AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 7: The Republican Era—Democratic Rights/Free Speech/Obscenity

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United States v. Harmon, 45 F. 414 (D.C.D. Kan., 1891)

Moses Harman was the publisher of Lucifer, the Light Bearer, *a radical journal that espoused free love, among other principles. The February 1890 issue of that journal included an essay entitled "A Physician's Testimony" by "Richard V. O'Neill, M.D," which detailed acts of sexual aberrance (those details were deemed "too indecent and filthy" to be described in the court's opinion. On February 14, 1890, Harmon attempted to send a copy of that issue through the U.S. mails. He was immediately arrested and indicted for violating federal law prohibiting persons from sending obscene materials through the mails.*

Such bans on obscenity were common during and immediately after the Republican Era. States generally prohibited the distribution of "obscene" and "indecent" material. The federal government banned using the postal service to ship obscene matter. . Free speech advocates and entrepreneurs who wanted to ship such materials challenged these statutes as violating state and federal constitutional provisions protecting the freedom of the press, but courts routinely upheld obscenity laws.

Judges in the Republican Era did not believe the freedom of the press did include the "license" to do "harm" to the "public safety." Obscene publications were harmful to society and could be constitutionally regulated by legislators exercising police powers. Non-obscene publications, by comparison, might be e constitutionally protected by the freedom of the press if they did not fall under some other exception to constitutional free speech rights. A great deal turned on the meaning of "obscene." The U.S. Supreme Court did not provide much guidance. Many American courts instead looked to an influential opinion from the Queen's Bench in England. In Regina v. Hicklin *(1868), Lord Chief Justice Alexander Cockburn concluded, "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." The "*Hicklin *Rule" allowed the prosecution to focus on isolated passages of a publication and was concerned with the corrupting tendency of material on even the most sensitive members of society. American courts did not always strictly follow this definition of obscenity, but the* Hicklin *Rule shaped American law on the definition of obscene materials and as a result which materials were outside the constitutional protection of the freedom of the press.*

In United States v. Harmon, *federal district court judge John Philips upheld the congressional ban on the shipment of obscene material through the U.S. mails. A former congressman, the Missouri Democrat issued a widely cited opinion explaining why such laws were constitutional and how the obscenity test was to be applied. What test does Philips use to establish obscenity? How does he justify that test? Does he rely on distinctive Republican Era notions are his basic principles shared by contemporary opponents of obscenity?*

JUDGE PHILIPS

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The Constitutionality of the Act of Congress. It is . . . objected that the act of congress under which this indictment was founded is in contravention of the first amendment of the federal constitution, which declares that "congress shall make no law . . . abridging the freedom of speech or of the press." . . . . The constitutionality of the act in question has been affirmed by the court of last resort in the case of *Ex parte Jackson* (1878). It is true, the direct question there presented was as to that branch of the statute denying the use of mails to lottery circulars, etc.; but the opinion of the court proceeds on the theory that the

provision of the statute respecting lotteries is so closely allied to that declaring obscene literature non-mailable matter that it must rest upon the same general principle. . . . [I]t may as well be said here as elsewhere that it is a radical misconception of the scope of the constitutional protection to indulge the belief that a person may print and publish, *ad libitum*, any matter, whatever the substance or language, without accountability to law. Liberty in all its forms and assertions in this country is regulated by law. It is not an unbridled license. Where vituperation or licentiousness begins, the liberty of the press ends. . . . While happily we have outlived the epoch of censors and licensors of the press, to whom the publisher must submit his matter in advance, responsibility yet attaches to him when he transcends the boundary line where he outrages the common sense of decency, or endangers the public safety. . . .

In a government of law the law-making power must be recognized as the proper authority to define the boundary line between license and licentiousness, and it must likewise remain the province of the jury—the constitutional triers of the fact—to determine when that boundary line has been crossed.

The Test of Obscenity, etc. The language of the statute is as follows:

> "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent, character, . . . are hereby declared to be non-mailable matter, and shall not be conveyed in the mails. . . ."

The statute does not undertake to define the meaning of the terms "obscene," etc., further than be implied by the succeeding phrase, "or other publication of an indecent character." On the well-recognized canon of construction these words are presumed to have been employed by the law-maker in their ordinary acceptance and use. As they cannot be said to have acquired any technical significance . . ., but are terms of popular use, the court might perhaps with propriety leave their import to the presumed intelligence of the jury. A standard dictionary says that "obscene" mean "offensive to chastity and decency; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be expressed." This mere dictionary definition may be extended or amplified by the courts in actual practice . . . Chief Justice Cockburn in *Rex v. Hicklin* (1868), said: "The test of obscenity is this: Where the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall"; and where "it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of the most impure and libidinous character." . . .

Laws of this character are made for society in the aggregate, and not in particular. So, while there are individuals and societies of men and women of peculiar notions and idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, what is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made of men and women, young boys and girls,—the family, which is the common nursery of mankind, the foundation rock upon which the state reposes? . . . Who is to deem, who is to judge, whether a given publication impinges upon the general sense of decency? . . . The answer to this is, that asserted violations of this statute, like other criminal statutes, must be left to the final arbiter under our system of government,—the courts. The jury, the legally constituted triers of the fact under the constitution, is to pass upon the question of fact. Under our institutions of government the panel of 12 are assumed to be the best and truest exponents of the public judgment of the common sense. . . .

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