Roundtable

THE ROLE OF CHURCH AND STATE IN CONTROLLING PORNOGRAPHY

Participants: Arvo Van Alstyne
Kenneth R. Hardy
Stephen L. Tanner

The problem of obscenity in literature, movies and other art forms has received increasing attention in recent years as a result of what to many has seemed an increased boldness on the part of writers and producers and increased libertarianism on the part of the courts. In this Roundtable three Latter-day Saints bring both their varied professional perspectives — as an expert on constitutional law, a social scientist, and a teacher of literature — and their common faith to bear on this problem. Arvo Van Alstyne, who has published numerous books and articles on public law and procedure while teaching at U.C.L.A. and Stanford Law Schools, recently became Professor of Law at the University of Utah and is serving as bishop of one of the L.D.S. student wards there. Kenneth R. Hardy is Professor of Psychology at Brigham Young University and has published most recently an essay in PSYCHOLOGICAL REVIEW *on "an appetitional theory of sexual motivation." Stephen L. Tanner is a teaching assistant and Ph.D. candidate in the English Department at the University of Wisconsin and teacher of his ward Gospel Doctrine Class.*

OBSCENITY AND THE INSPIRED CONSTITUTION: A DILEMMA FOR MORMONS

Arvo Van Alstyne

One of the most prominent tenets of Mormonism emphasizes moral purity as essential to the Christian life. Self-mastery over physical appetites and passions is regarded as a fundamental aspect of the doctrine of eternal progression; hence, Mormons are admonished to "let virtue garnish thy thoughts unceasingly."[1] Mormon scriptures constantly underscore the need for personal sanctification,[2] while sexual sins are revealed as especially grave

transgressions of the laws of God.[3] Indeed, sexual lust is as culpable as sexual misconduct.[4] The assimilation of this doctrinal position to social values of contemporary significance is exemplified by the recent statement of the President of the Church, David O. McKay:

> A clean man is a national asset. A pure woman is the incarnation of true national glory. A citizen who loves justice and hates evil is better than a battleship. The strength of any community consists of and exists in the men who are pure, clean, upright, and straightforward, ready for the right and sensitive to every approach of evil. Let such ideals be the standard of citizenship.[5]

The prevalence of deep concern about, and vigorous opposition to, the dissemination of lewd and obscene publications is thus a natural manifestation of Revealed Truth.[6] To Mormons, the question so widely debated in the relevant literature[7] — whether pornography can be shown to influence those exposed to it to engage in anti-social acts — seems not to be of immediate or primary relevance. Mormon doctrine regards obscenity as fundamentally evil *per se,* since it glamorizes evil and evil-doing, exalts the sordid and ugly, pollutes the mind, debases spiritual judgment and sensitivity, and corrupts the sense of public morality. Because the spiritual welfare of man is thus threatened by it, opposition to pornography needs no practical justification. A basic article of Mormon faith declares that the Church and its membership seek after everything "virtuous, lovely, praiseworthy, and of good report"; conversely, all that is sordid, filthy, and evil is utterly rejected.

As the quotation from David O. McKay suggests, however, doctrinal teachings of the Church do, in fact, support the conviction that individual and collective spiritual corruption, unless checked, leads ultimately to corrupt and immoral deeds.[8] Opposition to the spread of obscene matter thus also finds justification for Mormons in secondary considerations of practical policy. But — and the point must be emphasized — such policy arguments are grounded upon doctrinal assumptions rather than upon empirical data.

---

[1] Doctrine and Covenants 121:45.

[2] See, e.g., Doctrine and Covenants 88:74; 112:28, 33.

[3] See, e.g., Alma 39:5.

[4] Doctrine and Covenants 42:23; 63:16; 3 Nephi 12:27-29.

[5] *General Conference Reports,* April 4, 1965, p. 8.

[6] See the Statement of the First Presidency, Feb. 1966, quoted *infra.* An organization including many prominent Mormons in California was actively engaged in the unsuccessful campaign to secure passage of a badly drafted and ill-considered anti-obscenity initiative measure (Proposition 16) on the California ballot in the general election of November 1966. Some of the publicity and fund-raising literature of this group tended to convey the impression that its efforts had the approval of the First Presidency of the Church. Whether such approval was deemed implicit in the Statement of February 1966, *infra,* or was in the form of some specific endorsement of Proposition 16 was never indicated.

[7] See authorities cited *infra,* notes 10-18.

[8] See, e.g., Moroni 7:10 ("A man being evil cannot do that which is good"); Alma 29:4-5, 41:3-6 (God grants unto men according to the desires of their hearts); Prov. 23:7 ("As he thinketh in his heart, so is he"). Compare Milton R. Hunter, member of First Council of Seventy: "The key to every man is his thoughts. Therefore, thought and character are one." *General Conference Reports,* October 4, 1946, p. 42.

THE FIRST PRESIDENCY'S STATEMENT

The two-fold rationale of the Church's position is implicit in the widely publicized statement of the First Presidency, issued in February, 1966, urging a united campaign by all "right-thinking people" to fight pornography.[9] The core of the statement contained these words:

> We are unalterably opposed to sexual immorality and to all manner of obscenity. We proclaim in the strongest terms possible against the evil and wicked designs of men who would betray virtuous manhood and womanhood, enticing them to thoughts and actions leading to vice, the lowering of standards of clean living, and the breaking up of the home.
>
> We call upon the members of the Church and all other right-thinking people to join in a concerted movement to fight pornography wherever it may be found, whether in books and magazines, on the screen, or in materials sent through the post office.

Presumably for prudential reasons, the First Presidency deliberately couched its appeal in terms of the pernicious and debilitating practical consequences of obscenity for society — that is, the second (but less obvious) theologically-oriented basis of the Mormon position. A preliminary passage from the same statement, for example, declares that

> These merchants [of pornography] seem to have no concern for the morals of the people, nor for the well-being of the communities at large which *inevitably must suffer* through the crime and corruption which *always results* from a lowering of standards of decency. (Italics added.)

However much Mormons may share the viewpoint implicit in the quoted statement, it should be recognized as essentially a doctrinal one reflecting faith more than proven fact. Competent scholars, after a searching analysis of the available data, report that reliable empirical evidence of the effect of exposure to obscenity upon human conduct is either entirely lacking or so meagre as to be wholly unreliable or inconclusive.[10] To be sure, widespread publicity has been given to *opinions* of respected journalists and law enforcement officers that the trade in salacious literature and lewd entertainment performs a significant role in the development of juvenile delinquency and the increase in sex crimes.[11] Upon examination, however, most such statements appear to be highly subjective, statistically unverified, and, more often than

---

[9] *Deseret News*, "Church News Section," Feb. 26, 1966, p. 3.

[10] See, generally, Magrath, "The Obscenity Cases: Grapes of Roth," 1966 Supreme Court Rev. 7, 48-55; Cairns, Paul, and Wishner, "Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence," 46 Minn. L. Rev. 1009, 1034 (1962); Gebhard, Gagnon, Pomeroy, and Christenson, "Sex Offenders: An Analysis of Types," 678 (1965); Gerber, "Sex, Pornography, and Justice," pp. 317-19 (1965); Lockhart and McClure, "Literature, the Law of Obscenity, and the Constitution," 38 Minn. L. Rev. 295, 382-87 (1954); Alpert, "Judicial Censorship and the Press," 52 Harv. L. Rev. 40 (1938).

[11] See, e.g., Armstrong, "The Damning Case Against Pornography," *Reader's Digest* (Dec. 1965); Armstrong, "Filth For Profit: The Big Business of Pornography," *Reader's Digest* (March 1966). For a more balanced view, see Roberts, *The Smut Rakers* (National Observer Newsbook, 1966).

not, characterized by the unreliable *post-hoc-ergo-propter-hoc* variety of reasoning.[12]

Recognized authorities on the subject of juvenile delinquency emphasize the complexity of multidimensional factors which appear to influence young people to engage in patterns of anti-social behavior — and salacious reading matter is not shown by the available evidence to be a significant factor.[13] On the contrary, investigations in depth indicate that juvenile delinquents "are far less inclined to read than those who do not become delinquent,"[14] and that most "education" in smut is derived by teen-agers from what their companions and associates tell them rather than from printed material.[15] Moreover, there is some evidence tending to show that juvenile delinquency has tended historically to increase during periods of emotional stress and strain.[16] Surely the present period of time, with its omnipresent threat of nuclear devastation, is no exception.

The available literature suggests that juvenile delinquency may be related more directly to non-reading than to reading of improper and unwholesome matter. A number of studies in depth have identified a pattern of other factors — broken families, crowded slum living conditions, curtailed education, starved emotions, and other typical circumstances associated with physical and psychic squalor which tend to nourish futility and hopelessness — as potentially far more damaging to moral standards, and far more efficient incentives to delinquent conduct, than obscene literature.[17] By this evidence, it would ap-

---

[12] The quality of reasoning exhibited by Armstrong, *supra* note 11, is well illustrated by this passage from the December 1965 article: " . . . during the decade 1955-64 the rate of forcible rape increased 37 percent. *The greatest increase among those committing this crime was in youths in their late teens.* Paralleling the growth of such crimes in the last decade has been the increase in salacious literature and lewd entertainment." (Emphasis in original.) Armstrong omits to mention that during the same decade there were also ominous "parallel" increases in sales of tobacco products, Bibles, artichokes, skis, and postage stamps. For a similarly vulnerable line of reasoning, see "Editorial," *Deseret News*, Feb. 26, 1966.

[13] See, e.g., Lockhart and McClure, "Literature, the Law of Obscenity, and the Constitution," 38 Minn. L. Rev. 295, 385-86 (1954), pointing out a consensus among scholarly studies of juvenile delinquency that the "many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards." Compare Alpert, "Judicial Censorship and the Press," 52 Harv. L. Rev. 40, 72 (1938), summarizing the results of a survey seeking to identify the sources of sexual stimulation of women college graduates. Of 409 women who replied, 218 answered "Man"; 95 said books; 40 said drama; 29 said dancing; 18 said pictures; and 9 said music. Of those who specified books as the source of sexual stimulation, not one indicated a "dirty" book as the source. Instead, the books listed were: The Bible, the dictionary, the encyclopedia, novels from Dickens to Henry James, circulars about venereal disease, medical books, and Motley's *Rise of the Dutch Republic.*

[14] Lockhart and McClure, op. cit., *supra* note 13, at 385. See also, Dr. Jahoda, quoted by Frank, J., in United States v. Roth, 237 F. 2d 796, 815 (1956): "Juvenile delinquents as a group read less, and less easily, than non-delinquents."

[15] Alpert, op. cit. *supra* note 13, at 74. Cf. United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930).

[16] See Novick, "Integrating the Delinquent and His Community," 20 Fed. Probation 38, 40 (1956).

[17] For full analysis of the complex determinants which are discernible causative factors in juvenile delinquency, see generally, Glueck and Glueck, *Unraveling Juvenile Delinquency*

pear that the energies and resources expended in fighting the war against obscenity might be more profitably channeled into the war on poverty. Indeed, one may even speculate as to what extent the cry for stricter controls on lewd publications reflects a deep-seated psychological need of the relatively affluent segments of society to find a scapegoat upon which to affix the blame for pressing social problems largely attributable to other many-faceted causes with which that affluent majority is unprepared or unwilling to cope.

THE PROBLEM OF MEANS

The want of convincing empirical evidence of a cause-effect relationship between obscenity and anti-social conduct[18] in no way denigrates the moral force of the Mormon drive for obscenity regulation; as previously pointed out, basic doctrinal rather than pragmatic premises provide the controlling rationale. This lack of evidence does, however, raise serious questions for thoughtful Mormons and non-Mormons alike. For example: to what extent do the theological tenets of Mormonism (and of other religions sharing similar views), together with their appendant social and cultural values, justify concerted efforts to impose those convictions upon the pluralistic community at large through the "compulsory means" of legal sanctions, as distinguished from the gentler techniques of "persuasion" and "long-suffering"?[19] Again; in light of the Mormon doctrine of "opposition in all things" and its relationship to free agency (e.g., the essentiality of opposites of good-evil, true-false, pleasure-pain, etc.), how much social advantage is likely to be derived from vigorously enforced controls which tend artificially to insulate young people from life's realities? Cannot a rational position be advanced that more effective results are likely to be achieved by a positive program of sex education in the home, school, and church, designed to help children interpret in a constructive way the evil and filth which is an unavoidable feature of the kind of society in which we live?[20]

Answers to the kinds of questions just raised could be provided in differing ways, all quite consistent with the general tenor of the First Presidency's statement calling for "a concerted movement to fight pornography." The portions of that statement quoted above, it will be noted, studiously refrain from suggesting what *kinds* of measures should be employed in the "fight." Affirmative programs of an educational nature, directed to youth and adults alike, are

---

(1950); Glueck and Glueck, *Predicting Delinquency and Crime* (1959); Bandura and Walters, *Adolescent Aggression: A Study of the Influence of Child-Training Practices and Family Interrelationships* (1959).

[18] The most widely cited study purporting to find a cause-effect relationship between obscenity and juvenile behavior is Wertham, *Seduction of the Innocent* (1954). Dr. Wertham's findings, however, are challenged in the later Jahoda Report, *supra* note 14; and, in any event, Dr. Wertham specifically says (p. 298) that he is not concerned particularly with any alleged impact upon adults and would advocate (pp. 303, 316, 348) only legislation aimed at keeping harmful literature away from children. Moreover, Wertham's concern is not directed particularly at obscene materials but more especially at "comic books" which center upon violence (sometimes coupled with sex).

[19] Compare Doctrine and Covenants 121:40 *et seq.*

[20] See, e.g., Watson, "Some Effects of Censorship Upon Society," in 5 *Social Meaning of Legal Concepts* 73, 83-85 (1963). Compare the famous opinion of Judge Curtis Bok, in Commonwealth v. Gordon, 66 Pa. Dist. & Co. Rep. 101 (1949).

clearly within the scope of the exhortation. More difficult problems, relating to the use of governmental powers and restraints, are stirred, however, by additional passages from the same statement, urging civil authorities to do "all in their power to curb this pernicious evil," and declaring it to be "incredible that elected officials can be so far misled as to suppose that they are acting in the public interest when they allow this debasing condition to continue."[21]

CONSTITUTIONAL LIMITATIONS: IN GENERAL

Printed material and dramatic productions, as forms of expression, assert not wholly implausible claims to constitutional protection against official sanctions, notwithstanding charges that they are lewd and obscene. The First Amendment to the Constitution of the United States, which Mormon doctrine holds to be divinely inspired for the very purpose of maximizing moral freedom of choice,[22] speaks after all in terms which are unqualified: "Congress shall make *no law* . . . abridging the freedom of speech, or of the press . . . . "

Despite its categorical language, the Supreme Court of the United States has never accorded literal effect to the First Amendment, either as applied to the federal government or (through the Fourteenth Amendment) to the states. In general, the Court has recognized the policy of the First Amendment as one of defense of the social interest in access to all viewpoints relevant to the human condition, especially fresh and uncoventional ones.[23] But, recognizing that words are a form of verbal conduct which may, in some circumstances, "have all the effect of force,"[24] some limited regulations of expression are permissible. Thus, where nature or content of expression is the focus of control, the validity of the regulation depends generally upon whether the public interest in prevention of anti-social conduct likely to result from the words used, in light of the circumstances of their use, outweighs the interest in full freedom of expression. Relatively minor and insubstantial disturbances of peace and tranquillity are not enough to justify curtailing the constitutional right;[25] the probability, imminence, and seriousness of the anticipated harmful conduct are required to be of significant magnitude to vindicate suppression of speech by governmental power.[26] In addition, expressions of harmless ideas

---

[21] Loc. cit., *supra* note 9.

[22] See Doctrine and Covenants 101:77-80.

[23] The best judicial exposition of the philosophical purposes of the First Amendment is the concurring opinion of Brandeis, J., in Whitney v. California, 274 U.S. 357 (1927). See also, New York Times v. Sullivan, 376 U.S. 254 (1964); Edwards v. South Carolina, 372 U.S. 229 (1963). It is settled, of course, that although the First Amendment, in terms, constitutes only a limitation upon the powers of the Congress, it is now fully applicable with equal effects as a limitation upon the states and their subdivisions by reason of the Due Process Clause of the Fourteenth Amendment, adopted in 1868. See Gitlow v. New York, 268 U.S. 652 (1925); DeJonge v. Oregon, 299 U.S. 353 (1937).

[24] Holmes, J., in Scheck v. United States, 249 U.S. 47, 52 (1919).

[25] See, for example, Brown v. Louisiana, 383 U.S. 131 (1966) (peaceful civil rights demonstration to desegregate public library); Cox v. Louisiana, 379 U.S. 536 (1965) (orderly civil rights demonstration on public streets); Edwards v. South Carolina, 372 U.S. 229 (1963) (peaceful civil rights demonstration on state capitol grounds); Taylor v. Louisiana, 370 U.S. 154 (1962) (peaceful "sit-in" demonstration in waiting room of bus depot).

[26] See, e.g., Feiner v. New York, 340 U.S. 315 (1951) (threat of immediate mob violence); Dennis v. United States, 341 U.S. 494 (1951) (threat of communist conspiracy). This approach is often verbalized as the "clear and present danger" test.

may, in some circumstances, be accompanied by conduct inimical to the public welfare (e.g., blocking of traffic, trespass upon private property or public premises not open to the public, excessive noise, etc.). Where this is the case, reasonable regulations of time, place, or manner of expression (i.e., of the related conduct) are constitutionally permissible.[27]

Under this traditional two-fold approach to the limitation of First Amendment rights, the problem of legal control of obscenity becomes a perplexing one. The first branch of the rule is of little avail, for, as already noted above, there simply is no reliable empirical evidence of a cause-effect relationship between obscenity and anti-social behavior. In the numerous prosecutions under obscenity laws which have been before the appellate courts of the land, including the Supreme Court, diligent prosecutors, reinforced by the full resources of public treasuries and personnel, have been unable in a single case to present competent evidence tending to sustain such laws on this ground.[28] The second (or "time, place, and manner") approach likewise offers little comfort to those seeking to suppress pornography, for the dissemination of such matter is seldom, if ever, accompanied by overtly anti-social conduct which disturbs public tranquillity or good order. Censorship laws aimed at smut typically seek to impose broad controls or prohibitions keyed to the nature of the subject matter and form of its expression, rather than personal behavior or conduct associated with it. Indeed, the very purpose of most such laws is to strike at the *content* of the publication because of its offensive nature.[29] Such laws can scarcely be assimilated within a constitutional doctrine which sustains legal control over time, place, and manner of expression, for the doctrine assumes that such controls, impartially enforced, are indifferent to content and thus do not prevent reasonable access to the author's views.

The constitutionality of properly drawn obscenity laws is, nevertheless, well settled by Supreme Court decisions.[30] The failure of the traditional approaches to supply a meaningful rationale for sustaining such laws has led to the partial and still unfinished development of a new and special approach adapted to the obscenity problem. Its premise is the purpose of the First Amendment, "to assure unfettered exchange of ideas. . . — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion."[31] Its rationale is that obscenity may be suppressed by law since it is outside this postulated purpose of the constitutional freedom. The historical judgment of American and other societies is that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth

---

[27] See, e.g., Adderly v. Florida, 87 Sup. Ct. 242 (1966) (trespass conviction of civil rights demonstrators); Kovacs v. Cooper, 336 U.S. 77 (1949) (sustaining ordinance banning use of sound-trucks); Cox v. New Hampshire, 312 U.S. 569 (1941) (sustaining parade license requirement).

[28] See Douglas, J., concurring, in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966): "Perhaps the most frequently assigned justification for censorship is the belief that erotica produces antisocial conduct. But that relationship has yet to be proven."

[29] See, generally, Henkin, "Morals and the Constitution," 63 Colum. L. Rev. 391 (1963).

[30] Roth v. United States, 354 U.S. 476 (1957); Alberts v. California, 354 U.S. 476 (1957). See also, Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966).

[31] Roth v. United States, *supra* note 30, at 484.

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[32] Accordingly, "obscenity is not within the area of constitutionally protected speech or press."[33]

THE CORE PROBLEM: DEFINING OBSCENITY

This prevailing approach to obscenity regulation seems to be consistent with accepted Mormon doctrinal positions. Agreement with the approach, however, is but a prelude to the crucial, and far more difficult, problem of application of that approach to specific cases. It is at once apparent that the core problem — the controversial heart of the entire issue — revolves about the meaning of "obscene." What definitional standards can be devised for distinguishing that which is constitutionally obscene from that which has substantial social value consisting of the exposition of ideas?[34]

The predominantly subjective nature of obscenity as a reflection of social, cultural, religious, ethical, and esthetic values cautions against the vesting of broad powers in censors, or in judges and juries, to apply merely personal and idiosyncratic standards of judgment in such matters. What appears to be art and literature to one man may well be obscene to another. To permit public officials to abridge the right of expression on purely individualistic notions of what constitutes obscenity is to make judicial control of their decisions impossible, and ranks as a form of unbridled official discretion which is the antithesis of the ideal of a "government of laws and not of men."

Over-zealous enforcement of even the most carefully drafted regulations could readily erode away and thus substantially impair basic constitutional safeguards for the free dissemination of ideas seeking intellectual acceptance. For example, ideas relating to sexual matters but having a content which is "unorthodox," "controversial," or "hateful to the prevailing climate of opinion," could easily be branded as "obscene" by the official censor. Indeed, historical experience suggests that censors are all too often disposed to resolve any doubts *against* freedom, and that censorship systems are institutions with vast potential for growth and expansion.[35] Especially in the treatment of matters relating to sex and sexual relationships are legal sanctions aimed at obscenity likely to miss the mark. In the words of Mr. Justice Brennan:

> Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force

---

[32] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), quoted with approval in Roth v. United States, *supra* note 30, at 485.

[33] Roth v. United States, *supra* note 30 at 485.

[34] See, generally, Lockhart and McClure, "Obscenity Censorship: The Core Constitutional Issue — What is Obscene?" 7 Utah L. Rev. 289 (1961). The conceptual problems are discussed in Semonche, "Definition and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation," 13 U.C.L.A. L. Rev. 1173 (1966). For the view that there are widely differing kinds of obscenity, for which different policy considerations are relevant, see Kaplan, "Obscenity as an Esthetic Category," 20 Law & Contemp. Prob. 544 (1955).

[35] See, e.g., Freedman v. Maryland, 380 U.S. 51 (1965); Near v. Minnesota, 283 U.S. 697 (1931); Emerson, "The Doctrine of Prior Restraint," 20 Law & Contemp. Prob. 648 (1955).

> in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.[36]

Not all members of the public are likely to observe the distinction drawn by Mr. Justice Brennan for the Court; nor was any attempt made in the First Presidency's statement of February, 1966, to define what was included within the "obscenity" and "pornography" which right-thinking persons were being rallied to fight against.

The danger inherent in the uncertainties of definition are well illustrated by an incident which followed the statement of the First Presidency. An anti-obscenity ordinance adopted by the city of Provo, Utah, seemingly in response to the statement, was locally interpreted to require motion picture exhibitors to cancel plans to show such films as *Our Man Flint* (a spy comedy which had received the approval of *Parent's Magazine* as picture-of-the-month) and the widely acclaimed epic, *The Bible — In the Beginning*.[37] Moreover, news dealers reported receipt of vigorous complaints from citizens about their holding for sale such "salacious" magazines as *Reader's Digest*, *Life*, and *Time*.[38] Obviously, application of this over-reactive concept of pornography would require the closing of most of our great art museums, the locking up of substantial portions of our public libraries, and the termination of much of the activities of the communications industries of America.

LEGAL STANDARDS OF OBSCENITY

The problem remains: is it possible to draw up rational definitions, capable of guiding judgment, which mark a recognizable distinction between impermissible obscenity and constitutionally permissible treatments of sexual matters? Moreover, is it possible to introduce into such standards appropriate safeguards, capable of being applied in a fair-minded and even-handed way, against unwitting or inadvertent interference with the dissemination of controversial ideas? This fundamental dilemma — how to strike an acceptable balance between the competing values of freedom and morality — is inherent in the First Presidency's call for a fight against pornography.

The dilemma, it should be noted, is minimal on the extremes. There are probably various sorts of "hard-core"[39] obscenity which nearly everyone would agree are beyond the pale. Conversely, there are vast quantities of work of artistic and literary merit (e.g., The Holy Bible;[40] Milne's *Winnie the Pooh*[41])

---

[36] Roth v. United States, 354 U.S. 476, 487 (1957).

[37] *Deseret News*, March 18, 1966; *Salt Lake Tribune*, March 19, 1966.

[38] Ibid.

[39] The term "hard-core obscenity" poses its own definitional problem. See the opinion of Mr. Justice Stewart in Ginzburg v. United States, 383 U.S. 463, 499 n.3 (1966); Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards," 45 Minn. L. Rev. 5, 63-64 (1961); Murphy, "The Value of Pornography," 10 Wayne L. Rev. 655, 668 (1964).

[40] However, doubt may be expressed as to whether Chapters 7 and 8 of the "Song of Solomon" would necessarily survive attack under the standards exhibited by some self-appointed censors. Compare the recent Provo experience, *supra* note 37.

[41] On second thought, the Pooh series may not be a very good example. See, e.g., F. C. Crews, *The Pooh Perplex* (1965).

which would presumably receive universal acclaim. It is in the vague and shadowy borderland — where virtue and vice overlap and are intermingled, as in daily life itself — that the problems of definition become most delicate and difficult.

Under currently applicable Supreme Court decisions, the prevailing legal standards for determining what kind of published matter are susceptible to government control may fairly be summarized in these terms:

First, the material may be treated as legally obscene only if it meets each element in a three-fold test:[42] (a) The dominant theme of the material taken as a whole must appeal to a prurient interest. (b) The material must be patently offensive in that it is contrary to contemporary community standards relating to candor of description or representation of sexual matters. (c) It must be utterly without redeeming social importance or value.

Second, the issue of "appeal to prurient interest" is to be judged in terms of the appeal to the audience for which the material was prepared and for whom it was primarily disseminated.[43] Thus, for example, publications aimed at sexually deviant groups, such as homosexuals or sado-masochists, should be assessed in terms of the interests of those groups rather than the interest of the normal individual.

Third, in determining whether the material has any redeeming social value, the manner and form of its commercial exploitation may be taken into account in "close" cases.[44] If the publisher or seller advertises the work as erotically stimulating and thereby panders to the salacious interests of potential customers, holding the material out as sexually titillating rather than possessing significant intellectual content, the court may treat it as obscene in that context even though in other circumstances a different conclusion might be required by the First Amendment.

Doubtless these legal standards leave much to be desired, as well as create numerous practical problems for which definitive answers are presently unavailable. It is not clear whether the "community standards" used in the second branch of the three-point test refer to the national or local community, or how such standards are to be proved. For example, it is uncertain to what extent the testimony of literary experts, librarians, booksellers, journalists, or critics is admissible to prove the applicable moral standard. Moreover, to define obscenity in terms of equally undefinable "prurient appeal" clearly seems to beg the question at issue.

The Supreme Court has indicated a painful awareness of the deficiencies in its own definition in this field,[45] but so far no better approach to the problem has been suggested. One must recall, however, that the constitutional dimensions of obscenity regulations have only recently been brought to the Court for consideration; the *first* decision in point, *Roth v. United States,*[46] was decided barely ten years ago. As has been the case with most problems

---

[42] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

[43] Mishkin v. New York, 383 U.S. 502 (1966).

[44] Ginzburg v. United States, 383 U.S. 463 (1966).

[45] See, e.g., Mishkin v. New York, *supra* note 43, at 511, where the court concedes that there are "ambiguities which are inherent in the definition of obscenity."

[46] *Supra* note 36, decided June 24, 1957.

before the Court requiring a balancing of competing social values, the early decisions tend to exhibit a tentativeness and experimental groping for judicial wisdom and understanding which, as experience and familiarity with the full dimensions of the problem are acquired, gradually evolves into a more deliberate and confident expertise. At this stage in the history of obscenity control, the Supreme Court is still feeling its way.[47]

Current constitutional law, it seems, will give support to legal controls over the most objectionable and clearly offensive forms of pornography as well as their commercial exploitation. On the other hand, the law quite clearly regards as constitutionally permissible the distribution of much "borderline" material, absent salacious commercial exploitation, which is thoroughly obnoxious to many if not all Mormons. The Book of Mormon, for example, exposes fornication and adultery as sins of utmost gravity for which divine forgiveness is difficult to obtain. Yet the motion picture *Lady Chatterley's Lover* was held constitutionally immune from censorship despite its theme that under certain circumstances adultery may be proper and acceptable conduct.[48] The same result was reached with respect to another film, *The Lovers*, having a similar theme.[49] The point is that these productions advanced a socially significant, albeit (to many) morally reprehensible, *idea* which was entitled to be heard in the public dialogue. The fact that the idea had been rejected by the weight of public opinion, history, experience, and religious teaching, and was deemed likely to corrupt public morals, did not alter the fact that, as an idea, it was entitled to constitutional protection.

To those who criticize the Supreme Court standards as too permissive, one may legitimately ask: How better can the dilemma be resolved? Would any less strict limits accord adequate protection to freedom of expression? Is it possible to devise effective, yet broader, definitions of obscenity, without trenching upon the constitutional policy of assuring full and adequate public discussion of ideas of all kinds? At what point should it be conceded that the search for the quality of obscenity in published matter loses objectivity, that the evil is really in the eye of the beholder? Is it possible to differentiate published material — at least in the "grey" areas — so that society can be assured that its strictures are being directed solely against dirty material and not against dirty minds?

THE PROBLEM OF LEGAL CONTROLS

Other subtle and complex issues, which can only be suggested here, involve choice of means. A decision to establish a censorship system which reviews publications before they can be legally sold or exhibited manifestly

---

[47] See Magrath, "The Obscenity Cases: Grapes of Roth," 1966 Supreme Court Rev. 7; Note, "Obscenity and the Supreme Court: Nine Years of Confusion," 19 Stan. L. Rev. 167 (1966); Comment, "More Ado About Dirty Books," 75 Yale L. J. 1364 (1966). The Court's difficulty stems in part from the fact that obscenity is a variable, dependent upon vagaries of time and place and the subjective attitudes of the beholder. See Gellhorn, *Individual Freedom and Governmental Restraints*, 55 (1956); Lockhart and McClure, op. cit., *supra* note 34.

[48] Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684 (1959).

[49] Jacobellis v. Ohio, 378 U.S. 184 (1964). The court pointed out, *inter alia*, that "The Lovers" had been widely reviewed favorably, and had been rated by two critics of national stature as among the best films of the year.

poses problems vastly different from a system which depends upon criminal prosecution after publication or sale as a deterrent to future action.[50] Of the enormous torrents of print flowing from presses, for example, which will be subjected to review by the censorship board and which will be immune? Should the censor's decision be final or subject to review by the courts? For how long a period of time may the censor's decision be effective before decision is had by the reviewing courts, thereby restraining distribution of material which may, ultimately, be held by the court to be non-censorable? If the censor's ruling is reversed, is the author, publisher, or distributor entitled to be reimbursed for the loss of profits in the interim? How much would a censorship bureacracy cost the taxpayers? Would its results justify the expense?

The last-mentioned problem — which directs attention to the fiscal impact of obscenity statutes — should not be lightly brushed aside; it is not irrevelant. Enactment of a penal law is unlikely, by itself, to have any substantial impact on the evil at which it is directed, not only because such laws deal with symptoms rather than causes, but also because the conduct of potential lawbreakers is more directly geared to enforcement policy than to legislative policy. There is a good deal of evidence that suggests that voters generally have been unwilling to demand increases in taxes necessary to support effective enforcement of existing criminal laws.[51] The emotional force of a concerted community effort to stamp out the evil of pornography is likely to be spent in a drive to obtain enactment of laws establishing a system of strict censorship or imposing more stringent punishment upon purveyors of filth. But laws on the statute books are not the equivalent of laws in action; without adequately financed law enforcement even the toughest statutes are often meaningless in practice.

It seems entirely clear that lurking beneath the implicit generalities in the First Presidency's call to action against pornography is a complex web of exceedingly difficult and intertwined problems of public policy which go to the very heart of any program of action. Resolution of these problems necessarily entails choices between competing values and alternative courses of action upon which reasonable minds may well differ.

Implementation of the First Presidency's declaration thus may be expected to find devout and dedicated Mormons, as well as equally pious and conscientious non-Mormons, in sharp disagreement one with another. Such differences, however, would not necessarily reflect lack of commitment to underlying principles. Rather they would be an index of variations in personal assessments of the dangers involved in permitting public officials to judge the moral quality of published material. Official censorship poses the

---

[50] For the profoundly different legal standards which are applied to censorship systems, as distinguished from systems of subsequent criminal punishment, as applied to forms of expression, see Freedman v. Maryland, 380 U.S. 51 (1965) (motion picture censorship) and Kingsley Books, Inc. v. Brown, 354 U. S. 436 (1957) (book censorship).

[51] The widespread lack of financial support for effective criminal law enforcement has been widely documented. See, e.g., Block and Geis, *Man, Crime, and Society*, 456 *et seq.* (1962); Reckless, *The Crime Problem*, 388-409, 429-50 (3d ed. 1961); Tappan, *Crime, Justice and Society*, 309-311 (1960). Thus, it is not at all unusual to find public clamor for stricter criminal sanctions mounted simultaneously with demands for lower taxes. See, generally, Hare, "The Ambivalent Public and Crime," 9 Crime and Delinq. 145 (1963).

threat that the inherently illusive standards of judgment which apply are likely to become mere ports of entry for individual religious differences, idiosyncratic moral predilections, and narrow-minded cultural Philistinism. To anticipate unity in the Church on issues of this sort would be naïve indeed; to find it would be truly alarming.

Most of the public discussion of obscenity control treats the subject as an undifferentiated one, where blanket sanctions addressed to the entire genre are the topic for debate. This approach itself tends to generate policy disputes. For example, stable and mature adults arguably need little legal protection against smut, for exposure to its corrupting influences is, for them, largely a matter of individual choice (free agency). An individual is not forced to buy or to read a dirty paperback; his admission to the theatre exhibiting a lewd film is the result of personal preference. If, by chance, his innocent preliminary evaluation of the offered material as praiseworthy proves to have been mistaken, he is free to close the book or leave the theatre. The power of self-censorship is implicit in the doctrine of free agency. One may thus question both the practicality and appropriateness of legal coercion as an instrument for protecting mature persons against their own base desires and moral lapses. Mormons, at least, are taught that it was the plan of Satan, not of Christ, to *compel* man to be righteous.

A NARROWER APPROACH: PROTECTION OF YOUTH

Total suppression of published matter which fails to conform to desirable standards of moral purity may thus, for persuasive policy reasons, be opposed by "right-thinking people." To completely ban books, magazines, and motion pictures for the reason that they are not fit for children would, quite obviously, be a policy of over-kill; it would reduce the adult population to the reading and entertainment level of juveniles.[52]

Selective regulation aimed at eliminating the commercial pandering of smut sellers to youth, however, may well be regarded as posing entirely different issues of policy and of law. Exposure of well-adjusted but relatively sheltered youth (not to mention the insecure or maladjusted) to certain types of visual pornography — at least its grosser "hard-core" forms — may reasonably be thought likely to produce harmful "psychic shock" effects which the law is entitled to try to prevent. Although empirical evidence of socially harmful conduct attributable to pornography is wanting, it seems plausible to regard obscenity as being detrimental to sound emotional and educational development of young people.

It is arguable, for example, that such matter, when brought to the attention of unsophisticated and impressionable minds, may produce unwholesome distortions of immature value systems and related moral standards. These, in turn, may impair the child's capacity to formulate the kind of balanced and discriminating judgments which are presupposed by the principle of free agency. There is also a possible danger that patterns of bizarre and unwholesome sexual conduct exhibited in pornography may, when viewed

---

[52] It is settled that total suppression of published material merely because its form or contents are deemed unsuitable for children is unconstitutional. See Butler v. Michigan, 352 U.S. 380 (1957) (unanimous decision).

by the sexually immature individual, be accepted as the norm of adult behavior rather than perversion of the norm. The social interest in sound and effective education suggests the need for and desirability of some limitations upon the dissemination of such morally and educationally disruptive material to youth.[53]

The current standards of the Supreme Court imply the constitutionality of carefully drawn regulations of this limited sort, where the focus of the legal sanctions is upon (a) the methods of commercial exploitation employed and (b) the specialized audience (i.e., youths) to whom the exploitation is directed. As Mr. Justice Goldberg stated, in the *Jacobellis* decision[54] in 1964,

> We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. . . . State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.

Yet, even here, it is clear that the difficult problems of basic policy referred to above remain to be resolved[55] — problems of statutory draftsmanship and careful definition, choosing between alternative techniques of regulation, identification of the most effective kinds of and degrees of sanctions, adoption of a practical enforcement policy in light of the economics of law enforcement.

SUMMARY

It is, to be sure, popular — and psychologically comforting — to be against sin. Conversely, opposition to anti-obscenity legislation and its vigorous enforcement is likely to be misconstrued, to be taken as evidence of a flaw in

---

[53] Legal limitations upon the sale or display of obscene materials to minors have been supported by eminent civil libertarians. See, e.g., Ernst and Seagle, *To The Pure*, 277 (1928); Chafee, *Free Speech in the United States*, 314-15, 543 (1941); Mill, *On Liberty*, 271 (Great Books of the Western World ed., 1952). Discriminations in terms of age classifications have been commonly accepted features of many statutes in foreign countries dealing with the obscenity problem. See St. John-Stevas, *Obscenity and the Law*, 221-256 (1956).

[54] Jacobellis v. Ohio, *supra* note 49, at 195. Moreover, the difficulties of constitutionality which pervade blanket suppression statutes are more easily surmounted by carefully drawn restrictions aimed at protecting impressionable children. See, e.g., Bookcase, Inc. v. Broderick, 18 N.Y. 2d 71, 218 N.E. 2d 668 (1966), appeal dismissed sub. nom. Bookcase, Inc. v. Leary, 87 Sup. Ct. 81 (1966); American Law Institute, Model Penal Code, Tentative Draft No. 6, sec. 207.10, subd. 2 (1957); Note, "For Adults Only: The Constitutionality of Government Film Censorship by Age Classification," 69 Yale L. J. 141 (1959). But see note 55, *infra*.

[55] See, e.g., Bantam Books v. Sullivan, 372 U.S. 58 (1963), censorship scheme designed primarily to shield children from unwholesome books held void for want of adequate procedural safeguards and because of over-breadth in the practical operation of the scheme; Winters v. New York, 333 U.S. 507 (1948), New York statute held unenforceable, on ground of excess vagueness, which purported to ban distribution of comic books principally depicting "deeds of bloodshed, lust or crime" so massed together as to incite to violent and depraved crimes against the person.

For a discussion of some of the problems involved in drafting an acceptable child-protection law of this kind, see Note, "The New York Law Controlling the Dissemination of Obscene Materials to Minors," 34 Ford. L. Rev. 692 (1966); Comment, "Regulation of Comic Books," 68 Harv. L. Rev. 489 (1955).

one's moral probity, or of misguided idealism, or even of a latent disposition to dangerous radicalism.[56] Yet the underlying tension between freedom and virtue necessarily requires an accommodation between conflicting goals and clashing values — precisely the circumstances likely to produce both support for and opposition to specific programs.

The need for such an accommodation may be obscured, but cannot be obviated, by emotional appeals for community appeals for community action, hand-wringing about the decay in moral standards, or righteous denunciation of the dealers in commercialized smut. The First Presidency's statement may well serve as a catalyst to development of useful and constructive programs of action, if accepted as an invitation to thoughtful and conscientious evaluation of the complex and delicate problems involved. The danger, of course, is that well-meaning but unsophisticated individuals not fully sensitive to the many dimensions of the issues may, without warrant, construe the necessary generality of the First Presidency's language as implying the absence of countervailing considerations that counsel restraint.

CONTROLLING PORNOGRAPHY: THE SCIENTIFIC AND MORAL ISSUES

Kenneth R. Hardy

> Contrast the following:
>
> The saturation of our civilization with obscenity and pornography shackles and enslaves to lust and depravity. It is necessary to slip these surly bonds. This means it is necessary for each person in America to become a citizen for decency.
>
> —Charles H. Keating, Jr., founder and co-chairman, Citizens for Decent Literature.[1]
>
> Is there any scientifically acceptable evidence that individual misconduct or social evils result from the reading of obscenity, hard-core or merely erotic or realistic? There are what I have styled elsewhere cigarette testimonials, by J. Edgar Hoover and others, which attest to the dire consequences of reading pornography. But there are no empirical studies by psychiatrists, psychologists, criminologists, statisticians, sociologists or scientists generally, which would indicate such adverse effect on particular individuals or on society as a whole. Lacking such evidence, we cannot anticipate any calamitous results from a permissive attitude.
>
> —Elmer Gertz, noted lawyer[2]

---

[56] For examples of such simplistic and irresponsible criticism, as directed to the Supreme Court, see Gerber, "A Suggested Solution to the Riddle of Obscenity," 112 U. Pa. L. Rev. 834, 843 (1964) (charge by Congressman Clare Hoffman that the Supreme Court is part of a world-wide conspiracy to subvert personal moral standards); Semonche, "Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation," 13 U.C.L.A. L. Rev. 1173 (1966) (charge by Cardinal Spellman that the Supreme Court had accepted degeneracy and the beatnik mentality as the standard of American life).

[1] As quoted by Norman Mark in "The Anonymous Smut Hunters," *The Nation*, 1965, vol. 201, No. 1, p. 5.

[2] Quoted from his article, "An End to All Censorship," *The Nation*, 1965, vol. 201, No. 1, p. 9.