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## POLICE CONTROL OF OBSCENE LITERATURE

CHARLES H. ROGERS

The author is the Aide to Superintendent O. W. Wilson of the Chicago Police Department, a position to which he was appointed in the concluding months of his internship as a Police Legal Advisor fellow at Northwestern University School of Law.

In February of 1965, Mr. Rogers became the recipient of one of the Law School's Police Legal Advisor fellowships, which fellowships are financed by a grant from the Ford Foundation. Under this program graduate law students pursue a two year course of study and training leading to a Master of Laws degree. The first year is spent primarily in residence at the Law School; the second is devoted to field training in a police department.

Mr. Rogers is a 1962 graduate of the University of Nebraska Law School. He practiced law in Chicago for three years before entering Northwestern University School of Law as a graduate student. He is a candidate for a LL.M. degree in February, 1967.

The present article is based upon the Master of Laws thesis which Mr. Rogers submitted in partial fulfillment of the requirement for that degree. The views he expresses are his own and not necessarily those of the Chicago Police Department with which he is now associated.

In his article, Mr. Rogers traces the development of the American law of obscenity from its common law antecedents to the most recent decisions of the Supreme Court of the United States. Particular emphasis is placed upon the role of the police in the suppression of obscenity, and the special problems created for law enforcement personnel by court decisions. An examination of the work of the Chicago police department in this area is included, as is a detailed analysis of the obscenity market, a subject usually, but inexplicably, ignored by past law review commentaries.

### INTRODUCTION

As long ago as 1938, commentators writing on the censorship of obscene literature have felt the need to justify their entry into a field in which "so many printed pages . . . already exist".<sup>1</sup> The justification for the present article is that it presents the often neglected point of view of the law enforcement official—the police officer who is charged with the enforcement of the obscenity laws in addition to all of his other duties, and upon whom the blame falls when the law is seen by some to have been overzealously applied and by others to have been neglected.

As a participant in the Northwestern University School of Law Police Legal Advisor Program, I spent two days a week throughout 1965 working with and observing the various units of the Chicago Police Department's Vice Control Division. Approximately one-half of that time was spent with the Prostitution and Obscene Matter Unit. In addition to the assistance rendered to me by the members of that Unit in my research upon which this paper was based, much valuable information and advice was obtained

from Professor James R. Thompson of Northwestern University School of Law who, from 1959 to 1964, was an assistant state's attorney for Cook County, Illinois, and in that capacity served as prosecutor in many obscenity cases.

In the first section of this article the reasons or lack of reasons for censorship of obscene literature will be examined. This is followed by a discussion of the various citizen's groups' activities in the field and their effect upon obscenity law enforcement and the law itself, and then follows a section containing a summary of obscenity law and how it has evolved, with special emphasis upon areas presenting special problems to the police. The fourth section, termed "The Market", includes, so far as is possible, descriptions of the types of paperback novels, magazines, and other publications against which the charge of obscenity is currently being leveled. The next section of the article deals specifically with the Chicago Police Department and its history, accomplishments, activities, and problems in the area of suppression of obscenity. In the fifth and final section of the article the solutions to the problems of obscenity censorship which have been offered by other commentators will be discussed and suggestions and tentative conclusions will be presented.

<sup>1</sup> Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938).

## TERMINOLOGY

A word with regard to terminology is appropriate at this point. Throughout this article "obscenity" and "pornography" will be used synonymously. Although both words apparently are of Greek derivation and were originally very dissimilar in meaning,<sup>2</sup> the law no longer differentiates between them. As a matter of habit, judges generally refer to "obscenity" and its more flagrantly shocking counterpart, "hard-core pornography", but there is no reason why the latter could not be termed "hard-core obscenity"; in fact it is thus described by many non-lawyers.<sup>3</sup>

## THE BASIS FOR THE LAW

Any consideration of the problem of suppressing obscenity should begin with the question "Why"? Lawyers, with their proclivity for legal niceties, many times fail to meet this issue squarely and gloss over underlying reasons for the doctrines in the law, treating them as self-evident. Perhaps because it is deeply intertwined with moral law, the suppression of obscenity is one of the areas of the law in which this is most often the case.<sup>4</sup> Beginning with the assumption that obscenity is bad and therefore that suppression of obscenity is good, we may move on to the question of what obscenity is and how society should go about suppressing it.

What available data is there concerning the reasons or lack of reasons for the suppression of obscenity?

Most of those who have looked behind the law and have questioned the rationale for censorship of sexual literature have accepted, although tacitly, that the basic question concerns the effects of those things which are to be suppressed.<sup>5</sup> The

"evidence" usually thought adequate to sustain such laws would be proof that: (1) exposure to obscenity has some immediate or long range effect upon the individual, and from this society should protect him; (2) exposure to obscenity causes the individual to engage in anti-social conduct which is harmful to other individuals and therefore to society; (3) the availability of obscene matter in general has a long range deteriorating effect upon society which may eventually be detrimental; or (4) any combination of the above. If there is any empirical evidence suggesting the validity of any of these propositions it should be taken into account.

In a summary of her study entitled "*The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate*", prepared for Judge Frank by Dr. Marie Jahoda and cited in his concurring opinion in *United States v. Roth*,<sup>6</sup> it was stated with regard to the assumption that reading about sex, violence or crime leads to anti-social action, that there existed "no research evidence either to prove or disprove this assumption definitely".<sup>7</sup>

At that time, there was, and still is a surfeit of pseudoscientific evidence being quoted. Principally, it is the anti-censor who takes the pseudoscientific approach, possibly because he cannot meet the pro-censor on his own grounds—the moral argument—but the pro-censors also have their "proof". This "evidence", pro and con, includes, for example: a survey in which 409 women were to isolate a single item which was most stimulating sexually and 218 of them answered "man" while only 95 said "books";<sup>8</sup> the fact that Sheldon and Eleanor Glueck, probably the foremost authorities on juvenile delinquency in this country, did not even list reading among the ninety-odd possible factors they found leading to delinquent behavior;<sup>9</sup> opinions by policemen that, based upon

<sup>2</sup> "Obscene" probably originally referred to those things not allowed to be shown on the Greek stage, i.e., things that were not on the scene. See Allen, *The Writer and the Frontiers of Tolerance*, in "TO DEPRAVE AND CORRUPT . . ." 147 (1962); Amen, *The Church versus Obscene Literature*, 11 CATH. LAW. 21, 28 n. 25 (1965). "Pornography" means literally writings of a prostitute. See Webster's New World Dictionary (Popular Library ed. 1959).

<sup>3</sup> E.g., KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 21 (Rev. ed. 1964).

<sup>4</sup> This is born out by the fact that out of the approximately fifty law review articles cited in this paper, only one deals adequately with the question of whether the supposed rationale behind obscenity laws is valid. See Cairns, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962).

<sup>5</sup> *Id.* at 1013; KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 326 (Rev. ed. 1964).

<sup>6</sup> 237 F. 2d 796, 815 (2d Cir. 1956), *aff'd*, 354 U.S. 476 (1957). See discussion of case in text accompanying notes 137 through 147 *infra*.

<sup>7</sup> See Fagan, *Obscenity Control and Minors—The Case for a Separate Standard*, 10 CATH. LAW. 270, 275 (1964); LOEH, *THE EROTIC IN LITERATURE* 220-21 (1962).

<sup>8</sup> This survey is referred to *ad nauseum*, but was probably first cited in Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 73 (1938). One commentator recently guessed that the survey had gained its popularity from its humorous aspect—that 191 girls failed to place "man" first. See *Comment*, 12 U.C.L.A. L. REV. 532 n. 5 (1965).

<sup>9</sup> See CHANDOS, "TO DEPRAVE AND CORRUPT . . ." 46 (1962); KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 343 (Rev. ed. 1964); LOEH, *THE EROTIC IN LITERATURE*

their observation of criminals in possession of pornography, there is a causal relationship,<sup>10</sup> and the age old supposition that one of the causes of the fall of nations has been sexual laxity.<sup>11</sup>

The Kronhausens report<sup>12</sup> had this to say:

It is amazing . . . how many people have felt called upon to voice the most authoritative opinions about the effects of "obscene" writings, including law-enforcement officers, educators, clergymen, housewives, women's clubs, mens' fraternal organizations—in short, all those who are least qualified to give an authoritative opinion on a subject of such confusing dimensions and such width of scope, but who, because of their own deep emotional involvement, have felt no hesitation in expounding "ex cathedra" and with omniscient finality on the matter.

Suppositions based upon little or no evidence involving scientific controls, and stated in terms of unimpeachable propositions, serve only to confuse the issue.

In 1962, Robert B. Cairns, a professor of psychology, James C. N. Paul, a professor of law and a co-author of the book *Federal Censorship: Obscenity in the Mail*,<sup>13</sup> and Julius Wishner, a professor of psychology and law, undertook a study of the results of reading pornography in much the same manner as Dr. Jahoda had done in 1954.<sup>14</sup> They reviewed the available investigations made by behavioral scientists<sup>15</sup> on the question and summarized the results as follows:

Despite the inadequacies of some of the investigations, we believe the results are con-

sistent enough to suggest the following—which are offered, not as empirical laws, but as propositions which, thus far, appear to emerge from the evidence:

1. A significant proportion of our society is sexually aroused to some extent by some form of sex stimuli in pictures and probably in books.

2. Portrayals of female nudity and sexual activity lead to sexual arousals in many males—adolescents as well as adults. These materials arouse females far less frequently.

3. Females, on the other hand, are far more frequently sexually aroused than men by complex stimuli which portray "romantic" or "love" relationships and which constitute, in general, less direct sexual cues.

4. Males differ among each other in terms of preference for and response to various types of sex stimuli. Factors which account for different preferences among males for viewing sexually relevant materials include: adequacy of masculine sexual identity, strong guilt with respect to sexual behavior, physical maturity and intellectual ability.

5. The environmental circumstances under which the sex stimuli are viewed may influence the extent to which the viewers will show evidence of sexual arousal. It is not clear, however, whether the failure to observe evidence of sexual arousal is due to the fact that no arousal occurred or that the overt expression of the arousal was inhibited.

6. Exposure to certain types of sex stimuli is, for some persons, both males and females, a distinctly aversive experience. Sexual guilt appears to be an important determinant of the extent to which viewing sexually relevant material will be considered an unpleasant event.<sup>16</sup>

The authors' summary, and to a great extent, the materials reviewed deals only with the causal factor between exposure to obscenity (of a heterosexual, as opposed to deviate or scatological nature) and "arousal". It is of utmost importance to note here that "arousal" itself is not an effect upon an individual from which society needs to protect him. In other words, the data does not even meet the proof required for proposition (1) listed above, and has practically no bearing on propositions (2), (3), and (4). In this respect, the

216 (1962); ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* 200 (1956); Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 386 (1954).

<sup>10</sup> See LOEH, *supra*; Hoover, *Combating the Merchants of Filth: The Role of the F.B.I.*, 25 U. PITT. L. REV. 469 (1964). But see GEBHARD, GAGNON, POMEROY & CHRISTENSON, *SEX OFFENDERS* 676 (1965).

<sup>11</sup> E.g., FORD, *CRIMINAL OBSCENITY* 17 (1926). When Hugh Hefner was the guest on a recent television program, this assumption was expressed by several persons who called in.

<sup>12</sup> KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 326 (Rev. ed. 1964). See the collection of views to the contrary in Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655, 660 n. 14 (1964).

<sup>13</sup> PAUL & SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* (1961), one of the leading texts on obscenity law.

<sup>14</sup> Cairns, Paul & Wishner, *supra* note 4.

<sup>15</sup> This was accomplished by a search of the Psychological Abstracts from 1925 to 1961, resulting in the selection of approximately 250 articles. See Cairns, Paul & Wishner, *supra* note 4 at 1016 n. 14.

<sup>16</sup> *Id.* at 1032.

authors of the survey say:

Unfortunately, most justifications for censorship laws are predicated upon the presumed influence of obscenity on the subsequent sexual behavior and morals of the viewer. Thus, granting that many obscene materials do arouse under many circumstances, we need to know more. We need to know how long the conditions of arousal last and how this stimulation might effect overt behavior, attitudes governing behavior and mental health.

We cannot offer empirical evidence to answer such questions because no such evidence exists. The data simply stops short at the critical point.<sup>17</sup>

In the only studies going beyond the question of arousal and delving into the question of overt response mentioned by the authors, they admit that there was a complete lack of "experimental controls" and refuse to generalize from the findings.<sup>18</sup> Thus, in 1962, Cairns, Paul, and Wishner might have given the same answer to the question of pornography's part in delinquency and crime as Dr. Jahoda gave in 1954: there is no provable relationship.

Since 1948, when it published its first work, *Sexual Behavior in the Human Male*,<sup>19</sup> the Institute for Sex Research, founded by Dr. Alfred C. Kinsey at Indiana University, has been considered one of the leading authorities on the sexual habits of the American populace. Cairns, Paul, and Wishner quote from the finding of the Institute in its first report,<sup>20</sup> calling the work of the Institute, "the most comprehensive and meaningful studies on the subjective effects of sexual stimuli..." The studies at that time, however, also dealt with the question of "arousal" rather than the most important aspect of the problem—the immediate or long term effects on behavior and relationships to society. In 1953 Kinsey and his associates published their report on the *Sexual Behavior of the Human Female*,<sup>21</sup> but that study is of little assistance here because

of the fact that females very seldom write, and are seldom interested in, those aspects of pornography which are of erotic significance to males.<sup>22</sup> There is also a chapter on arousal from sado-masochistic stories.<sup>23</sup>

Then in 1965, the Institute published its report on *Sex Offenders*,<sup>24</sup> which is the first comprehensive scientific study considering the relationship between pornography and anti-social conduct. It includes one chapter dealing specifically with psychological sexual arousal of sex offenders, in comparison with non-sex offenders and non-offenders, which includes sections dealing with arousal from seeing or thinking of females, seeing or thinking of males, and sado-masochistic materials and pornography.<sup>25</sup> Before examining the authors' findings in the area of arousal from obscene matter, some attention should first be given to their research conditions in order to determine how conclusive those findings are.

Through personal interviews the Institute accumulated the "sexual case histories" of over 1,500 men<sup>26</sup> convicted for a "wide variety of sex offenses",<sup>27</sup> and the Institute had access to the official records of "the majority of" these men.<sup>28</sup> The Institute also made use of its own already available sexual histories of thousands of other persons who were never convicted of a sexual offense. The non-offender histories were drawn on for the formation of control groups.

The 1,500 sex offenders were divided into nine different groups on the basis of the following

<sup>22</sup> *Id.* at 672.

<sup>23</sup> *Id.* at 676-77. See text accompanying footnotes 363 through 368 *infra* for a discussion of sado-masochistic publications.

<sup>24</sup> GEBHARD, GAGNON, POMEROY & CHRISTENSON, *SEX OFFENDERS* (1965).

<sup>25</sup> *Id.* at 659-92 (Chapter 31).

<sup>26</sup> The study was limited to men, "... primarily because women are rarely charged with, and still more rarely convicted of sex offenses other than prostitution—which we (the authors) have ruled out of our study." *Id.* at 9.

<sup>27</sup> After much justification and explanation the authors announce the following definitions for sex offenses and sex offenders: "A sex offense is an overt act committed by a person for his own immediate sexual gratification which (1) is contrary to the prevailing sexual mores of the society in which he lives, and/or (2) results in his being convicted." *Id.* at 8. "A sex offender is a person who has been legally convicted as the result of an overt act, committed by him for his own immediate sexual gratification, which is contrary to the prevailing sexual mores of the society in which he lives and/or is legally punishable." *Id.* at 9. The study is further limited to white males 16 years of age and over. *Id.* at 11 & 16.

<sup>28</sup> *Id.* at 1.

<sup>17</sup> *Id.* at 1034.

<sup>18</sup> *Id.* at 1018.

See Haines, *Juvenile Delinquency and TV*, 1 J. Soc. Therapy (1955).

<sup>19</sup> KINSEY, POMEROY & MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

<sup>20</sup> Cairns, Paul & Wishner, *supra* note 4 at 1020.

<sup>21</sup> KINSEY, POMEROY, GEBHARD & MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953). This treatise was once banned in South Africa. ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* 263 (1956), but in 1965 was published in paperback, by Pocket Books Inc. at \$1.65.

three variables: (1) whether the offense was homosexual or heterosexual in nature; (2) whether force was involved; and (3) whether the object of the offense was a child, minor or adult.<sup>29</sup> The resulting nine types are:<sup>30</sup>

- Heterosexual, consensual, with a child;
- Heterosexual, consensual, with a minor;
- Heterosexual, consensual, with an adult;
- Heterosexual, forced, with a child;
- Heterosexual, forced, with a minor;
- Heterosexual, forced, with an adult;
- Homosexual, consensual, with a child;
- Homosexual, consensual, with a minor;
- Homosexual, consensual, with an adult.

In addition, the authors consider two "noncontact" offenses (peeping and exhibition) and the three types of father-daughter incest (child-minor-adult), bringing the total number of types considered to 14.<sup>31</sup> The professed primary purpose of the authors in making the study was "... to determine if and how persons who have been convicted of various types of sex offenses differ from those who have not, and how they differ from one another."<sup>32</sup>

To accomplish this purpose with fair results, the authors found it necessary to compare the sex offender group with two separate control groups, the "prison group" consisting of persons convicted of other than sex offenses and the "control group" consisting of persons never convicted of any offense. This last group was limited to those persons who had not gone beyond high school in their education, to make that group "... roughly equivalent to the sex offenders and prison group in terms of education and socioeconomic status."<sup>33</sup> With the above mentioned factors and many others<sup>34</sup> taken into account, to avoid differences between the three groups resulting from outside factors,<sup>35</sup> it is clear that if the study has any failures they result from the facts that the interview method (seemingly the only one feasible at this time) may not be com-

pletely accurate,<sup>36</sup> and that the assumption implicit in the study as it relates to obscene matter, arousal, and overt action may be incorrect. That assumption is that there is a "high positive correlation between the frequency of, preference for, and intensity of response to "obscene matter".<sup>37</sup>

With all of these various considerations in mind, we can proceed to an examination of the Institute's findings relating to obscene matter. The results of the study of arousal from sado-masochistic materials are disappointing at most. They cover only slightly more than one page<sup>38</sup> of the 875 page text, and the authors admit that the results are disappointing and their meanings not known.<sup>39</sup> At any rate, the degree of sexual arousal was strong in the greatest percentage of the group termed "heterosexual, forced, with a minor" (12.5%), as compared with 2.7% for the "control group" and 3.9% for the "prison group". Surprisingly enough, only 1% of the aggregate of the incest offenders showed any degree of sexual arousal from the sado-masochistic materials whatsoever.<sup>40</sup> The authors were only able to draw the following conclusion from the data gained in this study:

Of the sex offenders whose offenses include violence or duress between one eighth and one fifth reported arousal from sadomasochistic noncontact stimuli. While it is probable that in a few cases such stimuli triggered an offense, it seems reasonable to believe that they do not play an important role in the precipitation of sex offenses in general, and at most only a minor role in sex offenses involving violence.<sup>41</sup>

The authors could have gone on to say that by the same reasoning the sadomasochistic stimuli play an even lesser role in those offenses involving no violence or duress, but neither conclusion would carry much weight as proof of the harm-

<sup>29</sup> For purposes of the study, "children" are persons aged 11 and under, "minors" are those aged 12 to 15 inclusive and "adults" are persons 16 years of age or older. *Id.* at 16.

<sup>30</sup> The variables combine to form 12 types which were reduced to 9 "because the use of force is rare in homosexual cases." *Id.* at 11.

<sup>31</sup> The authors felt that consideration of other types was not warranted by the size of the sampling. *Id.* at 12.

<sup>32</sup> *Id.* at 12-13.

<sup>33</sup> *Id.* at 16.

<sup>34</sup> *Id.* at 19-26 & 659-62.

<sup>35</sup> Dr. Robert Gosling refers to these outside factors that may mislead the researcher as "flukes." GOSLING, DOES PORNOGRAPHY MATTER? 61 (1961).

<sup>36</sup> Dr. Gosling, recognizing this probable inaccuracy writes, "It is obvious to any psychoanalyst that a very great deal of intimate life is hidden in secrecy or forgetfulness or disguise, even in those who consciously wish to be as frank as possible; and this plain fact always casts doubts on the validity of work that is based on a few interviews or questionnaires." *Id.* at 63. See also Cairns, Paul & Wishner, *supra* note 4 at 1016-17 for a discussion of the failings of the interview approach.

<sup>37</sup> The Institute has reserved the study of this matter for subsequent research. GEBHARD, GAGNON, POMEROY & CHRISTENSON, SEX OFFENDERS 659 (1965).

<sup>38</sup> *Id.* at 668-69.

<sup>39</sup> *Id.* at 669.

<sup>40</sup> *Id.* at 683, Table 109.

<sup>41</sup> *Id.* at 669.

lessness or danger resulting from the dissemination of such material.

Next the question of arousal from "pornography" is examined in the Institute's report. This section is more complete and covers 9 pages of text,<sup>42</sup> and numerous charts and graphs. Furthermore, the results are much more enlightening. To begin with, "pornography" is defined as follows:

Erotica is a general term covering all graphic, literary, and auditory materials that induce, at least occasionally, some degree of conscious sexual response in most adults, chiefly male adults.\*\*\*

Within the general class of erotica there is the smaller and more specific subclass of pornography. Pornography is material deliberately designed to produce strong sexual arousal rather than titillation and which usually achieves its primary goal. Intent, as a lawyer would say, is an essential criterion of pornography, but the intention must meet with some success. A man who writes what he believes to be a pornographic poem which is received with laughter rather than sexual excitement has not, despite his intention, produced pornography. Conversely, the Hindu sculptor who with some religious symbolism in mind depicts coitus has not produced pornography, even though his work may inflame the imaginations of most Occidental viewers. While some erotica can be most indirect and subtle, pornography is almost always direct and obtrusive. Nevertheless, there is no reason why in skilled hands pornography could not be an aesthetically legitimate art form.<sup>43</sup>

It is clear that the material referred to is that generally defined as "hard-core pornography". This can be seen from the authors description of how such material is generally obtained:<sup>44</sup> the interview question, "Does it arouse you sexually to see photographs or drawings of people engaged in sexual activity?"<sup>45</sup> and the account of what men usually do with such material when they possess it.<sup>46</sup> The findings in this portion of the

study that are important for our purposes show: that only 14 males out of the total sample (all groups) of 2,721 had never been exposed to "pornography", and nine of these were in the "sex offender group";<sup>47</sup> that a strong degree of sexual arousal from pornography occurred most frequently in the "Heterosexual, forced, with a minor" group (44.4%), but the "control group" outstripped all but three of the 9 sex offender sub-groups in this regard with 30.7%, and the "prison group" percentage (36.3%) fell between that of the "homosexual, consensual, with a minor" group (33.3%) and the "homosexual, consensual, with an adult" group (42.8%).<sup>48</sup> The authors bring order out of this seeming chaos by explaining:

About all that can be said is that strong response to pornography is associated with imaginativeness, ability to project, and sensitivity, all of which generally increases as education increases, and with youthfulness, and that these qualities account for the differences we have found between sex offenders in general, and non-sex offenders. Since the majority of sex offenders are not well educated nor particularly youthful, their responsiveness to pornography is correspondingly less and cannot be a consequential factor in their sex offenses unless one is prepared to argue that the inability to respond to erotica in general precludes gaining some vicarious stimulation and satisfaction and thereby causes the individual to behave overtly which, in turn, renders him more liable to arrest and conviction.<sup>49</sup>

These conclusions are backed up by detailed examinations of each sub-group, factor and percentage of response figure.<sup>50</sup>

The authors next proceed to compare the arousal in response to pornography to the arousal in response to the sight or thought of females, and find the latter to be the more effective stimuli in every group except, of course the "homosexual, consensual, with an adult" group who responded more to the sight or thought of males than to

350 (S.D.N.Y. 1957). The Institute also has the only complete eleven volume set of "My Secret Life" (one of the classics of pornography) in America. See KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 107 (Rev. ed. 1964).

<sup>47</sup> GEBHARD, GAGNON, POMEROY & CHRISTENSON, *SEX OFFENDERS* 670 (1965).

<sup>48</sup> *Id.* at 684, Table 110.

<sup>49</sup> *Id.* at 673.

<sup>50</sup> *Id.* at 670-73.

<sup>42</sup> *Id.* at 669-78.

<sup>43</sup> *Id.* at 669. The authors admit that this definition is "not comprehensive." *Id.* at 670.

<sup>44</sup> *Id.* at 677.

<sup>45</sup> *Id.* at 670.

<sup>46</sup> *Id.* at 676. The Institute has some material which was considered obscene by the federal authorities. See *United States v. 31 Photographs, Etc.*, 156 F. Supp.

pornography.<sup>51</sup> They found, however, a high correlation between the effects of the two stimuli in the sex offender group and a slightly lower correlation between them in the control and prison groups.<sup>52</sup> In conclusion, the authors state:

Summing up the evidence, it would appear that the possession of pornography does not differentiate sex offenders from non-sex offenders. Even the combination of ownership plus strong sexual arousal from the material does not segregate the sex offender from other men of a comparable social level.<sup>53</sup>

And finally:

...pornography collections follow the pre-existing interests of the collector. Men make the collections, collections do not make the men.<sup>54</sup>

Although striking a blow against those who would blame obscenity for every ill of our society, and even those who insist only that there is an evil effect upon all of those who come into contact with obscene matter, the study does give some aid and support to the argument that the worst effect of the dissemination of obscene materials is on the young.<sup>55</sup> As quoted above,<sup>56</sup> the authors conclude that youthfulness is a factor in the strength of the response.<sup>57</sup> If one is to accept at all the findings of the Institute on the relationship of pornography to crime, he would have to agree that the only thing remaining to argue about in that respect is the possible harmful effect of obscene matter in the hands of the young. The question of any long range effect which is detrimental to society resulting from the availability of obscenity is of course not reached in the study.

Of significance is the fact that the 1965 "Kinsey Report", the first comprehensive scientific study dealing specifically with the supposed causal connection between reading pornography and crime, was met with very little interest or enthusiasm.

<sup>51</sup> *Id.* at 673. The "sight of females" refers to the sight of them in normal circumstances such as on the street or at the beach. *Id.* at 675.

<sup>52</sup> *Id.* at 675.

<sup>53</sup> *Id.* at 678.

<sup>54</sup> *Ibid.*

<sup>55</sup> See text accompanying notes 477 to 490 *infra*, for a discussion of the youth-obscenity problem.

<sup>56</sup> See text accompanying note 49, *supra*.

<sup>57</sup> Elsewhere in the book, however, it is pointed out that in the years just after puberty "[t]he threshold of sexual response is low and selectivity relatively undeveloped. In young mammals one often sees general excitement transmute into sexual excitement and this same liability is found in many young human males." GEBHARD, GAGNON, POMEROY & CHRISTENSON, *SEX OFFENDERS* 659 (1965).

The *Ladies Home Journal* ran an article on it authored by Dr. Gebhard and the *Book-of-the-Month Club News* reviewed it without even mentioning the portion of the study relating to pornography.<sup>58</sup> Typical of newspaper coverage of the report was an article in the Chicago Tribune entitled "Dope, Smut Role Debunked in Sex Crimes," which reported:

A new Kinsey report challenges the popular conceptions of sexual criminals as crazed by narcotics, aroused by pornography, or goaded by senile desire.

The study, "Sex Offenders", sets forth the findings of the late Dr. Alfred C. Kinsey and his associates that few sexual offenders are influenced by narcotics or pornography, tho many commit their crimes when drunk.<sup>59</sup> The article generally reviews the study, but there are no more references to pornography. Perhaps the report is too recent or considered too inadequate for any action to be taken in reliance upon its findings. On the other hand, perhaps the reason for this lack of interest in scientific results is that the question of obscenity is a moral one and the justifications for suppression of obscenity on scientific grounds are in fact a rationalization for views which are in fact deeply rooted morally. As Professor Henkin of Columbia University states in a recent article:

Specifically, I believe, despite common assumptions and occasional rationalizations, that obscenity laws are not principally motivated by any conviction that obscene materials inspire sexual offenses. Obscenity laws, rather, are based on traditional notions, rooted in this country's religious antecedents, of governmental responsibility for communal and individual "decency" and "morality".<sup>60</sup>

Opponents of suppression counter that these moral laws are not so deeply rooted in our Judeo-Christian society and point to what they term, with reference to present standards, "obscene" passages in the Bible itself.<sup>61</sup> Proponents say that man is forbidden by natural law to read that literature which will "endanger the preservation of morality",<sup>62</sup> and suggest that the "common

<sup>58</sup> *Book-of-the-Month Club News* (August 1965).

<sup>59</sup> Chicago Tribune, July 17, 1965.

<sup>60</sup> Henkin, *Morals and the Constitution*, 63 COLUM. L. REV. 391 (1963).

<sup>61</sup> See, e.g., GILLETTE, *AN UNCENSORED HISTORY OF PORNOGRAPHY* 27 (1965); LOTH, *THE EROTIC IN LITERATURE* 51 (1962).

<sup>62</sup> See, e.g., Amen, *The Church Versus Obscene Literature*, 11 CATH. LAW. 21, 22-23 (1965).



man" has "built in" competence to tell him that obscenity subverts public morality.<sup>63</sup> These commentators mince no words in stating that they advocate the protection of society against long term degeneration (change) in public morals.<sup>64</sup> The question thus becomes one of whether society should pass legislation regarding personal moral behavior, or forbid private indulgences. Consider the following statement of Richard H. Kuh, formerly Assistant District Attorney in Charge of the Criminal Courts Bureau of the New York County District Attorney's Office:

Our Penal Law exists not only to safeguard innocent victims, but to protect us from our own follies. We are not permitted to go to Hell in a handbasket simply because we may wish to do so. The pleasure of gambling, prostitution and narcotics are barred, although such indulgences, voluntarily enjoyed, do not directly harm third persons. Just as the weight of law is used to bolster traditional morality in these areas, that same weight may affirm the immorality of the obscene, whether or not we as individuals agree with the wisdom of its so doing.<sup>65</sup>

Ernest Van Den Haag, Adjunct Professor of Social Philosophy at the University of New York states:

A society functions only if its members share a common body of values, and back of it, a common ethos. \*\*\* Every society has the right and even the duty to cultivate its ethos, and to protect it from destruction. \*\*\* Certainly the right of censorship is implied.<sup>66</sup>

Others, with equal conviction, disagree with the proposition that government should be allowed to legislate private morals, as can be seen from the following statement:

Inherent in the common law tradition is the idea of the limited nature of law, its purpose being to make men good members of the earthly not the heavenly city, . . .<sup>67</sup>

Cairns, Paul and Wishner first examined the scientific evidence<sup>68</sup> and then stated:

Nor is it enough to damn obscenity as im-

<sup>63</sup> See, e.g., Hayes, *Survey of a Decade of Decisions on the Law of Obscenity*, 8 CATH. LAW. 93, 100 (1962).

<sup>64</sup> See statement of Manuel L. Port, assistant corporation counsel for the City of Chicago, expressing this attitude in Chicago Tribune, July 28, 1965.

<sup>65</sup> Kuh, *Obscenity: Prosecution Problems and Legislative Suggestions*, 10 CATH. LAW. 285, 295 (1964).

<sup>66</sup> VAN DEN HAAG, *Quia Ineptum*, in "To DEPRAVE AND CORRUPT . . ." 113 (1962).

<sup>67</sup> ST. JOHN-STEVAS, *LIFE, DEATH AND THE LAW* 37 (1961).

<sup>68</sup> See text accompanying notes 13 through 16 *supra*.

moral. Bad it may be, but badness in the abstract is not the test of speech we may suppress. Whatever the view of earlier times, our government today is not—cannot be—concerned *simply* with enforcing widely held religious precepts which inveigh against portrayal or contemplation in communication of sex stimuli on the ground that purely as an intellectual abstraction, such stimuli are evil. The consequence of obscenity exposure must entail something more than mere elicitation of a thought which one is not supposed to think.<sup>69</sup>

The last quoted authors have reached the heart of the issue when they say "government today . . . cannot be concerned simply with enforcing widely held religious precepts. . . ." Surely they go too far. Government has, does, and will continue to enforce moral precepts rooted in our religious heritage. Perhaps the question, "should this be?", is an academic one, but the question "can this be?" is a real one. Professor Henkin points out that government has long enforced morals with its laws against prostitution, bigamy, incest, adultery, fornication and its "blue laws" in general.<sup>70</sup> He further suggests that all of these laws, retained today even though, based in religion and morals, may have secular justification, but he dismisses that proposition upon careful examination of certain laws such as those forbidding private homosexual acts between willing adults, and against various practices of the conjugal bed.<sup>71</sup> Thus, without looking too far,<sup>72</sup> it can be seen that government today can and does enforce morality and forbid private immorality. While some of these laws merely remain on the books, others, such as those which forbid homosexual conduct, are definitely enforced.

Furthermore, it is not clear that the morality which is so enforced is the morality of a majority of the people. In the area of obscenity, it would appear that the number of pro-censors and anti-censors are about equally divided. This statement is qualified by the fact that on different types of pornography the commentators are differently divided. For example, it appears that a great majority of commentators are generally for the

<sup>69</sup> Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1013 (1962).

<sup>70</sup> Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 409-10 (1963).

<sup>71</sup> *Id.* at 410.

<sup>72</sup> At last count, in every state in the union except Illinois, it was a crime to engage in oral intercourse with one's wife regardless of her consent.

suppression of photographs showing intercourse, but on the issue of "girlie" magazines, the majority is on the other side. Assuming that obscenity laws are based on moral precepts, rather than upon scientific proof of a harm to society, it might be said that in some cases they are even less "desirable" because the morality which they reflect is that of a minority. Again there is the academic question of the *right* of a minority to enforce its will upon the majority,<sup>73</sup> but there remains the real question of whether the minority *can* enforce its will under our democratic system of government. It has been suggested that where moral views are in controversy, the force of public opinion should be relied upon to mold behavior,<sup>74</sup> but the force of public opinion is not necessarily the will of the majority when it comes to legislation.

Senator Miller of Iowa has introduced in Congress a bill "creating a commission to be known as the Commission for Elimination of Pornographic Materials".<sup>75</sup> The Citizens for Decent Literature<sup>76</sup> and the Knights of Columbus have both come out in favor of the bill.<sup>77</sup> Many would see this as an attempt of a vocal minority to impose its beliefs upon society. A member of the New York Police Department's Legal Bureau, writing in *The Catholic Lawyer*, sees the Citizens for Decent Literature influence in a different light. While conceding that rule by vocal minority is bad, he believes that the function of the CDL is to express community standards and at the same time to educate the public.<sup>78</sup>

Thus, it has been shown that the scientific evidence on the question of whether obscenity begets harm to society is inconclusive, and it has been established, to some degree, that there is no direct causal relationship between exposure to obscenity and crime. The larger question remains open, however, as to whether obscenity

may contribute to the eventual erosion of the morals of society. It is not clear whether present moral standards are to be protected or whether present obscenity laws reflect those morals, or only the moral views of a vocal minority.

It is evident, however, that pressures from the people, be it a vocal minority or a majority of the people, do affect the laws and thereby indirectly affect the police. Regardless of the arguments as to the *correctness* of laws against obscenity, it will be shown that a controlling force in society is desirous of *enforcing* the laws against obscenity.

#### CITIZENS' GROUP ACTION

Citizens' groups have long been active in the field of "unofficial" censorship. Prior to 1957, the largest and most influential of these was the National Office for Decent Literature, popularly known as the NODL. Traditionally, the method of that group was the publication of a list of "Publications Disapproved for Youth" in the *NODL Newsletter*.<sup>79</sup> These lists were used by prosecutors and policemen who threatened action against persons who refused to discontinue the sale of publications on the lists.<sup>80</sup> In 1957, however, the American Civil Liberties Union took a stand against this type of censorship and injunctions were obtained against the prosecuting attorneys of several localities enjoining them from suppression of books through the use of disapproved lists and threats of prosecution combined.<sup>81</sup> This marked the decline of NODL influence in the obscenity field, and in 1963 the Supreme Court in *Bantam Books Inc. v. Sullivan*.<sup>82</sup> declared all forms of "unofficial" censorship, which are in fact enforced officially by threats of prosecution, to be unconstitutional.

In the wake of the NODL came a new and different kind of organization, the Citizens for Decent Literature Inc. (CDL), which was founded in 1956, in Cincinnati, Ohio, by Charles H. Keating,

<sup>73</sup> See McClure, *Book Review*, 59 COLUM. L. REV. 387, 396 (1959) with regard to this question in the area of obscenity legislation.

<sup>74</sup> Joint Committee on Continuing Legal Education, *The Problem of Drafting an Obscenity Statute*, Problems in Criminal Law and its Administration No. 9, 94 (1961).

<sup>75</sup> Senate Bill No. 735 (89th Congress, 1st. Session) introduced January 26, 1965 and referred to the Committee on Government Operations.

<sup>76</sup> See text accompanying notes 79 through 106, *infra*, for a discussion of the methods and operation of this group.

<sup>77</sup> See National Decency Reporter, Vol. II, No. 10, July 1965; *Columbian*, Oct. 1965.

<sup>78</sup> Sullivan, *Obscenity: Police Enforcement Problems*, 10 CATH. LAW. 301, 307 (1964).

<sup>79</sup> This newsletter was still being published in March, 1965. That issue contains 8-1/2 pages of "disapproved" paperback novels and a 2 page list of "Recommended Recent Pocket-size Books."

<sup>80</sup> See a discussion of the use of NODL lists by the Detroit police in Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 314-16 (1954). See also ST. JOHN-STEVAS, *The Church and Censorship*, in "TO DEPRAVE AND CORRUPT . . ." 105-06 (1962).

<sup>81</sup> Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 7-8 (1960).

<sup>82</sup> 372 U.S. 58 (1963). See text accompanying notes 187 through 189 *infra*.

Jr., an attorney. It became a statewide organization in 1960,<sup>83</sup> and now claims to have "active units in all 50 states and in nearly all principal cities in the United States".<sup>84</sup> The CDL takes an entirely different approach to suppression of obscenity. The new method is to urge policemen, prosecutors, and judges to enforce the various obscenity laws and to aid such enforcement. The two professed means of attack are: (1) "an aroused citizenry", and (2) "enforcement of existing laws that make the distribution and sale of obscenity a crime".<sup>85</sup> On the national level, the emphasis is on advice and aid to existing local organizations and encouragement of the formation of additional local organizations. However, Keating and his co-counsel for the organization, James J. Clancey, formerly a deputy district attorney in Burbank, California, find time to aid in the enforcement of obscenity laws also. A Reader's Digest article reported:

... Keating and Clancey offered their knowledge and experience to any prosecutor who wanted it. Today Keating spends a substantial amount of his time helping to prepare briefs and advising prosecutors on details of obscenity statutes. \*\*\* The two men have filed amicus curiae... briefs to assist prosecutions in a number of obscenity cases.<sup>86</sup>

Also, in a recent 95 page publication called "Commentaries on The Law of Obscenity", offered by the CDL for \$2.00, the two attorneys have collected a monumental amount of up-to-date authority on obscenity laws, including chapters on *scienter*, Supreme Court obscenity decisions, a model obscenity statute patterned after the American Law Institute's model statute, and other pertinent matters.

Included under the heading of "an aroused citizenry" are the educational aids which the national office in Cincinnati provides for its local chapters and other interested parties. Among them are four films entitled *Pages of Death*,

*Perversion for Profit, I'd Rather Have a Paper Doll*, and *The Way to Victory*. The brochure announcement regarding the first film states that it is "a story, based on an actual crime, that depicts the slaughter of an innocent child by a sixteen-year-old boy stimulated to his crime by exposure to obscene magazines and pocketbooks".<sup>87</sup> These 16 millimeter, 30 minute films can be rented for four days at a cost of \$25.00 or else purchased for \$300 a copy.

The *National Decency Reporter*, a bi-weekly newsletter offered at \$5.00 a year, is a publication that includes summaries of recent obscenity trials, news of local units and youth groups, quotations from speeches made by public figures and other articles of interest to local units.

The "Procedures Handbook" advising on the organization and operation of local units, counsels:

Be cautious in admitting persons to membership in your CDL unit. Wild-eyed crusaders, fanatics, and zealots can destroy our public image and do great harm to our cause.

\* \* \*

Be careful too, that you do not permit your CDL unit to specifically become a part of any religious or political organization.

\* \* \*

(Exercise caution in assigning persons to assist in the review of subject matter, selecting only the more mature individuals.)

\* \* \*

When an arrest is made, follow the progress of the case carefully and have your CDL group attend all hearings to give support to the prosecuting officials. This expression of public support is most important to any public official, especially in an obscenity trial.

The local unit of the CDL in Chicago has about 30 active members and operates, to a great extent, in the manner which the "Procedures Handbook" suggests. As is mentioned elsewhere in this article,<sup>88</sup> the local campaign was, to a large extent, the cause of the recent crackdown on pornography in Chicago. The Reader's Digest reported in 1964 that:

Chicago's CDL, organized by Edward

<sup>83</sup> Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 9-10 (1961).

<sup>84</sup> CDL News Release, Sept. 1965.

<sup>85</sup> Hall, *Poison in Print—And How to Get Rid of It*, READER'S DIGEST, May, 1964.

<sup>86</sup> Armstrong, *The Fight Against the Smut Peddlers*, READER'S DIGEST, Sept., 1965. The CDL filed amicus curiae briefs in all three obscenity cases recently decided by the Supreme Court, (See text accompanying notes 249 through 275, *infra*.) but the request to be allowed to make oral arguments in the same capacity was denied. See *National Decency Reporter*, Vol. I No. 13, Oct. 1965; *New York Times*, Dec. 7, 1965 p. 77.

<sup>87</sup> M. W. Newman reports, "A man... sat in on a CDL conference at which a film was shown... 'I was shocked by the undraped figures displayed,' said this man. 'If they really are against indecency, why do they show this stuff?'" NEWMAN, *THE SMUT HUNTERS* 13 (1964), reprinted from a series in the *Chicago Daily News* starting Aug. 31, 1964 and running through Sept. 10, 1964.

<sup>88</sup> See text accompanying notes 385 through 387 *infra*.

Rekruciak, a young insurance executive, found that only two police officers in Chicago were assigned to the surveillance of obscene literature, and those part-time. Their record showed one arrest, for a pornographic paperback, in five years. When police claimed that they could not find offending material, Rekruciak supplied them with names and addresses of vendors. When arrests under state law were slow in coming, individual CDL members became complaining witnesses.

i As a result of this activity, Police Superintendent O. W. Wilson created a program of attack that is now hailed as a model for police.<sup>89</sup>

Since 1962, the local operation has remained strong. Members regularly survey the book stores and racks, instigate police investigations, act as complaining witnesses, and regularly attend obscenity trials, sometimes *en masse*.<sup>90</sup> Professor James R. Thompson, a former prosecutor of obscenity, has remarked that this technique has a marked effect on the outcome of obscenity trials, especially if they are before complaisant judges. He recalls that upon one occasion, as he was about to argue against an oft-repeated defense motion for a continuance, a woman from the CDL was standing directly behind him with her notebook and pencil in hand. Upon inquiry from the judge, she stated that she was "taking notes to tell my neighbors how justice is done."<sup>91</sup>

The Reverend Francis X. Lawlor is advisor to and the driving force behind the Chicago CDL unit. When he recently spoke at the National CDL Convention in New York City, he was described in the *National Decency Reporter* as follows:

A native of Bronx, New York and son of a New York City police officer, Father Lawlor was ordained a priest on May 22, 1945 in Washington, D.C. He has been stationed at St. Rita High School (all boys) in Chicago, from 1946 to the present as a teacher of Biology and Religion. He was appointed Arch-

diocesan Moderator of CISYA-CYO, the Chicago archdiocesan program of Catholic Action for all Catholic High Schools, and is currently conducting that work in the Chicago area. In 1955, Fr. Lawlor conducted a survey among 35,000 Chicago High School students and discovered that one out of every three were being reached by obscene literature. In 1956, he conducted a campaign among parent groups at various Chicago High Schools to alert them to the existence of the problem and to ask for law enforcement. He worked with the Christian Brothers Boys Association and Americans for Moral Decency, in 1958 and 1959, in their anti-obscenity programs.

From 1958 to 1964, Father Lawlor was Chaplain of the Christian Family Movement, which eventually evolved into the work of the Chicago CDL unit. From 1963 to 1964, he was State Chaplain of the Catholic War Veterans Department of Illinois. He was just recently appointed as Spiritual leader for the Illinois Knights of Columbus Moral Decency campaign.<sup>92</sup>

In July of 1965, I interviewed Father Lawlor. He sees the work of the CDL as follows: Its mission is to alert members of the public and through them urge the proper authorities to enforce the law. This is best achieved through speeches, films and other means that reach people in "all walks of life". The CDL is the only institution that is presently serving this function, and is necessary to check the "exploiters" of human frailty. In Father Lawlor's view, the police have lost a lot of ground by past inactivity, but this does not mean that some of that ground cannot be recouped. Police activity should be aimed at distributors; of the 850 titles now handled by one Chicago distributor, all except 25 to 50 "go beyond contemporary community standards". A few of these titles should not be selected for prosecution as has been done in the past; all should be prosecuted. Father Lawlor sees obscenity as one of the causes of early marriages, rejection in marriage, break-ups of marriages, and a too easy avenue to false happiness like alcoholic drink and narcotic drugs. As for the censors, Father Lawlor believes that they too may get caught up in the appeal of obscenity but he believes that the "watchers" receive the special graces that "go with the profession".

<sup>92</sup> National Decency Reporter, Vol. II, No. 12, Sept. 1965.

<sup>89</sup> Hall, *supra* note 85.

<sup>90</sup> The CDL has been criticized for its "pressure campaigns" of organized letter writing to judges and "court packing" as attempts to influence courts. See Lockhart & McClure, *Censorship of Obscenity: The developing Constitutional Standards*, 45 MINN. L. REV. 5, 10 n. 28 (1961).

<sup>91</sup> Address by James R. Thompson, 1965 Annual Short Course for Prosecuting Attorneys conducted by the Northwestern University School of Law, Aug. 6, 1965. See also Note, 1964 WASH. U.L.Q. 98, 107-10 for an account of CDL activity in St. Louis.

In 1962, Universal Publications, a New York publishing house handling "Softcover Library Books", brought suit against the local cdl unit (a corporation) charging that threats of illegal boycotts and of criminal action by the local unit caused Charles Levy Circulating Company<sup>93</sup> to drop the Softcover line and asked \$375,000 in damages.<sup>94</sup> The suit "dragged on" for two and a half years and, according to Father Lawlor, cost the local cdl \$10,000 in legal expenses before it was finally dropped. This may have been the reason that the Chicago unit stopped publishing its local newsletter, the *Decency Reporter*, but no marked decrease in local activity otherwise has been seen.

There is no question but that the cdl is a very effective body; many times, however, it hurts its own cause through extremism and entry into fields with which it should not be concerned. For example, in one issue of the *National Decency Reporter* appears the item:

Another "Bunny" Captured. Mary Denison, 21, who previously worked as a Playboy Club "Bunny" was taken into custody at Miami, Florida, recently, along with a beach boy pal of Jack (Murph the Surf) Murphy, and charged with the \$150,000 jewel robbery of a department store.<sup>95</sup>

And in another issue it was reported that a certain college had refused to house men and women in the same dormitory. When Omaha, Nebraska Municipal Court Judge Leahy dismissed a charge of indecent exposure against 61 year-old fan dancer, Sally Rand, because the ordinance under which she had been charged was unconstitutional, the Omaha World-Herald reported that "an executive of a Cincinnati, O., decency league wrote (to the Judge): 'Your knowledge of the obscenity laws is abysmally ignorant'.<sup>96</sup>

The "Procedures Handbook" warns against "Wild-eyed crusaders", and yet Mr. Keating gets a little "wild-eyed" himself at times. Before the Graham Committee in 1960, he referred to Dr. Kinsey as one of the "sensationalists... who draw sweeping conclusions from a handful of selected subjects and defraud the public by calling their meanderings a scientific study", and of the Kronhausens he said:

I think [they] deliberately appeal to the

<sup>93</sup> See text accompanying note 311 *infra*.

<sup>94</sup> NEWMAN, *op. cit. supra* note 87.

<sup>95</sup> National Decency Reporter, Vol. II, No. 12, Sept. 1965.

<sup>96</sup> Omaha World-Herald, Sept. 26, 1965.

mass audience by inclusion in their works of the most rank obscenities imaginable. A most cursory glance at the books will demonstrate there is no intention on their part of scientific work, but rather, it is a deliberate appeal to the sex instinct of the average newsstand devotee and the propagandizing of their own somewhat bizarre psychological conclusions.<sup>97</sup>

Mr. Keating also views *Playboy* as "perhaps the most dangerous and inherently evil of all the magazines dealing with sex..."<sup>98</sup>

The cdl is no longer the only active citizen group in Chicago. In August of 1965, Mr. Keating spoke before the 83rd annual Supreme Council meeting of the Knights of Columbus.<sup>99</sup> The Council thereupon passed a resolution which reads in part:

\*\*\* Whereas, it was the aim of the Supreme Council during the past year to jolt the members and the public from seeming indifference to the problem, stemming from lack of knowledge of the seriousness and extent of this frightening and growing traffic and to arouse all to demonstrate that filthy and revolting publications are universally considered unfit for use in this civilization.\*\*\*

Resolved, That each State and subordinate council appoint strong, active and energetic "Decent Literature" committees and that said committees promote the formation of Citizens Commissions in each community... whose duty it shall be to apply the application of the rights and responsibilities of citizenship to the dissemination of obscenity especially to children...<sup>100</sup>

The Council also agreed that it would be fitting to lend support to the bill pending in Congress relating to the establishment of a presidential commission for the elimination of pornographic materials<sup>101</sup> and for each Council to subscribe to the cdl's *National Decency Reporter* and make use of the films and other materials available from

<sup>97</sup> HYDE, A HISTORY OF PORNOGRAPHY 193-94 (1964). But see Cairns, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1019 (1962) in praise of Kinsey's methods and Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 11 n. 33 (1960) praising the work of the Institute as a "serious effort."

<sup>98</sup> Fleishman, *Witchcraft and Obscenity: Twin Superstitions*, Wilson Library Bulletin, April 1965.

<sup>99</sup> Columbian, Oct. 1965 p. 9; National Decency Reporter Vol. II, No. 13, Oct. 1965.

<sup>100</sup> Columbian, Oct. 1965 p. 11.

<sup>101</sup> Senate Bill No. 735 (89th Congress, 1st Session). See note 75 *supra*.

the CDL. The Supreme Council, in addition, voted a \$15,000 appropriation to assist in the *amicus curiae* briefs in the *Mishkin*<sup>102</sup> and *Ginzburg*<sup>103</sup> cases in the Supreme Court of the United States.<sup>104</sup>

Under the new Knights of Columbus plan, each local group is to appoint two "surveyors", one "recruiter", and one "communicator". The surveyors, with the help of committees, are to visit the retail outlets for literature; the recruiter is to recruit a staff of reviewers to read the publications in question; and the communicator is to get in touch with responsible leaders in the community.

The December 10, 1965 issue of the *Columbian* reports that approximately 100 Knights attended an all day seminar on obscenity on December 4, 1965. The speakers were members of the Chicago chapter of the CDL. On the same page, there appears a listing of the dates and court room assignments for all of the obscenity cases to be heard in the Chicago area during the following week. The article states that "Knights, their wives, and their friends are urged to attend one or more of these hearings. . . ."

Despite the fact that the CDL in Chicago is almost exclusively composed of Catholics, and the NODL and Knights of Columbus are Catholic organizations, it should not be assumed that they necessarily reflect the opinion of the Catholic Church in America.<sup>105</sup>

Although the Knights of Columbus has not long been active in the field of suppression of obscenity in Chicago, the activities of the CDL have had a marked effect. The CDL provided the main impetus for the Chicago crackdown in 1962.

<sup>102</sup> Discussed in text accompanying notes 271 through 275 *infra*.

<sup>103</sup> Discussed in text accompanying notes 263 through 270 *infra*.

<sup>104</sup> *Columbian*, Oct. 1965 p. 24.

<sup>105</sup> See GARDINER, *CATHOLIC VIEWPOINT ON CENSORSHIP* 188 (1958), quoting the 1957 Statement on Censorship of the Catholic Bishops of the United States as follows: "Although civil authority has the right and duty to exercise such control over the various media of communication as is necessary to safeguard public morals, yet civil law, especially in those areas which are constitutionally protected, will define as narrowly as possible the limitations placed on freedom. The one purpose which will guide legislators in establishing necessary restraints to freedom is the securing of the general welfare through the prevention of grave and harmful abuse. Our juridical system has been dedicated from the beginning to the principle of minimal restraint. Those who may become impatient with the reluctance of the state through its laws to curb and curtail human freedom should bear in mind that this is a principle which serves to safeguard all our vital freedoms—to curb less rather than more; to hold for liberty rather than restraint."

Through the activities of its advisor, Father Lawlor, it has served as a watchdog of the police and prosecutors and the bookstore surveillance operation carried on by its approximately 30 active members have served as an investigative aid to the police. Their attendance in court at obscenity hearings and trials, especially those where a jury sat, has probably had some effect on the outcome of obscenity prosecutions. It is submitted, however, that such groups tend to be overzealous in their efforts, and if the police and prosecutors allow themselves to be blindly led by such groups (which to date strong leadership in those agencies in Chicago has prevented), the result may be less than desirable;<sup>106</sup> strong public sentiment which might otherwise be on the side of the law enforcement agency may turn against it. Whatever the views of the individual reader may be on suppression of obscenity, it seems clear that any resolution of the problem which comes about in this manner is not a desirable one.

#### THE LAW

There have been innumerable discussions of the old English and early American obscenity cases.<sup>107</sup> For the most part, their interest to us is largely historical, especially in the light of the purposes of this article as set forth in the introductory section, and a reiteration of those discussions would serve no useful purpose here. Therefore, the older decisions will be discussed only when it is necessary to explain the present state of the law.<sup>108</sup>

The first case of that nature is *Queen v. Hicklin*,<sup>109</sup> an 1868 English decision, the repercussions of which are still visible in Supreme Court de-

<sup>106</sup> See Sullivan, *Obscenity: Police Enforcement Problems*, 10 CATH. LAW. 301, 307 (1964).

<sup>107</sup> See CHANDOS, "TO DEPRAVE AND CORRUPT . . ." 18 (1962); FORD, *CRIMINAL OBSCENITY* 98 (1926); LOTH, *THE EROTIC IN LITERATURE* 105 (1962); PAUL & SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* 1 (1961); Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938).

<sup>108</sup> Common law obscenity evolved in the following manner: Sir Charles Sydlles case, 1 Keble 620, 83 Eng. Rep. 1146 (1663) was a prosecution for obscene behavior which provided the basis for later obscene publication prosecutions; in *Queen v. Reed*, 11 Mod. 142, 88 Eng. Rep. 953 (1708), it was held that the writing of an obscene book was not an indictable offense at common law and in *Rex v. Curl*, 2 Str. 788, 93 Eng. Rep. 849 (1727), it was held that the distribution of an obscene book was a common law offense. See Thompson, *Common Law Crimes Against Public Morals*, 49 J. CRIM. L., C. & P.S. 350 (1958) for a discussion of this type of evolution in modern criminal jurisprudence.

<sup>109</sup> Law Reports, 3 Q. B. 360 (1868).

cisions and, therefore, the decisions of all other American courts today.

Benjamin Hicklin was not a book seller, but a Justice of Wolverhampton who, with a brother Justice, had before him the prosecution of one Henry Scott, a metal broker and a member of the Protestant Electoral Union. Scott was charged with selling (at no personal profit) a 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 pamphlet, it seems, was in two roughly equal parts. The first consisted of arguments against Roman Catholic practices, especially the use of the confessional, and the second part contained "impure and filthy acts, words and ideas".<sup>110</sup> The two justices found the pamphlet obscene.<sup>111</sup> (There seems to be no question that the charge of obscenity would not lie against the first part.) The 252 copies seized upon Scott's arrest were ordered destroyed.

On appeal, the Recorder quashed the destruction order and ordered all copies of the pamphlet returned to Scott on the ground that his intent had not been to corrupt, but rather to educate or warn; the Queens Bench, however, reversed the Recorder, reinstating the decision of the justices. In announcing his opinion, Chief Judge Cockburn noted that the statute under which Scott was charged<sup>112</sup> provided for the seizure and condemnation of "obscene" books, etc. and stated further:

...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.<sup>113</sup>

He disagreed with the Recorder's holding that a wrongful intent might not be inferred, and although his language is not clear he seemed to hold that intent to corrupt was not a necessary element under the statute.

The *Hicklin* decision is important for several reasons, the first being that Judge Cockburn's test for obscenity became the law not only in England, but also to a great extent in the United

States.<sup>114</sup> The "Hicklin rule" as it came to be known, was thought to be authority for the following propositions: (1) that the material need not be judged as a whole and any obscene passage was enough to condemn the work; (2) that language which would "deprave and corrupt" *anyone*, a child as well as an adult, was obscene, and (3) that no amount of merit or value would redeem an otherwise obscene work.

The American courts began to show a great deal of dissatisfaction with the *Hicklin* rule which first became apparent in the outcome of the cases<sup>115</sup> and later in the language of the decisions themselves.<sup>116</sup> Then, after Judge John Woolsey of the Southern District of New York had held two sex-instructional works not to be obscene in two separate cases,<sup>117</sup> Random House decided to set up a test of James Joyce's *Ulysses*. The book came through customs unscathed and had to be taken back to customs to be seized.<sup>118</sup> Judge Woolsey's opinion holding *Ulysses* not to be obscene,<sup>119</sup> although it was affirmed by the United States Court of Appeals for the Second Circuit,<sup>120</sup> became famous, and it still retains the honor of being one of the most often quoted decisions in the field. It is not clear whether the popularity results from the decision's far reaching implications in the law or the delightful and lucid language in which it was couched.<sup>121</sup> Judge Woolsey held that a high content of dirty words and passages dealing with sex do not make a work obscene. He added:

The words which are criticized as dirty are

<sup>114</sup> See *Rosen v. United States*, 161 U.S. 29 (1896); *United States v. Bennett*, 24 Fed. Cas. 1093 (No. 14, 571) (C.C., S.D.N.Y. 1879); *People v. Muller*, 96 N.Y. 408 (1884).

<sup>115</sup> See *In re Worthington*, 30 N. Y. Supp. 361 (1894); *St. Herbert Guild v. Quinn*, 64 Misc. 366, 118 N. Y. Supp. 582 (1909).

<sup>116</sup> See *United States v. Kennerly*, 209 Fed. 119 (S.D.N.Y. 1913).

<sup>117</sup> *United States v. One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (S.D.N.Y. 1931); *United States v. One Book Entitled "Contraception"*, 51 F. 2d 525 (S.D.N.Y. 1933).

<sup>118</sup> *LOTH, THE EROTIC IN LITERATURE* 178 (1962).

<sup>119</sup> *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933).

<sup>120</sup> *United States v. One Book Entitled "Ulysses"*, 72 F. 2d 705 (2d Cir. 1934).

<sup>121</sup> See MELLINKOFF, *THE LANGUAGE OF THE LAW* 442-43 (1963), quoting a part of the decision to illustrate effectiveness or "durability" obtained through the use of "humorous" and "rememberable" language; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 392 (1963); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 71 (1960).

<sup>110</sup> *Id.* at 363.

<sup>111</sup> Descriptions of the contents of the pamphlet can be found in HYDE, *A HISTORY OF PORNOGRAPHY* 172 (1964) and ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* 69 (1956). The latter work includes a quotation from the "obscene" part of the pamphlet and a description of its cover.

<sup>112</sup> 20 & 21 Vict. c. 83, s.1.

<sup>113</sup> Law Reports, 3 Q. B. at 371.

old Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe. In respect of the recurrent emergence of the theme of sex in the minds of his characters, it must always be remembered that his locale was Celtic and his season spring.<sup>122</sup> He further stated that the material must be tested with regard to what effect it would have upon a "person with average sex instincts"<sup>123</sup>, someone like the "reasonable man" in the law of torts; that the book must be read in its entirety and only its "net effect"<sup>124</sup> considered, and that Ulysses was "a sincere and serious attempt to devise a new literary method for the observation and description of mankind".<sup>125</sup> On each point, he refused to follow the *Hicklin* test. Judge Learned Hand who had some 20 years earlier first strenuously protested against, although feeling himself constrained to follow, the *Hicklin* rule in the *Kennerly* case,<sup>126</sup> joined in his brother's opinion affirming the *Ulysses* decision.<sup>127</sup> After *Ulysses*, many American courts began to depart from the *Hicklin* rule<sup>128</sup> but others held fast to its tenets.<sup>129</sup>

The law remained in this unsettled state until 1957-1958, when the Supreme Court of the United States actually entered the field of censorship of obscene matter for the first time by deciding no less than eight cases,<sup>130</sup> while also denying *certiorari* in two others.<sup>131</sup>

<sup>122</sup> 5 F. Supp. at 184.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Id.* at 185.

<sup>125</sup> *Ibid.*

<sup>126</sup> *United States v. Kennerly*, *supra* note 116.

<sup>127</sup> *United States v. One Book Entitled "Ulysses"*, *supra* note 13.

<sup>128</sup> See *Roth v. United States*, 354 U.S. 476, 489 n. 26 (1957); Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 328 n. 223 (1954); *Note*, 4 WASHBURN L. Q. 114, 118 n. 39 (1964).

<sup>129</sup> See Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 329 n. 230 (1954).

<sup>130</sup> *Butler v. Michigan*, 352 U.S. 380 (1957); *Roth v. United States*, 354 U.S. 436 (1957); *Adams Newark Theatre Co. v. City of Newark*, 354 U.S. 931 (1957) [*per curiam*]; *Kingsley Books Inc. v. Brown*, 354 U.S. 436 (1957); *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957) [*per curiam*]; *Mounce v. United States*, 355 U.S. 180 (1957) [*per curiam*]; *One Inc. v. Olesen*, 355 U.S. 371 (1958) [*per curiam*]; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958) [*per curiam*].

<sup>131</sup> *Mathews v. Florida*, 99 So. 2d 568, *cert. denied*, 356 U.S. 918 (1958); *United States v. Parr*, 255 F. 2d 86 (5th Cir.), *cert. denied*, 358 U.S. 824 (1958).

In the first of these Supreme Court cases, *Butler v. Michigan*,<sup>132</sup> the defendant appealed from his conviction in the Recorder's Court of Detroit for the sale of a paperbound edition of *The Devil Rides Outside*.<sup>133</sup> The statute under which he was convicted read in part as follows:

Any person who shall . . . sell . . . any book . . . containing obscene, immoral, lewd or lascivious language, or . . . prints, pictures, figures or descriptions; tending to incite minors to violence or depraved or immoral acts, manifestly tending to the corruption of the morals of youth . . . shall be guilty of a misdemeanor.<sup>134</sup>

The Supreme Court, in an opinion by Justice Frankfurter, found that the statute operated as a denial of the defendant's rights under the due process clause of the fourteenth amendment, saying:

It is clear on the record that appellant was convicted because Michigan, by §343, made it an offense for him to make available for the general reading public (and he in fact sold to a police officer) a book that the trial judge found to have a potentially deleterious influence upon youth. The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. 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.<sup>135</sup>

Thus, the obscenity of any matter must be judged with reference to adults, and not children, or the statute violates due process. This does not mean, however, that the state may not condemn that material which is designed for or directed to children and which is obscene with reference to children.<sup>136</sup>

The next three decisions were all handed down on June 24, 1957. The most important of these was *Roth v. United States*.<sup>137</sup> In his book on pornography, H. Montgomery Hyde summarizes

<sup>132</sup> 352 U.S. 380 (1957).

<sup>133</sup> Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 13 (1960).

<sup>134</sup> MICHIGAN PENAL CODE § 343.

<sup>135</sup> 352 U.S. at 382-83.

<sup>136</sup> See text accompanying notes 477 through 490 *infra*.

<sup>137</sup> 354 U.S. 476 (1957).



the backgrounds of the defendants<sup>138</sup> in the *Roth* case as follows:

Samuel Roth, aged sixty-five, had been born in Poland and came to New York as a boy. In the nineteen-thirties, he had conducted a flourishing business in erotic and pornographic literature as well as books of a "border line" character. For selling copies of *Ulysses*, he was sent to jail for sixty days in Philadelphia in 1930, and he received three other prison sentences. He traded under sixty-two names, such as Seven Sirens Press, Gargantuan Books and Book Gems, and he later boasted to the Kefauver Committee that he had a mailing list of 40,000 names. Over a period of a few years, he sent out ten million pieces of mail. He was still operating in the nineteen-fifties, and in 1954, he was indicted on twenty-six counts of mailing obscene pictures, photographs, magazines and books, found guilty, and sentenced to a \$5,000 fine and five years in prison. He thereupon filed an appeal.

Although he was considerably younger than Roth, thirty-five year-old David Alberts was as industrious in Los Angeles as Roth was in New York. With the help of an attractive wife, Alberts conducted an immense mail order business in pornography under the trade name of Male Merchandise Mart from an office on Melrose Avenue and a warehouse on Santa Monica Boulevard, his turnover averaging \$50,000 a month. In 1955, the municipal court of Beverly Hills found him guilty of lewdly keeping for sale obscene and indecent books in violation of the California penal code. Alberts was fined \$500, sentenced to sixty days in prison, and put on probation for two years. He, too, challenged the constitutionality of the state law by appealing.<sup>139</sup>

The two cases reached the Supreme Court on the sole issue of the constitutionality of the laws involved.<sup>140</sup> In *Roth*, the question was whether the

federal obscenity statute<sup>141</sup> violated the first amendment, and in *Alberts*, whether the obscenity provisions of the California Code<sup>142</sup> were violative of the freedoms of speech and press guaranteed by the due process clause of the fourteenth amendment. Mr. Justice Brennan delivered the opinion of the Court, finding both statutes constitutional, saying:

But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.\*\*\*<sup>143</sup>

We hold that obscenity is not within the area of constitutionally protected speech or press.<sup>144</sup>

The Court, in holding that the statutes were not unconstitutionally vague, found the proper definition of "obscenity" to be: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest".<sup>145</sup> The Court rejected by name the *Hicklin*<sup>146</sup> test as unconstitutional and approved the test laid down in the *Ulysses*<sup>147</sup> case and others.

*Adams Newark Theatre Co. v. City of Newark*,<sup>148</sup> was also a challenge of a state statute on the grounds of vagueness and denial of freedom of expression. The Supreme Court affirmed the holding of the New Jersey Supreme Court that the statute was constitutional in a *per curiam* opinion, citing only *Roth*, *Alberts*, and *Kingsley*.<sup>149</sup> The *Kingsley*<sup>150</sup> case, involved New York civil injunction procedures and the obscenity of the books

stitution and similar state constitutional provisions. See SCHROEDER, OBSCENE LITERATURE AND CONSTITUTIONAL LAW 12 (privately printed for forensic uses, 1911).

<sup>141</sup> 18 U.S.C. § 1461 is commonly known as the "Comstock Act." For post office procedure under this section see PAUL & SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL (1961) and *Comment*, 58 NW. U.L. REV. 664 (1963).

<sup>142</sup> WEST'S CAL. PENAL CODE ANN., 1955, § 311.

<sup>143</sup> 354 U.S. at 484.

<sup>144</sup> *Id.* at 485.

<sup>145</sup> *Id.* at 489. The word "prurient" was first used by the Supreme Court in *Mutual Film Corp. v. Industrial Comm'n.*, 236 U.S. 230 (1915). See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 56 n. 315 (1960).

<sup>146</sup> See text accompanying notes 109 through 116 *supra*.

<sup>147</sup> *United States v. One Book Called "Ulysses"*, *supra* note 119, *aff'd sub nom.*, *United States v. One Book Entitled "Ulysses"*, *supra* note 120.

<sup>148</sup> 354 U.S. 931 (1957), *affirming* 22 N. J. 472, 126 A.2d 340 (1956).

<sup>149</sup> 354 U.S. 931 (1957).

<sup>150</sup> *Kingsley Books v. Brown*, 354 U.S. 436, *affirming* *Brown v. Kingsley Books, Inc.* 1 N. Y. 2d 177, 134 N.E. 2d 461 (1956).

<sup>138</sup> *Roth v. United States* and *Alberts v. California* were decided in the same opinion.

<sup>139</sup> HYDE, A HISTORY OF PORNOGRAPHY 185-86 (1964). See also Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 19-24 (1960). Roth's conviction was affirmed in *United States v. Roth*, 237 F. 2d 796 (2d Cir. 1956) and *Alberts v. People v. Alberts*, 138 Cal. App. 2d. 909, 292 P. 2d 90 (1955).

<sup>140</sup> As far back as 1907 it had been argued that both federal and state obscenity laws were unconstitutional under the first amendment to the United States Con-

involved therein was not open to question.<sup>151</sup> It will be discussed in the part of this article dealing with police procedures.<sup>152</sup>

In the other four *per curiam* decisions decided during the next term, the Court reversed or remanded four Court of Appeals decisions. They were:

*Times Film Corp. v. Chicago*,<sup>153</sup> holding the motion picture "The Game of Love" obscene reversed on authority of *Alberts*;

*Mounce v. United States*,<sup>154</sup> holding an imported nudist and art magazine obscene remanded for "consideration in the light of" *Roth*;

*One, Inc. v. Olesen*,<sup>155</sup> holding *One, the Homosexual Magazine* obscene reversed on authority of *Roth*; and

*Sunshine Book Co. v. Summerfield*,<sup>156</sup> holding *Sunshine & Health* and *Sun Magazine*, two nudist publications, obscene, reversed on authority of *Roth*.

These four *per curiam* decisions are thought by most commentators to be an indication that the Court was of the opinion that the material involved was not obscene under the test laid down in *Roth*.<sup>157</sup> Dean Lockhart approves of the *per curiam* approach. In a speech delivered in March of 1961, he said:

I think the Court was wise in not seeking to explain its decisions in these early cases. The Court has just now moved into an area in which no court yet has satisfactorily explained the basis for its obscenity decisions. It is charting a new course in a very difficult and treacherous area. It is more likely to chart a true course that will avoid dangerous shoals in the future if it gains substantial experience in dealing with difficult cases before it

makes an effort to verbalize its standards for determining what is obscene. In time, it must do so in order to provide adequate guidance to lower courts—and to publishers—but presently, I think it has been wise to limit its explanations to problems on the periphery and simply to *decide* without explanation when it has faced the core problem of what is obscene.<sup>158</sup>

Others are not as impressed with the *per curiam* method,<sup>159</sup> and a few further considerations may be in order here in light of Dean Lockhart's seeming omissions and certain developments since 1961. First, why is the obscenity area so different than any other area? Why cannot the Court take the bull by the horns? Second, what about the police—from whence comes their "guidance"? And, third, when does the time become ripe—when does the Court have "substantial experience" so it can "verbalize"? By 1964, the Court was still giving us *per curiam* reversals,<sup>160</sup> and no majority opinions.<sup>161</sup>

In 1959, the Court decided two cases<sup>162</sup> and denied *certiorari* in one.<sup>163</sup> *Kingsley Pictures Corp. v. Regents*<sup>164</sup> marked the end of "ideological obscenity".<sup>165</sup> Kingsley Pictures had been denied a permit to show a French motion picture version of *Lady Chatterly's Lover* unless certain objectionable scenes were first cut from it. The denial was upheld in the New York Court of Appeals, not on the ground that the film was obscene, but rather because it "alluringly portrays adultery as proper and desirable."<sup>166</sup> In reversing, Mr. Justice Stewart stated:

What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that

<sup>151</sup> See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 30 n. 146 (1960) and accompanying text.

<sup>152</sup> See text accompanying notes 284 through 290 *infra*.  
<sup>153</sup> 355 U.S. 35, reversing 244 F. 2d 432 (7th Cir. 1957).

<sup>154</sup> 355 U.S. 180, remanding 247 F. 2d 148 (9th Cir. 1957).

<sup>155</sup> 355 U.S. 371 (1958), reversing 241 F. 2d 772 (9th Cir. 1957).

<sup>156</sup> 355 U.S. 372 (1958), reversing 249 F. 2d 114 (D.C. Cir. 1957).

<sup>157</sup> See Kalven, *The Metaphysics of the Law of Obscenity*, in the 1960 SUPREME COURT REVIEW 44 (1960); Lockhart & McClure, *The Core Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289, 293-94 (1961); Comment, 14 BUFFALO L. REV. 512, 518 (1965); Note, 43 N.C. L. REV. 172, 177-78 (1964); Comment, 12 U.C.L.A. L. REV. 532, 539 (1965); Note, 16 W. RES. L. REV. 780, 781 (1965).

<sup>158</sup> Lockhart & McClure, *The Core Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289-94 (1961).

<sup>159</sup> See, e.g., Note, 43 N.C. L. REV. 172, 179 n. 48 (1965).

<sup>160</sup> See text accompanying notes 196 and 197 *infra*.

<sup>161</sup> See notes 184 and 195 and accompanying text *infra*. See also note 283 *infra*.

<sup>162</sup> *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959), reversing 4 N.Y. 2d 349, 151 N.E. 2d 197 (1958); *Smith v. California*, 361 U.S. 147 (1959), reversing *People v. Smith*, 161 Cal. App. 2d 860, 327 P. 2d 636 (1958).

<sup>163</sup> *United States v. Padell*, 262 F. 2d 357 (2d Cir. 1958), cert. denied, 359 U.S. 942 (1959).

<sup>164</sup> 360 U.S. 684 (1959).

<sup>165</sup> The term is Dean Lockhart's and Professor McClure's. See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 39 (1960).

<sup>166</sup> 4 N.Y. 2d at 364, 151 N.E. 2d at 205.

adultery under certain circumstances may be proper behavior. Yet, the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.<sup>167</sup>

In *Smith v. California*,<sup>168</sup> appellant Smith, a proprietor of a book store, had been convicted under a Los Angeles ordinance which included no element of *scienter* or knowledge (of the book's contents). The Court,<sup>169</sup> per Justice Brennan, held the ordinance unconstitutional, saying:

By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter.<sup>170\*\*\*</sup>

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; . . .<sup>171</sup>

Thus, although clearly holding that obscenity statutes must contain the element of *scienter*, the Court left the door open as to the proof of *scienter*. This is a special police problem and the cases decided since *Smith* on proof of *scienter* are discussed later.<sup>172</sup>

In 1960 the Court was content to merely deny *certiorari* in two cases,<sup>173</sup> but in 1961 it decided *Times Film Corp. v. City of Chicago*,<sup>174</sup> *Marcus v. Search Warrant*,<sup>175</sup> another case involving police procedure discussed below,<sup>176</sup> and denied review in seven more cases.<sup>177</sup>

<sup>167</sup> 360 U.S. at 688. See, in defense of ideological obscenity, FORD, CRIMINAL OBSCENITY 17 (1926), VAN DEN HAAG, *Quia Ineptum*, in "TO DEPRAVE AND CORRUPT . . ." 111-24 (1962) and Amen, *The Church Versus Obscene Literature*, 11 CATH. LAW. 21 (1965).

<sup>168</sup> 361 U.S. 147 (1959).

<sup>169</sup> There were five separate opinions written for the unanimous decision.

<sup>170</sup> 361 U.S. at 153.

<sup>171</sup> *Id.* at 154.

<sup>172</sup> See text accompanying notes 414 through 427 *infra*.

<sup>173</sup> *United States v. Cain*, 274 F. 2d 598 (5th Cir.), *cert. denied*, 362 U.S. 952 (1960); *United States v. Hochman*, 277 F. 2d 631 (7th Cir.), *cert. denied*, 364 U.S. 837 (1960).

<sup>174</sup> 365 U.S. 43 (1961).

<sup>175</sup> 367 U.S. 717 (1961).

<sup>176</sup> See text accompanying notes 291 through 295 *infra*.

<sup>177</sup> *United States v. Collier*, 283 F. 2d 780 (4th Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); *Womack v. United States*, 294 F. 2d 204 (D.C. Cir.), *cert. denied*, 365 U.S. 859 (1961); *United States v. Astore*, 288 F. 2d 26 (2d Cir.), *cert. denied*, 366 U.S. 925 (1961); *State v.*

In this, the second *Times Film* case,<sup>178</sup> the constitutionality of Chicago's moving picture censorship system was under attack as a prior restraint upon appellant's first amendment rights. Under the Chicago procedure, a film had to be submitted to a censor board prior to its public showing, and if it was approved a license was issued. Appellant had refused to submit the film "Don Juan" to the board and brought a suit for injunctive relief on the ground that he could not constitutionally be required to submit the film. On this narrow ground, the Supreme Court, in a five-to-four decision, upheld the validity of the Chicago procedure, holding that all prior restraints were not unconstitutional.<sup>179</sup>

In 1962, the Court denied *certiorari* in four cases<sup>180</sup> and decided *Manual Enterprises v. Day*.<sup>181</sup> The *Manual Enterprises* case involved a ruling by the Post Office Department barring from the mails a shipment of magazines consisting "largely of photographs of nude, or near-nude, male models"<sup>182</sup> and "composed primarily, if not exclusively, for homosexuals".<sup>183</sup> There was no majority opinion,<sup>184</sup> and Mr. Justice Harlan sidestepped the issue of whether the magazines in question would "appeal to the purient interest" of the "average person" under the *Roth* test by deciding that the magazines were not "patently offensive"; that is, they did not "transcend the prevailing bounds of decency",<sup>185</sup> and the pictures, although of nude males, could not be regarded as more objectionable than those pictures of nude females which are tolerated. Thus, the contemporary community

Chobot, 12 Wis. 2d 110, 106 N.W. 2d 286 (1960), *appeal dismissed*, 368 U.S. 15 (1961); *United States v. Oakley*, 290 F. 2d 517 (6th Cir.), *cert. denied*, 368 U.S. 888 (1961); *Heinecke v. United States*, 294 F. 2d 727 (D.C. App.) *cert. denied*, 368 U.S. 901 (1961).

<sup>178</sup> See note 153 *supra* citing first *Times Film* case.

<sup>179</sup> *But see* *Freedman v. Maryland*, 380 U.S. 51 (1965), discussed in text accompanying notes 244 through 246 *infra*.

<sup>180</sup> *Monfred v. Maryland*, 226 Md. 312, 173 A. 2d 173 (1961), *cert. denied*, 368 U.S. 953 (1962); *United States v. Kahn*, 300 F. 2d 78 (5th Cir.), *cert. denied*, 369 U.S. 859 (1962); *People v. Finkelstein, et al.*, 11 N.Y. 2d 300, 183 N.E. 2d 661, *cert. denied*, 371 U.S. 863 (1962); *People v. Zucker*, 15 A.D. 883, 225 N.Y.S. 2d 154, *cert. denied*, 371 U.S. 863 (1962).

<sup>181</sup> 370 U.S. 478 (1962), *reversing* 289 F. 2d 455 (D.C. Cir. 1961).

<sup>182</sup> 370 U.S. at 480.

<sup>183</sup> *Id.* at 481.

<sup>184</sup> Justice Harlan wrote the "opinion of the Court", Justice Black concurred without opinion, Justices Frankfurter and White took no part in the decision and the Chief Justice and Justice Douglas joined with Justice Brennan in a concurring opinion.

<sup>185</sup> 370 U.S. at 490.

standards portion of the *Roth* test took on a slightly different meaning.

In 1963, the Court denied *certiorari* in three cases,<sup>186</sup> and decided *Bantam Books v. Sullivan*,<sup>187</sup> a case involving the activities of the Rhode Island Commission to Encourage Morality in Youth, a child of the Rhode Island Legislature, which served notices upon distributors of books found objectionable by a majority of the Commission. The notices advised that the book or books in question were not suitable for display or sale to youths under 18, asked the distributor's cooperation and reminded him that it was the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity. A local police officer would check to be sure that the notices were complied with. The Court held this system of censorship unconstitutional saying:

The procedures of the Commission are radically deficient. They fall far short of the constitutional requirements of governmental regulation of obscenity. We hold that the system of informal censorship disclosed by this record violates the Fourteenth Amendment.<sup>188</sup>

The Court went on to point out that this was not a holding barring law enforcement officers from any informal contacts with persons suspected of violating obscenity laws, so long as the purpose of such contacts was "aiding the distributor to comply with such laws and avoid prosecution under them".<sup>189</sup>

In 1964, the Court denied review in four cases,<sup>190</sup> reversed two cases *per curiam*,<sup>191</sup> and decided *Jacobellis v. Ohio*,<sup>192</sup> a case involving the motion picture "Les Amants" which, near its end, "depicted the facial expressions of a woman during orgasm induced, suggested off screen, by cunnilingus."

<sup>186</sup> *Goldstein v. Commonwealth*, *cert. denied*, 372 U.S. 910 (1963); *United States v. Mishkin*, 317 F. 2d 634 (2d Cir.), *cert. denied*, 375 U.S. 827 (1963); *United States v. Darnell*, 316 F. 2d 813 (2d Cir.), *cert. denied*, 375 U.S. 916 (1963).

<sup>187</sup> 372 U.S. 58 (1963), *reversing and remanding* 93 R.I. 411, 176 A. 2d 393 (1961).

<sup>188</sup> 372 U.S. at 71.

<sup>189</sup> *Id.* at 72.

<sup>190</sup> *United States v. Zuideveld*, 316 F. 2d 873 (7th Cir. 1963), *cert. denied*, 376 U.S. 916 (1964); *People v. Fried*, 18 A.D. 2d 996, 238 N.Y.S. 2d 742 (1963), *appeal dismissed*, 378 U.S. 578 (1964); *People v. Williamson*, 207 Cal. App. 2d 839, 24 Cal. Rptr. 734 (1962), *cert. denied*, 377 U.S. 994 (1964).

<sup>191</sup> *Tralins v. Gerstein*, 378 U.S. 576 (1964), *reversing* 151 So. 2d 19 (Fla. Dist. Ct. App. 1963); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964), *reversing* 156 So. 2d 537 (Fla. Dist. Ct. App. 1963).

<sup>192</sup> 378 U.S. 184 (1964), *reversing* 173 Ohio St. 22, 179 N.E. 2d 777 (1962).

gus."<sup>193</sup> The rest of the film was fairly innocuous; the Ohio Supreme Court had called it "vapid drivel."<sup>194</sup> Again, there was no majority opinion of the Court,<sup>195</sup> but at least five justices were of the opinion that the Ohio decision, holding the film obscene, ought to be reversed. This fragmented decision, of course, was of practically no help or guidance to the police, prosecutors, courts, or other parties concerned. Nor was the situation clarified in the two *per curiam* opinions handed down by the Court on the same day as the *Jacobellis* case. In *Tralins v. Gerstein*,<sup>196</sup> the Supreme Court of Florida had held *Pleasure Was My Business* obscene, and in *Grove Press, Inc. v. Gerstein*,<sup>197</sup> the same court had held *Tropic of Cancer* obscene. The Supreme Court reversed both cases, handing down identical opinions which read as follows:

June 22, 1964. *Per Curiam*: The petition for a writ of *certiorari* is granted, and the judgment is reversed. Mr. Justice Black and Mr. Justice Douglas would reverse for the reasons stated in the opinion of Mr. Justice Black in *Jacobellis v. Ohio*, (citation). Mr. Justice Goldberg and Mr. Justice Brennan would reverse for the reasons stated in the opinion of Mr. Justice Brennan in *Jacobellis* (citation). Mr. Justice Stewart would reverse for the reasons stated in his opinion in *Jacobellis* (citation). The Chief Justice, Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice White are of the opinion that *certiorari* should be denied.

The result of these three decisions seems to have been the settlement of one question while several more were left open. Settled was the demise of the "balancing" test, under which a court would weigh the social importance of a work against its purient appeal and hold the work obscene if the latter outweighed the former. In his opinion in the *Jacobellis*

<sup>193</sup> *Note*, 39 N.Y.U. L. REV. 1063, 1079 (1964). See BRUSDORFF & HENNINGSSEN, A HISTORY OF EROTICISM 40 (1963) showing a statue depicting cunnilingus in the Vatican collection.

<sup>194</sup> 173 Ohio St. at 28, 179 N.E. 2d at 781.

<sup>195</sup> Justice Brennan announced the judgment of the Court and wrote an opinion in which Justice Goldberg joined, Justice Black joined by Justice Douglas wrote a concurring opinion, Justice Stewart wrote a separate concurring opinion, Justice Clark joined with the Chief Justice in his dissenting opinion and Justice Harlan wrote a separate dissenting opinion. In addition Justice White concurred without opinion and Justice Goldberg wrote his own concurring opinion in addition to joining in Justice Brennan's opinion.

<sup>196</sup> *Note* 79 *supra*.

<sup>197</sup> *Ibid.*

case, Mr. Justice Brennan reaffirmed the test for obscenity laid down in *Roth*, but denied the validity of the balancing test, saying:

Recognizing that the test for obscenity enunciated there (in *Roth*)—"whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest", (citation)—is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is "utterly without redeeming social importance" and that "the portrayal of sex, e. g., in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." (citation). \*\*\* 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" without social importance. See *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 920, 383 P.2d 152, 165, 31 Cal. Repr. 800, 813 (1963).<sup>198</sup>

In the *Arnebergh* case referred to in Justice Brennan's opinion, the California Supreme Court had recognized that the balancing test was wrong under the California obscenity statute,<sup>199</sup> in which the term "utterly without redeeming social importance" evidently originated,<sup>200</sup> and had held *Tropic of Cancer* not to be obscene. But the Illinois Supreme Court, which had earlier adopted the balancing test in *American Civil Liberties Union v. City of Chicago*,<sup>201</sup> on June 18, 1964 weighed *Tropic* and found it wanting in social importance.<sup>202</sup> Four days later, the Supreme Court not only decided *Jacobellis*, outlawing the balancing test, but also the *Grove Press* case,<sup>203</sup> and reversed the Florida holding that *Tropic of Cancer* was obscene.<sup>204</sup> The

Illinois Court then withdrew its opinion and affirmed the Cook County Superior Court holding that the book was not obscene.<sup>205</sup> Subsequently, the Illinois Court withdrew another opinion in which it had affirmed a decision holding the night club act of Lenny Bruce to be obscene. Following the rationale of Justice Brennan's opinion in *Jacobellis*, the court reversed itself saying that "material having any social importance is constitutionally protected".<sup>206</sup> In a concurring opinion, Justice Schaeffer said the majority opinion was too broad and "... the fact that some fragments [of speech] relate to matters of social importance does not always ... immunize the whole."<sup>207</sup>

Related to the balancing test, but remaining unsettled, is the question of how far the "dominant theme of the material, taken as a whole" portion of the *Roth* test, should be carried. A recent publication of the works of the Marquis de Sade is over 700 pages in length. Most of the material included in the volume does not go beyond that which is freely published today, but pages 196 to 367 contain a separate and distinct essay "Philosophy in the Bedroom", which would probably be held obscene by any court in the United States under present standards. Worse yet would be a publication which began with a two page reproduction of the Bill of Rights and then continued with admittedly obscene writings or even pictures of persons engaged in intercourse and deviate sexual acts.<sup>208</sup> Surely, the Supreme Court does not intend that this type of material is to be protected—especially in instances where the part of the work that has the "redeeming social importance" is in no way related to the obscene part, or the obscene part is not an integral part of the whole, or where it may be excluded without doing violence to the whole. This, it seems, was the type of problem with which Mr. Justice Schaeffer was concerned when he wrote his concurring opinion in the *Bruce* case. It has been suggested that portrayals of sexual activity not germane to the theme of the work should not be protected under the *Roth* test and that "relevancy" should be, and perhaps is,

834, 835 & 844 (1964); *Recent Decision*, 10 CATH. LAW. 334, 334-335 (1964); *Comment*, 12 U.C.L.A. L. REV. 532, 546 n. 85 (1965).

<sup>198</sup> 378 U.S. at 191.

<sup>199</sup> CAL. PENAL CODE, § 311.

<sup>200</sup> See *Note*, 14 AM. U. L. REV. 226, 229 n. 15 (1965).

<sup>201</sup> 3 Ill. 2d 334, 121 N.E. 2d 585 (1954).

<sup>202</sup> See Gertz, *The Illinois Battle over the "Tropic of Cancer"*, 46 CHI. BAR REC. 161 (1965).

<sup>203</sup> *Note* 79 *supra*.

<sup>204</sup> *Tropic of Cancer* was first published by the Obelisk Press in Paris, owned by the father of Maurice Girodias of Olympia Press fame. For the various decisions on the obscenity of *Tropic* prior to 1964 see *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 902 n. 1, 31 Cal. Repr. 800, 801 n. 1, 383 P. 2d 152, 153 n. 1 (1963); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV.

<sup>205</sup> See Gertz, *supra* note 202 at 172.

<sup>206</sup> *People v. Bruce*, 31 Ill. 2d 459, 461, 202 N.E. 2p 497, 498 (1964).

<sup>207</sup> *Id.* at 462, 202 N.E. 2d at 498.

<sup>208</sup> Usually recognized as the epitome of hard-core pornography.

a part of the *Roth* test,<sup>209</sup> but the Court has certainly not suggested such a restriction.

In *Manual Enterprises*, Mr. Justice Harlan had held that the "contemporary community standards" referred to in the *Roth* test were those of the national community, but it is to be noted that only the federal obscenity statute was under consideration in that case and the question of what is the applicable community with regard to a state obscenity statute was therefore not reached. In *Jacobellis*, however, the appellant had been convicted under the Ohio statute.<sup>210</sup> Justice Brennan writing for himself and Justice Goldberg met the question of the definition of "community" in the following manner:

It has been suggested that the "contemporary community standards" aspect of the Roth test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of Roth.<sup>211\*\*\*</sup>

We do not see how any "local" definition of the "community" could properly be employed in delineating the area of expression that is protected by the Federal Constitution.<sup>212\*\*\*</sup>

We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is after all a National Constitution we are expounding.<sup>213</sup>

Many commentators have seized upon Justice Brennan's opinion as a holding by the Court that "community" means "national community" under the *Roth* test,<sup>214</sup> and suggest that such a holding is logical and consistent with the policy of the Court in this type of matter.<sup>215</sup> It is noteworthy, however, that in *Jacobellis* there was no majority opinion and Justice Brennan wrote only for himself and Justice Goldberg. The Chief Justice, with

whom Mr. Justice Clark joined in his dissenting opinion, took a contrary view. He stated:

It is my belief that 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. I believe that there is no provable "national standard", and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.<sup>216</sup>

The Illinois obscenity statute treats the standards problem in the following manner:

... In any prosecution for an offense under this Section evidence shall be admissible to show... The degree, if any, of public acceptance of the material in this State. . . .<sup>217</sup>

Since the contrary opinions were handed down in *Jacobellis*, the Supreme Court of Illinois, in *People v. Sikora*,<sup>218</sup> held that the above quoted portion of the Illinois statute had not yet been declared constitutionally impermissible. The Illinois court aptly states in reference to the Supreme Court:

Some of the justices would clearly favor a national standard; others would clearly favor a local standard; and still others adhere to an approach to first amendment problems that has made it unnecessary for them to consider the question.<sup>219</sup>

The latter part of this quotation is in reference to Justices Black and Douglas whose opinions have made it clear that in their view suppression on the grounds of obscenity is a violation of the first amendment guarantees and therefore unconstitutional. They have further expressed the opinion that "If despite the Constitution . . . this Nation is to embark on the dangerous road of censorship, . . . this Court is about the most inappropriate Supreme Board of Censors that could be found."<sup>220</sup>

Also, since *Jacobellis*, the Supreme Court of Arkansas in *Gent v. State*,<sup>221</sup> held that in a case arising in Pine Bluff, Arkansas, the proper standard "community" to be considered as a standard was

<sup>216</sup> 378 U.S. at 200.

<sup>217</sup> ILL. REV. STAT., Ch. 38 § 11-20 (c) (Emphasis added).

<sup>218</sup> 32 Ill. 2d 260, 204 N.E. 2d 768 (1965).

<sup>219</sup> *Id.* at 264-65, 204 N.E. 2d at 771.

<sup>220</sup> See Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 690 (1959). But see, Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 116 & 119 (1960).

<sup>221</sup> 393 S.W. 2d 219 (Ark. 1965), cert. granted, 384 U.S. 937 (1966).

<sup>209</sup> See Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 346 (1954); *Comment*, 14 BUFFALO L. REV. 512, 520-23 (1965).

<sup>210</sup> OHIO REV. CODE § 2905.34.

<sup>211</sup> 378 U.S. at 192.

<sup>212</sup> *Id.* at 193.

<sup>213</sup> *Id.* at 194.

<sup>214</sup> See, e.g., O'Meara & Scheaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 N.D.L. REV. 1, 6-8 (1964); *Comment*, 16 S.C.L.Q. 639 (1964); *Recent Decision*, 16 W. RES. L. REV. 780, 783 (1965).

Pine Bluff, Arkansas. And the Supreme Judicial Court of Massachusetts, in *Attorney General v. A Book named "John Cleland's Memoirs of a Woman of Pleasure"*,<sup>222</sup> held *Fanny Hill* to be "hard core pornography" saying, "... We would reach this result whether we applied local community or national standards."<sup>223</sup>

Before the decision in *Jacobellis*, the Superior Court of New Jersey had held, in *State v. Hudson County News*<sup>224</sup> (after the trial court had allowed testimony regarding the contemporary community standards in Hudson County, New Jersey):

We find that the trial court did not apply an improper standard it is to be presumed that the community standards of morality in Hudson County are the same as those in any other county in the state or nation. A county is a recognized subdivision of a state. Unless it is demonstrated that the standards of morality in Hudson County are different from those in comparable political subdivisions, it cannot be said that improper standards were applied.<sup>225</sup>

There is little agreement therefore, as to what constitutes the "community" under the *Roth* test except among the law review commentaries. Perhaps it is a question of "community tolerance" rather than "standards", as has been suggested,<sup>226</sup> and perhaps, as the Kronhausens point out, "... there is such an enormously wide variation in what is more commonly *practiced*, that in effect there is no such thing as a contemporary community standard to relate to erotic writings."<sup>227</sup> In any event, the attorneys involved in the area of defense of persons accused under obscenity statutes can put the national standard to good use. Under a national standard, it might be argued that the jury can no longer be considered to be a proper judge of community standards.<sup>228</sup> Also under a national standard, it is definitely pertinent to show how the material in question is being received in other parts of the nation. In *City of Chicago v. Universal Publishing & Distributing*

*Corp.*,<sup>229</sup> a case recently decided by the Supreme Court of Illinois, seven paperback books published by the defendant<sup>230</sup> were held obscene in the Circuit Court of Cook County. The defendant argued on appeal that:

Over 95,000 copies of each of these books have been circulated by Universal and publicly displayed for sale in the principal cities and other communities throughout the United States. Except for these proceedings instituted by the City of Chicago, no action against any of these books has been commenced anywhere in the United States.<sup>231</sup>

The Court must apply a national standard in applying the federal Constitution in this area. (Citing *Jacobellis*). These books do not violate the standards of propriety in Boston, St. Louis, Phoenix, Portland, or the many other cities in which they are publically sold or displayed. This indicates that the police and prosecutors in Chicago are not attuned to prevailing norms.<sup>232</sup>

The Supreme Court of Illinois reversed the Circuit Court on the ground that the books were not "utterly without redeeming social importance," and therefore not obscene, and found that there was no present necessity to resolve the issue of the applicability of national or local standards.

The other opinion in *Jacobellis* which merits discussion here is that of Mr. Justice Stewart, concurring. In what has now become a classic opinion he states:

I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today 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 is not that.<sup>233</sup>

Dean Lockhard and Professor McClure have long been of the opinion that "hard-core" is the

<sup>222</sup> 206 N.E. 2d 403, *reversed*, 383 U.S. 413 (1966). See text accompanying notes 251 through 262 *infra*.

<sup>223</sup> *Id.* at 405. See also *Interstate Circuit Inc. v. Dallas*, 249 F. Supp. 19 (N.D. Tex., 1965) applying a national standard.

<sup>224</sup> 78 N.J. Super 327, 188 A. 2d 444 (1963).

<sup>225</sup> *Id.* at 333, 188 A. 2d at 447.

<sup>226</sup> See *Note*, 1964 WASH. U.L.Q. 98, 121-22.

<sup>227</sup> KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 193 (Rev. ed. 1964) (Emphasis added).

<sup>228</sup> See Bromberg, *Five Tests for Obscenity*, 41 CHI. BAR REC. 416, 418 (1960).

<sup>229</sup> 34 Ill. 2d 250, 215 N.E. 2d 251 (1966).

<sup>230</sup> See text accompanying notes 305 through 323 *infra*.

<sup>231</sup> Brief for the Appellant 6, 7.

<sup>232</sup> *Id.* at 11.

<sup>233</sup> 378 U.S. at 197.

only matter unprotected.<sup>234</sup> In fact, they point out that the Solicitor General, in order to make sure that the Supreme Court would not hold all suppression on the grounds of obscenity unconstitutional in the *Roth* case without being fully advised of the nature of the "black-market" or "hard-core" material available, sent to the Court, along with his brief, a carton containing numerous samples of "actual hard-core pornography".<sup>235</sup> Other commentators now agree with this proposition<sup>236</sup> and one even refers to *Jacobellis* as the "long awaited clarification" in this area.<sup>237</sup> Another agrees with Mr. Justice Stewart that the term "hard-core" is sufficient, without further definition.<sup>238</sup>

Some state courts have also taken Mr. Justice Stewart's position,<sup>239</sup> but one wonders whether this is merely a question of semantics when the New York courts, having adopted this position, have held *Tropic of Cancer* obscene,<sup>240</sup> and the Massachusetts courts similarly have held *Fanny Hill* obscene.<sup>241</sup> Others are devising elaborate formulas for determining what is hard-core and what is not.<sup>242</sup> The answer is probably that under either the three sided test<sup>243</sup> or the hard-core test, the problem is that of drawing a line and the division becomes no easier to make by calling the categories by different names.

<sup>234</sup> Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 58 (1960).

<sup>235</sup> *Id.* at 26.

<sup>236</sup> See, e.g., Mulroy, *Obscenity, Pornography and Censorship* 49 A.B.A.J. 869, 872 (1963); *Recent Decision*, 10 CATH. LAW. 334 (1964); *Comment*, 16 S.C.L.Q. 639, 643 (1964); *Comment*, 12 U.C.L.A. L. REV. 532, 540 n. 50 (1965); *Note*, 1964 WASH. U.L.Q. 98, 125 n. 167.

<sup>237</sup> See Fagan, *Obscenity Control and Minors—The Case for a Separate Standard*, 10 CATH. LAW. 270 (1964).

<sup>238</sup> *Note*, 4 WASHBURN L. Q. 114, 121 (1964).

<sup>239</sup> See, e.g., *People v. Richmond County News*, 9 N.Y. 2d 598, 175 N.E. 2d 681, 216 N.Y.S. 2d 369 (1961).

<sup>240</sup> *People v. Fritch*, 13 N.Y. 2d 119, 192 N.E. 2d 713, 243 N.Y.S. 2d 1 (1963).

<sup>241</sup> *Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure"*, *supra* note 222.

<sup>242</sup> See definitions collected in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 60-63 (1960). See also Kalven, *The Metaphysics of the Law of Obscenity*, in 1960 SUPREME COURT REVIEW 43 (1960); *Note*, 4 WASHBURN L. Q. 114 (1964) and Dr. Gillette's observation in GILLETTE, AN UNCENSORED HISTORY OF PORNOGRAPHY 19 (1965), that the use in American jurisprudence of the "graphic superlative" hard-core pornography is apparently in reference "to such works as might be thought capable of stimulating instant erection—as opposed, let us say, to 'soft-core pornography', which only half does the job."

<sup>243</sup> See *Recent Decision*, 16 W. RES. L. REV. 780, 785 (1965).

On March 2, 1965, the Supreme Court handed down its opinion in *Freedman v. Maryland*,<sup>244</sup> in which the appellant challenged the Maryland film censorship statute in much the same way as the Chicago ordinance had been challenged in the second *Times Film* case, this time, however, with more favorable results. The Court distinguished the *Times Film* case on the ground that only the bare question of the constitutionality of prior restraint was before the Court there and held the Maryland procedure defective. The essence of the majority's reasoning is summed up in a footnote to the concurring opinion of Mr. Justice Douglas, joined by Mr. Justice Black, as follows:

The Court today holds that a system of movie censorship must contain at least three procedural safeguards if it is not to run afoul of the First Amendment: (1) the censor must have the burden of instituting judicial proceedings; (2) any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo; and (3) a prompt judicial determination of obscenity must be assured. Thus, the Chicago censorship system, upheld by the narrowest of margins in *Times Film Corp. v. Chicago*, 365 U.S. 43, could not survive under today's standards, for it provided not one of these safeguards, as the dissenters there expressly pointed out. *Id.* at 73-75.<sup>245</sup>

Mr. Justice Douglas again expressed, in his concurring opinion, the view held by himself and Mr. Justice Black that all censorship on obscenity grounds is unconstitutional.<sup>246</sup>

On March 15, 1965 the Court reversed, *per curiam*, *Trans-Lux Distributing Corp. v. Board of Regents of the University of New York*,<sup>247</sup> citing only the *Freedman* case. The *Trans-Lux* case involved the film "A Stranger Knocks" which was denied a permit.

The denial had been upheld in the New York courts. On December 6, 1965 the Court denied *certiorari* in *Phelper v. Texas*,<sup>248</sup> a case from the Texas Court of Criminal Appeals involving the question of the validity of a consent to search in an obscenity case.

Finally, on November 8, 1965, the Court an-

<sup>244</sup> 380 U.S. 51 (1965).

<sup>245</sup> *Id.* at 61-62.

<sup>246</sup> *Ibid.*

<sup>247</sup> 380 U.S. 259 (1965) reversing 14 N.Y. 2d 722, 250 N.Y.S. 2d 67, 199 N.E. 2d 165 (1964).

<sup>248</sup> 382 U.S. 943 (1965).



nounced that it had agreed to consider the Massachusetts holding that *Fanny Hill* was obscene,<sup>249</sup> grouping the case with two others in which review had been granted in its 1964-1965 term.<sup>250</sup>

The question of the obscenity of *Fanny Hill* (or *Memoirs of a Woman of Pleasure*) has a history unequalled in this field. The book, written by John Cleland in 1749 while he was in debtor's prison<sup>251</sup>, was, by a strange quirk of fate, the making of its author's fortune; he was given a pension in return for his promise not to write any more books like it!<sup>252</sup> It is suprisingly devoid of "dirty" or four-letter words (the author, for example, continually refers to the penis as a "machine") and some say that it was spiced up by later authors who made the language coarser<sup>253</sup> and also added a homosexuality episode.<sup>254</sup> The book deals generally with the life of a prostitute in 18th Century England,<sup>255</sup> and includes every type of sexual activity conceivable.

The first reported decision of censorship of a book for obscenity in the United States involved *Fanny Hill*.<sup>256</sup> It has undergone many a trial since that time,<sup>257</sup> and it was recently banned in England,<sup>258</sup> but held not to be obscene in British Columbia.<sup>259</sup> The book has been said to be a moral work because of the heroine's rejection of unnatural practices, but it appears to be devoid of redeeming social importance<sup>260</sup>. The Kronhausens, in the revised edition of their work *Pornography and the Law* after discussing their criteria for determining

which works should be suppressed, are unable to say why *Fanny Hill*, which meets all the criteria should not be suppressed as "hard-core pornography". Indeed, aside from the absence of "dirty words", it does have all the attributes of the most objectionable writings. The Kronhausens finally settle for the proposition that there is a need for "another category of erotic art and literature".<sup>261</sup>

In *Ginzburg v. United States*,<sup>262</sup> one of two cases grouped by the Supreme Court with the *Fanny Hill* case, the defendant had been convicted by a Federal District Court<sup>263</sup> for mailing obscene publications, and advertisements for those publications, in violation of the Comstock Act.<sup>264</sup> The publications included: (1) *Liaison*—a bi-weekly periodical containing such items as "Semen in the Diet" and "Slaying the Sex Dragon"; (2) *The Housewife's Handbook on Selective Promiscuity*—a book explicitly describing a woman's sexual experiences from early childhood, the description of sexual acts in which the District judge thought to be "astounding";<sup>265</sup> and (3) *Eros*—a quarterly magazine including, among recognized works of literature, a quote from *My Life and Loves* by Frank Harris,<sup>266</sup> and a series of photographs showing a nude male Negro and a nude white female embracing each other in various positions.<sup>267</sup> The Court of Appeals affirmed the conviction,<sup>268</sup> and *certiorari* was granted.<sup>269</sup>

The third case, *People v. Mishkin*,<sup>270</sup> involved the conviction of Edward Mishkin in a New York Court of Special Sessions<sup>271</sup> on 162 counts of a 198 count indictment, including charges for: possession of obscene books with intent to sell; publishing of obscene books; and employing other persons to prepare obscene books; and violations of a section of the business code relating to publishing. The books in question were paperbacks of the sado-masochist, whipping, spanking, and bondage variety<sup>272</sup> and included among the titles were: *Mistress of Leather*;

<sup>249</sup> 382 U.S. 900 (1965).

<sup>250</sup> *United States v. Ginzburg*, 338 F. 2d 12 (3d Cir. 1964), cert. granted 380 U.S. 961 (1965); *People v. Mishkin*, 15 N. Y. 2d 671, 204 N.E. 2d 209, 255 N.Y.S. 2d 881 (1964), prob. juris. noted, 380 U.S. 960 (1965). Both cases were affirmed on March 21, 1966, the *Ginzburg* case at 383 U.S. 463 and the *Mishkin* case at 383 U.S. 502.

<sup>251</sup> See KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 303 (Rev. ed. 1964).

<sup>252</sup> See HYDE, *A HISTORY OF PORNOGRAPHY* 97 (1964); Foster, *The "Comstock Load"—Obscenity and the Law*, 48 J. CRIM. L., C. & P.S. 245, 246 n. 8 (1957).

<sup>253</sup> LOEH, *THE EROTIC IN LITERATURE* 12 (1962).

<sup>254</sup> Hyman, *In Defense of Pornography*, *The New Leader*, Sept. 2, 1963.

<sup>255</sup> See HYDE, *A HISTORY OF PORNOGRAPHY* 97 (1964) and KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 303-22 (Rev. ed. 1964) for summaries of the content of the book.

<sup>256</sup> *Commonwealth v. Holmes*, 17 Mass. 336 (1821). See Foster, *"The Comstock Load"—Obscenity and the Law*, 48 J. CRIM. L., C. & P.S. 245, 246 n. 8 (1957).

<sup>257</sup> See Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 836 n. 18 (1964).

<sup>258</sup> See HYDE, *A HISTORY OF PORNOGRAPHY* 210-233 (1964) for an account of the trial.

<sup>259</sup> See Getz, *The Problem of Obscenity*, 2 U. BR. COLUM. L. REV. 216 (1965).

<sup>260</sup> But see HYDE, *supra* note 258.

<sup>261</sup> KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 263 (Rev. ed. 1964).

<sup>262</sup> Note 250 *supra*.

<sup>263</sup> *United States v. Ginzburg*, 224 F. Supp. 129 (E.D. Penn. 1963).

<sup>264</sup> 18 U.S.C. § 1461.

<sup>265</sup> 224 F. Supp. at 136.

<sup>266</sup> A recognized "classic" of pornography.

<sup>267</sup> See Kuh, *Obscenity: Prosecution Problems and Legislative Suggestions*, 10 CATH. LAW. 285, 291 (1964).

<sup>268</sup> 338 F. 2d 12 (3d Cir. 1964).

<sup>269</sup> 380 U.S. 961 (1965).

<sup>270</sup> Note 250 *supra*.

<sup>271</sup> 26 Misc. 2d 152, 207 N.Y.S. 2d 390 (1960).

<sup>272</sup> See text accompanying notes 363 through 368 *infra*.

*The Whipping Chorus Girls; Bound in Rubber; Return Visit to Fetterland; Screaming Flesh; Sorority Girls; Stringent Initiation; The Strap Returns; Columns of Agony; and Dance with the Dominant Whip.* The Appellate Division of the New York Supreme Court modified the judgement by deleting the convictions on the 32 counts charging violations of the business code and affirmed Mishkin's conviction on the remaining 130 obscenity counts. The Court of Appeals affirmed,<sup>273</sup> and the Supreme Court granted certiorari.<sup>274</sup>

The Court had before it again, in the October 1965 term, each of the questions left open by the *Manual Enterprises* and *Jacobellis* cases, and many persons hoped that some Court guidance would be forthcoming. Nevertheless, only one question was answered when the Court decided these three cases on March 21, 1966. The "average man" portion of the *Roth* test was clearly wrong. To be obscene under this portion of the test, a work had to appeal to the purient interest of the average person. Since the average person is obviously not a deviate, it was argued, the test, by definition, protected all deviate literature from suppression. Thus, the homosexuals, the fetishists, the sadists, and the others could all have their obscenity,<sup>275</sup> while the "normal" or heterosexually oriented could not. This problem had been raised in *Manual Enterprises v. Day*,<sup>276</sup> which involved the mailing of magazines admittedly composed for homosexuals. The Court of Appeals had held the magazines obscene because of their appeal to the "average homosexual,"<sup>277</sup> but Mr. Justice Harlan avoided the issue in his opinion by holding that the magazines did not go beyond contemporary community standards and that, therefore, the Court "need not consider the question of the proper 'audience' by which their 'purient interest' appeal should be judged".<sup>278</sup> The Court finally settled the question in its majority opinion affirming the *Mishkin* case.

On appeal the defense had argued simply that some of the books involved did not appeal to the average person because they depicted deviant sexual practices. The Court however, held:

We reject this argument as being founded

on an unrealistic interpretation of the purient-appeal requirement.

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the purient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material, taken as a whole appeals to the purient interest in sex of the members of that group.<sup>279</sup>

Aside from that one bit of guidance,<sup>280</sup> the Court merely muddled the waters further with its three most recent decisions. There were, at least, majority opinions in two of the three (*Ginzburg* and *Mishkin*), but the reversal of the *Memoirs* case was based upon the fact that the Massachusetts court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene".<sup>281</sup> This holding, which added nothing to the law of obscenity, and the affirmance of the *Ginzburg* case appears to rest on the manner in which the materials in question were advertised! In this regard the Court said:

We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise.\*\*\* We view the publications against a background of commercial exploitation of erotica solely for the sake of their purient appeal.<sup>282</sup>

The Court then discussed the advertising for the materials and said that it was "relevant". The net result of the decision is a new factor to be weighed in every case—advertising, of which the police must gather evidence and proof. It appears also that the advertising factor, unlike the other factors, can only be used to push an otherwise borderline publication into the obscene category. Whatever else besides advertising may be included in "setting" can be determined from the publication itself and has always been one of the factors in determining obscenity or nonobscenity.

<sup>279</sup> 383 U.S. at 508.

<sup>280</sup> The Court did infer that the federal standard was something less than a requirement that only hard-core pornography can be suppressed by saying that the New York standard was more stringent than the federal. See 383 U.S. at 506. The Court also touched on the problem of scienter in *Mishkin*. See note 411 *infra*.

<sup>281</sup> 383 U.S. at 419.

<sup>282</sup> 383 U.S. at 465-66.

<sup>273</sup> Note 250 *supra*.

<sup>274</sup> 380 U.S. 960 (1965).

<sup>275</sup> See text accompanying notes 363 through 373 *infra*.

<sup>276</sup> 370 U.S. 478 (1962).

<sup>277</sup> *Id.* at 482.

<sup>278</sup> *Ibid.*

## ONE OF THE POLICEMAN'S PROBLEMS:

## SEARCHES AND SEIZURES

As is evident from the number of fragmented decisions and "changes" in the law, even the justices of the Supreme Court of the United States are hard pressed to say what is pornographic and what is not.<sup>283</sup> Moreover, this problem, the definition of obscenity, is only one of the many that confront the police in their efforts to enforce the laws against obscenity.

One particular police problem involves those cases decided by the Supreme Court of the United States which deal with the constitutional restrictions upon the police in regard to search and seizure in obscenity cases. The cases are treated separately here because they deal with what is essentially a police procedural problem, as opposed to the problem of defining obscenity and the best understanding of them can be gained by reading them together. It is to be emphasized that the procedural problem is of paramount importance as the principal factor determining the effectiveness of the police in this area. (Non-effectiveness is one of the most pressing police problems in the obscenity field and it will subsequently be discussed at length.)

The first case in point, *Kingsley Books Inc. v. Brown*,<sup>284</sup> was decided on the same day as the *Roth* and *Alberts* cases,<sup>285</sup> and was an appeal from an injunction obtained by the New York City Corporation Counsel under §22a of the New York Code of Criminal Procedure, which reads as follows:

The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The district attorney of any county, the chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm 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, filthy, 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 defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme 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, photograph, figure or image or written or printed matter of an indecent character, herein described in section eleven hundred forty-one of the penal law.

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

3. In the event that a final order or judgement of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgement shall contain a provision directing the person, firm or corporation to surrender to such peace officer as the court may direct or to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where the judgement is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any county, city, town or village pursuant to this

<sup>283</sup> In the *Ginzburg*, *Mishkin* and "*Memoirs*" cases there were 13 written opinions, and no five members of the Court could agree on any one opinion in the "*Memoirs*" case.

<sup>284</sup> 354 U.S. 436 (1957).

<sup>285</sup> *Roth v. United States*, 354 U.S. 476, handed down on June 24, 1957.

section is chargeable with knowledge of the contents thereof.

Appellant had been enjoined, *pendente lite*, from distributing certain paper covered booklets under the general title of *Nights of Horror*, and upon the conclusion of the case, the appellant was required to surrender all copies of the books remaining in his possession for destruction.<sup>286</sup> On direct appeal to the New York Court of Appeals solely on the question of the constitutionality of Section 22a, the decision was affirmed,<sup>287</sup> and on appeal to the Supreme Court the section was again held constitutional.

The Court held that a state might employ such a civil proceeding with no more (indeed less) restriction upon freedom of expression than in a criminal proceeding such as in *Alberts*. The Chief Justice dissented on the ground that the state should not be allowed to place the "book on trial".<sup>288</sup> Mr. Justice Douglas, joined by Mr. Justice Black, dissented on the grounds that: (1) the injunction *pendente lite*, issued *ex parte*, gave the State "the paralyzing power of a censor",<sup>289</sup> and (2) the facts of any particular sale should be considered in determining obscenity.<sup>290</sup> Mr. Justice Brennan dissented on the ground that in *Alberts* and *Roth* contemporary community standards are a part of the test for obscenity, and §22a, by not providing for a jury determination representing a cross-section of the community's views, was unconstitutional.

Although not a search and seizure case, *Kingsley* set the stage for those to follow, the first of which was *Marcus v. Search Warrant*.<sup>291</sup> In *Marcus*, approximately 11,000 copies of 280 publications were seized by police officers in accordance with search warrants—issued *ex parte* and without the issuing judge having seen any of the publications to be seized—directing the seizure of "obscene materials" without naming the books to be seized. 100 of the 280 publications were ultimately held obscene and ordered destroyed; the rest were ordered returned.<sup>292</sup> The Missouri Supreme Court affirmed

the decision.<sup>293</sup> The Supreme Court reversed, distinguishing the *Kingsley* case on the ground that under Section 22a of the New York Code of Criminal Procedure: (1) no injunction may issue until the judge has viewed the material;<sup>294</sup> (2) the restraints run against a named publication; (3) the dealer may ignore the injunction *pendente lite* and distribute the books anyway (though risking a contempt charge); and (4) the issue of obscenity must be determined within 3 days after the issues are joined. The Court finally said: "Mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression."<sup>295</sup>

The Court decided *A Quantity of Books v. Kansas*<sup>296</sup> on the same day as *Jacobellis*,<sup>297</sup> and again the case arose from a civil proceeding. The Attorney General of Kansas had obtained a warrant authorizing the seizure of all copies of 59 different titles of *Night Stand* books,<sup>298</sup> found at the place of business of the P-K News Service. Seven different titles were scrutinized by the issuing judge who found them to be obscene. The warrant covered all 59 titles because the judge reasoned that all *Night Stand* books would fall within the same category. Only 31 titles were found, but all copies of each were seized, totaling 1,715 books, and all were eventually ordered destroyed. The Supreme Court of Kansas affirmed the destruction order.<sup>299</sup> Mr. Justice Brennan, joined by the Chief Justice, and Justices White and Goldberg, wrote the plurality opinion reversing the Kansas decision. He said:

It is our view that since the warrant here authorized the sheriff to seize *all* copies of the specified titles, and since P-K was not afforded a hearing on the question of obscenity even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient.<sup>\*\*\*</sup>

The New York injunctive procedure . . . does not afford *ex parte* relief but postpones all injunctive relief until "both sides have had an opportunity to be heard."<sup>\*\*\*\*</sup>

A seizure of *all* copies of the named titles is

<sup>286</sup> *Burke v. Kingsley Books*, 208 Misc. 150, 142 N.Y.S. 2d 735 (1955).

<sup>287</sup> 1 N.Y. 2d 177, 134 N.E. 2d 461, 151 N.Y.S. 2d 639 (1956).

<sup>288</sup> 354 U.S. at 445.

<sup>289</sup> *Id.* at 446.

<sup>290</sup> This is reminiscent of a variable obscenity approach. See text accompanying notes 460 through 472 *infra*.

<sup>291</sup> 367 U.S. 717 (1961).

<sup>292</sup> Among the books returned was "Freud on Sleep and Sexual Dreams", 367 U.S. at 733 n. 25.

<sup>293</sup> 334 S.W. 2d 119 (Mo. 1960).

<sup>294</sup> See *Aday v. Superior Court of Alameda County*, 13 Cal. Rptr. 415, 362 P. 2d 47, 53 (1961); holding that to determine probable cause for seizure, the judge need only examine so much of the book as is necessary to make a *prima facie* determination of obscenity.

<sup>295</sup> 367 U.S. at 738.

<sup>296</sup> 378 U.S. 205 (1964).

<sup>297</sup> *Jacobellis v. Ohio*, 378 U.S. 184 (1964). See text accompanying notes 192 through 195 *supra*.

<sup>298</sup> See text accompanying notes 323, 331 & 332 *infra*.

<sup>299</sup> 191 Kansas 13, 379 P. 2d 254 (1963).

indeed more repressive than an injunction preventing further sale of books.<sup>300</sup>

Mr. Justice Black, joined by Mr. Justice Douglas, wrote an opinion, concurring in the result, but without reaching the procedural question. Mr. Justice Stewart concurred on the ground that the material in question was not "hard core", although he expressed his opinion that the procedure was constitutional. Mr. Justice Harlan, joined by Mr. Justice Clark, wrote a dissenting opinion, stating that the procedures in question were constitutional. This left four members of the court (the plurality) believing the procedure to be unconstitutional, three believing it to be constitutional (the dissenters and Mr. Justice Stewart), and two not reaching the question (Justices Black and Douglas). If the plurality eventually prevails, mass seizures are unconstitutional, except by the use of a statute similar to New York's Section 22a, and, in fact, police must operate under the assumption that the plurality opinion is the law.

#### THE MARKET

It may seem somewhat theoretical to write about pornography without discussing what it is, i.e., what can be obtained in the market today, and yet many writers write long articles on the law of obscenity without describing a single publication. If this is done on the assumption that everyone knows what pornography is, it may be assumed that the author himself does not know what pornography is, for anyone who is introduced to the material is amazed and many times shocked at the content. This is true even though much of the material is available on many newsstands, book racks and in book stores. I was amazed when I first started to delve into the field, my friends are amazed when I show them what I am studying, and most policemen are amazed at the material upon being assigned to the Prostitution and Obscene Matter Unit of the Chicago Police Department. I am not speaking of the run-of-the-mill "girlie" magazines such as *Playboy*, *Gem*, *Dude*, and the like. Neither am I speaking of so called "hard core" pictures, stories, and cartoons that men carry in their billfolds until they literally wear out. It is clear that most men at least have come into contact with that type of material. I am speaking here of the paperback books that everyone may have seen, but which very few have read, and the

homosexual and other deviate literature that few persons have ever seen.

Postmaster General Arthur E. Summerfield once estimated the annual gross from "obscene" books at \$500,000,000 at the end of the 1950's,<sup>301</sup> and this figure is still being quoted.<sup>302</sup> The NODL sets the figure at twice that amount,<sup>303</sup> while others say that it is less. The figure, of course, depends upon what one includes within the definition of obscenity, but most of those in a position to make an accurate estimate agree that it is a multi-million dollar business.<sup>304</sup>

*Paperback Books:* Regular non-pornographic paperback books, in their present format, were introduced in 1939 when Pocket Books Inc. published 34 titles which sold 1,508,000 copies in the last half of that year.<sup>305</sup> In 1953, with ten major publishers in the business, between 250 and 300 million copies of some 1,200 titles were sold, most titles running 25¢ and a few as high as 75¢,<sup>306</sup> and between 80 and 90 per cent of the books published were reprints of books previously published in hardcover form.<sup>307</sup>

The industry has indeed changed since 1953. In 1964, W. F. Hall Company alone printed 282 million paperbacks,<sup>308</sup> and although the company prints 70% of the paperbacks printed in the United States, this still represents about a 1/3 increase in the last decade.<sup>309</sup> Kroch's and Brentano's of Chicago claims to have the largest paperback book mart in the world carrying 12,500 titles (which is still only about 1/3 of the approximately 37,500 titles in print), and has annual sales in paperbacks alone amounting to over one million dollars.<sup>310</sup> In Chicago there is also the world's largest distributor of paperback books, Charles Levy Circulating Company, which distributes 12 million paperback

<sup>301</sup> See LOTH, *THE EROTIC IN LITERATURE* 32 (1962).

<sup>302</sup> See, e.g., *Note*, 52 KY. L. J. 429, 431 n. 14 (1964).

<sup>303</sup> See LOTH, *THE EROTIC IN LITERATURE* 31 (1962).

<sup>304</sup> Hoover, *Combating Merchants of Filth: The Role of the F.B.I.*, 25 U. PITT. L. REV. 469, 470 (1964); Address by James R. Thompson, 1965 Annual Short Course for Prosecuting Attorneys conducted by the Northwestern University School of Law, Aug. 6, 1965.

<sup>305</sup> Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 302 (1954), citing LEWIS, *PAPER BOUND BOOKS IN AMERICA* 7 (1952).

<sup>306</sup> *Id.* at 302.

<sup>307</sup> *Id.* at 303.

<sup>308</sup> Hunt, *Giant Among the Printers* in the Chicago Tribune, *Books Today*, Oct. 24, 1965.

<sup>309</sup> *Ibid.*

<sup>310</sup> Peterson, *The Retail Revolution*, in the Chicago Tribune, *Books Today*, Oct. 24, 1965.

<sup>300</sup> 378 U.S. at 210 (Emphasis added.)

volumes a year,<sup>311</sup> accounting for over five million dollars in retail sales.

There are now very few 25¢ paperbacks on the market. They start at 35¢ and average about 58¢. Fifty cents is the most popular price, but many run over a dollar and some go as high as \$7.50. Pocket Books Inc., the first company in the field, offered its first paperback volume costing over a dollar this year, a reprint of a \$15.00 book, with the same pagination for \$1.65.<sup>312</sup> The reprint of hard cover editions, however, clearly no longer accounts for 80 to 90% of the business. Many books, especially those tending to be pornographic, are specifically written for paperback editions, and a great majority of the so-called "sex novels" fall into this class. Many other authors would rather sell their work to a paperback publisher because of the type of purchaser reached.

The "obscene" or "borderline" paperback business constitutes only a portion of the paperback industry, but it has been estimated to be an \$18 million dollar a year business, producing 500 new titles annually.<sup>313</sup> The writers of these novels, which take about two weeks to complete, get a flat rate of \$750 or \$1,000 from the larger publishers, and much less from the smaller concerns. The cover picture costs an additional \$200 to \$300, printing costs run 5 to 7 cents a copy, and shipping one cent a copy.<sup>314</sup> 50 to 100,000 copies are printed and sold to distributors or direct to retailers at 45 to 50% off cover prices.<sup>315</sup>

Early in 1962, and before, these novels dealt mainly with "normal" heterosexual activity, with an emphasis on nymphomaniac women and men who enjoyed variety in their women. Then the stories began to include more and more episodes of lesbianism. At first they were minor added occurrences, but soon lesbianism became the central theme of many of the stories, and the books carried such titles as *Lesbian Loveplay*, *Lesbian Love*, and *Lesbian Lure*. It should be emphasized that the market for these books did not similarly change. The lesbian books are purchased by the same well-dressed business men who purchased the pre-1962, strictly heterosexual product.<sup>316</sup> The lesbian books

are not purchased by, nor written by or for lesbians, nor, as a matter of fact, for any female. Dr. Kinsey pointed out:

But in all this quantity of pornographic production, it is exceedingly difficult to find any material that has been produced by females. In the published material, there are probably not more than two or three documents that were actually written by females. It is true that there is a considerable portion of the pornographic material which pretends to be written by females who are recounting their personal experience, but in many instances it is known that the authors were male, and in nearly every instance the internal content of the material indicates a male author. A great deal of the pornographic literature turns around detailed descriptions of genital activity, and descriptions of male genital performance. These are elements in which females, according to our data, are not ordinarily interested. The females in such literature extol the males' genital and copulatory capacity, and there is considerable emphasis on the intensity of the females response and the insatiability of her sexual desires. All of these represent the kind of female which most males wish all females to be. They represent typically masculine misinterpretations of the average female's capacity to respond to psychologic stimuli. Such elements are introduced because they are of erotic significance to the consuming public, which is almost exclusively male.<sup>317</sup>

Dr. Kinsey wrote these words in 1953, before lesbian episodes were in vogue. A recent article in the New York Times shows how the added lesbianism theme is not contradictory to Dr. Kinsey's findings. After speaking with the writers of this type of novel, the reporter stated:

One commercial writer who has produced a number of these pulps says he writes "by and large for men who are afraid of women." He believes that men buy such books to feel superior to the heroines who are either sexually insatiable, inclined toward lesbianism, or aggressively given to other unattractive practices. Thus the book buyer, the writer says, "feels he's not really missing a lot in relating so poorly to women".

The editor of a leading line of sex books believes his audience is primarily made up of

<sup>311</sup> Peterson, *Charles Levy's Mighty Middleman*, in the Chicago Tribune, *Books Today*, Oct. 24, 1965.

<sup>312</sup> KINSEY, POMEROY, MARTIN & GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

<sup>313</sup> New York Times, Sept. 5, 1965.

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.* (Much of the information in the article is corroborated by the information contained in the files of the Chicago Police Department.)

<sup>316</sup> Address by James R. Thompson, *supra* note 304.

<sup>317</sup> Kinsey, et al., *supra* note 312 at 672.

"frustrated men." The books he says allow such men to "transfer their guilt feelings about their inadequacies from themselves to the women in the book". Lesbianism is the most popular theme at present, he believes, because the reader "gets two immoral women for the price of one".<sup>318</sup>

The supposed reasoning behind the theories may be contradictory (and, indeed, the author and editor need not know the psychology behind a technique but only that the technique is good), but Dr. Kinsey, the author, and editor all agree that the books are written for and purchased by men.<sup>319</sup>

The Brief for the People in *People v. Kimmel*,<sup>320</sup> recently decided by the Supreme Court of Illinois, describes one of the paperback books involved there as follows:

The book, "The Orgy Boys" by Don Elliott, describes—in the words of the cover—how "wild passions explode on a lust campus". The hero, Jeff, a student at Hartford College, occupies himself by "banging townies, sleeping with professors' wives, seducing co-eds, and flunking quizzes" (p. 103). The female roles are played by Kate, "just a walking sexpot". (p. 29); Lisa, a faculty wife who says "I don't get to see enough of the student body". (p. 43); Lori, an acrobatic striptease (p. 60); and Dorothy, a sometimes virgin and lesbian (p. 118, 183). The orgy boys themselves are Jeff and his fraternity brothers.

The book has a vivid sexual scene approximately every 15 pages. It opens with a frustrated sexual advance on Dorothy (p. 14-15); intercourse with Kate in the woods (p. 28); viewing of Lisa while she is naked (p. 43); a "wild orgiastic" striptease by Lori, with help from the "orgy boys" (p. 55); multiple acts of intercourse by the orgy boys—upperclassmen first, highlighted by a "volcanic eruption" by Lori evoked by Jeff (p. 67).

The book continues with intercourse with Lisa, "her fingernails ploughed bloody furrows down his back". (p. 90); a mental resume of a lesbian movie (p. 106); oral-genital play with Dorothy, hitherto a virgin, and her eventual de-flowering, "her fingernails raking

his back" (p. 120); intercourse with Dorothy in a tavern (p. 125); acts of intercourse with Lisa in the George Washington Hotel (p. 145); the multiple rape and eventual murder of the "spread-eagled" Lisa by "drooling, slobbering townies" (p. 156); and intercourse with Dorothy after her expulsion from school for lesbianism.<sup>321</sup>

For those who believe that a summary of a book that has been held obscene, written by an assistant state's attorney on appeal of that holding, is an unfair sample of a typical paperback sex novel, I have—at the risk of being charged as a pornographer who conceals his purpose in a historical or scientific format<sup>322</sup>—chosen a typical intercourse scene from one of the many paperbacks I have viewed in my work with the Chicago Police Department. It reads:

... Steffi sheathed and compressed Glenn, sent stinging fire spiraling through him, to his brain. There it ignited a barbaric need, a need that would, moments hence, scorn this stylized, lyric lovemaking, would erupt with volcanic mania, leave only a very basic man. And a very basic woman.

While Steffi used a superbly practiced feminine wile on Glenn, seeking to bring him to blinding climax, he answered in kind, penetrating her expertly, stirring her supremely, causing her to shudder and sigh with delirious ecstasy. Deliverance wouldn't be denied her; not if Glenn had anything to do with it.

And he did. Very definitely.

Then, finally, the gasping, thrashing silence was shattered. As finesse and artistry were forgotten, as the bodies surged savagely to each other, as arms and legs knotted and strained to the breaking point. As Glenn began to groan agonizedly, triggering wanton response in Steffi.

"Oh Glenn. You are good, good, good. I love it, I love you. Please, please, please. Make it last. Forever and ever . . ."<sup>323</sup>

And the author does make the scene last—for another page and a half. Notable is the fact that this excerpt contains no "dirty" words, but rather the most emphatic words the language has to offer. (One police officer assigned to the Prostitution and

<sup>318</sup> Note 313 *supra*.

<sup>319</sup> See LOEH, *THE EROTIC IN LITERATURE* 153 (1962) where it is theorized that censorship has kept pace with, or its standards set immediately below, the material having an appeal to females.

<sup>320</sup> 217 N. E. 2d 785 (1966).

<sup>321</sup> Brief for the Appellee, 20-21.

<sup>322</sup> See text accompanying notes 327 through 329 *infra*.

<sup>323</sup> CALVANO, *WANTON NIGHTS* (Nightstand Books, 1962).

Obscene Matter Unit of the Chicago Police Department has offered the theory that the writers of this type of novel take a writer's handbook and use every word in it.) The characterization of *The Orgy Boys*, as having a "vivid sexual scene" every fifteen pages, is applicable to most of these novels. Sometimes the scenes occur more or less frequently. As is the case with *The Orgy Boys*, all of the paperbacks, including lesbian episodes, also have heterosexual scenes which dominate the novel. Many times in the end the hero is able to show the would-be lesbian how much better it is to be loved by a man. This supplies the moral ending with perversion losing to normality, or "morality", which is a common characteristic of the sex novel.

Recently the paperback novels seem to have taken another turn. Many of the latest releases contain episodes of, or appear to be principally concerned with, a sado-masochistic theme. The whole area of sado-masochistic literature is discussed at length later in this section of the paper,<sup>324</sup> but it should be mentioned here that the sado-masochistic paperbacks are purchased by the same type of men as the other paperbacks and that they still contain a great amount of "normal" love scenes. The changes seem to be a matter of providing bigger or better thrills through more shocking conduct, first through lesbianism and then through sado-masochism. Recent books of the latter type include: *Odd Man Out*, with a cover drawing of a girl in leather with high-heeled boots and a riding whip holding another girl, whose clothing is mostly torn off, in a hammer lock while a man cringes on the ground; *Twisted*, with a cover drawing of two girls in low-cut leather dresses, boots and gloves imprisoning another girl in a net hammock; and *Little Gay Girls*, with a cover drawing of four girls dressed in leather, tight-fitting outfits, holding whips and ropes accosting a meek looking man who appears frightened. The following passage occurs in *Odd Man Out*:

The little petite girl wouldn't let go of the whip. She beat him until he writhed on the floor like a snake. The whip came crashing down with a wild irregularity, propelled by a wild, frenzied arm attached to a hostile being. The other girls finally got the whip out of her clenched fist and took their turns.<sup>325</sup>

Also recently, homosexually oriented paperback

<sup>324</sup> See text accompanying notes 363 through 368 *infra*.

<sup>325</sup> FLETCHER, *ODD MAN OUT* (an original After Hours Book, 1965).

books have begun to appear on the book racks with titles such as: *Homo Alley* ("his eager fingers seared the young boy's body"); *Gay Boy*; *Queer Daddy*; *His Brother Love*; *Kept Boy*; and *Two*. These books treat homosexual lovemaking in much the same manner as the other books describe heterosexual love, but are obviously not intended for the same market. As with other homosexual materials, also discussed in this section of the paper<sup>326</sup> they appear to be written for and purchased by homosexuals.

There is a whole category of paperback books which purport to be serious histories or scientific studies, but which are sold alongside the sex novels in the book stores catering to this trade. The Kronhausens' book *Pornography and the Law*, hailed by Dean Lockhart and Professor McClure as a "serious effort",<sup>327</sup> is sold in this manner and has been condemned as undercover pornography by Charles Keating, head of the Citizens for Decent Literature and others.<sup>328</sup> Other books in this category include *The Erotic in Literature* by David Loth and *An Uncensored History of Pornography* by Paul J. Gillette. While the charge of obscenity will not fit these books, it is clear that upon many occasions they are sold as such to those persons who usually buy the paperback sex novel. *Candy* by Mason Hoffenberg and Terry Southern is another paperback being sold as pornography but purporting to be something else. In *Candy*, which purports to be a satire of pornography, the merit is not so clear. It is full of "dirty" words and outrageous sexual episodes, and ends with a scene where the heroine is thrown into intercourse with what appears to be a dung and ash covered holy man when a lightening bolt strikes a Tibetan temple where she has been contemplating Buddha's nose. With temple in ruins, and the fallen statue's nose in her "tooky", the rain entering the temple washes the face of the holy man (whose "member" is being forced in and out of her "honey cloister"), revealing him to be her father.<sup>329</sup> Clearly the situations are too contrived and far fetched in *Candy* for it to be

<sup>326</sup> See text accompanying notes 369 through 373 *infra*.

<sup>327</sup> Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 11 n. 33 (1960).

<sup>328</sup> The buyer for a large bookstore in Chicago has refused to stock the book for this reason.

<sup>329</sup> See GILLETTE, *AN UNCENSORED HISTORY OF PORNOGRAPHY* 186-95 (1965) for a summary of quotations from and a discussion of the book. *Candy* was first in best sellers of fiction throughout the country in September of 1964. See Time Magazine, Sept. 11, 1964, p. 6.



classed as a paperback sex novel and yet, in many cases, it probably serves the same purpose.

Due to the great number, and the varied and changing nature, of sex paperback novels it is impossible to suggest whether or not they are obscene generally. However, there remains some resemblances between books in the same line. The following is a collection of cases in which paperback novels were considered under obscenity laws in the various state courts. *State v. Books*<sup>330</sup> (Nightstand Books held obscene); *State v. Onorato*<sup>331</sup> (Nightstand Books held obscene); *People v. Birch*<sup>332</sup> (Nightstand Books held not obscene); *State v. Cercone*<sup>333</sup> (Boudoir Books held obscene); *People v. Sikora*<sup>334</sup> (Midnight Readers held obscene); *State v. Mahoning Valley Distributing Agency*<sup>335</sup> (Mid-Tower Books held obscene); and *City of Chicago v. Kimmel*.<sup>336</sup>

Some mention should also be made here of the paperback editions of Henry Miller's works, published by Grove Press. Miller, whom the Kronhausens call the "apostle of the gory detail",<sup>337</sup> is the author of *Tropic of Cancer*, which, after many legal battles, was declared not obscene by the Supreme Court.<sup>338</sup> Since that time, three more of his books have been published in paperback form. *Sexus*, *Nexus*, and *Plexus*, the three volumes of the trilogy entitled *The Rosy Crucifixion*, have been recently put on the market. There can be no comparison between Miller's work and the ordinary sex novel paperback. The text is full of "dirty" words, but the author makes no effort at creating erotic scenes. The sexual episodes are more likely to repel than excite the reader. This type of material is mentioned to point out the defect in the reasoning often voiced that "if Henry Miller's works are not obscene, nothing is". The two are not comparable.

"Men's" or "Girlie" Magazines: As earlier stated, there is no need to go into a detailed description of this type of magazine because their contents are

commonly known. They wholesale for about 40% off cover prices. They are no longer considered obscene in New York City,<sup>339</sup> but "girlie" magazines are still the subject of prosecutions under the city ordinance prohibiting obscenity in Chicago.

In 1960 and 1961, almost all ordinance prosecutions in Chicago were for magazines such as *Adam*,<sup>340</sup> *Jem*,<sup>341</sup> and *Scamp*.<sup>342</sup> The police files show 26 raids in Chicago in 1961, 21 of which were aimed at "girlie" magazines. Of the remaining five, three were on *Tropic of Cancer*, one was on a photographer's model book, and one was on stag film.

In 1962, out of 26 raids made by the Prostitution and Obscene Matter Unit, none were on "girlie" magazines, but 23 were on paperbacks, one on nudist magazines, and two on stag films.

In 1963, the Unit made 22 raids, 15 of these were on "girlie" magazines, including one on *Playboy*; 4 were on "girlies" and paperbacks and one was on paperbacks alone. The other two were on films.

In 1964, out of 24 raids made by the Unit, 13 were on paperbacks, 3 were on "girlies" (including one on *Adam*) and the rest were on "blackmarket" or "hard core" material.

In approximately the first nine months of 1965 taking into account the first 25 raids made by the Unit, 10 were on nudist magazines, none were on "girlie" magazines and only one was on paperbacks. (The figures relating to paperbacks may be largely distorted because only raids by the Unit are considered here, and under the system used in Chicago, district vice officers also make obscenity arrests, most of which are on paperbacks.)<sup>343</sup> I have been advised, however, that the Unit has recently made several arrests on "girlie" magazines—not those like *Scamp* and *Adam*, which have first class mailing permits, but on a new type of "girlie" magazine with titles such as *Wow*, *Nymph*, *Cuddle*,

<sup>339</sup> See Kuh, *Obscenity: Prosecution Problems and Legislative Suggestions*, 10 CATH. LAW. 285, 288 (1964); Sullivan, *Obscenity: Police Enforcement Problems*, 10 CATH. LAW. 301, 306 (1964).

<sup>340</sup> Various issues of *Adam* were held obscene by the Municipal Court of Chicago in case nos. 60 MC 148602, 60 MC 148473, 60 MC 187334, 60 MC 175249, 60 MC 175250, 60 MC 174435, and 60 MC 175248.

<sup>341</sup> Various issues of *Jem* were held obscene by the Municipal Court of Chicago in case nos. 60 MC 148306, 60 MC 148649, 60 MC 199921, 60 MC 175250 and 60 MC 175248.

<sup>342</sup> Various issues of *Scamp* were held obscene by the Municipal Court of Chicago in case nos. 60 MC 148650, and 60 MC 207760.

<sup>343</sup> See text accompanying notes 388 through 390 *infra*.

<sup>330</sup> 191 Kan. 13, 379 P. 2d 254 (1963) *rev'd on other grounds sub nom.* Quantity of Books v. Kansas, 378 U. S. 205 (1964).

<sup>331</sup> 2 Conn. Cir. 428, 199 A. 2d 715 (1963).

<sup>332</sup> 40 Misc. 2d 626, 243 N. Y. S. 2d 525 (1963). This case was reversed in 1966 by the Appellate Division of the New York Supreme Court, 269 N. Y. S. 2d 752.

<sup>333</sup> 2 Conn. Cir. 144, 196 A. 2d 439 (1963).

<sup>334</sup> 32 Ill. 2d 260, 204 N. E. 2d 768 (1965).

<sup>335</sup> 84 Ohio L. Abs. 427, 169 N. E. 2d 48 (1960), *aff'd*, 116 Ohio App. 57, 186 N. E. 2d 631 (1962).

<sup>336</sup> 31 Ill. 2d 202, 201 N. E. 2d 386 (1964).

<sup>337</sup> KRONHAUSEN, PORNOGRAPHY AND THE LAW 25 (Rev. ed. 1964).

<sup>338</sup> *Grove Press v. Gerstein*, 378 U.S. 577 (1964).

*Salome*, and *Buxom*. In the officers' opinions these are much "worse" than the old "girlie" magazines. The quality of the paper, photography, and models is clearly not so "good" as the run-of-the-mill "girlie" magazines. Also, the poses seem to be more erotically oriented. For example, in one a girl was depicted lying on a bed in her underwear with her legs spread apart, pulling at her panties.

The obscenity of "girlie" magazines or "men's" magazines has been considered in the following cases: *Flying Eagle Publications, Inc. v. United States*<sup>344</sup> involving *Manhunt*; *People v. Richmond County News*<sup>345</sup> holding *Gent* not obscene; *Excellent Publications Inc. v. United States*,<sup>346</sup> holding *The Gent* not obscene; *State v. Hudson County News*,<sup>347</sup> holding 48 "mens" magazines such as *Bold*, *Adventures for Men*, and *Battle Cry* not obscene; *State v. Hudson County News*,<sup>348</sup> holding six "girlie" magazines obscene; and *Larkin v. G. I. Distributors, Inc.*,<sup>349</sup> holding 13 "so-called girlie" magazines not obscene; *Gent v. State*, 393 S.W. 2d 219 (1965), holding *Gent*, *Swank*, *Modern Man*, *Bachelor*, *Cavalcade*, *Gentleman*, *Ace*, and *Sir* magazines obscene.

*Nudist Magazines*: Present day nudist magazines seem to be an extension of the "girlie" magazine trade. They are published mostly on the West Coast and, in Chicago, are shipped directly to the retailer, because no Chicago distributor is willing to handle them. They wholesale for from 40 to 50% off the cover price,<sup>350</sup> and normally retail for one, two, or at most three dollars, but Chicago retailers have been increasing the prices to as high as five dollars by putting price stickers over the amounts printed on the covers. Unlike the paperbacks, these are sold almost exclusively by the five or six retail outlets in Chicago which handle almost nothing but "borderline" books. The volume is great, however, for in a raid by Chicago Police in 1965, over 5,000 nudist magazines were taken from a warehouse serving three book stores.

In 1958, in a *per curiam* opinion, the Supreme Court reversed a United States Court of Appeals decision holding that the February 1955 issue of *Sunshine and Health*, and the January-February,

1955 issue of *Sun Magazine* were obscene.<sup>351</sup> Since that time, no other cases involving obscenity charges against nudist magazines have been considered by the Court. In describing one of the pictures appearing in the *Sunshine and Health* magazine, the United States District Court has said:

The woman . . . appears to be approximately 5 foot 7. She must weigh in the neighborhood of 250 pounds. She is exceedingly obese.\*\*\*

She has large, elephantine breasts that hang from her shoulder to her waist. They are exceedingly large. The thighs are very obese.\*\*\*

Being most liberal, one might say that the area shown of the pubic hair is caused by shadow, but the same is not to be noticed on both sides.<sup>352</sup>

In a 1960 New York case, the 1958 annual edition of the same magazine, *Sunshine and Health*, was found to be obscene. The court, in distinguishing the 1958 annual edition from the earlier edition that was held not obscene by the United States Supreme Court, stated:

Moreover, the proof in the instant case is much stronger than the proof in the case relied upon by the defendant. This Court has carefully examined the contents of the February, 1955 issue of "Sunshine and Health" which was considered by the Supreme Court in the *Summerfield* case, supra, and has compared it with "1958 Annual Sunshine and Health" which is involved in this case. There are a number of material differences with respect to the contents of each magazine.

The pictures and other material in both magazines are not the same in contents, description and effect. The February 1955 issue, which was before the Supreme Court in the *Summerfield* case, consists of only 32 pages including the covers, and contains 17 pictures of nude persons, while the one before this Court consists of 64 pages in addition to the covers, and contains 85 such pictures. In the 1955 issue there were no color pictures; whereas in the 1958 issue there are 10 full-page pictures of nude persons in color. In addition, a number of pictures in the 1958

<sup>344</sup> 273 F. 2d 799 (1st. Cir. 1960).

<sup>345</sup> 9 N.Y. 2d 598, 175 N.E. 2d 681, 216 N.Y.S. 2d 369 (1961).

<sup>346</sup> 309 F. 2d 362 (1st. Cir. 1962).

<sup>347</sup> 75 N.J. Super. 363, 183 A. 2d 161 (1962).

<sup>348</sup> 78 N.J. Super. 327, 188 A. 2d 444 (1963).

<sup>349</sup> 41 Misc. 2d 195, 245 N.Y.S. 2d 553 (1961).

<sup>350</sup> Information from the files of the Chicago Police Department.

<sup>351</sup> *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958), reversing 249 F. 2d 142 (D.C. Cir. 1957).

<sup>352</sup> *Sunshine Book Co. v. Summerfield*, 128 F. Supp. 564, 571-72 (D.D.C. 1955).

annual issue appear to be deliberately posed for the obvious purpose of arousing sexual interest. There are more pictures and more close-ups of stark nudity showing male, female and adolescent genitalia in the 1958 issue, and the pictures in it are much sharper in focus than the pictures in the February 1955 issue. Moreover, most of the pictures in the issue of the magazine before this Court tend to invite particular attention to the sexual organs and pubic hair of the persons depicted; which include men, women and children pictured together and alone, on various pages thereof. The publication in question is permeated with pictures which tend to incite passion and sexual urge and are of such nature and composition that the average person, applying contemporary community standards, could find the dominant theme of the material taken as a whole to appeal to prurient interest.

In the February 1955 issue which was sustained by the Supreme Court, some attempt was made by distance, shadowing and shading to conceal to a large degree the genital organs and pubic hair of those depicted, but not so in the 1958 issue. This Court is not saying that all of the pictures in the publication involved are obscene by legal standards, but most of them could be so considered by the triers of the facts. The contents of the magazine in question is so materially and significantly different in its dominant theme and prospectus from the one sustained in the United States Supreme Court in the *Summerfield* case, *supra*, that a petit jury would be legally justified in finding a conviction under Section 1141 of the Penal Law.<sup>353</sup>

This holding was reversed, with reluctance, by the New York Court of Appeals,<sup>354</sup> but the lower court's differentiation was no doubt valid.

The current nudist magazines show even a more pronounced change.<sup>355</sup> To begin with, there are

perhaps as many as 50 titles on the market today, including, for example, *Nudist Pictorial*, *Nudist Colorama*, *Continental Nudist*, *Nude Look*, *Modern Nudist*, *Sun Festival*, *Dynamic Nudist*, *The Nudist Idea*, and *Teenage Nudist*.

These magazines all have color photographs and many are in full color; the genitalia are highlighted rather than shadowed; they are printed on glossy paper and most of the photographs are of young, well proportioned women such as one might see in *Playboy* or the other "girlie" magazines, oftentimes posed with young men. The poses are unquestionably intended to stimulate erotic interests.

On page 28 of *The Nudist Idea* #1, which is marked "Collector's Item", there appears a photograph of a young woman, very pretty and well proportioned, with large breasts. She has her arm around a well-built young man, their hips are touching and he has his arm around her. In her other hand she holds a red rose which she has positioned between his scrotum and his penis in such a manner as to raise the penis and yet to leave it in full view of the camera. Her pubic hair is also prominently shown.

*The French Nudist*, published in California, has pictures of a girl tied to a tree (pp. 14-15); of two young girls, in jest, pretending to hang a young boy (p. 16); of girls in various intimate positions together on the beach (pp. 26-27); and a "human train" of girls and boys (p. 30).

Many of the magazines have center fold full color photographs also similar to the "girlie" magazines. It is obvious that the "girlie" magazine customers, and not the small amount of people interested in nudism as a way of life, are purchasing the nudist magazines. What can't be done in "girlies" (i.e. the depiction of genitalia) is being now done through the nudist format.

Although nudist magazine cases have not reached the appellate courts very often, there are a few cases ruling on their obscenity: *Sunshine Book v. Summerfield*,<sup>356</sup> holding issues of *Sunshine and Health* and *Sun Magazine* not obscene; *Sunshine Book Co. v. McCaffrey*,<sup>357</sup> holding issues of *Sunshine and Health*, *Sunbathing for Health*, *Modern Sunbathing and Hygiene*, and *Sun Magazine* obscene; *People v. Cohen*,<sup>358</sup> holding the 1958 annual *Sun-*

<sup>353</sup> *People v. Cohen*, 22 Misc. 2d 722, 727-28, 205 N.Y.S. 2d 481, 487-88 (1960).

<sup>354</sup> 22 A.D. 2d 932, 255 N.Y.S. 2d 813 (1964).

<sup>355</sup> Mr. Daniel Leahy, formerly an assistant state's attorney for Cook County, Illinois, has advised me that he obtained a copy of the issue of *Sunshine and Health* that was held not to be obscene by the United States Supreme Court in *Sunshine Book Co. v. Summerfield*, *supra* note 352, for the purposes of making such a comparison in a prosecution for the sale of nudist maga-

zines in 1965. I understand that the publisher now refuses to furnish further copies to prosecutors.

<sup>356</sup> 355 U.S. 372 (1958).

<sup>357</sup> 8 Misc. 2d 327, 112 N.Y.S. 2d 476 (1952).

<sup>358</sup> Note 354 *supra*.

shine and Health not obscene; *State v. Vollmar*,<sup>359</sup> considering issues of *Sun Fun*, *Sun Deck*, *Nudist Leisure*, *Sun and Health*, *Gymnos Sundeck*, *Tedlosa*, *International Nudist Guide*, and *National Nudist* obscene; *State v. Jungclaus*,<sup>360</sup> holding unnamed nudist magazines obscene; and *Parmelee v. United States*,<sup>361</sup> holding *Nudism in Modern Life* not obscene.<sup>362</sup>

*Sado-masochistic materials:* Like the nudist magazines, the publications considered here are sold almost exclusively in those bookstores in Chicago handling only "borderline" materials. The market, however, seems to be much more restricted than the nudist magazine market because the only apparent appeal of this type of publication is to the "deviate". The Marquis de Sade, an 18th Century Frenchman after whom sadism is named, spent his life enjoying and writing about obtaining sexual pleasure through inflicting pain (principally by flagellation) on someone else.<sup>363</sup> Leopold von Sacher-Masoch, a 19th Century Austrian, was the converse of the Marquis. He spent his time writing about and enjoying sexual pleasure through pain being inflicted upon him by others, principally women.<sup>364</sup>

The 1953 *Kinsey Report*<sup>365</sup> states as follows in regard to the arousal from sado-masochistic stories:

Some persons are aroused sexually when they think of situations that involve cruelty, whipping, flagellation, torture, or other means deliberately adopted for the infliction of pain. More individuals are emotionally disturbed when they contemplate such sado-masochistic situations, and they may not recognize such a disturbance as sexual; but at this stage in our knowledge, it is difficult to say how much of the emotional disturbance, or even more specifically sado-masochistic reactions, may involve sexual elements.

A distinctly higher percentage of the males in the sample had responded to sado-masochistic situations in a way which they recognized as sexual.\*\*\*

It is quite probable that many more males and some more females would respond to such

sado-masochistic stimuli if they were to find themselves in sexual situations which were associated with sadism. The development of sado-masochistic responses in a number of our histories had begun in that way.<sup>366</sup>

The materials available at present are very similar in format—5" by 8½" magazines on glossy paper with either a series of photographs or drawings and a narrative concerning the pictures. They retail at between one and five dollars, and usually at two or three dollars. The various themes, all seemingly related by the sado-masochistic theme, include domination by a woman over a man or another woman by whipping, spanking, binding (usually with leather straps, chains or leather clothing and ropes), and by forcing the dominated one to perform degrading tasks and forcing the dominated male to don woman's clothing, especially underclothing. The characteristics frequently encountered in these publications are leather clothing, black lace underclothing, net stockings, high-heeled leather boots laced up to the knee, masks, the leather whip, leather, tightly laced corsets, dog-type collars and leashes, and any conceivable type of torture device.

One such magazine, entitled *Co-Ed Takes A Slave* (Satellite Publishing Co., Jersey City, N. J.), contains the following narrative: The male runs an ad in the newspaper requesting that a female make him her slave; he gets a reply and goes to her home, satisfying her that he will be a good slave by allowing her to completely dominate him. At one point, the teller relates:

[She said] "Slave, sit up!" Her hands were firm and powerful as she drew the dog collar about my neck, viciously tightening it, then she buckled it. She attached the leash. Holding the handle of the leash, she commanded, "Follow me on your knees, I want to see you crawl, slave."

It was a moment of excitement that defies description. I was throbbing with a strange ecstasy. My heart pounded. "Yes, my Master."\*\*\*

My master had a strange smile on her face watching me crawl. At times, she would kick me to urge me to walk faster.

The photographs show the female in a mask and brief black underclothing and the male in a mask, woman's panties, and a dog collar. In various pictures, he is shaving her legs, cleaning the toilet,

<sup>359</sup> 389 S.W. 2d 20 (Mo. 1965).

<sup>360</sup> 176 Neb. 641, 126 N.W. 2d 858 (1964).

<sup>361</sup> 113 F. 2d 729 (D.C. App. 1940).

<sup>362</sup> See also, *State v. Martin*, 3 Conn. Cir. 309, 213 A. 2d 459 (1965).

<sup>363</sup> See HYDE, A HISTORY OF PORNOGRAPHY 122-23 (1964).

<sup>364</sup> *Id.* at 123-26.

<sup>365</sup> Kinsey, et al., *supra* note 312.

<sup>366</sup> *Id.* at 676-77.

applying her lipstick for her, giving her both a manicure and a pedicure (the latter after soaking her foot in his mouth), and serving as her chair while she eats or as her foot rest while he reads to her, and as her horse.

Another such magazine, entitled *Bound to Please* (B.S.F. Publishers, Newark, N. J.), includes only drawings as opposed to photographs. It tells the story of womens' domination over and punishment of each other. The drawings show voluptuous girls in very high-heeled shoes tied and chained into unbelievable positions. They are forced to wear leather suits, which restrict all movement of their arms, ridden like horses, used as holders for targets while bound in such positions so as to be unable to move, and spanked with bare hands and wooden paddles. At one point in the narrative, as the dominated girl is forced to serve cocktails to her mistress' guests, the narrator relates:

Elbows clamped at her back, the mesh-clad sweep of her legs hobbled at ankles and knees, Fern moved scarlet-faced among the tittering guests. Constrained by her rigid, wickedly spiked girdle harness, her every move was sheer writhing embarrassment. And slim bars connecting the collar of her headpiece forced her torso into a flaunting curve, so that the delicate outline of ribs distending satin skin strained with each sobbing breath as she fought for balance on her towering heels. Celeste's voice cut through the delighted babel of the admiring girls "Remember your Drill, Slave. Or must I discipline you in front of everybody?" Fern blushed yet more deeply; but she could only obey . . . and obediently she churned and swiveled and undulated with every remaining step. As she watched Fern's body curving in preposterous exaggeration, Celeste's eyes gathered a new, speculative look.

Other titles include, for example, *The Dominates*, *Exotique*, *Humiliation by Domination*, *Betty Page*, *Queen of Bondage*, and *Spanking Nurse*.

Two decisions of the New York courts have held sado-masochistic books obscene: *Stengel v. Smith*,<sup>367</sup> (holding obscene all 36 issues of the *Exotique* line, as well as individual magazines such as *Bondage Contest* and *Spanking Sisters*); and *People v. Mishkin*.<sup>368</sup>

<sup>367</sup> 37 Misc. 2d 947, 236 N.Y.S. 2d 569 (1963).

<sup>368</sup> 15 N.Y. 2d 671, 204 N.E. 2d 209, 255 N.Y.S. 2d 881 (1964), *aff'd*, 383 U.S. 502 (1966). See discussion

*Homosexual Publications*: There are approximately 20 to 25 homosexual magazines on the market, retailing at from fifty cents to \$2.50 and the market has been described as "huge".<sup>369</sup> They are sold in the "borderline" book stores, on newsstands, and through the mails. Several years ago, the only such magazines available were the "muscle building" magazines which probably were published for the muscle cult, but were often sold in the type of book store catering to the homosexual trade. The evolution was brought about a little at a time. Subtle changes would be made and tried first on the postal authorities and, if they passed, put into general circulation.<sup>370</sup> At present, the magazines contain photographs and drawings of men (very often young boys not well muscled) in various poses, both alone and with other males, generally in tight pants or "posing straps". Two changes which seem to be taking place currently are the advent of the completely nude model with genitalia clearly shown and the posing together of models in closer juxtaposition so as to create an erotic effect.

The 5" x 8" magazines of this type include: *Fizeek*, *Vim*, *Manual*, *Trim*, and *Grecian Guild*. The August 1965 issue of *Manual*, on page 34, has a photograph of two young men in posing straps, with what appear to be semi-erect penises; one man has his hand draped around the neck of the other and the caption under the picture states:

Jerry Hunter and Dick Heart are the two friendly wrestlers making their debut in *Manual* above and on the following page in photos by Vulcan!! Both Jerry and Dick are now available in a complete set of SIX 5x7 photos for only \$5.00. Send \$1.00 for information and color illustration, to: Vulcan, P.O. Box 470, N. Y. 21, N. Y.

One of the newer publications of this type is *Butch*, the first issue of which came out in mid-1965. That issue contains, from page 27 to 39, a series of photographs of completely nude models with their genitalia clearly shown. As in the nudist magazines, and in photographs in other and earlier magazines, the pubic area was in the shadow or

of this case and a partial list of the publications involved in text accompanying notes 270 through 274 *supra*. See also PAUL & SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 114 (1961); Kuh, *Obscenity: Prosecution Problems and Legislative Suggestions*, 10 CATH. LAW. 285, 287 (1964), and *United States v. Klaw*, 350 F. 2d 155 (2d Cir. 1965).

<sup>369</sup> Address by James R. Thompson, *supra* note 304.

<sup>370</sup> *Ibid*.

shaded, but in *Butch* it seems rather to be highlighted and made the focal point of the picture. *Trim Studio Quarterly* is an example of the trend in erotic poses with two models. Pages 6 to 9 show photographs of two young men in the bathtub together. Page 19 shows two young men in bed together, one with his head resting on the other's stomach and his hand resting on his thigh. Posing straps are clearly painted on the pictures. Page 64 shows a photograph of one young man attempting to pull off another's trousers from the top, in an endeavor which appears to be succeeding. Each series shown is advertised at five dollars per set of 10 "post-card size photos". It can be assumed that the sets received will contain completely nude photographs without the painted-on posing straps. The Florida Legislative Investigation Committee's Report on Homosexuality and Citizenship in Florida states that the black posing strap in this type of set is drawn in "with a material easily removed after it has been mailed to the purchaser".<sup>371</sup> Leather clothing, bondage, and whipping are also entering more and more into the homosexual magazines.

Some 8" x 11" homosexual magazines are also available; however, they follow more the format of the "girlie" magazine, but with male models substituted. For example, *The Young Physique* for October/November, has a fold-out cover and on the double page interior appears a photograph of a boy in a pink short nightgown pulled just above his bare buttocks. These publications have not progressed to the point of showing semi-erect penises or genitalia.

Two cases involving the obscenity of homosexual materials have reached the Supreme Court and are discussed in the section of this paper on the law, *One, Inc. v. Olesen*<sup>372</sup> and *Manual Enterprises v. Day*<sup>373</sup>. In both cases the Supreme Court held the material not obscene.

*Miscellaneous:* The paperbacks, nudist magazines, sado-masochistic materials, and homosexual magazines constitute well over 95% of the commercial market in obscenity and borderline

obscenity. There are available a few hard cover books which are also sold in the few book stores catering to the obscenity trade. They have presented no great problem to the police because their high retail price prevents their dissemination to large numbers of people. In fact, in recent years, the State's Attorney's Office in Cook County has only prosecuted one hard-cover book—*Fanny Hill*, when it was first available in hard cover. Most of the available hard-cover books are "classics" of pornography, such as *Justine* by the Marquis de Sade, *The Kama Sutra*, *The Art of Love* by Ovid and similar works, with which the average pornography reader soon becomes bored. Also available are a few soft cover, highpriced works, retailing for five dollars or more, which purport to be studies of the history of specific deviate sexual practices, or histories of erotic art, erotic sculpture, or simply eroticism. It would serve no purpose to engage in conjecture as to the seriousness of the compilers or authors of these works. Suffice it to say that they, for the most part, are sold with, and to the same persons who buy the more expensive works of pornography that make no pretense to scientific merit.

There are also available on many of Chicago's newsstands about 15 different "sensational" newspapers called, for example, *The Enquirer*, or *Chronicle*. These 15¢ newspapers carry headlines such as "Man Eats Baby", and "Doctor Seduced 12 Female Patients: The 13th Killed Him". They are filled with stories of crime, violence, and sex. On the back pages they carry ads from mail order houses purportedly offering obscene books, films, and other articles. Most of them also feature a mail order lonely hearts club column, carrying advertisements for men wishing to find women or other men, and vice versa. Young people are often observed reading these papers on the Chicago subways. Early in 1965, the Prostitution and Obscene Matter Unit of the Chicago Police Department made eight different arrests, all involving sales of this type of newspaper. The defendants were charged with violations of Chapter 23, Sections 2363 and 2364, of the Illinois Statutes, which read as follows:

2363. Sale of certain publications to minors prohibited.

It shall be unlawful for any person to sell, lend, give away, or to show or advertise, or otherwise offer for loan, gift or distribution to any minor child any book, pamphlet, maga-

<sup>371</sup> The Florida Legislative Report was also obtained in pamphlet form from one of the bookstores in Chicago that cater to the homosexual trade. The copy was "reproduced" by the Guild Book Service, the publishers of other homosexual magazines such as *Grecian Guild*.

<sup>372</sup> *One, Inc. v. Olesen*, 355 U.S. 371 (1958) discussed in text accompanying note 155 *supra*.

<sup>373</sup> 370 U.S. 478 (1962) discussed in text accompanying notes 181 through 185 *supra*.

zine, newspaper, story paper or other printed paper devoted to the publication, or principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime.

#### 2364. Exhibition prohibited.

It shall be unlawful to exhibit upon any street or highway, or in any place within the view, or which may be within the view of any minor child, any book, magazine, newspaper, pamphlet, story paper or other paper or publication coming within the description of matters mentioned in the first section of this act, or any of them.

In one of the cases, *People v. Madura*,<sup>374</sup> the defense attorney filed a motion to dismiss on the grounds that the section charged was unconstitutional because: (1) it violated the first amendment of the United States Constitution and Article 3, Section 4 of the Illinois Constitution; (2) it was vague, broad, and indefinite; (3) it attempted to reduce adult reading to what is fit for children only and (4) it failed to specifically require *scienter*. The section had never been construed by the Illinois courts. The Assistant State's Attorney assigned to prosecute the case, admitted orally that he too thought the section unconstitutional and the judge dismissed all eight cases.

Another category of material often charged as being obscene is that invoking humor through references to sex or scatological references. The opponents of censorship often cite works of this nature by Mark Twain,<sup>375</sup> Benjamin Franklin,<sup>376</sup> Robert Burns,<sup>377</sup> and even the famous children's author, Eugene Field,<sup>378</sup> as evidence of the supposi-

tion that pornography cannot be so bad if authors of this stature have written it. The material written by these authors is, of course, humor, and unlike *Candy*, it is hard to interpret it in any other way. It usually deals with scatological material such as flatulence and, as the Kronhausens state, with regard to one of Mark Twain's endeavors:

[T]he humor alone removes it from any suspicion of salaciousness, for if laughter can kill anything, it certainly can make short shrift of sexual excitement.<sup>379</sup>

A great deal of this type of material has also been shipped into the United States by Olympia Press, which has been called the leading publisher of pornography,<sup>380</sup> and whose founder, Maurice Girodias, has admitted a deliberate attempt to "destroy censorship" in the United States.<sup>381</sup> One such Olympia Press publication, entitled *Count Palmero Vicarion's Book of Limericks*, is in paper covers, on pulp paper, and includes a foreward and 207 limericks such as the following:

There was a young lady of Exeter,

So pretty that men craned their necks at her.

One went so far

As to wave from his car

The distinguishing mark of his sex at her.

Most of the others, however, are replete with "dirty" words, with evidently none too objectionable to include. There are also many unfavorable references to the sex habits of those following a religious calling. This type of work is not for sale at any retail outlet in Chicago, which is illustrative of the fact that while the standards of permissibility of material appealing to the prurient interest

<sup>374</sup> Case no. 65 MC 32940, Circuit Court of Cook County, Illinois.

<sup>375</sup> See, e.g., HYDE, A HISTORY OF PORNOGRAPHY 107 (1964).

<sup>376</sup> See, e.g., GILLETTE, AN UNCENSORED HISTORY OF PORNOGRAPHY 160-63 (1965).

<sup>377</sup> See, e.g., HYDE, A HISTORY OF PORNOGRAPHY 102 (1964).

<sup>378</sup> Eugene Field who wrote "Little Boy Blue", "Wynken, Blynken and Nod" and "Just 'fore Christmas", also wrote "When Willie Wet the Bed," two stanzas of which read as follows:

"Closely he cuddled up to me,  
And put his hands in mine,  
When all at once I seemed to be  
Afloat in seas of brine.  
Sabeen orders clogged the air,  
And filled my soul with dread,  
Yet I could only grin and bear  
When Willie wet the bed.

Had I my choice no shapely dame

Should share my couch with me;  
No amorous jade of tarnished fame  
No wench of high degree,  
But I would choose and choose again  
The little curly head  
Who cuddled up close beside me when  
He used to wet the bed."

Quoted in LOTH, THE EROTIC IN LITERATURE 156 (1962), the poem describes urolagnia, a form of deviancy to which Havelock Ellis is said to have been subject. See KRONHAUSEN, PORNOGRAPHY AND THE LAW 77 (Rev. Ed. 1964).

<sup>379</sup> See GEBHARD, GAGNON, POMEROY & CHRISTENSON, SEX OFFENDERS 676 (1965); KRONHAUSEN, PORNOGRAPHY AND THE LAW 55 (Rev. ed. 1964).

<sup>380</sup> See HYDE, A HISTORY OF PORNOGRAPHY 182 (1964).

<sup>381</sup> See GIRODIAS, *More Heat than Light*, in "TO DEPRAVE AND CORRUPT . . ." 125 (1962); Girodias, *Confessions of a Booklegger's Son*, Censorship No. 3, Summer 1965. See also PAUL & SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 120 (1961).

but containing no "dirty" words have been lowered, those of "dirty" word humor have not, the latter having no "redeeming social importance" to immunize them as do the works of Henry Miller, for example, which are equally replete with "dirty" words.

THE CHICAGO POLICE DEPARTMENT ATTACK UPON  
OBSCENITY AND THE PROBLEMS IT  
ENCOUNTERS

The Bureau of Inspectional Services is one of the three principle sections of the Chicago Police Department. Within the Bureau are four divisions, one of which is the Vice Control Division. The Vice Control Division, in turn, is divided into five units: Vice Analysis, Gambling, License, Narcotics and Prostitution and Obscene Matter.<sup>382</sup> With the latter unit rests the primary duty of the investigation and preparation of prosecutions for violations of city<sup>383</sup> and state<sup>384</sup> obscenity laws in Chicago. Although the strength of the unit varies, usually about 20 men are assigned to it, most of whom are also involved in the investigation of prostitution. There is no set number of men assigned to obscene matter investigations, but usually from one to five officers will be working exclusively on obscene matter on any given day.

In July of 1962 the Unit was besieged with complaints concerning the sale of allegedly obscene paperback books and magazines all over the city. The complaints came originally from citizens and were forwarded by the Mayor's Office, the Chicago Crime Commission, the Superintendent of Police, the State's Attorney's Office, city aldermen, and almost every other conceivable public agency, including the Board of Health. The main impetus for this flood of complaints is generally believed to have been the campaign against obscenity launched by the Chicago Branch of the Citizens for Decent Literature,<sup>385</sup> and, in fact, Father

Francis X. Lawlor,<sup>386</sup> advisor to the CDL in Chicago, had personally visited the office of the Chicago Crime Commission and for a time made daily visits to the Prostitution and Obscene Matter Unit. At that time, two officers from the Unit were assigned to the investigation of obscene matter. They had about 6 cases pending and a great amount of their time was taken up in consultation with the Corporation Counsel's Office, court appearances, and other duties.<sup>387</sup> The public clamor was too much to ignore, however, and in the latter part of 1962, a new system was initiated.

Under the new system, every police officer in the city became responsible for the suppression of obscenity. District Vice Officers were given special training, both in the field and in classes, and a two-part training bulletin was issued. The Patrol Division command personnel, the Training Division and the City Corporation Counsel and State's Attorney's offices all had a hand in setting up the new system. Part II of the new training bulletin<sup>388</sup> describes the beat officers' new responsibilities as follows:

The BEAT OFFICER is held responsible for the prevention of crime, suppression of crime, vice conditions, traffic conditions, preservation of law and order, and the protection of life and property in his assigned area. If there is a drug store, newsstand, candy store, cigar store, book store, or other business establishment on your beat that you suspect is selling obscene literature, take the following action:

1. Visit the business establishment and inspect the suspected books and magazines.
2. If, upon examination, you consider certain publication(s) to be "obscene", complete a Miscellaneous Incident Report of your findings. (The officer need only have the slightest indication that the subject publication comes under the definition of obscenity.)
3. List the Title, Author, Publisher, and where located in store (on book rack near entrance, on counter in rear, on shelf in center, etc.) of suspect publication(s) in the Narrative of your report.

Upon the filing of such a Miscellaneous Incident

<sup>382</sup> It is a matter for conjecture as to how obscene matter and prostitution became joined in the same unit. I have been informed that suppression of obscene matter was once scheduled to be one of the duties of the Youth Division of the Bureau of Field Services. The placement is possibly linguistically correct in that the word "pornography" come from the Greek root "porne" meaning prostitute and prostitutes are often found to have "hard-core" pornography in their possession.

<sup>383</sup> MUNICIPAL CODE OF CHICAGO, §§192-9, 192-10, 192-10.1 and 192-10.2.

<sup>384</sup> ILL. REV. STAT. Ch. 38, §11-20.

<sup>385</sup> See NEWMAN, *THE SMUT HUNTERS* (1964), originally published as a series in the Chicago Daily News, Aug. 31, 1964 to Sept. 10, 1964.

<sup>386</sup> See text accompanying note 92 *supra*.

<sup>387</sup> Much police time is wasted because of the distance between central police headquarters and the Cook County Criminal Court Building.

<sup>388</sup> Chicago Police Department Training Bulletin, Vol. III, No. 48, 26 Nov. 1962.



Report, the matter is then assigned to a District Vice Officer who follows the procedure set out in Part I of the Training Bulletin.<sup>389</sup>

1. Purchase a copy of the alleged obscene magazine or paper-bound book, and at the time of the purchase make every effort to obtain some evidence of the necessary element of scienter (knowledge of obscenity). (If it cannot be established that the owner or employee against whom action may be taken has knowledge of the obscene nature of the materials in question, the case will not stand up.)

2. Then submit the purchased copy or copies, together with a General Case Report, to the Prostitution and Obscene Matter Unit of the Organized Crime Division.

3. The publication(s) and the Case Report will be examined by personnel of this Unit, to determine if the element of scienter is provable. If so, the publication(s) will then be submitted to the Corporation Counsel's Office for a ruling.

4. If the Corporation Counsel's Office is of the opinion that the evidence is sufficient, that office will obtain jurisdiction over the defendant by having a summons or warrant issued by the bailiff's office. (The purchasing officer will be notified of the court date, and will appear as a City witness.)

5. No arrest will be made without a summons or warrant. (It will be up to the discretion of the Corporation Counsel to decide whether to proceed with a warrant or summons.)

The General Case Report mentioned in Step 2 above is to include:

1. Description of the premises in general. Here describe whether there is a store, newsstand or dwelling involved, and its location. If it is a store, state the business of the store (drug, cigar, school, etc.). If a dwelling is involved, state the type (single family, two family, etc.). Then give a further description as to the size of the premises involved and what can be seen from the street. For example: A drug store with two front windows on State Street—the store is 50 feet wide by 150 feet long, and has four counters on each wall running from the front to the rear. When a news-

stand is involved—a newsstand that includes two stands and seven racks for magazines.

2. Description of the particular place where the obscene matter was found. In answering this question, use the general description as a guide and build from there. Pay particular attention as to whether the matter is readily visible and accessible to the general public. Next, observe whether the obscene matter is separated from other articles of the same nature. (That is, are the obscene magazines or paper-bound books kept on a separate counter or rack?)

3. Description of the condition of the obscene matter at the time of the purchase. Here state whether the magazines were stapled so that they could not be opened, whether the articles were separately packaged and sealed so that they could not be read, or any other method that could be used in order to force a person to buy the article before he could examine it. Also, describe that portion of the article that can be observed by the public (the front page).

4. Description of any conversation between yourself and the seller at the time of purchase. Here you can use your initiative. In the past, officers have talked to the proprietor and requested that they be sold "hotter" merchandise (hard-core pornography) than that displayed.

5. Description of any other patrons observed. Here state whether there are juveniles observed making purchases, or if there are any known deviates making purchase of the obscene matter.

6. Description of the neighborhood where the premises are located. Describe whether the premises are located near schools, theatres, churches, or other places where people might gather.

7. Any other information pertinent to this arrest. It is necessary to show the element of scienter (knowledge of obscenity). To This end, it is your responsibility to show that the seller had knowledge that the matter was obscene—otherwise the case will not stand up.<sup>390</sup>

At the same time that the new procedure was being implemented, the Public Information Division went into action and issued several new

<sup>389</sup> Chicago Police Department Training Bulletin, Vol. III, No. 46, 19 Nov. 1962. (Copies of both training bulletins are distributed by the CDL)

<sup>390</sup> *Ibid.*

releases which served the two-fold purpose of advising the public that something was being done and giving notice to the booksellers that they were to be held responsible for what they were selling.<sup>391</sup> One such news release, dated October 29, 1962, announced that police had obtained warrants for the arrest of eight sellers of alleged obscene books, while another, dated November 20, 1962, announced the arrest of six more persons.

The system as set out in the Training Bulletin is currently in effect and, aside from the fact that the district men need periodic reminders of their duties in this regard, has worked well. The Prostitution and Obscene Matter Unit personnel are now free to make their own inspectional visits, referring instances of apparent violations to district personnel, and making arrests themselves when this procedure is deemed expedient. The Unit itself made 26 "raids"<sup>392</sup> in 1962, 22 in 1963, 24 in 1964, and 25 in the first 9 months of 1965.<sup>393</sup>

In addition, the Unit has been responsible for ridding the city almost entirely of commercial sellers of "hard-core pornography," including stag films. Two recent instances point up the fact that Chicago is a bad place to try to buy "underground" obscenity. In one, a known purveyor was asked by officers of the unit, posing as pornography lovers, to supply them with some "good stuff". He produced some innocuous pictures and was urged to do better with promises of large sums of money. Finally, the best he could provide was an old deck of French playing cards. In the other case, officers of the unit obtained information that a certain party could supply them with stag films. Contact was made with the supposed seller by officers posing as members of the American Legion, but when the transaction was completed, the officers arrested the seller after paying him \$215.00, the film cans were found to contain B-X cable and wet newspaper.<sup>394</sup>

<sup>391</sup> The first such news release carried the following caveat:

"Mr. Brian Kilgallon, head of the Ordinance Enforcement Division of the Corporation Counsel's Office, stated that each individual seller is responsible for the type of books he offers for sale. Mr. Kilgallon added that sellers arrested in the past have complained that the distributor puts the book on the seller's rack and they are unaware of the contents. He warned that this does not relieve them of the responsibility for what they sell. Mr. M. Port, Assistant Corporation Counsel, who has been assigned to handle obscene publications, has promised vigorous prosecution."

<sup>392</sup> Each investigation resulting in an arrest or seizure is deemed a "raid."

The identity of the last known large scale seller of stag film in the city was uncovered through the cooperation of the film manufacturers from whom he was purchasing the raw film. Officers from the unit obtained information that stag films were being sold on a large scale privately, but were unable to determine who the seller was. By checking the sales records of the various film manufacturers and making inquiries concerning those persons who purchased film in the size lots generally needed for the type of operation under investigation, the officers were able to quickly determine the seller's identity, who, upon finding out that he had been discovered, left town.<sup>395</sup> Likewise, when a down-state distributor, at the urging of a West Coast publisher, got into the business of distributing in Chicago a certain line of publications that had been dropped by Chicago distributors, he too was forced to withdraw. The line had been dropped by the Chicago distributors because of repeated prosecutions for the sale of various issues. The outside distributor began distributing in Chicago by shipping the material to a woman living on Chicago's North Side and then delivering it himself. Through independent investigation and cooperation with the police in the distributor's home town, officers of the unit were able to collect enough information to institute grand jury proceedings. The distributor voluntarily withdrew from operations in Chicago and was later arrested and prosecuted in his home town.

Aside from the fact that the Vice Control Division officers are free to undertake larger scale investigations, the Chicago Police system of "every cop a soldier in the war on filth,"<sup>396</sup> has its other attributes. Since the 1962 crackdown citizen complaints have been few and can be immediately investigated. In fact, Superintendent Wilson,

<sup>393</sup> Figures are taken from the files of the Chicago Police Department.

<sup>394</sup> One Training Bulletin, *supra* note 388 cautions: "The procedure as stated in Parts I and II of this Training Bulletin apply *only* to books, either paperback or hard cover, and magazines where an attempt has been made to cover the obscenity with a story of supposed literary value. Each police officer should be able to determine easily the difference between matter of this type and actual 'hard-core' pornography. When hard-core pornography is encountered, such as stag-films, 'Eight Pagers,' 'Maggie and Jiggs,' books, or any pictures, none of these procedures apply."

<sup>395</sup> In the first nine months of 1965 two arrests were made for sale of actual "stag" film.

<sup>396</sup> The phrase is Mr. Newman's, see NEWMAN, *supra* note 385, but seems to be an accolade rather than being derogatory.

confident of the effectiveness of the police in this area and confident that the city is one of the "cleanest" large cities in the United States in this regard, is able to strike a blow for freedom of the press from unwarranted censorship in answering some such complaints as follows:

The Chicago Police Department is devoting more manpower and attention to the problem of obscenity than at any previous time in recent history. The policies and procedures of the department are clearly established and have been made known to all members of the department.

I feel impelled to remind you that we live in a democracy. One of our cherished rights is freedom from unlawful authority. A police department under a democratic form of government cannot simply proceed to take action against those things considered objectionable by some members of the community. It can only enforce those laws enacted by the legislature—as they are interpreted by the courts. We cannot arrest people unless we believe that they have violated the laws and we have evidence to support our charge.

What is obscene literature to you may not be obscene within the meaning of Illinois law and the ordinances of Chicago. We must be guided by our legal advisors. If we are informed that particular literature is obscene within the definition of state statutes and city ordinances we will use every means available to us to prohibit the sale or distribution of such literature within the City of Chicago.

The mere presence of the police in the various bookstores and other shops, and the knowledge on the owners' parts that the police intend to rid the city of obscenity insofar as possible, seems to have had a definite deterrent effect. The book-sellers and shop owners themselves are beginning to take an interest in what the distributors are putting on their racks. It is not to be assumed, however, that bookstores are the only offenders in the area of obscenity. Since the advent of the paperback book, every conceivable type of retailer has become a book seller. The raids carried out by the Unit itself from January 1962 to September of 1965, include arrests at 5 cigar stores, 4 candy stores, a liquor store, 1 card shop, 11 newsstands, 2 cleaning establishments, 7 drug stores, 4 variety stores, a hardware store, and a

grocery store, in addition to the numerous arrests made in book stores.<sup>397</sup>

If this were not the case, the Unit officers could carry out all inspectional visits without the aid of the district men. There are less than ten book stores in Chicago that habitually carry the type of publications which might subject them to arrest and prosecution. No amount of police surveillance or repeated prosecutions seems to deter the proprietors of these establishments from selling anything they think they might get by with. The fact of the matter is that obscenity, or at least borderline obscenity, is their stock and trade and defending criminal charges is looked upon as one of the costs of doing business. The expense may be getting higher than the profits will bear, however. The proprietor of one such establishment recently announced that he had been forced out of business by the high cost of defending himself in court on obscenity charges.

While, to some, the effect of the Chicago system seems to be good, others take a dim view of the police methods employed, describing them as a "terror system". A Chicago reporter gives this example:

Two customers drop into a north Wells Street bookshop and scout the shelves. They are plain clothesmen from the Police Vice Control Division, masquerading as book lovers.

On the prowl for "smut", they ignore the hundreds of respectable hardbound books in the shop.

One of them picks up a paperback copy of "City of Night", a novel that deals with sexual deviation.

It has been a national best-seller for months, is sold at dozens of drugstores and newsstands and is not banned in any way.

"Ever read this?", the "customer" asks the shop owner.

"Only the first chapter", she replies.

The detective then lectures the owner about selling books she hasn't read—although it is obvious that no one could have read all the books in the well-stocked store.

The "customer", questioned by the suspicious dealer, finally identifies himself as a policeman. Someone has complained that the store is selling this particular book, he says.

He buys it and warns that it will be studied

<sup>397</sup> Figures are from the Chicago Police Department files.

for possible obscenity by the City's Corporation Counsel—an action that could lead to arrest and trial of the seller.

When the alarmed book dealer asks what now, he answers ominously: "You'll have to sweat it out".<sup>398</sup>

Part I of the Training Bulletin advises the District Vice Officer that, upon making a purchase of a book for submission to the Corporation Counsel's Office, he should "list any licenses issued to the premises where the suspected obscene matter was sold".<sup>399</sup> Under Chicago city license procedure, any city license, be it for retail sales of liquor, food, tobacco, or other commodities, can be revoked for "good and sufficient cause",<sup>400</sup> including the violation of "any of the provisions" of the Municipal Code "or any of the statutes of the state in the conduct of his business".<sup>401</sup> Thus, the proprietor of a cigar store who sells obscene matter may be put out of business through the loss of his license to sell tobacco.

Under the present procedure, in most cases the license is summarily revoked by the Mayor upon the charge that the business has violated city and/or state obscenity laws. There is no requirement that a hearing be held except in cases involving a liquor license, and in all cases the license may be revoked without the licensee having first been convicted of a violation. This also is a strong deterrent to sales of obscene and "borderline" material, but the booksellers who are solely in the business of selling this type of publication do not have to depend upon sales of commodities for which licenses are required. Recently, a tobacco license issued to one such bookseller was revoked. Shortly thereafter, a cigarette machine, which is also required to be licensed in Chicago,<sup>402</sup> was installed in the store. Obviously, the only effective deterrent to these people is a strong stand by the sentencing judge upon their conviction, and Cook County judges have recently taken a step in this direction, levying \$4,000 and \$1,000 fines in January of 1964.<sup>403</sup> On May 12, 1965, a distributor was sentenced to one year in the penitentiary and fined \$1,000 for handling a book called *Pajama Party*.<sup>404</sup>

In spite of the successes of present Chicago

police procedure, three major problems still exist which are probably not peculiar to Chicago. The first of these is the ever-present question of what is obscene. As pointed out above, the courts have given the police very little practical guidance on this matter.<sup>405</sup> And police officers, not being trained in the law, must look to their legal advisors. Suspect publications are referred to an Assistant State's Attorney, or to the Corporation Counsel for his opinion.<sup>406</sup> But this amounts to only book-by-book guidance. As John J. Sullivan, of the Legal Bureau of the Police Department of the City of New York, puts it:

While broad guide lines concerning obscenity have been established by our Appellate Courts, seldom is unanimity found among judges applying these rules. How then can the law enforcement officer, the first line of defense against lawlessness be expected to perform efficiently? Is he to arrest people who sell offensive material only to see the courts let them free? Or should he adopt an attitude of laissez-faire and hence allow the sale of anything anyone wishes to read? The choice is not his to make, for he has a sworn duty to enforce the laws of his state and country, regardless of his personal feelings. In enforcing these laws, he cannot disregard any limitations placed upon his actions by the courts or legislature.<sup>407</sup>

These legal advisors, having no better guidance from the courts than the police have, and generally being occupied with many other matters, are a poor substitute for definitive standards. In no other area of police work is the officer asked on the one hand to suppress a certain vice and, on the other hand, told that he is not qualified to judge even the existence of the vice. Legal advisors, who are usually turned to prior to an arrest only in novel or unusual circumstances, must be consulted in every case before any action is taken. Surely "obscenity" should be a concept that others beside lawyers and judges can understand.

The second major problem is that of *scienter*. Since the *Smith* case<sup>408</sup> was decided in 1959, a

<sup>398</sup> Training Bulletin, note 388 *supra*.

<sup>399</sup> Training Bulletin, note 389 *supra*.  
<sup>400</sup> MUNICIPAL CODE OF CHICAGO, §101-27.  
<sup>401</sup> *Ibid*.  
<sup>402</sup> MUNICIPAL CODE OF CHICAGO, §§178-20 through 178-23.

<sup>403</sup> See Chicago Sun Times, Jan. 23, 1964.  
<sup>404</sup> See Chicago Tribune, May 13, 1965.

<sup>405</sup> *Id.* at 307. See also Fagan, *Obscenity Control and Minors—The Case for a Separate Standard*, 10 CATH. LAW 270, 281 (1964).

<sup>406</sup> *Smith v. California*, 361 U.S. 147 (1961).

finding of scienter or knowledge is a constitutional requirement in every obscenity prosecution and the courts must find it in,<sup>409</sup> or read it into,<sup>410</sup> the obscenity statute before them. This does not mean, however, that the state must prove that the defendant knew the material in question to be *obscene*. It is necessary to establish only that the defendant was aware of the nature or character of the material.<sup>411</sup> The Chicago procedure as set out in the Training Bulletin is geared to the establishment of scienter at the time *suspected* material is purchased. Vice officers are admonished:

Do not make a purchase of a suspected obscene publication, unless the element of "scienter" is present. (Just go into a store and make a purchase of a suspected obscene book or magazine is not enough—you must talk to the seller, and ask him questions concerning the suspected publication. For example: Ask him—"Would you sell this book to children?" If he says "no," then ask him why not. Another question would be: "Do you have any 'hot stuff'?" He may answer by giving you a description of the contents of an obscene book or magazine. In this way, you are showing by the seller's answers to your questions that he has knowledge of the contents of the suspected publication.<sup>412</sup>

The Training Bulletin also points out that "Knowledge can be shown in a number of ways at the time of the sale, such as:

a. Awareness of type of pictures and printing on cover of publications.

b. Segregation of the publication type from other publications of other types. (Showing that the alleged obscene magazines are not intermingled with standard approved magazines.)

c. Stapling of magazine. (Was magazine stapled, so that it could not be readily opened?)

<sup>409</sup> The Illinois Statute (ILL. REV. STAT. Ch. 38, §11-20) provides that "A person commits obscenity when, with knowledge of the nature or contents thereof, he (1) Sells . . . any obscene writing . . ."

<sup>410</sup> See, e.g., *State v. Onan*, 261 Minn. 10, 110 N.W. 2d 514 (1961).

<sup>411</sup> See *People v. Williamson*, 207 Cal. App. 2d 839, 24 Cal. Rptr. 734, 738 (1962), *cert. denied*, 377 U.S. 944 (1964); *Kahm v. United States*, 300 F. 2d 78 (5th Cir.), *cert. denied*, 369 U.S. 859 (1962). See also *Mishkin v. New York*, 383 U.S. 502 (1966), approving the test for scienter announced by the New York Court of Appeals as follows: "... only those who are in some manner aware of the character of the material they attempt to distribute should be punished."

<sup>412</sup> Training Bulletin, note 388 *supra*.

d. Conversation with defendant at time of purchase. (Such as that defendant would not sell or exhibit for children or those under age; description of contents of book by defendant, which may give sordid details of contents.)

e. Place where publication is kept. (Such as back room, under counter, in drawer, and seller producing same to selected customers after appropriate discussion.<sup>413</sup>

All of these methods of proving *scienter* have been approved, to some degree, by the appellate courts of the nation in decisions handed down both before and after the Training Bulletins were issued:

A. Cover writings and pictures have been held relevant both in combination with other evidence of *scienter*<sup>414</sup> as well as alone.<sup>415</sup>

B. Segregation of "obscene" material from other materials has been held relevant on the issue of *scienter* when in combination with other evidence<sup>416</sup>, and in an Ohio case<sup>417</sup>, the fact that the book in question was found on a rack labeled "adults only", with other books of the same nature, was held to be evidence of *scienter*.<sup>418</sup> In this case the prosecution also introduced photographs of the defendant's store and of his "erotica" section to prove *scienter*. This seems to be an effective procedure and is now being employed by the Prostitution and Obscene Matter Unit of the Chicago Police Department.

C. Stapling of magazine pages has been held to be evidence of *scienter*.<sup>419</sup>

D. The admission by defendant that he had "seen worse books" has also been held to

<sup>413</sup> Training Bulletin, note 389 *supra*.

<sup>414</sup> *United States v. Hochman*, 277 F. 2d 631 (7th Cir.), *cert. denied*, 364 U.S. 837 (1960); *State v. Andrews*, 150 Conn. 103, 186 A. 2d 546 (1962); *State v. Onorato*, 2 Conn. Cir. 428, 199 A. 2d 715 (1963); *City of Chicago v. Doe*, 47 Ill. App. 2d 460, 197 N.E. 2d 711 (1964); *People v. Finkelstein*, 9 N.Y. 2d 342, 183 N.E. 2d 661, 229 N.Y.S. 2d 367, *cert. denied*, 371 U.S. 863 (1962).

<sup>415</sup> *State v. Vollmar*, 389 S.W. 2d 20 (Mo. 1965), [reversing on other grounds]; *State v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 (1964).

<sup>416</sup> *Alexander v. United States*, 271 F. 2d 140 (8th Cir. 1959); *State v. Andrews*, *supra* note 414; *State v. Cercone*, 2 Conn. Cir. 144, 196 A. 2d 439 (1963); *City of Chicago v. Doe*, *supra* note 414.

<sup>417</sup> *State v. Mazes*, 3 Ohio App. 2d 90, 209 N.E. 2d 496 (1965).

<sup>418</sup> The same type of evidence was present in *Smith v. California*, *supra* note 408, but the United States Supreme Court considered only the constitutionality of the statute and state procedure which did not require proof of scienter and did not consider the scienter question on the merits.

<sup>419</sup> *City of Chicago v. Doe*, *supra* note 414.

be evidence of his knowledge of the subject books.<sup>420</sup>

E. The fact that defendant kept *more* of the same type of magazines in his back room was considered by the court in ruling on the question of *scienter* in a 1962 Connecticut case.<sup>421</sup> (The latter case does not clearly consider the type of evidence referred to in section (e) of the Training Bulletin quoted previously, but it seems to be a fair assumption that a case of the nature described in that section would seldom get to an appellate court on the issue of *scienter*.)

Other indications of knowledge considered by the courts include high prices and high profit on cheaply printed books,<sup>422</sup> the method of delivery to defendant,<sup>423</sup> and from which distributor,<sup>424</sup> the fact that the books purchased were delivered to purchasing officers in paper bags,<sup>425</sup> and, in *People v. Sikora*<sup>426</sup>, the fact that defendant was the managing partner in a retail book business.

With all of the above authority showing what might be termed "circumstantial evidence of *scienter*" (as opposed to an outright admission on the part of the defendant) and holding it to be sufficient proof of the element of *scienter*, it would seem that, in almost any instance, a fairly strong case for *scienter* could be made, but the problem still persists. Early in the history of the Chicago crackdown, an enterprising officer entered a bookstore, approached the clerk and told him that he (the officer) had a friend in the hospital who had just undergone a circumcision and he (the officer) wanted some "hot stuff" to give him as a joke. The obliging clerk gave the officer an obscene paperback describing the contents in detail. For a long time afterwards the assistant Corporation Counsel in charge of obscenity prosecutions would be satisfied with nothing less. But, of course, the booksellers immediately got wise and since that time district vice officers' General Case Reports have come in looking like they were written by defense counsel. To questions like the suggested "Do you have any 'hot stuff'?", an officer gets an answer like "I don't read any of the books; I just

sell them.", or, "The distributor stocks the rack for me; I don't even know what's on it." When a book was referred to the Corporation Counsel's office with such a report, it came back marked "no *scienter*" and no decision on obscenity was rendered. The State's Attorney's Office was much more liberal on the matter. Recently, this problem has been lessened by the changing attitude of the Corporation Counsel's personnel, but it still remains in some degree. Counsel for the Citizens for Decent Literature point out:

It will be just as difficult to convince some officials that the bookseller complained against has the required "*scienter*" (guilty mind) for criminal prosecution, as it was in the first instance, to convince them that the obscenity laws were being violated. An official who wants to drag his feet will come up with an argument that it is impossible to try to prove that the seller "knew the book was obscene". This, of course, is not the test. . . .<sup>427</sup>

Such is not the case in Chicago, for past prosecutions and excellent cooperation with the police attest to the fact that no prosecutor there is "dragging his feet". It is submitted, however, that *scienter* is not and should not be a problem. No book submitted should be returned without an opinion on its obscenity. If necessary, police officers can later attempt to make a case for *scienter*, but even this only in rare instances. As in all cases where it is feared that the Supreme Court has gone too far in protecting the rights of the criminally accused and have put the police and prosecutors in an impossible position, the evidence is quite the contrary. The *Smith* decision can be and will be taken in stride and the only problem is the reading into it of problems which simply are not there.

*Effectiveness:* A great variety of factors go to make up the largest of the police problems in the area of suppression of obscenity.

The first of these is the manner in which the police are forced to proceed. A vast amount of police time and effort is spent in finding the seller of an obscene publication on the retail level and presenting the case for prosecution. Under normal distribution, a given book reaches all of its retail outlets at about the same time; it is offered for sale and a beat officer purchases and submits it to the Unit; the Unit in turn submits it for an opin-

<sup>420</sup> *People v. Finkelstein*, *supra* note 414.

<sup>421</sup> *State v. Andrews*, *supra* note 414.

<sup>422</sup> *People v. Finkelstein*, *supra* note 414.

<sup>423</sup> *State v. Andrews*, *supra* note 414.

<sup>424</sup> *Alexander v. United States*, *supra* note 416; *State v. Cercone*, *supra* note 416.

<sup>425</sup> *State v. Andrews*, *supra* note 414; *State v. Onorato*, *supra* note 414.

<sup>426</sup> 32 Ill. 2d 260, 204 N.E. 2d 768 (1965).

<sup>427</sup> KEATING & CLANCY, COMMENTARIES ON THE LAW OF OBSCENITY 92 (1965).

ion; the opinion is rendered a considerable time later; and finally, assuming a case for *scienter* has been established, the offender is arrested and prosecuted. With continuances at the request of defendants and other court delays, more time is lost. By the time the case is concluded there is a strong probability that all other issues of the obscene publications have been sold and are scattered throughout the city. It can be seen that the book has not been suppressed. The only effect of the proceeding is upon the individual who sold the copy in question, which may or may not be a deterrent effect. No benefit is derived from publicizing the holding of obscenity because the other retailers have sold whatever copies they may have had. There is no censorship, but only piecemeal prosecution.

The strict procedural requirements imposed by the Supreme Court in the *Marcus* and *Quantity of Books* cases<sup>423</sup> further hamper the police. As discussed above, after those cases, mass seizures are unconstitutional, unless made under a statute similar to Section 22a of the New York Code of Criminal Procedure.<sup>429</sup> Illinois does not have a comparable statute. At least one recent mass seizure has been made by members of the Chicago Police Department which resulted only in the incurring of charges for storage and return of the material. Prosecutions of distributors must now also be on a single book basis.

The local distributors, however, have not been the greatest offenders. The recent influx of nudist magazines<sup>430</sup> that has hit the city has come from the West Coast. The publishers have no local distributors, but rather ship their merchandise direct to the retail outlets by freight. They have tried and failed to secure the permanent services of local distributors. One such publisher wrote to a prospective distributor:

The City of Chicago is open only at the sellers' own risk. The merchandise we sent in is constitutionally protected, yet we still lost. It seems that when the city needs a scrape (sic) goat the books and magazines catch the arrests.

We would be more than please (sic) if you circled a common road map, covering the area you are serving. We could then point out our

problem areas, and from there you could go on your own. For all we know you might end up as the largest distributor in Chicago, and we feel that the city needs one, but one with intestinal (sic) fortitude. Anyhow, once we get the area mapped out from you, we will send you another letter with our views. You may not be the biggest distributor we have, but you are the best.

Failing in this, the publishers continue to ship direct, and to make matters worse, they ship what they want to. Of course, the retailer can return what he wishes, but this means extra expenses in time and bookkeeping and it is easier to sell what the publishers send. A bookstore owner recently informed me that he returns about 75% of what he receives. He would like to stop dealing with this type of publisher, but he needs the 25% of the material that he doesn't return to "meet the competition".

Officers of the Unit have continually sought aid from federal officials in solving this problem, but to no avail. The Post Office Department, which has been most cooperative with the police in the past, has no jurisdiction over the trucking industry.<sup>431</sup> The United States District Attorney's Office was consulted and officers were advised that the only prosecutions of this nature undertaken by that office were those instigated by the Federal Bureau of Investigation. Finally, a number of nudist publications were submitted to the F.B.I. and officers were advised that the publications had been forwarded to Washington, D. C., for advice on what steps should be taken. Personnel in Washington were evidently sufficiently impressed by the nature of the material, but the local office refused to carry the matter farther. This seems particularly incongruous in the light of the strong stand that J. Edgar Hoover has taken against obscenity, calling it "filth" and "pollution".<sup>432</sup>

Since the *Bantam Books*<sup>433</sup> case, and before, the publication of "banned" lists, or the urging to sell or not sell a certain publication, in any official capacity, has been frowned upon. This, however, has been carried to the extent of denying prospective sellers information on what should or should not be sold. The *Smith* case<sup>434</sup> is predicated upon

<sup>423</sup> See text accompanying notes 291 through 300 *supra*.

<sup>429</sup> See text of section in discussion of *Kingsley* note 284 *supra*.

<sup>430</sup> See text accompanying note 350 *supra*.

<sup>431</sup> See Hoover, *Combating Merchants of Filth: The Role of the F. B. I.*, 25 U. PITT. L. REV. 469, 471 (1964) for a collection of federal obscenity statutes and the agencies responsible for their respective enforcement.

<sup>432</sup> *Ibid.*

<sup>433</sup> *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

<sup>434</sup> *Smith v. California*, 361 U.S. 147 (1959).

the proposition that a bookseller cannot be expected to personally read everything he sells. The plight of the seller can be seen in a 1965 report of one of the officers in the Unit to his commanding officer. The investigation was of a combination grocery and liquor store, instigated by a citizen's complaint. The owner had been visited by members of two Catholic churches and by Catholic priests and was given a NODL list of objectionable publications.<sup>435</sup> He then put a second rack in an area of the store where children were not allowed, due to the sale of alcoholic beverages. Upon receiving further complaints he removed the second rack altogether. The report ends as follows:

Mr. ——— furnished the reporting officer with the attached pamphlet listing books which are considered objectionable by the National Office for Decent Literature. He has requested the reporting officer to advise him which of these books would be illegal to sell. He further requested that if the reporting officer is unable to tell him which books he may or may not legally sell, that he be advised as to where he can obtain such information as he feels the sale of newspapers, magazines, and publications are a service for his customers, but only wants to sell those which are legally allowable.

The policy of the Corporation Counsel's Office has been to return all such inquiries unanswered, informing the sender that the office is not authorized to render an opinion, and rightly so; first, the *Bantam Books*<sup>436</sup> case seems to forbid it, and second, that office, with its present staff, could no more read all of the material sold in the city than could the individual seller.

When the *Freedman*<sup>437</sup> case was decided in 1965, officers of the Unit noted that the Court had again reiterated its approval of the New York procedure under Section 22a of the Code of Criminal Procedure,<sup>438</sup> as it had done in the *Kingsley*,<sup>439</sup> *Marcus*,<sup>440</sup> and *Quantity of Books*<sup>441</sup> cases. It was also noted that under New York's Section 22a, action could be taken prior to distribution. Thus, under that procedure, it appeared that prompt police action could stop obscene publications from ever

reaching the retail outlets and that city-wide sales during the delay caused by cumbersome legal machinery could be avoided, giving police action a large measure of effectiveness which the present Chicago procedure lacks. Correspondence with Mr. Leo A. Larkin, former Corporation Counsel of the City of New York, and with Ellsworth A. Monahan, Director of the Legal Bureau of the New York City Police Department, indicates that the New York Police do not, and perhaps cannot, engage in pre-distribution censorship. Mr. Monahan sums up the situation as follows:

To date, all proceedings were commenced after the distribution of books to retail dealers. Since publishers or distributors are not required to submit publications to any review board, it is only after distribution is made that we are usually made aware of the existence or contents of the questionable material.

The subject material is usually purchased by the Police Department and submitted to the District Attorney's and the Corporation Counsel. If these legal experts deem the material pornographic, and if it is considered more advisable to proceed by the injunctive process rather than by criminal prosecution, the Corporation Counsel prepares the necessary papers.

In the few instances where we have utilized this procedure, the members of the Police Department served the requisite process on the defendants and made an inventory of the material.

In the case of material distributed through regular channels, such as books and magazines, this type of proceeding is not very effective to directly control the large volume in circulation. Any injunction order issued is effective only against those defendants who have been served with process. Others dealing in the material may continue to do so, at least until the court determines that the material is pornographic. If such a determination is made, those continuing to deal in the material may then be subject to criminal charges.<sup>442</sup>

It appears that there are several aspects of the New York procedure which lead to partial ineffectiveness. First, absent the requirement of prior submission, such as is the case with motion

<sup>442</sup> Letter from Ellsworth Monahan to Director John F. Mulchrone of the Vice Control Division, March 15, 1965.

<sup>435</sup> See text accompanying note 79 *supra*.

<sup>436</sup> Note 433 *supra*.

<sup>437</sup> *Freedman v. Maryland*, 380 U.S. 51 (1965).

<sup>438</sup> See note 429 *supra*.

<sup>439</sup> *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

<sup>440</sup> *Marcus v. Search Warrants*, 367 U.S. 717 (1961).

<sup>441</sup> *Quantity of Books v. Kansas*, 378 U.S. 205 (1964).



pictures, there is no available means of reviewing the books before they go on sale. Second, the submission of each suspect publication—first to legal advisors and then to a judge before a warrant may be issued—is time consuming.<sup>443</sup> Third, the control of material handled by more than one distributor, although much more effective than present Chicago procedure, is still somewhat inefficient. And, finally, although the defendant is guaranteed a hearing on the issue of obscenity within three days “after joinder of issue” under Section 22a, there is no requirement that the defendant take advantage of that guarantee,<sup>444</sup> and each day of further delay works to the detriment of police effectiveness.

In spite of the above mentioned defects in New York's Section 22a type procedure, it should be emphasized that this means of censorship is still far superior to the book-by-book criminal proceedings. First of all, it is the only method, under recent Supreme Court rulings, by which mass seizures can be made. When the books are seized and destroyed, someone, probably the distributor, loses money and, in addition, the books are no longer available to sell *anywhere*. Second, the procedure is aimed at, and works best against, distributors. Third, although people have strong sentiments about “book burning”, those feelings do not compare to the furor that is raised against a man getting a prison sentence for merely selling a book, and the imposition of a prison sentence seems to render a reversal by an appellate court much more likely. It is submitted that in light of the Supreme Court's repeated approval of the procedural guarantees in New York's Section 22a<sup>445</sup>, beginning in 1957, it is, it would seem, in the direct interest of each state to enact such a statute. Officers of Chicago's obscenity Unit have been advised by the Corporation Counsel's Office and the State's Attorney's Office that such statutes are being drafted, but so far as can be determined, none have been introduced in the State Legislature or in the City Council.

Contrary to the Supreme Court's attitude, the English have recently strengthened the policy of the law in dealing with distributors by the enactment of the Obscene Publications Act of 1959<sup>446</sup>.

Mr. H. Montgomery Hyde reports:

... The powers of the police to search the premises of suspected dealers in obscene matter were strengthened, notably by dropping the requirement of the Act of 1857, that an actual sale must first be deposed to by the police before the magistrate issues his warrant. The dispensation with this requirement was due to representations made by the police that it was extremely difficult, if not impossible, to make purchases from wholesale dealers in commercial pornography who kept large stocks of obscene books in their stores and warehouses.<sup>447</sup>

He further reports that “according to information supplied by the Home Office”, in the year ending November, 1963, “the police in England seized as obscene 276,187 ‘pin-up’ magazines, 143,859 paperbacks, 79,881 photographs and negatives and 11,530 other items”.<sup>448</sup>

Assuming that mass seizures are prohibited for the present, the question arises whether search warrants are of any use at all in obscenity prosecutions. The *Marcus*<sup>449</sup> and *Quantity of Books*<sup>450</sup> cases dealt with mass seizures in civil proceedings and can be interpreted as being limited, in some aspects, to those type of cases, as opposed to criminal proceedings.<sup>451</sup> The *Marcus* case, however, clearly holds that general warrants specifying merely that “obscene materials” are to be seized are no longer valid. This facet of the opinion is undoubtedly applicable in all obscenity cases. It has long been the law, however, that an officer lawfully on the premises under a valid search warrant is not obliged to close his eyes to, and may seize any evidence of crime uncovered during the course of his lawful search. Assuming, then, that if in executing a warrant for the seizure of a book which had been presented to a magistrate and was adjudged obscene in an *ex parte* hearing, the executing officer may seize *one* copy of each other obscene publication discovered in the course of his search, several uses of search warrant procedure remain open to the police. First, all obscene material handled by a seller can be used as evidence at his trial despite

<sup>443</sup> See Sullivan, *Obscenity: Police Enforcement Problems*, 10 CATH. LAW. 301, 305 (1964).

<sup>444</sup> It is noted in *Kingsley* that the defendant did not, *supra* note 439 at 439.

<sup>445</sup> See text accompanying notes 438 through 441 *supra*.

<sup>446</sup> See text of the Act in Joint Committee on Continuing Legal Education, *The Problem of Drafting an*

*Obscenity Statute*, Problems in Criminal Law and its Administration no. 9, p. 87 (1961).

<sup>447</sup> HYDE, A HISTORY OF PORNOGRAPHY 196-97 (1964).

<sup>448</sup> *Id.* at 201.

<sup>449</sup> Note 440 *supra*.

<sup>450</sup> Note 441 *supra*.

<sup>451</sup> See *Comment*, 12 U.C.L.A. L. REV. 532, 538-39 (1965).

the fact that only one was presented to the judge issuing the warrant. This has its obvious advantages. Second, if an officer was able to show probable cause to believe that a distributor was handling a certain obscene publication, through invoices and the like, and presented a copy of that publication with an application for a search warrant, the distributor's warehouses could be searched in the same manner, the officer seizing one copy of each obscene publication handled. Perhaps in some cases this would amount to a seizure prior to distribution. (Under the Illinois obscenity statute, possession of more than three copies is *prima facie* evidence of intent to disseminate;<sup>452</sup> query whether the seizure of three copies could be a mass seizure?)

Assuming all of the above, there remains the problem that the officer may not be legally qualified to judge whether or not a given publication is obscene and, therefore, may not be legally qualified to judge what is evidence of the crime of obscenity. In *State v. Vollmar*,<sup>453</sup> the Supreme Court of Missouri (although reversing and remanding the case on other grounds) upheld the seizure of nudist magazines without warrant when the magazines seized were *similar* to those which prosecutors had advised the police were obscene. The prosecutor's judgement, which it is assumed is superior to that of the police, was substituted, and the seizure upheld without the magazines having first been submitted to a judge or magistrate.<sup>454</sup> And in *People v. Kimmel*,<sup>455</sup> recently decided by the Supreme Court of Illinois, the State argued that, based upon the case of *United States v. Pisser*,<sup>456</sup> if police officers are on the premises under a valid search warrant, any obscene material found may be seized even though it is not named in the warrant provided there is also present an Assistant State's Attorney, qualified in the obscenity field, who has examined such material and found it to be obscene.<sup>457</sup> The court, however, was unimpressed with the state's reasoning. The case was reversed on the ground that even though the police are not required to ignore

"contraband" discovered in the course of a search, such was not the case there. The court thought that the officers were looking for all that they eventually seized and, what is more, the court held that the search and seizure rules applicable to publications are different from the rules applicable to other types of contraband because of the first amendment protection afforded to publications.

The Chicago Police Department has come a long way in the area of suppressing pornography, as it has in many other areas in the last few years. The fight has been largely a losing one, however, due to the holdings of the courts, and, in particular, the Supreme Court of the United States. The Prostitution and Obscene Matter Unit has not been permitted to work at maximum efficiency in this area, and their effectiveness has been severely limited. It is recognized that such limitations are a part of our constitutional system of law and as such are of intrinsic value. It is submitted, however, that solutions to some of the problems are desirable and possible. The next section of this article will deal with some solutions that have been suggested, and their usefulness, particularly with regard to police problems.

#### THE PROPOSED SOLUTIONS TO THE PROBLEM OF OBSCENITY

It is generally recognized that suppression on the grounds of obscenity under the present federal and state laws relating thereto is largely unworkable, both from the standpoint of the police and prosecution, and from the standpoint of the courts. The Supreme Court, because of the justices' inability to often agree, has become bogged down and is unable to supply even a workable definition of obscenity. There is also a great split in public opinion as to the correctness of any suppression on this ground, and no scientific proof of its correctness or incorrectness will be immediately forthcoming. Hostility on the part of the courts has hampered the police and has rendered police efforts in this regard largely ineffective, while certain segments of the population have been very critical of police efforts. Many law review commentators have suggested solutions to the problems in this area, but these solutions have, for the most part, been *law oriented* rather than *police oriented*, and should be examined with a view to law enforcement problems as well as continuity of legal theory.

<sup>452</sup> ILL. REV. STAT. Ch. 38, §11-20(e).

<sup>453</sup> 389 S.W. 2d 20 (Mo. 1965).

<sup>454</sup> On the matter of persons qualified to judge what is obscene, one defense attorney suggested that since Mr. Justice Stewart claims to know it when he sees it (378 U.S. at 97) all material should be submitted to him for a ruling.

<sup>455</sup> No. 38816-38817 (Ill. Sup. Ct.) (1966).

<sup>456</sup> 311 F. 2d 94 (4th Cir. 1962).

<sup>457</sup> Brief for Appellee, 14-22.

Suggested solutions have ranged as far as proposals to use opinion surveys,<sup>458</sup> or specially trained panels,<sup>459</sup> in determining what should be suppressed, but the two proposals which seem to have the most support are Dean Lockhart's and Professor McClure's system of "variable obscenity",<sup>460</sup> and the seemingly related system of restrictions only upon publications directed or sold to children. Both systems will be discussed with regard to enforcement.

*Variable Obscenity:* Lockhart and McClure have advocated the variable approach to obscenity since their first article on the subject.<sup>461</sup> A summary of the approach was given by Dean Lockhart in an address at the University of Utah in 1961. To begin with, he stated that, in his opinion, the only material that should be denied constitutional protection is "material treated as hard-core pornography" by the primary audience to which it is sold.<sup>462</sup> In defining hard-core pornography, he borrows from Dr. Margaret Mead, who says that pornography is "calculated to stimulate sex feelings independent of the presence of another loved and chosen human being" and its "essential element" is the "daydream as distinct from reality".<sup>463</sup> He further states that this material "appeals only to the sexually abnormal or immature person", and to the "normal or sexually mature person... is repulsive [and] not attractive".<sup>464</sup> With that definition, he goes on to explain how material treated as hard-core, should be suppressed:

Censorship should not depend upon the intrinsic nature of the material independent of its audience and method of marketing. Instead, it should depend upon the manner in which it is marketed and the primary audience to which it is sold. In this way constitu-

tional protection can be given to the occasional legitimate distribution of hard-core pornography for scientific purposes, while at the same time censorship of material that is not intrinsically hard-core pornography can be permitted when the manner of marketing and the primary audience to which it is marketed indicate that it is being treated as hard-core pornography—that its function in that setting is to nourish erotic fantasies in the sexually immature.<sup>465</sup>

In each instance the question should be: With respect to this *primary audience* is the material treated as hard-core...? This requires that any peripheral audience be disregarded.<sup>466</sup>

When a hole in the wall specializing in erotica, with a specialized primary audience of the sexually immature, stocks "Lady Chatterly's Lover", it is a reasonable conclusion, that the novel is offered and sold to such an audience, not for its literary and social values, but as a stimulant to their erotic fantasies.<sup>465</sup>

To begin with the characterization of hard-core pornography as "repulsive" to the normal person would seem to have been disproved both by Kinsey<sup>466</sup> and the Kronhausens,<sup>467</sup> unless to Lockhart and McClure the majority of male Americans are sexually immature. Aside from that, "variable obscenity" would seem to be almost entirely unworkable with regard to law enforcement. Lockhart and McClure recognize that there would be problems in the enforcement area, but dismiss them as inconsequential. In an earlier article they stated:

Yet it must be conceded that variable obscenity presents some practical difficulties in law enforcement. A police officer in making an arrest or a magistrate at a preliminary hearing cannot always "make necessary preliminary judgements from the book or picture itself, without for example inquiring whether an itinerant peddler is offering his wares only to rare book collectors". It is also true that in the prosecution of obscenity cases variable obscenity sometimes requires evi-

<sup>458</sup> See Getz, *The Problem of Obscenity*, 2 UN. BR. COLUM. L. REV. 216, 222 (1965).

<sup>459</sup> See Eliasberg, *Art: Immoral or Immortal*, 45 J. CRIM. L., C. & P.S. 274 (1954). The author's "standards" appear at 47 J. CRIM. L., C. & P.S. 468 (1956).

<sup>460</sup> Others have suggested the same or similar theories of obscenity. See, e.g., Joint Committee on Continuing Legal Education, *Problems in Criminal Law and its Administration* no. 9, p. 97 (1961).

<sup>461</sup> See Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 340-42 & 395 (1954); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 68-87 (1960); Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue*, 7 UTAH L. REV. 289, 296-302 (1961).

<sup>462</sup> Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue*, 7 UTAH L. REV. 289, 296 (1961).

<sup>463</sup> *Ibid.*

<sup>464</sup> *Id.* at 297.

<sup>465</sup> *Id.* at 298-99.

<sup>466</sup> See chart in Cairns, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1020 (1962).

<sup>467</sup> See KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 203-04 (Rev. ed. 1964).

dence beyond the material itself. These, however, do not seem to us to be sufficiently important objections to variable obscenity to justify its rejection as impracticable.<sup>468</sup>

It is difficult to ascertain why two such serious minded lawyers have taken such a cavalier attitude toward police enforcement problems.<sup>469</sup> It is clear that many of the paperback novels sold today have that "daydream" quality which Dr. Margaret Mead describes. They are sold, as has been pointed out, on newsstands and in drug, cigar and even grocery stores. How can a police officer, or anyone else for that matter, determine the "primary audience" to whom these works are directed or sold. Their primary appeal is to anyone who has the 50¢ or a dollar to purchase them, and because of their relatively low price this includes teenagers, children, "normal adults", and anyone else who is attracted by their suggestive covers. Consequently, to allow this type of publication to be sold freely in the neighborhood drug store while the proprietor of the "hole in the wall", who generally does not allow minors in his store, is arrested for selling the same material to the business men who patronize his store, the law would, indeed, be taking a strange position.

Outside of the foregoing objections to variable obscenity, under such a system the police officer, who is not even allowed to act upon his knowledge as to what is obscene, and who is struggling with the requirement of *scienter* and extraordinary search and seizure restrictions, would also be forced to make a case proving the "primary audience" of the material in question. In a field where there are few guidelines, even a Supreme Court decision that the *Tropic of Cancer* is not obscene would be of no guidance, because it might be obscene if it were directed to the "sexually immature".

On the surface, a variable obscenity concept is a valuable adjunct to the Supreme Court test for obscenity. It can be very useful in attempts to suppress those publications aimed specifically at deviate or youthful audiences. The Illinois obscenity statute adopts a variable obscenity concept, but only in addition to the more conventional

concepts.<sup>470</sup> Lockhart and McClure are evidently greatly impressed by the fact that Dr. Kinsey and his associates were allowed by a federal court order to bring into the country certain obscene articles for their scientific research when there was no recognized exception in the law covering such cases.<sup>471</sup> It is true that the law should not concern itself with such cases, but it seems hardly necessary to revamp the whole field to accommodate the exceptional instance. The Illinois statute deals with the problem by providing an affirmative defense to the charge of unlawful dissemination of obscenity when such dissemination "was to institutions or individuals having scientific or other special justification for possession of such material".<sup>472</sup> Dean Lockhart and Professor McClure may have had a fairly good solution to the obscenity problem in "variable obscenity" when they first suggested it over a decade ago, but, as has been shown elsewhere in this article, there have been great changes in the market since that time,<sup>473</sup> and their solution is no longer feasible.

The Supreme Court of the United States, however, seems to be moving closer and closer to a variable obscenity standard. In the *Ginzburg*<sup>474</sup> case, the Court held that the "setting" or advertising of a publication might settle the otherwise questionable issue of obscenity. In the *Mishkin*<sup>475</sup> case, the Court held that if a work appeals to the prurient interest of the members of the group to which it is primarily disseminated, then it is obscene. And in the *Memoirs*<sup>476</sup> case, the Court held that *Fanny Hill* might be obscene under some circumstances, but not under others. All of these holdings involve the concept of variable obscenity to some degree, and all complicate greatly, if not eliminate, effective police work in the area of obscenity.

The most widely advocated solution to the obscenity problem is the proposal that the only publications subject to suppression be those that

<sup>470</sup> ILL. REV. STAT. Ch. 38 §11-20(c).

<sup>471</sup> *United States v. 31 Photographs, Etc.*, 156 F. Supp. 350 (S.D.N.Y. 1957), discussed in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 69 (1960). See also PAUL & SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* 169-72 (1961).

<sup>472</sup> See ILL. REV. STAT. Ch. 38, §11-20 (c).

<sup>473</sup> See text accompanying notes 308 through 326 *supra*.

<sup>474</sup> *Ginzburg v. United States*, 383 U.S. 463 (1966).

<sup>475</sup> *Mishkin v. New York*, 383 U.S. 502 (1966).

<sup>476</sup> *A Book, Etc. v. Attorney General of Massachusetts*, 383 U.S. 413 (1966).

<sup>468</sup> Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 81 (1960).

<sup>469</sup> Either Lockhart or McClure was "for a time a police officer" but that was "years ago." *Id.* at 60 n. 337. It seems evident that he was not assigned to an obscene matter squad.

are obscene to children and designed for or directed toward children. In *Buller v. Michigan*,<sup>477</sup> the Supreme Court held that a state may not "reduce the adult population . . . to reading only what is fit for children", but the Court noted that Michigan, in fact, had another statute to protect children against obscene matter "tending to the corruption of the morals of youth," and set out the statute in full in a footnote.<sup>478</sup> And in Mr. Justice Brennan's opinion in the *Jacobellis* case, he stated:

We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be "to reduce the adult population . . . to reading only what is fit for children". State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children rather than at totally prohibiting its dissemination.<sup>479</sup>

In a footnote to this quoted portion of the opinion, Mr. Justice Brennan cited *State v. Settle*<sup>480</sup> with apparent approval. In that case, the Supreme Court of Rhode Island had upheld the constitutionality of section 11-31-10 of the Rhode Island General Laws which reads in pertinent part as follows:

Every person who shall . . . sell . . . to any person under the age of eighteen (18) years . . . any book . . . the cover or contents of which exploits, is devoted to, or is primarily made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain . . . shall . . . be punished by a fine . . . or by imprisonment . . .

However, the New York Court of Appeals in *People v. Bookcase, Inc.*,<sup>481</sup> held to be unconstitutional section 484-h of the New York Penal Law,

<sup>477</sup> 352 U.S. 380 (1957).

<sup>478</sup> *Id.* at 383. See also *In Re Louisiana News Co.*, 187 F. Supp. 241, 247-48 (E.D. La. 1960).

<sup>479</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964).

<sup>480</sup> 90 R.I. 195, 156 A. 2d 921 (1959).

<sup>481</sup> 14 N. Y. 2d 409, 201 N.E. 2d 14, 252 N.Y.S. 2d 433 (1964).

which is almost a verbatim copy of the Rhode Island statute involved in the foregoing *Settle* case. This holding, reversing a conviction for the sale of *Fanny Hill* to a minor, appears to be based upon the theory that the statute is unconstitutionally vague, or, in the alternative, unconstitutionally broad in its coverage, rather than upon the theory that a state cannot pass legislation relating specifically to sales of obscenity to minors.

Thus, the courts have long been ready to enforce obscenity restrictions which provide a special standard for or protect the youth of the nation. Recent law review commentaries and other articles have to a great extent expressed the same view,<sup>482</sup> and the findings of Dr. Kinsey and his associates support this view to some extent.<sup>483</sup> On the other hand, censors are always open to criticism on the ground that they never admit that they are subject to corruption; censorship is to protect others.<sup>484</sup> John Bowdler's Society for the Suppression of Vice, which was active in early 19th Century England, was dubbed "a society for suppressing the vices of those whose incomes do not exceed £500 per annum,"<sup>485</sup> and the question was always whether or not you would want your wife, or your children, or servants to read the publication in question.<sup>486</sup> Now that it has been determined that pornography has very little appeal to women and that we live in a "classless society" where the idea of "noblesse oblige" is no longer deemed applicable to servants, perhaps the only battle ground left for the censors is children. And there is very little scientific evidence pointing to

<sup>482</sup> See BIRKETT, *The Changing Law*, in "TO DEPRAVE AND CORRUPT . . ." 83 (1962); RUTLEDGE, *DOES PORNOGRAPHY MATTER?* 90 (1961); Fagan, *Obscenity Control and Minors—The Case for a Separate Standard*, 10 CATH. LAW. 270 (1964); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834 (1964); Hoover, *Combating the Merchants of Filth: The Role of the F.B.I.*, 25 U. PITT. L. REV. 469, 473 (1964); Kuh, *Obscenity: Prosecution Problems and Legislative Suggestions*, 10 CATH. LAW. 285, 298 (1964); Note, 52 KY. L.J. 429 (1964); Note, 43 N.C.L. REV. 172, 185 (1964); *Recent Decision*, 16 W. RES. L. REV. 780, 784 (1965); Note, 1964 WASH. U.L.Q. 98, 116. But see, Gertz, *The Illinois Battle over the "Tropic of Cancer"*, 46 CHI. BAR REC. 161, 167 (1965).

<sup>483</sup> See text accompanying notes 49 & 55-57 *supra*.

<sup>484</sup> See ALLEN, *The Writer and the Frontiers of Tolerance*, in "TO DEPRAVE AND CORRUPT . . ." 144 (1962).

<sup>485</sup> See ST. JOHN-STEVAS, *The Church and Censorship*, in "TO DEPRAVE AND CORRUPT . . ." 104 (1962). The recent "cleanup" of New York's Times Square area has been criticized on the same grounds.

<sup>486</sup> See ALLEN, *The Writer and the Frontiers of Tolerance*, in "TO DEPRAVE AND CORRUPT . . ." 148 (1962); GOSLING, *DOES PORNOGRAPHY MATTER?* 64 (1961).

the conclusion that boys are more adversely affected by obscene matter than are men,<sup>487</sup> or that they are affected at all (outside of merely being aroused) for that matter.

Aside from the fact that suppression of obscenity for youths only is open to question on policy grounds, it may also be objectionable because it is unenforceable. Cardinal Spellman has been quoted as saying that 75-90% of the pornography sold falls into the hands of youth, no matter who buys it.<sup>488</sup>

Police enforcement of an obscenity statute designed only to protect children might be just as difficult as it would be under a system of variable obscenity. Where a publication was not clearly directed to a youthful audience, the police officer would be required to wait until he actually observed a sale to a minor before making an arrest. It is true the officer would not have to make further determination as to whether the youth was a member of the primary audience, or just the peripheral audience, but it is clear that more officers than are presently being used to enforce the present obscenity laws in Chicago (which is the whole police force)<sup>489</sup> would be needed to enforce such a law.

Some have suggested that non-hard-core obscenity be treated as alcoholic beverages are treated. Under such a system, it is to be presumed, it would be a crime to sell pornography to minors, but the law would not be concerned with what the parents gave the children at home. The fallacy in

the analogy lies again in enforcement. The device used to make the enforcement of liquor laws possible is the license. It is used to limit the number and possible locations of purveyors of such beverages, and, most important, it is used as a powerful sanction to insure compliance with the law, which is, in most cases, voluntary compliance. A single violation may mean the loss of the license and the end of the violator's business. And there are other sanctions which are as powerful deterrents as license revocation, but because of their nature (e.g., imprisonment or large fines) the courts are reluctant to impose them in obscenity cases. Most lawyers and laymen are horrified at the thought of licensing book stores even if a system under which the granting of a license would be mandatory is suggested, and indeed the Court might very well strike down such a licensing statute as unconstitutional under the first amendment.

As they have in other areas of the criminal law, the courts generally, and the Supreme Court of the United States in particular, have sought to solve the conflict between the "rights" or interests of the individual and the interests of society in the area of obscenity by placing an ever increasing burden upon the police and the prosecution. This is a particularly happy solution for the Court and its protectors because the critics on the one side can be answered by saying that the Court has not held obscenity laws to be unconstitutional, and the critics on the other side can be placated by the fact that under the direction of the Court the law is becoming more and more liberal. It is true that the burden of forced ineffectiveness, and the blame for both action and inaction is being placed upon the police, but they seem to have become very popular whipping boys anyway.

It is time that the courts, the legislatures and the public, including the booksellers and publishers, accept the responsibility for pornography as their own. The first step is to recognize that the sole responsibility is not that of the police and the solution is not the placing of additional restrictions and responsibility upon the police.

<sup>487</sup> One might in fact conclude that just the opposite is true. Almost a century ago Lewis Carroll (Rev. Charles Dodgson) wrote in answer to those who criticized *Alice in Wonderland* for its many references to beheading:

"As far as I know, there have been no empirical studies of how children react to such scenes and what harm if any is done to their psyche. My guess is that the normal child finds it all very amusing and is not damaged in the least, but that books such as *Alice's Adventures in Wonderland* and *The Wizard of Oz* should not be allowed to circulate indiscriminately among adults who are undergoing analysis," quoted in GARDNER, *THE ANNOTATED ALICE* 109 n. 2 (1960).

<sup>488</sup> See Fagan, *supra* note 482 at 275 n. 26.

<sup>489</sup> See text accompanying notes 388 through 390 *supra*.