

Obscenity Control and Minors - The Case for a Separate Standard

Edward T. Fagan

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

OBSCENITY CONTROL AND MINORS— The Case for a Separate Standard

EDWARD T. FAGAN*†

Introduction

THE LONG ANTICIPATED CLARIFICATION of what is meant by totally suppressible obscene material¹ was finally made last June by the United States Supreme Court. *Jacobellis v. Ohio*,² coupled with its two companion per curiam decisions, *Grove Press, Inc. v. Gerstein*³ and *Tralins v. Gerstein*,⁴ limited such material to hard core pornography on the ground that such material is utterly void of socially redeeming importance.⁵

While this clarification did not come as much of a surprise,⁶ that which truly confounded the legal world was the totally inexplicable decision of the New York Court of Appeals a month later in *People v. Bookcase, Inc.*⁷ In this case the court declared unconstitutional a statute which provided protection solely to minors against those who sought to distribute obscene material to them for profit. The identical statute, which had also been enacted in Rhode Island, had been declared constitutional in 1959 by the Rhode Island high court in *State v. Settle*.⁸

* Professor of Law, St. John's University School of Law; Editor of *The Catholic Lawyer*.

† The author is indebted to the St. Thomas More Institute staff for research assistance in the preparation of this article.

¹ Fagan, *Editorial Comment*, 9 CATHOLIC LAW. 267 (1963).

² 378 U.S. 184 (1964).

³ 378 U.S. 577 (1964).

⁴ 378 U.S. 576 (1964).

⁵ What however is hard core pornography? Mr. Justice Stewart admits, in his concurring opinion, that he cannot define it but he knows it when he sees it. *Supra* note 2, at 197.

⁶ See Regan, *Freedom of the Mind and Justice Brennan*, 9 CATHOLIC LAW. 269, 276 (1963).

⁷ 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964).

⁸ 90 R.I. 195, 156 A.2d 921 (1959).

The Rhode Island case had also been cited with approval by Mr. Justice Brennan in his opinion in the *Jacobellis* case⁹ as an example of proper remedial legislation governing sales of obscene material to minors.

The net result of these recent cases has been to leave the children of New York State almost completely vulnerable to the poison dispensed by those who traffic in obscenity for profit.¹⁰ It is imperative, therefore, that all responsible members of the community take immediate action to re-establish appropriate legal safeguards for children against this danger. Lawyers, of necessity, must be the leaders in such remedial activity.

It is obvious to all students of law and to others who are interested in the particular aspect of law dealing with censorship that governmental regulation of obscenity has already been exhaustively analysed and discussed by a myriad of experts and jurists.¹¹ Numerous arguments have been advanced in the past by the "Philistines" who advocate variable standards as the basis for determining suppressible ob-

scenity on the adult level or who support the extension of the definition of legal obscenity to include all materials which might remotely smack of the licentious or the indecent. The "Libertarians" have been equally emphatic in their denunciations of any curbs whatsoever on the freedom of artistic expression. In effect, a torrent of writing has already been loosed—official, legal, psychological and lay.

For all practical purposes, further discussion and disputation in this area seems at first blush to have become academic. We now know that hard core pornography is all that can be removed from the adult book market. However, what has not been satisfactorily established to date is the exact nature of obscene material which, in addition to hard core pornography, can legally be barred from sale to minors. Too many people are prone to conclude that only hard core pornography can be withheld from both child and adult as a result of present Supreme Court and state court pronouncements. This conclusion is unwarranted.

Scope of Article

The aim of this article, therefore, is twofold. First, it shall delineate the separate classification, in law, of minors as a prospective audience for obscenity. This distinction has been uniformly recognized and accepted throughout the evolution of obscenity law and continues to exist to the present time. Recognition of such separate status becomes meaningful only if it further extends to the acceptance of a separate standard for the determination of what constitutes suppressible obscene material with respect to such minors. That such a separate standard exists is apparent from case law analysis.

⁹ *Supra* note 2, at 195 n.11.

¹⁰ New York is not alone in this predicament. Other states in a similar situation are California and Maryland.

¹¹ Without endeavoring to furnish a complete bibliography, the following are suggested in their respective fields. AMERICAN LIBRARY ASSOCIATION, *THE FIRST FREEDOM* (1960) (a general survey of the problem—a complete collection of materials). Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954); Lockhart & McClure, *Censorship of Obscenity; The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960) (a complete survey of the law to mid-1960); Hayes, *The Law of Obscenity*, 8 CATHOLIC LAW. 93 (1962); ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* (1956).

Secondly, it will endeavor to provide suggestions and *caveats* for the formulation of this separate standard to draftsmen who may presently be working on remedial obscenity legislation. It will also explore possible collateral aids to implement the enforcement of such a separate standard, once statutorily defined.

Separate Minor Classification

a) *Public Morality*

In regard to youth it has always been assumed in law that the government has a special responsibility and authority. According to the Supreme Court:

A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.¹²

Is it equally true that the law has always upheld the authority of government to prohibit that which offends public morality precisely because of its immoral character?¹³ It is particularly important to note here that while the police power is the means by which the state acts to protect public morality it normally will not be exercised if in such exercise the state interferes with freedoms guaranteed under the first amendment. In the case of *Prince v. Massachusetts*,¹⁴ it was established that in the realm of religious freedom the state has the right to restrict the child if such restriction is deemed necessary to protect the

child. (Although if such action were directed against an adult it would be clearly unconstitutional as an abridgement of his first amendment freedom.) Obviously, if religious freedom can be restricted, so also can freedom of speech be restricted in a child for his protection. It follows, therefore, that if the state determines that a restriction of a child's freedom, in the area of reading or scrutinizing certain materials, is necessary for his protection the exercise of police power should be justified in restraining the child from examining such materials. As a corollary to such child restraint, it follows further that adults may be restrained from selling such material to children even though such restraint limits to some extent the guarantee of free speech and free press which the adult may otherwise claim.

A unanimous Supreme Court, speaking through Mr. Justice Swayne, has said:

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of history.¹⁵

With respect to the question of who is to determine what is violative of public morality, the Supreme Court has said:

Under our system that power is lodged in the legislative branch of the government. It belongs to that department to exert what are known as police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.¹⁶

In this connection an important considera-

¹² *Prince v. Massachusetts*, 321 U.S. 158, 168 (1943).

¹³ Whelan, *Censorship and the Constitutional Concept of Morality*, 53 GEO. L.J. 547 (1955). For a discussion of the differences between law and morality see ST. JOHN-STEVAS, *LIFE, DEATH AND THE LAW* (1961).

¹⁴ 321 U.S. 158 (1943).

¹⁵ *Trist v. Child*, 88 U.S. (21 Wall.) 441, 450 (1874).

¹⁶ *Mugler v. Kansas*, 123 U.S. 623, 660 (1887).

tion in dealing with legislation restrictive of free speech is the division of responsibility between the legislature and the court in determining whether a certain type of expression produces evil results.¹⁷ It is not the function of the court to debate the wisdom of a legislative determination that obscene material can cause a moral deterioration in the young and a resultant tendency toward juvenile delinquency. In an area where the psychological experts are so divided, the policy decision is the legislature's, not the courts'. This is not to say that the courts cannot, in a due-process case, find that the legislative inferences from available data are so unreasonable and arbitrary as to be invalid. It is submitted that the courts' share of the responsibility is to accept the legislative judgment of the causal relationship between obscene material and societal evil as valid if not unreasonable—not to accept it as valid only if convinced it is sound.

The concern of the various communities throughout this country and, in fact throughout the world with respect to obscenity has been long established.¹⁸ These communities, after exhaustive analysis of the pros and cons as to the deleterious effect of obscene material, have determined

that obscenity corrupts morals and character and should be eliminated.¹⁹ This opinion is particularly evident with respect to children. Since the communities have strongly indicated their position concerning the adverse effect of obscenity on the character and morality of children, it follows that the legislature is obligated to take all necessary and proper legal steps consistent with constitutional guarantees of freedom of expression to support the right of parents to deal with the morals of their children as they see fit.

Professor Louis Henkin, in a recent article, admits that protection of the morals of children requires separate obscenity legislation for minors,²⁰ although he has recently challenged the conclusion that obscenity is a proper object of legislative social regulation under the aegis of public morality where adults are concerned.²¹ He questions whether in the balance of freedom and authority under the scrutiny of the Constitution the public's interest in suppressing obscenity outweighs the exponent's freedom of expression.

According to Professor Henkin, changing values may have dissipated notions once deemed fundamental to morality, and countervailing values of freedom, growing

¹⁷ See Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951).

¹⁸ This concern has been noted by Mr. Justice Brennan in *Roth* where he stated that:

But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹⁹ Such community studies in obscenity may be best illustrated by the reports of the New York State Legislative Committee. They contain, *inter alia*, exhibits of material deemed objectionable, expert testimony on what is obscene, proposed statutes, recently enacted laws, and New York court cases. The committee has published the following studies: Legislative Document Nos. 15 (1951), 64 (1952), 37 (1954), 37 (1955), 32 (1956), 83 (1957), 85 (1958), 83 (1960), 77 (1962), and 81 (1963).

²⁰ Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 (1963).

²¹ *Id.* at 406.

in potency, may now outweigh moral values on the constitutional scale.

Narrowing in on his argument, he posits that abhorrence of obscenity has its roots in religion and its suppression achieves no other apparent result than a support of religious belief. Absent any utilitarian social basis for obscenity control, he concludes that it may well be deemed an unreasonable interference by government in the area of private morality. His viewpoint has since been adopted by at least one other expert.²²

In reply to Professor Henkin one need merely point out that hard core pornography is all that may be banned from the adult today. If his argument is made as a defense of the pornographer then the answer is obvious—hard core pornography is utterly without any redeeming social importance. The repugnance and disgust which arises naturally upon exposure to hard core pornography is based not upon religious teaching and tradition but upon an instinctive rejection of corruption and decay. That which is filthy and disgusting cannot be amusing. Restraints upon pornographers have the utilitarian value of releasing presses for material that may at least produce some slight social benefit, if only adult level amusement. The production and commercial exploitation of hard core pornography is in the public domain and distinguishable from activity such as private blasphemy or private sacrilege which may be contrary to public morality but still may not be properly subject to legal restraint.

b) *Clear and Present Danger*

Another approach through case law can be taken in an attempt to establish the separate classification of minors in obscenity control, in addition to the public morality, police power justification.

The principal cases raising the issue of freedom of communication in recent years have involved "speech" found to be part of a pattern of subversive action believed to endanger the safety of the nation. If such speech creates a *clear and present danger* of any undesirable consequence at which the state may aim, it may be suppressed. Adopting the language of Chief Judge Learned Hand, the Supreme Court has said:

In each case [courts] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.²³

It has been argued that no responsible court, in modern times, has held or asserted that an obscene item is dangerous because it might incite the reader or viewer to perform a criminal act.²⁴ Hence, if the application of the clear-and-present-danger rule is interpreted as being limited to that which incites to violence or crime, a causal relationship cannot be established between obscenity and violence; hence, the rule is not applicable. This seems to be the view

²² Gerber, *A Suggested Solution To The Riddle of Obscenity*, 112 U. PA. L. REV. 834, 851 (1964).

²³ *Dennis v. United States*, 341 U.S. 494, 510 (1951).

²⁴ Gerber, *supra* note 22, at 851.

of Mr. Justice Black and others who have supported him.²⁵

Although it is true that one item of obscenity may be deemed insignificant in itself, the torrential flood of obscenity which is saturating today's young may well be an inducement to perversion and juvenile delinquency.²⁶ The problem is how to prove it. With respect to this condition, the Supreme Court of the United States, which may well be called a responsible court, has stated as recently as 1948 that "we recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency."²⁷

The argument against any significant causal relationship between juvenile delinquency and obscene material can be traced to a report which originally was cited in the concurring opinion of Judge Frank in *United States v. Roth*.²⁸ It was given still wider publicity by the Ameri-

can Law Institute which quoted from the report in support of its obscenity definition in its 1957 draft of the Model Penal Code.²⁹ This definition was the basis for the present Supreme Court definition of obscenity as set forth in *Roth v. United States*.³⁰

The report, which was prepared by Dr. Marie Jahoda, was summarized by her, in part, as follows:

1. (In regard to the assumption that reading about prurient sex or violence or crime leads to anti-social actions, especially juvenile delinquency) there exists no research evidence either to prove or disprove this assumption definitely.
2. Experts on juvenile delinquency agree there is no single cause.
3. With regard to the impact of literature on the mind of the reader . . . there is a vast overlap in content between all media of mass communications. . . . It is virtually impossible to isolate the impact of one of these media on a population exposed to all of them.

It is likely . . . that excessive reading of comic books will intensify in children those qualities which drove them to the comic book world to begin with. . . .

It should be noted that insofar as causal sequence is implied, insecurity and maladjustment in a child must precede this exposure to the written word in order to lead to those potential effects. Unfortunately, perhaps the reading of Shakespeare's tragedies or of Anderson's and Grimm's fairy tales do much the same harm.³¹

Since 1957, many additional investigations have been made in the area of research as to the causes of juvenile delinquency. Some of what has been produced

²⁵ To those who take this view, what is meant by "incitement" and what constitutes "incitement" would presumably present the same questions of degree and the same inquiries into *scienter*, purpose and gravity which the Court considered in the *Dennis* case.

²⁶ "Obscenity, pornography, salacious literature—whatever you may call it—is a two billion dollar a year racket in the United States. . . . It is shocking when we realize that 75%-90% of the materials peddled by these perverted profiteers fall into the hands of unwary young people." Address by Francis Cardinal Spellman, Grand Aerie Convention Banquet, Denver Hilton Hotel, August 6, 1964.

²⁷ *Winters v. New York*, 333 U.S. 503, 510 (1947).

²⁸ 237 F.2d 796, 815 (2d Cir. 1956), *aff'd*, 354 U.S. 476 (1957).

²⁹ § 207.10(2) (Tent. Draft No. 6, 1957).

³⁰ 354 U.S. 476 (1957).

³¹ *Supra* note 29.

has contradicted the Jahoda report conclusions. The report was admittedly based upon lack of research evidence, and confined strictly to the relationship between crime comics and juvenile delinquency.

The Committee on Public Health of the New York Academy of Medicine in 1963 strongly recommended "legislation designed to make salacious literature unavailable to minors by prohibiting sale of it to them," after the Committee concluded:

Although some adolescents may not be affected by the reading of salacious literature, others may be more vulnerable. Such reading . . . interferes with the development of a healthy attitude and respect for the opposite sex. . . .

Behavior is complex. It is difficult, if not impossible, to prove scientifically that a direct causal relation exists between libidinous literature and socially unaccepted conduct. Yet, it is undeniable that there has been a resurgence of venereal disease, particularly among teen-age youth, and that the rate of illegitimacy is climbing. . . . It can be asserted . . . that the perusal of erotic literature has the potentiality of inciting some young persons to enter into illicit sex relations and thus leading them into promiscuity, illegitimacy and venereal disease.³²

Another cautious commentator, after concluding from a review of the available empirical data that "a significant portion of our society is sexually aroused to some extent by some form of sex stimuli in pictures and probably in books," has considered reasonable the proposition that the portrayal of nudity or sexual activity detrimentally affects the formation of attitudes, particularly among the young: "Where no

strong sexual attitudes exist a priori, either because of a person's youth or his sexual naivete, one would expect that the exposure to sexual stimuli would have its strongest effect."³³

Moreover, there is evidence of psychological harm to young persons from the material at issue. In one view, "such reading encourages a morbid preoccupation with sex. . . . It is said to contribute to perversion. In the opinion of some psychiatrists, it may have an especially detrimental effect on disturbed adolescents."³⁴ Others have concluded from studies of "persons who reflect considerable sexual guilt and sexual identification problems" that "the presentation of sexual materials, for some persons, is an aversive or disruptive experience."³⁵ Although psychiatrists disagree as to the particular effects of this material, there appears to be a consensus that the danger of emotional harm is greatest for the young.³⁶

Another study, reported by Dr. Fredric Wertham in 1954, is notable for its thoroughness and objectivity in the examination of psychological aberrations in children caused by exposure to deleterious material.³⁷ The psychiatric patients, for the most part children, could only have as-

³² Statement By The New York Academy of Medicine Prepared by the Committee on Public Health, 39 BULL. OF THE N.Y. ACAD. OF MED. 545-46 (1963).

³³ Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1032, 1035, 1039 (1962).

³⁴ *Supra* note 32.

³⁵ *Supra* note 32, at 1036.

³⁶ PAUL & SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* (1961).

³⁷ WERTHAM, *SEDUCTION OF THE INNOCENT* ch. VI (1954). See also LORANG, *THE EFFECT OF READING ON MORAL CONDUCT AND EMOTIONAL EXPERIENCE* 23 N.4 (1945); St. John-Stevan, *Obscenity, Literature and the Law*, 3 CATHOLIC LAW. 303, 306 (1957).

sumed their familiarity with obscene matters from the books and magazines which they had read. These children could not have brought to their reading any pre-existing obscenity: the literature which they read caused the perversions from which they suffered. The process is something like the following: (1) some objective stimulus—the obscene book or magazine; (2) a mental reaction and then an emotional one; (3) “a physical and physiological expression, glandular or muscular, of the mental and emotional state.” The result of this process is some promiscuous sexual activity which is prompted by the reading material. Obscenity, therefore, does exist in the novel or magazine and is the occasion as well as the proximate cause of moral harm in the individual who is reading.

Dr. Jahoda's view is also in direct opposition to that of psychologists such as Dr. George W. Henry, Professor of Clinical Psychology at Cornell University. Dr. Henry has affirmed that children can “be sexually perverted by looking at, by studying, and by dwelling upon the photos of this nature and content. . . .” In his opinion, “a large proportion of the population” is susceptible to the evil influences of obscene publications.³⁸ In a similar vein Dr. Benjamin Karpman, Chief Psychotherapist at St. Elizabeth's Hospital, Washington, D.C., has testified in regard to the effects of obscenity that “you can take a perfectly healthy boy or girl and by exposing them to abnormalities you can virtually crystallize and settle their habits for the

rest of their lives.” He found that “there is a direct relationship between juvenile delinquency, sex life, and pornographic literature.”³⁹

Restating the argument which may be made against those who still insist on more empirical evidence before a causal relationship can be established between juvenile delinquency and the reading or viewing of obscene material, it appears that there is abundant psychological clinical evidence today of a correlation between the constant exposure to obscene material and criminal action. In reaching this conclusion psychology uses the tools proper to its field and understands the law of causality in a way that recognizes the peculiar characteristics of the human personality and that has proved not only realistic but productive of beneficial results in mental health and conduct.⁴⁰

Even if a particular court would still insist that a causal relation has not been scientifically established through such psychological studies, one can cite J. Edgar Hoover's statement that “we cannot afford to wait for an answer from psychiatrists as to the extent that it [obscene material] affects the youth's mind. We do know that sex crime is associated with pornography.”⁴¹

With respect then to the approach to the separate standard through the clear-and-present-danger test, it can best be summed up by saying that the scope of the test is not clear today with respect to obscenity control. The gravity of the danger required for the disturbance of various types of

³⁸ Testimony before the U.S. Congress, SENATE SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY, Rep. No. 2381, 84th Cong., 2d Sess. 10, 11 (1956).

³⁹ *Id.* at 12.

⁴⁰ MURPHY, CENSORSHIP: GOVERNMENT AND OBSCENITY ch. 9 (1963).

⁴¹ Letter From J. Edgar Hoover to All Law Enforcement Officials, January 1, 1960.

speech and press is so great that it is difficult to determine to what extent the doctrine is still viable in areas other than subversive speech. Its employment, therefore, as a sole justification for a separate standard for minors in the area of obscenity control is unwise. In the words of Paul A. Freund, "no matter how rapidly we utter the phrase 'clear and present danger' or how closely we hyphenate the words, they are not a substitute for the weighing of values."⁴²

The existence of the separate standard is best established through a state's right to limit the first amendment freedoms of children in protection of public morality. The evidence of causal relationship between constant exposure of children to obscene materials and moral degeneracy and juvenile delinquency, even though conflicting, can certainly justify a legislative decision to act in this area despite the fact that it results in some curtailment of adult freedom of press.

The Separate Standard

Recognizing, therefore, that minors have a separate status in law with respect to the sale to them of obscene material, is the separate status one which will be recognized merely in the procedural area or will it affect the substantive law as well? In other words, will hard core pornography be defined as the sole standard for the suppression of obscenity in sales to minors, with perhaps the requirement of *scienter* modified as to such sales, or will that which is deemed suppressible obscenity be defined as more than hard core pornography coupled with a *scienter* require-

ment modification where sales to minors are involved?

Underlying any discussion as to the mode in which the legislature can act with respect to the dissemination of obscene materials to minors is the case of *Butler v. Michigan*.⁴³ The Supreme Court, in this case, invalidated as arbitrary a Michigan statute prohibiting the sale to *anyone* of any material which would tend to have a deleterious influence upon youth. Counsel for the State of Michigan insisted that the statute was enacted to protect the children within Michigan from the possible effect that might result from seeing the type of material that was prohibited. Mr. Justice Frankfurter, writing for the undivided Court, however, stated that the legislation did not reasonably restrict the evil with which it was said to deal. Although the Court had the opportunity to hold that a state could not separately legislate in the area of obscenity with regard to children, it did not choose to so rule. Instead, it approvingly made reference to another Michigan statute which was specifically designed to protect minors by prohibiting the sale to them of material which would tend to corrupt their morals. From this unanimous Supreme Court decision it can be inferred that legislation restricting the sale of certain materials to minors, which material would be judged by a child's standards, would be constitutional.

Indeed, as recently as 1960, a federal court stated by way of dictum:

Neither our ruling here nor anything we have said should be construed as precluding an effective state policy of safeguarding minors against publications which, though not obscene when judged by the standards of the community as a whole, may, nevertheless, be thought to have a

⁴² FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1950).

⁴³ 352 U.S. 380 (1957).

corrupting influence on the morals of youth. While we have no occasion here to pass on the constitutionality of such a law, it would seem that a state might enact a valid statute "specifically designed to protect its children" from suggestive books and magazines that are not too rugged for grown men and women, without at the same time burning the house down to roast the pig by restricting everyone else to reading such fiction as *Boy's Life* at the magazine stand and *The Five Little Peppers* at the bookstand.⁴⁴

Further justification for this inference can be found in the statement of Mr. Justice Brennan, joined by Mr. Justice Goldberg, in the *Jacobellis* case wherein it was said, citing the *Settle* case as an example:

We recognize the legitimate and indeed exigent interest of the 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. Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution.⁴⁵

Mr. Justice Warren, joined by Mr. Justice Clark, expressed a similar view in a dissent:

We are told that only "hard core pornography" should be denied the protection of the First Amendment. But who can define "hard core pornography" with any greater clarity than "obscenity"? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we now are faced with the need to define "obscenity." Meanwhile, those who profit from the commercial exploitation of obscenity would continue to ply their trade unmolested.

In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but at the same time, "obscene" in the extreme when sold or displayed to children.⁴⁶

The Formulation of a Separate Standard

Once it is accepted that a separate standard for children is constitutional, it must be appreciated that laws to protect children against obscenity present problems of delineating standards and especially of definiteness and precision if attempts are made to define the kinds of material that are forbidden on the ground that they are deleterious to a child. A general description which bars material that "for a minor is obscene when it is presented in a salacious manner" may well be deemed sufficient to make for a constitutionally acceptable statute in itself when it is directed solely at barring sales to minors.

It is submitted that such general terminology should be deemed constitutionally acceptable as "permissibly uncertain" against the objection of vagueness and indefiniteness just as it has been in the

⁴⁴ *In re Louisiana News Co.*, 187 F. Supp. 241, 247 (E.D. La. 1960).

⁴⁵ *Supra* note 2, at 195.

⁴⁶ *Supra* note 2, at 201.

obscenity cases involving the general public.⁴⁷ If the legislative intent is clearly stated as a preamble to such a separate statute it should require of the courts the adoption of more rigid standards in the scrutiny of alleged obscene matter when viewed in its potential effect on minors rather than on adults.⁴⁸ Again, it should be emphasized that it is not the function of the courts to question the wisdom of legislative determination.

The practical result, nevertheless, will be that many courts may be reluctant to venture much beyond hard core pornography in suppressing material under such a general statute unless the legislature goes further and carefully and accurately describes the material forbidden to youth. This reluctance, however, may be overcome by the employment of expert testimony in each individual case on the question of whether the particular material is deleterious to minors, if the court considers such aid necessary.⁴⁹

Such legislation will certainly meet with strong opposition as will any other type of legislation in this field, however it is worded. According to Professors Lockhart and McClure:

To prohibit dealers from exhibiting within the view of adolescents books and magazines that can be sold only to adults would raise the additional problem of undue interference with the material's primary audience. Beyond these obstacles is the disrupting effect of "adult only" counters or shelves in book stores and newsstands, for

the "adult only" label would serve only to attract adolescents eager for a look at the forbidden fruit and would make it difficult for the dealer to prevent adolescent shoplifting of the books and magazines. To avoid these difficulties cautious dealers might well decide to abandon all books and magazines claimed by anyone to be unsuitable for adolescents.⁵⁰

Balancing the interests between the rights of parents and minors to obtain protection against material which adversely affects youth and the economic loss which might possibly result to booksellers if obscene material is banned from minors, it seems clear that courts will resolve any conflict in favor of the parents and minors since the danger to these persons is much greater than the possible monetary loss to booksellers which the avoidance of such danger may occasion.

A reading of the majority opinion of the New York Court of Appeals in the *Book-case* decision will support this conclusion. Judge Van Voorhis very carefully established that the issue before the court was not whether the material was obscene under a separate standard for minors, but "whether the legislature can constitutionally restrict, the sale . . . of material to minors . . . for the reason that it is principally devoted to the subject of illicit sex or sexual immorality." The opinion intimates clearly that if the particular clause objected to was deleted from the statute, the material under consideration might well have been deemed obscene with respect to minors and, therefore, sales to them made suppressible. In the words of the court:

It is noteworthy that the 1954 Report to the legislature of the Committee on whose

⁴⁷ *Winters v. New York*, 333 U.S. 503, 518 (1947).

⁴⁸ *People v. Finkelstein*, 156 N.Y.S.2d 104 (Magis. Ct. 1955).

⁴⁹ Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 99 (1960).

⁵⁰ *Id.* at 86.

recommendation the present Section 484-h of the Penal Law was originally adopted, recommended an addition to the obscenity statute proposed to be known as Section 1141-b, which would have forbidden the commercial distribution to minors of material "which, for a minor, is obscene, lewd, lascivious, filthy, indecent or disgusting" Such a recognition that printed material or pictures may be classified as obscene for minors which would not be so for adults would have been in accord with statutes adopted in a number of other jurisdictions. . . . Appellants, it may be repeated, have not been convicted of selling an obscene book to a minor, but one which is principally devoted to descriptions of illicit sex or sexual immorality, unrelated to whether the book is obscene. The People concede that no issue of obscenity is before the Court on this appeal.⁵¹

Legislative Suggestions

While it is true that the New York Court of Appeals has in effect pronounced in advance that it will declare constitutional a statute which suppresses sales to minors of material "which is obscene to a minor when presented in a salacious manner," the effectiveness of such statute is highly questionable on a law enforcement level. Our law enforcement officers, as is pointed out elsewhere in this issue,⁵² need definitive guides to assist them in determining against what materials they should proceed. Again, unless the legislature carefully spells out what type of materials it has determined are deleterious to minors, a court will have no recourse other than to usurp the legislative prerogative on this point.

The main obstacle which the draftsman faces when he undertakes to draft a statute which itemizes such material in a series of

specific descriptions is the fact that in order to avoid a "vagueness and indefinite" objection he must be so specific that his resultant description will be so unduly narrow that it will exclude much of the material he would wish to include.

A great deal of the difficulty in this area stems from *Winters v. New York*.⁵³ In this case the Supreme Court of the United States considered the constitutionality of a New York statute which made it a criminal offense to publish or distribute publications "principally made up of criminal news, police reports or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime." The statute had been previously interpreted by the New York Court of Appeals to be aimed at publications in which collections of accounts of criminal deeds of bloodshed or lust are so massed as to render them vehicles for inciting violence and depraved crimes against the person. Six members of the Supreme Court held, in an opinion by Mr. Justice Reed, that even as so interpreted by the court of appeals the statute did not set up a sufficiently definite standard of conduct:

When a legislative body concludes that the mores of the community call for an extension of the impermissible limits, an enactment aimed at the evil is plainly within its power, if it does not transgress the boundaries fixed by the Constitution for freedom of expression. The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime "must be defined with appropriate definiteness."

We think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the

⁵¹ *Supra* note 7, at 416, 201 N.E.2d at 18, 252 N.Y.S.2d at 438-39.

⁵² Sullivan, *Obscenity: Police Enforcement Problems*, *infra* at 301.

⁵³ *Supra* note 27.

trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. "So massed as to incite to crime" can become meaningful only by concrete instances.⁵⁴

While the Supreme Court did not explicitly outlaw all restraints on material dealing with violence in itself, it would seem that the almost inevitable conclusion one may draw from the *Winters* case is that it is impossible today to draft a statute which would validly ban the "pornography of violence." It may be wise, therefore, to leave this aspect of obscenity outside the area of legal controls and depend upon community action for its suppression from children.

A statute which attempts to define what is obscene to a minor should be preceded by a clear statement of legislative intent as to why such separate obscenity legislation is deemed necessary. The statute should then declare in general terms that "sales to minors of material which to a minor is obscene when presented in a salacious manner" are prohibited. The statute should then proceed, in separate sections, to itemize specifically by description certain material which falls within the general exclusion clause. It should be clearly spelled out that such enumeration is employed only to illustrate and not to limit the applicability of the statute solely to the specifically described examples. A severability clause should be made part of such statute to preserve it in the event that any of the separate itemizations are later interpreted as vague and unenforceable. The number of descriptions which

such statute may contain is dependent completely upon the expertise of the draftsman and his ability to express exactly the limits of the proscribed material.

An example of such description is the following:

"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."⁵⁵ Beyond this rather obvious depiction, the task becomes extremely difficult and the way fraught with peril. This is not to say however that it cannot be done. How well it can be done will depend upon the astuteness of the lawyers involved and the facility of the draftsman's quill.⁵⁶

Collateral Aids

Advisory Committee

No matter how specific a statute is drawn which restricts the sale of obscene material to minors, law enforcement officials will find great difficulty in predetermining the material which falls within the statute in advance of a court determination. As an aid to officials in this area it is suggested that a permanent advisory committee be established by the state or municipality, to be staffed by qualified legal, psychological and sociological experts in the field of obscenity control. This committee would function primarily as an advisory board to law enforcement officials, indicating to them what, in its opinion, would be adult-level material in the current

⁵⁵ N.Y. PEN. LAW § 484-h. *But see* *People v. Kaplan*, — Misc.2d —, 252 N.Y.S.2d 927 (N.Y.C. Crim. Ct. 1964), which ruled this clause void for vagueness.

⁵⁶ *See For Adults Only: The Constitutionality of Governmental Film Censorship by Age Classification*, 69 YALE L.J. 141 (1959).

⁵⁴ *Id.*, at §15, 519.

book market. Membership on such committee would serve also to establish the members, in part, as qualified experts in any later court action on the issue of obscenity in a particular publication under prosecution. The activity of such committee would be of immeasurable aid to those faced with the problems of operating under any obscenity control statute, regardless of how clearly it is worded.

Unfortunately, such committee might well be attacked as an illegal prior restraint since its determination of obscenity would be made in advance of any hearing on the question. It should be noted, however, that although any prior restraint by its very nature is offensive to constitutional principles, its use is not per se prohibited. The Supreme Court has, in many instances, considered the constitutionality of censorship statutes, especially those statutes relating to obscene materials. Although the Court in each of these cases held the particular provisions of the statutes in question to be unconstitutional, it has never said that prior restraint itself was unconstitutional. It has very carefully avoided this issue. By implication it is clear that given a justified reason for such legislation, coupled with adequate constitutional safeguards, such legislation would probably be held not to violate constitutional safeguards.

Support for the above statements is derived from the Supreme Court case of *Bantam Books, Inc. v. Sullivan*.⁵⁷ Involved in this case was the constitutionality of a Commission, created by the Rhode Island Legislature, whose purpose was to educate the public as to what materials were obscene, to investigate and recommend the

prosecution of violators of the obscenity statutes, to combat juvenile delinquency and to encourage morality in youth. The Court, however, did not hold the legislation creating the Commission to be unconstitutional, but held that certain acts of the Commission were unconstitutional, i.e., the intimidation of booksellers. Mr. Justice Clark, who concurred in the result, indicated that he felt that even in light of this decision the Rhode Island Commission would still be free to publicize its feelings, to solicit and support the public in preventing dissemination of deleterious material to minors, to furnish its findings to publishers, distributors, retailers and law enforcement officials and to seek the aid of such law enforcement officials in prosecuting offenders.

In drafting a prior restraint statute, it would be necessary to incorporate several other provisions not utilized in the Rhode Island Resolution in order to have a more effective statute and to have procedural safeguards. There must be a provision for an appeal from the committee's determination. This is necessary to satisfy the requirement of judicial supervision espoused by Mr. Justice Brennan in the *Bantam Books* case.

In order to strengthen the statute there should be incorporated some form of notification to be put on the book or magazine by the wholesaler or retailer that the Commission has found the book to be objectionable to children. This would not prevent a parent from buying the so labeled book for his or her child to read if the parent so desired. The retailer could also disregard the Commission's recommendation and await a summons and then litigate the obscenity issue or could proceed by way of injunction against the Commission

⁵⁷ 372 U.S. 58 (1963).

as to the particular book and thus have the question of obscenity decided by the court.

Although the problem created by using the "adults only" notification—notoriety of the book so labeled—is recognized, the general benefit of the statute to the community would far outweigh this shortcoming.

Tie-In Statutes

Another problem which arises out of separate statutes directed at restricting obscene materials from minors is that of effective prosecution. On the adult level, prosecutions are very effective when law enforcement officials utilize injunctive relief and sequester all the allegedly obscene material pending a court determination. This removes the book from the market immediately and effectively ties the hands of the bookseller until the outcome of the suit.

When prosecuting under a minor statute, however, sequestration of the material is not an available remedy since the material is still saleable to adults and such sales cannot be proscribed.

As a partial solution to this problem it is suggested that communities enact a "tie-in sale" statute similar to the following New York State statute, but re-enacted to be applicable to that which is obscene to minors:

Distribution of indecent articles; tie-in sales.

—No person, co-partnership or corporation shall as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication require that the purchaser or consignee receive for resale any other article, book or other publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent or disgusting nor shall any person, co-partnership or corporation, deny or

threaten to deny any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept such articles, books, or publications, or by reason of the return thereof.

A violation of this section shall be a misdemeanor.⁵⁸

With such a statute on the books, a community can approach a bookseller who is attempting to cooperate with community activity in obscenity control and compel removal of a great deal of material from the magazine racks and bookshelves in one action. Again, however, the cooperation of the bookseller is necessary to make such legislation effective.

Conclusion

It is undeniably true that, while a constitutionally acceptable statute can be drafted for the restriction of material from minors, which to a minor is obscene, the law is a clumsy instrument to use as a sole solution to this problem. Good law is necessarily minimal in order to allow maximum freedom and individual differences and in order to be based on generally held convictions.⁵⁹ Law can never substitute for individual responsibility.

The suggestions for legislation which have been made in this article of necessity will result only in an effective minimal protection to youth in the matter of obscenity control. The main challenge that confronts any community today is the need for educating our adult population to an

(continued on page 308)

⁵⁸ N.Y. PEN. LAW § 1141-c.

⁵⁹ See the Statement of the Catholic Bishops of the United States printed in HAROLD GARDINER, CATHOLIC VIEWPOINT ON CENSORSHIP 188 (1958).

OBSCENITY CONTROL

(Continued)

awareness of the widespread danger to our children resulting from the deluge of obscenity and the necessity for social action in this area.

Responsible agencies in our modern society have responded to this challenge and are creating and shaping machinery for self-government in the area of obscenity control with respect to minors. This ma-

chinery requires for its successful operation the education of the people and their full co-operation. The machinery can be implemented by law but should not be and is not dependent upon legislation to achieve its primary purposes. Let men of good faith, therefore, stand firm and join together in a two-fold fight against this danger of obscenity to minors—realizing that it will be only through united action on both the legal and social levels that the battle will be won.