4-1-1991

Artistic expression and the First Amendment.

Karen Ann Weber

ARTISTIC EXPRESSION AND THE FIRST AMENDMENT

A Thesis

Presented to the

Department of Communication

and the

Faculty of the Graduate College

University of Nebraska

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

University of Nebraska at Omaha

by

Karen Ann Weber

April 1991

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 - 1346

THESIS ACCEPTANCE

Acceptance for the faculty of the Graduate College, University of Nebraska, in partial fulfillment of the requirements for the degree Master of Arts, University of Nebraska at Omaha.

Committee

Name	Department
Martin Rosenberg	Art and Art History
Hugh R. Cowdin	Communication

Chairman

April 18, 1991

Date

TABLE OF CONTENTS

ABSTRACT

Freedom of expression is a fundamental concern for all artists who seek to create and exhibit their works. Throughout history, the church, government, other institutions, and those with personal power over artists, have attempted to suppress artistic expression. In many instances of censorship, the works in question did not conform to perceived standards of taste and decency. In other cases, art was suppressed or destroyed in an effort to squelch political criticism.

The First Amendment to the U.S. Constitution guarantees freedom of expression to all Americans. However, the right to artistic freedom is not absolute. The U.S. Supreme Court has ruled for example, that obscene expression is not entitled to any constitutional protection. Despite Supreme Court precedents which established the constitutional standards for determining obscene art, this area of law remains unsettled. Many contemporary artists continue to test the boundaries between the obscene and nonobscene.

The central research question to this thesis focused on the extent of First Amendment protection given to artistic expression. Through an examination of federal case law, the courts appear to recognize artistic expression as a protected form of speech with certain qualifications. The courts have given the most protection to artistic expression

of a political nature. If the work depicts a political theme or at least deals with some public issue, the courts give artists more latitude. This is true even when the art involves a "captive audience." The courts appear more reluctant to offer the same constitutional protection to artistic expression that is chiefly self-expressive, decorative or of a purely social nature.

Inconsistencies also exist in the area of public art. In these cases, the artist's right to create and exhibit works in a public place must be reconcilled with government's attempt to regulate public spaces. The courts have found the First Amendment rights of artists minimal when the artistic expression belongs to the government.

ACKNOWLEDGEMENTS

Special thanks go to Dr. Michael Sherer for his skillful guidance in chairing this thesis and offering encouragement when needed; the other committee members, especially Dr. Martin Rosenberg, for sharing his expertise in art history and providing helpful comments and suggestions; Dr. Hugh Cowdin, for his careful editing and insights into the research topic; my children, Jennifer and Christopher, for their patience and understanding; and my husband, Larry Weber, for his emotional and financial support which made this project possible.

INTRODUCTION

CHAPTER I

Before photographer Robert Mapplethorpe died from AIDS at age 42, he commanded $10,000 per sitting and his one-of-a-kind prints sold for $20,000 each. Included among his portraits of celebrities, still lifes and flower studies is a self-portrait showing the photographer scowling at the viewer with the handle of a bull-whip protruding from his anus.[1] In another portrait, two men are dressed in leather with one urinating into the mouth of the other.[2]

The homoerotic photographs from Mapplethorpe's so-called X Portfolio were part of a 175-photo exhibit assembled by the Institute of Contemporary Art in Philadelphia. The exhibit, which ran without incident in that city and in Chicago, was partially funded through a $30,000 National Endowment for the Arts (NEA) grant. Two months before it was scheduled to open at the Corcoran Gallery of Art in Washington, D.C., an exhibition catalog featuring one of Mapplethorpe's tamer photos (two male

---

[1]Bering-Jensen, *The Cultural Politics of Controversial Art,* INSIGHT, July 17, 1989, at 8, 9.

[2]Indiana, *Censorship in the Arts,* ARTnews, Sept. 1989, at 11, 14.

models, one black and one white, embracing) circulated on Capitol Hill.[3]

The cancellation of the Mapplethorpe exhibition on June 12, 1989, coincided with a written protest sent to the NEA by 108 House members. The letter, spearheaded by Texas Republican Richard K. Armey, denounced the works of Mapplethorpe and Andres Serrano, whose portfolio featured a photo of a plastic crucifix submerged in urine. Armey urged massive revisions of NEA funding policies stating that a clear line exists between "what can be classified as art and what must be morally reprehensible trash."

Angry protesters picketed the Corcoran museum with signs saying "Artistic expression must be free" and "China in America," as well as reproductions of Mapplethorpe's works. The curator of the museum was charged with succumbing to political pressure in an effort to protect its $292,000 NEA grant.[4]

Sen. Jesse Helms, a leader in the efforts to stop federal funding of "obscene" art, insisted he's not a prude or a censor. He just doesn't want the NEA spending tax dollars to offend God-fearing Americans. "If America persists in the way it's going, and the Lord doesn't strike

---

[3]Bering-Jensen, *supra* 1 at 9.

[4]Indiana, *supra 2*, at 14.

us down," Helms said, "he ought to apologize to Sodom and Gomorrah."[5]

In the past few years disputes involving controversial art have often pitted artists against government officials. A painting on display at the School of the Art Institute in Chicago which dressed the late Mayor Harold Washington in a brassiere and garter belt so enraged the city's black leaders, it was seized by aldermen. Entitled "Mirth and Girth," the painting by student David K. Nelson was later impounded by police.

Another student at the same school exhibited an American flag on the floor of the museum inviting patrons to "confront their feelings" about patriotism. They were told to step on the flag if that was the feeling the display inspired. The school refused to apologize for the flag display and thousands of angry veterans picketed the exhibit. The Illinois Senate reacted by reducing the school's grant allocation from $130,000 to $1, noting the school had acted "irresponsibly with public money."[6]

In Cincinnati, Ohio, a museum curator was tried on obscenity charges after a county grand jury deemed seven of

---

[5]Mathews, *Fine Art or Fool?* NEWSWEEK, July 2, 1990 at 46, 52.

[6]*Bering-Jensen, supra* 1 at 10.

the Mapplethorpe photos to be obscene. After obtaining a federal court injunction to keep the exhibition open, thousands of patrons--many of whom had never set foot in the museum before--stood in long lines for a chance to view the show.[7]

The Cincinnati jury acquitted Dennis Barrie, the museum director, after five days of testimony from some of the nation's leading art experts. Barrie told reporters after his acquittal:

> This was a major battle for art and for creativity in his country. Mapplethorpe was an important artist. It was a beautiful show. It should never have been in court.[8]

A record number of nearly 80,000 patrons attended the exhibition before it closed and moved to the Boston Institute of Contemporary Art. The Boston curator joked that demand for tickets was so hot he needed to move the whole works to Fenway Park.

In Miami, an album by the rap group 2 Live Crew became the first ever ruled obscene in federal court. And while hundreds of record stores pulled the banned album off its shelves, it still sold nearly two million copies. The attorney for the group insisted that the lyrics were meant

---

[7]N. Y. Times, Apr. 8, 1990, at 1 col. 1.

[8]*Cincinnati Jury Acquits Museum In Mapplethorpe Obscenity Case,* N.Y. Times, Oct. 6, 1990, at 1, 6, col. 1.

to be funny not dirty. To make his case he recited some lines from "Me So Horney." ("You can say I'm desperate/Even call me perverted/But you say I'm a dog/when I leave you f---d and deserted." The judge, not amused, found the lyrics obscene.[9]

Two Florida juries, however, sent mixed signals following contrasting obscenity verdicts. Record store owner Charles Freeman was convicted for selling a copy of 2 Live Crew's "As Nasty As They Wanna Be" album to an undercover policeman.[10] A few weeks later, another jury acquitted the group's members of obscenity during a live performance.

Under the current Supreme Court test for obscenity, *Miller v. California*, a work is obscene if, applying "contemporary community standards," the work, taken as a whole, appeals to prurient interests, or it depicts or describes sexual conduct in a patently offensive way. The "obscene" work must also lack serious literary, artistic, political or scientific value.[11] The Court's obscenity doctrine also bans "hard core" pornography, and in cases

---

[9]MATHEWS, *supra* 6, at 52.

[10]*Mixed Signals on Obscenity*, NEWSWEEK, Oct. 5, 1990, p. 74.

[11]*Miller v. California*, 413 U.S. 15 (1973).

involving minors, even "soft core" pornography lies outside the realm of First Amendment protection.[12]

Pictures of nude adolescent girls were seized last May by FBI agents in a raid of a San Francisco photography studio. Jock Sturges, known for his black and white portraits of families in the nude, has not been arrested or charged with a crime. But thousands of his photographs, personal correspondence and records remain in federal custody.[13]

Unlike the recent disputes over the Mapplethorpe photographs or the rap lyrics of 2 Live Crew, the Sturges photographs are not available for public view. Law enforcement officials and other investigators who have seen the photographs say their content is "extremely different than his exhibited work."

Without having seen the pictures, the San Francisco Board of Supervisors passed a non-binding resolution, July 9, 1990, urging the U.S. Attorney's Office to drop the investigation. The resolution cited "a dangerous state of

---

[12]See *Ginsberg v. New York,* 390 U.S. 629 (1965) which upheld a conviction for the sale of two "girlie" magazines to minors. The magazines were not deemed obscene for adults, but the Court held that New York could prohibit the distribution of such materials to minors. The Court upheld the state's interest in protecting the "ethical and moral development of our youth." 390 U.S. at 641.

[13]L.A. Times, July 5, 1990 at F 1, col. 2.

hysteria and repression over freedom of expression of artists and said the First Amendment is under a national assault. U.S. Attorney William T. McGivern Jr. responded that the government's intention was not to "chill First Amendment rights or to regulate morality standards." But he vowed to prosecute those who sexually exploit children."[14]

As these cases demonstrate, the fundamental right of freedom of artistic expression often collides with what the government perceives as its obligation to protect the public interest. But who decides what is art and what is trash? What forms of artistic expression should be protected and what forms should be prosecuted? Ultimately, the courts are called upon to answer these questions.

The current public furor over freedom of artistic expression underlies the focus of this thesis. Whether or not photographs of Karen Findley's nude body smeared in chocolate, or Serrano's latest efforts experimenting with semen and menstrual blood[15] depict classic works of art is not the question. The issue centers on just how much protection federal courts are willing to give to artistic expression. Through an examination of federal cases, this thesis will attempt to determine the extent of First Amendment protection of artistic expression.

---

[14]*Id.*

[15]Matthews, *supra 5*, at 52.

CHAPTER TWO

A HISTORICAL PERSPECTIVE

The first section of this chapter will detail instances of censorship from the Renaissance to the Twentieth Century. These examples will illustrate the collision of values between artists and those with the power to challenge, suppress, or prohibit artistic expression. A better understanding of the history of censorship in art may provide an insight into the present controversy over freedom of artistic expression. Often, censorship has resulted from actions taken by officials of government, the church, institutions, professional societies and art museums.[16]

During the Renaissance, painting, sculpture and architecture were almost always produced at the specific request of a patron. These men represented the power structure of society and included not only kings and popes, but dukes, noblemen and monks, guild masters and town mayors.[17]

Renaissance art served a function such as the

---

[16]*Id.* at 243.

[17]T. COPPLESTONE, ART IN SOCIETY, at 174-175, (1983).

expression of papal, governmental, or personal power. Leonardo DaVinci spoke for countless artists before and after him when he said, "I serve the one who pays me." Artists in effect, became the public relation arms of the establishment.[18]

In some cases, artists were forced to accept dogma they did not believe. When artists strayed from the teachings of the church or fell out of favor with royalty, they were often imprisoned or exiled. Other artists who denounced traditional teaching or rebelled against the political system saw their works altered or destroyed.[19]

Even Michelangelo was subjected to censorship by the Catholic Church in the atmosphere of the Reformation. The popes, recognizing his boundless talents, used their authority to commission sacred works. Michelangelo, driven by his own demands rather than by others, chafed under the papal authority. Nevertheless, he formed an uneasy alliance with the popes which although productive, was never trouble-free.[20]

---

[18]J. MERRYMAN & A. ELSEN, LAW ETHICS & THE VISUAL ARTS, (1987) at 240.

[19]Id.

[20]COPPLESTONE, *supra* 17 at 200.

One of the more celebrated controversies centered on Michelangelo's "The Last Judgement," commissioned by Pope Paul III. Thirty years earlier, he had completed the ceiling frescos in the Vatican's Sistine chapel. At that time the nudes the artist painted on the ceiling walls created no protest. But in 1541 when he returned to paint the "The Last Judgement" on the end wall, Michelangelo was accused of immorality in his representation of sacred characters.[21]

One of the Michelangelo's loudest critics, the nobleman Aretino, sent a scathing letter to the artist berating him for painting nudes. Aretino wrote:

> And here comes a Christian, who, because he rates art higher than faith deems it a royal spectacle to portray martyrs and virgins in improper attitudes, to show men dragged down by their shame, before which things houses of ill-fame would shut their eyes. Your art would be at home in some bagnio [prison] certainly not the highest chapel in the world.[22]

Michelangelo, upon hearing Aretino publicly denounce the fresco, retaliated by painting a recognizable portrait of Aretino. The portrait depicted a pair of horns on his head and a serpent coiled around his waist. The character was thrust into a corner of hell, the right hand corner of

---

[21]E. UPJOHN, P. WINGERT, & J. GASTON MAHLER, HISTORY OF WORLD ART, at 207-208, (1949).

[22]T. CRAVEN, MEN OF ART, at 155-156, (1931).

"The Last Judgement." Aretino, now the laughing stock of Rome, protested to the Vatican but was ignored by the Pope.[23]

After Michelangelo refused to cover the nudes in "The Last Judgement," one of his students, Daniele da Volterra, was ordered by Pope Paul IV to paint draperies over the naked figures. He earned the nickname "Il Braghettone" (Breeches-maker) as he painted veils, draperies, breeches, skirts and clouds to "correct" the fresco.[24] This "process of correction", witnessed by Michelangelo, was continued by succeeding popes. An appeal made to the Academy of St. Luke finally prevented Pope Clement VIII from completely destroying the painting.[25]

Veronese, another Renaissance artist who raised the ire of church officials, was tried by the Inquisition for including "drunkards and Germans" in his picture of the Marriage of Cana. Veronese defended the content of his picture and told the court it should concern itself more

---

[23]*Id.* at 157. Some years later, the succeeding pope, Paul IV, decided to remove the picture but first sent a messenger to confer with Michelangelo. The artist replied: "Tell his Holiness that to reform a picture is a small matter. Let him look to setting the world in order."

[24]J. SEWALL, HISTORY OF WESTERN ART, at 618, (1961).

[25]J. GIMPEL, THE CULT OF ART; AGAINST ART AND ARTISTS, at 57 (1969).

with such works as Michelangelo's "The Last Judgement." Michelangelo's work had come under increasing attack for nude depictions of Christ and his saints. But the Chief Inquisitor replied, "Do you not know that in these figures by Michelangelo there is nothing that is not spiritual--*non vi e' cosa se non de spirito?*"[26]

Veronese was also accused of sacrilege in his painting, "The Last Supper that Jesus Took with His Apostles in the House of Simon." He was instructed to remove human and animal figures other than Christ and the Apostles. Veronese partially carried out the alterations but refused to substitute Mary Magdalene for a dog in his painting. The artist later changed the name of the painting to "Feast in the House of Levi" to satisfy church officials.[27]

Throughout the seventeenth century, nudity was synonymous with indecency as church leaders campaigned to

---

[26]*Id.* at 52. (After the decrees from the Council of Trent (1545-63), nudity was objected to in sacred subjects, and some of the more zealous popes contemplated destroying or painting over Michelangelo's "The Last Judgement." The Council of Trent was formed in response to the turmoil within the Roman Catholic Church in the aftermath of the Reformation. The Church launched its own Counter Reformation to combat the reforms and win back the confidence of the masses so disturbed by the corruption within the Church hierarchy. Art historian Kenneth Clark maintains that the nude survived the Counter Reformation largely due to the "unassailable prestige of Michelangelo."

[27]*Id.* at 58-59.

cover all nudes. In France Michelangelo's "Leda" and other works were burned at the French court on moral grounds.[28] As the century progressed, more outcries against creation of "immoral" art were heard throughout Europe. One of the most vocal critics, author Denis Diderot, wrote of Baudouin's "Wedding Night", "All that preaches depravity is made to be destroyed, and all the more so if the work is especially perfect."[29]

Diderot believed that one of the functions of art was to help promote morality. He was a part of a growing opposition to the "erotic" style prevalent in France at that time. After the French Revolution, those who seized power urged artists to use their talents espousing virtue and not in corruption of morals.[30]

A drive to cleanse art of themes and forms considered illicit and obscene was launched not only in France but in Spain, England and America. The resurgence of the Puritan mentality in art was also directed at eliminating art that was considered blasphemous.[31]

While the Spanish Inquisition was in full force, a

---

[28]J. CLAPP, ART CENSORSHIP, at 76 (1972).

[29]P. WEBB, THE EROTIC ARTS, at 144 (1983).

[30]*Id.* at 182.

[31]*Id.* at 183.

painter was thrown into jail for representing the Virgin in an embroidered petticoat. Puritanism decreed for women a form of dress designed to deny the existence of the body below the waist. According to art historian, Thomas Craven, only two major portraits of nude women exist in Spanish art--Velasquez's "Venus" and Goya's "Naked Maja."[32]

Goya's two Majas, one naked and one clothed in thin, skin tight breeches were brought before the Grand Inquisitor in 1814. The works were among five 'obscene paintings' from the collection of Godoy. A year later, Goya was summoned to appear before the tribunal and ordered to identify the paintings. He was also required to admit whether he painted the works and under whose order. Unfortunately, the sequel to this affair remains unknown, but the case was probably suppressed.[33]

Depictions of nudes continued to offend many Europeans and Americans. When American painter John Vanderlyn's "Ariadne" was shown in Paris in 1815, critics called it "the most skillful nude yet exhibited by an American." But when the picture of the sleeping, undraped figure was put on

---

[32]CRAVEN, *supra 26* at 281-282.

[33]P. GASSIER and J. WILSON, THE LIFE AND COMPLETE WORKS OF FRANCISCO GOYA, at 152., (1981). The origin of the "Naked Maja" is shrouded in mystery. According to one rumor, the Duchess of Alba, who pursued Goya while he served as a court painter, posed for the two Majas.

public display, American gallery-goers were shocked and denounced the work "as a deplorable example of European depravity."[34]

In the same year, a Pennsylvania man was tried and convicted in the first U.S. court case involving obscene art. "Filthy conduct," the judge wrote in *Commonwealth v. Sharpless* after the defendant was found guilty of exhibiting "a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman." The lithograph depicted a nude woman sitting on the lap of a nude male.[35]

Although there was no statute on the books to enforce, Jess Sharpless and five associates were found guilty under the common law. The defense claimed the court lacked jurisdiction because the offense was one of private morals that in England would have been dealt with in an ecclesiastical court. But the court laid down the sweeping rule that under the common law the courts are obliged to pass upon all questions of public morals, a rule that became the basis for public censorship not only of pornographic,

---

[34]A. ELIOT, THREE HUNDRED YEARS OF AMERICAN ART, at 45 (1957).

[35]2 Serg 8 Rawle, Pa 91, (1815).

but classical works.[36] The case set a precedent in American law implying that the courts had the right to define and determine what was immoral or obscene in art.[37]

The early sexual obscenity cases prompted various states to enact statutes aimed at protecting the morals of youth. The first federal anti-obscenity statute was directed at only pictorial art (words were not thought to be dangerous). The statute enacted in 1842, was aimed primarily at the French postcard trade. The law specified that all "indecent and obscene prints, painting, lithographs, engravings and transparencies" were to be seized and destroyed. In 1857, the law was amended to include additional indecent and obscene "articles", including photographs and printed matter.[38]

Meanwhile, the notion that nudity in art was synonymous with indecency prevailed. In 1831, at the unveiling of American artist Horatio Greenough's "Chanting Cherubs," the naked infants depicted in the sculpture "were forced to wear little aprons for the sake of modesty."[39] Twelve years

---

[36]T. MURPHY, CENSORSHIP: GOVERNMENT AND OBSCENITY, at 8, (1963).

[37]M. CARMILLY-WEINBERGER, FEAR OF ART: CENSORSHIP AND FREEDOM OF EXPRESSION, at 183 (1986).

[38]MERRYMAN, *supra 22,* at 282.

[39]W. CRAVEN, SCULPTURE IN AMERICA, at 103-104 (1968).

later, Greenough was ostracized again for his Zeus-like statue of George Washington undraped to the waist. The sculpture, which took eight years to complete, weighed 20 tons and stood 10 1/2 feet high. After the public outcry, the artist wrote: "I have sacrificed the flower of my days and the freshness of my strength only to have purblind squeamishness awake with a roar at the colossal nakedness of Washington's breast."[40]

Censorship of artistic expression occurred not only when the work was deemed morally offensive but it was also suppressed in cases involving political criticism. Under such authoritarian governments as King Louis Philippe of France, any criticism of government policies and officials in power was forbidden. However, one of the major problems in most authoritarian systems was establishing effective restraints over those who used both art and the press as a means of protest.[41]

Charles Philipon, a French journalist and caricaturist, proved to be the king's nemesis as he depicted the monarch in the shape of a large Burgundy pear. Philipon was tried

---

[40]R. LYNES, THE TASTE MAKERS at 13 (1954). However, the public's objections also centered on the alleged "unseemly" depiction of America's first president as a Greek god.

[41]F. SIEBERT, T. PETERSON, and W. SCHRAMM, FOUR THEORIES OF THE PRESS, at 19, (1963).

and convicted for "crimes against the king" for his "Le Poire" drawing. Philipon was sentenced to six months in prison and fined 2,000 francs.[42]

A French artist, Honore Daumier, was also brought to trial for his lithograph, "Gargantua." In this picture, the King was shown sitting on a chaise percee (toilet seat) as he devoured baskets of gold brought up a ramp to his mouth by tiny men. Daumier was sentenced to six months in prison and fined 300 francs.[43]

Meanwhile back in America, where democracy brought much greater political freedom, the problem of nudity in art continued to trouble puritan spirits throughout the nineteenth century. Aprons were made for the classical Greek and Roman statues on display in American museums and

---

[42]CLAPP, *supra 32*, at 120-24. Philipon's weekly satirical sheet appeared in Paris each Thursday after the July Revolution of 1830. During the four years it was published, the French authorities seized the paper twenty-seven times. One of his cartoons entitled, "Soap Bubbles," used bubbles as representations of the French government's promises for social reform vanishing in thin air. Upon publication the Paris chief of police seized the offending picture in a raid.

[43]Id. at 126. The French Assembly passed the so called "September Laws" aimed at censorship of the press in 1835. The government attempted to completely silence political criticism by outlawing caricatures and political satire. The laws lasted thirteen years until their abolishment in 1848 after the overthrow of Louis Philippe. Under these laws, insults to the King were regarded as direct threats to public security.

separate viewing hours were arranged for men and women.[44]

Americans were also concerned about protecting the public from indecent drawings, photographs and literature being sent through the mail. The first postal obscenity law was enacted in the United States in 1865. Those convicted of sending obscene books and pictures through the U.S. mail were fined $500 or jailed for up to a year. The law was passed after complaints were filed about the reading material of soldiers serving in the Civil War. One of the questionable books was John Cleland's *Memoirs of a Woman of Pleasure*.[45] One of the first pictures banned under the new postal censorship law showed a picture of General Washington crossing the Delaware and presenting a nude young lady in an edition of Harvard University's *Lampoon*.[46]

"Morals, not art and literature!" and "Books are feeders for brothels!" became the cry of Anthony Comstock, American's leading crusader against indecency. A Union Army veteran of the Civil War and a member of the Young Men's Christian Association (YMCA) in New York City, Comstock insisted on covering the breasts and genitals of all nude

---

[44]T.CRAVEN, *supra 26*, at 23.

[45]CLAPP, *supra 22*, at 146.

[46]J. PAUL & M. SCHWARTZ, FEDERAL CENSORSHIP; OBSCENITY IN THE MAIL, at 48 (1961).

art figures. Comstock later took pride in the fact that during his 40-year war against obscenity, 200,000 pictures, 100,000 books, and 5,000 decks of playing cards were confiscated and destroyed. Among the artistic works destroyed as obscene were 117 prints of French classical art.[47]

Comstock maintained that nude art could be properly displayed in a museum where "cultured minds" could appreciate the work. But he insisted that reproductions of such art in the form of drawings or photographs were an affront to moral purity. "Such display must be kept in its proper place out of the reach of the rabble in a saloon, a store window, or where it reached the common man."[48]

Zealots like Anthony Comstock imposed their own standard of morality and decency in suppressing artistic expression. However, the societal mores and tastes throughout the Victorian era strongly encouraged this practice. Societies for the "suppression of vice" were organized in Massachusetts, Pennsylvania, New York and California for the purpose of protecting youth from the harmful influence of illicit and obscene art and

---

[47]CARMILLY-WEINBERGER, *supra 41,* at 184.

[48]CLAPP, *supra 32,* at 151.

literature.[49]

Artists were often told to adjust their work to conform with acceptable norms of good tastes. For example, several of Aubrey Beardley's drawings in the set he made for the illustrated edition of Oscar Wilde's *Salome* were suppressed by the publisher as too risque. Beardley revised his drawing to make them more acceptable to the publishers. But he couldn't resist an editorial comment in verse on the margin of one drawing:

"Because the figure was undressed,
This little drawing was suppressed.
It was unkind,
But never mind--
Perhaps it all was for the best."[50]

Many censored artists used the defense of sincerity to counter charges of indecency.

The famed French sculptor Rodin, who was frequently criticized for creating indecent art, argued in 1907:

> In art, immorality can not exist. Art is always sacred even when it takes for a subject the worst excesses of desire. Since it has in view only the sincerity of observation, it cannot debase itself. A true work of art is always noble even when it translates the stirrings of the brute, for at that moment, the artist

---

[49]CARMILLY-WEINBERGER, *supra 41*, at 184.

[50]H. HYDE, A HISTORY OF PORNOGRAPHY, at 112 (1965).

> who has produced it had as his only objective, the most conscientious rendering possible of the impression he has felt.[51]

As Comstock's morals brigade continued its war on obscenity, more artists such as playwright George Bernard Shaw and sculptor Gutzon Borglum became vocal critics against censorship. Comstock and Shaw exchanged verbal blows over the New York Public Library's removal of Shaw's play "Man and Superman" from the public shelves of the library to the reserve section. Shaw, in an interview, said:

> Comstockery is the world's standing joke at the expense of the United States. Europe likes to hear of such things. It confirms the deep seated conviction of the old world that America is a provincial place, a second-rate country town civilization after all.[52]

Comstock responded to Shaw's jibe: "I had nothing to do with removing this Irish smut dealer's books from the public library, but I will take a hand in it now.[53]

Shaw's comments about provincialism also struck a raw nerve among American artists who anxiously sought recognition for their experiments in the new modern art.

---

[51]MERRYMAN, *supra 22,* at 240-241.

[52]CLAPP, *supra 32,* at 180.

[53]*Id.*

Hoping to create a "revolution in art" in the United States, organizers of the 1913 International Exhibition of Modern Art assembled over 1,600 works of art by some of the most celebrated modernists of the day.[54]

The exhibition, known as the Armory Show, opened February 17, 1913, in New York City. Promoters of the event enlisted art students to distribute catalogs and badges with the pine tree flag of pre-revolutionary Massachusetts. With the theme the "New Spirit", some believed it was an undisguised attempt to legitimatize revolutionary art in the context of the American Revolution.[55]

The Armory Show gave America its first massive exposure to modern art. The impact of assembling such works into a single display produced shock waves throughout the American art community. Milton Brown, an art historian who has written extensively on the Armory Show, called it "probably the most important art exhibition in our history, it was certainly the most exciting one."[56]

---

[54]S. HUNTER & J. JACOBUS, AMERICAN ART OF THE TWENTIETH CENTURY, at 98. (1973).

[55]B. ROSE, AMERICAN ART SINCE 1900: A CRITICAL HISTORY at 76 (1967).

[56]MILTON BROWN, THE STORY OF THE ARMORY SHOW, at 136-137, (1988). Professor Brown is considered the foremost scholar of the Armory Show. His first edition of *The Story of the Armory Show* was published in connection with the fiftieth anniversary celebration of the exhibition.

Although the number of works included in the show was impressive, its efforts to educate the American taste with a comprehensive survey of the history of modern art was far more important.

> In spite of efforts by the critics to find the American section better, or at least saner than the foreign, it was the European section which drew crowds and created discussion. Whatever the circus aspects of the Armory Show, the serious and comprehensive display of the latest European contemporary art gave its true significance.[57]

However, both the American art world and the public in general balked at the sudden thrust of the so-called revolutionary new art. Americans were also naturally suspicious of anything foreign and unknown. Brown wrote:

> Whether from puritanism, provincialism or chauvinism, there was a rather strong feeling in America that European culture was decadent." Many American of 1913 and one would hope fewer now, found the radical art movements an expression of not only the decadence but the degeneracy of European culture in an intellectual, moral and political sense.[58]

Many Americans saw modern art as morally dangerous. More than one writer called for the closing of the exhibition because of its threat to public morality. A writer in the *New York Review* characterized avant garde artists as the "degenerates of art" and added that the

---

[57]Id. at 111-112.

[58]Id. at 163-164.

propaganda of the Cubist, Futurist and Post-Impressionist painters is not only "a menace to art but a grave danger to public morals." The writer also called on Anthony Comstock to galvanize opposition to the exhibition.[59]

The puritanical reaction of the American public to modern art forms was no more intense than the unfavorable receptions of the French to advanced movements in art since Monet and the Impressionists. The values of the new art were based precisely on new expressions of individualism. But to the public, these values equated socialism, anarchism and radical politics.[60]

Press reaction to the Armory Show ranged from mock howls of pain to threats of violent retaliation. A *New York Times* critic called the show "pathological" and "hideous" and accused those involved as being "cousins to anarchists in politics."[61] An article entitled "Lawless Art," in *Art in Progress*, the official magazine of the American Federation of Art, compared the new European artists involved in the show to "anarchists, bomb throwers, lunatics and depravers."[62]

---

[59]Id. at 165.

[60]*Id.* at 103.

[61]CLAPP, *supra 32*, at 192.

[62]HUNTER & JACOBUS, *supra 58*, at 100-101.

Former President Teddy Roosevelt led the list of dignitaries who visited the Armory Show. Roosevelt later wrote an article for the *Outlook* entitled, "A Layman's View of an Art Exhibition." He called for an open mind in viewing the new art but disassociated himself with any association with radicalism.

> It is vitally necessary to move forward and shake off the dead hand of the reactionaries, Roosevelt wrote, and yet we have to have the fact that there is apt to be a lunatic fringe among the votaries of any forward movement. In this recent exhibition, the lunatic fringe was fully in evidence . . ."[63]

The general public joined the chorus of jeers and outrage but also enjoyed the spectacle in high culture. For the first time in American history, modern art achieved national prestige albeit a prestige of notoriety.[64]

Marcel Duchamp's "Nude Descending a Staircase" created the most stir at the exhibition. The work was seen as both a symbol of the ultimate in moral degeneracy and as a mad

---

[63]BROWN, *supra 60,* at 145. Roosevelt's comments, according to Brown, revealed an essential ignorance and prejudice about modern art which he shared with the majority of Americans.

[64]*Id.*, at 167-168. Professor Brown states that the equating of artistic insurgence with political radicalism can be traced back to the branding of the Impressionists with the *spectre rouge* during the 1870's. He notes that the left-wing press of 1913 also failed to understand the implications of political revolution in the new art movements.

irresponsible joke. The "Nude" was described as "a lot of disguised golf clubs and bags", "an assortment of half-made leather saddles," an "elevated railroad stairway in ruins after an earthquake," "a dynamited suit of Japanese armor", a "pack of brown cards in a nightmare," an "orderly heap of broken violins," or an "academic painting of an artichoke." The most popular description was coined by art critic Julian Street, "an explosion in a shingle factory."[65]

The work was also the butt of humorous jibes, the object of verse and a puzzle to be deciphered. The search for the nude prompted the *American Art News* to offer a $10 prize for the best solution. The winning entry was a poem entitled, "It's Only a Man":

> You've tried to find her,
> And you've looked in vain
> Up the picture and down again,
> You've tried to fashion her of broken bits,
> And you've worked yourself into seventeen fits;
> The reason you've failed to tell you I can,
> It isn't a lady but only a man.[66]

Reaction to the Armory Show turned ugly when the exhibition left New York for Chicago. The Law and Order

---

[65]BROWN, *supra 60,* at 136-137.

[66]*Id.* at 136.

League of Chicago demanded the exhibition be shut down. Arthur Burrage Farwell, president of the group stated, "It is a grave mistake for these pictures to hang here, why the saloons could not hang these pictures. There is a law prohibiting it. The idea that people can gaze at this sort of thing without hurting them is bosh. This exhibition ought to be suppressed."[67]

Students at the Art Institute of Chicago were advised to shun the exhibit "like the plague" by their academically orientated professors. The students responded enthusiastically by planning to burn artists Brancusi, Matisse, and Walter Pach in effigy.[68]

By sheer coincidence, the Illinois legislature was investigating prostitution at the time of the Armory Show opening. M. Blair Coan, investigator for the Senatorial Vice Commission, immediately launched the attack. Coan told the press that after inspecting the works, he found Futurist art immoral. He said that every girl in Chicago was gazing

---

[67]*Id.* at 206.

[68]*Id.* at 207. The intended lampoon of the show did not come off as planned because some members of the Chicago Art Students League were not willing to go along with the prank. Despite an injunction against hanging any of the Cubist artists in effigy and a police restriction that the ceremonies be confined to the museum terrace, students staged a mock trial and proceeded with the burning. Several of the city's government officials, art critics and newspapers publicly criticized the actions of the students.

at examples of distorted art, and that one of the women in Matisse's "Le Luxe" had four toes.

Despite inconclusive findings that the "outlandish" paintings were "immoral and suggestive," the investigation whetted the appetites of the curious. According to one rumor, members of the Chicago underworld enticed by the prospect of viewing "salacious art in high places," visited the show in great numbers to see what all the fuss was about.[69]

Walter Kuhn, a New York artist and one of the Armory Show organizers, was repelled by the provincialism of Chicago and the anti-modern art sentiments expressed by both the public and the press. The Chicago schools considered declaring the exhibition off limits to school children, while women's groups denounced art works which distorted the female body. "The body is the temple of God," Chicago official, Charles Francis Brown, said to a ladies group in Evanston, "and the Cubists have profaned the temple."[70]

---

[69]BROWN, *supra 60,* at 207. The Illinois legislature failed to take any action against the Armory Show. The senators rehashed the standard repertoire of modern art jokes including the one about the animal being able to paint just as good a picture with its tail.

[70]BROWN, *supra 60,* at 206. Professor Brown argues that the content of the Armory Show exhibition showed nothing immoral; lewd or pornographic. However, any attack on established standards of beauty, especially the female body, referred to as the "female form divine," was considered offensive. In addition, any effort to tamper with "God's

American artists' willingness to experiment in new art forms peaked shortly after the Armory show. The onset of World War I brought a return to a more conservative atmosphere. Mounting pressures of American provincialism in the post war period once again forced the artist to choose between embracing modernism or returning to the more accepted naturalism.[71]

Many artists rebelled against the shift toward conservatism. They used various experimental devices to assert their individualism. In 1917, Marcel Duchamp, creator of the infamous "Nude Descending a Stair Case," submitted one of his "ready mades," a urinal signed R. Mutt to an Independents' exhibition sponsored by the Society of American Artists. Duchamp, vice-president of the Society, resigned in protest the night before the exhibition opened after the rejection of his "Fountain".[72]

As the "poster boy" of Europe's avant-garde, Duchamp challenged the premise of democracy in art. He continued to challenge art's most sacred tenets for 50 years. Art historian Barbara Rose said of the post-Armory show period:

---

will" in the form of the academic nude was viewed as "sacrilege."

[71]HUNTER, *supra 60,* at 101-102.

[72]ROSE, *supra 69,* at 83.

"For the moment, democracy could not be extended to tolerate extremism. It was safe to say that until it did, modernism would remain an artificial flower, rootless in American soil.[73]

As the 1920's ushered in the frenzy of the Jazz Age, Americans concerned themselves with the evils of Bolshevism, the activities of the Ku Klux Klan, the threat of labor unions and the flood of immigrants. With attention focussed on economic and political concerns, a public outcry over American art and morality seemed out of sync with the times.[74]

Still a growing number of American artists, writers, actors, musicians and film makers protested against repressive censorship laws. In 1923, the National Council to Protect the Freedom of Art was formed to organize a "nation-wide fight against all kinds of censorship." The Council was chaired by George Creel, the former newspaperman who headed the Committee on Public Information during World War I. The organization urged repeal of existing censorship laws, as it considered censorship of one form of expression

---

[73]*Id.*

[74]*Id.* at 84.

a threat of regulation and banning in all forms.[75]

In 1927, editorial writers joined the swelling chorus of those speaking out against censorship. A *New York Times* editorial commented on the growing number of bills before the state legislature aimed at banning and limiting a variety of arts. "This is growing evidence of a mounting desire to control and standardize everything to the Anglo-Saxon character trait 'earnestness,' that is an overwhelming impulse to make everybody exactly like yourself."[76]

Censorship was occurring not only in America at this time, but across Europe as well. The *New York Times* reported on March 7, 1927, that active censorship was taking place in Germany with the recent action by the Reichstag on its far-reaching "Trash and Smut" bill. In Italy, Mussolini was joining forces with the Vatican "as a censor of

---

[75]CLAPP, *supra 32*, at 214. The Committee on Public Information coordinated government propaganda efforts and served as the government's liaison with newspapers. Creel wrote in his book *How We Advertised America*, at 4 (1920) that the committee's work "was a plain publicity proposition, a vast enterprise in salesmanship, the world's greatest adventure in advertising." Creel rallied painters, sculptors, cartoonists, photographers, writers, movie stars and singers to do their patriotic duty for the war effort. They used their creative skills to stimulate military enlistments, and encourage support for industrial mobilization and food conservation programs. Creel's association with these artists during the war apparently led him to become involved in the fight to protect freedom of artistic expression.

[76]N.Y. Times, Jan. 28, 1927, at 16, col. 3.

morals."[77]

In 1928, German artist George Grosz and his publisher Herzfeld were convicted of blasphemy and sacrilege following the publication of two satirical drawings which depicted Christ wearing a gas mask and balancing a cross on his nose.[78] On appeal, a Berlin judge who supported Grosz' social criticism of the First World War, stated: "The artist made himself the spokesmen of millions who disavow the war by showing how the Christian Church had served an unseemly cause which they should not have supported."[79]

On the eve of the Nazi's rise to power, artists from various disciplines joined forces to counter the suppression of artistic expression in Germany. "We will fight until the last breath for the liberty of art," was the rallying cry of German artists.[80]

Meanwhile Russian artists, who experienced relative freedom following the revolution, were now told to abandon individualism and the fear of strict discipline. During Stalin's regime, artistic creation was systematized and

---

[77]*Id.*, Mar. 7, 1927, at 18, col. 5.

[78]*Id.*, Dec. 7, 1928, at 10, col. 6.

[79]R. SHIKES, THE INDIGNANT EYE, THE ARTIST AS A SOCIAL CRITIC IN PRINTS AND DRAWINGS FROM THE FIFTEENTH CENTURY TO PICASSO, at 293 (1969).

[80]N.Y. Times, Mar. 12, 1929, at 5, col. 1.

controlled by the party. Art was to be carried out under the guidance of the political party and wielded as a weapon. The official standard and measure of a work of art included party character, Socialist content and national costs.[81]

To carry out Stalin's dictate that "all art must be propaganda," the Association of Soviet Artists was formed assuming centralized control of painting and sculpture. Independent or unofficial art groups were abolished, replaced by Communist unions which all Russian artists were required to join.[82]

Back in Germany, total control over the arts was established by 1933 with the creation of the Reich Chamber of Culture under Dr. Joseph Goebbels' Ministry of Propaganda and Popular Enlightenment. Every artist who wanted to earn a living in Germany was required to belong to the Art Chamber. Banned artists considered "racially inferior or politically unreliable" were forbidden to exhibit or sell their works, and even to paint in the privacy of their own

---

[81]CLAPP, *supra 32*, at 233-34. For a better understanding of art and censorship under the Soviet regime, *see* H. LEHMANN-HAUPT, ART UNDER A DICTATORSHIP, (1954). Lehmann-Haupt states that for a brief period before Stalin's crackdown, artists were free to create works that were considered futuristic and avant garde. Under Lunacharsky, the commissar for cultural matters and education and a Lenin cabinet member, artists were left to their own devices.

[82]*Id.* at 238.

homes. The decree was enforced in some instances by surveillance and periodic inspections by Gestapo agents.[83]

On the night of the infamous mass book burning on May 10, 1933, Minister Gobbels outlined the aesthetic principles of the Nazis:

> Only that art which draws its inspiration from the body of the people can be good art in the last analysis and mean something to the people for whom it has been created. There must be no art in the absolute sense, such as liberal democracy acknowledges. An attempt to serve such art would end in the people's losing all internal contact therewith and the artist's becoming isolated in a vacuum of art for art's sake.[84]

By 1937, Germany's nation-wide drive to eliminate "degenerate" art began in earnest. Jewish artists and those with Bolshevik tendencies who produced modern art were prime targets for the label of 'degenerate' or 'decadent' artist. Hitler had denounced modern art as the product of "morbid and perverted minds." However, at an exhibition of the so-called degenerate art, more than three times the usual number of patrons attended the show.[85]

---

[83]*Id.* at 244.

[84]*Putting Art In Its Place,* NATION, May 10, 1933 at 519.

[85]N.Y. Times, Aug. 6, 1973 at 15, col. 8.

As the Nazis continued their virulent campaign of censorship, American artists became increasingly united in the fight against suppression. At the second annual American Artists Congress held in December of 1937, artists passed a series of resolutions condemning infringements on civil liberties, criticizing censorship in art. The group called for an end to discrimination against black artists and urged artists to join the trade union movement.[86]

By November, 1938, the persecution of Jews in Germany led to the confiscation of thousands of priceless works of art including heirlooms that had been in Jewish families for generations. Special pawn brokerage offices were set up in Berlin to sell the banned Jewish art.[87]

In England and America, the blatant efforts of the Third Reich to stifle the creativity of non-Aryan artists came under increasing attack. In a speech at the opening of the new building of the Museum of Modern Art in 1939, President Franklin Roosevelt expressed the artist's and the American ideal of freedom in the arts:

> The arts cannot thrive except where men are free to be themselves and to be in charge of the discipline of their own ardors . . . what we all liberty in politics results in freedom of the arts . . . crush individuality in the arts,

---

[86]*Id.*, Dec. 20, 1937 at 25, col. 4.

[87]*Id.*, Nov. 27, 1938, at 46, col. 1.

and you crush art as well.[88]

Roosevelt's comments were a slap in the face directed at the totalitarian regimes of Hitler, Mussolini and Stalin. And as the threat of world war loomed closer for Americans, interference from Mussolini's Fascist government led to the United States withdrawal from the international Venice Biennial Art Exhibition.[89] Axis powers which denied artists the freedom to create as they pleased, directly conflicted with the democratic principles of individual liberty.

Despite claims that censorship stifled creativity, artistic freedom was still curtailed in the United States during World War II. After the Japanese attack on Pearl Harbor, artists involved in the Federal Arts Project in Los Angeles were ordered to paint only war subjects for hanging in army camps. The portrait of General Douglas MacArthur became a favorite subject.[90]

Americans while espousing the virtues of artistic freedom were still disturbed by nudity in art. An issue of *Life* Magazine was banned in Boston because it reproduced in

---

[88]H. KALLEN, ART FREEDOM, at 907, (1942).

[89]N.Y. Times, Apr. 20, 1940, at 15, col. 5.

[90]CLAPP, *supra 32*, at 271. Prior to the outbreak of war, artists were encouraged to explore their creativity under Roosevelt's WPA program. Depression years represented a boom time for artists, writers, performers and others involved in the arts.

full color several nudes on display at the San Francisco Museum of Art.[91]

In October, 1943, artist Umberto Romano created a 14 X 11 foot mural entitled *The Spirit of Freedom*, which had been commissioned by the New Jersey branch of the U.S.O. The picture which included a nude man was returned to the artist uninstalled because U.S.O. officials objected to soldiers being exposed to nudity. "I wonder how they will protect our boys from those nude statues and paintings once they reach Rome," Romano complained in an interview.[92]

During the post-war years, Americans became increasingly preoccupied with the threat of communism. Artists suspected of harboring communist sympathies came under increasing attack during the McCarthy period. William Hauptman, in his article, *The Suppression of Art in the McCarthy Decade*, wrote:

> The grim facts remain that an almost pathological fear of communist infiltration in the first decade after World War II resulted in one of this country's most shameful endeavors to deny artists their basic freedom of

---

[91]*Prudish Bostonians Ban Nudist Show Now In San Francisco Museum*, ARCHITECT and ENGINEER, Feb., 1943, at 4-5.

[92]*Puritanism Edits the 'Spirit of Freedom': Romano Painting for Trenton Branch U.S.O.*, ART DIGEST, Nov. 1, 1943, at 15.

expression.[93]

But often, modern art was considered radial and equated with political extremism. George A. Dondero, a Republican representative from Michigan, launched virtually a one-man campaign to purge American art of any communist tendencies. Although his assaults were primarily politically-oriented, Dondero claimed all modern art was communist inspired because of the "depraved" and "destructive" nature of its forms.[94]

In various speeches, Dondero blasted American artists who refused to conform to his ideal of what art should be, calling them "human termites," "germ-carrying vermin," and "international art thugs." Many artists attacked by Dondero were vocal in their opposition. Artist Ben Shahn countered that what right-wing congressmen were trying to suppress, namely freedom of thought, was in essence the heart of artistic creation. Shahn spoke for hundreds of American artists when he said: "to deny the artist the right to paint or sculpt whatever themes and in whatever style he chooses was to deny his entire freedom."[95]

---

[93]Hauptman, *The Suppression of Art in the McCarthy Decade,* ART FORUM, Oct. 1973 at 48.

[94]Id. ital.

[95]MERRYMAN, *supra 22,* at 269.)

Another example of censorship involved one panel of a four-panel mural painted in 1930 by Mexican artist Jose Clemente Orozco. The mural, on display at the New School for Social Research in New York City, was covered in May of 1953. The offending panel depicted the Russian Revolution with portraits of Lenin and Stalin. School authorities had been so harassed with protests against the Russian painting that they installed a copper plaque which stated that "the sentiments expressed in the picture were exclusively Orozco's." This present curtaining was made, officials explained, "during a period of great unease about Russia."[96]

It was not the first time the depiction of Lenin and communism provoked opposition. Fellow Mexican muralist Diego Rivera's fresco painted on a wall of the Rockefeller Center was destroyed in 1934. Rivera had been commissioned by Nelson Rockefeller to paint the mural entitled "Portrait of America" two years earlier. After approving the preliminary sketches, the Rockefellers became increasingly uneasy as the work depicted microbes given life by poison gases in war, lurid battle scenes with men in gas masks, gleaming bayonets, and tanks and planes flying overhead. The scene which caused the most objection showed a Communist demonstration complete with young girls carrying red

---

[96]N.Y. Times, May 22, 1953 at 29, col. 5.

banners, singing workers and club-swinging policemen.

Architects, construction heads and other Rockefeller associates pleaded with Rivera to "tone down" the red color, subject matter and realism and especially remove the head of Lenin. The artist refused, citing that one concession would lead to others and ultimately destroy his concept. The offending panel was later covered.[97]

The controvery sparked fierce debate among the art world. Demonstrators picketed Radio City demanding the unveiling of the covered mural. A group of conservative painters countered the protests and formed the Advance America Art Commission. Harry Watrous, president of the National Academy of Design, declared the head of Lenin "unsuitable for an American mural."[98]

In October, 1954, the American Federation of Arts at its 45th Annual Convention issued a statement regarding the freedom of the artist from political or other governmental investigations and oppressions:

> Freedom of artistic expression in a visual work of art, like freedom of speech and press, is fundamental in our democracy. This fundamental right exists irrespective of the artist's political or social opinions, affiliations or activities. The latter

---

[97]B. WOLFE, THE FABULOUS LIFE OF DIEGO RIVERA, (1969) at 317-340.

[98]*Id.* at 329.

> are personal matters, distinct from his work.[99]

In 1956, the "Sports in Art" show sponsored by Time-Life Corporation was attacked by the Dallas County Patriotic Council because four of its artists were suspected of harboring communist sympathies. The Dallas Park Board refused to buckle under pressure in its decision to allow the show to open as scheduled. In a 1,500 word signed statement, the board declared:

> Democracy cannot survive if subjected to book burning, thought control, condemnation without trial and proclamation of guilt by association . . . . It is important once and for all time to dissipate the nonsense that any single group in our community is the custodian of the patriotism of the rest of us. We reject and resent the imputation that we are less patriotic than others . . .[100]

The issue of whether modern art was communist-inspired and whether avant-garde artists were hired by the Soviet government to undermine the American way of life raged intensely during the 1950s. Liberal factions of the art world protested such actions of government censorship vigorously. Artists pointed out that the same type of repression, under the guise of patriotic duty was common in

---

[99]ART NEWS, Feb., 1956 at 7.

[100]N.Y. Times, Feb. 12, 1956 at 15, col. 3.

Nazi Germany and a reality in the Soviet Union.[101]

Throughout the turbulent decades of the sixties, limitations placed on artistic expression were still often politically motivated but the emphasis shifted away from fears of a communistic influence. A relaxing of societal mores on sex and nudity protected some works of art once considered indecent. On July 19, 1969, a 22-foot-high marble copy of Michelangelo's "David" appeared without a fig leaf for the first time since 1937 at Forest Lawn Memorial Park in Cypress, California. "Nudity is no longer something to be covered up," officials explained, because times and social attitudes have changed.[102]

During the Vietnam War, many artists created works as a form of protest. On April 18, 1969, a student art exhibit at Stanford University was shut down after complaints from some college officials and alumni. The exhibit, "Love Not War," featured nude men and women embracing a bizarre assortment of mechanical devices, including vacuum cleaners, electric fans, and lamps. The artist, J. Michael Barnes, denounced the closing, calling for an end to censorship on campus.[103]

Among the most controversial were Marc Morrel's

---

[101]HAUPTMAN, *supra 87*, at 271.

[102]N.Y. Times, July 20, 1969, at 32, col. 1.

[103]CLAPP, *supra 32*, at 364.

depiction of phalluses on an American flag.[104] A sculpture entitled "The Spirit of '76" was removed from an exhibition preview of the Art Show at the Minnesota State Fair, August 27, 1970, because it included an American flag with a dynamite box, a molotov cocktail and a red flag.[105]

In another Vietnam War protest, members of the Art Workers Coalition staged a "lie-in" before Picasso's "Guernica" in the Museum of Modern Art in New York City. They charged that the Museum had failed to keep its promise to collaborate with the Coalition on a poster protesting the massacre at Songmy, South Vietnam.[106]

The disillusionment Americans felt during the Vietnam War led many to question other values. A sexual revolution took place in the arts during the late sixties and early seventies with the introduction of nudity on the stage. The revolution began with the 'tribal love-rock musical,' *Hair*, which opened in an off-Broadway theatre in 1967. The use of nudity, acid trips and explicit discussion of sex was shocking to many audiences.[107]

After *Hair*, the musical *Oh 'Calcutta* both enraged and

---

[104]N.Y. Times, Feb. 19, 1970 at 49, col. 7.

[105]*Id.*, Aug. 30, 1970 at 43, col. 6.

[106]*Id.*, Jan. 9, 1970, at 36, col. 1.

[107]WEBB, *supra 33*, at 334.

titillated theater-goers. The musical featured singing, dancing and very explicit sexual comedy. One sketch concerned the history of women's underwear, another demonstrated the techniques and surprises of suburban wife-swapping. One of the musical's most controversial scenes set to John Lennon's "Four in Hand," showed four men masturbating in front of screens on which their fantasies appeared.[108] Following the breaking of taboos and relaxation of censorship in the late sixties and early seventies, the tendency for sexually explicit performance art was less sensational in the eighties.

Popular music during the eighties became more explicit in both lyrics and performance. Among the more provocative song titles were Mick Jagger's "Cocksucker Blues," Adam Ant's "Whip In My Valise," and Iggy Pop's "Cock In My Pocket". On Prince's "Purple Rain"[109] album, a song called "Darling Nikki," tells of a girl masturbating with a magazine in a hotel lobby. In the KISS song, "Fits Like a Glove," the rock stars sing:

> Ain't a cardinal sin, baby.
>
> Let me in.
>
> Girl I am going to treat you right.

---

[108]*Id.* at 336.

[109]*Id.* at 436.

Well, goodness sakes,
My snake's alive, and it's ready to bite.
Baby, let me in.
It fits like a glove.
Think I'm gonna burst.
When I go through her
It's like a hot knife through butter.[110]

Another fairly recent phenomenon in the late seventies and eighties was the gradual acceptance of homosexual themes and images, particularly in the world of painting and photography. Homosexual photography was recognized as a serious art form when galleries began devoting exhibitions to the subject in New York, Los Angeles, Paris, Amsterdam and Berlin.[111]

The late Robert Mapplethorpe, whose controversial homoerotic photos formed the basis of an obscenity trial in Cincinnati, Ohio, (see Chapter One) often produced startling and at times visually overpowering effects. His icons of the sadomasochist subculture are shown through high definition images in which dramatic lighting and highly polished finish contribute to the effect. Mapplethorpe

---

[110]Note, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 783 (1990), (authored by Peter Alan Block).

[111]WEBB, *supra 41*, at 438.

often used symbols of male power in his work. In "Marc, New York" (1976) the right shoulder and naked torso of a tattooed man is shown as he leans on a table. His well developed genitals are meticulously positioned on the table top, carefully exposed by his crotchless leather trousers.[112]

The emergence of the angry feminist-performance art of such artists as Karen Findley also continued to shock audiences in the eighties. Findley has smeared food into her genitals, covered her nude body with chocolate and even defecated onstage. Her performances also included graphic descriptions of violent and bizarre sex acts with priests, children, relatives, and the handicapped. Police have stormed some of Findley's performances and worried gallery and club owners routinely cancel her engagements.[113]

Hardly any aspect of the art world from the very earliest times has caused such a furor as so-called erotic art. Attitudes toward erotica have see-sawed from revulsion to acceptance and back again. What is regarded as moral and aesthetic in one part of the world during one period is

---

[112]Id. at 436.

[113]CARR, *Unspeakable Practices, Unnatural Acts: The Taboo Art of Karen Findley,* Village Voice, June 24, 1986 at 17-19. *See also,* MERRYMAN, *supra 22,* who express their surprise that Findley's work has, to date, never reached the courts.

rejected as obscene elsewhere in another generation.[114]

Opinions about works of art keep changing, not only today but throughout the known course of history. Even the greatest classics have had their ups and downs. Consider the works of Michelangelo, Monet, Shakespeare and Beethoven, to name a few. The history of taste--which is part of the history of art--is a continuous process of discarding established values and rediscovering neglected ones.[115]

Changing societal morals and taste can lead to censorship of artistic expression. Throughout history, censorship has resulted from acts by those legally empowered to alter, suppress, or destroy works of art and to prohibit artists from making certain kinds of art. Censors have been--and continue to be--officials or designated representatives of government, the Church and institutions such as academies, universities, professional societies and art museums.[116]

The censoring of art is based on ideological, moral and aesthetic grounds. Censorship ultimately works to deprive the artist of access to an audience or the public access to

---

[114]CARMILLY-WEINBERGER, *supra 41*, at 174.

[115]H. JANSON, A. SURVEY OF THE MAJOR VISUAL ARTS FROM THE DAWN OF HISTORY TO THE PRESENT DAY, at 9 (1969).

[116]MERRYMAN, *supra 22*, at 243.

a work of art. The word censorship is often viewed as an unwarranted interference with an artist's right to create a work of his or her own choosing. Yet the concept of complete artistic freedom was not fully developed until the twentieth century.[117]

The right of artists to create works of their own design owes its legacy to the libertarian philosophers of the late eighteenth and nineteenth centuries. Philosophers like John Stuart Mill emphasized the importance of an individual's freedom of expression.[118]

The First Amendment to the U.S. Constitution states that "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 . . . ."[119] This language has remained unchanged for two hundred years; yet the speech whose freedom it protects has changed dramatically.

The ongoing NEA controversy and the new guidelines to restrict obscene art has prompted several recent legal commentaries on the constitutional implications of such action. A recent *Harvard Law Review* Note criticized the

---

[117]*Id.* at 240.

[118]See J. MILL, ON LIBERTY (1859).

[119]U.S. CONST. amend. I.

guidelines, stating that the U.S. government "reassumes the position of censor that it held in the early twentieth century."[120] In singling out homoerotic expression for special condemnation in the guidelines, the author maintains that Congress has ignored the Supreme Court's demand that expression should not be suppressed because of its message, ideas, subject matter or content.[121]

The two primary goals of current obscenity laws--protecting art while restricting obscenity--"lie in a state of irreconcilable conflict due to the nature of contemporary art," Amy Adler argues in a recent issue of *The Yale Law Journal*.[122]

> 'Art,' by its nature will call into question any definition that we ascribe to it. As soon as we put up a boundary, an artist will violate it, because that is what artists do. In the end, we as a society are left with a choice: either we protect art as a whole or we protect ourselves from obscenity. But we choose one at the sacrifice of the other. It is impossible to do both.[123]

In the 1973 landmark Supreme Court obscenity ruling,

---

[120]Note, *Standards For Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969, 1988 (1990).

[121]*Id.* at 1984.

[122]Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L. REV. 1359, 1378 (1990).

[123]*Id.* at 1359.

Miller vs. California, the Justices set forth a new three-pronged test for determining if a work of art is obscene and thus outside the realm of First Amendment protection. An obscene work must (1) appeal to the prurient interest, (2) contain potentially offensive portrayals of specific sexual conduct and (3) lack serious literary, artistic, political or scientific value.[124]

The most pressing challenge to the *Miller* test, according to Adler, comes from those Post-Modern artists like Karen Findley, who not only defy standards like serious value, but also attack the most basic premise of *Miller:*

---

[124]413 U.S. 15 (1973). Several legal commentators have recently challenged the validity of the *Miller* test for obscenity. The Supreme Court had already reaffirmed that obscenity falls outside First Amendment protection in *Roth vs. United States,* 354 U.S. 476 (1957). *See Note, Obscenity: Is the Value of a Literary or Artistic Work to be Judged by Individual Community Standards,* 15 S.L.U. REV. 129, 140 (1988) (authored by Sonceree Smith). Note, *Obscenity and the Reasonable Person: Will He Know It When He Sees It?* 30 B.C.L. REV. 823, 859 (1989) (authored by Eric Jaeger). Perry, *Freedom of Expression: An Essay on Theory and Doctrine,* 78 N.W. U.L. REV. 1137, 1211 (1983). Perry agrees that certain features of contemporary First Amendment doctrine are not fully consistent with the principle of freedom of expression. "The Supreme Court's exception of 'obscenity' from the protection of freedom of expression is deeply problematic, even for one who rejects moral skepticism" at 1211. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea,* 86 MICH. L. REV. 1564, 1634 (1988). Roberts, *The Obscenity Exception: Abusing the First Amendment* 10 CARDOZA REV. 677, 728 (1989). *But See,* Finnis, *Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity,* 116 U.P.A.L. REV. 237, (1967).

that art can be distinguished from obscenity.[125] The works of contemporary artists that deliberately shock the public and offend often make it extremely difficult to view the work as "art." The new art that has arisen since *Miller* has rendered standards such as "serious artistic value" obsolete.[126]

Adler cites Annie Sprinkle as another performance artist who, like Findley, challenges the distinction between art and obscenity. Sprinkle has performed in art settings at New York's Kitchen for the Performing Arts and also at the Carnival of Sleaze Festival. She has appeared in several pornographic magazines and X-rated movies. Her recent show, "Post Porn Modernist", at the Kitchen has also come under Congressional attack over NEA funding of 'obscene' art.[127]

Many of the same legal commentators who question the effectiveness of *Miller* point to the increasing difficulty of distinguishing between contemporary sexually-explicit art, pornography and obscenity.[128] Professor Stephen Gey argues that many modern artists are driven by indecent impulses indistinguishable from those that motivate creators

---

[125]Adler, *supra 124*, at 1369.

[126]*Id.* at 1359.

[127]*Id.* at 1370-1371.

[128]Gey, *supra 126*, at 1628-1629.

of pornography. He cites the example of artist Oskar Kokschka who commissioned a doll maker to make a life-sized doll of his estranged love Alma Mahler. The doll later turned up in an oppressive painting called "Self-Portrait with Doll," in which "Kokoschka portrays himself also looking dumb and doll-like as he points ruefully in the direction of the reclining creature's bell and genitalia."[129]

Gey also includes the work of Egon Schiele, Henry Miller and rock star Prince as examples of artists who have exploited sexually-explicit themes. Schiele's favorite subject was himself, usually unclothed, and often captured in the act of making some masturbatory gesture.[130]

Tropic of Cancer contains a great deal of explicit narrative relating to Miller's fascination with French prostitutes.[131] The more popular forms of artistic expression are equally obsessed with forbidden alternative sexual visions. For example, before he became a mega-star, the rock singer Prince was best known for his odes to incest.[132]

---

[129]*Id.*, quoting Bass, *A New View of Kokoschka,* ARTNEWS, Feb. 1987, at 111.

[130]*Id.*, *See* S. WILSON, EGON SHIELE 21-32 (1980).

[131]*Id.* at 1628, *See* H. MILLER, TROPIC OF CANCER (1961).

[132]*Id.* at 1628.

Obscenity disgusts people because they are applying their values to what they see, not because certain patterns of sense data cause such responses.[133]

> Indeed, in terms of uninterpreted sense data, there is little, if any difference between an obscene photograph and a photograph of a nude painting or between a collection of obscene songs and Schubert's 'Winterreise'. Perception of the differences between these categories and our responses to them are part of an intellectual process in which thought plays the central role.[134]

Noted obscenity law scholar Frederick Schauer has attempted to bridge the gap between obscene speech and non obscene speech. He maintains that hard-core pornography and obscenity can work only as a sex aid, not as a communication of ideas. Schauer's theory argues that artistic expression is protected if it is intentionally political or conveys messages which address public concerns. But if there is a gap between an artist's intention and the observer's perception, the resulting breakdown in communication means

---

[133]Roberts, *supra*, at 712.

[134]*Id.*

the expression should not be protected.[135]

Such attempts to solve the problem of obscenity by defining it leads to confusion. Obscenity is denied protection as speech because it lacks serious value. Serious value is a function of the communication of ideas, which in

---

[135]F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY, at 50-52 (1982). Dr. Schauer is a professor of law at the University of Michigan Law School. He was also a member of the Attorney General's Commission on Pornography. *See e.g.*, ATTORNEY GENERAL'S COMMN. on PORNOGRAPHY, U.S. DEPT. of JUSTICE, FINAL REPORT 251-69 (1986). *See also*, Schauer, *The Return of Variable Obscenity?* 28 Hastings L. J. 1275 (1977). *But see*, Roberts, *supra 124*, at 714, who argues that Schauer's theory is flawed since pornography can only work as a sex aid if it communicates. If the pornographer intends to create a sex aid, he must also intend such communication. Thus, pornography qualifies as communication. Roberts also refutes Schauer's claim that an artist's intent must be taken into consideration in delineating between obscene speech and protected artistic speech. "Knowledge of an artist's intent is not sufficient for communication, nor is it necessary. An atheist ignorant of German can appreciate Bach's 'St. Matthew's Passion.'" *Id.* at 715-16. *Also see*, Gey at 1595, who argues that Schauer's theory creates a "censorship calculus" that would find no compelling reason to allow the artistic merits of a book or movie to outweigh its probable effect on those who will probably constitute its audience. Gey states, "it seems more consistent with Schauer's theory that if a book's sexual stimulus value is very high and its artistic value is very low, the logic seemed to run in favor of censoring the book."

turn identifies protected speech.[136]

Much of the legal research in the area of artistic expression has focussed on its relationship to the problem of obscenity. First Amendment scholars have paid far too little attention to the nature and function of artistic expression, argues Sheldon Nahmod in his article, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment.*[137]

According to Nahmod, legal commentators such as Alexander Meiklejohn have acknowledged that the First Amendment protects some form of artistic expression. But they explicitly confer second class status on artistic expression.[138]

---

[136]Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value,* S. Ill. U. L. J. 1159, 1177 (1987). Professor Main argues that the Supreme Court has failed to fully examine the "value" prong of the *Miller* test. "Because it appears that obscenity does communicate something, the apparent falsity of this basic premise threatens to topple the court's entire approach to the problem of obscenity." *Id.* at 1177.

[137]Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment,* 221 WIS. L. REV. 235, 263 (1987). Nahmod complains that artistic expression has been assigned a derivative and second status in the views of many legal scholars, the Supreme Court, and other courts. Nahmod insists that any First Amendment theory that does not explicitly account for the nature and functions of artistic expression is inadequate.

[138]*Id.*, at 235-236.

Professor Nahmod's argument that legal scholars have neglected the importance of artistic expression appears plausible given the lack of research articles which address artistic expression in and of itself. For example, the self-government theory espoused by Alexander Meiklejohn puts political expression at the core of the First Amendment.[139] However, Meiklejohn does offer some constitutional protection to literature and the arts "because they lead the way toward sensitive and informed appreciation and response to the values out of which the rights of the general welfare are created.[140]

> There are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgement which, so far as possible a ballot should express."[141]

Thomas Emerson, a leading First Amendment theorist, acknowledges the long history of censorship of artistic expression but does not explain its importance. Emerson

---

[139]Meiklejohn, The First Amendment is an Absolute, SUP. CT. REV. 245 (1961). *But see,* Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L. J. 1 (1971). Bork excludes artistic expression altogether from First Amendment protection.

[140]*Id.* at 256.

[141]*Id.*

states that apart from any impact on behavior, expression should not be restricted just because it influences moral beliefs and attitudes.[142]

Martin Redish's theory of the First Amendment appears on its face to include artistic expression as a means of individual self-realization. The "use of the uniquely human mental or emotional processes" [included in such forms of expression as music, art and dance] serves one of the "touchstones of first amendment protection."[143]

> There is more to self-realization, however, than private self-government. For it is highly doubtful that fine art, ballet, or literature can be thought to aid one in making concrete life-affecting decisions, yet all seem deserving of full first amendment protection.[144]

As demonstrated throughout this chapter, protecting morals been used as justification for suppressing artistic speech. As contemporary artists like Findley and Serrano continue to create works of art that shock the sensibilities of the majority, new ethical and legal questions arise. Although most of the research on First Amendment issues has

---

[142]T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT, at 90-91 (1970). *See also*, W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976).

[143]M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS, at 75 (1984).

[144]*Id.* at 76.

not focussed specifically on artistic expression, recent clashes over controversial art may encourage legal scholars to reconsider its importance. Two symposiums on law and the arts held in the spring of 1990 demonstrate an increased interest in freedom of artistic expression.[145]

As outlined in Chapter One, this thesis will focus on the First Amendment aspects of artistic expression. The primary research will involve an examination of federal court cases pertaining to First Amendment protection of artistic expression.

STATEMENT OF PURPOSE

This study will attempt to fill part of the void that has resulted from the lack of legal research in the area of artistic expression. As demonstrated in chapter two, censorship of artistic expression deemed offensive or obscene has occurred throughout history. The public furor over controversial art and the inevitable constitutional challenges, underscore the need to examine how federal courts have interpreted the First Amendment with regard to freedom of artistic expression.

---

[145]*See* Bresler, *Art, Obscenity and the First Amendment* 14 NOVA L. REV. 357-67 (1990). Rhode, *Art of the State: Congressional Censorship of the National Endowment for the Arts* 12 COMM/ENT. L. J. 353-396(6) (1990). Faaborg, *Some Constitutional Implications of Denying NEA Subsidies to Arts Projects Under the Yates Compromise*. 12 COMM/ENT. L. J. 397-402 (1990).

Any law which restricts artistic expression is bound to come before the federal courts on constitutional grounds. A study which examines the constitutionality of this action may provide insights on future federal court rulings.

The primary purpose of this thesis is to examine federal cases to determine the extent of First Amendment protection of artistic expression.

RESEARCH QUESTION

This thesis will attempt to answer the following research question: To what extent has the First Amendment protected artistic expression based upon how the federal courts have interpreted artistic expression through case law?

CHAPTER THREE

METHODOLOGY

Traditional legal research will be used to answer this question. This approach was selected because of the legal nature of the research question.

Traditional legal research in the area of Constitutional law consists of:

1) Developing a research problem.
2) Researching the general background of a problem through secondary sources.
3) Developing a list of cases which relate to the problem.
4) Reading and analyzing these cases in order to trace how the law has treated this area.
5) Shepardizing these cases to insure that they are still valid law.
6) Analyzing the results and drawing conclusions.

To answer the research question, research will be conducted on how the federal courts have traditionally interpreted artistic expression through case law. Federal courts were chosen because they are logical forums for deciding the constitutional question of First Amendment

protection for artistic expression. This study will not be confined to a particular form of artistic expression (i.e., visual arts), but instead will focus on the creative act of artistic expression whether it be a painting, photograph, sculpture, poem, dance or musical composition.

The various forms of artistic expression will then be examined according to the principles and doctrines that the Federal courts have developed in artistic speech cases. These doctrines include the "free marketplace of ideas" concept, pure and non-verbal artistic speech and "captive audience theory". This study will thoroughly examine the relevant cases that will provide answers to the central research question.

CHAPTER FOUR

CASE ANALYSIS

"Defining art is about as troublesome as defining a human being."[146]

Fundamental to any discussion of artistic expression is its intangible and indefinable nature. No clear cut definition of art exists. Art historians, philosophers, even legal scholars, have sought in vain to provide answers to the age-old question, "What is art?" Some believe that art must be an object of beauty specifically designed to elicit a pleasurable response from the viewer or listener. Others maintain that art should challenge the system, break down societal barriers, shock, even offend. For legal purposes, a work of art has been defined as: "any human work made with the specific purpose of stirring human emotions; something displaying artistic merit . . . all works belonging to the so-called fine arts, painting, drawing, and sculpture."[147] The confusion surrounding what is art and what is not, and the differences between "good" and "bad" art, have led to both suppression

---

[146]JANSON, *supra 117,* at 9.

[147]6A C.J.S. *Arrest* § 291 (1975).

and destruction of works of art. In an ideal society, artists should be free to create without outside interference. However, history has shown that when art involves content that is sexual in nature, politically subversive or socially controversial, an artist's freedom of expression may be compromised.

As demonstrated throughout the historical review of censorship in Chapter Two, official attempts to curtail artistic expression have occurred for centuries.

Many incidents of suppression took place outside the church or state legal system. Censorship came as a direct result of actions taken by officials and private citizens who exerted their status and power over artists. Cases reached the courts when those in power attempted to control the creation and content of art through the force of law. Despite the libertarian goals set forth by the constitutional framers, the United States, like its European counterparts, has suppressed objectionable artistic expression. The First Amendment was written to guarantee Americans freedom of expression. But a fundamental conflict has arisen between the government's interest in regulating political subversion and obscenity and the guarantee of freedom of expression.[148] Both government officials and

---

[148]L. DuBOFF, ART LAW IN A NUTSHELL, 1984, at 245.

artists have turned to the courts to protect their interests. Chapter four of this thesis will focus on federal cases involving First Amendment challenges by artists seeking to protect the right to create, exhibit or perform their works. Other cases will center on the government's attempt to define and regulate obscene, offensive, or politically subversive artistic expression.

U.S. CUSTOM CASES

Before any First Amendment analysis of federal case law, it is useful to take a look back at early U.S. Custom cases. These cases restricted the definition of art to the fine arts and focused on the appearance and purpose of the work of art. In *United States v. Perry*,[149] the court held that stained glass windows containing effigies of saints and other representations of biblical subjects for use in a church could not be admitted duty free as fine art. The court did not dispute the stained glass windows' "artistic beauty" but narrowed protection to those works "intended solely for ornamental purposes". These included paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone or bronze.[150]

The courts at this time believed that "art" should be

---

[149]*United States v. Perry*, 146 U.S. 71 (1892).

[150]*Id.*

primarily ornamental in nature, made to "please the eye and gratify the taste". In addition, the court required as in *United States v. Olivotti* that the works be representational. This meant that sculpture was limited to imitations of natural objects, primarily the human form, depicted in its actual proportion.[151]

These cases failed to recognize the emergence of abstract art as a legitimate art form. Only three years before the *Olivotti* case, the American public was scandalized by the 1913 Armory Show, the first major exhibition of modern art in the United States.[152]

It wasn't until *Brancusi v. United States* that the Court discarded its representational test set forth in *Olivotti*. The case was brought to trial in 1926, after Edward Steichen, a prominent American photographer, attempted to bring to the United States the piece of abstract sculpture directly from its creator, the Romanian artist Constantin Brancusi.[153] Unfortunately for Steichen, U.S. customs officials regarded the sculpture, entitled "Bird in Space," as a "lump of bronze". One appraiser was

---

[151]*United States v. Olivotti*, 7 Cust. Ct. App. 46 (1916).

[152]M. BROWN, *supra 60*, at 21-27.

[153]*Brancusi v. United States*, 54 Treas. Dec. 428 Cust. Ct. (1928).

reported to say, "If that is art, then I'm a bricklayer," and another, "Dots and dashes are quite as artistic as Brancusi's work."[154]

The customs case was not the first time Brancusi's works clashed with American taste. The Romanian sculptor also attracted hostility during the 1913 Armory Show, where his non-traditional approach brought censure and ridicule. One critic called Brancusi's marble statue of a woman entitled "Mlle. Pogany", "a hard-boiled egg balanced on a cube of sugar."[155]

Steichen's attorneys sought to establish four main points in arguing the case: (1) the article was "original sculpture or statuary"; (2) it was the "professional production of a sculptor"; (3) it was made as the "professional production of a sculptor" and (4) it was "not an article of utility."[156]

---

[154]L. ADAMS, ART ON TRIAL, FROM WHISTLER TO ROTHKO, 1976 at 3338.

[155]*Id.* at 39. During the initial review before the trial several prominent artists including Marcel Duchamp and art critics testified that "Bird in Space" was an original work of art by a professional sculptor and therefore entitled to duty-free entry into the United States. When Mrs. Harry Payne Whitney, a major financial backer of the Armory Show and active patron of modern art, heard about Steichen's dilemma, she offered to have her own lawyers take over the case. Steichen agreed and appealed the decision.

[156]*Id.*

The court in granting "Bird in Space" duty-free entry into the United States stated that it was necessary to recognize the existence and influence of "a new school of art." The court also acknowledged the work bore no resemblance to a bird but because it was beautiful, symmetrical in outline and created by a professional sculptor: it qualified as fine art.[157]

For the next thirty years the U.S. Custom Courts struggled with many subtle and at times arbitrary distinctions between art and non-art. According to law professor Leonard DuBoff, these distinctions often penalized innovative forms.[158] In 1958, Congress amended the Tariff Act of 1930 to allow free entry of art works in other media. As artists continued to experiment with different art forms, the courts tended to take a more liberal approach to defining art.[159]

POLITICAL ART and the FIRST AMENDMENT

A year after the *Olivotti* customs case, one of the first major challenges to freedom of artistic expression was tried in U.S. federal court. The case, *Masses Publishing*

---

[157]*Brancusi*, at 432.

[158]DuBOFF, *supra 148*, at 34.

[159]*Id.*

Co. v. Patten[160] involved a militantly socialist magazine called *The Masses* which contained cartoons and a text of a politically revolutionary nature. The Postmaster General prohibited mailing of the publication claiming it violated the Espionage Act of 1917. The lower court ruled that the government had no authority to suppress the publication.

District Court Judge Learned Hand stated that while the cartoons directly criticized the draft, there was no evidence they expressed the idea for mass resistance to conscription. The cartoon in question portrayed a youth lying across the mouth of a cannon with his arms chained to the wheels of the gun carriage. Another cartoon entitled "Democracy," featured a nude woman, tied by her extended arms and crossed feet to a wheel. Another called "Labor" depicted a woman crouched down on the gun carriage fastened in the same manner. The third cartoon showed a woman kneeling on the ground at the side of the cannon in utter despair with her arms uplifted, while a child lies ignored at her side.

The Court said: "A cartoon can express ideas as lucidly and clearly as printed words and there is no escape from legal responsibility because pictures, rather than

---

[160]*Masses Publishing Co. v. Patten*, 244 F 535 (S.D .N.Y. (1917), reversed 246 F 24 (2d Cir. 1917).

words are used."[161] The decision was overturned by the Court of Appeals, which held that the Postmaster was acting within his jurisdiction to determine what is mailable and what is not under the statute.

The court also found that preventing Masses Publishing Company from mailing its magazines did not violate First Amendment rights. The court reasoned that the company could distribute its magazines through other means.

Masses Publishing Co. marked one of the first significant cases which addressed the First Amendment's role in determining whether government had a right to suppress political criticism. Throughout the previous century, artists in France, Spain and Germany were harassed or jailed for "speaking out" through their works against poverty, oppression and injustice. War also proved a fertile ground for the protest artist as nationalism continued to rise. Government found the artist's ability to communicate an idea dangerous even to the illiterate.[162]

In this country, political cartoons have long been used as means of political satire dating back to the American Revolution. But it wasn't until the period after the Civil

---

[161]*Id.* at 36.

[162]DuBOFF, *supra 148*, at 246. Examples of governmental censorship of protest artists such as Philipon, Daumier and Grosz were included in Chapter Two.

War that the political cartoon became an effective editorial device. New York Times cartoonist Thomas Nast's savage attacks on New York City's Tweed political ring during the early 1870's was credited with causing its downfall. Later, other cartoonists also turned to social ills for their subject matter. Arthur Henry Young, suffered because of his devotion to left-wing causes especially during the World War I period. His best work appeared in *The Masses* including one cartoon that showed a ragged child of the slums looking up at the night sky and saying: "Ooh, look at the stars; they're as thick as bed bugs."[163]

Two years after *The Masses* decision, the U.S. Supreme Court made its first significant effort at developing a First Amendment doctrine which provided some protection to unpopular forms of expression. The case, *Schenck v. United States,*[164] evolved out of the court's dilemma of reconciling new government-imposed laws making it a crime to oppose government or the military recruiting service, with the guarantee of freedom of expression. In *Schenck*, the Supreme Court attempted to specifically define what kind of words were protected by the First Amendment and what kind of words were outside the range of protected speech. The case

---

[163]E. EMERY, THE PRESS and AMERICA, 1988 at 368-370.

[164]*United States v. Schenck*, 249 U.S. 47 (1919).

involved an appeal by members of the Philadelphia Socialist party who mailed anti-war leaflets to young draftees urging them to join the Socialist party and work for repeal of the selective service law. Charles Schenck, the general-secretary of the organization, and other party members were tried and convicted under the Espionage Act. The socialists appealed to the High Court, asserting the law denied them their constitutional rights.[165]

Justice Oliver Wendell Holmes in writing the opinion for this case, initially acknowledged that the main purpose of the First Amendment is to prevent prior censorship. Holmes wrote:

> But the character of every act depends upon the circumstances in which it is done . . . . The question in every case is whether the words used, used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantial evils that Congress has a right to prevent. It is a question of proximity and degree.[166]

Political liberals reacted with considerable dismay to Holmes's "clear and present danger" test set forth in the Schenck case. Holmes was regarded as a great civil libertarian, but his formulation of the clear and present danger test left little room for what most American liberals

---

[165] *Id.*

[166] *Id.*

(and socialists) believed was protected expression. Under this test a work of art with a politically subversive message could be attacked as endangering a similar interest in national security.[167] While the *Schenck* ruling has been criticized throughout the years, many scholars regard the case as the first significant effort by the Supreme Court to develop a First Amendment doctrine which provides protection to unpopular forms of expression.[168]

SYMBOLIC SPEECH and the FIRST AMENDMENT

The values underlying freedom of expression apply with special force to artists. What makes the First Amendment of paramount value to artists comes from the importance placed on individual liberty through self-expression. Art frequently serves as the vehicle for the artist's ideas, even if the ideas are unorthodox or rejected by the majority.[169] However, many forms of artistic expression go beyond an artist's simple statement of ideas through verbal or written communication. The expression involved in such forms as the visual arts falls into the category of "symbolic speech". In a long line of symbolic speech cases beginning with the 1931 decision in *Stromberg v.*

---

[167]MERRYMAN, *supra 22,* at 277.

[168]DUBOFF, *supra 148,* at 248.

[169]MERRYMAN, *supra 22,* at 276.

California,[170] the Supreme Court has recognized that speech may be nonverbal.

Once nonverbal expression such as visual art is recognized to fall within the realm of the First Amendment, the very nature of the law necessitates some distinction between protected and non-protected expression. Much of the federal courts First Amendment litigation has centered on attempting to draw those lines.[171]

In the *Stromberg* case, Chief Justice Hughes in a majority opinion, wrote that a law "so vague and indefinite as to permit the punishment of the fair use of the opportunity for free political discussion was repugnant to the guaranty of liberty . . . ."[172]

The court in *Stromberg* did not, however, create any tests for defining what kinds of conduct and what circumstances fall within the protection of the First Amendment. Thirty-seven years later, in the landmark case of *United States v. O'Brien*, the Court set forth a four-part test for determining when a governmental interest

---

[170]*Stromberg v. California*, 283 U.S. 359, (1931). In this case, the Supreme Court struck down a California law prohibiting display of a red flag as a symbol of protest on First Amendment grounds.

[171]MERRYMAN, *supra 22*, at 276.

[172]*Stromberg*, 283 U.S. 359.

sufficiently justifies the regulation of expressive conduct.[173]

The case stemmed from a draft-burning incident after O'Brien burned his draft card on the steps of the South Boston Courthouse while a crowd of spectators looked on. He was convicted of violating the Universal Military Training and Service Act of 1948, as amended in 1965. On appeal to the Supreme Court, O'Brien argued that the amended statute was unconstitutional because it restricted his freedom of expression. The Court ruled against the appeal, stating, "We cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaged in the conduct intends thereby to express an idea."[174]

Although O'Brien's action involved the required communicative element, the Court contended it did not automatically become protected speech.

> When speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element--here the destruction of the draft card--can justify incidental limitation on First Amendment freedoms."[175]

---

[173]*United States v. O'Brien,* 391 U.S. 367 (1968).

[174]*Id.*

[175]*Id.* at 376.

The Justices applied the following test to uphold O'Brien's conviction:

> [A] government is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.[176]

A year later, in *Tinker v. Des Moines Independent Community School District,*[177] the Court reached a different conclusion in another symbolic expression case. In *Tinker,* three high school students were suspended for wearing black armbands in protest of the Vietnam War. A school policy adopted two days earlier prohibited the wearing of black armbands to demonstrate opposition to the war.[178]

The Court held that the students' action was "closely akin to pure speech" and found no evidence that their conduct created any disorder, interfered with the function of the school, or violated other persons' rights.[179]

---

[176]*Id.* at 377.

[177]*Tinker v. Des Moines Independent Community School District* 393 U.S. 503 (1969).

[178]*Id.* at 504.

[179]*Id.* at 508.

Yet even in *Tinker*, the Court provided no clear foundation to distinguish between pure speech and symbolic speech. As Justice Harlan wrote in *Cowgill v. California*[180]:

> The court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the state's interest in proscribing conduct against the constitutionally protected interest in freedom of expression.[181]

In another case decided in the same year, *Schacht v. United States,*[182] the Court also failed to provide a method of determining when symbolic speech is protected.

Schacht had been convicted for performing in an anti-war skit in front of the Armed Forces Induction Center in Houston, Texas. The Court of Appeals affirmed the lower court ruling based on a federal statute prohibiting the unauthorized wearing of any U.S. Armed Forces uniform. The statute allowed an exemption for actors portraying members of the Armed Services "if the portrayal does not tend to discredit that armed force."[183]

Schacht argued that he met the criteria for the exemption, saying he wore the uniform as a "costume". He

---

[180]*Cowgill v. California* 396 U.S. 371, 372 (1970).

[181]*Id.* at 372.

[182]*Schacht v. United States* 398 U.S. 58 (1970).

[183]*Id.* at 59, 60.

also claimed that the skit was designed to expose the evil of the American presence in Vietnam and was part of a larger, peaceful antiwar demonstration at the induction center that morning.[184]

The Supreme Court overturned the conviction, stating that Schacht should not be punished for speaking out against the U.S. Army's role in the Vietnam War. "Clearly punishment for this reason would be an unconstitutional abridgement of freedom of speech."[185]

The Court sidestepped any questions surrounding the symbolic nature of wearing an Army uniform. However, Justice White in his concurring opinion, found it "neither necessary or correct to hold that petitioner's 'theatrics' per force amounted to a 'theatrical production.'"[186]

FLAG DESECRATION

The first time the Supreme Court attempted to set boundaries on the extent of protection given to symbolic speech involved flag desecration cases. Some of the most fierce battles concerning freedom of visual expression have centered on the use of the American flag to communicate an idea or sentiment. The Stars and Stripes serve as a symbol

---

[184]*Id.*

[185]*Id.* at 63.

[186]*Id.* at 70.

of American patriotism and freedom.[187] The flag as the embodiment of America's strength and glory was so recently evidenced in the patriotic fervor brought on by Operation Desert Storm. Yet for others the flag represents a symbol of protest--an opportunity to call attention to government's failings. *Texas v. Johnson,*[188] which in effect invalidated flag desecration state laws, stirred intense debate throughout Congress and the country. The case addressed the issue of the scope of First Amendment protection that courts are willing to afford to expressive speech in the form of flag desecration. Many Americans as well as their elected representatives believed the Supreme Court's decision in *Johnson* went too far.[189]

The case involved a Texas man who took part in a flag-burning protest in front of City Hall during the 1984 Republican National Convention. Johnson, a member of the Revolutionary Communist Youth Brigade, was sentenced to one

---

[187]DuBOIS, *supra 148,* at 254.

[188]*Texas v. Johnson* 109 S. Ct. 2533 (1989). See also, *United States v. Eichman* 110 S. Ct. 2404 (1990) which affirmed the ruling set forth in *Johnson*. The Court reiterated that flag burning as a mode of expression, unlike obscenity or fighting words, enjoys full protection of the First Amendment.

[189]Comment, Art and First Amendment Protection in Light of *Texas v. Johnson*, 14 NOVA LAW REVIEW, 487 (1990). *See also,* JACOBY, MCDANIEL, MCKILLOP, A Fight for Old Glory, NEWSWEEK, July 13, 1989, at 18.

year in jail and fined $2,000. The Texas Court of Criminal Appeals reversed the decision on constitutional grounds, holding that Johnson was engaged in symbolic speech protected by the First Amendment. The Appeals Court also found the state's interests were insufficient to support a conviction. The U.S. Supreme Court, in a writ of *certiorari*, upheld the Appeals Court decision.[190]

While flag burning does not in itself constitute artistic expression, the U.S. flag has been used by artists as a vehicle of protest and public expression. *People v. Radich,* a federal ruling originating in a New York City criminal court, became the first major case directly involving art and flag desecration.[191]

Steven Radich, the owner of a private New York gallery was convicted of "casting contempt" on the American flag. His arrest on charges of flag desecration came after he displayed a series of art works by artist Marc Morrel. The court, which referred to Morrel's work as certain "constructions," which instead of sculpture, were partly composed of U.S. Vietcong and Russian flags, a Nazi swastika and a gas mask. The state court had singled out three of the

---

[190]109 S. Ct. at 2537.

[191]*People V. Radich* 385 F. Supp. 165 (D.C. S.D. N.Y.), (1974).

thirteen works as particularly objectionable. These works included an object resembling a gun caisson wrapped in a flag, a flag stuffed into the shape of a six-foot human form hanging by the neck from a yellow noose, and a seven foot cross with a bishop's miter on the headpiece, the arms wrapped in ecclesiastical flags. But the work which received the most notoriety featured an erect penis wrapped in an American flag and protruding from a cross.[192]

Radich never faced obscenity charges, however. According to art history professor Laurie Adams, the crucified phallus served as the "clincher" in the original trial. "In that particular sculpture," Adams wrote,

> The artist attacked not only the very war that Cardinal Spellman had called 'Christ's conflict,' but also the Church that had supported the war for so long. And hanging on the cross--not the savior Jesus Christ--but the 'the male sexual organ.' And to add insult to injury, the phallus was represented as the flag of these United States of America. The very same flag that Betsy Ross had lovingly labored over and that generations of soldiers had died for and were dying even today in the American struggle for peace with honor in Vietnam. There it was, boldly displayed at a second-floor Madison Avenue art gallery, open to the public--the American flag, a crucified phallus.[193]

During the lower court trial both Radich and Hilton Kramer, the art news editor of the *New York Times*, testified

---

[192]*Id.* at 168.

[193]ADAMS, *supra 154*, at 163-164.

the constructions were "works of art" under contemporary standards.

Radich told the court that the exhibition was not intended to show disrespect for the American flag but was an expression of protest against the Vietnam War and war in general. (The exhibition was accompanied by anti-war protest music, played from a tape recorder.)[194]

On appeal, the New York court of Appeals affirmed the conviction by a 5-2 decision. The court rejected Radich's First Amendment claims, although it implied that the works constituted symbolic speech. By applying the analysis set forth in *U.S. v. O'Brien*, the court concluded that the exhibition was a willful act of flag desecration and upheld

---

[194]*Id. See also* ADAMS, *supra 154,* at 164. Professor Adams notes that with the advent of pop art in the sixties, the American flag became a quite commonly used iconographic element. Perhaps the best known painted flags were made by artist Jasper Johns. (Radich used John's work in his defense.) Adams also cited other examples of the use of the flag in modern art in a directly sexual way as in Tom Wesselman's series, *Great American Nudes*. As an art form, the flag provides the artist with both formal (all those stars and stripes) and symbolic content. According to Adams, few national symbols have the emotive power of the flag, thereby making it a eminently suitable subject for various kinds of protest art. See *supra* note 7 which refers to the controversy surrounding a Chicago art student. Scott Tyler's work placed the American flag on the floor and urged patrons to step on it. While both politicians and war veterans screamed foul, artists and civil libertarians denounced the angry crowds declaring they were more concerned about the flag than the freedoms it represented. The case never went to trial.

the government's right to preserve the public peace.

Chief Justice Fuld joining with Judge Burke, dissented:

> I do not understand how it may be reasonable to say that the mere display of Morrel's constructions in an art gallery, distasteful though they may be, poses the type of threat to public order necessary to render such an act criminal. This prosecution, in my view, is nothing more than political censorship . . . . It should not be constitutionally sustained.[195]

The decision of the Appeals Court was upheld by an equally divided U.S. Supreme Court in 1971. It was the first time in American history that a case of artistic freedom had gone that far. Briefs and reply briefs were submitted to the court. Radich's reply included a comprehensive summary of examples of flag art in contemporary paintings, sculptures, collages, buttons, posters and political cartoons.[196]

But Radich refused to give up. On a writ of *habeas corpus* the case was heard again--eight years after the initial charges--and this time, Radich won. U.S. District Court Judge J. Cannella in granting the writ, applied a recent U.S. Supreme Court decision, *Spence v. Washington*. The judge stated that *Spence* provided a workable framework within which Radich's First Amendment challenges could be analyzed. He held that under the circumstances of the

---

[195]*Id.* at 170.

[196]*Radich,* 401 U.S. 531 (1971).

contest in which the works were displayed, the exhibition was protected by the First Amendment. The judge also found no imminent unlawful conduct or probability of public disorder which would pose a threat to public peace. In addressing the issue of protection of the sensibilities of passersby, the court noted that the display was placed on the second floor of a private art gallery not readily in view of the passing crowds below. "the appellant [Radich] did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display.[197]

In concluding his opinion, Judge Cannella wrote:

> The flag and that which it symbolizes is dear to us but not so cherished as those high moral, legal and ethical precepts which our Constitution teaches. When our interests in preserving the integrity of the flag conflict with the higher interest of preserving, protecting and defending the Constitution, the latter must prevail even when it results in expressions of ideas about our flag and nation which are defiant, contemptuous or unacceptable to most Americans.[198]

It is significant to note that artist Marc Morrel was never prosecuted for his act of creating the sculptures involved in the *Radich* case. Professor Leonard DuBoff, a

---

[197]*Id.* at 175-179.

[198]*Id.* at 184. *See also,* L. DuBOFF, THE DESK BOOK OF ART LAW, at 216-227 and BALLANTE, *Radich: Seven Years Later, Art & The Law,* Dec. 1974, at 3, col. 4.

well-known art law scholar, contends that the government may not have been willing to test how far the courts would go in regulating artistic creation apart from the display. He also asserts that Radich's earlier conviction and the courts' conservative view of the facts reflected sentiments at the height of the Vietnam War. But after the United States withdrew from Vietnam, the Federal District Court appeared to adopt a more liberal stance--perhaps echoing the growing anti-war feelings among the American public.[199]

The central issue in a First Amendment analysis of flag desecration cases such as *Radich* revolves around whether the desecration falls within the scope of pure speech or symbolic speech. The use of a flag to express an idea is obviously nonverbal, but in many cases elements of communication similar to pure speech may be seen[200]

As noted earlier, the 1974 Supreme Court case, *Spence v. Washington,* paved the way for *Radich* and subsequent flag desecration cases. In *Spence*, the Court attempted to develop a working definition which would assist in deciding protected forms of expression. The case involved a college student who hung an American flag with a peace symbol attached to it from his apartment window to protest the Kent

---

[199]DuBOFF, ART LAW IN A NUTSHELL, *supra 148,* at 258.

[200]*Id.* at 255.

State killings and the U.S. invasion of Cambodia. The trial court found Spence guilty under Washington's "improper use statute forbidding exhibition of a U.S. flag with attached extraneous material." The Washington Supreme Court then sustained the conviction.[201]

On appeal, the U.S. Supreme Court considered both the nature of Spence's activity and the factual context and surroundings of the action. In overturning Spence's conviction, the Court stated that "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[202]

The Court found that none of the circumstances which would warrant state action against flag desecration were involved in *Spence*. The criteria (as later addressed in *Radich*) included preventing a breach of the peace, protecting the sensibilities of passersby or preserving the

---

[201]418 U.S. at 406-408.

[202]*Id.* at 410-411.

flag as an unalloyed symbol of the United States.[203]

The two part analysis adopted by the Court in *Spence* and later used in *Radich*, first determines whether the conduct falls within the bounds of the First Amendment. Secondly, the courts decide if the state's interest is so compelling as to justify infringement of constitutional rights.[204]

Both the *Radich* and *Spence* decisions were applied in an 1984 U.S. Appeals Court decision which overturned an Atlanta, Georgia, woman's flag desecration conviction. Diane Monroe ignited an American flag during a 1979 demonstration by the Iranian Student Association and the Revolutionary

---

[203]*Id.* at 412-414. *See also,* Comment, *supra* 188 at 496. The NOVA LAW REVIEW Comment argues that the Court in *Spence* appeared to make a subtle shift from the rigid four-prong test of *O'Brien* to a more general balancing against alleged governmental interests. *See also, Korn v. Elkins,* 317 F. Supp. 138 (D. Md. 1970) involving University of Indiana officials' refusal to permit publication of a student-produced magazine which pictured a burning flag on the cover. The court sustained the student challenge to the constitutionality of the flag desecration statute. The court also found that the artistic expression presented itself close to pure speech, and thus, was protected unless a considerable state interest was proven.

[204]DuBOFF, *supra 148,* at 259. Professor DuBoff points out the significance of the court's decision to not assume the conduct actually involved protected First Amendment rights. By first considering whether or not the conduct was protected speech, the court clarifies the relationship for the competing interests involved. The court thus establishes a more exacting balance by first deciding if the conduct is protected by the First Amendment, then determining the degree of protection.

Communist Party to protest U.S. involvement in Iranian affairs. The U.S. Appeals Court's decision in *Monroe v. State Court of Fulton County*[205] reversed a U.S. District Court ruling which upheld the Georgia flag desecration statute. The lower court held that Georgia's interest in preserving integrity of the flag as a national symbol outweighed *Monroe's* First Amendment interest in burning the flag.

The Appeals Court found the statute unconstitutional because *Monroe's* action was, in effect, symbolic speech. The court also determined that the flag burning did not produce "clear and present danger of a serious substantive evil in as much as there was no evidence demonstrating the likelihood and imminence of public unrest" (inciting a riot). In addition, the fact that a single spectator struggled for control of the flag was not sufficient to restrict Monroe's First Amendment rights.[206]

ART AND OBSCENITY

Flag desecration statutes represent only a portion of external constraints placed on free expression. The government interest in protecting citizens from allegedly

---

[205]*Monroe v. State Court of Fulton County,* 739 F. 2d 568 (1984 U.S.C. A 11th Cir.).

[206]*Id.* at 570.

obscene works has also limited artistic expression. As in the *Brancusi* case, which challenged the very premise of fine art, many obscenity cases originated in U.S. Customs disputes. One of the most celebrated cases centered on the attempt to keep James Joyce's *Ulysses* out of the United States. When the case reached the federal court, the judges ruled that the book "taken in its entirety did not tend to excite sexual impulses or lustful thought"--the legal definition of the word obscene as defined in 1933--but that its net effect was a "somewhat tragic and very powerful commentary on the inner lives of men and women."[207]

"I have not found anything that I consider dirt for dirt's sake," Judge Woolsey wrote. Later he added that while some of the scenes in *Ulysses* were "a rather strong draught to ask some sensitive, though normal, persons to take," the overall effect was "undoubtedly somewhat emetic" (causing one to vomit), "no where does it tend to be an aphrodisiac."[208]

Federal courts have long struggled to determine standards by which a work may be considered obscene. The exploration of graphic sexual themes in both literature and

---

[207]*United States v. One Book Called Ulysses*, 72 F. 2d. 705, 2d Cir. 1934, affg. 5 F. Supp. 182 (S. D. N.Y. 1933).

[208]*Id.* at 185.

art has led to an often erratic attempt at defining obscenity.[209] In *Parmalee v. United States,*[210] the appeals court found that the word obscenity was not a technical term of law and thus not susceptible to exact definition, since such intangible moral concepts as it attempts to imply vary in meaning from one period to another.[211]

The court in *Parmalee* was asked to overturn an obscenity judgement involving a series of imported books entitled "Nudism in Modern Life". The books were seized by a Washington, D.C. customs official when Maurice Parmalee attempted to send the books to the United States by mail from England. The books contained several photographs depicting male and female frontal nudity. In reversing the Appeals Court found that the nude is not per se obscene in

---

[209]R. DUFFY, ART LAW: REPRESENTING ARTISTS, DEALERS, and COLLECTORS, 1977, at 322.

[210]*Parmalee v. United States* 113 F. 2d 729 D.C. Cir. (1940).

[211]*Id.* at 734. The court used the example of pictures of modeled male and female underwear in daily newspapers and magazines which would have been shocking to readers in another era. The court also cited the commonplace turn-of-the-century arrests and conviction of women who appeared on the beach attired in sleeveless bathing suits or without stockings. In 1906, the play *Sapho* was suppressed because the leading lady was carried up a flight of stairs in the arms of a man. A year later, American opera star Mary Garden was prevented from appearing in the opera, *Salome*. "What was regarded as indecent in the days of Floradora Sextette" the court wrote, "is decent in the days of the `Fan and Bubble Dances.'"

art unless there is something which shocks or offends the taste of an ordinary or decent man. For pictures as well as sculpture, the surroundings, circumstances, pose, posture and suggestive elements must be considered.[212]

The method of censoring art through seizure of allegedly obscene works by the U.S. Customs Bureau continued despite the *Ulysses* and *Parmalee* decisions. In the case of *United States v. One Unbound Volume TTC,*[213] the court ruled in favor of the government in denying entry to a series of erotic prints by Gaston Vorberg imported from Germany. The prints included Greek, Roman, Etruscan and Egyptian statues, vases, lamps and other artifacts which were decorated with or depicted erotic activities. The court found that the prints showed acts of sodomy and "other forms of perverted practice." The court also rejected claims that the photographs depicted scientific or scholarly works in the field of archeology.[214]

---

[212]*Id.*

[213]*United States v. One Unbound Volume of a Portfolio of 113 Prints* 128 F. Supp. 280 D. D. Md. (1955).

[214]*Id.* at 281. The importer, Cecil Rush, had argued that the Vorberg exhibit had been publicly displayed throughout Europe and in some U.S. museums. But the trial judge countered, "what is done in Europe is not determinative here." And although a vase depicting an erotic scene may be included in a group of vases on exhibition in a museum in this country, I do not believe the present state of the taste and morals of the community would approve . . . "

The case was decided two years before the U.S. Supreme Court liberalized the test for obscenity in *Roth v. United States*.[215] In *Roth*, the Court attempted to set a standard for defining obscenity: whether to the average person, applying community standards, the dominant theme of the material taken as a whole appeals to the prurient interest. The Court also ruled that if the work had "even the slightest redeeming social value it fell within the protection of the First Amendment.[216]

In 1966, the Court in three related opinions attempted to clear up some of the uncertainties left from *Roth* and subsequent decisions. In the first case, a book named *John Cleland's Memoirs of a Woman of Pleasure v. Attorney General*,[217] the Court set forth the following three-part test: (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts

---

[215]*Roth v. United States*, 354 U.S. 476, (1957).

[216]Id. at 484. *See also, Grove Press Inc. v. Christenberry*, 276 F. 2d 433 (C.A.N.Y. 1960). The Court of Appeals ruling held that *Lady Chatterley's Lover* was not obscene within the meaning of the statute making obscene material unmailable. Circuit Judge Clark also stated that "absence of adverse moral judgement does not of itself make the work obscene.

[217]*A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General*, 383 U.S. 413 (1966).

contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[218]

Using the test set forth in *Roth* and its progeny, a federal court in 1970 reached a much different conclusion than the one fifteen years earlier involving the Vorberg prints. In *United States v. Ten Erotic Paintings*,[219] the Court found the government's attempt to bar ten allegedly obscene paintings and drawings from entering the United States, unconstitutional. The pictures included works by German artist George Grosz and four other contemporary artists, an anonymous eighteenth century French etching, one Indian and one Japanese etching, and two Chinese works including a Ming scroll. The works were part of a 1000-piece collection of erotic art assembled by Drs. Eberhard and

---

[218]*Id.* at 418. The court expanded upon its obscenity doctrine in *Ginzburg v. United States*, 383 U.S. 463, (1966), stating, "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, the fact may be decisive in the determination of obscenity. The Court also held that works aimed specifically at minors could be declared obscene even if they would not be obscene to adults. *See also, Redrup v. State of New York*, 386 U.S. 767 (1967) which upheld a New York state statute regulating the exposure and sale of obscenity to juveniles. In *Stanley v. Georgia*, 394 U.S. 557 (1969)., the Court ruled that adults could possess obscene works in the privacy of their own homes without fear of government prosecution.

[219]*United States v. Ten Erotic Paintings*, 311 F. Supp. 884 aff'd, 432 F. 2d 420 (4th Cir. 1970).

Phyllis Kronhausen. The collection also featured paintings by Rembrandt and Picasso. (The Kronhausens authored the book, *Erotic Art*, published in 1969, which had already been sold in leading book stores throughout the United States.)[220]

The Court admitted that some of the works were indeed erotic and contained explicit portrayals of sexual acts. But several expert witnesses for the Kronhausens, including artists, art scholars, museum curators and two psychologists, testified that none of the pictures offended contemporary standards. The court ruled that the government presented no "factual basis" for a finding of obscenity and that even a lay person would find none of the pictures "utterly without redeeming [artistic] value."[221]

The issue of value in obscenity cases became a focal point in the U.S. Supreme Court's 1973 landmark decision, *Miller v. California*. The Court rejected the *Memoirs* requirement that a work must be "utterly without redeeming social value" to be obscene. The Court said the test placed too great a burden on the prosecution to prove a negative; i.e., that the material was *"utterly without redeeming social value"*--a burden virtually impossible to prove in

---

[220]*Id.*

[221]*Id.* at 421. But *See, United States v. Thirty-Seven Photographs*, 402 U.S. 363, (1971).

court. The Court added that the *Memoirs* test left the door open for exploitation of obscene works.[222]

The second significant revision centered on the adoption of "community standard" guidelines, citing that a national community standard would be an "exercise in futility".

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City . . . . People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[223]

As a result of *Miller*, an art work which portrays "hard core sexual content" and has some artistic value but not "serious" artistic value can be considered obscene. Chief Justice Burger did state however, that courts "must remain sensitive to any infringement on genuinely serious literary

---

[222]*Memoirs*, 413 U.S. at 225-226.

[223]*Id.* at 32-33.

artistic, political or scientific expression".[224]

While the majority in *Miller* said that obscene works lie outside the protection of the First Amendment, Justice Douglas found the concept troublesome.

> Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that 'obscenity was not an exception to the First Amendment.' For matters of taste like matters of belief, turn on the idiosyncrasies of individuals. They are too personal to define and too emotional and vague to apply . . . [225]

---

[224]*Id.* at 15. The *Miller* court here reiterated its position as set forth in *Kois v. Wisconsin* 408 U.S. 229 (1972). In *Kois*, the Court stated that earmarks of an attempt at serious art are not inevitably a guarantee against a finding of obscenity, but that element must be considered in assessing whether the dominant theme of the material appeals to the prurient interest. The case involved an underground newspaper in Milwaukee, Wisconsin which published a poem entitled, "Sex Poem" with two accompanying photographs of a nude couple embracing. The poem was a frank play-by-play account of the author's recollection of his first sexual encounters. The Court, in ruling the Wisconsin obscenity statute unconstitutional, said, "the vague umbrella of obscenity laws was used in an attempt to run a radical newspaper out of business. *But see, Advocates for the Arts v. Thomson,* Thomson 532 F2d. 792 (1st Cir., 1976). The federal court upheld a district court ruling which found no First Amendment violation in the governor of New Hampshire's decision to refuse a grant-in-aid to a literary magazine. The governor's action was based on his disapproval of a poem entitled, "Castrating the Cat," which he labeled as an "item of filth." In the court's view, the refusal to promote or fund a magazine which contained language and imagery that some may find offensive fell short of the kind of discrimination that "justifies judicial intervention in the name of the Constitution."

[225]*Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), *supra* 52 at 70, Douglas, J. dissenting.

After *Miller,* lower courts continued to wrestle with the new obscenity standards and the extent of discretion available to communities. In *Jenkins v. Georgia,*[226] the Supreme Court reversed a conviction of a Georgia theatre manager for showing the film, "Carnal Knowledge." The Justices found nothing patently offensive about the film nor did they feel it depicted hard-core sexual behavior for its own sake.

> Even though questions of appeal to the 'prurient interest' or of `patent offensiveness' are `essentially questions of fact,' it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive'. . . [227]

The Supreme Court took a major step in revising obscenity law in a little publicized decision in 1987--*Pope v. Illinois.*[228] The case involved two adult bookstore attendants convicted of selling obscene magazine in violation of an Illinois obscenity statute. The lower court instructed the jury to apply a community standard to the

---

[226]*Jenkins v. Georgia,* 418 U.S. 153 (1974).

[227]*Id.* at 160. *See also, Smith v. United States,* 431 U.S. (1977) at 300-301. In *Smith,* the Court reaffirmed that a jury must apply contemporary local community standards to the prurient interest and patently offensive prongs of the *Miller* test but rejected the suggestion that a jury must use community standards in determining the "serious value" of a work. (The Court overturned a federal prosecution of mailing of obscene materials.)

[228]*Pope v. Illinois,* 481 U.S. 497 (1987).

serious value question. The petitioners in challenging the Court's instructions argued that the First Amendment prohibited judging the value of a work based on the tastes and mores of the *average person in a local community.*[229]

The Pope Court, in citing *Miller* and *Smith*, said the value component in questioning an allegedly obscene work was never meant to be judged by community standards.

> In *Miller* itself, the Court was careful to point out that the First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.[230]

Justice White, in setting forth a "reasonable person" standard instead of an "ordinary person", wrote:

> Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is

---

[229]*Id.* at 500-501.

[230]*Id.* at 400, quoting *Miller,* 413 U.S. at 34. *See also, Norma Kristie Inc. v. City of Oklahoma City,* 572 F. Supp. 88 D. W.D. Okla. (1983). The federal court found no evidence that the male contestants in a "Miss Gay America Pageant" would engage in obscene sexual conduct in violation of state law. (Oklahoma City officials had sought to prohibit use of its convention center for the pageant.) The Court ruled that mere subjective belief that the pageant was immoral could not justify prior restraint of assertedly distasteful expression. "The First Amendment values free and open expression, even if distasteful to the majority, including personally distasteful to this Court. As Voltaire said, 'I disapprove of what you say, but I will defend to the death your right to say it.'"

> not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material taken as a whole.[231]

Justice Scalia, while concurring with the majority opinion, expressed reservations about an "objective" test of the value component.

> I must note, however, that in my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada and art in the replication of a soup can . . . . Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide 'what is beauty is a novelty even by today's standards.'

In closing, Scalia called for a reexamination of *Miller*.[232]

CAPTIVE AUDIENCE

The courts weigh the rights of the speaker, performer or exhibitor in First Amendment challenges against the rights and interest of the state and offended viewers.

---

[231]*Id.* at 500-501.

[232]*Id.* at 504-505. *See also,* Main, *supra* 138 and *supra* 126. For a non-legal discussion, see ROSEN, *Miller Time*, THE NEW REPUBLIC, Oct. 1990 at 17-19. Rosen criticizes the Supreme Court's adoption of the "reasonable person" test in *Pope*. "It's hard to imagine a more philistine and less appropriate test for artistic value than the aesthetic sensibility of the 'reasonable person'. Reasonable people attacked Manet's "Dejeuner Sur L' Herbe" and Beethoven's "Ode to Joy" as indecent. And reasonable people are even less likely to find serious value in artists like Mapplethorpe and Findley who go out of their way to offend reasonable tastes.

Because of this, works displayed to a captive or unwilling audience are more likely to be suppressed. And even when the work is not legally obscene the courts, as demonstrated in *Close v. Lederle,*[233] tend to favor the viewers' right to privacy. In *Close*, a federal court of appeals ruled that when a captive audience is involved, viewers have a right to protection against "assault upon individual privacy" short of legal obscenity.[234]

Chuck Close, an art instructor at the University of Massachusetts, was asked by a superior if he wanted to display a collection of his works along the corridor walls of the Student Union. The exhibition, which included clinically explicit nudes, brought immediate controversy and discussion among university officials. The exhibit was removed from the Student Union on the fifth day of a scheduled twenty-four day run. Close, claiming his First Amendment rights had been violated, sued for a mandatory injunction ordering the university officials to make space available for the unexpired time.

The district court, ruling in favor of Close, found university claims that the exhibition was "inappropriate" to

---

[233]*Close v. Lederle,* 424 F. 2d 988 (1st Cir.), cert. denied 400 U.S. 903 (1970).

[234]*Id.* at 990.

the corridor were insufficient to interfere with the artist's right of free speech. In effect, the court said the university had no right to censor the exhibition simply on the basis of "offensiveness, embarrassment or annoyance" when it fell short of unlawful obscenity.[235]

On an appeal, the federal appellate court reversed the lower court ruling. The court discounted Close's claim that "Art is fully protected by the Constitution as political or social speech." Chief Justice Aldrich wrote, "There is no suggestion, unless in its cheap titles, that the plaintiff's art was seeking to express political or social thought . . . . We consider the plaintiff's constitutional interests minimal."[236]

The court also noted that the corridor where the exhibition was displayed was a passageway, regularly used by the public, including children. Several of the paintings were nudes, both male and female, explicitly displaying genitalia. One painting featured a skeleton with only the genitalia fleshed. Another bore the title, "I'm Only 12 and

---

[235]*Id.* at 989.

[236]*Id.* at 990.

Already My Mother's Lover Wants Me."[237]

In dismissing the complaint, the court drew an analogy between visual speech and pure speech:

> There are words that are not regarded as obscene in the constitutional sense, that nevertheless need not be permitted in every context. Words that might be properly employed in a term paper about *Lady Chatterley's Lover*, or in a novel submitted in a creative writing course, take on a very different coloration if they are bellowed over a loud speaker at a campus rally or appear prominently on a sign posted on a campus tree.[238]

The court added that freedom of speech must recognize, at least within limits, freedom not to listen.

Another clash between an art professor and a college resulted in a similar federal court of appeals decision.

---

[237]*Id.* In an exhibition of artwork containing nudity or explicit sexual conduct, the courts give considerable weight to the interests of minors. *See,* U.S. 390, *supra 12*. Some states have specific statutes restricting the display or the sale of such works to minors. A New York statute, for example, bans the sale to minors of any artwork depicting nudity, sexual conduct or sadomasochistic abuse. N.Y. PENAL LAW § 235.21 (McKenney 1980 & Supp. 1989). The New York statute was tested and upheld by the Supreme Court, in *New York v. Ferber,* 458 U.S. 747 (1982).

[238]*But see, Cohen v. California,* 403 U.S. 15, (1971). Cohen was convicted of disturbing the peace by walking through the corridors of the Los Angeles County Courthouse wearing a jacket emblazoned with the phrase, "Fuck the Draft." The Supreme Court reversed the conviction, holding that Cohen's conduct was not likely to provoke disorder. Justice Harlan reiterated that government, in acting as a guardian of public morality, exceed its authority by such prosecutions as attempting to remove offensive words from the public vocabulary. The public display of offensive or unpleasant sentiments may not necessarily constitute a criminal offense.

Albert Piarowski, the chairman of the art department at Prairie State College, a junior college outside of Chicago, filed a federal civil rights suit after school officials demanded that he relocate three of his art works to an alternative site on campus. Piarowski's works (eight stained glass windows) were part of an annual art department faculty exhibition. The windows which caused the most stir depicted the naked rump of a brown woman with a white cylinder resembling a finger sticking out from or into it. The judge wrote, "upon careful inspection" the cylinder appeared to be a jet of gas. Another window showed a woman clad only in stockings and apparently masturbating. The third window also included a naked brown woman crouched in a position of veneration before a robed white male while embracing a "grotesquely outsized phallus."[239] (The appeals court judge acknowledged that while descriptions of the windows sound obscene, they are not obscene in the legal sense.)

> The windows are not very realistic; seem not intended to arouse, titillate or disgust; and are not wholly devoid of artistic merit, or at least artistic intention. They are in the style of Aubrey Beardsley, the distinguished *fin de siecle*

---

[239]*Piarowski v. Illinois Community College*, 759 F. 2d 625 (7th Cir. 1985) at 627.

English illustrator.[240]

The three windows, which were clearly visible from the campus mall, provoked a number of complaints from students, cleaning women and black clergymen. After ten days, the administration ordered Piarowski to remove the windows and exhibit them in a fourth floor classroom. When Piarowski refused to remove the windows, one college official removed them. Two days later, the art department voted to close the exhibit rather than break it up.[241]

Piarowski said he never intended to make a political statement with the content and coloring used in his windows or intentionally disparage women or blacks. He argued that the windows were "art for art's sake". Piarowski testified that he never intended the windows to depict black women but used the brown glass only for contrast.[242]

In affirming the district court judgement dismissing the complaint, Circuit Judge Posner said Piarowski seemed more interested in "becoming a martyr to artistic freedom"

---

[240]*Id.* Two of Piarowski's windows were imitations of two Beardsley illustrations for "Lysistrata," Aristophanes' comedy about wives who go on a sex strike to end the Peloponnesian War. On his death bed, Beardsley ordered his illustration for "Lysistrata" destroyed as obscene but the order was never carried out.

[241]*Id.* at 628.

[242]*Id.*

than finding an alternative site to exhibit his works. The court pointed out that the college gave Piarowski an opportunity to offer suggestions for a new location but he refused. Posner said the case was "easier" than *Close v. Lederle*, where the issue was removal, not relocation.

> The discouragement is much less and hence abridgement of freedom of expression is less . . . . Although this location (the alcove of the mall) maximized the artist's audience, the impact both on his incentive to create controversial works of art and on the accessibility of those works to the viewing public, of moving it to another place (and we do not mean the broom closet) in the same building would have been slight.[243]

The political and social content of an artist's work appears to increase the chances for a successful First Amendment challenge. In *Sefick v. City of Chicago,*[244] the artist, John Sefick, brought action challenging a decision by a city official to revoke permission to display his sculptures in the lobby of the Civic Center. The district court held that although the city was not required to permit the display, once it did grant permission, removal

---

[243]*Id.* at 632. Judge Posner also noted the absence of a political motivation and the school's effort to *regulate not suppress* as factors in the court's decision. "Not every trivial alteration of the site of an art exhibition--not every mode yielding to public feeling about sexually explicit and racially insulting art," Judge Posner wrote, "is an abridgement of freedom of expression."

[244]*Sefick v. City of Chicago,* 485 F. Supp. 644 (N.D. Ill. 1979).

constituted a violation of the artist's First Amendment rights. The federal court, in agreeing with the lower court ruling, said cancellation of the exhibition could not be justified under the "captive audience theory" or as necessary action to protect the city for a libel or slander suit.[245]

The offending work consisted of a series of sculptures accompanied by a tape recording which satirized the handling of then Mayor Michael Bilandic's handling of the city's snow removal operations. (Chicago was hit hard by a record snowfall during the winter of 1979.) The work depicted Bilandic seated in an easy chair with his wife, Heather, sitting on the arm of the chair. The tape recording detailed an imaginary conversation between the mayor and his wife. The mayor keeps telling his wife "It's still snowing. God, it must be around eight feet now, isn't it, Heather? . . . My God, it must be eight feet out there now Heather. I don't know what to do. What do you think we should do, Heather?"[246]

When Rose Farina, coordinator of programs and exhibits for the Chicago Council on Fine Arts, first saw the exhibit, she contacted Sefick and informed him it was "unsuitable for display" in the Daley Center. The same day she reiterated

---

[245]*Id.* at 645.

[246]*Id.* at 647.

her displeasure in a letter to Sefick and ordered him to remove the work by the end of the day. Meanwhile, Farina placed a blanket over the exhibit to prevent others from viewing it.[247]

In contending Farina's action was unconstitutional, Sefick argued that artistic expression of social and political views was protected speech under the First Amendment. The federal court agreed, stating, "The Court believes that the art form involved in this case constitutes speech within the meaning of the First Amendment and thus is entitled to constitutional protection."[248]

PUBLIC ART

Conflicts also arise between the rights of artists to exhibit works in a public space and the rights of the majority users of that space. In these cases, the artists' First Amendment rights of artistic expression often collide with claims of public nuisance. The courts, as in the case

---

[247]*Id.*

[248]The Court also cited several cases which supported the concept that constitutionally protected speech extends beyond verbal expression. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (improper prior restraint of rock musical), "Hair"; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (constitutional protection of films) and *Cohen v. California*, 403 U.S. 15 (1971) (words and inscription on a jacket).

of *Silvette v. Art Comm'n,*[249] have ruled that artists do not have an absolute right to exhibit in a particular place. The case involved a long time dispute between David Silvette, a portrait painter, and the Virginia Art Commission. The controversy came to a head when the Commission members asked Silvette to modify a portrait he had donated as a gift to the state. After appealing to the governor without success, Silvette filed suit. He claimed the Commission's rejection of the portrait constituted an unlawful censorship of free artistic expression. Silvette also argued that the state's action was a "subterfuge form of censorship and represented an unequal enforcement of the law."[250]

The state district court ruled in Silvette's favor but the Supreme Court of Virginia reversed the ruling and federal court affirmed that decision.

> Of course an artist has the right to paint as he chooses. It does not follow, however, that he has the right to compel the Commonwealth to accept and display any or all his paintings tendered as gifts.[251]

The most notorious case involving public art, the so-called "Tilted Arc" case, centered on a nearly decade-long battle between the internationally known American sculptor

---

[249]*Silvette v. U.S.,* F. Supp. 1342 (D.C. E.D. Va. 1976).

[250]*Id.*

[251]*Id.*

Richard Serra and the General Services Administration (GSA). In 1979, the GSA, as part of its Art-in-Architecture program, commissioned Serra to create a sculpture called "Tilted Arc" for the Federal Plaza in lower Manhattan.

Serra studied the site for three years making numerous sketchings and a model which were all approved by the government. The finished work weighed 73 tons and was constructed of Corten steel. The final curved structure stood 12 feet high, 120 feet long and three inches thick. It tilted on one foot off its axis and was securely anchored to the steel and concrete plaza. From the moment of its installation in 1981 to its dismantling, and ultimate destruction in 1989, "Tilted Arc" provoked controversy. A petition initiated by a federal judge and signed by 1,500 workers who passed daily by the sculpture called for its removal.[252]

Objections ranged from complaints of the work's "ugliness and inappropriateness" to the site to the allegation that it posed a public danger. Opponents at a public hearing charged that the sculpture created an opportunity for "obnoxious graffiti" and was a "haven for muggers." A security officer for the two federal buildings protested that it was impossible to surveil the plaza for

---

[252]MERRYMAN, *supra 18,* at 258-259.

such criminal activities as drug dealing. He also said the concave side of the structure would produce a "blast wall effect" for a terrorist bomb planted in front of it.[253]

In his defense, Serra assembled a large cross-section of the international art world to testify on his behalf. He also presented more than 4,000 signatures calling for retention of the work. Serra argued that he had made a legally binding contract after going through the required processes of selection. He maintained removal would be a breach of contract, an act of censorship, a suppression of his right to freedom of expression, and a bad precedent for

---

[253]The "Tilted Arc" controversy received much publicity. For a better understanding of the issues involved, see also S. JORDAN, PUBLIC ART, PUBLIC CONTROVERSY: THE TILTED ARC ON TRIAL (1987); LERNER, *supra 145*, at 222-277 and 331-333; TOMKINS, *"Tilted Arc,)* NEW YORKER, May 20, 1985 at 95-101, STARR, *Tilted Arc: Enemy of the People?* ART IN AMERICA, Sept. 1985; SENIE, *Richard Serra's "Tilted Arc": Art and Non-Art Issues*, ART JOURNAL, Winter, 1989 at 298-301; SERRA, *Art and Censorship*, NOVA LAW REVIEW, at 323-332, (1989).

government-sponsored public art.[254]

Following the public hearing, Serra vowed to continue seeking legal remedies to protect the sculpture. Serra lost every legal battle. In a long awaited decision, the U.S. Court of Appeals affirmed the district court ruling, the court found that the First Amendment has only limited application where the artistic expression belongs to the government rather than a private individual. The court further stated that Serra relinquished his free speech rights when he sold the sculpture to the government and thus, the decision to relocate the work did not violate the

---

[254]MERRYMAN, *supra 22,* at 362. It is interesting to note that authors Merryman (a law professor) and Elsen (an art history professor) disagreed on relocation of the "Tilted Arc." Merryman believed relocation, with or without Serra's consent, would constitute censorship and suppression of the artist's right to free speech. Elsen supported its relocation. Many who testified on Serra's behalf did not necessarily like his art, or specifically the "Tilted Arc". Some artists thought the work gave public sculpture a bad name and others believed Serra had a moral obligation to create more viewer-friendly public art. However, Serra testified that his primary intent was to create a work of that was confrontational with the viewer and the setting. In an interview, he added, "I find the idea of populism defeating. It is the needs of art, not the public that come first."

artist's First Amendment rights.[255]

Not all art involving the use of public space is meant to be permanent. Artists have created installation pieces or works of art designed for a particular space, often in conjunction with a show of the artist's work. The art work may have no practical sale value and is usually destroyed at the end of the show. Some artists also create works under a public or private commission that is designed to be only temporary. However, because of the impact on public space, such works often spur controversy.[256]

The artist Christo, for example, hung a curtain across a deep valley in Colorado and made a fence of white nylon fabric which stretched across 24 miles of Marin County near

---

[255]*Serra v. United States Gen. Servs. Admin.*, 664 F. Supp. 798, 667 F. Supp. 1042 (S.D. N.Y. 1987) aff'd 847 F. 2d 1045 (2d Cir. 1988). See HOFFMAN, "Tilted Arc: The Legal Angle at 42-43. Barbara Hoffman, a former law professor, is currently practicing in New York City, specializing in art law. Hoffman contends that in many controversies involving public art, "legal subterfuge and secondary effects" mask opposition to the work for aesthetic reasons. In the Serra controversy, opposition to the work during a public hearing focused on interference with plaza space, terrorism and maintenance, as reasons for relocation, rather than the content of the work. Hoffman also expresses concerns about the likelihood of censorship of artistic expression imposed upon public art in the future. As a result of *Serra*, GSA administrators have tightened the rules on commissions including stipulations that the works must not be "pornographic or overtly political and they should promote solidarity."

[256]LERNER, *supra 145*, at 227.

San Francisco. He also wrapped in cloth the Pont Neuf in Paris. In each case, Christo secured permission from the appropriate local authorities. A written agreement was also drafted which specified such items as the duration of the work's existence, details of its eventual removal, whether it can be sold, who owns the copyright or any left over matters, sketches or photographs.[257]

Because Christo uses only private funds to support his work, he has seldom become involved in a political controversy. Likewise, he has avoided, at least to date, any legal battles which have reached the federal courts. This could conceivably change, however, if more of his proposals are turned down by local authorities. When Christo proposed an installation of his project, "The Gates," in New York City's Central Park, the city denied his permit application. The artist planned to install between 11,000 and 15,000 steel-supported golden orange banners on 25 miles of park paths for a two-week period sometime between 1982 and 1985. In denying the permit, the city parks and recreation commissioner concluded that the project was "in the wrong place at the wrong time and in the wrong scale." "In all these respects the defects of the physical project mirror the defects in the artist's grasp and understanding of

---

[257]*Id.* at 228.

Central Park." The commissioner also said the city had an obligation to protect the park's structure from "the substantial unknown risks inevitable in such a venture".[258]

First Amendment theory traditionally opposes regulation of the content involved in speech. But it does allow for certain regulation of the form or manner of speech. In the case of art, however, form is often at least as important as content. Art is particularly vulnerable to a diluted form of censorship in the placement of art in a public place. The legal issues in such as would be in assessing the validity of a time-place-manner regulation against the potential harm to state interests.[259]

---

[258]DAVIS, *Report and Determination in the Matter of Christo: The Gates,* cited in I. F. FELDMAN, S. WEIL, D. S. BIEDERMAN, ART LAW et.seq. (1986).

[259]MERRYMAN, *supra 22,* at 278.

CHAPTER FIVE

SUMMARY AND CONCLUSION

A fundamental concern for most artists centers on the freedom to create works of their own design and share them with others. However, outside forces for centuries have attempted to interfere with that process--especially when the art challenges perceived standards of decency and taste. Attempts to suppress artistic expression continue today as evidenced by the trial of a Cincinnati, Ohio art museum director recently acquitted for displaying Mapplethorpe's homoerotic photographs. Dennis Barrie, the museum director, hailed the jury's decision as a victory for freedom of artistic expression.[260]

The central research question of this thesis focused on the extent of First Amendment protection given to artistic expression. Through an examination of federal case law, the courts appear to recognize artistic expression as a protected form of speech with certain qualifications. Constitutional protection is not absolute. Artistic expression deemed 'obscene' or that which incites violence

---

[260]N.Y. Times, *supra 8*, at 1, col. 1.

lies outside of First Amendment protection.[261]

The courts have given the most latitude to artistic expression involving political themes. Dating back to the earliest days of this nation, artists have used their works as a means of social and political commentary. In *Schenck v. United States*,[262] the Supreme Court established the precedent which provides protection to unpopular forms of expression. Under this test, a work of art with a politically subversive message can be suppressed only if the government proves the work endangered national security. If the artist has reasonably shown that the artwork includes content of a political nature, the courts are more likely to extend First Amendment protection.[263]

One of the most emotionally-charged disputes involving artistic expression centers on flag art. Those artists who use the flag as a vehicle of protest may enjoy even greater freedom in light of the recent U.S. Supreme Court decisions, *Johnson* and *Eichman*. These controversial decisions have ruled that no laws could prohibit political protestors from burning the American flag.[264]

---

[261]413, U.S. 15.

[262]249, U.S. 47.

[263]385 F. Supp. 165 and 485 F. Supp. 644.

[264]109 S. Ct. 2533 AND 110 S. Ct. 2404.

Another area of federal case law which has provoked heated debate involves art and obscenity. As stated earlier, the Supreme Court in *Miller* has ruled that obscene art is not entitled to any constitutional protection. Given that fact, the post-Miller courts still struggle to determine the precise moment sexually explicit art becomes obscenity.[265]

The most pressing challenge to the *Miller* test comes from such contemporary artists as Karen Findley, whose performance art has been called "obscenity in its purest form."[266] Particularly troublesome is the "serious value" component of the *Miller* test. Justice Scalia, in citing the need for a re-examination of *Miller*, expressed reservations about an "objective" test of the value component.[267]

Even in cases where the art work is not legally obscene, the courts have placed restrictions on its display to a "captive audience". Here the courts have ruled in favor of the viewers' right to privacy and the government's efforts to protect the public from "offensive" works.[268] The courts also grant special consideration to the interests of

---

[265]431 U.S. 300 and 481 U.S. 497.

[266]*Adler, supra 122,* at 1369.

[267]U.S. 481, at 505.

[268]424 F. 2d 988 and 759 F. 2d. 625.

minors in protecting them from non-obscene art depicting nudity or explicit sexual conduct.[269]

The courts give more weight to the constitutional rights of artists involved in "captive audience" cases when the work includes political content or at least deals with some public issue. The courts appear more reluctant to offer the same constitutional protection to artistic expression that is primarily self-expressive, decorative or of a purely social nature.

Another area of art law which remains unsettled deals with public art. In these cases, the artist's right to create and exhibit works in a public place often collides with the government's efforts to regulate public spaces. The emergence of certain art forms such as site-specific art has created new legal dilemmas for artists as demonstrated by Richard Serra's notorious "Tilted Arc."[270] Here the courts found the First Amendment rights of artists minimal when the artistic expression belongs to the government.

The analysis of federal case law demonstrates the court's adherence to traditional First Amendment theory which gives the most protection to political speech.

The degree of protection afforded to other forms of

---

[269]383 U.S. 463.

[270]847 F. 2d. 1045.

speech, including artistic expression, is often determined through its relationship to political speech.

In this author's opinion, federal courts should consider artistic expression in and of itself and grant the same careful analysis afforded to political speech. Because of its diversity and marked influence on society, artistic expression should be given independent status as constitutionally protected speech. Should a work of art be measured by whether or not it depicts a political message?

It is also time for the courts to re-evaluate current obscenity law in light of the emergence of contemporary art forms which blur the distinction between the obscene and the nonobscene. The *Miller* test of 1973 may be outdated given the tastes and mores of the 1990's.

Art can often be offensive, disturbing and repugnant. It can invite scorn and outrage. Art is often misunderstood. Yet, its value should not rest on the opinions of the majority. A free society gives its citizens the opportunity to choose for themselves which art to embrace or rail against.

Freedom of expression is a precious right for all Americans. The First Amendment's constitutional guarantee of this freedom is vital to all artists who seek to create works of their own design. But just as important as an

artist's right to create art is the ability to reach an audience. The importance of art to society can not be underestimated. The Italian philosopher Benedetto Croce once wrote:

> *Art is the only eternal and concrete reality which man possesses, science being only a succession of hypotheses which replace each other in turn. Humanity or perhaps better, civilization without art would certainly perish quickly.*[271]

[271]B. CROCE, AESTHETIC, at 65 (D. AINFLIE trans. 2d. ed. 1922).

TABLE OF CASES

Korn v. Elkins, 317, F. Supp. 138 (D. Md. 1970).

Masses Publishing Co. v. Patten, 244 F. 535 (S.D. N.Y. (1917), reversed 246 F. (2nd Cir. 1917).

Memoirs v. Massachusetts, 383 U.S. 413, (1966).

Miller v. California, 413 U.S. 15 (1973).

Mishkin v. New York, 383 U.S. 502 (1966).

Monroe v. State Court of Fulton County, 739 F. 2d 568 (1984 U.S.C.A. 11th Cir.).

Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230 (1915).

New York v. Ferber, 458 U.S. 747 (1982).

Norma Kristie Inc. v. City of Oklahoma, 572 F. Supp. 88 (1983) (D. W.D. Okla.).

Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973).

Parmalee v. United States, 113 F. 2d 729 (D.C. Cir. 1940).

Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985).

People v. Radich, 26 N.Y. 2d 114, 257 N.E. 2d 30 (1970). United States ex rel. *Radish v. Criminal Court of New York,* 385 F. Supp. 165 (D.C.S.D.N.Y.), (1974).

Pope v. Illinois, 481 U.S. 497 (1987).

Redrup v. New York, 386 U.S. 767 (1967).

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

Schacht v. United States, 398 U.S. 58 (1970).

Sefick v. City of Chicago, 485 F. Supp. 644 (N.D. Ill. 1979).

Serra v. United States Gen. Serv. Admin., 664 F. Supp. 798, 667 F. Supp. 1042 (S.D. N.Y. 1987) aff'd 847 F. 2d 1045 2d Cir. (1988).

Silvette v. Art Comm'n, F. Supp. 1342 (D.C. E.D. Va. 1976).

Smith v. United States, 431 U.S. 300 (1977).

Spokane Arcades Inc. v. Ray, 449 F. Supp. 1145 (D.C. Wash. 1978).

Southeastern Promotions v. Conrad, 420 U.S. 546 (1975).

Spence v. Washington, 418 U.S. 405 (1974).

Stanley v. Georgia, 394 U.S. 557 (1969).

Stromberg v. California, 283 U.S. 359 (1931).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Texas v. Johnson, 109 S. Ct. 2533 (1989).

United States v. Kennerly, 209 F. 119, (D. N.Y. 1913).

United States v. A Motion Picture Entitled "I Am Curious Yellow", 404 F.2d 196 (2d Cir. 1968).

United States v. O'Brien, 391 U.S. 367 (1968).

United States v. Olivotti, 7 Cust. Ct. App. 46 (1916).

United States v. One Book Called Ulysses, 72 F.2d 705, (2d Cir. 1934), *aff'd 5 F.Supp.* 182 (S.D.N.Y. 1933).

United States v. One Unbound Volume of a Portfolio of 113 Prints, 128 F. Supp. 280 (D. D. Md. 1955).

United States v. Perry, 146 U.S. 71 (1892).

United States v. Reidel, 402 U.S. 351 (1971).

United States v. Schenck, 249 U.S. 47 (1919).

United States v. Ten Erotic Paintings, 311 F. Supp. 884 aff'd 432 F. 2d 420 (4th Cir. 1970).

Ward v. Illinois, 431 U.S. 767 (1977).

Whitney v. California, 274 U.S. 357, 375 (1927).

Young v. American Mini Theatres, 427 U.S. 50 (1976).