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Deciphering a Duality:
Understanding Conflicting Standards in Sex & Violence
Censorship in U.S. Obscenity Law

Submitted May 1, 2012

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Deciphering a Duality: Understanding Conflicting Standards in Sex & Violence Censorship in U.S. Obscenity Law

Honors Colloquium 2011-2012

Abstract

This research examines the division in US obscenity law that enables strict sex censorship while overlooking violence. By investigating the social and legal development of obscenity in US culture, I argue that the contemporary duality in obscenity censorship standards arose from a family of forces consisting of faith, economy, and identity in early American history. While sexuality ingrained itself in American culture as a commodity in need of regulation, violence was decentralized from the state and proliferated. This phenomenon led to a prioritization of suppressing sexual speech over violent speech. This paper traces the emergence this duality and its source.

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Acknowledgments

I would first like to express my deep gratitude to Professor Patrick Schmidt, my honors advisor. He provided vital insight and direction which guided my research in substantive ways. Without the long hours he spent editing and analyzing my work, I would not have been able to succeed in finishing my project. Furthermore, I would like to thank both Professors Terry Boychuk and Zornitsa Keremidchieva for introducing me to many of the authors and theories I studied in preparation for my thesis. Another invaluable source of expertise and constructive critique was my Honors Colloquium which consisted of Professor Julie Dolan and my honors peers Matthew Mullarky, Jisoo Hong, and Kaitlin Roh. Finally, I'd also like to thank my close friends Kyle Serafin, Logan Sand, Nicholas Pernsteiner, Mason Wells, Robert Strickling, and Jackson Robbins for all of their emotional and moral support throughout the year. The efforts of all of these individuals were paramount to the completion of my research.

Introduction – A Liberty Divided

In his wake there exists only chaos, violent carnage so visceral and palpable that it blurs the ever thinning line between entertainment and war. Whether it is explicit torture or gratuitously stylized executions, his craftsmanship in cruelty is only limited by the imagination and audacity of the individual willingly commanding his every exploit. “He” is James Earl Cash, the fictional protagonist of the controversial 2003 video game entitled *Manhunt*, and the “individual” is any man, woman, or child in the US with access to interactive new media. However, such seemingly uninhibited proliferation of violent speech is not a global phenomenon. Just across the pond and north of America’s borders, this title is either highly restricted and regulated or banned all together due to its legally obscene content.¹

Conversely, these other regions enjoy day/nighttime television programming like *Skins*, a serial drama with frequent and graphic depictions of teen sex and nudity marketed to youth demographics. *Skins* garnered critical acclaim and commercial success in Britain, but, when a heavily edited adaption of the show arrived in the US, it met immediate resistance and a hasty demise. Though the remake was censored specifically for sex, nudity, adolescent promiscuity and sexual language, it was regarded by many as morally repugnant and accused of portraying child pornography and legal obscenity. Due to the rapid loss of commercial sponsors and impending legal challenges, the show was quickly cancelled and taken off the air.²

Neither of these events represents an isolated event or solitary example of inverse obscenity interpretation, rather they are merely small pieces of a much greater pattern spanning centuries of culture and law. The pattern of obscenity censorship in the US is uniquely different from all other western nation states, particularly Canada, New Zealand, Australia and most of

¹ Smith, Tony. "Australia bans Manhunt." *Register*. 30 Sep 2004: n. page.

² Szalai, Georg. "PTC Calls MTV's 'Skins' the 'Most Dangerous Show for Teens'." *Hollywood Reporter*. 12 Jan 2011: n. page.

Europe. While these other states interpret obscenity law to enable censorship of violent speech quite severely, they often provide much more freedom to sexual speech than the US does. Furthermore, the US fails to acknowledge violent speech as categorically susceptible to obscenity law. This often overlooked predicament came to national attention recently with the case of *Brown v. EMA* (2011) where the question of violence as legal obscenity was assessed with regard to violence in video games. The Supreme Court found that violent video games represented legitimate speech protected by the First Amendment and not vulnerable to suppression or strict regulation by the government as obscenity. This controversial ruling reignited the legal, political and public debate regarding the discrepancy between sexuality and violence censorship standards and prompted my research question: Why does U.S. obscenity law focus on censoring sexual speech while virtually ignoring violent speech?

In my paper, I argue that a family of forces consisting of faith, economy, and identity, created during early American history and integrated throughout it, has solidified sexual speech as a threat to society while enabling violent speech to exist. Furthermore, a decentralization of violence as a cultural commodity simultaneously helped institute violent speech as a form of expression that represented no threat to the public welfare. I argue the validity of these assertions by first analyzing sexual speech by dividing it into three sections of its development in the US: origins, development, and contemporary. I then compare this analysis to violent speech's parallel development with the same sections. Throughout these six chapters I will employ the use of historical, socio-cultural, political, and judicial evidence in tandem in order to articulate the forging and proliferation of the family of forces comprised of faith, economy, of identity that discriminates against sexuality over violence to this day.

Chapter 1 – The Origins of America’s Obsession with Regulating Sex

A. Introduction- The Paradigm for Sex as Obscenity

The epistemological roots of America’s paradigm for obscenity did not sprout from a single seed. Rather, they reside on the cultural continuum between primal desire and pious shame. Our legal concept of obscenity consists of the tabooed images, acts, and impulses that exist in humanity’s most prurient interests. As Eric Larrabee suggests, we suppress the proliferation of our most sexual aspirations in order to prevent moral corruption.³ This notion is not inherent in human behavior, as demonstrated by the conflicting standards of obscenity abroad. Rather, this view is unique to the American construction of the limits of free speech. However, this definition did not arise overnight; a long history of geopolitical movements, court cases, and cultural developments contributed the state of obscenity law today. In this chapter I will argue that a family of forces involving cultural and legal stimuli between faith, economy, and identity in early American history precipitated the cascade of “prurient interest” based content restriction in speech at both a statutory and societal levels. I will do this by tracing the formation of American religiosity, the spread of Protestant values and its integration into capitalism, the creation of the ideal citizen in immigration law, and the earliest statutory and legal attempts at censorship.

B. Transforming Religiosity and Shaping American Christianity

Faith, specifically multid denominational Protestant Christianity, plays a major and highly visible role in every sphere of modern American life from culture to entertainment to law. The fiscal and intellectual development of many countries has been accompanied by the decline of faith’s importance in public life; however, there is one exception to this rule: the United States of

³ Larrabee, Eric. "The Cultural Context of Sex Censorship." *Law and Contemporary Problems*. 20.4 (1955): 672-688.

America.⁴ Indeed America possesses a massive public dedication to religion in comparison to the rest of the economically successful world. Yet, this financial success, amidst a myriad of other factors, has much to do with the popularity of religion in early American history. Many important scholars such as Max Weber have determined as much; however, none have examined how this diffusion of Judeo-Christian values in the name of economic progress helped steer, at least partially, the cultural sensibilities and tolerances of the American populace in terms of amenability to censorship provisions.⁵ I will examine how a reformed notion of religiosity migrated to America and helped shape society economically and politically in a manner that would indirectly instill moral values inherently hostile to sexual speech.

In order to understand how faith's decisive integration into the American economy had such a significant impact on public persuasions on sexuality, one must first establish the role faith played in church-state relations in the transformative period leading up to the cultural genesis of America. Philip Gorski explains the evolution of religion in Europe by arguing that old pre-Reformation religiosity focused too much on irrational devotion to divine intervention via the performance of rite and ritual (magical religiosity), the repetitive commemoration to the divine via a priestly class (ritual religiosity), and the material and spiritual needs of society at large both living and dead (communal religiosity). The proliferation of rationalist beliefs and a utilitarian sense of government and religion were rapidly changing the nature of the nation-state's role in public life in Europe. The "Confessional Age" brought about the alliance of the church and state. During this particular era from 1555 to 1648, political and religious elites began cooperating in order to control and influence the general populous. The church became a branch of sort of the nation-state in its mission to instill "social discipline". Consequently, the

⁴ Blow, Charles. "Why Is America So Religious?." *New York Times* [New York City] 29 Sept 2008, n. pag.

⁵ Weber, Max. *The Protestant Ethic and the Spirit of Capitalism*. Reprint. New York: Courier Dover Publications, 2003.

new form of religiosity emphasized receiving divine intervention and blessing via good behavior (ethical religiosity), the avowal and propagation of certain religious teachings and truths (intellectual religiosity), and the welfare of the individual as well as a focus on the living (individualistic religiosity).⁶ It is this notion of the Church as a tool of social and moral control that comes to America in the form of various Protestant faiths. Consequently, the transformation of religiosity brought about an intimate relationship between the values of the state and the values of religion which would eventually enable the transfer of sexual normativity from Christian dogma to the American public.

This notion of religiosity thrived in the Colonies as various religious groups fled to the New World due to theocratic oppression in Europe during the post-Reformation era. Charles Foster contends that the rise of the Evangelical faith represented a geopolitical social movement stemming from a need for civic unity and individual redemption following the rise of the secular nation state in the post-Constitution American and British government. Lacking a central monarchy or aristocracy, society more readily turned to an influential and empowering faith in order to fulfill their own needs and desires. Foster focuses on how the Evangelical sects change over time in both Britain and America according to geopolitical strife and evolution.⁷

Paul Johnson's interpretation of the distribution and spread of faith in the New World naturally follows Foster's logic. Using a holistic manner of research of the history, culture, and economics that shaped early America, Johnson concludes that it was not the poor who were the champions and propagators of the Evangelical revival but rather the wealthy and the middle class especially from the 1600s to the 1800s. He argues that the spread of these new faiths was not a

⁶ Gorski, Philip. "Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe, CA. 1300-1700." *American Sociological Review*. 65. (2000): 138-167.

⁷ Foster, Charles I. 1962. *Errand of Mercy: The Evangelical United Front, 1790-1837*. Chapel Hill, NC: University of North Carolina. Chapters I, II, III, IV, V.

product of the downtrodden desire and need for absolution and divine guidance, but rather a means of effective social control and the religious embodiment of the entrepreneurial capitalist zeitgeist of the US.⁸

The early 1800s especially was a time of shared optimism for many in the Northeast and the affirmative sanguinity of the Evangelical faiths reaffirmed the capitalist triumph of the emerging middle-class. They embraced this new faith as divine verification of their chosen path in life. To them, their personal success irrevocably proved that if America was to succeed, free market capitalism had to succeed and that the acceptance of Protestant moral values represented the solitary means by which to guarantee economic liberty and ethical purity in the nation. Consequently, Johnson argues that this Protestantism's spread to the poor had more to do with the elite and middle-class's active and intentional campaign to correct social and economic ills than the underclass's affection for passionate revivalism.⁹ This campaign is critical to the formation of the faith and economy portion of the family of forces which amplifies the social control necessary for the stigmatization of sexual speech.

As industry began to shift from familial to wage labor based production, employers and wealth-producers faced a new series of challenges in their business practices. With workers now being residentially segregated and socially isolated from their employers (rather than living in tandem and having close kinship/community bonds), productivity, work quality, and attendance decayed as workers suffered from alcoholism, crime, and laziness since they no longer felt an obligation to their bosses beyond their pay grade. Furthermore, the rapidly growing disparity in lifestyle and wealth between the employees and their managers and business owners created an additional divide in terms of social connection due to the structure of this new economic reality.

⁸ Johnson, Paul E. 1978. *A Shopkeeper's Millennium: Society and Revivals in Rochester, New York, 1815-1837*. New York: Hill and Wang. Introduction, Chapters 1, 2, 6.

⁹ *Ibid.*

Members of the poor and working class would frequently imbibe, engage in premarital sex, and live outside the family unit. Though the upper classes were not at all innocent of these sins, they refused to acknowledge any hypocrisy. In order to combat these problems, the middle-class promoted employee conversion to the Evangelical faiths in order to spread a message of temperance, sobriety, loyalty, work ethic, obedience, Church attendance, chastity in the form of abstinence until marriage and family morality (something I describe as the “Christian ethical identity suite”).¹⁰

Christianity inspired wage laborers to strive for Godliness through hard work and dedication. The poor were instructed to lift themselves up through faith in God but also, and more importantly, behaving in a Christian manner and contributing to society and the economy as much as possible. The disadvantaged were promised divinely distributed economic mobility. Now there was a clear and guaranteed path to the fiscal security and comfort enjoyed by their superiors that the poor could easily gain access to. This strategy for proselytizing and converting the poor was extremely successful for the middle-class both monetarily and socially as it enabled them to have a dependable work force that they shared a faith with and could count on not to spread moral corruption. However, though this mass adoption of the Christian ethical identity suite arguably assisted the poor in securing steady wage-based income, it did not repair income inequity or create economic mobility for them by any substantive measure. What it did do was create a rapidly self-proliferating social and economic system in which Protestant values became integral to American optimism and life, particularly female chastity and family values.¹¹

Johnson also argues that the spread of the revival faiths became mandatory for the functionality and growth of the new large scale US economy at the macroscopic level. In the

¹⁰ Ibid.

¹¹ Ibid.

early America, especially in the North, business could depend on close knit kin and community ties to ensure fairness and trustworthiness in economic transactions both large and small.

However, soon technological innovation created competitive advantages in labor and production specialization and urban population growth generated higher demand. These factors made the autonomously operating local business model seem antiquated for it could no longer service the scope of demand, nor could it claim to be the most lucrative manner for commerce to operate.¹²

Consequently, as the era of completely independent trade faded, shared faith became the bond that ensured continuity and confidence in business arrangements. Common religion replaced the role of common blood or geography in business networking as resource gathering, processing, production, manufacturing, and sales stopped being handled by the same business and each aspect of commercial enterprise traveled to different regions. Essentially members of the same faith would coordinate through church membership or shared religious belief to determine what trades and transactions would be made, and with whom.¹³ Max Weber also recognizes this notion of Protestant values as a litmus test in the micro-processes of capitalism.¹⁴

This sociocultural bond between the moral tenants of Christianity and economic identity demonstrates how faith can and has shaped the convictions, priorities, and values of citizens. Based on this historical evidence, moral ideals that reverberated with the ethos of capitalism were not merely proliferated to enhance the quality of the market but also to protect our economic system from degeneration and corruption stemming from the counter-proliferation of immoral ideals. The premise of my argument that a family of forces encompassing faith, economy, and identity has perpetually influenced public opinion against sexual speech resides on this assertion that the preservation of the aforementioned family of forces (faith, economy, and

¹² Ibid.

¹³ Ibid.

¹⁴ Weber (2003).

identity) is paramount to the success of America as a nation. The rising elites and middle-class entrepreneurs that constituted the founding generations of United States citizens certainly agreed upon the validity of this assertion, in fact, they were willing to stake their economic livelihoods on it. They believed in this necessity of faith shaping the physical manifestation of economic principles so greatly that they spread it to the less financially fortunate in their society in order to enlighten them and offer them a conduit to success. In their eyes, only if there was a moral consensus on the true nature of the economic identity of America could the nation thrive. However, there is more than just faith and economy linking sexual suppression to the core American ethos; the very genesis of our concept of citizenship would help solidify the family of forces linking faith, economy, and identity in the US.

C. Race, Gender, and Sexuality – How Concepts of Citizenship Shaped Sex Suppression

Throughout the saga of Protestant proliferation and economic revolution in early America, another important narrative ran parallel and in supplement of this all-important union of faith, economy, and identity. The rhetorical and statutory tale of US immigration and naturalization policy helped gender the concept of citizenship and instill an exceedingly critical sexual component to the definition of the American identity. In this section I will demonstrate how centuries of immigration and nationality politics created a classification of the US citizenship that manipulated naturalization policy into reinforcing normative sexual, racial, and familial values for the purpose of preserving and perpetuating Protestant-capitalist triumphalism. Furthermore, I will argue that this process inadvertently pressured society in the same way faith did into fighting for sexual censorship as a means of defending the national identity and American economic system.

Firstly, the origin of the US's construction of citizenship resides in ancient concepts of what constitutes the notion of the "foreigner". As Julia Kristeva observed in Greek history and mythology, women became the first "foreigners" in the most modern sense of the word when some became refractory to the concept of marriage. This created the notion of the "other" in society, referring to those individuals whom become less than human in the eyes of one collective due to the alien nature of their characteristics or ideas compared to the collective's norms. Due to their rejection of marriage and the right of men to produce a lineage in society, women were ejected from the community and became the first people to define the identity of the "foreigner". Thus the foreigner was a threat to the system by which society operated and consequently was something to fear, repel, or conquer. This concept of controlling reproductive and marriage rights as a means of societal structuring played a large role in historical civilizations and eventually manifested itself in American immigration policy.¹⁵

One of the most central themes to US immigration policy is the recurring struggle between the endogenous and cosmopolitan roots of citizenship. Essentially, the idea of citizenship in the US in terms of the Founding documents resembles more of an exogenous or cosmopolitan model in that, hypothetically, our society is meant to be one tied together by a common set of ideas, doctrines, and beliefs. However, in practice, the homogenous nature of the ethnic, cultural and religious makeup of the original population created a strong endogenous framework for immigration policy. Legislation has struggled to reconcile these two notions of citizenship, often leaning more towards one than the other throughout history. The 1790 Naturalization Act is one of the earliest codifications of the endogenous model in immigration policy by defining the US citizen as the "free white male" who had "good moral character", which essentially amounted to a free white Christian heterosexual land owning male since that

¹⁵ Kristeva, Julia. *Strangers to Ourselves*. New York: Columbia University Press, 1991. 42-60.

was what was implicitly required in order to vote or have any power in early American society. This automatically excluded women, the openly gay, indentured servants, slaves, free blacks, Native Americans, and later would include Asian races. Furthermore this Act initiated (or rather reinforced in writing) the patriarchal nature of citizenship by endorsing a patrilineal passage of status and property to male heirs, advancing the endogenous model. The same system, Kristeva notes, came to define the women as the first foreigner. This system was underlined later with the Naturalization Acts of 1795 and 1798 with further emphasis on moral character.¹⁶

The implications of this genderized notion of citizenship and the American identity had a profound effect on the treatment of sexuality in US culture. Essentially, one of the most fundamental and celebrated provisions of the American Constitution (such as the 14th Amendment) and the Founding ideology of this country is that of economic liberty, an inalienable right to one's own property and the sweat of one's own brow. As previously noted, one's property, wealth, and status were passed in a patrilineal manner from one male heir to the next. This preserved the system of capitalism and free market trade from generation to generation and ensured the longevity of one's personal liberty by transferring the fruits of said liberty to future generations along one gender line. This patrilineal form of inheritance was innately necessary not just because of the historic usage of this system but because keeping the body of a woman sacred was the only way to control the production of heirs and consequently the continued existence of America's fundamental liberty. This made women an economic commodity and a metaphorical cog in the capitalist system of wealth production and legacy.

More importantly, sex became a major unit of economic organization in the US. Due to the fact that the only manner by which one could determine the flow of wealth was to manage the creation of heirs, sex had to be controlled so that economic liberty would be maintained. This

¹⁶ Hymowitz, Carol, and Michaela Weissman. *A History of Women in America*. New York: Bantam, 1975.

control of sex evolved into the censorship of speech that appealed to the “prurient interests” since the proliferation of sexual ideas would lead to the normalization of sexual activity outside socially mandated norms. This result would be catastrophic to the Christian ethical identity suite’s mission to promote capitalism and would degrade the very spirit of the national identity created by the propagation of the suite and the statutory shaping of citizenship. In essence, this basic fear augments the potency of the family of forces connecting faith, economy, and identity in the US since another dimension of economic and societal values are introduced to support the unification of the three concepts. However, this perpetuation of normative sexual values and female subjugation in immigration policy did not end in the late 1700s; in Chapter 2 I will describe how it continued to ingrain itself in America culture as righteous self-defense against moral and economic chaos, further legitimizing my argument. But before I can address the further development of sexuality regulation in the context of immigration policy, I must examine the first statutory and judicial censorship standards that emerged following the period of capitalist and Protestant triumphalism in the early to mid 1800s.

D. The Comstock Era – The Rise of Victorian Values and the Social Purity Movement

The earliest efforts to censor sex and promote an agenda of the suppression of vice occurred during the late 1800s, coinciding not so coincidentally with the height of the Victorian era in Britain and the period of capitalist/Protestant triumphalism in the US. This era was marked by the fall of rationalism and the rise of the values of extreme modesty, social conformity, and sexual restraint. Although the Victorian philosophy did not carry the same potency and relevance as it did in the British Empire, its influence did reach the states. This permeation of Victorian values likely occurred partly because of the resonance it had with the Puritan roots of the US, in terms of the Christian proclivity to maintain moral purity, but largely because of the influence

these principles had on an important figure in American censorship history: Anthony Comstock.¹⁷

The leader and founder of the New York Society for the Suppression of Vice (NYSSV), Comstock and his organization led the charge to purge society of the impure and immoral by personally seeking the censorship and burning of thousands of different publications they deemed obscene. Highly concerned with the ethical deterioration of society due to the rise in poverty and alcoholism, Comstock fiercely promoted and enforced Victorian/Protestant morality through suppression of obscene materials, property seizure and destruction, and arrest of “smut peddlers” via his authority as a United States Postal Inspector. Although he was primarily concerned with sexual obscenity, Comstock and his cohorts also sought to censor displays of violence and criminality. This dedication to suppressing both sex and violence would become much rarer amongst censorship activists in the future. Nevertheless, through Comstock’s vision and leadership, the NYSSV successfully began a movement for primarily sexual censorship that spread across the country in the form of statutory suppression of obscene materials. Furthermore, his crusade’s justifications matched the rationales of industrialists and entrepreneurs spreading Protestant sexual norms during the same period, tying the reproduction of cultural norms to necessary censorship standards for the first time in US history.¹⁸

A supporter of a judicial obscenity standard from Great Britain called the Hicklin test, Comstock was responsible for ushering in some of the first obscenity censorship-based initiatives at the federal level. Basically, this was a legal test for obscenity created by the 1868 English case of *Regina v. Hicklin*. The chief question in this case was the statutory understanding of the term "obscene" in the Obscene Publications Act of 1857, which sanctioned the elimination of

¹⁷ Beisel, Nicola. "Morals Versus Art: Censorship, The Politics of Interpretation, and the Victorian Nude." *American Sociological Review*. 58.2 (1993): 145-162.

¹⁸ *Ibid.*

literature deemed obscene by the state.¹⁹ The court held that all such material tending "to deprave and corrupt those whose minds are open to such immoral influences" was legally obscene, regardless of any positive artistic, literary or social merit. However, British common law no longer had any official bearing on US law since the Revolution and Judges were not required to universally accept it as good precedent. This did not stop Comstock from trying to incorporate it into American jurisprudence and subsequently introducing the concept of legal obscenity to the US.²⁰

Comstock's persistent lobbying led to the passage of a massive new federal anti-obscenity statute. Based on the principles of *Hicklin*, the Comstock Act amended the Post Office Act and made it unlawful to mail any materials deemed "obscene, lewd, and/or lascivious" through the postal service as well as contraceptive devices and information. In addition to these bans, the Act also prohibited the circulation of educational information on abortion. In 1873, Congress passed this Act and decided to bestow Comstock with federal policing authority by appointing him to the US Postal Inspector's office which would enable him and the NYSSV to accomplish their state level goals. Furthermore, this Act would pave the way for the *Hicklin* test to become part of American federal jurisprudence. The test, which singled out sexuality as the sole form of legal obscenity, further legitimized the Protestant capitalist zeitgeist of the time by codifying its principles in judicial thought (at least to a small extent).²¹

Although lower courts in the U.S. had used the *Hicklin* test somewhat infrequently since its advent in 1868, it was not until 1879, when prominent federal judge Samuel Blatchford upheld the obscenity conviction of D. M. Bennett using the *Hicklin* test, that the

¹⁹ The Obscene Publications Act of 1857, AKA Lord Campbell's Act, was a landmark obscenity law in the UK allowing the Court to confiscate and destroy objectionable material for the first time.

²⁰ Wood, Janice Ruth. *The struggle for free speech in the United States, 1872-1915*. New York: Routledge, 2008.

²¹ *Ibid.*

constitutionality of the of the test via the Comstock Act became firmly established in federal judicial thought.²² The legal implementation of the Hicklin test in America was mainly possible due to the sustained labors of Comstock and his followers in their petitioning of Court and government officials in order to create federal law that replicated the standards and attributes propagated by the British court's definition of obscenity in *Regina v. Hicklin*.²³

Comstock did not stop at simply the interstate federal level. His efforts to institutionalize his beliefs directly resulted in the drafting and passage of a bill called the "*Sale of Immoral Publications to Children Act*" in the New York state legislature in 1884 which made it illegal to disseminate "books, pamphlets, magazines, newspapers or other printed paper devoted to the publication, and principally made up of criminal news, police reports or accounts of criminal deeds or pictures and stories of bloodshed, lust or crime." Although textually the bill focused on the censorship of the glorification of crime, "lust" became the keyword for many suppression advocates who felt emerging urban trends in expressing female sexuality threatened traditional values. This focus on sexuality was also dominant since the stipulations regarding crime were difficult to define and subsequently lost the same authority and clarity sex censorship had in society.²⁴ The Act primarily applied to children at its inception since its purpose was to prevent the corruption of the highly impressionable minds of the youth. However this legislative purpose was expanded by an amendment in 1887 which broadened the statute's authority, effectively banning obscene material for all age groups as a means to cleanse society entirely of its debasing influence.²⁵

²² In US law, it is acceptable and fairly common for Judges to cite or footnote precedent and jurisprudence from foreign legal systems; however, these references are to provide argumentative support and have no legal binding

²³ Ibid.

²⁴ This phenomena will be further explained in Section 2

²⁵ Saunders, Kevin W. *Violence As Obscenity: Limiting the Media's First Amendment Protection*. Durham: Duke University Press Books, 1996.

The 1884 law was widely popular and was deemed successful by advocates. This reputation led to the creation of similar statutes in nine other states in 1885. However, these newer imitation statutes were different in that the censorship was limited to youth access and sexuality as well as applicable to obscenity distribution of any kind instead of just via mail. These new laws sprouted organically from different pro-censorship groups across the country that drew inspiration from Comstock but more importantly from the principles he held regarding moral purity and the fears he held of America's descent into ethical chaos. These groups and their political and social activities became known as part of the broad social purity movement.²⁶

This surge of sex censorship continued to grow in the following years and by 1895, eight more states passed what were called "*An Act Concerning Obscene and Immoral Publications.*" By 1914 this trend reached the west coast with Washington and two other states passing similar laws. Eventually twenty-four states enacted comparable bans on sexually obscene materials disseminated within their respective borders. These various state and federal regulations became jointly known as "the Comstock laws." Surprisingly enough, although the prohibition on contraceptive circulation was declared unconstitutional by the courts in 1936, the other segments of the Act are still enforced as law today. However it is important to note that evolving judicial standards in determining the nature of obscenity have heavily narrowed the purview of this seemingly expansive law.²⁷

Overall, the Comstock era (roughly 1872 to 1914) represents an undeniably important cultural and legal period in which sexuality first becomes tied to the idea of obscenity. From Comstock and his cohorts espousing to Victorian values to the proliferation of statutory sexuality

²⁶ Ibid.

²⁷ Ibid.

A 1948 Supreme Court case would strike down or force the retooling of the various Comstock laws and several major opinions would alter the definition of obscenity under federal law; this will be further discussed in Chapter 2.

suppression for the first time, this era marked the beginning of America's obsession with censoring sexuality. Although Comstock introduced this perception of obscenity, the manner by which it was championed independently by groups around the country demonstrated that this was not the will of a single man, but the emerging zeitgeist of the nation which already had begun to construct itself around Protestant moral values as an integral part of a national ethical and economic identity.

E. Conclusion – An Emerging Ethical Identity

Comstock's crusade of the late 1800s and early 1900s did not merely represent the consequences of the importation of Victorian values, but rather the institutionalization of enduring Protestant-capitalist philosophy as limitations on free speech. The focus and attention other scholars have placed on the Comstock era and the campaigns for moral unity following it fail to acknowledge the influence of the Christian free market triumphalism that I argue helped create the impetus for much of this period. Just as entrepreneurs of the 1800s saw promiscuity, alcoholism and sloth in society as problems only conversion could fix, Comstock saw them as problems that could be preemptively curbed by censorship of obscene material, primarily those of a sexual nature. It is no coincidence that the American notion of citizenship created by early immigration policy, the Protestant identity proliferated by elites, and the censorship standards set forth by Comstock all share the same goal for society. These three fronts are unified in their cause of creating a moral and productive society because they are all products of the same family of forces intertwining faith, economy and identity. This bond between a cultural inclination to control sexuality and legal obscenity suppression would further develop as time progressed.

Chapter 2 – The Development of Sex Censorship

A. Introduction- Proliferation and Liberalization

I demonstrated why faith and economy became linked at a higher conceptual level via the fusion of capitalist and Protestant triumphalism by the beginning of the Industrial Revolution. However, I must also establish how the Christian ethical identity suite managed to persist throughout history and achieve long-term salience in the sensibilities of our national identity. I will argue that early notions of Protestant charity and, more importantly, public education would form the American civic religion and national identity via systemic integration of the suite into the general population. I will demonstrate how immigration policy continued to genderize and racialized citizenship in the US and how it supported structural regulation of sexuality. Furthermore, I shall explore how conservative morality control backfired and enabled the liberalization of sexuality in the first half of the 1900s while still maintaining and underlying cultural desire to suppress prurient interests.

B. Charity & Education - The Institutionalization of Protestant Moral Unity

First, the research of several authors solidifies the notion of top-down religious proselytization set for by Johnson, Foster, and Gorski in their discussions on trends in American Protestant philosophy on the most effective form of charity. Raymond Mohl's arguments regarding how poverty was dealt with during this period of revival essentially aligns with Johnson's analysis of the middle-class's proliferation of Evangelicalism. Part of what Mohl describes is a general aversion to overinvestment in pure charity in that it would hurt the free market by curbing ambition and incentive while promoting selfishness and damaging industry.

Rather, it would be better to help the poor help themselves by giving them social and economic guidance via conversion.²⁸

Though Mohl's portrayal of Protestant rhetoric on charity appears bleak during this period, the sentiment from which community leaders argued their position was that of long term economic sustainability. Terrence Cook's analysis of the four paradigms of social thought also embodied Johnson and Mohl's conclusions. This is because Cook argues that the "capitalist's" goal of maximizing labor effectiveness, productivity, and efficiency is also his solution to the multitude of economic troubles plaguing the underclass. This argument meshes well with Johnson and Mohl's description of the motivation of the middle-class in their pursuit of converting the laboring classes as the greatest form of charity they could bestow. Essentially, it was all a part of the same paradigm of social thought that was prevalent during and shortly following the Industrial Revolution, which leads back to Foster and Gorski's emphasis on how politics influences the role of religious sentiment.²⁹ Mohl and Cook argue that religion is the basis of social order by instilling the virtue of self-denial as a natural form a discipline and motivation to work. This notion of using religion as social control to enforce Christian morality such as sobriety, hard work, abstinence and dedication to the normative family unit is pervasive in Paul Boyer's analysis as well of how Protestantism exercised moral control over the masses in response to flagrant immorality instead of simply administering monetary charity.³⁰

The most telling theme from these texts emerges from the arguments made by religious and economic elites in unison during the 1800s and early 1900s that have been more or less mirrored by the modern religious right, conservative and libertarian philosophies' views on

²⁸ Mohl, Raymond. 1971. *Poverty in New York, 1783-1825*. New York: Oxford University Press. p. 241-258.

²⁹ Cook, Terrence. 1991. *The Great Alternatives of Social Thought: Aristocrat, Saint, Capitalist, Socialist*. Savage, MD: Rowan & Littlefield Publishers. Pp. 1-18.

³⁰ Boyer, Paul. 1978. *Urban Masses and Moral Order, 1820-1920*. Cambridge, MA: Harvard University Press. chapters 15, 16, 18, 19, 20.

welfare based charity. This arises from the subtle incorporation of ideals such as the Protestant work ethic and the divine path to capitalist prosperity into more seemingly secular 20th century adaptations such as the famous concept of “the American Dream” or the GOP’s “boot-straps” metaphor on achieving social mobility. The evidence elucidating these striking connections to contemporary political rhetoric resides in the further public internalization of the Christian ethical identity suite into the very creed of America itself.

Religion as a mechanism of social control and values dispersion is further realized with the rise of public education during the common school movement as well. In his analysis, James Fraser describes how the common school movement served several functions in early American history, the most important of which was bolstering literacy amongst the populace. However, the integration of faith into government funded institutions represented a far greater feat compared to curbing illiteracy in terms of what the idea of the common school stood for. The constitutionality of this movement may be questionable under today’s standards of religious pluralism but the inextricable link between the American national identity and civil religion was far too potent and omnipresent in daily life for such concerns to interfere in the 1800s. Essentially, the common school movement was used to create a basic Christian template for education in order to enforce and propagate the social and economic order born during the Evangelical revivals.³¹

The common school movement emerged in the aftermath of the Civil War. Fraser, and most academics credit Horace Mann for the advent and propagation of the idea of the non-sectarian common school (an idea popular with the Protestant elite and middle-class). Mann also argued that the unification of the nation, the church, and the school system would result in the creation of a powerful national identity and civic religion that would promote morality, literacy,

³¹ Fraser, James W. 1999. *Between Church and State: Religion and Public Education in a Multicultural Society*. New York: St. Martin’s Press.

productivity, loyalty, and assimilation of different peoples' into one national community. This message was all the more universal due to the fact that these new common schools would be free in order increase accessibility and ensure maximum assimilation. Protestants were determined to see their faith become the basis of the United States' moral soul and public consciousness. To them, "Americanism and Protestantism were inseparable". So long as the religious instruction remained as neutrally Protestant as possible, the reading and instruction of the Bible was purely textual, and children were taught "proper" morality such as the Protestant work ethic, the American Protestant population were willing to allow professional teachers and local government take over this once religious function.³² These requirements, combined with the promised creation of a national Protestant-American community, comforted the average Christian of the success of the common school (with the important exclusions of African-Americans, Catholics, Lutherans and other non-English speakers, and non-Christian faiths).³³

As I discussed earlier, there was a strong consensus amongst those of wealth and authority that the primary problem the poor suffered from was habitual sinning and vice such as promiscuity and alcoholism. There was some focus on prison reform, the failure of debt jailing, and mental health awareness but the central belief of most philanthropists of this era was that the economically disadvantaged created their own misery through poor moral character.³⁴ They argued that the most effective way to *create* the poor was to *give* to the poor, since charity would merely validate their sinful lifestyles by inhibiting motivation and incentive to repent and work. The common school fits perfectly into this theory of improving social welfare and instilling Christian moral values in the public. Since it was free and universally accessible, the children of

³² Ibid.

³³ Billington, Ray Allen. 1938. *The Protestant Crusade, 1800-1860: A Study of the Origins of American Nativism*. Chicago: Quadrangle Books. Chapter XIV.

³⁴ Mohl (1971). p. 241-258.

the poor could access it and become productive members of society by embracing the basic moral tenants of Protestantism and the work ethic that it holds so dear. This served the purpose of fighting poverty by giving the poor the tools for social mobility and assimilates the normally excluded poor into what the elites deemed the “culture of prosperity” without directly administering charity.³⁵ Incorporating the lifestyle of the masses into this “culture” translated into integration of their personhoods into the desired national identity via the new American civic religion born out of Protestant capitalist triumphalism.

Overall, the common school became possible due to its underlying purpose of achieving national unity and establishing the American civic religion. Horace Mann and other activists’ vision, the common school came to dominance in the post-Civil War era until the early 1900’s. Additionally, the common school represented an anti-poverty measure compatible with the intellectual consensus of the times and was an integral part of creating new generations of acculturated practitioners of American wage-labor based capitalism and morality. In the end, the use of non-sectarian Protestant public education shaped America’s definition of the “moral citizen” and the values many citizens strive for today.

Moreover, the epistemic assimilation of this Christian definition of the culturally accepted morality for a “true” American subtly bound the notion of sexuality suppression to the aggregate sensibilities present throughout US population thereafter. Though there are a multitude of sacrosanct values and cultural institutions that make up the Christian ethical identity suite, passed down generation to generation via various forms of tradition and societal pressures (such as the common school), normative family structuring and puritanical sexual behavior remain indivisible portions of the suite. Though state sponsored nonsectarian common schools would slowly dissipate during post Great War era and become extinct by due to the 1948 Supreme

³⁵ Mohl (1971). p. 241-258.

Court decision of *McCullum v. Board of Education*³⁶, their principles and values would remain due to their greater incorporation into the national identity and economic/legal system of the US.

This “subtly bound” notion of sexual suppression occurred as the result of US society being programmed to perpetually defend against the degradation of the moral values essential to its economic vitality via mass acculturation and conversion. Since sexually normative family values were so essential to the continued prosperity of American capitalism, it became necessary, in the eyes of economic and political elites, to prevent the promulgators of sexual speech from gaining legitimacy, lest our financial system be destroyed. As I demonstrated in my discussion of the spread of Christianity and the evolution of economy from the 1600s through 1800s, Protestant theology became the building block of the most integral economic and interpersonal societal relations of American civilization. This relationship was further built upon by the standardization of the Christian ethical identity suite through the adoption of free common schools across the nation and subsequently transformed into the American civic religion and the unifying national identity of the country. These values were, and still are, considered a toolset for economic success and moral virtue, thus are distributed to the destitute as the apex of charity. However, there is more than just faith and economy linking sexual suppression to the core American ethos; the very genesis of our concept of citizenship would help solidify the family of forces consisting of faith, economy, and identity in the US.

C. Immigration and Citizenship’s Evolution – How Sex Became Integral to Identity

I described the origins of sexual control in immigration law in terms of liberty and patrilineal property rights; however this was merely part of the story. Another over-arching narrative in American history regarding anxieties over immigration can best be summarized by

³⁶ This landmark case established that any public funding of religious education that coerced compliance violated the First Amendment.

the conflicting feelings of xenophilia and xenophobia exhibited by Americans. This process began with the immigrant being the original “other” as noted by Kristeva. The immigrant was inherently the outsider of society, inviting primarily antagonistic feelings. However, as Bonnie Honig notes, the immigrant, despite his or her “otherization”, often defines the citizen by both describing everything the citizen is not but also everything the citizen may aspire to be. This is particularly true in the US as the country often celebrates its history and origin as a “nation of immigrants.” This suggests that America by definition should welcome and promote pluralism at every level of society; however, the actions of the US have generally embodied the opposite vision, creating a sort of cognitive dissonance. Thus there is both a romanticizing of the immigrant’s story while also fear mongering around his or her presence resulting in anti-foreigner legislation. When this xenophilia/xenophobia combination meets the endogenous roots of US citizenship, an interesting phenomenon emerges. There is a trend to lift some immigrant groups into the normative Anglo-American racial and political structure in order to suppress other racial or economic minority groups.³⁷ Fears that racial and socioeconomic differences in minority groups from society at large could corrupt the family of forces’ purposes if marriage and sexual relations are allowed between groups (if they are given legitimacy by the government) help support my argument that sex is designed to be controlled in America culture.

The first legislative manifestations of this fear were the Page Act of 1875 and the Chinese Exclusion Act of 1882. These laws not only reinforced the exclusion of Chinese immigrants (and most East Asian races) from naturalizing but also barred them from entering the US to begin with. Large quantities of Chinese immigrants had been arriving on the west coast during this period due to the California Gold Rush and the need for cheap labor to complete the transcontinental railroad. However, Chinese sexual norms at the time involved polygamy and a

³⁷ Honig, Bonnie. *Democracy and the Foreigner*. Princeton: Princeton University Press, 2001. 1-131. Print.

system of multiple female companions in which the most important woman would be the first wife, followed by second wives and concubines, followed by lower tiers of prostitutes owned by the head male. Furthermore, as more and more Asian sex workers entered the US, an increasing number of white men were engaging in sexual activity with them.³⁸

Fear of this sexual deviancy proliferating across the nation enabled public support for the Page Act (1875) which targeted Chinese contract laborers and, more importantly, Asian prostitutes. Since immigration officers considered almost all Asian women prostitutes, the law effectively stopped their immigration to the US. As this legislation was designed to protect monogamous marriage, it continued the pattern of sexuality control being ingrained into the American identity. This was further exacerbated by the passage of the Chinese Exclusion Act (1882) a few years later which specifically targeted all Asian immigration and citizenship. This statute came about as it became clear that Chinese men were not inhibited from immigration merely because of their inability to attain wives and concubines from their home country. The Fourteenth Amendment gave birthright citizenship to the children of Chinese immigrants and the population became fearful that this would integrate their sexual behaviors into American democracy.³⁹ Once again, in order to prevent the sexual values of this group from becoming intertwined with the sacred family of forces, society elected to restrict them from assimilation.

The blockading of African America racial integration into the family of forces binding faith, economy and identity was also based heavily on their perceived sexuality by white culture. The Fourteenth Amendment also enfranchised many black Americans who had their sexual identities warped and distorted over a long history of slavery and systemic discrimination.

³⁸ Chin, Gabriel J., and Hrishi Karthikeyan. "Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950." *Berkeley Asian Law Journal*. 9. (2002): 1-40. Web. 21 Mar. 2012. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=283998>.

³⁹ Ibid.

African American men and women were portrayed to be sexually deviant in nature; with men being over aggressive and prone to rape (particularly targeting white women) while women were described to be highly promiscuous and duplicitous in their attempts to seduce and lure white men from their families.⁴⁰

Julie Novkov argued that these fears augmented the generally white supremacist dogma of American elites, especially in the South, leading to long-lasting sexual stigma for black Americans. This stigma, in turn, integrated itself into the legal system via anti-miscegenation laws and anti-prostitution laws targeting African-American sex trade. However, these laws sparked debate that would define what society viewed to be “licit and illicit sexual behavior.”⁴¹ This construction of statutory and sociocultural sexual values simultaneously as a means of preserving a specific set of racial and religious tenets integral to the American identity would further enrich the bond between faith, economy and identity. The race-based stigmatization of sex and sexuality continued as the laboring classes began to unite in postindustrial America during the late 1800s. Noel Ignatiev notes how blacks were further suppressed with the acceptance of Irish Catholics into the Caucasian hegemony because their racial/religious background seemed more amenable to the Protestant/capitalist family of forces than African-Americans.⁴²

The enfranchisement of white women in America followed a similar pattern of diminishing an adversarial group in order to attain social ascendancy. The 1907 Expatriation Act removed the citizenship of all women married to men of foreign decent, forcing them to take on the nationality of their husbands even if they were born US citizens. However, foreign women

⁴⁰ Novkov, Julie. *Racial union: law, intimacy, and the White state in Alabama, 1865-1954*. Ann Arbor: University of Michigan Press, 2008. 68-102.

⁴¹ Ibid.

⁴² Ignatiev, Noel. *How the Irish Became White*. New York City: Routledge, 1995. 148-177.

could still obtain full citizenship by marrying American men, without any other qualification. The Cable Act of 1922, passed following women's suffrage, granted citizenship to all white women regardless of who they married; however, it took away instant citizenship for immigrant women when they married US men. Instead, it forced them to go through a process of "Americanization" by proving their loyalty to the USA (political and economic values), their ability to be good wives (Christian sexual norms), and their capacity to be good mothers (Christian familial norms). It is important to note that Asian races remained excluded from citizenship and white women who married male members of these races still faced expatriation.⁴³

This bill was a product of the women's rights movement and subsequently allowed the status of citizens to adversely affect the status of noncitizens. The movement utilized the underlying rhetorical framework of "us" (white Protestant nativists) vs. "them" (the deviant immigrant masses) as powerful tool to achieve white female suffrage at the cost of both female alien naturalization and male alien enfranchisement. More importantly, the Cable Act created a new mechanism by which foreign women, to this day, must be integrated into the sexual and familial norms of the Christian ethical identity suite before being granted permanent citizenship through marriage. Though this Act was officially repealed in 1936, the state still tracks recent immigrant brides' marriage statuses in order to ensure the proper normative values of American society permeate their unions as a mark of legitimacy.⁴⁴ Both the 1907 and 1922 Acts further demonstrate how sex has been persistently treated as a commodity in need of control and regulation for the production of the ideal American identity that would in turn, support capitalism and deeply entrenched religious values in the US. Furthermore, the sexual demonization and social otherization of black and Asian Americans continued to bar them from

⁴³ Bredbenner, Candice. *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship*. 1. Los Angeles: University of California Press, 1998. 45-112.

⁴⁴ Ibid.

equal access to this carefully constructed American identity while even the historically and globally oppressed Irish were granted assimilation due to their outward racial compatibility and Christian background (though Catholicism remained secondary to Protestantism).

All in all, the connection between the values of the family of forces consisting of faith, economy, and identity in America and the subtle yet persistent inclination to censor sexual speech as obscenity does not merely arise due a basic importance of Protestantism in early US history. Indeed my argument does not merely suggest this base and amorphous association. Instead, I have demonstrated how the importation of top-down post-reformation religiosity formed the basis for faith's role in early colonial American life. As it quickly became clear that the Protestant denominations of Christianity yielded the most practically resourceful benefits for the US economy in the eyes of many religious, political, and business elites, the Christian ethical identity suite was refined and proliferated to the masses. Among the values of this suite was an emphasis on chastity, outward modesty, and sexual normativity according to the Bible. Adherence (or perceived adherence) to these principles became compulsory for employment, large-scale trade, and access to socioeconomic mobility. Through both charitable promulgation and free common schooling, the suite became intensely ingrained into the American zeitgeist and identity from coast to coast.

Simultaneously, the very structure and definition of citizenship became established in a manner that reinforced the propagation of Christian sexual normativity as a necessary function of economic liberty. Subsequent immigration statutes and minority population management efforts further utilized the control of sex as the core unit of analysis when determining how to incorporate the very residents of America into a preconceived identity. Thus, the control of sexuality became a dimension of state power. While some groups became sexually demonized,

others were given citizenship as a means of preserving the family of forces' potency in face of changing demographics and intellectual norms. It became abundantly clear that the very essence of America itself required the control of sexuality to a certain degree because the values of the faith which enabled economy prosperity dictated so, and the propagation of these values on multiple levels came to define the identity of the US citizen. Thus the family of forces tying faith, economy, and identity together was slowly born.

However, the First Amendment of the US Constitution's provision of freedom of speech conflicted with unified and mandated submission to the Christian ethical identity suite via the eternal trumpeting of the family of forces. Essentially, though proselytization of the masses and statutory definitions of citizenship could control and protect the free market of the *economy*, these methods could not effectively cull the free market of *ideas* from questioning the values of the family of forces. Consequently, since the public utilized institutional coercion of sorts to strongly suggest sexual uniformity for the sake of economic prosperity and unity of identity and morality, it became necessary to censor sexual speech in order to prevent the collapse of the family of forces' perceived benevolent dominance over the nation. Sex censorship represents an underlying defense mechanism used to protect and preserve the sole path to economic and moral vitality under the very definition of the American identity. Nevertheless, the late 1800s to mid 1900s saw major shifts in culture and sexual ideology in the US which would not be lost on standards of legal obscenity despite societal pressures stemming from the family of forces.

D. Free Speech in the Face of Temperance – The Failure of Social Purity

Earlier, I explained how the social purity movement gained ascendancy up through the early 1900s; however, the fervor of Comstock and those like him did not go unopposed. Margaret Sanger, famous for founding Planned Parenthood, was a fierce opponent of them. To

Sanger, the concept of female reproductive rights, particularly birth control, was an issue of free speech and not feminism. She led a zealous fight against federal and state anti-obscenity measures not only due to their barring of the movement of contraception and abortion related goods and information but also because of the underlying suppression of free love and sexuality.⁴⁵ In this right, she found an ally in Emma Goldman, an anarchist political activist and philosopher.⁴⁶

In New York's Greenwich Village in 1914, Goldman and other progressive intellectuals, known as the Free Speech League or FSL, provided Sanger with the legal and scholarly support she needed to mount her counter-offensive on US obscenity law.⁴⁷ Sanger's *The Woman Rebel*, an eight-page monthly publication which endorsed contraception and described various sexual practices as well as various feminist and progressive issues, with the motive of intentionally creating a legal challenge to the sex and birth control stipulations of the Comstock laws.⁴⁸

Sanger also desired to write specifically about contraception and published a pamphlet called *Family Limitation* with the same motives. Goldman, highly supportive of this strategy, helped disseminate copies of these publications in order to raise public awareness of their cause of sexual awareness via free speech.⁴⁹

Sanger and Goldman's objective was soon realized in August when Sanger was indicted on federal and state anti-obscenity statutes. However, prosecutors wanted to focus the charges on her writings involving assassination and the institution of marriage rather than contraception or sexuality in *The Woman Rebel*. Sanger fled to Great Britain under an alias in order to escape imprisonment without the opportunity to challenge the Comstock laws in court on proper

⁴⁵ Baker, Leah H. *Margaret Sanger: A Life of Passion*. 1st ed. London: Macmillan, 2011.

⁴⁶ Chesler, Ellen. *Woman of valor: Margaret Sanger and the birth control movement in America*. reprint. New York: Simon and Schuster, 2007.

⁴⁷ Founded in 1902, The Free Speech League (FSL) was a progressive intellectual organization which strived to support 1st Amendment free speech rights from the early 1900's to nearly 1920. The League's primary directive was fighting institutionalized censorship, especially when it came to political speech and sexual material.

⁴⁸ Ibid.

⁴⁹ Baker (2011).

grounds. Soon after she fled to Europe, an undercover USPS inspector arrested and briefly imprisoned Sanger's husband when he sold a copy of *Family Limitation* to him. This event along with Sanger's original attempted prosecution created a storm of controversy in the US. Much of the public began to believe that the government's targeting of Sanger was politically motivated and represented nothing more than ideological persecution. Consequently, Sanger felt comforted enough by this upsurge in support to return a year later. The authorities dropped the charges in 1916 in response to the controversy.⁵⁰ Despite the family of forces comprised of faith, economy, and identity's strength in society during this period, this backlash demonstrated how it was not immune to erosion.

Emma Goldman faced off against the intellectual constraints imposed by Comstockery in the public and in the legislatures as well. Though her focus as an anarchist philosopher was broader and more nuanced than just free love and contraception, she dedicated her time to these issues during the early 1910s in her alliance with Sanger. In her autobiography she personally attacked Comstock and his views on multiple occasions.⁵¹ In Sanger's absence, Goldman launched a nationwide speaking tour in 1915, during aforementioned period of positive feelings towards the liberalization of obscenity law, in which she discussed free love, anti-capitalist/conscription ideology, and contraception usage. In spite of the government's bowing to public opinion in Sanger's case, Goldman failed to receive such treatment. In 1916, she was arrested for violating the federal Comstock law and found guilty of disseminating obscene materials and contraceptive materials in the mail. She refused to pay the fine of a hundred dollars

⁵⁰ Ibid.

⁵¹ Goldman thought of Comstock as the leader of America's metaphorical "moral eunuchs" (eunuchs being boys castrated at a prepubescent age rendering them impotent)

and was given a sentence of two weeks two weeks of labor in a prison workhouse.⁵² Aside from the jail time, Goldman's lectures were well-attended and received.⁵³ Although this public liberalization was focused more on contraception and abortion rights than public displays or sexuality, the concept of obscenity was nevertheless changing rapidly.

All of this evolution in the public perception of sexuality and obscenity ran alongside a very powerful and in many ways opposing cultural phenomena known as the Temperance movement. Although this movement in America can be traced to the late 1600's, it did not gain notable traction until the mid 1800's during the Second Great Awakening⁵⁴. Support for prohibition grew even more during the late 1800's as women unified behind it with hundreds of organizations appearing across the nation.⁵⁵

This movement occurred for many of the same reasons the social purity movement did and they consequently had overlapping support systems on a certain level. Both movements thought society was rapidly degenerating into state of immorality and chaos due to rampant alcoholism, the departure from traditional family values, and the economic and social exploitation of the vulnerable, generally women and children, via criminal enterprise or obscene material. To the Temperance movement, alcohol represented the catalyst and the origin of all of these ails including, and especially, the breakdown of the family unit via domestic abuse, sexual freedom, prostitution, or crime. Prohibitionists also sought the moral conformity of society, although overall the movement was more progressive and focused on protecting women from the

⁵² Goldman saw this punishment as preferable as it allowed her the time and ability to better understand and connect with society's disenfranchised and rejected.

⁵³ Chesler (2007).

⁵⁴ Period of theological proliferation in early American history in which Evangelical Protestantism spread rapidly throughout the country via revivals and "born-again" conversion. Temperance was widely preached as part of Christianity.

⁵⁵ Clark Kee, Howard, Emily Albu, Carter Linnberg, William Frost, and Dana L. Robert. *Christianity: A Social and Cultural History*. 2nd. River: Prentice Hall, 1998.

evils of men and even had strong bonds to the Woman's Suffrage movement. In terms of its relation to the growing support for birth control freedom and the breakdown of sexual norms in the early 1900's, members of the Temperance movement were mixed in their reception of these developments. Some saw it as part of society's progress towards female political and social equality while others regarded viewed it as entirely separate. However, the majority logically grouped these developments in as part of the moral degeneration of society since they merely promoted the same "anti-family" values that alcoholism induced. Additionally, the massive pan-Protestant religious and political network that supported sex censorship and the social purity movement also aligned itself with the Temperance movement with many of the same goals in mind. The Temperance movement achieved success in the late 1910s with a war-time prohibition act. This eventually led to the passage of the Volstead Act.⁵⁶ This was followed by the ratification Eighteenth Amendment the next year which enacted national prohibition in 1920.⁵⁷

To the dismay of its proponents, prohibition was a colossal disaster which not only failed to achieve its goals, but exacerbated nearly every problem it sought to fix, including sexual liberation. Immediately following prohibition illegal black-market bootlegging skyrocketed⁵⁸ and became the most profitable enterprise in organized crime, leading to rampant police and government corruption. Almost all other crimes rose with gang related activities, especially prostitution and gambling. Furthermore, heavy drinking became a facet of feminine culture as well, as speakeasy owners needed to attract new customers in light of the fall of the hyper-masculine saloon atmosphere that dominated alcohol consumption before.⁵⁹ As criminal activity increased and woman began drinking, social norms and traditional values became even more

⁵⁶ National Prohibition Act, known informally as the Volstead Act of 1919 created the enforcement, regulatory, and procedural guidelines and regulations for the Eighteenth Amendment.

⁵⁷ Ibid.

⁵⁸ Classic examples include the rise of the Italian, Irish, and Russian Mafia and gangsters such as Al Capone

⁵⁹ Speakeasies were the illegal bars and dives of the Prohibition Era.

corrupted as a new generation of flappers redefined sexuality and beauty.⁶⁰ Casual sex became a common attribute of urban living and enforcement of the Comstock laws became nearly nonexistent. This was due partially to the endemic corruption of federal and local law enforcement but also changing attitudes of society towards sex and contraception in particular. Nevertheless, prohibition brought about the end of the Victorian era of sexual and social purity and replaced it with a far more sexually laissez-faire society.⁶¹ Ultimately, after over a decade of steadily rising violence and crime, economic and political elites called for an end to prohibition with the ratification of the Twenty-first Amendment in 1933 which repealed the Eighteenth.⁶²

Though prohibition and the new national agenda during the Great Depression and WWII effectively killed the goals of the social purity movement, it enabled Sanger and anti-obscenity advocates to draw on new public support. Contraceptive use became commonplace during this period and although prosecution under Comstock laws did occur, there was far more room to navigate as some of the first birth control clinics were established during this time. Overall, this trend of sexual liberalization continued into the 1940s as several smaller legal victories allowed for the flourishing of the contraception industry.⁶³

Although the Comstock laws remained in place for the majority of the Prohibition Era and the decades following it, there was an undeniable societal departure from the principles behind them. With enforcement declining, these laws became antiquated relics of the past. There still existed a strong rural and urban divide on the issue of sexual obscenity and contraception. In fact, contraception may have become commonplace in society but public sexuality and the

⁶⁰ Sexually promiscuous females of the Prohibition Era who enjoyed jazz, social events, drinking, flashy make-up, and revealing clothing.

⁶¹ Behr, Edward. *Prohibition: Thirteen Years That Changed America*. New York: Arcade Publishing, 1996

⁶² Levine, Harry G. 1985. "The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness." *Contemporary Drug Problems*. 63-115.

⁶³ Baker (2011).

distribution of other types of sexually obscene material was still controversial. Though the public no longer approved of the government's intrusive regulation of female sexual practices, activists such as Sanger and Goldman were not able to convince American society to abandon the concept of legal obscenity.⁶⁴ In many ways, this phenomenon of sexual proliferation during the early 1900s coinciding with the preservation of certain underlying sexual norms and aversion to sex obscenity mirrored the manner by which legal obscenity developed in the courts during this same period.

E. *Hicklin to Roth* – Establishing and Adapting Sex as Obscenity

In Chapter 1-D the British court case of *Regina v. Hicklin* (1868) was introduced in which the court ruled that content that worked "to deprave and corrupt those whose minds are open to such immoral influences" was legally obscene, regardless of any positive artistic, literary or social merit. This jurisprudence regarding obscenity was officially adopted by the US court system in 1869 with the Supreme Court case of *Rosen v. United States* via a 7-2 majority decision. Justice Harlan adopted *Hicklin*'s reasoning almost exactly in his opinion and the *Hicklin* standard became the first official judicial test for identifying obscenity in the US. Justice Harlan wrote that the material in question was "obscene, lewd, and lascivious" and conflicted with the "decency, purity, and chastity in social life." These details reveal the early espousal and embracing of a definition of obscenity closely related to a religious and social call to normative sexual behavior and thought that was quite Victorian in nature.

The *Hicklin* standard continued to be prominent in the following decades with little dissent. For example several decades later, Justice Brown reaffirmed this standard in the 1897 case of *Dunlop v. U.S.* when he upheld a conviction regarding obscenity mailing for its "obscene, lewd, and lascivious" content. However, in 1933, the *Hicklin* test and the Comstockian fervor of

⁶⁴ Ibid.

the time were virtually ignored in *U.S. v. One Book Called Ulysses*. In this Southern District of NY case, federal district judge Woolsey ruled to permit James Joyce's "Ulysses" to be imported and sold in the US. Judge Woolsey, slightly ahead of his jurisprudential time, saw the redeeming literary value of work as a whole and its effects on an individual with "average sex instincts." He distinguished obscenity from this book by arguing that truly obscene materials tended "to stir the sex impulses or to lead to sexually impure and lustful thoughts." The state government appealed Woolsey's ruling, however the Court of Appeals sustained his decision that the book did not constitute obscenity. Judge Woolsey's reasoning would reemerge in a few decades.

These ideas were further refined in the late 1940s and 50s. The Court followed the *Dunlop* precedent in *U.S. v. Alpers* (1950) when it upheld a ban on the interstate mailing of phonographs containing similarly indecent material. However, the Court began to further shape its definition of what qualified as illegally indecent in *Butler v. State of Michigan* (1957). In this case, the Court reversed the conviction on the grounds that the indecent text did not cause any harm to youth. The previous cases all involved the mailing of indecent materials to locations where corruptible youth could access tainted speech. However, in *Butler*, the material was not readily available to youth and consequently did not present danger worthy of stripping it of its Constitutional protection. The Court struck down the Michigan statute as overbroad since another law was already on the books that protected youth from such material. The law in question merely violated the Due Process clause of the Fourteenth Amendment.

This evolving jurisprudence from *Butler* became further refined just a few months later in 1957 when the Supreme Court delivered the landmark 6-3 decision of *Roth v. U.S.* Justice Brennan's opinion declared obscenity to be speech outside of the protection of the First or the Fourteenth Amendments. He held that a published work is to be considered legally obscene if it

“a) appeals predominantly to prurient interests; b) is patently offensive by contemporary community standards; and, c) is utterly without redeeming social value.” Replacing Hicklin, Justice Brennan carried some of the *Butler* language over, deemphasizing the importance of society’s obligation to protect the fragile minds of the youth since their developmental welfare was so dependent on a myriad of other variables that singling out obscenity exposure provided for a weak basis for censorship. This standard reaffirmed the Comstock Act’s convictions (in the incorporation of hyper sexuality as obscenity in the form of prurient interests) but also created a three tiered system that was overall more protective than the Hicklin test. The opinion made it possible for material that was considered obscene to still remain uncensored so long as it could find some level of salvation in artistic or social merit. Furthermore, the second prong of the Roth standard allowed for greater variation in censorship standards across the country since determination of the offensive nature of the content in question was not fixed to a standardized definition. Once again, the Supreme Court navigated defining obscenity strictly within the realm of sexuality with violent media not even being eligible in that it could never pass prong one (with one exception being the display of sexually violent media such as rape).⁶⁵

From *Rosen* in 1869 to *Roth* in 1957, the Supreme Court articulated a jurisprudential vision that sought to define sexual speech as the basis for legal obscenity. Nevertheless, the Justices slowly modified their approach to defining obscenity in order to create artistic exceptions and consider the audience of the speech in question while taking the differing sensibilities of various communities into their deliberation. Obscenity as a whole became more reliant on hypothetical standards with *Roth* since community standards and redeeming value were so subjective and, as a result, the legal definition became vaguer. This judicial liberalization

⁶⁵ Richards, David A.J. "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment." *University of Pennsylvania Law Review*. 123.1 (1974): 45-91.

of standards while maintaining a focus on some level of acceptable sex obscenity follows the sociocultural progression of sex in US society. Though the family of forces of faith, economy, and identity remained present in jurisprudence in the form of prurient interests being blacklisted, *Roth* created a legal mechanism for maneuvering that accounted for society's slowly growing acceptance of sexuality outside of the strict standards set forth by the Christian ethical identity suite.

F. Conclusion – Retaining Tradition, Acknowledging Progress

The late 1800s to the mid 1900s saw the growth of ideas of social purity followed by a certain degree of sexual liberalization. Protestant and economic elites further promoted and institutionalized their ideal sexual and moral values through new philosophies in charity and the common school movement's religious consolidation of the American identity. Immigration legislation utilized sexuality control to evolve the standards of citizenship in order to best assist the supremacy capitalism and Christian morality. The Temperance movement fused the goals and ideals of previous religious movements to prohibition and sought to cleanse America of all its social ills in one fell swoop only to fail. Backlash to the social purity movement resulted in activists like Sanger and Goldman to gain ground in the realm of sexual freedom and prohibition only exacerbated social rebellion from familial norms. The courts adjusted their definition of obscenity to align with shifting social standards. Nevertheless, there remained a cultural and legal undercurrent committed to some manner of codified sexual obscenity censorship which further exemplified the deeply entrenched nature of the family of forces comprised of faith, economy and identity in the American character.

Chapter 3 – Sexual Obscenity and the Contemporary Era

A. Introduction – Revolution and Reaction

In Chapter 2 I described how, in the wake of the birth control movement's establishment of contraceptive and sexual education across America, legal challenges to the Comstock laws finally began to reach the Supreme Court starting in the 1930s. For the next three decades, the Court began to poke holes in the zero tolerance jurisprudence previously employed. Instead, the Justices of the Supreme Court attempted to define obscenity in a manner that would create exceptions for sexuality related speech that had artistic, social, political, and literary importance. During the 1950s and 1960s these efforts reached a fever pitch as the legal standard of obscenity became more and more legally amorphous and conceptually intangible, resulting in the proliferation of pornography and other previously legally obscene material. Furthermore, the Warren Court's other liberal rulings regarding the end of prayer in school, criminalization of racial segregation, and the legalization of contraceptive devices emboldened those on the left while antagonizing the right. In this chapter I will argue that the late 1950s to the 2000s more liberalization of sexuality in society and in law even while consensus still remained on the importance on some degree of sex censorship. I will do this by examining cultural shifts and movements during this period as well as the development of jurisprudence by the Supreme Court to account for evolving cultural norms in the face of the family of forces.

B. Entering the Modern Debate – Sexual Proliferation and the Reactionary Response

This legal liberalization of sexuality coincided with the beginning of the Sexual Revolution. This movement took place from the early 1960s until the late 1980s involved the proliferation of a myriad of tabooed sexual concepts and ideas including but not limited to: the normalization of premarital sex, homosexual sex and relationships, erotic fantasies, pornography,

public nudity (in the form of new age art), abortion and contraception, masturbation, fetishes, and non-marriage based unions (although geographically uneven in presence). Although the movement was not centered on any particular figure or philosophy, it can best be summarized by the general notion of individual sexual determinism independent of theological barriers or societal norms. This movement also received commercial support as the hardcore and softcore pornography industries began to emerge during the 1960s in response to the decriminalization of such materials with the fall of the Comstock laws and the increased demand from the public. Historically banned books such as *Lady Chatterley's Lover*, *Tropic of Cancer*, and *Fanny Hill* were smuggled into the US during this period and widely distributed (though some were present and smuggled earlier in smaller quantities). Challenges stemming from convictions for these acts were appealed all the way to the Supreme Court, paving the way for the liberal Warren Court rulings. Furthermore, the Court's decision in the early 1970s to protect a woman's right to pursue an abortion was seen as further legitimization of the revolution.⁶⁶ Throughout these years the left sought to dissociate the notion of sexuality from the weighty puritanical social archetypes it had been forcibly molded into via centuries of obscenity law and cultural pressure. The liberal opinions of the Warren Court in the 1950s and 1960s challenged traditional marital values and customs.⁶⁷

Although society had been liberalizing for quite some time in its view towards sexuality, the law and the courts had, for the most part, remained dedicated to the principles of *Hicklin* (and later *Roth*). These citizens, more focused on religion and building moral communities, saw teen sex and pregnancy become a common occurrence, divorce rates reach historic levels, faith

⁶⁶ *Roe v. Wade* (1973) was, and still is, a highly controversial Supreme Court case in which the Court decided that a right to privacy under the due process clause in the Fourteenth Amendment extends to a woman's right to have an abortion. (The right had to be balanced with the protection of life and the women's health)

⁶⁷ Allyn, David. *Make Love, Not War: The Sexual Revolution: An Unfettered History*. New York City: Little Brown and Company, 2000.

became less prevalent in the public domain, “smut” peddling in the streets and schools, and a general decline in social morality.⁶⁸ As these individuals began organizing, at least partially, behind the goal of returning to an era of Protestant sexual modesty, the moral framework of previous eras remained in place. Though it seemed the advancement of women’s rights and the evolution of capitalist markets marginalized “economy’s” importance in the family of forces, more than a hundred years of tradition in this area effectively linked a subtle notion of faith to financial prosperity regardless of modern advancement to a certain degree.

Religious groups were failed by the political and moral promises of the Nixon and Carter administrations but the newly created religious right flocked to Ronald Reagan and began a new movement to reinstall faith and Protestant ethics to society.⁶⁹ Several political action groups, the most notable of which was the Moral Majority, fought to rekindle public support for conservative values in line with the principles of the family of forces.⁷⁰ Major pushes, albeit unrealized, were made for a prayer in school amendment to the Constitution and anti-abortion legislation although they were not realized. Many of these groups began to disband though towards the end of the Reagan years despite a lack of tangible victories outside of the culture war due to a lack of funding and enthusiasm.⁷¹ However, such factions would reemerge in the future.

The subtle decline of reactionary politics groups also likely had to do with the Sexual Revolution’s fading in the late 1980s precipitated at least partially by the AIDS/HIV epidemic.

⁶⁸ Although teen sex rates rose through the early 90’s, teen pregnancy actually declined overall due to contraception usage although America still has the highest teen pregnancy rate of any country in the developed world. Pro-censorship advocates merely perceived a rise in teen pregnancy due to the public nature of youth sexuality.

To reactionaries concerned with tradition, “Smut” meant porn, sex education, contraceptive and abortion information, and masturbation normalization.

⁶⁹ Flippen, J. Brooks. *Jimmy Carter, the Politics of Family, and the Rise of the Religious Right*. Illustrated. Athena: University of Georgia Press, 2011.

⁷⁰ The Moral Majority, founded in 1979 by renowned Past Jerry Falwell, was a political organization in the US which had an agenda of evangelical Christian-themed legislative lobbying.

⁷¹ Hudson, Cheryl, and Gareth Davies. *Ronald Reagan and the 1980s: perceptions, policies, legacies*. Illustrated. London: Macmillan, 2008.

Due to the fear and stigma surrounding this new and deadly virus, sexual experimentation and the proliferation of free love slowly evaporated from popular culture. Even so, the massive commercial and pharmaceutical buildup around the pornography and contraception industries ensured that concept of sexuality remained open to further liberalization.⁷²

As America entered the internet, television and general mass media age following the 80s, obscenity became omnipresent in society due to its proliferation in almost every medium of communication. The debate partially shifted from sexual obscenity being purged from society as a whole, to simply preventing the developmentally vulnerable minds of children from being harmed by it.⁷³ Preventing child pornography became part of a general realm of criminal activity outside of obscenity due to the inherently destructive nature of its production during the 1980s. However, extreme fetish pornography such as scatology and bestiality are still targeted by the FBI's Anti-Porn Squad under the legal pretext of obscenity today. Overall sexuality has heavily liberalized in this era and there exists a far higher degree of acceptance for nudity and sexuality in art than there has been in the past but this progress is only relative to America's own history, as Europe, Great Britain, and Australia have society's far more sexually progressive than the US's.⁷⁴ Liberals and civil libertarians have taken stances against sex censorship, citing free speech and the benefits of sexually open society, while conservatives and some modern feminist theorists have supported it, arguing that the more sex obscenity exists, the more it corrupts the youth morally and injures women. However, this political divide is complicated and does not perfectly encapsulate the population's views on sexual obscenity. Obscenity has now become

⁷² Allyn (2000).

⁷³ Hartz, Frederic R. "Obscenity, Censorship, & Youth." *Clearing House*. 36.2 (1961): 99-101.

⁷⁴ Ward, Paula Reed. "Woman pleads guilty to obscenity for child-sex story site" *Pittsburgh Post-Gazette* [Pittsburgh] 07 Aug 2008, n. pag.

deeply entangled in the spiritual and moral internal struggle the US grapples over regarding embracing a sexually progressive future or a preserving a modest past of traditional values.⁷⁵

All in all, the Warren Court's rulings assisted the flourishing of the Sexual Revolution in the US while angering the religious right. In response, the right launched a political offensive to correct the obscenity proliferation caused by the free love movement, which eventually resulted in the election of Ronald Reagan and a new national rhetoric of Christian piety and morality. HIV and other factors helped bring an end to the Sexual Revolution but its effects had already take their toll of the development of society and sexual obscenity continued to flourish in the modern era where is has become intertwined with deeper cross-cultural conflicts.

C. *Jacobellis to Miller* – Developing Modern Obscenity

The post-*Roth* era primarily focuses on adapting and refining a new test for obscenity that could adapt to emerging forms of media while simultaneously maintaining a high level of respect and defense of free speech. As noted in the previous section, the family of forces comprised of faith, economy, and identity faded during the late 20th century and the law attempted to adjust to the shift without losing a grasp on society's obsession with obscenity censorship. Consequently, the Justices tried to establish a more holistic test that would engage the debate between the collective good and individual liberty to the degree necessary for the targeted suspension of such an important right. In the decades following *Roth*, the Supreme Court arrived at the standard that defines modern obscenity law in the US.

The Roth standard continued to modify itself in the years following its initial inception in *Roth*. In *Jacobellis v. Ohio* (1964) Justice Brennan, writing for the plurality, argued that "community standards" relevant to an obscenity should be judged by national, not local standards. Furthermore, he added that the material had to be "utterly without redeeming social importance"

⁷⁵ Manning, Rita C. "Redefining Obscenity." *THE JOURNAL OF VALUE INQUIRY*. 22.3 (1988): 193-205.

to be considered legally obscene. Additionally, Justice Stewart famously quotes, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it...*" in his concurrence, attempting to justify his position that nothing can be considered legally obscene except for this tough-to-verbally-define concept of "hard-core pornography". Though this statement very arguably constituted hopelessly ethereal jurisprudence, Justice Potter's candor helped illuminate the difficulty and deadlock the Warren Court had been facing during those years in its attempts to consensually define obscenity. This difficulty mirrors society's inability to arrive at a concrete definition of the obscene as well to a certain extent.

Memoirs v. Massachusetts (1966) created another small change in the Roth obscenity standard. In this case, the material in question, *Fanny Hill*, was considered to meet the requirements of both prongs one and two in that it was patently offensive and blatantly appealed to the prurient interests. However, Justice Brennan ruled that the material was not obscene because they could not prove that it had absolutely no redeeming social importance, and argued that it must be proven beyond a doubt that the material in question possesses "not a modicum of social value". This addition changed the standard again into the Roth-Jacobellis-Memoirs test. Although this test was now well refined and described, meeting its requirements became immensely difficult due to the intrinsic difficulty in proving that truly anything was "utterly without" any redeeming social value. Justice Clark's dissent attacked Brennan's creation and espousal of this third prong of redeeming social value, arguing that the Court ignored the possible negative side effects of youth exposure to obscenity. He insisted that the possibility of social harm should be considered part of that prong's judgment and that the Court should more actively seek out empirical and social science research enlightening them of the truth of this

issue. All in all, it was becoming clear that this modified Roth standard no longer functioned as an effective means of detecting and censoring obscenity. The Court needed a new direction.

Ginsberg v. New York (1968) and *Stanley v. Georgia* (1969) suggested a major break from the Court's old pattern of obscenity reasoning could be possible. In *Ginsburg* the Court returned to address the consequences of obscenity exposure to minors and how that affects the legality of censorship. Justice Brennan, writing for the majority, abandoned his allegiance to the refined Roth standard and simply argued that regardless of whether or not the material in question was obscene (he now believed nothing was intrinsically obscene), the government had a substantial interest in protecting minors from harm and thus should regulate such material as needed since minors do not have rights in the same manner that adults do. This notion of differing sets of standards for obscenity depending on the audience became known as "variable obscenity" In *Stanley*, Chief Justice Earl Warren, writing for a unanimous Court, also abandoned the Roth standard and admitted that though the material in question was obscene by all accounts, censorship justification *did* have a relationship to public exposure and thus the state could not invade the privacy of an individual in order to suppress their First Amendment right to free speech and their Fourth Amendment right to due process. Both of these cases represent departures from the *Roth* era since the Court abandoned a broken test and actively engaged two issues they had specifically avoided during the last decade. However, *Stanley* largely became irrelevant in future cases why *Ginsburg* continued to be cited.

Finally, in a split 5-4 majority decision in *Miller v. California* (1973) the Supreme Court established the obscenity test that still remains in place. Learning from the debate and consequences of the aforementioned decisions, the Supreme Court created the Miller standard which incorporated various facets of their earlier tests and opinions. In his decision, Justice

Burger laid out a new three-point test which required that the speech in question satisfied all of the conditions in order to lose its First Amendment protection. The test asked the Justices to consider “whether the average person, applying contemporary community standards (not national standards, as some prior tests required), would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” The first and second prong would be subject to local review and the third to national views to balance differentiating interpretations of offensiveness. The third prong created a large amount of room for possible exceptions. Additionally, the use of the word “serious” rather than “utterly without” made it possible to actually argue for censorship since the Justices no longer bore the impossible burden of determining whether or not certain speech was completely devoid of any redeeming value. Although this newly devised third prong made censorship easier than with previous standards, the rise of the internet would make it difficult to determine “community standards” with regard to online speech. The dependence on what would offend the “average person” also allowed the Justices more leeway in striking down speech regulation in comparison to previous standards like *Hicklin* since they were reliant on the tolerance of the most sensitive members of a community. Overall, the Miller standard represented a logical integration of previous tests while attempting to compensate for historic flaws.

The post-*Roth* era saw much debate and internal struggle within the Supreme Court. The Justices found it difficult to precisely determine the criteria for defining obscenity. As a result, they attempted to comply with local persuasions and opinions regarding what constituted speech

offensive enough to be sexual obscenity while maintaining a certain level of allegiance to the principle of free speech. Subsequent chapters address the manner by which obscenity jurisprudence develops further in terms of forum and indecency.

D. Conclusion – The Right to Censor

Establishing the definition of progress or peril represents a difficult task for any society to accomplish. In America, the peril invented in the late 1800s was sexual obscenity and the progress was censorship. Circumstances, such as the Sexual Revolution, and ideological shifts may have enabled the liberalization of sexuality and the diminishing of strict obscenity law over time, but the constant reprisal of reactionary forces proved that there exists a permanent attachment to regulating sexuality within the American zeitgeist at some level. While the courts have come to accept their role as arbiters of the sexually obscene, they have utilized new legal tests to bestow some of the power of determining what is and isn't obscene to individual communities as a safeguard of freed speech. Essentially, sex obscenity attached itself to one of the longest lasting cultural forces in US history: Protestant theology. The historic integration of the paradigm of sex obscenity into Evangelical Protestantism allowed for sexually conservative values to become eternal tradition in the narrative of American society.

Chapter 4 – The Origins of America’s Relationship with Violence

A. Introduction – The Paradigm for Violence as Obscenity

Sexuality does not constitute the only concept in speech deemed vulnerable to censorship. The presence of violence in speech has stirred controversy and prompted calls for suppression as well. However, the US maintains a unique relationship with violent media. The American Academy of Pediatrics reports that, by age 18, the average American child will have viewed roughly 200,000 acts of violence on television alone. This includes everything from beatings to graphic bodily dismemberment.⁷⁶ Violence has proliferated from primetime adult television to Saturday morning children’s cartoons. Today violence is a cultural commodity that is readily available in American society and practically unregulated in the media compared to most Western countries. As demonstrated by the first three chapters, the same cannot be said about sexuality. Nevertheless, violence censorship in America bears its own unique identity and history. In this chapter I will describe how early development of what defined legitimate violence in the US helped create framing problems suffered by pro-violence censorship advocates of the Comstock era as well as how legal obscenity’s inception sidestepped addressing violence to begin with.

B. The Role of Violence in America’s Ethical Origins

Every state on Earth attempts to regulate violent acts within its borders to a certain degree; however, the manner by which nations approach controlling violent speech varies significantly. Though I have demonstrated the necessity of sexual speech regulation for the preservation of the family of forces blending faith, economy, and identity in the US, there was little evidence to suggest that the curbing of violent speech played a similarly pivotal role in defending the identity

⁷⁶ "Media Violence." *National Center for Children Exposed to Violence*. National Center for Children Exposed to Violence, 16 Dec 2005.

of America. Instead, violence as a concept in and of itself has a unique role in US culture and identity that has intrinsically functioned differently from its purpose in other wealthy western nations.

Max Weber was the first to define the monopolization of violence as a core duty and necessity for a state to achieve in order for a state to even be considered as such. According to Weber, a true nation-state "upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order." Moreover, a country must be the sole proprietor of the concept of violence within its territorial boundaries, at least in terms of the legal use of force, in order to truly qualify as a functional state.⁷⁷ This assertion is quite logical for the practical purposes of creating social order and organized enforcement of will by the state. Though many scholars investigating the American violence culture often argue that the US merely experienced more barbarism and violence in its early history compared to a more "civilized" Europe at the time and thus remains less adverse to it today, this argument fails closer scrutiny. European nations from the 1600s into the late 1800s experienced various forms of violence at levels only marginally lower than the Colonies (later the States), the primary difference being the clear-cut nature of the violence itself.⁷⁸

While violence could be categorized into the dichotomy of legitimate and illegitimate in Europe, the same could not be done in the New World (and later the US). Public executions and violent intimidation were common in Europe; however, they aligned with Weber's "monopoly of violence" and were perfectly legal as they were mechanisms of various European states' police powers.⁷⁹ Furthermore, rampant crime remained a problem as well, particularly with the rise of highwaymen, mounted thieves and criminals who terrorized travelers across Europe (though less

⁷⁷ Weber, Max. *The Theory of Social and Economic Organization*. 1. New York: Oxford University Press, 1947. 154.

⁷⁸ Goldstein, Robert J. *Political repression in 19th century Europe*. 1. London: Croom Helm, 1983. 7-112.

⁷⁹ Ibid.

in France and Germany than other areas).⁸⁰ In such cases, the violence was clearly illegitimate and in violation of the state's monopoly. Though due to conflicts with Native Americans, the US technically did see more violence overall.⁸¹ However, the difference in the frequency of violence's presence in society is not substantial enough to account for the discrepancy in how it is treated in contemporary US culture compared to European culture. In fact, I argue that it was the decentralization of violence away from the solely the US government and the obscure nature of what constituted "legitimate" violence in America that set it apart from European violence.

During pre-revolutionary American history, colonists frequently came into conflict with various native groups across the Thirteen Colonies and various territories. These instances were often entirely divorced from the ongoing French and Indian Wars and generally resulted in violence and bloodshed. However, these occasions could not be classified as clearly as legitimate or illegitimate in terms of how violence was utilized, subtly starting the process of decentralization. Though the cause for the violence varied with each instance, ranging from self-defense to intentional aggression on the part of the Colonists, none of these acts were explicitly sanctioned or prohibited by the British Empire or municipal governments.⁸² These instances existed outside of Weber's general dichotomy. Though his theory does make exception for some scenarios involving self-preservation, it hardly covers the multitude of colonial-native regional conflicts of the era. In the aftermath of the Revolution, this grey area of violence only grew.

In 1789, the U.S. Marshals Service, the first federal law enforcement agency was created (though it would not be officially named as such until 1969). The Marshals functioned as the enforcement arm of the federal court system and were primarily utilized to hunt down fugitives.

⁸⁰ Billett, Michael. *Highwaymen and Outlaws*. London: Weidenfeld Military, 1997.

⁸¹ Slotkin, Richard. *Regeneration through violence: the mythology of the American frontier, 1600-1860*. Norman: University of Oklahoma Press, 1973. 25-93.

⁸² Slotkin (1973). p. 25-93.

These officers gained fame during the 1800s, especially during the period of Manifest Destiny as America rapidly expanded into the west. Marshals had broad and sweeping authority, especially in the west where little local law enforcement was available. One of their most unique abilities is their authority to form “posses.” Essentially, they had the power to “deputize” any number of civilians in order to accomplish their goals, primarily capturing fugitive criminals (a power that remains intact today). Originally, refusal to aid a Marshal in such a manner could result in a heavy fine and imprisonment.⁸³ The heroism attached to such actions became the foundational basis, along with Revolutionary militia glorification, for American fetishization of vigilante justice. Furthermore, the temporary recruitment of armed individuals for violent purposes aided a cultural perception of a decentralization of violence in America by fusing pseudo-state authority with civilian enacted bloodshed and coercion. Though the Marshals Service is not the most integral example of the decentralization of violence, its popularity and presence in early American history helps draw a clear line between US culture and the glorification of violence.

The original inception of the Marshals Service was followed by the ratification of the Second Amendment in 1791 along with the rest of the Bill of Rights. This was supplemented by the Militia Act of 1792, signed into law by President George Washington, which drafted all able-bodied white men between the ages of 18 and 45 for service in local militias for at least a year as well as creating an unfunded individual mandate requiring all draftees to purchase a firearm as well as ammunition and combat supplies. The Amendment was initially interpreted as enabling the existence of standing state militias for defense of the commonwealth but undoubtedly assisted the decentralization of violence with the arming of the majority of the male populous with only a temporary sanction from the state to commit violence on its behalf. This is because

⁸³ Traub, Stuart H. "Rewards, Bounty Hunting, and Criminal Justice in the West: 1865-1900." *Western Historical Quarterly*. 19.3 (1988): 287-301.

these men kept their firearms after the end of their short-term militia service but often continued to serve as keepers of the peace after their discharge.⁸⁴

However, as vigilantism, defense of one's family and liberty, and gun culture began to intertwine as fundamentally American ideals, the interpretation of the Second Amendment began to change to assert a more universal "right to bear arms." This was due, at least in part, to the proliferation and expansion of the fugitive bounty system and right-wing extremist groups such as the KKK who practiced different forms of vigilante justice with and without the consent of the state as civilians. By the end of the 1800s, the people were both armed and accustomed to taking matters of criminal justice into their own hands whether it was the famous examples of bounty hunters capturing criminals and destroying bandit strongholds in the West or the infamous examples of race-based lynching, assaults, and intimidation in the South.⁸⁵

Overall, a decoupling of legitimate violence, to a certain degree, from the state in early US history created an environment in which violence became seen as a tool guaranteed to every citizen (white men during this period) through the glorification of vigilante justice and the early state promotion of a gun culture. This began the process of subtly integrating violence into the identity of the American citizen since society at large treated violence as a legitimate means of defending liberty instead of treating it like a threat (as immigration law and religious/economic elites treated sexuality proliferation). Consequently, violence faced a different fate than sexuality in first era of statutory censorship: the Comstock Era.

C. A Mission of Morality – Curbing Criminality and Mischief

Violence censorship began in tandem with some of the earliest efforts to suppress sexuality. As I chronicled in some detail in Chapter 1-D, Anthony Comstock and members of the

⁸⁴ Brown, Richard. *Strain of Violence: Historical Studies of American Violence and Vigilantism*. New York: Oxford University Press, 1975. 3-67.

⁸⁵ *Ibid.*

Social Purity movement waged a crusade for moral order and Victorian restraint during the late 1800's. Though the long-term successes and major historical legislation achieved by this movement focused on sexuality, the efforts of supporters of "social purity" in shaping public policy resulted in the suppression of violent media as well.

Though the federal Comstock law applied strictly to the interstate mailing of contraceptive/abortion materials and information as well as sexually deviant literature and photography, the state level Comstock laws were far more expansive by including violence in their preview. The "*Sale of Immoral Publications to Children Act*" passed by the New York state legislature in 1884 was the first example of such a law. The statute had a textual focus on violent media and the glorification of criminal activity in particular (likely a focus on dime novels of the time). Speech that incited gang related activity and youthful rebellion against the cultural norms of reserved and obedient behavior were the targeted social ailments of this Act. However, it is important to note that the judicial principle upon which this law was based, the *Hicklin* standard (1868), made no mention of violence. This bill was reproduced and passed in legislatures across the entire country in the form of "Comstock laws" in twenty-four states by 1914. Advocates for the bills proclaimed them massive successes as the spread of targeted materials dramatically decreased at the peak of enforcement just prior to Prohibition in 1920.⁸⁶

The targeted gender of violence censorship was male rather than female. Sex obscenity posed the risk of normalizing sexually deviant behavior and causing harm to the psyches of the vulnerable women by promoting promiscuous conduct and anti-family romantic affairs. Violence obscenity, on the other hand, threatened to corrupt young men by enticing them to indulge in their more primal instincts such as wrath and aggression. Bluntly, proponents of censorship

⁸⁶ Saunders, Kevin W. *Violence As Obscenity: Limiting the Media's First Amendment Protection*. Durham: Duke University Press Books, 1996.

feared that extending freedom of speech to such socially tabooed regions of human behavior would turn men into murderous fiends and women into licentious nomads.⁸⁷

At the conceptual level, the rationale for censoring both was the same even at the legal and cultural inception of obscenity suppression. The idea was to inhibit the propagation of speech that would cause harm to the “proper” moral and social development of citizens. Advocates made the assumption that exposure to morally depraved material, sexual or violent, would inevitably result in the mass emulation of the activities and attitudes expressed in “obscene” material. The NYSSV, Comstock, and members of the Social Purity movement lived fought by this reasoning in order to preserve a very specific civic code of conduct highly intertwined with Protestant virtues. There was little debate into any comparative perception of which form of obscene material represented a greater threat to society within the movement itself; instead, it was assumed that the regulation of both were required for the salvation of America. However, this purist approach to cleansing society of ethically corrupting influences would not last.⁸⁸

The Supreme Court decision of *Winters v. New York* (1948), which I shall discuss in further technical detail in the Chapter 5, invalidated state Comstock laws. Like most obscenity statutes, and criminal law in general, enforcement fell off during the Prohibition era as I described in Chapter 2-D. Consequently, this ruling merely codified a practical reality for violence censorship by the 1940s; although sexual suppression remained intact and would even come to solidify its place in Constitutional jurisprudence in the following decade.⁸⁹

⁸⁷ Ibid.

⁸⁸ Beisel, Nicola. "Morals Versus Art: Censorship, The Politics of Interpretation, and the Victorian Nude." *American Sociological Review*. 58.2 (1993): 145-162.

⁸⁹ Saunders (1996).

Scholars have attributed various factors to this inconsistency between the long-term presence of obscenity ideology descending from the Social Purity movement and the legal regulation of such materials. Sexual obscenity's influence remained potent due to its existence at the federal level, the Comstock Act, and the fact that there existed no official state or religious organization celebrated for its sexuality. Violence, on the other hand, may have been deemed a contagious anti-morality based form of speech akin to sexuality, but celebrated and revered organizations such as the police and the military regularly exposed the American public to a normalized notion of violence as an intrinsic function of their duties. For example, the "Why We Fight" films released by the US government in the lead up to WW2 promoted participation in war as a necessary public good.⁹⁰ Indeed, America is one of a few Western states whose national origin is that of violent revolution. Though this is obviously not a deciding factor in how our culture has developed in regard to violent media, it contributes to a national culture that gives some legitimacy to violence as the source of our very national identity. The same cannot be said about sexuality.⁹¹

The critical factor was the Social Purity movement's lack of clear framing, comparatively, between the rationales for violence and sex censorship. They argued that unrestrained sexual expression in society would recreate that sexuality in the persona of American civilization, causing harm to the people. Their logic directly equated sexual liberation to societal degradation. In contrast, when it came to violence they argued that exposure to it would induce augmented levels of criminal behavior, which would in turn lead to harm. This reasoning inadvertently forced individuals to consider whether it was the proliferation of crime glorification that caused the societal harm or the spread of violence causing glorification itself. The problem was that

⁹⁰ Lavine, Harold, and James Arthur Wechsler. *War propaganda and the United States*. New York: Garland Publishing, 1972.

⁹¹ Saunders (1996).

violence was often glorified intentionally throughout history by the state, literature, and news organizations and these images of violence were not considered inherently evil, whereas images of non-normative sexual behavior had no redeeming purpose. Consequently, the idea that violence itself was obscenity of the same brand and caliber as sexuality was difficult to internalize for the average American.⁹²

The sociocultural preconceptions about the moral nature of sex and violence glorification shed light on why the immediate legal and political aftermath of the Comstock and Social Purity era looked more favorably on violence than sex. These preconceptions themselves are neither incidental nor coincidental. The positive views of violence and vigilantism as well as the state mandated proliferation of guns I described in Chapter 4-B no doubt helped create these preconceptions on violence just as much as Protestant/capitalist triumphalism created them for sex. Furthermore, although the indirect reasoning for violence censorship in this era may have prevented a “holistic” version of obscenity from being passed on, there remained a deep cultural controversy over what exactly was an appropriate level of violence for society to accept as normal. Despite the Supreme Court’s ruling striking down the Comstock laws, some states continued to pass similar bills censoring violence in the hopes of challenging the opinion or to take an ethical stand. The response to the SC’s invalidation of violence obscenity in 1948 cannot be described as monumental as the reactionary backlash to the Warren Court’s obscenity rulings described in Chapter 3-B, but it is important to note that many individuals still supported the principles of social purity as it related to violence suppression. To many, emerging forms of media began to solidify a direct connection between the idea of violent speech and societal harm.

⁹² Ibid.

The manner by which society dealt with violence in new forms of media will be elaborated on in the next chapter.⁹³

Overall, from the late 1800s until the mid-1940s, violence censorship operated much like sex censorship. The rationales behind each fledgling concept of obscenity overlapped on a higher level in that both sought to prevent purportedly morally toxic material from replicating its attributes in the people of America and causing detrimental effects to the citizenry. For this period, advocates for suppression targeted both types of obscenity but were unable to maintain a statutory embargo on violent speech due to a myriad of factors including differing sociocultural preconceptions and ideological framing regarding sex and violence.

D. Conclusion – Deconstructing “Legitimacy” in Violence

All in all, even before the United States declared its independence, the line between legitimate and illegitimate violence was indistinct and blurred. Conflicts with native peoples, vigilante culture, and early development of a gun culture helped decentralize the concept of violence from the state. As a result, those seeking to suppress violence in speech suffered from problems in framing the debate so that expressive violence could be seen as leading to social harm. Since criminality was the perceived threat (not violence in and of itself) and non-state violence was deemed a legitimate solution, censoring violence in speech didn't logically flow from the presence of violence while censoring sexuality in speech in order to curb sexuality in society did. Furthermore, as the legal foundation for violence as obscenity did not exist, the early measures of violence censorship of the Comstock Era failed by the mid-20th century.

⁹³ Ibid.

Chapter 5 – The Development of Violence in American Culture

A. Introduction - New Media and the Divergence of Violence from Obscenity

The divergence between the efforts and rhetoric surrounding sexual and violence obscenity censorship in the 1940s lead to a dramatic collapse of pursuance of the latter in legislative affairs. Additionally, jurisprudential reasoning continued to evolve to consider obscenity as strictly pertaining to sexual material as well. This shift was not only dependent on the Social Purity's movement's failures in framing for violence suppression, but also the rise and acceptance of the legitimacy of several forms of new media. Furthermore, the rise of artistic protection and intellectual interpretation of film and television added new restraints upon the censorship capabilities of authorities while self-censorship created a normative standard for public media. In this chapter I will describe how media itself helped proliferate and legitimate violence as part of the American identity as well as how the Supreme Court separated the concept of violence from legal obscenity.

B. The “Convergence” of Media – The Sidelining and Emergence of Violence Obscenity

One of the first genres of media that challenged the notion of what was speech beyond the written and spoken word was film. Beginning in the 1910s, films experienced regulation and censorship due to their ability to display sexuality and violence in means previously unheard of. Since the statutory definition of speech had yet to expand itself to apply to them, film became vulnerable to suppression based on the subjective standards of morality of various municipalities. During the 1920s and 1930s, the ACLU and other organizations rushed to the legal and popular defense of film as not only a medium of speech but as a legitimate art form depicting the human condition. Although various court cases marked the path film would take during this period between the 1910s and 1940s, the social and culture consequences of the film industry's self-

regulatory decisions had a great impact on society's interpretation of this form of media as well.⁹⁴

Due to the previous constraints and legal limitations placed on the film industry in the 1910s, movie producers not only engaged in a legal battle for freedom of expression but also began a campaign of targeted self-censorship in order to bypass both statutory and popular controversy. In 1921, the National Association of the Motion Picture Industry (NAMPI) created the "Thirteen Points," a series of standards created to guide filmmakers towards a content-based arena of restrictions that would dispel public debate and legal battles.⁹⁵ These principles primarily focused on the prurient interests in that they centered on banning "emphasis and exaggerated sex appeal", "commercialized vice", "passionate love", "salacious titles", or "disrespect for any religion". Only a small portion of the regulatory standard applied to violence, banning "bloodshed and violence" as it related to instructing "the morally feeble in methods of committing crimes." Once again, violence was one degree removed from criminal activity, which was the primary social ailment censorship sought to cure. When NAMPI failed to enforce these standards properly due to bureaucratic incompetence and disorganization, Congress threatened to codify them with a new federal censorship bill. In order to avoid further trouble, the film industry reorganizes and united behind the MPPDA which replaced NAMPI and had broader reach, better organization, and a larger membership.⁹⁶ The MPPDA created a new foundation for industry self-censorship.⁹⁷

⁹⁴ Barbas, Samantha. "How the Movies became Speech." *Rutgers Law Review*. (2011): n. page.

⁹⁵ National Association of the Motion Picture Industry, this short-lived group began in 1916 in order to oversee film censorship but was replaced by the MPPDA.

⁹⁶ The Motion Picture Producers and Distributors Association of America formed in 1922 in order to enforce industry content standards and the business interests of its membership. Later in the 20th century, anti-piracy became a major function of this organization. (Later renamed MPAA, Motion Picture Association of America.)

⁹⁷ Ibid.

In 1926 the MPPDA formed state censorship boards across the country to review all films in order to enforce these standards. Furthermore, in 1927, the censorship standards were tightened and focused, as “profanity, miscegenation, drugs, sex perversion, and man and woman in bed together” were added to the aforementioned standards. These regulations were directed primarily at sexuality suppression and barely touched violent content. Even when such restriction did enter the realm of violence, it was only when it related to the celebration of criminal behavior. This self-regulation was intended to prevent litigation and public controversy regarding film content and was successful to this end to a certain extent, but it severely curbed creativity in the industry and virtually condemned non-abiding film-makers to the economic and notoriety sidelines. Though effective, the public and government officials would soon demand more regulation.⁹⁸

The MPPDA strengthened its censorship standards in the 1930s in order to maintain its moral image to the public. Due to the rise of independent film companies creating films challenging present MPPDA standards legal, the Association augmented its self-regulation. The MPPDA drafted more standards with the help of various Christian religious groups and leaders, primarily the Jesuit Father Daniel Lord. These groups primarily fueled the public outrage and congressional oversight. The film industry acted to appease them by banning any film that promoted the “sympathy of the audience” for sexual and criminal acts or the violation of “law, natural or human.” These new standards aligned even more heavily with mainstream Protestant Christian values (promoting female chastity and familial values) and imposed a steep fine for the time, \$25,000, for films that ignored the prohibition of state censor boards and released the film anyways. Though over time these restrictions liberalized based on the age of the viewer, with the creation of the “ratings system” in the 1960s, the majority of these standards relating to sexuality

⁹⁸ Ibid.

remain in place for younger viewers, shaping film speech to present day. On the flip side, violent content was still not being directly censored by any force of authority.⁹⁹

The restrictions regarding violence in films in relation to criminality died with the rise of public consumption and acceptance of newsreels. The propagation of newsreels displaying labor struggle, Spanish-Civil War, and WWII related violence from the 1920s to the late 1940s created a myriad of legal challenges. Though initially suppressed by the government, violent media become commonplace propaganda by the height of WWII and increased viewership of films dramatically. The sensationalization of violence bled into print media as well during this period. By the 1950s, the population was in the ballpark of 139 million with more than 70 million attending films every week, 46 million receiving newspapers, and 34 million listening to radios regularly. Over time, violent images became more commonplace in popular media due to the government propagation and weak self-censorship of violent materials while sexuality became further encumbered as highly obscene.¹⁰⁰

The sociocultural path taken by film in its mission to become protected speech closely mirrors the routes taken by the other forms of emerging media in the following decades. The rise and proliferation of television, radio, and the internet first resulted in attempted censorship of each respective form of media. This arose out of a fear that these new forms of media were so dramatically different and vivid compared to previous forms that they would undoubtedly have a stronger influence over those exposed to them. The objective of each series of restrictions was the same as Comstock era censorship laws. They sought to prevent the moral pollution of society via the display of undesirable material. However, given enough time, each of the mediums became increasingly integrated into everyday life and eventually became valued by the general

⁹⁹ Ibid.

¹⁰⁰ Ibid.

populous as protected speech. Scholars refer to this phenomenon as “media convergence” or “social convergence of mass communications,” meaning the process by which the uses, practices, and cultures associated with different forms of communication come to resemble one another. However, the important take-away from these developments is that despite these new forms of media being accepted as protected speech, there still remained a content-based distinction between the value of sexual speech versus violent speech.¹⁰¹

No matter the form of media, historic attitudes and conceptions of propriety and integrity in speech continued to resonate within new forms of communication. The manner in which film arrived at the status of protected speech remains a good example for this reason in that the industry behind this new media self-regulated according to previously held belief systems which placed more scrutiny on sexual imagery, language and ideas than on violent ones. This strategy proved successful in the end in combination with the “media convergence” of film over time. This pattern continued in the industries of television and radio throughout the 1970s and 1980s as the industry proactively attempted to shape internal content production to avoid legal battles and fines from the FCC (Federal Communications Commission) while simultaneously appeasing public interest groups, such as religious and parental organizations, dedicated to keeping the airwaves clean of obscenity. Though strict statutory oversight and regulation of these industries ended with their ascendance into the realm of “converged” media, the cultural and social consequences and standards of their self-censorship would continue. However, as I discussed in Chapter 3-B, the sexual revolution and, later, the resurgence of the Religious Right played a

¹⁰¹ Krattenmaker, Thomas G. "Converging First Amendment Principles for Converging Communications Media." *Yale Law Journal*. 104. (1994-1995): 1719-1741.

major role in how sex obscenity was viewed by the public. Consequently, self-regulation by these industries ebbed and flowed according to the normative social standards of the times.¹⁰²

Throughout this period, violence continued to be virtually ignored while in plain sight. All forms of media displayed cartoonish, realistic, artistic, and intentionally excessive forms of violent imagery and speech, from the *Road Runner* cartoons to slasher films like *Halloween* (1978), yet debate was primarily focused on sexuality. Nevertheless, the ever-present standard of curbing the glorification of “criminality” remained, the public still had some underlying desire to assess the nature of this brand of speech as well.

The evolution of self-censorship standards in the industries of film, radio, and television enabled violence to survive in these mediums while the promotion of criminal behavior became suspect along with sexuality. Furthermore, fictionalized vigilantism became exceedingly popular with the rise of comic book superheroes as well as cinema, television, radio and literature glorifying extralegal violence as essential to the survival or “true” justice.¹⁰³ Though real life vigilante justice was reigned in to a certain extent during the 20th century and onwards, fictional superheroes such as Batman, Superman, and Spiderman as well as historical figures like Wyatt Earp or movie icons like Dirty Harry gained glory during this period as paragons of justice. The standards of self-censorship set forth by media industries helped reinforce long-standing cultural traditions which accepted extralegal violence as a means of curbing criminal or immoral activity. Essentially, vigilante justice became overlooked as it was portrayed as violence that fought criminality instead of proliferating it, thus it wasn’t seen as threatening to society, but, rather an integral part of it. Even war-time propaganda vigilantes like Captain America persisted beyond their original purposes (in this case raising morale during WWII) and became immortalized as

¹⁰² Clark, David G., and E.R. Hutchison. "Self-Censorship in Broadcasting--The Cowardly Lions." *New York Law Forum*. XVII.1 (1972): n. page.

¹⁰³ Lenz, Timothy. "Republican Virtue and the American Vigilante." *Legal Studies Forum*. XII.2 (1988): 117-184.

timeless heroes. This celebration of vigilantism further decentralized the concept of violence in the eyes of the American public as it became more prevalent and more aligned with righteousness in every facet of popular culture from the early 1900s to the present.¹⁰⁴

Despite there being no more, or no less, evidence proving a link between sex and societal harm or violence and societal harm, the state, media industries, and the public heavily targeted the former for censorship compared to the latter.¹⁰⁵ The law, on the other hand, closed the door to censorship of violence as legal obscenity and opened another to censor it as legal indecency during this period.

C. *Hicklin* to *Reno* – Violence as Indecency

As described in Chapter 4-C, the earliest judicial test for determining legal obscenity was the *Hicklin* standard, which lacked any acknowledgment of violence as a potential “immoral influence”. Nevertheless, the Comstock era produced laws which targeted materials which contained violent speech. These laws were addressed and struck down in the landmark case *Winters v. New York* (1948). The statute in question dealt somewhat with sexuality but primarily with “bloodshed and crime.” In striking it down, the Supreme Court argued that the violent material did not constitute obscenity as it had been previously understood in law. However, they struck it down on a due process violation since the text of the statute was so vague that it was unclear when an innocent act became a criminal act. This lack of clarity arose from the condition in the statute that the violent material had to become so “massed” in stock in a certain store that it would become “a vehicle for inciting violent and depraved crimes.” This essentially meant that under this law there was an invisible stock threshold a shopkeeper could exceed without any way of knowing he or she did where their products became obscenity.

¹⁰⁴ Rosenbaum, H. Jon, and Peter C. Sederberg. "Vigilantism: An Analysis of Establishment Violence." *Comparative Politics*. 6.4 (1974): 541-570.

¹⁰⁵ Saunders (1996).

Winters and *Butler* (discussed in Chapter 2-E) both struck down statutes that would produce a chilling effect. *Butler* clarified that obscenity worthy of censorship was heavily dependent on audience standards since material that would be legally obscene for youth could be acceptable for adults. This helped defeat absolute statutory bans on certain types of obscene materials. *Winters* gave violent media some Constitutional protection by establishing a chilling effect and it separated violent speech from legally defined obscenity. The question of violence as obscenity would not be brought back into question until the 2000s but despite the Supreme Court's focus on sex as legal obscenity in the decades following *Winters*, another venue opened up the possibility of state censorship of violence.

The 1978 case of *FCC v. Pacifica Foundation* fundamentally expanded the amount of content and speech that could be restricted or censored without affecting the obscenity standards by addressing the regulation of airwaves rather than just print. Essentially, the 5-4 majority opinion by Justice Stevens determined that although the speech in question did not qualify as legal obscenity under the Miller test, "indecent but not obscene" was sufficient enough to censor it. He argued that the FCC required more authority in restricting certain content during the day hours since vulnerable youth populations would unintentionally be exposed to them without their parent's wishes. Justice Stevens accepted the state's argument that it had a compelling government interest in "shielding children from patently offensive material" and "ensuring that unwanted speech does not enter one's home." As Justice Stevens put it, "When the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." Also, he argued that since the FCC had already established "safe harbor" hours for undesirable and potentially harmful daytime speech to be aired, no First Amendment violation had occurred. The notion of "indecent" constituting enough grounds for

restriction opened up a new judicial argument by which violence and sex media suppression advocates could argue their cause as it is much easier to prove something to be indecent rather than obscene. However, the facts of *FCC* revolved primarily around sexuality, the notion that violence could be censored under indecency is only a theory held by legal scholars thus far.¹⁰⁶

The subject of indecency reappeared in *Reno vs. American Civil Liberties Union* (1997), the first Supreme Court case dealing with the regulation of another context based speech – the internet. The 7-2 majority decision was once again delivered by Justice Stevens but this time he struck down indecency based regulations instead of enforcing them. The case involved several provisions of the Communications Decency Act (CDA) of 1996, which sought to restrict access to “indecent and obscene” materials of primarily a sexual nature by criminalization knowing transmission of such materials to children under the age of 18 over the internet. The decision left the obscenity and child pornography based regulations intact but struck down the indecency based ones. Justice Stevens argued that the *FCC* precedent only applied to situations where the content was so pervasive that there was no way of inhibiting the reception of unwanted material and parental forces could not prevent children from accessing it. However, internet-based speech required a “series of affirmative steps” by the user to access explicit material whereas with television and radio, it may simply appear. This decision clarified the idea of legitimate indecency-based censorship by outlining the importance of audience access and participation when determining appropriate scenarios for state intervention.

Overall, the Court in these cases reaffirmed its stance that violence was not obscenity and that it was afforded at least some protection under the law (in *Winters*) as legitimate speech. Furthermore, it ruled that context and forum of speech does have a major bearing on the

¹⁰⁶ Smith, Craig R. "Violence as Indecency: Pacifica's Open Door Policy." *Florida International University Law Journal*. (2007): 75-90.

threshold of potential harm that needs to be present for censorship. Depending on the medium of speech, indecency could be censored, opening up violence to the possibility of censorship without being argued as legal obscenity.

D. Conclusion – Obscenity in the 20th Century

Violent media as obscenity in the eye of the American public has only recently reemerged as a possibility since the Comstock era. Cycles of self-suppression by various industries throughout the mid to late 1900s merely reinforced preconceptions that sexuality was a graver threat to society than violent media. Furthermore, the concept of decentralized violence was further ingrained into the American identity as vigilante heroes flooded the media market as vanguards of morality and justice. Despite the fact that both of the forms of speech in question have been argued to be dangerous to the social welfare of society, particularly its youth by conditioning them to exhibit the very same behaviors described by such speech, sexuality has been censored far more severely. However, developments regarding legal indecency as a justification for censorship opened the door to possible censorship of violence even though the context of such suppression was limited by subsequent forum cases.

Chapter 6 –The Contemporary Debate on Violence Obscenity

A. Introduction – Ancient Standards, Modern Society

Though the issue of whether or not violence constituted legal obscenity in speech remained dormant for more than a half a century, the emergence and proliferation of another new forum for speech reinvigorated the debate. As video games and gun violence permeate the lives of children in America in the contemporary era, long standing preconceptions have come into question and the disparity between how we address sex and violence as a society has been illuminated by tragedy and strife. In this chapter I will extend the analysis of US attitudes towards sexuality and violence to the contemporary debates on censorship, culture, and public policy. Furthermore, I will reiterate sexuality's perceived significance to this family of forces and how sex censorship is a societal defense mechanism against moral and economic degeneration. I will do this by tracing the judicial catalysts for the reintroduction of the legal debate on violence obscenity as well as investigating the sociocultural and political debates that shape and reflect our present sensibilities and how they are directly connected to values that have molded the US since before its inception.

B. *Stevens & Brown* - Confronting Over a Hundred Years of Precedent

During the post Miller era, censorship of offensive material took several interesting turns. Speech no longer had to be legally obscene to be restricted so long as the content was indecent enough and its media carrier adequately pervasive in society. Standards for state regulation became dependent on the ease of accessibility of unwanted content. Finally, violent media returned to the censorship debate as its rapidly growing presence in new media exposes society

to the discrepancy in how sexual and violent imagery are treated in comparison with one another under the law.¹⁰⁷

The debate surrounding the censorship of violence-based speech and content reemerged for the first time since *Winters* with the cases of *US v. Stevens* (2010) and *Brown v. Entertainment Merchants Association* (2011). *Stevens*, was arguably the less important of the two, revolved around sexual fetish films known as “Crush Videos.” In these videos, individuals crush small animals to death to gratify the viewer’s sexual desires. A federal statute, named Public Law No: 106-152, banning the production, sale, and possession of films depicting animal cruelty criminalized these crush videos but was challenged as a violation of free speech.

In an 8-1 majority ruling, the Court found that animal cruelty was not a categorically unprotected form of speech and consequently struck down the law. In his opinion, Chief Justice Roberts found the law to be substantially overbroad with the potential to have a chilling effect on free speech when it came to non-crush related video displaying violent imagery that could be considered “animal cruelty” such as hunting videos. In the Supreme Court’s reasoning there simply was no case-history or jurisprudence that created a category of unprotected speech for animal cruelty or extreme violence nor could its content be considered legal obscenity. However, since the Supreme Court struck down the law based on over breadth, a simpler and more narrowly tailored law specific to only crush videos was passed because the Court acknowledged a compelling government interest in protecting animals.¹⁰⁸ *Stevens* provides an interesting modern example of how dependent Supreme Court jurisprudence is on precedent as well as the Court’s unwillingness to establish new categories of restricted speech or stray from cultural/legal history.

¹⁰⁷ Saunders (1996).

¹⁰⁸ Simon, Richard. "Local congressman introduces new bill to stop the sale of animal cruelty videos." *L.A. Unleashed* [Los Angeles] 21 Apr 2010, n. pag.

Brown dealt with a California law banning the sale of select violent video games to minors without parental consent. In a landmark 7-2 majority decision, the Supreme Court found the law to be unconstitutional and declared video games a protected form of speech. In his opinion, Justice Scalia wrote that violence, no matter how severe, does not constitute legal obscenity under the Miller Standard. Indeed, as this Section has displayed, violence has *never* been a candidate for legal obscenity based suppression. Justice Scalia further argues that the *Ginsberg* precedent of variable obscenity does not apply either due to a lack of connection between violent speech and obscenity regardless of the audience. Consequently, the law had to be judged by a standard of strict scrutiny which dictated that the law in question possess a compelling government interest, be narrowly tailored to achieve its purposes, and represent the least restrictive means of accomplishing the aforementioned goals.

The statute failed to meet the first prong, according to Justice Scalia, since the science behind the argument that the violent video game exposure effects children negatively failed to be conclusive. Furthermore, he argued that present ESRB self-regulation was so effective that “filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest.”¹⁰⁹ Since such games require money, resources, and time to acquire and play, Scalia contended that the forum in which video games deliver speech was not so pervasive that it could not be stopped (unlike airwaves). For, even if harm were to occur from exposure to such games, it would require large amounts of time intentionally spent playing them. During such a period, parents would likely notice and take action if necessary. Overall, the Court dismissed the arguments that violent video games were obscene or indecent since violent speech didn't fit into those two types of suppressible speech nor did they lack enough “redeeming” social, artistic, or

¹⁰⁹ The Entertainment Software Rating Board is a self-regulatory agency that assigns age-based ratings to video game media.

political value to be stripped of their free speech protection even if *Miller* was applicable. There also did not exist a compelling enough government interest to justify abridging the First Amendment.

As video games became more and more realistic, accessible, and violent in nature, the public began to take notice. Once again, the pattern of attempted suppression followed by self-regulation, in this case by the ESRB, occurred. It remains unclear whether video games will follow a path of convergence but the unique factor this time is the fact that violence in and of itself is the focus of the censorship attempts, not sexuality or criminality (though sexuality does play a part in video game censorship advocacy as well). For the first time since the early suppression efforts of the NYSSV, the exempt status of violent speech from censorship is being forcefully challenged. Due to the inherent appeal of video games to children and the hyper-violent and interactive nature of their content sometimes, the public is questioning the status quo of the legal and cultural doctrine that considers sexuality as obscene while ignoring violence. Nevertheless, this popular challenge to existing legal norms has yet to be addressed directly by the Courts while isolated legislators work to enact narrowly tailored censorship for violent media in video games and certain television. Proponents of violence censorship utilize the exact same arguments as sex censorship advocates - exposure equals harm - yet the legislative and judicial results achieved are staggeringly different, with the few laws that are passed being overturned in court. Consequently, it remains to be determined how the law will evolve.¹¹⁰ However, it is no coincidence that the games at the center of *Brown's* debate and public scrutiny were titles such as *Grand Theft Auto*, *Postal* and *Manhunt* as all of them promote criminal violence and put the player in the shoes of an outlaw. While there are some exceptions to this rule, society continues to be primarily fixated on stopping glorification of violence of a criminal nature while being

¹¹⁰ *Ibid.*

more amenable to violence executed by archetypical heroes and vigilantes.¹¹¹ This fixation is a product of the decentralization of violence in the US which I outlined in the previous two chapters.

C. Reconciling the Roles of Violence and Sexuality

As I discussed in Chapter 4, the Second Amendment and the early development of gun culture represents an integral element of the nature of violence as a cultural commodity in the US. The first Supreme Court case that expanded the scope of the Second Amendment was *Presser v. Illinois* (1886). Here, the Court determined that the “right to bear arms” should be interpreted to apply only to the federal government’s ability to regulate firearms, not the states. The next critical decision was *US v. Miller* (1939), which upheld a federal regulation of sawed-off shotguns, as they were not necessary to a “well regulated militia”. However, *Miller* was also called a victory by some gun rights advocates for it established the right to own weapons so long as they were appropriate for a militia. Though not without controversy, gun rights advocacy rapidly grew during the second half of the 20th century via well funded and organized lobbying groups such as the National Rifle Association. These efforts resulted in the proliferation of firearms in the US and the creation of many lenient state level gun control laws such as minimal background checks, elimination of waiting periods, easy-to-access conceal & carry licenses, and assault weapons legalization (with exception of a ten year ban between 1994-2004).¹¹²

Eventually the 2008 Supreme Court ruling in *District of Columbia v. Heller* established a right to firearms ownership outside of a militia in federal enclaves. This landmark ruling was quickly followed by another in 2010 in the case of *McDonald v. Chicago* where this right was expanded to all states and municipalities. The Castle Doctrine also became popular during the

¹¹¹ Ibid.

¹¹² Greenberg, Mark, and Harry Litman. "Gun Violence and Gun Control." *UCLA School of Law, Public Law and Legal Theory Research Paper Series*. 10.01 (2010): 1-18.

late 20th century and early 21st as many state and local governments adopted laws which shielded civilians from criminal prosecution if they attacked or killed an intruder on their property. Interestingly enough, some of the early bills under this doctrine were named “Make My Day Laws” after the aforementioned film vigilante Dirty Harry’s iconic piece of dialogue.¹¹³

More recently, these statutes have been expanded on in the form of Stand Your Ground laws which allow for any civilian to kill another civilian if they feel threatened to the point of immediate danger, regardless of location and even if flight was available as an option. Though these new laws are extremely controversial, they have continued to rapidly proliferate, effectively fully decentralizing the monopolization of violence by the nation-state in every municipality where such laws are applicable.¹¹⁴ Even after the fatal shooting of an unarmed 17 year old named Trayvon Martin in 2012 in a state with such a statute, 55% of the public still supported Stand Your Ground laws while 73% of the same sample wanted Trayvon’s killer arrested.¹¹⁵ These statistics help to illustrate the American dedication to the principles of both firearms liberty and vigilante justice even in a situation where the public acknowledges the failure of such a policy.

These contemporary advances in the decentralization of violence starkly contrast with the current controversy surrounding policy issues related to sexually liberation such as abortion rights, contraception, and gay rights. Though, as I demonstrated earlier chapters, there have been considerable advances both legally and culturally in these fields, reactionary forces have once again turned these policies into major wedge issues in the 2012 Presidential politics.¹¹⁶ Though Stand Your Ground Laws have recently sparked heated debate and protest, the resistance to these

¹¹³ Drake, Denise M. "An Expanding Right to Stand Your Ground." *Saint Mary's Law Journal*. 39. (2008): 574-595.

¹¹⁴ Ibid.

¹¹⁵ "CNN poll: Majority call for arrest in Trayvon Martin shooting." *CNN*. Cable News Network, 26 Mar 2012.

¹¹⁶ Harwood, John. "GOP Candidates Scramble to Make Differences" *New York Times* [New York City] 29 Feb 2012, n. pag.

types of laws is nowhere near as politically potent in terms of popular and monetary support.¹¹⁷ Furthermore, every advance for self-defense and gun rights becomes highly institutionalized while even an issue such health care coverage for contraception remains in political limbo despite massive public acceptance for the concept of contraception itself.¹¹⁸ For example, after a state adopts leaner concealed carry or handgun permit standards, the legal standards have never reverted from either popular support or a court ruling. Although the recent overturning of Proposition 8 and funding victories for Planned Parenthood exemplify victories for sexual liberation, a multitude of state constitutional amendments banning same-sex marriage and invasive trans-vaginal ultrasound laws continue to be proposed and debated.¹¹⁹ These fundamental differences in the popular treatment and perception of the state control of violence and the state control of sexuality echo each concept's role in the family of forces intermingling faith, economy, and identity.

Essentially, there exists a historic and heavily ingrained notion that sex must be regulated to the dictates of the Christian ethical identity suite in order to preserve the American identity. Violence has no direct role to play in the suite and thus there is less inclination to censor such speech, as it fails to pose the risk to the economic and moral identity of America. Nevertheless, another interesting facet of the family of forces comprised of faith, economy, and identity provides a unique role for violence in US culture. As I described earlier in Chapter 1-B, one of the reasons, besides sexuality control, elites spread Protestantism was to eliminate criminality. In Chapter 4-C I described how the conceptual disconnect between violence and criminality aided the failure of early violence suppression attempts. Through the decentralization of violence and

¹¹⁷ Sussman, Dalia. "Support for Gun Control Has Dropped in Recent Years." *New York Times* [New York City] 10 Jan 2011, n. pag.

¹¹⁸ Savage, David G. "Birth-control controversy heads toward more debate." *State* [Columbia] 13 Feb 2012, n. pag.

¹¹⁹ "Virginia Ultrasound Bill Passes In House [UPDATE]." *Huffington Post* [New York City] 22 Feb 2012, n. pag.

the creation of legitimized civilian level violence along with a storied history of vigilantism and cultural deification of vigilantes as arbiters of justice, an individual mandate to combat criminality with violence has arisen. In European nations this fight is generally left to the state to conduct alone as violence remained centralized on the central government in those nations, as exemplified by those nations' lack of gun rights/culture, enthusiasm for violent media, and celebration of vigilantes. In the US, vigilante violence, though illegal in most places and scenarios, is still part of the national ethos to a certain extent when one considers present gun control laws and cultural celebration of both fictional and historical acts of extrajudicial justice. Consequently, the censorship of violence has been difficult to achieve as violence is often perceived as a means to curbing criminality and preserving the family of forces.

Finally, in addition to the role violence plays in preserving the vitality of the family of forces by targeting criminality, it also remains decentralized in the US, as the Founders intended for the people to possess the means to combat a tyrannical government. Though this logic may seem almost comically antiquated now, in the age of supercarriers, helicopters, jet aircraft, satellites, unmanned drones, ICBMs, and tanks, Americans have internalized the belief that they have a right to defend themselves against not only civilian criminals, but a criminal government. This has occurred not only as a product of long-term decentralization of violence, but due to the inherent romanticization of armed Revolution in American history.¹²⁰ As Thomas Jefferson said, "I hold it, that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical," in a letter regarding Shay's Rebellion.¹²¹ Once again, this demonstrates another key manner by which violence became a cultural commodity to be

¹²⁰ Brown, Richard. *Strain of Violence: Historical Studies of American Violence and Vigilantism*. New York: Oxford University Press, 1975. 3-67.

¹²¹ Foner, Eric. *Give Me Liberty! An American History*. New York: W.W. Norton, 2006. 219.

embraced rather than controlled and regulated like sexuality. In turn, speech regarding each concept would respectively endure the same fate.

D. Conclusion – Censorship and the Ideological Preservation of America Itself

After a hiatus that lasted more than a century, violence as obscenity finally became a subject of public controversy and legal debate with the rise of video games as a forum of speech. Though the result of the judicial inquiry into this issue was not radically different from previous discussions on violence in speech, it has illuminated a stark disparity that concerns many citizens. I have argued that a family of forces consisting of cultural and legal stimuli between faith, economy, and identity in early American history created the flow of “prurient interest” based content restraints in speech at both a statutory and societal levels which fuel debate on sexual proliferation issues to this day. Furthermore, I argued that the absence of violence’s necessity to this family of forces helped to define citizenship in the US and, in conjunction with the historic decentralization of legitimized violence from vigilante justice to gun rights, spared it from such censorship.

Conclusion – Deciphering a Duality

The divergence in severity between sexuality and violence censorship in US obscenity law emerges from an underlying public desire to preserve the family of forces comprised of faith, economy, and identity. This is true, in part, because this set of forces helped create free market success and shape the character of the United States as a nation. Protestant-capitalist triumphalism espoused by elites as charity as well as public schools as citizenship training and moral guidance would further integrate these forces into what Americans view today as their core identity. This multilayered institutionalization of the Christian ethical identity suite via elite propaganda and immigration law enabled the longevity of subtle inclinations towards controlling sexuality and promoting violence in a particular manner. Over time, these inclinations translated into historically replicated censorship patterns that sought to suppress sexuality while ignoring violence as a means of maintaining the ideal economic and social status quo. Though modern strife has emerged regarding the validity of both forms of content proliferation and its effects on society, a pervasive bias towards sex suppression and violence decentralization persists in direct correlation with sexual control and vigilantism's rise to legal legitimacy.

Though this research illustrated how sexually stringent doctrine captivated both American culture and the court system throughout history, the Supreme Court decisions, social movements, and legislation discussed in previous chapters did not constitute the origins of the modern sex/violence duality. Rather, they merely represent the symptoms of a heavily ingrained inclination the public possessed and nurtured since the earliest attempts to codify the nature of citizenship in the United States. More specifically, the division between obscenity regulation of sex and violence arose as a natural sociocultural and legal defense mechanism designed to perpetuate and preserve a highly specific notion of citizenship. This particular definition of the

American identity, in turn, would propagate the sexual norms required for the success of our economic and political system in the early days of our Union.

Over time, the faith and economy components of the family of forces melded seamlessly into the cultural force of identity as changing societal norms and cultural values eroded the possibility of fundamentalist adherence to the Christian ethical identity suite. Instead, the notion of controlling sexuality as integral to the success and prosperity of the American identity and spirit subtly bound itself to the sensibilities of Americans. All the while, violence as a cultural commodity proliferated as a means of defending personal liberty, a liberty which was also integral to the American identity. Though both of these cultural commodities' relationships with the American identity undoubtedly weakened over time, we cannot simply ignore their influence. The right of freedom of speech represents one of several critical building block for a successful republican democracy, understanding its limits and why they exist is the only way we can determine if they should exist.

The United States of America's embrace of free speech evokes envy around the world and remains one of the most paramount liberties afforded to citizens by the Constitution. It is because of this magnitude and reverence that it must be protected with vigilance and fortitude. For it is this very freedom that constructs the bonds between man to man, man to society, man to government, and, most importantly, man to liberty itself. We cannot hastily sacrifice such a consecrated commodity upon the altar of public indignation every time a new form of it emerges, nor can we simply accept an antiquated and normative set of preconceptions as a stand-in for a free market of ideas. For, if we did, this nation would be deprived of true artistry, substantive representation, and meaningful expression. If the First Amendment is to have any potency in our time, it must remain unshackled by the subjective winds of factionalized dogma and examined

critically when restricted by any notion of obscenity. Thus, both violence and sexuality in speech must be examined and restricted based on the pragmatic and empirical realities of contemporary thought and culture, not persistently controlled by the arcane whispers of an antiquated history of religious prejudices or unsubstantiated fears of societal destruction.