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THE EVOLUTION OF OBSCENITY
CONTROL STATUTES

JOHN HARRINGTON

One of the more illusive legal concepts has been the evolution of an adequate and yet constitutional definition of obscenity, particularly as that term is used in statutes designed to prohibit expressions of such a nature in literature, motion pictures, and other creative art forms. Although an occasional court will proceed with a peremptory observation that "the term 'obscene' has achieved a sufficiently precise meaning to describe a class of motion pictures which the state may validly suppress,"¹ most courts have come to realize that "'obscene' is not a technical term of the law and is not susceptible of exact definition, since such intangible moral concepts as it purports to connote vary in meaning from one period to another,"² and, it may be added, from place to place.³

The "first serious attempt to define obscenity"⁴ considered the effect such material would have on "those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall."⁵ It has been observed of the factual context of this case, however, that more of an element of religious controversy existed in it than alleged obscenity of a definite literary product, the book in question violently attacking the Catholic Church in a Protestant society.⁶

¹ American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585 (1954).

² *Parmelee v. United States*, 113 F. 2d 729 (D.C. Cir. 1940).

³ See footnote 16 by the court in *Parmelee*, *supra*, for an interesting account of such differing moral concepts. For example, Japanese women are not shocked by the absence of clothing on workmen, but are greatly shocked by the evening dress of European women.

⁴ Rittenhouse, *Obscenity and Social Statics*, 1 W. AND M. L. REV. 303 (1958).

⁵ *Regina v. Hicklin*, L. R. 3 QB 360 (1868).

⁶ Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 53 (1938).

The Hicklin Rule was first adopted by the American courts in 1879 in *United States v. Bennett*.⁷ Concededly broad in its inception, since under it a work is obscene if it offends anyone, regardless of age or occupation, the court applied it even more broadly. If any part of a book was obscene within the meaning of *Regina v. Hicklin*, then the entire book must be held obscene and suppressed. The Bennett application became known as the "partly obscene test" and was generally adhered to by the American courts, although at times reluctantly,⁸ until 1934.

In that year one of the most historic obscenity decisions was handed down in *United States v. One Book called "Ulysses."*⁹ The *Ulysses* case disposed of the "partly obscene" doctrine and established what has become known as the "wholly obscene" test. The court declared: ". . . the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content."¹⁰ No longer was a book to be judged by the "impact of isolated passages on the susceptible," but by the "impact of the whole on the average member of the audience,"¹¹ this latter impact however to be judged and measured by a "few selected and approved critics."¹²

Another milestone in the evolution of the law of obscenity was erected in 1957 by *Roth v. United States*.¹³ Material is

⁷ *United States v. Bennett*, 24 Fed. Cas. 1093 (No. 14,571) (S.D.N.Y. 1879).

⁸ Judge Learned Hand, in *United States v. Kennerly*, 209 Fed. 119 (S.D.N.Y. 1913), found himself applying law which he thought to be distinctly out of phase with the moral standards of the times.

⁹ 72 F.2d 705 (2d Cir. 1934).

¹⁰ *Id.* at 708.

¹¹ Kalven, *The Metaphysics of the Law of Obscenity*, SUP. CT. REV. 1 (1960).

¹² Rittenhouse, *supra*, note 4.

¹³ 354 U.S. 476 (1957).

obscene, announced the court in *Roth*, if its dominant theme taken as a whole appeals to prurient interest, as measured by the average person applying contemporary community standards. But this is inherently vague. "We are driven to the conclusion that the verbal formula for obscenity approved by the court in the *Roth-Alberts* decision is not a single formula at all, but one that embraces all of the current definitions of obscenity . . ." ¹⁴ The *Roth* "Prurient Interest" test is of little help in actually defining "obscene." "We know only that material tested for obscenity must be judged as a whole instead of by its parts and by its appeal to or effect on average persons instead of the weak and susceptible. But of what it is that must be judged in this fashion we know little save that it deals with sex in any of its many manifestations." ¹⁵

One thing is clear from the *Roth* opinion; obscenity is not protected by the Constitution:

The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this court either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this court has always assumed that obscenity is unprotected by the freedoms of speech and press. ¹⁶

The opinion then cited ten superior court cases where it is assumed that obscenity is not protected by the Constitution. ¹⁷

A problem present even under the *Roth* opinion is the question of whether obscenity is a variable or a constant. That is, "whether obscenity is an inherent characteristic of obscene materials, so that material categorized as obscene is always obscene at all times and places and in all circumstances, or whether obscenity is a chameleonic quality of material

¹⁴ Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 58 (1960).

¹⁵ *Ibid.*

¹⁶ *Roth*, *supra*, note 13.

¹⁷ *Id.* at 481.

that changes with time, place and circumstance."¹⁸ Chief Justice Warren in *Roth* advocated the variable obscenity concept, at least in the application of the law.

The line dividing the salacious or pornographic from literature is not straight or unwavering . . . It is manifest that the same object may have a differing impact, varying according to the part of the community reached. . . the conduct of the defendant is the central issue . . . [and] the materials are thus placed in a context from which they draw color and character. A wholly different result might be reached in a different setting.¹⁹

In applying an obscenity statute or ordinance, the distinction between "hard-core pornography" and "ideological or critical obscenity" should be kept in mind. Material of the first type has a self-evident nature and is so blatantly shocking and revolting that it is always held to be obscene. An example of critical obscenity came to light in the recent case of *Kingsley Int'l. Pictures Corp. v. Regents of the University of New York*.²⁰ This type of obscenity is that which advocates ideas offensive to community moral standards. In the *Kingsley* case, the idea presented was that adultery was "right and desirable for certain people under certain circumstances." The opinion of the Supreme Court made it plain that this was not obscenity at all, but is in the area of constitutionally protected free speech. "The First Amendment's basic guarantee is of freedom to advocate ideas."²¹ In this area of ideological obscenity, the court frequently resorts to the "clear and present danger test," so familiar in other freedom of expression cases, that there must be clear and imminent danger that the idea advocated will produce a serious substantive evil which the state has power to prevent.

Yet another factor which has influenced court decisions interpreting obscenity statutes has been the doctrine of Prior Restraint. As stated by Blackstone, "the liberty of the press

¹⁸ Lockhart and McClure, *supra*, note 14 at p. 68.

¹⁹ *Roth v. United States*, 354 U.S. 476, 495 (1957).

²⁰ 360 U.S. 684 (1959).

²¹ *Id.* at 688.

is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published."²² Although obscenity may be controlled by the state through the exercise of prior restraint,²³ care must be taken that the statute is not so broad in its language that prior restraint is exercised against authors who would otherwise produce valuable literature merely bordering on the obscene. Also, an obscenity statute must have sufficient certainty of language, for the Supreme Court has stated that a crime "must be defined with appropriate definiteness"²⁴ and where "a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."²⁵

Where a criminal prosecution takes place under an obscenity statute, *Smith v. California*²⁶ introduces still another requirement. In that case, a Los Angeles, California obscenity ordinance held a bookdealer criminally liable for mere possession of a work later found to be obscene, even if he had not read the book, nor had any other knowledge as to its content. The court held that scienter is a necessary requisite for a crime of this nature, and lack of a scienter provision in the statute would render it unconstitutional.

Despite the above decisions, and those intimating similar principles, many states retained obscenity statutes framed in terms of the discredited Hicklin "Partly Obscene" test. These statutes began to pass under Supreme Court scrutiny in 1957.

Michigan had a statute dating from 1938 which prohibited sale of any book *containing any* obscenity tending to corrupt the morals of youth.²⁷ The Supreme Court overruled

²² 4 BLACKSTONE, COMMENTARIES 151-152.

²³ *Near v. Minnesota ex rel Olsen*, 283 U.S. 697 (1931).

²⁴ *Pierce v. United States*, 314 U.S. 306 (1941).

²⁵ *Winters v. New York*, 333 U.S. 507 (1948).

²⁶ 361 U.S. 147 (1959).

²⁷ Michigan Compiled Laws, 1948, § 750.343: "Any person who shall . . . print, publish, sell . . . any book, magazine . . . containing obscene, immoral, lewd or lascivious language . . . manifestly tending to the corruption of the morals of youth . . . shall be guilty of a misdemeanor."

this statute in 1957 in *Butler v. Michigan*.²⁸ Mr. Justice Frankfurter said of the Michigan statute: "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable condition for the maintenance of a free society."²⁹ Michigan and other states with similar statutes responded by enacting new legislation which merely prohibited the sale of such books to minors.³⁰

At this date, there is a good deal of divergence in the treatment of obscenity by the various states. Some, like Virginia, have attempted to keep their statutes in step with the latest court pronouncements, by codifying what is substantially the language of the Supreme Court in defining obscenity, and applying the "approved" *Roth* "Prurient Interest" test of what may constitutionally be censored. Michigan, Florida and Maine, while removing the infirmity of unreasonable breadth and restraint found specifically in *Butler*, still cling to definitions of obscenity rooted in the old partly obscene and wholly obscene theories.³¹

Some states, such as New York, have retained statutes of exceedingly broad language forbidding the production, sale or use by anyone of anything "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting."³² New York then attempts to meet constitutional problems and infirmities in the application of the law on a case-to-case basis, in effect engrafting, through these decisions, the latest definitions and tests on the statute. For example, a 1960 New York case held that "the proper test of obscenity today is whether to the average person, applying contemporary

²⁸ 352 U.S. 380 (1957).

²⁹ *Ibid.*

³⁰ Lockhart and McClure, *supra*, note 14.

³¹ *Ibid.*

³² N. Y. Penal Law § 1141 (1950).

community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Any test which is based on other considerations, such as the possible effect on the young and susceptible, or on the other hand, on sensualists and libertines, does not meet the constitutional test of obscenity."³³

The New York method is not particularly successful, since in attempting to engraft modern concepts onto an ancient statute³⁴ even the state courts find themselves in occasional serious disagreement. Thus we have the phenomenon of one New York court holding in 1959 that: "Subsection 1 of § 1141 of the Penal law is contrary to the letter and spirit of the Fourteenth Amendment and Article 1 § 8 of the Constitution of New York,"³⁵ and another court of New York finding in 1960 that "this section does not violate the Fourteenth Amendment of the Constitution of the United States nor does it operate as a restraint in violation of said Amendment."³⁶

In March, 1960, the General Assembly of Virginia enacted the latest of the Commonwealth's statutes relating to the control of obscenity.³⁷ As has already been indicated, Virginia is attempting to keep its obscenity statutes in line with Supreme Court pronouncements. The new statute defines obscenity as that "which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion and if it goes substantially beyond customary limits of candor in description or representation of such matters."³⁸ This definition is derived from both the *Roth* case and the Model Penal Code, but it should be noted that there are differences between the two. For example, the *Roth* case

³³ *People ex rel. Callaghan v. Bunis*, 23. Misc. 2d 156, 198 N. Y. Supp. 2d 568 (1960).

³⁴ N. Y. Penal Law § 1141 has been in substantially the same form since 1884. See Alpert, *supra*, note 6 at p. 64.

³⁵ *People v. Douglas*, 21. Misc. 2d 551, 202 N.Y. Supp. 2d 160 (1959).

³⁶ *People v. Cohen*, 22 Misc. 2d 722, 205 N.Y. Supp. 2d 481 (1960).

³⁷ VA. CODE ANN. § 18.1-227-236.3 (1950) (Replacement Volume 1960).

³⁸ VA. CODE ANN. § 18.1-227 (1950) (Replacement Volume 1960).

speaks of "the average person, applying contemporary community standards" and concludes that if "the dominant theme of the material taken as a whole appeals to prurient interest,"³⁹ the material is obscene. The Virginia and Model Codes, however, make no reference to the "average person" and "contemporary community standards." Instead, they find two levels of prurient interests. By a strict interpretation of the Virginia statute, an appeal to prurient interest would not be obscene *unless* it also went "substantially beyond customary limits of candor in description or representation of such matters."⁴⁰ The absence of "average person" and "community" standards is cured within the Virginia statute by "customary limits of candor" and later reference to "degree of public acceptance of the book or books of similar character, within the county or city in which the proceeding is brought,"⁴¹ but it is interesting to note that the Supreme Court seems to be saying that obscene *equals* appeal to prurient interest, even though measured by contemporary community standards, while the Virginia Legislature is saying that obscene equals prurient interest *plus* going *substantially* beyond customary limits in the appeal to prurient interest. It would thus appear that Virginia may be giving even more protection to literature and the arts than the Supreme Court gave in *Roth*.

Against the background of illusive value judgments inherent in the concept of obscenity, Virginia's new statute is perhaps the best that can be hoped for. It contains a court-approved definition of "obscene," one that is neither too broad in scope, nor too restrictive in evaluation of the questioned work or of its possible effect on a particular class. It contains the proper element of scienter, as the words "every person who knowingly" are used throughout.⁴² The Virginia statute is concise and explicit, thus satisfying the requirements of definiteness. The concept of variable obscenity is recognized in that the statute exempts public educational

³⁹ Roth, *supra*, note 13 at 489.

⁴⁰ VA. CODE ANN. § 18.1-227 (1950) (Replacement Volume 1960).

⁴¹ VA. CODE ANN. § 18.1-236.3(8)b (1950) (Replacement Volume 1960).

⁴² VA. CODE ANN. § 18.1-1228, 230, 231, 232, 235 (1950) (Replacement Volume 1960).

institutions⁴³ and persons such as scholars, scientists and physicians, for whom the work may have no prurient interest,⁴⁴ from its requirements. As has been pointed out, "one criticism that may be leveled . . . is that the exemption is limited to institutions supported by public appropriations."⁴⁵ The intent of the legislature is evident in attempting to prevent the creation of 'schools'⁴⁶ for the study of obscenity."⁴⁷ However, it is worth noting that even if this were not done, courts are given the authority under the statute to except a restricted category of persons from their judgment that a book is obscene.⁴⁸ This would seem broad enough to cover the case of private educational institutions.

The Virginia statute also requires the courts to consider evidence, if offered, either by experts or non-experts, of the artistic, literary, medical, scientific, cultural and educational values of the work, considered as a whole; the intent and reputation of the author of the book; and the circumstances of sale, advertising, and promotion of the book in determining the issue of obscenity. There would seem, then, to be enough elasticity in the statute to suppress hard-core pornography while at the same time permitting freedom of press and free cultural expression. The Virginia statute is perhaps the best thus far fashioned as an aid to discovering that "present critical point between candor and shame at which the community may have arrived here and now."⁴⁹ An obscenity statute can do no more; now it is up to the good sense of prosecutors and judges, proceeding on a case-to-case basis, to prevent the statute from again becoming so restrictive as to impair the constitutional guaranties of liberty.

⁴³ VA. CODE ANN. § 18.1-236.2 (2,3,4) (1950) (Replacement Volume 1960).

⁴⁴ VA. CODE ANN. § 18.1-236.3(8)f (1950) (Replacement Volume 1960).

⁴⁵ Shepperd, *The Law of Obscenity in Virginia*, 17 WASH. & LEE L. REV. 322 (1960).

⁴⁶ *Id.* at 327.

⁴⁷ Shepperd, *supra*, note 45.

⁴⁸ VA. CODE ANN. § 18.1-236.3(10) (1950) (Replacement Volume 1960).

⁴⁹ Judge Learned Hand's personal definition of obscenity, so opposed to the legal definition prevailing at the time, which he felt constrained to follow. See, *United States v. Kennerly*, 209 Fed. 119, 120-121 (S.D.N.Y. 1913).