

OBSCENITY AND THE LAW



The history of banning books

from the 1800s to present day

Banned Books Week

A Selection of Works

September 18-24, 2022

Curated by Devan Orr and Fred Dingley

Obscenity and the Law:

The History of Banning Books from the 1800s to Present Day

The following books were on display in the Wolf Law Library September 18-24, 2022. Links are to the books in the [W&M Libraries catalog](#). All books are held in print by the Wolf Law Library and may be borrowed by members of the William & Mary community.

- [**100 Banned Books: Censorship Histories of World Literature**](#) by Nicholas J. Karolides, Margaret Bald, and Dawn B. Sova. (New York: Checkmark Books, 1999)
- [**Bad Attitude/s On Trial: Pornography, Feminism, and the Butler Decision**](#) by Brenda Cossman, Shannon Bell, Lise Gotell, and Becki L. Ross. (Toronto: University of Toronto Press, 1997)
- [**Banned Books: Challenging Our Freedom to Read**](#) by Robert P. Doyle. (Chicago, Illinois: American Library Association, 2014)
- [**The Banned Books of England and Other Countries: A Study of the Conception of Literary Obscenity**](#) by Alec Craig. (Westport, Connecticut: Greenwood Press, 1977)
- [**Banned in Boston: The Watch and Ward Society's Crusade Against Books, Burlesque, and the Social Evil**](#) by Neil Miller. (Boston: Beacon Press, 2010)
- [**Banthology: Stories from Banned Nations**](#) edited by Sarah Cleave. (Dallas, Texas: Deep Vellum Publishing, 2018)
- [**Blue Politics: Pornography and the Law in the Age of Feminism**](#) by Dany Lacombe. (Toronto: University of Toronto Press, 1994)
- [**Bookbanning in America: Who Bans Books? – And Why?**](#) By William Noble. (Middlebury, VT: P.S. Eriksson, 1990)
- [**Censorship: Government and Obscenity**](#) by Terrence J. Murphy. (Baltimore: Helicon Press, 1963)
- [**Censorship and Obscenity**](#) edited by Rajeev Dhavan and Christie Davies. (Totowa, NJ: Rowman and Littlefield, 1978)
- [**Censorship and the Limits of the Literary: A Global View**](#) edited by Nicole Moore. (New York: Bloomsbury Academic, 2015)
- [**Comstockery in America: Patterns of Censorship and Control**](#) by Robert W. Haney. (New York: De Capo Press, 1974)
- [**Degradation: What the History of Obscenity Tells Us About Hate Speech**](#) by Kevin W. Saunders. (New York: New York University Press, 2011)

- ***Dirt for Art's Sake: Books on Trial from Madame Bovary to Lolita*** by Elisabeth Landenson. (Ithaca: Cornell University Press, 2007)
- ***The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer, and Fanny Hill*** by Charles Rembar. (New York: Notable Trials Library, 1991)
- ***Literary Obscenities: U.S. Case Law and Naturalism After Modernism*** by Erik M. Bachman. (University Park, PA: Pennsylvania State University Press, 2018)
- ***Literary Trials: Exceptio Artis and Theories of Literature in Court*** edited by Ralf Grüttemeier. (New York: Bloomsbury Academic, 2016)
- ***Literature, Obscenity, & Law*** by Felice Flanery Lewis. (Carbondale: Southern Illinois University Press, 1976)
- ***Literature Suppressed on Political Grounds*** by Nicholas J. Karolides. (New York: Facts on File, 1998)
- ***Literature Suppressed on Sexual Grounds*** by Dawn B. Sova. (New York: Facts on File, 1998)
- ***Literature Suppressed on Sexual Grounds*** by Dawn B. Sova. (Revised edition. New York: Facts on File, 2006)
- ***Literature Suppressed on Social Grounds*** by Dawn B. Sova. (New York: Facts on File, 1998)
- ***Lust On Trial: Censorship and the Rise of American Obscenity in the Age of Anthony Comstock*** by Amy Werbel. (New York: Columbia University Press, 2018)
- ***The Man Who Hated Women: Sex, Censorship, and Civil Liberties in the Gilded Age*** by Amy Sohn. (New York: Farrar, Straus and Giroux, 2021)
- ***The Most Dangerous Book: The Battle for James Joyce's Ulysses*** by Kevin Birmingham. (New York: The Penguin Press, 2014)
- ***Not in Front of the Children: "Indecency," Censorship and the Innocence of Youth*** by Marjorie Heins (New York: Hill and Wang, 2001)
- ***Obscene in the Extreme: The Burning and Banning of John Steinbeck's The Grapes of Wrath*** by Rick Wartzman. (New York: Public Affairs, 2008)
- ***Obscenity and Public Morality: Censorship in a Liberal Society*** by Harry M. Clor. (Chicago: University of Chicago Press, 1985)

- **Obscenity Rules: Roth v. United States and the Long Struggle Over Sexual Expression** by Whitney Strub. (Lawrence, KS: University Press of Kansas, 2013)
- **Offensive Literature: Decensorship in Britain, 1960-1982** by John Sutherland. (Totowa, NJ: Barnes & Noble, 1983)
- **On Pornography: Literature, Sexuality, and Obscenity Law** by Ian Hunter, David Saunders, and Dugald Williamson. (New York: St Martin's Press, 1993)
- **The People v. Ferlinghetti: The Fight to Publish Allen Ginsberg's Howl** by Ronald K. L. Collins and David M. Skover. (Lanham: Rowman & Littlefield, 2019)
- **Pornography: The Politics of Legal Challenges** by Max Waltman. (New York: Oxford University Press, 2021)
- **Pornography and Censorship** edited by David Copp and Susan Wendell. (Buffalo, NY: Prometheus Books, 1983)
- **Pornography On Trial: A Handbook with Cases, Laws, and Documents** by Thomas C. Mackey. (Santa Barbara: ABC-CLIO, Inc., 2002)
- **Purity in Print: Book Censorship in America from the Gilded Age to the Computer Age** by Paul S. Boyer. (Madison: University of Wisconsin Press, 2002)
- **The Repeal of Reticence: A History of America's Cultural and Legal Struggles Over Free Speech, Obscenity, Sexual Liberation, and Modern Art** by Rochelle Gurstein. (New York: Hill and Wang, 1996)
- **The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act** by Wendell Bird. (New York: Oxford University Press, 2020)
- **Saving Our Children from the First Amendment** by Kevin W. Saunders. (New York: New York University Press, 2003)
- **Seal of Approval: The History of the Comics Code** by Amy Kiste Nyberg. (Jackson, Mississippi: University Press of Mississippi, 1998)
- **The Ten-Cent Plague: The Great Comic-Book Scare and How It Changed America** by David Hajdu. (New York: Farrar, Straus and Giroux, 2008)
- **Tropic of Cancer on Trial: A Case History of Censorship** by E. R. Hutchinson. (New York: Grove Press, 1968)
- **Ulysses and Justice** by James McMichael. (Princeton: Princeton University Press, 1991)

- *The Ulysses Trials: Beauty and Truth Meet Law* by Joseph M. Hassett. (Dublin, Ireland: The Lilliput Press, 2016)
- *The Zhivago Affair: The Kremlin, the CIA, and the Battle Over a Forbidden Book* by Peter Finn and Petra Couvée. (New York: Pantheon Books, 2014)



CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT, DECEMBER TERM, 1815

The Commonwealth against SHARPLESS and others

THE following indictment was found in the Mayor's Court of the city of Philadelphia, and removed to this Court by certiorari.

" MARCH SESSIONS, 1815.

" City of Philadelphia, ss.

" The Grand Inquest of the Commonwealth of Pennsylvania, inquiring for the city of Philadelphia, upon their oaths and affirmations respectively do present, that Jesse Sharpless, late of the same city yeoman, John Haines, late of the same city yeoman, George Haines, late of the same city yeoman, John Steel, late of the same city yeoman, Ephraim Martin, late of the same city yeoman, and — Mayo, also late of the same city yeoman, being evil disposed persons, and designing, contriving, and intending the morals, as well as of youth as of divers other citizens of this commonwealth, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on the first day of March, in the year one thousand eight hundred and fifteen, the postures and attitudes of the figures should be minutely described; it is enough if the picture be so described as to enable the jury to apply the evidence, and to judge, whether or not it is an indecent picture. Nor is it necessary to lay the house, in which the picture is exhibited, to be a nuisance; the offence not being a nuisance, but one tending to the corruption of morals.

Any offence which in its nature and by its example, tends to the corruption of morals, as the exhibition of an obscene picture, is indictable at common law. In an indictment for exhibiting an obscene picture, it need not be averred, that the exhibition was public; if it be stated, that the picture was shewn to sundry persons for money, it is a sufficient averment of its publication. Nor is it necessary that

The first obscenity case in the United States, *Commonwealth v. Sharpless*, the Pennsylvania Supreme Court upheld Sharpless' conviction and opened the door for further obscenity challenges in secular courts in other jurisdictions.

COMMONWEALTH versus PETER HOLMES.

In an indictment for publishing an obscene book or print, it is sufficient to give a general description thereof, and to aver their evil tendency, without copying the book, or minutely describing the print. The Court of Common Pleas, succeeding to the powers of the Court of Sessions, has jurisdiction of the offence of publishing libels.

THE defendant was indicted at the Circuit Court of Common Pleas sitting in this county, for publishing a lewd and obscene print, contained in a certain book entitled "Memoirs of a Woman of Pleasure," and also for publishing the same book. The indictment contained three counts, charging the publishing and delivering of the print to three several persons, and three counts alleging the publishing and delivering of the book to the same three persons. The second count alleged that the defendant, "being a scandalous and evil-disposed person, and contriving, devising and intending, the morals as well of youth as of other good citizens of said commonwealth to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, with force and arms, at, &c., on, &c., knowingly, unlawfully, wickedly, maliciously, and scandalously, did utter, publish and deliver to A. B. a certain lewd, wicked, scandalous, infamous and obscene printed book, entitled, &c., which said printed book is so lewd, wicked and obscene, that the same would be offensive to the Court here, and improper to be

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Commonwealth v. Peter Holmes was the first United States obscenity case regarding a book, *The Life and Adventures of Miss Fanny Hill*. Individuals were prosecuted for showing illicit images from the book to others. Obscenity and pornography censorship has continued through American history.



*360] *THE QUEEN, ON THE PROSECUTION OF HENRY SCOTT, APPELLANT, v.
BENJAMIN HICKLIN AND ANOTHER, JUSTICES OF WOLVERHAMPTON,
RESPONDENTS. April 29.

*Obscene Publication—Misdemeanor—Seizure and Destruction of Obscene Articles,
under 20 & 21 Vict. c. 83, s. 1.*

By 20 & 21 Vict. c. 83, s. 1, if upon complaint that there is reason to believe that any obscene books, &c., are kept in any house or other place, for the purpose of sale or distribution, and upon proof that one or more of such articles has been sold or distributed in connection with such place, justices may, upon being satisfied that such articles are of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such, order by special warrant that such articles shall be seized, and after summoning the occupier of the house, the same or other justices may, if they are satisfied that the articles seized are of the character stated in the warrant, and have been kept for the purposes aforesaid, order them to be destroyed.

A number of copies of a pamphlet entitled, "The Confessional Unmasked; showing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession," were seized in the appellant's house and ordered by justices of a borough to be destroyed as obscene books within the above section.

On appeal, the following facts were found. The pamphlet consisted of extracts taken from the writings of theologians on the doctrine and discipline of the Romish Church and particularly on the practice of auricular confession. On one side of the page were passages in the original Latin, and opposite to each passage was a free translation in English. The pamphlet also contained a preface and notes condemnatory of the tenets and principles of the writers. About half of the pamphlet related to controversial questions, but the latter half of the pamphlet was grossly obscene, as relating to impure and filthy acts, words, and ideas. The appellant sold the pamphlets at the price he gave for them to any one who applied for them. He did not keep the pamphlets to sell for profit or gain, nor for the purpose of prejudicing good morals, though the indiscriminate sale and circulation of them was calculated to have that effect; but he kept and sold them for the purpose of exposing what he deemed to be the errors of the church of Rome, and particularly the errors of the confessional. The recorder, being of opinion that the sale and distribution of the pamphlets under the above circumstances would not be a misdemeanor, quashed

As obscenity laws and convictions became more common in the United States, we continuously looked to England for standards to apply. The rule from *Regina v. Hicklin* was used in the Comstock Act and applied to prosecutions in the states moving forward.

Under the *Hicklin* rule, material could be found obscene if any portion could be found to corrupt vulnerable minds. Overall context, literary merit, and community standards were irrelevant.

Penalty for, in any place within the exclusive jurisdiction of the United States, selling or possessing obscene books, pictures, &c.;

or drugs, &c., for preventing conception or causing abortion; or advertising or making the same.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever, within the District of Columbia or any of the Territories of the United States, or other place within the exclusive jurisdiction of the United States, shall sell, or lend, or give away, or in any manner exhibit, or shall offer to sell, or to lend, or to give away, or in any manner to exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession, for any such purpose or purposes, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing of other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertize the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or



A major development in the United States were the Comstock Laws (17 Stat. 598). Passed under Grant, these acts criminalized the use of the U.S. Postal Service to send obscene materials including obscene literature, contraceptives, sex toys, and information about the previously listed items. Various states then passed their own versions of the laws as well.

In 1879, *United States v. Bennett* upheld the Comstock Laws as constitutional, and the language used in the laws to define obscenity, the *Hicklin* rule, was valid US law until the Comstock laws were annulled in 1957.

These laws were used to ban and censor various types of media, including comic books and other popular novels.

Case No. 14,571.

UNITED STATES v. BENNETT.

[16 Blatchf. 338 8 Reporter, 38; 12 Myer's Fed. Dec. 692; 25 Int. Rev. Rec. 305.]¹
Circuit Court. S. D. New York. May 31, 1879.

CRIMINAL PRACTICE — OFFENCE AGAINST POSTAL REGULATIONS—OBSCENE PUBLICATION—INDICTMENT—HOW SET OUT—TRIAL—VERDICT.

1. There is no provision of law whereby an indictment found in a circuit court can be remitted by it to the district court, unless the district attorney deems it necessary.

2. The provisions of section 3893 of the Revised Statutes, as amended by section 1 of the act of July 12, 1876 (19 Stat. 90), which forbids the depositing in the mail, of any obscene or indecent publication, are not repugnant to any provision of the constitution of the United States.

3. It is not necessary that an indictment under that statute, in respect to a book, should set forth in hæc verba the alleged obscene book, or the alleged obscene passages in it, if the indictment states that such book is so indecent, that it would be offensive to the court and improper to be placed on its records, and that, therefore the jurors do not set forth the same in the indictment, and if the book is sufficiently identified in the indictment for the defendant to know what book is intended.

[Cited in U. S. v. Noelke, 1 Fed. 433.]

4. The defendant can always procure information of the charge which he is to meet, so far as

¹ [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 38, and 25 Int. Rev. Rec. 305, contain only partial reports.]

UNITED STATES v. ONE BOOK CALLED
"ULYSSES."

District Court, S. D. New York.
Dec. 6, 1933.

1. Customs duties ☞22.

In determining whether book is "obscene," and, therefore, not importable, it is material first to determine whether book was written with "pornographic intent," that is, written for purpose of exploiting obscenity (Tariff Act 1930, § 305 [19 USCA § 1305]).

[Ed. Note.—For other definitions of "Obscene; Obscenity," see Words & Phrases.]

2. Customs duties ☞22.

Word "obscene," within statute prohibiting importation of any obscene book, means tending to stir sex impulses or to lead to sexually impure and lustful thoughts (Tariff Act 1930, § 305 [19 USCA § 1305]).

3. Customs duties ☞22.

Whether particular book tends to excite sex impulses or to lead to sexually impure and lustful thoughts, rendering book "obscene" and not importable, must be tested objectively by court's opinion as to effect of book, read in its entirety, on person with average sex instincts (Tariff Act 1930, § 305 [19 USCA § 1305]).

4. Customs duties ☞22.

Book "Ulysses" held not "obscene" in statute prohibiting importation of books (Tariff Act 1930, § 305 [19 USCA § 1305]).

Libel by the United States for infringement of one book, called "Ulysses" by Random House, Inc. On the ground that the book is obscene under Tariff Act 1930, § 305 (19 USCA § 1305).

Subject to seizure and destruction by the United States. Plaintiff's motion denied.

AUGUSTUS N. HAND, Circuit Judge.

This appeal raises sharply the question of the proper interpretation of section 305 (a) of the Tariff Act of 1930 (19 USCA § 1305 (a)). That section provides that "all persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, . . ." and directs that, upon the appearance of any such book or matter at any customs office, the collector shall seize it and inform the district attorney, who shall institute proceedings for forfeiture. In accordance with the statute, the collector seized *Ulysses*, a book written by James Joyce, and the United States filed a libel for forfeiture. The claimant, Random House, Inc., the publisher of the American edition, intervened in the cause and filed its answer denying that the book was obscene and was subject to confiscation and praying that

One of the most notable cases against a singular work is *United States v. One Book Called "Ulysses"*. In 1922, James Joyce published *Ulysses* and there was almost instant outrage globally and was *de facto* banned for publishing in many jurisdictions. Random House owned the U.S. rights, and wanted to challenge obscenity law and the ban. The district court held *Ulysses* was not obscene, and so could be imported. At the Court of Appeals, Judge Augustus Hand broke from the *Hicklin* rule to affirm the District Court ruling.

UNITED STATES v. ONE BOOK ENTITLED
ULYSSES BY JAMES JOYCE
(RANDOM HOUSE, Inc., Claimant).

No. 459.

Circuit Court of Appeals, Second Circuit.
Aug. 7, 1934.

We may discount the laudation of *Ulysses* by some of its admirers and reject the view that it will permanently stand among the great works of literature, but it is fair to say that it is a sincere portrayal with skillful artistry of the "streams of consciousness" of its characters. Though the depiction happily is not of the "stream of consciousness" of all men and perhaps of only those of a morbid type, it seems to be sincere, truthful, relevant to the subject, and executed with real art. Joyce, in the words of *Paradise Lost*, has dealt with "things unattempted yet in prose or rime"—with things that very likely might better have remained "unattempted"—but his book shows originality and is a work of symmetry and excellent craftsmanship of a sort. The question before us is whether such a book of artistic merit and scientific insight should be regarded as "obscene" within section 305 (a) of the Tariff Act.

That numerous long passages in *Ulysses* contain matter that is obscene under any fair



ROTH v. UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT.

No. 582. Argued April 22, 1957.—Decided June 24, 1957.*

3. Obscenity is not with freedom of speech or press, as to the Federal Clause of the Fourteenth Amendment. Pp. 481–485.

(a) In the light of history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect obscenity. Pp. 482–483.

(b) The protection given speech to assure unfettered interchange of ideas for the advancement of political and social changes desired by the people.

(c) All ideas having even the slightest merit—unorthodox ideas, controversial ideas, ideas that offend the prevailing climate of opinion—have the right to the free interchange of ideas, unless excludable because they invade some other area of more important interest. The First Amendment is the cornerstone of the First Amendment without redeeming social importance.

1. In the *Roth* case, the constitutionality of 18 U. S. C. § 1461, which makes punishable the mailing of material that is “obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character,” and Roth’s conviction thereunder for mailing an obscene book and obscene circulars and advertising, are sustained. Pp. 479–494.

4. Since obscenity is not protected, constitutional guaranties were not violated in these cases merely because, under the trial judges’ instructions to the juries, convictions could be had without proof either that the obscene material would perceptibly create a clear and present danger of antisocial conduct, or probably would induce its recipients to such conduct. *Beauharnais v. Illinois*, 343 U. S. 250. Pp. 485–490.

(a) Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest—i. e., material having a tendency to excite lustful thoughts. P. 487.

(b) It is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest. Pp. 487–488.

(c) The standard for judging obscenity—adequate to withstand the attacks of the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

Roth v. United States also upheld a criminal obscenity statute, but redefined obscene material as “material which deals with sex in a manner appealing to prurient interest” as determined by contemporary community standards and overall theme. When properly applied, the court felt this standard did not violate the First Amendment guarantees of free speech or press, or violate due process.

Obscenity Law Today



In 1982, the Supreme Court held the First Amendment limits the power of schools to remove books to suppress ideas in *Island Trees v. Pico*. However, challenges and book banning are still occurring across the country. Books are being challenged in schools and libraries by parents, patrons, school boards, and more.

One recent challenge was *In re: Gender Queer, A Memoir*, a Virginia Beach suit brought by Tommy Altman, a former congressional candidate, represented by current Delegate Tim Anderson, to remove two books from libraries and bookstores in Virginia. The case was dismissed on August 30, 2022, when the books were found to not be obscene, and Virginia Code § 18.2-384 was held unconstitutional.

