

# Obscenity: Legal and Moral Aspects

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## **Introduction**

The problem of obscenity is basically a problem of non-definition. Neither Canon Law nor Civil Law give a precise definition. The former proscribes obscene books—leaving the definition of obscenity or pornography up to common parlance and the latter in this country is still in an evolving state.

The reason for the problem of obscurity concerning obscenity is complex. The problem begins to be muddled when one takes into account the objective element—the printed matter (I am limiting this article to the printed matter) and the subjective element—the reader with diverse moral, social and educational development living within a pluralistic society.

The notion of obscenity is also entwined in the historical milieu—a milieu which has seen the pendulum swing from one extreme of forbidding perfectly sound books on sex education less than fifty years ago to the other extreme of permitting blatant pornography to be printed because it contains “some redemptive value.”

Still further, the problem of the writer to have freedom of expression—inherent in our Constitution—and the reader freedom of access to this material, must also be taken into account.

In spite of the complexity of the problem, the picture is far from pessimistic and futile. Advancements have been made by the courts and contemporary moralists have been keeping abreast of changes of attitude and legal norms in applying principles of Christian morality. Before entering into a discussion of the legal and moral aspects of obscenity, the question of whether a government has any right to interfere in a citizen's reading habits must be tackled first.

## **Authority and the Role of Coercion**

A human person, being a social animal by definition, naturally enters into society—the family society in which he was born and into a communal society with other men. He enters into society with other men because he cannot find complete fulfillment by his own or his family's endeavors. If he wishes to attain certain goals—peaceful co-existence, educational and economical well-being—he must depend on others, since he is not competent in all areas to achieve his own and his family's prosperity.

But, together with his impulses towards societal living, man, even in society, still possesses his individual will, his particular desires and ambitions. Given this fact, itself another God-given attribute, society is faced immediately with the problem of a number of individuals and families trying to get along together for some common purpose, toward some mutually agreed goal . . . Obviously there arises the necessity of some compromise; individual differences must be resolved; somebody, or some group selected to deliberate and speak for the whole community, has to make the decisions. And so arises, just as naturally and just as clearly God-given in origin as man's societal nature itself, the institution of authority.<sup>1</sup>

This institution of authority is more than just a substitutional factor springing from the individual's inability to achieve certain goals. It not only flows from man's definition as a social being; it also flows from his rationality—it arises out of the individual's free will. If society based on authority freely given is to achieve any goals, then each individual must allow himself to be governed by this society if all the individuals are to pull as a team for the cohesion and advancement of the community.

Therefore, a person should not only freely allow himself to be ruled by the society and show respect for it, he should also love the society and the authority invested in it. "Authority is not only to be respected but *loved*. If the common purpose of a family—mutual love, peace, prosperity, and so on—is a purpose worthy of love, then the authority that directs the family to that purpose is worthy of love, and not only because authority is the human instrument through which the common purpose may be achieved, but because, just as the family and its essential purposes are natural (i.e. God-instituted), so the authority is natural (i.e. God-instituted)."<sup>2</sup>

This love for authority is rooted in the love which is the core of the family bonding; it is also a sacrificial and altruistic love—the foregoing of legitimate individual ambitions for a higher good—the com-

mon good. Authority should be loved because it is reductively from God and in its legitimate exercise, it also leads to God, since such exercise of authority leads to the common good which is also willed by the Creator.

I will point out here that the Church is also a society invested with authority. Since it is an extension of Christ's body, it is even more clearly traced back to the Will of God. It is a society super-naturally and Incarnationally instituted, based upon and perfecting the natural society—both familiar, communal and governmental.

Authority to be effective in securing the common good must have the power of giving directives: establishing laws, interpreting and changing them as the conditions warrant. It must also have the power of enforcing these laws: *the power of coercion*. In the human context (a context of original sin and weakness), this means vigilance—police power to see that the laws are obeyed, and Courts of Law (Justice) to mete out penalties on those who do not obey the law—fines, imprisonment, and in its extreme form—death.

Not only should authority be loved, but even its coercive power. For many, at face value, this would seem “a hard saying,” but if we examine more closely the reason and function of coercion, we can bring ourselves to accept even coercion. Law should be viewed in a positive light rather than in a restrictive and negative one. A road sign posting speed at 60 m.p.h. is best translated as “driving within the prescribed limit will assure the freedom of other drivers and pedestrians.” In this case, we can see the notion of compromise on the part of the person or an individual and the individual as a part or member of society. The above example also has a positive aspect for the driver—by staying within the speed limit, he is being virtuous, or, it is at least a forced action which disposes a person to be virtuous.<sup>3</sup>

But what has all this to do with obscenity? Plenty! Most of the objections raised against any curtailment of freedom—including the freedom to print obscenity—is based on a lack of understanding the role of authority, the individual's inherent rights to express himself in society, the coercive role of authority and the common good. There is also a misunderstanding on the notion of freedom itself.

### **Freedom of Expression**

A professor of chemistry in a large eastern university is perfectly “free” to think that hydrogen is nothing but dust balls bonded together with bubble gum. Does he have the same freedom in seriously trying to teach this novel theory to his class or will he soon be looking for a

new job? Freedom of speech is guaranteed to all citizens by the Bill of Rights. Yet, we can bring in the time honored example of the person shouting "Fire" in a public gathering—with the ensuing result of panic and physical injury. From the above two examples we can glean certain notions about freedom. In the first example of the chemistry professor, we can see that freedom does not mean the right to think or to act in anyway that suits the individual. In the face of a recognized fact, there is not intellectual freedom to deny that fact. This is by no means slavery; it is freedom in truth, and the more and more a person knows the truth, the freer he is. (The truth shall set you free.) Everyone, even the person advocating no censorship, will agree that the person who shouts "Fire" is wrong and should be penalized, and laws should be formulated which will prevent this from happening. But what are we agreeing to—we are saying that in spite of the fact that we are endowed with the inalienable right to free speech, in certain instances it can be harmful to society and the authority should step in to see that the common good is protected.

In other words, freedom of the press and of expression can be legitimately subject to restriction as any other type of freedom—when it is necessary and directed to the common good. The fact that censorship and obscenity is a partial curtailment of a basic right should be kept in mind. This fact, coupled with the obscurity over the definition of obscenity and the other problems enumerated in the introduction of this paper, gives us somewhat an appreciation why the American Civil Liberties Union and the Authors' League vehemently oppose any restrictions pertaining to freedom of expression and of the press.

### **Obscenity: Legal Aspects**

As stated previously, the reason for authority is the safeguarding of the common good. The common good is not a static, immobile fixture. Rather, it is an evolving thing reflecting the culture from which it arises. When authority, in its legitimate exercise, passes laws to protect the common good, it is the present common good that the authority has in mind. When the culture mutates, hence the common good, laws must be changed or reinterpreted to meet these situations.

I will briefly discuss the more important decisions handed down by the Supreme Court over the last few decades.

1. In the *U. S. vs. One Book Called Ulysses*—1933, the following definition of pornography was given: "The same immunity should apply to literature as to science, where the presentation, viewed

objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication. The question in each case is whether the publication taken as a whole has a libidinous effect."

2. In the *Roth vs. United States* and in rejecting the appeal of *Alberts vs. State of California*, both in 1956, the Supreme Court, besides the aspect that a work charged as obscene must be judged as a whole and not from isolated passages, considered the matter of the readers of such a work. Judge Brennan, who handed down both decisions, had the following observations, ". . . the test is not whether it (the material charged as obscene) would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish . . . the test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community . . . You judge by present-day standards in the community. You may ask yourselves (if they) offend the common conscience of the community by present-day standards."

The general conclusions reached by these three Supreme Court decisions is the freedoms of speech and the press guaranteed by the First and the Fourteenth Amendments do not extend to obscene speech, taken in the sense in which the Court has defined it immediately above . . . obscenity doesn't fall within the boundaries of "free speech" as constitutionally understood; that obscene speech is therefore illegal and punishable either after a judge's decision or jury trial; and that obscene speech may even, under certain circumstances, be legally subject to "prior" censorship.<sup>4</sup>

3. Using the *Roth—Alberts* decisions as a working definition (i.e. obscene material is matter which deals with sex in a manner appealing to prurient interest . . . whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest), the Supreme Court in *Edwar Mishkin vs. United States and Ralph Ginzburg et al. vs. United States*, and in its rejection of a book named "*John Cleland's Memoirs of a Woman of Pleasure*" et al. vs. the United States. March 21, 1966, the Supreme Court strongly denounced the "business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."

"The three decisions stand as the most important obscenity rulings

in this nation's history . . . they have erased the doubts which clouded what many have regarded as muddied waters."<sup>5</sup>

The following are some of the highlights of these decisions:

Regarding the evidence of scienter (subjective knowledge) in publishing cases:

- (a) the publisher's instruction to his artists and his writers.
- (b) any efforts of the defendant to disguise his role in the enterprise.
- (c) titles, covers and illustrations which demonstrate the transparency of the character of the material.
- (d) the number of obscene books published and possessed for sale.
- (e) the repetitive quality of the sequences and formats of the books.
- (f) exorbitant prices marked on the books.

Regarding the relevant evidence on the issue of obscenity:

- (a) evidence showing that the material in question was sold as stock in trade of a business purveying textual or graphical matter openly advertised to appeal to the erotic interest of its customers.
- (b) advertising which gives an indication of the "leer and the sensualist."
- (c) the manner of solicitation. If the nature of the material is such that it has "social redeeming importance" to a limited audience, such as psychiatrists, physicians, psychologists, etc., was the distribution directed to the proper audience or was it indiscriminate?

The above decisions are considered by many as the Magna Carta for eradicating pornography and obscenity. "The Supreme Court decisions of March 21 make it a different ball game . . . Any area that decides to rid itself of obscenity can do so by competent enforcement and vigorous prosecution. There is no excuse for pornographers to be in business after the court's decision."<sup>5a</sup> Like most initial reactions, this reaction proved to be optimistically naive. Legally speaking, we are still in muddied waters. What does "social redemptive value" mean? Social value means (especially to the courts) any material containing a minimum of artistic, historical, scientific or literary value. What this comes to mean in the *de facto* order is that any printed work which can attract to its defense the support and testimony of a few recognized scholars and critics will be declared to be of social value and not pornographic.

The Supreme Court seems to have partially reversed itself in its most recent decision. As previously noted in the *Roth vs. United States* decision, Judge Brennan stated, ". . . the test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature. . . ."



The Court, by a 6 to 3 vote upheld a New York statute which stated that it is a crime knowingly to sell to minors under 17 years of age material defined to be obscene to them whether or not it would be obscene to adults.

### Obscenity: Moral Aspects

The Fathers of the Church nor the great theologians, such as St. Thomas, did not take up the problem of printed obscenity for the simple reason that the printing press did not yet exist. Canon #1399, 9° states that "books which purposely treat of, narrate or teach lascivious or obscene matter are *ipso iure* forbidden."<sup>7</sup> The Code of Canon Law does not define what is meant by obscenity. Evidently, the word did not present any difficulty to the drafters of this Canon. They took it for granted that the word and its meaning was clear from normal usage. It is in a pluralistic society such as ours that the problem of the precise definition of obscenity arises. Therefore, we have to look to theologians and commentators on the Code to see how they interpreted this Canon.

"Not every nude can be called obscene; in common estimate, an obscene nude is a nude that allures, and obscenity may be defined as a degrading manifestation of the mind . . . or a degrading solicitation of the mind (of the viewer or reader) in and through the nudity."<sup>8</sup>

The question now arises: In precisely what does the "degrading" element consist? It consists in the intrinsic tendency or bent of the work to arouse sexual passion, or, to put it more concretely, the motions of the genital apparatus which are preparatory to the complete act of sexual union . . . It is not so much a matter of the individual's own reaction here and now as the nature of the work under consideration.<sup>9</sup>

A panel of theologians meeting at the ninth convention of the Theological Society of America defined the obscene as "that which in its general tenor invites or excites to venereal pleasure by appeal to the sensitive appetite."<sup>10</sup>

In this country, outside of the intrinsic methods employed by the Church in her didactic role and sacramentary role, an extrinsic means is the National Office for Decent Literature (NODL). Founded by the Catholic Bishops in the United States in 1938, its function is to set up guide-lines for the protection of Catholic youth. It is a service organization to coordinate activities and supply information to all interested groups regardless of race, color or creed. The following norms are laid down by the NODL for objectional publications:

- (a) glorify crime or the criminal.
- (b) describe in detail ways to commit criminal acts.
- (c) hold lawful authority in disrespect.
- (d) exploit horror, cruelty or violence.
- (e) portray sex facts offensively.
- (f) feature indecent, lewd or suggestive photographs or illustrations.
- (g) carry advertising which is offensive in content or advertise products which may lead to physical or moral harm.
- (h) use blasphemous, profane or obscene speech indiscriminately and repeatedly.

It is interesting to note that the first six norms under much current psychological and social investigation by the sciences in trying to find the extent of causal influence upon the mind of others—particularly the young.

Once in a while—like every time decent people protest the sex and sadism which greets them in the press, movies, plays, TV—the purveyors of pornography argue that no one has ever proven the cause/effect of their product to the detriment of mankind. A more realistic approach is that expressed by Dr. Nicholas Frignito, neuropsychiatrist of Philadelphia's Municipal Court. Dr. Frignito declared "the most singular factor inducing the adolescent to sexual activities is pornography: the lewd picture, the smutty story-book, indecent film, the obscenely pictured playing cards, the girlie magazines." . . . Let the sophisticates flit around their ivory towers making a flap about "freedom of expression," "the agonizing appraisal of the artist," and the need to know. Dr. Frignito asserts "the devastating effect of smut is evident by the increase of anti-social behavior, particularly sexual offenses."<sup>11</sup>

#### FOOTNOTES

<sup>1</sup> Harold Gardiner, S.J., *Catholic Viewpoint on Censorship*, New York: Hanover House, (1958) p. 20.

<sup>2</sup> *Ibid.*, p. 23.

<sup>3</sup> St. Thomas (I, II, 95, 1 ad 1) states, "Men who are well disposed are led willingly to virtue by being admonished better than by coercion: but men who are evilly disposed are not led to virtue unless they are compelled."

<sup>4</sup> Harold Gardiner, *op cit.*, p. 76.

<sup>5</sup> "Analysis of the Mishkin, Ginzburg and Fanny Hill Decisions," *The National Decency Reporter*, June-July, 1966, p. 3.

<sup>6a</sup> *The Cleveland Plain Dealer*, March 28, 1966 as reported in *The National Decency Reporter*, p. 3.

<sup>6</sup> *Summa*, II,II, 153, 5 ad 4. (Benzinger Edition: p. 1814).

<sup>7</sup> *Canon Law*, ed. by Bouscaren et al. (Milwaukee: The Bruce Publishing Company, 1963), p. 789.

<sup>8</sup> Arthur Vermeersch, *Theologia Moralis*, (Rome, 1926), p. 94 as quoted in Gardiner, *op. cit.*, p. 64.

<sup>9</sup> *Ibid.*, p. 64

<sup>10</sup> Peter Connolly, "The Moralist and the Obscene", *Theology Digest*, Volume XIV, number 3, p. 196.

<sup>11</sup> *The Brooklyn Tablet*, Thursday, November 24, 1966.