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Book Review - Schauer: The Law of Obscenity

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Book Review

THE LAW OF OBSCENITY. By Frederick F. Schauer.[1] Washington, D.C.: The Bureau of National Affairs, Inc. (1976). Pp. x, 459. $19.50.

The Law of Obscenity is a heavily referenced treatise designed to assist judges who interpret obscenity laws, legislators who write such laws, prosecutors who enforce them, and private attorneys whose legal practice involves such laws.

Professor Schauer has drawn upon his practical experience as a private practitioner in the obscenity law field and as a professor of constitutional law and evidence to develop this limited but confused, vague and difficult area of the law. The result is a practical "How to . . ." book which carefully develops each aspect of the United States Supreme Court tests for the regulation of obscenity. The book's strongest point is its abundant use of citations to the decisions of lower federal courts and state courts in order to illustrate how Supreme Court decisions have been perceived by those courts. Relevant books and law review articles are also noted. The references are so complete that the book would be valuable for this reason alone.

In the book, the author first develops the substantive law of obscenity and then discusses procedural aspects of obscenity regulation with helpful advice on such things as the use of expert

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witnesses, pretrial motions, and jury selection. Additional material is included in five appendices, the last of which contains the full opinions of eleven major United States Supreme Court obscenity cases.[2] Also included are examples of voir dire questions,[3] jury instructions, and typical forms as well as the texts of major statutes.

The analysis of substantive law begins with an examination of the tests developed by the Supreme Court. *Miller v. California*'s[4] tripartite test was an attempt to clarify the law of obscenity. Professor Schauer rejects as inadequate the various attempts to define the first part of the *Miller* test, appeal to the prurient interest.[5] Only by looking at the precedents does one begin to understand what the court has in mind, he says, and then only in a negative sense. Material appealing to the prurient interest is something other than profanity, nudity, the sexually explicit or the advocacy of any sexual activity or sex-related idea.[6] What it is not is clear. Sex *per se* is not only not punishable, it is entitled to the highest degree of protection because of its relationship to fundamental interest.[7]

Next, there is the "average man" concept originated by the

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2. Of landmark obscenity cases decided at the time of publication, only Freedman v. Maryland, 380 U.S. 51 (1965) is omitted. The text, however, has an excellent discussion of *Freedman* particularly in its application of the principal of *Freedman* and Carroll v. President and Commissioner of Princess Anne, 393 U.S. 175 (1968) to the use of injunctions against obscene materials. (See summary at page 238.) Also good is the related discussion of search and seizure as a form of prior restraint. (See summary at page 212.)

3. Appendix A lists 56 questions (some with multiple parts) for voir dire examination of prospective jurors. The first eight questions are very general; the remainder deal primarily with sexual attitudes. Number 27 is illustrative: "Does the idea of sex between humans and animals offend you." In view of the fact that the first 56 questions cover everything except whether the prospective juror owns a water bed, it is perhaps unfortunate that it is the last question which asks, "Are you embarassed when you talk about sex?"

4. 413 U.S. 15 (1973)

5. Probably, the most common definitions are found in footnote 20 of Roth v. United States, 354 U.S. 476, 487 (1957), i.e., "material having a tendency to excite lustful thoughts," material appealing to a "shameful or morbid interest in nudity, sex, or excretion." Other courts have defined it as relating to "lecherous thoughts or desires" or catering to "a loose-lipped sensual leer."

6. Professor Schauer points out that such sexual advocacy though absolutely protected, Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 688 (1949), "may very well have a long-term effect on sexual morality or conduct very similar, or perhaps even greater, than explicit depictions of sexual conduct." Thus, a ban on obscene speech is not likely to be very protective of morality in this country, even if such a purpose is a legitimate state interest.

7. Justice Brennan noted in *Roth* that sex "is one of the vital problems of human interest and public conern." *Supra* at 487. It is amazing that the courts have found it so difficult to distinguish between such an important subject and the "utterly worthless." *See* n. 13.

Supreme Court in *Roth v. United States*[8] to avoid the "most susceptible person" test of *Regina v. Hicklin*.[9] Obscenity is to be judged based on its appeal to average persons, not just on the effect of such material on susceptible persons or groups such as children. But what is an "average" person? It is not the same as the reasonable man in tort law who is the "ideal" person.

> If the sexual sophistication of the reasonable man were as finely tuned as his judgment and caution, then the major justification for obscenity laws would disappear, since this 'ideal' would not be aroused by *Ulysses* or *God's Little Acre*, and would be merely bored by commercial pornography.[10]

The average person is a composite of all people in a community—men, women, children, educated, uneducated—with human weaknesses and strengths. However, Professor Schauer argues persuasively, the courts should define the average person for the jury simply by explaining that the purpose behind the concept is to exclude both the "especially susceptible and the especially sophisticated."[11] Furthermore, Professor Schauer points out that any mention of the fact that children are included in the composite average person is likely to have a disproportionate effect on the jury.

The second part of the *Miller* test requires that the pruriently appealing material must also be patently offensive; that is, it must go "substantially beyond customary limits of candor in describing or presenting [sexual] matter."[12] The applicable law must specifically describe the type of sexual speech which can be found patently offensive.

Contemporary community standards are used to define what is patently offensive. The purpose of the contemporary community for the Warren court, according to Schauer, was to emphasize the temporal aspect of obscenity: What is offensive to the community today, not yesterday? The Burger court has allowed the concept to become primarily geographic by rejecting the national standard as unworkable and substituting local standards. In *Miller* the Burger court discounted the harm done to

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8. *Supra*, n. 5.
9. [1868] L.R. 3 Q B. 360.
10. Schauer, Frederick F. THE LAW OF OBSCENITY. Washington: The Bureau of National Affairs, Inc., 1976, at page 73. (Hereinafter cited as SCHAUER.)
11. SCHAUER, at page 75.
12. A.L.I., Model Penal Code § 251.4 (1) (1962).

national distributors of sexually explicit materials by the multiplicity of different local standards.[13]

The Court did not discuss the fact that a local community standard seems to unnecessarily personalize the jury's decision. If a jury decides that a particular film is not patently offensive in its community, has it impugned the reputation of its city or state? Professor Schauer suggests that the defense should attempt to minimize this problem by stating the issue not as being whether the community or the average person is offended, "but whether the community or the average person is offended by the materials being available to those who wish to see them."[14] In other words, an acquitting jury should not be viewed as being sex-crazed, only tolerant.

A more important question, in a practical sense, is whether a "local" standard is any more workable than a "national" standard. Professor Schauer points out that it is no more feasible to prove what the communities in the state of California believe to be patently offensive than to prove the same fact nationally. Most states passing new legislation have provided for a statewide definition of obscenity. Only when the community is defined very narrowly does the feasibility of proof become significant. Yet, as the number of possible communities increases, so does the danger to First Amendment rights. All major movies and books are distributed nationwide. It might be possible for a distributor to know the different sexual tolerances of the fifty states and thus avoid breaking the law, but it would be impossible to know the standard in all counties, let alone all cities, villages and judicial districts.

Professor Schauer argues that, whatever instructions the jury is given, it is likely in any event to apply the standards of the community from which it is drawn. Recognizing this point helps resolve conflict of laws problems when the offense takes place in more than one community or state.[15] Though the better ap-

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13. The Court commented that a local standard will allow a local community to give a higher level of protection to sexually explicit speech than that given by a national standard. As Professor Schauer points out, that argument ignores the fact that a national standard would have set only a minimum with any state or locality free to set a higher standard in any event. Compare the Court's treatment of the risk of multiplicity of inconsistent burdens in commerce clause case, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

14. SCHAUER, at page 133.

15. For example, 18 U.S.C. § 1461 makes mailing obscene matter a violation in every community through which the mail passes. The book does not discuss whether air mail being flown over a state would be enough. Conflict of laws problems generally are discussed in Schauer, *Obscenity and the Conflict of Laws*, 77 W. Va. L. REV. 377 (1975).

proach, Professor Schauer argues, would be to apply the law of the community where the material is actually available to the public; practically speaking the jury is likely to apply the community standards of the forum.

The most significant part of the *Miller* test is its requirement that even patently offensive, prurient-appealing sexual material must also be without "serious literary, artistic, political or scientific value." Though less strict than the Warren court's "utterly without redeeming social value" test,[16] the "serious value" test is more protective of free speech than either of the preceding two parts of the *Miller* test. The average man and the local community are no longer important: "A finding of serious literary value should be made . . . where that serious literary value is only perceivable by a sophisticated (or perhaps unsophisticated) segment of the population."[17] Thus, expert testimony is extremely important as to this part of the test, particularly for the defense.[18] Professor Schauer suggests this approach:

> [I]f material has serious literary value for a significant portion of the population, then the fact that this portion is neither average nor in the majority is irrelevant. . . . If a work is a serious literary endeavor with the purpose of stimulating the mind, and if it has this effect on a significant number of people, then literary value exists, and there can be no finding of obscenity.[19]

Though Professor Schauer states that intent is the crucial determination, he does not believe that good intent alone is a complete defense.[20]

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16. The exact phrase was first used in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966), but the concept was endorsed by Justice Brennan in Jacobellis v. Ohio, 378 U.S. 184 (1964). In *Memoirs*, only 3 justices joined in the plurality opinion endorsing the "without value" test, but Justices Black and Douglas argued even that test gave inadequate protection to First Amendment rights. It is ironic that the Black and Douglas "absolutist" position limited the precedential value of *Memoirs* thus making it easier for the *Miller* court to substitute a standard less protective of free speech.

17. SCHAUER, at page 144.

18. But Professor Schauer cautions, "Evidence of this sort should be presented only if there is a likelihood of making a believable case." (p. 274) Otherwise, the jury "is likely not to believe *any* of the defense's contentions." (p. 274) Expert testimony, Professor Schauer states, may be equally valuable in proving community standards. (p. 131-35)

19. SCHAUER, at page 144.

20. Professor Schauer does not really discuss why good faith intent should not be a complete defense. In regulating political speech, the court made bad intent a necessary part of any limitation on political speech, Brandenburg v. Ohio, 395 U.S. 444 (1969).

Professor Schauer cautions that superimposed on the *Miller* tripartite test "is the requirement that only hard-core pornography may be included within the regulation of obscenity."[21] The Burger court is in agreement with the Warren court in that respect. Professor Schauer does not attempt to explain how the two courts could arrive at such very different definitions of hard-core pornography. In fact, it appears that with the Burger court's emphasis on the average man and local communities and its rejection of the "utterly without redeeming social value" test, the *Miller* test would seem to permit the regulation of sexual material far short of the hard-core.

It is possible that almost any definition of unprotected material would have the same result. Perhaps that is why many believe that the most lucid statement by a member of the Court about pornography is Justice Stewart's clever, "I know it when I see it."[22] But Justice Stewart intended more than just a quip. His was a psychological and legal point that there is a distinct difference between even hard and soft-core pronography and that anyone—juries, judges, prosecutors—will see it too. A prohibition limited to hard-core pornography would be easier to enforce, would give clearer notice to distributors and would be more protective of legitimate discussions of sex.

The essence of the Warren court's desire to protect all legitimate discussion of sex, however, was the "utterly without redeeming social value" test. That test was first developed in *Jacobellis v. Ohio*[23] though it appears to have had its origins in *New York Times v. Sullivan*[24] decided earlier the same term. In the latter landmark free speech case, the Supreme Court held that even false and defamatory statements were protected:

> Speech on public issues should be uninhibited, robust, and wide open . . . . The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered. As Madison said, 'Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.' . . . [E]rroneous statement is inevitable in free debate, and [must] be protected if the freedoms of expression are to have the 'breathing space' that the 'need' . . . to survive.[25]

The "utterly without redeeming social value" test was an attempt to apply the *New York Times* approach to obscenity cases. A free society must take risks including the protection of sexual

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21. SCHAUER, at page 109.
22. *Jacobellis*, *supra*. at 197. (Stewart, J., concurring).
23. *Supra*. *See*, n. 13.
24. 376 U.S. 254 (1964).
25. *Id*. at pp. 270-272. Internal citations omitted.

speech with even very doubtful value to make sure that all speech with real value is in fact protected. The Warren court test left room for error without threatening legitimate speech about such a fundamental interest as sex. The *Miller* test leaves no such room for error. A "no value" test misapplied may reach material with "no serious value." A "no serious value" test may reach material with substantial value. But, as Professor Schauer points out, the trial judge has an important responsibility in every obscenity case to make an independent determination as to whether or not the material is hard-core. Only if the judge believes that it is should he allow the jury to make the same determination. The appellate courts then must make a final, independent judgment on this important constitutional issue. Only by assessing the hard-core aspect of sexually explicit speech independent of the *Miller* test will free speech be given adequate protection.

From the in-depth discussion of the substantive tests of obscenity law, Professor Schauer develops the procedural aspects of implementing these tests in the courtroom. The book is oriented toward a practical emphasis of obscenity law. Together with the in-depth analysis of the relevant Supreme Court tests by which obscenity standards are to be judged, Professor Schauer has compiled a most comprehensive reference source which will provide practicing lawyers with material on all aspects of obscenity cases.

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