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THE FIRST AMENDMENT AND FREEDOM OF SPEECH IN AMERICA

THE ISSUE

A problem of increasing concern in American society has been that of the burgeoning production of pornographic materials in the form of books, magazines, photographs, films, and motion pictures. While this problem has in itself attracted considerable attention, an even more notorious aspect of it has been the use of children in pornography. Recent accounts and studies by the police departments of various cities, by social workers and psychiatrists, and by local leaders indicate that the abuse of juveniles in the production of obscene materials is increasing. Authorities estimate that pornography in the United States has revenues of $1 billion a year and that child pornography ("kid-porn") accounts for 10% of this. The Los Angeles Police Department has conducted an extensive survey of this type of pornography and has concluded that 70% of the child pornography market caters to homosexual depictions of boys, that 25,000 juveniles under 17 are currently involved in this aspect of the trade alone. In Mineola, New York, a pornographic ring was broken up which was estimated to make $250,000 a year.

Many congressmen and senators have expressed concern over the brutalizing effects of the production process on the children who are forced, intimidated, or gulled into participating. This aspect of the issue is not seriously in question; and, accordingly, several bills have been introduced in both the House and Senate to penalize the production of child pornography and to prevent more effectively the abuse of juveniles in its production.

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However, due to the well-attested difficulties of apprehending the producers, some legislators feel that a more stringent approach is necessary. They point out, as have police officials, that pornographers are often transient and do not sign their work. Much of the production is on a short-term basis and occurs in private homes, motels, or abandoned locations. Children are often not the most reliable witnesses and cannot identify their victimizers; and the process of testifying may be traumatic for them. Thus, the legislators believe the only effective way to curb pornography, especially of this genre, is at the level of distribution rather than at the level of production. They advocate the punishment of the mailhouses and booksellers that sell child pornography.

This aspect of the proposed legislation is more controversial. Critics charge that such provisions would be a violation of the First Amendment, particularly if passed by Congress. The American Civil Liberties Union, for example, has supported the prosecution of the producers, but argues that prosecution of the distributors would be unconstitutional. When confronted with the difficulties of the police in this field, Alan Reitman of the ACLU said, "The police will just have to try harder." Congressman Paul Findley (R-Ill.) has stated, "The first amendment's guarantee of free speech and a free press cannot be set aside even to gain a conviction of a smut peddler."[1] On the other hand, Congressman Robert Dornan (R-Calif.) has stated, "As anyone who really understands the Constitution knows, the first amendment was never intended to protect gross indecency and the corruption of the public marketplace."[2]

In order to review the background of this debate, which goes to the core of meaning of our Constitution, let us examine the historical and legal implications of the First Amendment.

THE FIRST AMENDMENT: HISTORICAL AND LEGAL BACKGROUND

The First Amendment states the following:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

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1. Congressional Record, March 2, 1977, p. E1121.

2. Congressional Record, May 18, 1977, p. H4686.

> assemble, and to petition the government for a redress of grievances.

Throughout American history many historians and legislators have believed that this statement guarantees an untrammeled right to say, write, or depict any and every opinion, argument, or statement whatever (though sometimes they would except libel), that the First Amendment creates the United States as an "open society." But whatever the value of the recognition of such rights and whatever the implications of the concept of an open society, there can be little doubt that the Founding Fathers were not for the most part proponents of this interpretation, nor did they believe in an open society as it has come to be thought of today.

Benjamin Franklin, for instance, in an early essay, "An Apology for Printers" (1731), argued that vice and immorality in printed material for public consumption should not be countenanced. In 1789, writing on the First Amendment in "The Court of the Press," Franklin said, "few of us, I believe, have distinct Ideas of Its Nature and Extent," indicating that he did not believe it had very large implications.[3]

Alexander Hamilton, writing in Federalist No. 84, argued that freedom of the press was indefinable and opposed the whole idea of a Bill of Rights in the first ten amendments. One of the men who, after Madison, was most responsible for the framing of the Constitution was James Wilson of Pennsylvania. Wilson argued in the ratifying convention of Pennsylvania that

> The idea of the liberty of the press is not carried so far as this [the open society idea] in any country -- what is meant by liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual.[4]

In 1790 Wilson drafted the state constitution of Pennsylvania. He included a long section on liberty of the press, in which he stated,

> The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject,

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3. Leonard W. Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression (New York: Harper and Row, 1963), pp. 126-127, 200.

4. Op. cit., pp. 201-202.

> being responsible for the abuse of that liberty (Article IX, section 7). [Emphasis added][5]

This interpretation of the freedom of the press is quite different from that upheld by advocates of an open society. It argues that "liberty of the press" consists of liberty from prior inspection and censorship of publications before they are distributed, but that after publication the authors are responsible for what they said and can be prosecuted for it if they harmed public safety or morality or were guilty of libel. Delaware and Kentucky also had similar provisions in their constitutions. It is an interpretation that was based on the ideas of the eighteenth century English jurist William Blackstone, whose defense of the rule of law greatly influenced the Founders.

Others of the Founders who qualified their endorsement of the First Amendment were Hugh Williamson of North Carolina and John Adams. The latter believed that the press should be free within the bounds of truth but that falsehoods, scandals, and bad motives should be criminally prosecuted. Williamson also expressed belief in the Blackstonian idea that when government placed no prior restraints or license on publishing, "the press became perfectly free." John Marshall, in the Virginia ratifying convention of 1788, made statements that implied his belief that Congress could suppress minority critics if it had the support of public opinion.[6]

It might be objected that many of these men -- e.g., Adams, Hamilton, and Marshall -- were on the "conservative" or "authoritarian" wing of the Revolution and that others, such as Jefferson and Madison, expressed more libertarian views. It is true that Jefferson and Madison did express a wider interpretation of the First Amendment, especially at the time of the Sedition Act. But it should be noted that this Act was passed by their political opponents, that the U.S. courts never denied its constitutionality, and that Jefferson, when he became President, did not hesitate to support the prosecution of Federalist editors under the very Act. Jefferson's early opposition to the Sedition Act was clarified by him in a letter to Abigail Adams on September 11, 1804:

> While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so.[7]

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5. Op. cit., p. 203.

6. Op. cit., pp. 216-217.

7. Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976), p. 82.

In 1803, writing to Governor McKean of Pennsylvania, Jefferson said,

> ...the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses.[8]

And in his Second Inaugural, Jefferson said,

> These abuses of an institution [the press] so important to freedom and science are deeply to be regretted, inasmuch as they tend to lessen its usefulness and to sap its safety. They might, indeed, have been corrected by the wholesome punishments reserved to and provided by the laws of the several States against falsehood and defamation, but public duties more urgent press on the time of public servants....[9]

In other words, Jefferson several times expressed the belief that it was indeed unconstitutional for the federal government to legislate against the abuses of freedom of expression but that the states were free and authorized to do so. This does not support the current popular view of Jefferson as an exponent of the "open society" so much as it does the view that he dreaded the centralization of power in Washington. In any case, Jefferson's beliefs did not restrain his Administration from prosecuting the Federalist editor Henry Croswell in 1801 for his attacks on Jefferson's party.

Thus it cannot be said that the Founding Fathers were libertarians in any modern sense or that they believed seriously in the theory that the United States was an open society by virtue of the First Amendment. Franklin, Wilson, Hamilton, Jefferson,

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8. The Constitution of the United States of America: Analysis and Interpretation: Annotations of Cases by the Supreme Court of the United States to June 29, 1972 (Washington, DC: U.S. Government Printing Office, 1973) p. 938, n.12.

9. Inaugural Addresses of the Presidents of the United States from George Washington 1789 to Richard Milhous Nixon 1973 (Washington, DC: U.S. Government Printing Office, 1974), p. 19.

and several other less important of the Founders believed in what today would be considered a very limited role for the First Amendment: It pertained to the federal government but not to the states or it pertained to antecedent restraints (prohibition or press licensing), or both. In almost every case, these men believed that government had the right and the duty to prosecute irresponsible or seditious publications that threatened public safety.

COURT DECISIONS

The Blackstonian concept that regards liberty of the press as consisting in the absence of prior restraints is not a mere legal antiquity. Until well into the twentieth century it was the dominant interpretation of the meaning of the First Amendment and was expressed by Oliver Wendell Holmes in 1907. Holmes later modified his interpretation in Schenk vs. U.S., where he gave his famous "clear and present danger" opinion; but one week later he expanded on his conception of the meaning of the First Amendment, with unanimous consent, in Frohwerk vs. U.S., 249 U.S. 204 (1919):

> ...it is necessary to add to what has been said in Schenk v. United States...only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity to every possible use of language....

Although the Supreme Court in the 1950s and 1960s considerably modified its interpretation of the meaning of the First Amendment and moved towards a wide libertarian concept, the current status of Supreme Court rulings on freedom of speech is far from recognizing a constitutionally mandated open society. A brief review of some of these decisions in two areas of First Amendment cases will serve to indicate the existing judicial consensus on this issue.

NATIONAL SECURITY

In Dennis vs. U.S., 341 U.S. 494 (1951), the Court upheld the conviction of eleven Communists for violation of the Smith Act, which forbids advocacy of violent overthrow of the government. In Yates vs. U.S., 354 U.S. 298 (1957), the Court overturned the conviction of several CPUSA leaders, but this decision was based on construction of the statute, not on the First Amendment. In 1961, the Court upheld the Internal Security Act of 1950 (McCarran Act) requiring registration of the CPUSA in Communist Party vs. SACB, 367 U.S. 1 (1961), with only Justice Black

dissenting. In Scales vs. U.S., 367 U.S. 203 (1961), the Court upheld the constitutionality of proceedings against the members or organizers of a group proscribed by the Smith Act.

However, in 1969, the Court went far toward reversing this long-standing trend. In Brandenburg vs. Ohio, 395 U.S. 444 (1969), the Court forbade states to legislate against advocacy of illegal or violent action unless such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

It is possible to see this recent trend in Court rulings as a deviation from the traditional juristic interpretation. There can be little doubt that it does represent a radically different understanding of the First Amendment from that held by the earlier interpreters and the Framers themselves. But some, with apparent incongruity, believe that it is a "fulfillment" of the lines laid down by the Framers. It is difficult to accept this idea when there is such a broad disparity between their recorded statements and the current trend.

OBSCENITY

There is little doubt in this area that the Supreme Court has excluded obscenity from the protection given by the First Amendment. Thus, in Roth vs. U.S., 354 U.S. 476 (1957), Justice Brennan argued that "the unconditional phrasing of the first amendment was not intended to protect every utterance." The Court pointed out that practically all of the state legislatures ratifying the First Amendment had laws against blasphemy or profanity or both. "Implicit in the history of the First Amendment," wrote the Court, "is the recognition of obscenity as utterly without redeeming social importance."

The clear and present danger test, applicable in internal security cases, was rejected for obscenity. However, the problem is not whether the First Amendment protects obscenity but what obscenity is. Brennan held that "obscene material is material which deals with sex in a manner appealing to prurient interest." And the Court arrived at the test for obscenity that a publication in its dominant theme appealed to the prurient interest of the average person, applying contemporary community standards. This test was again upheld in the Fanny Hill decision, 383 U.S. 413 (1966). But despite this affirmation, rulings since 1966 have tended to broaden the definition of obscenity, to reverse convictions for obscenity, and, in the opinion of many, to undermine the meaning of the Roth decision. In Stanley vs. Georgia, 394 U.S. 557 (1969), the Court upheld the right of an individual to possess obscene materials in his home, though it reasserted the Roth standards. In U.S. vs. Reidel, 402 U.S. 351 (1971), the Court upheld

the constitutionality of prohibiting the distribution of obscene materials through the mails and the authority of customs officials to seize obscene materials from travelers' baggage. The Court again specifically reasserted the Roth standards.

However, in decisions of 1973, notably Miller vs. California, 413 U.S. 15 (1973), the definition of obscenity was altered somewhat. Henceforward, a work is to be considered obscene if, as a whole, it appeals to a prurient interest, portrays sexual conduct in a patently offensive manner, and does not, taken as a whole, have "serious literary, artistic, political, or scientific value." This latter phrase replaced the Roth ruling that it must be "utterly without redeeming social importance" and is thus a more stringent standard. The Court also emphasized the role of the community in providing determination of obscenity, but whether this is to be the state or local community is not yet clear. A national, uniform definition of obscenity is, however, no longer required to declare a work obscene.

EXISTING FEDERAL LEGISLATION

At the present time there are five federal statutes which regulate obscenity and its distribution. These are: 19 U.S.C. section 1305, which forbids the importation of obscene materials into the United States; 18 U.S.C., section 1461, which prohibits the mailing of such materials; 18 U.S.C., section 1464, which prohibits obscene broadcasts; and 18 U.S.C., sections 1462 and 1465, which prohibit interstate transportation of obscene materials or the use of common carriers to transport them. In 1968, Congress enacted the Anti-Pandering Act (39 U.S.C., section 3008) which gave postal patrons authority to terminate the mailing of unsolicited, sexually offensive materials.

IS AMERICA AN "OPEN SOCIETY"?

The legal history recounted above would indicate that there is little basis for the often-heard contention that the Founding Fathers, the Framers of the Constitution, or the Supreme Court have established through the First Amendment an "open society" -- i.e., a society in which all expressions, regardless of their moral value or social and political consequences, have an equal status of permissibility before the law. It is true that the Court, especially in recent years, appears to have moved in this direction, but even here its record is as yet ambiguous and far from unequivocal. There yet remains adequate constitutional authority for the legal punishment of expressions which threaten national security or public morality.

But an increasing number of citizens find such precedents irrelevant to what they regard as the progressive trends of

contemporary society. Even if American legal traditions do not support an open society, these persons would argue, we should move toward one in recognition that government has no business in protecting morality or deciding what is dangerous, if the act or statement does not actually hurt anyone. In other words, these persons advocate the creation of an open society regardless of American traditions.

The problem of whether an open society is a desirable, or even a possible, one is an ancient question of social philosophy. Critics of the concept of an open society have pointed out that human society consists in a set of beliefs or affirmations shared by all or most members, past and present, of the society. This "consensus" or "public orthodoxy," they argue, is what really gives definition and meaning to what would otherwise be a disparate aggregation of individual wills. Without such a consensus, this aggregation would be incapable of any sustained or concerted enterprise: to support a policy calling for public sacrifice, to fight a war, or to have any agreed sense of what the goals and basic values of the society are.

Those who hold this belief that a consensus must undergird social cohesion point out that it is at odds with the "open society" concept. The latter admits no such consensus and assumes that individuals may do and say what they please within the limits of not harming others or preventing them from doing or saying what they please. Many of the consensus school also emphasize that, though the majority in a society believe in and live by the consensus, a minority may violate it or at least parts of it. This violation by a numerical minority can have disruptive effects on the consensus and on the society's perception of its common purposes. It is therefore the duty of the government to enforce the consensus and to provide appropriate sanctions and legislation in support of it.

Such a position is often caricatured as "repressive" and presented as leading to a totalitarian system of thought control. The libertarian advocates of openness often charged that, once public authorities enter the field of enforcing moral values, there is no logical stopping place on the road to philistinism in taste, the complete suppression of dissent, and a return to Victorian standards of public morals. Consensus advocates reply, however, that there is no necessary progression from the punishment of those forms of expression which threaten subversion or the debasement of morals to these extreme results. In any case, they argue, the dangers of repression are not now our problem. Philistinism is already triumphant in Deep Throat and Larry Flynt's Hustler magazine. Dissent is already threatened when demonstrators are legally able to enforce silence on those with whom they disagree and when advocates of traditional morality are denied access to public forums. As for the much dreaded return to "Victorian morality," many advocates of stricter public discipline point out

that 45% of the American people favor stricter standards for the sale of "sexually explicit material" (only 6% believe in less strict standards, as reported in the Gallup Opinion Index of May, 1977, page 4) and that this large cross-section of the population cannot be limited to those who have socially extremist or unrepresentative opinions.

LEGISLATING MORALITY

Libertarians also argue against legal protection of public morality by advancing the argument that morality cannot, or should not, be legislated. But it is difficult to see what else can be legislated. Any law forbidding one act or permitting or commanding another contains an assumed judgment of value that the forbidden acts are wrong and anti-social or that a legal act is good and pro-social. A law against murder condemns murder as wrong just as much as a law against obscenity condemns obscenity. The libertarian question, "Who decides what is wrong?" is essentially a political problem in this context. The duly appointed political representatives of a society decide this, whether they are to be the courts, the Congress, or the state and local governments.

It is precisely the point of the consensus advocates that hostility to permissiveness and to the highly vocal radicalism that attacks both public decency and national security is in keeping with the mainstream of American life and society, and not just a transient whim or a prudish backlash. As the late Willmoore Kendall of Yale once wrote:

> Those beliefs that the people share are what defines its character as a political society, what embodies its meaning as a political society, what above all, expresses its understanding of itself as a political society, of its role and responsibility in history, of its very destiny.... In such a society by no means are all questions open questions; some questions involve matters so basic to the consensus that the society would, in declaring them open, abolish itself, commit suicide, terminate its existence as the kind of society it has hitherto understood itself to be.[10]

Many in the consensus school argue that those who favor more permissive standards for the sale of pornography or who indulge in support for un-American political causes are alienated from or hostile to the way of life characteristic of American society. They object that it is unjust and undemocratic that these minorities

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10. Willmoore Kendall, The Conservative Affirmation (Chicago; Henry Regnery Company, 1963), pp. 74-75.

or their allies are able to dominate not only public discourse but also that increasingly the Supreme Court seems to be imposing the peculiar values and beliefs of this minority on the large remainder of the population.

CONCLUSION

It would appear from the above review that federal legislation prohibiting or controlling the distribution of obscene materials is in keeping with the long-standing traditions of American Constitutional law. Such legislation may be open to other criticism: it cannot be adequately enforced; it requires too much of the time and effort of local or federal police agencies; it is inconsistent with the movement toward an open society that the United States has experienced in the recent past. But these are pragmatic considerations, and in the last case, a question of social and political philosphy. As such, they are separate from and independent of the more narrow question of the meaning of the First Amendment for the future of public morality and national security.

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