

Censorship: The State as Censor, Part 1

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First Amendment

- The First Amendment to the U.S. Constitution says:
 - “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.”
 - The clause about “abridging the freedom of speech” is our focus here.

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First Amendment

- First important point: “**Congress** shall make no law”
- This is the state action element of the First Amendment.
- Applies only to action of federal, state, or local governments or their agents – not to actions of private individuals.
- First question is always whether there is state action involved in an act of censorship of free speech.

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State Action Requirement

- Some state action is obvious: censorship exercised by federal, state, or local government agency or department.
- Sometimes agencies and individuals who are acting on behalf of government have been treated as engaging in “state action.”
 - E.g. Amtrak railroad: was created by government and controlled by government to an extent that makes it equivalent to a government agency.

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First Amendment

- The second part is “**abridging** freedom of speech.”
- This gets into questions of what constitutes “abridging” – or impermissible restrictions.
 - Some restrictions are not viewed as serious enough to constitute “abridging.”
- The other question is what is “**freedom of speech**.”
 - Some forms of speech are not protected as strongly as other forms of speech.

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Forums for Speech

- Public and Nonpublic Forums:
 - Exercise of speech treated differently, depending on forum in which it occurs:
 - Traditional public forum, including streets, parks, areas open to the public and used for public assembly: government may restrict speech only to meet a “compelling” interest - involving a clear and present danger to public safety.
 - Designated open public forum is public property that the government has designated for expression of ideas.
 - Nonpublic forum is an area that might be used for expression of ideas but has never been designated as a place where people are free to make public statements.

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Three Forms of Speech

- The three forms of speech under First Amendment analysis are:
 - Pure speech: expression of ideas orally or through text. Protected most strongly.
 - Symbolic speech: expression of ideas not through words but through images. Receives slightly less protection than pure speech.
 - Conduct: expression of ideas through physical action. The type of “speech” is subject to the greatest restriction.

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First Amendment Protection of Speech

- Visual Art has long been recognized as a form of “symbolic speech” that is protected by the First Amendment, despite not necessarily involving writing.
- ◊ Art clearly is a form of “expression;” the questions are always:
 - Where the expression of ideas takes place, and
 - Whether it involves protected forms of expression, and

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Free Expression and Obscenity

- The U.S. Supreme Court struggled for many years with definitions of “obscenity” and the relationship between the First Amendment and obscenity.
- In 1957, Dr. Alfred Kinsey attempted to import hard-core pornography for his social science research. The New York Customs office impounded the material. In *U.S. v. Thirty-One Photographs*, the Court ordered the works released because of the scientific, as opposed to prurient, purpose for their use.

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Free Expression and Obscenity

- The Commission on Obscenity and Pornography, appointed by Pres. Lyndon B. Johnson in 1968, made sweeping recommendations to liberalize laws concerning obscene material, finding that there was no connection between viewing this material and engaging in deviant behavior.
- Richard Nixon was president by the time they published their report, and he found their conclusions “morally bankrupt.” The Senate rejected their findings by a vote of 95-5.

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Miller v. California, 1973

- The case that still controls the law of obscenity arose from a mail order business that sent unsolicited brochures through the mail for sexually explicit materials.
- Brochures included primarily sexually explicit illustrations with a small amount of text.
- The unsolicited nature of distribution and the possibility of the material falling into the hands of juveniles were significant factors.

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Miller

- State laws that regulate obscenity are primary means of regulation.
- Obscenity refers to works that depict or describe sexual conduct, and is not protected by First Amendment.
- Three requirements for obscenity:
 - The “average person, applying contemporary community standards, finds that the work, taken as a whole, appeals to prurient interests.”
 - The work must depict or describe sexual activity in a patently offensive way, and
 - The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

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Miller

- In 1973, reference to community standards was a recognition that the U.S. is large and diverse, and one national standard for obscenity would be impossible to develop. Gives local communities the ability to regulate according to their standards.
- Today, does this make as much sense, given the wide distribution of media throughout the country?

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Miller

- Does the “serious artistic value” standard mean that all art could be protected, regardless of subject matter?
- Expert testimony is necessary in each case to establish the artistic value of the work in question.
- High value placed on the free development of the arts, and protection from interference.

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Robert Mapplethorpe in Cincinnati

- The Contemporary Arts Center in Cincinnati held a Mapplethorpe exhibition in 1990 consisting of 175 photographs.
- Of these, 7 were the subject of a criminal prosecution against the gallery and the curator for violating the obscenity law.
- 2 involved minors and 5 involved either anal sex or other alternative sexual practices.

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Cincinnati v. Contemp Arts Center

- The defendants, CAC and the curator, interpreted the *Miller* rule calling for consideration of the work “as a whole” to require the prosecution to include all 175 photographs in the exhibition, not just the 7 alleged to offend.
- The Court restricted the evidence to just the 7 photographs, holding that each photograph is a “work, taken as a whole.”

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Cincinnati v. Contemp Arts Center

- The result affirms one’s faith in humans: the jury acquitted the defendants on both counts.
- The 4 men and 4 women on the jury were drawn from the conservative suburbs of the city. All were working class people and none had ever visited the museum or heard of Mapplethorpe.

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Cincinnati v. Contemp Arts Center

- Deciding factor: the “serious artistic value” criterion. The defendants did a good job of establishing the place and reputation of Mapplethorpe’s work in the art world, while the prosecution’s expert was a communications expert, testifying about the negative messages of the images. She was also connected with a conservative anti-pornography group.

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Cincinnati v. Contemp Arts Center

- Interesting exchange: content vs. artistic technique:
 - Prosecutor: Would you call these sex acts?
 - Barrie: (CAC's expert): I would call them figure studies.
 - Prosecutor: This photograph of a man with his finger inserted in his rectum, what is the artistic content of that?
 - Barrie: It's a striking photograph in terms of light and composition.

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**Child Pornography and
Obscenity**

- A 1982 case, *New York v. Ferber*, established that child pornography has no First Amendment protection, even if it does not meet the *Miller* obscenity test.
- Mapplethorpe's sexualized images of children: taken with consent of children's parents, and included with parents' consent. Should that be a defense in all cases?

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**Offensiveness and the Captive
Audience**

- Social exposure of art that may be considered offensive poses problems under the First Amendment.
- This problem is most acute when a "captive audience" is in a position to view sexually explicit art that is not obscene, but could be considered offensive.

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Piarowski v. Prairie State College

- Prairie State is a community college owned by the state of Illinois and located just south of Chicago.
- Albert Piarowski is chairman of the art department.
- The case arose when Piarowski was ordered to remove 3 works that he had created from public exhibit at the college from one room to another, less conspicuous location.

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Piarowski v. Prairie State College

- Exhibit located in the main college building in a room adjoining the “mall,” the main college gathering place. No walls between the “mall” and the gallery.
- The mall is the entrance to the cafeteria, bookstore, and the main classroom corridors, and the gallery also houses the student lounge, so it a very conspicuous public place.

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Piarowski v. Prairie State College

- Visitors to the college and prospective students and parents pass through the mall to go to the admissions office and tour facilities.
- Piarowski and another member of the art department faculty serve as coordinators for exhibits in the mall gallery; no criteria exist for selecting works for exhibit other than their judgment.

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Piarowski v. Prairie State College

- In March of 1980, a faculty exhibit was opened at the mall gallery. Piarowski contributed 8 stained glass windows to the exhibition. 5 were abstract; the 3 representational works became the source of controversy.
- The works were not alleged to be obscene, but to have sexual content and to be offensive for highly public display.

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Piarowski v. Prairie State College

- Description of the works:
 - One depicts the rump of a brown woman with a white jet of gas emitting out of the anus.
 - Another shows a naked brown woman on her back masturbating.
 - The third shows another naked brown woman crouched in front of a robed white man whose prominent feature is a grotesquely large penis, which the woman is embracing.

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Piarowski v. Prairie State College

- Are these works obscene?
 - Piarowski's windows were made in the style of Aubrey Beardsley, and were not highly realistic nor intended to titillate or arouse.
 - The rump and gas image, for example, was styled after one of Beardsley's illustrations of *Lysistrata*, which tells the story of Greek wives who go on a sexual strike to end the Peloponnesian War. The image with the woman masturbating was also styled after one of Beardsley's *Lysistrata* illustrations.

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Illustration in
Lysistrata,
Aubrey
Beardsley, 1896.



Piarowski v. Prairie State College

- The reference to Beardsley in the style of the work and the absence of clear intent to arouse the viewer convinced the court that they were not obscene, under the *Miller* test.
- That meant that they were entitled to some First Amendment protection. . . But were still considered offensive.
- While on exhibit at the mall gallery, faculty, students, administrators, and custodial staff complained. Black clergy also complained.

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Piarowski v. Prairie State College

- The complaints focused more on the racial messages of the images than their sexual content. Piarowski denied that he intended to depict Black women, but the images with brown skin color gave that clear impression.
- The images were viewed as representing Black women in a negative light; this was an especially damaging allegation for the community college with a large minority enrollment.

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Piarowski v. Prairie State College

- 75% of the students at Prairie state are part-time; the majority are from working class families who have little knowledge of art, and the exhibit did not reference Aubrey Beardsley, so the allusion to his work in the images was not known by the viewers.
- The college feared for its reputation and damage to its admissions recruiting from the messages sent by the public exhibition.

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Piarowski v. Prairie State College

- After 10 days on display, the administration ordered Piarowski to remove the windows from the mall gallery. They suggested that he move them to a 4th floor exhibit room instead, where they could still be displayed, but less prominently.
- Piarowski refused, and the three windows were removed and returned to him. The art department then voted to close the entire exhibit in protest.

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Piarowski v. Prairie State College

- Piarowski claims that he intended no obscene message, and no disparagement of women or Black people with the images. The windows were created as art for art's sake.
- Issue: is the mall gallery a "public forum" for use by the public to engage in expression of ideas? If so, then removal of Piarowski's work might have been a problem.

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Piarowski v. Prairie State College

- Public forum: court concluded that the mall gallery was not a public forum because it was open to use for exhibition purposes only by those selected by the art department.
- As a private exhibit space, it may be regulated more closely by the college administration than a truly public forum.

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Piarowski v. Prairie State College

- State operated colleges may not regulate all expression of ideas by faculty on college property.
 - Academic freedom is a recognized First Amendment right, protecting the college from higher governmental interference and teachers from interference by administration.
 - Academic freedom does not apply here, though, because Piarowski was not teaching with these particular images, but displaying them in an exhibition.

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Piarowski v. Prairie State College

- The college did not order the total suppression of the exhibit of the windows, but removal to a less public gallery.
- Freedom of expression does not give artists the right to display any image in public, regardless of offensiveness.
- All museums use judgment in where to place images in their exhibits; often sexually explicit material is placed in a less public location where the audience may choose to view it rather than being a captive audience for the work.

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Piarowski v. Prairie State College

- Considering all of these factors, the Court concluded that the college was exercising its permissible right to locate the exhibit in a less public location, given the subject matter and the nature of the available gallery spaces. No violation of the First Amendment in this decision.
- Court said that if the alternative of the 4th floor gallery had not been suggested, the result may have been different.

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Issue: Captive Audience and Offensive Material

- How should these case be resolved? Are there limits on what can be displayed in highly public areas?
 - E.g. public art: what if a sculptor were commissioned to create public art for a city park, and created a giant phallus. Would the city be required to display it?

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Issue: Political vs. non-political content

- The Court also said in *Piarowski* that it would treat art with an element of expression of political ideas differently.
- Why would this be the case?

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Issue: Public Forum

- The issue of the public forum was also important in *Piarowski*.
 - What is the difference between a “public forum” and a place at which access is limited to a select few?

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Issue: Offensiveness in Art

- At what point can state-operated museums draw the line on offensiveness?
 - E.g. a “body art” performance where the artist is strapped in an electric chair capable of delivering a fatal jolt and the switch is available to the visitors. Is this protected expression?
 - E.g. a chair in which members of the audience are invited to sit that faces a gun aimed at the chair and set to go off randomly sometime in the next 100 years. Protected expression? (This exhibit was banned in Berlin but shown in San Francisco.)

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Offensiveness and Killing

- At what point should “art” exhibitions be suppressed if they kill living things?
 - E.g. Kim Jones exhibit at Cal State Fullerton student gallery in which kerosene was poured over living rats and ignited. The gallery director was fired. Is this a protected expression?

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Political and Social Censorship of Art

- In the late 18th century, an Alien and Sedition Act made it a crime to publish or utter “false, scandalous, or malicious criticism of the President, Congress, or the government with the intent to defame them or bring them into disrepute.”
- These were based on sedition laws designed to protect English kings.
- These laws were invalidated because of their conflict with the First Amendment.
- A standard of protecting expression of ideas unless it would “incite imminent lawless conduct” was established.⁴³

People v. Radich

- “Flag art” case in New York.
- Artist Marc Morrel produced “constructions” that used the American flag in various ways.
- Two of these were the subject of a prosecution for defacing and defiling the flag under NY law:
 - A flag in the form of a human body, hanging from a yellow noose, and
 - A flag in the form of a phallus, erect and protruding from a cross.⁴⁴

People v. Radich

- The prosecution was against the gallery owner, Stephen Radich, who displayed the work in his second floor art gallery.
- The image of the body in the noose was visible through the second floor window; the others were visible only inside the gallery.

People v. Radich

- The work was characterized as symbolic expression of political protest against the Vietnam War. War protest music accompanied the exhibition.
- The case was first considered by a New York state appellate court.
- They considered whether this display of the flag dishonored it and was likely to provoke a violent response. They found that it was, and affirmed Radich's conviction.

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People v. Radich

- Next step: case appealed to federal court.
- The federal court took a very different view of the case, based on the *Spence v. Washington* case.
- 3 interests could justify state action against flag desecration:
 - Preservation of the American flag as an unalloyed symbol of our country
 - Protection of the sensibilities of passersby
 - Prevention of breach of the peace.

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People v. Radich

- Flag as “unalloyed” symbol:
 - This factor relates to appropriation of the flag to imply government endorsement of a product, service, or viewpoint.
 - No danger of that in Morrel's use of the flag.
 - He simply transferred the symbol to an additional context of protest and dissent, and did not burn or destroy it, so did not alter the flag's universal symbolism.

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People v. Radich

- Protection of sensibilities of passersby
 - Mere offensiveness to others is not adequate reason to control expression of ideas.
 - Those who might be offended can simply avoid the display.
 - Radich’s gallery was on the second floor, and the display in the gallery window was not so obtrusive as to be unavoidable to an extent supporting its suppression.

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People v. Radich

- Preservation of public peace
 - The NY court evoked the fear of a hypothetical danger to public peace from the display without evidence of any actual threat of violent response.
 - Every expression of dissent has the potential to incite opposition; the state must demonstrate a situation of an actual threat to public safety to justify suppression of free expression through use of the flag.

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Implications of Radich

- Have the events of 9/11/2001 altered the social circumstances that the court assumed in the Radich case in 1974?
 - What if the American flag were used in protest art created for a rally of Muslims?
 - Held at Arlington National Cemetery at the burial of a soldier killed in Iraq?

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