BOOK REVIEWS

Obscenity and the Law. By St. John-Stevas. London: Secker and Warburg, 1956. Pp. 289. $5.00.

Concurring Opinion in United States v. Roth. By Judge Jerome Frank, 237 F.2d 796, 801–27 (C.A. 2d, 1956).

The literature on the legal aspects of obscenity has been growing apace in the past few years.[1] In 1946, we had Judge Thurman Arnold's witty opinion in the *Esquire* case. In 1947, Judge Curtis Bok wrote his celebrated judicial essay in *Commonwealth v. Gordon.* In 1952, the Gathings Committee provided both extensive congressional hearings and a report on the contemporary problems, particularly those created by the influx of paper-back books. In 1954, Dean Lockhart and Professor McClure added their major article, *Literature, the Law of Obscenity and the Constitution.* The next year Law and Contemporary Problems provided an extensive and excellent symposium, and now Mr. St. John-Stevas has given us a broad survey of the English law and experience, and the late Judge Jerome Frank in one of his last judicial acts has added an extraordinary personalized essay as an appendix to his opinion in *United States v. Roth.*

This is perhaps an unseasonable moment at which to review these two efforts since as I write the United States Supreme Court has awaiting decision three obscenity cases.[2] Oddly enough, the Court has never before spoken ex-

[1] Since this comment was written, the American Law Institute has published its tentative draft on obscenity as Section 207.10 of the Model Penal Code. The central definition is:

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, 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.

[2] The guess that this was an unseasonable time at which to discuss obscenity proves to be correct. Just as this goes to press, the Supreme Court had handed down its decisions in the three obscenity cases that have been pending. In Kingsley Books v. Brown, 25 U.S. Law Week 4557, June 25, 1957, the Court, by a 5 to 4 decision, upheld a New York statute authorizing an injunction against the sale and distribution of matter found after trial to be obscene. In Alberts v. State of California, 25 U.S. Law Week 4539, June 25, 1957, the Court, by a 7 to 2 decision, upheld the constitutionality of the California statute making the dissemination of obscene material a crime; and in the companion case, Roth v. United States, by a 6 to 3 decision, it upheld the constitutionality of the federal statute making the mailing of obscene materials a crime. The Court adopts the two level speech theory first suggested in the *Beauharnais* case, and finds accordingly that obscenity is not within First Amendment protection. It also rejects the contention that the term is unconstitutionally vague. The majority opinion therefore puts to rest some of the issues raised in this comment, but does so in a fashion I find altogether unpersuasive. Neither the majority opinion nor the dissenting opinions in the *Roth* case refer to Judge Frank's opinion below.

plicitly on the law of obscenity, and there is considerable hope that its imminent decisions will clarify many perplexities in the existing American law.

There is, however, special utility in considering Judge Frank's appendix and St. John-Stevas' book together. St. John-Stevas has written a broad survey, dealing with the topic in a straight-forward, common-sense way. His book is the end product of the work of a Committee of the Society of Authors which after a recent outburst of obscenity prosecutions in England met, with A. P. Herbert as Chairman, to draft a model obscenity statute. The book concludes with a discussion of the statute. The view of the author clearly is that while there have been excesses of censorship in the past, there have also been excesses of the written word, and there is little in the obscenity issue which cannot be put to rest by reasonable legislation. In brief it is a very moderate book.

Judge Frank, on the other hand, has made a passionate exploration of the difficulties, as he sees them, of framing obscenity laws within the constitutional commitments to free speech. It is a notably daring and candid judicial essay.

One is tempted to say, therefore, that had Judge Frank written Mr. St. John-Stevas' book we would have the ideal statement on the problem. For the Frank opinion, although rich in brilliant flashes, is too unsystematic and too short-winded to persuade. And the book, although systematic, is too sane and pedestrian to excite.

The organization and emphasis of *Obscenity and the Law* suggest once again that the English have a way of writing about law which we do not know.[3] They appear able to produce books which fall somewhere in between the avowed popularization for laymen and the treatise for lawyers. Mr. St. John-Stevas' book is therefore graceful, literate, informative, but in the end disappointing in its analysis. A little more than half the book is a history of the fate of literature under the obscenity taboo; this is followed by directly legal essays on the law of England, the United States and Ireland; and the book concludes with a brief summing up by the author. The appendices present the proposed Obscene Publications Bill and a series of notes on the law of another dozen or so countries. The difficulty with this blend is that it does not provide quite enough of either of its components. Thus although the chapter on the Irish book censorship apparatus is most interesting, the discussion of American law is at best barely adequate, and the treatment of English law although detailed on the issue of intention does not appear to give a full coverage of all the relevant English authorities.

Similarly the literary history half of the book makes one wish the author had more carefully separated sheer controversy among literary critics and reviewers over the good taste of famous books from strictly legal moves against them. We thus are given a good deal of material on the fate amidst contempo-

[3] The various books of Morris Ernst are, perhaps, the one exception.

rary reviewers of Byron, Meredith, Wells, Swinburne, the Brontes, Rossetti, et al. This material is interesting, so interesting in fact that one would like to see a full literary history keyed to critical and popular contemporary comment on works with a sexual theme. The manner of its inclusion here however tends to blur the perspective on the frequency of actual legal restraint. There is of course a decisive difference between critics condemning a book as obscene and the law using its coercive power to do so. At times Mr. St. John-Stevas writes as if criminal prosecution was simply a somewhat more emphatic act of literary criticism. Thus, if I kept a correct box score on the author, it would appear that during the Victorian half of the nineteenth century there were only four prosecutions of works of any literary merit; and while the rate steps up somewhat in the twentieth century, there have been surprisingly few prosecutions in all.

The historical essay does, however, have its uses. It is the best summary I know of the extent to which obscenity was a common law crime; it places both Lord Campbell's Act of 1857 and the first relevant English opinion in *Queen v. Hicklin* in 1868 in perspective; it points up the enormous influence of the reviews and the circulating libraries in controlling the reading habits of the nineteenth century; it suggests the persuasive hypothesis that the Victorians were concerned with the sudden increase in literacy produced by the broadening of public school education; and it emphasizes that the Victorian Era had a genuine problem of regulating prostitution and cheap pornography. And while there is no English counterpart of Anthony Comstock, the Vice Societies were at least as influential in England as here.

Judge Frank's opinion is, as American lawyers have come to expect, a genre of its own. It is really a collection of notes and questions written with verve and flashes of insight and with a profound conviction that the law of obscenity needs a candid re-evaluation. Undoubtedly the possibility of explicit constitutional challenge under American law provides a sharper focus for analysis of issues of this sort than English law invites or permits. The problem with the law of obscenity, as Judge Frank views it, is to make it fit with our constitutional notions of free speech in other areas. The pressure of this sort of inquiry causes Judge Frank to push with vigor and gusto at the perplexing questions: just what evil is obscenity regulation aimed at? just how serious and imminent is that evil? and just how can regulation of that evil be captured in legislation that is not intolerably vague?

So viewed the law of obscenity immediately becomes curious and disturbing. Although the courts have not customarily been fully explicit about it, the law on obscenity appears aimed at a series of possible evils: the arousing of feelings of disgust and revulsion; the advocacy of improper sexual values; the exciting of the mind to sexual imagery; the incitement to anti-social sexual con-

duct. And it appears reasonably clear too that any of these standing alone has been sufficient to support a conviction. The principal clarification of the law since the *Hicklin* case has been to shift the test audience from the young and vulnerable to the average adult. This is the achievement of such famous American opinions as that of Judge Learned Hand in the *Kennerly* case, Judges Wolsey and Augustus Hand in the *Ulysses* case. It is a chief reform in the proposed English legislation in St. John-Stevas' book, and the point has been given constitutional status by the very recent opinion of Mr. Justice Frankfurter in *Butler v. Michigan.* However admirable this change, it goes a long way toward depriving the law of any rational basis. For the law then is concerned with the impact of the sexual themes and imagery in art and writing on the ordinary adult, who is sexually experienced, set in his habits, mature, and in no sense a captive audience. I would suggest that the full significance of this change has not as yet been faced. It means that the impact on children, however defensible as a basis for special legislation, is today not relevant in law when the material circulates generally and is not specifically aimed at children. If the material is obscene legally it is so only because of its effects on adults. The children, I repeat, have become irrelevant.

Let us return for a moment now to the possible evils. Surely, the arousing of disgust or revulsion in an adult who is perfectly free to leave the material alone is a curious predicate for a crime. And surely too the advocacy of ideas about sexual conduct would seem entitled to the same protection as the advocacy of ideas about other issues in the public domain. We are left then with the evil of imagery so intense as to move one to improper sexual action or with the arousing of inner sexual excitement, short of action. The law has never required that overt action be the effect of obscenity and the evidence that it does have this effect on the adult is totally missing. We come then to the apparent chief target of the law of obscenity today: the arousing of sexual thoughts or desire in adults short of action.

There is up to this point no dispute between Judge Frank and St. John-Stevas in their statement of the law. The difference arises in their reaction to it—Judge Frank reacts with a note of incredulity that the law can be serious about its chief target. It is at this point that both common sense and the mandate of the First Amendment would appear to intrude with compelling force. As we await further light from the Supreme Court, we can only trace here briefly the perplexities of the constitutional issue. Criminal statutes regulating obscenity have generally been assumed to be constitutional although, as noted, the Court has never spoken directly on the question. If, as there is some reason to suspect, the Court will say the First Amendment does not apply to obscenity, the difficulty is in understanding why this should be so. Whether obscenity can stand as a historical exception understood as part of the law of free speech at the time of the adoption of the First Amendment, or whether as

Justice Frankfurter seemed to say in the *Beauharnais* case there are two levels of language—one of which libel, fighting words, and obscenity does not reach First Amendment protection, whatever these intricacies of doctrine, it is hard to see how language dealing with love, lust, and sex is any less entitled to First Amendment scrutiny when regulation is attempted than is the language of violence and revolution. And if obscenity is to be tested against customary clear and present danger notions, it is difficult to see that any specified evil as to adults can be said to be sufficiently clear or present, or, and this should be underscored, sufficiently substantial to satisfy the test. Judge Frank, like Judge Bok, would tend to resolve these difficulties by requiring that there be the threat of clear and present danger not of sexual fantasy merely but of criminal sexual conduct. This is perhaps a statesman–like way to leave the law intact, but in fact it is tantamount to repealing it.

Nor do the difficulties end here. The point cannot be fully argued here, but I think there is much to the view that obscenity is not only intolerably vague as defined by the law today but that the vagueness cannot be cured. At least not without resorting to the absurd specificity of the Hollywood Movie Code. We can perhaps distinguish between degrees of explicitness in the discussion of sex, but among explicit discussions of sex it is a heroic venture to attempt to distinguish between the good and the bad. In any event, and this is the main point, the distinction is an extraordinarily subjective and subtle one upon which to base criminal guilt. Perhaps the difficulty arises because the law has been unable to define obscenity in terms of its content. It has rather always talked in terms of effects. And the effects in turn are hard to specify, partly because we know so little about them and partly because we seem anxious only to prohibit "impure" responses. Hence, the law is always close to defining obscenity in terms of itself. Most people who have advocated some regulation of obscenity have had the French postcard or its equivalent in mind. The difficulty, however, is that there seems to be no way to phrase a formula that will reach the postcard and leave Molly Bloom's soliloquy in *Ulysses* or the Song of Songs unscathed. Mr. St. John-Stevas predicates his entire discussion on the distinction between obscenity and pornography. "A pornographic book," he tells us, "can be easily distinguished from an obscene book. A pornographic book, although obscene, is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac." And throughout his legal discussion he lays great stress on the author's intention as the clue. He is, of course, not the first to urge that there is a "hard core of pornography" which can be delineated as the legislative target. It is not without relevance, however, that his proposed statute continues to speak in terms of "obscenity" while making relevant the author's intention "to corrupt."

Nor do we escape the ambiguity if we rely on intention as St. John-Stevas would have us do. There is little evidence of the author's intention in these

matters apart from what he has said, and we are back again speculating about the effects on adult fantasy of what he said. Just what was the intention of D. H. Lawrence, for example? And what is the intention of much modern advertising or of the movie exploitation of Marilyn Monroe? Undoubtedly Mr. St. John-Stevas has in mind something less subtle—namely, whether the publisher is reputable or not. The implicit rule of thumb is that gentlemen do not publish obscene books.

These, then, are the two great anomalies of the law on obscenity when placed against a constitutional background. It is unprecedentedly trivial in objective and unprecedentedly vague in execution. These are of course familiar points. It is the basic weakness of St. John-Stevas' book that he does not face up to them squarely; it is the basic charm of Judge Frank's essay that he is so ebulliently candid about them.

There are three further points deserving some attention. First, much of the law on obscenity has been informal and extra-legal. The vagueness of the criminal standard has played no small part in the shifting of so much of the actual regulation in this area to informal extra-legal schemes built upon the cooperation of prosecutors, the threat of prosecution and the threat of boycott. In recent years there have been many disclosures of such informal censorship groups and lists, and it is precisely this sort of "voluntary" censorship which the Gathings Committee so heartily applauded as an alternative to law.

Second, there is the issue of whether literary or scientific merit somehow excuses obscenity. It is probably true today both in the United States and England that the law has now read into the statute an exception of this sort. Again the improvement in the law makes it harder to understand. It is not clear, as Judge Frank shrewdly points out, whether literature is exempt because artistic merit tends to nullify the sexual stimulus otherwise present or whether it in effect operates to privilege material prima facie obscene. St. John-Stevas has as a principal point the stressing of the importance of this exception; his proposed legislation makes evidence of literary merit relevant, although it carefully avoids making it decisive. But surely, as more than one irritated judge has observed, artistic skill may make the material all the more seductive and stimulating. And in any event it makes the standard less certain. If we take two equally explicit discussions of sex one may be a felony and the other escape unscathed solely on the basis of an aesthetic judgment. Judge Frank has some of his most rollicking fun at the expense of this exception and argues with force that it really gives the game away. We should, he urges, be consistent and either apply the standard across the board with the result that the French postcard and *Ulysses* are both banned and with the further result that the unconstitutional reach of such legislation is then apparent; or we should restate the standard so as to eliminate *Ulysses* with the result that the French postcard is now also beyond reach. In brief he

argues, and I would agree with him, that the literary merit exception is a judge-made inconsistency to keep the law from being "laughably absurd."

The third point goes to the special role of the jury in obscenity cases, a matter on which St. John-Stevas is virtually silent and Judge Frank, as expected, given his general views of the jury system, is critical. The law's strategy here, as with defamation and negligence, has been to avoid any serious effort at definition of its key terms by leaving it to the jury to supply the meaning. Obscenity in criminal law, within the broadest limits, means what the jury says it means and no more. Forty years ago in a classic opinion Judge Learned Hand made this explicit when he told us that obscenity was the "critical point" reached at any given moment in a society between candor and shame, and it was for the jury to set this point anew in each case.[4] Twenty-five years later in another famous passage he returned to the theme, explaining:

> This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently. As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury . . . because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors. We mentioned some of these in United States v. One Book Entitled Ulysses, . . . the work must be taken as a whole, its merits weighed against its defects; . . . if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus "obscenity" is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premiss, but really a small bit of legislation ad hoc, like the standard of care.[5]

This, then, is the final admission that the law has been unable or unwilling to define obscenity. But the point is more interesting than that. If we must have some form of official censorship in this area the jury is surely more tolerable than any other group, for, as Judge Hand puts it, it leaves literature in the leash of the average conscience of the time and there will always be shorter leashes which might otherwise have been used. And the reliance on the jury carries strong implications for the untenability of administrative censorship

[4] United States v. Kennerly, 209 Fed. 119, 121 (S.D. N.Y., 1913).

[5] United States v. Levine, 83 F.2d 156, 157 (C.A. 2d, 1936).

devices, such as movie boards and the post office, where some official must then play the jury's role of representing the community sentiment. But, as Judge Frank intimates, there is left the troublesome question of whether allowing only such discussion of sex as the average man will tolerate is compatible in the end with the First Amendment aspirations.

Perhaps the law might be considerably improved if we were to take the jury task more seriously and make an honest effort to communicate to the jury what interests it is to consider when it "legislates ad hoc." For the standard charge to a jury on the law in an obscenity case reads quite differently from a contemporary appellate opinion. What is wrong, I suggest, is not that the charge fails to define obscenity but that it fails to convey to the jury the counter-balancing values in free speech; it fails to tell it that it is an extraordinary thing in our society to make the publishing of any book a crime. What we want the jury to tell us, on this line of analysis, is not whether it thinks the book in poor taste, but whether it is deeply shocked by it. In brief, although we cannot know quite what we mean, we want the jury to tell us not that the book is obscene but that it is obscene beyond a reasonable doubt. Thus, the failure of the current jury charge is not a failure of content but of emphasis. It may of course be difficult to liberalize the charge under American traditions of jury administration, but it is one of the services of St. John-Stevas' book that it preserves the splendid charge of Justice Stable in the recent prosecution of *The Philanderer*.[6] He said in part:

> Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. Then you say: "Well, corrupt or deprave whom?" and again the test: those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. What, exactly, does that mean? Are we to take our literary standards as being the level of something that is suitable for a fourteen-year-old school girl? Or do we go even further back than that, and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public.
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> So far as his amatory adventures are concerned, the book does, with candour or, if you prefer it, crudity, deal with the realities of human love and intercourse. There is no getting away from that, and the Crown say: "Well, that is sheer filth." Is the act of sexual passion sheer filth? It may be an error of taste to write about it. It may be a matter in which some, perhaps old-fashioned, people would prefer that reti-

[6] There is a delightful account of the *Philanderer* prosecution from the viewpoint of the publisher defendant, Felix Warburg, in the New Yorker, April 20, 1957, p. 101.

cence continued to be observed as it was yesterday. But is it sheer filth? That is a matter which you have to consider and ultimately to decide.

I do not suppose there is a decent man or woman in this court who does not wholeheartedly believe that pornography, the filthy bawdy muck that is just filth for filth's sake, ought to be stamped out and suppressed. Such books are not literature. They have got no message; they have got no inspiration; they have got no thought. They have got nothing. They are just filth and ought to be stamped out. But in our desire for a healthy society, if we drive the criminal law too far, further than it ought to go, is there not a risk that there will be a revolt, a demand for a change in the law, and that the pendulum may swing too far the other way and allow to creep in things that at the moment we can exclude and keep out?

That is all I have to say to you. Remember what I said when I began. You are dealing with a criminal charge. This is not a question or a case of what you think is a desirable book to read. It is a criminal charge of publishing a work with a tendency to corrupt and deprave those to whom it may fall. Before you can return a verdict of "Guilty" on that charge you have to be satisfied, and each one of you has to be satisfied, that that charge has been proved. If it is anything short of that the accused are entitled to a verdict at your hands of "Not Guilty."[7]

There is an enormous difference between that invitation to the jury and the trial judge's routine instruction in, for example, *United States v. Roth.*

There emerge from this discussion perhaps four different views of obscenity and the law. The first, which neither St. John-Stevas nor Judge Frank shares, is that sex is sufficiently explosive and obscenity is sufficiently a problem so that it is safer to err on the side of regulation rather than the side of license. Hence, the law of obscenity is quite satisfactory as it stands. The second, which is the view of St. John-Stevas and the proposed English statute, is that a proper balance can be maintained between freedom and restraint if the law privileges artistic merit and makes the intention of the publisher relevant. The law will then tend to hit only commercialized pornography and at least will not disturb serious literature or art. The third is the view of Judge Frank, toward which I incline, that the distinction between literature and pornography cannot be captured and that candidly viewed there is no significant problem left for law to regulate—where the audience is adult and the First Amendment is remembered. The fourth is, I take it, the urbane view of Judge Hand. It appears to agree, privately as it were, with Judge Frank but to give weight not so much to the evils of obscenity as to community anxiety about it as a value also deserving the protection of law. Whether or not the sense of shame in the community is sensible, it is there, and it is not to be dismissed too lightly. The decent solution, therefore, between anxiety and candor in matters of sex is to leave it to the jury to strike a tolerable compromise between their competing claims.

[7] Regina v. Martin Secker & Warburg Ltd., [1954] 1 W.L.R. 1138, 1139–40, 1143.

There are many other points which deserve attention and which are suggested by both Judge Frank and the book. There is the issue of prior restraints as it affects this area, particularly with the post office and the movie codes. And there is the ironic consequence that from the point of view of risks to authors and publishers a prior-restraint scheme would be fairer than reliance on subsequent criminal sanctions. There is the interesting possibility that different media of communication present genuinely different problems of impact. There is the old story of the frequent futility of prosecution which serves only to skyrocket the sales of the book in question. There is the arresting fact that the law has no comparable concern with literature which corrupts toward non-sexual vices such as pride, greed, cowardice, gluttony. There is the large problem of "obscene" violence highlighted by controversy over horror comics which English law and St. John-Stevas have expanded obscenity to cover. There is the interesting psychological problem of the type of personality likely to be recruited to censorship of obscenity—the Prurient Prude in the phrase St. John-Stevas quotes from Charles Reade. There is the political awkwardness of opposing obscenity regulation and thus of appearing to ratify sexual license. There is the puzzling problem of the political impact of Catholicism on American life. There is the mystery of obscenity and humor. There is the hypocrisy and double standard of so much obscenity enforcement, another point on which Judge Frank is witty and effective in his asking that judges take judicial notice of the obscene jokes and songs to which they are habitually exposed at Bar Association and law school alumni get-togethers. There are the problems of legislation to regulate books aimed directly at children, and there is the suspicion that the real concern here is with something everyone is too reticent to mention—masturbation.

If one can be too solemn about the risk of the young girl being ruined by a book, one can also be too solemn about the evils of censorship under the obscenity rubric. There have been even in recent years disgraceful errors, as in the Massachusetts decision that Lillian Smith's *Strange Fruit* was obscene; but on the whole, the explicit discussion of sex in American and English letters does not live under any great cloud. The current law of obscenity although rich in fascination is at most a modest problem today. But in matters of free speech it is important to have our basic doctrine straight and coherent, and it would be well if the law of obscenity were somehow brought more into line.

It is good, therefore, to have St. John-Stevas' addition to the literature. And we are very grateful to Judge Frank for one more glowing proof that a fine judge can be very human, and for his injudiciousness, if we may risk the metaphor, in proclaiming so loudly that the king is really naked.

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