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Paul & Schwartz: Federal Censorship: Obscenity in the Mail

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FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL. By *James C. N. Paul* and *Murray L. Schwartz.* New York: Free Press of Glencoe. 1961. Pp. 383. $7.50.

This is in many ways an exemplary piece of contemporary legal scholarship. It is a monograph on a single legal topic. The topic is rich in color and interest and has social significance. And the study was planned as one in depth, approaching the problem along several dimensions by paral-

leling a survey of legal doctrine with a close look at legislative history,[1] and with a close look too at the law in actual operation. This last in particular has required use of the research techniques of the field study, and among other things, the book may well be viewed as a substantial addition to the new and growing literature of empirical legal studies. Further, the authors do not merely report but add a critical essay exploring the rationale for obscenity regulation and providing a series of recommendations as to the proper role of the federal government in this field. *Federal Censorship* thus shows evidences both of an impressive amount of digging for information and of an impressive amount of reflection on policy. Finally, if read closely, it furnishes a welcome storehouse of ammunition in its data and conclusions for those who, like myself,[2] would like to see postal censorship disappear from the American scene.

Yet despite this impressive roster of virtues, there were for me certain puzzling shortcomings in the book. With the customary perversity of the reviewer I shall devote my space to an elaboration of these points rather than attempt an evaluation of some of the authors' challenging proposals for reform of the law in this area.[3]

A first difficulty is that the book seems at many points to lose its focus. It would be difficult with a topic of this sort to allocate satisfactorily space and emphasis between obscenity problems and postal problems.[4] But I cannot down the impression that the authors became too interested in the general obscenity problem. One consequence is that the book is open to the charge of rehashing much that has become familiar in the prior full studies of the law of obscenity that we have had from Lockhart and McClure and from St. John-Stevas.[5] The other consequence is that at points they underplay problems distinctive to postal control. Since we have had so little serious

1 The legislative history yields perhaps the most refreshing materials in the book. There is fascinating material from Lord Lynhurst's witty reactions to Lord Campbell's Act in 1857, to the Calhoun debates in 1836 over proposals for postal censorship of abolitionist tracts, to the one-man lobby of Anthony Comstock, to the debate between Senator Cushing and Senator Smoot in 1930 over the obscenity provisions of the Tariff Act.

2 My own views on the law of obscenity have been set forth in the *Metaphysics of the Law of Obscenity*, 1960 SUPREME COURT REV. 1; and *Obscenity and the Law*, 27 LIBRARY Q. 201 (1957); also in Book Review, 24 U. CHI. L. REV. 769 (1957).

3 The book covers not only postal censorship but Customs as well. The authors, in their final recommendations, leave some role for federal administrative screening via Customs. See pp. 227-28; 235-37.

4 The most arresting of the authors' ideas is the effort to treat obscenity as a relational concept depending on the audience and the manner of circulation. In developing this approach, the authors properly find great significance in the *Kinsey* case, United States v. Thirty-one Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957). This sort of graduated "adults only" approach to the problem seems to me attractive in theory but probably "not worth the candle" in practice. See pp. 205-19.

5 Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960); Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954); and ST. JOHN-STEVAS, OBSCENITY AND THE LAW (1956).

study of these problems to date, this seems to be something of a pity. I had hoped to find the arguments on the legality of postal censorship vigorously marshalled and scrutinized; instead the relevant materials are scattered throughout the book and the conclusions are stated so quietly that unless one reads with care he may well miss the authors' conclusions that postal censorship has probably been unconstitutional[6]—as well as inadvertent from the viewpoint of Congress[7]—for these many years, and should be abandoned in the future.[8]

Certainly some good points are slighted. There is little explicit wrestling with the anomaly of applying a national standard of "community sentiment" in this area, given the wide variety of sentiments in New York and Massachusetts, for example.[9] And this without the use of the jury. Nor do we ever get a report from the interview materials on how the administrators themselves sought to solve this dilemma.

Again because they decide to stick with obscenity and ignore other forms of postal censorship,[10] the authors do not confront the interesting fact that Congress has so rarely attempted to build from the rationale on which postal activity is said to be legally justified to any other form of censorship—although if the legal arguments are good at all they would give Congress far wider power over communications than it has thus far chosen to exercise. This seems to have been the point of the celebrated *Esquire* case[11] which the book treats as primarily concerned with limiting the sanction of revocation of second-class mail privileges. The larger significance of the case, I think, lies in the obvious reluctance of the Court to permit postal censorship to be expanded beyond obscenity.

Nor does the book pay sufficient attention to the significance of the old precedent that the fourth amendment does apply to the postal power.[12] This

6 See pp. 31-37, 159, 166.

7 See pp. 23, 28, 231. It is perhaps unfair to charge that the authors failed to anticipate the reaction of Mr. Chief Justice Warren and Justices Brennan and Douglas to the statutory construction problem in the very recent decision in Manuel Enterprises, Inc. v. Day, 370 U.S. 478 (1962). But it is striking that reading the book would never prepare one for the fact that, in 1962, three Justices of the United States Supreme Court would seriously and flatly hold that Congress had never authorized postal censorship. Further, it might be observed that the legislative history materials are arguably more fully and effectively handled in the opinions of both Justices Brennan and Clark than in the book—I think primarily this is the result of their being vigorously marshalled in the opinions.

8 See p. 227. The book also suggests a specific list of reforms if it is to be retained; see pp. 233-35.

9 In Manuel Enterprises, Inc. v. Day, 370 U.S. 478 (1962), it is refreshing to find that Mr. Justice Harlan did confront this problem squarely. He stated: "We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." *Id.* at 488.

10 See p. xi.

11 Hannegan v. Esquire, 327 U.S. 146 (1946), discussed in the book at pp. 73-77.

12 *Ex parte* Jackson, 96 U.S. 727 (1877). As the authors carefully point out, this part of the opinion is dictum, but an unchallenged dictum. See pp. 32-33.

raises the puzzler of why then the first amendment does not equally apply; and, moreover, it illuminates on what a curious house of cards the postal censorship power has been built. Under this ruling the post office cannot administratively touch first-class mail; hence, the entire edifice of postal control rests on the fact of mail subsidies and on the permission given for that reason to the postal authorities to inspect second-class mail.

Finally, the intricate and mysterious legal issue of the status of prior restraints keyed to obscenity seems to me not to have been dealt with persistently enough. Are the precedents on movie censorship applicable to postal censorship?[13]

There are two other puzzles with the book that reflect the desire of Professors Paul and Schwartz to give their study a touch of sociological significance and perhaps suggest points of a more general reach. First, the authors decided to view the problem in historical perspective and to organize their exposition along chronological lines. As a study in the process of legal and social change I do not think the book comes off and I think it was a mistake to cast it in so ambitious a mold. The large time periods into which the basic exposition is divided struck me as highly arbitrary and lent themselves to such unfortunate subtitles as: "Part II. Development from 1930 to 1945: How Law and Censorship Responded to Social Change"; or again: "Part III. Post War Developments: Another Period of Evolution, 1946 to 1956." Presumably it is this perspective, too, which produced sentences such as: "What was happening?—sober, intelligent, objective Americans wanted to know. Where were we going? Where should we be going?"[14]

Moreover, this historical structure produces a very choppy and confusing sequence as the authors hop from tracing legal doctrine to tracing legislative history to tracing law in action over the four major time periods. I have rarely encountered a book which seems so much the victim of its basic plan of organization.

We are told in the introduction that the study involved considerable empirical research with interviews with officials, digging in old files, etc.[15] And the reporting out of this effort to document the law in action looms large in exposition. It is for me the key puzzle of the book that I did not find the harvest from this empirical attack more rewarding. To a minor extent this may be the fault of the authors; they do not report their field work directly and with the professional empiricist's touch. We never learn how this part of this study was designed, just who was interviewed, and just what the results from the interviews were. But the difficulties in their path must have been formidable. Presumably they could find little in the way

[13] The book suggests that the answer may be "no"; see p. 159. There is a dangerous tendency to handle constitutional issues by counting Justices—a practice that may have already rendered certain conclusions obsolete upon the appointments of Justices White and Goldberg.

[14] P. 188.

[15] Pp. xii-xv.

of existing records—their best material often seems to have come from cases that reached the courts and the official reports.

The topic appears in retrospect to have been against them too. It is not clear just how one would measure *how much* postal censorship there has been. And with a substantive criterion like obscenity it is not clear how one can profitably compare the law on the books with the law in action. The authors spend time and effort carefully collecting and describing for us particular instances of postal censorship; these items are, to be sure, colorful and amusing, but they do not tell us much since we do not know with what to compare them. *Federal Censorship* thus provides a major instance for consideration in estimating the kind of enlargement of insight the current movement toward sociological studies of legal phenomena is likely to give us.

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