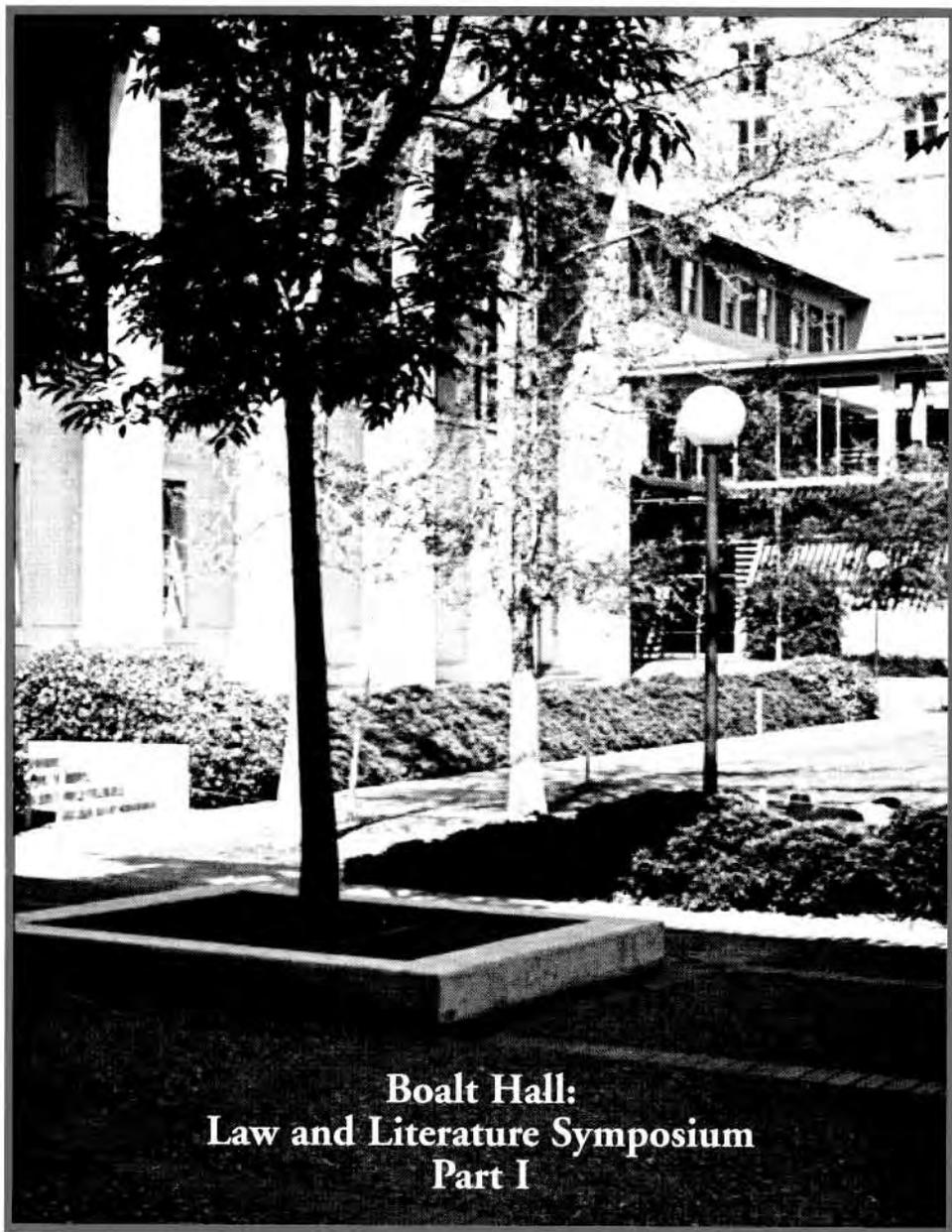


Cardozo Studies in Law and Literature



**Boalt Hall:
Law and Literature Symposium
Part I**

Volume 8, Number 2

Fall/Winter 1996



How Justice Brennan Freed Novels and Movies During the Sixties

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In June 1963, *New York Times* columnist Anthony Lewis wrote a piece for *Esquire* magazine entitled "Sex... and the Supreme Court." In it, Lewis, who was then working the *Times's* Supreme Court beat, observed that the nine not-so-old men sitting on the Court seemed to be quietly "liberating the country from puritanism."

Equally surprising was the fact that the liberation was proceeding from a landmark decision rendered in 1957, called *Roth v. United States*, in which the High Court had seemingly canonized the Comstockian attitude toward sexually-oriented expressive material by holding that "obscenity," i.e., "material having a tendency to excite lustful thoughts," was not protectable by the Constitution's free speech or free press guarantees. The reason it was not, said Justice William J. Brennan, Jr., speaking for the Court, was because obscenity was "utterly without redeeming social importance." In other words, obscene expression was worthless and so unworthy of 1st Amendment protection.

The contradictory encouraging evidence cited by Lewis consisted in largely unnoticed Supreme Court decisions, after *Roth*, that had resulted in the freeing from State or federal censorship of two French films, *The Game of Love* and *Lady Chatterley's Lover*, both based on well-known risqué literary works, plus a nudist magazine called *Sunshine and Health*, and three gay-oriented magazines titled *MANual*, *Trim* and *Grecian Guild Pictorial*. (Today such material would not even raise Jesse Helms's eyebrows.) What the Court seemed to say in freeing those works was that, in its view, they did not meet the *Roth* test for obscenity, that is, the Brethren could not believe that they aroused the average person's lust, and so they ought to be deemed "constitutionally protected" from government suppression.

In the gay-oriented magazines case, Justice Harlan, speaking for the Court, observed that, to be properly counted obscene, material had not only to be calculated to arouse its auditor's lust, it also had to be "patently offensive," terminology that some Court-watchers supposed meant it

had to resemble “hard-core pornography” (— whatever *that* might be!). Thus was the second prong added to what eventually came to be a three-prong constitutionalized test for obscenity.

Unnoticed by Anthony Lewis, a few lower federal courts, following *Roth*, had also contributed to the liberating movement. In San Francisco, a literate trial judge had thrown out obscenity charges brought against the owner of City Lights Bookstore, Lawrence Ferlinghetti, for selling an undercover policeman a copy of Allen Ginsberg’s seminal poem *HOWL*. The judge did this after the poem’s literary merit and social value were testified to by a professor of literature who was able to read into Ginsberg’s poem virtues that, perhaps not surprisingly, had escaped the notice of both the arresting policeman and the accusing prosecutor.

In Chicago, a liberal judge named Julius Hoffman freed from Post Office censorship a cutting-edge literary magazine called *Big Table* because it too had recognizable literary merit, containing as it did excerpts from prose work by the then scarcely known William Burroughs and Jack Kerouac. Ten years later, Hoffman would be branded a tool of the racist American system of justice by Bobbie Seale of the “Chicago Seven” conspiracy trial fame.

Another encouraging trial court decision unnoticed by Lewis had occurred in San Francisco, where a prosecution of the social satirist, Lenny Bruce, for uttering obscene words like “cock-sucker” during the course of a coffee house show, was also thrown out by the judge when Bruce’s A.C.L.U.-affiliated lawyer cited the language in *Roth* suggesting that if Bruce’s performance exhibited some social value, it ought not to be found obscene.

In his *Esquire* piece, Lewis opined that this country seemed to be changing “from one of the most timid countries in dealing with sex in the arts to what many believe is now by far the most liberated in the Western World.” “Gradually,” Lewis went on, “without much notice but with developing momentum,” the Justices were cutting “back the censor’s power over literature and the arts.” What Lewis seemed not to have realized at the time was that it was the author of the Court’s opinion in *Roth*, the Supreme Court’s freshman justice, the Catholic William J. Brennan, Jr., who was most determined to get rid of literary and artistic censorship.

In the winter of 1963, six months after Tony Lewis’s piece came out, Grove Press’s publisher Barney Rosset asked me to ask the Supreme Court

to review a case he'd lost involving the Grove Press edition of Henry Miller's notorious novel *Tropic of Cancer*; the book had been suppressed in scores of cities and states, and, in the case that I took over called *Grove Press v. Gerstein*, it had been banned throughout Dade County, Florida, by a disapproving prosecutor and a disgusted judge.

The prospect of trying to persuade the Supreme Court to free Henry Miller's iconoclastic novel was a high point in my career as a literary defense lawyer. That career had begun in 1956, about a year before the Supreme Court's decision in *Roth v. United States*, when, at the invitation of the A.C.L.U., I succeeded to wrest from the censorial hands of Postmaster General Arthur Summerfield an erotically illustrated, rare-edition copy of Aristophanes's *Lysistrata*. At that time, the post office engaged in the obscene practice of examining any literature of art that it found going through the mail to see if it was obscene. If the Post Office censors thought it was, they would refuse to carry it to its destination or return it to the sender. They would remove it from the mails, a form of "prior censorship" that is especially repugnant to 1st Amendment principles.

What had caused *Lysistrata* to be locked-up in the Post Office's Censor's file cabinet drawer was this rule-of-thumb test that the Censor used to tell the difference between literature and art on the one hand and vulnerable obscenity on the other. "BREASTS, YES, NIPPLES NO! BUTTOCKS, YES, CRACKS NO!" Aristophanes' heroine, Lysistrata, and her girlfriends, all flunked both prongs of the Post Office censor's test.

Although Aristophanes's play was freed in the case, and the Post Office thereafter abandoned its administrative censorship of literature and art going through the mail, the case made no dent in substantive obscenity law. The Florida *Tropic of Cancer* case, on the other hand, gave me a chance to speak to the Supreme Court about the need to radically reform obscenity law to remove the continuing threat that the enforcement of obscenity law, under *Roth*, still presented for literature and art.

It was the winter of 1963. As I researched for a way to help the Court to solve what it itself had more than once referred to as the "intractable problem of obscenity," I reviewed a solution that my favorite University of Chicago law school teacher, the 1st Amendment scholar Professor Harry Kalven, Jr., had advanced in the inaugural 1960 issue of a brand new law journal called *The Supreme Court Review*.

There, Kalven proposed a doctrinal vehicle for the Court to escape

from the jurisprudential corner it had painted itself into when, in *Roth*, it proclaimed that although literary and artistic discussions of sex were supposed to be protected by the 1st Amendment's free speech and press clauses, "obscenity" was not because it could not be said to be "within the area of constitutionally protected speech." The Court had thus created a doctrinal conundrum that had to be resolved if literature and art were to be set free of restraint by the governmental police power that was contained in obscenity law.

The question was how could a publisher, a bookstore owner, a librarian, or an author tell the difference between a protectable discussion or depiction of sex and an unprotectable obscenity? How could a painter or a photographer or the curator of an art gallery or museum tell? How could a policeman, a prosecutor, or even a judge tell if the Supreme Court did not tell?

Harry Kalven's solution was to turn on its head the Supreme Court's statement in *Roth* that "implicit in the history of the 1st Amendment is the rejection of obscenity as utterly without redeeming social importance." What this meant, Harry explained, was that only if sexually-oriented expression, say a novel, a movie, a magazine, or a song, was "utterly without redeeming social value," in other words, "worthless," could it be stripped of the protection that the constitution afforded to all other "discussions of sex" and properly be held "obscene."

In the papers I filed with the Supreme Court in the Florida *Tropic of Cancer* case, I urged the Court to adopt Kalven's proposition that only plainly worthless expression, expression utterly without any literary, artistic, scientific, or other social importance, could be held to be obscene, citing Kalven and *Roth*, as well as two State Supreme Court cases freeing Henry Miller's novel, in which the opinion-writers had adopted Kalven's approach in ruling that *Tropic of Cancer* could not be held obscene.

As it turned out, my *Tropic of Cancer* case was taken up by the Supreme Court at the same time that a case involving the censorship in Ohio of French movie director Louis Malle's motion picture, *Les Amants*, was brought a second time before the Court for reconsideration. The lawyer in the Ohio case, at the Supreme Court level, was the brilliant 1st Amendment lawyer and Law and Literature scholar, the late Ephraim London.

When, some years ago, I looked at the papers that London had filed in the Ohio case, known as *Jacobellis v. Ohio*, I found that he too had cited

Kalven's Supreme Court Review article for the proposition that the only kind of material that should be deemed "obscene" and so be excluded from constitutional protection was material that seemed to be "utterly without redeeming social value."

In the event, on the same day, it was June 22, 1964, and by means of a single opinion explaining its reasoning with regard to both cases, the Supreme Court handed down decisions that rejected the findings of obscenity in both cases. In the opinion, written by Justice Brennan, the Court held that both the novel and the movie were constitutionally protected and could not be branded obscene. That surely was a day when artists and writers everywhere might dance in the streets. And not only artists and writers, but everyone in America who hungered after the kind of freedom, in fact, that the 1st Amendment's guarantees of freedom of speech and freedom of the press seemed to have promised in law. The freedom to receive the images and ideas communicated by artists and writers without interference or restraint of any kind by policemen, prosecutors, judges, post office censors, or motion picture censorship boards.

Because on that day Justice William J. Brennan, Jr. took the opportunity afforded by governmental censorship of Henry Miller's novel and Louis Malle's film to launch a jurisprudential doctrine of great power and efficacy for the liberation of humanistic expression everywhere in the United States. This was to be a revolution in cultural freedom greater than anything imagined by most of us then working in the legal trenches. A revolution whose by-word might very well be: LITERATURE, YES, OBSCENITY LAW, NO! ART, YES, OBSCENITY LAW, NO! ENTERTAINMENT, YES, OBSCENITY LAW, NO! Here is how Brennan did it in the prevailing opinion that he wrote for both cases. First he reiterated in subtly different forms two basic premises of *Roth*: one, "our recognition that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance'"; and two, our realization that "the portrayal of sex, for example, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press...."

Then Brennan laid out his revolutionary doctrine, while all the time seeming to track the law laid out in *Roth*: "It follows that material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or other form of social importance, may not be branded as

obscenity and denied the constitutional protection." Nor, he went on, "may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance."

After that, thanks to the Brennan doctrine, lawyers seeking to free from obscenity charges a book, a magazine, a song, an art photograph, or a movie, need simply show that in Harry Kalven's terms the novel, the magazine, the song, the photograph, the play, or movie was not "worthless." Following Brennan's opinion in the *Tropic of Cancer* and *Les Amants* cases, any work of literature, art or science, any motion picture, and any other sort of expression having even the slightest "social importance," that was threatened with censorship, could now be worked free of threats of banning or destruction. And their distributors and exhibitors could be saved from threatened punishments of fine and jail.

There were, however, serious glitches in the Court's own application of the Brennan doctrine, notably in the cases of mail-order publishers Ralph Ginzburg and William Hamling, in 1964 and 1974 respectively, and in a 1967 case that arose in Berkeley where the police banned Jean Genet's only film, *Un Chant d'Amour*.

The Brennan Doctrine has to this day continued to do duty as a liberator of literature, art and entertainment, of high and low culture, and of the people whose 1st Amendment oriented occupation or profession it has been to publish, distribute, exhibit and perform such works. It was, for instance, by virtue of the Brennan Doctrine that Dennis Barrie, the curator of the Cincinnati Gallery of Modern Art was found not guilty of exhibiting obscenity and child pornography when he mounted a show of the photographic art of Robert Mapplethorpe; in that case the doctrine worked as well to save the art of Robert Mapplethorpe from being destroyed by the Cincinnati police.

Later on, the rap music group called 2 Live Crew was spared from the pains of fine or imprisonment, and their lyrical musical performances and the albums recording those performances were saved from suppression by Brennan's doctrine.

The doctrine's good work on behalf of literature and art has lasted to this day despite the efforts of the Supreme Court bench, first as headed-up by Chief Justice Warren E. Burger, to subvert it in the early 1970's. Burger mobilized a majority of the Nixon Court to revise the "utterly

without redeeming social value” terminology and substitute for it the weaker proposition that no expression may be found obscene or be denied the constitutional protection if it has any “serious literary, artistic, scientific, or political value.” Fortunately, however, the Burger revision seems not to have blunted the thrust of Brennan’s original doctrine to free from censorship any literature, art or entertainment making any non-frivolous claim to social worth.