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# **THE BORKEAN CASE AGAINST ROBERT BORK'S CASE FOR CENSORSHIP**

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## THE BORKEAN CASE AGAINST ROBERT BORK'S CASE FOR CENSORSHIP

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The primary purpose of this Essay is to criticize Robert Bork's advocacy of government censorship of American culture. However, I come as much to praise Judge Bork as to criticize him. To my mind, the principles advanced in his book, *The Antitrust Paradox*,<sup>1</sup> are just as much applicable to government regulation of culture as they are to government regulation of the economy—to some extent even more so. In his essay on *The Antitrust Paradox* in this volume, Judge Frank Easterbrook noted that Bork's conclusion in that book was that regulators should not "second-guess" the results of markets.<sup>2</sup> This principle applies just as much to cultural markets as to product markets. The Robert Bork who wrote *The Antitrust Paradox* is the best antidote to the later Bork who wrote *Slouching Towards Gomorrah*.<sup>3</sup>

Indeed, one of Bork's mentors at the University of Chicago was the economist Aaron Director. In 1964, Director wrote a famous article on the very subject of this Essay, entitled "The Parity of the Economic Marketplace."<sup>4</sup> In that work, Director pointed out that government regulation of cultural markets and of speech has many of the same weaknesses as government regulation of "economic" activity. Director's main purpose was to criticize political liberals who wanted to abolish government regulation of speech and cultural activities, yet supported heavy government regulation of the economy. But

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1. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (The Free Press 1993) (1978).

2. Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 445 (2008).

3. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996).

4. Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964).

of course the argument also works in reverse against conservatives such as Judge Bork, who oppose most economic regulation but advocate government intervention in the cultural market.

This Essay explains why government censorship of culture is not “prudent,” to use Professor George’s terminology,<sup>5</sup> because it cannot be contained within the bounds that George and Bork would like to confine it. I also discuss why such regulation is in fact unnecessary. Private institutions can do a much better job of promoting desirable cultural values than government can.

At the outset, it is important to appreciate the radical sweep of Judge Bork’s vision in *Slouching Towards Gomorrah*. Although Bork is usually viewed, quite correctly, as a conservative, there are some radical implications to this book. Judge Bork not only criticizes modern liberals and libertarians,<sup>6</sup> he also goes all the way back to the source, so to speak, and attacks the Enlightenment, the Declaration of Independence, and John Stuart Mill.<sup>7</sup> Judge Bork harshly criticizes the principles of the Declaration, arguing that they are “pernicious” if “taken . . . as a guide to action, governmental or private.”<sup>8</sup> He denounces John Stuart Mill’s liberty-protecting “harm principle” as “both impossible and empty.”<sup>9</sup>

There is, therefore, a great deal at stake in considering Judge Bork’s argument in *Slouching Towards Gomorrah*. If we accept it, we would have to reject a very large part of the American tradition of individual freedom and perhaps even the broader Western tradition of liberalism. I hope to convince you that we don’t need to do that. We should instead embrace the less radical option of rejecting Judge Bork’s call for government censorship of the culture.

First, it is essential to recognize a major conceptual problem with government regulation of the culture: that the state has a fundamental conflict of interest in this field. The people who control the government have a strong incentive to use state power to suppress their political opponents and indoctrinate

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5. Robert P. George, *Slouching Towards Gomorrah Revisited*, 31 HARV. J.L. & PUB. POL’Y 505 (2008).

6. BORK, *supra* note 3, at 4, 150.

7. *Id.* at 56–65.

8. *Id.* at 57.

9. *Id.* at 59.

the people to promote their own favored ideologies and to maintain their own grip on power.

Historically, the desire to indoctrinate has been a major motive for censorship and even, to some extent, for the creation of public education in the nineteenth century.<sup>10</sup> This would not have come as a surprise to the Robert Bork who wrote *The Antitrust Paradox*. After all, he pointed out that antitrust law is often captured by interest groups and used for their own purposes rather than for the purpose of benefiting consumers. The same is true, and I would argue even truer, of the institutions of cultural regulation and censorship. These policies more directly further the government's interest in perpetuating its own grip on power and suppressing potential opposition. The historical record provides ample evidence confirming that this conflict of interest is a serious concern.

In *Slouching Towards Gomorrah*, Judge Bork suggests that we need not worry about censorship too much because for the first 175 years of American history there was very little judicial enforcement of the First Amendment. And yet, he claims, there was not much unjustifiable censorship.<sup>11</sup> My view of the record is a lot less sanguine than Judge Bork's. If we look at that 175 years, we see numerous examples of indefensible censorship. For example, the Alien and Sedition Acts directly attempted to suppress the opponents of government.<sup>12</sup>

Other cases abound. There was the suppression of abolitionist speech in the southern states for many decades prior to the Civil War.<sup>13</sup> Later, there was the censorship of serious literature under the guise of suppressing pornography or obscenity.<sup>14</sup> There are many examples of works that I think even Judge Bork would consider to be serious literature, that were banned.<sup>15</sup>

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10. See generally E. G. WEST, *EDUCATION AND THE STATE: A STUDY IN POLITICAL ECONOMY* (3d ed. 1994) (discussing this motive in the establishment of public education in the nineteenth century).

11. BORK, *supra* note 3, at 141.

12. See, e.g., JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 41-43, 139-41 (1951).

13. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* 160-62 (1998); CLEMENT EATON, *FREEDOM OF THOUGHT IN THE OLD SOUTH*, at xi (1951).

14. MARJORIE HEINS, *SEX, SIN, AND BLASPHEMY* 27-28 (1993).

15. As late as 1953, a federal court of appeals upheld the censorship of Henry Miller's classic novels, *Tropic of Cancer* and *Tropic of Capricorn*, under a federal

During World War I and its aftermath, and World War II, there was extensive repression of political speech—including speech that was in no way treasonous, but merely criticized the government’s war policies.<sup>16</sup> I could probably fill this entire Essay just by listing these sorts of examples. Unlike Judge Bork, I am far from convinced that the first 175 years of American history proves that we can trust government with the power to regulate culture.

The Western European experience provides further evidence. In many European nations, government has a considerably freer hand to censor and regulate the culture than it does in the United States today. This power has routinely been abused. Several European governments have used their power to censor speech criticizing radical Islam or speech hostile to homosexuality.<sup>17</sup> European governments have certainly not exercised restraint in their use of the power to censor, and there is no reason to expect them (or other governments) to do so. As already noted, governments have strong incentives to use censorship to perpetuate their own grip on power and, in some cases, to use it to appease powerful interest groups.<sup>18</sup>

Perhaps we should reach a different conclusion if we could be absolutely certain that the power to censor will always be held by Judge Bork, Professor George, or other like-minded people. Frankly, I would not be willing to accept censorship even if that were true. But some conservatives perhaps would be. We cannot, however, be assured of any such thing. The power that we might want to give to Judge Bork or to a conservative President will sooner or later—and right now probably sooner rather than later—be wielded by a liberal administration, just as it has already been wielded by liberal and left-wing governments in Europe.

So even if one is a conservative comfortable with the idea that Judge Bork or Robert George might censor American cul-

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statute forbidding the importation of “obscene” books. See *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953). For a discussion of the case, see RICHARD A. POSNER, *LAW AND LITERATURE* 341–42 (2d ed. 1998).

16. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 135–226, 235–303 (2004).

17. John O. McGinnis & Ilya Somin, *Should International Law be Part of Our Law?*, 59 *STAN. L. REV.* 1175, 1219–21 (2007).

18. See *supra* text accompanying notes 10–16.

ture and make decisions about what is permissible, ask yourself this question: Are you equally comfortable with Ted Kennedy, Hillary Clinton, or Barack Obama doing it? If you would not trust Hillary Clinton to exercise the power to censor, I would suggest that we should not entrust that power to government at all. Consider the likelihood, indeed the inevitability, that even if Hillary Clinton doesn't win the presidency in 2008, someone like her probably will win sooner or later in the future.

Perhaps all of these risks must be accepted if, as Judge Bork argues, censorship is the only way to maintain a healthy culture. Without censorship, he claims, American culture will inevitably slide into Gomorrah-like degradation.<sup>19</sup> According to Bork, "[t]he alternative to censorship, legal and moral, will be a brutalized and chaotic culture, with all that that entails for our society, economy, politics, and physical safety."<sup>20</sup> "Without censorship," he opines, "it has proven impossible to maintain any standards of decency."<sup>21</sup> In reality, there is little justification for this fear. The free market and civil society can do a much better job of regulating the culture than government.

*Slouching Towards Gomorrah* was published in 1996. In the book, Judge Bork argues that only through government censorship can we avoid social pathologies such as crime, illegitimacy, and rising welfare dependency.<sup>22</sup> Unfortunately for his thesis, in the years since 1996 each of those social pathologies has greatly decreased. Crime,<sup>23</sup> welfare dependency,<sup>24</sup> illegitimacy,<sup>25</sup> and even divorce,<sup>26</sup> are all declining.

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19. See BORK, *supra* note 3, at 140–53.

20. *Id.* at 140.

21. *Id.* at 147.

22. *Id.* at 142–53.

23. See, e.g., Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 163–66 (2004) (documenting massive decline in violent crime during the 1990s).

24. See Ron Haskins, *The Rise of the Bottom Fifth*, WASH. POST, May 29, 2007, at A13 (discussing massive decline in welfare dependency following the Welfare Reform Act of 1996).

25. See June E. O'Neill & M. Anne Hill, *Gaining Ground? Measuring the Impact of Welfare Reform on Welfare and Work*, 17 MANHATTAN INST. CIVIC REP. 1 (2001) (noting that the Welfare Reform Act of 1996 helped produce a decline in the percentage of children raised by single-parent families, especially among poor African-Americans).

This improvement was achieved despite a near-total absence of the kind of censorship that Judge Bork said was essential to ensure progress. Indeed, with the rise of the Internet and other modern communications media, explicitly sexual and violent material is probably much more widely available today than it was when Judge Bork wrote his book.

International comparisons also bear out this point. Some countries such as Japan, where sexually explicit material is even more readily available than in the United States, have rates of social pathology significantly lower than ours.<sup>27</sup> Lack of correlation is not definitive proof of lack of causation. But the international evidence does show that the relationship between an absence of censorship and social pathology is far less clear than Judge Bork suggests. And the case for censorship is that much weaker as a result.

Moreover, private sector alternatives enable people to shape the cultural environment around themselves and their children without resorting to state coercion. For example, as Robert Nelson points out in an important recent book, today some 52 million Americans live in private planned communities of various types.<sup>28</sup> If they so choose, people in such communities can create a culturally conservative environment or any other type of environment that they prefer.<sup>29</sup> They can do so without imposing their preferences on other citizens with different values. Similarly, private schools, which conservatives are quite correct to champion, do a better job of promoting both education and civic values than do government schools.<sup>30</sup> Finally, of course,

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26. See Betsey Stevenson & Justin Wolfers, *Divorced from Reality*, N.Y. TIMES, Sept. 29, 2007, at A15 (“[T]he divorce rate has been falling continuously over the past quarter-century, and is now at its lowest level since 1970.”). For a more detailed academic analysis, see Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces* (Instit. for the Study of Labor, Discussion Paper No. 2602, 2007), available at <http://ftp.iza.org/dp2602.pdf>.

27. See, e.g., Nobuo Komiya, *A Cultural Study of the Low Crime Rate in Japan*, 39 BRIT. J. CRIMINOLOGY 369 (1999) (noting Japan’s very low crime rates).

28. ROBERT H. NELSON, *PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT*, at xiii (2005).

29. See *id.* at 67–68 (noting that many private planned communities were established to promote socially conservative religious values).

30. See, e.g., David E. Campbell, *Making Democratic Education Work*, in CHARTERS, VOUCHERS, AND PUBLIC EDUCATION 241, 244–45, 258–61 (Paul E. Peterson &

religious institutions and other institutions of civil society also play a valuable role in shaping the culture.

Professor George agrees that such private associations should have the primary role in promoting a healthy culture. But, he suggests, government should have a “subsidiary” role.<sup>31</sup> At an abstract level, I don’t necessarily disagree with that view. But there are two serious practical problems with such proposals for limited censorship. The first is the great difficulty of keeping government censorship confined to a “subsidiary” role. Once established, censorship regimes have a strong tendency to expand. That is what has happened in Western Europe in recent years, as discussed above. Second, government regulation of culture can actually often undermine the very private institutions that Professor George and I agree should be the main bulwarks of a sound culture.

Certainly, a government that aggressively regulates culture may seek to undermine private schools, religious institutions, and other such civil society organizations. All of these institutions compete with the state in the marketplace of ideas, and the state has a strong incentive to suppress competitors.<sup>32</sup> That, to some extent, is exactly what has happened in some European countries, and even to a limited degree with government regulation of private schools and other institutions here in the United States.<sup>33</sup>

Ultimately, the question is not whether a healthy culture is important. I agree that it is. The key question is whether to trust the government to promote a healthy culture, or whether to place our trust in communities, churches, schools, and other

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David E. Campbell eds., 2001) (documenting superiority of private schools in these fields).

31. George, *supra* note 5, at 509.

32. See WEST, *supra* note 10, at 190 (noting the importance of this motive in the government’s efforts to displace private schools with public schools); see also EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870–1914, at 111 (1976) (discussing how the rise of government education in France was motivated by the desire to inculcate nationalism and loyalty to the state by displacing traditional religious and civil society institutions).

33. See, e.g., HENRY PERKINSON, THE IMPERFECT PANACEA: AMERICAN FAITH IN EDUCATION 22–32 (4th ed. 1995) (discussing how American government schools originated in large part as a result of efforts to impose cultural uniformity and diminish the cultural influence of Catholics and other religious minorities); WEST, *supra* note 10 (discussing origins of public education in the United States).

private institutions. I think we should place our bets on the private sector, not the state. The Robert Bork who wrote *The Antitrust Paradox* made the same case in the realm of economic regulation. He argued that most government antitrust regulation causes more harm than good to consumers. He also emphasized the danger that the regulatory process will be captured by narrow interest groups who will use it to advance their own agendas at the expense of the general public.<sup>34</sup> Judge Bork's well-taken criticisms of antitrust regulation apply even more strongly to government regulation of culture.

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34. BORK, *supra* note 1, at 134, 347.