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STATE AND FEDERAL CENSORSHIP

CHARLES J. TOBIN, JR.*

THE RECENT DECISIONS of the Supreme Court in *Roth v. United States*,¹ and *Kingsley Books, Inc. v. Brown*,² have given new encouragement to those forces in the community which are concerned with the elimination of indecency and obscenity from our various communications media. Both at the state and federal level, government has a significant role to play in the total control by the community of the existing media in order to protect the public interest and foster the general welfare. Governmental means for such controls must exist side by side with the efforts of other elements in society to eliminate publications which violate the natural law and are demonstrably responsible for serious harms to the community.

The principal instrumentality through which government may initiate these protections is legislative enactment. Once so initiated, it becomes the role of society to support the fair and just enforcement of such laws. Religion, social groups, education, business and labor will find common objectives in supporting the judicial and administrative branches of government in the performance of their duties under such laws. It is well to examine the background of government's role and to consider the means which are available or which may be made available to it to carry out its share of the total task.

In Anglo-Saxon jurisprudence, the earliest reported instance of government control of obscenity is found in 1663 in *Sir Charles Sydlyes Case*,³ which involved a celebrated incident of indecent exposure. It was not until 1727 in England that obscenity in literature found its punishment in the common law court.⁴ Prior to that time obscenity was punishable only in the ecclesiastical courts, though public profanity and similar offenses against religion were indictable offenses at

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¹ 354 U.S. 476 (1957).

² 354 U.S. 436 (1957).

³ 1 Keble 620, 83 Eng. Rep. 1146 (K.B. 1663).

⁴ *Rex v. Curl*, 2 Strange 788, 93 Eng. Rep. 849 (K.B. 1727).

the common law.⁵

Since early colonial days, government in the United States has provided statutory prohibitions against the publication, sale and distribution of written material harmful to society. In many instances these early



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statutes expressed their limitations in terms of vice, immorality, blasphemy or profanity. Characteristic of these statutes was the law of the Massachusetts Bay Colony which made it a crime to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon in imitation or mimicry of religious services."⁶

These early laws passed through various stages of amendment to reach the form of statute which may be found today in every state in the Union, except one.⁷ These statutes are similar in their content and may be typified by the New York statute which makes it a misdemeanor to sell, distribute or otherwise transmit any "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic, or disgusting" publication.⁸ These statutes have been the occasion of sporadic

⁵ See 3 CATHOLIC LAWYER 180 (April 1957), for a history of the development of government control of obscenity. See also for a review of the early history of obscenity laws, Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938).

⁶ Acts and Laws of the Province of Mass. Bay Colony, CV § 8 (1712); Mass. Bay Colony Charters & Laws 399 (1814). See also Act for Suppressing Immorality § IV (1788), 2 Laws of N. Y. 257, 258 (Jones & Varick, 1777-1789).

⁷ See *Roth v. United States*, 354 U.S. 476 (1957).

⁸ N.Y. PEN. LAW § 1141.

periods of enforcement and have been considered in reported judicial opinions in few instances. Until recent years little attempt has been made to develop other enforcement devices in supplement of the criminal sanction.

Under the more limited authority provided by delegated powers, the federal government has provided, for over a century, various statutes to restrict the dissemination of obscene publications. As an incident of its power over interstate and foreign commerce and its conduct of the postal system, statutes have been enacted which prohibit the use of such commerce, or such system, for the dissemination of obscene material. For example, "every obscene, lewd, lascivious, or filthy book" or other publication is prohibited from using the mails, and a substantial penalty is provided for violation.

The experience of enforcement of these federal and state statutes has been varied and has had only a limited restraining effect upon the dissemination of objectionable publications. The few reported opinions involving these statutes have arisen principally in Massachusetts and New York, and we have found a substantial divergence in approach by the distinguished courts of these two states. The New England Watch and Ward Society was the inspiration of rigid enforcement in Massachusetts. The first conviction on record took place in 1821 for the publication of a book.⁹ Strict judicial interpretation of the obscenity was provided in *Commonwealth v. Buckley*,¹⁰ in which that court adapted the rule of *Regina v. Hicklin*,¹¹ in which a particularly objectionable anti-Catholic publication was

⁹ *Commonwealth v. Holmes*, 17 Mass. 335 (1821).

¹⁰ 200 Mass. 346, 86 N.E. 910 (1909).

¹¹ L.R. 3 Q.B. 360 (1868).

declared in violation of the English Obscene Publications Act, 1857. The English rule developed in this case was;

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.¹²

The rule so established in *Regina v. Hicklin* was adopted by other United States courts.¹³ It provided flexibility in the judgment of obscenity as it enabled a determination to be predicated upon the obscene character of a portion of a publication as well as upon a consideration of the probable effect upon the young or immature.

In New York, however, a more "liberal" rule was being established by gradual judicial interpretation.¹⁴ These and other decisions modified the *Hicklin* rule, based upon so-called expert opinions from literary critics and persons denominated as prominent in the community.

The most serious judicial limitation upon the obscenity statutes took place in 1933 in *United States v. Ulysses*.¹⁵ In the circuit court the rule in the *Hicklin* case was clearly repudiated and a new test was evolved which was expressed in the following excerpt from the opinion;

While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of the approved critics, if the book is modern, and

the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.¹⁶

Under our federal system the power of the people to punish individuals for conduct which is harmful to the community lies fundamentally in the states. The powers granted to the federal government by the states include certain areas of responsibility in which there arises incidental opportunity to protect the common welfare against the distribution of obscene printed matter, *viz.*, control of the postal system,¹⁷ import and export laws, and the regulation of interstate commerce. In the field of new media of communication, radio and television, the degree of responsibility is increased, in view of the substantial control which the federal government has over the conduct of these media. This has been emphasized because of the particular character of these media which make local or state enforcement of standards of conduct extremely difficult.

One of the inherent weaknesses of the present system of federal control over the licensing and re-licensing of radio and television stations is that neither the law nor administrative action has sought to provide and define the proper responsibility of the government in determining whether the facilities which have been made available to operators by administrative grant have been used in derogation of the general welfare. Occasional attempts have been made to control program content through the re-licensing procedure but lack of strong administrative determination has resulted in

¹⁶ *United States v. Ulysses*, 72 F.2d 705, 708 (2d Cir. 1934).

¹⁷ For a penetrating study of a case involving obscenity, see Schimdt, *A Justification of Statutes Barring Pornography from the Mail*, 26 *FORDHAM L. REV.* 70 (1957).

¹² *Regina v. Hicklin*, L.R. 3 Q.B. 360, 371 (1868).

¹³ *United States v. Kennerley*, 209 Fed. 119 (S.D.N.Y. 1913).

¹⁴ *People v. Eastman*, 188 N.Y. 478, 81 N.E. 459 (1907); *People v. Brainard and Harper & Bros.*, 192 App. Div. 816, 183 N.Y. Supp. 452 (1st Dep't 1920).

¹⁵ 72 F.2d 705 (2d Cir. 1934).

a failure to establish firmly, and enforce, accepted standards.

In 1946, a modest attempt was made when the Federal Communications Commission issued its so-called "Blue Book," or *Standards for Evaluation of Programming of Licensees*.¹⁸ While the "Blue Book" has been discussed and re-discussed in the intervening years, it has continued to remain in the background as a threat rather than a positive force in maintaining standards of good programming.

Part of the reason for this inaction in an area in which a federal agency has an opportunity to establish and maintain strong standards in the community interest, has been the sporadic, but sincere, attempts of the broadcasters themselves, through trade associations, networks and other groups to maintain acceptable norms. Commendable as such attempts may be, they are not an appropriate substitute for governmental exercise of its responsibility in the licensing and re-licensing of radio and television stations.

As a result of the judicial confusion which developed in the enforcement of the criminal obscenity laws, police and prosecuting officers moved slowly to respond to the public efforts to suppress the widespread dissemination of obscene and indecent publications which flooded the newsstands and drug counters of the nation after the close of World War II.¹⁹ Most significant of the decisions which created this reluctance was *Winters v. New York*,²⁰ which ruled un-

constitutional a New York statute²¹ that made it a criminal offense to sell or distribute publications devoted principally to stories of crime and criminal acts. The decision indicated that the Court would require, in such prohibitory statutes, a precision of definition which was not present in any existing statutes.

Concurrent with these developments, more adequate statutory safeguards were needed because of abuses which prevailed in the distribution of comic books, of paper-bound novels and in picture magazines. New techniques of enforcement were explored and significant developments occurred which merit consideration for those charged with the improvement of our statutes in the several states and in the federal government.

Most significant of these techniques is the use of the injunction which was sustained recently by the Supreme Court in *Kingsley Books, Inc. v. Brown*.²²

The statute involved in that case was originally enacted by the New York State Legislature in 1941 and was subsequently amended in 1954 in order to eliminate objections which had been raised to the statute by law enforcement officers.²³ It provides that the chief executive officer or the principal legal officer of any municipality may maintain an action for an injunction against the sale or distribution of any written or printed matter which is obscene, lewd, lascivious, filthy, indecent or disgusting. The section provides for prompt trial and decision in the action, under a provision which requires that there be a trial of the issues within one day after joinder

¹⁸ See FEDERAL COMMUNICATIONS COMMISSION, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946).

¹⁹ For a critical review of the law of obscenity, see Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

²⁰ 333 U.S. 507 (1948).

²¹ N.Y. PEN. LAW § 1141(2).

²² 354 U.S. 436 (1957).

²³ N.Y. CODE CRIM. PROC. § 22-a, as amended, Laws of N.Y. 1954, c. 702.

of issue, and a decision rendered within two days after the conclusion of the trial.

This procedure is an effective weapon for prompt action against the dissemination of obscene literature and has been used effectively in municipalities throughout the State of New York. As a civil procedure, it has particular merit in those jurisdictions where law enforcement agencies and prosecuting officials are reluctant to charge distributors or vendors with a crime under the usual type of obscenity statute.

Successful prosecution of such an action results in an injunction against the sale or distribution of the publications involved in the action, and provides that the defendants in the injunction proceedings surrender to the sheriff of the county all copies of the publications so that they may be destroyed. This aspect of this statute is similar to those statutes which provide for a proceeding against the obscene publication or article itself. While aimed directly at the purveyor of the obscene publications, the injunction against future sales of the same publications should normally act as a successful deterrent for most distributors or vendors. An important amendment was made to this statute in 1957 by extending its jurisdiction to the publishers of obscene books, magazines or pamphlets.²⁴ Thus, a proceeding brought against a publisher in New York, if successful, would be effective to prevent distribution of the offending publications throughout the State of New York and make unnecessary multiple proceedings in various areas.

In the 1957 session of the Minnesota Legislature, a proposal was introduced which deserves careful examination as an example of the effort being made throughout the United States to find effective means

²⁴ Laws of N. Y. 1957, c. 182.

to deal with obscene and indecent publications. The bill was based upon a study made of the law of obscenity by William B. Lockhart and Robert C. McClure of the Minnesota Law School.²⁵ The proposed statute would supplement the existing obscenity statute in Minnesota with a procedure which would empower the attorney-general or the county attorney to institute a proceeding in the district court for the adjudication of the obscenity of specified printed matter. The proceeding would be directed against the printed matter itself and would allege the obscene nature of the printed matter and would set forth the names of all persons who were known to be either author, publisher or otherwise interested in the sale or distribution of the printed matter.

Under the procedure, the district court would summarily examine the printed matter charged as obscene and, if it determines that there was probable cause to believe it obscene, it would issue an order to show cause why the printed matter should not be adjudicated obscene. The procedure requires newspaper publication of the order to show cause, service upon all of the persons listed in the application to the court and provides for a return date in thirty days. Pending the hearing on the order to show cause, the district court would be authorized to make an interlocutory order which would effectively restrain the sale and distribution of the publication until hearing and determination.

The proposal provides for a procedure upon the hearing alike to the procedure applicable to the trial of cases by the court

²⁵ Lockhart and McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587 (1955); Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

without a jury. The proposed statute sets forth the types of evidence, including expert testimony, which the court shall receive. This enumeration is as follows;

- (a) the class of persons comprising the audience to which the printed matter is primarily directed by its nature and the manner of its publication, advertisement, distribution and sale;
- (b) the effect of the printed matter, considered as a whole, upon the sexual behavior of readers typical of the class of persons to whom the printed matter is primarily directed;
- (c) artistic, literary, scientific and educational values of the printed matter, considered as a whole; and
- (d) intent of the author and publisher in writing and publishing the printed matter.

The statute would require that the court consider each of the matters so enumerated and include a determination on each matter in the findings of fact and conclusions of law, or memorandum, at the conclusion of the trial.

If the court determines that a certain publication is obscene, under the proposed statute, the consequence is that a person who sells or distributes such publication is presumed to know it is obscene and is in violation of the criminal obscenity statute and may be charged with such violation.

While this proposal is a commendable effort to find a satisfactory statutory procedure for dealing with the dissemination of obscene and indecent publications, several of its provisions would mitigate against its effectiveness to accomplish the objective intended.

Most of the earlier cases involving obscenity in literature were concerned with full length books, but today the current

concern relates to magazines, comic books, paper-bound books and pamphlets which are published monthly and which turn over rapidly on the newsstands.²⁶ In order to reach these publications effectively, it is necessary to have a procedure which will act promptly. Otherwise, the harm may well be done long before a final adjudication is obtained. While promptness is a keystone of the New York statute, the thirty day period provided by the Minnesota proposal is an unreasonable period of time to delay the proceeding. It is true that the Minnesota proposal authorizes the court to grant an interlocutory order but this can have only a minimum effect because of the relationship of the proposed statute to the existing obscenity law. In other words, a violation of the interlocutory order against the sale of the cited printed matter, pending trial, would only create a presumption which would be usable in a criminal prosecution under the Criminal Obscenity statute. The cumbersome nature of this procedure, while a trial is pending, would inevitably cause the court to be reluctant to issue such interlocutory orders.

This criticism with respect to the use of the interlocutory order is equally applicable to the procedure with respect to the final adjudication. The preliminary trial with respect to the obscenity of printed material is, under the statutory plan, only the first stage in ultimate prosecution of individuals for the sale or commercial distribution of the matter. While the determination of obscenity in the proposed procedure will provide a helpful presumption in the prose-

²⁶ See 1956 LEG. DOC. NO. 32, 1957 LEG. DOC. NO. 83, REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE STUDYING THE PUBLICATION AND DISSEMINATION OF OBJECTIONAL AND OBSCENE MATERIALS (hereinafter cited as COMMITTEE REPORT ON OBSCENE MATERIALS).

cution of cases under the obscenity statute, it would be, in no sense, binding upon the court in such a criminal proceeding and the issues sought to be determined in the proposed proceeding might be raised again in the criminal proceeding. It is believed that the proposal would become a more effective procedural tool if it contained, within it, sanctions against the material and the persons responsible for its sale and distribution. Authority might be provided to include in the proceeding, as defendants, any persons or corporations which are determined by police investigation to have in their possession, for sale or resale, copies of the obscene material. The final judgment might then provide for the destruction of all such material found to be obscene, as a result of the determination of the court, which is in the possession of the persons who have been made party defendants in the proceeding.

Lastly, the attempt of the proposed statute to require that the court receive, pass upon and make determination with respect to certain criteria is an unreasonable limitation upon the authority of the court. While the listed criteria are those considered by the draftsman of the bill to be essential to a determination of obscenity²⁷ this view is not shared by others interested in the effective elimination of obscene literature from the newsstands.²⁸

To enumerate certain criteria places a straitjacket upon the court, which is a veiled criticism of its ability to arrive at a correct result by the evaluation of all relevant factors. It is believed that dependency

²⁷ Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

²⁸ See generally, 1956 LEG. DOC. NO. 32, 1957 LEG. DOC. NO. 83, COMMITTEE REPORT ON OBSCENE MATERIALS, *supra* note 25.

must be placed upon the court to consider all relevant evidence and use available case-law to enable it to reach a satisfactory determination.

It is encouraging that the state legislatures, such as Minnesota, are considering the development of new statutory techniques to deal with the obscenity menace. With modification along the lines suggested, it would be helpful that this procedure be enacted and utilized so that the experience may be studied to determine its effectiveness for the purpose desired. It has been characteristic of the whole field of obscenity control over the years that statutory proposals have been more numerous than the prosecuting efforts. Within limits, all possible procedural tools should be made available to the community and its enforcement officials in order to eliminate excuses for inaction.

Among the statutory proposals which have been widely considered in recent years, is the establishment of a government agency which would review all materials offered for sale on the newsstands and in the bookstores of the state and would render advisory opinions to prosecuting officials with respect to those publications which it considers to be in violation of the existing state obscenity statute. It was a proposal of this type, relating to comic books, made in the 1949 session of the New York Legislature, that was one of the factors leading to the establishment of a legislative committee to study the publication and dissemination of offensive and obscene material. During the first years of its study, this proposal remained in the background, as the committee collected evidence and made corrective changes in the existing New York statutes, and proposed additional statutory procedures. In 1956

it presented in its annual report a proposed bill which would establish a literature division in the State Education Department.²⁹ Under the proposal the division would be composed of three citizens who would meet at least monthly to hold hearings, and make findings on literature that they found to be obscene. The division would have the authority to recommend prosecution of persons in the state who were found to be selling obscene literature. The division would also furnish district attorneys with data which would be helpful to them in the prosecution of persons under the usual obscenity statutes.³⁰ In 1957 the same committee suggested that the legislature give consideration to the establishment of such a literature division to act as a continuing body in substitution of the legislative committee, when the legislative committee ceased to function.³¹

In recent years the State of Georgia has sought to answer the problem of obscene literature by the establishment of such a Literature Commission. This commission meets periodically, reviews literature, receives complaints, holds hearings and recommends prosecution with respect to any printed material which it finds to be in violation of the obscenity statutes of Georgia. Its conclusions are merely advisory to the respective prosecuting officials.

Certain criteria used by the Georgia Commission in determining whether a publication is obscene are alike to certain of the criteria suggested in the proposed Minnesota statute previously referred to. These are as follows;

²⁹ 1956 LEG. DOC. NO. 32, COMMITTEE REPORT ON OBSCENE MATERIALS 45.

³⁰ *Id.* at 46.

³¹ 1957 LEG. DOC. NO. 83, COMMITTEE REPORT ON OBSCENE MATERIALS 61.

1. What is the general and dominant theme?
2. What degree of sincerity of purpose is evident?
3. What is the literary or scientific worth?
4. What channel of distribution is employed?
5. What are the contemporary attitudes of reasonable men towards such matters?
6. What type of readers may be reasonably expected to peruse the publication?
7. Is there evidence of pornographic intent?
8. What impression will be created in the mind of the reader upon reading the work as a whole?

While the establishment of such an advisory commission has objective merit, there are certain practical problems to be anticipated in its administration which militate against its effectiveness. Any governmental agency of this kind ultimately rests its basic responsibility in a small group of full-time civil servants whose continual attention to the review of publications of all types tends to insulate them from the public-at-large. There may grow up a group of professionals in the field who establish criteria and standards which do not reflect fully the conscience of the community. It is felt that this condition has arisen to a certain extent in the state-licensing of motion pictures. It is realized that movies which are generally considered indecent and obscene have been licensed by the professional staffs of state-licensing boards. A forceful example of this occurred recently in the motion picture, "Baby Doll," which was almost universally condemned as an indecent and obscene motion picture, but was duly licensed by the few state-licensing boards now operating.

Furthermore, there is a concomitant effect of review by a commission or board which tends to give the seal of approval to those publications which manage to pass the review of the professional staff. This condition has even been given statutory acceptance. In New York, a motion picture which is licensed by the State Department of Education is immune from prosecution under the state obscenity statute even though local prosecuting officials may be perfectly satisfied in their own judgment that the motion picture is obscene and warrants prosecution for violation of the statute.

While state censorship and licensing of motion pictures has a substantial merit because of the nature of the motion picture industry, it is believed that, in the field of publications, more effective advisory judgments can be obtained through competent community organizations acting alertly in cooperation with local prosecuting officials. Such groups more readily reflect the moral standards and judgments of the community than do protected civil service departments.

Aligned with effective community organizations in helping prosecuting officials to carry out their responsibilities, under effective statutory enactments, is the valuable resource of the grand jury investigation. This device is, perhaps, the most effective, and at the same time the least considered, of the many available devices which can be utilized in the community for the elimination of obscene and indecent literature. Grand juries reflect promptly the conscience of the community, in its reaction to the dissemination of obscene material. Investigation by a grand jury has a tradition in Anglo-American law which gives to its proceedings a status which cannot be

developed for any newly-created agency. The established powers of the grand jury are adequate for appropriate investigation³² and it would be difficult to provide similar powers for any specialized agency. In addition, the mere fact that a grand jury inquires into the subject of the sale and publication of obscene materials is a substantial deterrent to those elements in the community who are consciously dealing in obscene material. In recent years communities have found that continuing interest of the grand jury in the types of publications found on the newsstands of the community has curtailed the distribution and sale of most obscene material, without the necessity of prosecution.

Another significant statutory tool which should be considered by our legislative bodies is a special statute to punish those responsible for the sale of immoral, indecent and obscene publications to persons under the age of eighteen. Such a statute should be designed to avoid the implications of the decision in *Butler v. Michigan*³³ and at the same time provide an effective means for the arrest and conviction of persons who sell or distribute to children. The general judicial rejection of the rule of *Regina v. Hicklin*,³⁴ and the adoption of a judicial test by which the material charged to be obscene is judged in relation to the average adult in a community, makes it imperative that some additional criminal sanction be provided against those vendors and distributors who direct their efforts towards children.

A statute of this character was enacted in 1955 by the New York State Legislature

³² *United States v. Thompson*, 251 U.S. 407 (1920).

³³ 352 U.S. 380 (1957).

³⁴ L.R. 3 Q.B. 360 (1868).

with respect to comic books, pocket books, photographs, pamphlets, magazines and pornographic films.³⁵ The act made certain legislative findings with respect to the effect of obscenity, brutality, and immorality upon children and provides for a broader scope of prohibited publications than is found in the New York obscenity statute which applies to all publications. The objective of this type of legislation is to penalize the vendor who knowingly sells publications containing some obscene material to persons under the age of eighteen. The test of *scienter* should be made explicit and should be based upon a determination as to whether a reasonable inspection would disclose the nature and content of the publication as obscene. A statute of this type directed against the sale of publications to children can include in its scope categories of undesirable publications which go beyond the limited judicial definition of obscene. Violence, brutality, nudity and immorality may be prohibited under such a statute whereas the courts would be reluc-

³⁵ N.Y. PEN. LAW §§ 540-42.

tant to prohibit these matters with respect to the sale of publications to adults.

Censorship through statutory enactment by the state and federal governments is in a violent period of change which requires diligent consideration by our legislative bodies. The implications of recent judicial determinations, and various procedural tools which have been developed in some jurisdictions in recent years, should be studied. Legislative concern for the serious problem confronting the American people in the sale and distribution of obscene materials can be reflected in legislative inquiry and community response. In the last analysis, the people, in their respective communities, acting through their duly designated, elected officials, can obtain the kind of law enforcement against obscene, indecent and immoral publications which they desire. Once the statutory tools are in hand, it becomes the responsibility of the community, through community organizations, grand jury investigations, education and parental responsibility, to accomplish the results that all men of good will seek.