

# THE MORALITY OF FIRST AMENDMENT JURISPRUDENCE

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Many people argue that government cannot, or should not, try to dictate morality.<sup>1</sup> But the judiciary, particularly the United States Supreme Court, has dictated *immorality* through First Amendment jurisprudence. What has achieved greater First Amendment free speech rights than political campaign speech, the Pledge of Allegiance, the Ten Commandments, and the Boy Scout Oath combined? The answer is pornography. Since a series of Warren Court decisions in the 1960s, perhaps no single side of any issue has won in the Supreme Court as often as pornography.

In the early twentieth century, the American people, without resort to government or litigation, maintained a society of decency. Pornography did not appear in neighborhood movie theaters or in popular music. Americans did not need or want government action because Hollywood regulated itself. The Hollywood Production Code, known as the Hays Code, reviewed movie scripts and banned sex, nudity, and profanity.<sup>2</sup> Their efforts contributed to the success of the business; more people went to the movies in the 1940s than go today.<sup>3</sup>

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1. See, e.g., G. Marcus Cole, *What is the Government's Role in Promoting Morals . . . Seriously?*, 31 HARV. J.L. & PUB. POL'Y 77 (2008).

2. FRANK MILLER, *CENSORED HOLLYWOOD: SEX, SIN & VIOLENCE ON SCREEN* 51, 89 (1994).

3. See Karen L. Gulick, *Creative Control, Attribution, and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 76 n.82 (1994) ("At the peak of moviegoing in the 1940s, one-half of the U.S. population went to the movies at least once a week, with attendance regularly topping four billion annually. . . . For the past two decades, theater admissions have maintained a constant rate of roughly one billion annually.").

In a 1957 case, *Roth v. United States*,<sup>4</sup> the Supreme Court declared that “obscenity is not within the area of constitutionally protected speech or press.”<sup>5</sup> Calling *Roth* “the first time the question has been squarely presented to this Court,” the majority stated that “expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.”<sup>6</sup> The cases cited in support of this declaration dated back as far as 1877.<sup>7</sup> Another way of reaching the *Roth* Court’s conclusion would be to hold that obscene performances do not qualify as “speech” and obscene publications do not qualify as “press” as those terms are used in the First Amendment.<sup>8</sup>

The supporters of pornography sought to overturn this decision. Charles Rembar, an advocate of constitutional protections for pornography, described their legal strategy in a book entitled *The End of Obscenity*, and constructed a clever legal argument to persuade *Roth* author Justice William Brennan to change his position on the issue.<sup>9</sup> Rembar took Justice Brennan’s *Roth* definition of “obscenity as utterly without redeeming social importance”<sup>10</sup> and persuaded him to make “utterly” a constitutional requirement.<sup>11</sup> The new legal test became that pornography *cannot* be banned “unless it is found to be *utterly* without redeeming social value.”<sup>12</sup>

Justice Brennan adopted this new legal test in the Court’s next obscenity case, *Memoirs v. Massachusetts*,<sup>13</sup> also known as the *Fanny Hill* case.<sup>14</sup> “Social value” became a key phrase used in winning the Supreme Court’s approval of pornography.<sup>15</sup> Justice Brennan was joined in his opinion supporting pornography by

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4. 354 U.S. 476 (1957).

5. *Id.* at 485.

6. *Id.* at 481.

7. *Id.* (citing *Ex parte Jackson*, 96 U.S. 727 (1877)).

8. U.S. CONST. amend. I.

9. CHARLES REMBAR, *THE END OF OBSCENITY* 118–26 (1968).

10. *Roth v. United States*, 354 U.S. 476, 484 (1957).

11. See REMBAR, *supra* note 9, at 439, 480.

12. *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion) (emphasis added).

13. *Id.*

14. See REMBAR, *supra* note 9, at 490.

15. *Id.* at 480.

Chief Justice Earl Warren and by Justice Abe Fortas,<sup>16</sup> whom President Lyndon Johnson had just appointed to the Supreme Court. Justice Fortas had connections inside Lyndon Johnson's White House,<sup>17</sup> served as an attorney for pornographers,<sup>18</sup> and signed an amicus brief on behalf of pornographers in *Roth*.<sup>19</sup>

After *Memoirs*, pornographers dramatically increased their production of movies and invested a significant amount of time and money to bring dozens of cases to the Supreme Court. By the fall term in October 1966, the Supreme Court was flooded with appeals from lower court convictions. This showed the great financial resources of the pornography industry, its determination to change a longstanding culture, and its optimism that it could accomplish this with the assistance of the Warren Court, including the activist liberal Justices Warren, Fortas, Brennan, Black, and Douglas.

In the short space of thirteen months, May 1967 to June 1968, the Warren Court handed down a series of twenty-six decisions that changed dramatically the law of obscenity.<sup>20</sup> These decisions elevated pornography and other assaults on decency to the level of a First Amendment right. The Supreme Court reversed dozens of judges, juries, and appellate courts in sixteen states, made laws against obscenity unenforceable, and lowered drastically the standards of decency in communities throughout America.

This avalanche of pro-pornography decisions started on May 8, 1967, with *Redrup v. New York*.<sup>21</sup> The case involved the sale of books published by William Hamling, a wealthy publisher of lewd magazines, who financed the defendant's case.<sup>22</sup> The most shocking aspect of this case is that Hamling had been Justice

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16. *Memoirs*, 383 U.S. at 414.

17. See EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* 529 (1992) ("Fortas listed himself in *Who's Who in the South and Southwest* as 'Presidential advisor,' giving his address as 'Care of the White House, 1600 Pennsylvania Avenue, Washington, D.C.'").

18. See *id.* at 527 (Fortas's firm "had represented the publishers of *Playboy* and *Rogue* magazines").

19. *Id.* at 528.

20. See *infra* note 25. This tally also includes *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam).

21. 386 U.S. 767 (1967) (per curiam).

22. DE GRAZIA, *supra* note 17, at 513.

Fortas's client before he joined the Court.<sup>23</sup> Despite this connection, Justice Fortas did not recuse himself, but instead voted to reverse Robert Redrup's conviction for selling pornographic books published by Hamling.<sup>24</sup>

Following the *Redrup* decision, from June 1967 to June 1968, the Supreme Court handed down nineteen more pro-pornography decisions that simply cited *Redrup* as the reason for reversing lower court decisions.<sup>25</sup> The majority of these decisions consisted of only one or two sentences, a pattern Justice John Harlan referred to as the "*Redrup* treatment."<sup>26</sup> For example, in *Mazes v. Ohio*,<sup>27</sup> the Court reversed the judgments of the Ohio Supreme Court, the Ohio Court of Appeals, the trial judge, and the jury, in a single 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."<sup>28</sup> This single sentence constitutes the entire majority opinion. In most of these decisions, the Court granted *certiorari* and reversed the

23. *Id.* at 527–28.

24. See *Redrup*, 386 U.S. at 768, 771.

25. (1) *Keney v. New York*, 388 U.S. 440 (1967) (per curiam); (2) *Friedman v. New York*, 388 U.S. 441 (1967) (per curiam); (3) *Ratner v. California*, 388 U.S. 442 (1967) (per curiam); (4) *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam); (5) *Sheperd v. New York*, 388 U.S. 444 (1967) (per curiam); (6) *Avansino v. New York*, 388 U.S. 446 (1967) (per curiam); (7) *Aday v. United States*, 388 U.S. 447 (1967) (per curiam); (8) *A Quantity of Copies of Books v. Kansas*, 388 U.S. 452 (1967) (per curiam); (9) *Schackman v. California*, 388 U.S. 454 (1967) (per curiam); (10) *Books, Inc. v. United States*, 388 U.S. 449 (1967) (per curiam); (11) *Mazes v. Ohio*, 388 U.S. 453 (1967) (per curiam); (12) *Potomac News Co. v. United States*, 389 U.S. 47 (1967) (per curiam); (13) *Conner v. City of Hammond*, 389 U.S. 48 (1967) (per curiam); (14) *Cent. Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967) (per curiam); (15) *Chance v. California*, 389 U.S. 89 (1967) (per curiam); (16) *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968) (per curiam); (17) *Robert-Arthur Mgmt. Corp. v. Tennessee ex rel. Canale*, 389 U.S. 578 (1968) (per curiam); (18) *Felton v. City of Pensacola*, 390 U.S. 340 (1968) (per curiam); (19) *Henry v. Louisiana*, 392 U.S. 655 (1968) (per curiam). Six other pornography cases decided during this period relied on other, or no, reasoning. (1) *Corinth Publ'ns, Inc. v. Wesberry*, 388 U.S. 448 (1967) (per curiam) (citing no cases); (2) *Rosenbloom v. Virginia*, 388 U.S. 450 (1967) (per curiam); (3) *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (per curiam); (4) *Rabeck v. New York*, 391 U.S. 462 (1968) (per curiam); (5) *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968) (per curiam); (6) *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

26. *Bloss v. Dykema*, 398 U.S. 278, 278 (1970) (Harlan, J., dissenting).

27. 388 U.S. 453 (1967).

28. *Id.*

lower courts at the same time, thus not even allowing the government to present its views in oral argument.<sup>29</sup>

This procedure enabled the Court to conceal from the public the substance of the cases that it was approving. In fact, it requires a search of the lower court decisions to identify the nature of the gross obscenities the Court protected with the First Amendment.<sup>30</sup> The public was kept in the dark, but the Justices knew exactly what they were doing. The Court held “movie day[s]” where the Justices and their clerks would watch the films at issue in pornography cases.<sup>31</sup>

All but one of the twenty-eight pro-pornography decisions the Warren Court handed down during this period were issued *per curiam*, that is, anonymously.<sup>32</sup> This practice of anonymity suggests that the Justices could not defend the obscenity that they used the First Amendment to protect.

Hollywood understood the message of the Court, and the Motion Picture Association stopped enforcing its own Production Code. The results of the Academy Awards reflected this

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29. *See, e.g.*, *Chance v. California*, 389 U.S. 89 (1967) (per curiam).

30. *See, e.g.*, *State v. Mazes*, 209 N.E.2d 496, 498 (Ohio App. 1965).

31. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 198 (1979).

32. (1) *Redmond v. United States*, 384 U.S. 264 (1966) (per curiam); (2) *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam); (3) *Keney v. New York*, 388 U.S. 440 (1967) (per curiam); (4) *Friedman v. New York*, 388 U.S. 441 (1967) (per curiam); (5) *Ratner v. California*, 388 U.S. 442 (1967) (per curiam); (6) *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam); (7) *Sheperd v. New York*, 388 U.S. 444 (1967) (per curiam); (8) *Avansino v. New York*, 388 U.S. 446 (1967) (per curiam); (9) *Aday v. United States*, 388 U.S. 447 (1967) (per curiam); (10) *Corinth Publ'ns, Inc. v. Wesleyberry*, 388 U.S. 448 (1967) (per curiam); (11) *Rosenbloom v. Virginia*, 388 U.S. 450 (1967) (per curiam); (12) *A Quantity of Copies of Books v. Kansas*, 388 U.S. 452 (1967) (per curiam); (13) *Schackman v. California*, 388 U.S. 454 (1967) (per curiam); (14) *Books, Inc. v. United States*, 388 U.S. 449 (1967) (per curiam); (15) *Mazes v. Ohio*, 388 U.S. 453 (1967) (per curiam); (16) *Potomac News Co. v. United States*, 389 U.S. 47 (1967) (per curiam); (17) *Conner v. City of Hammond*, 389 U.S. 48 (1967) (per curiam); (18) *Cent. Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967) (per curiam); (19) *Chance v. California*, 389 U.S. 89 (1967) (per curiam); (20) *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968) (per curiam); (21) *Robert-Arthur Management Corp. v. Tennessee ex rel. Canale*, 389 U.S. 578 (1968) (per curiam); (22) *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (per curiam); (23) *Felton v. City of Pensacola*, 390 U.S. 340 (1968) (per curiam); (24) *Rabeck v. New York*, 391 U.S. 462 (1968) (per curiam); (25) *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968) (per curiam); (26) *Henry v. Louisiana*, 392 U.S. 655 (1968) (per curiam); (27) *Von Cleef v. New Jersey*, 395 U.S. 814 (1969) (per curiam). Only one of the Warren Court's pro-pornography decisions was signed. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) (opinion by Marshall, J.).

abrupt change. 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.<sup>33</sup> This new freedom brought obscene language, near-total nudity, graphic sex scenes, and sadistic violence to neighborhood movie theaters.

When Chief Justice Warren announced his resignation in 1968, President Johnson nominated his good friend Justice Fortas to be Chief Justice.<sup>34</sup> In a dramatic confirmation battle led by Republican Senator Robert P. Griffin, the Senate refused to confirm Justice Fortas as Chief Justice, primarily because of his votes in obscenity cases and his conflict of interest involving pornographers.<sup>35</sup> Senators were shocked when they viewed the pictures and videos of the obscenity that the Warren Court had wrapped in the First Amendment. As Democratic Senator Frank Lauschke said, "If the nominee were my brother, I would not vote for him."<sup>36</sup> Justice Fortas was not confirmed as Chief Justice; he later resigned from the Court in disgrace, and his own law firm, Arnold, Fortas and Porter, would not take him back out of fear that he would tarnish the firm's image.<sup>37</sup>

Justice Fortas did not write many significant Supreme Court opinions, and he did not author any of the pornography decisions. He did, however, participate in every obscenity case while serving on the Supreme Court, and in every case he voted in favor of the challenged materials.<sup>38</sup> Justice Fortas was generally recognized as extremely forceful and persuasive, as well as very intelligent—that is how he achieved great success as a private lawyer—and it stands to reason that he could have had a similar effect on his fellow Justices in their private deliberations.<sup>39</sup>

This record vindicates the words of Judge Robert Bork that "the suffocating vulgarity of popular culture is in large measure the work of the [Supreme] Court" because "it defeated attempts . . . to . . . minimize vulgarity."<sup>40</sup> Chief Justice Warren

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33. See PETER C. MOWREY, AWARD WINNING FILMS: A VIEWER'S REFERENCE TO 2700 ACCLAIMED MOTION PICTURES 250–51, 357 (1994).

34. See DE GRAZIA, *supra* note 17, at 538.

35. See *id.* at 530, 545–46. The President eventually withdrew his nomination of Justice Fortas in the face of Senate opposition. See *id.* at 546.

36. *Id.* at 539.

37. *Id.* at 549.

38. See *supra* note 25.

39. See DE GRAZIA, *supra* note 17, at 528.

40. ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 64 (2003).

and Justices Fortas, Brennan, Black, and Douglas no longer sit on the Supreme Court, but in Shakespeare's words, "The evil that men do lives after them."<sup>41</sup>

The Supreme Court continues to treat pornography as a privileged industry. After Warren Burger replaced Earl Warren as Chief Justice, a new majority tried to minimize the damage of the Warren Court's decisions and to restore the *Roth* test, particularly in *Miller v. California*.<sup>42</sup> It was nearly impossible, however, to turn back the tide of pornography; the damage was already done and continues to this day. Courts have not extended constitutional protection to individuals who say a prayer before a football game<sup>43</sup> or post the Ten Commandments in a courthouse.<sup>44</sup> The federal courts routinely censor political and religious speech,<sup>45</sup> but protect pornographers. Explicit sex can travel onto family computers where children may access it, and the Supreme Court prevents democratically elected officials from acting to restrict access to such material.

In the last five years, the Supreme Court has extended First Amendment protection to computer-generated child pornography and Internet pornography in general, thereby blocking efforts to clean up the culture. In *Ashcroft v. Free Speech Coalition*,<sup>46</sup> the Supreme Court struck down two provisions of the Child Pornography Prevention Act, which would have banned computer-generated child pornography.<sup>47</sup> In *Ashcroft v. ACLU*,<sup>48</sup> the Supreme Court enjoined enforcement of the Child Online Protection Act, which would have required pornographers to take reasonable steps to restrict minors' access to pornography on the Internet.<sup>49</sup> This law did not censor a single word or picture.<sup>50</sup> It merely required the purveyors of sex-for-profit materials to screen their websites from minors, which they could do

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41. WILLIAM SHAKESPEARE, *JULIUS CAESAR* 114 (Mary Ellen Snodgrass trans., Wiley Publ'g, Inc. 2006) (1623).

42. 413 U.S. 15 (1973).

43. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

44. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

45. See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003); *Lee v. Weisman*, 505 U.S. 577 (1992).

46. 535 U.S. 234 (2002).

47. *Id.*

48. 542 U.S. 656 (2004).

49. *Id.* at 659, 662, 673.

50. See *id.* at 682 (Breyer, J., dissenting).

by credit card or other verification requirements.<sup>51</sup> The Court instead shifted the burden to families to screen out graphic Internet sex, rather than imposing the cost on the companies profiting from the pornography, as the invalidated law required.<sup>52</sup> The reasoning makes as much sense as telling a family to pull down its window shades if it does not want to see people exposing themselves in the street.

The lower federal courts have followed the Supreme Court's direction, often with illogical results. After the State of Washington imposed a fine for the sale or rental to minors of video or computer games that demonstrate how to kill police officers, a federal court struck down the statute because violent video games "are as much entitled to the protection of free speech as the best of literature."<sup>53</sup> In other words, a video game showing how to kill police officers deserves the same constitutional protection as the works of William Shakespeare and Herman Melville.

In June 2007, the Court of Appeals for the Second Circuit struck down the Federal Communications Commission's discipline of television networks for broadcasting profanity at entertainment awards ceremonies.<sup>54</sup> The court implied that it is unconstitutional to ban similar profanity in the future.<sup>55</sup>

Today, pornography exists even in public school classrooms. Assignments for middle school children include books of fiction that contain explicit sex, immoral behavior, and profanity. Parents cannot make progress with their objections, even when many supporting parents attend a school board meeting to assert their rights. The courts are expanding a power for public schools to teach anything to schoolchildren because, as the Ninth Circuit initially wrote in *Fields v. Palmdale School District*,<sup>56</sup> parents' rights over the care and upbringing of their children do "not extend beyond the threshold of the school door."<sup>57</sup>

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51. *See id.*

52. *See id.* at 667-69.

53. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004) (quoting *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003)).

54. *Fox Television Stations v. FCC*, 489 F.3d 444, 467 (2d Cir. 2007).

55. *See id.*

56. 427 F.3d 1197 (9th Cir. 2005).

57. *Id.* at 1207. This ruling stirred up so much criticism that the United States House of Representatives passed a resolution denouncing the decision. H.R. Res. 547, 109th Congress (2005). Subsequently, the Ninth Circuit amended its opinion

The pornographic sea continues to rise. The courts are not interpreting the First Amendment; they are rewriting it to guarantee the profits of pornographers. The Supreme Court's view of the First Amendment now protects X-rated movies and other forms of obscenity, which represents a serious problem for standards of decency in America's communities and for the proper education of America's children.

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to delete the offensive "threshold" sentence, but did not change its previous ruling. *Fields v. Palmdale Sch. Dist.* 447 F.3d 1187, 1190 (9th Cir. 2006).