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Federal Censorship: Obscenity in the Mail

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BOOK REVIEWS

FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL
by *James C. N. Paul* and *Murray L. Schwartz*
The Free Press of Glencoe, Inc., New York, 1961. Pp. 358. $7.50.

Reviewed by
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The authors of this latest book on obscenity have done their homework well and no one can gainsay that they display a thorough knowledge of the statutes and the cases. The genesis of the anti-obscenity laws is found by them in Anglo-American tradition, is observed crossing the Atlantic, and is developed from Milton (hardly a purist) through Summerfield (hardly a poet). The crusades against smut and the crusades against the crusades are narrated at length and are festooned with liberal judges, perplexed lawyers, bigoted bureaucrats, narrow minded legislators, persecuted and misunderstood authors and a sickening array of photographers, traffickers and assorted low lifes, many of whom are bolstered by unseemly allegiances.

The authors, at the outset, delineate the evolution of the current legal definition of obscenity. Its vagueness is assayed, graphically demonstrated and denounced, and the dangers of subjectiveness and relativity with regard thereto are exposed. The necessary limitation of the *Hicklin* case (the test there being whether the tendency is to corrupt and deprave those whose minds are open to immoral influence and into whose hands the questionable matter might fall) is explained as made by the circuit court in the celebrated *Ulysses* case, which formulates the test that if the dominant effect of a book of recognized literary merit, taken as a whole, was not the promotion of lust in normal adults there would be no federal confiscation.

Emerging as the villain of the book is the hapless postal official saddled with carrying out the prohibitions and sanctions of the Comstock Act. Confiscation of nonmailable matter is highlighted in its abuses. The unlettered letter carrier is scorned for his lack of sophistication and for his stodgy, dull and often vindictive pursuit of his role as censor. His ignoble weapons, *viz.*, revocation of second class mailing privileges (39 U.S.C. § 4354) and mail blocking (39 U.S.C. §§ 259, 4007) are denounced as abuses of postal police power as case after case is "unveiled." Postmaster General Summerfield emerges as a strong rival for the pedestal of ignominy primarily reserved for Anthony Comstock (undefeated champion, enemy of the sentient man). Summerfield's lieutenants, the postal lawyers and administrators, are not as heavy but are generally depicted as narrow and incompetent.

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On a broader level, the very real and difficult problem of administrative tribunals is cogently explained, but the dilemma, posed by foresaking intradepartmental adjudication with its relative effectiveness in favor of the ponderous, time consuming and less pragmatic recourse to the federal courts, is not answered.

Messrs. Paul and Schwartz combine, however, to do a fine job of highlighting the weaknesses of the Comstock Act and of the instrumentalities of this somewhat imperfect law. The panderer need only increase his price so as to mail first class and he has skirted the main problem of confiscation. While the Post Office employees might be rigorously confiscating packs of pornographic paperbacks, the druggist across the street could be selling the same book to any high school girl who stops for a soda on the way to her baby-sitting assignment. Finally, the United States Attorneys sometimes refuse to take cases to court under the Comstock Act because a conviction is so hard to come by.

On the other hand, the authors object to the right of the Post Office to make determinations of obscenity and to confiscate what is so determined. The legislature nevertheless thinks this necessary. Although one will agree that neither is the optimum, still it does appear that the Congress of the United States has decided it would be better to allow room for some abuses of the individual's right to complete freedom of access rather than to open the floodgate of licentiousness upon certain classes of citizens deserving of protection. By and large the nation isn't up in arms crying for the repeal of the Comstock Act. If the "pressure group" (a recurrent phrase used by the authors with reference to backers of censorship) seeking relaxation of censorship represented enough of the people perhaps it would effect its end. In the absence of this, let us assume that in this democracy the majority feel censorship is here to stay. It becomes necessary, therefore, to measure censorship against the Constitution of the United States and to listen to what the Supreme Court has to say. Despite the fact that recent decisions of this Court have upheld censorship in specific instances, the authors still are of the opinion that there is a bench aching to find postal censorship unconstitutional.

The authors do endorse legal sanctions to prohibit assaulting people with obscenity (granting that one should be free to take it or leave it alone), knowingly circulating obscenity to adolescents or abnormal audiences, and the reckless commercial exploitation of obscenity. They do not advocate complete abandonment of federal controls. "[T]he sovereignty of the United States government should be concerned only with cases involving substantial use of the mails (to the exclusion of other means) and operations otherwise beyond the convenient reach of local authorities."[1]

Commendations are in order on a thorough exposition of the problems involved in framing, implementing and enforcing anti-obscenity laws. The book is the result of extensive research, is well documented and, this writer would say rather scholarly, were it not for his aversion to, and the authors' penchant for, editorializing the facts and taking sides. Certainly, when it becomes apparent that arguments which favor the abolition of all censorship also result inevitably in the championing of the clandestine panderer (who mails lascivious words and lewd nudes to greedy

[1] PAUL & SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 222-23 (1961).

perverts and aching adolescents) it then becomes difficult to share the views of the authors. It is evident from the writing of Messrs. Paul and Schwartz that neither of them believes in original sin. They trust that *natura vulnerata* is capable of self-protection. That a single act of the will without more was the cause of Calvary would be regarded as immaterial by them. A disregard of this position by the authors on the ground that law must serve a plural society partially explains why the writer finds it impossible to come to the same conclusion in the premises as that advocated in this book.

The authors' end of the telescope can be appraised in the chapter "Why Do We Suppress Obscene Publications?" In questioning that obscenity laws are necessary to prevent sexual misbehavior of impressionable youths, the authors state: "The danger, if any, to youth is too often cited as the justification for new restrictions on the freedom of adults."[2] The authors do not take seriously the danger of obscenity on the minds, no less the souls, of youth, nor on the impulsive activities of perverts.

> There is a deep popular intuition here, unrefined as it is, and popular intuitions of such strength are not to be ignored.
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> Perhaps if the negative were ultimately proved . . . repeal . . . would be possible. . . . The direction of change must be to evaluate particular techniques of control, to refine the standards, and to assure that freedom to publish cannot be impetuously limited from time to time by the power of government acting on the prejudices of articulate pressure groups.[3]

The authors also charge that obscenity regulation is "the product of intuitive impulses and imprecise assumptions. . . . The notion that distribution of this kind of human expression results in tangible harm to those exposed is probably supported by less 'verifiable' information than are most legislative assumptions."[4]

While it must be conceded that the law's present machinery is imperfect and that abuses and inequities abound, this writer must still submit that the law does not deserve to be chipped away or confined and restricted as urged. Reformation is needed. The definitions should be made more definite. The administrative censorship should be regulated with more workable standards. Censorship should be clarified and improved but not weakened. The purpose of this review is not to suggest the necessary reforms. This writer cannot presume to be capable of the necessary constructive analysis. It would, however, be most unfortunate if the book reviewed remained the last word on the peculiarly current problem of obscenity censorship, which is as timeless as sin itself.

[2] *Id.* at 197.

[3] *Id.* at 204.

[4] *Id.* at 240.