



Contesting Obscenity

Book Challengers and Criminalizing Literature

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Book challenges have long been a regular part of library and school operations. “Book challenges are requests by members of the public to remove, relocate, or restrict books from or within institutions” (Knox 2015, 3). At base, the book challenger sees some information contained in a book as dangerous and seeks to make it harder to access. In recent years book challenges have exploded in frequency, escalating rapidly in 2021. This was driven increasingly by national conservative activist groups attempting to purge what they perceived as dangerous information from the public sphere.

In one illustrative example, Representative Matt Krause, Texas House Chair of the Committee on General Investigations, sent a list of 850 books to Texas school districts demanding that they inform the committee of how many of the titles they had and how much money was spent on them.¹ An analysis of the list found that 62% were LGBTQ inclusive with the other major categories being sex education (14%) and representations of race (8%) (Ellis 2021). As Ellis concluded, it seems that someone simply did broad searches for any mention of LGBTQ, race, or sex education and threw them in a list of potentially dangerous titles. The goal appeared to have been a warning to school districts and this list pushed at least two school districts to remove hundreds of books for an investigation with unclear rules or policy guidelines (Crum 2022; Cruz 2022).

PEN America’s *Banned in the USA* (2022) report attempted to present a broad picture of the number of books

banned in schools. This is often quite difficult because book challenges occur at the lowest level of government and rarely generate public attention. The American Library Association’s Office of Intellectual Freedom (2022) suggests that 82-97% of book challenges are likely never reported anywhere. PEN America’s report sought to utilize both self-reports of bans as well as media reports from July 1, 2021, to March 31, 2022. This 9-month period found 1,145 titles banned in 1,586 incidents across the country. As this still only involved 86 school districts in 26 states, it is likely an undercount. In terms of content, the report found that 41% had protagonists or prominent characters of color, 22% addressed issues of race and/or racism, and 33% had LGBTQ characters. Where once book challenges were episodic and ad hoc, “book bans have become a favorite tool for state-wide and national political mobilization” such as through Moms for Liberty, No Left Turn in Education, and Parents Defending Education groups curating lists of dangerous books to disseminate to their members (PEN America 2022).

1. Krause Letter to Texas Education Agency, 25 October 2021.



Finally, and key for this article, is “the focus on alleged obscenity in books” in this wave of book controversies (PEN America 2022). The recent wave of book challenges has attempted to resurrect the notion of obscenity in print to bring the criminal, punitive system to bear on schools and/or libraries that will not remove material. This article explores this development first by engaging with a brief history of the development of obscenity law with concern for books in particular. Then I turn to the ways in which book challengers have often deployed notions of obscenity, pornography, and/or indecency to criticize the institutional possession of some books. Finally, I examine some of the attempts to deploy the criminal process in recent years. Obscenity crusaders are leading a movement that challenges the basic definition of obscenity itself and seeks to return to an earlier era of criminalized literature. While this resurrection of older obscenity law is unlikely, the very attempt to engage the criminal process is likely to bring a chilling effect to school libraries.

Obscenity and Books

Books have a long and messy history with obscenity law which in turn has a complicated history with notions of pornography. As Whitney Strub (2010, 4) described, “obscenity denotes a legal term” where pornography “merely refers to anything deemed pornographic by a given authority at a given moment.” Pornography is “a discursive site onto which varied social tensions are mapped out” (Strub 2010, 3). For much of American history, obscenity and pornography were treated as deeply connected precisely because relevant actors saw anything that constituted porn, to them, must also be legally obscene and thus subject to punishment (Boyer 2002; Werbel 2018). After World War II battles against obscenity and porn were one means of strengthening and normalizing the (straight) nuclear family (Strub 2010, 13). Police, politicians, and prosecutors engaged in this moral panic through obscenity charges as a means of removing dangerous literature from the community. Courts struggled with how to review these obscenity charges.

The Massachusetts Supreme Judicial Court is illustrative of this struggle. In 1945, it declared its duty to “enforce the public policy of the Commonwealth . . . whatever our own personal opinions may be.”² The court warned that the “fundamental right of the public to read is not to be trimmed down to the point where a few prurient persons can find nothing upon which their hypersensitive imaginations may dwell” but that criminal punishment is warranted if selling a book if it “adversely affects a substantial proportion of its readers may well be found to lower appreciably

the average moral tone of the mass in the respects hereinbefore described and to fall within the intended prohibition.”³ It is hard to take this claim that their personal opinions did not influence the outcome of cases seriously. *Strange Fruit* by Lillian Smith (1944) was obscene because of four scenes of sexual intercourse and other unspecified distasteful material⁴ but *Forever Amber* by Kathleen Winsor (1944) was not obscene even though it had numerous “sexual episodes” because “in the opinion of the majority of the court . . . it undoubtably has historical purpose, and in this is adequately accurate in achievement.”⁵ *Serenade* by James M. Cain (1937) was not obscene despite having “several sexual episodes” because they were not portrayed in a depraved or corrupting manner⁶ but Erksine Caldwell’s *God’s Little Acre* (1933) was obscene because it “abounds in sexual episodes and some are portrayed with an abundance of realistic detail.”⁷ The refusal to engage with what specifically differentiated the obscene from the protected literature left a strong impression that it was nothing more than the justices own personal opinions of the books in question.

The messiness of obscenity law exemplified by the Massachusetts cases contributed to a call for more concrete guidance on the issue. In *Roth v. United States*, the Supreme Court definitively stated that while obscenity is unprotected speech, “sex and obscenity are not synonymous.”⁸ This declaration helped to create space between the legal notion of obscenity and the popular understanding of pornography. *Roth* declared that the modern test for obscenity was “whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.”⁹ While the justices may have hoped to create a new era of coherent, objective obscenity law, it would spend the next 16 years divided over the various details of what made a work obscene or not (Powe 2000, 336-357). Lower courts were left without any real guidance about what obscenity meant, for books or anything else.

This doctrinal incoherence in the Supreme Court’s approach to *Roth* and obscenity left little clear rationale to lower courts in the determination of literary obscenity.

3. *Isenstadt*, 62 N.E.2d at 845.

4. *Isenstadt*, 62 N.E.2d at 846-47.

5. *Attorney General v. Book Named “Forever Amber,”* 81 N.E.2d 663, 666, 667 (Mass. 1948).

6. *Attorney General v. Book Named “Serenade,”* 94 N.E.2d 259, 260 (Mass. 1950).

7. *Attorney General v. Book Named “God’s Little Acre,”* 93 N.E.2d 819, 821 (Mass. 1950).

8. *Roth v. United States*, 354 U.S. 476, 487 (1957).

9. *Roth*, 354 U.S. at 489.

2. *Commonwealth v. Isenstadt*, 62 N.E.2d 840, 843 (Mass. 1945).



Often obscenity turned on little more than the tastes of the relevant judges. For example, a 4-3 majority of the New York Court of Appeals found Henry Miller's *Tropic of Cancer* (1961) obscene because it was "nothing more than a compilation of a series of sordid narrations dealing with sex in a manner designed to appeal to the prurient interest."¹⁰ While some experts might see value in *Tropic of Cancer*, to accept this as a defense "would permit the substitution of the opinions of authors and critics for those of the average person in the contemporary community."¹¹ In contrast, the Massachusetts Supreme Judicial Court, in its own 4-3 decision, found *Tropic of Cancer* not obscene precisely because of the literary value: "Much in modern art, literature, and music is likely to seem ugly and thoroughly objectionable to those who have different standards of taste."¹² Some courts tried to weigh a challenged book against those found to be protected by the Supreme Court. For example, the Pennsylvania Supreme Court held *Candy* by Maxwell Kenton (1958) not obscene largely because it seemed no different than pulp novels held by the Supreme Court to be protected.¹³

The Supreme Court attempted to settle the obscenity chaos in *Miller v. California* (1973). In a 5-4 opinion, the Court came to agreement on an obscenity standard by modifying some aspects of recent doctrine. Now obscenity would require three elements: "whether 'the average person, applying contemporary community standards, 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" defined by state law; and, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."¹⁴ This modification of *Roth* would also clarify that the relevant community standards were local in nature,¹⁵ though it would later declare that the serious value judgment must be that of a reasonable person.¹⁶ This local standards approach allowed obscenity law to vary based upon the supposed local values of each community but *Miller* also included language suggesting a more fundamental

limit to obscenity: under *Miller* "no one will be subject to prosecution for the sale or exposure of obscene materials, unless these materials depict or describe patently offensive 'hard core' sexual conduct."¹⁷

Two other issues merit mention. While *Miller* standardized the general obscenity test, the Court also recognizes the concept of variable obscenity. Briefly this means that states are allowed generally to punish obscenity as to minors even if the material would not be obscene for adults.¹⁸ States commonly punish obscene material in "harmful to minors" laws that utilize minors as the reference point for what is prurient, patently offensive, and has serious value. However, the *Miller* requirement that the dominant theme of the work as a whole is still preserved.¹⁹ Images of child sex abuse, commonly termed "child porn," are not protected and are punishable without reference to the obscenity standard.²⁰

While the Supreme Court refused to declare prose novels inherently outside of obscenity law in a companion case to *Miller*,²¹ the functional reality of this shift to concern for "hardcore porn" was to end the possibility of charging books as legally obscene. After all, prose novels by definition are not depictions of actual sex acts. Long gone were the days were James Joyce's *Ulysses* would be charged as a danger to the public (Birmingham 2015). Additionally, the market changed dramatically. In the 1970s, adult stores and theaters brought new forms of pornographic magazines and films to the market, later assisted by the home video revolution, and prosecutors and police simply had no real interest in pursuing smutty novels any longer as they were overwhelmed by the explosion of sexual expression in new media (Stone 2017, 296-312). Controversy over books did not disappear, of course, it simply shifted to the book challenge. The legal battles transitioned to a question of whether libraries and/or schools could remove books from their institutions simply because some elements of the community objected to them.²²

10. *People v. Fritch*, 192 N.E.2d 713, 716 (N.Y. 1963).

11. *Fritch*, 192 N.E.2d at 717.

12. *Attorney General v. Book Named "Tropic of Cancer,"* 184 N.E.2d 328, 334 (Mass. 1962).

13. *Commonwealth v. Dell Publications, Inc.*, 233 A.2d 840 (Pa. 1967). At 858 the Pennsylvania Court noted that "None of the published works involved in the *Redrup* related cases comes close to having achieved the national recognition affording 'Candy.' Indeed, to our knowledge, none of them were reviewed in any publication and none certainly appeared on any best seller lists" (citing *Redrup v. New York*, 386 U.S. 767 [1967]).

14. *Miller v. California*, 413 U.S. 15, 24 (1973).

15. *Miller*, 413 U.S. at 24.

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

17. *Miller*, 413 U.S. at 27.

18. *Ginsberg v. New York*, 390 U.S. 629 (1968).

19. See, e.g., Illinois Statutes Ch. 720, Sec.11-21(a); Texas Penal Code Sec. 43.24(a); Utah Code 76-10-1203(5).

20. *New York v. Ferber*, 458 U.S. 747 (1982). See also, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding that part of the Child Pornography Prevention Act of 1996 was unconstitutional where it targeted images of adults made to appear younger since there was no actual abuse of a child involved.)

21. *Kaplan v. California*, 413 U.S. 115 (1973).

22. This culminated in *Board of Education v. Pico*, 457 U.S. 853 (1982) where a fractured plurality said that removing a book from a school library solely because of ideological disagreement with its message would be unconstitutional.



Book Challenges

Educational spaces have long advocated a broad right to read. In 1953, the American Library Association (ALA) and Association of American Publishers (1953/2004) jointly issued the Freedom to Read Statement. They centered concern on a public movement “in various parts of the country . . . to remove or limit access to reading materials, to censor content in schools, to label ‘controversial’ views, to distribute lists of ‘objectionable’ books or authors, and to purge libraries.” In contrast to censors, the ALA and book publishers framed the freedom to read as a cornerstone of democracy because the “written word is the natural medium for the new idea and the untried voice from which come the original contributions to social growth.” To achieve this end the two groups called for resistance by libraries, publishers, authors, and booksellers to the broad demand of 1950s censorship.

In 1981, the National Council of Teachers of English (NCTE) (1981/2018) issued *The Students’ Right to Read* elaborating on similar arguments but driven by a new generation of censors. Having lost the threat of obscenity charges, book challenges arose in the 1970s and ‘80s as a means of contesting the place of particular items in libraries and school curriculum. The NCTE admitted that the freedom to read “can be used wisely or foolishly . . . but to deny the freedom of choice in fear that it may be unwisely used is to destroy the freedom itself.” One value of this right to read is that the “reader is freed from the bonds of chance. The reader is not limited by birth, geographic location, or time, since reading allows meeting people, debating philosophies, and experiencing events far beyond the narrow confines of an individual’s own existence.” The NCTE centered this right in English classrooms by defending the expert judgment of teachers in selecting texts to serve this important purpose. It is particularly crucial for English teachers to resist unwarranted censorship because such actions skew the picture of the world presented to students and, thus, undermines, the value of the right to read itself.

These two statements worked within a broader civil libertarian trend that emphasized the right not only to produce information but also the right to consume it free from governmental intrusion (Wheeler 2013). This vision of a liberal right to read, however, was contested by new generations of book challengers. At base, the book challenger seeks to make knowledge harder to gain access to whether by removing it from a library or simply shifting the location of book in such a way as to make finding it more difficult. Some knowledge is simply too dangerous for easy access. Book challengers invoke a wide array of arguments with one common example being the idea that the book is obscene and thus inappropriate.

To many book challengers, obscenity and pornography are interchangeable items; porn is inherently obscene and anything obscene must be pornographic. Going further, they equate nearly any sexual conduct within books to be porn and thus obscenity. For example, a challenger to *A Bad Boy Can be Good for a Girl* (Stone 2006) complained that it was “like a porno in paper.” Depicting what they saw as “sexual perversion” and “immorality” was the equivalent of showing a hardcore porn film in the school library.²³ Challengers often target John Green’s *Looking for Alaska* (2006). A parent complained about its use in a high school English class because of its use of profanity (281 instances!), mention of students consuming pornography, and depiction of oral sex. They could “see no purpose other than getting students ‘excited’ about porn, sex, drugs, + alcohol.”²⁴ In an earlier email, they complained that “some situations could be x-rated.”²⁵ Another challenger summarized the book as “nothing short of pornography and filth.”²⁶ By invoking the defunct “X” film rating, the challenger sought to utilize popular notions of pornography to denigrate the book by equating it to watching a dirty picture and calling it English class. Another challenger invoked the idea of times changing because in their childhood Penthouse had similar content as *Looking for Alaska* but the “difference was then you had to go to the convenience store to get it and it was wrapped in brown paper and sold to those over the age of 18. Not provided to 15 and 16 year olds as required reading.”²⁷

Such complaints were not only about personal offense at the content. Book challengers see the books as infecting children, causing them fundamental harm in a variety of ways. When challengers objected to Alice Walker’s *The Color Purple* (1982) one warned that “requiring a 16 year old hormone charged teenager to read a book filled with sexually explicit material is not using wisdom.”²⁸ Another described the result of students reading this AP English text would

23. Park City School District #6, Wyoming. Request for Reconsideration, 10/4/17.

24. Marion County, Kentucky, Schools. Request for Reconsideration of *Looking for Alaska*, 3/30/16.

25. Redacted to E.V. Marion County, Kentucky, Schools, 3/22/16.

While the names are redacted the context of the communications suggest that this email was sent by the same person who filed the formal challenge.

26. Waukesha, Wisconsin, School District. Request for Reconsideration of *Looking for Alaska*. 6/14/14.

27. Clinton City, North Carolina. Board of Education public comments of D.B. 2/5/18.

28. Brunswick, North Carolina, County Schools. Request for Reconsideration of *The Color Purple*, 12/16/13.



be “Trash in & trash out.”²⁹ A parent in Texas warned that the effect of reading *Looking for Alaska* would be to “increase teens’ curiosity, ruin their morals” and thus “harming our children, Taking away innocence.”³⁰ To challengers, reading about something is the first step to doing it. For example, they at times worry that depictions of sexual violence will cause not only harm to sexual abuse survivors but also cause others to rape: “this is an extremely dangerous situation for a girl who has been raped, for a boy who has raped a girl, for a boy who is mentally ill and now thinks, hey raping girl is an idea I may peruse.”³¹ This challenger went further and suggested that because the book failed to explicitly condemn the sexual violence it left the message open for interpretation and suggested sexual violence is perfectly acceptable. As one challenger to *Looking for Alaska* warned “There could never be enough good in this book to outweigh the bad.”³² A challenger to *Perks of Being a Wallflower* (Chbosky 1999) complained that in the past such “obscene and harmful material” would never have been introduced but “the creep of secularization and relegation of all things sacred to the private sphere only, has amputated our minds from our hearts and souls. The new religion of modern culture and much modern literature is one where there are no transcendent realities, no sexual boundaries, no special protection for youth, no shame, and ultimately, no meaning.”³³

At times, book challengers invoke formal legal ideas to support their points. But in doing so they tend to mix legal and popular notions of obscenity and porn in a way that ignore the key elements of the law. One challenger to *Perks of Being a Wallflower* invoked a form of the harmful material to minors statutes. They admitted that the “legal definitions make an accommodation for overall literary value” and that some great works have sexual content, such as *Hamlet*, but sexual references in *Hamlet* “are in poetry form and are very often couched in imagery requiring a translation. *Perks* . . . is no Shakespeare. With blatant descriptions such as, ‘then he put his penis in her mouth,’ we are not dealing with literary greatness.”³⁴ They acknowledge a key limitation of obscenity

law but then discount that because the sexualized elements are too easy to understand unlike Shakespeare that requires the expert guidance of a teacher to get at the real intent behind the poetry. At other times, the assertions are less clearly tied to the actual law. For example, community members in Campbell County, Wyoming, claimed that a number of books were “illegal” in some unspecified manner. *Gender Queer* (Kobabe 2019) “violates Wyoming’s Constitution” by simply existing.³⁵ Another complained that *This Book is Gay* by Juno Dawson (2014) “violates the contemporary community standards and is considered obscene.”³⁶ In this way, the challenger deployed one element of obscenity law but none of the others.

In a challenge to *Eleanor and Park* by Rainbow Rowell (2013), the challengers argued that parents “entrust the public schools to be the primary educators of their children in the academic fundamentals as well as to provide examples of the moral norms of our society” but this role also made it “possible for those educators to have a disproportionate impact on the moral and societal views of our children.”³⁷ Turning to the book they described being “assaulted” by the language and subject matter that “is pornographic and sexually explicit.”³⁸ They cataloged every instance of objectionable (to them) material concluding that the book “touches on a variety of age inappropriate and highly controversial topics including underage sex, underage drinking and drug use, pornography, and sexual abuse of children. These are topics that are best left to be addressed by parents or guardians in a supervised context with some moral guidance . . . not in our school libraries or classrooms.”³⁹ Instead of relying upon notions of legal obscenity alone, they utilized various external systems to validate their challenge. For example, they quoted a dictionary definition of pornography as being intended to cause sexual excitement, arguing that because the characters in the book desire sex it inherently meant that Rowell’s goal was sexual excitement.⁴⁰ Similarly, they

29. Brunswick, North Carolina, County Schools. Request for Reconsideration of *The Color Purple*, 12/1/13.

30. Austin, Texas, Independent School District. Request for Reconsideration of *Looking for Alaska*, 5/24/16.

31. Kennett, Pennsylvania, High School. Request for Reconsideration of *Nineteen Minutes*, 6/17/14.

32. Marion County, Kentucky, Schools. Request for Reconsideration of *Looking for Alaska*, 3/30/16

33. Dubuque Community School District. Reconsideration Request Form for *The Perks of Being a Wallflower*, filed 11/2/16.

34. Dubuque, Iowa, Community School District. Request for Reconsideration of *The Perks of Being a Wallflower*, 11/2/16. The statute

referenced was the federal Child Internet Protection Act which they acknowledged

35. *Gender Queer* Challenge, Campbell County Public Library, Wyoming, 10/7/21.

36. *This Book is Gay* challenge, Campbell County Public Library, Wyoming, 8/16/21.

37. Addendum to *Eleanor and Park* challenge, Anoka-Hennepin School District, 23 July 2013, 2.

38. Addendum to *Eleanor and Park* challenge, Anoka-Hennepin School District, 23 July 2013, 3, 4.

39. Addendum to *Eleanor and Park* challenge, Anoka-Hennepin School District, 23 July 2013, 7.

40. Addendum to *Eleanor and Park* challenge, Anoka-Hennepin School District, 23 July 2013, 8-9.



invoked both Federal Communications Guidelines indecency rules for broadcast radio and television as well as the private Motion Picture Associations rating system for film to argue that a reproduction of this content would be prohibited to anyone under 17.⁴¹ This all led the challengers to conclude that *Eleanor and Park* fell below “a normative baseline of societal decency standards.”⁴² They expressed shock at “the lack of moral outrage by district staff regarding the contents of the book,” describing it as “blatantly obscene material.”⁴³ This reinforces Strub’s point (2010, 3) about the nature of pornography being a contested field: here the challengers utilized external sources unrelated to obscenity law to strengthen their claim that anything sexual was inherently dangerous and, implicitly, that *Roth* was wrong to separate the two.

Book challengers often situate themselves in a narrative around moral decay in society and blame objectionable content in books as one reason for this decay (Knox 2015, 68). Challengers “view the library as an institution that has a moral responsibility to protect children from reading materials the challengers believe will be harmful to their development” (Knox 2013, 205). This moral harm is something that can only be prevented by removing access to dangerous material, or at least hiding that material in a section where it would be hard to discover by accident. The danger of the books is treated by most book challengers as self-evident, that there is no need to actually explain why swearing, sex, or representations of LGBTQ people are an inherent danger to the moral health of the community. They engage in common sense interpretations of texts that argues “not only . . . for the literal interpretation of texts but also that such an interpretation should be self-evident” (Knox 2017, 13). This common sense interpretative view is a central component of the Christian Right and its deployment of parental rights as “an essential cog in the family values agenda conservatives would use in their drive for control of national politics (Dowland 2015, 63, 74).

This rhetoric fits into a long history of attacking supposedly dangerous material to preserve the moral health of the community. This argument speaks to “what conservative Christians find most distressing about the modern state—its failure to act as a moral leader” (Herman 1996, 153). For much of the twentieth century, obscenity law was deployed

to purge moral dangers from the community. This was about creating safe communities. Now that obscenity law does not prevent the sale of supposedly dangerous books, the book challenger must seek to preserve the role of the library and school as a moral leader by forcing it to purge the danger. Challengers reject the concept of being a censor with the negative connotations that come with that title. Instead, they are simply trying to preserve a safe moral space for all children, not only their own (Know 2014). Invoking legalistic and popular notions of pornography, indecency, and obscenity allows the book challenger to strengthen their case. The law already prohibits obscenity, after all, and if a book is obscene, removing it is not censorship but just enforcing the law. However, the challengers do so by invoking a rejected notion of obscenity law where any discussion of sex is inherently obscene. In doing so, they contest obscenity law itself. What is new in recent years is that this contestation is increasingly moving into formal legal avenues again as challengers seek to invoke obscenity law to support their purge of materials.

Resurrecting Obscenity?

In recent years, some book challengers have sought to reinvigorate obscenity law to target what they consider to be objectionable books. In 2019, the Florida Citizens Alliance began to develop reports on dangerous books that supposedly violated various statutes. For example, the middle grade graphic novel *Drama* (Telegemeir 2012) was described as having “age inappropriate” content that included “explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct” because it depicted two boys kissing. This was treated as violating the state obscenity law. Perhaps most oddly, the book was described as violating the Florida Constitution’s unconstitutional⁴⁴ definition of marriage as between a man and woman only.⁴⁵ In total, the group documented over two dozen novels, overwhelmingly LGBTQ-inclusive books, for the supposed violation of obscenity and other laws. This kind of activism laid the groundwork for broader attacks.

In September 2019, a parent objected to the assignment of Allen Ginsburg’s *Howl* in a music literature class in Steamboat Springs, Colorado. Another community member was so outraged that he sought criminal charges against the teacher. In an email to members of local government he complained that “it seems reasonable that distributing, assigning reading, and discussing such patently obscene sexual material with

41. Addendum to *Eleanor and Park* challenge, Anoka-Hennepin School District, 23 July 2013, 10-12.

42. Addendum to *Eleanor and Park* challenge, Anoka-Hennepin School District, 23 July 2013, 12.

43. Letter to Chairman Heideman, Anoka-Hennepin School District, 27 August 2013.

44. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

45. Florida Citizens Alliance Review of *Drama*, obtained 11 January 2020.



minors may meet the statutory elements” under Colorado law. If the exact same conduct had occurred anywhere else in the community “law enforcement would have likely been notified to determine if a crime occurred.”⁴⁶ The Steamboat Springs Police Department declined to pursue charges after the detective specifically noted that *Howl* “became one of the most widely read poems of the century.” As the definition of obscenity requires that consideration of the merit of a work, the detective concluded that a poem so widely read and translated “would not lack literary or artistic value, therefore it would not meet the statutory definition” of obscenity.⁴⁷ Unhappy about this determination, the community member requested that the District Attorney review the case and present it to the grand jury. The DA declined to prosecute because a “piece of speech that has for over sixty years inspired countless people to consider their individualism, their relationship to the organized state, their political voice and ability to think freely” could not plausibly be said to lack literary merit.⁴⁸

In 2019, challengers sought to have *Fun Home* by Alison Bechdel (2006) removed from the English curriculum at Watchung Hills, New Jersey, High School because the graphic novel had a number of images of masturbation and oral sex. After the school refused to remove the book (Price 2021a), a group sued seeking to utilize civil legal mechanisms as a means of enforcing obscenity law. This creative attempt to invoke obscenity law failed when the superior court noted that the civil courts were not a proper means of attempting to enforce obscenity law in this case.⁴⁹ Ultimately, these examples suggest that at times, recently, challengers have elevated their demands into legalized attacks on literature.

This development escalated dramatically with the conservative book activism of 2021. This is when Representative Krause distributed his watch list discussed above. Texas Governor Gregg Abbot and South Carolina Governor Henry McMaster both invoked obscenity law to threaten schools. For example, Abbott complained repeatedly about “pornography” that was supposedly available in public school

libraries and directing various state agencies “to develop statewide standards to prevent the presence of pornography and other obscene content in Texas public schools.”⁵⁰ Both governors provided *Gender Queer* by Maia Kobabe (2019), a graphic novel memoir about the author discovering her non-binary identity and comfort in asexuality, as an example of this supposedly illegal literature. McMaster flatly asserted that the images of masturbation and oral sex “easily meet or exceed the statutory definition of obscenity.”⁵¹ He failed to actually explain how this was so, it was just treated as an obvious fact. In this way, both governors represented an attack on obscenity law because the simple presence of sex in books was sufficient to prove it obscene. There was no need to engage in legal analysis of the work as a whole. In contrast to *Roth*, sex is equal to obscenity, or at least it is when queer sex is involved.

Recent book challengers have often made this argument with *Gender Queer* receiving special attention because as a graphic novel they can point to images. Challengers in North Hunterdon, New Jersey, for example repeatedly invoked the graphic images in *Gender Queer* as reason to remove it with one even complaining that it amounted to child pornography under New Jersey and federal law.⁵² The graphic images, however, were not present in other books challenged. For example, the same challenger claimed that the prose memoir *All Boys Aren't Blue* by George M. Johnson (2020) was illegal because it discussed Johnson’s sexual experience and “it is arguably illegal as it can be considered distribution of pornography to children.”⁵³ The images are just a convenient scapegoat for the real target: any representation of LGBTQ sexuality.

When schools refused to remove the books, numerous book challengers and public officials sought to file criminal charges. One in Kitsap County, Washington, complained that *Gender Queer* was “graphic pornography” presumably because it included “sexual intercourse, masturbation and fellatio.”⁵⁴ In Campbell County, Wyoming, another challenger filed charges against various public librarians for

46. Kenneth Mauldin email to local government, 5 September 2019.

47. Officer Report for Incident P1910417, Steamboat Springs Police Department.

48. Declination of Prosecution letter, 10/2/19. Mauldin then claimed that the DA was biased because his wife worked for the school district and that he should have recused himself (Mauldin 10/3/19, 9:14 AM email) and then threatened to seek review from the Colorado Attorney General’s office (Mauldin 10/3/19, 1:43 PM email). As of 12 November 2019, the Attorney General’s office had no record of a complaint.

49. Gallic, et al., v. Watchung Hills Regional High School Board of Education, et al., C-012032-19 9N.H. Super.), Order Denying injunction and Dismissing Complaint with Prejudice, 6/10/19, 7.

50. Abbot to Mike Morath, et al., 8 November 2021.

51. McMaster to Molly Spearman, 10 November 2021.

52. G.D. Challenge to *Gender Queer*, North Hunterdon, New Jersey, 10/7/21.

53. G.D. Challenge to *All Boys Aren't Blue*, North Hunterdon, New Jersey, 10/26/21.

54. Steve Adams to Chad M. Enright, 10/20/21, Kitsap County Prosecutor’s Office. Adams reported that the sheriff’s department refused to take his complaint because he was told this was a school matter rather than criminal. So he sent an email inquiring about criminal charges to the county prosecutor.



providing access to sexual education materials.⁵⁵ Flagler School Board member Jill Woolbright sought to have school staff criminally charged for providing access to *All Boys Aren't Blue*. While she admitted to not reading the book, she did review two chapters and asserted that they were criminal because they are “very descriptive and discusses masturbation, oral sex, and sodomy.”⁵⁶ The basis for the criminality was never explicitly stated. She described the book as “disgusting” with the examples being Johnson’s being molested by a cousin and losing their virginity which she described as “how he first sodomized another male and then later he was sodomized by the other male.” Woolbright then asserted that she wants librarians “held accountable for this crime committed on our children” without specifying any other details about the crime.⁵⁷ The simple presence of gay sex in a book was sufficient to be illegal. In Leander, Texas, a parent complained to police because *Lawn Boy* (Evison 2018) has a character who talks about sexual contact when he was ten.⁵⁸ She specifically referenced Texas obscenity statute with a vague assertion that “many examples in the book” would be considered obscene under it. She noted that she monitored her children’s reading to prevent them from being exposed to “atrocities” such as *Lawn Boy* but she was “worried about the other kids with parents that may not be aware” of the books.⁵⁹ In Indian River, Florida, a group of “Moms for Liberty” sought to have the schools criminally charged for three books that it refused to remove—though the district did remove six other books. The Moms for Liberty complained that books contained “references to sex, rape and drugs.”⁶⁰

Prosecutors and police resisted these calls. For example, Kitsap County Prosecutor Chad Enright noted that he and his staff had examined the various potential crimes and found no criminal violation here. There was no distribution of “erotic material” both because libraries were exempt from that statute but also because it would require a judicial finding that particular material was erotic first and that was lacking here. More fundamentally, the claim that *Gender Queer* was some kind of child pornography failed both

because that law was about photographic reproductions of child abuse but also “must be used for the sole purpose of ‘sexual stimulation of the viewer.’ While I would respect arguments to the contrary, the intent of the book does not appear to be solely for ‘sexual stimulation.’”⁶¹ He also closed with a gesture to the “First Amendment protections from criminal prosecution in distributing these types of materials.”⁶² The Weston County, Wyoming,⁶³ prosecutor largely echoed similar views in refusing to prosecute the library for provision of sexual education materials. The prosecutor noted Wyoming criminal law forbids enticement of juveniles into sex, a reference to the book challengers claiming that sexual education is akin to sexual grooming by pedophiles, but that this applies to attempts to engage in sexual activity and that this certainly did not cover materials “disseminated to the general public.” While Wyoming obscenity law exempted libraries, the prosecutor engaged with the substance and noted that the books in question did not describe sexual activity “in a patently offensive manner and they may have scientific value” with both being independent bases for refusing to prosecute.⁶⁴ Similarly, the prosecutor in Leander, Texas, informed the police that criminal action would require, at minimum, a judgment from the state Attorney General of a Texas court that *Lawn Boy* was legally obscene before prosecution could occur.⁶⁵ In Flagler County, Florida, the Sheriff’s general counsel concluded that *All Boys Aren't Blue* “is a widely recognized award winning piece of nonfiction which deals with difficult subjects of both social and political issues impacting this age group” and thus there was no basis for concluding that it lacked serious literary or artistic merit.⁶⁶ In Indian County, Florida, the Sheriff’s investigation concluded that no criminal actions occurred for multiple reasons including that while a few portions of the prose novels could meet the definition of “sexual excitement” the statute requires the material predominate and this was not met here; the investigator noted that the portions flagged by

55. Campbell County, Wyoming, Sheriff’s Report Incident 21-06990, filed 9/29/21.

56. Flagler County Sheriff’s Office Report for Case Number 2021-00100272, filed 11/9/21.

57. Flagler County Sheriff’s Voluntary Witness Statement for Case Number 2021-00100272, filed 11/9/21.

58. Leander Police Department Incident Report 21-2280. This was not treated as a criminal complaint, the officer clearly informed the people complaining that it would only be an informational report.

59. Leander Police Department Incident Report 21-2280. Voluntary Witness Statement of Brandi Burkman, 9/9/21.

60. Indian River County Sheriff’s Report 2022-00026805, filed 3/8/22.

61. This appears to be misinformation produced by failure to read the book. Kobabe’s book depicts some fantasies of sexual behavior in eir youth but the sexual episodes with other people are in eir adulthood.

62. Chad Enright to Steve Adams, 10/21/21.

63. The Campbell County Prosecutor appointed a neighboring prosecutor as special prosecutor to consider this issue. The reason for this was not explained but it seems likely that he was afraid of angering members of his local consistency close to reelection.

64. Weston County & Prosecuting Attorney’s Office to Campbell County Sheriff Matheny, 10/27/21.

65. Leander Police Department Incident Report 21-2280. The officer memorialized and quoted an email from the prosecutor’s office to this effect.

66. John T. LeMaster, Legal Memorandum 11/16/21. Flagler County Sheriff’s Investigative Report Case 2021-100272, 21.



the Moms for Liberty amounted to 6 of 236 pages (1.84%), 17/622 (2.73%), and 11/213 (5.16%) for the three novels.⁶⁷

To date only one attempt to criminally punish literature has proceeded to the point where the petitioner had to deal with the requirement that the book be read as a whole. In Virginia Beach, Virginia, a sitting legislator, Tim Anderson, sought to bring a civil action under an obscure provision of Virginia code to declare two books obscene, one being *Gender Queer* (Kois 2022). When various defendants noted that the petition only cited 7 of 240 pages of the graphic novel, Anderson sought to simply pivot around this requirement. He declared that “although seven pages specifically were selected out of 240 in the filing of the Petition, these pages encompass the theme of the book as a whole – portraying sexual conduct in a patently offensive way with respect to what is suitable for minors or adults.”⁶⁸ While no reading of the book could possibly support the idea that it is about patently offensive sexual conduct throughout, after all he could point to only 7 pages, the assertion was treated as obvious and correct. However, Anderson also dropped a reference to the idea that “the totality of the work standard should be judged with a different lens for minors than adults and that graphically or textually sexual content in the amount contained in these books meets the obscenity standard.”⁶⁹ In this way, Anderson suggested the law must shift because, in his view, the material available in books has simply gotten too dangerous for adherence to this outdated doctrine.

Discussion

Book challengers have long invoked rhetorical norms of obscenity, pornography, and indecency. The sample of challenges explored here support the idea that pornography is “a discursive site onto which varied social tensions are mapped out” (Strub 2010, 3). Book challengers are unhappy to see some content, whether it be actually sexual in nature, sexual education, or just LGBTQ people existing in the book, and translate that into a concept of pornography. What is new in recent years is the sustained attempt to translate that rhetoric into actionable criminal complaints under obscenity

laws. Something that one sex crimes investigator expressed confusion over: “During my years investigating these crimes, there is no precedence of a criminal investigation I can reference . . . based on a published literature book being checked out by a minor at a library public or private.”⁷⁰ The shift to obscenity law as distinct from a rhetorical construct has at least two important components.

First, it allows challengers to both shift away from claims that they are censors and bigots. As discussed by Knox (2014), challengers define censorship as the total elimination of a book or other media. Removal of a book from the library, whether public or school, cannot be censorship because the book exists somewhere else. Invocation of obscenity law takes this perspective one step further because obscenity law itself defines material as inherently without worth, as too dangerous to consume. Enforcing that is just good citizenship. Furthermore, the shift allows challengers to alter the rhetoric of disagreement. They are able to claim that it is only the sexual content and not the LGBTQ representation that leads to complaints against books like *Gender Queer* or *All Boys Aren't Blue*. The “shift from challenging ‘pro-homosexual’ books in the collection to challenging ‘sexually explicit’ and ‘youth-targeted pornographic literature’ suggests they recognized attacks on GLBTQ literature for its own sake were becoming less palatable to a more tolerant public” (Gaffney 2014, 735). Obscenity provides political cover from criticism that challengers are bigots by translating LGTBQ books, or books about race or other disfavored topics, into complaints solely about sexually explicit material.

Second, and more broadly, book challengers are engaged in a sustained critique of the *Roth-Miller* conception of obscenity. As discussed above, a core component of this conception is that works must be judged as a whole and sex is not synonymous with obscenity. This new round of challengers invoking obscenity law ignore these requirements. Any sexual content is treated as inherently obscene, there is no need to read the whole book or consider the value of the work. There is simply no value at all, at least for minors. In this sense they invoke older notions of literary obscenity and a return to the days when police and prosecutors sought to purge anything they objected to from the public sphere, based on a few pages of a novel. And as the challenger to *Lawn Boy* above noted, challengers “worried about the other

67. Indian River County Sherri’s Report 2022-00026805, filed 3/8/22, 5-6.

68. Petitioner’s Omnibus Brief in Opposition of Respondents’ Motions. In RE: *Gender Queer*, A Memoir (No. CL22-1985) and In RE: A Court of Mist & Fury (No. CL22-1984). Virginia Beach Circuit Court, 5 August 2022, 15-16.

69. Petitioner’s Omnibus Brief in Opposition of Respondents’ Motions. In RE: *Gender Queer*, A Memoir (No. CL22-1985) and In RE: A Court of Mist & Fury (No. CL22-1984). Virginia Beach Circuit Court, 5 August 2022, 2.

70. Deputy Report for Incident D22-01690, 21. Davis County Sheriff’s Department. As of this writing the County Attorney was still considering the complaint.



kids with parents that may not be aware” of the books.⁷¹ The danger of the book is presumed and, thus, other parents must simply be unaware. Obscenity law, thus, is treated as a method of helping others parent their children better. It represents the conservative demand that the state “act as a moral leader” (Herman 1996, 153).

So far, this attempt has failed. Prosecutors have refused to indict librarians or school officials for providing books. But the very attempt to criminally charge has effects. Invocation of legal forms, even if baseless, seems to have effectively scared a significant number of schools and libraries into preemptive censorship outside of established institutional policy (PEN America 2022). After all, a school receiving complaints about obscene material will rarely have to justify its decision in the way it would have to if it simply acknowledged that *All Boys Aren't Blue* is being removed because some members of the community do not want LGBTQ inclusion in their (and it is only theirs) library. It provides a veneer of plausible justification. More worrisome, some school districts have just invented sexual conduct to justify removals (Price 2021b). This will likely lead to more removals but also a chilling effect will spread as school districts seek to prohibit “sexually explicit” material from being purchased or stocked in the library. As sexually explicit is often just code for representations of diverse perspectives, this will serve to limit the literature and views presented to children and library patrons widely (Jones 2021). A legislator in Iowa repeatedly called for broadening obscenity law to fight back against what he deems objectionable in schools (Higgins and LeBlanc 2021). In Williams County, Texas, the local government withheld CARES funding from two districts over the complaints about “inappropriate” books in the library (Kriniaak 2021). In Ridgeland, Mississippi, a mayor withheld the library’s budget until it removed LGBTQ books from the shelves, apparently because they offended his religious values (Judin 2022). As teachers and librarians often need strong institutional support to offer diverse material, this attack will almost certainly lead many to shy away from topics that are labeled as dangerous by anti-diversity activists. After all, a 2016 survey found that 90% of elementary and middle school librarians, and 73% of high school librarians, had recently refused to buy a book because of potential controversy (School Library Journal 2016, 2). With the 2021 backlash, it is not hard to assume that this tendency will increase. And it is far more difficult to combat the softer censorship of just refusing to purchase on certain topics than it is to fight book removals.

71. Leander Police Department Incident Report 21-2280. Voluntary Witness Statement of Brandi Burkman, 9/9/21.

Conclusion

This article explored the history of obscenity law as it related to books to provide context to the modern evolution of book challenger tactics: the invocation of the criminal obscenity process. In seeking to more regularly deploy criminal charges, book challengers seek to bring to bear extraordinary pressure upon schools and libraries to comply with the demands of challengers. To date this has failed in a formal sense as no prosecutor has attempted to bring charges. This may only be a matter of time, however, as most district attorneys and sheriffs are elected partisan officials; one may decide that pushing charges serves their electoral interest. At least one sheriff, a district attorney, and a successful candidate for a Tennessee prosecutor’s office suggested support for criminal charges (Wiggins 2022).⁷² Of course, as the PEN America report (2022) found, the very effort to invoke criminal law along with political pressure from governors, legislators, and local officials has been sufficient to push schools, at least, to remove materials often without regard to formal policy. The future of book challenges will certainly continue to see the interaction of this criminal and political strategies.

Appendix on Primary Sources

This article relies upon a significant amount of material disclosed by libraries, schools, law enforcement, and prosecutors’ offices under freedom of information laws. As these documents are redacted to varying degrees and the identities of most of the writers are irrelevant, I utilize initials and gender neutral pronouns (they/them). The only exceptions are for those who hold a public office (elected officials, superintendents) and people who filed criminal or other legal action. I strive to include the necessary information to correctly source any material utilized. All primary materials are available at <https://adventuresincensorship.com/publications-data>.

72. Eric Flowers to David Moor and School District of Indian River County, Indian River County Sheriff, 4/19/22 (“we do not feel that this content is appropriate for young children even though it does not rise to the level of a crime” and the District should “continue to review their policy to allow for stricter oversight” of library books); Benjamin David to Ed McMahon, New Hanover County District Attorney, 6/7/22 (complaints of books containing “obscene and pornographic material. As a father of three children, I share the concerns of these parents” but the statute exempted libraries).



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