Chapman University School of Law

NEXUS

A Journal of Opinion

2005 Vol. 10

LAW • POLITICS • ECONOMICS • MEDIA

Obscenity and the Law

Robert Peters
Arnold H. Loewy
Judith D. Fischer
Senator Dick Ackerman
Robin S. Whitehead
Lawrence G. Walters, Esq.
Clyde DeWitt, Esq.
William A. Huston
Patrick M. Garry, J.D., Ph.D.
David L. Hudson, Jr.
Susanna Frederick Fischer
Craig R. Smith
Rev. Ric Marchi
David Greene

Under Color of Law: Obscenity vs. the First Amendment

William A. Huston*

Introduction

Ostensibly, one of the purposes of obscenity law is to help parents shield their children from objectionable images, words, and ideas.[1] However, obscenity law creates a censorship mechanism. This censorship mechanism itself is prone to criticism.[2] Specifically, questions arise as to who gets to decide what is obscene. Should it be a government censor? A corporate director? The clergy? A citizens' review board? Should a minority be able to decide what kinds of information, words, and images to which everyone should have access?

Upon closer examination, an even greater problem can be discovered. America is a democracy, where the people hold the sovereign power.[3] Such a government requires the free flow of information so that the citizenry can be informed voters and consumers, and make intelligent decisions on matters which affect our own lives and the lives of our families and neighbors.[4] Thus, the suggestion of any censorship mechanism should be worrisome to all, and the motives of persons advocating such carefully scrutinized.

Noam Chomsky and Edward Herman have argued that in democratic states, propaganda serves the same function as brute force in totalitarian states.[5] Propaganda and censorship are

* William Huston is a professional computer programmer and systems administrator, but has discovered a passion for media and media literacy education. He is a researcher and journalist, and is a public access television and community radio producer and advocate. He also is a pro se litigant with a First Amendment case against AOL/Time Warner regarding public access television.

two sides of the same coin. Censorship is the "review of publications, movies, plays, and the like for the purpose of prohibiting the publication, distribution, or production of material deemed objectionable. . . ."[6] Conversely, propaganda is defined as "ideas, facts, or allegations spread deliberately to further one's cause or to damage an opposing cause."[7] The effect of both propaganda and censorship is the same: control of the idea-space, and the "manufacture of consent."[8] To a large degree, this is the function of advertising, and the Public Relations industry.[9] Obscenity laws thus can be seen as a one possible mechanism imposed by ruling elites to control the public mind.

The primary thesis of this essay is summarized by the following points: obscenity cannot be legally defined; obscenity laws define "victimless crimes," which are based on preferences and not rights; and the application of obscenity laws will always be arbitrary and discriminatory.

In support, four defects inherent in all obscenity law will be discussed. The first and second problems involve a failure to meet the minimum requirements for a cause of action sufficient for judicial review. The third defect is the paradox of statutory definition. Finally, the problem of legal standing in the context of the widely variable standards that exist will be discussed.

Based on my study of the historical context surrounding obscenity law, I believe that the primary purpose of the First Amendment is to prevent despotic entities from coercing the actions of speakers and writers.[10] Another purpose is to ensure that sovereign citizens have access to "diverse and antagonistic" information sources sufficient to make informed decisions, which is necessary in a properly functioning democracy.[11] While I do recognize the right of parents to restrict their child's access to pictures of Janet Jackson's breast and naughty words, I assert that the potential injury of exposure to such stimuli is far less than the danger of censorship, which once in place, can be used to restrict access to political ideas.

I. The Problem of Cause, Part One: The Right Not to be Offended

Before one can take another to court, one must have a valid claim, or, in other words, a cause of action.[12] Generally, to establish a cause of action, one must demonstrate a right and an injury.[13] Consequently, the determinative question becomes whether there is a right not to be exposed to offensive material?

Before discussing rights, taxonomy should be established for reference purposes. This efficacy of this model is certainly debatable, as the definition of rights and injuries are somewhat convoluted.

1. Natural Rights: "Life, Liberty, and the pursuit of happiness;" violations clearly produce victims with injury (murder, kidnapping); the jurisdiction of criminal courts.[14]

2. Statutory Rights/Civil Rights: Conferred by substantive law or jurisdiction in civil courts. Some violations of civil rights are defined as criminal, but probably derive from natural rights, or are classified such in error (e.g., all felony "victimless crimes").[15]

3. Contractual Rights: These might better be called "expectations of performance" rather than rights;

violations are subject to the jurisdiction of civil courts.[16]

The key questions identifying these rights are:

A. Is there a victim with injury?

B. Is there a contract present between parties?

Note that there is a difference between a right and a mere preference. For example, preferring to stay warm in the winter, to have an enjoyable job, a loving spouse, and a full belly, are mere preferences and not rights.

Suppose that one does not wish to be exposed to material, which they find objectionable. The issue that is then raised is whether this wish constitutes a natural right, a contractual right, a statutory right, or a mere preference. Unless one can demonstrate that a contract exists between the exposer and the offended, or that a real injury is caused by the exposure, then this is likely a preference and not a right.

While "the right to have one's preferences met" could be conferred by substantive law, violations would not always produce a real victim with injury—at least not in the sense that murder or rape creates a clear victim with injury.[17] Moreover, any law criminalizing the violation of a mere preference is likely to violate the rights of those convicted. For example, laws that prohibit smoking in bars violate the rights of smokers.[18] This recognizes the preference of one class of people (non-smokers), while simultaneously violating the preferences of another class (smokers).[19] The author believes that such laws will probably ultimately be found unconstitutional. Additionally, the definition of such laws has a serious paradoxical problem, which we will be discussed in further detail below.

II. The Problem of Cause, Part Two: The Injury of Exposure to Obscene Material

Children are taught that "sticks and stones can break my bones, but names can never hurt me." Yet curiously, as adults we pass laws and generally recognize the injury of "exposure to obscenity." Can you imagine someone running down the street yelling, "I was injured by words! I was harmed by images!" It sounds absurd framed in this manner, but a cause of action under obscenity law is tantamount to such declarations.[20] Nevertheless, once an injury occurs, how can it be proven? Proving injury from the exposure to obscene material is often difficult. Physical scarring is clear to see, whereas psychological injury is more difficult to ascertain.[21]

Further, exposure to "obscene" material will have different impacts upon each individual exposed. For example, assume that an individual suffers injury when exposed to the word "fuck," a word commonly recognized to be obscene.[22] To a non-English speaker, this word is just a sound without semantic meaning. It certainly could produce no more injury then the sound of another word. There is nothing inherent in the human mind to induce injury by the sound of this word.

Further, classification of a word as obscene to an English-speaking person is even more interesting. If one has never heard the word before, then she is in the same class as the non-English speaker. That is to say, in order for any word to have meaning, it must have an *a priori* meaning agreed upon by both parties. Hearing it again simply invokes this prior knowledge, or the memory of its meaning.[23] So if one accepts the

aforementioned propositions, and the utterance causes injury, how can one determine which utterance caused the injury? Since the injury derives from the stimulation of a memory, is obscenity in fact a thought crime?

A different argument can be found for being exposed to nude pictures, as we all are born naked. It seems unreasonable that exposure to images of people in a natural state could be injurious. Moreover, the desire to be naked or clothed, and reactions to images of such are clearly variable by culture.[24] If exposure to such images were injurious, one would imagine that their prohibition would be culturally universal, which is not the case.

III. The Problem of Statutory Definition

For any law to be enforceable, it must be defined in clear and specific terms.[25] This mandate is known in constitutional jurisprudence as the vagueness doctrine.[26] The vagueness doctrine promotes several important public policies.[27] Specifically, the doctrine ensures that individuals have notice of prohibited conduct and fair warning.[28] Second, the doctrine proscribes capricious and discriminatory application of laws by providing "explicit standards" to policemen, judges, and juries.[29] Third, the vagueness doctrine seeks to avoid any unnecessary inhibition of individual freedoms.[30] The Supreme Court recognizes that "[u]ncertain meanings inevitably lead citizens to steer 'far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'"[31]

Nevertheless, defining obscenity in clear and specific terms sufficient to satisfy the vagueness doctrine is very difficult. The process of defining obscenity law is paradoxical in nature. For example, if lawmakers want to make a law against writing the obscene word "fuck" in a book, then they would have to write this law in a book, thus becoming obscene in the process! All obscenity law suffers from this paradox.

A similar paradox was realized in the Congressional Record in 1985 when United States Senate Committee on Commerce, Science and Transportation held hearings on pornographic lyrics in popular music.[32] Congressmen and witnesses read samples of these lyrics into the record, thus making the Congressional Record pornographic![33]

The paradox of defining obscenity can be resolved by invoking either: a) class, b) community standards, or c) hypothetical "reasonable persons." Each proposed solution is flawed, and will be examined in order.

A. Class as Flawed Solution to the Paradox of Definition

The United States is a republic, a representative democracy founded upon the precept that all persons are created equal.[34] The egalitarian principle embodied in these words is at odds with the concept of class hierarchies.[35] Necessarily, then, a class-based solution to the paradox is untenable in this country. For example, one can imagine a king that declares he can utter the obscene word with such royalty and grace as to not be sinful, or that one endowed by God such powers to carry out executive enforcement would therefore be immune to all infractions of law. There, the king would be both making and enforcing the law. The important characteristic of such a solution is that it

is axiomatic, outside public scrutiny or the system of law. It relies upon a disparity between the class of the governor and the governed. This is antithetical to the democratic principles espoused by the Founding Fathers.

B. Community Standards—Another Flawed Solution

Many obscenity issues arise out of graphic depictions of nakedness, sexual activity, excretory functions, or offensive language. However, not everyone believes that such expression is obscene. For example, a nudist would probably feel no shame over seeing nakedness, and a vulgar man may have no objections to the language he himself uses. Even within a particular community, everyone possesses different standards.

It seems quite misguided then for obscenity law or the courts to appeal to such standards.[36] In reality, community standards do not appeal to the standards of the entire community, since the community is heterogeneous no such uniform standard exists. In fact, community standards generally are applied to the standard of the most prudish individual that can be found.[37] Necessarily, then a community standards approach is untenable as a solution to the paradox.

C. Hypothetical Reasonable Persons—The Final Error

Recall that for a law to be enforceable, it must be defined.[38] However, federal obscenity statutes do not contain a definition of what is obscene.[39] Instead, the Supreme Court defined obscenity in *Miller v. California*.[40] The *Miller* court provided that material is obscene when it "appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value."[41]

A determination of prurience and patent offensiveness is determined with reference to contemporary community standards for the geographical area where charges of obscenity have been brought.[42] The literary, artistic, political, or scientific value of material is determined according to a hypothetical reasonable person test.[43] A reasonable person test does not provide any objective standard upon which facts of law can be decided.[44]

The capricious nature of the *Miller* mandate demonstrates that there is no cogent definition of obscenity. In fact, federal obscenity law defers definition of what is obscene to someone else! Therefore, the current state of obscenity law is improperly vague.

IV. The Problem of Legal Standing

If there exists a right to live free of offensive words or images, then should not all such violations be actionable? In practice, however, prosecution of these actions is quite arbitrary and discriminatory. For example, it is likely that a vegetarian would find McDonald's advertisements depicting slaughtered cow flesh to be obscene, and advertisements targeted specially towards children as indecent. Similarly, a pacifist might find CNN and the other news networks cheerleading the latest United States campaign of bombing civilian populations to be obscene. However, such individuals are not generally recognized to have standing for

obscenity claims.

If we allow a father to bring a complaint because his child was allegedly injured from hearing a word on the radio,[45] then we must allow the vegetarian and the pacifist standing as well. It is the same principle in both cases, although the vegetarian and the pacifist may be offended by different things than others in their community.

But if this were to happen, we would in fact open the door to an endless number of these "I was injured by words!" lawsuits because everyone has different standards. For any given image or utterance, surely someone can be found who takes objection to it, and others that do not. It is therefore not possible to appeal to "community standards" without either finding everyone guilty of offending someone, or unfairly and arbitrarily granting standing to some and denying it to others.

Conclusion

A great potential exists for censorship, inevitably created by any obscenity law, leading to the suppression of political dissent, a symptom of oppressive rule and a breakdown of democracy.

NOTES

1 *See* 47 U.S.C.S. § 231 (Law. Co-op. 2004).

2 The author is a free speech advocate, but secondarily to being an advocate of non-violence. It is clear that certain speech can cause injury, including psychological warfare/torture (evil parent who yells at child, military psychological operations techniques), libel, slander, false testimony, incitement to commit violence (asking someone to commit murder, ordering a soldier to kill), incitement to riot (shouting "fire" in a crowded theater, etc.), hate speech ("all xxxx deserve to die"), which often predicts actual violence, and images which depict prior violence such as "snuff porn" depicting actual rape, murder, bondage, or other atrocities. I would hope the arguments herein are not used to further the production of such things. But I do not believe the First Amendment provides the proper forum for indicting the larger problem of violence in society. This is the realm of philosophy, theology, and the criminal courts. There are already laws against murder; it seems unnecessary, perhaps even Orwellian, to criminalize the speech which lead to the murder, especially if such speech is punishable to the same degree as the act, whether or not the act actually occurred.

3 *See* Appeal of Norwalk S. Ry. Co., 69 Conn. 576, 586-87 (1897).

4 *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978).

5 *See* NOAM CHOMSKY & EDWARD HERMANN, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (Pantheon Books 1988); *see also* NOAM CHOMSKY, NECESSARY ILLUSIONS (South End Press 1989); NOAM CHOMSKY & DAVID BARSAMIAN, PROPAGANDA AND THE PUBLIC MIND (South End Press 2001).

6 BLACK'S LAW DICTIONARY 224 (6th ed. 1992).

7 MERRIAM-WEBSTER ONLINE (2005) *available at* http://www.m-w.com/cgi-bin/dictionary?book=Dictionary &va=propaganda.

8 *See* NOAM CHOMSKY & EDWARD HERMANN, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (1988).

9 *See* ALEX CAREY, TAKING THE RISK OUT OF DEMOCRACY: PROPAGANDA IN THE U.S. AND AUSTRALIA (Univ. of NSW Press 1995); *see also* SHELDON RAMPTON & JOHN STAUBER, TOXIC SLUDGE IS GOOD FOR YOU! (Common Courage Press 1995).

10 *See* Barenblatt v. United States, 360 U.S. 109, 145-46 (1959).

11 Associated Press v. United States, 326 US 1, 20 (1945); *compare with* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), (extending the reasoning that the First Amendment is not just a right of speakers and writers, but is also of readers and listeners).

12 *See generally* Lawson v. First Union Mortgage Co., 786 N.E.2d 279, 283 (Ind. App. 2003).

13 Lewis v. Casey, 518 U.S. 343, 351-52 (1996).

14 Clinic For Women, Inc. v. Brizzi, 814 N.E.2d 1042, 1050 (Ind. App. 2004).

15 BLACK'S LAW DICTIONARY 223 (5th ed. 1979).

16 BLACK'S LAW DICTIONARY 521 (7th ed. 1999).

17 *See, e.g.,* Kerman v. City of New York, 374 F.3d 93, 105 (2d Cir. 2004).

18 *See, e.g.* CAL. LAB. CODE § 6404.5 (West 2005).

19 *Id.*

20 *See* Inland Empire Enter., Inc. v. Morton, 365 F. Supp. 1014, 1019 (C.D. Cal. 1973) (dismissing a cause of action under obscenity law for failure to show irreparable injury).

21 Welker v. S. Baptist Hosp. of Fla., Inc., 864 So.2d 1178, 1185 (Fla. Dist. Ct. App. 2004).

22 Anne M. Coughlin, *Representing the Forbidden*, 90 CAL. L. REV. 2143 (Dec. 2003); *but see* Julie Hilden, *Bono, Nicole Richie, and The F-Word: The Insanity of Broadcast Indecency Law*, (Dec. 23, 2003), *available at* http://writ.news.findlaw.com/hilden/20031223.html (explaining that in 2003, the Federal Communications Commission ruled that "fuck," when used as an exclamatory adjective and not to describe a sexual act, is not obscene. The decision arose out of an incident at the Golden Globe awards, when U2's singer Bono exclaimed, "This is really, really fucking brilliant.").

23 Erick Janssen, Walter Everaerd, Mark Spiering & Jeroen Janssen, *Automatic Processes and the Appraisal of Sexual Stimuli: Toward an Information Processing Model of Sexual Arousal; Statistical Data Included*, J. OF SEX RESEARCH, Feb. 1, 2000, at 8.

24 Nicholas Wolfson, *Eroticism, Obscenity, Pornography and Free Speech*, 60 BROOK. L. REV. 1037, 1040-54 (Fall 1994).

25 *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (noting that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined").

26 *Id.* at 108-09.

27 *Id.*

28 *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

29 408 U.S. at 109.

30 *Id.*

31 *Id.* (citing Baggett v. Bullitt, 377 U.S. 360, 372 (1964) [internal citations omitted]).

32 The hearings occurred at the urging of the Parents Music Resource Center, a powerful lobbying group whose leadership included the wives of ten senators, six representatives, and one sitting Cabinet member. Perhaps the most prominent member of the Parents Music Resource Center was Tipper Gore. *See generally*, *Record Labeling: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 99th Cong., 1st Sess. (1985); Shosana D. Samole, *Rock & Roll Control: Censoring Music Lyrics in the '90's*, 13 U. MIAMI ENT. & SPORTS L. REV. 175**,** 187-88 (providing general background information on the efforts of the Parents Music Resource Center).

33 *Record Labeling: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 99th Cong., 1st Sess. (1985).

34 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

35 *See* Walter Berns, *Equality as a Constitutional Concept*, 47 MD. L. REV. 22 (Fall 1987).

36 *See* Roman A. Kostenko, *Are "Contemporary Community Standards" No Longer Contemporary?*, 49 CLEV. ST. L. REV. 105 (2001) (arguing that a "community standards" approach to obscenity is untenable because of its chilling effect on freedom of speech).

37 *Id.* at 106.

38 *See supra* notes 24-30.

39 18 U.S.C. §§ 1460-1470 (2004).

40 413 U.S. 15 (1973).

41 *Id.* at 24.

42 *Id.*; *see also*, Lorri Staal, *First Amendment—The Objective Standard for Social Value in Obscenity Cases*, 78 J. CRIM. L. & CRIMINOLOGY 735 (1988).

43 *See* Pope v. Illinois, 481 U.S. 497 (1987).

44 *See* Staal *supra* note 42 (discussing the objective reasonable person standard).

45 On October 30, 1973, Paul Gorman, a DJ at Pacifica Radio station WBAI, aired Carlin's "Seven Dirty Words" during a daytime slot on his show, issuing a disclaimer that those who might be offended by strong language should tune away. John H. Douglas, a planning board member of Morality in Media, was driving with his young son at the time, heard the disclaimer, but decided to listen anyway. In a letter of complaint to the FCC enforcement bureau dated November 28, 1973, Douglas expressed concern that his 12-year-old son heard parts of the Carlin routine. While Douglas acknowledged that Carlin's monologue had some

social value and that he understood selling the record for private use, the complaint alleged the WBAI broadcast was inappropriate for children to hear during the middle of the day. Pacifica lost in the Supreme Court, and this case still is a controlling case in indecency cases. *See* FCC v. Pacifica Found., 438 U.S.726 (1978).