Obscenity, Tolerance, and the Moral Community
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How do you know that you are speeding? You look at the posted speed limit as you drive by, and then glance at your speedometer. If the latter reads a number higher than the former, you quickly scan your rearview mirror. Why? Because you know that you are speeding.

Likewise, if a football player is running downfield with the football tucked tightly under his arm, how does he know where to step to keep from going out of bounds? If the sign over a door reads “No One Under 21 Allowed,” how does a patron know whether or not he or she is permitted to enter? If the pizza a family ordered was promised to be delivered within thirty minutes or it is free, how do they know what the tip should be?

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With the exception of the final query the answer is simple: a determination is made by measuring to the standard, the rules, the norm. In football, a player follows the official rule book, which states that on the line or beyond is out of bounds. In establishments required to restrict their patronage to adults 21 or older, entrance is determined by date of birth. When pizza arrives after the thirty minute guarantee, it is still customary to tip the driver because it takes him or her just as much effort to deliver the pizza late as early. Additionally, the driver is likely still working his or her way through college! The point is that there is a standard by which we as society measure against.

Each of these examples contains one common element: the standards are not defined simply by personal preference. For example, a football fan will not see a referee reverse an out-of-bounds call because a wide receiver claims that the chalk line limits personal expression and that each player must determine his or her own boundaries. Additionally, a bouncer in a night club will not have a change of heart when he is told by an 18-year-old that he is being an ageist. And finally, thirty minutes is thirty minutes by any standard.

I. Introduction

What is obscenity? Why is it illegal? Should it even be illegal and if so how should it be identified, regulated, and its purveyors be punished? Opinions of and answers to these questions are myriad and come from a variety of perspectives. Lawyers strive to comprehend obscenity and apply the law. Social guardians take up issues such as child pornography, the availability of obscene materials on the Internet, and the degradation of women. Members of the media seek to protect their Constitutional rights against restrictive standards that affect radio, television, music recordings and public discourse. I struggle to write about obscenity from the perspective of morality because I am a pastor, and my milieu is a matter of the soul, the heart of the substance that makes a difference in our daily lives.

II. Defining Obscenity

“I don’t know anything about art, but I know what I like.”

In my attempt to define obscenity, I would hope that Gelett Burgess would not mind me paraphrasing his famous self-deprecating phrase when I say: “I can’t tell you what it is, but I can tell you I don’t like it.” In much the same way that an appreciation of art lies in the eye of the beholder, obscenity finds its definition in the eye of the offended. Therein lays the cause of the elusive yet concrete definition of “obscene.”

Although many in society may believe that obscenity is difficult to define because no definition exists, they would be wrong. In the 1973 landmark decision of Miller v. California, the United States Supreme Court developed an arguably imperfect definition of obscenity. To be considered “obscene,” the Court ruled that a judge and/or a jury must determine three things; first, that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; second, that the work, as measured by contemporary community standards, depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable law; and third, that a reasonable person would find that...
the work, taken as a whole, lacks serious literary, artistic, political and scientific value.\textsuperscript{4} Unfortunately, however, the Court’s ostensibly workable definition requires several prerequisites: common sense, average people, contemporary community standards, an agreement as to what constitutes prurient interest, and an ability to define serious literary, artistic, political, and scientific value.\textsuperscript{5}

It becomes painfully apparent that just like art, obscenity is hard to pin down in concrete, measurable terms. The clear definition of obscenity is a moving target that seems to lurk on the fringes of our peripheral moral vision. As G.K. Chesterton put it, “[a]rt, like morality, consists of drawing the line somewhere.”\textsuperscript{6} So does obscenity. What, however, do we do with a legal definition of obscenity that is replete with relative terminology?

In his article titled \textit{A Review of the Law of Obscenity for Webmasters and Others}, Stan Morris describes how “in 1996 Congress passed the Communications Decency Act (CDA), which sought to ban what was referred to as ‘indecent’ and ‘patently offensive’ material from the Internet if the material was available to minors.”\textsuperscript{7} The government was sued by the American Civil Liberties Union (ACLU) because they believed the CDA violated speech protected by the First Amendment.\textsuperscript{8} The Supreme Court found again a similar problem with the vague language.\textsuperscript{9} What exactly is “indecent” and how is it measured?

The Supreme Court ultimately ruled in favor of the ACLU and portions of the CDA were struck down, deemed contrary to the First Amendment.\textsuperscript{10} The issue, however, was far from settled. Morris concluded that “despite the Court’s ruling, it remains unclear as to what constitutes ‘obscenity’ on the Internet.”\textsuperscript{11} His advice to others: “make sure your lawyer is aware of your publishing efforts.”\textsuperscript{12}

\textbf{A. What is “obscene”}\textbf{?}

The \textit{American Heritage Dictionary} defines obscene as that which is “offensive to accepted standards of decency or modesty; inciting lustful feelings.”\textsuperscript{13} This definition begs numerous questions. First, accepted by whose standards? Second, how many does it take to determine those standards? Third, what constitutes a majority? And finally, is it possible for something that is not “obscene” to incite lustful feelings?

Similarly, \textit{Webster’s Revised Unabridged Dictionary} defines “obscene” as that which is “offensive to chastity or modesty; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed; impure as obscene language; obscene pictures.”\textsuperscript{14} “Offensive to chastity or modesty,” each of these terms is relative. Where is the uniform code to provide measurable standards for delicacy? A man who has witnessed the birth of his child can effectively argue that while the process may or may not be delicate, pure or decent, it is certainly one of life’s most incredible and moving moments.

In an informal poll conducted among friends and family I asked, “What do you consider to be obscene?” The following were the most common answers: graphic nudity in movies; photos of a sexually explicit nature; and child pornography. British philosopher Bertrand Russell, however, took a slightly different view. “It is obvious that ‘obscenity’ is not a term capable of exact legal definition; in the practice of the Courts, it means
'anything that shocks the magistrate.'

It is likely that one might hear this same sentiment from the mouths of a variety of artists whose work pushes the boundary of what is rendered as being of “serious literary, artistic, political and scientific value.” Value is the operative word in that phrase as value in and of itself is completely subjective. The aesthetic value of one’s art, whether it be stage play or film, painting or sculpture, performance or photograph, poetry or prose, can be pricelessly dear while to another it may simply be pragmatic; tomorrow’s eBay hot item available to the highest bidder.

But how does obscenity affect the non-artistic areas of our daily life? Is there really such a thing as an obscene gesture? What is considered obscene language? These are tough questions to answer, even for those who enforce the standards society has set forth.

B. The relevance of intent in defining obscenity

NASCAR racing champion Dale Earnhardt Jr. used profanity in an interview after he won a race at Talladega. NASCAR promptly fined Earnhardt $10,000 and docked him 25 championship points, which ended up affecting Earnhardt’s standings in the season’s rankings.

Interestingly, the penalty drew criticism from some of the other drivers, including Tony Stewart. Stewart commented, “The last time I checked, we had freedom of speech, correct? Since when has that changed now? I didn’t know the Constitution changed in the last couple of weeks.” However, Stewart’s reasoning was less moralistic and more pragmatic. “What he said didn’t cheat anybody on the racetrack,” Stewart said. “It didn’t have any effect on how the race was run.” Everyone can agree that Earnhardt’s comment had no affect on how the race was run by the simple fact that Earnhardt’s choice expletive was spoken in a post-race interview. However, the race itself was not the point. News articles reported that NASCAR President Mike Helton acknowledged the debate over free speech but likened NASCAR’s rules on swearing to restrictions imposed by homeowners’ associations. “This is another community that you participate in,” Helton stated, “this is [sic] the rules of the community, and this is how we have to live in it.”

In what was likely a preemptive effort to avoid saying something considered as “obscene,” NASCAR driver Rusty Wallace asked what drivers were allowed to say. Apparently experiencing the same dilemma as the United States Supreme Court, Helton responded, “Well, we know what you can’t say. We’ll start there. . . .”

What about television? While some will argue that there is no art in television, with the possible exceptions of the History or Discovery channels, the vast majority agree that the infamous 2004 Super Bowl wardrobe malfunction incident took an already besieged medium to a new low in violating broadcast standards. One benefit, if it can be considered such, is that this incident brought the definition of obscenity into the arena of pop-culture public debate. It is interesting to note that while many found Janet Jackson’s brief exposure to be offensive, the issue seemed to focus less on what was shown and more on whether it was an accident or a deliberate and calculated self-promoting act. From Perry Mason to CSI, if there is one thing that television
has taught the masses it is that intent is a major factor in determining both the degree of severity of a capital crime and the resulting penalty facing the offender. Does intent then play a role in the identification of obscenity?

The United States Supreme Court’s definition of obscenity focuses on the effect that obscenity has on the victim more so than it does on the intent of the creator. It is extremely unlikely that hardcore pornographic magazines are published for the purpose of introducing emerging photographic talent, but is it possible for someone to create a work of art that they intend to be instructive, reflective or historical and yet still fail to meet the standard of “serious literary, artistic, political, or scientific value?” How would an artist with an avant-garde vision and talent temper his or her artistic expression with a desire to be socially and legally responsible? What answer would we give someone who, like the NASCAR driver Rusty Wallace, asks, “What is allowed?” D.H. Lawrence would never have made such an inquiry, probably considering permission anathema to artistic expression, “since obscenity is the truth of our passion today, it is the only stuff of art – or almost the only stuff.”

III. Regulating Obscenity

The same problem of moral relativity that arises when attempting to define obscenity also affects the regulation of obscenity. For example, the Super Bowl incident occurred on broadcast television, which is why so much was made of the debacle in post-wardrobe malfunction America. Is there an expectation that viewing a broadcast television program is safe whereas cable television programming is caveat observator?

Can anyone really trust the Motion Picture Association (MPA) movie ratings? I personally have been offended by material in a movie rated PG, and yet have sat with my children under the age of 17 together watching as we were moved to tears and deep reflection by a film bearing an R rating.

The Telecommunications Act of 1996 touted the V-chip as an effective weapon in any parent’s battle to protect his or her children from the violence and presumably obscene sexuality on television. In a speech given at the signing ceremony for the Telecommunications Act, President Clinton stated

[If every parent uses this chip wisely, it can become a powerful voice against teen violence, teen pregnancy, teen drug use, and for both learning and entertainment. The responsibility of parents to do this is something they deserve and something they plainly need. Now that they have it they must use it.]

Although legislation requiring the V-chip to be installed in all televisions sold in the United States went into effect on January 1, 2000, I have yet to meet a parent who actually uses it. The reality is, I have never met a parent who even knows how to use it. Additionally, since most television sets do not password-protect use of the V-chip, it would hardly be a restraint against the prurient interests of a technology savvy teenager.

The real question, however, remains when defining “obscene;” what standard should be used. To what should the definition be compared or measured against?

In our post-modern era of espoused tolerance, one could ask why we even have laws regulating obscenity. The First Amendment to the United States Constitution protects both free speech and the right to publish. Obscenity laws
arguably contradict the guaranteed rights of the First Amendment. Does the First Amendment to the Constitution protect publication, distribution and viewing of pornography defined as “obscene”?

Again, the U.S. Supreme Court ruled that the obscenity classification applies to materials that appeal predominantly to a prurient interest in sexual conduct, depict or describe sexual conduct in a patently offensive way, and lack serious literary, artistic, political, or scientific value. Material or expression deemed “obscene” by the Court is not protected by the free speech guarantee of the First Amendment to the United States Constitution.

However, the problem of relative definition rears its head again. Prurient is quite a subjective term, meaning “inordinate interest.” It is derived from a root word that literally means “to itch” and “implies desire out of control.” Modernly, inordinate means “excessive” and envisions the act of being “immoderate.” Something that is inordinate exceeds reasonable or customary limits, not being limited to the rules or the usual bounds. The wide receiver mentioned previously would have wanted his inordinate field work to be accepted. These definitions, however, beg more questions. If one can have an inordinate interest what then is an ordinate interest? What is a wholesome interest? Who defines these subjective standards, and on what basis?

Traditionally obscenity has been defined using a community or social standard as a “chalk line” to determine and define boundaries. These boundaries are subjective as they are predicated by various factors: education, religious guidelines, and exposure (e.g. a community exposed to “lower” standards of indecent entertainment will have a less restrictive definition of obscenity). As these boundaries are subjective, they are by definition then subject to change. What was “obscene” in 1964 may be socially acceptable, or at least accepted, in 2004. Constant exposure, however, can inure the tastes so that overtime a calloused psyche is less sensitive and therefore less judgmental.

Then there is the morally ambiguous state of those who publicly decry indecency and obscenity and in the privacy of their homes entertain those same indecent and obscene materials. Is there then a public standard that differs from the private standard? Is there a community dynamic that precludes a higher standard for public behavior but overlooks violations of those same behaviors when done in a situation that is perceived not to hurt anyone? Is this communal hypocrisy winked at by those in the know?

The question then becomes whether obscenity is merely a byproduct of personal and public preference, dependent entirely on the majority thinking of a community, or whether there is actually a standard by which to judge obscenity that exists apart from preference, apart from taste, and apart from esoteric knowledge of art? What guides a community’s moral standards?

Moral standards have traditionally been the milieu of the church, whether Jewish, Christian, Muslim or any other religion. Moral standards are documented in scripture (holy writings), and interpreted by religious leaders and teachers. While the standards defined in scripture are unlikely to change, interpretation is subject to similar dynamics as those described in the social comments. In his essay, The Nature of
Morality, William H. Shaw tackles this devilish debate:

A characteristic of moral standards is that their soundness depends on the adequacy of the reasons that support or justify them. For the most part, fashion standards are set by clothing designers, merchandisers, and consumers; grammatical standards by grammarians and students of language; technical standards by practitioners and experts in the field. Legislators make laws, boards of directors make organizational policy, and licensing boards establish standards for professionals. In every case, some authoritative body is the ultimate validating source of the standards and thus can change the standards if it wishes. Moral standards are not made by such bodies, although they are often endorsed or rejected by them. More precisely, the validity of moral standards depends not on authoritative fiat but on the adequacy of the reasons that support or justify them. Precisely what constitutes adequate reasons for moral standards is problematic and, as we shall see, underlies disagreement about the legitimacy of specific moral principles.39

It would be difficult to find a society or culture that does not regulate obscenity. It is rarer still to find those who would advocate complete tolerance of anything that others might define as obscene. The difficulties in the regulation of obscenity are numerous. For example, it is first necessary to establish a definition, using specific concrete, measurable terminology. Next, there must be adequate recognition, giving those tasked with policing obscenity the ability to readily identify violations. Additionally, it is necessary that there be prosecution, proving beyond a reasonable doubt that obscenity infringes upon the standards of society. Finally, there must be enduring regulation, withstanding the constant challenges and pressure applied to change existing definitions and regulations so as to allow behavior or production of materials currently deemed “obscene.”

The reality is that as a society, we have a generally hypocritical approach to morality. Society wants laws passed to control behavior or materials we deem “obscene,” yet society does not want these same laws to infringe upon the fundamental right of privacy. It is not only hypocritical to espouse and labor to establish a community moral standard that the individual neither adheres to nor advocates in private, but it is also unrealistic.

As a society, we have community laws against murder, physical abuse, and rape. None of these are deemed acceptable behavior just because they occur in private and no reasonably sane person would attempt to argue them so. What is good for the community is good for the individual. Yet we are bombarded daily with the philosophy that we must be tolerant of the beliefs of others. Tolerant essentially means I will not do to you if you do not do to me. Not quite the proverbial Golden Rule, which is a proactive statement of community responsibility. However, there is that big if. As aforementioned, we can logically see where tolerance would end and an intolerant push back against the violator would begin.

A morality based on tolerance is a morality that values no one thing above another, which results in no thing of value. No value system is of greater importance than another; no point of view is more right than another; no one then has the right to complain or restrict another’s behavior or expression, even if it is obscene. Is not the very label “obscene” intolerance?

Tolerance requires an ethic derived from moral relativism. “Epistemological
and moral relativism dictate that the supreme good word of postmodern culture is tolerance. Since truth is merely a tool, each of us is free to select which truths are most beneficial for us, and we are not permitted to judge another person’s truth.”40 If no standard of moral absolute is recognized, then there is no persuasive argument to prefer one espoused moral standard over another. In his book The Right Questions, Phillip B. Johnson writes:

More recently many have come to doubt that human reason can supply the missing transcendent standard by which differing human moral beliefs can be evaluated. From a scientific standpoint, morality – like religion – is a matter of subjective belief rather than objective knowledge. That makes it effectively a matter of personal preference. This does not mean that moral codes will cease to exist (even a gang of robbers or terrorists has one), but it does mean that those codes will be grounded on the preferences of local power holders rather than on universal principles of reason and knowledge. What is right or wrong depends on the preference of whoever has the power to impose his will.41

To argue that there is no absolute morality is a position of tenuous weakness. How can one know that something does not exist? How can that same one state absolutely that there is nothing absolute? That in itself is at best an oxymoron and runs the risk of disqualifying the claimant as an absolutist. However, of most relevance is the question as to whether or not morality can even exist if it is not absolute.

Morality that is based solely on the gradient scale of community standards is not really morality. It is preference based on taste. For morality to have any value above the will of the majority, it must also be true if the majority neither prefers it nor adheres to it.

In a speech delivered to the 2002 Graduation Exercise of the United States Military Academy at West Point, President George W. Bush made the following statement:

Some worry that it is somehow undiplomatic or impolite to speak the language of right and wrong. I disagree. Different circumstances require different methods, but not different moralities. Moral truth is the same in every culture, in every time, and in every place. Targeting innocent civilians for murder is always and everywhere wrong. Brutality against women is always and everywhere wrong. There can be no neutrality between justice and cruelty, between the innocent and the guilty. We are in a conflict between good and evil, and America will call evil by its name. By confronting evil and lawless regimes, we do not create a problem, we reveal a problem. And we will lead the world in opposing it. 42

Why do I cite this statement from a president who is neither a lawyer nor a recognized scholar? Why do I give credence to the words of a self-described Christian businessman? Precisely because President Bush is guided not by his own understanding of what the law differentiates as right from wrong, but rather by what he perceives to be an overarching meta-narrative worldview that defines right and wrong in absolute values. Although one can certainly argue with the President’s politics and actions, can anyone honestly argue that moral truth does not stand above the culture of every nation, that it is not defined by preference, that it is not subjective to the whims of the majority? I cannot. Phillip B. Johnson writes:

This conclusion assumes that we have a standard capable of distinguishing good from evil, and this may be in doubt in an era of moral relativism when those for
whom the supreme value is “tolerance” consider it more reprehensible to name evil than to do evil. If science is our only source of knowledge, and science gives us knowledge only of fact and not of value, then distinguishing between good and evil can only be a matter of arbitrary preference.\footnote{Are we then to base our laws and legal system on common sentiment? Is there no higher purpose to our efforts to control the behavior of artists and publishers than to serve our own preference? Or is there a higher standard that dictates how we are to treat one another, depict life in sitcom, film or prose, and protect those who are defenseless and weak against those who would prey upon their souls? The very fact that we recognize the existence of right and wrong means that there is a standard we did not concoct out of our superstitious fear or pragmatic needs.}

Nineteenth century women’s rights crusader Josephine Butler wrote, “The double standard of morality owes its continued existence very greatly to the want of a common sentiment concerning morality on the part of men and women. . . .”\footnote{Are we then to base our laws and legal system on common sentiment? Is there no higher purpose to our efforts to control the behavior of artists and publishers than to serve our own preference? Or is there a higher standard that dictates how we are to treat one another, depict life in sitcom, film or prose, and protect those who are defenseless and weak against those who would prey upon their souls? The very fact that we recognize the existence of right and wrong means that there is a standard we did not concoct out of our superstitious fear or pragmatic needs.}

There is a statement that pervades the public debate: one cannot legislate morality. What is really meant by this truism is that people cannot be forced to think and act in certain ways by passing laws, but people can be deterred from and punished for certain types of behavior. Morality, however, was never meant to be published in books or enacted in laws; it was intended to be written on the hearts of every man, woman and child

Recently, there has been controversy over posting the Ten Commandments in government’s offices. It is contended that this constitutes the government establishment of religion and violates the separation of church and state. In all my years of church service, I have never met anyone who wants the government to establish religion. It is a historical fact that our nation was founded by many who left nations where an oppressive government rode roughshod over religious institutions. However, many men and women of faith work in the public service arena as administrators, attorneys, judges, and senators. If their workplaces are examined, whether cubicle or spacious office, they have family photos, vacation souvenirs, crayon “I love you” notes, and snow globes from around the world. Essentially, their offices would be filled with testimonials of life. Some of these individuals also want to be reminded that there is something above the social morass of relativistic practices that steadily erode the legal definitions of obscenity until what was once unthinkable is now displayed on themed calendars. They want to have hope that by subscribing to and living by an absolute moral standard we can protect our children, encourage artistic freedom, empower the weak and embolden the marginalized.

What does all this have to do with the Ten Commandments? If we look back even further in history we can see that God had Moses deliver these ten statements of spiritual and public law only after everything else had failed.\footnote{Prior to Moses receiving these two great stone tablets, we can see that God’s original intent was for His people to heed His voice. Moreover, it is overtly stated that God intended His people to be a blessing to all others.\footnote{Not by passing laws that force behavior to conform to the absolute standards, but by changing the hearts of individuals to seek what is right, not what is evil. The desire of the heart gives birth to the actions of the flesh, of the body.}}
This idea is even more apparent when one realizes that Biblical authors did not always address societal immorality such as slavery, unfaithfulness, or abuse of women. The goal was to change society by changing the heart of the individual, what Jesus described as the only true law: love God and your neighbor.\(^47\) If this theory were to function as intended, no further laws would be necessary. Therefore, rather than rail against slavery, the apostle Paul addressed how slaves and masters were to relate to one another.\(^48\) Changed hearts would result in changed lives and thereby engender changed cultures.

What is obscenity? It is that which defiles the heart of man, woman and child. It is that which over time “will have an eroding effect on moral standards.”\(^49\) This concept of obscenity first requires that we as society have moral standards to be eroded. If our cultural morality is based on preference, then obscenity does not erode; it debates. If, however, there is an absolute standard, then the will and ability to adhere to that standard can be eroded by that which once was obscenity but now is commonplace.

NOTES


2 The Quote Cache, at http://quotes.prolix.nu/Authors/?Gelett_Burgess (last visited Jan. 29, 2005).


4 Id.


8 Id. at 3.

9 Id.

10 Id.

11 Id.

12 Id.


18 Id.

19 Id.

20 Id.

21 Id.


23 Id.

24 Id.
25 Id.
27 Id.
28 The criteria set forth in Miller v. California, as discussed above, focus on the intent of the creator because it asks whether the creator designed the work to have a prurient interest, described or illustrated the material in a patently offensive way, and whether the creator designed to work to have any literary, artistic, or scientific value. Miller, 413 U.S. 15, 24 (1973).
30 I used a Latin-English dictionary on the Internet to create this phrase; it is intended to mean let the viewer beware.
31 Motion Picture Association of America, What the Ratings Mean (The MPA employs a full-time Rating Board which views each film and votes on an appropriate rating. According to the MPA website, a “G” rated film is one “which contains nothing in theme, language, nudity and sex, violence, etc. which would, in the view of the Rating Board, be offensive to parents whose younger children view the film.” An “R” rated film “may include hard language, or tough violence, or nudity within sensual scenes, or drug abuse or other elements, or a combination of some of the above, so that parents are counseled, in advance to take this advisory rating very seriously”), available at http://www.mpaa.org/movieratings/about/index.htm (last visited Jan. 23, 2005).
32 Federal Communications Commission, V-Chip Viewing Television Responsibility (“The FCC has adopted rules requiring all television sets with picture screens 13 inches or larger to be equipped with feature to block the display of television programming based upon its rating. This technology is known as the ‘V-Chip”), at http://www.fcc.gov/vchip (last visited Jan. 23, 2005).
34 Stan Morris, A Review of the Law of Obscenity for Webmasters and Others,
37 Id.
45 Genesis 3:11; Genesis 6:5-6; Exodus 16:28; Exodus 19:5; Exodus 20:1-17; Exodus 20:19 (New King James).
46 Genesis 12:1-3; Genesis 22:18 (New King James).
48 Ephesians 6:5-9; I Timothy 6:1-2; Titus 2:9-10 (New King James).