Obscenity and Social Statics

David C. Rittenhouse

Repository Citation
David C. Rittenhouse, Obscenity and Social Statics, 1 Wm. & Mary L. Rev. 303 (1958), https://scholarship.law.wm.edu/wmlr/vol1/iss2/4
OBSCENITY AND SOCIAL STATICS

DAVID C. RITTENHOUSE

... whatever aspect of our culture is considered each is packed with sex obsession. Its vast totality bombards us continuously, from cradle to grave, from all points of our living space, at almost every step of our activity, feeling, and thinking ... In the conditions of spiritual, moral, and mental anarchy which is becoming characteristic of our environment, it is difficult to maintain sexual sanity.¹

Although it is not inevitable that a study of obscenity should concern itself primarily with sex or affairs having sexual significance, men in their attempts to delineate the concept have formulated it upon a sex-centralized idea.² The purpose of this paper is to illustrate some of the changes which have taken place in obscenity as an idea and the struggle which has taken place in the effort to formulate a stabilized concept which may be applied with some assurance of fairness by man with his limited understanding. Constitutional limitations have had an effect upon the development of the concept and, indeed, time with its attendant changes in the social order, mores, and customs of the community be it city, state, or nation has inhibited the development of a test which will have validity at all times or in all places.

Evolutional Development In The Concepts Of Obscenity

Problems of obscenity began to come into focus after the invention of the printing press. With the increasing ease of publication, the circulation of books and pamphlets was greatly expanded; as more people became literate the influence of the author rapidly increased. The Roman Catholic Church of the Middle Ages was the first organized group to assume for itself the role of the censor. That the Church should do so was natural,

² "As our Desires, Passions, and Affections are connected, in their origin and development, with the knowledge which we have of their objects, Opinion may be said to be, not merely the condition of these states of feelings, but an element of them." [Fleming, Moral Philosophy, p. 45].
for in this period the Church was concerning itself with Man and his introspective life. Public manifestations of private thoughts must bear the burden of the Church's approval, or the thinker must continue his contemplations in silence. At first the power of the Church and its ecclesiastical courts was exercised through the medium of excommunication and admonition. Later fines, imprisonment, and the stake were added to these sanctions. With the coming of the Reformation in England the power of these ecclesiastical courts waned; however, Henry VIII was quick to fill the vacuum, and the Court of Star Chamber resumed the function of censorship. In 1585 at the instigation of Archbishop Whitgift, the court passed a regulation that no book could be published without the perusal and approval of the Archbishop of Canterbury or the Bishop of London. Performance of this tedious task was, for the most part, delegated to a chaplain.

The first half of the 17th Century in England saw the end of the Tudor Dynasty with the passing of Elizabeth. The union of Scotland and England was temporarily effected with the ascension of James VI of Scotland to the English throne as James I. The period was one of consolidation of the gains in English power—especially sea power—under the reign of Elizabeth. In 1625 Charles I replaced James I and endeavored to maintain the established royal prerogatives against a growing popular unrest. Charles, nevertheless, increased the fear of the adoption of the Roman heresy when he received Panzani, the Pope's agent, in 1634. In 1649 there was found, in Cromwell, a catalyst to stimulate and direct the increasing discontent of the English people with the king. The people, however, were deceived for the Puritan dictatorship under Cromwell proved to be worse than that under King Charles. The situation reached its nadir in 1659 with

3 In 1876 the paucity of their jurisdiction was judicially recognized in Phillimore v. Machon, 19 Eccl. 310, 27 H.&W. 50.

4 Ecclesiastical censorship survives today in the Index Librorum Prohibitorum published by the Roman Catholic Church. This Index contains a list of some four thousands books forbidden throughout the world and in every translation. No Roman Catholic layman may read any of these books without special permission granted only for single books and only in urgent cases. The edition of the Index published in 1938 includes: Gibbon's Decline and Fall of the Roman Empire, Montaigne's Essays, Ranke's History of the Popes, Taine's History of English Literature, Hugo's Notre-Dame de Paris and his Les Miserables. The list contains works by Hobbes, Locke, Pascal, Stendhal, and Voltaire. Craig, Above All Liberties, p. 14 (George Allen & Unwim, Ltd., 1942).
a year of anarchy following the dissolution of Cromwell. In 1660 with the return of Charles II from France, where he had been receiving his education and engaging in the very full and “free” Parisian social life, “Merry England” returned in earnest. The people were ready for a change and Charles proved to be the very man to lead the way. As customarily happens with any sudden and drastic change, the people went too far and there were serious excesses. One of the most famous of these incidents resulted in Sedley’s case. Sir Charles Sedley was one of the close friends of Charles II and was a member of a group of gay young wits who were accustomed to gather in the taverns in the neighborhood of Charing Cross and to horrify the customers and passers-by with their unseemly words and acts. On the particular day in question, according to Anthony à Wood, the following events took place:

In the month of June 1663 this our author, Sir Charles Sedley, Charles Lord Buckhurst (afterwards Earl in Middlesex) Sir Thomas Ogle, etc., were at a Cook’s house at the sign of the Cock in Bowstreet near Covent-garden, within the liberty of Westminster and being inflamed with strong liquors, they went into the balcony belonging to that house, and putting down their breeches they excrementized in the street: which being done, Sedley stripped himself naked, and with eloquence preached blasphemy to the people . . .

For this reproach to religion and the peace and good order of the king, Sedley was fined 500 £. Upon hearing his sentence Sedley cavalierly replied that he now supposed that he was the first person in all England who had to pay for his relief.

It was in an atmosphere such as this that the Crown un-

5 The great number of spicy translations from works by Italian writers was deplored by a small but vocal group of moralists. Roger Ascham in his Schoolmaster described the feeling of this group: “. . . Ten sermons at Paul’s cross do not so much good for moving men to true doctrine, as one of those books do harm, with inticing men to ill living . . . They open, not fond and common ways to vice, but such subtle, cunning, new and diverse shifts, to carry young wills to vanity and young wits to mischief, to teach old bawds new school points, as the simple head of an Englishman is not able to invent, nor never was heard of in England before.” Craig, op. cit., supra, at 17.

6 Athenae Oxonienses (1813-20), IV, p. 731; King v. Sedley, Kebble, 620, 10 State Trial Ass. 93 (1663) (1st reported conviction for obscenity).
successfully brought an action, in 1708, for obscene libel against
the publisher of a book entitled *The Fifteen Plagues of a Maiden-
head*. The judge in dismissing the indictment commented upon
the action:

This is for printing bawdy stuff, that reflects on no
person... and a libel must be against some particular
person or persons, or against the Government. It is stuff
not fit to be mentioned publicly. If there is no remedy
in the Spiritual court, it does not follow there must be
a remedy here. There is no law to punish it.7 I wish
there were: but we cannot make law. It indeed tends to
the corruption of good manners, but that is not sufficient
for us to punish it...8 As to the case of Sir Charles
Sedley, there was something more in that case than
showing his naked body in the balcony...9

Needless to say the situation of which the judge spoke was
later remedied. In more modern times Count Potocki of Montalk
was prosecuted for obscene libel under Clause 19 of the Criminal
Justice Bill passed by the House of Commons in 1923. This
clause provided that upon information on oath by an inspector
of police or any other officer of equal or superior rank, to the
satisfaction of a justice, that there is reasonable cause to suspect
that indecent or obscene articles are kept within any place for
the purpose of sale or distribution, the named place may be
searched and the offending publications seized with a fine or jail
sentence or both for the publisher. The publications seized, copies
of which were furnished the judge, turned out to be *Wild Oats*
(1927), *Surprising Songs* (1930), and *Lordly Love Songs* (1931). The prosecution was required to prove that the character of the
poems was such that under the circumstances their publication
was a criminal offense. In as biased a summation as was ever cal-
culated to mislead a jury, Judge Wild remarked:

Are you going to allow a man, because he calls himself
a poet, to deflower our English language by populariz-
ing these words? Remember the standard of morals has

7 The statute imposing censorship of the press was allowed to expire in 1695.
8 But see King v. Curl, 2 Strange 788, 790 (1727), where the court said:
   "... if it [a libel] tends to disturb the civil order of society, I think
   it is a temporal offense."
9 Regina v. Read, Fort. 98, 99 (1708).
advanced... A man must not say he is a poet and be filthy. He has to obey the law just the same as ordinary citizens, and the sooner the highbrow school learns that the better for the morality of the country.  

After an extended deliberation the jury returned a verdict of guilty and Montalk was sentenced to six months in prison. Upon an examination it is apparent that Montalk was the victim of judicial change. Prior to 1915 an indictment for obscene libel was required to allege an express intent on the part of the accused to publish an obscene libel accompanied by a publication with such intent. After the Indictments Act of 1915 the charge was merely required to allege that the defendant had "published an obscene libel." Thus it was no longer necessary for the Crown to prove that the accused had done the act with the specific intent of publishing an obscene libel; it was only necessary to show that the accused did the act, that he had intended to do the act which he in fact did, and that the matter published constituted an obscene libel. The law presumed from the obscene character of the matter published that the publication had taken place with the specific intent to publish an obscene libel. The basis for this reasoning is the principle that a man is held to intend the natural and probable consequence of his own acts. It is interesting to note that it was about this time that Sir Archibald Bodkin, as Director of Public Prosecution, was able to obtain an interpretation from the court that a publication included an obscene com-

---

10 Craig, *op. cit. supra*, at 85.

11 The form of the indictment used was:

"that (so-and-so) being a person of a wicked and depraved mind and disposition, and unlawfully and wickedly devising, contriving, and intending, to vitiate and corrupt the morals of the liege subjects of our said Lord and King, to debauch and poison the minds of divers of the liege subjects of our said Lord and King, and to raise and create in them lustful desires, and to bring the said liege subjects into a state of wickedness, lewdness and debauchery, on the... day of..., in the year of our Lord, etc., and within the jurisdiction of the said Court, unlawfully, wickedly, maliciously, scandalously, and wilfully did publish, etc., a certain lewd, wicked, bawdy, scandalous, and obscene libel, in the form of a book entitled... in which said book are contained among other things, divers wicked, lewd, impure, scandalous, and obscene libels... To the manifest corruption of the morals and minds of the liege subjects of our said Lord the King, in contempt of our said Lord the King, and his laws, in violation of common decency, morality, and good order, and against the peace of our said Lord and King, his Crown and Dignity." Craig, *op. cit. supra*, at 88 and 89.
munication between two persons which did no harm to any third party.

Recently, in England, insurance companies have refused to cover obscene books whenever policies were issued to librarians or the owners of private collections. Some of those insured have obviated this difficulty by a "gentlemen's agreement" with the insurance company that in the event of the presentation of a claim the company will not raise the issue of "obscenity".

The most difficult problem in a study of obscenity is to define the concept under consideration. It is in fact almost impossible to produce a description which is broad enough to include all of those subjects which have been held to be obscene, and narrow enough to exclude those which were found not to be covered. Havelock Ellis, who devoted his life to a study of the psychology of sex, has defined obscenity as "that which is off the scene on the stage of life and normally hidden." Although Ellis' definition has been much criticized, it would seem that ultimately obscenity is nothing more or less than those objects to which the social group in control applies the appellation.

The courts, too, have had little luck with the concept of obscenity. The first serious attempt to define obscenity is to be found in Regina v. Hicklin. This case involved a prosecution for the publication of a number of copies of a pamphlet entitled "The Confessional Unmasked." The stated purpose of this publication was to show the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession. At the trial it was admitted by all of the

12 In England and on the continent nudist magazines with pictures depicting the daily activities and routine of life in a nudist camp appear to occupy a favored position. As long as the subjects are arranged naturally and there are no improprieties of position, it is permissible for full face, full length photographs to be taken and published in the magazine.

13 This standard would also apply to the withdrawal of books from open circulation in the great libraries of the world. For example, John Robertson's Generative System (1817-1824) has been withdrawn from the public catalogue of the British Museum Reading Room and Payne's Villon (1878-1892) and Boccaccio's Decameron have been stricken from the catalogue of the Bibliotheque Nationale.

14 L. R. 3 Q.B. 360 (1868).
parties that the part of the pamphlet in question was obscene. The question presented for the decision of the justice was whether, that being so, the fact that the defendant had only a good motive in preparing the pamphlet saved him from a prosecution for publishing obscene matter. The court held that the prosecution was proper and Chief Justice Cockburn in a statement which was mere obiter gave his famous definition of obscenity which has become known as the Hicklin Rule:

... I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall.\(^\text{15}\)

It is apparent at once that this test is inadequate for it expands the definition of obscenity to include any picture or publication which might tend to offend anyone regardless of age or occupation. Subjected to such a rule, almost any publication might be found to be obscene. No author working under such a standard could hope to create literature of any great value. The Hicklin Rule was soon adopted by the American courts.\(^\text{16}\)

As adopted, the rule was modified in United States v. Bennett,\(^\text{17}\) in which the court said that if any part of a book was obscene under the statute the entire book was obscene within the meaning of the statute and should be suppressed as such. This decision produced a very curious result. In 1895 John B. Wise of Clay Center, Kansas, was arrested and convicted of sending obscene matter through the mails.\(^\text{18}\) The obscene matter consisted entirely of a quotation taken from the Bible. Thus applying the rule in the Bennett case we reach the result that the Holy Bible is obscene. Such a conclusion is of course absurd, but the example serves to illustrate the effect of carrying such a rule to its end result.

In 1934 what is undoubtedly the most important case in the American law of obscenity was decided. United States v. One

\(^{15}\)Ibid. at 371.
\(^{16}\)People v. Muller, 96 N.Y. 408 (1884); Rosen v. United States, 161 U.S. 29, 43 (1896).
\(^{18}\)Schroeder, Obscene Literature and Constitutional Law, p. 65 (Privately Printed for forensic uses, 1911).
Book Entitled Ulysses raised the question of whether Ulysses came within Section 305(a) of the Tariff Act of 1930 which forbade all persons to import obscene books into the United States. In holding that Ulysses was not obscene within the meaning of the statute, the court refused to follow the rule of the Hicklin case and said instead that the proper test of obscenity is "... whether the book is obscene in its dominant effect." In applying this test, the court will consider

... [the] 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, [as] persuasive pieces of evidence.20

However, several factors upon which the court does not elaborate, or fails to mention entirely, enter into the decision of this case.

The court felt that the obscene passages in Ulysses were buried in the bulk of the book and thus somehow lost their significance to the story as a whole.21 The book contains 768 pages and, according to the dissenting justice who followed the Hicklin Rule, thirty-three of them contain obscene passages. This figure represents slightly over 4% of the book.

The judges also felt that Joyce was sincere throughout the entire book and was not engaging in pointless pornography.22 The purpose of the obscene passages is to bring out the personalities of the characters as they are and to shade in and give tint and texture to the environment in which Joyce's people co-exist.

Underlying both of these determinations is the peculiar style in which Joyce has written his book. This treatment is perhaps best described as a "stream of consciousness" in which the statements of the characters run together without punctuation, and the thought sequences vary rapidly and to a marked degree. Such a method makes even the obscene passages difficult to un-

19 72 F.2d 705 (2d cir. 1934).
20 Ibid. at 708.
21 "... The erotic passages are submerged in the book as a whole and have little resultant effect." Ibid. at 707.
22 "... We think that Ulysses is a book of originality and sincerity of treatment and that it has not the effect of promoting lust. Ibid. at 706.
derstand,\textsuperscript{23} and tends to cause them to merge their identity with the rest of the book.

Judge Woolsey, in the process of reaching his decision equated obscenity with pornography. Prior to the Ulysses case most courts had recognized a difference between the two.\textsuperscript{24} According to Judge Woolsey:

\ldots in any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called \ldots pornographic, that is, written for the purpose of exploiting obscenity.\textsuperscript{25}

The Court of Appeals in affirming Judge Woolsey's decision did not pass upon this precise point. Instead the court used the "obscene in its dominant effect" test. This latter test is far more conducive to a successful prosecution than the one proposed by Judge Woolsey, for the element of an intentional publication of obscene literature for the sake of obscenity alone is not necessary to a conviction under the test.

A peculiarity of both the decision in the District Court and the Court of Appeals is that neither court attempted to define "obscenity" in the process of formulating different tests for the presence of obscenity. Thus while the rule of the Ulysses case is more reasonable and more equitable than that applied in the Hicklin case, it is subject to the criticism that it is no test for obscenity at all, since the fundamental prerequisite for the application of the test is a finding that the subject matter under consideration is obscene. On behalf of the court it may be said that the court is not trying to define "obscenity" as such but is attempting to formulate the factors to be considered in determining whether or not the published matter should be removed from public circulation. Once the determination to ban the publica-

\textsuperscript{23} "Ulysses is not an easy book to read or to understand \ldots in order properly to approach the consideration of it it is advisable to read a number of books which have now become its satellites \ldots." United States v. One Book Entitled Ulysses, 5 F.Supp. 182, 183 (S.D.N.Y. 1933), aff'd, 72 F.2d 705 (2d Cir. 1934).

\textsuperscript{24} Pornography is literature written solely or primarily \textit{for the purpose of} exploiting obscenity. Obscenity on the other hand may be language interposed in a piece of literature for the purpose of characterization, realism, or simply to shock the reader.

\textsuperscript{25} United States v. One Book Entitled Ulysses, supra, note 23, at 183.
tion has been made, the court affixes the label of obscenity to the printed matter to justify and characterize its result.

Many other tests for obscenity have been developed by the courts, and more often the emphasis has been placed upon the effects produced by reading the publication in question rather than the nature of the words and expressions themselves.

In *Commonwealth v. Isenstadt*, the defendant was convicted of selling and having in his possession for the purpose of sale an obscene book. The book in question is *Strange Fruit* which deals with the problem of miscegenation and race relations in the South. The court in overruling the defendant's exceptions to the judge's ruling, pointed out the fact that the statute under which the prosecution was brought was designed to protect the morals of youth. As such, the test for obscenity, under the statute, is whether the book, *Strange Fruit*, would be likely to have young people among its "probable readers" and, if so, whether the book has a substantial tendency to deprave or corrupt these youthful readers by inciting lascivious thoughts or arousing lustful desires.

Judge Lummus in his dissent points out the fact that the record contained no evidence to show that any adolescent had ever read the book or ever would read it under normal conditions. Nevertheless the fact of a prosecution for obscenity normally arouses undue and unnatural interest in a book among both adults and adolescents alike. Therefore by bringing the indictment, the State has, to a certain extent, provided a "probable audience" which will conform to the requirements of the statute.

In applying such a statute as Massachusetts enacted and used in the *Isenstadt* case, most courts adopt a variation of the rule of the *Hicklin* case. The variation being that if the average adolescent would not tend to be depraved or corrupted by the book, the fact that an occasional young person might be so influenced would not make the book obscene.

---

27 "... under each of the prohibitions contained in the statute the test of unlawfulness is to be found in the effect of the book upon its probable readers..." *Ibid.* at 844.
28 The obscenity statute in Virginia is substantially the same as that in Massachusetts, and it is very likely that should there be a prosecution under the statute, barring unconstitutionality, the Virginia courts would reach a similar result. See Va. Code, §18-113 (1950).
A modification of the Hicklin Rule is still the test in at least one jurisdiction in the United States. New Hampshire by statute defines an obscene book as one

... whose main theme or a notable part of which tends to impair, or to corrupt, or to deprave, the moral behavior of anyone viewing or reading it. 29

It is not always necessary to obscenity that the prurient passage be likely to produce improper conduct on the part of the reader. A number of statutes concern themselves with the effect upon his mind and emotions alone. In United States v. Levine, 30 which involved a statute directed against publications stimulating sensuality, the Court of Appeals approved of a jury charge that the literature was not to be measured by its effect upon the "highly educated" or upon the "highly prudish" mind, but instead was to be measured by its effect upon the "usual, average human mind". 31 The conviction for mailing obscene material through the mails was nevertheless reversed because the judge in the trial court delivered part of his charge to the jury under the mistaken apprehension that a book or passage was obscene or innocent by an absolute standard independent of its readers and that a single tainted passage might condemn the whole book.

In other cases in which the prosecution was brought under a statute which forbade selling or offering for sale an "obscene, lewd, indecent, lascivious, disgusting, or filthy" book, the courts have held that a book does not fall within the condemnation of the statute unless conduct is involved. 32 The State of New York in People v. Creative Age Press, 33 brought an action against a publisher for the sale of a book entitled The Gilded Hearse. The

30 83 F.2d 156 (2d Cir. 1936).
31 In Walker v. Popenoe, 149 F.2d 511, 512 (D.C. Cir. 1945), a pamphlet "Preparing for Marriage" was involved in a prosecution brought under a similar statute passed during President Grant's administration. The court said: "... If a publication as a whole is not stimulating to the senses of the ordinary reader, it is not within the statute."
32 Occasionally a book sent through the mails is obscene for sheer nastiness. Besig v. United States, 208 F.2d 142, 145 (9th Cir. 1953): "... The civilization of our times holds to the premise that dirt in stark nakedness is not generally and at all times acceptable."
33 192 Misc. 188, 79 N.Y.S.2d 198 (1948).
court found that the book was not obscene under the statute because:

To determine whether a book falls within the condemnation of the statute, an evaluation must be made of the extent to which the book as a whole would have a demoralizing effect on its readers, specifically respecting sexual behavior . . . 34

Since the primary purpose of the book was to show the shame and guilt, the grief and hardship, which marital infidelity ultimately brings to the participants, the book could not have the demoralizing effect contemplated by the statute.

The courts have frequently looked to the literary, scientific, and educational values of a book in determining whether or not it is obscene. A vigorous dispute has been going on for many years concerning the validity of this Artistic Merit Test. Those persons whose sensibilities are easily offended tend to feel that artistic merit is no excuse for the publication of a book which is obscene to any degree. With the opinion of Lord Cockburn in the Hicklin case, the Artistic Merit Test was discarded in favor of the rule that if any part of a book was obscene the entire book was obscene. This rule has come to be known as the Partly Obscene Test. 35 This rule is the "orthodox test" for obscenity in literature and was uniformly applied in England and the colonies for many years. Recently, however, with the opinion of the court in Ulysses case, the trend has been towards the development of a formulation that a book is not obscene unless it is wholly obscene, i.e., unless it is obscene in its dominant effect. The development of the Wholly Obscene Test has given judges and juries a much greater opportunity to exercise a personal discretion in their decisions as to whether or not a book is obscene.

Frequently the turning point in a close case is the sincerity of the author 36 and the artistic merit of his work. 37 Despite this:

\[34\text{Ibid. at 201.}\]
\[35\text{It is thought that the test developed out of an old rule of pleading that required the indictment to specify the parts of a book alleged to be obscene. Commonwealth v. McCance, 164 Mass. 162, 41 N.E. 133 (1895); Commonwealth v. Friede, 271 Mass., 318, 171 N.E. 472 (1930).}\]
\[36\text{United States v. Dennett, 39 F.2d 564, 569 (2d Cir. 1930).}\]
\[37\text{United States v. One Book Entitled Ulysses, supra, note 23.}\]
fact a few courts still adhere to the view that the literary qualities of a book are irrelevant. Although in Massachusetts the literary qualities of a book are not too important, they are not entirely ignored. In New York the courts have reached the opposite extreme and have occasionally held that the obscene literature law is totally inapplicable to works of genuine literary value. As a general rule the artistic merit of the book is important, but it is by no means conclusive, especially where the court believes that the author was insincere in the purpose with which he wrote the book.

As we have seen from the previous discussion, obscenity may be all things to all people. However, there is one thing that obscenity is not. Obscenity is not static. It is a constantly changing concept which takes its fabric from the warp and the woof of the society in which it is spun. Judge Struble in *State v. Lerner*, had this to say:

Obscenity is not a legal term. It cannot be defined so that it will mean the same to all people all the time, everywhere. 'Obscenity' is very much a figment of the imagination, an indefinable something in the minds of some and not in the minds of others; and is not the same in the minds of the people of every clime and country, nor the same today that it was yesterday or will be tomorrow.

The summation, however, belongs to Judge Learned Hand who in *United States v. Kenmerly*, said:

... should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?

---

40 People v. Viking Press, 147 Misc. 813, 264 N.Y.Sup. 534 (1933); People v. Miller, 155 Misc. 446, 279 N.Y.Sup. 583 (1935).
42 81 N.E.2d 282 (Ohio C.P. 1948).
45 *Ibid.* at 121.
Constitutional Limitations

The problems of obscenity and the protections of a free speech and a free press afforded by the First Amendment and the Due Process Clause of the Fourteenth Amendment have recent origins in our constitutional history.

In *Chaplinsky v. New Hampshire*, a statute forbade the use of offensive or annoying words in a public place and had been interpreted by the New Hampshire Supreme Court as being limited to the use in public of words directly tending to provoke a breach of the peace. The Court in affirming a conviction found that the statute as construed by the New Hampshire State Courts was not vague and indefinite and was a valid exercise of the police power of the state. In the course of his opinion, Justice Murphy, by way of dictum, commented:

... There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd, and obscene, the profane, the libelous, and the insulting ... words ...

Later the Court upheld an Illinois statute which made it a crime to distribute in public places pamphlets which portrayed unchastity or a lack of virtue in any class of citizens or of any race. Thus obscene speech in pamphlets circulated publicly was placed in the same unprotected category as obscene language spoken in public places.

The Court, however, had not yet squarely faced the problem of obscenity in a book or other literary publication. To refuse constitutional protection to the use of obscene language in public places, or pamphlets libelous of a race or class, was clearly correct because such language had never been thought to represent an essential part of any exposition of ideas, and therefore was of little social value in relation to the interest of society in order and morality.

---

46 Burstyn v. Wilson, 343 U.S. 495 (1952); Schneider v. Irvington, 308 U.S. 147 (1939).
47 315 U.S. 568 (1942).
48 Ibid. at 571 and 572.
When the problem did arise the Supreme Court was faced with the problems of prior restraint, certainty, and reasonableness of the statute.

Initially, the Court upheld state obscenity statutes, and it is only recently that literature challenged on the grounds of obscenity has begun to receive any measure of constitutional protection.

The Doctrine of Prior Restraint was first enunciated by Blackstone:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.  

In America the first case to formulate the doctrine fully was Near v. Minnesota ex rel. Olson. The Court pointed out that there were certain exceptions to the prior restraint principle and that one of these exceptions pertained to obscene publications.

It was not, however, very long before the Court became disturbed over the uncertainty and ambiguity of the meaning of "obscenity" as used in the state statutes. While not saying that obscenity as such was constitutionally protected, the Court began to find some of these statutes unconstitutional because of their vagueness and ambiguity. In Winters v. New York, the Court reversed a conviction under the New York statute which prohibited the distribution of magazines consisting primarily of stories of lust and crime "so massed as to become vehicles for inciting violent and depraved crimes against the person." The ground for reversal was that the statute was so uncertain and indefinite that it included, according to the language used, the

---

60 4 Bl.Com. 151, 152.  
61 283 U.S. 697, 716 (1931).  
punishment of events within the protection of the Fourteenth Amendment.

In 1948 in Ohio, a dealer in books was prosecuted under an Ohio statute which forbade the sale, or the offering for sale, of an obscene "writing, advertisement, or circular." An amendment to the statute prohibited the sale, or the holding for sale, of "books, pamphlets, and magazines" not "wholly obscene." The dealer was prosecuted because he had offered for sale a magazine entitled "Sunshine and Health". The state did not maintain that the magazine was wholly obscene but it did claim that the magazine was partially obscene because of the pictures of nude men and women contained within it. The Court of Common Pleas found the defendant not guilty and also found that the amendment to the statute was in violation of Article I, Section II, of the Ohio Constitution which provided that:

... no law shall be passed to restrain or abridge the liberty of speech, or of the press.

The Court remarked that there was no valid reason for finding books, papers, pamphlets and magazines obscene when they only contained a few objectionable passages and finding writings, advertisements, and circulars not obscene unless they were objectionable in their entire content. Proclaiming that there is a "rule of reason" which the courts must follow in construing the obscenity statutes, the court pointed out that it is extremely difficult to define exactly what types of literature the legislature intended to prohibit when it banned the sale of obscene literature. Since each case must depend on its own facts, it is unreasonable to provide any test other than that the book be wholly obscene or obscene in its dominant effect. The court remarked:

... In holding an 'obscene book' as one 'wholly obscene' we are supported by the weight of recent decisions.

A recent decision by the Supreme Court has continued the trend of extending the constitutional protections of free speech and free press to publications alleged to be obscene, upon the

---

53 State v. Lerner, supra, note 42.
54 Ibid. at 290.
55 Ibid. at 288.
failure of the legislature to set the proper standard or the courts to apply the proper test for obscenity.

In *Butler v. Michigan*, the defendant was convicted for violating a Michigan statute which made it an offense to make available for the general reading public a book that is found to have a potentially deleterious influence upon youth. The Supreme Court in reversing the conviction noted that Michigan already had one statute specifically designed to protect children from obscene literature tending to corrupt them. The Court then went on to say:

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.

Another recent case involved one of the Court's pronouncements upon the Doctrine of Prior Restraint. The case of *Kingsley Books, Inc., v. Brown* involved an action for an injunction under Section 22 of a New York statute authorizing the legal officer of a municipality to maintain an action for injunction against the sale or distribution of indecent written or printed matter. The statute provided the seller or distributor with a right to a trial of the issues within one day after joinder of issues and a decision within two days of the conclusion of the trial. In connection with the application of this statute, New York authorized the use of an injunction *pendente lite*. Appellants challenged the constitutionality of Section 22-a on the ground that it operated as a prior restraint upon the publications affected. Justice Frankfurter, in upholding the constitutionality of the statute, made it clear that the New York statute unlike the Minnesota statute in *Near v. Minnesota*, withheld restraint upon material not yet published and not yet found to be obscene. The fact that the statute provided for satisfactory procedural safeguards in the

---


57 Judge Forrest B. Wall of Municipal Court, Newport News, Virginia, recently ruled that the Newport News ordinance pertaining to obscene literature was unconstitutional on the basis of its close similarity to the Michigan statute of the above cited case. *Daily Press Newport News, Warwick, Hampton*, December 13, 1957.

form of an immediate trial of the issues followed by a prompt decision in the case saved it from a violation of the Due Process Clause of the Fourteenth Amendment. The issuance of an injunction *pendente lite* was reasonably adapted to the proper end which the statute sought to effectuate. It is significant that no question as to the reasonableness of the standard of propriety adopted by the legislature, or the test of obscenity used by the trial court was raised in this case. However, Justices Douglas and Black dissented upon the ground that it was no defense that the statute only involved a "little encroachment" or a slight prior restraint. They also point out that the statute makes one criminal conviction for obscenity conclusive, and authorizes a statewide decree, when in fact the composition of the persons among whom the obscene matter was distributed may vary widely from city to city and will undoubtedly have an important influence upon the determination of guilt in each case. Justice Brennan dissented, remarking that the statute was fatally defective in that it failed to provide for a right to a jury trial. Chief Justice Warren also dissented because he felt that the New York statute placed the book on trial without providing in the statute any standard for judging the book in context.

In a case heard and decided on the same day as the *Kingsley Books* case, the Court was squarely presented with the question of whether written matter which had been previously determined to be obscene in the lower state and district courts was entitled to the protection afforded by the First and Fourteenth Amendments. *Roth v. United States*[^69] involved the appeals of Roth and Alberts from convictions under separate federal and state statutes dealing with obscene publications. The federal statute involved in Roth's appeal made it a felony to send obscene matter through the mails. The California statute challenged in Albert's appeal made it a misdemeanor to keep for sale or advertise material that is indecent. Justice Brennan, speaking for a majority of the Court, disposed of both appeals on the basis of whether or not obscenity is an utterance within the area of protected speech and press. In affirming both convictions the Court laid stress upon the fact that obscenity *per se* has never been within the protection of the Constitution because purely obscene literature is of no "redeeming social importance". The court also found that the "Clear and

Present Danger” test used by Judge Bok in Commonwealth v. Feigenbaum did not apply to obscene matter; a federal obscenity statute prohibiting the sending of obscene matter through the mails is a proper exercise of the power delegated to Congress by the Constitution to establish post offices and post roads; the certainty required in an obscenity statute is that the language convey a sufficiently definite warning of the proscribed conduct as measured by common understanding and practices; and the federal government by its statute did not preempt the field since the federal statute was limited to federal postal functions. Chief Justice Warren concurred because he felt that the state and federal governments by these statutes had constitutionally prohibited the conduct of dealing in obscene publications, although the same statutes might not constitutionally condemn any particular book as obscene. Justice Harlan concurred in the Court's approval of the conviction under the California statute because the states have the right under the Fourteenth Amendment to enact reasonable laws under the police power as long as the exercise of this power is “consistent with our concepts of ordered liberty.” However, Justice Harlan dissented from the Court’s affirmation of the conviction of Roth because the opinion of the majority relegated the final determination of obscenity to the trier of fact in the lower court when in truth the Supreme Court should be the final arbiter of this question; the Court also failed to distinguish the added freedom which is given to state legislatures when they pass laws on obscenity from the limited scope of permissible Federal legislation, and the federal statute failed to conform to the definition of obscenity approved by the American Law Institute and adopted as the correct standard by the majority of the court. Justices Douglas and Black joined in

60 166 Pa. Super. 120, 70 A.2d 389 (1950).

61 . . . Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric. Roth v. United States, supra, note 59, at 504.

62 “We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code, §207.10(2) (Tent. Draft No. 6, 1957), viz.: ‘ . . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., 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 . . . ’” (Emphasis added) Ibid. at 487.

321
dissent, as they had in the *Kingsley Books* case, because as they put it:

The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control... the test that suppresses a cheap tract today can suppress a literary gem tomorrow.\(^63\)

From these recent cases it is clear that in principle obscene matter *per se* is not within the protection of the First and Fourteenth Amendments to the Constitution. If, however, the legislature has failed to set forth in the statute the proper standard for determining the propriety of written matter, or if the trier of the fact in the lower court has failed to apply the proper test for obscenity to the facts of an individual case, and this failure is the question before the court on appeal, a majority of the Court will, in all probability, find that the statute contravenes the First or the Fourteenth Amendment to the Constitution, or will remand the case to the lower court for the framing of a proper charge to the jury on the issue of obscenity. Chief Justice Warren appears to feel that the decisive factor is whether or not the statute in question is penal in nature and prohibits the handling of an obscene book, or whether the statute merely seeks to ban, suppress, or destroy an obscene book. Justice Harlan feels that federal obscenity statutes have an attenuated jurisdiction; however state legislatures may enact any laws which do not so subvert the fundamental liberties of the Due Process Clause that they cannot be sustained as a rational exercise of the police power. Justices Black and Douglas would protect obscene literature by applying the "Clear and Present Danger" test of the *Dennis*\(^64\) case to obscenity statutes, and would hold the statutes constitutional only when they prohibit a use of speech or press which appears likely to create an imminent danger of the perpetration of an unsocial act, i.e., "substantive evil."

---

\(^{63}\) *Ibid.* at 511 and 514.

\(^{64}\) *Dennis v. United States*, 341 U.S. 494 (1951).

322
CONCLUSION

The test for obscenity has passed through two distinct periods of development in the American courts and is now entering upon a third period of development.

The first period is represented by the Hicklin Rule. This rule has also been known as the Partly Obscene Test. The Hicklin Rule is no longer the law since any application of it by statute would be unduly restrictive of the freedom of speech and press guaranteed by the First Amendment and incorporated into the Due Process Clause of the Fourteenth Amendment. It would seem therefore that any provision applying a test for obscenity such as was enacted into the New Hampshire Code in 1953 must now be declared unconstitutional if challenged on the basis of a violation of the Due Process Clause of the Fourteenth Amendment.

The second period is represented by the rule of the Ulysses case. This rule is known as the Obscene-in-its-Dominant-Effect Test or the Wholly Obscene Test. In deciding whether a book is obscene in its net effect, the courts have placed emphasis upon the verdict of the past and the estimation of approved critics. In the quarter of a century following the Ulysses decision the groundwork was laid for the development of a new and more limited test for obscenity.

With the decision in the Roth case, a third period, marked by the enunciation of a Prurient Interest Test for obscenity, is beginning to develop. The Supreme Court appears to be returning to the idea of Judge Woolsey that a book is not obscene unless it is written for the purpose of exploiting the degrading aspects of sex, i.e., is pornographic in its substance and intent. Obscenity is the act of appealing to that which is basest in human nature, not for the purpose of pointing a moral or narrating a story that is built upon the passions and emotions that motivate the human race, but solely for the purpose of arousing base ideas in the

---

65 In Roth v. United States, supra, note 59, at 489, the court said: "The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedom of speech and press."

66 Supra, note 29.

67 Supra, note 25.
reader. The titillation and enticement of the reader are the end and not the means of reaching an end of some redeeming social importance. The prurient appeal must predominate throughout the book and control its purpose and effect. The central element of the Wholly Obscene Test has thus been retained and incorporated into the Prurient Interest Test. A difference is found, however, in the fact that the latter test is now to be administered by the normal, average person in the community rather than by a few selected and approved critics.

The three tests represent a consistent line of development in the law of obscenity. The legislatures and the courts have been narrowing the scope of obscenity and increasing the field of artistic license. Such a trend in the application of the First Amendment liberties of free speech and free press is highly desirable and is in accord with an accepted constitutional doctrine providing for a liberal protection of First Amendment rights and privileges.