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Technical Report of The Commission on Obscenity and Pornography

Volume II

LEGAL ANALYSIS

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Technical Report of The Commission on Obscenity and Pornography, v. 2

Volume II

LEGAL ANALYSIS

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Foreword

The members of the Commission on Obscenity and Pornography take special satisfaction in making available these Technical Reports of research undertaken at the Commission's request and under the direction of its staff.

These reports are an important part of the Commission's response to the directive from Congress to study and report on (*a*) constitutional and definitional problems relating to obscenity controls, (*b*) traffic in and distribution of obscene and pornography materials, and (*c*) effects of such materials, particularly on youth, and their relationship to crime and other antisocial conduct.

Most of the Technical Reports are original work because, outside of the legal field, very little research on the questions assigned to the Commission had been undertaken by anyone prior to the funding of the Commission in the summer of 1968. At appropriate points in these volumes, reference is made to reports of earlier research, as well as to research projects undertaken independently of the Commission during the two years of its effective life. Primarily, however, the Commission found it necessary to rely on the original research reported here.

Although attention will initially focus on the findings and recommendations of the Commission and its four panels, the research reflected in these Technical Reports will have greater long-range importance. The findings by the Commission and its panels are necessarily limited and hurried distillations, and its recommendations are inevitably tempered by the give and take of seeking to reach a group judgment on a highly controversial subject. The research reported here, however, was subject to no such limitations and is being made available primarily for two purposes:

(1) We expect and invite critical examination and appraisal of these reports, for we have only begun the task of interpreting the wealth of information they contain.

(2) We hope that the Commission-sponsored research will stimulate and point the way to further scientific inquiry in this difficult and baffling field. There are still many unanswered questions, and these will require further research with more refined techniques and instruments.

For the Commission, I wish to express deep appreciation to all the individuals and teams whose research is reported here. We are most grateful both for their willingness to pioneer in this unexplored and controversial field and for their shouldering of the burden on such short notice and with such restrictive time schedules.

I also wish to express for the Commission our admiration and thanks to Dr. W. Cody Wilson, our executive director, and his excellent staff. Only

through their valiant and effective efforts in planning and implementing this vast array of highly diverse research projects, all focusing on specific tasks assigned to the Commission, was it possible for us to bring our work to a timely completion.

WILLIAM B. LOCKHART
Chairman

General Preface

Many of the papers in these volumes share two characteristics: a focus on empirical description and a lack of refinement in presentation. Each of these characteristics is a product of both circumstance and deliberate policy.

The emphasis on empirical description reflects in part the nature of existing knowledge at the beginning of the Commission's work. Few empirical observations had been reported in the literature, and these were not sufficient to provide even a tentative description of the phenomena of concern to the Commission, nor to form the basis for research at a higher level of conceptualization.

The emphasis on empirical description also reflects the nature of the task assigned to the Commission. The policy questions posed by the Congress required primarily empirical description for guidance.

The overall research strategy and the specific research projects were guided, however, by ideas and concepts from more theoretically developed areas of the behavioral sciences such as socialization, personality, and social structure. Hopefully, the data compiled for purposes of empirical description of the phenomena of obscenity and pornography will be relevant to theoretical issues in these other areas.

Some of the empirical descriptions may appear to many social scientists as demonstrations of the obvious. This is often the case *after* an empirical description has been provided. Yet, it is never certain that "obvious" concepts and relations are valid until they have been tested empirically. As it turned out, there were a few surprises to a few people.

The policy implications of the findings of this research program may very well stir controversy and debate. Because of their crucial importance for policy discussion and decision, the Commission has presented the basic empirical observations with a minimum of complex statistical manipulation and conceptual analysis. The lack of refinement in presentation of several of the research reports is due in part to the Commission's desire to keep very close to the raw data.

Most of the researchers had less than nine months in which to establish a research team, arrange a research setting, develop measuring instruments, secure subjects, collect the data, reduce the data, and write a report. In several instances we are presenting, literally, the first draft of a report.

The Commission staff has refrained from all but very minor editing of these reports. The observations and interpretations are entirely the authors'. To insure that ideological standards were not imposed on the results of the reports, the Commission and its staff have also foregone the prerogative of

imposing generally accepted standards of scientific reporting. To the same end we have also published all of the research that has been undertaken for us.

Nevertheless, most of the reports in these volumes quite satisfactorily reflect current standards, not only for conducting research but also for reporting on its results.

We trust that many of the authors will soon present to the behavioral science community reports based on these data but directed to more theoretical and conceptual issues and reflecting a higher degree of refinement of both data and presentation than has been possible here.

This series of volumes of Technical Reports is a joint effort of the Congress, the Commission, the Commission staff, the research teams headed by the authors of the several papers, and the many people who participated in the studies: Congress posed the general problems, authorized the Commission to contract with competent agencies to conduct research, and provided the necessary funds. The Commission specified the kinds of information that it required and worked closely with the staff in designing an appropriate research program. The Commission staff specified the details of the research program and, under the direction and guidance of the Commission, implemented it—partly by undertaking research directly, but more often by contracting with outside agencies to conduct research. The authors of the papers accepted responsibility for developing concrete research arrangements, collecting and analyzing data, and writing reports, all under tremendous time pressure. Several thousand people cooperated in collecting the data and devoted uncounted hours of time providing the information in these volumes.

On behalf of the Commission, its staff, the authors of the papers, and the people who read these volumes and make use of the contents, I express deep appreciation to the Members of Congress who initiated and made possible the gathering of this information, and to the people who participated in the various studies and contributed the basic information.

W. CODY WILSON
Executive Director
and Director of Research

Contents

	Page
Foreword	v
General Preface	vii
Introduction to Volume II	1
Obscenity law in the United States	3
Definition of "obscene" under existing law. *Paul Bender*	5
Implications of Stanley v. Georgia. *Paul Bender*	28
State obscenity statutes—description and analysis. *Jane E. Friedman*	37
Historical and philosophical perspective	63
Origins of the law of obscenity. *Martha Alschuler*	65
Theoretical approach to "morals" legislation. *Martha Alschuler*	82
Comparative perspectives	91
Argentina. *Helen Silving*	93
Australia. *Bryan Bromberger*	109
Denmark, Sweden, and Norway. *Knud Waaben*	127
France. *Mirjan Damaska*	148
Hungary and the Soviet Union. *Mirjan Damaska*	160
Israel. *Dr. Ernst Livneh*	165
Italy. *Mirjan Damaska*	175
Japan. *Peter Hocker*	186
Mexico. *Helen Silving*	190
United Kingdom. *Bryan Bromberger*	206
West Germany. *Mirjan Damaska*	222
Yugoslavia. *Mirjan Damaska*	233

Introduction to Volume II

This volume of the Commission's technical reports is one of two nonbehavioral science volumes. It is devoted entirely to legal analysis. The Commission's general counsel, Paul Bender, has been primarily responsible for securing the participation of the authors of the several papers that compose it.

The first section attempts to describe relatively briefly the state of the law regarding obscenity and pornography in the United States early in the year 1970. The Bender papers are memoranda, originally addressed to the members of the Commission, which present his analysis of the several Supreme Court decisions over the past decade and a half. The Friedman paper describes the laws of the various States.

The first of Alschuler's papers examines the historical development of laws regulating obscene publications in England and the United States. Her second paper provides perspective on the philosophical debate regarding whether or not the state should attempt to legislate private morals.

The third section of this volume presents descriptions of and commentary on the legal situation relating to obscenity in a wide variety of national states by legal scholars who are intimately acquainted with the laws in these countries.

W. CODY WILSON
Executive Director and
Director of Research

Obscenity Law in the United States

Definition of "Obscene" Under Existing Law

PAUL BENDER
Commission on Obscenity and Pornography

Some aspects of the law defining obscenity today are certainly a matter of doubt. However, I think it is possible to have a fairly clear idea at this time about undisputed parts of the definition and also to have the background for understanding just what the legal disputes are all about.

1. *Two Sources of Confusion.* Before getting to specifics I would like to point out two sources of enormous confusion which are present whenever the definition of obscenity is discussed.

The first point of confusion is that one must be very careful to distinguish between the definition of "obscene" which is permissible under a "general" statute and that which is permissible under a "specific" statute. A "general" statute is one which generally penalizes or prohibits commerce in or distribution of "obscene" materials, without special regard to the type of distribution. In essence, a general statute seeks to define materials which are obscene in and of themselves—which are abstractly .obscene, if you like—and to prohibit or penalize all or a broad range of dealings with such materials without worrying about to whom the materials were sold, whether the sale was public or private, whether it was accompanied by "pandering", etc. A general statute thus ordinarily includes prohibition upon sale of the obscene to consenting adults. It may permit seizure and destruction of the material to which it applies.

On the other hand, a "specific" statute only prohibits dealing with defined materials in a specified way or ways. Thus, it may prohibit the sale or distribution of certain material to minors, or the public display of certain material, or unsolicited mailings of certain material. However, distribution of the material to which such a statute applies may be perfectly legal in many contexts other than that prohibited by the specific statute. For example, material prohibited for juveniles may be sold to adults. Thus, a specific statute does not in any real sense

"outlaw" the defined material or hold it abstractly obscene; it merely prohibits certain dealings with it.

The bulk of this paper will be devoted to the legal definition of "obscene" which is permissible under a general statute, for it is here that the law has been extensively elaborated in recent years. The law concerning the definitions permitted under various kinds of specific statutes has not been developed to any significant extent. Bear in mind, however, that while the Supreme Court has not laid out just how far the definitions may go under specific statutes, the Court *has* made it abundantly clear that the limitations which restrict the permissible definition of "obscene" under a general statute *do not apply to certain very important kinds of specific statutes, and that substantially more inclusive definitions may be incorporated constitutionally in such specific statutes.* Three types of specific prohibitions where more extensive definitions are permissible have been mentioned by the Court: juvenile prohibitions, unconsented distributions or displays, and "pandering." There may be others as well. Again, if it appears in the principal portion of this paper that, for example, material must be patently offensive to be "obscene," this is so in a general statute. On the other hand, a specific statute relating only to distributions to juveniles may very well be constitutional even though it prohibits material which is not patently offensive from being sold to juveniles.

The second point of confusion has to do with the difference between what the law presently permits and what the law might permit if certain facts were to be developed and proved. The present law on obscenity has developed without any proof or empirical data, one way or the other, on the harm which may be caused by the distribution of "obscene" materials. This is true with regard to specific statutes as well as general statutes. If harm were proved—or disproved—the law might well be changed substantially. Thus, even if one were to conclude, on the basis of existing case law, that the utter nonexistence of redeeming social value is a requisite of obscenity under a general statute *today*, this would not mean that this Commission might not properly recommend a general statute which prohibits material containing some redeeming value. One of the Commission's tasks is to develop data on whether sexual material is harmful. If the Commission found that certain material was harmful, the Supreme Court would very likely be prepared to change its present limitations if that were necessary in order to prevent such harm. Correspondingly, if we were to find that "obscene" material was not harmful, the Court might well be amenable to making the constitutional limitations upon what an obscenity statute could prohibit more restrictive than at present. *The law today, whatever it is, does not stand in the way of redefinition in the light of the empirical evidence which we develop.* Indeed, I would suppose that such redefinition in light of factual data is one of the most important tasks of this Commission.

To a great extent, therefore, present discussions about whether a specific element is or is not part of the test of obscenity under the law today may not be very important in guiding what can and should be recommended in the Commission's final report. That report—and the legislative recommendations it will contain—hopefully will be based upon the Commission's appraisal of empirical data which has never been available to the courts. There is every reason to suppose that the judicial view of what the Constitution requires

in an obscenity statute will take due account of such data, once it has been developed.

2. *What is Presently "Obscene" Under a General Statute.* Rather than presenting my own ultimate conclusions about where the definition of "obscene" stands today, allow me to set out a narrative of the development of the definition in our law up to the present time, with short quotations from the important opinions which have shaped the definition. This narrative is going to be longer than I would have wished, but the number of opinions and complexity of the issue will not let me be both brief and objective.

(a) Cases Before "Roth." The Supreme Court of the United States, although it appeared for a great many years to assume that obscenity prohibitions were not inconsistent with the First or the Fourteenth Amendments to the Constitution, did not attempt a definition of the "obscene" until the *Roth* decision in 1957. The basic definition of "obscene," which received virtually unanimous judicial acceptance for most of the hundred years preceding *Roth,* was that formulated by the Court of Queens Bench in England in the late 1860's in a case called *Regina* v. *Hicklin.* The entire court appeared to adopt the following definitional formulation of Chief Justice Cockburn:

> . . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

Note that this test appears to focus primarily on the effect the material will have upon the minds of recipients and that it is enough that the accused material *tends to* cause the impermissible mental reaction in some susceptible recipients. Note also that the defendant apparently does not have to intend to deprave or corrupt, or even to intend that susceptible persons be exposed to his work; it is enough that the work "may fall" into the hands of those who would be adversely affected. On the other hand, a limited distribution of a work may save it, if by virtue of the limitation it would be prevented from falling into the hands of susceptible persons.

The work actually involved in *Hicklin* was an anti-Roman Catholic pamphlet entitled "The Confessional Unmasked; showing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession." The court seemed to have no doubt that the tract was a bona fide religious work distributed by the defendant for religious—not titillating—purposes, nor did it doubt that such a purpose was a permissible one. The Chief Justice nevertheless found about half the work in the *Hicklin* case clearly obscene under the test adopted because

> . . . it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of the most impure and libidinous character. . . . This work, I am told, is sold at the corners of streets, and in all directions, and of course it falls into the hands of persons of all classes, young and old, and the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains. . . . It seems to me that the effect of this work is mischievous and against the law, and

> is not to be justified because the immediate object of the publication is not to deprave the public mind, but, it may be, to destroy and extirpate Roman Catholicism.

By using this language the court seems to have rejected the idea that the presence of some "redeeming social value" is an absolute defense to an obscenity prosecution, but it is not at all clear that the court meant to exclude social value from the picture entirely. It may merely have meant to say that such value is not a defense when outweighed by potentialities for corruption, leaving open the possibility of a defense in cases where the value outweighed the harmful tendencies. I make this observation because the Chief Justice was at pains to point out that "the probability is, that nine hundred and ninety-nine out of every thousand into whose hands this work would fall would never be exposed to the chance of being converted to the Roman Catholic religion." Thus, "here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote and very doubtful good." The result conceivably might have been different if the potential good had loomed larger in proportion to the apprehended evil.

I have said that for most of the period prior to the *Roth* decision the test of *Regina* v. *Hicklin* held sway as the basic definition of obscenity in almost all courts in this country. During this time certain things about the test became clarified in some places. Bear in mind, as I discuss these clarifications, that it is impossible to generalize about them with complete accuracy. We are dealing with the multitude of State courts and lower Federal courts, and a substantial amount of variation was inevitable from one court to another and from one decade to another in the application of the *Hicklin* standard. The Supreme Court of the United States had not yet formulated or adopted a uniform definition for the country as a whole.

I believe that for much or most of the time when the *Hicklin* standard was the basic law, the following refinements of Chief Justice Cockburn's definition were adopted in a large number of jurisdictions. (The quotations are from *United States* v. *Bennett,* decided by an authoritative three-judge Federal circuit court in New York City in 1879, and often cited thereafter for the approved test.) The first refinement had to do with what part or portion of a work might be examined to determine whether it was obscene. In the *Hicklin* case half the tract had been found to be obscene; the court considered that proportion of obscenity plainly sufficient to prohibit the distribution of the whole work. Through further refinements in many places evolved the rule that *selected* obscene passages, which might constitute a relatively small part of a work, could make the entire work obscene. The jury charge approved in the *Bennett* case contained the following instructions to the jury (emphasis added):

> Now you have had this book in your hands, and the district attorney has marked certain passages. He does not claim that any passages in that [book] bring it within the statute, except those marked, and, therefore, you may confine your attention to the marked passages, as the matter which you are to determine upon. It is upon those passages alone that this case must turn . . . If this book is, in any substantial part of it, obscene, lewd, lascivious, or

of an indecent character, then it is non-mailable under the statute and the defendant is guilty. . . . [*T*]*he general scope of this book is not the matter in hand, but the question is, whether those marked passages are obscene or indecent in character.*

A second refinement in many places had to do with the type of audience according to which the selected passages of the work alleged to be obscene were to be judged. *Hicklin* spoke of corrupting the minds of "those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Bennett* elaborated on this as follows (emphasis added):

> . . . [I]t is not a question whether it would corrupt the morals, tend to deprave your minds or the minds of every person; . . . *It is within the law if it would suggest impure and libidinous thought in the young and the inexperienced.*

The last part of the quotation above implies a third clarification, which I have already suggested. A tendency actually to bring about improper acts appears indeed not to have been required in many places; a tendency to suggest improper thought was sufficient.

Finally, if a work might be judged in part only, and if it might be judged by its effect upon "the young and inexperienced," one supposes that the social value of the work as a whole played little or no part in the determination of whether a work was obscene in places where these refinements were adopted.

As time went on the *Hicklin* definition, as refined in some or all of the ways I have just described, provoked increasing dissatisfaction among judges, including some of special eminence. (I include here a few of the noteworthy objections and defections prior to the Supreme Court's *Roth* decision which, as we shall see, followed this trend toward rejection of some of the refinements of *Hicklin*.) In 1913, Learned Hand, sitting as a judge in the lower Federal court in New York City, stated and applied the *Hicklin* rule in a case called *United States* v. *Kennerley*. He felt bound to do so by precedent, which made it "no longer proper for me to disregard" *Hicklin*. Judge Hand then went on to criticize the lack of relevance of the social value of an accused work and the focus upon especially susceptible persons (in a passage which, whether you agree with it or not, I think you will find enormously well spoken):

> While, therefore, the demurrer must be overruled, I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time . . . I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature.

In 1934, Augustus Hand, joined by Learned Hand in the Federal Court of Appeals in New York, actually modified (for his jurisdiction) the *Hicklin* refinement permitting examination of isolated passages in determining obscenity. He affirmed a lower court decision that *Ulysses* was not obscene (and therefore might be imported into the United States) and strongly suggested the importance of literary value in judging the obscenity of works of fiction:

> . . . [W]e believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevance of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.

In 1949, Judge Curtis Bok, sitting as a trial judge in a State court in Philadelphia, also refused to be bound by aspects of the refined *Hicklin* test, finding that more recent cases took a new direction. The works in question were the *Studs Lonigan* trilogy, another work by Farrell, *Sanctuary* and *Wild Palms* by Faulkner, *God's Little Acre, End as a Man,* and Harold Robbins' *Never Love a Stranger.* Judge Bok refused to judge these works by their effect upon the most susceptible persons in society (emphasis added): "[T]he modern rule is that obscenity is measured by the erotic allurement upon the *average modern reader.*" He also appears to have rejected the notion that a mere general tendency to suggest improper sexual thoughts is a sufficient hallmark of obscenity: "erotic allurement . . . is measured by whether [a work] is sexually impure—*i.e.*, pornographic, 'dirt for dirt's sake,' a calculated incitement to sexual desire—whether it reveals an effort to reflect life, including its dirt, with reasonable accuracy and balance . . . ." These words further suggest to me that in Judge Bok's view attention must be paid to the work as a whole, including its literary and social value.

Finally, just 4 months before the Supreme Court decided *Roth,* eight members of the Court joined in Justice Frankfurter's opinion in *Butler* v. *Michigan,* striking down a State statute which prohibited the distribution of material containing "obscene" matter "tending to incite minors to violent or depraved or immoral acts [or] manifestly tending to the corruption of the morals of youth." In an apparent contradiction of the approval under *Hicklin* of general restrictions geared toward the most susceptible in society, the Court held:

> . . . Surely, this is to burn the house to roast the pig. We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance of progress of a free society.

(b) The "Roth" Decision. It was at this stage of growing dissatisfaction with the refined *Hicklin* rule that *Roth* was decided in an opinion formed by a bare

majority of five of the nine Justices. The Court's opinion in the *Roth* case was written by Justice Brennan who, at that time, was just completing his first term of service on the Court. (He is still a member of the Court. None of the four other Justices who joined in the opinion–Frankfurter, Burton, Clark, and Whittaker–remains on the Court.) Chief Justice Warren (no longer on the Court) concurred in a separate opinion and Justice Harlan (still on the Court) did the same. Justices Black and Douglas (both still on the Court) dissented. (I shall try to be as brief and objective as possible in summarizing for you these various opinions. My switch, hereafter, to the present tense in describing *Roth* is deliberate; it is a majority opinion of the Court which has never been overruled and which, consequently, *is* the law):

Fundamentally, the majority opinion in *Roth* adopts the basic approach of the *Hicklin* standard, namely, that obscenity is to be judged by its tendency to arouse sexual thoughts. The prohibited tendency, however, is defined in *Roth* through new terminology–that of "prurient" appeal; and the appeal which is prohibited is defined in terms of material tending to result in lust rather than, as in *Hicklin*, material tending to result in depravity or corruption.

The opinion thus states, as its basic definition of the "obscene," the following:

> . . . Obscene material is material which deals with sex in a manner appealing to prurient interest. *I.e.*, material having a tendency to excite lustful thoughts. [The second sentence of this quotation appears in the opinion as a footnote to the first sentence.]

To some extent, this modification in terminology introduced by *Roth* may just be a more complicated way of saying the same thing. I think, however, that there may be more to it than that. *Hicklin*'s concept of the effect of obscenity had rested on a premise of innocent minds previously unsullied by impure sexual thoughts; *Hicklin* posited that such minds would be corrupted or depraved by exposure to obscene matter. In *Roth* the idea that there is a "prurient interest" in people to which obscenity appeals by exciting lust, on the other hand, seems to reject the corruption-of-the-innocent rationale in favor of a premise that sexual tendencies–even impure sexual tendencies–are present in persons before they are exposed to obscenity. The purpose of obscenity laws, in such a view, seems to be more to prevent persons from preying on human weakness or fallibility than to preserve innocence.

At the same time as *Roth* adopts *Hicklin*'s basic approach, it firmly rejects two important *Hicklin* refinements. These are the approval under *Hicklin* of examining the effect of isolated passages in judging the obscenity of an entire work, and the focus of *Hicklin* on the effect of material upon particularly susceptible persons. In *Roth* it was found that these portions of *Hicklin* had already been discarded by the recent trend of decisions and that different rules regarding the relevant audience and use of isolated passages had been substituted. Using this substituted approach, which *Roth* appears to have approved and adopted, a work appeals to prurient interest so as to be obscene only if (emphasis added):

> . . . to the *average* person, applying contemporary community standards, the *dominant theme of the material taken as a whole* appeals to prurient interest.

I have tried to state the "test" laid down by *Roth* for defining obscenity. What emerges from this attempt is not nearly as clear as one would like, principally because of uncertainty over the meaning of "prurient interest." Now I am afraid that I am going to have to muddy the waters still further. The reason for this is that even the majority opinion of *Roth* does not speak with a single voice in defining the "obscene." What I have given is, I believe, the major definitional language. At the same time, *Roth* contains other language which seems to point to somewhat different definitional formulations. It is this other language, I believe, which has produced much of the enormous confusion since *Roth* over the meaning of that case.

There are three main sources in *Roth* for other and different definitional possibilities. The first relates to the Court's apparent equation of prurient interest material with material which excites lustful thoughts. Although the Court clearly states that equation in one place, it goes on to note, apparently with approval, *Webster's* definition of "prurient" as ". . . itching; longing; uneasy with desire or longing; of persons, having itching, morbid or lascivious longing; of desire, curiosity or propensity, lewd . . ." The *Webster's* definition is not obviously the same as the Court's equation of prurient interest material with material tending to arouse lustful thoughts.

The second source of definitional confusion relates both to the meaning of prurient interest and to other matters. After the Court defines obscenity as "material which deals with sex in a manner appealing to prurient interest," the Court then states in a footnote that it perceives no "significant difference" between that definition and the following definition contained in a tentative draft of the Model Penal Code (M.P.C.) of the American Law Institute (emphasis added):

> . . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., *a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.* . . .

Despite what the Court says, the Model Penal Code definition does not, in fact, appear to be the same as the Court's definition. First, it seems entirely clear that a somewhat different concept of prurient interest is being used by the M.P.C. The M.P.C. defines prurient interest material not as material arousing lustful thoughts, or even (as *Webster's* appears to do) as material productive of sexual desire or longing, but as material appealing to "a shameful or morbid interest" in sex. The necessity of shame or morbidity in the recipient would seem to be a change of substance. Perhaps even more important, the M.P.C. definition has *two* elements, whereas the Court's has only one element. The Court says simply that obscene material is that which appeals to prurient interest; the M.P.C. requires in addition that material, to be obscene, go "substantially beyond customary limits of candor in description or representation of" sexual matters. The addition of this element of excessive candor would appear to make the definition more restrictive. Finally, the M.P.C. definition broadens the concept of obscenity somewhat in holding it applicable to material dealing with excretion; the Court's definition applies only to material "which deals with sex."

A third source of potential definitional confusion in *Roth* flows from the following passage, which is part of the Court's discussion of the First Amendment's application to obscene material:

> All ideas having even the slightest redeeming social importance–unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion–have the full protection of the guarantees [of the First and Fourteenth Amendments], unless they encroach upon the limited area of important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

This passage was intended primarily as a justification for the Court's holding that obscenity is not protected from regulation by the Constitution. It easily leads, however, to an additional test for what is obscene, if one is willing to treat it as definitional language. For if, as the Court states, obscenity is prohibitable, despite the First Amendment, only because it is material "utterly without redeeming social importance," and if, on the other hand, "all ideas having even the slightest redeeming social importance" have the "full protection" of the Constitution, a necessary test for obscenity would be whether the material in question is indeed "utterly without redeeming social importance." If it is not utterly without such value then the material would be entitled to full constitutional protection and thus could not be considered legally obscene. None of these definitional problems finds its solution in the *Roth* majority opinion itself, and they have plagued us ever since.

As I noted earlier, there were three opinions in *Roth* in addition to the majority opinion written by Justice Brennan. Chief Justice Warren did not agree with the Court's efforts to define "obscene" material as material which might abstractly be prohibited. In his view,

> . . . It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture.

The Chief Justice gave some insight into what kind of conduct he would prohibit by the following discussion:

> . . . The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for material with prurient effect.

Justice Harlan also did not accept the Court's definition of "obscene." In his view the question of the constitutionally permissible definition of "obscene" should be resolved in different ways depending upon whether a State or Federal prohibition is involved. For State prohibitions Justice Harlan would have permitted a *Hicklin* type of test permitting prosecution of

> . . . one who sells books whose dominant tendency might be to deprave or corrupt a reader.

Justice Harlan would have modified *Hicklin,* however, to require that "the books must be judged as a whole and in relation to the normal adult reader."

For Federal prohibitions, Justice Harlan found the dangers of censorship "far greater" than for State prohibitions (because of the nationwide impact of Federal prohibitions) and the affirmative governmental interest in regulation smaller, since "Congress has no substantive power over sexual morality." Here he would have held

> . . . that the federal statute can [not] be constitutionally construed to reach other than "hard-core" pornography. Nor do I think the statute can fairly be read [as the Chief Justice would apparently have read it] as directed only at persons who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography.

Finally, Justice Douglas, writing for himself and Justice Black, found the Court's definition of "obscene" to be violative of the Constitution because

> . . . that standard does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit.

In the view of these Justices,

> The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience.

(c) Cases after "Roth." For five years after *Roth* the Supreme Court was quiet in regard to the definition of "obscene." In 1962, however, a series of opinions of Justices began which reflect at least clarifications—and perhaps modifications—in the minds of the writers of the opinions regarding the meaning of the *Roth* definition. I shall try to summarize these opinions in chronological order up to the present.

(i) *Manual Enterprises* v. *Day.* (1962). Only two Justices announced views on the meaning of "obscene" in this case: Justice Harlan and Justice Stewart (who had joined the Court since the *Roth* case). The other Justices disposed of the case on other grounds and there was no opinion of a majority of the Justices on any point. In an opinion written for both Justices by Justice Harlan, Justices Harlan and Stewart stated that, in their view, the test of obscenity under the Federal mail statute was a two-part test:

> Obscenity under the federal statute . . . requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal. Both must join before challenged material can be found "obscene" . . .

Patently offensive material was defined by the Justices as material "so offensive on [its] . . . face as to affront current community standards of decency. . . ." The view of these Justices appears to have derived at least partly from constitutional considerations. It also rested largely on the American Law Institute Model Penal Code, which had been quoted with approval in the majority opinion in *Roth* and which set forth the same two-part test. On the question of *which* current community standards of decency are relevant in applying the test, the Justices said that, under the Federal mail statute at least, "a national standard of decency should be applied."

(ii) *Jacobellis* v. *Ohio* (1964). This is the case in which the existence of a *three*-part test for determining obscenity was first explicitly suggested. There was no opinion of a majority of the Justices. Justice Brennan, writing for himself and Justice Goldberg, adhered to the *Roth* test of appeal to the prurient interest of the average person as the basic hallmark of obscenity. In the following language, however, they appeared to state their adherence to two additional definitional factors–that of social importance (already hinted at in the *Roth* opinion itself) and that of offensiveness (referred to in the Model Penal Code definition set out in *Roth* and previously adopted by Justices Harlan and Stewart in the *Manual Enterprises* case):

> . . . [M]aterial dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a "weighing" of its social importance against its prurient appeal, for a work cannot be proscribed unless it is "utterly" with social importance. It should also be recognized that the *Roth* standard requires in the first instance a finding that the material "goes substantially beyond customary limits of candor in description or representation of such matters."

On the question of which community to refer to in applying their definition, Justices Brennan and Goldberg said (as had Justices Harlan and Stewart in applying the Federal mail statute in *Manual Enterprises*):

> . . . the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.

Justices Black and Douglas appeared to reassert and perhaps to broaden their view as to the unconstitutionality of obscenity statutes in *Jacobellis*:

> . . . the conviction of appellant or anyone else for exhibiting a motion picture abridges freedom of the press as safeguarded by the First Amendment.

Justice Stewart also wrote a separate opinion in *Jacobellis*. He appears to have adopted, for both State and Federal prohibitions, the definition urged by Justice Harlan in *Roth* for Federal prohibitions, namely that

> . . . criminal laws in this area are constitutionally limited to hard-core pornography.

Then, in a passage which has become as famous as any ever written in judicial obscenity opinions, Justice Stewart went on to explain what he meant by hard-core pornography:

> . . . I shall not attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case [*The Lovers*] is not that.

Chief Justice Warren and Justice Clark wrote still another separate opinion in the *Jacobellis* case. The Chief Justice had not joined the Court's majority

opinion in *Roth*; Justice Clark had. In *Jacobellis* both Justices said that "we should try to live with" the *Roth* definition of obscene "at least until a more satisfactory definition is evolved." According to Justices Warren and Clark, the *Roth* definition was:

> . . . Material is obscene and not constitutionally protected against regulation and proscription if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Justices Warren and Clark added two clarifications to their understanding of the test. The first has to do with the meaning of "community standards":

> . . . when the Court said in *Roth* that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard, as is sometimes argued.

The second clarification was as follows:

> . . . the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, "obscene" in the extreme when sold or displayed to children.

Justices Warren and Clark did not elaborate in any great detail on what kinds of "use" of materials might, in their view, make them obscene. In a footnote, however, they did indicate that advertisements for material might "provide some evidence of . . . [a work's] dominant theme" for purposes of applying their version of the *Roth* test.

A final separate opinion in the *Jacobellis* case was that of Justice Harlan. He continued to adhere to the difference he found in *Roth* between the definition of "obscene" permissible in Federal proceedings and the definition permissible in State proceedings. He thus

> . . . would apply to the Federal Government the *Roth* standards as amplified in my opinion in *Manual Enterprises*. As to the States, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in State judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.

(iii) *A Book Named John Cleland's Memoirs Of A Woman Of Pleasure* v. *Massachusetts* (1966). The fragmentation of opinion among the Justices evident in the *Jacobellis* case over the definition of "obscene" became even more evident here. There were no less than seven different opinions dealing with what is "obscene" and only one of these, the opinion of Justice Brennan, was joined in by more than one Justice. Justice Brennan spoke for Chief Justice Warren and Justice Fortas, who had come on the Court since the last case dealing with the meaning of obscene. These three Justices announced their adherence to the *Roth* definition. They further made entirely clear their view that the *Roth* definition is, in fact, a three-part test for the obscene:

> . . . Under this definition as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The three Justices also refined their understanding of the social-value part of this three-part test. The supreme court of Massachusetts had held that the book in question in the *Fanny Hill* case "had some minimal literary value." It nevertheless held it obscene because of its prurient appeal and patent offensiveness. Justices Brennan, Warren, and Fortas disagreed (emphasis added in original):

> The Supreme Judicial Court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book be found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Hence, even on the view of the Court below that Memoirs possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.

Justices Black, Douglas, and Stewart each wrote separate opinions in *Fanny Hill,* adhering to previously expressed views: Justices Black and Douglas stated their view that no speech could be prohibited as obscene unless shown to affect conduct, and Justice Stewart stated his view that only "hard-core pornography" could be regulated. Justice Harlan also repeated in *Fanny Hill* his previously expressed views, namely, that Federal prohibitions may only apply to "hard-core pornography" and that State prohibitions may have significantly greater latitude. As for State prohibitions, Justice Harlan said specifically that "it should be adequate if a Court or jury *considers* such elements as offensiveness, pruriency, social value, and the like" (emphasis added) and that the existence of some social value should not insulate a work from State prohibition if, at the same time, it "be deemed offensive and salacious."

Justice Clark's opinion in *Fanny Hill* stated his continued adherence to the *Roth* case, in which he had joined. Justice Clark, however, disagreed with Justices Brennan, Warren, and Fortas as to the meaning of the *Roth* definition of obscenity. Principally, Justice Clark disagreed that the existence of some social importance will automatically save a work charged to be obscene. In his view,

> . . . evidence of social importance is relevant to the determination of the ultimate question of obscenity. But social importance does not constitute a separate and distinct constitutional test. Such evidence must be considered together with evidence that the material in question appeals to prurient interest and is patently offensive.

Thus, Justice Clark would apparently permit social value, even though it exists in a work, to be outweighed by other factors.

Justice White took a view similar to that of Justice Clark. He accepted *Roth* (in which he had not participated) but disagreed with Justices Brennan, Fortas, and Warren as to its meaning, specifically in regard to the relevance of social value:

> In my view, "social importance" is not an independent test of obscenity but is relevant only to determining the predominant prurient interest of the material, a determination which the court or the jury will make based on the material itself and all the evidence in the case expert or otherwise.

(iv) *Mishkin* v. *New York* (1966). This case was decided on the same day as *Fanny Hill.* It involved, principally, sadomasochistic or "bondage" printed and pictorial materials. Apparently the only definitional issue raised related to the meaning of the prurient interest part of the *Roth* test. This is an element which everyone agrees is part of the *Roth* test and, since the *Roth* test in one form or another is adhered to by a majority of the Court, it was possible for a majority of the Justices to concur in a single opinion in the *Mishkin* case. As he had in *Roth*, Justice Brennan again wrote for a majority of five.

The allegation in *Mishkin* was that the material at issue did not appeal to the prurient interest of the "average person," as *Roth* seems to require. The Court recognized the seeming inapplicability of *Roth* to the *Mishkin* case but modified the *Roth* "average person" requirement as follows:

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.

The majority in *Mishkin* also made an observation of some importance regarding the relationship between the *Roth* test and the "hard-core pornography" test used by some Supreme Court Justices and some State courts. The majority said that in its view the "hard-core pornography" definition of obscenity "is more stringent than the *Roth* definition"; that is, any work which is "hard-core pornography" under such a test would also be "obscene" under the *Roth* test.

(v) *Ginzburg* v. *United States* (1966). This case also was decided on the same day as *Fanny Hill* and, like *Mishkin,* it also commanded a majority opinion of the Court because it did not deal with the full range of definitional problems connected with the *Roth* standard. *Ginzburg* is not strictly relevant to our problem because it did not deal with the question of whether material is "abstractly" obscene. Rather, *Ginzburg* held that if material is "almost" obscene in and of itself, it may be treated as obscene if it is distributed in a "pandering" manner by the defendant; such "pandering" could "resolve all ambiguity and doubt" as to whether "almost" obscene material was, indeed, obscene. Nevertheless, I think it is important for our purpose to note that in resolving the ambiguities through the use of evidence of pandering the majority of the Court in *Ginzburg* seemed to accept the pertinence of the three-part interpretation of *Roth* which Justices Brennan, Warren, and Fortas adopted for themselves in *Fanny Hill.* Thus, the majority in *Ginzburg,* in finding one of the works obscene in light of the fact that it was pandered, made the following analysis (emphasis added):

> . . . The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as *prurient*; he looks for titillation not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the *offensiveness* of the publications to those who are offended by such material. And the circumstances of the presentation and dissemination of material are equally relevant to determining whether *social importance* claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the market place or a spurious claim for litigation purposes.

(vi) *Redrup* v. *New York* (1967). This is the most recent opinion in which the Supreme Court has dealt directly with the meaning of "obscene." The Court's per curiam opinion, written for seven Justices, holds the materials in issue not to be obscene but reflects the absence of any majority consensus on the Court as to the precise definitional formulation to be used. The opinion describes the various existing and competing definitional formulations in use among the Justices as follows (I have inserted brackets to indicate my understanding of which particular Justices, among the seven who joined the *Redrup* opinion, adhere to the various definitional formulations mentioned in the opinion):

> Two members of the Court [Justices Black and Douglas] have consistently adhered to the view that a State is utterly without power to supress, control, or punish the distribution of any writings or pictures upon the ground of their "obscenity." A third [Justice Stewart] has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material ["hard-core pornography"]. Others [Justices Warren, Brennan, and Fortas] have subscribed to a not dissimilar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value," emphasizing that the "three elements must coalesce," and that no such material can "be proscribed unless it is found to be *utterly* without redeeming social value" . . . Another Justice [Justice White] has not viewed the "social value" element as an independent factor in the judgment of obscenity. . . .

The two Justices who did not join in the *Redrup* opinion (Justices Harlan and Clark) have not been included in the above catalog of which Justice adheres to which definition, because the Court in *Redrup* apparently did not include them in its description. These Justices dissented in *Redrup* on grounds having nothing to do with the definition of obscenity. Justice Clark, in fact, appears from his opinion in *Fanny Hill* to adhere to a view essentially similar to that of Justice White. From his prior opinions it appears that

Justice Harlan takes a more complicated position. When Federal prosecutions are involved he appears to agree essentially with Justice Stewart's opinion that only hard-core pronography can be prohibited as obscene; when State prosecutions are involved he appears to take a view, unique among the members of the Court, that States may prohibit sexual material as obscene so long as they draw a reasonable definition of what constitutes offensive material.

(vii) *Stanley* v. *Georgia* (1969). The Court, in an opinion written by Justice Marshall and joined in by four other Justices, held that private possession of obscene material could not constitutionally be made criminal. Thus, the case does not directly bear upon the definition of "obscene." In the course of its opinion, however, the Court made the following statement, which seems to me to have some relevance to what the five Justices who joined the *Stanley* opinion mean by the criterion of "social value," insofar as it is deemed relevant to the definition of obscenity:

> . . . Nor is it relevant that obscenity in general, or the particular film before the Court, are arguably devoid of any ideological content. A line between the transmission of ideas and mere entertainment is much too elusive for the Court to draw, if indeed such a line can be drawn at all.

(*d*) *The State of the Law Today.* Attempting to define the law is always a tricky proposition. As one can see from the legal development I have just outlined, propositions of law are always subject to being overruled or modified by subsequent judicial decision. One can never be sure at a particular time that such an overruling or modification is not imminent. Even if we leave aside the possibility of overruling or modification, the task of saying where the law on obscenity stands today has to confront the fact that the Court has never spoken as a majority on the issue with anything resembling clarity. Having thus cautioned you, I attempt the following observations.

The touchstone most often used by lawyers in deciding the state of the law is whether there exists a majority opinion of the highest relevant court on the question in issue. The highest relevant court for our purposes is the Supreme Court of the United States. There is a majority opinion of that Court in the *Roth* case, which has not been overruled. Thus, anything stated clearly in the *Roth* case, which has not been subsequently modified, is part of the law regarding what is obscene today under the approach ordinarily used by lawyers. Using this approach, we can say that it is established law today, that in determining whether something is obscene the material in issue must be taken as a whole, that it must be considered in light of its dominant theme, and that it must be considered with regard to its effect upon average persons; if it is specifically directed at a particular group, the *Mishkin* case probably permits one to examine the effect upon the group to which the material is directed. It is also the law that, to be obscene, material must at least appeal to prurient interest, whatever that may mean. I say that the foregoing factors are part of the definition of "obscene," because it seems to me that these factors appear quite clearly as part of the *Roth* standard in the *Roth* opinion itself, which was joined in by a majority of the Justices.

There seems to me to be one other factor which one can say is clearly part of the *Roth* definition, despite the fact that the *Roth* opinion itself is not unambiguous on the point. That is the requirement of offensiveness in light of community standards. While it is not entirely clear on this point, the *Roth* opinion does suggest, as I have noted, that offensiveness is part of the test of obscenity. More importantly in the *Fanny Hill* case, as I read it, five Justices (Brennan, Warren, Fortas, Clark, and White) recognized offensiveness as part of the test of obscenity, and in the *Manual Enterprises* case two other Justices (Harlan and Stewart) recognized offensiveness as part of the test where the Federal mail statute was concerned. There is, however, no agreement at all among the Justices about which "community" one looks to in determining offensiveness. I believe that four Justices have spoken on this question, when State prohibitions are involved, and the opinions were evenly divided. In *Jacobellis*, Justices Brennan and Goldberg opted for a "national standard," while Justices Warren and Clark urged "community standards–not a national standard." When Federal prohibitions are involved, two Justices (Harlan and Stewart) have spoken and they, in *Manual Enterprises,* opted for a national standard. (I assume that Brennan and Goldbert would agree.)

If I am correct about the foregoing, that would leave two additional parts of the current legal definition of "obscene" subject to some doubt. These are, (1) the meaning of "prurient interest" material; (2) the relevance of "redeeming social value." The reason why the meaning of prurient interest remains unclear, in my view, is simply that the Court has never made it clear in any opinion of any Justice. The Court muddied the waters to a considerable extent in the *Roth* opinion, and no Justice that I can see, who has accepted the *Roth* opinion as the governing standard, has brought any clarity thereafter. Under *Roth* as I read it, prurient interest material may be material which arouses lustful thoughts; it may be material which arouses feelings of shame and morbidity connected with sex; it may be material which creates itching and longing sexual feelings; or it may be any combination of those three factors.

The reasons that the relevance of redeeming social value is subject to doubt are somewhat different. Here, members of the Court since *Roth* have clearly expressed opinions on the question. The difficulty is that there has never been a majority of Justices which have both accepted *Roth* as the governing standard and agreed upon the relevance of social value. There are many instances in the law when, after a majority–even a bare majority–of the Court have adopted a certain rule, the remaining members of the Court (including those who dissented from the majority's opinion) have been willing to apply the majority standard in subsequent cases. If this had happened in regard to obscenity, all members of the Court in the years since *Roth* would have accepted the *Roth* majority opinion, and it is likely that a majority consensus would have developed within the Court as to the meaning of various parts of the *Roth* opinion. This, however, has not happened. Except for Chief Justice Warren, no Justice who was on the Court at the time *Roth* was decided and who did not agree with the *Roth* opinion has subsequently accepted *Roth* as the governing standard; Justices Black, Douglas, and Harlan

have continued to urge other standards in their opinions. Some Justices who have come on the Court since *Roth* have accepted the *Roth* standard, namely, Justices White, Goldberg, and Fortas; Justice Stewart, however, is one who has refused to accept the *Roth* standard. Justices Marshall and Burger have, as yet, neither adhered to *Roth* or disagreed with it. As a result, there never seems to have been more than five Justices on the Court at any given time who have accepted *Roth* as the governing standard. Since it takes five Justices to make up a majority of the Court, and since the five Justices who have accepted *Roth* at any given time have never been able to agree unanimously on what it means, with regard to the relevance of redeeming social value, there has never been a majority "rule" on the Court about redeeming social value. It is true that in the *Fanny Hill* case, where a majority of five Justices of the Court adhered to the *Roth* case, a majority of that majority (namely, Justices Brennan, Warren, and Fortas) agreed that under *Roth* material could not be obscene unless it was utterly without redeeming social value and that even a modicum of social value could not be outweighed by prurient and offensive factors. A majority of a majority, however, does not make a majority.

Thus, we have a situation where no majority of the Court has ever both agreed on a single *verbalization* of the definition of obscenity and on the meaning of that *verbalization* with regard to the relevance of redeeming social value. On the other hand, I believe it is true that a majority of the Court *have* agreed on the *result* of the question whether material which has some social value can be branded as obscene and thereby prohibited. This has come about in the following way. Along with the three Justices (Brennan, Warren, and Fortas) who in *Fanny Hill* held that *Roth* would not permit material with any social value to be branded as obscene, there were at least two Justices in *Fanny Hill* (Black and Douglas) who held that no material could be branded obscene unless it could be proved to have had an effect upon conduct. A majority of the Court in *Fanny Hill* thus agreed (albeit not in a single opinion and for different reasons) upon the proposition that material with some social value may not be branded obscene and that social value may not be outweighed by other factors. That is, obscenity regulation not requiring the proof of utter lack of redeeming social value would, at the time of *Fanny Hill*, have been held unconstitutional, for at least five Justices (Black, Douglas, Brennan, Warren, and Fortas) would have voted against it. To this five-man majority in *Fanny Hill* probably may be added the name of Justice Stewart, whose "hard-core pornography" test probably would not permit the prohibition of material with social value. Where Federal prosecutions are concerned, still another member of the Court may be added, for Justice Harlan uses Justice Stewart's hard-core pornography test for Federal prohibitions. Thus, if one is willing to count votes on results rather than adherence to a single opinion, one can count a majority for the proposition that material may not be prohibited as obscene unless it is utterly without redeeming social value and that such social value may not be outweighed by other factors. This was true at the time of *Fanny Hill* (1966) and remained true at least up to the time when Justices Warren and Fortas left the Court.

There is, perhaps, a more satisfactory way than this head-counting of Justices to decide whether and to what extent redeeming social value is part of the present legal test for obscenity. One could ask what a State court judge or lower Federal court judge would feel bound to include in his definition of obscenity in light of Supreme Court opinions, in order to insure that his decision would not be upset upon appeal in the Supreme Court. It seems to me that such a judge would not ordinarily feel free to adopt a definition which he could see would not be approved by a majority of the Justices on the Supreme Court. While Justices Fortas and Warren remained on the Court, the situation would have appeared to a lower court judge as follows: Two Justices (Black and Douglas) would and will not approve any definition of obscenity. Three others (Brennan, Warren, and Fortas) would only approve a definition which required a demonstration of the utter absence of redeeming social value. A sixth Justice (Stewart) probably would not approve a definition which omitted redeeming social value. A seventh Justice (Harlan) would not approve such a definition in a Federal prosecution.

Even after Justice Fortas left the Court there were at least five Justices on the Court who would not approve an obscenity conviction obtained under a definition which would permit a holding of obscenity for material with some redeeming social value. Thus, as of the end of the last term of the Supreme Court of the United States, I think that any viable definition of obscene—that is, a definition which would meet with the approval of the Supreme Court of the United States—would have had to contain a requirement of the utter absence of redeeming social value.

This conclusion of mine is confirmed by the actual situation in the lower Federal courts and State courts. There are a large number of cases in these courts since the *Fanny Hill* decision which accept the necessity of a three-part definition including the utter lack of redeeming social value. For example, *Hudson* v. *United States*, 234 A.2d 903 (1967), in the Court of Appeals for the District of Columbia; *United States* v. *A Motion Picture Film Entitled "I Am Curious – Yellow,"* 404 F.2d 196 (1968), in the United States Court of Appeals for the Second Circuit; *Oregon* v. *Childs*, 446 P.2d 304 (1968), in the Supreme Court of Oregon; *In re Giannini*, 446 P.2d 535 (1968), in the Supreme Court of California; and *Stein* v. *Batchelor*, _____F. Supp. _____ (1969), in the United States District Court for the Northern District of Texas. At the same time, I can find only one recent case in the lower Federal or State courts in which it was decided that the definition of obscenity need not necessarily contain the factor of the utter absence of redeeming social value: *Cain* v. *Kentucky*, 437 S.W. 2d 769 (1969), in the Court of Appeals of Kentucky.

Chief Justice Warren having left the Court, there are now only three Justices (Black, Douglas, and Brennan) who, if they adhere to previous opinions, will certainly require a redeeming social value to be part of any obscenity test. Justice Stewart, as I have already noted, is probably another member of this group through his hard-core pornography test, and Justice Harlan can be included for similar reasons where Federal prosecutions are concerned. Thus, the situation probably remains as it was prior to the close of the last term of the Supreme Court, at least for Federal prosecutions.

Where State prosecutions are concerned, however, Justice Harlan is not part of this group, and there is no certain or clear majority on the court for the proposition that redeeming social value must be part of the test. What the Court will actually decide depends on the opinions of the newer Justices who have not yet expressed an opinion (Justice Marshall, Chief Justice Burger, and Justice Blackmun). If these Justices vote to adhere to existing precedent (as is ordinarily the case) they will adopt the *Roth* test; but there is no precedent to direct them as to whether the *Roth* test requires utter lack of social value. On the other hand, if one of these Justices votes either to disregard precedent and join Justices Black and Douglas, or to adopt the Brennan/Warren/Fortas/Goldberg view of the meaning of *Roth*, there will continue to be a working majority for the necessity of lack of redeeming social value.

3. *What May Be Prohibited Under a "Specific" Obscenity Statute.* As I have indicated earlier in this paper, the law concerning permissible definitions under "specific" obscenity statutes is much less developed than the law about definitions under general statutes. The development towards specific statutes is a relatively recent one, and the Court has written very few opinions.

The basic groundwork for the principle that specific statutes may have more comprehensive and inclusive definitions than general statutes is *Redrup* v. *New York* (1967). In this case the Supreme Court noted three areas where specific statutes might contain more inclusive definitions than the rule for general statutes: (1) statutes reflecting "a specific and limited state concern for juveniles"; (2) statutes dealing with "assault[s] upon individual privacy by publication in a manner so obtrusive so as to make it impossible for an unwilling individual to avoid exposure to it"; (3) statutes dealing with "the sort of 'pandering' which the Court found significant in *Ginzburg* v. *United States.*" *Redrup* itself did not say how far any such statutes could go.

There have been no cases in the Supreme Court dealing with the second class of statutes mentioned in *Redrup*: statutes dealing with offensive assaults upon sensibilities. There have been three cases dealing with juvenile statutes and one case (the *Ginzburg* case) dealing with pandering. I shall attempt to briefly summarize what limits, if any, these cases suggest.

(*a*) *Juveniles.* I find three cases in this area. The first, *Butler* v. *Michigan*, was discussed earlier in connection with the developing definition of "obscene." It holds that if a definition is evolved which describes material harmful to juveniles but not to average adults, then such a definition may not be used to prohibit distributions to adults generally. I consider this to hold that a juvenile definition of "obscene" can be used only in a statute directed toward special "juvenile" kinds of distributions: either those that go directly to juveniles, or those which create some special or distinct danger that the distributed material will end up in the hands of juveniles.

The second case is *Ginsberg* v. *New York* (1968), in which the Court held constitutional a statute prohibiting the sale of certain defined materials to persons under 17 years of age. The Court assumed that the materials involved in the case were "not obscene for adults," but it nevertheless upheld a conviction under the statute.

Five members of the Court joined in this opinion. The definition approved by the Court is a complicated one, and varies slightly depending on whether it is dealing with pictorial matter alone, or with books, magazines, and so forth. (I shall omit reference to these differences here; hence, the definition set forth below is not entirely accurate for all materials.) The basic definition is in two parts: In order to be prohibited, material must first fall into one of a number of explicitly defined categories of sexual material; then it must also qualify as being "harmful to minors," which means that it must satisfy a version of the three-part version of the *Roth* test adapted for minors. Thus, to be "harmful to minors" material must be that which:

> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.

In addition, as I have said, the material, to be prohibited, must deal with certain explicitly defined types of sexual matters. These are "nudity," "sexual conduct," "sexual excitement," and "sado-masochistic abuse." These terms are defined as follows:

> . . . "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of a female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.
>
> . . . "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.
>
> . . . "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
>
> . . . "Sado-masochistic abuse" means flagellation or torture by or on a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

If material fits within one of these categories and is, in addition, harmful to minors, as defined above, it falls within the definition.

In approving the definition employed by New York in the *Ginsberg* case, the Court did not suggest that such a definition would have to be employed or that a different type of definition could not be employed. All we know for sure is that that particular definition is permissible. The only general language in the Court's opinion about what kind of definition is permissible is that the definition must be such that it is

> . . . rational for the legislature to find that the minor's exposure to . . . [the defined] material might be harmful [to minors].

This test, of course, depends largely on what the Court would find as sufficient "harm" to minors to justify legislative action reasonably related to prevent the harm. It seems apparent from *Ginsberg* that the Court would, at least, permit a State to prohibit distribution to minors of material which the legislature reasonably believes would cause minors to engage in antisocial conduct. There is language in *Ginsberg* indicating that the Court would also permit a definition to include prohibition of material which the legislature rationally believes would "impair . . . the ethical and moral development of . . . youth."

The third juvenile case is *Interstate Circuit* v. *Dallas* (1968), decided on the same day as *Ginsberg* v. *New York*. Here the Court found the Dallas definition of material prohibited for minors to be unconstitutionally vague. The Dallas definition was as follows:

> "Not suitable for young persons" means:
>
> (1) describing or portraying brutality, criminal violence, or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or
>
> (2) describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.
>
> A film shall be considered "likely to incite or encourage" crime, delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to the "prurient interest" of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is "not suitable for young persons," the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational value such film may have for young persons.

In finding this definition excessively vague the Court emphasized the lack of definition of "sexual promiscuity" and also the imprecision of a standard which prohibits material because it would create the impression that certain conduct is "profitable, desirable, acceptable, respectable, praiseworthy or commonly acceptable."

(*b*) *Pandering.* The Court has never dealt with a "pandering" statute as such. In *Ginzburg* v. *United States* it held that material which was not obscene in and of itself under the *Roth* standard could nevertheless be prohibited under a general statute in a "pandering" distribution if it was a matter of "ambiguity and doubt" as to whether the material was obscene without using the *Roth* standard. *Ginzburg* is not at all clear as to the meaning of "pandering" which can thus make a doubtfully obscene work fall within an obscenity prohibition. The best definitional language I can find in

the opinion is that "pandering" is "commercial exploitation of erotica solely for the sake of their prurient appeal." It is not at all sure that the Court intends the pandering concept to go any further than it was taken in *Ginzburg*: that is, it may only be a useful concept for resolving doubtful questions as to whether materials are obscene under *Roth* in and of themselves. This interpretation is emphasized by the fact that in the *Redrup* case (which I have described previously), in which the Court mentioned three areas where specific statutes might exist, it described the pandering area as "the sort of pandering which the court found significant in" the *Ginzburg* case. On the other hand, the Court might be inclined to go further than *Ginzburg* and to permit pandering prohibitions of material which is fairly clearly not obscene under *Roth*, if a specific pandering statute were drafted.

To summarize the state of the law concerning specific statutes on obscenity, I would say that as yet there has been very little development of guidelines for determining what kinds of specific statutes would be permissible. *Interstate Circuit* makes it clear that excessive vagueness must be avoided. The only other applicable rules I perceive are: (1) the specific prohibition must not sweep more broadly than is necessary to achieve its specific objective (according to *Butler* v. *Michigan*); (2) there needs to be at least a "rational relationship" between the definitional language in the specific prohibition and the harm which the legislature seeks to prevent; and (3) the harm which a legislature may seek to prevent through a specific statute may be at least the offensiveness of uncontracted exposure to sexual materials, harm to juveniles, or harm through pandering.

Implications of Stanley v. Georgia

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The *Stanley* case strikes me as a very significant one for the Commission and its assigned tasks. For these purposes it appears to be easily the most important judicial decision since *Roth* v. *United States,* and it may well turn out to be even more important than *Roth* itself. The significance I find in the *Stanley* decision flows not from the actual "holding" of the case (which, as I shall discuss, is of only limited applicability) but from the stated underpinnings of that holding and from certain other statements about obscenity law made by the Court in the course of its opinion.

1. The holding of *Stanley*—that is, what it actually decided—is that "the mere private possession of obscene matter cannot constitutionally be made a crime" (Opinion, p. 2). The case involved a Georgia state conviction for the "knowing . . . possession of obscene matter." The Supreme Court reversed the conviction, finding it inconsistent with the First Amendment ("Congress shall make no . . . abridging the freedom of speech . . .") as made applicable to the States by the Fourteenth Amendment.

This *holding* is, in one respect, of limited practical significance, because prosecutions for mere private possession (that is, possession without proof of intent to sell or distribute) which it prohibits have been extremely rare. Obscenity law is virtually always used against persons who are directly or indirectly engaged in distributional activity; it is almost always more or less an accident or afterthought when police discover private possession of obscenity and decide to prosecute. The *Stanley* case is a good example of such a situation. Stanley was suspected not of possessing obscenity but of bookmaking. A warrant was obtained to authorize the search of his house.

The search turned up no solid evidence of bookmaking, but the police did find three reels of obscene movies in a desk in Stanley's bedroom and a

projector with which to view the films in another part of the house. (It is interesting that another famous Supreme Court case, *Mapp* v. *Ohio*, 367 U.S. 643, involved a similar discovery by police of obscene materials in the course of a search for something else. In that case the Court did not decide the validity of the State possession-of-obscenity law under which a conviction was secured. Instead, it held the search to have been unconstitutional because no valid warrant had been obtained and it decided, for the first time, that the fruits of such an unconstitutional search are inadmissible as evidence in State criminal proceedings.) Although not stated as a basis for the *Stanley* holding, the fact that possession-of-obscenity prosecution has tended to be accidental rather than a vindication of a comprehensive State policy may well have played some part in helping the Justices arrive at their decision.

On the other hand, there is some evidence that, prior to *Stanley*, "possession" statutes often were used as a basis for prosecuting *distributors* of obscene materials.[1] For, it is obviously much easier for the prosecution to prove "possession" than it is to prove "distribution" or "intent to distribute." To this extent, of course, the *Stanley* case will surely impinge on a prosecutor's ability to obtain a conviction where he is unable to actually *prove* distributional activity or intent to engage therein.

2. A more significant aspect of *Stanley*, for our purposes, is the fact that it was decided by a majority of the Court. Justice Marshall wrote the Court's opinion, which was joined in by four other Justices: The Chief Justice, Justice Douglas, Justice Harlan, and Justice Fortas. Justice Black separately agreed with the majority's holding on the basis of two of his prior opinions advocating even broader restrictions on the regulation of obscenity than were adopted by the majority in *Stanley*. The three remaining Justices—Justice Stewart, Justice Brennan, and Justice White—also concurred in the result, but on separate grounds flowing from the illegality of the police search of Stanley's home. Thus, at least five Justices agreed to the statements made in the *Stanley* opinion as the basis for the result, and no Justice expressed disagreement. It is, as you know, quite rare to have the concurrence of such a majority of the Court in legal principles in the obscenity area. If the reasoning in *Stanley* is important to us (as I think it is), we thus have the rare good fortune of knowing that the reasoning carries the weight of adherence by the majority.

3. Most of what I find important in the *Stanley* opinion goes to what the Supreme Court views as the proper and permissible objectives for obscenity law. These views of the Court are directly relevant to the sorts of statutes and public policies which the Commission may properly recommend. Before

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[1] In a questionnaire which was recently sent to prosecuting attorneys, the respondents were asked to describe, for their three most recently instituted obscenity actions, the kind of activity that the defendant had engaged in. (The respondents were told to omit any cases which arose prior to 1966.) In the first 100 replies received, a large proportion of the prosecutors indicated that they had not instituted *any* legal actions during the last three years. Of the remainder, seven stated that at least one of their last three obscenity cases was brought on a charge of "possession" (not coupled with a charge of distribution or intent to distribute).

coming to those matters, however, there is at least one statement in *Stanley* which has considerable potential impact upon the scope of proper application of present law and policy. You will remember that the present constitutional definition of "obscene," which is both widely employed in the lower courts and which appears to command a majority of votes in the Supreme Court, requires three elements before allegedly obscene material may be generally regulated or suppressed. These elements are (1) prurient-interest appeal, (2) offensiveness, and (3) lack of redeeming social value. You may also recall that an important puzzlement in the social-value test is the matter of what type of "value" is to be deemed "redeeming social value." If only ideological values qualify, the fine and popular arts are largely left out of the protection of this test. On the other hand, if entertainment or amusement values qualify, it is difficult to perceive what commercially distributed material is not exempted from prosecution as obscene, since consumers would normally buy material at least to be amused by it, if not to be educated.

Stanley contains two sentences which appear to express a view on this problem. The sentences are as follows (Op., p. 9): "Nor is it relevant that obscenity in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." If the line cannot, in fact, be drawn, and if "mere entertainment" value is thus to be equated with "ideological content" in the decision of obscenity cases, then it must be concluded that the prospects for a successful obscenity action under the tripartite test are extremely dismal. The Court has already suggested that this is true by reversing a large number of obscenity convictions in per curiam decisions with only the brief explanation that the material was not obscene. *Stanley* appears to afford a doctrinal explanation for these actions.

4. The Court in *Stanley* was not content to rest its result—as it thus apparently might have—upon the existence of redeeming social amusement value in the films which Stanley possessed. It went on to hold private possession statutes wholly unconstitutional regardless of the obscenity of the material to which they might be applied. In doing so, the Court appears to me to have made major excavations into the stated constitutional underpinning of the decision in *Roth* v. *United States* with extremely important ramifications for future legislative recommendations.

Until *Stanley, Roth* stood as the fundamental statement of the constitutional basis for obscenity legislation. *Roth* stated as its holding that "obscenity is not within the area of constitutionally protected speech or press." *Roth's* stated holding thus seemed to say that, should material be found "obscene" under the applicable test, the free speech provisions of the constitution would become irrelevant in judging the regulation of such material.

The Supreme Court in *Stanley* assumed that the films found in Stanley's possession were obscene under existing tests (Op., p. 2, n. 2). If the stated holding of *Roth* were to remain unimpaired, the conclusion would appear to follow that the speech clause of the First Amendment could not possibly have prevented Stanley's conviction for possession of the films. The amend-

ment would no more apply to protect Stanley from a charge of possessing non-speech obscenity than it would to protect him from a charge of possessing unregistered firearms. Yet *Stanley* holds that a conviction for possession of obscene films is prohibited *by the First Amendment* (as applied to the State, by the Fourteenth Amendment) and, at the same time, it claims that "*Roth* and the cases following that decision are not impaired by today's holding" (Op., p. 11). What is the explanation for this apparent inconsistency?

It seems to me that the explanation is that, regardless of the Court's disclaimer, there has been a serious incursion into at least the stated holding of *Roth*—that material found to be "obscene" cannot be accorded constitutional protection as "speech." That is, it is no longer true, if indeed it ever was, that material can be examined in the abstract to determine whether it is "obscene" under the applicable test and that once having been found obscene through such an examination, the First Amendment can be ignored in assessing the legality of the regulation of the material. I have expressed doubt as to whether this approach ever *was* the law because I think courts have always been willing under *Roth* to judge obscenity in an actual distributional context—rather than abstractly by looking at the material alone—and that in making such judgments courts have taken First Amendment factors into account. For example, in a famous 1957 case referred to in the footnote on page 6 of the *Stanley* slip opinion (*United States* v. *31 Photographs,* 156 F. Supp. 350 [D.C.S.D.N.Y.]), the government attempted to confiscate materials being imported by the Kinsey Institute. Although the materials were almost certainly obscene under the *Roth* test if viewed abstractly (that is, they had ample prurient appeal, offensiveness, and seeming lack of redeeming value), the Court found that they were actually to be used for a scientific purpose and, hence, were not obscene. Thus, there has always been some flexibility in the application of *Roth*; material would probably at least be judged in its actual distributional context when the obscenity determination was made, and the First Amendment would come into play if such an in-context examination led to a finding of non-obscenity. *Stanley*, however, goes much further in putting the First Amendment back into obscenity cases. Even under the Kinsey Institute Case approach, if an in-context examination before *Stanley* resulted in a finding of obscenity, the government was free to regulate without reference to the amendment's protections. *Stanley,* however, holds the First Amendment paramount, even though it assumes throughout that the films in question actually were obscene. It is simply no longer accurate to say that the First Amendment does not protect a category of materials defined as "obscene."

5. If regulations which deal with "obscene" material must now pass constitutional muster, what are the standards by which such regulations are to be judged? Are all such regulations unconstitutional? If not, which are valid and which are not? The *Stanley* opinion, I believe, furnishes at least some of the answers to these questions.

First of all, it is clear that, although *Roth* has been modified so as to subject obscenity regulations to constitutional scrutiny, the *Roth* result has

not been completely turned around so as to make all obscenity regulations invalid. Rather, *Roth* and succeeding cases are now to be read as recognizing "a valid governmental interest in dealing with the problem of obscenity" (Op., p. 6). This interest may be legitimately vindicated by certain legislation; other legislation (like that in *Stanley*) will be deemed an improper exercise of governmental power.

The decision as to the validity of particular obscenity legislation under *Stanley* appears to involve an evaluation of the strength of the competing interests involved including the particular governmental objective for enacting the challenged legislation. This was the process followed by the Court in *Stanley* itself. On the one hand, the Court will look at the interests favoring freedom from regulation. The Court found two such interests in *Stanley*: one, of more or less general applicability, is present in most obscenity cases; the other, an interest quite peculiar to statutes penalizing private possession, may not be present in other cases. The general interest or freedom recognized in *Stanley* is the individual "right to receive information and ideas, regardless of their social worth" (Op., p. 7), or, put another way, the "right to read or observe what . . . (one) pleases" (Op., p. 8). The added special interest in *Stanley* was "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy" (Op., p. 7); "the right to satisfy . . . (one's) intellectual and emotional needs in the privacy of his own home" (Op., p. 8).

There is a strong suggestion in *Stanley* that no governmental concern can override these individual interests where both are present. Thus, the Court states that "if the First Amendment means anything, it means that a State has no business telling a man, sitting in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds" (Op., p. 8). In all events, these interests plainly at least put the burden on the government to justify any regulation which impinges on them.

The State in *Stanley* suggested three possible justifications for its regulation. All three were rejected by the Court. I believe that we can learn much about the Court's present attitude toward the permissible aims of obscenity regulation by examining these rejected justifications:

–The State asserted "the right to protect the individual's mind from the effects of obscenity" (Op., p. 8). The Court first viewed this asserted legislative purpose as directed solely toward preserving internal moral attitudes toward sex in the general populace. The Court found such a purpose to control attitudes toward sex constitutionally impermissible. Government, it said, "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" (Op., p. 9).

–The Court then viewed the State's assertion of legislative purpose as one to control conduct, rather than merely to regulate thought and attitude. Specifically, the Court addressed itself to the assertion that obscenity may be regulated because exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence" (Op., p. 9). The Court appears to have rejected the validity of this legislative purpose on two grounds, one quite sweeping in

its potential impact and one tied closely to the present state of empirical knowledge regarding the connection between obscenity and conduct.

The broader ground, which the *Stanley* opinion designates as the "more important" of the two, is that "if the State is only concerned about literature inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . .'" (Op., pp. 9-10). Here is a possible total rejection of any use of obscenity laws as an indirect regulation of the conduct of the consumer of obscenity, a rejection which would completely undercut the most frequently mentioned contemporary justification of obscenity statutes–that they prevent antisocial conduct to which the consumers of obscenity would otherwise be stimulated. A possible qualification upon the breadth of the Court's statement in this regard is contained in the limitation of its applicability to "the context of private consumption of ideas of information." The rejection of indirect control of antisocial conduct through obscenity laws, that is, may only apply to statutes penalizing possession, not to statutes penalizing distributional activity. It is also to be noted that the quoted passage merely says that indirect controls are "ordinarily" not to be favored. A strong empirical case for the efficacy of such controls may overcome the general reluctance to permit them.

This brings me to the second ground, given by the Court for rejecting the *Stanley* statute as an asserted aid in reducing "deviant sexual behavior or crimes of sexual violence." Citing articles summarizing the present state of knowledge on the asserted causal connection between obscenity and antisocial behavior, the Court states that "there appears to be little empirical basis" for such an assertion and it concludes that, "given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits" (Op., pp. 9-10). Thus, the Court seems to suggest both that a proper demonstrable level of causal connection between obscenity and crime may justify regulation and that the level is not presently demonstrated. The chemistry book analogy used by the Court suggests also the type of causal connection which will be deemed significant. There seems no question that chemistry texts can be and sometimes are used in constructing illegal "stills"; yet the Court, quite expectedly, finds those facts alone no warrant for suppression, for such texts serve countless useful and legal functions also. To me this suggests that the "knowledge" which would justify the use of obscenity regulations to control crime would have to be more than mere knowledge that obscenity can cause or trigger crime in some cases. It would, I imagine, have to be knowledge either that the ordinary effect of obscenity is harmful or, at the least, that the harmful effects outweigh the beneficial or neutral effects.

–The final assertion of legislative purpose invoked to justify the *Stanley* possession statute was that "prohibition of possession of obscenity is a necessary incident to statutory schemes prohibiting distribution," the assumption being that penalizing distribution remains constitutionally permissible in

some circumstances (Op., pp. 10-11). This justification is rejected by the Court because of serious doubts about the necessity of controlling possession in order effectively to control distribution and because it is simply too broad a control where constitutional rights are affected. If the government may only legitimately aspire to penalize distributional activity, then according to the Court it must limit its controls to such activity; it may not sweep other activity into the net of prohibition merely for the sake of convenience or administrative ease. The message, I believe, is that controls must be rather narrowly tailored to meet only properly recognizable evils. When dealing with individual constitutional rights of speech the Court will not tolerate broad "protective" legislation as is often tolerated, for example, in legislation which regulates economic impacts on commerce.

6. While the *Stanley* opinion is primarily addressed toward rejecting certain asserted bases for obscenity regulation, it also touches on the permissible and proper basis which may exist for such laws. As I noted in paragraph 5 above, the *Stanley* opinion assumes the continued validity of some legislation, like that upheld in *Roth,* penalizing the distribution of obscene materials. Specifically, the Court affirms the validity of legislation dealing with "public distribution" of obscenity (Op., p. 10). Having rejected the offered bases for possession-of-obscenity legislation, what legitimate basis does the Court find for thus penalizing public distribution?

The difficulty in sustaining one type of legislation while rejecting the other is fairly apparent. The underlying premises of the *Stanley* result are the rights of the individual "to receive information and ideas, regardless of their social worth" (Op., p. 7) and "to read or observe what he pleases" (Op., p. 11). These rights are affected by legislation prohibiting distribution of material fully as much as they are affected by legislation prohibiting private possession (except for the relatively unimportant case of self-produced material). Legislation prohibiting private possession, it is true, conflicts additionally with the ordinary right to be free from "unwanted governmental intrusions into one's privacy" (Op., p. 7), but it is difficult to believe, after reading the entire *Stanley* opinion with its repeated emphasis on the individual's right to read what he wishes, that this factor of privacy was necessary in order to place the burden on the State to offer a legitimate justification for its prohibition of possession of obscenity.

If government, then, does have the burden of justification when it invades the right of a consenting adult to receive obscene stimuli, and if broad restrictions upon distribution of obscenity amount to such an invasion, what proper justification can be offered for statutes prohibiting public distribution? The *Stanley* opinion suggests two bases for such legislation by way of "example": "[T]here is always the danger that obscene material might fall into the hands of children . . . or that it might intrude upon the sensibilities or privacy of the general public" (Op., p. 10).

Considering the second basis first, I note that it apparently applies only to actual "public" distribution, such as open sale or broadcast, sale accompanied by open display, or unsolicited forms of communication. Solicited sales by

mail or sales at discreet retail outlets would not seem to be subject to regulation using this rationale.

The other basis offered—that distributed material might fall into the hands of children—is comprehensive in the restrictions which it would appear to permit but more troublesome to accept as a basis for broad regulation in light of prior decisions. The breadth of this rationale flows from the fact that *any* distributed material "might" fall into the hands of children. One wonders whether the Court, if faced with this issue in a case, would actually use a "might" test or whether it would require a stronger showing that particular types of distributions create a special and great danger of reaching children. The theoretical difficulty in using the danger that children may ultimately receive material indirectly to justify broad regulations on distributions to adults flows from a 1957 Supreme Court case called *Butler* v. *Michigan*, 352 U.S. 380, not cited by the *Stanley* opinion. *Butler* involved a Michigan statute which generally prohibited the sale of sexual material tending to deprave or corrupt minors. The State attempted to justify the prohibition of sales to everyone—adults as well as minors—of material harmful to minors, on the ground that such broad restrictions were necessary "to shield juvenile innocence." The Supreme Court unanimously held the statute unconstitutional on the ground that the Michigan statute was legislation "not reasonably restricted to the evil with which it said to deal." The State's efforts were characterized as an attempt "to burn the house to roast the pig . . . The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."

The Supreme Court's suggestion in *Stanley* that legislation broadly restricting public distribution of obscene material may be justified by the danger that such material might fall into the hands of children is strongly reminiscent of the rationale rejected in *Butler* v. *Michigan*. One possible distinction is that the *Butler* case did not involve material which qualified as "obscene" under the tripartite or a similar test; the material in *Butler* may well have had no prurient appeal or offensiveness for adults, and may have had substantial redeeming value for adults as well. The material which would be affected by a statute generally prohibiting the public distribution of the "obscene," on the other hand, would have to satisfy the tripartite test and therefore would have to be prurient, offensive, and without any redeeming value. Thus, one might say that the barn would not be "burned" by prohibiting such material to everyone in order to protect children, for the material is valueless in all events. I am not sure, however, that this distinction is really a tenable one in light of some of the doctrinal underpinning of *Stanley*. *Stanley* takes admittedly "obscene" material and holds that such material nevertheless comes within an adult individual's ordinary "right to read or observe what he pleases." If, indeed, adults have a constitutional right to read obscenity—and, as I have noted above, it is hard to explain the *Stanley* result as flowing from the First Amendment without recognizing that this is so—then, to this extent at least, the barn would be burned to roast the pig if the desire to protect children were to be permitted to justify prohibitions on all public distributions. As I have noted there is, therefore, at least a strong possibility that when faced with this issue in the future the

Court will let the need to involve children justify regulation of distributions to adults only in cases where there is some special demonstrable likelihood that particular sorts of distributions will in fact be likely to reach children, and only when the legislative prohibitions are drawn to reach only such distributions.

7. In summary, *Stanley* actually insulates only private possession of obscenity from governmental regulation. In the course of making this constitutional judgment, however, the Court, by appearing to equate amusement or entertainment value with ideological value, casts serious doubt on whether general obscenity statutes requiring utter lack of redeeming social value are ever to be permitted to be operative in cases where consensual distributions to adults are involved. Even more important, the Court changes the doctrinal framework in which obscenity laws exist. Whereas the *Roth* case had suggested that "obscene" materials could be regulated wholly without First Amendment restrictions, *Stanley* demands that obscenity laws reflect a legitimate and demonstrably rational legislative purpose. Two asserted legislative purposes—protection of morality and control of antisocial conduct—are rejected in *Stanley*, the former as constitutionally illegitimate, the latter as lacking empirical support. The Court in a *dictum* (a statement unnecessary to its result) suggests that two other purposes—protection of children and protection of privacy—may nevertheless support restrictions on the public distribution of obscenity. Only subsequent litigation, however, can actually establish the extent to which general distributional controls can be justified on these bases in view of well-established Supreme Court doctrine indicating that, where First Amendment rights are concerned, prohibition must be narrowly drawn to affect only recognized social evils, leaving constitutional freedoms their greatest possible breathing space.

State Obscenity Statutes

Description and Analysis

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This paper attempts to describe and analyze the obscenity statutes of the 50 States plus the District of Columbia. Due to a shortage of time, the author did not examine the Codes of each jurisdiction in an attempt to ferret out all existing laws relating to obscenity and pornography. Instead, she relied primarily on a compilation of those laws which had been previously prepared by the Legislative Reference Service of the Library of Congress. That compilation is entitled "Statutory Regulation of Pornography and Obscenity; A Compilation of Federal and State Statutes," dated February 19, 1969, and was prepared by Miss Karen Danart of the American Law Division. Miss Danart told this author that, to the best of her knowledge, this compilation is a complete compendium of all obscenity laws in existence as of February 1969. She was kind enough to supplement it with obscenity statutes which were enacted subsequently by the legislatures of Idaho, New York, California, Washington, Florida, Rhode Island, Pennsylvania, Arkansas, Tennessee, and South Dakota.

In addition, the author of this paper further supplemented the compilation in January 1970 with several recently enacted obscenity statutes which had come to her attention. Again, no effort was made to systematically review the slip laws of each State in order to ensure the inclusion of all recently enacted obscenity laws. Thus, it is possible that the primary reference material relied upon in the preparation of this paper represents something slightly less than 100 percent of all existing State obscenity statutes.

GENERAL CRIMINAL STATUTES

Fifty of the 51 jurisdictions surveyed (the 50 States plus the District of Columbia) have criminal statutes which forbid distributions of obscene materials. The only exception is the State of New Mexico, which has no Statewide sanctions respecting obscenity but does empower its municipalities to "by ordinance . . . prohibit and suppress . . . the sale, possession or exhibition of obscene or immoral publications, prints, pictures or illustrations."[1]

Of the remaining 50 jurisdictions, 49 have statutes which will hereinafter be termed "general criminal statutes"—that is, statutes forbidding distributions of obscene materials to *all* persons, regardless of age. The exceptional State is Vermont, which prohibits the dissemination of obscene materials only to persons under the age of eighteen.[2] This type of statutory prohibition will hereinafter be referred to as a "minors" statute,[3] and will be discussed and analyzed in the section of this paper on "Minors Statutes."

Statutory definitions of obscenity

While 49 of the 51 jurisdictions do have some general provision prohibiting the dissemination of obscene material, 18 of these 49 do not define the term "obscene" in their general statutes.[4]

The other 31 jurisdictions do have statutory definitions of obscenity. Most of these States have adopted the language of the *Roth* case as their definition; that is, "Obscene means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[5]

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[1] New Mexico Stats. Vol. 3, Section 14-17-14.

[2] Vermont Stats. Ann. Title 13, Section 2802.

[3] The age limits contained in "minor statutes," of course, vary from State to State. In general, however, they range from 16 to 18.

[4] These 18 jurisdictions are: Alaska—Stats. Sec. 11.40.170. Colorado—Rev. Stat. Sec. 40-9-16 et al. Delaware—Code Ann. T 11 Sec. 435.711. District of Columbia—Code Ann.—Sec. 872(a). Hawaii—Rev. Laws—Sec. 267-8. Idaho—Gen. Laws Ann. Secs. 18-1506 to 1510; 18-4101 to 4102. Indiana—Stats. Ann. Sec. 10-2803. Iowa—Code Ann. Sec. 725.5. Maine—Rev. Stats. Ann. (1964). T. 17 Sec. 2901. Maryland—Ann. Code Art. 27 Sec. 417. Massachusetts—Gen. Laws Ann. (1968 Supp.) Ch. 272 Sec. 28A. Missouri—Vernon's Ann. Stats. Sec. 563. 290:563.310. Nebraska—Rev. Stats.—1964 (1967 Supp.) Sec. 28-922. North Dakota—Gen. Code Secs. 12-21-07 to 12-21-09. Ohio—Page's Rev. Code Sec. 29.05.34. Washington—Rev. Code Ann. T. 7 Sec. 42.010. Wisconsin—West's Stats. Ann. 944.21. Wyoming—Stats. Ann. Sec. 6-103.

[5] These States are: Alabama—Code T.14 Sec. 374(3) (but the words "lewd, lacivious, filthy, and pornographic" are added to the definition). *Arizona—Rev. Stats. Ann. (1967 Supp) Sec. 13-531.01(2). Arkansas—Stats. 1947, 1964 Replacement, Sec. 41-2715(2). Connecticut—Gen. Stats. Rev. (1968 Supp)—Sec. 53 244a(b). Florida—Stats. Ann.—Sec. 847.011(10). *Illinois—Hurd Ann. Stats. (1967 Supp)—Sec. 11-20. Kansas—Stats. Ann. Sec. 21-1102(b)—Substantially the same approach as *Roth*, although the language is different. *Kentucky—Baldwin's Rev. Stats. Ann.—Sec. 436.101(1)(c). Michigan—Comp. Laws Ann.—Sec. 750.343(b)—Substantially the same approach as *Roth*, although the language is different. Louisiana—Stats. Ann. (1967 Supp) Sec. 106(2)(3). Minnesota—Stats. Ann.—Sec. 617.241. Mississippi—Code 1942 (1966 Supp)—Sec. 2674-02. *Montana—Rev. Code—Sec. 94-3601. *Nevada—Rev. Stats. Sec. 201.250(1)(b). *New Hampshire—Rev. Stats. Ann.—Sec. 571-A:1. *North Carolina—Gen. Stats.—Sec. 14-189.1(b). Oklahoma—Stats. Ann. (1968-69 Supp)—Sec. 1040.9. Pennsylvania—Stats. Ann. (Purdon's)—Sec. 4524. *South Carolina—Code—Sec. 16-414.1. Texas—Vernon's Penal Code—Art. 527.509 Sec. 3 (but a sentence adds that "contemporary community standards shall in no case involve a territory or geographic area less than the State of Texas.") Virginia—Code—1950 (1968

Four other States, California,[6] New Jersey,[7] New York,[8] and Tennessee,[9] use as their statutory definition of obscenity the tripartite *Memoirs* test, apparently requiring the independent existence of all three elements (that is, prurient interest, patent offensiveness,[10] and utter lack of social value) before the material can be found obscene.

Three other States employ a statutory definition which appears to be a hybrid of the "prurient interest" test and the tripartite *Memoirs* test. These States use the "prurient interest" test but then go on to define "prurient interest" as including patent offensiveness (or exceeding customary limits of candor) and utter lack of redeeming social value. These three States are Georgia,[11] South Dakota,[12] and Utah.[13]

Rhode Island[14] uses the tripartite *Memoirs* test, but in an evidentiary capacity only. The elements of prurient appeal, patent offensiveness, and social value, among others, may be introduced into evidence to establish whether or not the material is objectionable.

West Virginia[15] appears to be the only State which has departed from the *Roth* and *Memoirs* definitions of obscenity. In that State, a thing is obscene if it "tend[s] to corrupt the morals of youth, or tend[s] to corrupt the public morals."

Thus, all of the 49 jurisdictions having general criminal obscenity statutes either fail to define "obscene" or otherwise define that word by use of the subjective terms "prurient interest," "patent offensiveness," "social value," or "tendency to corrupt morals." In this connection it should be noted that in the Survey of Prosecutors conducted by the Commission the following question was asked: "Have you experienced any special difficulties in enforcing existing obscenity legislation? If the answer . . . is 'yes,' please describe . . ." The most frequently listed difficulty was that the definition of obscenity was unworkable, that is, it was too vague, too subjective, and so forth.

Penalties

The typical maximum penalty for a first-time violator of a State obscenity statute is a $1,000 fine and/or a one year prison sentence. The actual range

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Supp)—Sec. 18.1.227. Oregon has substantially the same language but omits any reference to "contemporary community standards." Rev. Stats. Sec. 167.151(2).

Those states (listed above) which are marked with an asterisk (*) define prurient interest as a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor.

Those states which are *not* marked with an asterisk, do not define the term "prurient interest."

[6] California Penal Code (1969 Supp)—Section 311(a).

[7] New Jersey Stats. Ann. (1968-69 Supp)—Section 2A:115-1.1.

[8] McKinney's Con. Laws Ann.—Penal Law—Section 235.00.

[9] Tennessee—Code Ann.—Section 39-3007.

[10] While California and New York do not require "patent offensiveness," in haec verba, they do require, as an independent "test" that the material go "substantially beyond customary limits of candor in describing or representing such matters."

[11] Georgia Code Ann. §26-2101.

[12] South Dakota Laws of 1968, Ch. 29, §1(b).

[13] Utah—Code Ann.—Section 76-39-11.

[14] Rhode Island—Gen. Laws 1956 (1967 Supp)—Section 11-31.1-7.

[15] West Virginia Code Ann. Section 61-8-11.

runs from $100 (and no prison sentence) (Minnesota) to $5,000 and/or 10 years in prison (Oklahoma).

In addition, 14 of the jurisdictions impose a more stringent penalty on those who have already been convicted once of an obscenity violation. The typical recidivist statute reads as follows:

> [A person who knowingly violates this section] is quilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000.00, or both. A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000, or by both such fine and imprisonment.[16]

Table 1 indicates the penalties imposed by each jurisdiction for both first-time and (when applicable) repeated violations.[17]

Table 1

OBSCENITY PENALTIES

State	Maximum fine	Maximum fine (repeated violations)	Maximum sentence	Maximum sentence (repeated violations)
Alabama	$ 500		6 months	
Alaska	300		30 days	
Arizona			1 year	
Arkansas	2,000		5 years	
California	10,000	$25,000	360 days	1 year
Colorado	2,000		1 year	
Connecticut	1,000		2 years	
Delaware	2,500	5,000	3 years	5 years
Florida	1,000	10,000	1 year	5 years
Georgia	[a]	5,000	[a]	5 years
Hawaii	500		6 months	
Idaho	1,000		2 years	
Illinois	1,000	5,000	1 year	3 years
Indiana	1,000		1 year	
Iowa	1,000		1 year	
Kansas	300		30 days	
Kentucky	10,000	25,000	360 days	5 years
Louisiana	500		1 year	
Maine	1,000		11 months	
Maryland	1,000	5,000	1 year	3 years
Massachusetts	5,000		5 years	
Michigan	1,000	[b]	1 year	[b]
Minnesota	100		none	
Mississippi	500		6 months	

[16] Florida Stats. Ann. Section 847.011(1)(a).

[17] See footnotes 4 through 15 for the applicable statutory citations.

Missouri	1,000		1 year	
Montana	1,000	2,500	30 days	1 year
Nebraska	1,000		1 year	
Nevada	--		1 year	
New Hampshire	500		1 year	
New Jersey	[c]		1 year	
New York	2,000		1 year	
North Carolina	--		1 year	
North Dakota	1,000		1 year	
Ohio	2,000		7 years	
Oklahoma	5,000		10 years	
Oregon	1,000		6 months	
Pennsylvania	2,000		2 years	
Rhode Island	1,000		1 year	
South Carolina	1,000		2 years	
South Dakota	500	1,000	6 months	3 years
Tennessee	1,000		11 months & 29 days	
Texas	1,000		1 year	
Utah	299	5,000	6 months	5 years
Virginia	5,000	10,000	1 year	2 years
Washington	[d]		[d]	
West Virginia	1,000	[b]	1 year	5 years
Wisconsin	5,000		5 years	
Wyoming	100		6 months	
District of Columbia	3,000		1 year	

a. As for misdemeanor (unspecified).
b. As for other felonies (unspecified).
c. Misdemeanor (penalty unspecified).
d. Gross misdemeanor.

Persons, materials, and activities exempt or immune from criminal liability

Many State statutes exempt from criminal liability those persons who distribute obscene materials in the course of scientific or artistic pursuits. This type of provision usually reads substantially as follows:

> This Act shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise prescribed by this Act, when such possession, distribution, or conduct occurs in the course of law enforcement activities, or in the course of bona fide scientific education or comprehensive research or study, or bona fide objects of art or artistic pursuits, or like circumstances or justification, where the possession, distribution or conduct is not related to the subject matter's appeal to prurient interest.[18]

Another common exemption provision relates to materials which have been "cleared" by a Federal agency (usually Customs or the Post Office) or else by the Motion Picture Association of America. For example, Oklahoma exempts from its criminal statutes all commercial motion pictures which:

> (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) are legally imported from foreign

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[18] Oklahoma Stats. Ann. Title 21, Sec. 1021.1. See also Hurd Ill. Ann. Stats., Ch. 24 Sec. 11-20(f); New Hampshire Rev. Stats. Ann. Sec. 571-A:3; North Carolina Gen. Stats. Sec. 14-189.1(c); McKinney's Consol. Laws of New York Ann., Penal Law Sec. 235.15; Utah Code Ann., Vol. 8, Sec. 76-39-15; Ohio Rev. Code Ann., Title 29, Sec. 2905.37.

countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.[19]

The exemptions for motion pictures bearing the MPAA's Code Seal of Approval would probably no longer be applicable now that the association's rating system is in effect. However, many States are currently attempting to incorporate by reference that rating system into their statutes. For example, in January 1969 a bill containing the following provision was introduced into the New York legislature:

> It shall be unlawful for any person, firm, association or corporation being the owner, lessee, manager or employee of a motion picture theater to allow to be exhibited to any child less than seventeen years old, at a matinee advertised as a children's matinee, or together with any daytime showing of another film intended principally for children, any motion picture or preview thereof which the motion picture industry has suggested for other than general audience viewing pursuant to the Motion Picture Code of Self Regulation. A violation of the provisions of this section shall be a class B misdemeanor.[20]

Although this bill was defeated, similar proposals have been introduced recently in a number of States.[21] All might be open to constitutional attack on the ground that they constitute unlawful delegations of power.

A third type of statutory exemption, found in at least three States is one for noncommercial distributions to adult personal associates. For example, a provision in the Illinois obscenity statute provides that:

> It shall be an affirmative defense to obscenity that the dissemination . . . was not for gain and was made to personal associates other than children under 18 years of age.[22]

Finally, a few States provide immunity to motion picture projectionists[23] or exemptions for daily and weekly newspapers.[24]

Prohibitions on tie-in sales

Twenty-three States have statutory provisions prohibiting publishers and distributors from requiring as a condition to a sale of legitimate magazines, books, papers, and so forth that the purchaser also receive obscene material. For example, a provision in the California obscenity statute reads as follows:

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[19] Okla. Stats. Ann. Title 21, Sec. 1040.51. See also Ohio Rev. Code Ann., Sec. 2905.371 (immunity for publications entered as Second Class Mail matter by Post Office Department); South Carolina Code, Vol. 4, Sec. 16-414.9 (Exemption for motion pictures bearing MPAA seal).

[20] New York State Senate, Bill No. 2199-A, Sec. 396-j.

[21] Statutory proposals incorporating by reference the MPAA's rating system were also introduced last term in Maryland, Minnesota, Nevada, Massachusetts, North Carolina, and Wisconsin.

[22] Hurd Illinois Ann. Stats., Ch. 24 Sec. 11-20(f). See also New Hampshire Rev. Stats. Ann., Sec. 571-A:3(b); North Carolina Stats. Sec. 14-189.1(c).

[23] See, e.g., New Hampshire Rev. Stats. Ann. Sec. 571-A:2-a; Washington Rev. Code Ann. (1969 Supp.) Ch. 256, Sec. 19.

[24] See, e.g., Vernon's Ann. Penal Code of Texas, Art. 527.509, Sec. 5 Kansas Stats., Ann. Sec. 21-1117.

> Every person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any obscene matter or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept obscene matter, or by reason of the return of such obscene matter, is guilty of a misdemeanor.[25]

The Tennessee statutes contain a slightly different tie-in provision. Rather than impose criminal liability on publishers and distributors who require purchasers to receive obscene materials, the statute simply provides that tie-in arrangements of this type are unenforceable and that the existence of a tie-in contract will not be allowed as a defense to a criminal prosecution or governmental civil action.[26]

Miscellaneous Provisions

Extradition. While the statutes of four States specifically provide for the extradition of persons violating injunctions or other civil decrees relating to obscenity,[27] only one State specifically provides, by statute, for the extradition of persons charged with violating the general criminal obscenity laws of the State. Section 1040.23 of Title 21 of the Oklahoma Statutes Annotated reads as follows:

> Section 1040.23 Extradition.
>
> In all cases in which a charge or violation of any section or sections of this Act is brought against a person who cannot be found in this State, the executive authority of this State, being the Governor or any person performing the functions of Governor by authority of the law of this State, shall demand extradition of such person from the executive authority of the state in which such person may be found, pursuant to the law of this State.

It is possible that the legislatures of other States felt that a specific extradition statute for obscenity offenses was unnecessary, since their general criminal extradition statutes would probably cover obscenity violations. This

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[25] Calif. Code Ann., Ch. 7.5 Sec. 311.7. See also Arizona Rev. Stats. Vol. 5, Sec. 13-534; Florida Stats. Ann. Sec. 847.011(3); Kansas Stats. Ann. Sec. 21-1102b; Kentucky Rev. Stats. Ann. Sec. 436.101(6); Louisiana Stats. Ann., Vol. 9, Sec. 106(6); Maryland Ann. Code, Vol. 3, Sec. 422; Massachusetts Gen. Laws Ann., Ch. 272, Sec. 30C; Michigan Laws Ann., Sec. 750.343d; Minnesota Stats. Ann. Sec. 617.243; Montana Rev. Code, Sec. 9403601(6); Nevada Rev. Stats. Sec. 201.250(3); New Jersey Stats. Ann. Sec. 2A:115-3.1; North Dakota Sec. 12-21-08; Ohio Rev. Code Ann. Sec. 2905.341; Oregon Rev. Stats. Sec. 167.152; Penn. Stats. Ann. Title 18, Sec. 3832; Rhode Island Gen. Laws, Vol. 3, Sec. 11-31-12; South Carolina Code, Vol. 4, Sec. 160414.6; South Dakota Laws (1968 Supp.), Ch. 29, Sec. 7; Virginia Code, Art. 3, Sec. 18.1-233; Washington Code Ann. (1969 Supp.) Ch. 256, New Sec. 17.

[26] Tennessee Code Ann. Vol. 7, Section 39-3004.

[27] These four States are Alabama, Arkansas, Connecticut, and Mississippi. The injunctions and other civil enforcement statutes will be discussed in Part III.

would be particularly true in those States where violations of the obscenity laws are felonies.

Pandering. In its recently enacted obscenity statute, the State of Georgia, apparently in an effort to codify the *Ginzberg* decision, included the following provision:

> Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.[28]

Likewise, in Tennessee, in any obscenity prosecution,

> wherein the question of the obscenity of any material is an issue, it shall be admissible in evidence, among other things, to show . . . appeal to prurient interest, or absence thereof, in advertising or other promotion of the material.[29]

In Rhode Island, evidence of the "advertising, promotion and other circumstances relating to the . . . dissemination of the . . . material" is admissible,[30] but it is not clear whether evidence of "pandering" would taint material which would not otherwise be obscene.

In New Jersey, evidence of "pandering" may be considered, but only for the purpose of ascertaining whether the material is totally lacking in social value:

> In any prosecution under the provisions of the chapter to which this act is a supplement, evidence of pandering or evidence that the sale or distribution of the material in question was exploited on the basis of its appeal to prurient interests, may be considered in determining whether the material is utterly without redeeming social value.[31]

The statutes of the jurisdiction other than the four referred to above do not appear to contain "pandering" provisions.

Scienter. Although it is probably constitutionally impermissible to convict a person of an obscenity violation in the absence of proof that the defendant had knowledge of the character and/or content of the material adjudged to be obscene,[32] very few State statutes contain provisions relating to the "scienter" requirement. Those which do contain such statutory references are of two types. The first type is exemplified by the Oregon statute, which provides that "scienter" can be proved by evidence of

> the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine.[33]

Perhaps it is fair to summarize the above provision by stating that if the publisher or wholesaler has "pandered" the material, it will be possible for

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[28] Georgia Code Ann., Section 26-2101(c).
[29] Tennessee Code Ann., Section 39-30006(e).
[30] General Laws of Rhode Island, Section 11-31.1-7(d).
[31] New Jersey Stats. Ann., Section 2A:115-1.2.
[32] *Smith* v. *California* 361 U.S. 147 (1959).
[33] Oregon Rev. Stats., Section 167.151(4).

the prosecution to make out a prima facie case of "scienter" on the part of the retailer.

The other type of scienter provision is the statutory presumption. For example, in New York,

> A person who [disseminates] . . . obscene material, or possesses the same with intent to [disseminate] it, in the course of his business is presumed to do so with knowledge of its content and character.[34]

It appears to this writer that New York's attempt to thus evade the "scienter" requirement of *Smith* v. *California* raises serious constitutional questions.

Dissemination for purposes of resale. In the State of New York, while all commercial disseminations of obscene materials are prohibited, stiffer penalties are imposed on those persons who "wholesale promote" obscene materials, that is, disseminate *for purposes of resale.* According to a recently enacted statute,[35] ordinary disseminations of obscene materials are misdemeanors, but disseminations for the purpose of resale are felonies.

None of the other jurisdictions surveyed appears to make a distinction between ordinary disseminations of obscene materials and disseminations for purposes of resale.

MINORS STATUTES

In 1968, the Supreme Court formally endorsed obscenity laws enacted specifically to protect children when it upheld the New York State conviction of Sam Ginsberg for selling "girlie" magazines to a 16-year-old boy. Justice Brennan, writing for the majority, stated that the State had a legitimate interest in protecting children from abuses "which might prevent their growth into free and independent citizens."

The Supreme Court's recognition of this right on the part of the States not only provided support to those States which had followed New York in enacting "minors" statutes but also served as an impetus to other States to enact similar laws.

Thus, today the statutes of 41 jurisdictions contain some type of special prohibition regarding the distribution of erotic materials to minors. Eighteen of these statutes are either identical to or closely patterned after the New York statute upheld in the *Ginsberg* case, and thus will be hereinafter referred to as "Ginsberg" statutes.

Ginsberg Statutes

The New York statute, the full text of which is set forth in the

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[34] McKinney's Consol. Laws of New York Ann., Penal Law, Section 235.10(1), as amended on February 4, 1969 (effective September 1, 1969).

[35] McKinney's Consol. Laws of New York Ann., Penal Law, Sections 235.00 and 235.05, as amended on February 4, 1969 (effective September 1, 1969).

footnote,[36] prohibits the dissemination of indecent materials to minors. In order to be proscribed, the material must meet two tests: It must depict nudity, sexual conduct, or sadomasochistic abuse (or contain a verbal description of sexual excitement, sexual conduct, or sadomasochistic abuse) *and* it must be harmful to minors. The terms, "nudity," "sexual conduct," "sexual excitement," and "sadomasochistic abuse" are all defined quite explicitly. The test of what is "harmful to minors" is essentially the tripartite *Memoirs* test as applied to minors; that is, the predominant appeal of the material must be to the prurient interest of minors, *and* the material must be patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors, *and* it must be utterly without redeeming social importance for minors.

Listed below in the footnote are the citations to the seventeen other "Ginsberg" statutes referred to above.[37]

One other jurisdiction, the District of Columbia, has what might be called a "modified" Ginsberg law. The statute[38] forbids the distribution of material which depicts nudity, sexual abuse, sexual conduct, or sexual excitement (all defined in the same way as in the New York statute) and which taken as a

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[36] McKinney's Consolidated Laws of New York, Ann., Book 39 Penal Law, Article 235.

§ *235.20 Disseminating indecent material to minors; definitions of terms*

The following definitions are applicable to sections 235.21 and 235.22:

1. "Minor" means any person less than seventeen years old.

2. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of male genitals in a discernible turgid state.

3. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast.

4. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

5. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

6. "Harmful to minors" means that the quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(a) Predominantly appeals to the prurient, shameful or morbid interest of minors; and

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Is utterly without redeeming social importance for minors. Added L. 1967, c. 791, §34, eff. Sept. 1, 1967.

A person is guilty of disseminating indecent material to minors when:

1. With knowledge of its character and content, he sells or loans to a minor for monetary consideration:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors; or

whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable for minors. However, the statute does not contain either the "prurient interest" or the "social value" requirement.

Statutes containing either the "Roth" or "Memoirs" test as applied to minors

In Massachusetts,[39] material cannot be distributed to minors if it appeals to the prurient interest of minors, is contrary to community standards as to what is suitable for minors, and is utterly without redeeming social value for minors.[40]

In California, the "social value" test is modified so as to apply particularly to minors, although the rest of the *Memoirs* test remains unchanged. That is, material cannot be distributed to minors if, "taken as a whole, the predominant appeal . . . to the average person, applying contemporary standards, is the prurient interest . . .; and is matter which taken as a whole goes

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2. Knowing the character and content of a motion picture show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he:

(a) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or

(b) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or

(c) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture show or other presentation.

Disseminating indecent material to minors is a Class E felony (changed from Class A misdemeanor on Feb. 18, 1969, effective September 1, 1969).

§*235.22 Disseminating indecent material to minors; presumption and defense*

1. A person who engages in the conduct proscribed by section 235.21 is presumed to do so with knowledge of the character and content of the material sold or loaned, or the motion picture, show, or presentation exhibited or to be exhibited.

2. In any prosecution for disseminating indecent material to minors, it is an affirmative defense that:

(a) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and

(b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more. Added L. 1967, c. 791, §36, eff. Sept. 1, 1967.

[37] Alabama—House Bill No. 111 (Aug. 7, 1969), (age 18); Arkansas—Act 133, Laws 1969, Senate Bill No. 120 (Aug. 7, 1969) (age 17); Colorado—Senate Bill 59 (June, 1969) (age 18); Florida—Chap. 69-10 (May 7, 1969) (motion pictures only) (age 17); Georgia—House Bill 1747 (Feb. 4, 1969) (age 18); Idaho—Session Laws, Ch. 325, HB #342 (approved March 28, 1969) (age 18); Indiana—HB 1747 (February 4, 1969) (age 18); Louisiana—S.B. No. 120 (Aug. 7, 1969) (age 17); Minnesota H.F. No. 990, Chap. 1071, (June, 1969) (age 18); Mississippi—H.B. No. 906 (July 26, 1968) (age 17); Nevada—Assembly Bill No. 70 (April 18, 1969) (age 18); New Hampshire—Chap. 571-B, effective August 16, 1969 (age 17); North Carolina—Senate Bill 242, Chap. 1215 (effective July, 1969) (age 18) (movies not covered); Pennsylvania—Stats. Ann., Title 18, §4524(b) (July 31, 1968) (age 17); Texas—Senate Bill 661 (May 7, 1969) (age 18); Tennessee—HB 510, Chap. 278 (May 20, 1969) (age 18); Vermont—Stats. Ann., Title 13, §§2801-6 (effective March 23, 1968) (age 18).

[38] D.C. Penal Code, Sec. 872, as amended by P.L. 90-226, Dec. 27, 1967 (age 17).

[39] Mass. Gen. Laws Ann., Chap. 272, §28 (1966) (18 years).

[40] The material must also depict nudity, sexual conduct, or sexual excitement, but since none of these terms is defined, this statute has not been included in the preceding section on Ginsberg statutes.

substantially beyond customary limits of candor . . . ; and is matter which is *utterly without redeeming social importance for minors.*"[41]

The Illinois statutes also contain a modified *Memoirs* test. In that jurisdiction, the "predominant appeal to prurient interest of the material [is] judged with reference to average children of the same general age of the child to whom such material was . . . distributed."[42] Additionally, the redeeming social importance of the material must be "substantially less than its prurient appeal."[43] Montana,[44] which employs the *Roth* test in its "general" obscenity statute, provides, in a "minors" clause that "if the subject matter is directed to minors under 18 years of age, predominant appeal shall be judged with reference to such class of minors." South Dakota[45] during its last legislative session, enacted a similar law.

Statutes containing a "general" obscenity provision and a separate but identical "minors" provision

The statutes of six States contain "minors" provisions which are virtually identical to their "general" obscenity provisions. For example, Section 12-21-09 of the North Dakota Code provides that

> No person . . . shall . . . distribute . . . or hold in possession with intent to . . . distribute . . . any obscene, lewd, salacious, or lacivious material . . .

Section 12-21-07 of that Code provides that

> No obscene, lewd, salacious, or lacivious material . . . shall be . . . distributed . . . or held in possession with intent to . . . distribute, to anyone under the age of twenty-one.

The penalty for violating either one of the foregoing provisions is a maximum fine of one thousand dollars and/or a maximum prison sentence of one year.

Similar situations exist with respect to the obscenity laws of Maryland,[46] Michigan,[47] South Carolina,[48] Wisconsin,[49] and Kentucky.[50] That is, in

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[41] Wests Ann. Penal Code of California, Chap. 7.6, §313 (June 16, 1969). Emphasis supplied.
[42] Ill. Hurd Ann. Stats. (1967 Supp.)—§11-21(c).
[43] Id. at §11-21(b)(1).
[44] Rev. Code of Montana. 1967 Cum. Pocket Part. §94-3601.
[45] South Dakota Laws, 43d Sess. Ch. 29. HB. 794. (Feb. 15, 1968).
[46] Annotated Code of Maryland. 1968 Cumulative Supp. Compare §418 ("general" provision) with §419 ("minors" provision).
[47] Michigan Compiled Laws Ann. Vol. 39. Compare §750.343 ("general" provision) with §750.343e ("minors" provision).
[48] Code of Laws of South Carolina. 1967 Cum. Supp. Vol. 4. Compare §16-414.2 ("general" provision) with §16.414.3 ("minors" provision).
[49] Wisconsin Stats. Ann. Compare §944.21(1)(a) and (b) ("general" provision) with §944.21(1)(c) ("minors" provision).
[50] Baldwin's Kentucky Rev. Stats. Ann. Ch. 436. Compare §436.101(2) ("general" provision) with §436.101(3) ("minors" provision). Kentucky is the only one of the six states in this category in which a more stringent penalty is imposed on those who violate the "minors" provision than on those who violate the "general" provision.

each of these States, there is a "minors" provision which is in no way different from the general obscenity provision of that State.

Statutes which prohibit the dissemination to minors of both erotic and violence-oriented materials

The "minors" statutes of four States treat erotic materials in the same manner as violence-oriented materials. Neither can be disseminated to young persons. For example, in Connecticut, while the general obscenity statute prohibits the dissemination of materials containing "obscene, indecent or impure language or . . . picture(s) . . . ,"[51] the "minors" statute prohibits the distribution to those under the age of 18 of materials

> The content of which is principally made up of pictures or accounts of methods of illicit sex, horror, terror, physical torture, crime, brutality or physical violence or any [material] . . . which is obscene, lewd, lacivious, filthy or indecent or which consists of pictures of nude or partially denuded figures, posed or presented in a manner likely to provoke or arouse lust or passion in persons below the age of eighteen or to exploit sex or perversion for commercial gain.[52]

Similar statutes exist in Hawaii,[53] Iowa,[54] and Missouri.[55]

Statutes which prohibit the dissemination to minors of materials which "tend to corrupt [their] morals" or "appeal to [their] lust"

Three States, Delaware,[56] Ohio,[57] and Nebraska,[58] prohibit the dissemination to youth of materials which have a tendency to corrupt their morals. The Delaware statute provides as follows:

> Whoever paints, publishes, sells, or distributes . . . [material] containing any obscene or indecent picture of any description tending to the corruption of morals of youth shall be fined not more than $100.

The Ohio statute is similar. However, it provides for a maximum penalty of $2000 and/or 7 years. The Nebraska statute[59] is phrased in terms of "perversion" rather than "corruption" of morals.

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[51] Conn. Gen. Stats. Ann. §53-243.
[52] Conn. Gen. Stats. Ann. §53-244.
[53] Hawaii Rev. Laws—1955 §267-8.
[54] Iowa Code Ann. §725.8.
[55] Missouri Vernon's Ann. Stats. (1968-69 Supp.) §563.310.
[56] Delaware Code Ann. Vol. 7 Title II §435.
[57] Page's Ohio Rev. Code Ann. Title 29 §2903.11.
[58] Nebraska Rev. Stats. §28-926.09.
[59] The Nebraska "minors" provision also contains the "Roth" definition part of which is modified so as to apply to minors.

Two other States, New Jersey[60] and Rhode Island,[61] prohibit the dissemination to a minor of materials "presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of 18 years."[62]

Utah's statute forbidding the sale to minors of hard-core pornography

In April 1969, the State of Utah enacted a "minors" statute[63] containing two parts. The first part prohibits the distribution to minors of material which "manifestly tends to corrupt their morals." Violation of this provision is a misdemeanor.

The second part of the law makes it illegal to sell or offer for sale hard-core pornography to minors. "Hard-core pornography" is therein defined as material "that shows people, or people and animals, in actual genital contact of any kind." Violation of this provision is a felony.

None of the other jurisdictions studied has a statutory provision of this type.

Washington's "adults only" statute

The State of Washington has also adopted a unique approach to the problem of sales to minors. A statute enacted in August 1969[64] prohibits the sale, distribution, or exhibition of erotic material to minors. Erotic material is defined as material

> the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value.

The statute further provides that when it appears that material which might be erotic is being sold or distributed within the State, the prosecuting attorney may apply for a hearing and obtain an adjudication as to whether the material is erotic within the meaning of the statute. If the court rules that the material is erotic, an order is then issued requiring that an "Adults Only" label be placed upon it.[65] Failure to comply with a court order so

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[60] New Jersey Stats. Ann. 2A:115-1.3.

[61] Gen. Laws of Rhode Island 1967 Supp. §11-31-10.

[62] This is the wording of the New Jersey statute. The Rhode Island statute, however, is quite similar.

[63] SB No. 133 Amending §76-39-5 and §76-39-13 of Utah Code Ann. (April 25, 1969).

[64] Rev. Code. Wash. Ann. Ch. 256. New Sections 12 through 21. Effective Aug. 11, 1969.

[65] If the subject matter is a motion picture, the court is required to issue an order requiring that such motion picture be labeled "adults only." The exhibitor is required to prominently display a sign saying "adults only," at the place of exhibition, and any advertising of said motion picture must contain a statement that it is for adults only. The exhibitor is also required to display a sign at the place where admission tickets are sold, stating that it is unlawful for minors to misrepresent their age. (New Section 14(3)(b))

issued subjects the dealer or distributor to contempt proceedings. Any person who sells or distributes labeled materials to a minor is, for the first offense. guilty of a misdemeanor;[66] for a second offense, guilty of a gross misdemeanor;[67] and for all subsequent offenses, guilty of a felony.[68]

Miscellaneous Provisions

Legislative findings that the proscribed material is harmful. The New York "minors" statute, upheld in the Ginsberg case, contained a legislative finding to the effect that the proscribed material was a "basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." The court, in upholding the statute, stated that

> it is very doubtful that this finding expresses an accepted scientific fact, . . . [however] to sustain the state power to exclude material defined as obscenity by . . . [the statute] requires only that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.[69]

Despite this basis for upholding legislation aimed at restricting distributions to juveniles, very few State "minors" statutes actually contain legislative findings relating to the effects of obscenity. Only one State, New Jersey, has expressly stated in its "minors" law that the materials proscribed by the statute "are a contributing factor to juvenile crime."[70]

Laws prohibiting persons from employing or permitting minors to distribute obscene materials. In addition to statutes designed to protect minors from consuming erotic materials, many States have laws aimed at protecting minors from participating in the distribution of such materials. For example, § 2803 of Title 13 of the Vermont Statutes Annotated provides that

> No person may hire, employ, or *permit* a minor to sell, lend, distribute, or give away any material, the sale, lending, distribution or giving away of which to minors is prohibited by Section 2802.[71]

Similar laws are to be found in Virginia,[72] Kentucky,[73] Maine,[74] Maryland,[75] Michigan,[76] North Dakota,[77] and South Carolina.[78]

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[66] Maximum penalty is $500 or 6 months imprisonment.
[67] Maximum penalty is $1000 or one year imprisonment.
[68] Maximum fine is $5000. Minimum period of imprisonment is one year.
[69] 390 U.S. 641 (1968).
[70] New Jersey Stats. Ann., Sec. 2A:11503.3. The New Jersey statute, like its New York counterpart, also contains the finding that the materials are "a basic factor in impairing the ethical and moral development of youth and constitute a clear and present danger to the people of the state."
[71] Amended 1967. No. 340 (Adj. Sess.) § 3, eff. March 23, 1968. Emphasis supplied.
[72] Virginia Code, Vol. 4, § 1-234.
[73] Kentucky Rev. Stats. Ann. § 436.101(4).
[74] Maine Rev. Stats. Ann., Vol. 9, Title 17, § 2903.
[75] Maryland Ann. Code, Art. 27, § 420.
[76] Michigan Laws Ann., Vol. 39, § 750.345.
[77] North Dakota Century Code, Vol. 2, § 12-21-07.
[78] South Carolina Code of Laws, Vol. 4, § 16-414.4.

The use of the word "permit" in the Vermont statute could, if construed broadly enough, apply to a bystander who happens to observe a minor engaged in the distribution of obscene materials. A few States have, therefore, tightened up this provision, and have made it applicable only to persons who employ (or use) a minor to distribute obscene materials, and to those who, "having the care, custody or control of any minor child," permit the child to engage in the distribution of such materials.[79]

Outdoor movie provisions. On May 20, 1970, the Governor of New York vetoed a bill which would have made it a felony to exhibit any motion picture proscribed by the state *Ginsberg* statute at a location near a public highway in such a way that the contents of the picture would be visible to minors using the highway.[80] The reason for the veto was that

> [t]he bill is too broad in its scope and is, therefore, subject to serious questions of constitutional validity. Under its provisions, for example, a projectionist in a drive-in theater could be found guilty of a . . . felony, for showing a film that might or might not be obscene by law and which, in fact, was never viewed by a minor.[81]

Similar proposals have been introduced in Delaware, Florida, Maryland, and Oklahoma; but so far none have passed on a Statewide basis. A few municipalities, however, have enacted ordinances of this type.[82]

CIVIL ENFORCEMENT PROCEDURES

Declaratory judgment actions

In a recently enacted obscenity statute,[83] the Georgia State legislature included a provision to the effect that no prosecution may be commenced unless the district attorney serves the accused with prior written notice that he (the district attorney) has determined the material to be obscene. Any person receiving such notice is then given 30 days to bring a declaratory judgment action, therby seeking a judicial determination as to whether or not the material is obscene.[84]

Georgia appears to be the only State in which prior notice to the accused and opportunity for him to bring a declaratory judgment action are mandatory prerequisites to criminal prosecution. However, seven other State obscenity statutes do have some type of declaratory judgment provision, usually

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[79] See Maine Rev. Stats. Ann., Vol. 9, Title 17, §2903; Michigan Laws Ann., Vol. 39, §750.345; North Dakota Century Code, Vol. 2, §12-21-07.

[80] See Governor's Memorandum filed with Senate Bill No. 5296-A.

[81] Ibid.

[82] See, e.g., City of Kentwood, Michigan, Outdoor Movie Licensing Ordinance No. 67 (December 1967).

[83] See Georgia House Bill No. 61. Eff. March 26, 1969.

[84] This opportunity given to the accused to obtain a prior declaration of obscenity seems to be somewhat diluted by the last clause of the provision, which reads as follows: "No such [declaratory judgment] action shall, by reason of the commencement thereof, stay the enforcement of this Act."

coupled with a provision relating to injunctions. For example, Sections 2674-04 and 2674-05 of the Mississippi Code provide as follows:

> Whenever ... [a law enforcement official] in this state has reasonable cause to believe that any person, with knowledge of its contents, is (a) engaged in sending or causing to be sent, bringing or causing to be brought, into this state for sale or commercial distribution or is (b) in this state preparing, publishing, selling, exhibiting or commercially distributing, or giving away, or offering to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or give or offer to give away, any obscene mailable matter, the ... [law enforcement official] shall institute an action in the chancery court for that county for an adjudication of the obscenity of the mailable matter.
>
> ... The complaint shall:
>
> (a) Be directed against the mailable matter by name or description.
>
> (b) Allege its obscene nature.
>
> (c) Designate as respondents and list the names and addresses, if known, of its author, publisher, and any other person sending or causing it to be sent, bringing or causing it to be brought into this state for sale or commercial distribution, and of any person in this state preparing, selling, exhibiting or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away.
>
> (d) Pray for an adjudication that it is obscene.
>
> (e) Pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this state for sale or commercial distribution or in this state preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away.
>
> (f) Pray for its surrender, seizure and destruction.

Similar provisions relating to declaratory judgments are found in the obscenity laws of Oklahoma,[85] Wisconsin,[86] Alabama,[87] Arkansas,[88] Connecticut,[89] and Nebraska.[90]

Although the Mississippi provision, as well as its Arkansas and Connecticut counterparts, states that the law enforcement official "*shall*" institute the declaratory judgment action, none of these statutes explicitly provides that such an action is a mandatory prerequisite to the bringing of a criminal

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[85] Okla. Stats. Ann. Title 21, §§1040.14 and 15. Provides that law enforcement official "may" (rather than "shall") institute declaratory judgment action.

[86] Wisc. Stats. Ann. §269.565 ("may" rather than "shall").

[87] Alabama Code §374(5) through (11) ("may").

[88] Ark. Stats. Ch. 27 §§41-2717-18 ("shall").

[89] Conn. Gen. Stats. Ann. §53-244c ("shall").

[90] Rev. Stats. of Neb. §28-926.01 ("may").

prosecution. Thus, it is the Georgia statute alone which gives the defendant an opportunity to litigate the issue of the obscenity of the materials prior to his being charged with a criminal violation. In the other seven States referred to above it appears that absolute discretion is given to the law enforcement official as to whether he wishes to use this method of establishing scienter on the part of the defendant. For example, the Alabama statute[91] states that the law enforcement official "*may* institute an action ... for an adjudication of the obscenity of the ... material" and then further provides that

> Any ... matter which is ... distributed ... with knowledge of the decree finding it to be obscene ... is subject to the criminal provisions of ... this chapter.[92]

The Nebraska statute does give a seller or distributor an opportunity to institute, affirmatively, an action for a declaratory judgment.[93] However, this provision does not seem to give as much protection to potential defendants as does the Georgia statute; for, in Nebraska, the seller or distributor, by bringing such an action, runs the risk of placing information in the hands of law enforcement officials which they might not otherwise have, that is, information to the effect that the seller or distributor is dealing in erotica. This could not happen in Georgia, since in that State the statute provides that *first* the district attorney must serve the accused with prior written notice that he (the district attorney) has determined the material to be obscene. The accused is then given 30 days in which to bring the declaratory judgment action. Furthermore, in Georgia no criminal prosecution may be brought without the district attorney's first having served such written notice on the potential defendant.

The notice provision contained in the Mississippi statute[94] as well as its counterparts in the statutes of the six other States referred to above[95] appears to have been drafted so as virtually to guarantee actual notice of the pending litigation to all persons who are known to have a possible interest therein. The statute initially requires that the complainant

> Designate as respondents and list the names and addresses, if known, of its author, publisher, and any other person sending or causing it to be sent,

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[91] See footnote 87.

[92] Section 374(12).

[93] §28-926.05 of the Revised Statutes of Nebraska provides that "Any person ... [who] ... distributes ... any of the items ... which may be prohibited by the criminal laws of this state relating to obscenity shall, if such person ... has genuine doubt as to the question of whether such items are in fact within the terms and provisions ... of the criminal provisions of this state relating to obscenity, have a right to bring an action ... for declaratory judgment under the uniform Declaratory Judgments Act against the city ... or county ... in which said items are located or are intended to be ... distributed ... for a determination of the legality of said items.

[94] Mississippi Code §§2674-05(c) and 2674-06.

[95] See footnotes 85-90.

bringing or causing it to be brought into this state for sale or commercial distribution, and of any person in this state preparing, selling, exhibiting or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away.

It then provides that

Upon the filing of the complaint . . . the prosecuting attorney shall present the same, together with the . . . [objectionable] matter exhibited thereto, as soon as practicable to the court for its examination and reading.

. . . . . .

If, after such examination and reading, the court finds probable cause to believe such . . . matter to be obscene, the court shall cause an endorsement to that effect to be placed and dated upon the complaint, whereupon it shall be the responsibility of the prosecuting attorney, . . . promptly to request the clerk of the court to issue summons and to copy such endorsement upon such number of duplicates of such complaint as are needed for the service of summons, to each copy of which summons shall be attached a copy of such complaint as so endorsed. Service of such summons and endorsed complaint shall be made upon the respondents thereto . . .

The obscenity statute of Massachusetts also contains a declaratory judgment provision.[96] However, unlike the Mississippi provision, which provides for actual service of the summons and complaint on all persons known to have an interest in the litigation, the Massachusetts provision requires only that the court, if it has reasonable cause to believe the material obscene, issue a show-cause order,

directed against such book by name and addressed to all persons interested in the publication, sale, loan or distribution thereof.

However, even though the order must be *addressed* to all interested persons, it need not be served on them or even mailed to them. Instead,

Notice of such order shall be given by publication once each week for two successive weeks in a daily newspaper . . .

Additionally,

A copy of such order of notice shall be sent by registered mail to the publisher of said books, to the person holding the copyrights, and the author, in case the names of any such persons appear upon said book.

Since it is quite likely that the publisher, the author, and the person holding copyrights will all reside outside of Massachusetts, and thus be

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[96] Mass. Gen. Laws Ann. Ch. 272, §§28c-28g.

beyond the reach of the statutes of that State, it is quite likely that no person actually interested in the litigation will be aware of its existence. For the only interested persons likely to be found within the State of Massachusetts, that is, the sellers and distributors of the book, need be apprised of the pending action only "by publication once each week for two successive weeks in a daily newspaper."[97]

The statute further provides that

> If no person appears ... [to defend the action], the court may ... order a general default and if the court finds that the book is obscene ..., may make an adjudication against the book that the same is obscene ...[98]

The final section of the statute provides that

> In any [criminal] trial ... for any offense committed after the filing of [the declaratory judgments] proceeding ... the defendant, ... [if the book has been held obscene in the declaratory judgment action] shall be conclusively presumed to have known said book to be obscene.

Thus, in Massachusetts it is possible for a book to be adjudicated obscene without the sellers and distributors of that book ever having been apprised of the existence of the declaratory judgment action or the decree which culminates therefrom. Yet, once that decree is entered, these same sellers and distributors are (in any subsequent criminal proceedings which are brought against them) conclusively presumed to have knowledge that the book is obscene.

Injunctions in rem

The obscenity statutes of five States contain provisions for injunctions in rem,[99] that is, injunctions which are directed against a book or material qua book or material, as opposed to injunctions in personam which are directed at particular persons and the conduct of those persons. In each of these five statutes, the provision for an injunction in rem appears as a corollary to a declaratory judgment provision, such as the Mississippi provision set forth in the preceding section.[100] To wit, each of these statutes provides that the complaint must be directed against the objectionable matter by name or

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[97] The Rhode Island obscenity statute, which contains a substantially similar declaratory judgment section [R. I. Laws §§11-31.1-1, et seq] attempts to remedy this defect by requiring that "Notice of such order shall be published once a week for two (2) successive weeks in a newspaper of general circulation ... and if their names and addresses are known, a copy of such order shall be served by registered mail upon the author, publisher, exhibitor, and *all other persons interested in the sale or commercial distribution of the book ... or other material*" (emphasis supplied).

The Declaratory Judgment section of the Virginia statute is substantially the same. See Virginia Code, Vol. 4, §§18.1-236.3.

[98] §28E.

[99] See Alabama Code, ch. 64A, §374(6); Arkansas Stats., Ch. 27, §41-2718; Connecticut Gen. Stats. Ann. §53-244c; Mississippi Code, §2674-05; Okla. Stats. Ann., Title 21 §§1040.14 et seq.

[100] See text immediately preceding the text which accompanies footnotes 85-90.

description, allege its obscene nature, designate as respondents and list the names and addresses of all persons known to have a commercial interest in the matter, pray for an adjudication that it is obscene *and*

> Pray for a permanent injunction against *any* person sending or causing it to be sent, bringing or causing it to be brought, into this state for sale or commercial distribution or in this state preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away,[101]

and, pray for its surrender, seizure, and destruction.

It is not clear whether or not the prayer for an injunction against *any* person having a commercial interest in the litigation can encompass future violators who are not designated as respondents to the suit. If such is the intent of the provision, however, serious constitutional questions might be raised.[102]

Injunctions in personam

The legislatures of 18 States have explicitly authorized their courts to restrain prospective violations of their obscenity laws through the issuance of injunctions in personam.[103] These are decrees which are directed at specified persons, enjoining them from specified conduct or activities. The Arizona provision, the full text of which is set forth in the footnote,[104] is a typical

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[101] See, e.g., Mississippi Code, §§2674-04 and 05. Emphasis supplied.

[102] See Note, *Binding Non-Parties to Injunction Decrees,* 49 Minn. L. Rev.

[103] Arizona—Rev. Stats. Vol. 5, Title 13, Art. 28. §13-535; Colorado—Rev. Stats. Vol. 3. §40-9-213; Florida—Stats. Ann. Vol. 22A. §847.011(7); Idaho—Gen. Laws, Ch. 15, §18-1510; Kentucky—Rev. Stats. §436.570; Maryland—Ann. Code. Art. 27. §418A; Missouri—Vernon's Ann. Stats. Vol. 41, §563.285; Nebraska—Rev. Stats. §28-926.01; New Jersey—Stats. Ann. §2A:115-3.5; New York—McKinney's Consol. Laws, Book 39. §22a; Ohio—Rev. Code Ann.—§290.5.343; Penna.—Purdon's Penna. Stats. Ann. §3832.1; Rhode Island—Gen. Laws. Vol. 3. §11-31-13; South Carolina—Code Vol. 4, §16-416; Tenn.—Code Vol. 7. §39-3005; Texas—Vernon's Ann. Penal Code, Art. 527.509, Sec. 6 (appears to authorize both injunctions in rem and in personam). Utah—Code Ann., Vol. 8. 76-39-10; Washington—Rev. Code §7.42.020.

[104] Ariz. Rev. Stats. §13-535. Obscene prints and articles; jurisdiction.

A. The superior court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as described in subsection B.

B. The county attorney of any county or the city attorney of any city in which a person, firm, association or corporation publishes, sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filty, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose, or in any other respect devined in §13-531.01, may maintain an action on behalf of such county or city for an injunction against such person, firm, association or corporation in the superior court to prevent the sale or further sale or the distribution or further distribution of the acquisition, publication or possession within the state of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photographed figure or image or any written or printed matter of an indecent character, described in this subsection or in §13-531.01.

C. The person, firm, association or corporation sought to be enjoined shall be entitled to a trial of the issues within ten days after joinder of issue and a decision shall be rendered by the court within ten days of the conclusion of the trial.

example. Briefly, it provides that the county attorney of any jurisdiction in which a person distributes or is about to distribute any obscene material may seek an injunction against such person. The defendant is entitled to a trial within 10 days after joinder of issue and the court must render its decision within 10 days of the conclusion of the trial. If the final judgment is adverse to the defendant, the order shall contain a provision including, among other things, a directive to the defendant to surrender the material to the county sheriff, who must in turn seize and destroy such materials.[105] Finally, every person who distributes any of the material described in the injunction after service upon him of a summons and complaint in the action is chargeable with knowledge of the contents of the material.

In 16 of the States referred to above, only the State's attorney or other public official may institute an action pursuant to the basic injunction provision. The two exceptional jurisdictions are Colorado and Kentucky.[106] The Kentucky statute[107] provides that:

> The Commonwealth's attorney or county attorney, *or any citizen of the county* may maintain an action in equity in the state, upon the relation of the Commonwealth's attorney, county attorney or citizen to enjoin the publication, distribution or sale of articles prohibited by the [criminal obscenity statutes].

In Colorado, a private citizen is not empowered to institute an injunction action. However, he can force the district attorney to do same. The statute[108] provides as follows:

> Whenever there is reason to believe that any person knowingly has committed or is committing or is about to commit or threatens to commit any of the acts prohibited by sections 40-9-16 and 40-9-17, the district attorney on demand of any responsible citizen of the county, must institute and maintain an action in equity to prevent and temporarily or perpetually enjoin the person or persons who knowingly have committed,

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D. If a final order of judgment of injunction is entered against the person, firm, association or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm, association or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in subsection B and such sheriff shall be directed to seize and destroy such obscene prints and articles.

E. In any action brought as provided in this section, such county attorney or city attorney bringing the action shall not be required to file any undertaking before the issuance of an injunction order provided for in subsection C.

F. The sheriff directed to seize and destroy such obscene prints and articles shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm, association or corporation sought to be enjoined.

G. Every person, firm, association or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in subsection B, after the service upon him of a summons and complaint in an action brought pursuant to this section is chargeable with knowledge of the contents thereof. Added Laws 1964, Ch. 12 §3.

[105] Seizure and destruction of obscene materials will be discussed under "seizure."

[106] In Ohio, although a private citizen may not institute an action under the basic obscenity injunction section, he may sue under a related statute pertaining to Abatement of Nuisances.

[107] Balitwin's Kentucky Rev. Stats. Ann. §436.570. Emphasis supplied.

[108] Colorado Rev. Stats., Vol. 3, §40-9-21.

are committing, or are about to commit, or threaten to commit, any of the acts prohibited by said sections or either of them. If the district attorney shall refuse to institute within ten days after such demand and thereafter prosecute the same to conclusion within ninety days after the institution of such action, any reputable citizen may institute a mandamus action against the district attorney to compel the district attorney to institute the injunction action contemplated by the provisions of this section, and to compel said district attorney to perform all of the duties imposed under and by virtue of the terms, provisions, and conditions of section.

The 18 States differ on the issue of whether the court may grant a temporary restraining order (hereinafter referred to as a TRO) pending the outcome of the litigation, and also as to the type of notice which must be given to the defendant before such an order can be granted. The majority approach has been simply to ignore the issue altogether. Thus, most of the injunction statutes neither allow nor prohibit the granting of TRO's.[109] The statutes which do contain references to TRO's run the gamut from those containing an outright prohibition on the issuance of temporary decrees to those which give the courts plenary power in this area. For example, Colorado[110] has given its courts sweeping authority to grant "temporary writs of injunction" whenever the judge is satisfied that there are "reasonable grounds or cause for such action." Additionally,

> service of notice on the defendants shall not be required on the application for temporary injunction unless ordered by the court or judge.

In Florida,[111] the court can issue a TRO, but the defendant must be notified on the State's application for same unless

> It is manifest to . . . [the] judge from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person that the apprehended violation will be committed if an immediate remedy is not afforded.

In Nebraska,[112] no temporary restraining order or injunction can be issued in advance of final adjudication by the trial court where the question of whether said matter is obscene is in issue.

Finally, the Rhode Island statute[113] contains an absolute prohibition on the issuance of all "restraining orders or preliminary injunctions."

Seizure

Most injunction and declaratory judgment statutes contain a provision to the effect that the government's complaint shall request the "surrender,

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[109] See, e.g., Kentucky Rev. Stats. §436.570; Maryland Code Ann. Art. 27, §418A. Missouri Vernon's Ann. Stats., Vol. 41, §563.285.

[110] Colorado Rev. Stats. §40-9-22.

[111] Florida Stats. Ann., Vol. 22A, §847.011.

[112] Rev. Stats. of Nebraska, §28-926.02.

[113] Gen. Laws of Rhode Island, Vol. 3, §11-31-13.

seizure, and destruction" of the objectionable material.[114] Provisions of this type are probably not open to constitutional objection, since the material presumably would not be seized or destroyed until after a final adjudication that it is obscene.

Several statutes, however, contain an independent seizure provision such as the following:

> An obscene or indecent writing, paper, book, picture, print or figure found in possession, or under control of a person arrested therefor, shall be delivered to the magistrate before whom the person arrested is required to be taken, and if the magistrate finds it is obscene or indecent he shall deliver one copy to the county attorney of the county in which the accused is liable to prosecution, *and at once destroy all other copies.* The copy delivered to the county attorney shall be destroyed upon conviction of the accused.[115]

Such a provision requires that the material be seized and destroyed prior to a trial on the merits of the case and without a prior adversary hearing on the issue of its obscenity. Several lower Federal courts have held such a procedure unconstitutional,[116] and at least four Justices of the Supreme Court have held likewise.[117]

Additionally, several seizure statutes contain provisions allowing law enforcement personnel to "seize any equipment used in the photographing, filming, printing, producing, manufacturing or projecting of pornographic, still or motion pictures and . . . also any vehicle or other means of transportation . . . used in the distribution of such obscene prints and articles."[118] The materials so seized are then subject to forfeiture proceedings.

Motion picture licensing and classification boards

Maryland is the only State which has a motion picture licensing board.[119] The issue of the constitutionality of this procedure is presently pending before the Supreme Court.[120] In addition, the State of Tennessee has empowered its municipalities to establish boards for the "classification and regulation of the presentation of motion picture films to minors."[121]

Study commissions

The State of Texas has created a special temporary study commission, the purpose of which is

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[114] See statutes cited in footnotes 77-82.

[115] Arizona Rev. Stats. §13-353 (emphasis supplied) Cf. Okla. Stats. Ann. Title 21, §1023; Idaho Laws, Ch. 41, §18-4102.

[116] See, e.g., *Tyrone Inc.* v. *Wilkinson* 410 F2d 639 (4th Cir. 1969); *Delta Book Distributors* v. *Cronvich* 304 F Supp. 662 (ED La 1969); *Overstock Book Co.* v. *Barry,* (EDNY 1969).

[117] *Quantity of Books* v. *Kansas* 378 U.S. 206 (1964).

[118] McKinney's Consol. Laws of N. Y. Ann., Penal Law §410.00. See also North Dakota Century Code, Vol. 2, §12-21-11.

[119] Md. Code of 1965, Art. 66A, §19.

[120] See *Grove Press* v. *Maryland Board of Censors,* cert. granted _____ U.S. _____ (1970).

[121] Tenn. Public Acts of 1969. Ch. 306. (Sen. Bill #841, May 21, 1969).

to study the motion picture industry in Texas with respect to the display of prurient or obscene moving pictures, looking toward the feasibility of prohibiting the showing of these pictures in the state of Texas and in addition thereto study the taxing of said movies as a revenue measure.[122]

The commission was appointed by the Lieutenant Governor and is composed of five members of the State senate. A final report is due in January 1971.

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[122] Texas Sen. Res. #41 (Sept. 8, 1969).

Historical and Philosophical Perspective

Origins of the Law of Obscenity

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This paper traces the development of laws regulating obscene publications in England and the United States. It treats obscenity and related offenses up until approximately the 1870's, by which time obscenity offenses had become well rooted in the laws of both countries.

I.

The offense of obscenity as it is now conceived of did not originate, in either England or the United States, until the 19th century. But as early as the 16th century a licensing system was set up in England, and during the 17th and 18th centuries cases arose which are generally regarded as forebears of anti-obscenity laws.

The principal factor separating the early controls on expression from later anti-obscenity legislation is their emphasis on protecting the political and religious fiber of society, but not necessarily the moral. Censorship for political and religious reasons dates back at least to Greek and Roman times. In both ancient cultures, licentiousness was tolerated in drama[1] and often was combined with religious themes. Plato advocated expurgating works to make them more suitable for youth by omitting sexual descriptions or portions which might terrify the young,[2] but actual censorship seems to have been limited to the religious. The killing of Socrates for his atheism shows that denial of the existence of God was not tolerated. In Rome obscenity remained largely uncensored; censorship was directed primarily against works subversive of the political order. During the Republic, the Roman censors

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[1] See, for example, the plays of Aristophanes, Plautus, and Terence.
[2] See *The Republic* 84, 90, 71 Everyman edition (1950).

exercised unreviewable power to punish any person whose writings or actions were considered seditious; after the Republic, the emperors exercised similar powers.

During medieval times, as in earlier periods, religion and bawdiness were not seen as mutually exclusive. They combined in the vividly descriptive ballads of the period, and the *Exeter Book,* a largely devotional work which constitutes the earliest example of Anglo-Saxon literature, contains obscene riddles which were collected by a monk. The Church did not censor at all until the Council of Trent, in the mid-16th century, and then it was concerned only with the antireligious and not with the obscene.

It was also in the 16th century that royal censorship commenced in England. During the 15th century the printing of books had increased enormously. Largely in response to this, Henry VIII set up a licensing system through the Star Chamber in 1538.[3] Like earlier censorship systems, it was not directed against works which might be considered obscene but only against seditious and heretical works. The system was first made effective under Elizabeth, but during the Elizabethan period contemporary taste did not demand censorship on the basis of obscenity. It is also noteworthy that the classics, defined as "aucthours and workes in any language that hath been heretofore commonly receyued or allowed in any the unyuersities or scoles," were exempt from censorship under Elizabeth's decree.[4]

Toward the end of Elizabeth's reign, however, Puritanism was on the rise. The Puritans considered pleasure of any kind as sinful and were concerned with the spread of bawdy books,[5] though the major part of their efforts was directed against the stage. They made some progress in their efforts against the theater under the first two Stuarts (1603 to 1649). In 1605 courts were authorized to try proceedings against actors for profanity on stage, and in 1642 Parliament abolished the playhouses. During the same period, ecclesiastical censorship became more stringent, though it still hardly represented a concerted attempt to suppress obscenity. Under the Commonwealth, by contrast, censorship of all works was rigid. At the Restoration in 1660, however, a reaction to the Puritan repression took

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[3] The decree provided: "Item that no persone or persons in this realme, shall from hensforth print any boke in the englyshe tonge, onles vpon examination made by some of his gracis priuie counsayle, or other suche as his highnes shall appoynte, they shall haue lycense so to do, and yet so hauyinge, not to put these wordes Cum privilegio regali, without addying ad imprimendum solum and that the hole copie, or els at the least th effect of his license and priuilege be therewith printed, and playnely declared and expressed in the Englyshe tonge vnderneth them." 16 November 1538, S.T.C. 7790, quoted in St. John-Stevas, *Obscenity and the Law,* 6-7 (1956).

[4] St. John-Stevas, *Obscenity and the Law,* 8 (1956).

[5] In 1580 the Puritans, in alliance with the established printers, supported a draft "acte to restraine the licentious printing selling and utterynge of unproffitable and hurtfull Inglishe bokes," which was aimed at publications "serving (for a great parte of them) to none other ende (what titles soever they beare), but only to let in mayne Sea of wickednesse and to set vp an arte of making lasciuious vngodly love, to the highe displeasure of GOD, whose guiftes and graces bee pitiefully misused thearby to the manifest inurie and offence of the godly learned whose prayse woorthie endevours and wrytinges are thearefore the lesse read and regarded, to the intollerable corruption of the common lyfe and manners, which pestilently invadeth the myndes of many that delight to heare or read the said wantone woorkes, and to no small or sufferable waste of the treasure of this Realme which is thearby consumed and spent in paper, being of it selfe a forrein and chargeable comoditie." The act, however, was never presented to Parliament. St. John-Stevas, *Obscenity and the Law,* 11-12 (1956).

place. The playhouses were revived and given royal protection, and licensing was limited to its original purposes of suppressing sedition and heresy. In this setting, in 1663, arose *Rex* v. *Sedley*, 1 Keble 620 (K.B.), Mich. 15 Car. II B.R., the case generally regarded as "the first reported obscenity case."

Sir Charles Sedley was an intimate of Charles II, "as famous for his wit as he was for the profligacy of his life."[6] Together with two other noblemen, he engaged in a drinking spree at a tavern known as "The Cock." After the three became drunk, they climbed the balcony of the tavern, which overlooked Covent Garden, and they removed their clothes. Sedley proceeded to give a speech, which included profanities, and he poured upon the amazed onlookers bottles filled with urine. A riot followed. The populace tried to storm the tavern and, when it was barricaded, threw stones at Sedley and his friends until they withdrew within.[7]

Sedley "was fined 2000 mark, committed without bail for a week, and bound to his good behavior for a year, on his confession of information against him, for shewing himself naked in a balcony, and throwing down bottles (pist in) vi & armis among the people in Covent Garden, contra pacem, and to the scandal of the Government." 1 Keble 620 (K.B. 1663).

Sedley's is the only "obscenity case" that is reported before the 18th century. Toward the end of the 17th century, however, in reaction to the licentiousness of the Restoration, there began a concern with public morals which was gradually to grow through the following century and culminate in the Victorian period. The Puritans renewed their efforts against the stage, and in 1692 there was founded, under royal patronage, a Society for the Reformation of Manners, which energetically set about encouraging virtuous living by such techniques as the blacklisting of persons considered guilty of vice. Ten years later, Queen Anne issued a proclamation denouncing vice, blasphemy, swearing, drinking, dicing, and selling liquor in coffee houses. It is noteworthy that the publication or reading of obscenity was not among the selected vices of either the Society or the Queen.

In 1695, when the Licensing Act expired, Parliament declined to renew it. This was not because it disapproved the practice of licensing but because it considered the act unenforceable. The end of the licensing system made it likely that some new legal controls over writings would develop, at least for areas like libel which were suddenly substantially unregulated. And even though the licensors had not directed their attention against obscenity, the existence of a licensing scheme probably had had some inhibiting effect on pornographic publications. In any case, the demise of the system, coupled with the spread of literacy and the increased popularity of reading, led gradually to a new class of writers, aiming to produce popular works and obtain a quick return for their money. The upper classes became concerned about the possible effects of these writings. It is in this setting that the effort was made to control obscenity through the common law courts.

In 1708 a prosecution was instituted against a man named Read for

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[6] Cambridge History of English Literature, 158 (1912).

[7] This account of *Sedley's* case is taken largely from Alpert, "Judicial Censorship of Obscene Literature," 52 *Harv. L. Rev.* 40, 41-43 (1938).

writing a book called *The Fifteen Plagues of a Maidenhead,* which was charged to be obscene. Read was acquitted. The report reads: "A crime that shakes religion, as profaneness on the stage, etc. is indictable; but writing an obscene book, as that intitled, The Fifteen Plagues of a Maidenhead, is not indictable, but punishable only in the spiritual court." *Queen* v. *Read,* 11 Mod. Rep. 142 (1708).

The *Read* case, then, affirmed that obscenity, if it was an offense at all, was within the exclusive jurisdiction of the ecclesiastical courts. It was not an offense at common law. The church courts had been separated from the lay courts by William the Conqueror. They could punish anything they regarded as sinful, and they did not have a system of written rules or precedent. All of the penalties they imposed were spiritual ones, the supreme punishment being excommunication.[8]

Not only obscenity but sex offenses in general had traditionally been under the exclusive jurisdiction of the ecclesiastical courts. Adultery and fornication, which were forbidden by the Bible,[9] were civilly punished for the first time under the theocratic government of Cromwell, and during the Restoration they fell again under the exclusive control of the ecclesiastical authorities.

While, according to the *Read* case, the church courts had exclusive control over obscenity offenses prior to the 18th century, it does not appear that even this control was broadly exercised. Church courts certainly did not seek every possible occasion to condemn a work as obscene; instead, they fit in with contemporary attitudes of tolerating coarseness in literature. In the "obscenity" cases that did exist, there was almost always an element of defamation, an offense in the ecclesiastical jurisdiction until the 16th century, or of the crime of blasphemy, which also could be heard only in church courts.

The Fifteen Plagues of a Maidenhead was, in the words of Justice Powell, dismissing the indictment, "bawdy stuff, but reflects on no person or persons or against the Government. It is still not fit to be mentioned publicly; if there should be no remedy in the Spiritual Court, it does not follow there must be a remedy here. There is no law, to punish it. I wish there were but we cannot make law" (Fortesque 98, 100).

Curl, the man next prosecuted for "obscene libel," like Read, was not the author of serious literature. The book he was prosecuted for publishing was entitled *Venus in the Cloister or the Nun in Her Smock.* The court, in *Curl's* case, 20 years after *Read,* was less hesitant to create a new offense at law, and *Read* was overruled. Counsel for Curl attempted to use the *Read* case to have the indictment quashed, but the attorney general, while admitting the lack of precedent for his position, argued that acts should be considered disruptive of the King's peace and forbidden by the common law even if they do not involve force or the treat of retaliatory force, as libel does. Acts that corrupt the morality of the public at large are "against the peace of the

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[8] For a discussion of the evolution and procedures of the church courts see May, "Experiments in the Legal Control of Sex Expression," 39 *Yale L. J.* 219 (1929).

[9] Exodus 20:14; Leviticus 20:10; Deuteronomy 22:22; I Corinthians 10:8; I Thessalonians 4:3.

King," although acts of immorality that affect only individuals, such as private fornication, are not public offenses punishable at common law.

Justice Fortesque was the most disturbed by the position that there could be a breach of the peace without actual force or violence or the likelihood of creating it: "To make it indictable there should be a breach of the peace or something tending to it, of which there is nothing in this case." After two continuances, however, during which time Fortesque retired from the bench, the court was able to reach a decision. The court found precedent for its punishment of "obscenity" in *Sedley's* case. It said Sedley was not distinguishable because of the showering of the public with urine and because of the violence thereby provoked; it thought the more important part of Sedley's offense was his nakedness.[10] *Curl's* case is considered thus to have established for the first time in England that a person could be punished at common law as a violator of the King's peace though no force or threat of violence was involved in his actions but only a breach of the general moral code.

At least one scholar, however, is of the opinion that even *Curl's* case did not create a common law crime of obscenity substantially the same as the crime today. Instead, Theodore Schroeder has maintained, the offense of obscene libel created by *Curl's* case was closely tied to religion and *only* obscene works that discredited the official religion were held "obscene" through the 18th century. Only later did Puritan standards make "obscenity" as a criminal offense come to relate to the bawdy rather than the irreligious character of a publication.[11]

According to Schroeder, the law before *Curl* punished publications that were seditious or heretical or that tended to provoke an actual breach of the peace, as libel of an individual. *Curl* added to the category of punishable works those that directly discredited established religion or its servants. *Sedley* fit within this theory in two ways: First, Sedley's speech was antireligious. Moreover, Sedley committed a trespass vi et armis upon the populace by pouring bottles of urine upon them. This conduct tended to promote violent retaliation; it did in fact provoke it. Curl's work was punishable, under Schroeder's theory, because it dealt with a religious theme in a bawdy manner. Language in an early report of *Curl* supports Schroeder's position: "After solemn deliberation, the court held it to be an offense properly within its jurisdiction; for they said that religion was part of the common law; and therefore whatever is an offense against that is evidently an offense against the common law. Now morality is the fundamental part of religion and therefore whatever strikes against that, must for the same reason be an offence against the common law. The case of *King* v. *Taylor,* 1 Ventris 293, is to this very point."[12] The *Taylor* case, cited as an authority for the proposition that offenses against morality are common law offenses, was a case of obscene blasphemy. The defendant was convicted for calling Christ a bastard and a whoremonger and calling all religion a cheat. Schroeder draws

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[10] *Rex* v. *Curl* is reported in 2 Stra. 788 (1727). The report includes the arguments of counsel.
[11] See Schroeder, "Obscene Literature at Common Law," 69 *Albany Law Journal* 146 (1907).
[12] *King* v. *Curl,* Barnardiston's Rep. 29 (1744).

the conclusion from this citation that "morality" in *Curl* was used simply in the sense of religious morality.

That 18th century writers did not consider obscenity a crime apart from religion lends support to Schroeder's position; no one suggested that licentiousness in a printed work was alone enough for it to be declared criminal. Blackstone and all lawbook writers of the time classified obscenity as an offense against God.

The 18th century cases following *Curl* are consistent with the view that only antireligious things were "obscene" in the sense of the newly found common law crime of obscenity. The most well known of these cases is *Rex* v. *Wilkes,* 4 Burr. 2527 (K.B. 1770). Wilkes was convicted on a default judgment for obscenity and "impious libel" for his poem "Essay on Women," which was a parody of Pope's "Essay on Man." Wilkes' "Essay on Women" is erotic, but it also treats God and religion disrespectfully and thus was considered "impious."

The *Wilkes* case is therefore consistent with the theory that impiety must have coexisted with obscenity for a publication to have been criminal at common law at this time in history. Moreover, the real reason for prosecuting Wilkes was clearly not his "Essay on Women" or any of his other publications (which are not named in the report but which were challenged along with the essay) but his political troublesomeness. Wilkes was a Whig writer who was constantly trying to expose the corruption of the Tory government, and so he had many political enemies.

It is noteworthy that the "Essay on Women" for which Wilkes was convicted was not for public distribution. Wilkes had ordered only 12 copies printed; those were for distribution to a society of which he was a member which called itself the Medmenham Monks, a group of 12 men. The printer, however, secretly made a 13th copy and turned it over to the government so that the prosecution could be instituted.[13] It has also been suggested that certain parts of the essay were forged for purposes of the prosecution because it was not bawdy enough,[14] and even that Wilkes did not write the poem at all.[15]

Wilkes admitted the printing of the obscene "Essay," but he denied responsibility for its circulation. As well as being convicted he was denounced by Commons and by the House of Lords. The Lords passed a resolution that the work was "a most scandalous, obscene, and impious libel," and Wilkes was expelled from Commons.

Few other 18th-century cases concerning obscenity are reported. In 1733, in *King* v. *Gallard* (W. Kelynge, p. 163), prosecution was sought "for running in the common way, naked down to the waist, the defendant being a woman." The state argued that the defendant could be convicted on the strength of *Curl* because her behavior was immoral. The indictment was dismissed, however, on the ground that under *Curl* the defendant's immodesty was not a crime, though it would have been if it had occurred in

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[13] Alpert, "Judicial Censorship of Obscene Literature," 52 *Harv. L. Rev.* 40, 44-47 (1938).
[14] Id. at 46.
[15] See E. R. Watson, *Notes and Queries,* 11th Ser., Vol. IX (14 Feb. 1914).

church. Gallard thus supports Schroeder's theory that a common law crime was committed only if there was an impiety as well as, or instead of, an obscenity.

The 1791 case of *Rex* v. *Tophan* (4 Term Rep. 129) also throws light on the scope of the common law offense of obscenity. The defendant was charged with libeling the memory of a deceased person by recounting his life, which was full of vices. According to Schroeder, some of the descriptive material could have been considered "obscene" in the purely erotic sense. Nevertheless, the charge of libel was not sustained, on the ground that there was substantially less likelihood of a breach of the peace resulting from libelous writings when the subject is deceased than when he is alive.

In 1817 and again in 1822 Lord Eldon, the Lord High Chancellor, had occasion to pass upon the merits of two works: first Southey's drama, "Wat Tyler,"[16] and next Byron's poem, "Cain."[17] In both cases the author of the work in question was attempting to restrain its pirating, and in both the court held that its misappropriation could not be restrained; for the work was not worthy of public protection because it was calculated to do harm to the public. Southey's drama was an attack on governmental power, and Byron's poem was antireligious in the sense that it sympathized with one whom religion disfavored; but neither dealt with sex. In the course of his opinion in Byron's case, the Lord High Chancellor also took it upon himself to express his feelings concerning Milton's *Paradise Lost,* but after some doubt, he decided that it passed inspection because its overall object was to promote reverence for religion rather than to bring it into disrepute.

A final case that sheds some light on the original meaning of the common law offense of obscenity is the 1809 case of *Rex* v. *Crunden* (2 Campbell 89). In that case the defendant was charged with bathing nude in the sight of homes. The court found the defendant guilty of the crime charged but discharged him since this was "the first prosecution of this sort in modern times." Until then, immorality and immodesty apart from antireligious behavior or seditious behavior or behavior provoking violence had not been punished.

Besides the strong connection with the antireligious, there is another limitation on the scope of obscenity as a common law offense which was to disappear after the offense was codified. In 18th-century England no work which was thought of as a work of literature, as opposed to mere pornography, was ever charged as obscene. It was only after statutes were enacted that works regarded as artistic pursuant to these statutes were condemned for licentiousness. It should also be noted that despite the prosecutions detailed above, pornographic works circulated freely throughout the 18th century. By the end of the 18th century in England, however, a refinement in manners had developed that was in sharp contrast to the attitudes of a century before and that laid the foundation for the Victorian Code of the century to come. During the 19th century, obscenity law was given content in England. A definition of obscenity was formulated, and

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[16] See *Southey* v. *Sherwood,* 2 Mer. 435 (Ch. 1817).
[17] See *Murray* v. *Benbow,* Jac. 474 (Ch. 1822).

obscenity for the first time was torn sufficiently from its religious foundations so that impiety was no longer a necessary element of the offense.

At the beginning of the century prosecutions at common law continued. It has been estimated that there were about three per year between 1802 and 1857,[18] which is scarcely an overwhelming number. The first legislation on the subject of obscenity of lewd publications—as opposed to lewd conduct which had been dealt with sporadically before[19]—was in the Vagrancy Act of 1824, which forbade exposing an obscene book or print in public places (5 Geo. 4, c. 83). In 1853 a law was passed to ban foreign obscenity. The act was aimed at the French postcard trade. It provided for prosecution of sellers of obscene publications, but not confiscation of their stocks (16 & 17 Vict., c. 107). The principal British legislation on the subject of obscenity did not occur until 1857 when the Campbell Act was passed, which curbed obscenity generally. The bill allowed searches of public shops to see if obscene matter was held for sale. The bill, however, did not define obscenity (20 & 21 Vict., c. 83).

Much has been made of the fact that the sponsor of the English bill was Lord John Campbell, a noted lover of literature. During the debate on the act, Lord Campbell claimed that the bill was to apply only to works written for the sole purpose of corrupting the morals of youth and which would shock common feelings of decency in any person's mind (146 Hansard Parl. Debs. 327 et seq. [3d series 1857]). When it was pointed out in debate that the lack of a definition of obscenity might lead authorities to go substantially beyond the limited category where the author's motive was to corrupt and when youth would be threatened by the publication, Lord Campbell stated that "he did not wish to create a category of offenses in which [works of recognized literary or artistic merit] might be included although [they were] of a polluting character. It was only from the force of public opinion and an improved taste that the circulation of such works could be put a stop to: but he was glad to inform their Lordships that there was a Society for the Encouragement of Pure Literature of which his noble friend the Duke of Argyll was president. He was shocked to think that there should be so much circulation for works like the one in his hand—the Lady of the Camellias. In this work, the Lady described her red camellias and her white camellias; but he would not shock their Lordships by going further."[20]

Lord Campbell's background and remarks have been used to show that the act was not meant to apply to literary works, that the motive of the author was to be important, and that the act was to have a relatively limited scope. Leo Alpert, in his article entitled "Judicial Censorship of Obscene Literature," 52 *Harv. L. Rev.* 40, 51-52 n. 29, questions the accepted view. He claims the more plausible inference is that Campbell was willing to sacrifice the fate of literature to his own political career (which was perceptibly advanced by his sponsorship of the anti-obscenity act), for the

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[18] St. John-Stevas, *Obscenity and the Law,* 66 (1956).

[19] For example, Queen Anne's 1702 proclamation against vice.

[20] 146 Hansard, Parl. Debs. 1152 et seq. (3d ser. 1857).

dangers of the act had been pointed out in debate, and Campbell was undaunted. He did not attempt to make his limiting definition of obscenity a part of the act. In any case, if the limitations Campbell made on the statutory definition of obscenity during debate should have been read into the act, this was not in face done.

The act was first interpreted in 1868 in the case of *Queen* v. *Hicklin,* L.R. 3 Q.B. 360 (1868). That case, like earlier ones, involved an antireligious pamphlet. The pamphlet was entitled "The Confessional Unmasked: shewing the depravity of the Roman Priesthood, the iniquity of the Confessional and the questions put to females in confession." It had been published by a militant Protestant society, and it was sold at cost. The pamphlet indicated that improper questions were put to women in confessional for the purpose of exciting the priest rather than to cleanse the penitents, and the pamphlet detailed actual seductions of women during confession.

The test of obscenity laid down by the court did not, however, limit itself to the antireligious; instead, a general test of obscenity was adopted for the first time in England. Chief Justice Cockburn, who announced the test, which was to have great influence in this country in the years that followed as well as in England, did not turn the existence of obscenity on the intention of the author as some comments of Lord Campbell's had indicated was the purpose of the act. Instead, he said that "the test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." This remained the test in England up until the late 1950's.

II.

Unlike England, in the United States "obscenity" never took root as a common law offense, even the kind of obscenity tied in with impiety that became a common law offense in England after the *Curl* case in 1727.

In colonial New England there was little concern over obscenity. There was little restriction on pornographic materials in the 17th century, particularly, but for different reasons than in England. In contrast to the ribaldry that characterized Elizabethan England, the early colonists were unconcerned with depiction of sex largely because there was little or none in circulation. The general disinterest in pornography may be attributable to a lack of leisure time. The life of a typical colonist during this period was one of hard physical labor, and cultural contact with England was minimal.

Even at this time, however, a censorship system developed in Puritan Massachusetts. A fundamental interest of the Massachusetts colony was to uphold the religious faith. From the beginning of its existence, the colonial authorities had freely dispensed punishments for such religious crimes as swearing and working on Sunday.[21] Until 1697 punishments for blasphemy included the death penalty,[22] and after that they included methods of

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[21] See Laws of the Colony of New Plymouth, part 3, p. 247.

[22] Ancient Charter, Colony Laws, and Province Laws of Massachusetts Bay, §3.

torture such as boring through the tongue with a hot iron.[23] Prosecutions for sedition, including the possession of seditious works, were also serious but not on a level of blasphemy.

There was much Quaker literature available for dissemination during the 17th century. The Quaker view of the world differed essentially from that of the Puritans, and the Puritans protected their views against Quaker influence by passing a law punishing possession of writings containing Quaker opinions. Private possession in the home was included in the ban.[24] Similarly, when individuals incurred the wrath of the Puritan government, possession of their works became forbidden. Such acts were passed to deal with the writings of two men by the names of John Rooves and Lodowick Muggleton.[25]

In 1662 a general censorship system was instituted, apparently in reaction to the writings disagreeing with the Puritan view of the universe. Two named censors were given the duty of scrutinizing all writings to be published and deciding whether publication would be allowed.[26] The control of the censorship gradually increased until in 1681 it reached its culmination in an act which allowed only one man, designated by name, to have a printing press in Boston.[27]

This censorship system was very severe, but it was not aimed at obscenity. And the shared ideas and Puritanical culture of the colonists kept obscenity from posing any problem for the time being. As the colony became more prosperous, however, and contact with England increased, materials dealing with sex began to appear, and the colony of Massachusetts reacted by passing a statute. The statute, enacted in 1711, was entitled "An Act Against Intemperance, Immorality and Profaneness, and For Reformation Of Manners." It provided that "whereas evil communications, wicked, profane, impure, filthy and obscene songs, composures, writings or prints do corrupt the mind, and are incentives to all manner of impieties and debaucheries, more especially when digested, composed or uttered in imitation or in mimicking of preaching, or any other part of divine worship, every person or persons offending in any of the particulars aforementioned, shall be punished by fine to Her Majesty not exceeding twenty pounds or by standing on the pillory once or oftener, with an inscription of his crime in capital letters affixed over his head, according to the discretion of the justice in quarter sessions."[28]

The Massachusetts statute was the only one of its kind during the colonial period. All other colonies left obscenity essentially unregulated, except insofar as it was covered by the offenses of blasphemy and libel. The offense

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[23] Ancient Charter, Colony Laws, and Province Laws of Massachusetts Bay.

[24] Colonial Laws of Massachusetts, 1672-86; laws passed 1646-56. See also Colonial Laws, 1660-72, p. 156.

[25] Colonial Acts of Massachusetts, p. 155; Ancient Charter, Colony Laws and Province Laws of Massachusetts Bay of 1814; General Laws of the Massachusetts Colony, Revised and Published By order of the General Court in October, 1658, §3 of "An Act Against Heresy."

[26] Ancient Charter and Colony Laws of Massachusetts Bay 1814, §1 of "Acts Restraining the Press."

[27] Ancient Charter and Colony Laws and Province Laws of Massachusetts Bay, §3 of "Acts Restraining the Press."

[28] Ancient Charter, Colony Laws and Province Laws of Massachusetts Bay 1814.

created by the Massachusetts statute itself was related to religion,[29] but under the statute the offense of obscenity could exist quite separate from an impiety.

Thus Massachusetts had by statute made obscenity a crime 16 years before England found it an offense at common law, and the Massachusetts offense was more separate from religion than the English offense created in 1727. The Massachusetts statute was not thorough in its coverage, however. It prohibited only "composing, writing, printing, or publishing" of obscene material; it did not punish importation, dissemination, or possession.

Despite the Massachusetts statute, it remains true in general that during the colonial period there was not a felt need to regulate obscenity by law. Colonies other than Massachusetts had no law on the subject, and there were no prosecutions under the Massachusetts statute. Nor was there a movement similar to the contemporaneous one in England to make obscenity a common law crime.

One possible reason for the colonists' general lack of concern with obscenity may be a shared religion and ideology, so that there was little need felt for legal prohibitions. This does not adequately explain the lack of concern of the Puritans, however, for they did punish sexual misbehavior, unlike their contemporaries in England, and did not leave that to be taken care of by the general moral code.[30] Moreover, there were in circulation some works that might be considered pornographic; and there certainly were indecent pictures, which unlike writings were not covered even by the Massachusetts statute.

There were no obscenity cases during the colonial period. The first obscenity case in the United States arose in 1815 in Pennsylvania, where there was no obscenity statute in existence. The question for consideration was the same question considered in England more than a century before: whether obscenity was a crime at common law. The answer, however, was the opposite of the one given in the *Read* case, which had by this time been overruled even in England, in *Rex* v. *Curl.*

The Pennsylvania case, *Commonwealth* v. *Sharpless,* 2 S. & R. 91 (1815), involved the showing of an immoral picture. The showing was not in public, but it was for profit. The charge was that the picture was "lewd, wicked, scandalous, infamous, and obscene . . . representing a man in an obscene, impudent, and indecent posture with a woman, to the manifest corruption and subversion of youth, and other citizens of this commonwealth, to the evil example of all others in like case offending, and against the peace and dignity of the commonwealth of Pennsylvania," and the indictment also charged that the defendants were guilty of "designing, contriving, and intending the morals, as well of youth as of divers other citizens of this commonwealth, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires." The defendants argued, as had Read and Curl, that they could not be convicted of such a crime without any

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[29] "[Obscene writings, etc.] do corrupt the mind, and are incentives to all manner of impieties and debaucheries, more especially when digested, composed or uttered in imitation or mockery of devotion or religious exercises."

[30] See Ernst & Schwartz, *Censorship: The Search for the Obscene,* 5-6 (1964).

statute prohibiting their conduct. The court found, however, that the defendants had violated the public decency and had thereby committed a legal offense. The court relied on *Sedley's* case in reaching its conclusion that acts of public indecency were indictable at common law.

Six years later the first case involving a book arose. This time the prosecution was in Massachusetts, where obscene publications were outlawed by statute. The case involved *Fanny Hill,* an illustrated book. The prosecution was brought against the publisher, Peter Holmes, in *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821). The book had been outlawed in England by the time the case was brought in Massachusetts. The conviction was based upon an illustration in the book, as well as the text itself; and since illustrations were not prohibited by the Massachusetts statute, the prosecution to some extent involved a common law crime.

These cases do indicate the beginnings of a common law crime of obscenity in this country. Nevertheless, it was the legislatures rather than the courts that headed the anti-obscenity movement in this country. In 1821 the State of Vermont passed the first obscenity statute in the United States (in contrast to the Massachusetts statute, which dated from colonial times).[31] In 1834 Connecticut followed suit,[32] and in 1835 Massachusetts amended its colonial law to extend the ban on obscenity to importation and distribution and to include prints, pictures, figures, and descriptions within the ban.[33] The updated Massachusetts statute was not as tied to religion as the old one and a test of obscenity was included for the first time. The test was whether the work is "manifestly tending to the corruption of the morals of youth." The scope of the Massachusetts statute was essentially the same as those of other States during the period.

The first obscenity case came at a time when the country had just been enlarged by the Louisiana Purchase and the population had vastly increased. Control over morality might therefore have been thought less safely entrusted to common religious and cultural backgrounds than before. The period was one of declining influence of the church over community life. Moreover, the new interest in legal control of obscenity coincided with a steady increase in literacy. The first public high school in the United States opened in 1820. There was as yet no compulsory education, but the move for free universal education was gaining steady support. State anti-obscenity statutes typically emphasized a purpose of protecting youth.[34]

The first Federal anti-obscenity statute was passed in 1842. This was § 28

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[31] The Vermont statute provided "if any person shall, hereafter, print, publish, or vend, any lewd or obscene book, picture or print, such person, on conviction, before the supreme court, shall be sentenced to pay a fine, not exceeding two hundred dollars." Laws of Vermont, 1824, Ch. XXIII, No. 1, § 23 (1821).

[32] Stats. of Conn. (1838) p. 182-84 (1834).

[33] Mass. Rev. Stat., Ch. 130, § 10.

[34] See, for example, Mich. Rev. Stat. (1846), Title XXX, Ch. 158, § 13, which provides: "If any person shall import, print, publish, sell or distribute any book, pamphlet, ballad, printed paper, or other thing, containing obscene language, or obscene prints, pictures, figures or descriptions, *manifestly tending to the corruption of the morals of youth,* or shall introduce into any family, school or place of education, or shall buy, procure, receive or have in his possession, any such book, pamphlet, ballad, printed paper or other thing, either for the purpose of sale, exhibition, loan or circulation, or with

of the Customs Law, 5 Stat. 566 (1842), and it was aimed only at a narrow problem. Only material sought to be imported was covered. Commerce between the States was not regulated, nor were the territories where the Federal Government had exclusive jurisdiction. Moreover, only pictorial art was thought to be dangerous; the printed word was not included in the ban.[35] The law directed the seizure and destruction "of all indecent and obscene prints, painting, lithographs, engravings and transparencies." It is generally agreed that the act was aimed primarily at the French postcard trade.

Although anti-obscenity statutes appeared on the books during the first half of the 19th century, they were not enforced in earnest. For almost a century after it was passed, the customs law was not enforced in court by suits against travelers, though customs officers may have confiscated works entering the country from the very beginning. Moreover, there were few prosecutions under the various State statutes until the 1870's. In the 1870's, however, Anthony Comstock took it upon himself to put some teeth into the laws relating to obscenity.

After the Civil War, Protestant leaders in New York City were much aroused over vice, and largely at the urging of the local YMCA the New York legislature enacted, in 1868, a bill to suppress obscene literature.[36] At this time Anthony Comstock was a clerk in a New York grocery store, and his chief diversion was tracking down the sellers of obscene publications and having them prosecuted under the 1868 act. Comstock, however, felt limited in this pastime to local sellers because there was no Federal obscenity statute. So Comstock joined efforts with the YMCA to work for national anti-obscenity legislation that would make possible prosecution of publishers as well as local dealers.[37]

Together they formed the Committee for the Suppression of Vice, and with Comstock as their agent they set about lobbying Congress to undertake to solve the problem of obscenity. In 1873, Congress, in response to the lobbying, passed an act governing the passage of obscene material through the mails. 17 Stat. 599, 18 U.S.C. ch. 71, §1461. The act was essentially the same as the one now in effect, though there have been minor amendments. The act provided:

> . . . no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information, directly

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intent to introduce the same into any family, school or place of education, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars" (emphasis added).

[35] Compare the Massachusetts colonial act, which punished only the printed work and not pictures.

[36] 7 New York Stats. 309.

[37] For accounts of Comstock's career see Trumbull, *Anthony Comstock, Fighter* (1913); Cushing, *Story of Our Post Office* (1893); Broun & Leech, *Anthony Comstock: Roundsman of the Lord* (1927).

or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore-mentioned articles or things, or any notice, or paper containing any advertisement relating to the aforesaid articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of the hereinbefore-mentioned articles or things, shall take, or cause to be taken, from the mail any such letter or package, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge.

Comstock himself was made special agent of the Post Office in charge of enforcing the Federal law, a power he used to confiscate and convict with vigor. Moreover, the existence of the Federal statute encouraged more obscenity laws in the States.[38]

There was some precedent for the postal act of 1873 in an 1865 statute, which was the first law enacted by Congress with the purpose of barring obscenity from the mails. The 1865 act made it a crime to mail obscene publications. Fine and imprisonment were possible penalties. It is not entirely clear whether the Post Office was also given power to exclude material from the mail,[39] though the statutory language would indicate that it was.[40] There were few prosecutions under the statute.

The 1865 statute was contradictory of the principles established in an 1835 congressional debate on postal censorship. That debate did not deal with problems of obscene literature but with a proposal to ban from the mails all literature which might incite to rebellion the slaves of the South. It was generally agreed in the course of the debate that such an enactment would be unconstitutional and that there was a duty to carry all mail. Webster, Clay, and Calhoun were among the spokesmen for the position that postal censorship was not permissible even when the goal was the prevention of rebellion.[41]

If the 1865 act was violative of the principles so established, the 1873 act was even more so. In 1876 there was added to the statute a declaration that obscenity was nonmailable matter.[42] While it is not clear that this was the

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[38] Ernst & Schwartz, *Censorship: The Search for the Obscene,* 33 (1964); see No. Dak. Pen. Code (1877); La. Acts of 1884, No. 111; So. Car. Stats. of 1885 (19) 334.

[39] See Paul & Schwartz, *Federal Censorship: Obscenity in the Mail,* 17-18 (1961).

[40] See 13 Stat. 50 (re-enacted in 17 Stat. 322).

[41] On the debates see 12 Register of Congressional Debates, 24th Cong. 1st sess., pp. 26-33, 1103-71, 1721-37. See also Deutsch, "Freedom of the Press and of the Mails," 36 *Mich. L. Rev.* 703 (1938); Rogge, "Congress Shall Make No Law . . .," 56 *Mich. L. Rev.* 331, 579 (1958); L. Rogers, *The Postal Power of Congress: A Study in Constitutional Expansion,* 105-15 (1916).

[42] 19 Stat. 90.

original purpose of the declaration,[43] it was interpreted to allow the Post Office to inspect and censor mail;[44] the censorship did not have to be incidental to a conviction. The year 1876 was the last time Congress changed the basic structure of the Comstock Act, though there have been minor changes since.

III.

A narration of the development of anti-obscenity laws makes apparent a relation between these laws and various other developments. Most striking is the interrelationship between obscenity offenses and religion, especially Puritanism. The history shows that as the offense of obscenity first developed, impiety was an essential element of it. Moreover, the Roman Catholic Church and the Church of England were traditionally not overly concerned with eroticism. It was primarily the Puritans who undertook to suppress the obscene. Since the 17th century the degree of control of obscenity was, to a large extent, related to the amount of influence the Puritans possessed. Although in the 20th century anti-obscenity drives have been largely associated with the Roman Catholic Church, that institution did not play a prominent role in the development of anti-obscenity legislation. Even the 19th century American crusaders against obscenity were Protestant in faith.

Also apparent, and not surprising, is a relationship between anti-obscenity legislation and the manners of the times. Generally speaking, when obscenity was punished, sex offenses (such as adultery and fornication) were also criminal, and vice in general was denounced. There are instances of campaigns against vice which were *not* accompanied by anti-obscenity drives, but whenever obscenity was punishable, other morals offenses were as well. (That obscenity *followed* control of other morals offenses but never preceded it is of special interest today, for the reverse situation may be coming to pass. The constitutionality of morals offenses where the only "harm" done is to consenting adults is under increasingly successful attack, and consensual exposure to obscenity as an offense may outlive other consensual morals offenses.)

A third interrelationship is between the control of obscenity and the growth of literacy. As the lower classes became more literate, the ruling classes felt more pressure to control freedom of expression in literature; while they had not been overly concerned about the effects of erotic writings upon themselves, they were more nervous about the effects it might have on others. The fear of pornography's effects on youth as well as on the lower classes was a concern. This concern is evident from the wording of some American anti-obscenity legislation, and also from the fact that the

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[43] For an argument that it was not the purpose, see Paul & Schwartz, *Federal Censorship: Obscenity in the Mail,* 253-62 (1961).

[44] See 19 Op. Atty. Gen. 667 (1890); 55 Cong. Rec. 6257-62 (1917). Cf. 26 Op. Atty. Gen. 555 (1908) (declaring that postal censorship of seditious writings is authorized even in the absence of a censorship statute).

development of anti-obscenity laws in this country coincided with the drive for universal free education.

A further item of note is that it is only after anti-obscenity laws had developed that they were directed, in England or the United States, against any work that might be considered of literary value. Early obscenity prosecutions were against written works either attacking religion or with a dominant purpose of sexual stimulation of the reader. Though the line is unclear and imprecise, it does not appear that prosecutions were directed against works containing erotic passages but which arguably had "redeeming social value" until after obscenity was established as an offense.

BIBLIOGRAPHY

Alpert, "Judicial Censorship of Obscene Literature," 52 *Harv. L. Rev.* 40 (1938).

Blackstone, *Commentaries on the Laws of England* (Tucker ed.) (1803).

Broun & Leech, *Anthony Comstock: Roundsman of the Lord* (1927).

Cushing, *Story of Our Post Office* (1893).

Deutsch, "Freedom of the Press and of the Mails," 36 *Mich. L. Rev.* 703 (1938).

Duniway, *The Development of Freedom of the Press in Massachusetts* (1906).

Ernst & Schwartz, *Censorship: The Search for the Obscene,* 1-132 (1964).

Fowell & Palmer, *Censorship in England* (1913) (dealing with stage censorship).

Holdsworth, "Press Control and Copyright in the 16th and 17th Centuries," 29 *Yale L. J.* 841 (1920).

May, "Experiments in the Legal Control of Sex Expression," 39 *Yale L. J.* 219 (1929).

Mencken, "Puritanism as a Literary Force" in *A Book of Prefaces* (1917).

Paul, "The Post Office and Non-Mailability of Obscenity: An Historical Note," 8 *U.C.L.A. L. Rev.* 44 (1961).

Paul & Schwartz, *Federal Censorship: Obscenity in the Mail,* 1-31 (1961).

Pinto, *Sir Charles Sedley* (1927).

Rich, *The History of the United States Post Office to the Year 1829* (1924).

Rogers, *The Postal Power of Congress: A Study in Constitutional Expansion* (1916).

Rogge, "Congress Shall Make No Law . . . ," 56 *Mich. L. Rev.* 331, 579 (1958).

Sampson, *The Concise Cambridge History of English Literature* (1949).

Schmidt, "A Justification of Statutes Barring Pornography from the Mail," 26 *Fordham L. Rev.* 70 (1957).

Schroeder, "Obscene Literature at Common Law," 69 *Albany L. J.* 146 (1907).

St. John-Stevas, "Obscenity and Law Reform," 194 *The Spectator* 119 (Feb. 4, 1955).

St. John-Stevas, *Obscenity and the Law*, 1-86 (1956).

Trumbull, *Anthony Comstock, Fighter* (1913).
Reports of Society for Suppression of Vice 1800-1825.
Note, Massachusetts and Censorship, 10 *B.U. L. Rev.* 36, 147 (1930).
"Lord Campbell's Bill," 3 *Law Mag. and Law Rev.* 2d ser. 283 (1857).

Theoretical Approach to "Morals" Legislation

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It has long been debated whether the state should have power to prohibit conduct solely on the ground that it is deemed harmful to the morality of the actor. In his essay *On Liberty* John Stuart Mill took the position that "the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."[1] According to Mill the state should not restrain an individual's freedom in order to prevent that individual from harming himself morally or even in order to protect him from physically harming himself: "His own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right."[2] James Fitzjames Stephen, on the other hand, in his book *Liberty, Equality, Fraternity,*[3] replied to Mill's essay and took the position that the law properly enforced morality and protected individuals against themselves.

The same question is a subject of widespread debate today, most notably in the exchanges between H. L. A. Hart and Lord Devlin.[4] Hart does not follow Mill in saying that the law should not protect the individual from inflicting physical harm upon himself,[5] but he does maintain that the law

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[1] J. S. Mill, *On Liberty,* ch. 1 (1859).

[2] Ibid.

[3] Second edition (1874).

[4] The clearest exposition of H. L. A. Hart's position is found in his lectures entitled *Law, Liberty, and Morality* (1963). Lord Devlin's views are concisely expressed in his book, *The Enforcement of Morals* (1959).

[5] Recent cases involving the constitutionality of State statutes requiring motorcyclists to wear protective headgear pose this issue. See *American Motorcycle Ass'n.* v. *Dept. of St. Police,* 11 Mich. App. 351 (1968) (statute invalid exercise of police power because no relation to public safety); *Colvin*

outsteps its proper bounds when it seeks to enforce morality; it impinges upon a domain that is better left to individual choice.

Hart does recognize a distinction between enforcement of morality and prevention of offensiveness to others, and he says that the state can properly prevent affronts to public decency even though it should not prohibit conduct merely because it deems it immoral. He maintains this distinction by not recognizing as a sufficient reason for regulation that some are offended simply by learning that conduct they disapprove of is indulged in by others. The line Hart draws is between private consensual conduct and conduct which is public and is thrust upon unwilling witnesses. Though both types of conduct may offend the public, "a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a value."[6]

According to Hart, therefore, activity may be regulated if it threatens physical harm to the actor or to other persons; if it threatens the morals of persons other than the actor who have not consented to the activity; or if it offends their sensibilities in some way other than distressing them because they dislike learning that others do things of which they do not approve.

Lord Devlin takes issue with the view that society cannot properly enforce morality as such. His argument is that "an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first state of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity . . . ."[7]

Legislatures and courts, particularly in this country, have traditionally assumed that the police power encompasses a right to regulate consensual immoral activity—apart from physical harm to others and apart from any element of public offensiveness.[8] Recent developments, however, indicate a trend away from the Stephen-Devlin position and towards the Mill-Hart position that it is not for the state to regulate conduct unless it can find

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v. *Lombardi,* 36 U.S.L.W. 2732 (R. I. Sup. Ct.; 5/8/68) (statute upheld as valid exercise of police power); *Commonwealth* v. *Howie,* 354 Mass. 769 (1968) (statute upheld as valid exercise of police power).

[6] Hart, *Law, Liberty, and Morality,* 46 (1963).

[7] Devlin, *The Enforcement of Morals,* 13-14 (1959).

[8] United States Supreme Court cases assuming a right in the state to regulate morality are *Keller* v. *United States,* 213 U.S. 138 (1908); *Hoke* v. *United States,* 227 U.S. 308, 321 (1913); *Caminetti* v. *United States,* 242 U.S. 470, 483, 487 (1916); *Cleveland* v. *United States,* 329 U.S. 14, 19 (1946). See also *L'Hote* v. *New Orleans,* 177 U.S. 587 (1899). Cf., *United States* v. *Holte,* 236 U.S. 140, 146 (1914).

some identifiable harm resulting from that conduct other than a supposed harm to the morality of the actor.

In fact, the Devlin-Hart debate centered largely over the Wolfenden Report,[9] which was published in 1957. In that report the Committee on Homosexual Offenses and Prostitution recommended for Great Britain that homosexual behavior between consenting adults in private no longer be criminal and that prostitution itself not be made an offense. It thought regulation of prostitution should be confined to public solicitation and to "the manner in which the activities of prostitutes and those associated with them offend against public order and decency, expose the ordinary citizen to what is offensive or injurious, or involve the exploitation of others."[10]

These recommendations followed consideration by the committee of the relation between law and morals in which it arrived at the solution later defended by Hart. In its report the committee said it considered that the function of the criminal law, in the area of sex offenses, "is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence." The committee then added, "It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined."[11]

More recently the Working Party set up in Great Britain by a Conference on the Obscenity Laws evidenced a similar approach in a report[12] in which it recommended repeal of the laws prohibiting obscenity but not laws against public displays or behavior in public places which might be offensive to people. Among the reasons given for the recommendation of repeal of the obscene publications acts were that "it is not for the state to prohibit private citizens from choosing what they may or may not enjoy in literature or art unless there were incontrovertible evidence that the result would be injurious to society"; and that "no encouragement should be given to the concept of the state as *custos morum* with its corollary that merely to shock is a criminal offence."[13]

Similarly, in this country the American Law Institute in the draft Model Penal Code repeatedly took the position in deciding whether particular behavior should be criminal that the state should prohibit conduct only if it could show some definite secular evil would flow from that conduct and that to justify a prohibition it was not sufficient that the conduct violated society's moral code. The committee also recommended that all consensual relations between adults in private be excluded from the scope of the

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[9] Report of the Committee on Homosexual Offenses and Prostitution (1957).
[10] Id., 80.
[11] Id., 9-10.
[12] Report by the Working Party of a Conference on the Obscenity Laws (1969).
[13] Id., 17.

criminal law,[14] despite the fact that statutes punishing fornication and adultery were on the books in most states. This recommendation was made after a consideration of the secular harms which might result from illicit intercourse and a decision that a criminal prohibition would not affect any harms sufficiently to justify the restriction on individual freedom. The same utilitarian analysis was used in deciding whether other conduct should be criminal. The comments to the Code said that prostitution was retained as an offense only because of the impracticality of effective civil regulation to control venereal disease.[15] Similarly, bigamy was retained as an offense only upon a finding of identifiable social harm in disruption of the first marriage.[16] In considering incest the institute decided it should make criminal only those forms of incest which in its judgment created a clear biological risk or where there is a likelihood of imposition upon one of the parties; other instances of incest, despite religious and sociological arguments against it and the general public hostility to it, should be left to civil regulation.[17] In considering statutory rape, the institute decided that the actor should escape all liability if he reasonably believed the girl to be over 16 years of age because "pursuit of females who appear to be over 16 betokens no abnormality but only a defiance of religious and social conventions . . . ."[18] The drafters of the Model Penal Code, like H. L. A. Hart, did recognize a public affront to the sensibilities of others as a secular evil that could properly be protected against; for this reason, indecent exposure was made criminal, though consensual group nudism was not.[19]

The courts, as well as persons concerned with legislation, appear to be moving away from the traditional assumption that it is proper for the law to regulate morality even in the absence of a showing of secular harm. While early United States Supreme Court cases assume without consideration that regulation of morals is within the police power,[20] some more recent cases, and opinions of individual Justices, subject the assumption to more critical scrutiny. The Court has explicitly rejected the suggestion that obscene material should not be regulatable except on a showing of a clear and present danger of its causing overt antisocial conduct.[21] Justice Douglas, however, took the position as early as 1966 that censorship of pornography would be allowable only if there were a showing that it led to antisocial behavior,[22] and Justice Clark has also analyzed the permissibility of prohibiting certain works according to whether they are likely to produce harmful behavior (although he, unlike Justice Douglas, came to the

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[14] A.L.I., Model Penal Code, Tent. Draft No. 4, 204-219.

[15] Id., Tent. Draft No. 9, 173-74.

[16] Id., Tent. Draft No. 4, 220-21.

[17] Id., 231-38.

[18] Id., 253.

[19] Id., Tent. Draft No. 13, 82. See also id., 1-25, on the subject of disorderly conduct.

[20] See cases cited in note 8.

[21] See *Ginsberg* v. *New York,* 390 U.S. 629, 641 (1968). For opposing views see *Comm.* v. *Gordon,* 66 Pa. D. & C. 101, 156 (1949) (Curtis Bok, J.), aff'd sub nom *Comm.* v. *Feigenbaum*, 166 Pa. Super. 120, 70 A.2d 389 (1950); *United States* v. *Roth*, 237 F.2d 796, 806, 826 (2d Cir. 1956) (Jerome Frank, J.), aff'd 354 U.S. 476 (1957).

[22] *John Cleland's Memoirs of a Woman of Pleasure* v. *Massachusetts,* 383 U.S. 413, 431-33 (1966); *Ginzburg* v. *United States,* 383 U.S. 463, 489 (1966).

conclusion that there is sufficient evidence that pornography will produce evil conduct).[23] Justice Harlan also has not uncritically indulged in the assumption that law should regulate morality but explicitly addressed the issue in his opinion in *Poe* v. *Ullman*[24] and came to the conclusion that society can properly regulate morals.

Moreover, there are two recent cases in which a majority of the Court seems to have recognized an area of private morality not subject to public regulation. In *Griswold* v. *Connecticut*[25] the Court held invalid a state prohibition on use of contraceptives, and in *Stanley* v. *Georgia,*[26] it held that a state cannot constitutionally make criminal the private possession of obscene material. The new limitations on state regulation of morals are not apparent from those decisions.

A trend towards the Hart position is evident in decisions of lower courts as well. One of the areas where courts have started to question the justifiability of criminal statutes is sodomy. In *Buchanan* v. *Batchelor,*[27] for example, a three-judge district court held unconstitutional the Texas sodomy statute. The court said, "Sodomy is not an act which has the approval of the majority of the people. In fact such conduct is probably offensive to the vast majority, but such opinion is not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct. Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation."[28] Similarly, in *Cotner* v. *Henry*[29] the United States Court of Appeals for the Seventh Circuit held that Indiana could not constitutionally punish consensual sodomy in private between married persons. These decisions are not inconsistent with the recent conclusion of the United States District Court in *Fowler* v. *Peyton*[29a] that a conviction for *forcible* sodomy upon one's wife was not constitutionally invalid, or the holding in *Raphael* v. *Hogan,*[30] that public acts of consensual sodomy on the stage could constitutionally be prohibited.

Courts have also recently held that one cannot be dismissed from a civil service position for being a homosexual absent some showing of effect on office efficiency.[31] See also *Morrison* v. *St. Bd. of Educ.*, 82 Cal. Rptr. 175, 461 P.2d 375 (1969), where a teacher was reinstated. The Court found such an adverse effect in *Schlegel* v. *United States,*[32] a case involving a civilian employee of the Department of the Army.

The question of the degree to which the state can constitutionally curtail an individual's freedom of choice has been involved also in recent cases concerning public school regulations of student dress and hair length. In

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[23] *John Cleland's Memoirs of a Woman of Pleasure* v. *Massachusetts,* 383 U.S. 413, 453 (1966).
[24] 367 U.S. 497, 545-46 (1960).
[25] 381 U.S. 479 (1965).
[26] 394 U.S. 557 (1969).
[27] 7 Crim. L. Rptr. 2144 (U.S.D.C. N.D.Tex.) May 20, 1970.
[28] Id., 2145.
[29] 394 F.2d 873 (7th Cir. 1968).
[29a] 303 F. Supp. 581 (W.D. Va. 1969).
[30] 305 F. Supp. 749 (S.D.N.Y. 1969).
[31] *Norton* v. *Macy,* 417 F.2d 1161 (D.C. Cir. 1969).
[32] 416 F.2d 1372 (U.S. Ct. of Claims 1969).

recent cases in this area, courts have adopted a Hart analysis in deciding whether a particular regulation is valid. In *Sims* v. *Colfax,*[33] for example, the Court held unconstitutional a school rule governing hair length as an unnecessary and unreasonable infringement of the Fourteenth Amendment rights of female students. In *Crews* v. *Cloncs,*[34] the Court upheld a school rule governing hair length only because it found that for the plaintiff, a male, to wear long hair would directly cause disruption of the educational process.

A final area in which courts have recently begun to intervene to protect the value of individual choice is in the field of abortion. Unlike areas involving only morals or only questions of good or bad taste, there is in the area of abortion no question that the prohibited conduct does involve some physical harm, that is, the death of the fetus. Nevertheless there is an accelerating trend for courts to find that the mother's interest in deciding whether or not to have a child outweighs any interest legitimately within the police power of the state.[35]

There is a developing trend, therefore, toward a position similar to that of H. L. A. Hart giving more leeway to the element of individual choice than has previously been done in situations where no secular harm has been shown to result from the conduct in question. Even if the Hart position is totally accepted, problems arise in the application of the theory. In the area of obscenity regulation, for example, the Model Penal Code, which has generally adopted a utilitarian approach, refused to turn the legal definition of obscenity on the likely consequences of the material in terms of secular harm, because it considered it too difficult to discover which material was likely to lead to antisocial behavior.[36] It did this even though it said, as a matter of principle, that all that should be prohibited is material that leads to antisocial behavior and that it was not sufficient for prohibition that a particular thing was generally considered to be immoral.[37] It may also be true, in the area of obscenity, that the taboo against material where the only threat is to the morality of the reader or viewer who voluntarily encounters it is less likely to fall than in some other areas because of the accident of linguistic classification. For unlike areas like adultery and fornication, there are grouped within the category of anti-obscenity laws prohibitions serving many different goals. There are those aimed only at the regulation of morality. But there are prohibitions with some other goal as well, such as the protection of the public against offensiveness by being forced to witness displays to which they do not consent; protection against the exploitation of other persons; and laws with affirmative policies such as allowing parents to make their own choice as to the moral development of their children. Under a Hart analysis these latter goals might justify some kind of regulation while

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[33] 307 F. Supp. 485 (U.S.D.C. S.D. Iowa 1970).

[34] 303 F. Supp. 1370 (U.S.D.C. S.D. Ind. 1969).

[35] See, for example, *Babbitz* v. *McCann,* 6 Crim. L. Rptr. 2435 (U.S.D.C. E.D. Wisc. 3/5/70); *People* v. *Belous,* 458 P.2d 194 (Calif. S.Ct. 1969). Cf. *United States* v. *Vuitch,* 305 F. Supp. 1032 (D.C. Cir. 1969). See also Williams, "The Law of Abortion," 5 *Current Legal Problems* 144 (1952).

[36] American Law Institute, Model Penal Code, Tent. Draft No. 6, p. 28.

[37] Id., 5-9.

enforcement of a moral code alone would not. The same linguistic classification of acts with different secular consequences does exist, in such a crime as sodomy (including forcible and consensual, public and private, acts between married and unmarried persons, heterosexual and homosexual acts), and the courts have managed to draw distinctions—as they are beginning to do in obscenity and other morals areas—between the various categories of the offense.

SELECTED BIBLIOGRAPHY

Cairns, Paul and Wishner, Sex censorship, the assumptions of anti-obscenity laws and the empirical evidence, 46 *Minn. L. Rev.* 1009 (1962).

Cantor, Deviation and the criminal law, 55 *J. of Crim. Law, Criminology, Police Science* 441 (1964).

Clor, *Obscenity and public morality* (1969).

Devlin, *The enforcement of morals* (1959).

Dworkin, Lord Devlin and the enforcement of morals, 75 *Yale L. J.* 436 (1966).

Elias, Sex publications and corruption of morals, 9 *Wm. & Mary L. Rev.* 302 (1967).

Gellhorn, *Individual freedom and governmental restraints* (1956).

Goodhart, The Shaw case: The law and public morals, 77 *Law Quarterly Rev.* 567 (1961).

Hart, Immorality and treason, 62 *Listener* 162 (July 30, 1959).

Hart, *Law, liberty, and morality* (1963).

Hart, Social solidarity and the enforcement of morality, 35 *U. Chi. L. Rev.* 1 (1967).

Hart, The use and abuse of the criminal law, 4 *Oxford Lawyer* 7 (1961).

Henkin, Morals and the Constitution: The sin of obscenity, 63 *Colum. L. Rev.* 393 (1963).

Hughes, Morals and the criminal law, 71 *Yale L. J.* 662 (1962).

Larrabee, The cultural context of sex censorship, 20 *L. & Contemp. Prob.* 672, 676 (1955).

Loewy, Free speech: The missing link in the law of obscenity, 16 *J. of Pub. Law* 81 (1967).

Mitchell, *Law, morality and religion in a secular society* (1967).

Murphy, *Censorship: Government and obscenity* (1963).

Murphy, The value of pornography, 10 *Wayne L. Rev.* 655 (1964).

Packer, *The limits of the criminal sanction* (1968).

Rostow, The enforcement of morals, *Cambridge L. J.* 174 (1960).

Schwartz, Morals offenses and the Model Penal Code, 63 *Colum. L. Rev.* 669 (1963).

Slough & McAnney, Obscenity and constitutional freedom, 8 *St. Louis U. L. J.* 279, 449 (1969).

Stone, *Social dimensions of law and justice,* 368-81 (1966).

Williams, Conspiring to corrupt, *The Listener,* Aug. 24, 1961, p. 275.

Williams, The proper scope and function of the criminal law, 74 *L. Q. Rev.* 76 (1958).

Wollheim, Crime, sin, and Mr. Justice Devlin, *Encounter*, Nov. 1959, p. 34.
American Law Institute, Model Penal Code, Tentative Drafts Nos. 4, 6, 9, 13 (1955).
Report of the Committee on Homosexual Offenses and Prostitution (1957) (The Wolfenden Report).
Report by The Working Party of a Conference on the Obscenity Laws (1969).

Comparative Perspectives

Argentina

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CONSTITUTIONAL SYSTEM

Both authority and limitation of imposing rules and regulations in matters of obscenity and pornography are derived from the national Constitution of 1853, as amended. Neither the Proceedings of the Revolution of June 28, 1966 (*Acta de la Revolución*) nor the Act [Statute] of the Argentine Revolution (*Estatuto de la Revolución*) purport to have affected the basic human liberties mentioned in the "Declarations, Rights and Guaranties" contained in the first part of the national Constitution. For annex 3 of the *Acta de la Revolución* proclaims a "general objective" of guaranteeing "our spiritual tradition inspired by the ideals of liberty and dignity of the human person which are the heritage of Western and Christian civilization"; and a "special objective" of internal policy, restoration of "the concept of authority, a sense of respect for law and rule of true justice, in a republican form of government, in which exercise of the obligations, rights and liberties of individuals are in full force." The sole method of rendering constitutional guaranties inapplicable would be for the President to suspend them in proclaiming a state of emergency. The supreme court of Argentina so held in the habeas corpus case in *Marcelo Sánchez Sorondo,* decided April 30, 1968, Fallos de la Corte Suprema 277: 289 (1968), involving prohibition of printing, publishing, and circulating the periodical *Azul y Blanco.*[1]

It has been observed that there are certain incongruities in recent Argentine legislation, such as democratization of political crimes in the latest penal law reform, which hardly seem consistent with the present political "status."[2] For purposes of the instant study, we are undoubtedly justified in

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[1] Held that since advance censorship is proscribed by the Constitution, a fortiori it is a "plain and simple closing of a publication."

[2] Ricardo C. Nuñez, *La Reforma del Código Penal,* 129 La Ley 1 (March 14, 1968).

proceeding from the assumption of a fully operative constitutional regime. There is hardly any aspect of the problem of controlling "obscenity and pornography" that is not in some sense affected by a constitutional provision.

I. Among the constitutional provisions that are most immediately pertinent to the topic of "obscenity and pornography," article 19 of the national Constitution figures prominently. It reads thus:

> The private actions of men which in no way either offend public order or morality or harm a third party, are reserved to [the judgment of] God alone and are exempt from the authority of [worldly] magistrates. No inhabitant of this Nation shall be obligated to do anything the law does not command nor prohibited from doing anything it does not prohibit.

There is no counterpart to this provision expressly affirming both the "legality principle" (second sentence) and a constitutional "right of privacy" (first sentence) either in the United States Constitution, after which the Argentine Constitution is largely patterned, or, indeed, in any other constitution. It has been interpreted as conferring upon the nation both the authority and the duty of legally limiting the freedom of conduct that is either "not private" or offensive to "public morals." Judge Ragucci said:[3]

> [B]y contrast to the majority of regimes to be found in comparative law, the Argentine Republic has incorporated in its Constitution, elevated to the supreme rank of the Basic Law, collective morals, since it established it as barrier and limitation of the right of privacy sanctioned by Article 19, in providing, as an inference *a contrario,* that private actions of men which in any way offend public morals are not exempt from the authority of magistrates.

The national Constitution is neither indifferent nor neutral in matters of morality. The very inviolability of individual conscience and privacy bars imposing upon anyone the viewing or audition of displays or words which are offensive to his moral sentiments.[4] In a case involving a controversial book, Nabokov's *Lolita,* the supreme court of Argentina held that the state has the duty of protecting public morals. Another instance is *S.R.L. Editorial Sur* v. *Municipalidad de la Ciudad de Buenos Aires,* decided December 27, 1963, Fallos de la Corte Suprema 257: 275, considerando 6°. In this case Justice Luis María Boffi Boggero (partially dissenting), 279, said at 282:

> It has not been disputed that because of the necessity and the duty of the State to preserve public morals, the latter is endowed with the authority that is indispensable in order to impede the exhibition, circulation and sale

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[3] Cited in Jaime Prats Cardona, *La defensa legal del pudor público en la obra cinematográfica,* 119 La Ley 1042, at 1045 (1965).

[4] Carlos Valiente Noailles, La Moral Publica y Las Garantias Constitucionales (Le Ley, Buenos Aires, 1966), p. 29.

of immoral words and publications, for this is part of the Police Power pertaining to social mores ("buenas costumbres"), . . .[5]

"Public morals" within the meaning of the Constitution has been read to be broader than mere exclusion of pornography and obscenity. "All that which is obscene is immoral but not all that which is immoral is obscene," said the criminal court of the capital.[6] Thus the prohibition of obscenity by the Federal Penal Code has been held by the supreme court not to exclude protection against works which, though not pornographic or obscene, are immoral.[7] Until recently the Federal Penal Code limited itself to proscribing pornography and obscenity.[8] It was held that enactment of administrative regulations with regard to other types of "immorality"[9] and inclusion of minor acts of obscenity in the Codes of Violations of the Argentine Provinces[10] were constitutionally proper. Nor is the control over "public morals" limited to the punitive sphere. As will be seen, the postal law authorizes postal detention of publications that prima facie violate a Penal Code provision.[11] Moreover, the executive power (municipality) may intervene even after acquittal in a criminal case charging violation of the Penal Code as indeed occurred in the famous *Lolita* case.[12]

II. Especially relevant to the subject at issue also are the constitutional provisions guaranteeing freedom of the press. This freedom is specifically stressed in the Argentine Constitution and only included in the general guarantee of free speech and thought, as is the case in the U.S. Constitution. Articles 14 and 32 of the Argentine Constitution read in part thus:

Art. 14. All inhabitants of the Nation shall enjoy the following rights in accordance with statutes that regulate their exercise: . . . of publishing their ideas by the [medium of the] press without advance censorship . . .

Art. 32. The federal Congress shall not enact statutes restricting the freedom of the press of establishing federal jurisdiction over it.

The supreme court of Argentina held that crimes committed by the medium of the press are *sui generis:* the national (Federal) Penal Code does

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[5] As to jurisdictional distribution, see below.

[6] Cited in Ricardo Levene, *Publicaciones obscenas,* 102 La Ley 1095, at 1096 (1961).

[7] See *S.R.L. Editorial Sur* v. *Municipalidad de la Capital,* cited supra in text, considerando 6°.

[8] On the recent amendment see below.

[9] See, for example, the Organic Municipal Act 1260 of the City of Buenos Aires, art. 50: Items 5° and 7°, providing that the Deliberative Council (*Concejo Deliberante*) has authority to "enact the necessary provisions so that there not be offered to the public exhibits which offend the morals or harm the social mores (*buenas costumbres*) or tend to reduce the respect due to religious beliefs and institutions" and to "prohibit the sale or exposition of immoral writings or drawings." Cited in Levene, supra, note 6, at 1102-1103.

[10] For example, the Code of Violations (*Código de Faltas*) of the Province of Santa Fe, article 66, no. 6, imposes punishment upon a person who "not being included in the sanction of article 129 of the Penal Code, by indecorous [*torpes*] acts or words offends against public decency." Cited in Levene, at 1104.

[11] Fallos de la Corte Suprema 168:15. On the postal law see below.

[12] *S.R.L. Editorial Sur* v. *Municipalidad de la Capital,* supra, considerando 9°.

not apply to them.[13] Doctrinal efforts to distinguish specific "press crimes," meaning crimes that can be committed only by the press, and common law crimes that happen to be committed by the press have been repudiated.[14] However, article 32 was held not to bar jurisdiction of Federal judges in matters of crimes committed by the medium of the press against national authorities.[15] This would seem to apply also to pornography committed by the medium of the press.[16] Valiente argues that the problem of public morality, in contrast to that of defamation, an issue in cases before the supreme court,[17] is a national rather than an individual concern, and that it should be governed by the principles pertaining to matters concerning crimes against national authorities. At least there should be recognized a residuary authority of Congress to protect public morality violated by the medium of the press where local authorities have neglected to act.[18]

III. An important constitutional provision of special relevance to the disposition of "obscene or pornographic" objects is article 17, which in part reads thus:

> Property is inviolable, and no inhabitant of the Nation can be deprived thereof except by virtue of a sentence founded on law.

IV. Of equal importance is article 18, providing that "the domicile is inviolable as are also the correspondence by letter and private papers; and a statute shall determine in what situations and on what grounds it shall be permissible to proceed to search for them and seize them."

V. To be mentioned also are article 2, stating that "The Federal Government supports the Apostolic Roman Catholic religion"; that part of article 14 which establishes freedom "to teach and to learn"; and article 33, implying the existence of "human rights," especially the right of "human dignity," not specified in the Constitution.[19]

THE PENAL CODE

Evolution of present law

"Obscenity" was not criminally sanctioned in Argentina until 1906. The provisions in force originated in legislation of that year. Until recently the

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[13] For citations see Valiente, op. cit., supra, note 4, at pages 154-158.

[14] But see the recent case of *Raúl A. Ramos,* decided by St. Misiones Sala Penal, on Dec. 6, 1967 [Núm. 60.661: ley 346 (ADLA, XXVII-B, 2394); ley 48 (ADLA, 1852-1880, 364), in 32 La Ley, August 30, 1968, pp. 1 et seq.], finding that such crimes fall within the national penal code. For critical note of Humberto S. Vidal see ibid.

[15] For citations see Valiente, op. cit., supra, at pages 154-158.

[16] There has been no case in point before the supreme court.

[17] Fallos de la Corte Suprema 130:121; 131:282.

[18] Valiente, op. cit., supra, at pages 160-161.

[19] Valiente, op. cit., supra, at pages 33-34, 128-129.

pertinent provisions of the Penal Code (of 1921), appearing in its second book (on specific crimes), Title III on "Crimes against [sexual] Propriety" (*Delitos contra la honestidad*), Chapter III, on "Corruption and Offenses to the Sense of Shame" (*Corrupción y ultrajes al pudor*), read thus:

> Art. 128.—A person who publishes, manufactures or reproduces obscene books, writings, images [any corporeal representation] or objects, and one who exhibits, distributes them or makes them circulate, shall be punished by imprisonment for fifteen days up to one year.
>
> Art. 129.—A person who in a public place performs [executes] or makes another perform obscene exhibitions shall be punished by a fine of fifty to five hundred pesos.
>
> The same punishment shall be applied where the acts occur in a private place but are exposed to be seen involuntarily by third parties.

This version of the Penal Code was the subject of much criticism, especially concerned with its leniency. A draft prepared by José Pecó[20] suggested that in article 129 the phrase "in a public place" be enlarged to read "in a public place or in a place exposed to the public" and that the second paragraph be accordingly omitted. It also recommended raising the penalty and transforming it to one of liberty deprivation, with a limit as suggested by the Italian and the Uruguayan Code.[21] Of greatest influence has been the draft of 1960, prepared by Sebastián Soler, one of the most prestigious Argentinian jurists. With amendments by a Legislative Committee on Penal Legislation approved by Soler and further amendments recommended by him, this draft was submitted by the executive to the national Congress on November 10, 1960.[22] It was adopted with very minor changes in the recent amendment of the Penal Code, in which Soler played a prominent role as chairman of the committee which prepared the final draft.[23]

The pertinent provisions as amended by the revision, Law 17.567 of Dec. 6, 1967 (ADLA, Bol. No. 5/68, 8) (ADLA XXVII-C 2872), now read thus:

> Art. 128.—A person who publishes, manufactures or reproduces obscene books, writings, images or objects, with the purpose of uttering them or of exposing them to the public, and one who exhibits, distributes them or makes them circulate, shall be punished by imprisonment for two months to two years.

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[20] José Pecó, Proyecto de Código Penal, La Plata 1942, pp. 343-344.

[21] Generally, three months to three years. Italian Penal Code, arts. 527, 528. Uruguayan Penal Code, art. 277; 3 to 24 months, art. 278.

[22] Published by the House of Representatives of the Argentine nation in 1966. Proyecto de Codigo Penal (Cámara de Diputados de la Nación Argentina, Comisión de Legislación Penal 1966).

[23] Actually, the committee composed of Soler, Carlos Fontán Balestra, and Eduardo Aguirre Obarrio had very little time to deliberate. A former committee resigned because instead of considering a draft which the committee had submitted, the executive sent it a totally different draft. See Nuñez, supra, note 2, at p. 1. The new committee was nominated in the last days of May and submitted the draft on September 8, 1967. Notice that the amendments were promulgated on December 6, 1967, and that they involved about one hundred articles of the Penal Code.

The same punishment shall be applied to a person who gives obscene shows of theater, cinematography or television or effectuates radio transmissions of this sort.

The same punishment shall be imposed upon a person who exhibits, sells or delivers to a person less than sixteen years old, books, writings, images or objects which, though not obscene, may seriously affect his sense of shame or excite or pervert his sexual instinct.

Art. 129.—A person who in a public place or in a place open or exposed to the public performs or makes another perform obscene acts shall be punished by imprisonment for two years.

The same punishment shall be imposed on a person who performs such acts in a private place with the purpose of their being seen involuntarily by a third party.

Scope of the law

As may be seen, there is a tendency to enlarge the scope of criminal law prohibition beyond the merely "obscene." Paragraph 3 of article 128, definitely influenced by Section 184a of the German Penal Code (referred to in the Statement of Legislative Reasons), subjects to penal sanctions supplying to a minor any objects which, though not obscene, may be harmful to a healthy sex development. It may be pertinent to notice that the cited section of the German Penal Code (which does not include the clause "or excite or pervert his sexual instinct") is being interpreted as including the sale to a minor of such objects as illustrations in an anatomical atlas, or wax representations of parts of the human body.[24] Thus, the Penal Code itself proscribes "immorality" beyond "obscenity"—a function hitherto left to provincial and municipal legislations.

Another significant feature of the revision is the substantial increase in punishment. The former legislation imposed no imprisonment at all on obscene exhibitions (art. 129) and sanctioned obscene publications and exhibits by imprisonment from 15 days to one year. The punishment now is uniformly one of imprisonment, and it is quite substantial, lasting from two months to two years.

Elements of the offense

Type of mental element. The crime of article 128 has now been expressly formulated as one of "specific intent." Soler, following Carrara's doctrine, interpreted former article 128 as requiring such intent,[25] but the terms of that article did not indicate the necessity of such interpretation. Indeed, some commentators, such as Ricardo C. Nuñez,[26] assumed that direct intent was not required, *dolus eventualis*[27] being sufficient.

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[24] Schönke-Schröder, Strafgesetzbuch Kommentar, 15th ed. 1970, comment to section 184a.

[25] Soler, Derecho Penal Argentino, vol. III, 1956, p. 395.

[26] Nuñez, Derecho Penal Argentino, Parte Especial, vol. IV, 1959, p. 382.

[27] This means foresight of a possible result, accompanied by its "acceptance" in the event it should occur.

Under prior law there was much controversy regarding the question of whether actual publicity was required in article 128. Some commentators assumed that the proscribed conduct had to be "public." Others asserted that it was sufficient if the "obscene" object was "destined for publicity." Again, there were those who thought that article 128 merely required a "possibility of the obscenity becoming known to the public." Finally, some thought that "the obscene writing, figure or object is required to be manufactured for the purpose of its delivery to the public in any form, even clandestinely."[28] In the present law, since specific intent to publish is required, it would seem that actual publicity is rendered unnecessary.

Actus reus. Except within the context of paragraph 3 of the present article 128, the object of prohibition is required to be "obscene," the latter concept being interpreted as included in but narrower than "immoral." What is "obscenity"? In contrast to the Italian Penal Code,[29] the Argentine Penal Code does not define "obscenity." Commentators unanimously believe this to be the proper course, the subject not being susceptible to a reliable definition.[30] Accordingly, neither the draft of José Pecó[31] nor that of Sebastián Soler[32] defined "obscenity." However, various attempts at circumscribing the concept have been made by courts and commentators.

The criminal court of the capital (*Cámara del Crimen de la Capital*), in a case involving the book *La Garconne* by Victor Marguerite (*Fallos* of the C.C.C., t. 2, p. 446) defined "obscene" as "all that which by writing or image tends to excite vile instincts and base sexual appetites, offending the public sense of shame [chastity] and the social mores [*bonos mores*]." The same court also said that "obscenity" is the quality of lewdness and lubricity, "exhibitionism of unchastity" (*pompa de la deshonestidad*) (Fallos, C.C.C., t. 2, p. 451).[33] The court emphasized that the public sense of shame should be understood as an average sentiment, showing neither a sensibility which is shocked by everything nor a lack of care to which nothing is repugnant.[34] To evaluate what is "obscene" one must not use as a mechanical yardstick either the excessively broad criterion of a libertine or the strict one of an ascetic.[35] "Obscenity" must rather be determined on a case-to-case basis.[36]

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[28] Nuñez, op. cit., supra, note 26, p. 380.

[29] Italian Penal Code, art. 529: section 1. "For the purpose of the penal law, acts and objects are deemed *obscene* if according to common sentiment they offend the sense of shame [chastity]." Section 2. "A work of art or a work of science shall not be deemed obscene unless for a purpose other than that of study it is offered for sale, sold or otherwise procured for a person less than 18 years of age."

[30] See Jiménez de Asúa, *La Protección penal del pudor público,* in *El Criminalista*, 2d series, vol. V, 125, at 135 (1961); Jaime Prats Cardona, cited supra, note 3, at 1046.

[31] Cited supra, note 20, article 191, comments at 343-345.

[32] Cited supra, note 22, article 174.

[33] Decision of April 14, 1939, in 14 La Ley 373. For further citations see Levene, supra, note 6, at 1096.

[34] Cámara Criminal de la Capital, Decision of June 17, 1941, 23 La Ley 331.

[35] Cámara Criminal de la Capital, Decision of May 20, 1960, in 99 La Ley 777 [4865-S].

[36] Ibid.

Although, again in contrast to the Italian test, the Argentinian test does not specifically exempt from "obscene publications" works of art and science, the courts have read such limitation into the provision.[37] Beginning with the case concerning *La Garconne,*[38] in a number of widely publicized cases[39] the law was interpreted in the sense that inclusion in a book of episodes of sexual licentiousness crudely presented cannot deprive the work of its overall purpose of constituting a study of the mores of the community and thus of its artistic value.[40] Unless the *sole* object of a publication is to arouse base sexual instincts or to provoke licentiousness, the publication does not qualify as "obscene."[41]

Strictness in interpreting the criminal law concept of the "obscene" has been promoted in Argentina by the fact that a much broader notion of the "immoral" has likewise been deemed to be within the ambit of state prohibition, beyond the range of the national penal code. This aspect of Argentine law will be discussed in the appropriate context.

Thus within the circumscribed limits courts have endeavored to formulate certain guides of determining the "obscene." They have emphasized that its test is offensiveness to the "public sense of shame" (chastity) and that the latter is a social sentiment formed by influences of the environment, determined by an average individuality based on the law of adaptation; it is thus a psychosociological phenomenon and presents a norm that is made concrete in the observance of the forms of morality and reserves imposed by community life.[42]

Of great importance in determining "obscenity" is evaluation of the purpose of the writer. A prominent Argentinian jurist emphasized this element in his article "Protection of Public Chastity";[43] it is considered a classic of legal literature on obscenity. Courts have attributed a great significance to the ideas that inspired the author, weighing whether or not he tended to espouse public sentiments of morality and decency even if he chose to do so by exposition of objectionable themes or by use of crudely realistic samples. In trying to establish this element of the author's purpose,

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[37] On this see Blasco Fernández de Moreda, *Les infractions contre la famille et la moralité sexuelle en Argentine,* Report to the Association Internationale de Droit Pénal, in 35 Revue Internationale de Droit Pénal 475, at 490 (1964).

[38] Supra, text at p. 11.

[39] The publications involved were *Tumulto,* by José Portogallo (pseudonym Anania) *El reposo de guerrero,* by Christiane Rochefort; and the periodicals, *Revista Milonguita,* 1924, and *Revista Medianoche,* 1932.

[40] Levene, supra, at 1100. In the "qué kilo" case, involving a periodical that contained immoral photographs, double meanings, and dubious stories, it was held that all this only added up to a general impression of frivolity, roguishness, and boldness characteristic of this type of periodical but did not amount to "obscenity" within art. 128 of the Penal Code. C.C.C. decision of May 20, 1960, in 99 La Ley 777 [4865-S].

[41] Cámara Criminal de la Capital, Decision of March 6, 1959, in La Ley, 1867-S, 28/6/959—JA, 959-III-431.

[42] Cámara Criminal de la Capital, Decision of June 14, 1941, in 23 La Ley 331. The "sense of shame" protected by article 128 is the sentiment of shame which is experienced by a majority of persons when confronted by an obscene work of sculpture, painting, literature, and so on. See decision cited supra, note 40.

[43] Ernesto J. Ur, *La tutela penal del pudor público* in 64 La Ley 760 ( ).

they have been using a variety of factors as a guide, such as the literary value of the work or the need for using certain otherwise objectionable descriptions to enhance comprehension of the theme; and they went so far as to take into consideration the type and quality of the printing, the paper, and the binding of the book.[44]

Limitations imposed by constitutional freedom of the press and prohibition of advance censorship

Article 49 of the Argentine Penal Code provides:

> Persons who lend to the author of a writing or engraving solely the material cooperation necessary for its publication, distribution or sale shall not be deemed accomplices in crimes committed by the press.

There appears to be an inconsistency between this provision and that of article 128. Commentators believe that one of these provisions is *lex specialis* (having a special application) with regard to the other which to a certain extent makes it inapplicable. But there is no agreement as to which of them is *lex specialis* and which is *lex generalis.* Jiménez de Asúa[45] believes that article 49 is the *lex specialis,* whereas Soler[46] is of the opinion that article 128 "makes an exception from the exception of article 49." Nuñez[47] thinks that article 128 exempts from the operation of article 49 "solely that material cooperation which does not per se imply any of the modes of publication enumerated in article 128." Thus he approves of those decisions of the Cámara Criminal de la Capital which acquitted from responsibility within article 128 persons whose complicity was not effected "publicly": an engraver who cooperated in the manufacture of a title page of a book that qualified within article 128;[48] a printer who had his workers print an obscene book, without publicity;[49] a person whose cooperation was limited to repairing, without publicity, obscene films that were cut or damaged.[50]

Obscene theater performances and films (general observations)

It will be noted that the distribution of subjects between articles 128 and 129 does not reflect any differentiation between publications and performances. In fact, in the original version theater performances or their equivalents were not mentioned but were nevertheless deemed covered by the respective provisions. It has been held by the Cámara Criminal de la Capital[51] that exhibition of obscene films falls within article 128 and not within article 129, since the qualification within the one or the other article

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[44] Cámara del Crimen de la Capital, Decision of June 2, 1959, cited in Levene, supra, at 1101.
[45] Supra, note 30.
[46] Soler, op. cit., supra, note 25, section 99, X, p. 401.
[47] Nuñez, op. cit., supra, note 26, pp. 384-385.
[48] C.C.C. April 30, 1926, Fallos, t. II, p. 452.
[49] C.C.C. Sept. 1, 1937, in 7 La Ley 1007.
[50] C.C.C. June 25, 1941, in 23 La Ley 494.
[51] Decision of June 17, 1941, in 23 La Ley 333.

is not affected by the fact that the exhibit of images is made under conditions which produce in the spectator an illusion of movement. The distinction advanced by the defense between "static obscenity" (art. 128) and "dynamic obscenity" (art. 129) has been rejected.[52]

However, a distinction is being drawn between publications and performances, and especially between the former and cinematography. It is being emphasized that obscenity in cinematography constitutes a greater jeopardy to the public than it does in the theater because of its accessibility to the masses[53] and that this justifies greater and particularly more advanced protection, especially in the interest of safeguarding minors. Before elaborating on the subject of cinematography, it is necessary to deal with the problem of protection against "immorality" beyond "obscenity," a matter which before the recent inclusion of paragraph 3 in article 128 of the Penal Code was wholly within the jurisdiction of the provinces and municipalities.

MUNICIPAL LAWS ON "IMMORALITY"

In the case of *S.R.L. Editorial Sur* v. *Municipalidad de la Capital,*[54] the supreme court of Argentina recognized the authority of protection against the exhibition, circulation, and sale of immoral works and publications as being "part of the Police Power pertaining to social mores (*buenas costumbres*) delegated in the Federal Capital to the Municipal Government and municipal administration in conformance with art. 50, numbers 5 and 7 of the Law 1260."[55] On the potential conflict between article 128 of the Penal Code and the municipal ordinance, the supreme court, speaking through Justice Boffi Beggero, said:[56]

> The possibility that the rule of par. 5 of art. 50 of the Law 1260 may coexist with or supersede that of art. 128 of the Penal Code does not impair the existence and validity of the former, which is necessarily more comprehensive than the latter (describing the more serious conduct) and whose respective autonomy and application on the administrative and the judicial level the ordinances have maintained.

In its "considerando 9" the court compared the object of prohibition of the Penal Code with that of the municipal ordinance,[57] "obscenity" as compared with "immorality" short of "obscenity," considering the fact that the petitioner had been acquitted of "obscenity" within the Penal Code prior to the action of the municipal superintendent qualifying the book involved (*Lolita*) as "immoral." While noticing that this qualification was not directly an issue in the case, the court said:

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[52] On this see also Levene, supra, at 1104.
[53] On this see Levene, supra, at 1103.
[54] Cited supra, text at note 5.
[55] Quoted and cited supra, note 9.
[56] Supra, at 282.
[57] Supra, at 282-283.

The fact that the book in issue does not involve "hard-core pornography," . . . , does not stop [its qualification as immoral], since proscription of "pornography" is not the only safeguard of "public morals" and "social mores;" nor does the former finding [that the book is not pornographic] foreclose consideration in the instant case of "passages" and "expressions" of obvious obscenity and pornography as pertinent to the present evaluation, since in the present context these features are not used to affect qualification of the book within the category of the obscene or pornographic, but rather are used as elements in evaluating the ethical content of the book in its totality, in the course of exercise of Police Power and not of repressive justice.

The case has further significance in the area of remedies against denial of individual rights, which will be discussed after consideration of postal laws. At this point, I shall resume discussion of cinematography.

CINEMATOGRAPHY

As regards cinematography, the decree-law 62 of January 4, 1957 (ADLA XVII-A 1957, 229) provides as follows:

> The freedom of expression consecrated by the National Constitution includes expression by means of cinematography, in any of its kinds. There obtain with regard to the freedom of cinematographic expression the same rules that govern the freedom of the press. Nevertheless, when educational reasons make it advisable, access to certain cinematographic exhibitions may be prohibited to persons less than 18 years of age. Apart from this, neither may prohibitions be imposed nor cuts in the motion pictures effectuated except by judicial decision rendered in a criminal proceeding by the judge having jurisdiction [over the matter].

This decree-law also provided for the creation of a National Institute of Cinematography (*Instituto Nacional de Cinematografía*) to be organized as "autonomous unit" related to the Federal executive power by the Ministry of Education and Justice. This institute, headed by a general manager (*Administrador General*),[58] was to classify each film prior to its exhibition, "in order to determine whether or not for reasons of educational character it is appropriate for being shown to persons less than 18 years old."

There has been since enacted a decree-law 8205 of September 27, 1963 (ADLA, XXIII-C, 1804), whose article 1 reads thus:[59]

> The freedom of cinematographic expression, in any of its manifestations, must not be restricted except when required by educational reasons or considerations of public morals, the social mores or national safety, in which case the National Honorary Council of Cinematographic Qualification (Consejo Nacional Honorario de Calificación Cinematográfica)

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[58] Law 16.955 (ADLA XXVI-B, 802).

[59] Reproduced in Prats Cardona, supra, note 3, at 1949.

may provide for cuts to be made in the films which are submitted to it for qualification by virtue of the provisions of this decree:

The provisions and powers established in the present decree are not to be understood as excluding similar powers held concurrently by local authorities within their respective jurisdictions. The exercise of the police power of local order shall not affect the limitations or qualifications imposed on the national level, without prejudice to decision in the appropriate sphere to impose further limitations or raise the qualifications or aggravate the measures already undertaken.

After providing in article 2 for the composition of the Consejo Nacional, the decree-law states in article 3 as follows:

No Argentine or foreign production may be exhibited within the territory of this country without previous award of a certificate by the Consejo Nacional Honorario de Calificación Cinematográfica. To this end, the definitive qualification of the films and of their sounds is to be fitted within one of the following categories:

(a) Recommendable for the infantile public.
(b) Fit for all the public.
(c) Inconvenient or prohibited for minors of 14 to 18 years.

Cuts may be ordered only for serious and justified reasons which are related to the protection of minors, the family, public morals, social mores or national safety. In such cases the decision shall be adopted by the vote of three thirds of the members of the Council, and the cuts ordered shall be made on all the copies, sounds and "existing duplicate negatives."

Prats Cardona quotes in this context also article 13 of Law 15.244, which created the National Council for the Protection of Minors (Consejo Nacional de Protección de Menores) (ADLA, XIX-A, 1ª, 233), that has "the necessary representation before all the official organs of control and qualification of public shows, radio auditions, or television. In addition, it is to initiate actions leading to preventing or stopping the same when they are violative of the ends of this law." The writer adds that the Council of Minors possesses legal authority to oppose the exhibition of a film even when it had been qualified as prohibited for minors less than 18 years old, provided that it considers it as inappropriate also for minors less than 22 years of age.

The Consejo Nacional Honorario de Calificación Cinematográfica is thus authorized to classify the films and to order cuts, the latter, to be sure, only on the limitative grounds defined in the decree-law. It also possesses the authority of provisional seizure of the films if they are exhibited without previous qualification, but under no circumstances can it prohibit the exhibition. It was so held in the habeas corpus case involving the seizure of the film *Morir en Madrid.*[60] On the other hand, a qualification by the council does not give a film a "bill of health," so that the question of its

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[60] J.A., 1964-VI, p. 539, cited in Prats Cardona, supra, at 1051.

"obscenity" is still open and may be adversely determined by a court under the Penal Code, and the issue of its "immorality" is likewise open and may be adversely determined by the pertinent local authorities.

That a qualification does not bar a judicial finding of obscenity has been ruled in a case involving the film *Silence* directed by Ingmar Bergman.[61] In the appellate decision in this case the court dealt with the issue of the relationship of the esthetic value of a film to its elements of obscenity. It held that because of the greater suggestive force of an image in movement, there is a need for greater protection, so that invoking the artistic value of the work was inappropriate. The standard to be applied is that of common men and women and not that of persons of special refinement.

POSTAL REGULATIONS

The basic provision governing prevention of using the mail to distribute obscene objects is Law No. 816 of October 10, 1876 (ADLA 1852-1880, p. 1119), which provides in article 36 as follows:

> Books, pamphlets, engravings, paintings, lithographs or photographs of immoral character shall not be received in post offices; if such objects have been deposited, they shall be retained for the purpose of being duly dealt with in accordance with section 3° of art. 97.[62]

The latter provision reads thus:

> Letters [referring to letters in a dead-letter file] which do not contain objects or documents of value shall be burned in the presence of officials named in the previous section, a record being made establishing the number and class of the burned items.

The officers to be present (as stated in art. 97, 2°) are the director general of the Post and Telegraph Office, the comptroller and the chief clerk of the Government.

CIVIL RIGHTS AND REMEDIES

Perhaps the best illustration of the types of remedies reflecting civil rights concepts available in cases involving objects found by the authorities to be "obscene" may be found in the famed *Lolita* case, as adjudged by the supreme court of Argentina.[63] The *Editorial Sur* made several allegations attacking the action taken with regard to the book by the municipal superintendent of Buenos Aires. It first contended not to have had a hearing on the matter, to which it was entitled by virtue of article 18 of the Constitution ("No inhabitant of the Nation may be punished without

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[61] In 117 La Ley 498, fallo 53.227.

[62] Law No. 816 was amended by Law No. 16.984 of October 18, 1966 (ADLA XXVI-C 1489). Art. 36 now also prohibits distribution through the mail of Communist propaganda.

[63] Supra, text at note 5.

previous trial . . .”). The supreme court found that, while the petitioner may not have had a hearing before the superintendent, it had an ample opportunity for a full hearing *a novo* before the civil division of the appellate court of the capital city (Cámara Nacional de Apelaciones en lo Civil de la Capital). Of the several constitutional arguments made next, invoking articles 14, 28, 32, and 95 of the Constitution, the last cited one deserves a brief notice. Article 95 provides: “In no case may the President of the Nation exercise judicial functions, assume jurisdiction over pending cases, or reopen those decided.” The Editorial contended that the municipality, a branch of the executive power, had actually reopened a decided case, in declaring *Lolita* immoral after it was judicially found not to be “obscene.” As stated before, the supreme court rejected this argument, holding “immorality” to be broader than “obscenity.”

The central issue in the case was the applicability of article 17 of the Constitution, stating that “Property is inviolable, and no inhabitant of the Nation can be deprived thereof except by virtue of a sentence founded on law.” The Editorial contended that the superintendent had destroyed copies of the book *Lolita,* without observing the safeguards guaranteed by the Constitution, and that this constituted an unconstitutional confiscation of property. The municipality alleged in defense that the superintendent did not act “by way of a simple administrative decision, but rather in application of an ordinance in force”—decree-ordinance 3802/52, which establishes “the municipal authority to prohibit the circulation of immoral books, impeding their sale, and being empowered to proceed to their immediate seizure and to their destruction.” The supreme court denied the authority of the municipality to proceed to destruction of the book “while the judicial organ has not pronounced its decision in the matter, even assuming that such authority be used to deprive of all subsistence a work that merits the total repudiation of the community.” Such proceeding would be “clearly unconstitutional, and its application would bring us back to historical periods that have been overcome by juridical culture.”[64]

By destroying the books the municipality also impeded its circulation outside the limits of its jurisdiction, arbitrarily imposing its rule and criteria of determination also upon the several Provinces, which by virtue of article 32 of the Constitution are entitled to use their own judgment in matters of morality or immorality.

The final contention was that the superintendent had usurped Federal authority by advising the Post Office and Customs Office (and the Federal police) of the prohibition imposed upon the book. But the supreme court thought that since the municipality has no power over these entities, a mere communication as challenged does not in effect assume Federal jurisdiction over them.

It may be pertinent to cite in the context of the present section the important fact that any decision of authority remains even under the present

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[64] Supra, at p. 285.

regime open to public criticism, not subject to curtailment. It has been so held in a case granting habeas corpus to critics of official action taken with regard to the film *Silence,* in the matter of *Alejandro Moreno and Jacobo Timerman,* decided by the supreme court on October 30, 1967, Fallos de la Corte Suprema 269:200 (1967). In a periodical directed by Timerman, there appeared a letter signed by Moreno, which read thus:

> Dear Sir (Director): I believe that the problem of the seizure of *Silence* has not been analyzed in its proper framework. There has been too much forbearance by those who, with absolute justice, have come to the defense of this film and of its undoubted creator. I would add to all that has been said by those who in 1964 have declared themselves in favor of reason and art that this seizure constituted a triumph of immorality. Those who hold power over the morals and the social mores of our city have never said anything about the filth of each corner of Buenos Aires where there are exhibited obscene periodicals. Nor did they do anything against a movie house located in the very same Corrientes Street where there are exhibited pornographic films. If all this immorality is effective in our city and a work of art with a religious background is proscribed, this means the triumph of obscenity which possesses in this justice without eyes its executive arm.

This letter was believed defamatory by the magistrates and judicial officers who had taken part in the seizure of the film, and Timerman was given a two months' suspended sentence for contempt. The supreme court reversed its agreement with the position taken by the solicitor general. The court said:[65]

> The challenged publication no doubt reflects a strong censure of the officials who ordered the seizure of the film *Silence,* and indeed a vehement protest against a "justice without eyes" . . . .
>
> This way of dealing with the matter of *Silence* involves a criticism of those who have the duty of watching over public morals; but this severe criticism in essence reveals but a discrepancy in the criterium [applied], which by its terms is not apt to dishonor, discredit or offend in their dignity and decorum the magistrates and officials who intervened in the seizure episode. Under these circumstances, . . . since "no official, not even the judges, enjoy the privilege of being exempt from criticism," we agree with the Solicitor General that "the challenged conviction violates the guarantee [of free speech] invoked by petitioner."

CONCLUSION

The subject of "obscenity" and "immorality," their control, and the civil rights limiting it in Argentina is many-sided and cannot be dealt with exhaustively within the scope of an analysis confined to answering definite

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[65] At pp. 208-209.

questions. In the light of the many areas of potential prohibition,[66] and of the vast volume of decisional law and theoretical coverage, dealing with differential treatment of the matters in the several areas, it would be impossible to present more than examples reflecting patterns of approach rather than definite rules.

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[66] For example, an Ordinance of the Municipality of Buenos Aires dealing with advertisements, Ord. 22.521 (Municip.)—*Código de la Publicidad* (B.M. 5/VII/67), provides in art. 37: "An advertisement must not . . . (b) violate morals or social mores."

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COMMONWEALTH CENSORSHIP

Censorship of obscene literature is dominated by the circumstances that the majority of all literature is imported. Local publication is by no means negligible and is now considerably augmented by the production of paperback editions. Nevertheless, Commonwealth censorship over importations based on power over customs is now and is likely to be in the future the most significant limitation of the right to read.

Censorship is maintained under the Customs Act and regulations are made by the governor-general under the act. These regulations are made, in fact, by the Customs Department; and although they contain provisions setting up the entire machinery and policy of censorship, they have never been fully debated by the Parliament. By regulation 4A of the Customs (Prohibited Imports) Regulations, importation of: "Blasphemous, indecent or obscene works or articles and advertising matter relating to blasphemous, indecent or obscene works or articles" is forbidden. The Minister may grant permission to import after he has obtained a report from the chairman of the National Literature Board of Review, or from the director-general of health. The qualification was designed to allow importation of proscribed books for use by academics, members of the professions, and students ostensibly to meet the claim that serious study should not be impeded by censorship. The cynic might suppose that the real objective was to head off criticism of the Government, which was assumed to be coming from the "intellectual" fringe.

The Minister is empowered to impose "conditions" as to the custody, use, reproduction, disposal, or destruction of the books which are permitted to be specially imported; some of the conditions imposed have been such that any worthwhile use for teaching or other purposes has been made almost impossible. Senator Scott has recently indicated that the provision relates only to works required for postgraduate or original research or for reference by professional men in such fields as law or medicine.

The Minister or the comptroller-general of customs may refer any imported literature to the National Literature Board of Review in order to determine whether such literature is, in the opinion of the board, "blasphemous, indecent or obscene." The board is established by the Customs (Literature Censorship) Regulations.

The present advisory board was appointed in January 1968. Whether the Minister will release various books of literary merit now banned in Australia but available in the United Kingdom, United States, Canada, and New Zealand will depend largely on their recommendations. No members of the board are psychologists, psychiatrists, criminologists, or sociologists, and it is not clear what qualifications they possess to decide whether people might be depraved by certain books. The qualifications of Senator Scott, who has the final say as to whether a book will be released, are even less clear.

The board's procedures are highly informal. Books are received and read, and the ensuing consultation is frequently done by correspondence. Importers are not permitted to make any verbal or written representations to the board. Yet another board, the Literature Censorship Appeal Board, is established to reconsider findings by the first board that a book is within the proscribed categories. Submissions to the appeal board are few and far between, and its influence in the past has been negligible. The titles of books which are prohibited after reference to the National Literature Board of Review are published in the Commonwealth *Gazette.* The last full list was published, after a review by the board, on August 19, 1965; new titles are added to the list from time to time. The latest additions are Mailer's *An American Dream,* a book already published in *Esquire* magazine, which had been admitted to Australia; *Last Exit to Brooklyn,* by Selby; *Eros Denied,* by Young; and *Powdered Eggs,* by Simmons. These were added to the list in 1965.

Although at first impression this system appears fairly satisfactory, it suffers from a number of defects. First, the boards are not administrative tribunals in that they do not give a hearing and have no orderly procedures; their proceedings are secret and so also are their recommendations; it is not known whether they give any reasons for their recommendations or even what tests, if any, they apply to works they are considering. Secondly, the Department refers to the boards only those works which in its opinion, have literary merit (and only these works are listed in the *Gazette*). Consequently, many books which would seem to have some literary merit are never referred to the boards at all. Examples are *The Trial of Lady Chatterley,* by Rolfe (a report of the trial of Penguin Books with an introduction by Lord Birkett P.C. and including assessments of Lawrence's work by writers such as Rebecca West and E. M. Forster—this book was released by the Commonwealth after publication within Australia); *The A. B. Z. of Love,* by Inge and Sten Hegeler; and *The Spy Who Loved Me,* by Ian Fleming. Thirdly, all that the boards can do is to recommend; the Minister need not accept its recommendations. It is known that the board at least twice recommended the release of *Lady Chatterley's Lover* but was overruled by the Minister presumably with the concurrence of the Prime Minister. It is widely assumed that the board, after a review in 1963 of the list of banned

books, recommended the release of other titles but was overruled again by the Minister and Federal Cabinet. In 1965, after the publication in Australia of *The Trial of Lady Chatterley,* Senator Scott announced the release of Lawrence's book.

To make effective the customs prohibition, the department's officers operate at two levels. Importers are required to submit returns of books received, and no book may be sold or offered for sale until approved by the department. Customs officers also seize banned or doubtful books carried by or mailed to ordinary members of the public. Needless to say, the smuggling of a prohibited book can incur penalties. It is also an offense to send "indecent or obscene" works through the mail, and such works may be impounded and destroyed; but these powers have never been used to impose a system of censorship and are comparatively unimportant. The Post and Telegraph Act of 1901-1966 and regulations made thereunder prohibit the use of the mail to transmit postal articles which are indecent or obscene and authorizes their impounding, destruction, or return to the sender, and his punishment. Prosecutions for offenses against the act and regulations may be commenced by any person whether authorized by the postmaster-general or not. However, under section 156 when any person admits to the commission of a nonindictable offense under the act, the postmaster-general may, with the written consent of the offender, determine the matter himself and impose such pecuniary penalty as he thinks appropriate. Such steps bar any criminal proceedings in respect of the same offense.

The postmaster-general has a further discretion under section 57 to refuse postal services to obscene, indecent, or immoral businesses or undertakings, and in *R.* v. *Arndel* the high court held that the exercise of the postmaster-general's discretion was dependent only on his belief that he had reasonable grounds for supposing that a person was receiving money or any valuable thing in connection with an obscene, indecent, or immoral business or undertaking. Employees of the postmaster-general's department are empowered to refuse to accept or transmit any telegram or picturegram containing indecent or obscene matter, and the use of obscene language while speaking on a telephone or through a radio telephone exchange is prohibited.

Despite the appearance of a legal framework, the Commonwealth system of censorship is merely a facade to cloak the reality of censorship by the Minister and his departmental officials. There is without doubt a political censorship, which varies in its impact according to the influence brought to bear by various pressure groups in the community and the imminence of elections. Customs ministers in recent years have not been noted for liberality in censorship matters. A number of the listed and nonlisted banned books are freely available in the United Kingdom, the United States, and in neighboring New Zealand. The New Zealand Indecent Publications Tribunal has recently ruled that *Another Country* is not an indecent book.

Publishing houses have been strangely reluctant to challenge Commonwealth censorship action in the courts. Although challenge is not possible in cases where the Minister has banned the importation of books which, in his opinion, unduly emphasize matters of sex and so forth, legal action may be taken against Commonwealth authorities when, for example, books have been

seized on the ground that they are blasphemous, obscene, or indecent. To date, no such case has come before the courts. Penguin Books Ltd. contemplated court action over *Lady Chatterley's Lover* but, presumably on legal advice, decided not to proceed. It does little credit to those engaged in the Australian book trade that an obscenity issue arising out of administration of the Commonwealth laws has not been presented for judicial decision. The obscenity test is vague, but there is a good chance that if the high court were given a suitable opportunity, it would adopt a liberal view.

STATE OBSCENITY LAWS

During the 1950's the worldwide reaction against obscene literature extended to Australia, and all the States with the exception of Western Australia took steps to tighten up legislation dealing with the problem. In New South Wales and Victoria the relevant legislation[1] provides for retention of the offense of publishing an obscene libel and for application of the *Hicklin* test to decide what is obscene. In addition, persons who "knowingly keep" obscene articles or in whose premises such articles are seized, or who sell, make, or publish obscene material, are made liable to summary prosecution before a magistrate. The *Hicklin* test is extended by sections which declare that material may be obscene if it places "undue emphasis on matters of sex, crimes of violence, gross cruelty or horror." In determining whether particular material is obscene by application of this extended definition, the courts are required to take into account the nature of the material and the persons, class of persons, and age groups to whom or by whom it is intended or likely to be published, distributed, or sold. Material may be held obscene if it is likely to deprave or corrupt persons in one class or age group notwithstanding that other classes or age groups might not similarly be affected. Although there is a defense of scientific or literary merit, it is qualified by the requirement that the courts must again take into account the persons, class of persons, and age groups to whom or by whom it is likely to be published, distributed, or sold. Distributors (defined to include publishers other than publishers of newspapers and printed matter of religious, professional, social, or trading character) are forbidden to sell or distribute any printed matter unless duly registered; and their registration may be canceled or suspended if they are convicted either of the indictable offense of publishing an obscene libel or of an offense under the acts.

In Queensland and Tasmania the sale or exposure for sale of an obscene book or other obscene matter is punishable under the criminal codes and other statutes.[2] In addition, both States have established boards of review.[3] The Queensland Literature Board of Review is empowered to prohibit the distribution of objectionable literature. "Objectionable" literature is defined

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[1] N.S.W. Obscene and Indecent Publications Act; Vic. Police Offences Act.

[2] Queensland Criminal Code, section 228; Vagrants Act, section 12; Tasmanian Criminal Code, section 138; Police Offences Act, section 26.

[3] Queensland Objectionable Literature Act; Tasmanian Objectionable Publications Act.

by language similar to that defining "obscenity" in the New South Wales and Victorian legislation. Literary merit is to be taken into account, and there is a right of appeal to the courts. It is an offense to distribute or sell literature prohibited by the board. The Tasmanian Board of Review is required to examine publications, including those referred by the Minister, with the object of preventing the distribution of "objectionable" publications. In the case of a publication consisting in substantial part of pictures (with or without the addition of words) the board may prohibit distribution if it is indecent or if it suggests indecency or portrays acts or situations of a violent, horrifying, criminal, or immoral nature. The circumstances and area of publication and literary or other merit are to be taken into account, but there is no appeal to the courts. Again, it is an offense to sell or distribute material prohibited by the board.

South Australia and Western Australia have provided by legislation penalties for the sale or exposure to sale of obscene materials.[4] South Australia introduced amended legislation in 1953[5] which required the courts to take account of the "area of operation" addendum to the *Hicklin* test introduced in most other States, but the definition of "obscene" was not otherwise extended. Western Australia has retained the common law definition supplemented only to the extent of allowing summary proceedings for seizure and destruction of obscene materials.

It might be thought that the Commonwealth censorship scheme would be sufficiently comprehensive to avoid State action in regard to cleared material. This has not proved to be the case. In 1960 a Victorian magistrate ordered the destruction of Erskine Caldwell's *God's Little Acre*. He found the book to be obscene because it placed undue emphasis on matters of sex. A parallel finding of literary merit did not save the book because the magistrate was of the opinion that its general distribution was unjustified. Another Victorian magistrate made a similar finding and ordered destruction of Agnar Mykle's *The Song of the Red Ruby*. Editions of the English magazines *Reveille* and *Parade* have been ordered to be destroyed in Victoria, and *Playboy* magazine has been withdrawn from sale in several States (many editions were prohibited by the Commonwealth in any event). The cause celebre of 1964 was the Victorian banning of Mary McCarthy's novel *The Group*. By threat of prosecution the police succeeded in having the book withdrawn from sale; they in turn were fully supported in their action by members of the Victorian government. Police in New South Wales aspired to a similar role but failed to secure governmental backing. A repetition of *The Group* episode can be expected after the 1965 release by the Commonwealth of *Borstal Boy, Lady Chatterley's Lover, Lolita,* and *Confessions of a Spent Youth.* The Prime Minister has described the resultant situation as "confusing, dangerous and ludicrous," and proposals to introduce uniform censorship once again are being put forward.

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[4] South Australia Criminal Law Consolidation Act, section 270; Western Australia Criminal Code, section 204; and Act to Suppress Indecent and Obscene Publications.

[5] Police Offences Act.

The registration requirements of the New South Wales and Victorian legislation appear to have been effective in preventing publication of any borderline material by registered publishers. Government authorities do not even appear to be aware of the monstrous restriction these anachronistic provisions place on freedom of speech, and there are no proposals for reform. Unregistered publishers are apparently to be brought into line. In April 1964 the publishers of the University of New South Wales student newspaper *Tharunka* were found guilty of publishing obscene material. Despite evidence from eminent witnesses in the fields of religion, education, literature, and psychiatry a New South Wales magistrate found that an article unduly emphasized sex and was therefore obscene. On appeal Judge Levine quashed the conviction largely on the ground that the newspaper would not have a tendency to corrupt university students. More recently the publishers of the magazine *Oz* were found guilty of the same offense and sentenced to jail. Virtually no evidence was offered for the prosecution; a mass of expert evidence was given for the defense in an endeavor to establish that the magazine was not obscene and that it was of literary merit. The magistrate rejected the defense evidence and described it as "an insult to the intelligence of the court." Again an appeal was successful. Judge Levine has indicated that he intends to hold that the allegation of undue emphasis on matters of sex cannot stand alone; there must also be a tendency to deprave or corrupt or to injure morals. In addition the existence of persons to whom the publication would do much harm must be established by evidence. "It is not enough," the Judge said, "to presume the existence of persons who must be harmed." This the prosecution had failed to do.[6] The decision seems to establish that the police prosecution was not supported by adequate evidence.

The State laws have benefited little from interpretation by the superior courts. It is perhaps true to say that they are incapable of benefit. Professor Glanville Williams has described the so-called *Hicklin* test as being nothing but a "fictitious formula." The real test is whether the tribunal in fact is shocked by the publication. The high court has noted that phrases such as "unduly emphasizes matters of sex" and "likely to be injurious to morality" are of uncertain meaning.[7] However, it is certain that the courts are applying a purely subjective reaction to the material before them. In dealing with an appeal from the Queensland Literature Board of Review, the high court ruled that no evidence was admissible as to the content and nature of a particular publication. This "the Court can see for itself and must judge accordingly." A Victorian judge has accepted the high court's exhortations and has ruled that he must form his own opinion as to the question of obscenity.[8] Judge Levine took a similar view in the *Tharunka* case.

Although the courts sometimes claim that their findings of "obscenity" or "undue emphasis on matters of sex" reflect community standards, it is clear that this claim cannot be substantiated. Time and time again the comment is

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[6] Sydney Morning Herald, February 27, 1965.
[7] *Transport Publishing Ltd.* v. *The Literature Board of Review* (1956), 99 C.L.R. 111.
[8] *Mackay* v. *Gordon and Gotch* (Australian) Ltd. (1958) Angus Law Reports, 953.

made that the material is likely to deprave adolescents or immature and unhealthy-minded adults. Is this a community standard for literature? Further, the courts are at pains to exclude the very evidence which is capable of establishing a community standard.

INFORMAL CENSORSHIP

The prospect of extra-legal informal censorship was raised by the action of the Namoi Shire Council in directing withdrawal from regional libraries of James Jones' novel *The Thin Red Line*. This book had been cleared by the Commonwealth authorities. To its everlasting credit, the Library Board of New South Wales adopted in June 1964 a statement declaring that: "Individuals and groups should not seek to impose upon others private standards of their own which differ from the standards established and sanctioned by law. Self-appointed arbiters of public morals have no right to assume that they should determine what is good and what is bad for their fellow citizens."

Informal censorship is also practiced by publishers in order to meet the standards imposed by the Australian authorities. A special edition of *The Carpetbaggers* was produced for this purpose. The result is a more severe censorship than would probably be contemplated by officials.

FILM CENSORSHIP[9]

Film censorship is the most restrictive form of censorship in Australia today. In 1965-1966, 18 out of 1,512 35-mm. films were banned and 114 were cut. Out of 10,076 television films, 91 were rejected and 23 cut; and out of 808 8-mm. and 9.5-mm. films, 104 were rejected. The heavy rejection rate of 8-mm. and 9.5-mm. films can be partly explained by the fact that in several overseas countries, such as the United Kingdom and the United States, a motion picture equivalent of the girlie magazine is freely available. These films often come into the country by mail and are held up by customs officers who refer them to the censors. To get a balanced picture of the censors' impact on films seen by the average viewer these imports should be deducted together with advertising films. Using 35 mm. and television as a rough measure 1,422 out of 11,588 films, or roughly one in eight films offered, were censored in 1965-1966. However, if we exclude shorts (which are seldom tampered with) there were only about 475 feature films imported in 1965-1966. One in four of these feature films was banned or cut. Australian film censorship is stricter than that of almost any other Western country.

A censorship board consisting of the chief censor, the deputy chief censor, and five members (one of whom must be a woman), and an appeal censor,

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[9] The information with respect to film censorship was obtained as a result of a private survey carried out by the Victorian Council for Civil Liberties.

may ban or cut any imported film which, in the opinion of the board, or on appeal in the opinion of the appeal censor:

is blasphemous, indecent or obscene,
is likely to be injurious to morality,
is likely to be offensive to the people of a friendly nation,
or depicts any matter the exhibition of which is undesirable in the public interest.

Films exported as well as imported are censored and (under arrangements made with State governments) films made within Australia have to be censored in order to gain a classification for public exhibition.

Censorship regulations provide that any appeal against a decision of the board shall be lodged with the appeal censor. Beyond that there is a further right of appeal to the Minister for Customs, whose decision is final. Although legal challenge by court action is theoretically possible, the chances of success are quite remote. Moreover, it is only the importers who could be in a position to bring such action. The private citizen can take no action to secure the release of a banned film.[10]

Film censorship seems to be based on the Chinese proverb "He who knows, does not tell." Only three titles of banned films have been named in 38 years of annual reports of the Commonwealth Film Censorship Board (Hitchcock's *Blackmail* in 1929, and *The Tunnel* and *When Knights Were Bold* in 1935). Unlike certain categories of books, titles of banned or cut films are not listed in the Commonwealth of Australia *Gazette,* or any other official publication. Nor will the film censor name titles or discuss cuts or bans. "This information is confidential between me and the distributor."[11] The extent to which particular films are banned or cut can only be ascertained by private research.

A quick scrutiny of titles named by distributors or revealed in film journals shows that many recent films of distinction have either been banned outright, badly mutilated, or so cut as to be rendered unfit for screen projection. Others are likely to suffer one of these fates shortly.

Viridiana (Spain/Mexico, 1961), directed by Luis Bunuel, has been banned. It was described as the climax of Bunuel's work in the British Film Institute's *Monthly Film Bulletin.* "One simply cannot envisage a more starkly assured and uncompromisingly black expression of a preoccupation reaching back thirty years to L'Age d'Or. *Viridiana* is one of the cinema's few major philosophical works and is almost certainly Bunuel's masterpiece."

Night of the Hunter, which was made in the United States in 1955 where it is banned, was Charles Laughton's first and only film as a director and has been described in the *Monthly Film Bulletin* as "one of the most daring, eloquent and personal in style to have come from America in a long time."

Une Femme Mariée ("A Married Woman"), France, 1964, was directed by Goddard and has been described as "Goddard's most mature and masterly

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[10] H. Whitmore, *The Bulletin*, May 8, 1965.
[11] *Bulletin,* 20/11/1965.

work" by the *Monthly Film Bulletin.* It is banned in Australia. *The Connection,* by Hurley Clarke, was not shown here when cuts demanded by the censor were not agreed to by the distributor.

Ulysses has been banned. Molly Bloom's final soliloquy, which once caused the banning of Joyce's entire book, can now be heard in cinemas in major cities in England and America but not in Australia. The Catholic League of Decency in the United States has said that the film is "morally unobjectionable for adults," and Dilys Powell, one of Britain's most respected film critics has said that the film is a "serious translation of an extraordinary piece of literature."

Blow-up, by Antonioni, has been shorn of a couple of "naughty" minutes after much debate with the censor and threats that he would remove more than a quarter of an hour of it.

Oedipus Rex, an impressive version of the Greek classic directed by Pasoloni, will almost certainly have scenes of nudity and violence which are essential to the story mutilated by the censor. *Masculin-Feminin,* by Goddard, which deals with contraception, abortion, and other topics rarely discussed publicly in the Lucky Country, will probably suffer the same fate as his film *Une Femme Mariée.*

The War is Over, directed by Alain Resnais, has had its ending rendered almost incomprehensible due to indiscriminate cutting, while *Seventeen,* a Danish film dealing with a boy's first sexual experiences, has been banned. Roger Corman's *The Trip*, which shows the excitements and horrors of an LSD trip and which has been exhibited in the United States, probably will not be released in Australia even if an "X" certificate system is introduced.

Many other films have been banned, such as the "underground" pictures *Scorpio Rising* and *Oh Dem Watermelons* (sent here by the United States Government!), Mai Zetterling's *Night Games,* Japan's fascinating films *Onibada* and *The Amorist,* Corman's *The Wild Angels,* Tod Browning's *Freaks*, Grauman's *Lady in a Cage,* and Corman's *Pit and the Pendulum.*

Other films of distinction have been cut: *The Silence, Repulsion, Loves of a Blonde, Darling, The Deadly Affair, Dear John, The Dirty Dozen, Lilith, Loving Couples, Modesty Blaise, The Red Desert, Alfie, The Servant, The Balcony, Up the Down Staircase,* and *Woman of the Dunes* all have received attention from one or the other of the named or unnamed and unknowable censors. It is difficult to find a recent adult picture of note that has not been mutilated or banned by the censors.

There is no provision for an "X" certificate

The censors ban and cut many films because they fear the films will be viewed by children in cinemas. The board classifies films on behalf of State authorities under the headings "G" ("suitable for children"), "A" ("not suitable for children"—soon to be changed to NRC," not recommended for children"), and "AO" ("adults only"). As chief censor, Mr. C. J. Campbell pointed out in his report for 1958: "When the British Board of Film Censors classify a film 'X'—adults only—they are secure in the knowledge that exhibitors are forbidden by law from admitting children under 16 years of

age. No such law exists in any Australian State." Classification of films in Australia is for the guidance of parents only. No theater manager is legally obliged to refuse admittance to children. Some proprietors are socially responsible, but others offer half prices to encourage children to see "AO" films. Greater liberality and even the elimination of censorship for adult audiences seems possible only at the expense of having children legally be denied access to certain films. The introduction of the "X" certificate system would require a Premiers' Conference, since the various States would have to pass the appropriate laws. However, its introduction is not a panacea for the problems of film censorship. There is no guarantee that it would lead to less banning and cutting of films for adults.

The Australian Council for Children's Films has argued that an "X" certificate system should be introduced similar to that operating successfully in the United Kingdom, New Zealand, several European countries, and some Canadian states. Under this system young people under 16 years (in some countries and for some films, under 18 or 20) are not permitted to see cinema films classified by the censors as "suitable only for adults." Children under 16 are permitted to see other films classified as "not suitable for children" only if they are accompanied by adults. Adults are permitted to see films as complete works of art virtually uncut by the censor because he knows that children cannot see them. The council suggests that the main argument for these reforms is that the system functions successfully in other countries, particularly in the two countries most like Australia racially, politically, and culturally, namely, Britain and New Zealand. It also points out that the Commonwealth Film Censor has strongly recommended the adoption of the "X" certificate system in his annual reports.[12]

Theater managers have argued that it is futile to exclude children from "adults only" films in cinemas, because they "can see just as bad on television." However censorship of films for television is rather stricter than censorship of films for the cinema. For example, *Who's Afraid of Virginia Woolf* was passed for the cinema but not for television, and only authorized clips of it can be used for television advertising of the film. They also argue that such legislation would involve the imposition of criminal penalties on managers who admitted children to "X" certificate films, overlooking that theater managers in the United Kingdom and New Zealand have had no difficulty with the system. The final argument against the "X" certificate system is that it is difficult or impossible to decide the age of young people these days. But theater managers in Britain and New Zealand have had little trouble in this respect, and even Australian managers have no difficulty in judging age when they have to decide (as they do every day) whether to charge adult or child admission rates.

Seven censors have been appointed by the governor-general in council, namely Mr. Richard Prowse, the Commonwealth chief censor of films; Mr. Richard Pinfold, the deputy chief censor (both of them from the Customs Department); Mr. L. Kirkwood, from the former import licensing branch; Mr.

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[12] *The Age,* 19/12/1965.

G. Robin, B.Ec., a former mayor of Kuringai; Miss E. McMillan, formerly of the Kindergarten Training College in Brisbane; Miss C. Piddington, B.A., formerly of the Y.W.C.A.; and Mrs. M. Stuckey, B.A., Dip. Ed., a former head of the Women's Graduate Association in Sydney.

In the last year for which details have been reported, 1965-1966, films totaling 9,091 hours of screening time were subject to censorship. In theory the seven film censors would view this mass of material, but if the work were split evenly between them 1,298 hours would be spent by each appointed censor, amounting to 25 hours each per week and allowing for no vacations or public holidays. But many films need to be seen by two censors and some, on request, by the full seven. If any one of the appointed members were absent an almost unbearable load would fall on his or her colleagues. "It is evident that such a system cannot work, nor does it work thus in practice."[13]

Several changes have been made to the system of film censorship since the advent of television over a decade ago. The methods which have been adopted to deal with the large increase in film footage have never been formally made public. One of the most important moves has been the appointment of deputy censors. Thus Mr. Keith Fraser of the Australian Broadcasting Commission acts as a deputy censor responsible to the Minister for Customs and censors all the A.B.C. news items and documentaries.

The Minister has from time to time appointed other deputy censors from among the administrative personnel of the chief censor's office in Sydney with familiar functions. "Relief censors" are appointed for relatively long periods. Thus the late Mr. Ray Maher, ex-speaker of the Legislative Assembly of New South Wales acted as a relief censor from time to time.[14] The names of deputy censors and relief censors generally are not published and cannot be readily ascertained.

The regulations give the Minister and his advisory board an almost unfettered discretion to ban and cut films. Anything "likely to be offensive to the people of a friendly nation or to the people of a part of the Queen's dominion," and "any matter the exhibition of which is undesirable to the public interest" can be banned.

A Peking-produced film on the war in Vietnam called *Hit the U.S. Aggressor* was banned by the Minister in 1965, presumably because the United States is a friendly nation and would be offended if the film were shown. Somewhat paradoxically, other films which seem blatantly offensive to other friendly countries are released. There have been numerous feature films specializing in showing the cruelty of Japanese prison camp guards during the Second World War, such as *King Rat,* and there has been an avalanche of anti-German war films, such as *The Battle of the Bulge,* in recent years.

Film censorship in Australia is more restrictive than book censorship because the Minister's ban on books can be overcome by local publications,

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[13] *Nation,* 21/10/1967.
[14] Ibid.

as occurred with *The Trial of Lady Chatterley,* whereas films cannot be "reproduced" so readily in Australia. Also, people interested in particular banned books generally can import them in practice (whatever the Regulations might say), although they cannot do the same with films. *Fanny Hill* and *Tropic of Cancer* are not unknown on Australian bookshelves. And finally, the Minister publishes a partial list of banned books but no list of banned films. There are few books of outstanding merit now banned in Australia. But there are many films of recognized merit which have either been banned or have been chopped up by the censors and destroyed as works of art.

The most important reason why film censorship is more restrictive than book censorship is the attitude of the film distributors, who often seem to be afraid to offend the censorship board and who seem to have a vested interest in keeping motion pictures conformist. Mr. Prowse has stated that the board has continued to receive the utmost cooperation from the film distributors, and film distributors express admiration for the board. There seems to be an alliance between the censors and the distributors (comparable to that of the wowsers and the breweries in the days of early closing) which works against the freedom of the Australian public to view films.

RADIO AND TELEVISION

Television and radio are subject to stringent control by the postmaster-general and the Australian Broadcasting Control Board under powers conferred by the Commonwealth Broadcasting and Television Act.

Obscenity. Broadcasting and television stations are subject to an absolute prohibition against the dissemination of blasphemous, indecent, or obscene material. In April 1965, the Broadcasting Control Board arranged for the censorship of imported television films to be undertaken to observe strict television standards. This has resulted in a greater degree of censorship of television films than of films to be shown in cinemas.

The Broadcasting Control Board claims there is a fundamental difference between television, which comes into the home and is subject to involuntary or compulsive viewing, and the screening of films in theaters, which can be seen only after a conscious effort on the part of those who wish to see them. But the objections to the present system of film censorship mentioned in the previous chapter apply here as well. In particular, no list of banned or cut films is published; no reasons are given for decisions; and there is no meaningful right of appeal.

The Australian Broadcasting Commission

The A.B.C. is subject to more public criticism than commercial television largely because it is publicly owned and regarded as responsible to the public; whereas the commercial stations are presumably responsible primarily to their shareholders and advertisers. Recent criticism of the A.B.C. by representatives of commercial television have come at a time when the A.B.C.

television ratings have grown. The A.B.C. might once have been a "sacred cow" but it is now something of an "Aunt Sally."

The A.B.C. suffers from some disabilities which do not afflict the B.B.C., on which it is modeled. At present the A.B.C. relies on parliamentary appropriation, is subject to treasury control, and uses technical services provided by the postmaster-general. These factors must compromise the independence of the A.B.C. to some extent.

As with the B.B.C. the postmaster-general may prohibit the broadcasting or televising of any matter by the A.B.C. The postmaster-general has often claimed that there is no political interference with the affairs of the A.B.C.; but a series of events have created a reasonable suspicion that interference takes place from time to time. The alternative explanation of some—but not all—of these events is that the commission is prepared to go to considerable lengths to avoid offending governments in power and groups in society that wield political influence.

During the 1961 Federal elections the Federal Government brought pressure on the A.B.C. to withdraw a useful and stimulating political program entitled "The Candidates." The A.B.C. resisted the pressure and continued the program for the duration of the elections but has not resurrected it since. More recent controversies have centered on the A.B.C.'s "Four Corners" program. It was alleged that the production team was refused permission to film the Indonesian takeover of West New Guinea. The Minister denied that any directions had been given but conceded that there had been "discussions." The Minister for National Development rejected an invitation to speak on the subject of housing and then objected to the program because, he argued, it gave only one side of the picture. He demanded and was granted a right to reply to ensure a "correct balance." Strong protests to the Government and the commission were made following a study of the role of the R.S.L. (Returned Soldier's League) in Australia. The president of the R.S.L. claimed that it gave a distorted picture of the league's activities. A film on the hanging of the Perth murderer, Eric Cooke, was held back following protests by the Western Australian Premier until it had ceased to be controversial or even of any particular interest.

But it is easy to exaggerate Government interference. Many allegations that interference has taken place are politically motivated and have been denied by men of standing and integrity in the A.B.C. Under the chairmanship of Dr. J. R. Darling the A.B.C. gradually developed a stronger sense of purpose and independence which is now reflected in its documentary programs and a program entitled "This Day Tonight." "The Frost Report" and "Till Death Us Do Part" are the best satirical programs on Australian television. Unfortunately there are no comparable programs satirizing Australian society.

CENSORSHIP OF THE LIVE THEATER

There is no Australian equivalent of the English Lord Chamberlain, who until recently could censor all new plays before they were produced. But the live theater in Australia is subject to the possibility of censorship in two ways.

Legislation such as the Victorian Theatres Act provides that the chief secretary, "whenever he is of opinion that it is fitting for the preservation of good manners, decorum, or of the public peace so to do, may forbid the acting or presenting of any stage play, or any act, scene or entertainment." This type of power is seldom used, but the police sometimes attend performances (especially at universities) apparently in the hope that their physical presence will promote "good manners and decorum." The chief secretary could ban a play on political or other grounds that in his opinion pertained to the public interest, but there is no instance of a play being banned in this way. Quite apart from these powers, the police may prosecute for the criminal offenses of using obscene or indecent language, or engaging in indecent or offensive behavior. Thus the police recently successfully prosecuted a performer in a strip show and the producer of the show, because the mandatory G string was deliberately removed. However the police generally can accomplish their ends simply by threatening to launch criminal proceedings if a particular show is not "cleaned up." The police sometimes make public pronouncements of their intention to "clamp down" on particular categories of entertainment. The constabulary of Melbourne, who apparently do not follow the maxim that "nothing human disgusts me," have put a virtual end to striptease by stating that prosecutions would be launched if the shows were not closed down. But the shows still flourish in Sydney apparently without any effect on good manners, decorum, or the public peace.

Prominent citizens are permitted to give readings from banned books to selected audiences in Melbourne. But the first all-male revue involving female impersonation in Melbourne was stillborn when six trench-coated members of the Victorian Vice Squad impounded (arrested, to use the technical term) the entire cast and audience. The action taken by the police in effecting a mass arrest of Melbourne citizenry doubtless improved the overall rate of crime detection.

Reports of the incident indicate that the revue was stopped with the following ceremony:

"Ladies and Gentlemen, I am Detective Miller of the Vice Squad."

The audience responded with stormy prolonged applause, loud laughter, cries of "mug copper" and stamping of feet.

"This has been declared a disorderly house."

Loud applause, laughter, and derisive shouts.

"You are all under arrest."

Prolonged applause mingled with mild consternation and expressions of disbelief.

"Will you move out into the patrol wagon. You will be taken to St. Kilda station where arrangements will be made for your bail."

Silence.

All-male revues continue to thrive in Sydney, due (according to one source) to "the exotic climate and the laxity in moral standards caused by years of Labor government." One of the minor inconsistencies of Australian censorship is that great efforts are made to ban the portrayal of the naked human body in films, and to prevent frank discussion of sexual love and

sexual problems, but entertainment based on sexual aberration is permitted in some States.

Judging by the results the present chaotic and haphazard system of censorship of plays seems preferable to the relatively systematic censorship maintained in the case of films and books by the Minister for Customs. The live theater has been noticeably free of the restrictions imposed upon films and books. The fact that many plays produced in Australia have already been produced in New York and London has discouraged local puritans from endeavoring to impose their own standards on the rest of the community. The official view seems to be that sophisticated theater audiences, including Ministers of the Crown, are unlikely to be corrupted by plays in the same way that ordinary Australians may be (allegedly) corrupted by books and films. But the censors still occasionally provide us with entertainment by trying to ban plays of recognized merit. Thus in 1964 the Queensland authorities took exception to *Who's Afraid of Virginia Woolf,* though it had played to enthusiastic audiences in centers of international culture such as London and New South Wales.

MOVEMENTS TOWARD REFORM

There is no official commission in Australia whose function is to recommend change of any form in the present laws relating to obscenity. There does exist, however, the Council of Civil Liberties. This organization, which is comprised mainly of professional men and women, has branches in every State except Tasmania. The aims of the various groups are to "investigate and take up matters involving censorship of books and films; police conduct; freedom of speech and privacy; and freedom to choose one's own way of life and private behavior."

It is difficult to assess the success of this group, but recent film festival restrictions lead one to believe that it is rather limited.

CRIMINAL SANCTION

The following three tables show the variety of fines and terms of imprisonment applicable to persons convicted of offenses against state anti-obscenity legislation.[17]

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[17] Fox, *Obscenity in Australia.*

Table 1

Penalties applicable to persons convicted of offenses against Lord Campbell's Act provisions (possession of obscene or indecent articles, etc., for purposes of gain)

STATE	FIRST OFFENSE Fine/Imprisonment	SECOND OR SUBSEQUENT OFFENSE Fine/Imprisonment
N.S.W. Obscene & Indecent Publications Act 1901-1955, section 15	max. $100 or 3 months Corporate body: max. $200 - - -	max. $200 or 6 months Corporate body: max. $400 - - -
VICTORIA Police Offences Act 1958, section 166	max. $100 or 12 months	max. $200 or 2 years
TASMANIA Police Offences Act 1935, section 26	No distinction made between penalties imposed under Lord Campbell's Act provisions or other sections. For any offense: max. $100, or if committed willfully, max. $200 or 3 months.	
QUEENSLAND Vagrants, Gaming and other Offences Act 1931-1967, section 13	max. $40 or 3 months	max. $100 or 6 months

Table 2

Penalties applicable to persons convicted of offenses involving public display, sale or exposure for sale of obscene or indecent articles, etc.

STATE	FIRST OFFENSE Fine/Imprisonment	SECOND OR SUBSEQUENT OFFENSE Fine/Imprisonment
N.S.W. Obscene & Indecent Publications Act 1901-1955, section 16	max. $100 or 6 months Corporate body: max. $200 - - -	as for first offense as for first offense
VICTORIA Police Offences Act 1958, sections 168, 172-3, 177	Obscene displays or exhibitions: max. $10 or 3 months Printing or publishing an obscene advertisement or picture: max. $40 or 3 months Exposing indecent postcards: max. $50 or 6 months	as for first offense max. $200 or 12 months min. $40 - - - as for first offense
TASMANIA Police Offences Act 1935, section 26	max. $100, or if committed willfully, max. $200 or 3 months	
Criminal Code section 389	Standard maximum sentence for all offenses under the Code-imprisonment for 21 years or fine at the discretion of the judge.	
QUEENSLAND Vagrants, Gaming and other Offences Act 1931-1967, sections 12, 14	max. $40 or 3 months Exposing indecent postcards: max. $100 or 6 months	second offense: max. $100 or 6 months third and subsequent: max. $200 or 12 months as for first offense
SOUTH AUSTRALIA Police Offences Act 1953-1961, section 33(2)	max. $200 or 6 months	as for first offense
WESTERN AUSTRALIA Indecent Publications Act 1902, section 2	max. $40 or 6 months	as for first offense
Police Act 1892-1965, section 59	max. $40 or 1 month	as for first offense
Criminal Code section 204	- - - 2 years	as for first offense

Table 3

Penalties applicable to persons convicted of offenses involving failure to comply with orders of State censorship boards

STATE	FIRST OFFENSE		SECOND OR SUBSEQUENT OFFENSE	
	Fine/Imprisonment		Fine/Imprisonment	
TASMANIA Objectionable Publications Act 1954, section 15	max. $100	- - -	min. $10 max. $200 or 3 months or both	- - -
QUEENSLAND Objectionable Literature Act 1954, section 17	max. $200	- - -	max. $1000	- - -

It is to be observed that the legislation usually declares a maximum prison sentence coupled with the alternative of a fine. It is obvious that the penalties liable to be imposed for similar offenses differ from State to State, but in addition it is apparent that for a given maximum prison term, the maximum fine prescribed as a possible alternative varies considerably, not only between States but within them. Thus, taking the grosser anomalies a maximum sentence of 3 months is correlated with a maximum fine of $10 in section 168 of the Victorian Police Offences Act of 1958, $40 in sections 172-3 of the same act, and $200 in section 26 of the Tasmanian Police Offences Act of 1935. The following summary of prison-fine correlates disclosed in the tables above further illustrates the legislature's piecemeal approach to the question of penalty:

MAXIMUM SENTENCE MONTHS	MAXIMUM ALTERNATIVE FINE
1	$40 (W.A.)
3	$10 (Vic.); $40 (Vic., Qld.); $100 (N.S.W.); $200 (Tas.)
6	$40 (W.A.); $50 (Vic.); $100 (N.S.W., Qld.); $200 (N.S.W., S.A.)
12	$100 (Vic.); $200 (Vic., Qld.)
24	$200 (Vic.)

Denmark, Sweden, and Norway

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INTRODUCTION

In penalizing pornography the legislator has only limited means of defining the scope of his statutory prohibition. Relatively clear answers will of course normally be given to a number of questions, such as the definition of the types of objects (writings, pictures, sculptures, etc.) or the categories of persons (authors, artists, publishers, booksellers, etc.) to be included under criminal responsibility. However, on the essential point, when it comes to the question of specifying what makes a publication or a picture punishable, the legislator can hardly avoid resorting to a choice of words so vague and inconclusive that the legislative power will more or less be transferred to the courts. To some extent this is a result intended by the legislator, and a desirable one, since the text of the penal code ought to be susceptible to an interpretation adapted to the changing customs and concepts in the community.

It follows from this that criticism against the law on pornography will frequently be directed toward the courts, claiming that they are too strict or too tolerant in their assessment of sexual representations in writings or in pictures. In an extreme form the criticism of the liberal opinion is expressed as a demand that courts ought to regard statutory provisions on pornography as if they did not exist. But of course even legislators will be under criticism. Those who find court practice too lenient will be facing the troublesome task of proposing a statutory amendment in words apt to lead the courts in the direction they want. On the other hand, those who oppose the convictions resulting from judicial censorship on publications and pictures have increasingly united themselves in the conclusion that nothing but a complete repeal of the law on pornography can bring about a lasting and satisfactory solution to the problem.

In Denmark, Sweden, and Norway a state of relative satisfaction with the statutory provisions and with a liberal court practice has, over the last 10 or

15 years, changed considerably in the direction of a strongly critical attitude toward the legal system. The demand that pornography be "decriminalized" has been brought forward with more and more emphasis. Among the principal arguments supporting this development may be mentioned: that the liberty of expression ought to be more firmly established as a fundamental legal principle, that court practice tends to keep the law in a state already bypassed by the norms and feelings of the community, that criminal law, in this field as in several others, has been too ready to accept the enforcement of moral standards as a valid basis of action, and that legislation and court practice have failed to ask for evidence concerning the eventual harmful effects of pornography.

Criticism against the law on pornography has been less pronounced in Norway than in Denmark and Sweden, and only in Danish and Swedish law has it resulted in legislative amendments. In Denmark an almost complete decriminalization of pornography has taken place by amendments of 1967 and 1969. The only provision on pornography which remains in the Danish Penal Code reads as follows: "Any person who sells obscene pictures or objects to any person below 16 years of age, shall be liable to a fine" (section 234). In Sweden a similar decriminalization of pornography is under way, though the result of legislative action will probably be that a modification aimed at the protection of children and youth will be framed in wider terms than in the Danish Penal Code. So far convictions for pornography have been rare both in Denmark and Sweden. This holds true also of Norwegian law, but some court decisions seem to indicate that suthors and publishers run a greater risk of being convicted in Norway than has been the case in Denmark and Sweden. It seems unlikely that any proposition for the repeal of the law on pornography will be laid before and adopted by the Norwegian Parliament in the near future.

A survey of former and current rules in the three countries will be given below. Attention will be given not only to the provisions dealing with the liability of authors, publishers, and so forth, but also to a set of secondary rules on matters such as the dissemination of pornography among youth, unsolicited mailing, advertising, and indecent behavior. An outline of the law on film censorship will be added under each country.

The words "pornography" and "pornographic" are normally used here in a rather loose sense denoting writings, pictures, and other objects of a sexual character but not necessarily falling within the scope of the penal provisions. As will be seen below, the words "obscenity" and "obscene" are used as a translation of the words in Danish and Norwegian Penal Codes indicating the *actus reus*. The Swedish Penal Code has a different terminology.

DENMARK

Former law

Under 1967, section 234 of the Danish Penal Code read as follows:

1. Any person who
   (*i*) offers or hands over to any person under eighteen years of age

obscene publications, pictures or objects; or who

(*ii*) publishes or circulates or, for such purpose, produces or imports obscene publications, pictures or objects; or who

(*iii*) arranges for any public lecture, performance or exhibition of an obscene nature;

shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding six months.

2. If any of the acts mentioned in subsection 1 of this section is committed for commercial purposes, a fine may be imposed only in particularly extenuating circumstances.

3. Any person who, for the purpose of gain, publishes or circulates or, for such purpose, produces or imports publications or pictures which, without being actually obscene, must be assumed to be solely intended for a commercial exploitation of sensuality, shall be liable to a fine or to simple detection for any term not exceeding one year.

Subsections 2 and 3 were added to section 234 in 1939. There had been, in the 1930's a number of cases in which publishers had been acquitted because their publications were not considered "obscene" under subsection 1 (*ii*). In the opinion of the Minister of Justice, endorsed by the Parliament, these cases had demonstrated a need for an amendment in order to reach certain gravely offensive sexual representations which were not "obscene" in the sense of subsection 1. The new provision in section 234, subsection 3, on publications "solely intended for a commercial exploitation of sensuality" was intended to meet this need. However, the provision remained practically without application. In court practice concerning pornography the interpretation of the word "obscene" in subsection 1, especially in (*ii*), has continued to be the decisive issue. It will be convenient here to make a distinction between "publications" (pornography in writing) and "pictures" (as well as sculptures and other tangible objects).

Publications: Court practice until 1967

In spite of much dispute as to what makes a book or other publication "obscene" and punishable under section 234, subsection 1, there has been a widespread agreement both in legal theory and in court practice that two criteria are particularly relevant. First, the sexual representation in question must be of a considerable gravity or offensiveness. That the representation should have a sadistic or otherwise physically violent or brutal character has not in itself been decisive, but such qualities have of course often been indicative of a special gravity. Secondly, it has generally been assumed that literary, scientific, or other cultural qualities attached to a publication will normally lead to impunity, even if particular passages are gravely offensive and the artistic or scientific qualities of the work rather modest. In other words: criminal responsibility for obscenity has—at least in the last 50 years or so—on the whole been limited to publications lacking literary or other cultural values.

The problem of deciding the pertinence of literary merit was raised in the 1950's when some of Henry Miller's books were translated into Danish (among these *The Rosy Crucifixion,* published in two volumes under the titles *Sexus I* and *Sexus II*). The sexual elements in these books raised much indignation, but the chief public prosecutor decided not to take action against any of them. The same decision was taken concerning the French author Jean Genet's *Diary of a Thief* and the Norwegian author Agnar Mykle's *The Song of the Red Ruby.* On the other hand, prosecution was raised when John Cleland's *Memoirs of a Woman of Pleasure* and de Sade's *The Bedroom Philosopher* and *Justine* were published in English. They were all, together with certain other books, convicted in a case decided by the high court for the eastern district in 1958. There were similar decisions concerning a number of publications of a different category, novels and short stories, of a character so obviously cheap and dirty that the question of literary or historical merit could safety be left out.

By far the most conspicuous case was the one raised in 1964 against two publishers who had prepared a Danish edition of John Cleland's book under the title *Fanny Hill.*[1] As mentioned above, the English version of that book had some years earlier been classified as "obscene" by a high court decision. The outcome of the new case was that the supreme court (like the low court and the high court by its majority) acquitted the book. One out of seven justices in the supreme court considered the book obscene under section 234. Among the six justices voting for an acquittal there was a certain difference of opinion concerning the arguments for the decision. In a later commentary[2] to the supreme court decision one of the six justices of the majority has indicated that the court has had some discussion on two different criteria or principles which do not appear directly from the decision itself but may more or less be read into it: (1) "the quality criterion," according to which a book or other publication only in rare cases can be considered "obscene," if it possesses literary, historical, or scientific merit (even if this merit is small), and (2) "the principle of balances," according to which even works possessing the qualities here mentioned must be submitted to a weighing of these qualities against the gravity of the sexual representations of the work. There is some reason to assume that most of the justices of the majority were of the opinion that *Fanny Hill* possessed certain literary and historical merits without which the sexual descriptions of the book would not have escaped a conviction.

The *Fanny Hill* case was of a special character, since the book was more than 200 years old and not typical of the kinds of books, magazines, and stencilized short stories discussed in the 1960's in relation to the Penal Code section 234. Nor was the decision of the supreme court formulated in such a way as to permit the conclusion that henceforward there would be no possibility of obtaining a conviction under section 234. Convictions occurred

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[1] *Ugeskrift for Retsvaesen* [Weekly Law Journal], 1965, p. 415.
[2] *Jørgen Trolle in Ugeskrift for Retsvaesen,* 1965 B, p. 255.

ever after the *Fanny Hill* case; thus, the eastern high court decided in 1966 that the books *Javin's Diary* and *The Adventures of Father Silas* were obscene and punishable. The supreme court since the *Fanny Hill* case has not been confronted with further cases of pornography, except that the court has approved a preliminary seizure on two books: Pauline Réage's *O's historie* (Danish translation of the French book *Histoire d'O* and Annakarin Svedberg's *Er pornografi skadelig?* ("Is Pornography Harmful?"—a Danish translation of a Swedish anthology in pornography). Both cases were later dropped by the prosecutor after the Penal Code had been changed.

Publications: Change of law 1967

In 1964 the Minister of Justice asked the Criminal Law Committee to consider the question of pornography. The committee presented its report in 1966.[3] Out of four members of the committee, three proposed that the criminal law provisions on obscene books and other publications be repealed. One member could not recommend a solution as radical as this but was nevertheless in favor of giving section 234, subsection 1 (*ii*) a more narrow scope of application. To a great extent the views expressed in the report (1966) were shared both by the majority and the dissenting member.

It is difficult to summarize in a few words the arguments of the majority for its proposal to repeal the law on obscene publications. There were several points of view speaking in favor of this conclusion.

First, the practice of prosecutors and courts had developed in such a way that only a very small category of publications of a sexual character were punishable. This was a fact which raised serious doubts as to whether it was still expedient and reasonable to direct the efforts of criminal law against a numerically insignificant selection of books and other publications dealing with sexual behavior, when an overwhelming majority of such publications—even numerous publications which were strongly offensive to many citizens—could already be published and circulated without any risk of seizure and conviction. Even within the scope of punishable obscenity the effectiveness of the legal system to prevent the spreading of such publications was obviously limited. Large stocks of books were often brought on the market before a decision on seizure or confiscation could be obtained, and there was ample opportunity to import books—including books in Danish translation—from Sweden.

As regards the difficulties of prosecutors and courts in drawing a line between punishable and nonpunishable publications, it was natural to conclude that the delimitation of "obscenity" had become so uncertain that legal authorities ought no longer to participate in decisions which might seem arbitary and lacking in rational basis.

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[3] *Straffelovraadets betaenkning om straf for pornografi* [The Criminal Law Committee's Report on Pornography], Report No. 435, 1966.

Such misgivings were accentuated by the fact that in the public debate on pornography there had been a growing demand for liberty in this field. It has never been called in question that under the Danish constitution the lawgiver has the power to provide punishment for pornography as well as for libel, infringement of private life, instigation to commit crimes, and so forth. Consequently, there has been no possibility of arguing against the law on pornography in constitutional terms. However, on the basis of moral and political principles it has been argued that in the field of pornography the law ought to ensure the liberty of authors and publishers to have their products circulated, as well as the liberty of the citizens to decide what they want to read. In this connection it was pointed out by the committee that the content of pornographic writings is normally not forced upon the individual reader against his will. A person who starts reading a book dealing with sexual behavior normally will be warned against what comes and is free to leave the book aside. In this respect the situation may be somewhat different in the case of pictures, including book covers (see below).

An essential problem was whether the spreading of obscene publications involves such a risk of harmful effects—especially in relation to children and young persons—that protection against this danger ought to be provided through criminal law. The Criminal Law Committee attached great importance to having this question examined. Though no firsthand research was carried out for the purpose of the committee, helpful guidance was obtained in the form of written and oral statements from experts in such fields as psychiatry, psychology, pedagogy, and criminology.

It was obvious from these statements that both in Denmark and in other countries there were only scarce materials on the eventual effects of the reading of pornography. Consequently, there was hardly any scientific support for the hypothesis that such reading does have or may have harmful effects on adults or youngsters. On the other hand, there was no strong support either for the hypothesis that the reading involves no risk of such effects. Of special interest was a report submitted by the Medico-Legal Council, the supreme official body in psychiatric and other medical matters of legal relevance. The council had previously on more than one occasion expressed the view that in the case of children and young persons the reading of pornographic literature presented an obvious risk of causing mental harm. In its new statement the council drew the following general conclusion from its discussions: "On the basis of general psychiatric and child psychiatric experience it cannot be assumed that the direction of the sexual bent, the mental development of the personality or the total attitude toward sexual life and sexual-ethical norms can—in adults or in children—be influenced in a harmful direction through the media here discussed (pornographic literature, pictures or films). Whether these media may have a beneficial influence on a group of inhibited and sexually shy neurotic personalities is doubtful, but can hardly be totally excluded. What has been said here, holds true no matter whether the pornographic publications, pictures, etc. describe normal or perverse sexual relations."[4]

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[4] Report, 1966, p. 80.

The majority of the Criminal Law Committee concluded that the reports and other statements of the experts had provided no support for an assumption that the reading of pornographic literature involves a tendency to exert harmful effects on children, young persons, or adults. It was admitted that the scientific evidence was incomplete and that psychiatrists did not exclude the possibility of harmful effects in relation to a small group of persons who were particularly insecure sexually.[5]

Both the council and the experts had considered, of course, the question whether pornography had a propensity to lead to the commission of criminal offenses. This was probably the least controversial of the issues covered by the discussions; there was a common agreement that although reading pornography or attending a pornographic film may under extraordinary circumstances lead or contribute to the commission of a crime, this was a factor which could rather safely be left out from the discussion on arguments in favor of penal provisions on pornography.

To complete the picture of the arguments considered, it should be pointed out that in its report the committee rejected the idea that punishment for pornography was justified by a desire to enforce a certain moral opinion or tradition in sexual matters.

The minority in the committee did not find it advisable to exclude altogether the possibility of taking legal measures against pornographic publications, which, as it was pointed out, might appear in growing numbers and increasingly grave forms. The minority pointed to the inconclusiveness of the evidence on the effects of pornography, as well as to the risk that a complete decriminalization might facilitate violations of the sense of decency in large groups of the population. The minority would not object to giving section 234 an even more narrow scope of application than in current practice, either through court practice or by means of a modification in the wording of the section. Without formulating a draft provision the minority expressed the view that punishment ought to be available for "the coarsest forms of sexual descriptions, especially representations of a strongly perverted character, which can be assumed to have brutalizing and debasing effects—among these representations of a pronounced sadistic or masochistic character."

The proposals of the majority were accepted by the Minister of Justice and by Parliament. By Act No. 248, 9 June 1967, obscene books and other written publications were removed entirely from the Penal Code.[6]

Pictures

For the Criminal Law Committee it was a matter of considerable doubt whether the proposed decriminalization of pornographic writings should be extended to comprise even pictures, sculptures, and other "objects."

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[5] This modification refers to a passage in the psychiatric evidence not quoted above.

[6] In 1967 Denmark gave notice to terminate its participation in the international convention of September 12, 1923, on the Suppression of the Distribution of and Trade with Obscene Publications. Norway is still a party to the convention. Sweden, on the other hand, has never ratified it.

Although this aspect of pornography had attracted less attention than books and other writings, a few cases had demonstrated that the existence and enforcement of a penal prohibition against obscene pictures was highly controversial.

In 1937 a surrealistic painter, Wilhelm Freddie, had been convicted under section 234 for having displayed two paintings and a painted bust at a public exhibition.[7] Male genitals formed a conspicuous part of the theme of both the paintings and the bust. All three pieces of art were confiscated and since then had been in the custody of the police. In 1961 the artist exhibited copies of his three pieces of art, and criminal action was initiated against him for a second time. The opinion of the Academy of Arts, which was once more obtained for the guidance of the court, had in the meantime changed considerably in favor of the defendant, and by decision of the eastern high court he was acquitted.[8]

There had been also a number of cases concerning indecent photographs—most of these without any artistic value—and court practice seemed to indicate that such photographs would be considered obscene under section 234 in cases where sexual intercourse was represented in the pictures, or where the genitals of the models were depicted in a particularly offensive manner.

The Criminal Law Committee found that certain arguments could be advanced in favor of keeping obscene pictures within the range of criminal law. Such pictures easily can be brought into circulation and have a directly offensive effect which is more difficult to avoid than in the case of books and other writings. The risk of a conflict between criminal law and the liberty of art and of other forms of expression appeared to be less pronounced, since court practice was mainly concerned with photographs of a decidedly vulgar character. Furthermore, it seemed less difficult for prosecutors and courts to draw a reasonable and relatively clear line between the various groups of pictures than where books and other written publications were involved.

By the 1967 amendment of the Penal Code the prohibition against obscene "pictures and objects" was retained, and section 234 was given the following wording:

> Any person who
>
> (1) offers or hands over to any person under 18 years of age obscene pictures or objects,
>
> (2) publishes or circulates or, for such purpose, produces or imports obscene pictures or objects, or who
>
> (3) arranges for any public lecture, performance or exhibition of an obscene nature,
>
> shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding six month.

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[7] *Ugeskrift for Retsvaesen,* 1937, p. 1159.
[8] *Ugeskrift for Retsvaesen,* 1963, p. 870.

However, it soom became evident that the 1967 amendment, though a radical one on the essential point, would hardly be accepted as the final solution to the problem. There was a widespread dissatisfaction with the distinction made between publications and pictures, and a number of prosecutions against picture magazines left the impression that a rather strict course would now be taken in regard to pictures. Two cases were brought before the supreme court in 1968 and resulted in convinctions.[9] Since the decriminalization of obscene publications seemed to have effected a pronounced weakening of the market for such publications, the Minister of Justice found in this development an encouragement to meet the boom in pornographic pictures which had by then gained force. He introduced a bill to decriminalize pictures as well, and the bill was adopted by Parliament. By Act 224, 4 June 1969, section 234 was given its present formulation:

> *Any person who sells obscene pictures or objects to any person below 16 years of age, shall be liable to a fine.*

As will be seen from this provision, its only intention is to protect children under *16 years,*[10] and only the *sale* of obscene pictures and objects is punishable.

It should be added, however, that certain other forms of obscenity still will be within the range of criminal law by means of other provisions.

First, there are provisions in local police regulations making it a punishable act to display certain posters, pictures, and so forth in public places. The general police regulation for Copenhagen contains a provision of this type in section 12, subsection 1:

> On or towards streets or other places to which there is general access, it is prohibited to set up or carry around placards, or to display, sell or distribute publications or pictures, if such act is apt to disturb the public order, or if the placards, publications or pictures are of an insulting character. The same rule shall apply to a person who sets up or carries around placards, or who displays or distributes publications or pictures, if such placard, publication or picture is of an offensive character.

The word "offensive" in the last passage refers primarily to the risk of an offense against feelings of sexual decency (although the word carries a broader connotation than "obscene" or "indecent"). The display or circulation of obscene books will not fall under the said provision, unless the cover of the book—or an illustration displayed to the public—is "offensive." Generally it is assumed that the provision, by its words "places to which there is general access," will cover the premises of a shop to which there is general access, unless it is a special porno-shop, where the public must be

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[9] *Ugeskrift for Retsvaesen,* 1968, p. 410 and 726.

[10] See below under "Film censorship" on the age limit of 16 years in the Act on Film Censorship.

prepared to find obscene materials. The facade of porno-shops must of course comply with the requirements of section 12, subsection 1.

Secondly, attention should be drawn to section 232 of the Penal Code:

> Any person who by indecent behavior violates feelings of decency or gives public offense shall be liable to imprisonment for any term not exceeding four years or, in extenuating circumstances, to simple detention or a fine.

This is a general provision on indecent behavior not amounting to sexual intercourse; examples from court practice are exhibitionism, window-peeping, invitation to sexual intercourse, and other forms of indecent speech. Section 232 will cover some types of obscenity which have previously been punishable under section 234, but the provision cannot be expected to be applied outside cases of gravely offensive acts of admitting youngsters to porno-shops or porno-shows, sending indecent publications to others, handing out indecent pictures to persons visiting a public exhibition, or reading aloud from pornographic books.

Obscenity by mail

It follows from the 1967 and 1969 amendments to section 234 of the Penal Code that publishers and booksellers can lawfully send pornographic publications and pictures, provided such sending does not constitute or form part of a sale of obscene pictures to children under 16 years. However, unsolicited mailing of obscene material may be punishable under section 232 as a violation of the receiver's (including an adult receiver's) feelings of decency. Further protection against unsolicited mailing or other distribution of obscene material follows from provisions in the local police regulations stating that it is a punishable act to deliver writings or pictures (for instance advertisements and free specimen copies) of an offensive nature in houses, except to occupants who have expressly ordered such writings or pictures. So far there is little court practice to illustrate the role of section 232 or police regulations in this field.

Special problems have been noticed concerning international mailing of pornographic publications and pictures. Denmark is a party to the Universal Postal Convention, by which the mailing of obscene or immoral objects, or other objects considered illegal in the country of destination, is forbidden. Accordingly, the Danish Post Act No. 312, 14 August 1963, makes it a punishable offense to mail obscene material and other items covered by international conventions and agreements to which Denmark is a party. It is evident, however, that the enforcement of this provision must by necessity be imperfect. The Danish postal service cannot undertake to carry out an extensive and regular inspection of mail, and even where the contents of parcel post are known to the postal service, it is an extremely difficult task to judge whether such material is considered illegal in the particular country of destination. As a consequence of this, the Danish postal service will normally

refrain from taking action unless a complaint is brought against the sender through international channels to the Danish police.

Film censorship

Until 1969 the Danish rules on film censorship (Cinema Act 1938) provided that all movies intended to be shown in public had to be submitted for official censorship. The State Film Censorship could forbid a film to be shown to children below 12 or 16 years of age, or it could set up an absolute prohibition. As a consequence of growing dissatisfaction with this system—especially as regards "adult censorship"—a committee was set up in 1963 by the Ministry of Justice to consider the matter. The committee reported in 1967.[11]

In accordance with the conclusions of the committee, the system was changed by Act No. 135, 29 March 1969, on Film Censorship. "Adult censorship" was abolished. A film or cinema owner is entitled to show a movie without prior scrutiny if he voluntarily sets a minimum age of 16 years. Censorship is mandatory only in cases where a movie is intended to be shown at public performances where children will be admitted. The censorship may in such cases authorize a movie to be shown publicly without any restriction, or it may decide that the movie cannot be shown to children below 12 or 16 years of age. Approval may be given, as before, on condition that specified pictures or sequences of the movie be cut.

According to the act of 1969, the decision of the State Film Censorship shall be based on the criterion "whether the movie can be assumed to be harmful to children." The question of possible harmful effects on children was the main theme of discussion in the report of 1967.

If a movie is prohibited for children below 12 or 16 years, the cinema owner is under an obligation to give clear notice of such restriction in advertisements and on posters. Similar notice on a 16-year age limit must be given in the case of a movie which has not been submitted for censorship.

The State Film Censorship consists of a chairman (a lawyer qualified to be nominated as a judge) and a number of other members; these members must have an education in pedagogy or psychology, or they must through their previous occupations have acquired special knowledge of child or youth problems. A child psychiatrist may be appointed as a consultant.

An appeal against the decision of the censorship can be made to a review board consisting of five members.

The programs of the State Radio and Television Company are not included under the rules of the Act on Film Censorship. Criminal or civil responsibility for the contents of programs is determined according to the general rules on violation of decency, infringement of privacy, slander, and so forth.

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[11] *Betaenkning om filmcensur* [Report on Film Censorship], No. 468, 1967 (with a summary in English).

The Penal Code

The former Swedish Penal Code contained, in chapter 18, section 13, subsection 1, the following provisions on pornography:

> If a person spreads or offers for sale or in other ways offers a writing, painting, drawing, or picture which offends morality and decency, he shall be sentenced to pay a fine or to imprisonment.[12]

By the new Penal Code of 1962, which came into force on 1 January 1965, this was replaced by chapter 16, section 11, subsection 1:

> If a person offends morality and decency by written or pictorial representation or by offering for sale, exhibiting or otherwise spreading a writing or picture, he shall be sentenced for offending morality and decency[13] to pay a fine or to imprisonment for at most six months.

As will be seen from the texts, it is a common element in the old and the new definition of the offenses that there must be a writing or picture which "offends morality and decency" (in Swedish, "sårar tukt och sedlighet"). This corresponds to the expression "obscene writing or picture" in the Norwegian Penal Code and in the Danish Penal Code until 1967.

In close connection with the provision quoted, the Swedish Penal Code contains two other rules. One of these, aiming especially at the protection of children and youth, is found in the Penal Code, chapter 16, section 12:

> A person, who distributes among children or youth a writing or picture which due to its content can coarsen or otherwise involve serious risk for the moral nurture of the young, shall be sentenced for leading youth astray to pay a fine or to imprisonment for at most six months.

Secondly, there is in section 11, subsection 2, a provision dealing with certain offenses in public places:

> The statement just made [in subsection 1, see above] shall also apply, if a person in a public place or otherwise publicly offends morality and decency by speech or action.

As will be seen from the words of the section, this provision is not limited to behavior which may be named "pornography"; within its scope falls, for instance, indecent exposure and other types of offensive sexual behavior in a public park.[14]

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[12] The provision had been given the wording here quoted by an act of 1911. The range of "imprisonment" was from one month to two years.

[13] Although the words "offending morality and decency" seem to be a mere repetition of words already used in the section, they have, in the original text, the function of giving the offense its official name according to a principle followed consistently in all sections where particular crimes are defined.

[14] A related, though less grave offense is to behave publicly "in a manner apt to arouse public indignation," chapter 16, section 16.

Such acts may at the same time be punishable as "indecent conduct" toward an individual person under chapter 6, section 6, which, in its subsection 2, includes the case that "a person exposes himself to another in a manner apt to give offense, or .... otherwise behaves indecently toward him by word or action which flagrantly offends against morality and decency." This is the Swedish parallel to the Danish Penal Code section 232 and the Norwegian Penal Code section 212.

Court practice

The construction of the Swedish provision in chapter 16, section 11, subsection 1, and the corresponding section in the old Penal Code, has presented roughly the same problems as in Danish legal theory. It has been pointed out that the interpretation of the code must take into account the general opinion in society concerning the limits of acceptable written or oral expressions, and that there must be all necessary freedom for literary and other artistic activities. Swedish theory seems to have emphasized more strongly than Danish authors that attention primarily should be given to the brutal or sadistic or otherwise abnormal character of the representation.

In Swedish court practice the words "offending morality and decency" have been given a narrow scope of application. The information available seems to indicate that the number of cases on pornography has been even smaller than in Denmark. For example, no prosecution was initiated against John Cleland's *Fanny Hill.*

There are a few court decisions from the 1960's by which pornographic publications have been found punishable; among these are two books containing descriptions of sexual abuse of girls under age. In 1965 prosecution was brought against a Swedish book on homosexuality, *Man i bur* ("Man in Cage"), but the case resulted in an acquittal. The latest Swedish committee report on pornography (see below) gives the following piece of information:

> From the small number of court decisions concerning the texts of printed publications it seems possible to draw the conclusion that a printed representation will be considered an offense to morality and decency only in cases where it is of a particularly sadistic, perverse or brutalizing character.[15]

Pictures

The production of pornographic picture magazines for domestic consumption or export seems to have increased significantly in the 1960's. It is estimated that in 1969 between 300 and 400 pornographic picture magazines appeared in Sweden, many of these with a circulation of 20 to 30 thousand copies.[16]

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[15] *Yttrandefrihetens gränser* ("The Limits of Liberty of Expression"), Statens offentliga utredningar, 1969:38, p. 30.

[16] Report 1969 (see preceding note), p. 55.

There seem to have been more judicial cases on picture magazines than on books and other writings, and it must, as in Denmark until 1967, be taken as a fact that the courts have been more strict in their assessment of pictures than in the case of writings. It is difficult to specify the criteria determining the limit between punishable and nonpunishable pornography. In a decision of 1969 the supreme court has convicted a publisher on account of a number of pictures in various publications. In the decision of the supreme court it was said that the pictures, "judged on the basis of current concepts, by their content or the contexts in which they have been placed, express a brutalized view of sexual life. For this reason, and since it is obvious that the publication of the pictures cannot be defended on reasons of artistic or other cultural merits, it must be stated that the pictures constitute an offense to morality and decency."

In a decision of 1960 the high court for southern Sweden made an attempt to formulate criteria concerning pictures:

> Pictures of naked persons are not, even if they represent persons of different sexes, in themselves offending to morals and decency. Nor can the fact that the genitals of the persons are brought to special prominence on the pictures normally lead to the result that the pictures should be considered an offense to morality and decency. On the other hand, the following types of pictures will offend morality and decency, namely: pictures showing homosexual activity, pictures showing coitus or other sexual intercourse between man and woman, as well as pictures showing a naked man and a naked woman together in such a way that it is clearly the intention to lead the observer's thoughts toward sexual intercourse between the persons represented, pictures of a naked woman or a naked man if the pictures have been arranged in such a manner that the person represented unambiguously and obtrusively invites to sexual intercourse, and other pictures arranged in a conspicuously unnatural and hideous or disgusting or debasing way for the purpose of emphasizing the genitals of the person represented or bringing about a special erotic effect.[17]

It cannot be said with certainty to what extent the criteria here set up would be accepted by the Swedish supreme court.

Proposed amendments

In 1965 a committee was set up to consider various questions concerning the liberty of speech and other forms of expression, including the legal provisions on pornography. In the directions for the committee the Swedish Minister of Justice pointed to the fact that common concepts in society had developed toward greater liberality and tolerance in relation to sexual representations. The Minister found it desirable that a revision of the legal provisions should set out from, in principle, an unlimited freedom of expression, even though the result of new rules might be that offensive and

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[17] Quoted from Report 1969, p. 31.

unsavory writings and pictures would gain a wider distribution, at least temporarily. It is possible that these statements expressed an expectation on the part of the Minister that a complete decriminalization of pornography would be proposed by the committee. In any case, the result of the committee's work, as presented in its report of 1969, was not a proposal to that effect.

Like the Danish Criminal Law Committee, the Swedish committee attached great importance to obtaining information from experts on the possible harmful effects of the spreading of pornography. As was the case in Denmark, the committee was led to the conclusion that there is scarce support for a hypothesis of such harmful effects on individuals (or on the crime rate), while on the other hand it cannot be considered proved by research that the possibility of harmful effects is excluded. It was the conclusion of the Swedish committee that the scope for punishable pornography ought to be narrowed but that society ought not to preclude itself entirely from taking action against extreme cases of pornography through the instruments of criminal law. The Swedish committee has, to a somewhat higher degree than the Danish committee, paid attention to the risk of such brutalizing effects of reading, movies, and so forth, which are not necessarily connected with sexual phenomena, especially brutalizing and depraving effects of scenes of violence in films. In the Swedish Report 1969 the following wording of the Penal Code, chapter 16, section 11, was proposed:

> A person who violates the common feeling of decency by representation which is a grave offense to decency or has a pronounced brutalizing character, or by spreading such representation, shall be sentenced for offending propriety[18] to pay a fine or to imprisonment for at most six months.

The proposed text was intended (by the word "grave") to define pornography more narrowly than in the present text, while on the other hand it includes, for instance, representations of violence of a brutalizing (coarsening) nature even outside the range of sexual representations. Thus, the proposal should meet at the same time the demand for extended liberty of expression in sexual matters *and* the criticism that penal law does not concern itself with representations of acts of violence of a potentially harmful character.

As far as pornography is concerned, the proposal would in other respects achieve an extension of the penal provisions, especially in regard to the spreading of pornographic material. After section 11 the following provision was proposed as section 11 *a*:

> A person who in a public place or otherwise publicly exhibits or shows representation offending decency, or who in other ways spreads such representation without regard to the attitude of the receiver toward such

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[18] The word "propriety" (in Swedish: "anständigheten") has been substituted for the words "morality and decency," which have been reserved for section 11 *b* (see below).

object, shall be sentenced for unlawful spreading to pay a fine or to imprisonment for at most six months.

The former section 11, subsection 2, would remain essentially unchanged as section 11 *b*:

> A person who, in cases other than those set out in sections 11 and 11 *a*, in a public place or otherwise publicly by speech or action offends morality and decency, shall be sentenced for offending morality and decency to pay a fine or to imprisonment for at most six months.

Finally, a certain extension was proposed in chapter 16, section 12, concerning the protection of children and youth:

> A person who in relation to children or youth exhibits or shows a representation which by its content can have a coarsening effect on the young or otherwise involve serious risk for their moral nurture, or who spreads such representation among children or youth, shall be sentenced for leading youth astray to pay a fine or to imprisonment for at most six months.

Change of law 1970

After the Report 1969 was submitted to the Swedish Ministry of Justice, and opinions had been asked from a number of authorities and organizations, the course of events has been moving in a somewhat different direction. The Minister of Justice decided not to follow the proposals set out in the Report 1969. According to a draft bill,[19] which has been adopted by Parliament on May 29, 1970, section 11 of the Penal Code (including subsection 2) is totally repealed. The general principles underlying this reform were stated by the Minister of Justice in the following words:

> A far-reaching liberty of expression is a necessary condition for a well-functioning debate and formation of opinions in social and cultural matters. Society ought not through legislation to set up other limitations to the liberty of expression than those necessary in order to protect other significant public or individual interests. Another important point is that the individual should to the widest possible extent decide for himself which communications in writing, in pictures or by other media he wants to take part in. However, there may be good reasons to restrict the right to *spread* different kinds of objects in such a way that the individual is not, directly or indirectly, forced against his will to be confronted with materials which according to current notions are considered contrary to decency, insulting or otherwise offensive.

In order to counteract certain types of dissemination of pornographic materials, the amendment of May 1970 inserts as a new section 11 the following provisions:

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[19] Kungl. Maj:ts proposition [Draft bill] nr. 125, 1970.

> A person who, through advertising or in similar ways, on or near a public place shows a pornographic picture in a manner apt to give common offense, shall be sentenced for unlawful handling of pornographic picture to a fine or to imprisonment for at most 6 months. The same rule shall apply to a person who by mail or in other ways sends to any other person a pornographic picture without a preceding request.

Both elements of this new section 11 (showing pictures in a public place, unsolicited mailing) have parallels in the Danish police regulations referred to earlier.

In contrast to all previous statutory provisions, the new section 11 has, in the Swedish text, expressly included the word "pornographic." The comments to the draft bill contain the following passage:

> A pornographic picture is a picture which, without possessing scientific or artistic merits, represents a sexual theme in an unveiled and provoking manner. This means that the statutory prohibition will include pictures of a sexual character falling outside the range of pictures which, according to current practice under the Penal Code chapter 16, section 11, are considered offensive to decency and morality.

According to Swedish law, provisions on pornography are related to a set of rules contained in the Freedom of the Press Act and having the character of constitutional provisions. It follows from this that the rules on pornography now adopted will have to be laid before a new Parliament after general elections have been held (in the fall of 1970) and will come into force only if they are formally adopted for a second time.

Film censorship

Sweden has had a film censorship since 1911. Under the present rules (Ordinance No. 348, June 5, 1959, on cinema performances) no film can be shown at a public performance without the approval of the National Board of Film Censors (Statens biografbyrå), an administrative body consisting of a director and a number of other censors (Instruction No. 748, 3 December 1965). The board cannot approve a film (or part of a film) "if, on account of the way in which events are represented, or the context in which they occur, the presentation of the film may have a brutalizing or harmfully exciting effect or may entice to crime." The board has the power to ban a film, or part of it, also in cases where it would "clearly violate a common law" to have the film shown in public. The decision of the board may be of the following types: (1) unrestricted approval (or approval with cuttings), (2) children under 11 years of age not admitted, (3) children under 15 years not admitted, (4) totally banned. In relation to the age limits here mentioned, the criterion shall be whether the film is apt to cause psychological harm to children under 11 or under 15 years of age.

The board must in certain cases obtain an advisory opinion from the National Council for Film Inspection (Statens filmgranskningsrad) consisting of five experts. The decision of the board may be appealed to the Minister of Education.

The abolition of "adult censorship" has been discussed in Sweden on several occasions. In 1964 a special committee was asked to consider the present censorship system, and in the report of the committee[20] it is proposed that "adult censorship" be abolished, while the rule on censorship in relation to children below 11 or 15 years of age should be retained.

So far the report of the film committee has led to no legislative action. Some have expressed a fear that the abolition of adult censorship might involve certain risks, if—as was decided in May 1970—the penal prohibition against obscene pictures and so forth is removed from the Penal Code. However, in the comments accompanying the bill on pornography of 1970 the Minister of Justice pointed out that, even after the abolition of adult censorship and a decriminalization of obscenity in the Penal Code, it would still be possible to include in the film act a special penal prohibition against the presentation of films offending decency or containing elements of sadism or brutality.

NORWAY

The Penal Code

The Norwegian Penal Code of 1902 contains in section 211 the following provisions on pornography:

> (1) Punishment of up to two years imprisonment may be imposed upon anybody who
>
> (a) gives a public lecture or arranges a public performance or exhibition with obscene content, or is accessory to the occurrence of such lecture, performance or exhibition,
>
> (b) publishes, offers for sale, exhibits or otherwise seeks to spread, obscene writings, pictures or similar objects, or who is accessory thereto,
>
> (c) delivers obscene writings, pictures or similar objects to persons under eighteen years of age or who is accessory thereto.
>
> (2) Anybody who commits such an act as mentioned in (1) by negligence, shall be punished by fines or by imprisonment up to six months.
>
> A proprietor or superior who intentionally or by negligence omits to prevent such act as mentioned in this section from occurring within his enterprise, shall be punished similarly.

In 1955 the Minister of Justice asked the Criminal Law Committee to consider a change of section 211. The background of this request was not a wish to bring about a liberalization of Norwegian law on this point. In a decision given by the Norwegian supreme court concerning some pornographic photographs, it had been stated that although the photos in

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[20] Filmen — censur och ansvar (Film: Censorship and Liability), Statens offentliga utredningar 1969:14. (With a summary in English.) A research report was submitted by the committee in 1967 under the title Filmens inflytande på sin publik (Influence of the Film on its Audience), Statens offentliga utredningar 1967:31.

question were not obscene in the sense of section 211, they must be considered offensive, some of them even to a high degree.[21] The Minister of Justice therefore wanted a sharpening of the law to be considered. He pointed out particularly that books, magazines, cartoons, and other material were being sold

> describing criminal acts with an emphasis on brutality, sadism, sexual relations etc. and thereby presenting a risk of exerting a harmful influence on children and youth.

In its report of 1957[22] the Criminal Law Committee proposed, in addition to some minor changes in section 211, a new section 211 *a* to be inserted in the Penal Code:

> A person who publishes, offers for sale, exhibits or otherwise seeks to spread or for the purpose of sale acquires writings, pictures, records, wire tapes or similar objects which are clearly offensive or have a tendency to exert a brutalizing or debasing effect on children or youth, shall, if the main purpose of the act is assumed to be an economic exploitation of an interest in sexuality, violence or crime, be punishable with a fine or imprisonment up to one year, or both. An accessory to the act shall be liable to the same penalty.[23]

The proposals did not result in any change of the Penal Code, and the question has not been dealt with later by the Criminal Law Committee.

Corresponding to the Danish Penal Code section 232 (see above), the Norwegian Penal Code section 212, subsection 1, contains the following provisions on indecent behavior:

> Anybody who by obscene conduct in acts or words, offends modesty, or is accessory thereto, shall be punished by fines or imprisonment up to one year, if the conduct has occurred
>
> (1) in public,
>
> (2) in the presence of or toward somebody who has not consented thereto,
>
> (3) in the presence of or toward children under sixteen years of age.

A similar provision, classified in the Penal Code under "petty offenses" and somewhat corresponding to the provisions on advertisements and so forth in Danish police regulations, is section 376:

> Anybody who offends decency in a public place by oral or written remarks, exhibition, representation, offensive exposure or any other offensive conduct, or who is accessory thereto, shall be punished by fines or imprisonment up to three months.

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[21] *Norsk Retstidende* (Norwegian Law Journal), 1954, p. 1130.

[22] *Innstilling fra Straffelovrådet om forandringer i straffebestemmelsene om pornografi m.v.* (Report of the Criminal Law Committee on Pornography etc.), 1957.

[23] Compare with the Swedish Penal Code chapter 16, section 12.

Court practice

The number of reported cases under section 211 is small, which partly may be due to a less provocative production and importation of pornography in Norway than in Denmark and Sweden. However, a few cases decided over the last 10 or 15 years have given new life to the discussion on what is the scope of the words "obscene writings" in section 211, subsection 1 (b). As far as "pictures and similar objects" are concerned, Norwegian court practice seems to offer no basis for a comparison with Danish and Swedish practice. It is safe to say, however, that Norwegian judges will not be more liberal than their Danish and Swedish colleagues in their evaluation of pornographic pictures.

The first case to be mentioned concerning pornography in writing was a prosecution against the Norwegian author Agnar Mykle's novel *The Song of the Red Ruby.* The case was brought before the supreme court and ended with an acquittal in 1958.[24] The next case arose on the occasion of a Norwegian translation of Henry Miller's *Sexus.* This book was considered "obscene" under section 211.[25] From the decision of the supreme court the following may be quoted from the opinion of the justice who voted first:

> A wealth of details characterize the book, and its sexual descriptions—evenly spread as they are over the whole book, with a great number of sexual partners and highly varying patterns of sexual behavior—are so predominant that the whole work is colored by them. If ever it should be appropriate to use the expression that "the whole book is blackened," it must be in this case.

In 1967 the supreme court decided a case raised against the Norwegian author Jens Bjoerneboe and his publisher on account of the former's novel *Without A Stitch.*[26] Bjoerneboe was well known and respected for several modern novels, but there was a general agreement that *Without A Stitch* was, to put it mildly, well below his standard. By a majority decision this book was found obscene. One of the justices said: "Although the courts must apply the meaning of the word 'obscene' which the concepts of changing times point to, the courts cannot interpret section 211 in a way which would be equal to a repeal of the section. Rather much of what has been said in the discussion around Bjoerneboe's book is directed toward the legislator and not toward the courts. Courts cannot abstain from applying the provision in section 211 even if they might find that pornography does no harm, and that people, who want to read pornography, should be able to do so. The courts must accept the law no matter whether there may be different opinions whether it is right or useful." One justice dissented from the majority. He pointed out that in matters of pornography legal opinion in Norway was more conservative than in Sweden and Denmark, but it was

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[24] *Norsk Retstidende,* 1958, p. 479.
[25] *Norsk Retstidende,* 1959, p. 431.
[26] *Norsk Retstidende,* 1967, p. 1502.

nevertheless moving quickly in the same direction. "With the close and extensive cultural community between the Scandinavian countries, the tendencies toward greater freedom, which are so perceptible in our neighboring countries, will make themselves felt even with us with considerable strength."

Film censorship

In Norway film censorship is administered by the State Film Control, consisting of five ordinary members, one of them acting as chairman. Although it appears as the main rule that decisions on censorship are taken by only one member, the law specifies certain cases in which one more member or the entire control board should be called to participate. A number of persons are appointed as advisers to the Film Control. There is no access to an appeal against or other administrative review of the Film Control's decisions.

As far as the criteria for the decisions of the censorship are concerned, the following principles shall apply. A film, or particular parts of a film, cannot be approved even for adults, if the presentation of the film in public would be contrary to law or decency or would have a brutalizing or morally deteriorating effect. In other cases the censorship is authorized to set up an age limit of 16 or 12 years, if the censorship finds that the film is apt to have a harmful effect on the mind or concepts of law of persons in the particular age group. Under the same criterion the age limit of 16 years may in special cases be raised to 18 years.

In addition to this, there is a general prohibition against admitting children below 7 years not attending school at public film performances. This is modified by a rule to the effect that a film may in certain cases be permitted by the Film Control for children of 5 years or more accompanied by their parents or other persons taking care of them.

Finally, there are rules prohibiting children of certain age groups to be admitted at performances starting after certain hours, unless they are accompanied by adults.

The provisions here mentioned are contained in the Act on Public Film Performances of 1913, as amended in 1969.[27] In a report of 1965 a committee recommended that an appeal board be established. Instead of following this proposition it was decided in 1969 to bring about a strengthening of the Film Control, resulting in the provisions referred to above.

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[27] See Proposisjon No. 23, 1968–69 (Draft Bill on the Act of 1913 on Public Film Performances).

France

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WHAT KIND OF SEXUAL EXPRESSION IS SUBJECT TO PUNISHMENT OR OTHER LEGAL CONTROLS

Since 1939, when the word "obscenity" (*obscénité*) disappeared as a technical legal term, French law has used a variety of phrases to describe sexual expression subject to censure and legal controls. The central one is "outrage to good morals" (*l' outrage aux bonnes moeurs*). In everyday speech the phrase is broad enough to encompass any violation of moral standards rather than solely those pertaining to sexual ethics. When in the Yule season of 1967 Parisian stores were flooded with "sadistic toys"[1] many French lawyers felt that criminal prosecution should be brought against the manufacturers and commercial distributors of these *jouets sadiques* for outrage to good morals. Objects capable of stimulating cruelty were thought by many to be contrary to community moral sentiments. French courts, however, have consistently refused to stretch the concept of "outrage to morals" beyond the field of sexual morality.

In contrast to West Germany, the French judiciary has failed to develop a generally accepted definition of morally outrageous sexual expression. In their decisions French courts declare rather ambiguously that morally outrageous matter cannot be restricted to matter patently offensive to the sense of shame (*obscénité*, in the French usage) but also embraces expression violating shame in a less serious way (mere "licentiousness" to the French). Violations of canons of good taste or decency are said to fall short of the morally outrageous. These broad judicial pronouncements obviously shed very little light on the substantive, operational meaning of "outrage to good morals."

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[1] These sadistic toys included guillotines, scaffolds for executions by quartering with a system imitating cries of pain, etc. See Legris, *Guillotines en miniature, Le Monde* of December 17, 1967.

Compared to West Germany there is in France very little discussion on how, in a concrete case, offensiveness to shame should be ascertained. Nor has any discussion been found in reported cases concerning the help of experts[2] in arriving at a finding of outrage to good morals.

Because of the failure on the part of the judiciary to develop generally acceptable tests of what constitutes censurable sexual expression. French case law on obscenity is bewildering, somewhat confusing, and defies generalization. Thus, only some characteristic features of the case law and possible tendencies one can extrapolate therefrom can be presented.

The opinion has been voiced quite often by courts that the actor's purpose to stimulate erotically constitutes one of the prerequisites to a finding of outrage to morals.[3] Decisions have been found, however, in which the court has held the nature of an object to create sexual desires and arouse prurient interests sufficient for a finding of "moral outrage," irrespective of subjective intentions.[4]

Although, as stated before, French courts like to stress that mere "licentiousness" in sexual expression suffices to make it criminal, a review of reported decisions indicates that by far the greatest bulk of cases involved outright commercial pornography. Thus in cases involving written material judges almost invariably stress lack of any literary merit, predominant appeal to the "vulgar" or "morbid," as well as the actor's purpose to make money from the dissemination of the writing. In cases involving pictorial representation even complete nudity of a person has not been held to be obscene per se, although artistic value was totally lacking. The same apparently applies even to billboards! The additional element required for a finding of outrage to morals lies in provocative gestures, positions, or activity. A point of possible interest is that exposure of pubic hair seems almost invariably to sway the court towards a finding of obscenity.[5] Not a single decision has been found holding a movie outrageous to good morals, even though the breadth of relevant provisions makes such a finding technically possible. Dissemination of birth-control information does not fall within penal statutes sanctioning outrage to good morals. There is an area, however, in which French law seems to be quite strict. Newspaper announcements advertising various sexual "services" were held obscene, although their wording was veiled or matter-of-fact.[6] But salacious, smoking-room jokes, even when inserted in the periodical press, are usually considered merely instances of bad taste.

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[2] Note that in the continental system of procedure, "experts" are called by the court rather than the parties. They are sharply distinguished from witnesses.

[3] Compare, for instance, Ancel, "La pornographie et le droit pénal" (Pornography and the criminal law), *L'Hygiène Mentale,* 387 (1956).

[4] See Judgment of January 22, 1964 (Lyon) in *Gazette de Palais* I, 324 (1964).

[5] For cases involving the "pubic hair test," see *Encyclopédie Dalloz, Répertoire de droit pénal et de procédure pénale,* III (1969), 4. The references to cases which appear in the text are from this source unless otherwise indicated. The source shall be cited hereinafter as *Dalloz.*

[6] Thus the advertising of "English" or "Persian" massage has been held outrageous to good morals. Publishing addresses of prostitutes has also been held criminally obscene in a case reminiscent of the *English Ladies' Directory* case. See *Dalloz,* 6.

French courts often have been called upon to decide claims of literary or artistic merit of allegedly obscene material, but here again no penetrating analysis has been found and no clear and uniform criteria have evolved. Nor has the issue ever assumed constitutional dimensions. The following views seem to be generally accepted. In passing on a claim of artistic or literary merit, contemporary trends must be considered, even those which are avant-garde. The product must be assessed as a whole rather than through isolated passages. Following this logic French courts regularly reject the argument advanced by the defense that passages similar to those sub iudice can be found in other works some of which are renowned. Passages cannot be compared; it is the "gestalt" that counts.[7] On the other hand, creation of "new wholes" from passages excerpted from various works may lead to a finding of obscenity. In drawing a line between tolerable artistic license and obscenity a great stress seems to be put on the actor's intent. Thus, where artistic or literary ambitions are obvious, the product even if daringly erotic may fall outside the criminal law.[8]

Evolution of uniform tests to establish "outrage to good morals" is rendered more difficult in France because of certain views taken by the French supreme court. The court holds that "outrage to good morals" is an issue for the trier of facts, and is accordingly nonreviewable by higher courts which alone can secure uniformity in case law.[9]

PENAL STATUTES INCORPORATED INTO THE FRENCH PENAL CODE

The criminal offense under article 283 of the Penal Code[10]

Article 283 of the Penal Code covers a great number of activities connected with material outrageous to good morals. These activities may be classified into five groups.

Producing and *keeping* material contrary to good morals is made criminal only if coupled with the specific intent to sell, distribute, hire out, or exhibit such material. Accordingly, mere keeping or production of obscene matter for private use falls outside the criminal law.

Export from and *import into* France as well as *transportation* of immoral material in order to fall within the criminal law must be accompanied not only by the specific intent to disseminate the material but also must occur

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[7] See the decision by a court at Lyon in Ancel, op. cit. (footnote 3), 31.

[8] It is not clear, however, whether French courts consider artistic merit and obscenity as mutually exclusive. Certain provisions seem to indicate the opposite [art. 290(2) of the French Penal Code].

[9] The French trier of fact in an obscenity case must, however, accompany his factual findings with a statement of reasons. A mere proclamation by the trier of fact that a given matter is "obscene" does not constitute a valid explanation of factual findings and the conviction may be quashed on appeal. In 1949 the French supreme court had a unique chance to provide the courts below with guidelines for obscenity cases. The case against Baudelaire, convicted in 1857 for having published *Les Fleurs du Mal,* was reopened and the supreme court was called on to reverse the old conviction. The court passed up the opportunity to enunciate clear guidelines.

[10] The translation of article 283 of the Penal Code is appended to the report. The French Penal Code shall be abbreviated as P.C.

with knowledge of the obscene nature of the material imported, exported, or conveyed.

Posting, exhibiting, or *showing* immoral matter is punishable only on condition that it takes place in public. An erotic film shown at a private party does not constitute "public showing." And a coffeehouse owner who used to show photos of his waitresses in the nude to his *habitués* was acquitted of the charge of showing obscene pictures (Recueuil Hebdomadaire de Jurisprudence, 526, 1936).

Selling and *hiring out* immoral material, as well as mere *putting up for sale* or *offering for hire,* also fall within article 283 P.C. The same applies to *offering to transfer title,* even if gratuitously. Thus, lending obscene material for private use is not criminal.

Lastly, *distribution* of obscene material and *turning over for distribution* (for instance, to the post office) fall within the punishable activities under article 283 P.C.

The criminal offense under article 284 of the Penal Code

The first paragraph of this article threatens punishment to "whoever shall cause the public to hear songs, cries or speech contrary to good morals." The offense may be committed on the stage, through broadcasting, by the actor's own voice, or by an instrument.

The second paragraph of article 284 P.C. punishes "calling an incidence of debauchery to the attention of the public" and "publication of correspondence and announcements relating to debauchery no matter what wording is therein used." The second punishable hypothesis has already been discussed. We have seen that, for instance, the mere publication of addresses of prostitutes materializes the definitional elements of the offense discussed. The first punishable hypothesis is couched in somewhat cryptic language of uncertain compass. If a prostitute solicits customers in the street such conduct often implies directing peoples' attention to "debauchery." Even so, French courts have held that this type of activity does not fall within the second paragraph of article 284 P.C.

The mental element in offenses under articles 283 and 284 of the Penal Code

French law makes an important distinction between obscenity offenses committed through the press and all other modes of perpetration.

For offenses committed by way of the press, special rules of constructive culpability were established (art. 285 P.C.). Publishers, editors, and sometimes printers, distributors (including newsboys), and even poster-stickers may be prosecuted for the mere fact that an immoral publication has been disseminated. They need not know about the immoral nature of the matter involved. Publishers and editors may be prosecuted as principals even when the author of the publication is known. Note that these special rules do not apply to the broadcasting media, although the underlying policy reasons equally could be applicable to these media.

As regards offenses other than those committed through the press, general rules of culpability apply. The latter require, inter alia, awareness on the part of the actor of the immoral nature of the material involved. This is why the mistaken belief in the artistic value of a sexually oriented matter was held by some French courts as a valid defense. Although the Code makes an express reference to *scienter* only in talking about "export import and transportation of material contrary to good morals," this is universally interpreted only as an emphasis stressing that the burden of proof with respect to knowledge in this particular context rests with the prosecution. In the context of other punishable activities under the Code the burden of proof sometimes shifts to the defense. Thus, if obscene material is found with a book dealer, he shall have to prove that the material is for his private use rather than for commercial distribution.

Special procedural rules in obscenity prosecutions under the Code

Special rules of procedure apply to prosecutions involving allegedly *immoral books,* on condition that they carry the name of their author and an indication of the publisher, and that the required number of copies thereof has been turned in with the appropriate public authority.

Prior to instituting a prosecution the public prosecutor must secure an opinion from a special commission on whether the book at issue is contrary to good morals. The commission's opinion is not binding on the law enforcement agencies or the courts, and instances are known in which convictions have been obtained on an obscenity charge notwithstanding the commission's opinion that a book was acceptable. But all procedural actions taken prior to securing the opinion are null and void. The commission[11] is moved by the Ministry of Justice, which in turn acts at the instance of the public prosecutor's office. Each new edition of a book in regard to which prosecution is contemplated calls for a new advisory opinion on the part of the commission. In this manner fluctuations in literary taste are taken into consideration.[12]

French police, compared with their American counterpart, have wide powers to search and seize evidence and other important matter even without judicial warrant. This is particularly so in cases of the so-called flagrant offenses.[13] But even here books are given a "preferential treatment." They can be seized only after the opinion of the commission on the book's

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[11] The latest provision concerning the composition of the commission is of September 15, 1958. It is presided over by a justice of the French supreme court. Members are: a representative of the Ministry of Education, a university professor, a representative of the writers' association, the National Union of family associations, and a person representing a variety of associations for the protection of "public morality." The commission proved to be quite tolerant of daring sexual literature in luxurious and limited editions.

[12] The commission may find a book unobjectionable for adults but damaging to immature readers. In such cases it is authorized to take the matter up with another commission in charge of publications designed for the young. This commission is discussed in the section on "Measures under the statute on "youth publications."

[13] The meaning of these offenses is explained in art. 53 and 290 of the French Code of Criminal Procedure.

character has been obtained. As an exception to this general rule, books can be freely seized by the police if discovered at the border. Also, in case of flagrant offenses the police may seize two copies of the book they consider "outrageous to good morals."

It may be interesting to note that the outlined special rules of procedure do not apply to books containing illustrations, even if only the illustrations appear obscene. Books containing erotic illustrations may be seized without judicial warrant pursuant to the rather flexible general procedural provisions, except where the illustrations are materially separable from the text (as with erotic illustrations on the jacket of a book).

Punishments for offenses under articles 283 and 284 of the Penal Code

Conviction under both articles of the Penal Code carries a maximum prison term of two years and a fine not to exceed 18,000 francs. These penalties may be doubled if the offenses have been committed with respect to a person under 21 years of age, or by a person previously convicted on an obscenity charge (art. 287 P.C.). In addition, the Code provides for the possibility of imposing various disqualifications and disabilities as collateral consequences of conviction, affecting persons engaged in the publishing industry or in journalism (last par., art. 283, par. three, art. 287 P.C.).

The petty misdemeanor of exhibiting indecent posters

In 1955 a statute has been passed with the aim of suppressing overly erotic posters and billboards advertising movies. Three years later the statute was incorporated in the Penal Code as article R. 38-9 and classified as a petty misdemeanor. Under this penal statute the public exhibition of posters and "representations"[14] contrary to public decency is punishable by a fine and—in the court's discretion—also with imprisonment not to exceed eight days. The French supreme court has held that a prosecution can be pressed under this article only if the material is not "sufficiently obscene" to fall under article 283 of the Penal Code. Thus there cannot be plurality of convictions or even prosecutions (Judgment of April 24, 1958, in Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle, 346, 1958).

THE OFFENSE UNDER THE STATUTE CONCERNING PUBLICATIONS DESIGNED FOR JUVENILES

By virtue of a special juvenile statute of July 16, 1949, all publications, periodical or otherwise, that are designed primarily for youth must not carry items "favorably presenting banditism, lying, theft, laziness, hatred, *debauchery* (emphasis added), acts constituting crime, or acts capable of

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[14] The literal translation would read "images." It has, however, been avoided as the French courts hold that "images" include sculptures and some other embodiments of the obscene.

demoralizing the young or inspiring or furthering racial bias." Import of such publications from abroad is prohibited.

What does "presenting debauchery in a favorable light" mean? It means depicting objectionable sexual conduct in such a way as to make it attractive to the young. The total impact of the item must be ascertained. Therefore, passages critical of sexual practices may be disregarded if they fail to affect the totality of the impression, or if they are inserted for the purposes of outwardly satisfying the statutory ban on "unfavorable presentation." Insertion of such items into a youth publication is punishable by a fine of up to 15,000 francs and by imprisonment not to exceed one year. Also, the conviction must be published in newspapers and certain official bulletins. The publication containing such an unacceptable item must be confiscated and destroyed. The court may also impose a ban on the publication of a periodical for a maximum period of two years (art. 7, 13).

The question arises as to the relationship between the offense under the juvenile statute and offenses of outrage to good morals incorporated into the Penal Code. If an item in a youth publication is such as to constitute an "outrage to good morals," the offense under the juvenile statute merges into one of those under the Code, and there is accordingly no crime plurality. A prosecution under the juvenile statute can be brought only if an item appearing in a youth publication, although sexually oriented, is not sufficiently offensive to constitute outrage to good morals. It follows that stricter standards apply in considering the limits of the erotically acceptable when publications designed for youth are involved.[15]

The juvenile statute of July 16, 1949, also contains numerous provisions concerning the organizational structure of firms publishing for young readers. These firms are duty bound to supply specific data to the authorities. Their staff must have special credentials. Violations of these provisions are met with sanctions.

ADMINISTRATIVE CONTROLS OVER PUBLICATIONS

Measures under the statute on youth publications of July 16, 1949

The statute on youth publications contains a number of provisions regarding all publications, rather than solely those designed for the young. Some of these provisions should concern us here.

If a publication appears to the Minister of the Interior to be such as to present a danger for the juveniles by reason of its "licentious or pornographic character or the place given to crime or violence," he is authorized to impose three types of bans. He may ban the *distribution* to persons under the age of 18 of such publication; he may impose a ban on the public *display* of such publication; and he can ban the *advertisement* thereof through "prospectuses, newspapers, posters, business mail or broadcasting." Under the 1967 amendments to the statute the Minister of

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[15] Compare Lambert, *Traité de droit pénal special,* 647 (1968).

the Interior was given the option of imposing a ban only on the distribution to juveniles, or a ban only on distribution and display, rather than all three types of bans cumulatively. Violations of these administrative injunctions are threatened with harsh penalties and some collateral measures which could be financially disastrous to publishers. (For example, a duty may be imposed on the publishers to deposit a number of copies of each publication with the Ministry of Justice and suspend commercial distribution thereof until three months from the day of deposition.)

These provisions, although inspired by a concern to protect the young from exposure to hard-core pornography, were subject to a great deal of criticism in France. Many argued that the cumulative effect of the administrative bans is to make a publication unavailable even to adults. In actual practice, however, most administrative bans relate to distribution to juveniles and leave open the possibility of some kind of publicity for the publication among adults. The constitutionality of the provisions under discussion has never been tested.[16]

The statute on youth publications provided for a commission to be set up with the Ministry of Justice "to examine and supervise" publications designed for juveniles. Such a commission was set up in 1950. It meets every three months to scrutinize periodicals and all other youth publications and to make recommendations to the authorities. As a rule, the Ministry of the Interior imposes bans concerning these publications only after receiving a demand to this effect from the commission. Also, a license to import youth publications from abroad may be issued only after clearance from the commission has been obtained.[17]

Measures under the Statute of July 29, 1881

By virtue of the Statute of July 29, 1881, on the Press, the Minister of the Interior may impose a ban on "the circulation, distribution and sale" in France of all foreign printed matter. One of the statutory grounds for the imposition of the ban is that the printed matter is likely to "infringe on good morals." There is no commission to assist the Minister in carrying out his responsibilities. He has, however, exercised his vast powers with great restraint, and there is only one instance in which a *well-known* book has been banned in France pursuant to the statutory authority accorded by the Press Law. An administrative decision of the Ministry of the Interior, dated December 10, 1950, banned Henry Miller's novel *Sexus* from distribution in France.

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[16] The legal possibility of testing the constitutionality of statutes in France is of recent vintage. It was only in 1959 that the Constitutional Council was established by constitutional amendments. But a typical French lawyer has yet to develop the habit of thinking of legal problems in constitutional terms. See Waline in 12 *Am. J. Comp. L.* 483 (1963).

[17] The year 1950 was that of "house cleaning" by the commission. Almost one third of all youth publications were inserted in a list of "youth endangering" publications. Later reports have stressed satisfaction by the improvement in the moral tone of the juvenile press.

Judicial control over administrative measures

There is no possibility of recourse to the courts in the case of injunctions under the 1881 Press Statute. The imposition of bans under the juvenile statute of 1949 may, however, be challenged in the highest French administrative court (Conseil d'Etat).

EROTIC MATERIAL IN MOTION PICTURES, IN BROADCASTING, AND ON THE STAGE

Censorship of motion pictures

The distribution of domestic and foreign movies in France and the export of French movies abroad are subject to a priori censorship.[18] Since the abolition of the Ministry of Information, movie censorship has been exercised by the Minister of Cultural Affairs, assisted by a commission (Commission de contrôle des films cinematographiques). The commission consists of 24 people, eight of whom are chosen from various government departments, eight from among persons in the movie industry, and the remaining eight from among educationalists, public figures, and the clergy. At the moment, the commission is presided over by a member of the Council of State (Conseil d'Etat).

All motion pictures and their advertising material must be submitted to the commission in advance of distribution and a license (*visa*) obtained for exhibition. The law does not spell out the grounds on which a license can be denied outright or granted for showing the movie to specific audiences only. It is, however, generally accepted in France that the most important ground for justifying "control over movies" is the safeguard of moral standards and the protection of juveniles. Thus, the work of the commission should concern us here.

In view of the magnitude of its task the commission meets in Paris twice a week to preview movies screened beforehand by a subcommission. After deliberation the commission may recommend to the Minister of Cultural Affairs that a license be issued for the exhibition of the movie or that the same be denied. It can, further, recommend that the movie be released only for audiences over 13 years of age, or only for those over 18 years of age. Finally, it may suggest that cuts be made in the film and give the producers sufficient time to comply with the suggestion. The opinion of the commission is not binding on the Minister; he may license a movie considered objectionable by the commission, and vice versa.[19] The Minister's

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[18] The odious word "censorship" is not used. One speaks euphemistically of "contrôle." Space limitations preclude treatment of motion pictures censorship designed for newsreels, educational films, and movies shown outside the commerical network of movie theaters. For details see: Lyon-Caen-Lavigne-Desbois, *Traité théorique et pratique de droit du cinéma,* 41-43 (1957). The newest comprehensive regulation on censorship can be found in the Decree of January 18, 1961 (no. 61, 62). Subsequent changes affect solely the composition of the movie censorship commission.

[19] See the Decree quoted in the preceding note, art. 5. The commission has sometimes proved to be less permissive than the Minister. For details see P. Alexandre, *La* censure, *Le Figaro Littéraire,* March 2, 1970. A number of well-known American movies were not granted exhibition licenses in France.

decision to refuse a license may, within narrow limits, be reviewed by administrative courts.

Showing a movie without a license or to the legally excluded audience is subject to fines, seizure of movie prints, and, possibly, revocation of the license granted for limited audiences only.

A point of possible interest is that even movies in preparation are subject to administrative controls. Producers are bound by law to submit the outline of the scenario to the commission to obtain a preliminary opinion (art. 3, Decree of January 18, 1961). If negative, the preliminary opinion is not binding on the producer and he may proceed with the production, but few would dare to invest their money in a picture only to have their product denied a license.

The French supreme court has held that a movie (or its advertising material) may be declared contrary to good morals in terms of the Penal Code, although a license has been obtained for exhibition of the movie from the administration.[20] The decisions of the latter, said the court, are not binding on the judiciary.

Mayors heading the French local administration have a residual power to ban performances of a motion picture they consider, inter alia, of an "immoral nature."[21]

Where a movie has been barred from immature audiences, cinemas must put up notices to this effect and take measures towards preventing minors from entering the movie theater. Managers and attendants are even authorized to require some identification in doubtful cases. Violations of these provisions are met with sanctions.[22]

Radio and television

Radio and television networks in France are run by the Bureau of French Radio and Television (O.R.T.F.). The bureau, as a public corporation, is under ultimate governmental control. Even so, radio and television programs are subject to advance screening by two commissions, one for sound broadcasts and the other for television.[23] Whenever feasible, broadcasting programs must be submitted to these commissions, which must be satisfied that nothing is included in the programs that offends, inter alia, sexual morality. The views expressed by the commissions are not binding on the O.R.T.F. direction. However, programs to which one of the commissions is opposed may go on the air only upon express authorization of the "general director" of the O.R.T.F.

When a television program is considered unsuitable for susceptible audiences a warning in the form of a white square must be on the screen for the duration of the program.

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[20] Decision of June 1, 1965, in Lambert, op.cit. (footnote 15), p. 659.

[21] Lambert, op.cit., p. 638.

[22] See Decree no. 61-63 of January 18, 1961.

[23] For details on the composition of the commission see Debbasch, *Traité du droit de la readiodiffusion,* 293-298 (1967).

As with motion pictures, the broadcasting of erotic matter may be subject to prosecution under the Penal Code, notwithstanding a clearance obtained from the censorship commission.

Theatrical performances

Censorship of theatrical production is technically still on the French law books. Reintroduced in 1874, it has never been explicitly abolished. Yet, in 1906 the French National Assembly refused to make appropriations for censors and has never allocated any funds to them since. As a result censorship of the stage has "died out" in France as a practical matter. Subsequent repression is, of course, possible. If, for instance, a play includes offensive erotic scenes, prosecution for an obscenity offense under the Penal Code may be instituted. Another possibility of legal control is for the police courts to declare a performance "a nuisance to public order."[24]

CONFISCATION AND DESTRUCTION OF OBSCENE MATERIAL

After conviction on an obscenity charge the court must decree confiscation and destruction of "objects whereby the offense has been committed" (art. 290 P.C.). But if the artistic value of such objects justifies their preservation, the court may order that these be handed over to a police museum or a similar institution for custody. The reader will note that the Penal Code clearly envisages the possibility that material of artistic value be obscene. This is usually a bone of contention in European jurisdictions.

In contrast to German law, there is in France conflicting authority on whether the court may confiscate obscene material in case of an acquittal. There are no provisions on in rem proceedings, that is, proceedings against an allegedly obscene matter wholly independent of a criminal prosecution.

Allegedly obscene material may be seized at the border by the police. They are notified of possibly obscene matter by the customs officials. Whether postal shipments may be stopped at the border by postal authorities on suspicion of obscenity is not altogether clear under French law.[25]

APPENDIX

THE FRENCH PENAL CODE

Section VI

On outrage to good morals perpetrated particularly by way of the press or in a book

Article 283

Imprisonment from one month to two years and a fine from 360 to 18,000 francs shall be inflicted upon whoever:

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[24] The staging of *Hair* in Paris has stirred much controversy. Pressure groups have pledged that at least *Oh! Calcutta* shall not pass (*Le Monde* of January 28, 1970, p. 13). Actually, bans on theatrical performances are unusually rare even in extreme examples. For illustrations, see *Le Figaro Littéraire* of March 2, 1970, p. 9.

[25] See *Dalloz,* p. 7.

Produces and detains with the purpose of selling, distributing, hiring out, posting or exhibiting;

Knowingly imports or causes import, exports or causes export, conveys or causes to convey for the same purposes;

Posts, exhibits or exposes to the public view;

Sells, lends for a consideration, puts up for sale or for lending against a consideration, even if not publicly;

Offers to transfer title, even for free and not publicly, in any form, directly or in a roundabout way;

Distributes or hands over for distribution in any way

Any printed matter, writing, drawing, poster, engraving, painting, photograph, film or negative, type or sound recording, emblem, or any other object or representation contrary to good morals.

The convicted person may also be subject to a prohibition to exercise directly or indirectly, nominally or by actual control for a period not exceeding six months, all managing functions in printing and publishing firms, as well as firms engaged in distribution and collating of newspapers and periodicals. Whoever shall contravene such prohibition shall be punishable by penalties provided by the present article.

Article 284

The same punishment shall be inflicted upon:

Whoever shall cause the public to hear songs, shouting or speeches contrary to good morals;

Whoever shall call the attention of the public to an incidence of debauchery, or shall publish an announcement or correspondence of such kind, no matter what terms are used therein.

Hungary and the Soviet Union

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As we turn to the socialist countries of Eastern Europe other than Yugoslavia, the problem of controlling objectionable sexual expression appears in a quite different sociopolitical and cultural setting. Tight and efficient social control is exercised in these countries through a variety of extra-legal channels and techniques. Foremost among these are either articulated or intuitively felt "directives" (official views) on most important questions, including standards of the permissible in sexual expression. Observance of these standards is secured through various social pressures which need not detain us here.

Standards concerning the permissible in sexual expression are rather strict and prohibitive when compared to those which prevail in most Western democracies. Soviet visitors to the West are shocked by pictures in "girlie" magazines which to Westerners are hardly objectionable anymore. A translation of Henry Miller's novels or staging a production like *Oh, Calcutta* is unthinkable in these countries. As a result of these differences, identical legal provisions addressed to the "obscene" may be applied with regard to widely different objects. Nor is this all.

In view of sociopolitical factors mentioned above, the relative importance of law as a means of social control seems to be greatly diminished in Eastern European countries, and there is a relative scarcity of legal provisions concerning control of sexual expression.[1] Also, while it would be unrealistic

[1] It is also very hard to obtain reliable information on various pieces of legislation and administrative regulations at least potentially applicable in the area.

to assume that there are in the East no individuals who violate standards of permissible sexual expression, obscenity and pornography seem hardly to be social problems.[2]

With these considerations in mind let us turn to the discussion of a few provisions on the control of erotic expression that were available to the present reporter.

CRIMINAL OFFENSES IN THE R.S.F.S.R. AND HUNGARIAN CRIMINAL CODES

The Soviet Union

As is known, each constituent republic of the Union has its own Criminal Code. The Code of the Russian Republic is, however, representative and the reader may safely draw inferences therefrom for the criminal legislation on obscenity in other republics. Besides, the Soviet Union has acceded to the International Convention for the supression of the circulation of and traffic in obscene publications,[3] and the wording of all obscenity statutes is partially inspired by this accord.

Article 228 of the R.S.F.S.R. Criminal Code reads:

> Producing, circulating, or advertising pornographic writings, printed publications, pictures, or any other objects of a pornographic character, or trading in them or keeping them for purposes of sale or dissemination shall be punished by deprivation of liberty for a term not exceeding 3 years or by a fine not exceeding 100 rubles with confiscation of pornographic objects and the means of producing them.

Not a single judicial decision has been found attempting to further specify the meaning of the term "pornographic." In legal writing it is usually stated that an object is pornographic if "it contains indecent descriptions or representations of circumstances connected with sexual relationships, whose aim or possible result is the stirring-up of sexual passion."[4]

Note that the mere making of pornographic objects, even in the absence of the specific intent to disseminate the product, falls within the offense as described by the Code. *Advertising* means spreading information about a pornographic object, and no element of laudatory comment seems necessary.[5]

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[2] Criminal prosecution for obscenity seems to be limited to the peddling of underground pornographic pictures and manuscripts. An example of such underground publication are *The erotic adventures of Supergirl Oktyabrina,* smuggled to the West. See: *International Herald Tribune,* March 14, 1970, p. 6. The incidence of such publications is impossible to judge. There are no criminal statistics available for the Soviet Union. In Hungary the number of convictions on obscenity charges is so negligible that it does not amount to one-thousandth of all crimes committed and is therefore not included in the official crime statistics.

[3] Concluded in Geneva on September 12, 1923. See 46 U.N.T.S., 202 (1950).

[4] Comp. Nikiforov, *Nauchno-prakticheskyi kommentaryi ugolovnogo kodeksa* (Theoretical-practical commentary to the Criminal Code), 447 (1963).

[5] Idem, 447.

The actor must be aware of the "socially dangerous" character of his activity (article 8 of the Penal Code), which means that he must also be aware of the offensive character of the object involved in his activity.

In addition to the punishment specified in article 228, supplementary punishments may be imposed if conditions are fulfilled therefor under the provisions of the general part of the Code. These may consist of social censure, dismissal from office, or forfeiture of the right to engage in certain activity or occupy certain offices (art. 33, 31, 29 P.C.).

Hungary

Article 288, paragraph 1 of the Hungarian Criminal Code of 1961 reads:[6]

> Whoever for a consideration puts into circulation, regularly lends or publicly exhibits an obscene object, furthers or attempts to further such circulation, produces or acquires such object for purposes of putting it into circulation or publicly exhibiting the same, shall be punished by deprivation of liberty for a term not to exceed one year.

According to the standard interpretative formula used in court decisions, material shall be deemed obscene if it "seriously offends the general moral sentiment by reason of its orientation to the sexual." In regard to obscene drawings and photographs the supreme court has declared that in order to be adjudged obscene, representations of nudity must be accompanied by the purpose to sexually arouse, and that such purpose must be "outwardly manifested" in "unabashed" portrayal of sexual organs or sexual activity.[7] No discussion on the relationship of art or other redeeming values to obscenity has been found.

As elsewhere in Europe, offensiveness to morality is judged with reference to an average person, and abnormal sensitivities are disregarded. If, however, erotic material is circulated solely among specially susceptible audiences, stricter standards apply. Dissemination of obscene objects among juveniles, if done by "a person charged with the education, care or custody of minors" constitutes a more serious offense, defined in article 274 of the Penal Code, and is punishable by a maximum penalty of 3 years imprisonment.

In contrast to Russian law mere "production" of obscene matter, that is, without the specific intent to disseminate it, does not fall under the offense described in article 288 of the Penal Code. This conforms with the Geneva Convention of 1923. "Putting into circulation" of an obscene object has been interpreted as meaning "to cause several persons to come into possession of an obscene object." The actor's mens rea must encompass awareness of the obscene character of an object (art. 16, 24 P.C.).

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[6] Hungary has also acceded to the Geneva Convention of 1923.

[7] As the reader will note this test of obscenity is quite narrow. But in regard to pictures in mass media much stricter standards apply as indicated in the preface. For example, nudity without any additional aspects—although not obscene—would be unacceptable in newspapers or magazines. Movies seem to be somewhat less inhibited.

CONTROL OVER EROTIC MATERIAL IN THE MASS MEDIA

Motion pictures

In the Soviet Union the mechanism whereby domestic movie production is controlled and decisions are reached on the purchase of foreign films has remained unknown to the present reporter. Some responsibilities in the field are discharged by the State Committee for Cinematography and some by the Ministry of People's Culture.[8] It may well be that there are no published provisions on the subject.

The only available piece of information on Hungary is that a special committee has been set up by the government to recommend purchase of foreign films and preview domestic production.

Other media

There are in Hungary no legal provisions on censorship of the press or broadcasting. As long as the sociopolitical structure sketched in the preface prevails, extra-legal control will probably suffice and there will be very little need for legal provisions in the area. Problems will probably not even be conceived as *legal* problems. Of course, the possibility of ex post facto criminal prosecution for an item disseminated through mass media remains. The language of article 288 P.C. is broad enough to encompass such activity ("putting into circulation an obscene *object*").

In regard to the Soviet Union almost no reliable information was available. No doubt internal "self-censorship" of the editors is most important. There exist "State committees" on the press and on radio and television, but their powers to exert a sort of control or guidance are unknown. A few years ago it became known that a decree has established a sort of censorship for publications (Glavlit). A decree of December 25, 1958, has threatened serious punishments for attempts to bypass control over publications. Even some cases of prosecution under the statute were reported in the Soviet press but did not involve erotic publications.[9]

EROTIC MATERIAL IN THE MAILS

Hungarian postal regulations provide that letters or other shipments containing obscene material cannot be forwarded. Nor can post cards or envelopes be forwarded with obscene illustrations, stamps, or inscriptions. What criteria of the obscene are used by postal authorities remains unknown, but it is doubtful that, for example, a post card picturing a nude would be forwarded, although such picture falls short of the obscene as interpreted for the purposes of applying the criminal law. The Post Office is empowered to refuse to accept shipments of obscene nature. If, in handling the mail,

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[8] The same Ministry supervises theatrical productions.

[9] See *Pravda,* July 23, 1965, p. 4; *Izvestia,* September 6, 1959.

suspicion arises that obscene material is shipped through the mail, letters or other shipments may be opened before a group of witnesses. In addition, Hungarian law provides the standard continental measure of "mail searches" in the course of a criminal prosecution.

No pertinent Soviet provisions were available except the general provision authorizing the seizure of postal and telegraphic correspondence in connection with a criminal prosecution. The seizure and search of mail need not, in the Soviet system, be ordered by a court. The public prosecutor's (procurator's) decree suffices.[10]

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[10] See article 174, R.S.F.S.R. Code of Criminal Procedure.

Israel

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The foundations of the Israel law on obscenity and pornography were laid by the former British Mandatory Government of Palestine. That law was at least as severe as the contemporary law of England, and it has hardly changed since. Considerations of freedom of press and of expression did not bind the Mandatory legislator. Only since the foundation of the State of Israel have they gained weight—not yet in legislation on this subject, but in the application of the law by administrative agencies and largely in its interpretation by the courts. But since prosecutions and other restrictive measures are sporadic no rich case law has developed, and some of the questions discussed elsewhere are still open in Israel.

No textbook exists on any of the topics discussed in this paper. The only commentary, Gorney and Kidron's *Criminal Law for Practical Use* (4th ed. 1969), is no more than a digest of cases entirely in Hebrew.

LEX LATA

Criminal and quasi-criminal provisions

The Criminal Code Ordinance 1936 (CCO), drawn from English common law and statute, contains provisions on indecency and obscenity. According to section 4 the ordinance is to be "interpreted in accordance with the principles of legal interpretation obtaining in England." This provision is still in force in Israel, but local courts now allow themselves a certain degree of freedom from English precedents.

1. *Indecency.* The code and the courts distinguish between indecent acts, suggestions, and so forth committed upon or addressed to a certain person

(sections 157 to 159, 167 to 168, CCO) and acts of indecency in public (sections 160 and 193(a)); only the latter are dealt with in this paper. These offenses are not considered as sex crimes, and the rule requiring corroborative evidence does not therefore apply.[1] Section 193(a), derived from the English Vagrancy Acts, was originally restricted to prostitutes but now penalizes "any person who behaves in a disorderly or indecent manner in any public place." Its scope was laid down in *Weiss and Spector* v. *State of Israel:*[2] In a "silent demonstration" before the American Embassy in Tel-Aviv, slogans were carried, most of which made little impression on the public. One, however, evoked excitement and even gave rise to demands from onlookers for police intervention; it read: "Americans, go fuck yourself with your 'H' Bombs!" The display of such an inscription was not in itself "an indecent act or gesture" as required by section 160, for only its content was indecent. Nor did the act come within the prohibition of obscene publications under section 179, for the "written matter" was not sold or held for sale, hire, or distribution as required by paragraph (a), and "exposure to view" of written matter, as opposed to pictures and so forth, is not forbidden in par. (b). In the view of the supreme court, section 193(a) closes this gap. Moreover, while section 179 (obscenity) is, in its present wording, intended to prevent corruption of morals,[3] section 193 (similar to section 160) protects the public from injury to feelings of decency. On the other hand, obscene matter can be published from afar, even from abroad or through an agent, while indecency offenses require a personal act and presence of the offender on the scene.

2. *Obscenity.* The word "obscene" appears in local legislation only in connection with publications or similar objects. "Pornography" is not a legal term but is used here as synonymous with "obscene" in its legal meaning.

(*a*) Israel case law on the subject opens with a judgment of the district court Tel-Aviv, *Limman* v. *Attorney General,*[4] an appeal in respect of two allegedly scientific publications. One of them, describing sex life in Japan, was recognized as such although it contained numerous erotic pictures calculated to arouse sexual excitement; the other was judged quite worthless. The court based its opinion on the old English case *R.* v. *Hicklin*[5] but also made some innovations. In the English tradition it discounted, in determining the character of the publications, the author's intent; but it stressed the relative nature of the notion of obscenity. And deviating from tradition the court accepted expert evidence on both the meaning of obscenity and the character of the two books.

(*b*) In another case, *Attorney General* v. *Bar Kochba,*[6] the district court of Tel Aviv unanimously accepted the appeal against the acquittal of the

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[1] *Od* v. *Attorney General* (1963), 17 I. P-D.42.
[2] (1963), 17 IV P-D.2310.
[3] See par. 2(f) below, and on criticism and reform proposals pars. 13-14.
[4] Cr. A. 123/50, not published, but mentioned in par. 6 of the report of the Witkon Committee on Pornographic Publications.
[5] (1868) L.R. 3 Q.B. 360.
[6] (1962) 28P(M)17.

accused in the magistrate's court, taking great pains to draw the line between material with some sexual content and real pornography. In addition to *Hicklin's* case,[5] it quoted modern English and also American precedents such as *R.* v. *Martin Secker & Warburg,*[7] *R.* v. *Shaw,*[8] *U.S.* v. *Ulysses,*[9] *Roth* v. *U.S.,*[10] and even a passage from D. H. Lawrence's *Pornography and Obscenity.* The court expressly accepted the test of *Roth's* case:[10]

> . . . whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.

(*c*) A pair of cases stresses the element of publicity in section 179 CCO. In both, a man showed obscene pictures to a girl. In *Dashti* v. *Attorney General*[11] the act took place in a public park, and the accused was acquitted because he was alone with the complainant. In *Shamai* v. *Attorney General*[12] it happened in an autobus, and since in the crowded conditions there prevailing the possibility of another person looking on could not be excluded, the accused was convicted.

(*d*) The Witkon Committee on Pornography (1968 to 1969) mentions two cases reported nowhere else. Both publications constituted obscenity pure and simple, and the courts refused to admit expert evidence on the artistic or literary value of the publications, holding that authority to accept such evidence was in England given only by recent statute law which does not apply in Israel. One of these cases concerned a weekly magazine, *Bull,*[13] which frequently publishes pictures of nude women; the other involved a book, *On the Way,* by Dan Omer.[14] In the latter case the court assumed that the book would not influence grown-up persons except by disgusting them but convicted the author in view of the misleading influence the book might have on juveniles (see also par. 11 below); there was no appeal. In both cases fines and suspended prison terms were imposed. *Bull* continues to publish sensational pictures of nudes.

(*e*) These cases ought not to be taken as an indication that convictions for publication of pornography are frequent in Israel. On the contrary, considering the weekly exposure of magazines, both local and foreign, with sensational and often disgusting pictures on their cover page, prosecutions are haphazard and without noticeable effect. While the better bookshops and newsstands show some restraint in displaying periodicals and so forth, others not only sell pornographic matter but freely expose it to view. It seems that some of them are, at least temporarily, susceptible to warnings either from the police or from the more conservative part of the public, but others are not. The Witkon Committee, in par. 46 of its report, endorses the statement

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[7] (1951) 2 All. E.R.685.
[8] (1961) 1 All. E.R.331.
[9] 72 F(2d) 705 (1934).
[10] 354 U.S. 476 (1957).
[11] (1962) 34 P(M) 220.
[12] (1963) 17 II. P-D 841.
[13] Mag. Ct. Tel-Aviv, Crim. File 3584/67.
[14] Mag. Ct. Jerusalem, Crim. File 17/67.

of its police witnesses that section 179 CCO has to a large extent become a dead letter.

The committee found the following reasons for the hesitation of the authorities to institute criminal proceedings:

(*1*) In Israel pornography is not one of the most troublesome problems; it does not lead to criminal activity (par. 43).

(*2*) There is no exact definition of obscenity, and the view of judges[15] is unpredictable; generally their attitude is rather liberal and at least partly shared by the police. On the other hand prosecution authorities are wary of taking confiscatory measures which later may be judged unfounded and involve the State or its servants in damage suits (pars. 44, 54).

(*3*) Israel law and practice offer too many opportunities of delay and obstruction which rob proceedings against weekly pornographic magazines of most of their preventive effect[16] (pars. 45, 99-100, 101 (7)).

(*f*) Three of the four paragraphs of section 179 CCO refer to "objects tending to corrupt morals." Till now this result was taken for granted—the formula does not lay down a condition of the criminal character of an obscene publication but rather describes what the legislator considered its natural, regular effect. Today this assumption is questioned, not least through the investigations of the Witkon Committee (pars. 61-80—see hereafter pars. 13-14). Thus in future trials under the present law the prosecution may be put to the difficult task of proving that the publication in question tends to corrupt morals. That may be the end of the application of section 179. (On reform proposals, see par. 15 below.)

3. *The Press Ordinance of 1933* (ch. 116 of the then "Laws of Palestine") provided in section 23 in the case of publication of "any seditious or other libel" additional sanctions such as closing of newspapers and printing presses and limitation of the activity of owners and editors. Although the term "libel" appeared in other local enactments only in connection with defamation, it was clear that section 23 comprised also what in England is known as "obscene libel." The words "or other" were repealed, however, by the Prohibition of Defamation Law of 1965 so that section 23 is now applicable only to seditious libels. (Its application was considered in one case but rejected.)

4. *The Youth (Care and Supervision) Law of 1960* was amended in 1968 by the insertion of, inter alia, a provision imposing imprisonment of one year on the publication of a picture in the nude of a person between nine and 18 years (see appendix). This is not an obscenity law in the traditional sense; it is designed to protect not the public but the minor, and if the picture does

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[15] There is no jury in Israel. Misdemeanors, which include obscene publications, are tried in the magistrate's court, normally before a single judge.

[16] The trial of one weekly issue of such a magazine took more than one year.

not allow his or her identification, its pornographic nature will not bring it within the ambit of this law.

5. *The Criminal Procedure (Arrest and Searches) Ordinance of 1924* (ch. 33) was amended in 1964 by addition of a chapter on the preliminary seizure of illicit articles (of any nature) by the police. In view of the newness of the amendment there is not yet any case law.

Section 31 of the Ordinance (which is no innovation) permits a judge to "impound, deface or destroy" material even without indictment and trial of a definite accused.

Administrative (preventive) provisions and arrangements

6. *The Customs Ordinance of 1929* prohibits the importation of indecent or obscene articles. The sanction is forfeiture, fine, and imprisonment.

7. *The Post Office Ordinance of 1930* forbids the use of postal services for the transmission of indecent or obscene matter. Transmission may be refused, postal packets may be detained, opened, or returned (sections 13-14). Section 87 provides in case of contravention against, inter alia, the prohibition for a fine.

8. *The Cinematographic Films Ordinance of 1927* (chapter 16 of the Laws of Palestine) set up a censorship board without providing it with instructions as to how to use its power of authorizing or interdicting the exhibition of films. In fact the board examines films not only from the aspect of pornography but also from that of violence, injury to religious feelings or to international relations, and other unwelcome features. During the year 1967 to 1968, 15 films out of a total of 450 were banned, of them 12 for cruelty, violence, or terror and only three for eroticism. Cuts were made in five or six films, and 150 were restricted to adults.[17]

There is no appeal board, but the board may reconsider its decision. Otherwise an applicant may seek an *order nisi* in the High Court of Justice, which will examine if the board transgressed its power or was led by considerations foreign to the matter—in view of the lack of legally defined directives a difficult problem.

(*a*) *Cohen* v. *Minister of Interior and Film Censorship Board*[18] may be considered as the leading case. The high court laid down the following rule:

> The guideline for the board . . . ought to be: not to permit the exhibition of a film calculated to offend morality or good taste or tending to corrupt morals. For today the film is an instrument of education; the board has to prevent it from educating toward spiritual or cultural values which the public considers as negative.

(*b*) Another much discussed case, *Israel Film Studies* v: *Geri,*[19] concerned

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[17] Report of the Witkon Committee, par. 48.

[18] (1960) 14 I. P-D 283.

[19] (1962) 16 IV. P-D 2407 – to be published in English in vol. 4 of Selected Judgments of the Supreme Court of Israel.

a newsreel which showed the forcible execution of an eviction order. The board banned it because it gave a misleading picture by failing to explain that the squatters and their neighbors were resisting the lawful execution of a judgment; but an additional reason for the prohibition was an episode in which a woman's dress was disarranged during a struggle and more of her thigh was revealed than at the time was considered proper. The high court, by majority, rescinded the order of the board. In respect to the scene mentioned, the court held that in view of the general liberal attitude of the board towards bedroom and similar scenes in play films there was no justification in objecting to a short incident of real life in a documentary film.

9. The Cinematographic Films Ordinance used to be complemented by section 11B of the Public Entertainment Ordinance of 1935, which called for the display of a notice stating whether the films on the program were licensed for universal exhibition or for adults only.[20] When the ordinance was replaced by the provisions of the Business Licensing Law 1968, section 11B was not saved. In fact this makes little difference: the notice continues to be displayed since it attracts the public, and the age restriction even beforehand had not been seriously enforced.

10. *The Public Performances (Censorship) Ordinance of 1927* (ch. 123), enacted together with the Cinematographic Films Ordinance, empowers the same board to authorize the performance of plays and circus entertainments also without any guiding criteria as to the use of this power. Recently a conflict arose because the board wished to view a performance before giving its decision while the producer hesitated to incur the expenses of a rehearsal before being assured of a positive reply; but so far neither this nor other cases under the ordinance are known to have come before the courts.

11. *The Committee for the Examination of Literature* at the Ministry of Education and Culture has no statutory basis or authority, but for the last 6 years it has been operating by virtue of an agreement with the Association of Publishers. Members of the association (which exercises a certain voluntary discipline over publishers) may submit books of doubtful character to the committee for its opinion. Up to April 1968, 28 books in Hebrew and 83 in English were thus submitted, of which 15 and 30 respectively were disqualified.[21] By arrangement with the prosecution authorities no criminal charges on behalf of the State are made in respect of books passed by the committee as suitable for publication. On the other hand, Dan Omer's *On the Way* (note above[14]) had been disqualified by the committee but afterwards published by the author himself; he was convicted under section 179 CCO. The unofficial status of the committee, however, was expressed in *Pahal* v. *Minister of Education and Culture.*[22] The petitioner asked for an *order nisi* against the Minister and the chairman and vice-chairman of the committee, the chief object of which was to show cause why they should

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[20] The age limit in this respect is 16 years.
[21] Report of Witkon Committee, par. 51.
[22] (1965). 19 II. P-D 648.

not refrain from forbidding the publication of the book. Held, petition rejected:

> The decision of the committee complained of is no "decision" at all . . . The committee did not say that it forbids the publication of the book; it stated correctly that its publication is "forbidden by law," that is to say it referred the questioner to the Criminal Code Ordinance of 1936 (section 179) which forbids, without decision by any committee, the publication of obscene materials. If the petitioner or their agents are indeed *bona fide* of the opinion that the committee's advice is wrong, they may publish the book and run the risk of criminal prosecution. This Court is neither obliged nor prepared to give them a "certificate" in advance for the publication of this book. Our task is to intervene in actions of the Executive which have been done not according to law or without competence. Here is no "action" infringing the rights of the citizen, and in such cases we do not interfere.

LEX FERENDA

12. The Committee on Pornographic Publications was appointed in January 1968 by the Minister of Justice,

> to examine the legal provisions on pornographic publications and the manner of their enforcement in practice, and to submit to the Minister any recommendations on that topic or in connection therewith as the Committee may think proper.

The committee comprised, in addition to supreme court justice Dr. Alfred Witkon (chairman), 10 members, among them academic teachers, pedagogues, journalists, lawyers, and writers. Its report, submitted at the end of 1969, contains a summary of the local law with its interpretation and application; a survey of American, English, Canadian, Japanese, and modern Danish law; a note on Jewish religious law; and an abstract from opinions of witnesses such as representatives of authorities concerned with the execution of the law and publishers, journalists, and so forth.

13. One chapter of the report, written by the committee's own expert members on the psychological and sociological aspects of pornography, comes to the conclusion that there is no evidence of "corruption of morals" through obscene publications. Theoretically there might be "risk groups," that is, persons whose sexual impulses could be excited and whose inhibitions (weak in any case) could on occasion break down, though these experts deny any long-term influence of obscene publications. But against the theoretical danger they stress the positive task of pornography: release of impulses (chiefly "deviating" activities); getting used to stimuli without immediate spontaneous action; and diversion of impulses into "permitted" channels (pars. 79-80).

14. The committee in its majority report adopts these views at least insofar as they deny the supposed criminal or depraving influence of pornography." . . . it is not in the nature of man—not even of juveniles, of

unsettled persons or of those with perverse inclinations—to be influenced by reading or viewing such material, to alter their way of life and to go in a direction they would not go in any case ... One may say (as is said in Australian cases and in William's book[23]) that the test (corruption of morals) does not, in fact, define the offense and that the tendency to corrupt is nothing but a quality which the law attributes to obscene material as a matter of course. Yet a test based on unproved and, as it seems, even wrong assumptions, is apt to mislead and had better be discarded." (par. 85)

15. The majority of the committee is of opinion that today the evil of pornography is to be seen in the injury to the feelings of a considerable part of the public. These feelings are to be protected and there is no point in analyzing their psychological origin or their logical foundation (par. 89). Following foreign examples the committee therefore proposes this new definition of obscene matter:

> material which, according to standards accepted at the time and in the society in question, injures the feelings of a considerable sector of the population. (par. 91)

The committee is well aware that such an elastic test may not always satisfy the demands of prosecution authorities, particularly in the diversified society of Israel. But the majority considers it sufficient to comprehend at least the hard-core cases of pornography; at any rate they see no other possible definition. (par. 91)

16. Insofar as *books and pictures* are concerned, the committee proposes to restrict the application of the basic definition given here in par. 15 by two exceptions:

> (*a*) It shall be a defense that the publication has any redeeming social qualities such as scientific, literary, artistic or other merit. In order to insure, however, that such qualities are genuine and not used as a disguise, the Committee inserts a requirement of *bona fide* (pars. 84, 88(2), 92-94, 96).
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> (*b*) Even in respect to obscene matter without redeeming social values the majority of the Committee recommends to exempt from punishment "publication" to an adult who asks for it. (pars. 95, 96).

17. The recommendations mentioned in the preceding paragraph do not refer to *public performances* (theater, cinema, and so forth). Here the committee thinks a more detailed inquiry desirable, hinting that it would consider less liberal rules appropriate (pars. 93, 94, 98).

18. On the question of social value of obscene publications, the committee recommends to admit the advisory opinion of experts but to leave the decision on such values in the hands of the court (pars. 92, 96). There is no similar recommendation in respect of disputes over the meaning of

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[23] G. Williams, *Criminal law, the general part* (2nd ed. 1961), p. 70.

"obscenity" (compare *Limman's* case under 2(*a*) above); obviously the committee views this problem, under the new definition proposed (par. 15 heretofore), as a purely legal one.

19. While the committee appears at least in principle to approve compulsory preliminary censorship of films and plays (par. 98), it recommends in respect to books, periodicals, pictures, and records to give the present voluntary censorship a statutory basis but not to make it compulsory: the change would be that material cleared by the committee on books and so forth would be *legally safe* from prosecution; in the case of objection by that committee the decision of a court would still not be prejudiced (pars. 97, 101(5)).

20. These recommendations would enhance the protection of material with positive or at least redeeming values and possibly reduce discussions on the nature of obscenity, but they are not intended to enlarge the possibilities of conviction. The committee makes it clear that in respect to hard-core pornography it considers the present law, in spite of its defects, quite sufficient and that its present ineffectiveness is due only to the hesitancy of the administration (par. 99). The committee rejects suggestions to charge other than judicial authorities with the suppression of obscenity (par. 100).

21. The following is a translation of the committee's own summary of recommendations (par. 101):

(1) The offense of publishing obscene matter should be defined in such a way that publications of literary, artistic, scientific, or other social merit will not fall within its area.

(2) In order to establish whether or not any material possesses such values, it shall be permitted to offer opinions of experts in evidence, but the decision must lie with the judge.

(3) The public presentation of obscene matter lacking such values as aforesaid and liable, by standards accepted in the society, to offend the feelings of a considerable part of the public, comes under the prohibition.

(4) The presentation and supply of such matter to an adult at his request (without exhibition in public) shall not come under the prohibition.

(5) It is desirable to give the committee of the Ministry of Education and Culture statutory recognition, so that it may authoritatively advise those applying to it on the question whether or not certain material is obscene; if the material is approved it should not be made the subject of prosecution.

(6) We express no opinion on the censorship of films and plays; it is desirable to make this topic the subject of a special study.

(7) It should be ensured that publications which come under the prohibition will be prosecuted with urgency and efficiency.

22. Two minority opinions represent the more extreme views within the committee. One of them, expressed by two members of the orthodoxy, propounds a definition of obscenity the test of which would be "erotic

excitement to the average person." But even this view would exclude from the prohibition "any work of real and genuine literary, artistic or scientific merit." The authors of this opinion deprecate the proposal to relieve acts preparatory to the sale of pornographic matter (printing, reproducing, storing, advertising) from all punishment. They demand that the police should be authorized to impound pornographic matter by virtue of a warrant from a district court judge; to grant such a warrant, the judge ought to be satisfied prima facie that the material is without any scientific, literary, or social value.[24]

23. The other dissent was expressed by a writer. He points to the numerous paraphrases of "pornography," none of which lends itself to an exact definition. While endorsing the finding of the majority that there is no proof of any damage caused by pornography to its "consumers" nor damage caused to the public, except to the sensibilities of certain groups, he doubts the justification of an enactment for the protection of a "not measurable part of the public"; this particularly since, in his view, pornography is not forced upon those objecting to it—at any rate not more than the view of miniskirts in the street or listening to political, social, or religious views to which they may equally object.

24. The author of this dissent also denies the ability of modern science to assist the court in evaluating artistic or literary (as distinguished from scientific) merits of a work. The expert can give either a scientific explanation without evaluation or a personal evaluation without scientific value and without weight for the court.

25. The author also criticizes the committee's recommendation to keep the prohibition of supplying obscene matter in force in respect to juveniles; the factual findings do not justify such a distinction between adults and minors. Instead of special provisions on pornography he suggests a law forbidding the encouragement of crime in general, whether sexual or otherwise.

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[24] It is hard to find any substantial innovation in this proposal. Under the Criminal Procedure (Arrest and Searches) Ordinance a judge of a district or even of a magistrate's court has wide powers to issue search warrants, provided (of course) that there is a *prima facie* connection with an offense. Moreover, the 1964 amendment of the ordinance empowers a policeman to seize — even without first obtaining a warrant — any article if he has reasonable grounds for believing that an offense has "been committed, or is about to be committed, in relation, to such article . . . ."

Italy

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WHAT KIND OF SEXUAL EXPRESSION IS SUBJECT TO PUNISHMENT OR OTHER LEGAL CONTROLS

Unlike most continental penal codes, the Italian Code of 1931 contains a definition of obscenity. In the first paragraph of its article 529 the Code states: "For purposes of applying penal statutes those acts and objects shall be obscene which according to the common sentiment are offensive to shame." The sense of shame may, of course, be offended by other than strictly sexual matters, but Italian courts have consistently refused to accept such an interpretation. In their written opinions they define offensiveness to shame as injury to the "usual feelings of reserve" (*sentimento di riserbo*) people experience in regard to sexual matters.[1] Objectionable sexual expression falling short of the obscene may still be punishable if it constitutes "public indecency," that is, if it goes beyond customary limits of the acceptable in outward conduct or expression.[2] There are other terms Italian law uses to describe objectionable sexual expression, but they will be taken up in specific contexts.

Injury to the sense of shame is to be judged with reference to an average adult citizen, unless a special juvenile statute governs the case.[3] Thus, veiled

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[1] See, for example, the Supreme Court's decision of March 9, 1960, rendered in the *Guiducci* case. *Giustizia Penale* (hereinafter *Giust. pen.*), II, 346 (1963). Voluminous case law can be found in Mazzanti, *L'Osceno e il Diritto Penale* ("Obscenity and the criminal law"), 2d ed., p. 40 (1962). Mazzanti's book shall be cited hereinafter as Mazzanti.

[2] Compare the supreme court's decision of January 20, 1955, in *Giust. pen.*, II, 255, 266 (1955). Piercing discussion of the relationship between public indecency and obscenity can be found in Mazzanti, p. 343, 348, footnote 2.

[3] On the juvenile statutes see discussion of the Migliori Statute in this report. The discussion of decisional authority which follows is based on Mazzanti, pp. 179-194. References to court decisions can be found in footnotes to the text of Mazzanti indicated above.

sexual expressions which require particular education to be understood are not held obscene, no matter how offensive and shocking to the initiated. As in other countries, Italian courts have emphasized that the obscene character of an object cannot be ascertained through isolated passages or details. The object must be evaluated as a whole. Following this logic, mere quantitative ratios of daringly erotic passages to other passages are not decisive for a finding of obscenity, unless the object assumes an obscene nature in its "gestalt."

Italian courts have held that the actor's intent to excite sexually does not suffice for conviction on an obscenity charge if his expression does not hurt the feelings of shame, as experienced by an average person. Evidence of the defendant's past record concerning dissemination of sexually oriented material shall be inadmissible for the purpose of establishing the obscene nature of an erotic object, except as a subsidiary source of information in difficult cases. Whether a matter is obscene or not must be decided by the court alone without the help of experts.[4]

Unlike its continental counterparts the Italian Penal Code offers some rough guidance to the courts for cases in which the defense of artistic[5] or scientific merit of an allegedly obscene object is raised in court. The second paragraph of article 529 of the Penal Code reads: "Works of art and science shall not be considered obscene, unless offered for sale, sold or otherwise procured to a person under eighteen for a motive other than that of study." By virtue of this provision there is an order of analysis for obscenity cases involving defenses of artistic or scientific merit. First, the court must ascertain if an object is obscene. Upon an affirmative finding, the court must turn to the problem of whether the obscene object possesses some "redeeming social merit." (Thus, obscenity and artistic or scientific merit are not mutually exclusive: if a work of art, for instance, cannot be obscene, how can it assume such a character when made available to a minor for purposes other than that of satisfying his scholastic needs?) Even if an object has artistic or scientific value, the defense of redeeming social merit still fails if such an object has been procured for a minor for other than scholastic purposes.

Many Italian cases discuss the problem of how to establish artistic value or scientific merit of an allegedly obscene matter. Perhaps the most notorious is the *Mariotti* case. In 1953, Mariotti, a university professor from Naples, was prosecuted for having published an allegedly obscene book entitled *Neophilia.* The court of original jurisdiction acquitted him, as it found redeeming scientific merit in the book. Upon the prosecutor's appeal from the acquittal—permissible in the Italian procedural system—the higher court changed the judgment to that of conviction, refusing to see any scientific merit in the book "for lack of methodological rigor and proper organization of research." The supreme court confirmed the decision.[6]

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[4] As will appear below, findings of artistic or scientific merit may and must be decided with the help of experts.

[5] "Art" in the Italian usage includes literature. "Science" encompasses the liberal arts and social sciences.

[6] See *Rivista Penale,* p. 500 et seq. (1953). Also *Giust. pen.* II, 366 (1955).

In other cases courts have held that a minimal level of artistic achievement or scientific merit suffices for a defense of redeeming merit.[7] But the defendant's mistaken belief in the artistic or scientific value of his product is not a valid defense.[8] Under the same "objectivistic approach," if the actor's purpose is to be shocking and obscene in expression, it does not suffice for conviction if his product has some artistic value.

In contrast to a finding of obscenity which a court must reach alone, artistic or scientific value is ascertained with the help of experts. The distinction is explained on the ground that the finding of obscenity implies a mere moral judgment of an average person, while the finding of scientific merit or artistic value calls for technical insight or aesthetic sophistication.

If a broad cross-cultural remark may be ventured at this point, it would seem that compared with West Germany and France, the Italian culture seems to be somewhat less liberal minded about sexual expression. This is reflected in the court adjudications of what is obscene.

PENAL STATUTES INCORPORATED INTO THE PENAL CODE OR LINKED TO IT

Article 528 of the Penal Code on obscene publications and performances

Article 528 of the Italian Penal Code reads as follows:

> Whoever for purposes of sale, dissemination or public exhibition produces, imports into the territory of the State, acquires, keeps, exports or puts into circulation writings, drawings, pictures or other obscene objects of any kind, shall be punished by strict imprisonment for from three months to three years and by a fine of at least 1,000 lire.
>
> Whoever trades in objects indicated in the preceding paragraph, disseminates or publicly exhibits the same, shall be subject to the same punishment.
>
> The same punishment shall also be imposed on anybody who:
>
> (1) Makes use of any means of publicity capable of furthering the circulation of or trade in objects specified in the first paragraph of the present article;
>
> (2) Gives public performances in theaters and cinemas, or public recitals or broadcasts of an obscene character.
>
> In the case under (2) the punishment shall be increased if the activities therein described have been committed in spite of a ban on the performance imposed by the authority.

This article, whose wording is inspired by the 1923 Geneva Convention on the suppression of traffic in obscene publications, is the central provision

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[7] See the *Iorio* case, decided by the supreme court on April 8, 1952, reported in *Giust. pen.*, II, 1084 (1952). For details about criteria evolved by the courts in judging artistic and scientific merit see Mazzanti, pp. 78, 81, 184.

[8] This, after an interesting history, now seems to be settled. The leading case is *Mariotti* (see footnote 6).

on obscenity in Italian law to which—as will soon appear—a number of other penal statutes are pegged. Types of punishable activity under the article need not be commented on. But the relationship between the present article and article 529 P.C., in which obscenity is defined, perhaps requires an illustration. Suppose that an activity made criminal under article 528 P.C. involves an obscene object in regard to which the defense has raised the claim of artistic value, that is, an exemption ground under article 529 P.C. Suppose further that the court has found at least some artistic merit in the obscene object. Under what circumstances can the defendant still be convicted? Conviction shall be possible if the object has been procured by the defendant for a person under 18 years of age for some other reason than that of satisfying his scholastic needs. A justifiable mistake regarding the latter's needs may exculpate the defendant. This leads us to the mental element of the offense. Pursuant to principles spelled out in the general part of the Italian Penal Code, the offense may be committed only *con dolo* (that is, with intent). Accordingly, the defendant must be aware, inter alia, of the obscene nature of the object or expression in question. But, as stated above, his mistake regarding redeeming social merit does not exculpate him. On the other hand, a mistake concerning "scholastic needs" of a minor, if the former is justified, constitutes a valid defense.

· *Trafficking in writings, drawings, or other objects contrary to public decency (article 725 of the Penal Code)*

Dissemination of sexually oriented material may be punishable if the material offends "public decency." Although decency may be offended by conduct or expression unrelated to sexual matters, it may also be affected by objectionable sexual expression not so patently offensive as to be declared obscene. Thus, situations may arise in which both the statute dealing with obscenity and the one dealing with objects contrary to public decency seem simultaneously applicable. But the latter, representing a lesser included offense, merges into the offense described by the former, and there cannot be more than one prosecution. Punishable types of activity involving "indecent matter" are specified by article 725 of the Penal Code and classified as a petty misdemeanor. Article 725 P.C. reads:

> Whoever exposes to the public view or in a public place or place open to the public, or whoever offers for sale or distributes writings, drawings or any other embodiment offensive to public decency shall be punished by a fine not less than 20,000 lire and no more than 200,000 lire.

Whether the defense of artistic or scientific merit may be raised in the context of article 725 P.C. is a much debated problem. The opinion seems to prevail that it cannot.[9] As regards the mental element of the offense, mere negligence suffices for responsibility, because under the Italian system

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[9] See Amato, *"In tema di reati contro il pudore e la decenza publici"* (On offenses against shame and public decency), *Giust. Pen.* II, 387, 407 (1961).

all petty misdemeanors (*contravvenzioni*) may be perpetrated either intentionally or negligently.

Injury to family morals committed through the periodical press (article 565 of the Penal Code)

As stated before, certain types of sexual expression may fall under other penal statutes besides those dealing with "obscenity" and "public indecency." One of these is article 565 of the Penal Code, which states:

> Whoever relates or underscores circumstances likely to offend family morals in a newspaper chronicle or chronicle in another periodical publication, in drawings attached to it, or in advertisements inserted therein, shall be punished by a fine from 20,000 to 100,000 lire.

"Family morals" have been interpreted by the courts as relating solely to morals concerning the sexual aspects of family life.[10] "Chronicle" (*cronaca*) is understood by the courts to cover not only items appearing under this rubric but also any item referring to recent events. Of course, social columns were contemplated by the legislator in the first place. Thus, for example, a salacious story on the amorous life of a married woman may materialize the definitional elements of the offense under consideration. In contrast to France, some Italian courts have held that advertisements must be couched in offensive language in order to fall under article 565 P.C. Mere suggestive, veiled language falls outside of the criminal law. The actor must be aware of the offensive nature of the material inserted in the press. There is a possibility of crime concurrence between articles 528 and 565 P.C.

Petty misdemeanor defined by article 726, paragraph 2, of the Penal Code

Using language contrary to public decency in public is threatened by a fine not to exceed 40,000 lire. Making indecent propositions to people in public places does not fall within this statute.[11] But obscene language used on the stage may fall within article 726 P.C.

The offense under article 15 of the Press Statute

Some Italian penal statutes defining offenses of objectionable sexual expression although not incorporated into the Penal Code are linked to it. Only one of these statutes should concern us here: the Statute no. 47 on the press of February 8, 1948. Its article 15 reads:

> The provisions of article 528 of the Penal Code on obscene publications shall also apply to printed matter describing or illustrating fictitious events or those which actually took place with shocking or horrifying details in

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[10] Manzini, *Trattato di diritto penale italiano* (A treatise on Italian penal law), Vol. VII, 700 (1936).

[11] A special statute was passed in 1958 to cover this situation. See article 5 of the so-called "Merlin Law" (Legge Merlin) of February 20, 1958 punishing "public invitations to debauchery in an obtrusive and scandalous manner," as well as "following people in the street inviting them to debauchery."

such a way as to be capable of disturbing the common moral sentiment or the family order, or to be capable of increasing the incidence of suicide or crime.

The opening phrase of the article ("provisions of article 528 P.C. shall apply") means that the offense created by article 15 of the Press Law has exactly the same wording as article 528 P.C.[12] and exactly the same framework of punishment. The only difference between the two offenses is that the reference to "drawings, pictures or other obscene objects" in article 528 P.C. is substituted by "printed matter" as defined in article 15 of the Press Law.

What "disturbing to common moral sentiment" actually means seems to be not altogether clear even to Italian lawyers. The phrase has indeed been criticized by many as too vague. Nor are there many judicial decisions on the point.[13] No doubt, however, that sexual morality is covered as part of the ambiguous "common moral sentiment." Accordingly it is possible, for instance, that an article reporting on a crime of passion, spiced with details relating to sex, may well fall within the ambit of article 15 of the Press Law. Details relating to sex need not be so patently offensive as to be considered obscene.

The offense under the Press Law may concur with the offense under article 565 of the Penal Code.

SPECIAL PENAL STATUTES FOR PROTECTION OF THE YOUNG

The offense under the Migliori Statute

Upon proposal of a deputy by the name of Migliori, a juvenile statute was passed by the National Assembly on December 12, 1960. In its article 1, the statute contains a penal provision which reads as follows:

> Whoever produces, posts, exhibits or brings into public places or places open to the public any drawing, painting, photograph or other figural object designed for exposure to the public view which by its nature is offensive to shame or public decency judged with reference to the particular susceptibility of minors under the age of eighteen and assessed with regard to the need for the protection of their morals, shall be punished by penalties provided under articles 528 and 725 of the Penal Code as the case may be.
>
> The punishment threatened by article 725 of the Penal Code shall also apply where drawings, paintings, photographs or other figural objects represent scenes of violence capable of hurting the moral sentiment and the family order.

Casual reading of the quoted provision reveals that Italian law has established a special test whereby to judge offensiveness to shame (that is,

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[12] Insofar as article 528 P.C. does not deal with "public performances."

[13] Compare Nuvolone, *I reati di stampa* (Press Offenses), 94 (1951). References to a few cases may be found in Mazzanti, p. 334, note 7.

obscenity) and public indecency in cases in which the protection of juveniles is involved. Whereas under general provisions on obscenity (art. 528 P.C.) and public indecency (art. 725 P.C.) the standard of an average adult controls, the juvenile statute focuses on the sensitivity of an average minor. As could be expected "the average sensitivity" is not established by scientific methods (such as a representative sample), and the courts accordingly decide on the basis of their intuition or hunch. As there is in Italy no *stare decisis* doctrine, the freedom of the judge to decide what is offensive on the basis of this special test is rather large.

The reader will also note that the Migliori statute created a curious blend of two classes of crime in a single penal provision. Because the latter purports to cover both obscene and indecent objects it refers both to article 528 and article 725 of the Penal Code. But while the former is a felony, the latter is merely a petty misdemeanor. This Janus-faced quality of the provision is reflected in different requirements concerning *mens rea.* If an object is found obscene under the Migliori statute, the actor must be aware of its offensive nature. But where an object is found merely indecent, negligence with respect to this definitional element will suffice.

Whether the art salvation clause of article 529 P.C. applies in the context of the Migliori statute is controversial.[14]

Offenses under the Press Law

In addition to the penal provision already discussed, the Press Law no. 47 of February 8, 1948, contains the definition of two offenses designed for the protection of juveniles.

Article 14 of the Press Law reads:

> The provisions of article 528 of the Penal Code shall also apply to publications designed for children or adolescents where these publications, by reason of the special susceptibility and impressionability of children and adolescents, are capable of offending the moral sentiments thereof or constitute for them an incitement to corruption, crime or suicide.
>
> In such a case the punishment shall be increased.
>
> The same shall also apply to newspapers and periodicals designed for the youth, in which descriptions and illustrations in police stories are systematically and repeatedly presented in such a way as to release violent instincts or social indiscipline.

Within the purview of this report only the first paragraph of article 14 must be discussed.

The reference in article 14 of the Press Law to article 528 of the Penal Code means that all types of activity punishable under the latter shall also be punishable if they involve youth publications of the nature described in article 14 of the Press Statute. The punishment scales of article 528 P.C. also

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[14] See Mazzanti, p. 301.

apply but may be "increased." By virtue of article 64 of the Penal Code this means that the maximum punishment under article 528 P.C. may be increased by one-third.

There has been much debate on what qualifies as a "publication designed for children (up to age 14) and adolescents" (up to age 18). The law seems now to be settled that those publications are also covered which, after an analysis of their content and style, appear to be addressed predominantly to juveniles.[15] They need not carry any indication of being designed for young readers.

The capacity of a youth publication to offend moral sentiments surely encompasses sexual morality. Some Italian authorities claim, moreover, that it is restricted solely to it. "Incitement to corruption" is said to consist in alluring to "premature initiation into carnal pleasures."[16] No proof of actual harm is, of course, needed, and a mere showing of a danger of corruption suffices.

Article 14 of the Press Law has raised some constitutional questions. Under article 21, paragraph 5, of the Italian Constitution, freedom of the press may be encroached upon only for the purpose of protecting "good morals." These are interpreted as relating solely to sexual morality. Insofar as article 14 of the Press Law attempts to suppress publications which incite "violent instincts" or cause "social indiscipline," it is on shaky constitutional grounds. The Italian constitutional court has not yet decided on the issue.

CENSORSHIP OF EROTIC MATERIAL IN THE MASS MEDIA

The press

In the second paragraph of its article 21 of the Italian Constitution explicitly prohibits censorship of the press. There was some discussion in Italy on whether some form of advance press censorship would be constitutional if exercised in the interest of youth protection. Most authorities came out against such advance screening of *stampa per ragazzi* (youth publications), and there is at present no prior control of youth publications similar to those under the West German and French systems.[17]

Where, however, a publication falls within a penal statute (as indecent or obscene, for instance), seizure of all its copies may be ordered by the court. In cases of "absolute urgency" where it is impossible for the courts to intervene on time, seizure of the periodical press may be effected by the police (*polizia giudiziaria*), who must report their action to the court immediately, and in no case later than within 24 hours. Should the judge fail to confirm the police action within the next 24 hours, the seizure becomes void (art. 21, par. 4, Italian Constitution).

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[15] A curious case involving one Alfeo Danti has been discovered. He produced wrappings for American chewing gum with "offensive figures." In 1956 he was convicted under article 14 of the Press Law by a court in Florence. The court obviously thought the wrapping to be a publication within the meaning of article 14. Compare Mazzanti, 297, note 5.

[16] See Mazzanti, p. 305, and authorities cited there.

[17] Compare Sergio Fois in VI *Enciclopedia del diritto* (Legal Encyclopedia), 726 (1960).

Motion pictures

Prior censorship of movies is presently governed by the Statute of April 21, 1962, on censorship of motion pictures and theatrical productions.[18]

Under the statute, internal distribution of Italian and foreign movies and the export of Italian movies must be approved by the Ministry of Tourism and Public Performances. The approval in the form of a *nihil obstat* may issue only upon a favorable opinion expressed by a special commission established to preview movies. Members of the commission, appointed by the Minister of Tourism, sit in several panels. Each panel is presided over by a judge and is composed of three members from the film industry and three from the academic community. The panels examine whether movies are contrary to good morals as conceived by adult audiences and also whether movies are suitable for viewing by immature audiences in light of their "special sensitivity and needs for moral protection." On finding that a film is contrary to good morals, the panel recommends that it be denied a *nihil obstat.* On finding that a movie, though not so offensive as to be contrary to good morals, contains "explicit erotic scenes" or similar daring passages, the panel may recommend that it be barred for persons under 14 years of age, or for those under 18. The panel may also suspend judgment and suggest to the producer to cut certain scenes from the picture. In contrast to France, there is no mandatory submission of movie scripts for preliminary examination prior to starting the shooting of a movie. As a further contrast to the French system, the opinion expressed by a panel of the commission is binding on the Minister of Tourism.

The producer or distributor, who has requested an approval for viewing and has found his request rejected may lodge an appeal with the "higher" commission. The latter is in fact composed of two panels of the *original* commission other than the one which has given the original opinion contested by the appeal. If the original negative opinion is upheld on appeal, the interested person may bring an action in the administrative court.

Where certain age groups have been barred from viewing a movie, managers of cinemas are bound to put up notices to this effect and take steps to enforce observation of the ban. Previews must not show scenes from movies reserved to mature audiences.

Showing a movie without a *nihil obstat,* or showing it in violation of a ban is punishable under article 668 of the Penal Code as a petty misdemeanor by imprisonment for a maximum term of six months and a fine. In case of a repeated offense, the court may also order closure of the movie theater for a period not exceeding 30 days. Violations of other provisions of the statute on movie censorship, such as failure to take appropriate steps to prevent minors from seeing a movie rated for mature audiences, are threatened by fines.

If a movie shown is found obscene, the provisions of article 528 P.C. (discussed above) apply. No decision has been found on the point whether

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[18] Another important source of censorship law is the Decree of the President of the Italian Republic of November 11, 1963. The provisions of this decree were used in presenting this report.

prosecution for obscenity is barred by the fact that an administrative *nihil obstat* has been issued by the Ministry of Tourism.

The stage

Under the statute on movie and theater censorship of April 21, 1962, theatrical productions need not, as a rule, obtain an administrative approval for presentation. But all those productions which were not submitted for advance administrative approval are considered to be for mature audiences only. A notice must be posted to this effect and measures taken to ensure that minors do not attend performances. Anyone desiring permission for general attendance must seek an advance approval of the production by a commission on theatrical censorship. The latter consists of a supreme court justice, a writer, and an educationalist. The commission is attached to the Ministry of Tourism and Public Performances. The commission may either suggest that a production be granted a license for general viewing or that minors be barred from attending the performances. It can never impose a general ban (one that includes mature audiences).

There are, however, some types of theatrical productions which need an advance approval from the commission just as is the case with movies. Herein fall musical comedies and variety shows "with musical and dance numbers prevailing" (art. 12, Statute of April 12, 1962). Only these productions may be barred for all audiences if found to be contrary to good morals.

As with movies, presentation of theatrical productions in violation of a ban falls within article 668 of the Penal Code. Also, if a production is found obscene, article 528 of the Penal Code applies. But, in contrast to the movies, there are additional possibilities of criminal prosecution if objectionable erotic scenes are performed on the stage, or if other unacceptable erotic expression occurs in the theater. Thus, for instance, simulated copulation from the off-Broadway production of *Che* would surely fall within article 527 of the Penal Code, punishing "obscene acts committed in public" with a maximum punishment of three years imprisonment. Use of obscene language on the stage—and some passages from *Oh, Calcutta* would probably be classified as such in Italy—could be punishable as a petty misdemeanor under article 726 of the Penal Code. Under article 82 of the Police Statute (Legge di Publica Sicurezza), the police are authorized to stop a performance on the probable cause that an offense against good morals is being committed on stage.

Radio and television

The Italian radio and television networks are run by a public body (R.A.I.) and most problems of program censorship posed in countries with commercial broadcasting do not arise in Italy. Even so, R.A.I. is bound every three months to submit its broadcasting program to the Ministry of Mail and Telecommunications for examination. The program is forwarded by the Ministry to a committee on broadcasting programs, which may recommend that changes be made therein. The recommendations are binding on the

R.A.I. By virtue of the statute on movie censorship of April 21, 1962, movies and theatrical productions barred for immature audiences may not be put on the air.

Prior restraint through administrative controls can be of only limited practical importance in the context of broadcasting where speed of reaction is essential. Accordingly, subsequent repression by way of criminal prosecutions represents a potential threat. Broadcasting of obscene material falls within article 528 of the Penal Code.

Japan

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1. The main statutory provisions are those in sections 174 and 175 of the Penal Code, as amended:

> *Section 174.* Any person who, in public, commits any obscene act is liable to imprisonment for a period not exceeding 6 months or to a fine not exceeding 25,000 yen or to a minor fine.
>
> *Section 175.* Any person who distributes, sells or publicly displays, or has in his possession for the purpose of sale, any obscene writing, drawing, picture or other thing, is liable to imprisonment for a period not exceeding 2 years or to a fine not exceeding 250,000 yen or to a minor fine.

The importation of any "obscene writing, drawing, picture or other thing" is prohibited under separate customs regulations.

2. Mere possession of obscene material is not an offense unless the possession is for the purpose of sale.

3. "Obscene" is nowhere statutorily defined. Court decisions do not draw any distinction according to the type of article involved, the type of display, or the audience the display might reach. Section 175 has been the subject of decision in the Japanese supreme court on a number of occasions. The question of what constitutes obscenity was thoroughly examined in a case arising from the prosecution of the seller of *Lady Chatterley's Lover.* In holding that the book was obscene, the court relied mainly on its earlier decisions, but the court's reasons may be paraphrased as follows:

An object may be considered obscene if it does injury to man's sense of shame (bashfulness), if it excites or stimulates the sexual desires, or if it is contrary to proper sexual morality. The court said that this sense of shame

was one of the characteristics which set man apart from the animals and which acted as an important check on the natural but difficult-to-control sexual appetites. Obscene literature, by exciting and stimulating the sexual appetites, makes man clearly conscious of his animalistic aspects and thus offends his sense of shame.

Although the court referred to three criteria by which an object might be judged obscene, it only attempted to state the nature of obscenity in relation to man's sense of shame. As to the third criterion, that is, being contrary to proper (conscientious) sexual morality, the court said that its responsibility was only to maintain a minimum of sexual order and morality but that section 175 of the Penal Code had clearly made the sale of obscene literature an offense. It said that there was no one code of sexual behavior accepted in all times and in all places; nevertheless, there are certain established boundaries that may not be transgressed.

According to the court's decision, art and obscenity belong to different dimensions and are incomparable. However, from the standpoint of society and the law, no matter how outstanding the artistic merits of a work, it may be declared obscene because the dimension of judgment is different. In a prosecution for selling obscene literature, the work must be considered from its social and legal standing, not its artistic one. The court recognized the artistic merits of the novel, not only as a whole but also of the parts which they designated as obscene under section 175, but said that its judgment must be based on legal and moral grounds, not aesthetic ones.

As to the purpose of the seller, the court said that the seller would be guilty of an offense if he sold a book subsequently held to be obscene even if the seller himself at the time of the sale did not believe it to be obscene.

The final question considered was the problem of freedom of expression guaranteed by article 21 of the Constitution, which provides: "Freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated." The opinion was expressed that these freedoms are always subject to the restrictions stated in articles 12 and 13 of the Constitution:

> *Article 12.* The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.
>
> *Article 13.* All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

4. The interpretation of "obscene" by law enforcement officials is extremely difficult to describe for a number of reasons. In the first place, there have been comparatively few prosecutions for the sale, distribution, etc. of obscene literature, pictures, etc. which have been appealed to the superior courts. The most famous and recent prosecutions have been the *Lady Chatterley* case, in which all members of the court considered it to be

obscene, and a prosecution relating to a work of the Marquis de Sade, where the court by a small majority found the work to be obscene. In both cases foreign authorship was involved. Particularly in the *Lady Chatterley* case commentators have considered this an important factor both in regard to the instigation of the prosecution and the ultimate finding of obscenity. It was not, of course, foreign authorship per se which determined the matter but rather the ambivalent Japanese attitude to things foreign—a superiority/inferiority complex. It has been suggested, again more strongly in relation to the *Lady Chatterley* case (decided in 1957), that the decision to launch the prosecution and the decision itself was the result of a lack of self-confidence in dealing with foreign literature. Furthermore, both cases were dealing with notorious books and it was perhaps felt that Japan had to take a stand on the side of morality. (Although perhaps outside the aim of this report, it is necessary to mention these matters as there is much Japanese literature, both serious and otherwise, which would seem to fall within the definition of obscene but which remains freely available.) Certain rules of thumb seem to be observed. Thus it is generally not regarded as permissible to refer to the sexual organs by name, such as in a description of a love scene, but some euphemism will be acceptable. Nude photographs appear to be quite acceptable, again provided the sexual organs are not visible.

There have been a number of prosecutions in recent weeks of groups involved in the selling of pornographic photographs and movie films. I have not seen the actual material involved in these prosecutions, but I am reliably informed that they come under the heading of "hard-core" pornography, that is, films and photographs of heterosexual and homosexual lovemaking. As far as I can gather, prosecutions are generally restricted to such cases. However I should add that bookshops of the type one can find in New York or San Francisco are not readily apparent in Japan and that much of the material (such as full nude photographs) sold in the United States would, I think, bring forward a prosecution in Japan.

Finally, the concept of obscenity in Japanese law seems to be restricted to sexual matters and does not include excessive violence as it does, for example, in most Australian jurisdictions.

5. There are no special "display" or "unsolicited mailing" statutes. Dissemination of obscene material in these ways is covered by section 175 of the Penal Code. There are no special juvenile statutes particularly relating to obscenity. Each prefecture in Japan has power to make "regulations" for the "peace, order, and good government" of the area under its control, and as this legislation is voluminous and not uniform throughout the country it is impossible to say whether or not local "juvenile protection" legislation has been passed. I am informed that it would be quite possible for such legislation to proscribe the sale of certain books to minors.

6. The usual method for obtaining legal control in a jurisdiction is by criminal prosecution under the Penal Code. The penalties have been set out above. It is possible for the court to give a suspended sentence, and there seems to be no power to issue an injunction. Even on conviction, the seller of an obscene publication retains the property in it and the court has no

power to order its destruction. Similarly, the court has no power to order seizure of an obscene publication. The case of censorship is somewhat complicated. According to article 21 of the Constitution (see above), no censorship shall be maintained. However, it seems to be the practice for the Customs Department to seize films, books, or other objects which it considers to be obscene, and the onus is then put on the person from whom they were seized to make application to the court for their return. If the court is of the opinion that the seized object is obscene, it may not remain in the country. In fact, film censorship is carried out on a voluntary basis by a committee set up by the film industry in Japan, and films not "passed" by that committee will generally not be shown or handled by any of the film distributors or cinemas.

7. There has been no commission or other body appointed for the study or reform of the law in Japan, and there seems to be no particularly strong movement seeking reform. The decisions in the *Lady Chatterley* and the Marquis de Sade cases were received in academic circles with some disappointment, as it was thought that this was an encroachment on the freedom of expression guaranteed by the Constitution. It was recently held that the freedom of expression article in the Constitution did not prevent the protection of property rights and that there was not an unqualified right for a person to write on or post posters on property which did not belong to him.

Mexico

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CONSTITUTION

The Constitution of the United States of Mexico of February 5, 1917, in contrast to that of Argentina, specifically excludes any religious affiliation of the state and, indeed, guarantees that education imparted by the state shall be "completely alien to any religious doctrine and, based on results of scientific progress, shall fight ignorance and its effects, servitude, fanaticism and prejudices" (art. 3° I).

Freedom of thought is guaranteed by articles 6° and 7°:

> *Art. 6°*. The manifestation of ideas shall not be the object of any judicial or administrative inquiry, except in case it attacks morals, the rights of third [parties], provokes crime or disturbs the public order.
>
> *Art. 7°*. The freedom of writing and publishing writings about any matter is inviolable. No law or authority may establish previous censorship, nor demand security [bonds] from authors or printers, nor restrain the freedom of the press, which has no limitations beyond the respect for private life, public morals and public peace. In no event may the press be seized as an instrument of crime.
>
> Organic laws shall enact whatever provisions may be necessary to avoid that under pretext of informations charging crimes of the press there be imprisoned agents, "paper makers," operators, and other employees of an establishment from which came out the writing informed against, unless the responsibility of such persons be previously proven.

The quoted provisions are motivated by experiences derived from certain historical events in which the methods of liberty restraint used were precisely those now proscribed.[1]

Of foremost importance is the guarantee of jury trial, specifically accorded for cases of press crimes:

> *Art. 20.* In every criminal trial the accused shall possess the following guarantees:
>
> . . . . . .
>
> IV. Whenever the punishment that may be imposed is in excess of one year's imprisonment, he shall be judged in a public trial by a judge and jury of citizens who know how to read and write and are neighbors of the place and District in which the crime has been committed. Crimes committed by the press against public order or the external or internal security of the Nation shall in every case be judged by a jury.

Of further significance are article 25, which guarantees freedom from search of correspondence which circulates in envelopes through post offices, and article 14, which guarantees that no one be deprived of "life, liberty or property, possessions or rights except by trial before courts, previously established, and in which the essential formalities of procedure are observed and according to laws issued prior to the act [charged]."

PENAL CODE

The Penal Code for the Federal District and Territories of Mexico of January 2, 1931, as amended, deals with "obscenity" and "pornography" in Book Two (Special Part), Title Eighth (Crimes Against Public Morals and Social Mores [*buenas costumbres–bonos mores*]), Chapter I (Offenses Against Public Morals), article 200. The latter article reads thus:

> Imprisonment for six months to five years and a fine up to 10,000 pesos shall be imposed upon anyone
>
> I. Who manufactures, reproduces or publishes obscene books, writings, images or objects as well as anyone who exhibits, distributes them or causes them to circulate;
>
> II. Who makes public by whatever medium, performs or causes another to perform, obscene exhibitions; and
>
> III. Who in a scandalous manner invites another to carnal commerce.

Speaking of the nature of the crimes "against public morals and social mores," Emilio Pardo Aspe[2] said:

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[1] On this development see Luis Castaño, *Regimen Legal de la Prensa en Mexico* (Editorial Porrua, S.A., Mexico, 1962), pp. 3-55.

[2] Apuntes del II Curso de Derecho Penal, en la Escuela Libre de Derecho, anö 1937-38, quoted in Francisco Gonzalez de la Vega, *Derecho Penal Mexicano* (Editorial Porrua, S.A., Mexico, 1968), pp. 305-306.

Criminal law does not purport to maintain intact the virtues, such as chastity, purity, etc. These values belong to the sphere of Religion and Morality. I pointed out in class, following Manzini, that criminal law aims at maintaining the *ethical minimum* that is indispensable for a good life in a community, and in the light of this aim unchaste or [sexually] improper actions are irrelevant as long as they do not jeopardize nor attack nor harm definite social arrangements [orders].

The *direct* bearer of the *legal object* of these crimes or of the interest protected by the penal law is sometimes *society,* and at other times the *individual.* For this reason we approve of the division established by our legislator between *Crimes against public morals,* whose passive subject is *society,* and the so-called *Sexual crimes,* whose passive subject is always a definite individual, *a human person.*

The author further points out that in Spanish law those crimes that are classified in Mexico as "crimes against public morals" constitute "crimes [creating] public scandal," this being a more appropriate characterization than those utilized in the German, Italian, or Mexican codes. The decisive factor in these crimes is not their "sexual motive" but the inobservance of certain minimum demands of conduct in society.

Luis Castano,[3] after pointing out that terms such as "public morals," "social mores," "obscenity," defy definition, suggests that nevertheless certain foundations may be laid for "determining the area within which they evolve." The author draws attention to the fact that the very concept of "crimes against morality" or "against public morals" seems to suggest as though morality or religion were the object of legal protection. This is misleading and increases the difficulties of definition of the object of protection in issue. As a result of this misconception, this allegedly "moral" factor has been divided into (1) morality in a broader sense, and (2) morality in a narrower sense or that which is called the "obscene" or "pornographic." The author reminds the reader of the criticism of the broader concept of "morality" when adopted by law set forth in Francisco Zarco's famous speeches in the Mexican Congress in 1857:

> Observing with horror the great abuses which have been committed in the name of morality, one almost wishes to proscribe the very word ["morality"] in all laws and in the common language.

As regards "public morals" in the narrower sense, the author notes that "it does not denote the clash of the acts or ideas of an individual with the general policy of the state or of a social group directed to a definite end, but rather indicates the opposition of such acts or ideas to the sense of shame and of propriety of the social group on any given occasion."[4]

Before discussing the judicial interpretation of article 200 of the Penal Code, it will be convenient to reproduce also certain portions of the Mexican

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[3] Cited in note 1, pp. 96-97.

[4] Id., p. 99.

Press Act and of the Mexican Organic Law of Public Education and the regulations issued thereunder.

THE PRESS ACT

The Mexican Press Act (*Ley de Imprenta*), published in the Official Journal of April 12, 1917,[5] provides in pertinent parts as follows:

Art. 1°[6] The following [acts] constitute attacks upon private life:

I. Every malicious manifestation or expression made orally or by signs in the presence of one or more persons or by means of a manuscript or of the press, of a drawing, a lithograph, a photograph, or in any other manner which, when exposed or circulating in public or transmitted by the mails, telegraph, radiotelegraph or by message, or in any other manner, exposes a person to the hatred, scorn or [loss of an] interest . . .

Art. 2° The following constitutes an attack upon morals:

I. Every manifestation by word, in writing or by any other of the media mentioned in section I of the preceding article, by which vices, violations or crimes are publicly defended or excused, counseled or propagated, or by which an apology is made for them or for their authors;

II. Every manifestation made with speeches, screams, songs, exhibitions and presentations or by any other means of those enumerated in section I of article 2°, by which one publicly violates or offends the sense of shame, decency or social mores, or incites prostitution or performance of licentious and shameless acts, all acts which in public opinion are qualified as contrary to the sense of shame being deemed such acts.

III. Every distribution, sale or public exhibition, in whatever manner it may be made, of writings, pamphlets, short treatises, songs, engravings, books, images, advertisements, cards or other papers or figures, paintings, drawings or lithographs of an obscene character or exhibiting lewd acts. . . .

Art. 7° In the cases of articles 1°, 2° and 3° of this law, the manifestations or expressions are deemed made publicly when they are made or executed in the streets, squares, passages, theaters or other public meeting places, or in private places, where done in a manner so that they can be observed, seen or heard by the public.

Art. 32. Attacks upon morals shall be punished as follows:

I. By jailing from one month to eleven months and a fine of one hundred to one thousand pesos in cases of violation of section I of article 2°;

II. By jailing from eight days to six months and a find of from one hundred to one thousand pesos in cases of violations of sections II and III of the same article.

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[5] Reproduced in Castaño, op. cit., pp. 227-238.

[6] This provision is reproduced here solely because certain parts thereof are incorporated by reference in Art. 2°, which is of interest in the present context.

Art. 9° It is prohibited

I. To publish the documents or indictments [informations] in a criminal case, prior to their being established in a public hearing;

II. To publish at any time without consent of all interested persons, the documents, complaints or other exhibits in proceedings for adultery, indecent assault, statutory rape, rape and attacks upon private life;

. . . . . .

IX. To publish the names of the victims of indecent assault, statutory rape, or rape. . . .

Art. 10. Violation of any prohibition contained in the preceding article will be punished by a fine of fifty to five hundred pesos and jailing for not less than a month or more than eleven months.

Art. 12. The officers and employees who supply the information for the making of a prohibited publication shall suffer the same punishment as is provided for in article 10, and shall be dismissed from their posts, unless the law establishes a graver punishment for the revelation of secrets, since in such cases the latter shall be applicable.

In article 13 there is created the duty of anyone who establishes a press, lithograph, or engraving enterprise or any other medium of publicity to notify thereof the municipal president of the locality. Article 14 provides that criminal responsibility for the acts described in articles 1°, 2°, and 3° is imposed upon the authors and accomplices as defined in penal law and in the Press Act. Article 15 provides that "in order to put into circulation printed material, attach it on walls or announcement boards exhibited to the public in the exhibits of commercial establishments, distributed by hand, by the mails, by express or messenger, or in any other form," there must be stated the name of the press, lithograph, etc., place of production, the date and the name of the author or the person responsible for the printing. There follow articles which establish the usual requirements as to responsibility in matters of the press, theater presentations, etc. With regard to the latter, article 19 provides:

> In theatrical presentations and exhibits of cinematography or phonograph auditions, there shall be responsible, in addition to the author of the play that is being presented or exhibited or auditioned, the manager of the theater, cine or phonograph.

Article 29 establishes the criminal responsibility for items introduced into Mexico that contain prohibited matters. Article 30 provides for publication at the expense of the responsible person of judgments of conviction for a press crime. Paragraph 2 of the same article states as follows:

> In every judgment of conviction there shall be ordered the destruction of the printed material, engraving, lithographs or other objects by which the crime has been committed, and where the document involved is a public document, the [proscribed portions] shall be obliterated so as to make illegible the words or expressions considered criminal.

THE ORGANIC LAW ON PUBLIC EDUCATION AND ITS IMPLEMENTATION

According to the Constitution and the Organic Law on Public Education, the state is charged with promoting the development and the progress of the culture and education of the country. The Regulation implementing this duty and authority of the state was published in the Official Journal on June 12, 1951.[7] Its "statement of legislative grounds" reads in part as follows:

> II. It is implied that the State must protect culture and education, avoiding that there be aroused in the persons to be educated sentiments of hatred, cruelty, deceit or superstition, by procuring an integral development of the persons to be educated in their physical, intellectual, ethical, esthetic, civic, social aspects, and by preparation for work, within the limitations imposed by age, as well as by fomenting propriety, mutual esteem and respect for the integrity and the activities of others;
>
> III. Publications which, in accordance with the law itself should be vehicles of propagating and developing culture and education, are being abused by some editors who try to make profit by stimulating evil passions and withdrawing the moral foundation on which culture must be based. This foundation is also seriously obstructed by a series of publications which often present descriptions that are offensive to the sense of shame, decency and social mores, sensually inciting youth and exposing it to the risks of an inconvenient and libertine conduct;
>
> IV. In addition, the systematic continuity of the influence which these publications produce, distracts children and youth from their school work and adults from the process of improving their culture and the fulfillment of their duties, diverting them, to the prejudice of their human dignity, from their useful activities that serve the Mexican community. . . .

The Regulation, which is rather detailed, creates a Qualifying Commission for publications, a very interesting institution. The text of the Regulation reads in parts thus:

> *Art. 1°* It is immoral and contrary to education to publish, distribute, circulate, exhibit or sell:
>
> I. Writings, drawings, engravings, pictures, pamphlets, images, advertisements, emblems, photographs or other objects that stimulate excitement of evil passions or sensuality and
>
> II. Publications, periodicals or strips of any of the following types:
>
> (a) Which adopt themes apt to destroy devotion to work, enthusiasm for study or consideration for the effort that any legitimate success requires;
>
> (b) Which stimulate excitement of evil passions or sensuality or which offend the sense of shame or the social mores;
>
> (c) Which stimulate passivity, a tendency toward idleness or confidence in chance as guide of conduct;

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[7] Reproduced in Castaño, op. cit., pp. 251-254.

(d) Which present adventures in which, evading the laws and respect for established institutions, the heroes obtain success in their enterprises by using measures that are contrary to the laws or the institutions;

(e) Which provide education in methods used in the execution of punishable acts;

(f) Which by virtue of the purpose of the narration or of the character of its heroes, provoke either directly or indirectly contempt for the Mexican people, its aptitudes, customs, traditions, history or for democracy; ....

(h) Which contain articles, paragraphs, scenes, prints, pictures, photographs or engravings which, by themselves, bear the defects mentioned in any of the previous numbers.

Art. 2° The directors and editors of the publications and productions referred to in the previous article shall be punished, administratively, as follows:

I. Individual fines of five hundred to five thousand pesos depending on the personal circumstances of the offender, the motivations of his conduct and the gravity or the magnitude of the act.

If the fine is not paid, there shall be substituted for it imprisonment up to fifteen days.

II. In the case of reincidence, the fines shall consist of double of those imposed the first time, but must not exceed ten thousand pesos, and

III. Imprisonment for fifteen days, in case of persistence in reincidence.

Art. 3° The following persons shall be punished administratively by up to half of the sanctions established in the preceding article:

I. The authors of the works referred to in art. 1° of this regulation, and

II. Those who exhibit or sell in commercial establishments in which the mentioned publications and productions are exhibited.

Art. 4° A Qualifying Commission [Comisión Calificadora] composed of five members nominated by the Federal Executive Power, acting through the Office of [the Ministry of] Public Education, shall have authority to

(a) Examine, ex officio, the productions referred to in art. 1°;

(b) Impose the respective sanctions upon the offenders;

(c) In the case of section II of art. 2°, or where the gravity of the offenses that have been committed justify it, to declare that the publication is illegal and file in the General Post Office Department a motion for its withdrawal from postal circulation;

(d) Inform the Federal Prosecutor's Office of the facts related to the works referred to in art. 1° that in its view have a criminal character;

(e) Communicate to the appropriate authorities its decisions for execution by such authorities.

Art. 5° Imposition of any of the sanctions established by this regulation is predicated upon observance of the following proceedings:

(a) The Qualifying Commission shall summon the offender to a hearing;

(b) In the summons it shall inform him of the nature of the offense, the day, hour and place in which the hearing will be held;

(c) The offender shall have the right to submit in the said hearing evidence he deems appropriate and to make allegations he deems appropriate as to his rights; and

(d) The Qualifying Commission shall immediately pronounce its decision.

Art. 6° The Qualifying Commission may sit in a panel of three of its members and shall decide matters within its jurisdiction by a majority of the votes which compose it.

Art. 7° In order to register the title or heading of the periodical publications referred to in art. 1°, of its contents or the copyright in these publications, it is required that the Qualifying Commission declare that they are free of the defects specified in that article.

Art. 8° The owners, directors or editors of the publications may at any time petition that the Qualifying Commission decide upon the legality of such publications.

Art. 9° The General Post Office Department shall permit postal circulation of periodical publications only if the pertinent petition is accompanied by a certificate of legality issued by the Qualifying Commission.

Art. 10 The provisions of the present regulation are applicable to all the publications mentioned in art. 1°, even those destined solely for adults.

JUDICIAL INTERPRETATION

In a habeas corpus case upon the petition of *Benjamín Rodríguez Alvarez,* involving the periodical *La Semana Cómica* (no. habeas corpus 8367/36, sec. 1ª, decided 1937), the petitioner argued that the periodical having been administratively pronounced lawful, it could not be thereafter declared obscene by a judge. The supreme court affirmed the conviction, stating that the assignments of error of the petitioner were unfounded, since

> the authority of declaring whether or not an act is a crime and to impose the consequent penalties is vested properly and exclusively in the judiciary in accordance with the provision of article 21 of the Constitution[8] and this authority may not be restricted or invalidated by the fact that an administrative agency has consented to the distribution of the periodical referred to. Moreover, the character of this periodical could have undergone radical changes from the point of view of morals since the date of its registration until the commission of the crime.

The court dealt also with the problem of how proof of "obscenity" could and should be adduced. It said:

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[8] Article 21 reads thus: "Imposition of punishment lies within the proper and exclusive jurisdiction of the judicial power. . . . The administrative agency has jurisdiction to impose penalties for violations of government and police regulations, which penalties may not exceed a fine or jailing up to thirty-six hours; but if the offender should not pay the fine imposed upon him, the latter shall be converted into the corresponding jailing which shall not exceed in any case fifteen days."

[T]he qualification of a periodical as obscene is a matter of evaluation by the Judge, without it being necessary to adduce evidence of a special type, directly aiming at establishing this fact, since obscenity being something contrary to the sense of shame, of modesty or of decorum, the judge is capable of determining whether such is the character of the periodical distributed or made circulate by the petitioner, it being presumed, with reason, that the judge possesses the average sense of morality which prevails at a given moment within the community. Such [judicial] evaluation does not violate [constitutional] guarantees unless it is contrary to the evidence [in the case]. . . .

These statements were quoted in another case, that of the habeas corpus of *Francisco Sayrols Mass,* involving the periodical *Caricatura* (no. 13, Semanario Judicial de la Federación, vol. LVI, page 133, April 1938),[9] the issue being similar to that of the *Rodríguez Alvarez* case. The supreme court pointed out that

> given the variable character of the notion of social mores or public morals, depending on the environment or the degree of culture in a given community, it is unavoidable that the function of determining which acts may be considered lewd, obscene or contrary to the public sense of shame be entrusted to the judges. Since there is neither an exact notion nor fixed rules in the matter of public morals, the judge has the duty in cases as the instant one to interpret that which average men understand by obscene or offensive to the sense of shame, without recourse to procedures of proof which are appropriate only in resolving purely technical questions. It is the average moral notion that should serve as a norm and guide for the judge in deciding these legal questions and in such type of delicate question there is no precise technical method of resolving, without possibility of error, that which should legally be conceived as obscene. For this reason, it is not the opinion of some experts—there are no experts on this matter—that should serve as support for a judicial decision in cases such as the one at bar; nor is a simple lexicological interpretation the only means one can use in order to arrive at a satisfactory conclusion. In such situations one must resort both to the juristic interpretation of the expressions used by the legislator and to doctrinal interpretation, as aids in the exercise of the judicial discretion which the law entrusts to the judges and to the courts. In sum, although there is no fixed basis or starting point for judging at a given moment what is moral or immoral, contrary to social mores or in accordance with them, there does exist an appropriate procedure for applying the law and for complying with the purpose visualized in creating this type of crime. However, this does not mean that there is attributed to the judges a total and arbitrary power; as any judicial function, that of applying penalties should be subject to defined rules, and in such case adjudicators should not lose sight of the fact that their decisions must be reached in conformance with the

[9] Reproduced in Castaño, op. cit., pp. 190-197.

principle stated before, of the average morality obtaining at a given moment in the community and the facts found in each case, for otherwise they would be violating constitutional guarantees of the defendants.

In the light of the stated principles, the supreme court then proceeded to analyze the decision of the trial judge, examining his reasoning in relation to the facts as found by him. It rejected defense counsel's argument that the judge had applied an abstract and unrealistic criterion "of the most severe commentator of Canonic law." Rather, comparing the grounds advanced by the trial judge in support of his judgment with the evidence in the case, it found that the decision below was fully supported by the actual evidence and by its "judgment grounds." The supreme court pointed out that while not obscene throughout, "the periodical *Caricatura* in its 'humorism' as well as in those parts that are not humorous, possesses a single motive, which constantly and invariably recurs in its many engravings, readings and articles: 'sex.' All of it treated without exaltation." In detail as well as in its total aim, the impeached periodical was found by the supreme court to be obscene.

Nor could petitioner hide behind the corporate veil of the unit of the Editorial Sayrols to avoid punishment. The supreme court found Francisco Sayrols' personal responsibility to be implicit in article 11 of the Penal Code which empowers the judge to dissolve or suspend a corporate entity when its member or representative commits a crime.

The general tendency of Mexican case law is to affirm the presence of obscenity.

RADIO AND TELEVISION

The Federal Act on Radio and Television, published in the Official Journal on January 19, 1960,[10] declares that "radio and television constitute an activity of public interest; and for this reason the State ought to protect them and watch over them so that they might duly fulfill their social function" (article 4°, lex cit). These means of communication should "contribute to and elevate the cultural level of the people and preserve its national characteristics, the customs of the country and its traditions . . ." (article 5° III). The law further declares that "everything pertaining to radio and television is a matter within federal jurisdiction" (article 8°). The Ministry of Communications and Transportation has authority to license the radio and television stations and to oversee their technical functioning (article 9°), whereas the Ministry of Government has the authority and duty of "watching that the radio and television transmissions keep within the limits of respect for private life, personal dignity and morals, and do not attack the rights of third parties, nor provoke the commission of any crime or disturb public order and peace" (article 10 I). This Ministry also has the authority of imposing the sanctions pertaining to its jurisdiction (article 10 IV).

Chapter III of the act is devoted to "programming." Some of the articles within this chapter deserve notice within our present context.

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[10] Reproduced in Castañ̃o, op. cit., pp. 328-346.

Art. 58. The right of information, of expression and of reception by means of radio and television is free and hence must not be the object of any judicial or administrative inquiry, nor of any limitation nor previous censorship, and shall be exercised within the terms of the Constitution and the statutes.

Art. 63. All transmissions that . . . are contrary to the social mores, whether by using malicious expressions, insolent words or images, phrases and scenes of double meaning, or by apology of violence or of crime, are prohibited; likewise prohibited is all that is debasing or offensive to the civic cult of heroes and to the religious beliefs, or discriminating against races; also prohibited is use of recourse to low humor and offensive sounds.

Restrictions are imposed on commercial propaganda transmitted by radio and television. Article 67, section IV provides that in such propaganda there must be avoided "expressions of violence that are prejudicial to the development of children, such as gun shots, quarrels, blows, cruelty and ill manners and bad taste." Section V prohibits use of "alien mannerisms and images and texts which offend the sense of shame."

Article 72 imposes certain limitations on transmission of programs and publicity that are improper for children and young people. Such programs must be announced in advance as such and scheduled for certain hours during which children are not usually listening to the radio or viewing television.

Article 78 prohibits actions that would "cause alarm or panic among the public" in information programs.

The Federal Act on Radio and Television also created as "coordinating organism" the National Council of Radio and Television (Consejo Nacional de Radio y Televisión) (articles 90 to 92), which is attached to the Ministry of Government and includes among its functions that of elevating "the moral, cultural, artistic and social level of the transmissions" (article 91, section IV).

CINEMATOGRAPHY

Among the Mexican institutions of supervision of mass media of communication the Comision Nacional de Cinematografía and its successor, the Dirección de Cinematografía, enjoy the greatest international fame. The pertinent legislation is contained in the Decree-law concerning the Cinematographic Industry published in the Official Journal on December 31, 1949.[11] It is implemented by a Regulation published in the Official Journal on August 6, 1951 (*Reglamento de la Ley de la Industria Cinematografica*).[12] The Law has been amended by a Decree published in the Official Journal on November 27, 1952, which provides in article 1° that "the cinematographic industry is of public interest and the provisions of this Act and of the Regulations issued thereunder shall be deemed matters of

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[11] Reproduced in Castaño, op. cit., pp. 347-352.
[12] Reproduced in Castaño, op. cit., pp. 353-361.

public policy for all legal purposes; the Federal Government by means of the Ministry of Government is charged with the study and resolution of all problems pertaining to this industry itself for the purpose of achieving its moral, artistic and economic elevation." To fulfill its task, the Ministry of Government performs a variety of functions, partly of promotion and partly of supervision of the national industry. Of special importance in our present context is its authority to

> grant authorization for exhibiting publicly within the Republic cinematographic films, whether produced within the country or abroad. The said authorization shall be granted provided that the spirit and the content of the films, in their figures and words, do not violate article 6° and the other provisions of the General Constitution of the Republic[13] (article 2° IX).

The same section provides that television stations may exhibit solely those motion pictures that are authorized as fit for all the public.

The Ministry has authority of temporarily withdrawing from the market motion pictures which are exhibited without authorization (section XI).

The law created a National Council of Cinematographic Art (Consejo Nacional de Arte Cinematográfico) which is to serve as a consultative organ assigned to the Ministry of Government in its function of promoting the economic development and the moral and artistic improvement of motion pictures (article 5°).[14]

The Regulation of August 6, 1951,[15] in its Tenth Chapter, deals with "cinematographic supervision" (*supervisión cinematográfica*). It provides:

> *Art. 62. Obligatory authorization for the exhibition of motion pictures.*—No motion picture, whether produced within this country or abroad, and no publicity made for its exhibition in movie houses, may be exhibited publicly without authorization of the Ministry of Government acting by the medium of the General Directorate of Cinematography (Dirección General de Cinematográfia).

The producers and distributors of motion pictures must prior to their public exhibition or exploitation submit them to the directorate for authorization and classification. They must mention in any publicity concerning a picture the number and class of authorization which has been accorded to it (article 63).

Article 68 prescribes the procedure to be followed in exercising the supervision of motion pictures, their viewing by the directorate, the manner the decision regarding them is to be made, and the availability of an appeal to the council from the directorate's decision not to supervise a motion picture where the sanction imposed has not been complied with.

Article 69 in its first paragraph elaborates on the terms of article 2°, section IX of the Law concerning the Cinematographic Industry (*Ley de la*

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[13] For text of article 6° of the Constitution, see supra. As seen, this article, as the Argentinian article 19, is interpreted as granting authorization to the Government to protect public morals.

[14] For composition of the Council see article 6°.

[15] Cited supra.

Industria Cinematográfica), as amended. It repeats the principle that authorization ought to be granted unless a motion picture "transgresses the limits imposed by articles 6° and 7° of the Political Constitution of the Republic upon the manifestation of ideas and the freedom of writing and publishing writings about any matter." Paragraph 2 of the same article interprets the meaning of the stated constitutional provisions for the purpose of the Law thus:

> It shall be deemed that there exists a violation of articles 6° and 7° of the Constitution, and the authorization shall be denied in the following cases:
>
> I. When one attacks or fails to respect private life;
> II. When one attacks morals;
> III. When one provokes any crime or makes apology for any vice;
> IV. When one attacks public order or peace.

Article 71 specifies what constitutes "attacks upon morals," thus:

> It shall be deemed that there exist attacks upon morals:
>
> I. When one offends the sense of shame, decency or social mores, or incites prostitution or the practice of licentious or lewd acts, all those acts which in public opinion are qualified as contrary to the sense of shame being considered as such;
>
> II. When [the motion pictures] contain scenes of obscene character or present lewd acts;
>
> III. When obscene or notoriously indecorous expressions are uttered.

Article 72 specifies what constitutes "provocation or apology of crimes or vices," thus:

> It shall be deemed a provocation or apology for any crime or vice [in the following cases:]
>
> I. When one incites anarchy, counsels or incites robbery, murder, destruction of real property or makes apology for these crimes or their perpetrators;
>
> II. When one defends, excuses or counsels vices, violations or crimes or makes apology for them or their perpetrators;
>
> III. When one teaches or demonstrates the form or method of committing these crimes or of practicing the vices, provided however that the one practicing those vices or committing those crimes is not otherwise punishable.

Article 74 of the Regulation contains the most important provision on classification of the motion pictures for which authorization is granted. It reads thus:

> The authorization shall be granted in each case in accordance with the following classification:
>
> I. Motion pictures permitted for children, adolescents and adults;
> II. Motion pictures permitted for adolescents and adults;
> III. Motion pictures permitted solely for adults; and

IV. Motion pictures permitted for adults in exhibitions especially authorized.

When granting the authorizations within any of the groups mentioned in this article, the Directorate, in classifying the motion pictures shall establish its criterion in accordance with the possible harm or prejudice which the motion picture involved may cause to minors or adolescents or to a special group of adults.

Article 76 imposes upon those who exhibit motion pictures the obligation not to exhibit them without previous authorization of the directorate; in the publicity made for a picture to state the number of the authorization and the type of classification accorded to it; where pictures of different classification are to be exhibited in one program, to use the most restrictive classification with regard to the appropriate ages; and to facilitate inspection.

Article 77 provides that municipal and Federal authorities shall not permit the public exhibition of motion pictures not previously authorized, and customs offices of the Republic shall not permit exportation of motion pictures whose exporter does not present the appropriate authorization.

Article 78 defines the authority of the directorate, thus:

I. To withdraw temporarily from the market motion pictures purported to be exhibited or exhibited without authorization referred to in the law and this Regulation, without prejudice to the sanctions incurred by the producers, distributors or exhibitors;

II. To cancel or suspend authorizations when this Regulation is violated or when supervening reasons of public interest justify it;

III. To order the cooperation of the authorities for the fulfillment of the provisions of this law and this Regulation.

Article 79 provides for review of the decisions of the directorate by the National Council of Cinematographic Art.

Of further significance is article 80, which authorizes cuts to be ordered in motion pictures, thus:

> Where, upon examination of a motion picture, the General Directorate of Cinematography finds that the authorization may be granted if cuts or modifications are previously made in such picture, the Directorate shall indicate this to the interested party. If the latter agrees to effectuate [such cuts or modifications], the authorization shall be granted subject to the pertinent conditions. If the public exhibition of a motion picture is made without effectuating the cuts and modifications, the offender shall be subject to the maximum of the penalties authorized by law.

Articles 92 to 94 deal with sanctions: administrative jailing, fines, and in case of nonpayment use of the "economic-coercive faculty"; appeal from imposition of a sanction by the directorate to the Ministry of Government.

PUBLIC EXHIBITIONS

A Regulation published in the Official Journal on March 12, 1929, and an amendment published on May 7, 1929,[16] establishes a system of classification of theatrical productions (articles 2° to 4°). It provides, among other matters, that "actors shall dress decently and shall preserve on the stage the utmost composure, in action as well as in words, avoiding carefully any act, posture or expression contrary to decorum or morals" (article 124). Actors are "strictly prohibited from adding words or phrases to the writings of authors" (article 125).

Article 128 provides that "No authority possesses the power of censoring or suspending the presentation of any theatrical work, nor of exercising pressure in order to prevent its exhibition. All authors and producers of theatrical works enjoy whatever rights of free utterance of thought is granted by the Political Constitution of the Republic." Paragraph 2 of this article, added by the amendment, however, states that "No work may be presented in public prior to its general rehearsal, with dress and decoration, before an Inspector nominated by the Department [of the Federal District]." Article 129 states that notwithstanding the exemption granted in the preceding article, the authors and producers shall be responsible in the case of attacks against public peace, morals, and private life. Article 130 provides that when a crime or violation consists not in that which the authors have written but in any addition by the actors or by the acts or demeanor of the latter, the actors shall be charged with crime by the courts or fined by the authority, depending on the gravity of the violation, provided that this must not affect the work being presented.

CONCLUSION

It may be important to note that "administrative law" is perhaps the most developed branch of Mexican law, in the sense that it has been given more attention than other legal disciplines. See, for example, Gabino Fraga, *Derecho Administrativo* (13th ed., Editorial Porrua, S.A., Mexico, 1969); Jorge Olivera Toro, *Manual de Derecho Administrativo* (2nd ed., Editorial Porrua, S.A., Mexico, 1967).

Except for this stress on administrative law, Mexican law is much less systematized or commented upon, and hence considerably less diversified, than that of Argentina, whose "legal science" is among the best—if not the best—in South America and is accepted as authoritative in other Latin American countries.

Whatever value study of the laws of these countries may have for our own legislative projects, there is one special point of the law of all civil-law countries which is worth imitating.

However one might aspire to defining "obscenity" in terms satisfying the rule of law, failure is practically implicit in the nature of the subject. The Supreme Court of the United States hence took recourse to a variety of

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[16] Reproduced in part in Castaño, op. cit., pp. 362-366.

devices, such as implicit admissions by the type of advertising used. One might query what value such admission may have as indication of the harm created by the publication of the item alleged to be "obscene." Is the defendant to be the judge of "obscenity"? There is, at least initially, an objective test to be reached. Considering the vast variety of potential approaches to this matter, a special value may be attached to the trial judges' qualification of an item as "obscene" or "not obscene" within a given environment. However, these judicial qualifications are entirely lost where judges are not required to make findings of fact and conclusions of law. Civil-law judges are always required to state the grounds of their conclusions of fact and of law.

United Kingdom

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ACTIVITIES COVERED

The Obscene Publications Act of 1959 makes it an offense to "publish" an obscene article.[1] A person is deemed to have "published" an article if he distributes, circulates, sells, lets on hire, gives, or lends it, or if he offers it for sale or for letting on hire,[2] and if the article is to be listened to or shown then, if he plays or projects it.[3] Importers, wholesalers, and distributors may be liable, and if a person has an obscene article for publication for gain[4] either for himself or another he commits an offense.[5]

For the purposes of the act a person has the article for publication for gain if with a view to such publication he has the article in his ownership, possession, or control.[6] An acquittal will result if the accused can prove that "*he had not examined the article and had no reasonable cause to suspect that it was such that his having it would make him liable for an offense.*"[7] This means that innocent disseminators such as importers, wholesalers, distributors, and booksellers have a defense,[8] and it would appear that publishers who had not yet read an unsolicited manuscript would have a similar defense. The burden of proof rests with the defense with the test being that of the balance of probabilities.

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[1] Section 2(1).

[2] 1959 Act, section 1(3)(a).

[3] Ibid. section 1(3)(b). Note also the proviso as it applies to film festivals within the meaning of the Cinematograph Act 1952 and private screenings to which the public is not admitted or to anything done in the course of sound broadcasting or television.

[4] Gain includes exchange *Chief Constable Blackpool* v. *Woodhall* (1965), Crim. L.R. 660.

[5] Obscene Publications Act 1964, section 1(1).

[6] Ibid., section 1(2).

[7] Ibid., section 1(3)(a).

[8] Obscene Publications Act 1959, section 2(5).

Under the 1964 act, section 1(3)(b), the question whether the article is obscene is to be determined with reference to such publication for gain of the article as in the circumstances it may reasonably be inferred he had in contemplation and to any further publication that would reasonably be expected to follow from it. There is no need for the gain to be direct and a conviction would lie where an admission fee was charged for entrance to an exhibition of nude photographs.[9] Proceedings under the act can take the form of a jury trial (where the individual is charged under section 2)[10] or a summary proceeding before a magistrate (where the prosecution only wants forfeiture of the "obscene" matter, section 3).

Importation

The Customs Consolidation Act of 1876 prohibits the importation of indecent or obscene works.[11] Customs officers are empowered to seize them.[12] As the list of banned books is secret, a person must take his chance when he enters the country. A person whose books are seized has a month in which to notify the Commissioners that he objects, after which the books are automatically forfeited. If he objects within the month, the matter goes to court. In practice the customs authorities refuse to return the book to the complainant so that he can read it and thereby prepare his defense. The customs officials can also prosecute for the offense of importing obscene articles,[13] although the number of seizures greatly exceeds the number of prosecutions.[14]

Distribution

The Post Office Act of 1953 makes it an offense to send a postal packet which encloses obscene or indecent matter[15] and authorizes officials to detain and destroy such materials. The Post Office has no power to open sealed packets in order to see whether their contents are obscene or indecent. Even so, cases of seizure average about 800 a year.[16]

Display

Under the Indecent Advertisements Act of 1889 it is an offense to affix an indecent or obscene picture anywhere where it may be visible to a person passing along any street, public highway, or footpath (section 3), and section 4 makes liable anybody who knowingly delivers the article to a person who has been convicted under section 3.

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[9] *Straker* v. *D.P.P.* (1963), 1 Q.B. 926.
[10] Obscene Publications Act 1959, sections 2(a) and 2(b).
[11] Section 42.
[12] Section 44.
[13] Section 45.
[14] Street, *Freedom, the individual and the law,* Penguin, 1963.
[15] Section 11.
[16] Street, *Freedom, the individual and the law.*

The Vagrancy Act of 1838 covers the exposing to the public view in the window or other part of any shop any indecent print, picture, or other indecent exhibition.

The Town Police Clauses Act of 1847 overlaps the preceding two acts with the requirement that the offering for sale in public or exhibition to the public view "any profane, indecent, or obscene book, paper, print, drawing, painting, or representation, or sings any profane or obscene song or ballad, or uses any profane or obscene language" to the obstruction, annoyance, or danger . . . .

Conspiracy

The Obscene Publications Act of 1959 provides that "a person publishing an article shall not be proceeded against for any offense at common law consisting of the publication of any matter contained or embodied in the article where it is the essence of the offense that the matter is obscene."

In the *Ladies Directory* case[17] the accused, Shaw, published what he called the *Ladies Directory* in order to assist prostitutes "ply their trade" when, as a result of the *Street Offences Act,* they were no longer able to solicit in the streets. The booklet contained names and addresses and photographs. These left no doubt that the intentions of the advertisers included acts of sexual perversion. Shaw was charged inter alia with conspiring with the prostitutes to corrupt public morals on the ground that the advertisements would induce readers to fornicate and indulge in perversions.

The House of Lords held that it was a crime to conspire to corrupt public morals and that it was rightly left to the jury to decide whether these advertisements did corrupt public morals. Lord Reid, who dissented in the House of Lords, pointed out that there were wide differences of opinion on how far the law ought to punish unusual acts done in private; that Parliament, not the Court, should decide this; that men will not know in advance whether their conduct will result in their imprisonment, which will depend on how juries choose to interpret expressions like "to corrupt public morals." The House of Lords did not decide that any act which corrupted was a crime; they said that a conspiracy to corrupt was: It all rested on the conspiracy between Shaw and the advertising prostitutes.

Shaw pleaded that he could not be prosecuted, since the conspiracy relied on the obscene publication. His plea was rejected because the offense of conspiracy did not "*consist of the publication*" of the magazines, it consisted of an agreement to corrupt public morals by means of the magazines which might never have been published.

At the time of the passing of the Obscene Publications Act in 1959 nobody thought of the possibility of such a prosecution,[18] since it was not realized prior to this that there was a general crime of conspiracy to corrupt public

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[17] *Shaw* v. *D.P.P.* (1962), A.C. 220.

[18] See Hansard and the Select Committee's report.

morals. While such a charge has not been pressed since, the government's refusal to prevent such a recurrence by introducing suitable legislation at the time they passed the 1964 Obscene Publications Act amendments has left this dangerous loophole! Assurances have been given[19] that the common law will not be used where the essence of the alleged offense is an agreement to publish an obscene article.

Definitions: Obscene

An article is obscene under the 1959 Obscene Offences Act if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[20] Justice Byrne in *The Trial of Lady Chatterley*[21] defined "to deprave" as "*to make morally bad, to pervert, to debase, or corrupt morally.*" The words "to corrupt" mean "*to render morally unsound or rotten, to destroy the moral purity or chastity of, to pervert to ruin a good quality, to debase, to defile.*"

The dominant characteristic of obscene material is the undue exploitation of sex for gain from prurient persons, although obscenity is not confined to sexual matters and may occur where a book has as its theme drug addiction.[22]

The test demands that the court determine who are the likely readers, and this eliminates an earlier tendency to define obscenity in the light of a possible 14-year-old schoolgirl reader. Other relevant circumstances are those which surround the whole availability of the book, the place where the books were offered for sale, its price,[23] and the age and occupation of the people for whom publication was made.[24]

The tendency must be to deprave and corrupt and it is not sufficient that the article be vulgar, shocking, or disgusting.[25]

The 1959 act makes it quite clear that the intention of the author or publisher is not to be considered when determining the issue of obscenity and that the work must be taken as a whole. This means that the traditional practice of a prosecutor's reading the "juiciest" parts to the jury is prevented, and the procedure adopted by Justice Byrne in the *Lady Chatterley* case when he required the jury to read the book (in the jury room) has become the usual practice.[26]

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[19] H.C. Debs, v. 695, c. 1212, 3 June 1964; and v. 698, c. 315, 7 July 1964.

[20] 1959 Obscene Publications Act, section 1(1).

[21] Not reported but for a summary see *R.* v. *Penguin Books* (1961), Crim. L.R. 176.

[22] *John Calder* v. *Powell* (1965), i Q.B. 509. This case involved "Cain's Book" by Alexander Trocchi.

[23] *Trial of Lady Chatterley* per Byrne J. 228.

[24] *Morgan* v. *Bowker* (1963), 2 W.L.R. 860; see also 1962 78 L.Q.R. 477.

[25] Trial of L.C. 229 per Byrne J.; R. V. Martin Secker & Wasburg Ltd. (1954) 1 D.L.R. 1138, 1139, Stable J.

[26] Lord Radcliffe has stated that this rule will not protect society from being contaminated by what it reads, since it does not read books as a whole. *Censors (Rede Lecture)* 1961, 17.

Where an action is brought under the Obscene Publications Act of 1959, it is possible for a work to be found to be obscene and yet no conviction will lie and the book will be available to the public. This occurs when the defense raises the issue of "public good." Section 4 provides that a person will not be convicted of an offense and an order for forfeiture made if it is proved that the publication is justified as being for the public good "on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern." The act also provides that the opinion of experts as to the above qualities may be admitted. It should be noted, however, that this expert testimony is only admissible insofar as it establishes the literary merit of the work and will be excluded if it results in an opinion as to the obscenity of the book.

In *Calder and Boyars Ltd.* [1968] 3 W.L.R. 974 (the *Last Exit to Brooklyn* case) the court of Appeals upheld a refusal by the lower court to admit expert evidence on the issue of obscenity. This would appear unfortunate, as in 1967 in the *Chewing Gum* case.[27] Lord Parker was prepared to extend the admissibility of expert evidence further than the special circumstances of that case necessitated. The justification for admissibility was that since children of different ages comprised the entire readership, express evidence was needed to give guidance as to the probable effect on them. "I cannot help feeling that with the advance of science, more and more inroads have been made into the old common law principles [i.e., evidence] . . . No doubt when dealing with the effects of certain things on the mind, science may still be less exact than evidence as to what effect some particular thing may have on the body but that, as it seems to me, is purely a question of weight."[28] The error in reasoning behind a refusal is obvious for if a "significant portion" of the readers are going to be adolescents, then it follows that expert evidence on the effects of the book should be admitted.

A further area of confusion in the statute (which arose in the *Last Exit* case) is the instruction that a judge must give to the jury when there is a section 4 defense. A jury may find it difficult to reconcile section 4 with sections 1 and 2, and may not understand how it is possible that a book which has the tendency to deprave and corrupt can be justified on any ground as being for the public good. The court of appeals in the *Last Exit* case suggested the following instruction:[29]

> . . . the jury must consider on the one hand the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity and corruptness; on the other hand, they should assess the strength of the literary, sociological or ethical merit which they consider the book to possess. They should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good.

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[27] 1967, 2 All. E.R. 504 (Lord Parker C.J., Widgery & O'Connor J.J.)
[28] 1967, 2 All. E.R. 504 at 506.
[29] 1968, 3 W.L.R. 986.

The problems of confusion in the minds of jurymen may not be as great as the possibility of a closed mind of a magistrate. Section 3 enables a magistrate who has been satisfied on oath of a reasonable suspicion to issue a warrant, valid for 14 days, authorizing police to enter and search any premises, stall, or vehicle and to seize and remove any articles which are reasonably believed to be obscene and which are kept for publication for gain[30] or with a view to gain.[31] Documents relating to trade or business may also be seized[32] so as to reveal the suppliers. The magistrate examines the material and may decide to issue a summons which calls upon the owner to show cause why it should not be forfeited.[33] The burden of proof rests upon the person summoned,[34] and if the magistrate is satisfied that obscenity and possession for publication for gain exists, the forfeiture order must be made. Where proceedings are taken against a bookseller, third parties such as the author are entitled to intervene and be heard.[35] An appeal lies to quarter sessions,[36] or a case may be stated for the divisional court of the Queen's Bench Division of the High Court on the application of either the owner or the prosecutor.[37]

It has been suggested[38] that it was not accidental that forfeiture proceedings that is, proceedings brought under section 3 of the 1959 act, were taken against John Cleland's *Fanny Hill.* In November 1963, copies of the book were seized from a firm of booksellers. The magistrate had no hesitation in ruling the book obscene. A great deal of controversy was aroused because of the decision to proceed under section 3 (without a jury) rather than (as in the case of *Lady Chatterley*) under section 2. The position therefore remains that a book of alleged literary value or other merit may be deprived a trial by jury should proceedings be brought under section 3 of the 1959 act.[39] The solicitor-general (Sir Peter Rawlinson) told the standing committee that the normal policy of the director of public prosecutions would be to proceed under section 2 where there was evidence of a deliberate breach of the law accompanied by a determination to persist in that breach.[40]

These assurances are of little value when the events leading up to the *Last Exit* case are examined. Prior to publishing the book in England, Calder and Boyars, realizing the possibility that the book was likely to be highly controversial, wrote to the director of public prosecutions, enclosed a copy

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[30] 1959 Act, section 3(1).
[31] 1964 Obscene Publications Act, section 1(5).
[32] 1959 Obscene Publications Act, section 3(2).
[33] Ibid., section 3.
[34] Ibid., section 3(3).
[35] Ibid., section 3(6).
[36] Ibid., section 3(5).
[37] *Burke* v. *Cooper* (1962), 1 W.L.R. 700.
[38] D.G.T. Williams, Control of Obscenity (1965), Crim. L.R. 471.
[39] Attempts during the committee stage of the 1964 act to make trial by jury available in section 3 proceedings failed H.C. Debates v. 698 c. 302, 7 July 1964. Standing Committee F. cc77 and 106, 16 June 1964.
[40] Note that such assurances are of limited value because of the rule of statutory interpretation, which prevents recourse to parliamentary debates.

of the book, and informed him that they proposed to sell it in hard covers for 30 shillings. They said that they thought that the director in reading the book would have no doubt that it was "*a work of very serious interest which is certainly not likely to appeal to those with merely a prurient interest.*"[41] They intimated that if, contrary to their expectations, the director did decide to prosecute, the proceedings would be strenuously defended and they asked that proceedings be taken under section 2 rather than section 3 of the act of 1959. An inconclusive reply was received on behalf of the director which finished with the sentence "*if you find–as I am afraid you will–that this is a most unhelpful letter, it is not because I wish to be unhelpful but because I get no help from the Act.*"[42]

The book was published in January 1966. It was most favorably received by many distinguished British critics and had a modest commercial success. In June 1966, a question was raised in the House of Commons asking the attorney general if he intended to prosecute. He replied in the negative. Later one of the Members of Parliament who had raised the question launched a prosecution under section 3 of the act. The magistrate who heard the case ordered the forfeiture of three copies of the books which he had seized. Calder and Boyars then wrote again to the director of public prosecutions informing him that in spite of the magistrate's decision, they would continue to publish the book and that they would defend any proceedings that he (the director) would bring under section 2. The director did institute proceedings under section 2, and the publishers were convicted.

On appeal it was held that the judge's summing up left a lot to be desired and the conviction was quashed. It is clear that the members of the court of criminal appeal[43] were of the opinion that the book should not be banned and that the safeguards of a jury trial are vital in this area.[44] If within the act there can be a variance as to what is deemed to be obscene depending on the type of hearing, the situation is worse outside it! Both the Post Office Act of 1953 and the Customs Act of 1876 refer to indecent or obscene material. The courts have held that these words (indecent or obscene) are to be dealt with disjunctively and that a work can be indecent without being obscene.[45] In *R. V. Straker*[46] the matter became even more ludicrous because the photographs in question had already been held not to be obscene in proceedings brought against Straker under the Obscene Publications Act of 1959. "Indecency" has not been the subject of an "accurate" definition, but the test seems to be whether "they do offend the ordinary normal person."[47]

Also when actions are brought under the Post Office Act of 1953 and/or the Customs Act of 1876 the defects in the law which existed before the

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[41] 1968, 3 All. E.R. 646.

[42] Letter dated 14 January 1966 and reported (1968) 3 All. E.R. 646.

[43] Salmon L.J., Geoffrey Lane, and Fisher J.J.

[44] Although it was the cause of a great deal of surprise that there should have been a conviction at all.

[45] R.V. Stanley (1965) Crim. L.R. 239. R.V. Straker (1965) Crim. L.R. 239.

[46] Ibid.

[47] The Obscenity Laws, Andre Deutsch. A report by the Working Party set up by a conference covered by the Chairman of the Arts Council of Great Britain.

Obscene Publications Act of 1959 remain. Literary merit is no defense; expert evidence is probably inadmissible; selected "juicy" parts of the book may be read; and so on.

In 1964 the then solicitor general, Sir Dingle Foot, bought Sir Richard Burton's *The Perfumed Garden* at a London airport bookstall when outward bound and had it seized by the customs on his return.

SPECIAL JUVENILE LEGISLATION

The Children and Young Persons (Harmful Publications) Act of 1955 applies to any book or magazine which is likely to fall into the hands of children or young persons and consists of stories told in pictures portraying the commission of crimes or violent, repulsive, or horrible acts or incidents in such a way that the work as a whole would tend to corrupt a child or young person into whose hands it might fall. It is an offense to print, sell, publish, let or hire, or possess for those purposes any such work. Professor Street relates the following incident as an indication of the ineffectiveness of this legislation.[48]

In 1966 the Chester Consumer Group attempted to prevent horror cards from being put into bubble-gum packets. The chief constable of Chesire refused to act on the ground that it was the national responsibility of the Home Office; the Home Office refused to act on the ground that the duty lay with the Cheshire police.[49]

OBSCENITY LAWS AND MASS MEDIA

Theater

Prior to 1968 the governing legislation for British theater was the Theatre Act of 1843.[50] But as a result of the findings of a select committee which had been commissioned to investigate censorship in the British theater the 1968 Theatres Act was passed.

The 1968 Theatres Act has the effect of:

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[48] Street, *Freedom, the individual and the law,* p. 125.

[49] Later that year, in Essex, the Crown prosecuted a chewing gum manufacturer in respect of his bubble gum battle cards. It is rather surprising that the charges were brought under the 1956 Obscene Publications Act and not the Children and Young Persons (Harmful Publications) Act 1955. (1967), 2 All. E.R. 504.

[50] The Theatres Act 1943 provided that one copy of every new play or other publication had to be sent to the Lord Chamberlain at least seven days before its first presentation. The act laid down no criteria for the guidance of the Lord Chamberlain, but he was largely guided by the criteria recommended by the 1909 select committee, that is, he could refuse a license if the play might reasonably be held

(a) to be indecent
(b) to contain offensive personalities . . .
(d) to do violence to the sentiment of religious reverence
(e) to be calculated to conduce to crime or vice . . .
(g) to be calculated to cause a breach of the peace.

Although his jurisdiction was restricted to London and Westminster, this gave him control over virtually all new plays in England.

(a) abolishing the censorship functions of the Lord Chamberlain (section 1);

(b) transferring to the appropriate local authority in every case the licensing of theater premises (section 2);

(c) the provision for criminal proceedings for performance of a play which is obscene (analogous to provisions of the Obscene Publications Act, 1959 to 1964 in relation to the publication of books) (section 4).

The provisions relating to the performance of plays are contained in sections 2, 3, 4, 5, and 6 of the act. Under the 1843 act the Lord Chamberlain had power to forbid any play "whenever he shall be of the opinion that it is fitting for the preservation of good manners, decorum, or public peace, so to do."[51] The 1968 act proscribes the giving of an obscene performance,[52] the giving of a play inviting the use of threatening, abusive, or insulting words with intent to stir up hatred against any section of the public of Great Britain[53] and likely to occasion a breach of the peace.[54]

For the purpose of the act, a performance is deemed to be obscene if "taken as a whole" its effect is such "as to tend to deprave and corrupt persons who were likely, having regard to all the relevant circumstances, to attend it,"[55] and provision is made similar to that in the Obscene Publications Act of 1959 to the effect that a person shall not be convicted under the act if it is proved that the giving of the performance was justified as being for the public good on the ground that it was in the interests of drama, opera, ballet, or other art, or of literature or of learning.[56] The opinion of experts may be admitted.[57]

Section 7(1) exempts a performance of a play given "on a domestic occasion in a private dwelling." This section alone exempts rehearsals although the rehearsal may only be attended by persons directly connected with the giving of the performance. (There is no attempt to clarify the position of critics.)

Proceedings can be instigated only with the consent of the attorney general[58] and section 9 provides that the script on which a performance is based shall be evidence of what was performed.

With regard to the transference of licensing power to the local authorities the act takes away from the local authorities the power to impose any term or condition or restriction as to the nature of the plays which may be performed under the license and restricts their power to the imposition of conditions in the interest of physical safety or health or to regulate or prohibit performances of hypnotism under the Hypnotism Act of 1952.

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[51] Section 14.
[52] Section 2(2).
[53] Section 5.
[54] Section 6.
[55] Section 2(1).
[56] Section 2.
[57] Section 3.
[58] Section 8.

Even though the words of the Obscene Publications Act of 1959 specifically cover the showing of films the film industry is subject to quasi-legal self censorship. It is "quasi-legal" because, even though the British Board of Film Censors has no official statutory evidence and is a purely private body set up by the cinematograph industry, the Cinematograph Act of 1952 gives power to licensing bodies to make conditions or restrictions on the admission of children based on the board's recommendations.

The 1909 Cinematograph Act was "*an Act to make better provision for securing safety at cinematograph and other exhibitions.*" This act was designed to protect the audience from danger due to the risk of fire, and where inflammable film was used the exhibitor required a license. County councils and county boroughs were made licensing authorities.

It is rather surprising that when challenged as to the use of their power to refuse a license of a film for which they disapproved the courts upheld the decision of the local authority. Because of the variances of local authorities and in order to create some form of universal standard the industry set up the British Board of Film Censors. The Home Office encouraged licensing authorities to follow the recommendations of the board and in practice this is what happens. They do this by recommending to the local authorities certain "model" conditions which they might attach to the cinema licenses. These conditions are based almost entirely upon the board's censorship and classification of films.

The main provisions of the model conditions are as follows: *No film shall be shown, and no poster or other advertisement of a film in or outside the premises shall be displayed, which is likely to be injurious to morality or to encourage or incite to crime, or lead to disorder, or to be offensive to public feeling or which contains any offensive representation of living persons.*[59] No film which has not been passed by the board shall be exhibited without the express consent of the licensing body. The provisions there refer to the board's classification: category "A," for films passed as more suitable for exhibition to adult audiences;[60] (no "A" film is to be exhibited if a child is present who is not accompanied by an adult); category "U," for films passed as more suitable for exhibition to general audiences; category "X," for films passed for exhibition provided that no child under 16 is present.

A licensing authority, even though it has adopted the "model" conditions, is free to reject the board's classification.

The British Board of Film Censors does not follow the former American practice of publishing a detailed code of rules for the production of films. Its task is also made easier because in Britain there are no unofficial powerful pressure groups systematically viewing and censoring films. Contrary to popular belief, violence and horror, not sex, is the Board's primary concern.

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[59] Street, *Freedom, the individual and the law,* p. 69.

[60] Ibid., p. 88.

Radio and Television

The British Broadcasting Commission is a body incorporated by royal charter. It received its license from the postmaster general and is subject to regulations under the License and Agreement of December 19, 1963. Section 14(3) of this license provides that the postmaster general may from time to time by notice in writing require the corporation to refrain at any specified time from sending any matter specified in such notice. In 1964, the B.B.C. was directed for the first time to maintain standards of good taste and decency. Should the B.B.C. refuse to obey a direction the postmaster general may, under section 24, revoke the license.

The Television Act of 1954 set up the Independent Television Authority. (The Operative Act is now the Television Act of 1964.) The Television Act requires that the I.T.A. satisfy itself that nothing is included in the programs which offends against good taste and decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling.

The B.B.C. takes great pains not to offend susceptibilities: It banned a record by Petula Clark called *The Sky* because there was a veiled reference to God; it banned Noel Coward's musical *Sail Away*, which American audiences have listened to for years. The B.B.C. maintains that it has no code and that key personnel instinctively understand what is expected of them.[61]

The I.T.A. has no published code but when Graham Greene's *The Complaisant Lover* was cut prior to a television performance they said they objected to the following: "the expression 'arse over tip'; dialogue about sex and the cigar butt; dialogue about girls in Curzon Street; a reference by Clive (the lover) to the cigar incident; the sentence 'you need your bloody sign'; Clive's unnecessary use of the word 'bloody'; the dentist's speech concerning his wife's habit of touching his face and saying 'thank you'; the wife's speech 'what a bastard you are'; and a sentence referring to 'the love with two backs'."[61]

Even though the stage play was presented uncut, the I.T.A. stated that they did not feel that the standards of theater were "necessarily correct for the medium of television."

SANCTIONS

Obscene Publications Act 1959

(*a*) On summary conviction: a fine not exceeding 100 pounds or prison for a maximum of 6 months.

(*b*) On indictment: to a fine (no amount specified) or to imprisonment for a term not exceeding 3 years or both.

(*c*) Forfeiture of the seized articles.

Customs Consolidated Act 1876

(*a*) A fine of three times the value of the goods or a maximum of 2 years imprisonment or both.

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[61] Ibid., p. 90.

(*b*) Forfeiture of the goods seized.

Post Office Act 1953

(*a*) Summary conviction: fine not exceeding 10 pounds.
(*b*) On indictment: imprisonment for not more than 12 months.
(*c*) Forfeiture of the article seized.

Indecent Advertisements Act 1889

(*a*) Under section 3—a 40 shilling fine or one month in prison.
(*b*) Under section 4—five pounds fine or 3 months imprisonment.

Vagrancy Act 1838

(*a*) A maximum of 3 months hard labor.

Town Police Clauses Act 1847

(*a*) A maximum of 14 days imprisonment. Conspiracy: This is a common law misdemeanor with discretion entirely vested in the court.

Theatres Act 1968

(*a*) On summary conviction: a fine not exceeding 400 pounds or imprisonment for not more than 6 months.
(*b*) On indictment: a fine (unspecified) or imprisonment for a term not exceeding 3 years, or both.

MOVEMENTS TOWARD REFORM

Both the Obscene Publications Act of 1959 and the Theatres Act of 1968 were the result of the findings of select committees appointed by the British House of Commons. At present, Parliament seems well satisfied with its work, and there is no official movement toward any further legislation. There is in existence, however, a committee of the Arts Council which is constantly working toward the alteration of existing legislation. In 1969 they published a report containing evidence given by writers, artists, lawyers, psychiatrists, members of the clergy, and other interested parties. The conclusion they reached and their recommendations are as follows:

(1) It is not for the State to prohibit private citizens from choosing what they may or may not enjoy in literature or art unless there were incontrovertible evidence that the result would be injurious to society. There is no such evidence.

(2) No crystal ball can tell us dogmatically whether more or less pornography would result from Repeal but in any case there is a complete absence of evidence to suggest that sex in the arts, even when aphrodisiac in intention, has criminal or anti-social repercussions.

(3) Though it is sometimes conjectured with no indisputable evidence that heavy and prolonged exposure to the portrayal of violence may not only reflect but also influence the standards of society, violence has been ubiquitous in the art, literature and Press of the civilised world for so long

that censorship must by now be recognised as a totally inadequate weapon to combat it. Indeed laws available for the purpose including the Obscenity Acts are virtually never even invoked against it.

(4) Since judges have to work in what is in effect a legal vacuum, the prosecution of an occasional book—usually the wrong one—often succeeds only in bringing the law in to disrepute, without effectively preventing the distribution even of that book.

(5) The very objective of the law is not even established, let alone identified in concrete meaningful terms that could command acceptance. Although judges emphasise that an article cannot be condemned because it shocks or disgusts, in practice that is precisely what happens, since juries have no other criterion to guide them.

(6) It is impossible to devise a definition of obscenity that does not beg the question or a rational procedure for weighing depravity and corruption against artistic merit and the "public good."

(7) When juries and defendants are without a comprehensible definition of the crime alleged, the defendant is left at the mercy of a personal opinion; which is a system of censorship rather than a system of law.

(8) It is intolerable that a man should be criminally punished for an action that he has no means of ascertaining in advance is criminal.

(9) Incitement to criminal behaviour is sufficiently covered by the ordinary law of incitement. To that extent the Obscenity Acts are redundant. Insofar as they add the concept of a mere unintentional tendency toward crime as a punishable offence they are to be deplored.

(10) It is an affront both to legal and common sense that incitement to a non-crime should be punishable as a crime; and worse when this doctrine is extended to a mere tendency.

(11) No encouragement should be given to the concept of the State as custos mórum with its corollary that merely to shock is a criminal offence.

(12) The proper sanction for breaches of taste or non-conformity with current mores should be social reprobation and not penal legislation.

The foregoing analysis has led the Working Party firmly to the conclusion that the laws against obscenity, while constituting a danger to the innocent private individual, provide no serious benefit to the public. The basic problem of founding a law that can be accepted on so subjective a concept as obscenity appears to be insuperable. Any formula of definition must be doomed to beg the question, so there can be little hope of formulating alternative legislation with more than peripheral improvements.

The Working Party therefore recommends that the Obscene Publications Acts of 1959 and 1964 should be repealed and should not be replaced for a trial period of five years or even at the expiration of five years from that

date unless Parliament should otherwise determine. The Theatres Act of 1968 should be brought into line.

It also recommends that certain other relevant Acts should be amended or repealed. Many of these have been or could be used as a basis for indirect censorship and contain words such as "indecent" and "profane" which are no more capable of definition than "obscene" but which may be used to circumvent any need to establish harmful consequences.*

We recognise, however, that it is reasonable to protect individuals who may be affronted by offensive displays or behaviour in public places. There are various Acts dealing with this, for which we would substitute a single section so that there should be no overlapping.

We would not seek to interfere with the existing arrangements under which the British Board of Film Censors classifies films into various categories. Television is not in practice affected by the Obscenity Acts and we are content that the B.B.C. and I.T.A. should be left to conduct their programmes on their own responsibility, with such regard as they see fit to pay to ascertainable public opinion.

We would leave intact the Children and Young Persons (Harmful Publications) Act 1955.

A draft Bill follows at Appendix A setting out the changes in the law which would give the effect to the above recommendations.

DRAFT OF THE WORKING PARTY'S OBSCENE PUBLICATIONS (REPEALS AND AMENDMENT) BILL

Explanatory Memorandum

The Purpose of the Bill is to repeal the Obscene Publications Acts 1959 and 1964 and to amend the provisions of various Acts which may be used in order indirectly to achieve the same objects as those Acts.

Arrangement of Clauses

(1) Abolition of Certain Offences
(2) Repeals
(3) Amendment of the Post Office Act 1953
(4) Offensive Behaviour
(5) Citation Commencement and Extent

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*An example of this is the prosecution of paintings and pictures under the Vagrancy Acts of 1824 and 1938, under which convictions have been obtained on the ground that the pictures were "indecent" (which is something less than "obscene") and no defence on the ground of artistic merit was possible.

A

BILL

to

Repeal the Obscene Publications Acts 1959 and 1964 and to amend various correlated Acts

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) No person shall be proceeded against for an offence at common law in respect of the publication of an article where it is of the essence of the offence that the article was obscene, indecent, offensive, disgusting or injurious to morality or that the persons against whom such proceedings would be brought have conspired to publish such an article.

(2) No person shall be proceeded against under any local Act or by-law where it is of the essence of the offence that the person has published an article which was obscene, indecent, offensive, disgusting or injurious to morality.

2. The Acts referred to in the first column of the Schedule hereto are hereby repealed to the extent set out in the third column of the said Schedule.

3. No proceedings shall be brought under section 11(1)(b) of the Post Office Act 1953 unless the packet is addressed to a person who

(a) has not solicited it or is unaware of the nature of its contents; and

(b) is offended thereby.

4. Any person who in any street, road, highway or other public place exposes or exhibits or delivers to any person any indecent article or behaves in an indecent manner so as to offend persons who read or see the article or witness the behaviour in question shall be liable on summary conviction to a fine not exceeding 50 pounds or on a second or further conviction to a fine not exceeding 100 pounds or two months' imprisonment or both.

5. (1) This Act may be cited as the Obscene Publications (Repeals and Amendment) Act.

(2) This Act shall come into operation on the expiration of one month beginning with the date of the passing thereof and shall continue in force unless at the expiration of five years from that Parliament should otherwise determine.

SCHEDULE

Repeals

Chapter	*Short Title*	*Extent of repeal*
5 Geo. 4	Vagrancy Act 1924	In section 4 the words "Every person wilfully exposing to view in any street, road, highway or public place any obscene print, picture or other indecent exhibition."

1 & 2 Vict. c. 38	Vagrancy Act 1838	Section 2.
10 & 11 Vict. c. 89	Town Police Clauses Act 1847	In section 28 the words "Every person who publicly offers for sale or distribution or exhibits to public view any profane, indecent or obscene book, paper, print, drawing, painting or representation, or sings any profane or obscene song or ballad, or uses any profane or obscene language."
39 & 40 Vict. c. 37	Customs Consolidation Act 1876	In section 42 the words "Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings or any other indecent or obscene articles."
52 & 53 Vict. c. 18	The Indecent Advertisements Act 1889	The whole Act.
7 & 8 Eliz. 2 c. 66	The Obscene Publications Act 1959	The whole Act.
12 & 13 Eliz. 2 c. 74	The Obscene Publications Act 1964	The whole Act.
14 & 15 Eliz. 2 c. 80	Criminal Justice Act 1967	Section 25.
15 & 16 Eliz. 2 c. 54	Theatres Act 1968	Sections 2 and 3.

West Germany

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WHAT KIND OF SEXUAL EXPRESSION IS SUBJECT TO PUNISHMENT OR OTHER LEGAL CONTROLS

Although epithets such as "obscene" (*obszön*) and "pornographic" (*pornographisch*) exist in the German language, they are not legal terms of art. What in American law would be referred to as obscene or pornographic can be found in West German law under quite different technical labels. Thus, as is often the case with reports on foreign law, problems of terminology arise at the very outset. To avoid semantic confusion and provide a common denominator for comparisons, neutral terms such as "objectionable sexual expression" will be used for purposes of this report. "Objectionable sexual expression" or similar phrases must not be understood to cover erotic expression through conduct (such as indecent exposure). Rather, its coverage should be limited to erotic expression as reflected or embodied in writings, images, or other representations to which attributes the terms "obscene" and "pornographic" conventionally apply in American law. Expression through the spoken word or gestures shall be covered only insofar as they are connected with theatrical performances or dissemination through mass media.[1]

The key term used in German law in referring to objectionable sexual expression is "lewdness" (*unzüchtigkeit*). In certain specific statutory contexts other expressions, such as "immoral" material or matter "leading to debauchery," can also be found but need not detain us here. Their meaning shall be explored in discussing specific statutory provisions wherein these phrases are used. Thus, only the import of "lewdness" as related to sexual expression shall concern us here.

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[1] The explanations and disclaimers in the text are applicable to the reports on Italy, France, Yugoslavia, Hungary, and the Soviet Union as well.

The "classic" test

The first important judicial definition of obscenity was laid down by the German supreme court over 80 years ago and is still widely used in decisions and legal writing. According to it an object or expression is lewd if it relates to sexual matters and is "grossly offensive to the sentiments of shame and morality."[2] This definition is far from self-explanatory. The precise relationship between "shame" and "morality" has never been clarified.[3] Nor has it been settled whether the property of a matter to arouse sexually is of the essence of "lewdness." The opinion seems to prevail that it is not. It is clear, however, that the actor's purpose to excite sexual desires is irrelevant to a finding of "lewdness." Objective analysis decides.

Offensiveness to the sentiments of shame and morality must be judged with reference to an average adult person. Thus, in a case involving dissemination of bawdy fiction in a homosexual club, a court has declared that a writing offensive to an average reader retains this property even if it solely circulates among people with an unusually low threshold of shame. Even if circumstances indicate that a matter is designed for an especially susceptible audience (such as juveniles), the offensive effect thereof shall still be tested against an ordinary adult. As will be seen later, specific statutes take care of the protection of juveniles.

The procedural problem remains of how to establish the reactions of an average person which, as the courts have said, always control. Disregarding an isolated case to the contrary (the *Reigen* case), courts have constantly refused to ascertain such reaction through testimony of individuals belonging to a representative sample of the population. Thus, it may safely be concluded that judges simply follow their hunches about the average man's reactions to an allegedly lewd matter.

The problem of the erotic in material with literary, artistic, or scientific pretensions has perhaps nowhere been so piercingly analyzed and thoroughly discussed as in Germany. But even here it has proved so thorny as to defy a stable approach. As elsewhere German courts have held that a work must be assessed as a whole, rather than on the basis of isolated passages. Following this logic, a court has declared that a writing does not become "lewd" by dissemination in circles which only read erotic passages and disregard the rest.[4] The German Constitution of 1949, while proclaiming the right to "free expression and dissemination of opinion," provides that the freedoms involved may be limited by "general statutes" (Constitution, art. 5, par. 2). Because provisions on "lewd matter" appear in "general statutes," no constitutional questions ordinarily arise. But as soon as literary, artistic, or scientific value of an allegedly obscene object is advanced in court, the case

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[2] See 4 *Entscheidungen des Reichsgerichts in Strafsachen,* 87 (1884); hereinafter abbreviated as RGSt. See decisional authority listed in Schönke-Schröder, *Strafgesetzbuch,* 15th ed., p. 1037 (1970); hereinafter referred to as Schönke-Schröder.

[3] For illuminating discussion Hanack, 23 *Juristenzeitung* (hereinafter J.Z.), 43 (1970).

[4] On the other hand, passages pulled out of context and built into a new whole may become obscene. This "metamorphosis" through transplantation is discussed in Germany under the rubric of "relative lewdness." See Schönke-Schröder, p. 1039.

assumes (ipso facto) constitutional dimensions. Article 5, paragraph 3 of the Constitution guarantees the freedom of "art, science and research," but—in contrast with the paragraph on free expression—fails to provide for any restrictions thereto, be it by "general statutes" or otherwise. How is this failure to be explained? Some maintained that literary, scientific, or artistic value negates "lewdness" in an object, or provides an exemption ground from responsibility by virtue of the constitutional "salvation clause." However, the supreme court refuses to take this view. Only the finding of scientific character to a work seems to eliminate "lewdness." The promotion of art and literature does not seem to the court to represent an intrinsic value and may be limited by statute. But, the latter being but an exception from a constitutional principle, the statute must be narrowly construed in the interest of free development of the arts. In pursuance of this general analysis the German supreme court has developed a specific test to establish redeeming artistic or literary value. While in ordinary obscenity cases the offensiveness of material is tested with reference to an average person, artistic or literary merit is judged with reference to the views and reactions of "educated persons attuned to modern artistic or literary trends."[5] Expert witnesses must be called in.[6] German law does not seem to be settled on the issue of whether a finding of *substantial* or *any* literary or artistic value suffices for exemption from responsibility. In at least one case a German court has held that the "fulfillment of minimal requirements of artistic or literary form" exempts.[7] Or, to put the same idea in the language of American case law, the work must not be *utterly* without redeeming artistic value.

The "Fanny Hill" test

In 1968 a court in Munich rendered a decision condemning the novel *Fanny Hill* as a "lewd writing" and ordering destruction of all copies of the translation. One of the grounds on which this decision was attacked in the supreme court was the allegedly unconstitutional vagueness of the old judicial definition of lewdness. After long deliberation the supreme court handed down a decision reversing the judgment.[8] Though unwilling to admit the vagueness of the old test, the court actually enunciated a new and greatly narrowed judicial test concerning "lewdness" in regard to writings. Before proceeding to spell out the new test the court made a few broad remarks sketching its general philosophy on the enforcement of morals. The courts, it said, must not act as moral custodians but must restrict their activity to suppressing phenomena positively harmful or disturbing to society. (A point

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[5] Such differential treatment has been criticized in legal writing, but even scholars seem to be satisfied with the practical result of the supreme court's approach. Recently a new test has appeared in writing on the subject. See Müller, Strafrecht, *Jugendschutz und Freiheit der Kunst,* 25 J.Z. 87, 89 (1970).

[6] In the *Fanny Hill* case to be discussed infra, experts were called in who testified to the literary value of Cleland's novel. See Judgment of the Munich *Langericht,* No. I, 456/68, in 23 J.Z., 72 (1970).

[7] See Judgment of the OLG Stuttgart in *Neue Juristische Wocheschrift* (1969), p. 1780.

[8] Judgment of July 22, 1969, in 25 J.Z., 72-74 (1970).

of possible interest: In outlining its philosophy, the supreme court has quoted as support Justice Douglas' opinion in *Fanny Hill* v. *Massachusetts*.) As a result of rapid change in attitudes toward sex, many expressions heretofore considered disturbing seem quite innocuous nowadays. In light of new attitudes, a depiction of sexual matters is lewd only if it severs the sexual phenomena from all other aspects of life, through "brazen" and "obtrusive" presentation. The sexual becomes a replacement for everything else. Helpful clues for a finding of lewdness are: unrealistic hyperbolae in the description of sexual practices, the ever increasing intensity and bizarre nature of experiences, deviant practices, glorification of debauchery, and vulgarity in expression. If a book contains nothing but a succession of instances of copulation and other sexual practices, it may still escape a finding of "lewdness" if, taken as a whole, the book remains within the bounds of *allgemein Lebensfreude* ("general joy of life"). Even outspoken descriptions of deviant practices need not be lewd in character if given "without inner participation" and in a detached way. As in the old test the new test has no reference to scatology.

As a result the German supreme court has achieved what Justice Stewart advocated in the American *Fanny Hill* case. It has narrowed the judicial definition of written obscenity to genuine hard-core pornography.[9] The new definition has greatly reduced the likelihood of difficult cases involving serious claims to artistic or literary merit of an allegedly obscene work. An object found "lewd" under the new test will seldom go beyond pure, unadulterated smut and will hardly provide a serious basis for aesthetic justification.

THE CRIMINAL OFFENSE OF DISSEMINATING LEWD MATERIAL

Types of punishable activity

The first type of activity falling within article 184 of the German Penal Code which defines the offense of "disseminating lewd material" is *dissemination* itself. It is narrowly construed so as to exclude mere communication of ideas contained in an object (such as reading an obscene book). Nor does "dissemination" cover giving obscene matter to individuals for private use.[10]

Making the lewd material "*generally available by exhibiting, affixing, displaying it or otherwise*" also falls within article 184 of the Penal Code. In contrast to "dissemination," the obscene material is not physically distributed or circulated, but ideas contained therein or the object itself are exposed.

Certain activities preparatory to actual spreading of obscene matter have also been brought under article 184 P.C. These are: *producing* obscene material, *copying* it, *obtaining, importing into or exporting from the jurisdiction, announcing* or *advertising* and *transmitting* it.[11] To be punishable

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[9] In doing so it has relied on German research on the matter. Compare:. Giese, ***Das obszöne Buch*** ("The obscene book") (1965); also Hanack, ***Report to the 47th "Juristentag"*** (Jurists' Convention), p. 354 (1968).

[10] The translation of the article as amended in 1969 is in the appendix.

[11] For the sake of brevity, references to cases were omitted. Most cases may be found in Schönke-Schröder, pp. 1037-1044.

all these activities must be done with the specific intent to disseminate or make "lewd" material "generally available."

Though by reason of a special juvenile statute the provision is probably obsolete, article 184 P.C. still threatens punishment to those who "*convey*" lewd matter or "*offer it for financial advantage*" to a person under the age of 16.

The next punishable activity is "*exhibiting in places open to the public any material designed for use in doing lewd acts, or announcing or advertising such material to the public.*" Examples of such material would be *gaude-mihi*'s, sadomasochistic paraphernalia.

Anybody who "*in a manner affronting decency and propriety announces or advertises means, objects or methods which are designed to prevent venereal diseases or who exhibits such means and objects in a place open to the public,*" shall also be punished under article 184 of the Penal Code.

The last type of activity falling within article 184 P.C. is to "*make public announcements leading to lewd relations.*" Lewd relations are defined as "sexual gratification in a manner violating the moral code." Legislative history reveals that this provision was primarily directed towards newspaper announcements and notices relating to sexual matters. But even a casual reader of the German press may testify to the fact that announcements of a quite daring nature are tolerated by law enforcement agencies as long as the words are veiled in meaning. Thus the reputable periodical *Der Spiegel* has recently carried an announcement recruiting "foreign and German girls for the profession of Irma la Douce."[12]

What then are the activities in connection with obscene matter falling clearly outside German criminal law? Mere production or possession of such matter for private use is surely not illegal. The same holds for lending such matter to individuals on the assumption that these will not make the matter available to additional persons. Nor can commercial dissemination of material falling short of obscene become criminal if the "disseminator" suggests or represents that it is.

Mens rea

The mental element of the offense under article 184 of the Penal Code is governed by the "general part" of the Code. The actor must be aware of all definitional elements of the offense, including the "lewd" nature of material involved. He need not know that dissemination of lewd objects is illegal, but invincible ignorance of law may exonerate him. In contrast to some other jurisdictions, there is in German law no presumption that obscene material is possessed for purposes of dissemination, even if the defendant is in the business of selling the same kind of object which is alleged to be "lewd" in the case sub iudice.[13]

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[12] See 24 *Der Spiegel* of March 2, 1970, p. 200.

[13] Compare the case of a book dealer who received a shipment of obscene photos from Denmark and was acquitted for failure of the prosecution to prove the specific intent of dissemination.

Punishment

Conviction under article 184 P.C. may carry a sentence for a term not to exceed one year or a fine, or both. Confiscation of lewd material incident to conviction shall be taken up later.

Recent developments

Article 184 P.C. has often been attacked on constitutional grounds. Until quite recently attack centered on the alleged unconstitutional vagueness of "lewdness" as a definitional element of the offense. Since the *Fanny Hill* decision, constitutional attack seems to be shifting to other grounds. In 1969, criminal prosecution was instituted under article 184 P.C. against a book dealer in Frankfurt who received a shipment of 10 volumes of erotic photographs from Denmark. When the prosecution failed to prove the dissemination intent on the part of the book dealer, it instituted confiscation proceedings against the books. Admitting in an interlocutory decision that the photographs—representing couples and groups copulating—may be recognized judicially as obscene under existing standards, a judge of a Frankfurt court nevertheless suspended proceedings on the theory that pertinent portions of article 184 P.C. are unconstitutional. Pursuant to German law relating to such cases, he referred the case to the German constitutional court for adjudication of the constitutional issue. The judge listed many points on which article 184 P.C. appears to be of dubious constitutionality, but only some may interest American lawyers. Thus, the judge stated that the legislator has exceeded his jurisdiction in threatening punishment for conduct which—without being harmful to anyone—merely flouts ethical values of certain segments within the pluralistic society. Also, in denying the "need" of some adults to "consume" erotic material, the legislator encroaches on the constitutional right guaranteeing the "free development of personality" (Constitution, art. 2). The constitutional right of "free access to information" is also affected (Constitution, art. 5). As of this writing, the case is still pending before the constitutional court. But no matter which way its decision goes, it seems obvious that the traditionally somewhat conservative attitude of the German judiciary toward sexual expression is changing. Whether this change will eventually lead, as in Denmark, to the abolition of restraints on the dissemination of erotic material is anybody's guess.[14]

THE FILTH AND SMUT STATUTE AND YOUTH PROTECTION

The criminal offense under article 184 of the German Penal Code is not directed towards protecting juveniles as an especially susceptible group. To this end the Statute of June 9, 1953, has been passed on the "dissemination

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[14] The criminal offense under article 184a P.C. need not be discussed within the purview of this report. True, it punishes the sale of "shameless writings to juveniles," but these writings are interpreted by courts as covering shameless matter *other than the sexually oriented.*

of writings endangering the youth." It is better known in Germany under the popular name of "Filth and Smut Statute" (Schmutz und Schund Gesetz). Though the sweep of this statute exceeds dissemination of sexually oriented material, its essential features must be presented cursorily.

At the very beginning the statute defines writings, pictures, sound recordings, and other embodiments which it considers dangerous to persons under 18 years of age. Therein fall, besides matters inciting to violence, crime, racial hatred, or exalting war, also "immoral" objects which are our sole concern here. There is no doubt that erotic material is encompassed by this formula of potentially gargantuan sweep. In contrast to "lewd matter," which has recently been limited to outright pornography, "immoral matter" is construed much more broadly.

Immoral matter is entered in a list of items considered dangerous to juveniles. It may not be entered, however, "solely because of its political, social, religious or ideological content," or where it "promotes art, science, research or teaching," or is otherwise "in the public interest" (in the last hypothesis the "form of presentation" must not be objectionable). When immoral matter has been entered in the list and this fact has been publicly announced, such matter must not be sold or "made available in any other way" to persons under 18 years of age. Also, important restrictions are placed on advertisement, display, commercial dissemination, and lending in public libraries. (See appendix to this report.) The latter restrictions are thought by some to be of dubious constitutionality insofar as they affect the constitutionally guaranteed right of adults to free access to information. Although challenged, these restrictions have not been struck down as unconstitutional so far. If material is "manifestly youth-endangering in a serious way" or if it "promotes nudism through pictures," all the above specified prohibitions and restrictions attach even *without* entry in the list of matter dangerous to youth. Moreover, the clause preventing entry in the list of matter with certain redeeming value (literary or artistic, for instance) *does not apply* in the context of "manifestly" youth-endangering matter.

The decision to include immoral matter in the list is made by a Federal Board (*Bundesprüfstelle*). The latter is presided over by a person appointed by the Federal Minister for Family Affairs, and is composed of artists, publishers, educationalists, and representatives of various religious groups. Proceedings before the board are regulated by the "Filth and Smut Statute" in some detail, and special summary procedure is envisaged for urgent cases (art. 12, 20). The board's decision may be subject to judicial review.

Violations of the ban on the sale to juveniles of "endangering matter" and violations of various restrictions imposed on commercial promotion of such matter are sanctioned with imprisonment for a term not to exceed one year, or a fine, or both. Certain immunity provisions apply to parents and specific classes of other persons. In contrast to penal provisions on "lewd" matter, violations of the "Filth and Smut Statute" are punishable even if committed through negligence. In this case, however, only a fine can be imposed.

As the reader will note, the statute has, in essence, set up a type of censorship in the interest of protecting juveniles from exposure to objectionable erotic matter. Censorship for any other purpose would violate a specific ban

on censorship inserted into the German Constitution. Possibly as a safeguard against financial losses due to inclusion in the list of matter dangerous to youth, German magazines have established a "council" to exercise voluntary "self-censorship" and develop standards of the acceptable for illustrated magazines. In 1964 the members of the council publicly expressed some misgivings about the usefulness of their job, and in 1966 the council was abolished. It has, however, been reestablished since. This leads us to controls over eroticism in the mass media.

LEGAL CONTROLS OF EROTIC EXPRESSION IN THE MASS MEDIA

Motion pictures

Censorship of movies by state agencies for purposes other than that of the protection of juveniles would in West Germany be unconstitutional (Constitution, art. 5, par. 2). But the motion picture industry has established a form of preventive self-restraint, known in Germany under the acronym SFK (freiwilige Selbstkontrolle).[15] Movie producers, distributors, and cinema owners, organized in a powerful association (SPIO), have set up an "examining board" and pledged not to distribute or show films without securing a license for distribution or showing therefrom. The board previews movies, looking, among other things, for matter "likely to offend the moral sentiment" of audiences. In case of such a finding the board may either turn down a request for license, or demand that certain cuts or changes be made in a movie, or issue the license for showing to limited audiences only. Violations of the SFK are met with sanctions in the form of various disciplinary penalties. Movie producers are urged—but not requested—to submit scripts for prior approval to the board, thus avoiding financial losses in case of denial of license to a completed movie.

The development in Germany concerning the rating of movies as suitable for certain age groups is interesting. As stated, movie censorship for the purpose of youth protection is not unconstitutional. Accordingly, on July 27, 1957, a statute was passed for the protection of youth in public (*Gesetz zum Schutze der Jugend in der Oeffentlichkeit*), which—besides numerous restrictions imposed on persons under 18 years of age—provided for the rating of movies as fit for certain age groups only. Films could be classified under the statute (art. 6) as suitable only for persons over 18, suitable only for persons over 16, or suitable for all persons over six years of age. (Children under six are not admitted to movie theaters.) The license for limited viewing was coupled in the statute with deadlines on the hours of the last performance for various age groups. The job of rating the movies was to have been entrusted to an agency appointed by the individual States of the Federal Republic. In an interesting move, all States have entrusted the rating of movies to the SFK examining board, rather than creating special censorship agencies. Although created by the industry, the board has proved

[15] Guidelines of the SFK are presented in a document entitled *Grundsätze der Freivilligen Selbstkontrolle der Filmwirtschaft.* The document is dated February 1, 1963.

to be quite active and comparatively strict in rating the movies. For instance, in 1963 it released only 46% of all cinematographic films for general viewing, as compared with 94% for the same year in France and 76% for the same year in the United Kingdom.[16]

Showing films to persons barred from the audience and failure to put up notices alerting customers to the specific rating of a movie is subject to punishment under the statute (art. 13, 14).

Radio and television

West German radio and television are run by public corporations (*öffentlich-rechtliche Anstalten*) under the rather general supervision of interparty and interdenominational councils responsible to the individual States. In this setting the need for legal provisions on censorship hardly arises. There are none in West Germany. Even so, television networks have adopted "guidelines" for their programming policy, part of which is the safeguard of the "moral code." It is perhaps worthy of note that the guidelines of the second television program were singled out by youth welfare organizations as an outstanding example of high moral standards.[17]

The stage

There is no censorship of theatrical productions in Germany. However, objectionable sexual expression on the stage may fall within offenses under the Penal Code. For example, simulated copulation or similar conduct on the stage could constitute "causing public annoyance by lewd acts" as defined by article 183 of the Penal Code. (Maximum punishment: imprisonment for a term not to exceed two years, or a fine.) Nudity on the stage may materialize the definitional elements of "gross mischief," which is classified as a petty misdemeanor under article 360 (11) of the Penal Code. Obscene language may in certain situations constitute the offense of "insult" (art. 185 P.C.).

CONFISCATION AND DESTRUCTION OF OBJECTIONABLE EROTIC MATERIAL

Following a conviction on an obscenity charge (art. 184 P.C.), all copies of "lewd" material, as well as molds and printing plates used in production thereof, must be ordered confiscated and destroyed (articles 41 and 184 P.C.). But confiscation and destruction of lewd material may also occur independently of a conviction. Under certain circumstances (for example, if a person is immune from prosecution) the prosecutor may move the court to institute in rem proceedings against allegedly lewd material (articles 430 to 433 of the Criminal Procedural Code). However, confiscation cannot in this

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[16] Compare Blau, "Moralismus in der Rechts-und Sozialordnung, 4 *der Kreis* (periodical, *"The Circle"*), p. 27 (1966).

[17] Blei, id. 28.

hypothesis be ordered unless dissemination of lewd material occurred in awareness of the erotic character of the object involved.[18]

If obscene matter is shipped through the mail within Germany, there is no legal way of opening postal deliveries prior to the institution of criminal proceedings against a person.[19] Exceptions are provided in the case of shipments from abroad. Customs officials are authorized to check not only for the purpose of discovering goods subject to duty but also to prevent import into Germany of "prohibited articles" (art. 1, par. 2 of the Statute of June 14, 1961, on the Customs Office). To this end they may also open postal shipments. Upon discovery of material which appears to be obscene, they are bound to forward it to the nearest public prosecutor's office, which may institute criminal prosecution under article 184 of the Penal Code, commence in rem proceedings, or order that the shipment be delivered to the addressee.[20]

APPENDIX

I

ARTICLE 184 OF THE GERMAN PENAL CODE OF 1871, AS AMENDED IN 1969

Spreading of lewd writings

(1) Anybody who

1. disseminates lewd writings or makes them generally available by exhibiting, affixing, displaying or otherwise;

1a. produces, copies, purveys, announces or advertises, or transmits lewd writings, imports them into or undertakes to export them from the territory to which this Code applies, with the purpose of disseminating them or copies made therefrom or of making these generally available;

2. turns over or offers lewd writings for consideration to a person under the age of sixteen;

3. exhibits in places open to the public objects designed for use in the commission of lewd acts, or announces or advertises such objects to the public;

3a. in a manner affronting decency and propriety, announces or advertises means, objects or methods which are designed to prevent venereal diseases or who exhibits such means or objects in a place open to the public;

4. makes public announcements designed to lead to debauchery,

shall be punished by deprivation of liberty not to exceed one year and a fine or either.

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[18] Comp. Schwarz/Dreher, *Strafgesetzbuch* ("The Penal Code"), 30th ed., commentary no. 4 to art. 41 (1969).

[19] After proceedings have commenced, provisions on the seizure of mail apply. (See art. 99 of the Criminal Procedural Code and art. 12 of the statute on installations for telecommunications). "Fishing expeditions" for obscene matter prior to the initiation of a prosecution are illegal.

[20] See Potrykus in *Monatschrift für deutsches Recht* ("German Law Monthly") 269, 270 (1969). These provisions are of late often applied in connection with shipments into Germany of pornographic material from neighboring Denmark.

(2) Sound recordings, pictures and representations shall be treated as writings.

(3) Objects to which the offense defined by paragraph one subparagraphs 3 and 3a relates, may be seized. Where the offense has been committed through announcements or advertisements, only the notices and ads may be seized.

II

STATUE OF JUNE 9, 1953 ON THE DISSEMINATION OF WRITINGS ENDANGERING THE YOUTH

(consolidated in 1968)

. . . . . .

Art. 4

A writing whose insertion in the list has been made public may not be sold, disseminated, lent, or stocked for the aforementioned purposes

(1) by the seller outside his business premises or by traveling salesman from door to door;

(2) in kiosks or other places where customers are attended without entering;

(3) through the mail; or

(4) in libraries or reading rooms.

Publishers and wholesale dealers shall not ship such writings to persons carrying on business in the manner envisaged by subparagraph 1 of the preceding paragraph, or operating establishments specified under subparagraphs 2 to 4 of the preceding paragraph.

Art. 5

Advertisement for business purposes must not indicate that proceedings for entering a writing in the list are pending or have been completed.

After announcement of insertion in the list, business promotion through displays in shop windows, within the store, or in other places accessible to the public, as well as advertising through notices, mail, or other means of communication for advertisement purposes shall be prohibited. Notices in professional journals designed for publishers are permissible.

Yugoslavia

MIRJAN DAMASKA
Zagreb,
Yugoslavia

WHAT KIND OF SEXUAL EXPRESSION IS SUBJECT TO PUNISHMENT OR OTHER LEGAL CONTROLS

Before turning to legal provisions attempting to define what is obscene, a few remarks on some aspects of the Yugoslav culture seem to be in order. The reader will note that similar digressions were not made in the reports on West Germany, Italy, or France. The reporter has assumed that these cultures are better known to the American reader and that he will be able to understand the sociological and cultural meaning of abstract legal propositions found in these Western countries without special difficulties. In the case of Yugoslavia, however, some readers may be inclined to think that the sociopolitical and cultural backdrop of legal propositions is so vastly different as to render mere legal analysis of Yugoslav obscenity laws almost meaningless. Hence the need for a few illustrations concerning the "thresholds of tolerance" of sexual expression in the Yugoslav culture.

After a period of almost Victorian reticence in sexual matters, which still prevails in public sexual expression in other Eastern European countries, the pendulum of tolerance seems to be swinging since roughly 1966 toward almost Scandinavian liberal-mindedness. It has recently been reported that "girlie" magazines displayed to the public at newsstands in Belgrade are as daringly explicit as any in the West outside Sweden and Denmark.[1] Many books whose publication in Yugoslavia was almost unthinkable a few years ago are readily available in bookstores. Suffice it to say that Henry Miller's novels were translated unabashedly without any expurgation and that the translation of *Fanny Hill* has been published recently without producing any raised eyebrows. Yugoslav movies are notoriously frank and explicit in their exposition of sexual matters, and in the first week of April 1970 an

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[1] See *International Herald Tribune*, February 13, 1970.

international festival of erotic films was organized in the city of Zagreb. As regards the stage, the American reader may derive an insight into the prevailing climate from the information that *Hair* has been performed before packed audiences in Belgrade for a number of months now. Television seems to be more reserved than other media, but even here quite daring erotic scenes appear occasionally, provoking criticism in some quarters. In sum, the American reader may assume—perhaps contrary to his expectations—that the climate of erotic culture in which Yugoslav provisions on obsenity breathe may quite readily be compared with the climate he is familiar with in his own culture.

Yugoslav legal provisions on objectionable erotic expression are couched in rather general terms of moral reference. The terms "obscenity" and "pornography" are seldom used. Legal provisions usually refer to expression or material "seriously injurious to morality." Although the breadth of the phrase permits a different construction, the phrase has been interpreted—at least for purposes of the criminal law—as referring solely to sexual morality.[2] Beyond this general limitation, there is relatively little decisional or doctrinal authority on what is "seriously injurious" to sexual morality. Perhaps the comparative lack of authority is explained by the great change in the attitudes toward sexual expression which has taken place over a relatively brief span of time. Under the old political and socioeconomic system, extra-legal social controls were tight and there was little need for elaborate obscenity laws. In the new permissive climate, with old standards of the acceptable dissolving and the new ones still nascent, legislators are still groping for new formulas, and law enforcement agencies are somewhat perplexed and reluctant to prosecute for fear of being declared old-fashioned and ridiculously conservative. For all this some criteria used by the courts in arriving at a finding of "serious injury to morality" may be extrapolated from a number of decisions. Some insights may also be gained from meager doctrinal writing on the subject.

Hard-core pornography has, to the best of our knowledge, never been defined in court decisions. Underlying this fact, but seldom expressed, is the belief that the substantive meaning of obscenity or pornography cannot be articulated and that the judge comes to a finding of objectionable sexual expression through intuitive reflexes. Review of cases involving outright pornography reveals that *secrecy* in production or dissemination of it was invariably an attending circumstance. Yugoslav law does not explicity provide that artistic, literary, or some other social value may constitute a valid defense against a charge of causing "serious injury to morality," but the opinion has been expressed that artistic or similar value may redeem a matter which otherwise might be condemned as obscene.[3] In drawing a line between

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[2] This limitation follows from the fact that the criminal offense of producing and disseminating material "seriously injurious to morality" has been inserted in the chapter of the Criminal Code dealing with sexual offenses, and that the heading over the text of the offense refers to "pornographic writings." As will be seen the offense does not cover writings only.

[3] Claims of artistic value are often advanced by magazine publishers, who even assert that photographs of nude females possess artistic value. See the decision in the matter of the Belgrade magazine *Adam i Eva* of January 9, 1970, rendered by the supreme court of Serbia. A constitutional

obscenity and art, somewhat more explicit pronouncements may be found in Yugoslav cases. As elsewhere, courts have held that an object must be judged as a whole rather than through passages or detail taken out of context. Even if a product focuses on the erotic to the exclusion of everything else it need not necessarily be declared "seriously injurious to morality." What controls is the "manner of presentation." Emphasis seems to be put on the author's purpose. Where the latter intends to castigate "unhealthy phenomena" and "immorality in sexual relations," his purpose may redeem a book.[4] Yet it is quite unlikely that a Yugoslav court would hold material obscene because the author intended to "provoke base instincts," unless his product objectively violated standards of acceptable sexual expression. Accordingly, the subjective intent seems to be only a secondary test in tough cases.

The argument that similar material to the one sub iudice was disseminated and not censured has lately gained currency. Yugoslav courts have so far refused to see in it a claim to a degree of public acceptance, but rather an implied reproach of unequal treatment, and have consistently refused to accept the argument. Nor has the related argument ever been accepted that magazines have to publish sexually oriented material in order to remain competitive.[5] In several instances courts have resorted to the *argumentum ad puellam.* Justifying a finding of "serious injury to morality," they pointed to the potentially detrimental impact the publication may have on juveniles.

How is the court to determine whether sexual standards were violated in times of rapid change and fluctuating views on the acceptable? In cases involving hard-core pornography this problem is never discussed (e.g., secret peddling of photographs representing copulating couples). Judges seem to believe that the finding is one of judicial notice, or self-evident. Where some claim of redeeming social value has been raised judges seem to be aware of the problem. However, not a single case could be found in which the court would attempt to establish community standards by a scientific method (such as using a representative sample), or artistic merit with the help of experts.[6]

THE CRIMINAL OFFENSE UNDER ARTICLE 189 OF THE PENAL CODE

Article 189 of the Yugoslav Penal Code reads:

Whoever produces, sells, disseminates, publicly exhibits, or acquires or keeps for purposes of sale any writing, picture or other matter seriously

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argument could be made in favor of artistic merit as an exemption ground from a finding of obscenity. (Article 45 of the 1963 Constitution proclaims the freedom of scientific and artistic "creativity.") It has, however, never been made in court.

[4] See Tahović, *Komentar Krivičnog Zakonika* (Commentary on the Criminal Code), 412 (1956). On the purpose to incite "base instincts" as an indication of obscenity, see the Judgment of the supreme court of Croatia in the matter of *Pop-Express Magazine.* (Judgment Kž 1770/69).

[5] See the Decision of the supreme court of Serbia, cited in footnote 3.

[6] In a 1969 case (the matter of *Pop-Express Magazine),* expert testimony was offered by the defense. The court of original jurisdiction rejected the offer on the ground that the issue of the magazine sub iudice was not obscene. He was overruled on the latter finding by the court above.

injurious to morality, shall be punished by imprisonment for not more than one year.

The first type of activity falling within article 189 P.C. is *producing* obscene material. It is interesting to note that the Code punishes production per se, that is, without the specific intent to disseminate the produced material. This departure from the International Convention for the suppression of and traffic in obscene publications of September 12, 1923 (which has been ratified by Yugoslavia) the present reporter cannot explain. It may even be due to a drafting oversight.[7]

The next type of activity punishable under the Code is *dissemination* of obscene matter. Merely showing obscene material to individuals is not considered disseminating it. *"Publicly exhibiting"* is consummated by exhibiting such material at a public place even if no person has noticed the obscene object. If given a broad interpretation, "exhibiting" could cover the showing of a movie. But no authority has been found on the point. The last two types of punishable activity are *keeping* or *acquiring* with the specific intent to sell the material kept or acquired. As elsewhere, mere possession or procurement of obscene objects for private use falls outside the criminal law.

The actor's mens rea must reflect the circumstances of the offense as presented in the crime description. Accordingly, knowledge is required of the immoral character of the object produced or disseminated. No case or other authority has been found on the problem of mistaken belief in some redeeming value of the obscene object. If the offense has been committed through mass media, the Statute on the Press and other Information Media[8] establishes subsidiary constructive responsibility of publishers, editors, motion-picture directors, and so on, in the event that the author is unknown, immune from prosecution, or unavailable. Thus a person falling within this group as specified by the Press Statute may be punished even in the absence of any knowlege about the nature of the matter disseminated by mass media.

As stated, the maximum penalty is imprisonment for a term of one year, but courts in practice seldom impose the maximum punishment. For example, from 1962 to 1968 there were 30 convictions under article 189 P.C. in the constituent republic of Croatia. Not a single one of these was unconditional, and in five instances a fine was imposed (under general provisions of the Penal Code).[9]

In addition to article 189 of the Penal Code there are other penal statutes applicable in cases of objectionable sexual expression, but we shall take them up in specific contexts.

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[7] In 1969, prosecution was instituted under article 189 P.C. against an Italian shopkeeper who repeatedly traveled to Yugoslavia to take photographs of girls in the nude. There was in this case no proof whatsoever that the Italian took the pictures for anything but private use. The court, however, never got the chance to pass on the point, for the Italian jumped bail.

[8] Statute of October 31, 1960, as amended in 1965. See *Official Gazette* of the Yugoslav Republic, No. 15 (1965). Provisions of this statute will be discussed later in the text.

[9] Courtesy of the Judicial Statistics Division of the Croatian Bureau of Statistics.

BAN ON DISSEMINATION OF OBJECTIONABLE EROTIC MATERIAL

"Media of information" may not be subject to censorship prior to publication.[10] But the Statute on the Press and other Information Media[11] lays down rules whereby dissemination of printed matter, films, and broadcasts may be enjoined under certain specific circumstances.[12] Two grounds on which a ban on the dissemination may be based are of interest for the purposes of this report. One is the protection of youth; the other resides in the nature of a matter to be "seriously injurious to morality" (art. 52 of the Press Statute). The former will be taken up in the next section and only the latter remains for consideration here.

Provisions dealing with proceedings leading to an injunction shall cursorily be presented only with reference to domestic printed matter[13] but they apply correspondingly to broadcasting and motion pictures.[14]

After material has been printed, the printer (or publisher if the material was not printed in a print shop) must transmit three copies thereof to the public prosecutor's office. If the latter finds the printed matter to be "injurious to morals" he is authorized to issue a temporary ban on the circulation of the publication, which remains in effect until final court adjudication of the case. Upon the prosecutor's order the police may search for and seize all copies of the publication. Having issued the provisional ban, the prosecutor must move the circuit court without delay to finally pass on the matter and impose a definitive judicial ban on the dissemination of the publication. The court is bound to hold a hearing on the matter within three days from the day it has received the prosecutor's motion. Court proceedings may terminate either with a decision vacating the tempoary ban or by a court decision upholding the prosecutor's ban and issuing an injunction concerning dissemination of the publication sub iudice. In the latter hypothesis the court shall also order confiscation of all copies and possibly even the destruction thereof. The decision of the circuit court is subject to review by the supreme court of the Republic. Finally, binding injunctions are published in the *Official Gazette.*

What is "seriously injurious to morals" in the context of the Press Statute is not altogether clear. Some claim that the phrase covers only sexual morality, as is the case in the criminal law field, whereas others would construe "morals" in the setting of the Press Statute as having a much larger

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[10] Art. 40 of the Constitution guarantees freedom of the press and other media. Art. 3, par. 2, of the Press Statute explicitly outlaws censorship prior to publication.

[11] See footnote 8.

[12] Articles 52 to 66 apply to the press, article 84 applies to broadcasts, and article 90 to motion pictures.

[13] Articles 67 to 79 of the Press Statute deal with foreign press. Some details will be presented in the context of seizures and confiscations. Let us note here only that the ban on the import and distribution of foreign press lies in the province of the police, whereas domestic press always enjoys judicial protection.

[14] Perhaps it should be noted at this point that newspapers and publishing houses may in Yugoslavia be founded even by a group of private persons. "Government" papers and publishing houses are a distinct minority.

sweep. Also the possibility remains for the courts to evolve different criteria of offensiveness to moral standards for different media. But the scarcity of cases precludes definitive and clear-cut answers.[15]

Distribution of publications or dissemination through other mass media in violation of an injunction is threatened by a prison term not to exceed one year. Contraventions of many other provisions are classified as mere police violations and are subject to fines or short prison terms.

SPECIAL PROVISIONS DESIGNED FOR THE PROTECTION OF JUVENILES

A provision was inserted in the Statute on the Press and other Information Media prohibiting dissemination of printed matter "designed for children or youth" or "circulating among children and youth" provided that the contents thereof are "damaging to upbringing" (art. 52, par. 2). The broad formula "damaging to upbringing" has been widely used in practice to suppress periodical publications containing sexually oriented material coming nowhere near obscenity. Thus mere salacious jokes and quite veiled spicy stories were held damaging to the upbringing of the young.[16] The prosecutor's office seems to equate "circulation" among juveniles with accessibility of a publication to juveniles, and most requests that courts enjoin dissemination of a publication are at least partially based on the ground that the publication in question circulates among the young and endangers their upbringing. In a recent decision the State supreme court of Serbia has rejected such interpretation on the rationale that it would expand standards applicable to juveniles to mature audiences.[17] Implicit in the court's holding is the thought that only those publications may be banned as damaging to the young which *primarily* circulate among immature readers.

Proceedings leading to the imposition of a ban on the dissemination of a publication damaging to youth are identical with those provided for all printed matter.[18] They accordingly apply to radio programs, television shows, and motion pictures primarily addressed to immature audiences.

CONTROLS OVER EROTIC MATERIAL IN THE MASS MEDIA

Motion pictures

Until 1954, censorship of cinematographic films in Yugoslavia was centralized. Purchase of foreign movies and the release of domestic pictures

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[15] Since 1964 only four successful injunction proceedings were instituted by the public prosecutor's office in regard to the dissemination of erotic material. All of them involved periodical publications. Study of passages therein which led the courts to enjoin the dissemination of periodicals reveals that these were quite innocuous in comparison with matter appearing daily in the periodical press. Perhaps the courts found in all those cases marginal elements of youth protection.

[16] In the matter of the *Pop-Express Magazine* (see footnote 4) a number of items appearing in the column corresponding to the American "letters to the lovelorn" were condemned as offensive and damaging to youth. At least two of them were taken from the 1969 *Playboy Directory*. Even to the prudish they would hardly mean more than mildly erotic jokes of dubious taste.

[17] Decision in the matter of the *Adam i Eva* (Adam and Eve) magazine, January 9, 1970;

[18] See footnote 3.

for internal viewing or export on a foreign market were all subject to the advance approval of a Federal Commission for the examination of cinematographic films, situated in Belgrade. The commission was authorized to ban purchase of a foreign movie or distribution or export of a domestic one if it was "offensive to public morality." After 1954 the constituent republics of the Yugoslav Federation were empowered to set up their own commissions to examine *domestic* movies. The Federal Commission retained jurisdiction to approve the distribution of foreign films in Yugoslavia.[19] The need to seek approval for export of a Yugoslav movie abroad was abolished on the theory that approval of domestic distribution implies an authorization to export.

It is perhaps interesting to note that the censorship commissions are empowered only to either ban or approve a movie. They may not rate a film as suitable for limited audiences only and impose a ban on juvenile attendance. There is no talk of changing the system although, as stated, recent years have witnessed a real wave of eroticism on the screen.

If a foreign information service intends to show movies it must secure an advance approval from the State Ministries of the Interior.[20]

Theatrical productions

Many avant-garde dramatic presentations have recently appeared on Yugoslav stages with rather uninhibited sexual expression and abundant scenes of nudity. No matter how daring, expression on the stage cannot fall within the language of any offense under the Penal Code. The only legal control which remains would, in the Yugoslav system, be considered "administrative."[21] Various statutes on public order and peace provide for the possibility of imposing "administrative" penalties for "public conduct which is offensive to moral sentiments."[22] Fines and even short prison terms may be imposed by administrative officials in a special sanctioning procedure. There is a right to appeal to a higher administrative authority and even a possiblity of transferring the case, upon exhaustion of administrative remedies, to the supreme courts of the constituent republics. Although technically possible, these "administrative" penalties have never been used so far in regard to a theatrical production. A more effective threat is the fear on the part of the producers of losing public financial support.[23]

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[19] By 1970 only three out of six constituent republics have taken advantage of the possibility to form their own commissions. Thus, for the time being the Federal Commission also approves domestic distribution of Yugoslav films for those constituent republics which have failed to set up their own commissions.

[20] See Statute on the Press and other Information Media, art. 111.

[21] As in the Soviet Union so in Yugoslavia the term "criminal" is given a narrow meaning. Thus, in addition to criminal offenses proper there are other categories of punishable offenses. One of them is so-called "administrative violations." No matter how classified, the latter are—to an American—punishable offenses.

[22] See, for example, the Croatian Statute as consolidated in January 1970, article 2 (2). The maximum punishment for the offense is a 60-day jail term.

[23] This happened with a daring play staged by a youth group in the Serbian city of Zrenjanin. The title of the play is indicative of its content — *Romeo in Juliet*. See: *TV Studio,* no. 302, March 28, 1970, p. 83.

Radio and television

With the exception of local radio stations of little importance, Yugoslav radio and television are in the hands of corporations (*ustanove*) set up by republican governments or parliaments. They enjoy virtual monopoly of broadcasting. After their corporate existence begins they have an independent status, at least as a matter of law. Legal provisions explicitly ban advance censorship by state agencies.[24] Even as a practical matter, broadcasting corporations enjoy a great deal of independence in day-to-day affairs. In matters of general programming policy, public and political pressure groups may (but seldom care to) exert influence through "councils" set up within each corporation. These councils are partly composed of representatives of the "society at large." The only legal control is the one described above, in presenting injunctions on the dissemination of erotic material in the mass media. In the context of broadcasting, such control is, however, of little practical importance.

SEIZURE AND CONFISCATION OF OBJECTIONABLE EROTIC MATERIAL

Matter "injurious to morality" (obscene matter) must be seized temporarily pending criminal prosecution for production or dissemination thereof. As a rule, seizure is subject to judicial warrant, but in emergency cases seizure may also be effected by the police (art. 143 of the Criminal Procedural Code). Upon conviction on an obscenity charge, the material must be confiscated. Confiscation is also mandatory where prosecution does not result in a conviction but the obscene nature of the matter has been ascertained (art. 62 of the Penal Code, art. 461 of the Criminal Procedural Code). Note, however, that there is under Yugoslav law no legal possibility of instituting in rem proceedings to confiscate an obscene object independently of a criminal prosecution. The only exceptions can be found in the law dealing with material imported from abroad.[25] Import of films, slides, drawings, and any printed matter for commercial distribution may be carried out only by authorized firms which must notify the police of the imported matter. If the matter is found by the latter to "seriously injure morality" they may ban the dissemination of such matter and confiscate it. Material imported for commercial distribution by anybody other than the authorized firms may be seized by the police. Thus, by virtue of these provisions import of objectionable erotic material from abroad may be prevented independently of criminal prosecution. Note, however, that confiscation is legally possible only if erotic material is designed for dissemination rather than private use.

What if obscene material is shipped through the mail? Under general rules of procedure mail shipments may be inspected only if reasonable grounds exist that evidence will be discovered for criminal prosecution (art. 199 Criminal Procedural Code). Beyond this, customs officials may open postal

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[24] See article 5, Statute of April 4, 1965, on broadcasting corporations.

[25] Legal provisions concerning such material can be found in the Statute on the Press and other Information Media (art. 67-79). What material falls under the Statute is specified in articles 15 and 21.

shipments in order to check whether matter therein contained is subject to duties. If, incidentally, these officials discover obscene matter, they are bound to report the incident to the prosecutor's office. The latter may request temporary judicial seizure of the shipment if criminal prosecution is contemplated. Thus, once again, there is no legal way of interfering with obscene material, unless an activity is involved warranting criminal prosecution. Mail shipments of obscene material for private use may not be tampered with.

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