

LAW AND CONTEMPORARY PROBLEMS

VOLUME 20

AUTUMN, 1955

NUMBER 4

FOREWORD

Restraints on freedom of thought and creative expression have long been regarded as fundamentally incompatible with the democratic ideal. Not only have such strictures been viewed as obstacles to the fullest possible realization of individual potential, but their imposition has been felt gravely to imperil all freedom. Such, no doubt, was the conviction of Thomas Jefferson when he wrote:¹

I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.

It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost.

But whatever its intrinsic value, absolute license has never characterized a vital society, however devoted its members to the concept of freedom. Other societal values have also been recognized, and social mechanisms have been devised to accommodate their seemingly antithetical demands in a manner conceived best to serve the public interest. Thus, the history of free expression in democratic societies has been one of constant re-assessment and redressing the balance as between it and other competing values so as to reflect as truly as possible the relative importance assigned by society to each at a given time.

Despite wide divergences in underlying philosophy, substantially all elements of our society recognize the validity of restraints on freedom of expression in some contexts. Thus, for example, even the most fervid civil libertarian would hardly contest Justice Holmes's dictum that²

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.

Not surprisingly, however, perhaps the heaviest fire, apart from that drawn by restraints "political" in nature, has been directed at those qualifications of freedom imposed in the name of public morals. Morals, in etymology and history, derive from *mores*—customs deemed essential to the well-being of the group—and their very elusiveness probably renders controversy inevitable.

¹ THOMAS JEFFERSON, *DEMOCRACY* 150-51 (Saul K. Padover ed. 1939).

² *Schenck v. United States*, 249 U.S. 47, 52 (1919).

The resultant clashes and the uneasy and short-lived truces that follow are perhaps most dramatically and significantly seen in those instances where artists adopting unconventional modes of expression, albeit for the attainment of valid objectives, have collided with certain sexual taboos. It is with the examination of some of the problems that inhere in the resolution of this conflict, some of the difficulties involved in proscribing what is termed *obscene*, that this symposium is concerned.

Assuming that there is general agreement that obscenity should be suppressed, the basic problem of definition presents itself: What is obscene? Are there any universally absolute concepts and standards? Are there any absolutes even within a given culture at all times and places? At the same time and place? Or, is one man's sacred cow rather another's sacrilege? The reflections of our contributors, from anthropological, philosophical, theological, and psychiatric points of view, would appear to indicate considerable diversity not only among cultures, but among component groups within a culture.

Then, there is the problem of control: What social mechanisms have we evolved both to articulate criteria and to enforce compliance? What is the source of their authority? With what media are they concerned? How valid are their criteria? What sanctions do they impose, and how effective are they? Can we gain new insights by studying the experience of a similar society in its efforts to deal with the same sort of problems? The picture our contributors paint is hardly inspiring—replete as it is with arbitrary and unrealistic standards, frequently postulated on what may at best be termed inadequate or misleading data, generally unevenly enforced, often by agencies operating without the sphere of public authorization or control. Nor is the English picture much brighter or more encouraging in many significant particulars.

Finally, there is the problem of taking into account and making due allowance for other considerations in framing a rational definition of obscenity and seeking effectively to cope with it. In devising control mechanisms, for example, what is the relevance, if any, of the constitutional injunction against prior restraints? Again, what will be the likely cultural or societal implications of a given policy? Will suppression of obscenity perhaps give rise to even more noxious social evils? And what relationship, if any, exists between obscenity and juvenile delinquency and maladjustment?

Many of these questions—and others—which were posed in planning this symposium, have not—indeed, could not have—been answered; and the editor is uncomfortably aware of the appositeness of the old Chinese proverb that a fool can ask more questions in an hour than a wise man can answer in a life-time. Some consolation, however, is found in the hope that these lacunae may serve further to stimulate thought and study in this area, and that this symposium may, in a small way, thus contribute to a rational resolution of a compelling societal problem.

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