

Michigan Law Review

Volume 63 | Issue 3

1965

Ernst & Schwartz: Censorship: The Search for the Obscene

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Recommended Citation

Erwin B. Ellmann, *Ernst & Schwartz: Censorship: The Search for the Obscene*, 63 MICH. L. REV. 569 (1965).
Available at: <https://repository.law.umich.edu/mlr/vol63/iss3/11>

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RECENT BOOKS

CENSORSHIP: THE SEARCH FOR THE OBSCENE. By *Morris L. Ernst* and *Alan U. Schwartz*. New York: Macmillan. 1964. Pp. xvi, 288. \$6.

Anxious to make legal thinking "intelligible to the laity," two seasoned and knowledgeable practitioners have here undertaken to survey for non-lawyers what they call the Law of the Obscene. Why they should have selected this area to exemplify jurisprudential wisdom is puzzling, for whatever the Law of the Obscene is conceived to be, it hardly marks a moment of triumph for legal method. The common law of obscenity still awaits its Mansfield. Apart from a few memorable apothegms of Learned Hand, Curtis Bok, Jerome Frank, and a bare handful more, most censorship decisions are as dismal as the materials with which they deal.

Apparently spawned from Charles Sedley's indecent exposure case in the reign of Charles II, obscenity law was in thrall for more than a century to Lord Justice Cockburn's omnivorous phrase in *Regina v. Hicklin*—"whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall."¹ The fragile contingencies, the headlong assumptions, the imprecision and subjectivity of this formulation were scarcely remarked as court after court found it serviceable weaponry for suppressing whatever was disapproved. Even during this century the decisions usually quibbled with details rather than the premises of the *Hicklin* rule. Only in the last decade have we been driven to search for the obscene among that which both attracts because it "appeals to the prurient interest" and repels because it is "patently offensive."

It is apparent that few things so unsettle the judicial mind as the human reproductive system. In an obscenity prosecution, the judicial process seems to take on a peculiar sacerdotal quality. Though he may be the Rabelaisian wit of the bar convention, the judge who mounts the bench and confronts a photograph of a nude feels compelled to put a stop to unwed motherhood, juvenile crime, lavatory art, the sins of onanism, lowered church attendance, and a welter of similar problems. As a result, obscenity decisions have been marked by more than their fair share of ostrich gymnastics, bootstrap ascents, tautologous pieties, and plain cant. It would seem better, as a mere matter of professional pride, to hide all this as a trade secret rather than to expose it to a heathen multitude. Messrs. Ernst and Schwartz, however, are nothing daunted.

That the story is fascinating is undeniable. The authors have

1. P. 35.

here retold pithily and with dash the tribulations of such official martyrs to suppression as *Mademoiselle de Maupin*, *Ulysses*, *Lady Chatterley*, and *Fanny Hill*. The authors recall the battles over the *Well of Loneliness*, *The Sex Side of Life*, *Married Love*, and many more. They rehearse the United States Supreme Court decisions from *Doubleday* to *Butler*, through *Roth* to the last *Bantam Books* case, in sufficient detail to give even the most unsophisticated reader an understanding of how the Constitution got into the dirty book business. While some favorite cases are omitted and others barely mentioned, this is a representative, readable, and illuminating selection. The book variously excerpts judicial utterances, editorializes about clusters of decisions, paraphrases or quotes other commentators, and even exhibits in full the throes of the Maryland Supreme Court in deciding how hard "hard core pornography" must be.

In a kaleidoscopic survey of what the cases hold, the authors cannot pause for long over the hard questions. Do we suppress a book because an unflustered judge can really competently predict that it will fluster someone else, or is this only another decorous "fable agreed upon"? Consistent with freedom of expression and individual liberties, does contemporary society really have a right to preserve us from copulatory incitements, whether pictures or perfumes? Is there a meaningful link between reverie, however lush or lurid, and overt conduct which can rationally be regarded as anti-social? How many undeniable outrages in our society do we obscure by seizing upon the smut-peddler as public scapegoat? What are the individual and social uses of the unrepressed sexual imagination as well as its dangers? Neither this book nor the decisions it reviews provide many helpful answers.

The question whether a writing is obscene, a New York jurist of a generation ago is quoted as declaring, "is one of the plainest that can be presented to a jury, and under the guidance of a discreet judge there is little danger of their reaching a wrong decision."² The recent varied fortunes of *Tropic of Cancer* in many jurisdictions purporting to apply the same rule of federal constitutional law suggest that the problem has never been so simple. Indeed, the Supreme Court, since *Roth*, has been having a harder time explaining the results it plainly wishes to reach. And even when the Justices are in agreement, experience suggests that it takes a good deal more than their opinion to restrict the self-assured excesses of the lower courts. In the last decade, as the Court has sought to curb the censor's zeal, trial judges have often penalized transgressions of the national moral law of obscenity with a voracity which might have made Torquemada blush. With few exceptions in recent years, the

2. Andrews, J., in *People v. Muller*, 96 N.Y. 408, 412 (App. Div. 1884).

appellate chore in censorship cases is to disinfect what trial judges close to "community morality" persist in doing.

Though there are warnings to the contrary in this volume, its very design tends to suggest that the law of obscenity has shown a long, steady march upward and onward, with true principles gradually honed, refined, and made more rational with each succeeding decision. Unfortunately, it isn't so. Having rejected in 1957 the thesis that disturbing thoughts about sex should be measured by basically the same standards as are used to measure disturbing thoughts about sedition or riots, the Supreme Court is still struggling to discover acceptable criteria of the obscene and to apply them to various media and diverse circumstances. Other courts are following behind at varying paces. Even if this volume makes the Law of Obscenity intelligible to laymen, it is likely to take years (and more volumes) to make it intelligible to lawyers.

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