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Book Review: The Law of Obscenity

Cover Page Footnote

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BOOK REVIEW

THE LAW OF OBSCENITY. By Frederick F. Schauer. Washington, D.C.: The Bureau of National Affairs, Inc., 1976. Pp. xv, 459. \$19.50.

Frederick F. Schauer accepts as a fact the existence of obscenity laws, and his book analyzes relevant statutes and court decisions in an effort to explain the historical development of obscenity regulation and its treatment by the Supreme Court. Admitting at the outset that obscenity is "a confused, vague and difficult area of the law,"¹ Schauer calls his book "an exposition of the law" and "a reference tool."²

The book begins by examining obscenity control by the Church during the sixteenth century, its civil takeover in seventeenth and eighteenth century England, and its eventual development in nineteenth century American law. The author then investigates the political, social and psychological underpinnings of modern obscenity regulation, especially the Supreme Court's emphasis on "standards." His inquiry includes a critical examination of the terms "average person," "prurient interest" and "patently offensive," as used by the Court. Particular emphasis is given to the Court's shift from national to local standards in *Miller v. California*.³ Observing the Court's reliance on the doctrine of "overbreadth"⁴ in striking down certain obscenity statutes, Schauer reviews a multitude of federal and state obscenity laws, focusing on regulatory procedures and the differences between civil and criminal prosecutions.⁵ Finally, he studies jury selection and instruction, trial tactics, and other problems an attorney faces in preparing for the trial of an obscenity case.

1. Schauer, *THE LAW OF OBSCENITY* viii (1976) [hereinafter cited as *LAW OF OBSCENITY*].

2. *Id.* at ix.

3. 413 U.S. 15 (1973).

4. The author describes the "overbreadth" doctrine as follows:

Essentially, overbreadth is a statutory defect which occurs when the statute punishes not only that which can properly be made criminal or otherwise restricted, but also that which cannot, without violating the Constitution, be made criminal. Thus, a statute which prohibits both protected and unprotected speech is unconstitutionally overbroad, and will be struck down by the courts.

LAW OF OBSCENITY at 154 (footnotes omitted).

5. *Id.* at 169-245.

Chapter one of Professor Schauer's book focuses on early United States obscenity regulation which was influenced by a strong religious belief in sexual morality. Court determinations of obscenity and the extent of prosecution were heavily drawn from an English case, *Regina v. Hicklin*,⁶ which held that obscenity was to be decided based on the content of "selected excerpts" from the work in question. But the twentieth century brought a call for more exact standards and procedures. In 1934, the Second Circuit Court of Appeals abandoned the "selected excerpts" test and ruled that a book was to be judged on its literary value "as a whole."⁷ This reasoning was widely followed during the next two decades; courts used expert testimony; assessed a work's effect on the "average person," and looked to the "dominant theme" of the work in judging whether it was obscene.⁸

The Supreme Court molded these factors together and promulgated a "community standards" rule in the landmark case of *Roth v. United States*.⁹ While examining the "dominant theme" of the work involved, Mr. Justice Brennan stated for the Court that obscenity was not within the area of constitutionally protected speech or press.¹⁰ Mr. Justice Harlan dissented, insisting that the federal government's role should be limited to prohibition of hard-core pornography, but that states should be free to experiment with obscenity laws.¹¹

In succeeding years, the conflicting opinions of Supreme Court justices revealed the Court's failure to agree on objective principles. The height of confusion was reached in *Memoirs v. Massachusetts*,¹² where a plurality opinion—written by Mr. Justice Brennan—insisted that three elements must coalesce before a work can be found obscene:¹¹ (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community

6. L.R. 3 Q.B. 360 (1868).

7. *United States v. One Book Entitled Ulysses*, 72 F.2d 705, 707 (2d Cir. 1934).

8. *Id.* at 708.

9. 354 U.S. 476 (1957).

10. *Id.* at 484.

11. *Id.* at 505-08 (Harlan, J., dissenting). Mr. Justice Harlan adhered to this position in *Alberts v. California*, 354 U.S. 476, 500-03 (1957), a companion case to *Roth*. See also *LAW OF OBSCENITY* at 38-39.

12. 383 U.S. 413 (1966).

standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."¹³

Commenting on the *Memoirs* case, Schauer says that this development is "eminently logical," and he notes that the Court thereafter adopted a policy of banning only hard-core pronography. Unfortunately for the reader, the author fails to note the dissent of Mr. Justice White,¹⁴ who saw the true dimensions of the constitutional question, indicated the error in the plurality opinion, and foreshadowed the *Miller* opinion of 1973. Mr. Justice White said in part:¹⁵

To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case—that such material is not protected *because* it is inherently and utterly without social value

Mr. Justice White not only concluded that "social importance" is not an independent test of obscenity, but gave some words of wisdom that would be partially adopted in *Miller*:¹⁶

Literary style, history, teachings about sex, character description (even of a prostitute) or moral lessons need not come wrapped in such packages. The fact that they do impeaches their claims to immunity from legislative censure.

In response to *Memoirs*, lower federal and state courts, as well as many state legislatures moved with some indecent haste to revise decisions and statutes on the basis of a so-called "*Memoirs* rule," even though it was only a plurality opinion.

The advent of the Burger Court in 1969 witnessed a return to the *Roth* rule in *Miller v. California*. The Court stated that a work is obscene if "(a) . . . 'the average person, applying contemporary standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."¹⁷ And

13. *Id.* at 418.

14. *Id.* at 460 (White, J., dissenting).

15. *Id.* at 461.

16. *Id.* at 462.

17. 413 U.S. at 24 (citations omitted), quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972).

so the third test of *Memoirs*—the “utterly without redeeming social value” test—was rejected. According to Schauer, “[t]he [tripartite] test must be taken in the context of the Court’s pronouncements that only hard-core pornography may be prosecuted, and it must be remembered that only if material meets *all* of these tests may it be legally obscene.”¹⁸

Psycho-Sociological Aspects and the Subjectivity of the Average Person

Beginning with his third chapter, Schauer examines the complex areas of the law which reflect a philosophy placing individual liberty before the needs and demands of society. He insists that his purpose is merely to expose—not espouse—the conflicting opinions.¹⁹ Accordingly, he presents the classic libertarianism associated with the writings of John Stuart Mill, and argues that censorship has a “chilling effect” on artistic and literary freedom. Then the author presents the opposing view of those who favor strong obscenity laws and who argue that virtually all laws embody some moral values and represent the will of the majority. Schauer finds “difficulty” in this latter position, especially because “speech is ‘special’ in our system of government.”²⁰ He admits that the answer to this difficulty depends on “a consideration of the theoretical basis of the First Amendment.”²¹

In this delineation of opposing positions, the author fails to indicate that there is still another position—the widely-held belief in an objective moral order, deriving from the Natural Law, and having its interpretive light in Christian revelation. This was the philosophical/religious belief of those who drafted the Constitution and the Bill of Rights. Perhaps the view adopted by most contemporary legal philosophers is that of logical positivism, by which the moral value of human acts is determined by changing times, places and ideas. But great numbers of Americans are not disciples of this thinking; their beliefs and reasoning constitute strong “community standards” in many localities, and they must be reckoned with in determining the objectivity of obscenity. From a tactical stand-

18. LAW OF OBSCENITY at 48 (footnote omitted).

19. *Id.* at 49.

20. *Id.* at 54.

21. *Id.*

point, they must be considered when impanelling a jury for any obscenity case. The author never mentions this strata in our society, but seems more concerned with commentators who have studied the issue.

The author finds "some case history" suggesting a causal relationship between pornography and sex offenses, but remarks that it is clearly in the minority. His focus is on immediate anti-social conduct; but he does not consider coalescence, the ripening of action-prone experiences into behavior. Moreover, he falls into the long-refuted error of the "Danish experience," saying that after "the abolition of all restrictions on the sale or exhibition of obscene or pornographic material . . . there was a decrease in the amount of sexual crime."²² This result can be explained, however, by noting the deletion of many sex crimes from the statutes.

Schauer admits that determining the "average person" from whom "community standards" are drawn, is a difficult problem unique to obscenity cases.²³ He feels that it is a question of law, to be solved by judges. But what is the determinant of this "legal concept"? Is it a majority opinion, or the opinion of expert psychosociologists? Is the Court to decide which experts are validly capable of representing the "average person"? Perhaps this concept should best be defined by the jury of each local community, composed of average men, who on serious reflection are likely to express the true wisdom of the human species.

The Value of the Work: A Guide in Drafting Law

Roth v. United States established that literary, scientific and educational materials which do not appeal predominantly to prurient interest are protected materials. *Miller v. California* maintains that obscenity exists only if "the work, taken as a whole, lacks serious literary, artistic, political or scientific value," and if "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest."²⁴ From this, the author concludes that, before *Roth*, the fact of obscenity was exclusively for jury determination; post-*Roth*,

22. *Id.* at 61.

23. *Id.* at 69-70.

24. 413 U.S. at 24.

it is a mixed question of law and fact.²⁵ But the author does not comment, as he perhaps should have, that "community standards" are determined not by the judge, but by the people at large, represented by the jury. Only in case of a gross miscarriage of justice by the jury should the judge intervene. That the judge may have a more elastic tolerance for obscenity than the community is no basis for overturning the local community's conscience/concern. Schauer also feels that "determination of literary, artistic, political or scientific value seem less majoritarian in purpose,"²⁶ and that the court should be "more willing to make the ultimate determination even in the closer cases."²⁷ In a contest between the judge's particularist opinion of such matters and the people's sense of what obscenity is, it is my opinion that the common sense of the people is the true and final community standard.

The author's discussion of federal and state obscenity laws is a good survey of the relevant legislation. He remarks that state laws are "in a constant state of flux," torn between traditional uses of the state's police powers and the evolving dicta of the Supreme Court. As noted earlier, the effect of the plurality opinion in *Memoirs* was to provoke rapid change in state legislation, a trend most upsetting to law enforcement efforts.

Procedural Considerations in Obscenity Regulation

A most interesting section of Professor Schauer's book deals with procedural aspects of obscenity control. Special procedural protections apply to obscenity cases. Fourth amendment "search and seizure" protections must be respected, since no-warrant seizure is a form of prior restraint. There must be an opportunity for "some judicial intervention before public access to the materials in question may be curtailed." Double jeopardy and collateral estoppel protections are also operative.²⁸ The prosecution must be prepared to show scienter on the part of the defendant. While federal intervention in state civil proceedings is minimal, the author notes that state autonomy is being narrowed.

25. LAW OF OBSCENITY at 148-49.

26. *Id.* at 151.

27. *Id.*

28. *Id.* at 219-22.

Enforcement of obscenity laws gives rise to many "prior restraint" issues. In *Freedman v. Maryland*,²⁹ the Supreme Court held that numerous procedural safeguards were required for constitutionally protected speech.³⁰ Such safeguards have become so complex that law enforcement officials often require the assistance of constitutional lawyers. The individual who markets obscene materials is so well-protected, by book publishers' associations, the motion picture industry and various special interest groups, that society as a whole is oppressed by a flood of degenerate materials.

The remainder of *The Law of Obscenity* is concerned with pre-trial procedures and tactical trial techniques. In his usual scholarly way, Professor Schauer unfolds the numerous means that can be utilized by prosecutor and defense attorney in conducting an obscenity case. This section is informative for bench and bar, as well as for anyone desiring to initiate legal action respecting obscene materials. While I admire the author's expertise, I must express my reservations with some of his evaluations. He places heavy emphasis on the expert opinions of criminologists, sociologists and psychologists. Again, I fail to see how these experts can provide a standard more realistic than the moral sense of the jurors themselves. A point in issue is the author's treatment of the "religious individual" as a prospective juror. He remarks:³¹

If an individual is religious, and his or her church is active in the anti-pornography movement, or has strong strictures against sexually explicit materials, such as do the Catholic Church and most of the fundamentalist churches, then this individual is likely to be extremely dangerous for the defense.

This may or may not be true, and it could be passed over as debatable. But when the author adds: "Certainly, if an individual feels it would be a sin to vote to acquit that which his church condemns, he cannot be free from bias, and should be excused for cause . . . ,"³² there is a need to challenge this generalization. First, the vote of the religious juror is made on the basis of the law and the legal determinants of obscenity—in short, "community standards." It is likely that he will find a great part of that standard in accord

29. 380 U.S. 51 (1965).

30. *Id.* at 57.

31. *LAW OF OBSCENITY* at 257.

32. *Id.*

with his opinion. Second, a juror cannot be charged with "bias" on the basis of objective moral values, unless such bias is simultaneously found in one who has no moral values at all or who has only temporary subjective values. Since all views may be termed "bias," discrimination against one type can hardly be permitted in the impanelling of a jury.

In concluding this review, let me say that *The Law of Obscenity* is an excellent summary and clear analysis of the ideas which have sprung up in federal and state court rulings since the nineteenth century. It will be most valuable as a reference for judges and lawyers who need insights into dealing with sensitive obscenity cases. References to the leading cases are clear, accurate, and pointed in exposing the legal idea of obscenity. As the tone of this review has made clear, my preeminent difference with Professor Schauer is his omission of a thorough treatment of the religious origins of our constitutional law, and a failure to recognize how such beliefs must have their expression in the reasoning of the courts.

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