BOOK REVIEW

CENSORSHIP: A SEARCH FOR THE OBSCENE. By Morris L. Ernst and Alan U. Schwartz. New York: The MacMillan Company, 1964. Pp. xvi, 288. $6.00.

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This publication is a casebook for laymen. I doubt whether most laymen can handle a casebook. However, on the assumption that a layman can profitably utilize a casebook, then for many purposes this is a fine work. It is well organized, and the authors have reduced a tremendous mass of material to workable proportions. The big problem, however, is not so much in the book but in the subject matter, in particular the definition of the term "obscene," to which a considerable portion of the book is devoted.

There is, of course, the view that the word "obscene" and its synonyms cannot be and need not be defined. A leading protagonist of this viewpoint was the famed Robert F. Wagner who, as a trial judge, said in *People v. Seltzer*[1] involving Schnitzler's *Cassanova's Homecoming*:

> [I]t seems to me that such definitions would be entirely unnecessary, for these words are in common use, and their meaning is readily comprehended by men of ordinary intelligence. The difficulty that has arisen . . . lies not in the particular test to be applied thereto in determining the question as to whether a particular book [is obscene] . . . or not, but in the misconception that there can be any judge-made or constant test at all established by way of formularization.

A discussion of Judge Wagner's opinion is found early in the Ernst-Schwartz book; but after completing the book, one may still conclude that Wagner's statement may be correct after all. Certainly, a careful reading of every case and every comment in *Censorship* could not enable any layman to read a book that dealt with sex and reach a conclusion as to whether that book was or was not "obscene" under the law.

Actually few, if any, lawyers can possibly perform the assigned task. Unfortunately, "obscenity" like "beauty" (or "ugliness") is a purely subjective concept, dependent entirely upon the nature of the mind behind the eyes of the beholder. It is dubious whether any court would sustain the constitutionality of a statute prohibiting the sale of "ugly" pictures or

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[1] 122 Misc. 329, 332, 203 N.Y. Supp. 809, 811 (Sup. Ct. 1924).

books. The courts would simply say that "ugliness" is such a loose standard that conduct so described cannot be made criminal. Of course, obscenity is an ancient legal concept and retains some form of constitutional permissibility only because many courts simply want to retain the prohibitions. Other courts simply lack the courage to call "a spade a spade" by openly admitting that, "We haven't the slightest idea what 'obscenity' is and we are not going to permit stupid police officers and ignorant magistrates to punish people for selling that which we cannot define, describe, or delimit."

From time to time Ernst and Schwartz indicate a similar opinion. However, when they verbalize their conclusions, they come out differently. For example, the major conclusion of the book appears to be:

> We have seen many judges take many winding roads in their search for the obscene. They, and therefore all of us, are still wandering along those roads. With more thoughtfulness and less haste, we shall all finally find our way to something society can call "truth"—a relative truth, no doubt, but a democratic one. It is in this context and toward this end that the Law of Obscenity must be considered. (P. 252.)

To this conclusion this reviewer can only say, "Balderdash." With all the thoughtfulness in the world and all the time in the world, society will never achieve an acceptable definition of "obscenity" as applied to photographs and literature which should be banned and for the sale of which the sellers should be incarcerated.

After more than a quarter of a century of wrestling on a day-to-day practical level with the problem of what constitutes an obscene book or magazine, I have "finally found my way" to the following contemporary definition: Whether an item is held obscene depends entirely on a series of factors. The first is the jurisdiction. In a rural court the inside of a woman's thigh is still obscene. The nipple of the breast is obviously obscene. In the sophisticated courts of the major cities, only that which educated and experienced people would regard as in bad taste will constitute obscenity. For example, word descriptions of copulation or perversion are acceptable but pictorial representations of these acts are still "obscene." In addition if you have enough money and force to take the case to the United States Supreme Court, then the rural lower courts and bible-belt upper courts can be reversed. But here, a caveat is in order: More than 2,000 cases are now taken to the United States Supreme Court each term. Of these, more than seventy-five percent are disposed of by a denial of a petition for certiorari, without hearing.[2] It has been estimated that if each one of these cases were to be considered by the full court at a conference, each appeal could receive a total of thirty-three seconds of discussion from each Justice. Therefore, reliance upon the Supreme Court can lead to bitter disappointment. The Supreme Court's preoccupation

[2] See *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 82 (1963).

with hearing and deciding obscenity cases each term, in numbers greater than the subject matter would normally appear to require, arises primarily from an inability of the Justices to agree with each other on any point of the subject of obscenity.

It is unfortunate that the book went to press before the United States Supreme Court decisions[3] of June 22, 1964, in which the controversial *Tropic of Cancer* and other items were cleared after having been banned by courts of last resort in various states. Although the actual opinions of the Court did not materially clarify past confusion, the Court's action appears finally to have convinced the state courts that the United States Supreme Court will not countenance blanket prohibition of sexual material.[4]

Although the Ernst-Schwartz book is intended for laymen, it might well serve lawyers better than laymen. I can think of no book better designed to bring a lawyer up to early 1964 in this field. Unfortunately, because the book was not designed for lawyers, case citations are omitted, law review articles are not cited, and much valuable material is omitted. The comments between the cases, often intended for laymen, are sometimes on the juvenile side. For example, in talking about a case decided by the Court of Appeals for the Second Circuit, which then consisted of Judge Learned Hand, Judge Augustus Hand, and Judge Manton, the authors observe: "As for Learned Hand's colleague, Judge Manton, he later left the bench under charges of corruption—which shows that not all judges, not even on the Second Circuit, are good men." (P. 113.) But the judges do better. For example, in contrast, see District Judge Woolsey's opinion in *United States v. One Book Called "Ulysses"*:[5]

> Joyce has attempted—it seems to me, with astonishing success—to show how the stream of consciousness with its ever-shifting kaleidoscopic impressions carries, as it were on a plastic palimpsest, not only what is in the focus of each man's observation of the actual things about him, but also in a penumbral zone residua of past impressions, some recent and some drawn up by association from the domain of the subconscious. (P. 97.)

Such contrast between the case material and the authors' comments between the cases sometimes gives a roller-coaster effect. Despite this, the volume is a worthy addition to the available materials in a field overstocked with substandard books and short on quality contributions.

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[3] Jacobellis v. Ohio 378 U.S. 184 (1964) (movie, "Les Amants" cleared); A Quantity of Copies of Books v. Kansas, 378 U.S. 204 (1964) (bookburning statute unconstitutional); Tralins v. Gerstein, 84 Sup. Ct. 1903 (1964), *reversing mem.* 151 So. 2d 19 (Fla. Dist. Ct. App. 1963) (state court reversed on banning of *Pleasure Was My Business*); Grove Press, Inc. v. Gerstein, 84 Sup. Ct. 1909 (1964), *reversing mem.* 156 So. 2d 537 (Fla. Dist. Ct. App. 1963) (state court reversed on banning of *Tropic of Cancer*).

[4] The Illinois Supreme Court vacated two opinions after the above decisions. People v. Bruce, 32 U.S.L. WEEK 2687 (Ill. June 18, 1964) (Lenny Bruce's night club act had been held obscene); Haiman v. Morris, 32 U.S.L. WEEK 2686 (Ill. June 18, 1964) (*Tropic of Cancer* had been held obscene).

[5] 5 F. Supp. 182, 183 (S.D.N.Y. 1933).