Duquesne Law Review

Volume 10 | Number 1 Article 10

1971

The Obscenity Commission Report - An Editor's Note

The Editor

Commentaries

The Obscenity Commission Report— An Editor's Note

In October, 1967 Congress established an advisory commission (1) to study the effect of obscenity upon the public, particularly minors, and its relationship to crime and other antisocial behavior; and, (2) to recommend legislative action necessary to regulate traffic in obscenity without interfering with constitutional rights. During the fall of 1970 the Commission on Obscenity and Pornography issued its report. The Commission majority recommended that legal restriction of obscene books, pictorials, and motion pictures be totally abolished for adults and that the restriction of obscene books be lifted for children. Such a prescription for legal reform was largely based on conclusions the Commission drew from its studies concerning the effects of obscenity.

To date legal periodicals have either ignored or refused to treat any aspect of the Commission's work. *Duquesne Law Review* believes that certain areas of the Commission's Report deserve responsible comment. Towards that end the editors have solicited professional opinion, both pro and con, on its methodology and findings.

The primary area of inquiry treated in the first issue of the *Review* concerns the work of the Effects Panel of the Commission. Questions discussed are often factual, social scientific and philosophical rather than purely legal. Some of the questions raised concerning the Commission's empirical research are as follows: Were the most relevant criteria of effects employed? How valid were the measures of impact? How much reliance can be placed on self report of responses to erotica? How representative were the populations studied? Do statistical correlations provide a strong basis for inference? May certain areas of inquiry be treated in terms of empirical research? Were the right kinds of questions asked to determine public opinion? Were the right kinds of effects studied in determining potential harm? Was the Commission consistent in its interpretation of data? Did it overgeneralize? Did it fail to explain apparent inconsistencies? Could it?

The importance of dissecting the Commission's empirical research

for the legal community is twofold. First, light may be shed on the wisdom of the Commission's legislative recommendation to abolish existing controls on commercial sales and dissemination on obscenity. Second, a deeper understanding of how to resolve questions of social policy and law generated by the holding and philosophy of *Stanley v. Georgia*[1] may be obtained.

Stanley, decided prior to the issuance of the Commission's Report, held that the mere private possession of obscene matter cannot constitutionally be made a crime. The correlative right of adults to acquire obscene materials also received express recognition.[2] Interesting questions arise from a logical extension of the court's basic holdings. If one person has the right to read and procure obscene material, then some other must have the right to disseminate it. Can the right to disseminate such materials be any narrower than the right to receive and possess? If so, are the latter rights effectively gutted?

It should be evident from the foregoing that the impact of the *Stanley* decision cannot be arbitrarily confined to obscenity possession cases. Certain evaluations and commitments made by the Supreme Court in reaching its result have significance for the commercial distribution of erotic material. Since obscene speech is no longer per se denied first amendment protection, the Court will have to take a closer look at the nature and extent of the government's interest in prohibiting sales in particular contexts. Four basic governmental goals or interests have been advanced as standard justifications for restricting the dissemination of obscenity: prevention of crimes of sexual violence, protection of adults from moral depravity and corruption (or sometimes preservation of the moral and legal fabric of our society), prevention of exposure of children to such material, and prevention of obtrusive, publicly offensive displays of obscene matter. The studies of the Commission as to effects and public attitudes toward obscenity, discussed on subsequent pages, constitute a source of information to either buttress or refute a particular governmental interest. As such, the authoritativeness of the Commission's work in a particular area (in terms of methodology and findings) is of relevance to the legal community.

Although *Stanley* apparently rejected the above mentioned govern-

1. 394 U.S. 557 (1969).
2. *Id.* at 564-65.

ment interests[3] in preventing sex crimes or protecting people's minds as sufficient justifications for obscenity censorship, certain points should be noted. First, the court treated either issue in only summary fashion. Second, the court left itself an "out" in both instances. In dealing with the anti-social behavior argument it noted that given the present state of knowledge, "There appears to be little empirical basis for that assertion."[4] It is reasonable to infer that a fuller consideration of the issue could be obtained should such an empirical basis develop. Similarly in rejecting the right of the state to protect an individual's mind from the effects of obscenity (in terms of controlling his private thoughts) the court indicated a certain residuum of state power to control public dissemination of ideas inimical to public morality.[5] Hence, unless one assumes a static attitude by the court towards issues treated in summary fashion, debates concerning harmful short and long term effects of obscenity are still relevant to the legal theorist or practitioner.

Finally, the debate may have the immediate effect of giving courts policy guidance in determining how far and how fast to extend the *Stanley* principle. In this regard two cases currently before the Supreme Court for decision should be noted. The first held that a statute prohibiting the selling, giving away, or possessing of obscene matter was unconstitutional insofar as it made mere possession a crime.[6] In short the case confined *Stanley* to its narrow holding, believing it had no bearing on the regulation of sales of obscene materials. By contrast the other case applied the *Stanley* privilege broadly to a public theater (exhibiting a film assumed to be obscene) which controlled its advertising and admissions in a way that limited its audiences to consenting adults.[7] The latter case would appear to extend the right to view obscene materials in an area one might term "privately public"; at the same time it would seem to vindicate the right of commercial distribution under such conditions.

In making the sensitive determination of whether to extend *Stanley* or confine it to its facts a court would do well to consider certain

3. *Id.* at 563-64.
4. *Id.* at 566.
5. *Id.*
6. Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex.), *cert. granted,* 396 U.S. 954 (1969).
7. Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), *prob. juris. noted,* 397 U.S. 985 (1970).

issues examined by the *Report of the Commission on Obscenity and Pornography*. At the same time it should critically examine the authoritativeness of the Commission's pronouncements on those same issues. *Duquesne Law Review* believes the commentaries which follow (in this and subsequent issues) will aid a court greatly in such a task.