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OBSCENITY CONTROL: A SEARCH FOR VALIDITY

The cry for control of obscenity is frequently released by legislators and private interest groups. Yet it either is not known or cannot be agreed as to what is obscene, why it should be censored, or the effects of the censorship means which have been adopted.¹ The work of the courts as well as that of the legislatures do not appear to follow a pattern of clarity or of consistency in this field.

Perhaps one of the largest stumbling stones encountered by the legislatures in drawing, and the courts in interpreting statutes in the obscenity area, lies in the very definition of obscenity. The inadequacy and vagueness of the definition of obscenity becomes obvious upon consideration of the types of terms generally used in the standard definition. These terms include material which arouses sexy thoughts, lustful thoughts, prurient interest, and shameful and morbid interest in nudity; or material which tends to deprave and corrupt or lead to acts of antisocial conduct; or material which is utterly without redeeming social value.² Such terms rely almost solely on individual subjectivity for their contextual meaning and are so imprecise as to cause grave inconsistencies in the law. An example of the inconsistency caused may be shown in that statutes containing such terms of definition are not so vague as to preclude criminal punishment,³ but such terms are too vague to allow the issuance of a search warrant.⁴ The frustration involved in the attempt to grasp a meaningful and workable definition of obscenity may be evidenced in the concurring opinion of Justice Stewart who upon admitting that he could arrive at no intelligible definition of obscenity continued by adding, "but I know it when I see it."⁵

That the definition of the offense is vague points to the expression of several justices that there might be no possibility of defining the term with any degree of precision. In one study of sexual response it was found that:

Males differ among each other in terms of preference for and response to various types of sex stimuli. Factors which account for different preferences

1. J. CHANDOS, "TO DEPRAVE AND CORRUPT . . ." 53 (1962).

2. *Id.* at 57.

3. *Ginsberg v. New York*, 88 S. Ct. 1274 (1968).

4. *New York v. Rothenberg*, 20 N.Y.2d 35, 288 N.E.2d 379, 381 (1967).

5. *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

among males . . . include: adequacy of masculine sexual identity, strong guilt with respect to sexual behavior, physical maturity and intellectual ability.⁶

In another study consisting of a survey of women college graduates by the Bureau of Social Hygiene of New York, testimony as to the broad scope of that which the individual may find obscene or sexually arousing was discovered. It was found that sex information and arousal were derived from the Bible, the dictionary, the encyclopedia, novels from Dickens to Henry James, Shakespeare, circulars for venereal diseases, music, pictures, dancing drama and men.⁷ Jung has stated consistently with the above findings that with the broadening of man's environment and basic goals the libido has expanded correspondingly resulting in its desexualization, at least concerning the basic drive, allowing an increase in phantasizing.⁸

In *Roth v. United States*, the Supreme Court made a monumental attempt to put the definition of that which is obscene into a practical, contextual base. In this case, the Court was faced with the task of determining what was obscene in the light of a statute stating that its purpose was the regulation of every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing print or other publication of an indecent nature.⁹ In an attempt to standardize the meaning of these terms the Court held that obscenity was to be defined in light of contemporary community understanding and practices.¹⁰

However, two defects become evident to the valid workability of the "community standard doctrine," rendering it of no help in clarifying the concept of obscenity. One, it has been ascertained that large numbers of "normal people" wish to read pornography and therefore no set community standard can be applied to prohibit the distribution and use of obscene materials.¹¹ The second infirmity rests within the Court's

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6. CLARK, *THE EFFECTS OF SEXUAL MOTIVATION ON PHANTASY*, IN *STUDIES IN MOTIVATION* 44-48 (1955).
 7. Comment, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 73 (1938).
 8. C. JUNG, *PSYCHOLOGY OF THE UNCONSCIOUS* 124 (1916).
 9. 18 U.S.C. § 1461 (1964).
 10. *Roth v. United States*, 354 U.S. 476, 491 (1957).
 11. G. Falk, *The Roth Decision in the Light of Sociological Knowledge*, 54 A.B.A.J. 288, 291 (1968).

use of the term community. The "community" referred to in the majority's opinion consisted of the nation as a whole and not to the individual localities in which an obscenity issue should arise. Had the Court incorporated the latter concept of community, the doctrine could possibly have aided the courts as well as the public in determining what was meant by obscenity. As has been pointed out, however, there can be no nationwide community standard in a *Gesellschaft* type of community such as the United States. Thus the Court's test of obscenity, which was tailored more to the *Gemeinschaft* community, is not workable.¹²

It should be clear then, that the state of the law in the field of obscenity has no firm position as the very thing which is being legislated and adjudicated against is not known with any degree of precision. The law to date, in this field is fraught with inconsistency and lack of a logical basis.

Adding to the confusion caused by the lack of agreement or ability to define the concept being opposed is the fact that there is lack of agreement as to why obscenity, whatever that it, is supposed to be bad. According to Anthony Comstock, obscenity was evil because it caused people to "lust," and this was wrong because "lust defiles the body, debauches the imagination, corrupts the mind, deadens the will, destroys the memory, sears the conscience, hardens the heart, and damns the soul."¹³ This line of reasoning, if that term may be applied, is largely responsible for the obscenity laws which presently harass individual members of society and plague the courts. Such thinking is based on religious precepts present at least since the time of Plato that weak men are controlled by their passions, strong men by their reason.¹⁴ Expression of this line of thinking has become more sophisticated, yet the rationalizations used for opposing obscenity presently, are still derived from this ancient and non-scientific source.

The reasons generally espoused for controlling obscenity may be categorized into four main themes. These are: 1) the

12. *Id.*

13. W. Lockhart and R. McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 380 (1954).

14. Finnis, *Reason and Passion: Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967).

advocacy if improper sexual values, 2) psychological excitement resulting from sexual imagery, 3) the arousing of feelings of disgust and revulsion, and 4) the incitement to anti-social conduct.¹⁵ The first reason presented must depend for its validity on Constitutional interpretation rather than scientific data. Although this problem has been dealt with, it still has not been laid to rest with any finality. The general view is that the free expression of ideas guaranteed by the Constitution are not limited to ideas which are conventional. This view was propounded by Justice Stewart in a case holding that the propounding of adultery as acceptable behavior, in a movie, did not make that movie obscene.¹⁶ The problem arises, due in part, to the attempted definitions of obscenity. This position being that obscenity is utterly without socially redeeming value¹⁷ and therefore is not the expression of any idea.¹⁸ Since the Constitution only protects ideas, and since obscenity expresses no idea, it is not protected.

The second reason presented for holding obscenity illegal is derived from a vague but present feeling instilled through religion that lustful thoughts are as great a sin as lustful acts.¹⁹ This raises further constitutional questions which shall not be dealt with here.

The third category, although given lip service, has never been favored by the courts as a strong enough reason for the basis of an opinion although it may be a major factor in commencing an action. The fact that obscenity may be offensive should be of trivial importance.²⁰ If one does not like what he reads in a book, he is at his leisure to put it down. Yet the censor will delve through a book, actively searching for a passage which will send him into shudders of demented glee for finding that which he may deplore as offensive.

15. H. Kalven, Jr., *The Metaphysics of Obscenity*, 1960, SUP. CT. REV. 1, 3 (1960).

16. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684, 689 (1959).

17. *Jacobellis v. Ohio*, *supra* note 5, at 187.

18. *Memiors v. Massachusetts*, 383 U.S. 413 (1966).

19. *Matthew*, 5: 27-28.

20. Comment, *Substantive Law of Obscenity: An Adventure in Quicksand*, 13 N.Y. L. REV. 81, 121 (1967).

The last category is the one most often cited as the reason why obscenity is harmful. It must depend upon the findings of society as it draws upon past experience and studies of its experts for its validity. If such a search were to point to an evil, then control of obscenity would pose no constitutional problems. Yet this has never been done. The validity of the argument has been generally assumed by society without any reliable substantiation. In light of the potpourri of definitions expressed above and the general climate of opinion as to why obscenity is harmful, focus will not be directed toward a survey of the argument that exposure to obscenity will result in overt acts of antisocial behavior.

Generally, before any type of speech may be held unconstitutional, it must come within the clear and present danger test. There must be: 1) clear and present danger that the speech will cause serious substantive evil; 2) it is not enough to "fear serious injury," there must be reasonable grounds for the belief; and 3) there must be imminent or present danger of harm, again based upon reasonable grounds.²¹ It would seem that if obscenity is to be banned on the basis that it incites people to acts of violence courts would use the clear and present danger test. However, as previously noted, "obscenity is not punished because it is dangerous, but because it is worthless."²² The decisions have turned more on the theories of appeal to prurient interest, at least in terms of "contemporary community standards," or that the material is utterly without socially redeeming value. Court decisions are rendered with a glaring absence of any mention of an acceptable foundation for holding the clear and present danger test applicable. Where an attempt has been made to discover the actual effects of obscenity on conduct, the findings have proved negative and have not been presented in majority opinions.²³ Justice Harlan stated what appears to be the view of the majority of judges when he stated in *Roth* that "if a state feels pornography is harmful, it is not irrational for it to refuse to accept the most advanced and sophisticated psychiatric opinion."²⁴

21. *Whitney v. California*, 274 U.S. 357, 372 (1927).

22. Comment, *supra* note 20, at 91.

23. See for example, Appendix of Judge Frank, *United States v. Roth*, 237 F.2d 796, 806 (2d Cir. 1956). (Concurring).

24. *Roth v. United States*, *supra* note 10, at 501-2.

It is the contention here, that the courts should make a valid attempt to find the most reliable information on the subject available, and that they should then present their understanding of the information in the content of a finding of presence or absence of a casual relationship between use of obscenity and overt conduct. "The state has no conceivable interest in suppressing speech merely because it lacks social importance. The factor of social importance acquires a meaning only within the context of a balancing process and here one of the prerequisites is missing. The Court has not explained what it is balancing, why the state should be permitted to suppress pornography or why it should be limited to pornography in exercising its regulatory powers."²⁵

There appear to be several reasons why no healthy skepticism has questioned the feeling that obscenity is bad. One reason appears to be the presence of both a conscious and an unconscious sense of guilt that tends to cause irrational action such as that channeled into sex censorship.²⁶ This guilt feeling is the result of a puritan neurosis.²⁷ Another reason why the feeling that obscenity causes harm has been so readily accepted is that such an opinion is often stated by those whom the average person relies on as an authority. Thus the opinion of parents, teachers, ministers, and law enforcement officers have become incorporated by the public to such an extent that few look for or care about supporting facts for the underlying assumption. It is the position of the social sciences however, that no data supporting the opinion that use of obscene material causes undesirable behavior has been discovered; that all scientific investigation in the field of obscenity has led to an opposite conclusion; and that statements that obscenity causes crime made by crimefighters such as J. Edgar Hoover are based on emotional outbursts and the law officers' distorted view of society rather than on investigative fact.²⁸ In fact, psychiatric study seems to favor the view that those who read salicious literature are less likely to commit

25. Comment, *Sex Publications and Moral Corruption*, 9 WM. & MARY L. REV. 302, 312 (1967).

26. G. ZILBOORG, *PSYCHOANALYSIS AND RELIGION* 169-188 (1962).

27. Comment, *supra* note 7, at 76.

28. FALK, *supra* note 11, at 289.

sex offenses because their reading neutralizes tendencies toward aberrant conduct.²⁹

On the censor's side, it may be argued that even though there is no proof of a casual relationship, that does not mean that such a relationship does not exist. There is a degree of truth in this argument, although its proponents have gone far less toward achieving conclusions than have the behavioral scientists. The reason why work in this field has not achieved the degree of finality reached in many other areas of motivational study is due in large part to the scarcity of research in this area. Also present is the great difficulty encountered by the researcher in an attempt to isolate and control all of the variables. Among the variables causing the most difficulty is the fact that "the potential effect of sexual stimulus is affected by the situation in which material is presented, as well as the erotic content of the material observed."³⁰ Another troublesome variable arises due to the fact that pornography has no uniform style. What may be obscene or sexually gratifying to one, will not be for another. Stocking advertisements may excite a fetishist or a comic book story dealing with an older man and a boy may excite a homosexual.³¹ Comingled with these variables is the lack of similar environment and variance in the impact of the socialization process on the individual. Indicative of the effect of these variables is the fact that it has been found under normal conditions that the sexual arousal causes sufficient anxiety to lead to the inhibition of manifest sexual imagery whereas, under the influence of alcohol this anxiety or guilt was sufficiently reduced to permit increased expression of manifest sexuality reflecting directly the heightened state of arousal.³² Despite these imperfections in the study of the area, the data obtained has proved sufficiently reliable to act upon and should be considered as a basis of study for those legislating or adjudicating within the field of obscenity. At the very least, the empirical data supports the proposition that while obscenity arouses sexual thoughts the resulting cues are not transmitted into

29. *Id.*

30. CLARK, *supra* note 6.

31. E. Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655, 667 (1964).

32. CLARK, *supra* note 6.

overt behavior.³³ Thus while obscene material may be used by sick persons, obscenity does not make a person sick.

An extension of this argument against obscenity is, adults using obscenity may be harmed in that they will entertain doubts as to whether they or their spouse are adequately fulfilling their sexual role. The assumption is that doubts as to one's sexual adequacy or that of his spouse, may be channeled into antisocial conduct.³⁴ The argument against this proposition, other than the fact that nothing can be found in its support, is that if such a proposition were true, the best way to combat such effects of obscenity would be through a more rational and educated attitude toward sex, not greater restriction of sexual matters. It has been urged that as the world's population grows the need for a climate in which sex can be discussed will become greater and the present type of climate tending to suppress that which pertains to sex will become more of a hazard. It has thus been contended that the case for the laws against pornography is much weaker than has generally been thought and that such laws should not be enforced lest more harm than good result.³⁵

Perhaps in partial recognition of the need for expression of attitudes pertaining to sex, the zeal of the censor as well as the statutory scope of obscenity law has shifted in recent years. Thus it was stated in *Butler v. Michigan* that adults and children cannot be held to the same standard concerning what they are allowed to see and hear.³⁶ Obscenity statutes aimed at the public at large are no longer on firm ground and are being held unconstitutional. Recent affirmance of this trend came about in the case of *Kay v. White* where a statute which made a crime of the showing of movies not fit for children was struck down. The Court went on to add that the striking down of one law did not mean to imply that children could not be barred from movies deemed unfit for them.³⁷ The Court did not state its reason for its dictum that children may be protected from obscenity was due to

33. Cairns and Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1035 (1962).

34. KILPATRICK, *THE SMUT PEDDLERS* 237 (1960).

35. CRAIG, *SUPPRESSED BOOKS: A HISTORY OF THE CONCEPTION OF LITERARY OBSCENITY 189-90*, 215 (1963).

36. *Butler v. Michigan*, 352 U.S. 380 (1957).

37. *Kay v. White*, 286 F. Supp. 684, 687 (E.D. La. 1968).

any proved harm which it caused to minors, but merely stated its hollow conclusion as if it did not matter whether or not children needed to be protected from obscenity.

The general consensus of opinion appears to be that obscenity has a deleterious effect on the impressionable minds of children, foremost of which is the assumption that it will incite them to acts of juvenile delinquency. Thus, even if there is a denial of a constitutional right, that fact is outweighed by the doctrine holding that society has an overriding responsibility to its youth.³⁸ This feeling, regarding children and obscenity was recently given added strength when the Supreme Court held that a legislature could make a valid decision that obscenity is bad for children according to prevailing standards in the adult community as a whole, with respect to what is suitable material for minors.³⁹ Since a community standard concerning what is right for children is no more capable of determination than a community standard of what is too obscene for adults, it would appear that the Court is spreading an unworkable doctrine. By espousing the beliefs of various groups in our society without obtaining a sound footing on which consistent opinions may be rendered, another segment of the obscenity law has become needlessly fraught with confusion.

A survey of the available data concerning the effects of obscenity on children indicates that the need to single out children for protection is no greater than the need to protect the public at large. The arguments opposing regulation of obscenity concerning children are broad in scope. Perhaps the most basic argument hinges on the fact that empirical evidence has not found that obscenity has any greater effect on children than it does on adults.⁴⁰ Yet another argument rests on studies showing that use of obscene material cannot be considered as a significant factor in the cause of juvenile delinquency because those with a tendency toward juvenile delinquency simply do not read any type of material.⁴¹ Other studies have discovered additional data indicating a lack of

38. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

39. *Ginsberg v. New York*, *supra* note 3, at 1280.

40. Cairns and Wishner, *supra* note 33.

41. Jahoda, *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate*, Research Center for Human Relations, New York University (1954).

necessity for obscenity control regarding minors. These studies go so far as to indicate that harm may be caused to children by regulation. It has been found that "children react, if at all, more keenly to nonfiction than to fiction. The fairy tales of our youth were replete with horrors—animals eating grandmas and all the rest—but we did not believe them."⁴² Judge Frank noted in his dissenting opinion in *United States v. Roth* that studies showed true newspaper articles concerning sex have more impact on minors than obscenity.⁴³ Other arguments against obscenity control for minors are based on findings that more harm is done in trying to completely cut minors off from the material of a sexual nature, in that the rigors of following ideals concerning sex can cause psychoneuroses, than letting them satisfy their curiosity for pornography.⁴⁴

The conclusion to be drawn from these studies is that at best, no good will come of holding obscenity illegal for children. It would also seem that regulation of what minors are to see and hear are not proper functions for the judicial system, but that any regulation should be left to the child and his parents based on their reason, social identity and religion.

At this point it should be obvious that the history of the law of obscenity control has lacked the elements of a known peril, agreement as to what the assumed harm is and a general understanding of the problem area. These elements are essential if a problem is to be dealt with effectively. And, if no problem can be found, the fact should be recognized. It does not appear to be the proper concern of the government that various groups within our society are incensed because other people read for titillation and not having intellectual content, at least to the point that the courts attempt to define what type of material titillates the mind so it may be made illegal. Kalven has noted that "the task of explaining why the words 'sexual relations' are decent and some other word with the same meaning is indecent is not one for which judicial techniques are adapted."⁴⁵

42. ERNST AND SCHWARTZ, *CENSORSHIP: THE SEARCH FOR THE OBSCENE* 249 (1964).

43. Appendix of Judge Frank, *supra* note 23, at 818.

44. Murphy, *supra* note 31, at 666.

45. Kalven, Jr., *supra* note 15, at 44.

If the courts must nevertheless feel obliged to hear obscenity cases they should first lay a foundation based on empirical evidence, stating what harm has been caused and why it has been caused. If a positive determination of an evil caused by obscenity can be developed, then the illegal material should be much more capable of definition. Next, if a cause and effect relationship can be validly established between obscenity and a harmful condition, the courts should determine what type of action will best remedy the condition. If no cause and effect relationship can be established or if the courts determine that their function is not qualified to handle the problem effectively, then they should say so and leave obscenity control to more adequately equipped institutions.

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