BOOK REVIEWS

FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL. By JAMES C. N. PAUL AND MURRAY L. SCHWARTZ. New York: The Free Press of Glencoe, Inc., 1961. Pp. xv, 368. $7.50.

James Jackson Kilpatrick †

This is a work of advocacy by two of the nation's most distinguished scholars in the field of first amendment freedoms—James C. N. Paul, Professor of Law and Director of the Institute of Legal Research of the University of Pennsylvania, and Murray L. Schwartz, Professor of Law at the University of California at Los Angeles. Having collaborated before in the study of the elusive and perplexing problems of obscenity censorship,[1] they have condensed a decade of intensive labor and thought in this solid and persuasive volume.

The problems of obscenity censorship are elusive because few persons will agree broadly on what obscenity is; they are unusually perplexing because even in the narrow areas where agreement can be reached—as in "hard-core" pornography—substantial doubt exists that obscenity is demonstrably a bad thing. These problems do not exist in other fields of the law—especially criminal law—or at least they do not exist to the same degree. Concepts of criminal action come and go, but they do not come and go very far. Murder, rape, arson, assault, larceny, fraud—these offenses are easily defined; they are subject to established forms of proof; and they are universally regarded as evil.

But obscenity? The concept changes year by year, region by region, court by court, book by book, as do the expressed limits of permissible control. The only consistency the authors can discover is the consistency of inconsistency. Even the United States Supreme Court shares this. Having sustained an Ohio film censorship statute in 1915 in an opinion which dismissed motion pictures as "business pure and simple," [2] the Court held thirty-seven years later that motion pictures were constitutionally protected speech,[3] and in 1959, reviewing New York's censorship of the film of *Lady Chatterley's Lover,* rebuked the state for striking "at the very heart of constitutionally protected liberty." [4] In a later case, pursuant to

† Editor, The Richmond News Leader. Author of *The Smut Peddlers* (1960).

[1] Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship,* 106 U. PA. L. REV. 214 (1957).

[2] Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 244 (1915).

[3] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). This reversal had been heralded by dictum in United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

[4] Kingsley Int'l Pictures Corp. v. Regents of the University, 360 U.S. 684, 688 (1959).

the rule of inconsistency, the Court seems to have said that censorship of motion pictures might be valid after all.[5] Perhaps these decisions can be harmonized,[6] but it is apparent that nonprofessional public opinion, which is deeply concerned to find the available limitations on the bar against prior censorship, has been perplexed by the evolution of judicial opinion in this area.

Professors Paul and Schwartz trace the same confusing trail through rulings of the Post Office Department and the Bureau of Customs. Nearly a hundred years of high court opinions to the contrary notwithstanding,[7] they strongly doubt the constitutionality of postal censorship as it has been practiced. They argue quite convincingly that the constitutional power of Congress to establish post offices and post roads was never intended to vest in the Postmaster General the power to say that a postcard bearing a Goya painting may not be placed in the mails.

The great virtue of this volume, distinguishing it from a number of other works in the field, is that the authors have managed simultaneously to keep an eye on the stars and an eye on the grass roots. Ideally, in their view, censorship in any guise should be cut to an irreducible minimum: the functions now vested by custom in the Postmaster General should be abolished or transferred to the federal courts; the various state and local laws dealing with obscene publications should be recast in order to narrow their application sharply. Yet practically, the authors acknowledge that public opinion will consent only to gradual reform of laws in this field. And they agree that the people have a valid right to restrain certain forms of expression regarded as obscene and that laws properly may be enacted to punish those who willfully purvey obscene materials to children or deliberately seek "to shock people or subject them to emotional distress, against their consent, without justification, and under circumstances transcending community standards and involving a likelihood that mental disturbance—serious affront, shame, fear or disgust—will in fact result." (P. 214.) Again, the "reckless commercial exploitation of obscenity" (p. 216) ought not to be tolerated.

This reasoning leads the authors to two recommendations of great merit. First, the notion should be abandoned that any given object is always, in every circumstance and to every viewer, "obscene." (Pp. 205-

---

[5] Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

[6] Between the *Mutual Film* decision and the *Paramount Pictures* case, motion pictures evolved from "silent" to "talkie"; and perhaps *Times Film* was not a reversal of the trend to limit prior censorship, but a careful application of the exceptions to the doctrine of Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931), see 109 U. PA. L. REV. 1010 (1961). Those who had hoped that the Court might draw some clear lines when presented with Pennsylvania's mild and prudent new motion picture censorship law were disappointed when, the law having been invalidated on both state and federal constitutional grounds by the Pennsylvania court, the Supreme Court denied certiorari in William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 173 A.2d 59, *cert. denied*, 82 Sup. Ct. 174 (1961).

[7] *E.g.*, Public Clearing House v. Coyne, 194 U.S. 497 (1904); *Ex Parte* Jackson, 96 U.S. 727 (1877); *cf.* Roth v. United States, 354 U.S. 476 (1957).

06.) Second, the law should concern itself "more with antisocial *conduct* in the circulation of obscene forms of communication and less with the idea that obscene creations, like deodands of old, must be totally expunged from the face of the earth." (P. 217.)

This is a common sense approach which should commend itself to legislative acceptance and judicial approval. It is obvious, when one thinks about it, that even the most shocking photograph of the sexual act is not "obscene" (in the sense that it corrupts the individual or may tend to promote antisocial conduct) to the serious student of human behavior; it is merely one more aberration for the files. Also, it is evident that there is a vast difference in the potential damage to society—which is the ultimate evil the law ought to be concerned with—between the collector's importation of a rare *Lysistrata* and the cynical smut peddler's commercial exploitation of a children's mailing list.

In the authors' view, the purveyors, not the books, should be the target of the law's thrust. But even the purveyors, they suggest, should be protected by ground rules that limit the definition of obscene expressions to those publications that meet three criteria: (1) their basic appeal is solely to the prurient interest, (2) their predominant effect is to stimulate sexual desires or morbid sexual impulses, and (3) they offend the minimum standards of candor. (Pp. 214-16.)

The authors have organized their work to appeal both to the layman, whose reading might be impeded by footnotes and case citations, and to the specialist, who will find in appendices all the detailed information he reasonably could ask. They have carefully avoided sensationalism; their effort throughout has been to acknowledge both the wrongs of censorship and the realities of public sentiment. The specific program they advocate would go far to eliminate the worst follies of bureaucratic censorship while leaving to the people their undoubted right to fix standards of public decency and public morality in the only rough fashion in which they ever can be fixed, according to what Judge Learned Hand once described as "the present critical point in the compromise between candor and shame at which the community may have arrived here and now." [8]

CASES AND MATERIALS ON TORTS. By Charles O. Gregory and Harry Kalven, Jr. Boston: Little, Brown and Company, 1959. Pp. lix, 1309. $12.50.

John David Stoner †

The dynamic quality of tort law and its public nature are depicted with contagious enthusiasm and searching openmindedness in this casebook.

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

† Assistant Professor of Law, Rutgers University, South Jersey Division. A.B. 1951, LL.B. 1955, Harvard University.

Furthermore, the numerous excerpts from the secondary literature and the comments explaining whether a citation is to a leading general article or to one discussing a narrow point make the secondary literature more accessible than does a standard bibliography.

The public policy emphasis is established by two questions underlying the entire book: (1) What rules for the allocation of loss are in the public interest? and (2) What is the role of tort law in our society's regulation of conduct?

Doctrinal problems, however, are not slighted. Apparently recognizing the danger that emphasizing public policy may result in superficial coverage of established doctrines, the editors use questions [1] and excerpts from scholarly articles [2] to keep the doctrinal implications of specific rules before the reader.

Indeed, the excerpts are so extensive, especially in part one, that they may steal from teacher and students the excitement of developing for themselves the ideas expounded. However, this does not seem to be too great a sacrifice, especially for the neophyte, be he teacher, student, or practitioner. The beginner can profit by all the help he can obtain from the masters, and ample opportunity still exists to discuss other problems only suggested by the editors.

Some of these suggestions illustrate the flexibility which should characterize the openmindedness necessary for a full utilization of legal doctrines. For example, the questions comparing contributory negligence with assumption of risk (p. 205), asking the reader whether *Polemis* [3] and *Palsgraf* [4] "illustrate two different legal rules for dealing with the same type of case" (p. 339), and inviting a comparison of the right of privacy with defamation (p. 912), remind the reader of the possibility of the use of alternate legal doctrines and assist him in the delineation of the boundaries of these doctrines.

Openmindedness is also necessary for full discussion of policy questions. It is reflected here in the editors' recognition that numerous institutions, both governmental and private, may be used to implement public policy. In addition to the common-law approach, these schemes include nongovernmental institutions,[5] statutory modifications,[6] administrative agencies,[7] and combination plans.[8] Nor is this just a catalogue of various

[1] *E.g.*, ". . . is or is not contributory negligence a defense . . . [in an ultrahazardous activity case under the *Restatement of Torts*]?" (P. 543.)

[2] *E.g.*, Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1-13 (1951) (pp. 184-92); Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147, 1153-56 (1942) (pp. 132-34).

[3] *In re* Polemis, [1921] 3 K.B. 560.

[4] Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[5] *E.g.*, insurance provisions which do not depend on tort liability (pp. 565-71) and the Fashion Originators Guild to combat "style piracy" (pp. 1224, 1292-99).

[6] *E.g.*, comparative negligence statutes (pp. 241-52) and copyright and patent statutes (pp. 1185-1206).

[7] *E.g.*, the Federal Trade Commission (pp. 1097-1103).

[8] *E.g.*, Professor Ehrenzweig's "Full Aid" Insurance, embodying common law, statute, and voluntary insurance. (Pp. 774-79.) See EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM 31-40 (1954).

proposals. The editors explore underlying policy reasons with more searching questions [9] and scholarly excerpts.[10]

This openmindedness is also reflected by the numerous materials permitting insights into the judicial process and the relative merits and limitations of that process. Here, however, the book may well be supplemented. Brandeis' dissent in the *International News* case,[11] pointing to the legislature's comparatively large investigatory powers and wide range of possible remedies, could be supplemented by materials reminding the reader that sometimes the judiciary seems better adapted to law reform than the legislature.[12] And the cases on immunities could be supplemented by more materials concerning prospective versus retrospective law reforms [13] and the interplay between the judiciary and the legislature in dealing with this problem.[14]

In addition to this suggestion that the materials in the casebook may be improved by supplementary readings on the judicial process—particularly where students of torts are not beneficiaries of a companion course devoted solely or largely to such problems—there are three other caveats which are appropriate.

(1) An even greater stress on factual analysis than is usually necessary may be required to compensate for the tendency to slight facts engendered by the editors' substitution of their own fact summaries for the judges' statements of facts.

(2) Additional information may be needed to correct possible misleading impressions conveyed by the casebook in at least three instances: (a) the impression that the failure to cooperate must always be prejudicial to the insurance company to be an effective defense in a case on a liability insurance policy (pp. 579-85) overlooks a 1958 Illinois case [15] which the two newest insurance casebooks have picked up as a principal case; [16] (b) the use of FELA cases without any warning about their special

---

[9] *E.g.*, ". . . whether the accident-prone hypothesis does not . . . provide a powerful argument against distributing the accident losses widely." (P. 703.)

[10] *E.g.*, DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 266-72 (1951) (pp. 650-52); HOLMES, THE COMMON LAW 77-82, 88-96 (1881) (pp. 57-63); MORRIS, TORTS 248-53 (1953) (pp. 611-14).

[11] International News Service v. Associated Press, 248 U.S. 215, 262-67 (1918).

[12] *E.g.*, Green, *Tort Law Public Law in Disguise*, 38 TEXAS L. REV. 257, 269 (1960); Wright, *The Adequacy of the Law of Torts*, 1961 CAMB. L.J. 44, 47-48. The casebook does have at least one excerpt, *Compensation Mess*, Fortune, April 1954, pp. 78-82, that points out that social legislation may become dated. (Pp. 723-24.)

[13] *E.g.*, Molitor v. Kaneland Community Unit District, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960).

[14] *E.g.*, Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958) (abolishing the charitable immunity doctrine); N.J. Laws 1958, ch. 131 (partially reinstating charitable immunity doctrine for one year only); N.J. STAT. ANN. §§ 2A:53A-7 to -11 (Supp. 1960) (partially reinstating charitable immunity doctrine without time limit).

[15] Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958).

[16] KEETON, BASIC INSURANCE LAW 470 (1960); PATTERSON & YOUNG, CASES ON INSURANCE 626 (4th ed. 1961).

flavor may mislead readers studying the relation between court and jury in the case of *Wilkerson v. McCarthy;*[17] and (c) The sentence, "The rule in the overwhelming majority of American jurisdictions is that truth, if proved, is a total defense in defamation, regardless of defendant's motives" (p. 911), hardly leaves the impression that thirteen states require additional qualifications such as good motives or justifiable ends to make truth a complete defense.[18]

(3) Additional information or cross references to other sections of the book may be needed to put some cases in proper perspective. For example, a reader may gloss over the anomaly in *Anderson v. Bingham & Garfield Ry.*[19] of a detailed discussion of last clear chance and its effect on contributory negligence in a case where no negligence need be shown. If the reader stops to consider that contributory negligence is usually not a defense in a strict liability situation, he may realize how the continued use of a term ("negligence") when it is inapplicable (negligence need not be shown in a Safety Appliance Act case) may blind courts to the paradox inherent in such a question as whether contributory negligence and last clear chance have any relevance in a strict liability situation.

Finally, the editors' apology that "the book is rather long, but the field is a big and busy one" (p. vii) evokes a plea for a reconsideration of what topics are fundamental to a torts course. Perhaps a torts casebook should be long enough to enable a teacher to comply with Professor Kalven's recent suggestion that the teacher should cover the entire subject matter of torts over a number of years, even if his students, in a given year, do not. The result, however, is to leave unanswered what Dean Griswold has designated as the "basic problem of legal education today . . . [:] to cut away much of the detail—not all of it—and to concentrate on fundamentals."[20]

The common statement that "something must be sacrificed" to cover the material in most torts casebooks in one year reflects the torts specialists' inclination to regard the entire subject matter of torts as fundamental and suggests that no further cutting can be done. Perhaps all the fundamentals could be covered if alternate topics were selected from year to year. These could be studied in sufficient depth to develop an approach sufficiently openminded to maintain flexibility in the use of legal doctrines and social institutions, an analysis sufficiently searching to avoid superficial generalities, and an understanding of both the judicial process and the dynamic quality and public nature of the law of torts. The topics of the substantive law of torts not so discussed in a given year would need to be covered

---

[17] 336 U.S. 53 (1949).

[18] See 1 HARPER & JAMES, THE LAW OF TORTS § 5.20 nn.6, 7 (1956), for a list of such jurisdictions, to which must be added Hawaii, HAWAII REV. LAWS § 294:6 (1955).

[19] 117 Utah 197, 214 P.2d 607 (1950).

[20] Griswold, *Some Thoughts About Legal Education Today,* Harv. L. School Bull., Dec. 1959, pp. 3, 4.

only in enough depth to permit recognition of appropriate areas of inquiry when these topics are confronted.

In other words, it is suggested that the advantages of this casebook, except for its contagious enthusiasm and accessible bibliography, are basic. All the critical suggestions, including those relating to such fundamentals as an understanding of the judicial process and an ability to analyze facts, can probably be met by supplementation and emphasis. Moreover, some of the suggestions relate only to detail, and the person for whom such specific detail is vital should not be relying exclusively on a casebook for a mastery of the subject matter.