do we define obscenity?

The early church attempted to control what we could say and many have been punished severely for both the words they used and the ideas those words conveyed.

The earliest banned book was the Bible. The Catholic church sent John Tyndale to the stake for translating it into

English. But this ban was not because of naughty words or sacrilegious ideas, but so that the church could control religion.

The first book officially banned as obscene in this country was Fanny Hill in 1821 in Massachusetts. Not that many other books have been banned, probably because publishers simply would not print books that might be banned because there would be no profit if there was nothing to sell. And even possibly some publishers simply thought that smutty books should not be printed.

The first federal anti-obscenity law was contained in the Tariff Act of 1842 which forbid the importation of all indecent and obscene paintings, engravings and transparencies. After the Tariff Act of 1930 was passed, obscene books were added to the list of things that could not be imported. And James Joyce's Ulysses was banned under that act. The case went to trial in New York in Federal District Court and Ulysses was declared to be art, not obscenity. But, it is interesting how it got to court.

Bennett Cerf, one of America's greatest book publishers (Random House and the Modern Library) wanted to publish the first authorized version of Ulysses. In his biography, At Random, he tells the story of how the fight came to court.

He recounts that he had heard Morris Ernest, the great lawyer, say that the banning of Ulysses was a disgrace and that he would like to wage a fight to legalize it. Cerf had lunch with Ernest and asked if Ernest would fight the case in court if he could sign Joyce to do an American edition. Cerf added that they did not have the money to pay his fancy prices, but did offer to

cover expenses and if he won the case, to receive a royalty on Ulysses for the rest of his life. He agreed.

Now Cerf went to Paris to meet with Joyce. Joyce was 51 and practically broke. Cerf told him that he did not know whether he could win the case, but that the climate in America was changing and that he was willing to gamble on it. He offered Joyce $1,500 with the understanding that if the book were legalized, the money was an advance against regular royalties of fifteen percent. He accepted.

Ernest and Cerf went to work. They wanted to get into the court records the opinions of the great men of literature - Arnold Bennett, Ford Maddox Ford, Edmund Wilson and Ezra Pound - who had all written reviews praising Ulysses. Evidentiary rules of the times would not allow these reviews to be read in court. Ernest told them that the only way they could be introduced was if they were part of the book. Cert then pasted copies of these reviews in a paper bound Paris edition of Ulysses. Since that copy had to be the one used as evidence, they got someone to take it to Europe and then bring it back to America, where it could be seized. Cerf's agent sailed to Europe and back. After the Aquitania docked in New York, the customs agent on duty was not looking into any luggage because it was an extremely hot day. Cerf's man demanded that his bag be searched. The customs agent looked at him as though he was an absolute lunatic and said, "it's too hot." Cerf's man said "I think there's something in there that's contraband and I insist that it be searched." The search ensued, the agent found

Ulysses, but rather than seize it he said "Oh, for God's sake, everybody brings it in. We don't pay any attention to it." Cerf's man persisted. He demanded that the book be seized. Finally it was, and when the case came up, that was the copy used as evidence.

The Court ruled that a literary work deserved to be judged in its entirety, rather than the contents of a few selected passages. It decided that Ulysses was art, not obscenity and could be admitted into the United States. The Modern Library published Ulysses in 1934 with the Court's decision in it. Up until this time, books banned as obscene were relatively tame by today's standards.

The 50's and 60's changed all this. Playboy magazine was gaining wide acceptance and with that came the smuttier magazines and their publishers who pushed decency aside under the guise of free speech.

The Granahan Committee of the U. S. Congress reported that in 1960 annual revenues from the sale of sexually explicit materials were estimated at five hundred million dollars, which almost everyone conceded was a conservative estimate. By comparison, total revenues earned by all television stations in the United States was 962 million dollars, while the total domestic box office receipts for all films shown in the U.S. that year were $710 million.

The First Amendment states quite clearly that Congress shall make no law abridging freedom of speech. If this is true, how is it that in the past we have had battles over censored books,

words, plays, songs, etc. The answer is quite easy. The Tenth Amendment to the Constitution reserves to the states those powers not delegated to the United States. In the early fifties, many states passed various censorship statutes.

In 1957, the Supreme Court jumped in. In Roth vs. The United States, the Court, for the first time, decided to review the constitutionality of existing federal and state anti-obscenity laws. The Court wanted to establish one set of national standards to define what could be categorized by American law as obscene. Roth held that obscene speech enjoyed no constitutional protection and insisted that all anti-obscenity laws contain specific safeguards to limit their application soley to those forms of expression that could properly be classified as obscene. The new test for obscenity was whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

On April 9, 1982, a friend of mine was driving home from a round of golf and was stopped for speeding. He was not in a good mood having just come from the golf course where his round of golf was not satisfying. He was also somewhat miffed about being stopped since he was just driving with the traffic and did not think it fair to be singled out and cited for speeding. Apparently not satisfied with the officer's explanation, he directed profane language towards the officer. He was arrested for harassment and convicted. In the Court's decision, they politely stated what Bill said to the police officer. This is what they said:

> "In the words of the Court of Appeals' Opinion, translated out of good taste, he called the officer 'a little, fat person who had a continuing incestuous relationship with his mother. Unfortunately, in doing so he employed a coarse phrase that is the vernacularism for the relationship he had in mind.'"

The conviction was reversed by the Circuit Court. The Court of Appeals reversed the Circuit Court and finally the Kentucky Supreme Court got the case. They ruled that the harassment statute imposed undue restriction on constitutional guarantees of free speech. I report this unusual case for two reasons. One, that you can call an arresting officer these words, although I don't recommend that, but also that the Court even in 1986 did not use the actual words used in the written decision of the Court. Good taste wins out. This vulgar words case involved private speech. But what if they were said on radio or television?

Radio and television have caused different problems for different reasons. While it is true that Congress shall pass no law abridging the right of free speech, there are federal enactments that dramatically affect what can be said or done on radio and television. This has been accomplished by federal enactments, principally administrative regulations governing licensing.

In the early 1950's, an Arkansas congressman with the God fearing name Ezekiel C. Gothings, held hearings on sex and violence on television. The networks reacted and adopted their own code of ethics which essentially decreed that nothing that any person anywhere could possibly find immoral would ever appear on America's

airwaves. In 1952, when Lucille Ball became pregnant, the term was not permitted on television - she was expecting. Nor was it just sex that prompted censorship. In 1956 when Rod Serling wrote a script about a black youth in Mississippi who was murdered after whistling at a white woman, the producers of the U. S. Steal Hour enthusiastically went along with the idea so long as the victim was not black, was not murdered and did not live in the deep south.

After watching a television special last week on the Rolling Stones, I was reminded about their first appearance on the Ed Sullivan Show in the early sixties. When the Rolling Stones sang on Ed Sullivan, they had a hit song, Let's Spend the Night Together, and presumably because there was some implication that this meant it was okay for unwed men and women to sleep together, Sullivan made the Stones change the lyrics to Let's Spend Some Time Together even though on every radio station in America and wherever records were played at that time, the lyrics were not changed and the Stones sang about the shameful practice of sleeping with one who is not your wife.

Sullivan also censored the king ... he would not allow a performance of Elvis to be shown in its entirety - he would be seen only from the waist up. Seems sort of provincial by today's standards. But these were Sullivan's censorship decisions. No federal licensing code or network executive made him limit these two performances.

For years I have heard stories concerning a particular incident involving a particular comedian and because of this paper

I can now report what really happened. In 1962 a fresh, young face appeared on the national scene and in his first comedy album, George Carlin attacked the church, language and I guess anything else he could think of. In the language skit, he reports that there are seven words you cannot say on television. The Supreme Court in FCC vs. Pacifica Foundation (438 U.S. 726, 1978, for you lawyers in the crowd) stated that Carlin claimed you could not say "shit, piss, cunt, fuck, cocksucker, motherfucker and tits on television.

This is what happened. At about 2:00 in the afternoon on Tuesday, October 30, 1973, a New York radio station owned by Pacifica Foundation, broadcast the Carlin language monologue. A few weeks later, a man who stated that he had heard the broadcast while driving with his young son, wrote a letter to the Federal Communications Commission complaining. He stated that although he could perhaps understand the record being sold for private use, he certainly could not understand the broadcast of the same over the air that supposedly you, meaning the F.C.C., control. The complaint was forwarded by the Commission to the station for comment. In response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that immediately before its broadcast, listeners had been advised that it included sensitive language which might be regarded as offensive to some.

On February 21, 1975, the Commission issued a declaratory order granting the complaint and holding that Pacifica could have

been the subject of administrative sanctions. The Commission did not impose formal sanctions, but it did state that "the order would be associated with the station's licensing file and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." Those being revocation of the station's license, issuing of a cease and desist order or imposition of a monetary forfeiture. The station, through Pacifica Foundation, appealed and the matter was heard by the Court. In their argument, Pacifica characterized Carlin as a significant social satirist and who like Twain and Sahl before him examined the language of ordinary people. Further, that Carlin was not mouthing obscenities, but merely using the words to satirize as harmless and essentially silly our attitudes towards those words.

In its memorandum opinion, the Commission stated that it intended to clarify the standards which will be utilized in considering the growing number of complaints about indecent speech on the airwaves. Advancing several reasons for treating broadcast speech differently from other forms of expression, the Commission found a power to regulate indecent broadcasting in two statutes, 18 USC Sec. 1464 and 47 USC Sec. 303, which forbid the use of any obscene, indecent or profane language by means of radio communications and which required the Commission to encourage the larger and more effective use of radio in the public interest. The Commission, however, did not characterize Carlin's monologue as obscene, but merely patently offensive and that it should be

regulated by principles analogous to those found in the law of nuisance where the law generally speaks to channeling behavior more than actually prohibiting it. Two of the commissioners expressed the following opinion. "We can regulate offensive speech to the extent it constitutes a public nuisance. The governing idea is that indecency is not an inherent attribute of words themselves. It is, rather, a matter of context and conduct. If called on to do so, we would find that Carlin's monologue if it were broadcast at an appropriate hour and accompanied by suitable warning was distinguished by sufficient literary value to avoid being indecent within the meaning of the statute." The Court agreed and by a 5-4 vote affirmed the FCC. The door to adult entertainment opened. This is of some interest to me for purposes of this paper and to us as citizens of this country because this very same issue is now before the United States Supreme Court in this session of the court concerning the right of the Playboy Channel to show virtually any movie it wants to at the times when children will not supposedly be up and able to watch.

But what about live concerts. Carlin was, in fact, arrested in Minneapolis for doing the dirty words monologue. He protested and ultimately the case was thrown out.

However, in June, 1990, a U. S. District Court in Fort Lauderdale entered a decree forbidding the sale or distribution of a music video "Nasty As They Wanna Be" by rap group, 2 Live Crew, anywhere within the jurisdiction of the Court. District Judge Jose Gonzales conducted extensive hearings before deciding that the

music video was, in fact, obscene and therefore could be prevented from being sold. The single music video contained more than a dozen references urging violent sex, some 200 descriptions of women as either "bitches" or "ho", 115 explicit terms for male or female genitalia, 87 descriptions of oral sex, nine descriptions of male ejaculation, four extensive descriptions of group sex, all within a general theme glorifying the debasement and humiliation of women.

A local music store owner, Charles Freeman, sold a copy of the music video to an undercover police officer a few days after the decree and was convicted of violating this ban. Shortly after Freeman's arrest, 2 Live Crew performed selections from the music video during an all-adult concert in Fort Lauderdale. The three members of the group were each charged with one misdemeanor count of disseminating obscene material and were tried in October, 1991, soon after Freeman's conviction.

The defense maintained that white jurors would be incapable of understanding this unique form of black artistic expression, but the jury voted unanimously for acquittal, finding that the performance was not obscene. The verdict turned on the "artistic merit" issue, for the jury accepted the judgment of a black English professor that "rapping" represented a serious black culture art form, whose words were not to be taken at their face value but to be understood in the historical context of black culture.

Then the 11th Circuit Court of Appeals reversed Judge Gonzales holding that he had not demonstrated that he possessed

either the artistic or literary background necessary to find that the work lacked "serious artistic, scientific, literary or political value."

For many reasons, states have attempted to morally guide us by enacting statutes to control our behavior. The difficulty, of course, is that acceptable behavior is a constantly changing concept. After the turn of the last century, hemlines apparently began to climb to midcalf and Utah considered imprisoning, not fining but imprisoning, women who wore skirts not more than three inches above the ankle. Virginia, alarmed by developments at the other end of the body, introduced a bill that would make it a criminal offense to display more than three inches of throat. Ohio decided to leave women unmolested, but to go to the heart of the matter and punish any retailer found selling a garment "that unduly displays or accentuates the female figure" and as late as 1935 any male venturing onto the beach of Atlantic City with a bare chest faced arrest for indecency.

The times, they were a changing. Apparently, this era was much like the 60's. Some say the change in attitudes had to do with the reaction to the very restrictive decades that proceeded it. Some blamed it on the automobile, some on bathtub gin, but regardless of the cause, change was in the air.

It was in this environment that the movies became a major influence on our culture as well as a major industry. Frank Miller in his book, Censored Hollywood, indicates that nothing better

captured this new spirit than the movies. After a cautious start, movies in the period 1915 to 1920 became wildly daring by the standards of the day. Studios cranked out a succession of pictures with provocatively enticing titles like Virgin Paradise, Red Hot Romance, The Fourteenth Lover, Her Purchase Price, Flesh and the Devil and White Hot Stuff. One lurid poster promised viewers a motion picture featuring neckers, petters, white kisses, red kisses, pleasure mad daughters, sensation craving mothers, the truth - bold, naked and sensational. Even historical epics got the treatment. Helen of Troy was advertised as an "A.D. Mamma in a B.C. town." A very few like the 1918 movie, A Man's World, did contain brief nudity and others certainly implied rampant sex, but for the most part the hottest thing was the poster. The sales pitch advertised something less than moral. And it sold. And with sales came the clamor for censorship.

In 1921 Hollywood was rocked by scandal. It was the year of the Fatty Arbuckle case and the death in a sexually questionable circumstance of a director named William Desmond Taylor. Thirty-seven states and hundreds of municipalities enacted or threatened to enact censorship codes. Hollywood acted. It formed a body officially called the Motion Picture Producers and Distributors of America, Inc., but it was soon to become known by everyone as the Hayes Office after its first director, Will H. Hayes. Hayes was an interesting person in his own right. He had been a former chairman of the Republican party and Postmaster General under Warren G. Harding. Hayes was a non-smoking, non-drinking Indiana

Presbyterian. Many said his pinched face had extreme moral rectitude written all over it. But, like many others in the Harding administration, his probity did not extend to financial dealings. He apparently was happy to receive and adroitly launder hundreds of thousands of dollars in illegal campaign contributions. But in 1921 he became the first director of the Motion Picture Producers and Distributors of America, Inc. at the salary of $100,000.00. He became the moral watchdog of America's movies.

In 1927 the Hayes Office issued a famous list of "don'ts and be carefuls". The list consisted of eleven proscribed acts such as excessive or lustful kissing and twenty-six acts to be handled with extreme caution. In 1930, this list was superseded by a much more comprehensive production code which would remain the bible of film production for half a century. The code decreed several broad principles - that pictures should be wholesome, that the sympathies of the audience should never be thrown to the side of crime, wrong doing, evil or sin and scores of other specific strictures. It forbade uttering on screen not just every common swear word and racial epithet, but such dramatically useful terms as eunuch, floozie, guts, in your hat, nuts, cripes, hell cat, belch and even virtuous on the presumption that it was too explicit a reminder that some people weren't. "Liar" was permitted in comedies, but not dramas and traveling salesmen could not be used in a context involving a farmer's daughter. One of the more indestructible myths concerning the code is that it decreed that when a man and a woman were shown in bed together, that the man

must always have at least one foot on the floor. It said no such thing, but it did touch on almost everything else. One movie historian commented that it prohibited the showing or mentioning of almost everything germane to the situation of normal human adults.

Then in 1939 a single vulgar word created a furor. As we are all well aware, the last line spoken by Rhett Butler to Scarlet in Gone With the Wind was "Frankly, my dear, I don't give a damn." The Hayes Office said this had to go. The producer, David Selznick, immediately wired John A. Whitney the money behind the picture and they went to work on the Hayes Office. They even shot the movie with different endings and previewed them before live audiences. The alternative last lines were "May your mean little soul burn in hell for eternity" and "Frankly my dear, I don't care." They argued to the Hayes Office that the audiences reacted more favorably to "Frankly, my dear, I don't give a damn" and that it was essential to the theme and meaning of the movie and the relationship between Rhett and Scarlet. Under great pressure, the Hayes Office relented and allowed the now famous line into the movie, but Selznick was fined $5,000 for violating the code.

As late as 1953, the main character in Gentlemen Prefer Blondes was not permitted to say bottoms up when quaffing a drink. In the broadway production of The Seven Year Itch, the main character committed adultery, but in the 1955 movie, Tom Ewell could only agonize over the dangerous temptation of it. Even Walt Disney was forbidden to show a cow with udders.

Something odd happened in 1948. It had nothing to do with censorship, obscenity, morals or free speech. By 1948, there were five major movie studios in the United States and all five of those studios owned the theater chains where their movies were shown. The Justice Department brought suit against them under the anti-trust law. Ultimately, the major film studios entered into a consent decree in which they agreed to rid themselves of the motion picture theaters. The studios were actually given the option of divesting themselves of either their role as film distributors or film exhibitors, but sensing the threat that television would soon pose for film theaters, they chose to retain their more profitable distribution role. Losing control of these major first run theaters also meant that these studios lost the capacity to impose industry standards on feature film content shown by the theaters. And at the same time, television viewing increased. During the 1950's, film attendance plunged from ninety million a week in 1948 to less than forty million a week only a decade later. To lure audiences back to film theaters, their new owners needed motion pictures promising special attractions television could not provide. One technique was to use technology to expand the screen, surround the viewer with sound, use color in all movies and portray action on a massive scale. Another was to show sexier or more provocative dramas than television offered the public. Freed from the constraints of the Hollywood production code, theater chains began turning to European producers for daring, far more explicit motion pictures than American audiences had ever seen in the past.

At this point, a number of local film boards originally formed in the early 1900's, but then dormant for decades as Hollywood closely supervised motion picture content suddenly came to life as these new independent films began appearing in their communities. Now as such boards operating under state authority began trying to fill that void left by the collapse of industry controls, the issue soon arose about their legal right as government agencies to impose conditions on the local exhibition of feature films.

In 1950, the New York Education Department issued a license to allow the showing of The Miracle, a film by Roberto Rosolini. However, the Education Department's governing body, the New York Regents ordered the license withdrawn after the regents had received protests from the Catholic church that the film was sacrilegious. The distributor of the film appealed the licenses withdrawal to the New York courts claiming the state's licensing statute was unconstitutional. The New York courts rejected the argument and in Burston vs. Wilson, the United States Supreme Court ultimately ruled unanimously that the New York statute and the term sacrilegious were both so vague that they abridged freedom of expression. Thus, for the first time films were given protection under the First and Fourteenth Amendments and specifically in this case movies which offended a particular religious group need not for that reason alone be banned, thus sacrilege can no long be a ground for censoring movies.

Seven years later in the Kingley International Pictures Corp. vs. New York, the court again upheld the concept that films

are within the protection of the first amendment. Now, with this constitutional protection given to movies, the clamor again rose for self censorship. In 1968, the movie industry adopted a rating system for its movies. Originally, films were rated in order of descending explicitness. "X", "R", "M" and "G". "M" was later changed to "GP" and later still to "PG". "XXX" or triple X, though favored by owners of porno theaters, never had official standing. The rating system had at least two unintended effects. One was to destroy the appeal of the "G" rated film as children began refusing to attend these films that adults thought were good for them. In 1968, thirty-two percent of the films released by major studios had a "G" rating, but by 1990 only four percent were rated "G". An interesting note on this concerns the John Wayne/Katherine Hepburn movie, Rooster Cogburn. When the film was first released, it received a "G" rating. When the producers learned of this, they insisted that one violent scene be inserted to guarantee a "PG" rating. In contrast, "R" rated films rose from twenty-two percent of all major releases in 1968 to forty-eight percent in 1990, as the average age of the film audience dropped from 22 to 16 and "R" became virtually synonymous with age group's favorite film genre', violent action packed adventures laced with mayhem and gore.

The other unintended effect was to make it virtually impossible to successfully market an "X" rated film. Soon after the code was adopted, a number of major newspaper chains established the policy of refusing to accept display ads for "X" rated films and several television groups began following the same

policy a few years later. In addition, most major video rental organizations refused to handle "X" rated films. In view of the severe constraints an "X" rating imposed on the earnings potential of a picture, Hollywood producers generally insisted on contractual agreements that allowed them to re-edit any film rated as "X", to delete any scenes that prevented it from receiving an "R" rating.

This code as enacted in 1968, was effective. If it could be enforced today as written, there would not be a suit before the United States Supreme Court involving the Playboy Channel and its after hours movie fare. Movies made for theatrical release still adhere to the 1968 code and its amendments and it is fairly restrictive even today.

Cable and pay per view have now entered the entertainment arena. Movies shown on cable do not have to adhere to the motion picture code and because the racier movies are shown late at night, they can show just about anything. And they do. It will be interesting to see what the Supreme Court says in The Playboy case.

So where does this leave us? The problem we now face is no different from the problem that society faced when Ulysses went to Court in 1935. How do you define obscenity? Is it art or is it obscenity?