ENGL 114: Censorship and the Arts
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By submitting this essay, I attest that it is my own work, completed in accordance with University regulations. — River Sell

Commonwealth v. Sharpless and the Invention of American Obscenity

by River Sell ’25

> The distinction between liberty and licentiousness is still a repetition of the Protean doctrine of implication, which is ever ready to work its ends by varying its shape… this doctrine turns loose upon us the utmost invention of insatiable malice and ambition, which, in all ages, have debauched morals, depressed liberty, shackled religion, supported despotism, and deluged the scaffold with blood.
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> —James Madison, January 23, 1799[1]

> And suddenly there came a sound from heaven as of a rushing mighty wind, and it filled all the house where they were sitting.
>
> —Acts 2:2 KJV

Modern jurisprudence takes for granted that sexual obscenity is an exception to the freedom of speech. Per the Supreme Court, it was “outside the protection intended for speech,” “categorically… unprotected,” and “excluded from the constitutional protection”: illegal at the Constitution’s adoption, obscenity can be “proscribed consistent with the First Amendment.”[2] Contrary to this misguided and often dogmatic assumption, obscenity in its modern sense was

[1] Kurland, Philip B., and Ralph Lerner, eds. 1987. *The Founders’ Constitution*. Document 21. Chicago: University of Chicago Press. https://press-pubs.uchicago.edu/founders/documents/amendI_speechs21.html.
[2] Roth v. United States, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973); Jacobellis v. Ohio, 378 U.S. 184; Alexander v. United States, 509 U.S. 544 (1993).

not a crime when the Constitution was ratified. Censoring indecency was of little concern to the framers. Most sexual material was not regulated in 1788.[3] There were no colonial prosecutions; English cases were rare. Obscenity was only criminal insofar as it expressed religious or political dissent, affiliated with–or a pretext for–the protection of the Christian state against sacrilege and sedition. This doctrine could not have survived the Constitution's provisions, and no such reconciliation was desired. The "product of a robust, not a prudish age," the Constitution guarded the very liberties obscenity law endangers.[4] Obscenity had *no* place in American law until the first prosecution, *Commonwealth v. Sharpless* (1815).

On March 1, 1815, Jesse Sharpless and five other "evil disposed persons" were indicted for their exhibition of a painting depicting a man and woman in an "impudent" posture.[5] Convicted in a lower court, Sharpless appealed. Citing no American statute, the Supreme Court of Pennsylvania would affirm the conviction and condemn the defendants' raising of "lustful desires" in Philadelphia's youth.[6] The court ruled all sexual obscenity–public or private–criminal at common law and the expression itself a "breach of the peace."[7] Obscenity's religious origins and its lack of American enforcement went unmentioned. The defense counsel diagnosed the case as prosecuting a non-existent crime. While the defendants might be convicted for their "private act of lewdness" in Anglican Britain's "spiritual courts," they deserved no more in secular America than the "frowns of society."[8] The common law, the defense argued, offered only unconstitutional religious censorship, not precedent censoring all obscenity. In this essay, I will examine the case's legal and social environment and the court's claims, ultimately

[3] Robbins, H. Franklin, Jr., and Steven G. Mason, "The Law of Obscenity–or Absurdity?" *St. Thomas Law Review* 15, no. 3 (Spring 2003): 521; Alpert, Leo M., "Judicial Censorship of Obscene Literature," *Harvard Law Review* 52, no. 1 (November 1938): 47.
[4] United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973) at 132.
[5] Commonwealth v. Sharpless, 2 Serg. & R. 91 (1815).
[6] *Commonwealth*, 2 Serg. & R. 91
[7] *Commonwealth*, 2 Serg. & R. 91
[8] *Commonwealth*, 2 Serg. & R. 91

concluding that the defense was correct. Sharpless' painting, however sexually explicit, could not have been an American crime. *Commonwealth* introduced an obscenity doctrine alien to Constitution and common law both: *all* sexual expression was criminalized. Decided amid the Second Great Awakening's religious revival and answering its cries of moral decline, the case brought obscenity law into secular America. Depending on but transfiguring the English law the Revolution rebuked, *Commonwealth* inaugurated American obscenity. Its ruling has since crystallized into legal fact. Understanding the case's context is vital to understanding–and critiquing–modern obscenity jurisprudence.

Commonwealth's Legal Environment: Anglo-American Obscenity Law Before 1815

To comprehend *Commonwealth*'s decision, we must understand the legal idea of obscenity by the Constitution's adoption. English obscenity law by 1788 was a little-used doctrine aimed at preserving religious order. Sexual speech, widespread in 18th century England and America, was only censored when antireligious. The era's licentiousness did not concern the founders; the liberty of pornography was a fact of Atlantic life. When *Commonwealth* claims a long Anglo-American history of censoring "indecent books," it conflates blasphemous speech with solely sexual material.[9] The latter was never regulated independently before 1815.

Commonwealth depends on English cases to criminalize sexual obscenity. Modern cases usually follow suit in recounting early obscenity law, but "[t]o assume that English common law in this field became ours" is to forget that one of the Revolution's objects was "to get rid of the English common law on liberty of speech."[10] An aspect of English law often ignored by modern courts–not to mention *Commonwealth*–is its overtly Christian identity. The "law of God" was the

[9] *Commonwealth*, 2 Serg. & R. 91
[10] *United States v. 12 200-Ft. Reels of Film*, 413 U.S. at 135.

"law of England."[11] Though some early colonial law was religious, especially in Puritan settlements like Massachusetts, the Constitution outlawed religious establishment in its departure from a Christian legal system. English common law's provisions cannot be pressed into American law without issue and obscenity cannot be extricated from this provenance or its ties to early blasphemy law. *Taylor's Case* (1676), cited in later English obscenity rulings, made this Christian affiliation clear. Taylor had blasphemed Christ as a "whoremaster" and "bastard," leading to his conviction before the King's Bench.[12] Though the court admitted his statements were of "ecclesiastical cognizance," the common law could punish them, for the "'Christian religion [was] part of the law itself.'"[13] To reproach Christianity was to subvert the law.

Like blasphemy, obscenity was originally in the ecclesiastical jurisdiction and "simply not criminal."[14] Early cases were only litigated in religious courts.[15] *Queen v. Read* (1707) was the first temporal prosecution, indicting one James Read for his erotic poem "The Fifteen Plagues of a Maidenhead."[16] The court ruled it had no jurisdiction: the poem, which detailed a maiden's sexual frustrations, was "bawdy stuff" but obscene literature was "punishable only in the Spiritual Court."[17] Twenty years later, *Rex v. Curll* (1728) incorporated obscenity into the temporal jurisdiction–but obscenity retained its religious identity. Edmund Curll had blasphemed Christianity with several indecent books, including "Venus in the Cloister." Citing the common law's Christian nature, the King's Bench fined Curll for his "offense against the peace, in tending

[11] Banner, Stuart, "When Christianity was Part of the Common Law," *Law and History Review* 16, no. 1 (Spring 1998): 29-31.
[12] Taylor's Case, 1676.
[13] Levy, Leonard W., *Blasphemy*. (New York: Random House, 1993), 305.
[14] Levy, *Blasphemy*, 305.
[15] Alschuler, Martha L. "The Origins of Obscenity Law," *Technical Report of the Commission on Obscenity*, Vol. 2 (1970): 68.
[16] Queen v. Read, 92 Eng. Rep. 777 (1708). Although Sedley's Case, 1 Keble 620 (1663) is occasionally cited as the first obscenity case, its defendant was charged for physical conduct and not obscene expression. It usually is not described as creating the crime of obscenity. The case is recounted in detail later and in Alpert, "Judicial Censorship," 41-43.
[17] Stone, Geoffrey R. *Sex and the Constitution.* (New York: Liveright Publishing, 2017), 59-60

to weaken the bonds of civil society, virtue and morality."[18] Some scholars cite *Rex* as criminalizing sexual obscenity sans religious offense, thus establishing modern, secular obscenity law.[19] The court's opinion leaves the opposite impression: "religion [was] part of the common law… and therefore whatever is an offense against that" was a crime.[20] Curll's book destroyed this "peace of government" by corrupting Christian morals.[21] Moreover, the conviction was made possible by King George II's removal of a wavering judge–Curll had published writings antagonizing the House of Hanover.[22] Hardly clear precedent for the censorship of all "obscene" expression–for an exception to the freedom of speech!–*Rex* limited its ruling to antireligious material and was partially a political decision. Though I grant *Rex* made obscenity a common-law crime, where not antireligious, obscenity was not criminal. For instance, a woman running nude was acquitted in 1773 on the basis that immodesty was no crime unless it occurred in church.[23] Contrary to assumptions of old-world prudishness, the Constitution was ratified in an age in some ways more permissive of sexual expression than our own. *Exclusively* works "discrediting the official religion" were held obscene in the 18th century.[24] Obscenity's religious nature is best evidenced by the proliferation of sexual material in the Anglo-American world despite these precedents. 18th-century England and America saw widespread access to pornography; stores in America housed an "amazing variety of erotica."[25] Prosecutions on both

[18] Stone, *Sex and the Constitution*, 61.
[19] Schauer, Frederick F. *The Law of Obscenity*. (Washington D.C.: Bureau of National Affairs, 1976), 6; Brenner, Susan W. "Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?" *Albany Law Journal of Science and Technology* 13, no. 2 (2003): 137; Robertson, Geoffrey. *Obscenity: an Account of Censorship Laws and their Enforcement in England and Wales*. (London: Weidenfeld & Nicolson, 1979), 23; Tribe, Laurence. *American Constitutional Law* (New York: Foundation, 2000), 657.
[20] Alschuler, "The Origins," 69.
[21] De Grazia, Edward. *Censorship Landmarks*. (New York: Bowker, 1969), 3.
[22] Reynolds, Richard R. "Our Misplaced Reliance on Early Obscenity Cases," *American Bar Association Journal*, 61, no. 2 (February 1975).
[23] Rex v. Gallard, 25 Eng. Rep. 547 (1773).
[24] Alschuler, "The Origins," 69; Robertson, *Obscenity: an Account of Censorship Laws*, 22-25.
[25] Wagner, Peter. *Eros Revived: Erotica of the Enlightenment in England and America.* (London: Secker & Warburg, 1988), 8; Stone, *Sex and the Constitution*, 61-62, 83.

sides of the Atlantic were extremely rare, if not nonexistent.[26] The common law was silent, even amid this deluge of lurid expression. This *total* void of case law cannot be dismissed as mere lax enforcement. The only way the aforementioned English precedents can be "harmonized" with this spread of material is that obscenity was only criminal when it discredited religion–or involved political dissent, which we will turn to next.[27] The sexually obscene was part of the liberty of speech, not excluded from it as *Commonwealth* contends. Obscenity law mainly existed by the Constitution's adoption as a tool regulating antireligious speech. The First Amendment thus protected the very expression obscenity law proscribed.

Furthermore, English obscenity law was often wielded as a pretext for political persecution. In *Rex v. Wilkes* (1770), the Tory government prosecuted John Wilkes, a whig and "consistent [supporter]" of the American cause for his poem profaning "many parts of the Holy Scriptures."[28] One commentator calls the case "radically unsound in law," deeming obscenity an excuse for Wilkes' political prosecution.[29] Cases like *Wilkes* were the kind of English actions the Revolution reacted against.[30] Among the other works censored as obscene were Trenchard and Gordon's *Cato's Letters*, the "most esteemed source" of revolutionary and republican sentiment for Americans.[31] Works by Thomas Paine were censored for impiety. Revolutionaries disdained this use of obscenity law. A 1769 letter of James Madison's described the need for the "Deliverance of John Wilkes from Persecution and Banishment."[32] The Boston Sons of Liberty

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[26] De Grazia, *Censorship Landmarks*; Robertson, *Obscenity: an Account of Censorship Laws*, 22-25; Stone, Lawrence. The *Family, Sex and Marriage in England, 1500-1800*. (New York: Harper & Row, 1977), 539.
[27] Schroeder, Theodore L. "Obscene Literature at Common Law," *Albany Law Journal* 69 (May 1907): 147.
[28] State v. Henry, 302 Or. 510 (1987); Maier, Pauline. "John Wilkes and American Disillusionment with Britain," *The William and Mary Quarterly* 20, no. 3 (July 1963), 374.
[29] Alpert, "Judicial Censorship," 47; Horowitz, Helen L. *Rereading Sex: Battles Over Sexual Knowledge and Suppression in Nineteenth-Century America*. (New York: Alfred A. Knopf, 2002), 38.
[30] Chafee, Zechariah, Jr. *Freedom of Speech*. (New York: Harcourt, Brace and Howe, 1920), 295; Maier, "John Wilkes"; Sainsbury, John. *John Wilkes: The Lives of a Libertine* (London: Routledge, 2016), 2.
[31] Levy, *Blasphemy*, 330.
[32] Madison, James. Letter from James Madison to Reverend Thoma Martin, August 10, 1769, in *Madison Papers*, National Archives, https://founders.archives.gov/documents/Madison/01-01-02-0004.

the same year compared Wilkes' "sufferings" to their own "wretched state" under British rule.[33] Wilkes, among the "foremost" friends of the Americans, was a correspondent with several founding fathers.[34] One scholar describes colonial disillusionment as "closely [following]... the Wilkes affair."[35] Far from demonstrating obscenity law's constitutionality, *Wilkes*, if anything, proves the opposite. Nonetheless, the case was one of the bases for *Commonwealth*'s decision, a fact that should draw increased critical attention. If *Wilkes* was instrumental in *Commonwealth*'s formulation of obscenity law, then this doctrine too should be reexamined. Obscenity law was equated with oppression and the hopelessness of working within the "arbitrariness of the King's government."[36] The doctrine was a political and religious mace, not a proscribed category of speech. Our survey of *Commonwealth*'s English precedent finds nothing approaching the censorship of all sexual indecency. Obscenity law was bound to the rule the Revolution rejected; it could not have survived the Constitution that Revolution produced.

But what of obscenity in colonial America? Prosecutions were nonexistent. Most scholars "[do] not so much as allude to punishment of obscenity" in discussions of early American law.[37] This is no mark of lazy scholarship. There was no legal development of obscenity in the United States predating the Constitution. Only one state had "any statutory law on the subject."[38] Puritan Massachusetts, along with punishing blasphemy with death and censoring all writings "disagreeing with the Puritan view of the universe" passed a 1711 statute banning "filthy and obscene" expression.[39] No cases ever occurred under this law, which treated obscenity as

[33] Committee of the Boston Sons of Liberty. Letter from the Boston Sons of Liberty to John Wilkes, November 4, 1769, National Archives. https://founders.archives.gov/documents/Adams/06-01-02-0078.
[34] Sainsbury, John. *John Wilkes: The Lives of a Libertine* (London: Routledge, 2016), 2.
[35] Maier, "John Wilkes," 374.
[36] Maier, "John Wilkes," 373.
[37] *United States v. 12 200-Ft. Reels of Film,* 413 U.S. at 134; De Grazia, *Censorship Landmarks*; Brenner,. "Complicit Publication," 138; Stone, *Sex and the Constitution*; Tribe, *American Constitutional Law*, 657.
[38] *State v. Henry*, 302 Or. 510.
[39] Schauer, *The Law of Obscenity*, 8; Alschuler, "The Origins," 69.

sacrilege and had an overtly religious aim. Contra *Commonwealth*, sexual obscenity was never an enforced colonial crime. Religious control like Massachusetts' would eventually be outlawed by the establishment clause. As colonies turned away from moral regulation and embraced personal liberty, the Revolution spurred a "serious decline" for American Christianity, establishing an explicitly secular republic.[40] From 1776 to the Bill of Rights' ratification, no significant figure publicly called America a "Christian nation."[41] Sexual obscenity was not an American concern. The idea that early Americans saw obscenity as an "implicit" exception to the freedom of speech is a legal fiction. If the framers wanted to proscribe the pornography pervading American shelves from Boston to Augusta, they would have made themselves clear. *Commonwealth* was the nation's very first prosecution of sexual speech.

Surveying obscenity law as it existed by the Constitution's adoption, we locate a legal tool used for political and religious repression. Most sexual expression was unregulated, and obscenity law punished precisely the speech the Constitution affirmed as righteous. Courts like *Commonwealth*'s err when they reference the English cases as creating an American offense of obscenity. William Blackstone, an influential English legal scholar wrote in his 1770 *Commentaries* that obscenity was that "injurious to God and His holy religion," illegal *because* "Christianity is a part of the common law."[42] Blackstone's words show the impossibility of reconciling obscenity with the Constitution, which placed a wall of separation between religion and the "public business of the nation."[43] Modern obscenity is nowhere to be found by 1788– implicit in the Constitution or outside of it. Obscenity, the vestige of a dead and religious legal

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[40] Stone, *Sex and the Constitution*, 80; Stone, Geoffrey R. "The World of the Framers: A Christian Nation?" *UCLA Law Review* 56, no. 1 (Fall 2008): 4; Lambert, Frank. *The Founding Fathers and the Place of Religion in America* (Princeton: Princeton University Press, 2008), 2-3.
[41] Butler, Jon. "Why Revolutionary America Wasn't a 'Christian Nation,'" in Hutson, *Religion and the New Republic*, 196.
[42] Blackstone, William R. *Commentaries on the Laws of England*. Avalon Project, Yale Law School. https://avalon.law.yale.edu/18th_century/blackstone_bk4ch4.asp; Banner, "When Christianity," 29-31.
[43] Meacham, Jon. *American Gospel* (New York: Random House, 2007), 24.

era, should have encountered insuperable constitutional obstacles to American enforcement. Obscenity as *Commonwealth* defined it was an invention: the implanting of a religious exception into a secular nation's freedom of speech.

With our conclusions that the Revolution rejected the speech control obscenity law exemplified and that sexual material was mostly unregulated in the 18th century, we are left with a mystery. How did *Commonwealth* arise in this legal environment? And how was this religious concept squared with American law? I will next examine the case's context and obscenity law's development in the Second Great Awakening–a revival reacting to an America perceived as sinful and dangerously secular.

***Commonwealth*'s Historical Context: Obscenity Law in the Second Great Awakening**

Commonwealth was decided in 1815 amid the Second Great Awakening, a period of Christian zeal marking a religious turn from the secular Revolutionary era. Envisioning church and state as united in moral purpose, the Awakening moved sexual speech into a legal concern. The *liberty* of sexual expression, no colonial crime, became a moral offense against a "Christian people."[44] It is no historical accident that obscenity was brought into American law during one of America's religious revivals. Relative to previous revivals, the Awakening had a "unity, an intentionality, and a sheer size that set it apart."[45] "Through mass politics and outright coercion," the movement aimed to institute Christian dominion over America's "hopelessly Godless multitude"; one evangelist called it the "greatest revival… that the world has ever seen."[46] A faith group reported that the "blasphemies of Paine" were "remembered only to be abhorred."[47] In a phrase alien to the Revolutionary generation, the United States began to be described as a

[44] People v. Ruggles, 8 Johns. 290 (1811).
[45] Johnson, Paul E. *A Shopkeeper's Millennium*. (New York: Hill & Wang, 2004), 4.
[46] Johnson, *A Shopkeeper's Millennium*, 6-7.
[47] Murray, Iain H. *Revival and Revivalism* (Edinburgh: Banner of Truth Trust, 1994), 116.

"Christian nation"; the mass movement was resolved that a "national morality [could not] prevail in exclusion of religious principles."[48] The advent of obscenity law was part of this movement to morally order America.[49] America would be baptized into the "greatest example" of a Christian nation, and a war would be waged against sexual speech, "moral crimes," and the flesh's sins.[50] At the revival's heart was the idea the American government should promulgate Christian morality: sexual speech and blasphemy were primary concerns, and cases like *Commonwealth* were vital to this project.[51]

Like obscenity law, English blasphemy law should have met insurmountable Constitutional barriers to American enforcement. Like obscenity law, it nonetheless overcame Constitutional objection: several people were convicted during the Second Great Awakening of the charge. *People v. Ruggles* (1811) was the first reported case. John Ruggles had called Christ a "bastard" in a crowded tavern; he was convicted in a lower court and lost on appeal.[52] Citing English authorities deeming the law Christian, the appeals court called Americans a Christian people in need of "moral discipline."[53] The English censorship of Thomas Paine's *Age of Reason* was cited as precedent–the political persecution of an American revolutionary evidenced the "root of Christianity" in law.[54] No American precedent was referenced. As in *Commonwealth*, the idea that the law should advance Christian morality was integral to the case's logic. Chief Justice William Tilghman–who decided *Commonwealth*–would later join a decision convicting a

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[48] Abzug, Robert H. *Cosmos Crumbling*. (Oxford: Oxford University Press, 1994), 41; Stone, *Sex and the Constitution*, 132; Butler, "Why Revolutionary America," 196; Stone, *Sex and the Constitution*, 80; Stone, "The World of the Framers," 4.
[49] Ahlstrom, *A Religious History*, 432; Johnson, *A Shopkeeper's Millennium*, 8; Murray, *Revival*; West, John G., Jr. *The Politics of Revelation and Reason* (Lawrence: University Press of Kansas, 1996), 119-121.
[50] Howe, Daniel. *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford: Oxford Univesrsity Press, 2007), 286; Stone, *Sex and the Constitution*, 146; Horowitz, *Rereading Sex*, 5-6; Abzug, *Cosmos*, 41.
[51] Stone, *Sex and the Constitution*, 146.
[52] Levy, *Blasphemy*, 400, 402.
[53] *People v. Ruggles*, 8 Johns. 290
[54] *People v. Ruggles*, 8 Johns. 290

man of blasphemy in *Updegraph v. Commonwealth* (1824), calling America a "Christian land."[55] The decision depicted *Commonwealth v. Sharpless* as upholding Christian morals, cited as precedent that it was criminal to vilify the "religion of the country."[56] *Commonwealth* was not just shaped by its religious environment. It was explicitly designated by jurists as part of a body of law upholding Christian morality. Some framers reacted with horror to the idea the law was Christian. Jefferson was appalled at the idea American law was a moral tool, calling it a "conspiracy… between Church and State" and a "forgery" in 1824.[57] John Adams lamented the cases as "great obstructions" to free inquiry and a Constitutional "embarrassment."[58] Today we look dimly upon the idea that blasphemy law could survive the establishment clause. Obscenity–bound to blasphemy legally and historically–should be reconsidered in a similar light.

A broad "moral campaign" was undertaken by evangelicals protesting spiritual decay; reformers devised "ways and means of suppressing vice and guarding the public morals."[59] *Commonwealth* embodied the Awakening, which formulated the idea of America as Christian and that idea's implications. Obscenity law endorses in spirit–and certainly in its citation of English cases–the idea that the common law is Christian. *Commonwealth*'s occurrence in 1815 is not incidental; its chief justice later convicting a blasphemer is no coincidence. Amid the Awakening's use of law as a moral tool, Sharpless' immoral exhibition of a lewd painting was prosecuted. *Commonwealth*'s result was made possible by its religious historical context–a departure from the Revolution's secular legal sentiment–and its English precedent. In this environment, answering threats to religious morality, *Commonwealth* made obscenity American.

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[55] Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (1824).
[56] *Updegraph*, 11 Serg. & Rawle 394
[57] Jefferson, Thomas. Letter from Thomas Jefferson to John Cartwright, June 5, 1824, in *Jefferson Papers*, National Archives, https://founders.archives.gov/documents/Jefferson/98-01-02-4313.
[58] Adams, John. Letter from John Adams to Thomas Jefferson, January 23, 1825, in *Adams Papers*, National Archives, https://founders.archives.gov/documents/Adams/99-02-02-7940.
[59] Stone, *Sex and the Constitution,* 136.

Commonwealth v. Sharpless Decided

Jurists often allude to *Commonwealth* as an early case in a larger body of obscenity case law, implying an older American provenance. On the contrary, *Commonwealth* was not *an* early American case. It was *the* early case—the first affirmation of obscenity law at an American bench. Dependent on English common law, *Commonwealth* cited no American precedent. As American obscenity's legal taproot, we should more closely inspect the case's reasoning than modern jurisprudence so far has. We should examine its decision as the moment of creation it was. As I hope to have shown, the case is closely linked to its legal and historical context–a context making clear *Commonwealth*'s ruling cannot be squared with the Constitution.

Indicted in March of 1815 in Philadelphia, Jesse Sharpless and five others were convicted for their exhibition of a "wicked painting" and their contriving to "debauch and corrupt" young Pennsylvanians.[60] They appealed to the Pennsylvania Supreme Court. Displayed privately to paying clients, their "infamous" picture represented a man in an "indecent posture" with a woman.[61] The appellate decision does not describe the painting in any detail, because the "records of the Court" were not to be "polluted by… indecent language."[62] Presumably the painting's infamy had reached the ears of the jury, who were also not shown the painting. The indictment cited no statute, since Pennsylvania, like most states, had no obscenity law.[63] The defense argued on appeal that they had committed a private, non-indictable act. Though in England they might be "proper objects" for the "animadversion of the spiritual Courts," in secular America their behavior "must go unpunished."[64] The common law, after all, had no precedent censoring *solely* sexual obscenity. The defendants merely committed a private "act of

[60] *Commonwealth*, 2 Serg. & R. 91.
[61] *Commonwealth*, 2 Serg. & R. 91.
[62] *Commonwealth*, 2 Serg. & R. 91.
[63] Stone, *Sex and the Constitution*, 146.
[64] *Commonwealth*, 2 Serg. & R. 91.

lewdness," not a public disturbance of "injurious public tendency" the state could criminalize.[65] Though indecent, the exhibition was not public; private immoralities were not criminal in secular America. The defense correctly identified *Commonwealth* as prosecuting an invented crime.

The court sustained the conviction. Chief Justice Tilghman made the ruling on the basis of *Sedley's Case* (1663), a decision described by most scholars as distinguishable from attempts to "control literary obscenity."[66] Charles Sedley had "shewn himself naked," assaulted a crowd with thrown bottles of a "foul liquor," and blasphemed at length–starting thereby a "minor riot."[67] He was convicted *not* for his obscene appearance, but for his riotous public disturbance, "*contra pacem* and to the scandal of government."[68] *Queen v. Read* described the case's criminal element as Sedley's "throwing out bottles," not his obscenity.[69] Sedley's actions were criminal insofar as they breached the peace; obscenity was criminal if it offended religion or government.

Commonwealth's decision melded the antireligious speech obscenity law criminalized with the public disturbance *Sedley* criminalized. In so doing, it disfigured the common law and invented an obscenity doctrine *prima facie* compatible with the Constitution. The court claimed *Rex v. Curll* cited Sedley's nakedness alone as criminal, misunderstanding both cases. *Rex*'s censorship was predicated on the idea that "Christianity [was] part of the law"–antireligious tendency, *not* mere sexuality, made speech obscene.[70] Early drafts of *Rex* even "distinguished *Sedley* as involving a use of force."[71] The court, though, interpreted *Rex*–on the basis of *Sedley*–

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[65] *Commonwealth*, 2 Serg. & R. 91.
[66] Schauer, *The Law of Obscenity*, 4; Alpert, "Judicial Censorship," 43; Alschuler, "The Origins," 67; Stone, "Origins of Obscenity," 720; Robertson, *Obscenity: an Account of Censorship Laws*, 21-22; Reynolds, "Our Misplaced Reliance"; Manchester, Colin, "A History of the Crime of Obscene Libel," *The Journal of Legal History* 12, no. 1 (May 1991): 37
[67] Alpert, "Judicial Censorship," 42.
[68] *Sedley's Case*, 1 Keble 620; Stone, Geoffrey R. "Origins of Obscenity," *New York University Review of Law and Social Change* 31 (2006), 720; Franklin and Mason, "The Law of Obscenity," 521.
[69] *Queen v. Read*, 92 Eng. Rep. 777.
[70] Rex v. Curll, 2 Stra. 788 (1727); Schroeder, "Obscene Literature," 147.
[71] Reynolds, "Our Misplaced Reliance," 221.

as criminalizing all speech "tend[ing] to corrupt society."[72] *All* sexual speech, private or public, was criminal. The English cases' religious spirit and the diffusion of 18th-century sexual material despite *Rex* were ignored. The painting was "destructive of morality in general."[73] The term "breach of the peace"–typically reserved for physical disturbances like Sedley's–was recast for obscene expression itself.[74]

Thus, in a perversion of precedent, American obscenity was born, and the liberty of sexual speech became criminal. Unable to cite religion yet threatened by speech questioning Christian morality, *Commonwealth* refit obscenity law for America. The court's English precedent–and contemporary religious pressure–forced it into legal ingenuity. Though outwardly secular, the decision embodied earlier cases' religious spirit. Courts were described as "guardians" or "schools of morals" protecting America from "impious" obscenity.[75] *Rex v. Wilkes* was cited as evidence of obscenity's criminality. Wilkes, of course, was a supporter of the American cause whose obscenity charge was a mere pretext. America's first obscenity conviction cited political and religious persecution as precedent. If sexual speech was indeed illegal at the founding–an "implicit" exception to a fundamental liberty–one would expect *Commonwealth* to cite an array of unambiguous, secular precedent instead of resorting to flawed cases like *Wilkes* or *Rex v. Curll*. *Commonwealth*'s precedents alone demonstrate the incorrectness of its decision.

Commonwealth's definition of obscenity–all sexual expression–was not a common law crime. Secularizing obscenity, *Commonwealth* attempted to control "spiritual deterioration" while surviving Constitutional scrutiny.[76] Unable to square religious precedent with secular American law, *Commonwealth* misinterpreted English cases and neglected to examine the

[72] *Commonwealth*, 2 Serg. & R. 91.
[73] *Commonwealth*, 2 Serg. & R. 91
[74] *Commonwealth*, 2 Serg. & R. 91.
[75] *Commonwealth*, 2 Serg. & R. 91.
[76] Benjamin Rush. Letter from Benjamin Rush to Noah Webster, July 20, 1798, in Butterfield, *Letters of Benjamin Rush Volume II* (Princeton: Princeton University Press, 2019), 799.

Constitutional obstacles to their American enforcement. It thereby claimed a non-existent Anglo-American history of censoring all "indecent books." Modern courts have been eager to accept this narrative without scrutinizing its assertions. *Commonwealth*'s obscenity doctrine is fundamentally an invention, standing today as the foundation of modern obscenity law. Even as it joined the Awakening's moral war, the ruling shrouded obscenity's religious provenance in its pursuit of an expedient method of censorship. Obscenity law is chained to this doctrine of errors and *Commonwealth*'s "distinction of liberty and licentiousness."[77] The moral anguish *Commonwealth* answered required solutions the Constitution proscribed. Far from affirming Revolutionary ideas, *Commonwealth* distorted them, Americanizing the distinctly un-American– inventing modern obscenity law.

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