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Criminal Law--Obscenity--The Need for Legislative Reform

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Criminal Law—Obscenity—The Need for Legislative Reform

I deplore . . . the patred state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These odours are rapidly depraving the public taste. It is however an evil for which there is no remedy, our liberty depends in the freedom of the press, and that cannot be limited without being lost.1

The law of obscenity is pathological. It neither lends an ear to reason, nor exhibits any sort of pragmatic approach. There has been much anti-obscenity legislation in the United States. However, the standards set must be ever changing, since the problem of obscenity is subjective. Thus, loss of predictability, increasing censorship, and inherent subjectivity are unsettling to the vast communication industry.

Kentucky has been plagued, since the legislature has not revised its statutes concerning obscenity to meet the times.2 Consequently, the Kentucky Crime Commission has proposed a new obscenity statute.3

The purpose of this comment will be to give the history of obscenity via Supreme Court decisions; to discuss the purposes of the Model Penal Code; to examine pertinent provisions of Kentucky’s proposed code; and to recommend what should and should not be included in an obscenity statute. The law has recently changed providing ample reason for this writer, as well as the Kentucky Legislature, to give a realistic re-analysis to the problem of obscenity.

I own, of our Protestant laws I am jealous
And long as God spares me will always remain
That once having taken men’s rights or umbrellas,
We ne’er should consent to restore them again.4

The classical generation gave us our words for pornography and obscenity.5 The earliest reported case is that of The King v. Sir Charles Sedley.6

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1 Thomas Jefferson, Democracy 150-51 (Saul K. Padover ed. 1939).
2 They were rewritten in 1966 to conform to recent Supreme Court decisions on first amendment freedoms. However, as will be shown in this paper, the standard for obscenity is ever changing and has undergone drastic change since 1966.
3 I Kentucky Crime Commission, Outline for Proposed Criminal Law Revision §§ 3101-20 (1968). The proposed statute on obscenity is divided into five sections: § 3101, Definitions; § 3105, Promoting Pornographic Materials; § 3110, Promoting Lascivious Materials for Minors; § 3115, Intent to Discriminate: Prima face Proof; and § 3120, Displaying Indecent Materials.
4 Moore, Growth of Law.
5 Porne and graphum come from Greek, meaning literally “writing about whores,” whereas obscenity comes from the Latin words for “filthy” or “repulsive.” However they were not applied exclusively to sexual expression and carried no moral stigma. Gilman, There’s a Wave of Pornography, Obscene Sexual Expression, N.Y. Times Magazine, Sept. 8, 1968, § 6, at 36.
He was fined 2,000 mark, committed without bail for a week, and banned to his good behavior for a year, on his confession of information against him, for shewing himself naked in a balcony, throwing down bottles (pist in) and armes among the people in Covent Gardens, contra pacem and to the scandal of the Government.\(^8\)

As early as 1727 common law held that obscene printing was punishable in England.\(^7\) The common law rule was also extensively used as a basis for prosecution in the United States.\(^8\) However several states enacted statutes making the writing or printing of obscene books or pamphlets punishable crimes.\(^9\)

Our earliest test for obscenity comes from the English courts in 1868 in the case of *Regina v. Hicklin*.\(^10\) A book was considered obscene if it contained any passages that tended to arouse libidinous thoughts in those persons "most susceptible" to such influence.\(^11\) This test was applied in our courts in 1879 in *United States v. Bennett*.\(^12\) This test allowed passages to be read out of context, and allowed no weight to literary, scientific, or other value of the work in question. Case law followed the *Hicklin* rule consistently.\(^13\) This was distinctly illustrated when in 1930 a Massachusetts court ruled Theodore Dreiser's *An American Tragedy* obscene because of objectional passages.\(^14\)

However, there were cases during this time that began to reject the *Hicklin* test.\(^15\) The absurdity of the test was that by it even the Bible could be declared obscene.\(^16\) Judge Learned Hand in *United States v. Kennedy*, applied the Hicklin test but expressed his discontent with allowing our literature to be graded by the standards of

\(^{6}\) J. Keeble 620 (K.B. 1663).

\(^{7}\) Rex v. Curl, 2 Str. 788 (1727). For the historical development of the law of obscenity, see ST. JOHN STEVAX, OBSCENITY AND THE LAW (1956).


\(^{10}\) 3 Q.B. 360 (1868). Lord Cockburns said, "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."


\(^{12}\) 24 F. Cas. 1093 (No. 14371) (S.D.N.Y. 1879).

\(^{13}\) United States v. Rosen, 161 U.S. 29 (1896); Commonwealth v. McCance, 164 Mass. 162, 41 N.E. 183 (1895); People v. Muhler, 96 N.Y. 408 (1884).


\(^{15}\) The New York Supreme Court held Paynes' edition of the *Arabian Nights*, Fielding's *Tom Jones*, Rousseau's *Confessions*, The Works of Rabelais, Ovid's *Art of Love*, the *Decameron* and *Heptameron* to be salable and not obscene. In *re Worthington*, 30 N.Y.S. 361 (Sup. Ct. 1894).

the dullest most susceptible, reader in the community.\textsuperscript{17} Beginning in the 1930's the Hicklin rule encountered further resistance. The first to be excluded from it were medical and other serious texts offering sex information.\textsuperscript{18}

Judge Learned Hand's discontentment became law in United States v. One Book called “Ulysses.”\textsuperscript{19} Judge Woolsey defined obscenity as "tending to stir the sex impulses or to lend to sexually impure and lustful thoughts."\textsuperscript{20} He claimed the book must be judged by its effects on reasonable men rather than on those most susceptible. In affirming the decision, Judge Augustus N. Hand wrote:

We believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern and the verdict of the past, if it is ancient are persuasive pieces of evidence.\textsuperscript{21}

In 1936 Judge Learned Hand specifically stated that Ulysses had overruled the Hicklin test.\textsuperscript{22} This new test also began to be considered by state courts.

However, the Supreme Court did not actually become involved with obscenity litigation until 1956, when it decided Roth v. United States.\textsuperscript{23} Prior to this case there was dictum, but no direct holding by the Supreme Court that obscenity is not protected by the first and fourteenth amendments.\textsuperscript{24} The Court decided that the “dispositive question is whether obscenity is within the area of protected speech and press.”\textsuperscript{25} The Court said obscenity was not protected,\textsuperscript{26} then proceeded to announce the test:

\[ \text{Whether \ldots to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.} \textsuperscript{27} \]

\begin{itemize}
\item \textsuperscript{17} "[I]t would reduce our treatment of sex to the standard of a child's library in the supposed interest of the salacious few and forbid all which might corrupt the most corruptible." 207 F. 119, 121 (S.D.N.Y. 1913).
\item \textsuperscript{18} Walker v. Popenue, 149 F.2d 511 (D.C. Cir. 1945); United States v. One Book Entitled “Contraception,” 57 F.2d 525 (S.D.N.Y. 1931); United States v. One Obscene Book Entitled “Married Love,” 48 F.2d 821 (S.D.N.Y. 1931); United States v. Dennen, 39 F.2d 564 (2d Cir. 1930).
\item \textsuperscript{19} 5 F. Supp. 182 (S.D.N.Y. 1933), aff'd 72 F.2d 705 (2d Cir. 1934).
\item \textsuperscript{20} 5 F. Supp. at 184.
\item \textsuperscript{21} 72 F.2d at 708.
\item \textsuperscript{22} United States v. Levine, 83 F.2d 156 (2d Cir. 1936).
\item \textsuperscript{23} 354 U.S. 476 (1956).
\item \textsuperscript{24} See, e.g., Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Chaplinski v. New Hampshire, 315 U.S. 588, 571-72 (1942); Near v. Minnesota, 283 U.S. 697, 716 (1931).
\item \textsuperscript{25} 354 U.S. at 481.
\item \textsuperscript{26} Id. at 492.
\item \textsuperscript{27} Id. at 489.
\end{itemize}
Justices Black and Douglas joined in a dissenting opinion expressing the view that all obscenity censorship is unconstitutional unless the censored material satisfies the clear and present danger test.28

After this decision it was felt that the Court was adopting a standard in favor of censorship.29 However, in 1957 the Court handed down four per curiam decisions30 which reversed lower court decisions upholding censorship. The Roth case did no more than open up a Pandora's Box in obscenity regulation. This can be seen from the simple fact that since the Roth decision, the law of obscenity has produced five separate and contradictory tests: one anti-Roth test and four Roth tests.

1. All material is constitutionally protected, except where it can be shown to be so brigaded with illegal action that it constitutes a clear and present danger to significant social interests. Justices Black and Douglas.

2. All material is constitutionally protected at both the federal and state level except hard-core pornography. Mr. Justice Stewart.

3. All material is constitutionally protected at the federal level except hard-core pornography; material may be suppressed at the state level if reasonable evidence supports a finding that it is salacious and prurient. Mr. Justice Harlan.

4. Material may be suppressed both by the federal and state governments when prurient appeal, patent offensiveness, and utter lack of social value coalesce; in addition, in close cases evidence that the producer or distributer commercially exploited the material so as to emphasize its prurience which draws constitutional protection from otherwise protected material. Chief Justice Warren and Justice Brennan and Fortas.

5. Material may be suppressed if its dominant appeal taken is to prurient interest. Justices Clark and White.31

In the decade between Roth and Ginzberg v. United States,32 the Supreme Court did not uphold a single finding of obscenity. In twelve cases it overturned judgments against nearly two hundred items and lower courts followed suit. Consequently the Court was criticized for its permissiveness. The result was Ginzburg and Memoirs v. Massachusetts.33 These cases established the contextual obscenity, or conduct approach, where the dominant issue is the conduct of the de-

28 "The test that suppresses a cheap tract today can suppress a literary gem tomorrow." Id. at 514 (dissenting opinion).
fendant and circumstances of the sale or publication, not the content of the book.

The most important step in the development of the theory of contextual obscenity came in *Ginzburg* where the majority adopted the "pandering" theory. The majority defined pandering as "the business of purveying textual or graphic material openly advertised to appeal to the erotic interest of their customers."³⁴

These contextual cases have best been summarized as follows:

In summary, *Ginzburg* and the related contextual cases are ill-starred and constitutionally dubious grants of power to the states and the federal government to punish the distribution of undistinguished literature relating to sex. It is a frantic effort to re-balance the scales in favor of the censors after a decade of tipping them in favor of free expression—which favored the "panderers." It is an effort to alleviate the frustration of the states occasioned by the first amendment, by an alternative route, a back door to censorship by imprisoning the merchants of sex literature.³⁵

After *Ginzburg* the Court agreed to hear *Redrup v. New York*,³⁶ a composite of three state obscenity convictions.³⁷ The Court said, "We have concluded in short, that the distribution of the publications in each of these cases is protected by the first and fourteenth amendments from governmental suppression whether criminal or civil."³⁸ The Court expounded on the views of the different judges concerning obscenity during the past decade³⁹ and concluded, "Whichever of

³⁴ The opinion held that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." 383 U.S. at 467.
³⁶ 386 U.S. 767 (1967).
³⁷ The other two cases were *Austin v. Kentucky*, and *Gent v. Arkansas*, 386 U.S. 767 (1967).
³⁸ 386 U.S. at 770.
³⁹ The Court reviewed the standards which have been invoked to govern state conduct in regulating pornography:

Two members of the court have consistently adhered to the view that a state is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their obscenity. *See Ginzburg v. United States*, 383 U.S. 463, 476, 482 (dissenting opinions); *Jacobellis v. Ohio*, 378 U.S. 184, 196 (concurring opinions); *Roth v. United States*, 354 U.S. 476, 508 (dissenting opinion).

A third has held to the opinion that a state's power in this area is narrowly limited to a distinct and clearly identifiable class of material. *See Ginzburg v. United States*, 383 U.S. 463, 479 (dissenting opinion). *See also Magrath, The Obscenity Cases: Grapes of Roth*, 1966 Sup. Ct. Rev. 7, 69-77.

Others have subscribed to a not dissimilar standard, holding that a state may not constitutionally inhibit the distribution of literary material as obscene unless (a) the dominant theme of the material taken as a
these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand.\textsuperscript{40}

After Redrup the Court reversed thirteen obscenity convictions without opinion.\textsuperscript{41}

Perhaps most significant in this highly subjective area, was the indication that a liberal majority is emerging. The Court’s three strongest foes of obscenity censorship, Justices Black, Douglas, and Stewart, were joined by Justices Fortas and White in all thirteen reversals. Justice Clark dissented in ten cases, the Chief Justice in eight, Justice Brennan in four, and Justice Harlan in the state cases.\textsuperscript{42}

Having considered briefly the judicial history of obscenity, let us now observe another major factor in the development of the law of obscenity—the Model Penal Code.\textsuperscript{43} Although the Model Penal Code was not directly involved in Roth, all the Justices appear nevertheless to have been influenced in their thinking by the Code, and it is cited in three of the four opinions. The Code states, “It is our purpose in Section 207.10 to draft a modern law of obscenity, conforming to the general penal norms of the Model Code, and taking into account changes of circumstances and knowledge since the time when the prevailing law of obscenity took shape.”\textsuperscript{44}

The American Law Institute defined obscenity as:

\begin{quote}
(2) Obscene Defined; Method of Adjudication. A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, \textit{i.e.}, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even if the obscenity is latent, as in the case of undeveloped photographs. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged
\end{quote}

\textsuperscript{43}MODEL PENAL CODE § 207.10 (Tent. Draft No. 6, 1956).
\textsuperscript{44}MODEL PENAL CODE § 207.10, Comment (Tent. Draft No. 6, 1956).}
with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience. In any prosecution for an offense under this section evidence shall be admissible to show:

(a) the character of the audience for which the material was designed or to which it was directed;
(b) what the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on behavior of such people;
(c) artistic, literary, scientific, educational or other merits of the material;
(d) the degree of public acceptance of the material in this country;
(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;
((f) purpose and reputation of the author, publisher or disseminator.)

Expert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall be admissible.45

Their intention was to reach the commercial panderer of literature designed to appeal to prurient interest.46 This purpose of the Institute has been incorporated into case law and is the basis for most of the modern statutes, including Kentucky's.

**YOUTH AND OBSCENITY**

You cannot ask the community to do for your child by censorship what you have not done for him by example. Hide the world from him and he will go into the world in ignorance.47

Our society had always assumed a special regard for youth, as do the laws of our land.

A democratic society rests for its continuance upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.48

Parents and schools have the responsibility of developing the character of our youth. "However parental freedom of choice in training offspring is entitled to some measure of community protection."49

46 Model Penal Code § 207.10, Comment (Tent Draft. No. 6 1957).
Some authorities say obscenity does not harm the child. However the majority of the evidence is contra. J. Edgar Hoover summed it up when he said, "We cannot afford, however, to wait for an answer from psychiatrists as to the extent that it obscenity asexual affects the youth's mind. We do know that sex crime is associated with pornography."

A closer look at Kentucky's proposed statute for youth obscenity would be appropriate here; for to this writer the recommendation regarding youth obscenity is the only important proposal of the Crime Commission in this field. The most important point of this law is the age brackets the statute would establish. "Minor" in this proposed statute means anyone under the age of seventeen in Section 484h, and anyone under the age of eighteen in 484i.

Is this a realistic assessment of where we should draw our line? What about sixteen year olds who are taking advanced biology courses, or advanced literature students—should their exposure to life be so distorted until they reach the arbitrary age of seventeen? A better classification would be to draw several age differentiations. Why not create a special class of permissible literature for those children from twelve to sixteen years and a different class for those sixteen to eighteen, then leave it to the discretion of the individual. At least up until that point they would have had guidance in their formative years and will now be able to better select what they want to read. Hopefully by partial exposure or at least some freedom in what they wanted to read earlier in their life, their reading desires will be more academically or aesthetically inclined.

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50 Dr. Jahoda in her study for American Law Institute asserts that they are not affected. Fagan, Obscenity Control and Minors, the Case for a Separate Standard, 10 Cath. L. Rev. 270, 275 (1964).
51 Dr. Frederic Werthan felt that children were harmed by obscene literature, as did Dr. Benjamin Karpman, Chief Psychotherapist at St. Elizabeth's Hospital. See F. Werthan, Seduction of the Innocent ch. IV (1954).
52 Letters from J. Edgar Hoover to all federal law enforcement officials, Jan. 1, 1960.
53 Its primary source is New York Penal Law §§ 484(h)-(i) (McKinney 1966). These statutes were declared constitutional in Ginsberg v. New York, 389 U.S. 965 (1968).
Likewise it should also be vital that these laws do not prohibit the cultural experience available to a child. As Judge Bok said:

It will be asked whether one would care to have one's young read these books [i.e., God's Little Acre, the Studs Lonigan trilogy]. . . . I should prefer my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly . . . no parents who have been discerning with their children need fear the outcome.\textsuperscript{55}

Most would agree that a child should not be subjected to that with which he cannot deal. This should be the purpose of our child obscenity statute, but we must not govern our adults with a child's standard.

RECOMMENDATION

Give your evidence,' said the King; and don't be nervous, or I'll have you executed on the spot.

Alice in Wonderland

For the preceding reasons, this writer feels that a statute governing the exposure of children to obscenity is a necessity. Nevertheless, for the following reasons statutes governing adult exposure to obscenity should be deleted from the current proposals in Kentucky.

In contrast to children, the effect of obscenity on adults is conjectural. Consequently, saying a work has no social value is not a reason, but an excuse. We now live in a society which views sex in a more candid manner than any generation before us.

(Footnote continued from preceding page)

power and are uninterested in 'adult erotic games.' If they are solicited by a 'panderer' his actions would be more tortious than commercial and the law should provide an appropriate civil, and in the extreme case, a criminal remedy.

Those in the latter group have acute sexual curiosity and have not as yet assumed viable sexual identities. The state should proscribe the soliciting of this age group by the merchant of 'hard-core pornography' (as Justice Stewart uses the term), alluringly portraying bestiality or other perversion—but should go no further because censorship solicits sexual curiosity in that which is least deserving of such curiosity and provides an unsettling example of secrecy and furtiveness towards life.

* * *

As of those over sixteen, any attempt to hide the adult world from them is self-defeating as it is vain.

* * *

Scienter as to age should be required for the same reason that scienter as to obscenity is required, to avoid self-censorship of constitutionally protected material. The emphasis should be on the solicitation of the 'hard-core pornography' of perversion to the otherwise indifferent juvenile before the bookseller can be imprisoned.

\textsuperscript{55} Id. at 110.
Obscenity cannot be measured as a crime, but only a sin. Likewise a sin is a very subjective standard and not amenable to legal sanction.56 The utter ridiculousness of obscenity legislation was summed up as follows:

Additionally, censorship spawns its own particular evils: timidity; cynicism; unwarranted curiosity. It stifles expression that may be therapeutic. Furthermore, it is self-defeating. The 'big business of pornography' thrives on the very laws that impede its supply and increase the demand. Experience has shown that the word 'censored' is more profitable to the pornographer than the content of his material.

There is no rational regulation for an irrational phenomenon. The best regulation is self-regulation. The applause or rejection of the audience will always be the ultimate censor, no matter what the state of the law. The great courage of the Supreme Court has faltered in the obscenity cases, save for the clear and thoroughly adult opinions of Justices Douglas and Black. Both Justices have emphasized that the choice of what to read is an individual and not a governmental choice. The choice is admittedly difficult but unavoidably personal and it is high-time that we stop imprisoning men for selling books, and lift the distasteful task of the censor from the Court, and from government, and make our own decisions as to what we are to read, to see, and to think.57

One should be free to choose his own reading material. Questions should not concern the nature of the material, but why some people read only pornography. One should be permitted to live his adult life with all its risks, including those involving sexuality and obscenity. The legislature should refrain from removing by law the natural right of presumptively rational adults to accept these risks and choose for themselves what they desire to read. The point was best summarized three hundred years ago by John Milton in his Areopagitica. Here he enunciated the eternal case against censorship: "For those actions which enter into a man rather than issue out of him, God uses not to captivate under a general prescription, but trusts him with the gift of reason to be his own chooser."58 (Emphasis added.)

Thomas B. Russell

CRIMINAL LAW—CONSENSUAL HOMOSEXUAL BEHAVIOR—THE NEED FOR LEGISLATIVE REFORM.—One has only to explore the pages of Kentucky legal history to find that before 1962 the statutory prohibition against sodomy was one of the untouched areas of Kentucky criminal law. The Penal Act of 1778 prescribed a two to five year penalty for

57 Note, supra note 54, at 132.
58 Gilman, supra note 5, at 82.