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Pornography and Community Standards

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PORNOGRAPHY AND "COMMUNITY STANDARDS"

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One of the most controversial and provocative fields of municipal law is the enforcement of sanctions against the recent inundation of obscene literature. Since the rebirth in popularity of the inexpensive paper-back book, the material available to the average reader has broadened in scope. New horizons in availability, circulation, and costs have been attained through this media.[1] Unfortunately, much of the new material contributes nothing of cultural value. One may purchase anything from a copy of the Dead Sea Scrolls to hard-core pornography at the local supermarket. While most of the part-time distributors who sell books as an additional customer service are extremely conscientious about the good taste and quality of the books they sell, every metropolitan area has a group of book vendors selling only paper-backs of the most offensive, vile, and filthy types.[2] These people represent a substantial danger and do in fact damage the public commonweal.

The fundamental question, "what is obscene?" has challenged English and American jurists. Early cases had to determine whether there was such a thing as obscenity.

Apparently, the first reported English case involving obscenity was aiudicated in 1663.[3] After a conflict of jurisdiction arose over the subject matter between the common law courts and the ecclesiastical courts,[4] it was determined that an indictment charging obscenity in a common law court could be filed and was jurisdictionally proper.[5] In 1821, a crime of obscenity under the common law was recognized in the United States in *Commonwealth v. Holmes.*[6] Today, although the fact phenomenon called "obscenity" is recogn-

1 "The Boom in Paper Bound Books" — Fortune Magazine, Sept. 1953. 300 million paper-back books were sold in 1953.
2 Report of New York State Joint Legislative Committee Studying the Publication and Dissemination of Objectionable and Obscene Materials, Legislative Document No. 32 (March, 1956).
3 1 Keble 620 (K.B. 1663).
4 *The Queen v. Read,* 11 Mod. 142 (Q.B. 1708).
5 *Dominus Rex v. Curl,* 2 Strange 789 (K.B. 1727).
6 17 Mass. 335 (1821).

ized in American and international jurisprudence,[7] it is evasive of definition.

Attempting to define obscenity is to invite controversy ranging from mere semantic quibbling to bitter ideological debate. The definition offered by Black's Law Dictionary lacks any incisive or lucid formula.[8] At best, it describes obscenity. This vague description has not substantially aided the appellate courts,[9] but the general tenor of the Black dictionary definition has been reduced to this rule of thumb: "Obscene material is material which deals with sex in a manner appealing to prurient interests."[10]

For the sake of discussion, it is to this definition that the writer will resort. Then, by such definition, the question "What is obscene?" becomes "What material deals with sex in a manner appealing to prurient interest?". This is the question which must ultimately be resolved by the trier of fact.

To guide the trier of fact in making his decision, the Supreme Court of the United States would have him decide, "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[11]

At first blush, it would appear that the Supreme Court has supplied a clear and workable rule for the guidance of the trier of fact. The rule can certainly be justified in that it tends to negate the whim, caprice and personal distaste of a given panel of jurors or a judge. In actual application, however, the rule becomes less workable than might be supposed from a reading of the definition. Both the prosecution and defense must consider new evidentary problems which arise from the use of the rule, especially in attempting to show what are the "contemporary community standards".

The question of proof in establishing contemporary community standards arose in the case of *Smith* v. *California*[12] because the trial judge had disallowed evidence by defendant of expert testimony of such standards.

Mr. Justice Frankfurther, in urging the inclusion of the expert testimony, stated: "Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such

7 Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stats. 1511; wherein over 50 nations joined together in an attempt to outlaw pornography.

8 Black's Law Dictionary, West Publishing Company, p. 1227 (1951). "Obscene — Offensive to chastity of mind or to modesty, expressing or presenting to the mind or view something that delicacy, purity, and decency forbids to be exposed; offensive to modesty, decency, or chastity; impure, unchaste, indecent, lewd; offensive to senses; repulsive; disgusting; foul; filthy; calculated to corrupt, deprave, and debauch the morals of the people, to promote the violation of the law, of such character as to deprave and corrupt those whose minds are open to such immoral influences; calculated to lower that standard which we regard as essential to civilization, as calculated, with the ordinary person to deprave his morals or lead to impure purposes; licientious and libelous and tending to excite feelings of an impure or unchaste character; having relation to sexual impurity; tending to stir the sex impulses or to lead to sexually impure and lustful thoughts; tending to corrupt the morals of youth or to lower the standards of right and wrong especially as to the sexuaul relation."

9 *Winters v. New York*, 333 U.S. 507 (1948); *New Library of World Literature v. Allen*, 114 F. Supp. 823 (1953). Compare: *Bantam Books Inc. v. Melko*, 25 N.J. Super. 292, 96 A. 2d 47 (1953); and *Commonwealth v. Gordon*, 66 Pa. Dist. & Co. R. 101.

10 *Roth v. United States*, 354 U.S. 476, 487 (1957). Prurient in pertinent part is defined as "Itching; longing, uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire curiosity, or propensity, lewd."

11 *Ibid.* Contrasted is the common law rule, first established in *Regina v. Hicks*, 3 Queens Bench 360 (1868), "The test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands publications of this sort may fall."

12 4 L.Ed. 2d 205, 221 (1960).

inquiries, it was violative of 'due process,' to exclude the constitutionally relevant evidence proffered in this case."[13] Thus, while it would certainly appear that the trier of fact, selected from the community at large, should possess the degree of intellectual sophistication sufficient to make him aware of what is and what is not filthy and repugnant to the area where he lives, the question of compelling the inclusion of evidence of contemporary community standards under the rule may quickly arise.

Another problem of proof arose in the *Smith* case concerning evidence of the subjective state of mind of a defendant. The defense of "I don't read every book in my store" poses a genuine evidentiary problem.

Mr. Justice Brennan, in *Smith,* writing for the majority, commented:

> We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind . . . . Eyewitness testimony of a bookseller's perusal of a book can hardly be a necessary element in proving its contents. The circumstances may warrant the inference that he was aware of what the book contained, despite his denial.[14]

Briefly, two approaches to this problem are suggested. The first approach concerns evidence of the type of books sold in the defendant's establishment. This would involve, in all probability, the taking of a large number of books from the premises for evidence. The attendant dangers of an illegal seizure could conceivably arise.

The second approach involves the extrinsic nature of the publication itself which should satisfy the scienter element. In a recent case[15] the Honorable Benjamin Gassman, writing for the Court of Special Sessions of the City of New York, observed that "the evidence before us discloses that each of these four books is a *paper covered* book," and that the descriptive sexual gusto of the language, printed on the back cover, was geared "as an inducement to the would-be buyer."[17] He also noted that the books were priced at five dollars each and contained between 60 and 176 pages. He further opined:

> It is a well-known fact that book publishers, in recent

13 *Id.* at 218.
14 *Id.* at 212.
15 *People v. Schenkman,* 195 N.Y. Supp. 2d 570 (1959).
16 *Id.* at 575.
17 *Id.* at 576.

> years, resorted to publishing soft-covered books, in order to broaden the market and to sell them at less than a dollar, in some instances as low as 25 cents per book, . . . to make the books available to those who could not afford to pay the price for a hard-covered book. Certainly the defendants possessed that knowledge. When, therefore, a paper-covered book is sold by a bookseller for $5, can it be truthfully said that he did not know that the sale was induced by the fact that the book contained 'hard core pornography,' or, as Judge Woolsey referred to it in the *Ulysses* case, as 'dirt for dirt's sake.'
>
> A bookseller may not shut his eyes to something he should know, for then the claimed lack of knowledge is a sham and should not be permitted to defeat the purpose of a statute which seeks to outlaw traffic in obscene literature.[18]

It is submitted that scienter places an overly harsh burden on the prosecution when the law would be better served by the use of a constructive knowledge approach. Mr. Justice Frankfurter, in *Smith,* proffered the following: "A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book."[19] This approach can assist the court in ascertaining the true state of the defendant's mind, without offending due process, or hampering effective law enforcement.

Another unique phase of pornography prosecutions appears in their treatment by appellate courts. In the initial trial under a typical statute[20] the trier of fact is asked to determine whether the defendant knowingly kept for sale obscene matter. He must ascertain the contemporary community standards and determine whether the material is appealing to the prurient interest. On an appeal from a conviction, some courts, troubled by the question, "Is this material obscene?", will surrogate their own value judgments, upset the finding and overturn a conviction. Their basis is that, as a matter of law, the work is not obscene. This, of course, involves a finding that the material is not a transgression of the standard of the community where the offense is alleged to have occurred, despite the fact that the jury who reside in such community have found the material to be obscene, after being fully instructed as to the applicable law. It would indeed require a degree of omniscience for jurists, far removed from the community where the alleged offense arose, to be attuned to the contemporary standards of such community so closely that they can find that the community standards were not offended, although the jurors who live in the community found that the community standards were transgressed,[21]

18 *Ibid.*

19 *Smith v. California,* 4 L.Ed. 2d 205, 217 (1960).

20 California Penal Code Section 311.3, provides: "Any person who wilfully . . . writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, cases, or otherwise makes any obscene or indecent figure . . . is guilty of a misdemeanor."

21 Mr. Justice Black in *Kingsley International Pictures Corp. v. Regents of the University of New York,* 360 U.S. 684, 690 (1959), recognized this problem, when he stated in the concurring opinion: "So far as I know, judges possess no special expertise providing special competency to set standards and to supervise the private morals of the nation. In addition, the Justices of this Court seem especially unsuited to make the kind of value judgment — as to what movies are good or bad for local communities . . . "

unless the reviewing court in effect is simply telling the offended community that its standards of morality and decency are too high and that it must lower its standards to the level appealed to by the material involved.

The very basic factor that permeates enforcement of obsenity ordinances or statutes is, of course, the immunities and guarantees of free expression and the dissemination thereof.[22] To keep inviolate the right of free speech is indeed a salutary goal. Generally speaking, voluntary and assertive conduct by a human being is oriented to the relating of the self to others. Words are merely one form of the assertive conduct we speak of. It goes without saying that they constitute a precious part of that which the Western World calls "liberty".

Since, however, the rule of law, our safeguard of liberty, implies a well-cast die, patterned from value judgments of good social conscience, into which human conduct must fit, so does it compel conformity to certain types of expression. Obscenity is an example of this. Due process does not render a sovereignty impotent to that which is said. The Supreme Court has stated, after relating the history of obscenity:

> It is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this court from concluding that libelous utterances are not within the area of constitutionally protected speech . . . there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance . . . . 'It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'[23]

In a profound sense, the liabilities of obscene expression are one of the rare places wherein the value judgments of society are superimposed over the pen of an offender. Unlike advocacy of noxious ideologies, which could remotely enrich the soil from which new ideas might germinate,[24] obscenity is devoid of any value to be left to posterity. It helps no one integrate his life into his legacy as a human being.

Since salacious expression has no worth in our culture and performs no social purpose, how then can it be any different than other goods, wares, and merchandise deemed repugnant to the public welfare? The reason underlying the protection of free expression is lacking. This writer submits that the mere fact that the commodity sold is in the form of a book should not grant it the substance of free expression. The Supreme Court appears to avoid that line of reasoning because it does not treat obscene writings as it does other commodities and it will not permit placing upon the seller

22 *Ex parte Jackson*, 96 U.S. 727, 733 (1877). "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."
23 *Roth v. United States*, 354 U.S. 476, 484-485, (1957).
24 *American Communication Association v. Douds*, 339 U.S. 382, 400, (1950).

of obscenity the same strict liability that is imposed upon the seller of other commodities which, as with pornography, have an inherent hazard or danger to the public. As a consequence, strict liability is valid for some noxious commercial goods but not for others.[25]

Advancing the commercial element one step further, one can readily observe that a number of "unwholesome works" have been copyrighted by the publisher, as was the fact in the *Smith* case. This reduces the personal aspect of free speech to a vested property right that can be bartered away. No one, except by permission of the owner, may repeat the protected expressions and use the property.[26] Certainly this is inconsistent with speech and its ebb and flow into the world of ideas. Damming up the stream of thought for profit unquestionably eradicates the fundamental purpose of free expression. As summarized in *Four Star Publications Inc.* v. *Erbes*[27] "Publishers are subject to the general law as is any other industry conducted for profit."

Today, prohibiting criminal obscenity has a vital urgency. The flood of pornography represents a trend toward degenerating the resolute purposes upon which this country was founded. Lewdness and idleness are not crafts of a nation of growth and strength. Historically, they are found in a civilization that has started its downward cycle.

The impact of pornography on those of tender years has a tragic effect. An example is the criminal activity of a youngster who committed a serious sex offense in New York. He got the idea from "Amboy Dukes."[28]

The increase of delinquency among juveniles is clearly attributable, in part, to this literary filth.[29] Mr. David Riesman, in his work "The Lonely Crowd"[30] observed: ". . . the child is allowed to gird himself for the battle of life in the small circle of light cast by his reading lamp. . . . With widely increased literacy and extensive print distribution, more and more people read messages not meant for them."

In closing, it is submitted that for personal satisfaction Candide need not have groveled in the dirt to find his "best of worlds" any more than this country need search the trash can for tools to shape its unfulfilled future.

25 *Smith v. California, supra,* at note 20.
26 *Fox Film Corp. v. Doyal,* 286 U.S. 123 (1931).
27 181 F. Supp. 483, 486 (1960).
28 Testimony of the Honorable James U. Mulholland, Justice of the Domestic Relations Court of the City of New York, Report of the Select Committee on Pornographic Materials, H.R., 82nd Cong., 2d Sess. p. 107 (May 12, 1952).
29 *Id.* at 100.
30 York University Press, New Haven, p. 91, 1950.