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The Youth-Obscenity Problem--A Proposal

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THE YOUTH—OBSCENITY PROBLEM—A PROPOSAL

**The Setting**

The problem of obscenity regulation and the law is rapidly becoming the most prominent constitutional issue of the decade. Indeed, like most problems of this nature, it has drawn the attention not only of courts, legal scholars and students but of clerics, crime enforcement officials, writers and certainly not least, elements of an outraged citizenry.

One element of the broader problem is the attempt of various states and communities to evolve a method to control obscene publications which will satisfy the constitutional requirements as laid down by the Supreme Court. There have been numerous methods of enforcement and controls proposed, but only a few sanctioned.

In the 1963 term the Court made a further curtailment upon state regulation by a decision in a Rhode Island case wherein it struck down certain practices of a state commission created to encourage morality in youth. This commission avowedly was dedicated and authorized solely to act in the protection of children from obscenity. As the case came up in this context it points to the serious problem of obscenity and the juvenile and what if anything can be or should be accomplished in this area.

This problem will be the main consideration of this note.

**The Crusaders v. the Libertarians**

Parents and crime enforcement officers argue that great quantities of obscene and pornographic matter are reaching our young people, which is having the effect of "contributing to juvenile delinquency, inciting to sex crime, leading to perversion and posing a serious threat to our morality." This group points to the rising number of sex crimes and crimes in general as indicative of the great danger to our

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3 In 1957 there were nearly eight forcible rapes per one hundred thousand inhabitants in the United States. In 1958 this figure increased 10.5 per cent, a forcible rape occurring every 36 minutes. In the year 1959 young people under the age of 18 accounted for 18.8 per cent of all arrests for forcible rape. By 1960, there had been an additional 8 per cent increase in this crime as compared with the same period for the prior year. During the same period, the records show a large increase in the crimes of aggravated assault and murder.

In 1961, during the nine months January to September, in cities of (Continued on next page)
society toward which legislation and control must be directed. As a result of the pressure being brought to bear by these "crusaders" a mass of legislation and litigation has ensued. As one writer has said, "This volume of legislative and judicial concern indicates the existence of intense and successful public pressure. It is also indicative of strict enforcement of constitutional standards by a Court sensitive to assaults on free speech guarantees."

The "Libertarians," on the other hand, argue convincingly that any form of censorship and the first amendment rights are simply incompatible. This group argues that exposure to obscenity does not result in any harm to society which can be demonstrated, that it may even be of social benefit, and there is no scientific evidence of adverse effect upon sexual conduct. Secondly, they contend that censorship suppression of the mass media in any manner merely for the benefit of the juvenile will have the effect of "... reduc[ing] our treatment of sex to the standards of a child's library..."

It should be stated early in this discussion that as a matter of fact the attack on obscenity is almost entirely one against various sex portrayals. As Harry Kalvan, Jr. has said, writing in the Supreme Court Review, the real question is, "What is the social utility of excessively candid and explicit discussions of sex?" Although the crusaders and the courts speak of other kinds of undesirable expres-

(Footnote continued from preceding page)

250,000 to 500,000 population, there was a 23 per cent increase in forcible rape. Twenty-three of the thirty cities in this group reflected increases. In actual numbers, there were 935 forcible rapes committed in these cities for the first nine months of 1961, as against 761 for the same period in 1960. 1962 Report 11.

4 Harry Kalvan, Jr., in The Metaphysics of the Law of Obscenity, 1960 Supreme Court Rev. 4, lists four possible dangers at which legislation in the field is directed:
(1) The incitement to anti-social sexual conduct
(2) Psychological excitement resulting from sexual imagery
(3) The arousing of feelings of disgust and revulsion
(4) The advocacy of improper social values.
See also, Roth v. United States, 354 U.S. 476, 502 (1957), wherein Mr. Justice Harlan indicates a possible fifth danger as being the possible impact of obscenity on character and hence slowly and remotely on conduct. See text and discussion infra accompanying notes 64-72.

7 That the reading of obscene matter is a sort of purgative or escape valve, see e.g., Karpman, The Sexual Offender and His Offenses: Etiology, Pathology, Psychodynamics, and Treatment (1954).
8 St. John Stevas, Obscenity and the Law 196 (1956).
sion such as violence, excretions and the like which might be sup-
pressed, it is obvious that the broad spectrum of the assault is one
directed at suppressing sordid sex materials. The tendency seems
to be to equate community standards in the obscenity field with
community sexual practices.

Lastly, it should be pointed out that publishers of sex tainted,
obscene and pornographic matter have a vested interest of a much
more real nature than mere constitutionality—cash. The report of a
New York legislative commission, studying the obscenity problem in
1962, indicated that the business of pornography had become a five
hundred million dollar a year business.

RHODE ISLAND'S EXPERIENCE

As the fight rages between the citizen crusaders and the guardians
of fundamental constitutional liberties on the broader subject of speech
censorship in any form, the Supreme Court continues to render
decisions allegedly designed to clear up misgivings as to how
obscenity should be handled. Another opportunity was decisions
allegedly designed to clear up misgivings as to how obscenity
should be handled. Another opportunity was presented the Court,

This action originated in the Rhode Island Superior Court by a
publisher to have a Rhode Island statute creating the “Rhode Island
Commission to Encourage Morality in Youth” declared unconstitu-
tional, as in violation of the first and fourteenth amendments and to
enjoin the practices and acts of the commission. The superior court
granted the injunction but refused to hold the act unconstitutional.
The supreme court of Rhode Island dissolved the injunction and
affirmed the superior court on its determination that the act creating
the commission was not unconstitutional. The United States Supreme
Court reversed the high court of Rhode Island, condemning the prac-
tices of the commission but not declaring the commission an uncon-
stitutional creation.

The Supreme Court, through Mr. Justice Brennan, who is the
author of most opinions in the field of obscenity, looked through the
forms and substance of the informal regulation and censorship carried
on by the commission and recognized that it “... may sufficiently

11 See e.g., 1962 Report.
14 Ibid.
inhibit the circulation of publications to warrant injunctive relief.\(^7\) It is apparent that the court was attacking the successful informal controls the commission had exerted over publication and distribution of books, magazines and perhaps movies.\(^8\)

Since the commission was an informal body although operating within the state sanction, at least to the extent of being created by the state,\(^9\) it is not unlike many other crusading organizations seeking to protect the public in general and youth in particular from exposure to obscenity.\(^10\) An examination of the condemned practices may reveal some guidance as to the limits an approach like that of Rhode Island can expect.

The commission's *modus operandi* was to send out notices to the bookseller advising him that a publication was objectionable for sale or display to youths under eighteen years of age as determined by a majority vote of the commission. If this were a mere plea for cooperation the court might not have so readily condemned the practice, but the notice went further and posed that the commission had authority "to prevent the sale . . . of indecent and obscene publications to persons under eighteen years of age"\(^11\) and that "the attorney general will act for this commission in case of non-compliance."\(^12\)

Justice Brennan recited from the evidence that a copy of the objectionable list was furnished to the local police and that an officer usually visited the distributor to see what action had been taken. These practices caused the retailers and distributors to (a) refuse to take new orders for the proscribed publications, (b) cease selling any of the copies on hand, (c) withdraw from retailers all unsold copies, and (d) return all unsold copies to the publishers. The resultant economic effect upon the publishers\(^13\) of the condemned publications was sufficient to give them standing to raise the issue. The Court held that these practices amounted to a scheme of governmental censorship.

\(^8\) Id. at n. 1.
\(^9\) The commission was broadly given three missions by way of legislative mandate: (1) to educate the public as to obscene publications as described by the law of the state, (2) to recommend for prosecution violators of obscenity peddling statutes, and (3) to recommend legislation in the field of obscenity with emphasis upon the juvenile. Bantam Books v. Sullivan, 83 S. Ct. 631, n. 1 (1963).
\(^12\) Ibid.
\(^13\) Appellants Dell Publications joined Bantam Books, Inc. in this action.
devoid of the constitutionally required safeguards for state regulation of obscenity.\textsuperscript{24}

Justice Brennan pointed out that in the now famous \textit{Roth-Alberts} decisions\textsuperscript{25} the Court had conceded that obscene communications are outside the protections of the first and fourteenth amendments. The states may regulate these communications if, and only if, they are found to be obscene by application of the Court's current test of "prurient appeal"\textsuperscript{26} expressed in the \textit{Roth} decision. Even then, however, the "... State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionally protected speech."\textsuperscript{27}

It was clearly of great annoyance to the court in both the instant case and in the earlier case of \textit{Marcus v. Search Warrant}\textsuperscript{28} that some of the publications seized were not in fact obscene as later determined by the state courts.\textsuperscript{29} But it should be pointed out that there was much more opportunity for a thoughtful consideration of the merit of the publications before the Rhode Island commission than by use of the procedures employed in \textit{Marcus} where police acting pursuant to a warrant seized some 11,000 pieces of material representing 280 separate issues in an all day raid. Later determination in the court revealed that 180 of the issues were not obscene.\textsuperscript{30} Nonetheless, the court felt that the Rhode Island commission, like the police procedure in \textit{Marcus}, failed to provide the procedural safeguards necessary for the constitutionally protected expressions which are often separated from the unprotected and obscene by "... a dim and uncertain line."\textsuperscript{31}

Mr. Justice Brennan also stated that although the commission may have been limited to informal sanctions the result of its threats of prosecution was to achieve suppression of the objectionable publications over and above the state's statutory criminal regulations of obscenity. Brennan argued the state had obviated the need for those regulations and as well as the safeguards of the criminal process. As


\textsuperscript{25} Roth v. United States, and Alberts v. California, 354 U.S. 476 (1957) decided together.

\textsuperscript{26} Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest. Id. at 488.

\textsuperscript{27} Marcus v. Search Warrant, 367 U.S. 717, 731 (1961).

\textsuperscript{28} 367 U.S. 717 (1961).


to the state's argument that there had been no criminal prosecutions in fact resulting from the procedures of the commission and that the booksellers and distributors were free to ignore the commission's letters and await prosecution for a violation under the existing statutory obscenity laws, Mr. Justice Brennan replied that the threats nonetheless produce from the average citizen the requisite compliance whether the courts remain open or not.\textsuperscript{32} It is clear that few businessmen wish the unfavorable publicity involved in a costly court action which may result in the label of "smut peddler" being attached to him. The cumulative effect of these procedures, said Brennan, was an unconstitutional "prior restraint," and prior restraints of any kind have had a strong presumption against their validity in the Supreme Court since the landmark case of \textit{Near v. Minnesota}, decided in 1931.\textsuperscript{33}

Another important factor which clearly had a significant effect on the Court's decision was that, while the commission's principle mission was to protect the juvenile from obscenity, it invariably resulted in depriving the adult reader of the opportunity to purchase the listed publications, a result which was condemned by the court's decision in \textit{Butler v. Michigan},\textsuperscript{34} as it reduced what the adult populace could read. In remanding the case the Court did not reinstate the broad injunctive relief sought by the appellant which would have enjoined the commission from notifying retail or wholesale distributors in any manner as to what books they had found to be objectionable.\textsuperscript{35} It would appear that such relief would be entirely too broad a restriction upon the state. The Supreme Court noted however that injunctive relief from threats of prosecution or license revocation had often been granted by other courts.\textsuperscript{36} One writer has also submitted that this is and has been an excellent device available to booksellers, publishers, exhibitors and the like to prevent suppression (and profit loss) until the matter is properly before the courts on the obscenity issues.\textsuperscript{37}

Brennan, in closing for the majority, does say however that consultation between law enforcement officers and distributors prior to an action being brought under the obscenity statutes might be desirable

\textsuperscript{32} One writer suggests that the reason that there are few prosecutions under state obscenity statutes is because of the fear of those seeking to suppress the publication that by doing so the popularity of the publication may be increased. 22 U. Chi. L. Rev. 216, 225 (1954).
\textsuperscript{33} 283 U.S. 697 (1931).
\textsuperscript{34} 352 U.S. 280 (1957).
\textsuperscript{37} 68 Harv. L. Rev. 489, 502 (1955).
where it is undertaken genuinely, to avoid prosecution, but he stressed that this practice must be done by those in the law enforcement business.

Mr. Justice Harlan, in the one dissent,38 did not believe that the majority had reached the central issue of the problem presented, which he saw as the accommodation that must be made between the state's concern with the problem of juvenile delinquency and the right of freedom of expression.39 In focusing his opinion upon the juvenile problem he noted that this was a problem to be dealt with by the state legislatures and pointed out that they should have a wide range of action in this area and, unless clearly unconstitutional, their acts should stand.

Justice Harlan, in disposing of the constitutional issues, felt that the Court had allowed a "broadside" attack on the states' system of obscenity regulation which the court refused to sanction in *Times Film Corp. v. City of Chicago*40 in the area of motion pictures. In that case an exhibitor attacked the city's film licensing regulation "broadside" as an unconstitutional prior restraint, not to a particular movie film but as to all. The Court held in *Times Film* that not necessarily all prior restraints of expression were unconstitutional and remitted the petitioner to his state court remedies as to a particular film for a decision of whether its suppression would be unconstitutional applying the *Roth* test.41 Harlan claimed that in view of the fact that the courts were still available to the Rhode Island petitioner with all the requisite judicial safeguards, he could stand his ground and await further governmental action. This being true, whatever element of prior restraint that existed in Rhode Island as a result of the commission's actions was far less dangerous than that sanctioned in *Times Film*.

Further, said Justice Harlan, the practices here were even less dangerous than the procedures employed in *Kingsley Books, Inc. v. Brown*,42 where after a preliminary restraint the owner was entitled to a full determination on the question of obscenity within two days under the statute.43 Here, he argued, there was no legal sanction for a restraint and the distribution of the questionable material was left undisturbed.

Whatever might be said for Justice Harlan's distinctions on the prior restraint issues, it is clear from his opinion that his greatest con-

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39 Ibid.
41 Ibid.
43 Ibid.
cern was with the states' need to have methods to combat juvenile delinquency problems which could be caused in part by undesirable publications. He felt that the court, without any guidance as to what would be within the scope of constitutional commission action, had cut into the effort of the state to deal with the juvenile delinquency problem without the publisher or distributor ever having to vindicate the protection given to their publication before any court.

Mr. Justice Clark, concurring in the result, condemned the specific utterances of the commission in their "orders" to the distributors and retailers but did join Harlan in an attempt to set out exactly what the commission might do within the bounds of the constitution as he read the majority opinion. The commission could constitutionally:

1. express its views on the character of any published reading or other material,
2. endeavor to enlist the support of law enforcement authorities, or the cooperation of publishers and distributors, with respect to any material the commission deems obscene, and
3. notify publishers, distributors and members of the public with respect to its activities in these regards; but that it must take care to refrain from the kind of overbearing utterances . . . that might tend to give any person an erroneous impression either as to the extent of the commissions authority or the consequences of a failure to heed its warnings.

The decision in the Rhode Island case makes it clear that any state action directed at suppressing expression cannot simply take the form of protection of the young and escape the constitutional safeguards where it results, however indirectly, in the successful censorship of expression that has not been judicially determined as obscene.

The decision, however, has no language to indicate how the court might decide an action based on effective state legislation which safeguards minors against publications which, when judged against the prurient interest test based on the standards of the community as a whole, might not be found to be obscene.

If it is true, as many believe, that the court has now adopted the "hard core" pornography rule as to what may be constitutionally suppressed as to the public in general, then it is obvious that the young can be thus protected from the most base of obscene expression by use of statutes employing the Roth test, and it is also apparently

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45 Ibid.
true that where material is on its face so offensive as to affront current community standards it is obscene without the use of the "prurient appeal" test.\textsuperscript{48}

However, the feeling is strong that the young reader should be protected from those expressions which are something less than hard core pornography but are none the less suggestive in the area of sex and related offensive subject matter which may have adverse effects upon the young. It is interesting to note that in England the protection of the young has remained unswervingly the key effort in the area of obscenity regulation.

**England's Approach**

As recently as 1959 the English obscenity statutes have been revised and geared to protection of the juvenile.\textsuperscript{49} This most recent English expression of concern for the morals of youth continues to follow the test of obscenity laid down in the classic case of *Regina v. Hicklin*\textsuperscript{50} in 1868, wherein the test as to whether a book was obscene was whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall.\textsuperscript{51}

The *Hicklin* test came about as an interpretation of the Lord Campbell Act, enacted by Parliament in 1857, which was apparently the first act in Anglo-American legal history directed at the suppression of writings whose sole purpose was to corrupt the morals of youth.\textsuperscript{52} The *Hicklin* test does more than merely protect the young reader; it will protect any adult who is susceptible to immoral influence.

The prevailing English view in this area seems to be simply that while there may be adults who would want to read obscene books, they are simply not as apt to do so as the young people, and the young are those primarily sought to be protected.\textsuperscript{53} The present statutory scheme in England employing the *Hicklin* test is modified only slightly by such considerations as the intent of the author, dominant theme, literary merit as a possible defense, and use of expert opinion as to any such merit.\textsuperscript{54}

The English statutes provide in general that a seller will be guilty of a misdemeanor if he sells or distributes the objectionable

\textsuperscript{49} Obscene Publications Act, 7 and 8 Eliz. 2, 666 (1959); see also Children and Young Persons (Harmful Publications) Act, 3 and 4 Eliz. 2, ch. 28 (1955).
\textsuperscript{50} 3 Q.B. 360 (1868).
\textsuperscript{51} Id. at 371.
\textsuperscript{52} 1 Washburn L.J. 220, 222 (1962).
\textsuperscript{53} Regina v. Reiter, 2 Q.B. 16 (1959).
\textsuperscript{54} 1 Washburn L.J. 220, 222 (1962).
material with the intent to corrupt those to whom it is so distributed, or if he sells or distributes such matter recklessly as to whether or not the matter would have a corrupting effect upon the person to whom sold. The statutes also provide punishment for the sale of "horror comics," which would tend to corrupt the youth.\textsuperscript{55}

This short review of the obscenity regulation and the youth in England, if nothing else, reveals either a greater concern over the youth problem than that which appears in the United States or a greater ability to deal with the problem than that which we now have.

If the growth of protection for the young is of chief concern to the English courts, the courts of the United States seem to be going the opposite direction. While the Hicklin Test was widely adopted early in our history,\textsuperscript{56} the great fear has been that the "minds open" criterion of the test would make the young and perverted the standard measure of the mind of society and severely limit that which might be available for distribution to the adult population. This fear was first pronounced directly by the Supreme Court in Butler v. Michigan,\textsuperscript{57} where the defendant bookseller was tried and found guilty of a violation of a statute which made it a crime to make available any obscene publication which tended to incite or corrupt minors, after selling the book to a policeman. The conviction was reversed by the Court as it found that the statute, thus interpreted, made a crime of making available to the general public that which may be unfit for the child. The determination of obscenity provided for under the statute was made on the basis of examination of isolated passages, a practice early condemned in the federal courts.\textsuperscript{58} The Court said that the statute here was not reasonably restricted to the evil sought to be protected against. However, it did say that the defendant could have been convicted if it were shown that he in fact had made obscene publications available to minors.\textsuperscript{59} Another example of the same fear is demonstrated in the recent Rhode Island Commission case discussed supra.

The rule announced in Butler\textsuperscript{60} effectively ended use of the Hicklin

\textsuperscript{55}3 and 4 Eliz. 2, ch. 28 (1955); see also Williams, Obscenity in Modern English Law, 20 Law & Contemp. Prob. 630 (1955) for a discussion of the English statutes.


\textsuperscript{57}362 U.S. 380 (1957).

\textsuperscript{58}E.g., United States v. One Book Entitled "Ulysses", 5 F. Supp. 182 (S.D. N.Y. 1938).


\textsuperscript{60}Ibid.
test, and shortly after Butler, the Roth-Alberts decisions firmed up the rule that the measure for all is to be the effect of the writing on the average adult. The injection into the "prurient appeal" test that material having "even the slightest redeeming social importance . . ." would receive protection makes it more obvious that the adult is left to his own choice in the twilight area of obscenity, while the child is remitted to the protection of his parents.

WHY SUPPRESS PUBLICATIONS AT ALL?

In order to draw any useful conclusions as to how statutory revision could be effected to offer increased ability for the states to deal with the obscenity problem, an examination of some of the particular reasons for obscenity laws will be made.

Two researchers, in an exhaustive look at the problem of obscenity in the mails, have suggested seven possible reasons why we suppress obscenity:

1. Obscenity laws are necessary to prevent people from thinking bad thoughts and thus adopting corrupt attitudes.
2. . . . to prevent sexual misbehavior among adults.
3. . . . to prevent sexual misbehavior by youthful and maladjusted persons.
4. . . . to protect parental interests.
5. . . . to prevent unjustified infliction of emotional disturbance.
6. . . . to prevent commercialized stimulation of psycho-sexual tensions.
7. Obscene publications may be banned because they form no useful part in the exposition of ideas or the advancement of the arts.

Of primary concern to any promulgation of statutes designed to protect the young specifically are 3, 4 and 6 of this categorization; however, it is readily apparent that the categories spill over into one another and might be regarded as the sum total of why we do suppress obscene publications.

Category 3. " . . . to prevent sexual misbehavior by youthful sexually maladjusted persons." This has been generally discussed as to the absence of specific proof of such effects. Suffice it now to say that, to the extent any law is formulated specifically to protect the youth as

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62 Id. at 489.
63 Id. at 484.
65 Id. at 196.
66 See text accompanying notes, 1-14.
an audience, a state must make it quite clear that such a law cannot impose restraints on the freedom of the adult reading public.

Category 4. "... to protect parental interests." While it is true that parents have no "overriding legal right to bring up their children as they choose ...," it is also true that our history has placed high regard upon parental teachings. This feeling on the part of parents that, if a child must be exposed to erotic stimuli it would be the better and perhaps only approach to have parental guidance in these presentations so that they appear more nearly in their proper perspective. The point is that the child will see only the "delights" of erotic behavior without the consequences and aftermath that the adult knows will follow any such experience. Thus a distorted picture of sexual experience is left with the child which might strengthen a "... socially undesirable attitude toward sex and sexual relationships." The purveyor of obscenity is then an unwanted intruder in the family in the handling of the problem. The parent, of course, in this fluid and mobile society cannot be left to handle this problem as he should unless there is some method of preventing the sales to the child of the objectionable material.

Category 6. "... to prevent commercialized stimulation of psycho-sexual tensions." This category was first expressed by the American Law Institute, which argues in its rationale that there is such a wall of secrecy surrounding sexual behavior that it has built up a shamefulness of sexuality; yet most are attracted by natural desires to read and see graphic materials on the subject. The mixed emotions of desire on the one hand and revulsion on the other create "repression tensions" which have an unsettling influence upon society. This approach argues that obscenity is not bad in the abstract, nor because it demonstrably triggers misbehavior, but because of its unsettling influence. If these tensions are present in the adult, a fortiori, it would seem they are compounded in the developing and curious minds of the young.

The institutes are of the opinion that while all the evidence is not in as to what effect the "unsettling influence" may have upon individuals, until it is in commercial exploitations of these tensions should be none the less a justification for anti-obscenity laws.

The remaining categorizations stated above have been much dis-

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67 Paul and Schwartz, op. cit. supra note 64, at 197.
68 Ibid.
69 46 Minn. L. Rev. 1009, 1039 (1962).
70 Paul and Schwartz, op. cit. supra note 64, at 199.
71 Paul and Schwartz, op. cit. supra note 64, at 199 sets out a discussion of the American Law Institute rationale.
cussed and require no further explanation here. Others have also argued that, regardless of whether there is a danger, the effects of which can be demonstrated, parents and others who rebel at the commercial efforts to exploit obscenity and to foster its wide circulation and for numerous other reasons must be accommodated as a matter of Real Politik.\textsuperscript{72}

Thus, we might condemn commercial distribution which exploits obscenity and which is either intentionally aimed at youth (and perhaps others with an obvious obsessive interest) or which is carried on with reckless disregard of the quality of the audience whose patronage is solicited.\textsuperscript{73}

FORMING A TEST

The Supreme Court, in combatting the onslaught of obscenity litigation, has struggled to come up with a satisfactory word test to apply in this area. In \textit{Roth}, the Court discarded the "clear and present danger" test developed in the other first amendment cases\textsuperscript{74} in order to avoid the problem of dealing with the lack of demonstrable effects and adopted the current test of "prurient appeal,"\textsuperscript{75} which has apparently been coupled with a test of "patent offensiveness." That is, if a writing is on its face "... so offensive as to affront community standards of decency," it may be considered obscene and outside the protections of the first amendment.\textsuperscript{76}

As to the inherent problems with these word tests, such a discussion is outside the scope of this note, but for our purposes here we need only say that these tests are based on the mind of the average adult and not the juvenile. Therefore, taking the existing tests, it could be argued that the Court would accept a test of "prurient appeal" based on an average child of a certain age group.

The difficulties in determining whether a publication is dominantly one of prurient appeal to an average minor of a given age group may be insurmountable. Even with expert psychological testimony, we are told that it is impossible to determine what has prurient appeal for the adult; hence, it could be argued that such a test is inconceivable with regard to a given age group.

It might also be argued that if that test is too difficult perhaps the approach could be on the basis of whether the material simply

\textsuperscript{72} \textit{Op. cit. supra} note 69, at 1040.

\textsuperscript{73} \textit{Ibid.}

\textsuperscript{74} The test was developed in \textit{Schenk v. United States}, 249 U.S. 47 (1919) and modified in \textit{Dennis v. United States}, 341 U.S. 494 (1951).

\textsuperscript{75} \textit{Roth v. United States}, 354 U.S. 476 (1957).

is a gross violation of community sensibilities as regards its distribution to the protected group without use of the test of "prurient appeal."\textsuperscript{77}

But if it is true, as many believe, that it is for the jury to make the determination as to allegedly obscene publications for the reason that they represent the contemporary community standards,\textsuperscript{78} it would seem that they should be allowed to make the determination with regard to what is prurient appeal or is patently offensive to a certain age group in the community. The fact that jurors are parents and have been children should qualify them as well as anyone to make this determination, and in so doing they should be allowed to have all the evidence that can be mustered, including not only psychological evidence as to possible effects, but also evidence as to literary or scientific merit, intent of the author, intent of the seller and publisher, the circumstances of sale, the method by which it is advertised and promoted, and the probable audience of the material. Thus armed, the jury should be able to determine whether a given publication should be suppressed as to the age group concerned but not perhaps as to one outside of the class.

This approach is what has been called "variable obscenity;"\textsuperscript{79} that is, that different standards can be applied to material considering its audience. It is not really a new concept; many jurisdictions have recognized for some time that in the hands of certain people, under some circumstances, even that which would be "hard core" pornography as to the general public might not be obscene as to researchers in the field.\textsuperscript{80}

\textbf{SCIENTER}

Assuming as we have that the goal of anti-obscenity legislation is not altogether directed at a given writing but at the purveyors of obscenity, any legislation must strike at the sale of the objectionable material, for in the commercialization of the material the only ends of the seller, distributor and publishers are profits.

Any effort at placing strict criminal liability upon purveyors of obscenity has been eliminated by the Court's decision in \textit{Smith v. California.}\textsuperscript{81} The Court now requires that a bookseller must know-

\textsuperscript{77}\textit{Ibid.}

\textsuperscript{78} See e.g., Hand's opinion in United States v. Levine, 83 F.2d 156, 157 (2 Cir. 1936); Kalvan, \textit{The Metaphysics of the Law of Obscenity}, 1960 Supreme Court Rev. 2, at 39.


\textsuperscript{80} As to the growing importance of the receiving group, see generally 34 Ind. L. Rev. 426; Lockhart and McClure, \textit{Literature, the Law of Obscenity and the Constitution}, 38 Minn. L. Rev. 295, 342 (1953).

\textsuperscript{81} 361 U.S. 147 (1959).
ingly sell such materials. When this standard is applied to any obscenity statute it makes punishment of a seller almost, if not wholly, impossible in the border line obscenity situations with regard to the existing prurient interest test on the average adult. If the bookseller has read the book and thought it not obscene, or if the distributor for an entire state as in *Bantam Books, Inc. v. Sullivan* is sought to be prosecuted, it is reasonably obvious he will have found it impossible to have any specific knowledge of the obscene contents of any book. Prosecution under any statute designed to punish the purveyor in these circumstances seem, doomed to failure.

This difficult situation seems compounded when the requirement of scienter is coupled with the suggested prurience or patent offensiveness test for a given age group, but it should be noted that the requirement of scienter laid down by the Court in *Smith v. California* is not clear as to just how much knowledge is required, although from the decision it could be argued that the reckless sale without any concern on the part of the merchant as to character or content might be sufficient to fulfill the requirement.83

It is submitted, however, that since dissemination for profit aimed at the juvenile is what has raised the loudest protests, we could find sufficient scienter on the part of a distributor or seller if he clearly should know that a substantial part of his audience for given publications is the juvenile group and it appears that his motive behind selling is either to intentionally exploit that protected group’s interests in the obscene or that he recklessly emphasizes by advertising the pruriency of the matter. Then it could hardly be argued that he has no knowledge as to the prurient appeal of the publication.

Here it seems that we are attacking the large distributors and publishers because of their commercial exploitation, and by taking into account their conduct and motives in the creations and sale of objectionable material, the necessary scienter is obvious when as a matter of fact the problem is a more local one. Indeed, some have argued it would be almost impossible to find exploitation and improper motives in the “...sedentary street corner magazine vendor.”84 While more difficult, a *de facto* look at the local bookseller can at a glance inform the observer whether his sales emphasis is upon the questionable material, and it is not believed that the seller is unaware of the general nature of publications and the reputation of a given publisher. The defense of “tie in sales” which has been pleaded in obscenity prosecu-

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83 Paul and Schwartz, *op. cit. supra* note 64, at 218.
84 Id. at 216.
tions, would lead one to believe that the average seller of the obscene or borderline obscene knows only too well what he is selling. It should be noted that "tie in" book sales have been eliminated in most jurisdictions and it is believed that such sales may now be unconstitutional as a result of a recent Supreme Court decision.\textsuperscript{85} Another method by which the requisite scienter may be determined would be where a citizens' group, acting within the confines of the \textit{Rhode Island Commission} decision, informs the local seller that given material seems objectionable as to the protected age groups, he could be charged with the duty of inspecting those materials with regard to sales to minors.

It has also been argued that well-publicized obscenity proceedings and prosecutions against publications \textit{of the same nature} as those in question might be sufficient notice to those in the business as to warrant a finding of scienter.\textsuperscript{86} The best approach to the determination of requisite scienter, however, seems to be a "totality of fact" approach considering all the possibilities heretofore indicated. Such a fact approach should include consideration by the jury of the reputation of publishers, cover pictures, manner of display, method of acquiring the material, and repetitions of offenses on the part of the seller.\textsuperscript{87} It must be remembered that what is sought to be prevented is not the isolated sale to a minor but the general commercialization. This practice being stopped, the greatest dangers are eliminated.

\textbf{Suggested State Statutory Reforms}

It is an extremely difficult task to formulate any practical and usable statutory proposals in the field of obscenity, not only because of the conflicting value objectives but also because of the rapid change of acceptable constitutional standards in the field. As has been stated, however, it is believed that such changes are needed to provide the states with more effective methods in dealing with the juvenile problem.

The possible changes recommended here are based solely on protection of the minor from the obscene publications. Despite the argument that specific protection for the minor will not be effective if these are not extended to the adult population,\textsuperscript{88} and despite the extremely hard job of policing, it would seem that such changes would

\textsuperscript{85} Lowes, Inc. v. United States, 83 S. Ct. 97 (1962).
\textsuperscript{86} Lockhart and McClure, op. cit. supra note 79, at 107.
\textsuperscript{87} 1962 Report 111-115.
\textsuperscript{88} 68 Harv. L. Rev. 494, 500 (1955).
be considerably more useful tools to achieve the desired ends than the existing statutory schemes in many states.

1. It is believed that specific statutory provisions should be enacted which comprehend a test of obscenity based on the variable obscenity concept with the criteria for judging whether or not material is obscene to be based on its patent offensiveness, or prurient appeal, considered as a whole, to the average or ordinary child of the age group sought to be protected.

2. Penal laws for the sale of obscene literature to minors should provide for the requirement of scienter as a necessary concomitant of the offense. The statute should include three levels or degrees of the offense with the intentional sale of obscenity to the protected class being the most serious. A lesser penalty should be provided for the sale of the objectionable material to one of the protected class which is made in reckless disregard as to its contents and character, and an even lesser offense should be provided for a bookseller who negligently sells the objectionable material without reasonably having inspected it as to its contents.

Such a statute is designed to fall most heavily upon the purveyor who intentionally takes advantage of the protected group and its inability to see what is represented in its true light. It is true that this approach imputes a duty upon the bookseller to investigate the contents before sales to the minor. In Smith v. California, however, the Court expressly states that they were not passing on "... whether there might be circumstances under which the state constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not and what the circumstances might be."

3. Legislative action should be taken to specify a method of rapid determination of whether or not a given publication is obscene with regard to the suggested test. The method of determinations should be special with regard to the juvenile obscenity regulations and be included within them. Such a statute should include:

(a) Provisions for ex parte application for temporary injunctions upon showing of probable cause to restrain the sale of the allegedly objectionable material to the protected group.

(b) Provision for a declaratory judgment proceeding brought against the objectionable book, magazine, etc., by its name to determine whether or not it is obscene with regard to the protected group.

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81 361 U.S. 147 (1959).
91 Id. at 54.
initiated by the local prosecutor. Where a temporary injunction order to restrain the sale has been issued, the declaratory judgment proceeding should follow within a very short time, probably no longer than one week. Such a proceeding should include a provision for jury trial if requested by the seller or other party in interest.

(c) Provision that the findings of the declaratory judgment proceeding shall constitute adequate proof of the requisite scienter on the part of all sellers within the jurisdiction of the court.

The injunction is of course not new to the field of obscenity regulation and does not require any arbitrary search and seizure such as that condemned in *Marcus v. Search Warrant.* While this is a prior restraint, it is only a partial one with respect to the protected group and does not prevent the sale to the general public. It should be noted, however, that in view of the Supreme Court's decision in the *Time Film* case and *Kingsley Books Inc. v. Brown,* such a procedure might be acceptable with regard to the general obscenity statutes.

Use of the declaratory judgment proceeding prevents undue bad publicity for the seller and fulfills the Supreme Court's mandate of judicial determination. Such a procedure must provide for a final determination of obscenity within a short time, it would seem, even with regard to the restricted class. The procedure is in use in several states in general obscenity statutes and has evoked favorable comment by writers in the field.

It should be noted that where such a procedure is employed within the general obscenity statutes, a special provision could be adopted to allow a finding of acceptability with regard to the adult public but could allow its suppression with regard to the protected class.

4. There should be state legislative determination of the age group or groups which are to be protected, but the maximum age at which the juvenile should be protected should be sixteen years, after which he should be considered an adult for the purpose of these statutes.

Sixteen years is an arbitrary age to lift reading restrictions, but it is believed that in the modern social climate the young people have

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by this time been sufficiently exposed to the "facts of life" to be able to cope with material which is suitable for adult reading, and it is believed that any more than normal susceptibilities to sex perversion and the like will have been discovered.

One possible caveat to the age limit could be that for the exceptional child of above average intellect a licensing system, perhaps administered by the schools to allow the child adult reading privileges, could be devised. Such a licensing could require psychiatric examination for stability of personality of the selected child.

5. Of a more general nature, legislative provisions could be enacted to provide for a commission to serve within the restrictions laid down in the Rhode Island Commission case\(^8\) to inform the public, law enforcement officers and those in the business of bookselling of that which they deem to be objectionable. Such a commission should also strive to seek the cooperation of the publishing industry, an approach which seems to have proven some success in the field of comic books.\(^9\) Given a slightly broader mandate, such a commission could and should, in conjunction with the education department of the state, of which it might be a part, devise and install in the school systems a program of sex education, to begin very early in the child's education, which would progress from year to year and perhaps greatly reduce the need for special obscenity regulation.

**CONCLUSION**

While there is an absence of scientific authority to demonstrate adverse effects resulting from juvenile consumption of obscene and near-obscene, sex-oriented publications, the growing concern of parents, educators and law enforcement officials that there is a very real danger to our young as well as to society as a whole, should be accommodated by the enactment of special state anti-obscenity statutes designed to protect only that class. It is believed that such legislation would be found to be a valid exercise of the police powers of the states.

*H. Hamilton Rice*

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