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Censorship: The Search for the Obscene by Morris L. Ernst and Alan U. Schwartz

Stephen L. Wasby
Southern Illinois University

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impact on state-wide water resources policy while regulation of architectural design might be designated a purely local matter.

Babcock's proposals will be met with the cry that they represent an undesirable centralization of power, sounding a death knell for local government. In fact, the opposite should occur. His proposals, although difficult to implement, can do for local legislative bodies what *Baker v. Carr*¹¹ is doing for state legislatures. Otherwise, if "the little fiefdoms of municipal powers"¹² continue to pursue their isolationist policies, they will eventually be circumvented altogether. Localization of the decision making process can be continued only if zoning boards become active participants in state-wide and regional planning. By asking state legislatures to expand the scope of "the general welfare," Babcock presents a way to maintain the benefits of local control over land use, while insuring that suburban municipalities will begin to cope with the dynamics of regional and state-wide urban growth.

A. Dan Tarlock*

* Assistant Professor of Law
University of Kentucky

CENSORSHIP: THE SEARCH FOR THE OBSCENE. By Morris L. Ernst and Alan U. Schwartz. New York: Macmillan, 1964. Pp. 288. \$6.00.

Censorship: The Search for the Obscene does much to make the law of a complicated and controversial subject intelligible for the layman. Even though the United States Supreme Court has decided important cases since the book's publication, notably *Ginzburg v. United States*,¹ *Mishkin v. New York*,² and *Memoirs v. Massachusetts*,³ this volume will without doubt remain for a long time as one of the basic explanatory works on the law of obscenity. While Ernst and Schwartz have written for the layman, they do not simply rehash past analyses.

The authors begin by relating sexual folkways to the surplus or deficit of women in relation to men in given societies, an argument which, while not totally persuasive, serves to emphasize the social context of "the search for the obscene." However, the authors' main focus is on the law of obscenity as developed in the courts—but not the United States Supreme Court alone. In fact, not until the last

¹¹ 369 U.S. 186 (1962).

¹² Cribbet, *supra* note 8, at 277.

¹ 383 U.S. 463 (1965).

² 383 U.S. 502 (1965).

³ 383 U.S. 413 (1965).

sections of the volume are the highest Court's decisions in *Roth v. United States*⁴ and related cases mentioned. Initial concentration is on the definition of obscenity as developed in the lower federal courts. As they lead us through the process of exclusion and inclusion by which our current legal definitions—if we may be said to have clear “definitions”—were developed, the authors point out the relevance of earlier arguments to the present day. This section provides the layman with a good means of viewing the ways of courts and judges. While Ernst and Schwartz do not belabor procedure, they show the effect of the framework of our legal system. Many valuable, but seldom discussed cases, are also included in this section; we find *United States v. One Book Called 'Ulysses'*,⁵ of course, and many more. Given the fact that the Supreme Court did not begin to develop a thorough obscenity definition until 1957, in the *Roth* case, and that most of its rulings on the procedures allowable in the “fight” against obscenity started at the same time, the primary emphasis on lower court decisions is both accurate, and salutary as a corrective to the over-emphasis on our highest court's treatment of public law, and particularly civil liberties, matters.

The authors next move to a topical treatment of obscenity in entertainment and books, sadism, and the procedural aspects of obscenity law by concentrating on *Kingsley Books v. Brown*,⁶ *Smith v. California*,⁷ and *Butler v. Michigan*.⁸ This latter portion of the book is more conventional and offers less new material and interpretation. Although the discussion of *Roth* should have followed the lower courts' “definitional” decisions, it is placed last.

Particular points brought out by the authors deserve mention:

(1) State obscenity laws were absent at the time our Constitution was adopted, despite the existence of British cases on the subject. While we have been familiar with the growth of state obscenity legislation after Comstock's escapades, the existence of much older British cases and the lag between them and state laws is worthy of note.

(2) Judge Woolsey's famous decision about *Ulysses* had more impact from a psychological than from a legal perspective—we could now openly talk about sexual matters and begin to be more sophisticated about such things.

(3) Publishers frequently—if not most of the time—have been

⁴ 354 U.S. 476 (1957).

⁵ 5 F. Supp. 182 (1933).

⁶ 354 U.S. (1957).

⁷ 361 U.S. 147 (1959).

⁸ 352 U.S. 380 (1957).

timid and have refused to defend their publications. This serves to counter the image of publishers as prime defenders of freedom of the press. This reviewer's experience in following the activities of distributors of printed material suggests that they wish to avoid prosecution and have as their prime goal a method by which books may be adjudged without any risk to the distributor, even if the material is not fully defended.

(4) An "essential ingredient" of obscenity is a "sense of shame and secrecy on the part of those responsible for the publication."⁹ Despite Ralph Ginzburg's behavior in trumpeting his work—thereby proving it not obscene—this argument certainly applies not only to "feelthy peectures" but also to "grey-area matter"—girly magazines and slick-cover paperback novels.

(5) The rapid growth of extra-legal censorship groups in recent years has occurred because such groups have not been adequately opposed by private groups on the other side. Certainly the American Civil Liberties Union has been involved but, as a multi-purpose organization, it cannot devote all of its time to fighting censors. That such special groups can be formed and be effective was shown during 1966 when a "Freedom to Read" group in suburban Washington, D. C., prevented a "Citizens for Decent Literature" group from occupying the field and giving the impression it represented the only community points of view about "clean books."

The main criticism to be made about the book is that the length of quotations from various court decisions, even though the technical material is eliminated, is excessive. *United States v. Dennett*,¹⁰ dealing with the possible obscenity of a sex guide written for children, may be fascinating, but hardly requires ten pages of a 250-page volume. Long quotations from other cases are found with great regularity. In only a few places is criticism interjected into the texts of the opinions, although questions are raised. The authors do make two telling points about the *Roth* case, however. They argue that the reasoning of Judge Brennan—who said that obscenity was not subject to first amendment protections because it was "without redeeming social importance"—was circular:

We first decide whether some writing is obscene and then we say that because it is obscene it is not entitled to any of the tests used to judge whether other kinds of writings are entitled to the protection of the Constitution. And yet, these are perhaps the very tests that should be

⁹ ERNST & SCHWARTZ, CENSORSHIP: THE SEARCH FOR THE OBSCENE 115 (1964).

¹⁰ 39 F.2d 564 (1930).

used in the first instance to decide whether something is legally obscene.¹¹

And they show that Justice Harlan's federalism argument, that to ban a book in an individual state is not intolerable, but to do so nationwide is outrageous, ignores the repressive effect that multi-state enforcement has on publishers who generally publish for a national market.

One might well ask how a publisher or author is supposed to know the obscenity laws of all fifty states, and what assurance would a publisher have that the would not be subjected to a multitude of costly civil and criminal lawsuits. . . . Federal censorship, at least, subjects a book to judgment only once.¹²

The lay public interested in civil liberties owes a debt to Messrs. Ernst and Schwartz for having so clearly laid out for them the history of the crucial legal aspects of the problem of obscenity and for having related these to certain non-legal aspects of the issue. As the courts continue to group around in this complicated field, the law will continue to develop, although it may not be clarified, as the 1966 decisions of the high court show. These recent decisions do not change any important particulars of the summary of obscenity law which closes the book. A book may now be denied circulation regardless of its social importance in certain circumstances, if the appeal of its promotional material has been to "prurient" interest. This means that the authors' motive, or at least the motive of his agent/publisher/distributor, is open to question in determining obscenity. The Court's stumbling from case to case making changes shows the need for clarity in this field of law, and the importance of having a background and understanding of the problem provided by *Censorship: The Search for the Obscene*.

Stephen L. Wasby*

¹¹ERNEST & SCHWARTZ, *op. cit. supra* note 9, at 205.

¹²*Id.* at 213.

*Assistant Professor, Department of Government, Southern Illinois University, Carbondale.