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Obscenity: Prosecution Problems and Legislative Suggestions

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OBSCENITY: PROSECUTION PROBLEMS AND LEGISLATIVE SUGGESTIONS†

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TODAY, THOSE CHARGED with enforcement of our states' and nation's obscenity laws are engaged in the frustrating experience of trying to nail a somewhat rancid custard pie to a tree. Like the pie, that body of law with which we are dealing is of uncertain consistency and mutable form, and—clearly—we can never be sure just how much of our work is likely to stick.

In attempting to analyze the confusion pervading the area of obscenity enforcement, I shall discuss what we in New York County law enforcement have done about seemingly obscene items during the last three years.[1] New York County is, unfortunately, one of our nation's major pornography—or, at least, quasi-pornography—mills. This concerns us deeply as our county is the home of some two million Americans, is host to another million who come to work here daily, and is one of America's major entertainment, tourist, commercial, and transportation centers.

Once I have reviewed our recent experiences, including the impact on law enforcement efforts of judicial decisions, I shall outline the sort of legislation that I believe would assist in achieving meaningful results in the area of obscenity and quasi-obscenity.

Recent New York Experience With the Obscenity Statutes

1. Pictures

During the last three years the New York County District Attorney's Office, working closely with the New York City Police Department, has acted on a number of fronts in the pornography area. In only one subarea has law enforcement gained any ground, howsoever slight—that is,

† This article was expanded from a statement made by the author on September 21, 1964, in New York City, before the New York State Joint Legislative Committee to Study the Publication and Dissemination of Offensive and Obscene Material.

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[1] The writer has limited his present consideration to New York County experience subsequent to his prior testimony at an earlier hearing of this same Joint Legislative Committee, held July 20, 1961.

in the area of so-called "strip-tease nude" sets.[2]

The case of *People v. Fried,*[3] decided by New York's intermediate appellate court in March 1963, involved "strip-tease nude" sets. Two years earlier, in May 1961, the New York Court of Appeals, divided two-two-three, had held, in the case of *People v. Richmond County News, Inc.,*[4] that only "hard core" was actionable obscenity in the Empire State. Immediately following that decision, trial judges hearing obscenity charges had become cautious, most feeling compelled to dismiss cases involving pictures other than those depicting sexual activity or revealing clearly exposed pubic area. Then came the *Fried* case in which a misdemeanor conviction for the sale of "strip-tease nudes" (and other items) was sustained. A month after this rare appellate victory for law enforcement, New York State Court of Appeals Judge Stanley Fuld, whose opinions in the obscenity area mark him as New York's most permissive high court judge, at least in the area of alleged pornography, *denied* leave to appeal to the state's highest tribunal. In July 1963, Mr. Justice Potter Stewart of the United States Supreme Court stayed Fried's jail sentence, until the Supreme Court could rul on Fried's certiorari petition. Almost a year thereafter, on June 22, 1964, split six to three, the Supreme Court denied certiorari.[5] Consequently, more than two years subsequent to his conviction, Fried was finally committed to serve his misdemeanor sentence of imprisonment.

Promptly upon the March 1963 affirmance by New York's intermediate appellate court of Fried's conviction, New York City's police launched a broad attack against vendors of these "strip-tease nude" sets, whose wares also included sadistic and masochistic books of a type that had earlier been declared obscene in *People v. Mishkin.*[6]

Starting in March 1963, plainclothes police officers made repeated purchases of "strip-tease nude" sets, and of "Mishkin-type" books. The purchases were promptly followed by search warrants and arrests were made. Between April 1963, and August 31, 1964, more than 130 of New York County's 166 obscenity arrests were made in the Times Square area. Of these 166 cases, by September 1, 1964, 118 had resulted in convictions, 22 in dismissals, 11 in acquittals, and 15 were still pending disposition.

An illuminating aspect of these figures is the number of repeaters they reflect. In a single one of the so-called "bookstores," 13 of the arrests had taken place, not simultaneously, but on 9 separate occasions. Eight separate arrests had taken place at another. And 5 or more arrests had taken place in each of 8 different other "bookstores." The cast of characters working these "bookstores" is as stagnant as are their employers. Two of the individual defendants were arrested 4 separate times each; 5 were arrested 3 times each; 15 were arrested twice or more.

The trial courts, in sentencing these convicted smut peddlers, have realistically noted that they were dealing with profes-

[2] "Strip-tease nude" sets are generally four to six pictures, each picture showing the same woman (and some showing two or more women) in various stages of undress.

[3] 18 App. Div. 2d 996, 238 N.Y.S.2d 742 (1st Dep't 1963) (memorandum decision).

[4] 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

[5] Fried v. New York, 378 U.S. 578 (1964).

[6] 26 Misc. 2d 152, 207 N.Y.S.2d 390 (N.Y.C. Ct. Spec. Sess. 1960), *aff'd as modified,* 17 App. Div. 2d 243, 234 N.Y.S.2d 342 (1st Dep't 1962).

sional law breakers: misdemeanants, it is true, but nevertheless misdemeanants who willfully and chronically skulked their livelihoods by trading upon the illnesses or the weaknesses (or, at the very least, the strange quirks) of adults, and upon the curiosity of youngsters. The trial judges, justices of the Criminal Court of the City of New York, have not been harsh; sentences have rarely been long. Neither have they been soft; sentences, generally running between thirty and ninety days, were rarely suspended. Only the few most blatant, important, and incorrigible offenders received sentences of as much as one year.

The fantastic aspect of all of this has been that, as yet, few of these professional "dirt for money's sake" men have served their sentences. Contrasted with the mountainous time, energy and expenditures of police, prosecutors and judges, hardly an undersized mouse has emerged. State supreme court justices, leaning upon Mr. Justice Potter Stewart's stay of Fried's commitment, ruled that this afforded a basis for believing that a legitimate legal question might exist as to whether or not "strip-tease nudes" were obscene. They, therefore, issued certificates of reasonable doubt which, under New York law, serve to release convicted and sentenced defendants, pending determination of their appeals in the appellate courts. Hence, during the eleven months from July 1963 through June 1964 (when the nation's highest tribunal ultimately determined not to review Fried's conviction), dozens and dozens of convicted pornographers were released, pending determination of their appeals. Understandably, these defendants were in no headlong haste to perfect these appeals. With Confucius, they recognized that "he who chases justice may catch it."

As of late September 1964, a substantial number of those sentenced defendants —including some who had been arrested by mid-1963 and convicted and sentenced before the year's end—still had their appeals pending, having done nothing whatsoever to perfect their appellate papers.

These delays have made a mockery of the enforcement of obscenity laws. The phrase "justice delayed is justice denied" should not be cast aside as a meaningless platitude, nor enshrined solely as an expression of *the defendant's right* to a speedy trial. The community, too, has some interest in the alacrity with which criminal justice moves. Reasonably swift punishment *may* deter. When imposed upon the professional miscreant, whose crime is not one born of momentary emotion but one founded on the craving for money, it is submitted that punishment has true deterrent value. But whether or not it deters, imprisonment, if swiftly applied, at least interrupts the continuity of criminal activity.

2. *Books and Magazines*

In late 1960, Edward Mishkin, then one of America's most successful and most noxious publishers and vendors of the obscene, was convicted for his 1959 and 1960 activities in publishing and selling a host of masochistic and sadistic booklets.[7] Mishkin's emanations were crammed with lesbianism, sodomy, sadism and masochism. Generally combining large print and simplified drawings, they dealt with torture of females for purposes of erotic arousal: flagellation, spanking, binding, stretching, and gagging, and the cult of spike heels and leather corselets. Many were written pursuant to Mishkin's order by unsuccessful authors who, understand-

[7] *Ibid.*

ably, preferred anonymity. Mishkin was sentenced to an aggregate of three years in the penitentiary and was ordered to pay fines totaling $12,500.

The continued flow of "Mishkin-type" items through the Times Square "bookstores" has been under constant police attack throughout the years since his conviction. Along with "strip-tease nudes," the sale of these items led to the arrests already considered. Yet, as of October 1964, approximately four years after his conviction, Mishkin too has yet to serve his sentence.

In expressing my dismay at these delays, and in noting their enervating impact on effective enforcement, I am *not* suggesting that the appellate courts are primarily responsible. In the *Mishkin* case, for instance, the appellate division came down with its decision approximately one month after the matter was submitted for its consideration. I mean, however, to criticize our bar—*including prosecutors*—for permitting endless adjournments, and for entering into repeated stipulations extending time. When problems of excessively heavy workloads, coupled with reciprocating respect for the convenience and professional demands of our colleagues, so command the field that the imposition of court-ordered punishment is endlessly delayed, the time is overdue for a new look. If the appellate courts on their own motion fail to police the adjournments of appeals more closely, then legislative restrictions should be enacted to see that these "courtesies" between consenting attorneys are effectively curtailed.[8] I shall deal with this problem when I consider legislative needs.

In late 1960 and in early 1961, all New York City law enforcement agencies—the district attorneys' offices, the Police Department, and the corporation counsel—joined forces in an injunctive campaign designed to drive the most offensive of the "girlie" magazines out of the City.[9] Hundreds of magazines were scanned by teams of lawyers, and those deemed most clearly offensive were the objects of the injunctive action. In December 1960, a proceeding against 54 specific issues of particular magazines was instituted; 39 were targets in February 1961, and 27 were the objects of an April 10, 1961 court action.

Although the injunctive campaign, during its early months, met with considerable success in stripping the vendors of their "girlie" stocks, it met with reverses in the courts. Here, too, there was long appellate delay. In June 1964, by a four to three decision, the New York Court of Appeals affirmed the action of the courts below, issuing a brief memorandum that cited a host of cases but contained no other text; in so doing it held that these magazines were not actionable.[10] Today, the city's newsstands bear no evidence that this intensive drive had ever existed.

The impact was to leave law enforcement deeply perplexed. Clearly, until and unless "girlie" magazines go beyond their present content, or until some changes are made in our obscenity laws, nothing can here be done about even the crudest of the "girlie" items. But the magazines that had been singled out by the injunctive campaign, logically studied, consisted to a large ex-

[8] The views herein expressed are solely those of the author, and neither reflect the official viewpoint of the New York County District Attorney's Office, nor those of the District Attorney's Association of the State of New York.

[9] The actions were commenced pursuant to N.Y. CODE CRIM. PROC. § 22-a.

[10] Larkin v. G.I. Distribs., Inc., 14 N.Y.2d 869, 200 N.E.2d 768, 252 N.Y.S.2d 81 (1964) (memorandum decision).

tent of *bound* sets of "strip-tease nudes"; the pictures contained in many of them appeared to be on all fours with those found objectionable in the *Fried* case; and textual material was minimal. Yet, the cases cited in the high tribunal's memorandum do not include *Fried,* nor is any effort made to distinguish that case. And so, as the law in New York now seems to stand, sets of pictures of the "strip-tease nude" variety are forbidden, but if camouflaged ever so slightly by being shown in *magazine* form, bound in with the most primitive of texts, advertisements, and other magazine content, they are removed from law enforcement's interdiction. Thus saith the law—by the margin of one judge of our state's highest court!

The same New York law enforcement team that had pursued the "girlie" magazines (the Police Department, prosecutor's offices, and corporation counsel), also sought to have the pornographic classic, *Fanny Hill* (bootlegged for almost two centuries but publicly re-issued in 1963 by G. P. Putnam's Sons, under the title *Memoirs of a Woman of Pleasure*), banned. (The "team," incidentally, had met years earlier and determined *not* to take any action concerning *Tropic of Cancer* which, it was agreed, had at least arguable "redeeming social value.") Law enforcement recognized at the outset that this *Fanny Hill* effort might not be successful. But it was felt that if ever a book was obscene, two centuries of under-the-counter sale and erotic appeal sustained our belief that this was it. Whether or not, ultimately, the appellate courts sustained the injunctive efforts, the *Fanny Hill* case, it was thought, would yield some guideposts to aid law enforcement in finding its way in the pornography jungle.

New York State Supreme Court Justice Charles Marks granted a temporary injunction, halting Putnam's from offering the book for sale in New York State.[11] Thereafter, at the conclusion of a trial without a jury, Justice Marks' judicial colleague, Supreme Court Justice Arthur Klein, vacated the temporary injunction and dismissed the complaint, opining that the book did not contravene New York's obscenity laws.[12] The corporation counsel, representing New York law enforcement, promptly appealed (this was a civil proceeding, and hence the finding of non-obscenity was reviewable). The New York Appellate Division, split three to two, held that the book was obscene, and that the injunction should have issued.[13] Ultimately, New York's highest tribunal settled the matter, splitting four to three, and sustained Justice Klein's position.[14] The tally sheet reveals that, in New York State, seven judges said that the book contravenes our laws; seven that it does not. But, *crucially,* those who held with the publishers, included *one more* of our highest court's judges than those who voted contrariwise—and so, in New York, in the year 1964, *Fanny Hill's* chronicle is as lawful as if it were from the quill pen of Louisa May Alcott.

The hoped-for guideposts, however, never quite materialized. Little direction, useful in testing other items, can be found in Judge Francis Bergan's words. Speaking for the court majority, he said:

When one looks carefully at the record

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[11] Larkin v. Putnam's Sons, 40 Misc. 2d 25, 243 N.Y.S.2d 145 (Sup. Ct. 1963).

[12] Larkin v. Putnam's Sons, Misc. 2d 28, 242 N.Y.S.2d 746 (Sup. Ct. 1963).

[13] Larkin v. Putnam's Sons, 20 App. Div. 2d 702, 247 N.Y.S.2d 275 (1st Dep't 1964).

[14] Larkin v. Putnam's Sons, 14 N.Y.2d 399, 200 N.E.2d 760, 252 N.Y.S.2d 71 (1964).

> since 1956 of what on constitutional grounds has been allowed to be printed and circulated, and what has been suppressed, *Fanny Hill* seems to fall within the area of permissible publications. It is an erotic book, concerned principally with sexual experiences, largely normal, but some abnormal.
>
> It has a slight literary value and it affords some insight into the life and manners of Mid-18th Century London. It is unlikely *Fanny Hill* can have any adverse effect on the sophisticated values of our century. Some critics, writers, and teachers of stature testified at the trial that the book has merit, and the testimony as a whole showed reasonable differences of opinion as to its value. It does not warrant suppression.[15]

The end result of the *Fanny Hill* experience, however, has been to suggest to New York police and prosecutors the utter futility of seeking action against the non-masochistic, non-sadistic written word, when offered for sale to adults. Hence, John Rechy's *The City of Night,* Terry Southern's and Mason Hoffenberg's *Candy,* William Burroughs' *The Naked Lunch,* and other pointedly specific works, heralded for their sexual content, normal or otherwise, have not occupied the attentions of New York law enforcement.

3. Sales to Minors

In 1963-1964, *Fanny Hill* embarked upon a double life in our courts. Not only did she serve as a test of the law's authority in enjoining sales of the specifically, chronically, and endlessly erotic novel to adults, but she also served to test a New York statute dealing particularly with the sale to youngsters under eighteen of books "principally made up of descriptions of illicit sex or sexual immorality."[16]

In 1963 the state legislature had sought to breathe life into a little used section of the law that had been enacted eight years earlier, barring sales of erotic and indecent materials to youngsters. The section initially had been hidden away in a "comic book" article of the Penal Law. In transferring it intact to the article that dealt with the protection of children and by re-enacting it as Section 484-h of the Penal Law, the legislature sought to re-awaken the public, as well as the police and prosecutors, to its existence.

There were, however, practical enforcement problems. Dealing with sales to persons under eighteen, this section could not be enforced, as could portions of the obscenity laws, by sending in *adult* plain-clothes policemen to make purchases. Nor was it practical to keep *incognito* policemen stationed near stores that might *possibly* sell to youngsters in the hope that the officers *might* spot someone making such a sale. An alternative, found repugnant by prosecutors and police alike, was for enforcement to utilize its own offspring or to recruit neighborhood youngsters and to send them into suspect stores to buy items under the watchful eyes of the police.

Operation Yorkville, a volunteer group of residents of the upper east side of Manhattan, filled the void and seemingly made Penal Law Section 484-h operable. Personnel of Operation Yorkville spotted merchants whom they believed were selling indecent items to youngsters. They then sent teen-age volunteers to purchase these items. Offenders were haled into the courts by the use of summonses. The purchase of *Memoirs of a Woman of Pleasure—Fanny Hill*—from a Yorkville bookshop by sixteen-year-old Victoria Keegan provided the vehicle for testing the Penal Law's spe-

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[15] *Id.* at 403-04, 200 N.E.2d at 762-63, 252 N.Y.S.2d at 74-75.

[16] N.Y. PEN. LAW § 484-h.

cial ban on the sale of indecent items to youngsters.

The corporation that operated the offending store, its president and the salesman who waited on young Miss Keegan were convicted by a unanimous three-judge bench of the Criminal Court of the City of New York.[17] Their conviction was affirmed, unanimously without opinion, by the appellate term of the supreme court.[18] On appeal, the state's court of appeals, on July 10, 1964—the same date that it held *Fanny Hill* to be outside of the proscription of the state's general obscenity law—by the same four to three judges held void for vagueness the key phrase in section 484-h.[19] That phrase barred the sale to the young of "any book . . . the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality."

Our highest appellate courts, writing in the area of pornography, have given us such phrases as "hard core,"[20] and "appeals to the prurient interest," judged by "contemporary community standards," and "without redeeming social value."[21] These are all *court-given* phrases, to be applied by police, prosecutors, and judges, in testing for obscenity. This observer has difficulty in understanding just what is so clear, and explicit, and certain in meaning about these phrases that makes them fit ambrosia for Olympus, while the *legislative* language, viz., "exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality" is, to the Olympians, vague and uncertain.

But lawyers have long learned that, in the profession of law, might makes right, and the highest appellate courts are the mightiest. The Penal Law section on sales to youngsters, therefore, *is* vague, and hence it *is* unconstitutional.

Consequently, I shall suggest a somewhat different legislative approach, to substitute for the now largely defunct section 484-h, in the latter portion of this paper.

4. High-Priced Erotica

Mailmen, trudging their appointed rounds during the winter of 1961-62, may have been warmed by both the content and volume of a mailing piece they were carrying. Ralph Ginsburg, formerly an editor of *Look* and *Esquire,* and author of the highly successful mail order volume *An Unhurried View of Erotica,* had sent out millions of stimulating mailing pieces, promising choice erotic items in a quarterly, *Eros,* he was about to publish. For $19.50, to charter subscribers (or $10. per issue), Ginsburg pledged an artistic magazine devoted wholly to love and to sex. The New York County District Attorney's Office, using a detective as a "mail drop," subscribed.

By the time the fourth issue appeared in the winter of 1962-1963, we had formed an impression that the quarterly was becoming progressively more obscene,[22] at least to an extent that it merited presenta-

[17] People v. Bookcase, Inc., 40 Misc. 2d 796, 244 N.Y.S.2d 297 (N.Y.C. Crim. Ct. 1963).

[18] People v. Bookcase, Inc., 42 Misc. 2d 55, 247 N.Y.S.2d 470 (Sup. Ct. 1964).

[19] People v. Bookcase, Inc., 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964).

[20] See People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

[21] See Jacobellis v. Ohio, 378 U.S. 184 (1964); Manual Enterprises v. Day, 370 U.S. 478 (1961); Roth v. United States, 354 U.S. 476 (1957).

[22] Apparently our judgment paralleled Ginsburg's own; he is quoted as noting that "the first issue was only so-so. After that it got progressively better. The fifth—which never got printed—was the best." Collier, *Ralph Ginsburg: Eros Revisited,* Cavalier, Nov. 1964.

tion to a grand jury to determine whether the jury, as the "conscience of the community," found that "contemporary community standards" had been violated. Among the items that issue contained were a photographic essay on "The Jewel Box Review" (a musical show, including strippers, the entire cast being female impersonators), excerpts from Frank Harris' *Life and Loves,* an appreciable collection of unexpurgated and extremely explicit bawdy limericks, an article on *The Natural Superiority of Women as Eroticists,* a series of color photographs showing a male and female nude in close embrace, and a modern highly unambiguous version of "Lysistrata." As best we were able, we tried to put the case to the grand jurors "down the middle" in order to get the voice of that "conscience" unpricked by prosecutorial thinking. After hearing witnesses and examining the magazine and its advertising, in the spring of 1963 the grand jury filed "no bill," declaring—in effect—that *Eros* was not repugnant to the contemporary community's highly sophisticated standards, and that any advertising of it that happened to fall into the hands of youngsters was unintentional, and inevitably incidental to the publication's massive direct mail campaign.[23]

5. *Movies*

In the early spring of 1964, one Jonas Mekas, formerly motion picture critic for a Greenwich Village weekly, the *Village Voice,* sponsored a showing of an avant-garde moving picture, "Flaming Creatures." The film contained repeated close-ups showing, quite explicitly, masturbation of the exposed male sexual organ, and fondling of uncovered female breasts.

Shortly thereafter, Mekas was arrested for showing another film, one based on a Jean Genet story, "Chanson d'Amour." This import, although dealing sensitively with the homosexual fantasies of male prisoners in adjoining cells, contained several explicit scenes of male masturbation, and others strongly suggestive of fellatio.

Despite anguished squeals of "persecution of the avant-garde," and howls of "censorship" by those who seemed to relish their kinship to martyrdom, Mekas was tried and convicted for showing "Flaming Creatures." The charges involving "Chanson D'Amour" were dismissed at the time of Mekas' sentencing for "Flaming Creatures," on condition, agreed to by Mekas, that the import not be shown anywhere in New York State before all appeals from the "Flaming Creatures" conviction had been finally disposed of.

6. *Live Performers*

The fecund rites of spring, 1964 in New York City embraced more than Jonas Mekas and his movies. Lenny Bruce, satirist and night club comic, also appeared in the Village, at a coffee house, the Cafe Au Go Go, where his performance included not merely all the four letter words Bruce could hurl repeatedly at his audience, but those hyphenated expressions that are generally, in our Puritan-rooted society, deemed to be considerably more objectionable. Although Bruce and the coffee-house proprietor were arrested after a secretly recorded tape of one of his performances was presented to a grand jury and resulted in that body's directing the filing of criminal charges,[24] Bruce contin-

[23] Ginsburg, however, was convicted in a federal prosecution for mailing obscene material. See United States v. Ginsburg, 224 F. Supp. 129 (E.D. Pa. 1963).

[24] The charges were violations of N.Y. PEN. LAW § 1140-a (presenting or participating in obscene or indecent performances).

ued to give essentially the same show. It was given, however, at post-arrest *raised* admission prices! Once again Bruce was arrested; this time his performances were discontinued. He and the proprietors were tried by three justices of the Criminal Court of the City of New York in June and July, 1964. He was finally convicted just recently, on Nov. 4, 1964.

The Judicial Trend

So much for New York County's experiences of the past three years in seeking to enforce the state's obscenity laws. Clearly, appellate decisions both on the state and federal level have, during the past two decades, increasingly restricted the role of law enforcement in keeping from the community items that many may deem of a pornographic nature.

The changes that time has wrought are brought into sharp focus by comparing the July, 1964 court of appeals action on *Memoirs of a Woman of Pleasure* with the action of that same court almost seventeen years earlier in another *Memoirs* case, the criminal litigation arising from the sale of Edmund Wilson's *Memoirs of Hecate County*. Doubleday & Co., Inc., the Wilson book's publisher, had been convicted of violating the New York obscenity laws, in publishing and offering for sale the *Hecate County* book, a beautifully written contemporary work, by a well-reputed and gifted critic. The book consisted of a number of short stories one of which, *The Girl With the Golden Hair,* contained, as an integral part of its narrative, some tender though erotic descriptions. The appellate division sustained the conviction, acting unanimously and without opinion.[25] This judgment was affirmed by the court of appeals, also without opinion; Judges Desmond and Fuld, of the present court, were members of that earlier high tribunal which unanimously affirmed the *Hecate County* finding of guilt. An equally divided United States Supreme Court (split four to four, with Mr. Justice Frankfurter not participating) affirmed the state's criminal conviction.[26]

The contrast between the 1940's *Memoirs of Hecate County,* and the 1960's republished *Memoirs of a Woman of Pleasure* is as one between the gentlest breezes of early evening and the torrents of the blackest night. *Hecate County* had a handful of moderately erotic passages; *Woman of Pleasure* was permeated with erotica, from defloration of tender post-childhood to memories of an aging woman, with detailed descriptions of sexual athletics, including numberless interludes of intercourse, female masturbation, voyeurism and lesbianism. And yet, the more delicate *Memoirs* was held to be obscene by every New York appellate judge to consider it; the blunderbuss *Memoirs*—as published seventeen years later—was, by the margin of one judge of the court of appeals, found not to be legally actionable.

Unequivocally, judicial thinking—never immutable—has undergone the most profound of changes, apparently in keeping with our society's changing mores. It little profits to argue whether these changes are for the better or for the worse. Like them or not, they have taken place, and wishing will not repeal them. Were our contemporary courts not infinitely more permissive than they were two decades ago, they would be shutting their senses

[25] People v. Doubleday & Co., 272 App. Div. 799, 71 N.Y.S.2d 736 (1st Dep't 1947).

[26] People v. Doubleday & Co., 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd,* 335 U.S. 848 (1948).

to the world around them.

Our judges, aware of these changes, are writing decisions dealing with alleged pornography while still deeply conscious of the dry aftertaste that fascism has left in the world. Thought control—rigid censorship—was one of its potent weapons. This grim post-World War II recollection has rendered the judiciary leary of anything that remotely smacks of totalitarian interference with freedom of expression.

Appreciating these factors, whether or not one agrees with the extreme permissiveness that has marked recent obscenity appellate decisions, one cannot, it seems to me, state that they are *all* unrealistic and dangerous to our American way of life or, in short, that they are "wrong." (Although *some,* indeed, are awesome.) Rather than ranting blindly against them, prosecutors and defense counselors should assist our courts and our legislators in probing both the pitfalls of public licentiousness and the dangers of over-enforcement.

Are there, then, values that are to be served by permitting the state to exercise some limited control over freedom of expression in the area of pornography? What are they, and what are the legislative needs that can be formulated to further these values?

A Legislative Program

There are many who will urge that obscenity leads to crime and that its suppression will alleviate our burden of crime. This may be so. But as one who has been active in law enforcement for almost twelve years, and has handled and directly supervised the handling of tens of thousands of cases ranging from disorderly conduct through impairing the morals of minors to rapes and sodomies, I *cannot* attest to the accuracy of this proposition. Arrests have been made for brutal crimes, with books and magazines turning up in the defendants' possession that are found to deal with similarly gross conduct. But we do not ban the sale of detective stories or the exhibition of motion pictures dealing with breath-holding burglaries because they entertainingly furnish rough blueprints for ingenious criminal capers. And just as there are qualified psychiatrists and psychologists who will state that pornography stimulates criminal conduct, they have their counterparts who, with equal certainty, state that pornographic titillation may provide a beneficial outlet.

Quite apart from obscenity as a progenitor of crime, should it sale to *minors* nevertheless be outlawed? I believe that it should—for two reasons:

Firstly, our society places upon the parents primarily, and upon the schools secondarily, responsibility for the education and the character development of the young. Children *are* regarded as second-class citizens, lacking in complete freedom of choice; their parents and educators are expected to make certain decisions for them. We cannot, however, place toddlers and teenagers in culture jars or petri dishes, there to germinate, nourished solely by parental and educational forces. Nor would it be desirable to do so. But in an age in which sexual mores are undergoing the swiftest of changes, it seems reasonable to expect society to lend such aid as it is able in keeping the pornographers-for-profit from defeating parental and educational efforts. Specifically, if a parent wishes to keep *Fanny Hill* away from a malleable fourteen-year-old, I believe that the community should do that little which it can to protect the parent's right to do

so.[27] Parental freedom of choice in training offspring is entitled to some measure of community protection.

Secondly, reputable scientific opinion suggests that youngsters may be beset with harmful tensions and disruptively insoluble dilemmas in our age of sexual change, when one set of standards is inculcated in the home while quite a variant set is *lawfully* fostered, and foisted upon them, on the outside.

Apart from the impact of obscenity upon the crime rate (which I discount), and from its impact upon the young (which I deem of major social concern), a third consideration exists. It is one that I believe also validly militates *for* anti-obscenity legislation. This third consideration is an intangible one. I call it "moral tone." It is something that cities have, just as individuals have it. One hears of "model cities" and of "sin cities"; one is familiar with the "nice" parts of town, and with the "honky-tonk" neighborhoods. Streets jammed with shopwindows and newsstands which display endless selections of painted, sketched, photographed and even imitation female bosoms and scantily clad torsos, and exhibit areas interspersed with rundown movie theaters with their montages of disarrayed feminine pulchritude (advertising what, allegedly, is to be found in animated version on the inside) do not contribute to the pride of a city.

Specifically, then, what course should legislation take to deal with these problems?

A General Pornography Statute

Because of rapidly changing community sexual mores, it is important that any statute barring the sale of pornography (or its possession with the intent of showing such items) retain the existing law's flexibility. Words like "obscene, lewd, lascivious, filthy, indecent," etc., contained in New York's present Section 1141 of the Penal Law, have been often interpreted, and are constantly being molded, by the courts. Roughly speaking, they provide a medium for keeping pace with changes in community attitudes. If a general provision on pornography is to remain part of our law, existing section 1141 does the job admirably.

I suggest that the interdiction on adult reading or viewing desires not be repealed entirely, although the law may ultimately be heading in the direction of complete permissiveness. I find support for retaining some limitations in several sources:

(1) 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 pleasures 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.

(2) The American Law Institute, in proposing its Model Penal Code,

[27] It is no answer to say that if the child is properly raised either it will respect parental wishes or will remain unharmed by minor deviations from them. Realistically, even the ideal home must deal with outside—sometimes disruptive—factors. In our paternalistic society, our communities traditionally act, within reasonable limits, to back-stop parents: the young are enjoined by law from purchasing tobacco and alcohol, from going to the cinema unescorted, etc.

> rejected proposals for total repeal of the obscenity law as applied to books, despite the persuasive argument that adults should be free to acquire and read whatever they wish, including pornography, since there is no scientific proof that obscenity is criminogenic.[28]

As the corps of draftsmen of the so-called "Model" was heavily weighted with academicians, appellate judges, social workers, psychiatrists and psychologists — persons other than working prosecutors or police[29] — and its orientation is noted not for its practicality but for its liberality,[30] the policy determination by this group that penal statutes *should* impinge on absolute adult freedom of choice in terms of reading material should be entitled to considerable weight.

(3) A third and, to me, highly persuasive argument for continuing at least some limitation on that which adults are permitted to see or read is the "trickle down" argument. Inevitably, if something is legally disseminated to adults, at least some of it is certain to get into the hands of children. A policeman is not always at our elbow, and if stag movies, for instance, can lawfully be sold to adults, inevitably teenagers will find them more readily available than is now the case. Moreover, children emulate their elders; the legal possession by a parent of an item argues to the young that it cannot be per se harmful. Therefore, although quite properly we cannot constitutionally relegate to adults only those things that are appropriate for their offspring,[31] yet, if our community morality dictates that certain extreme items are not fit for grown-ups, our wisdom in proscribing them is bolstered by the knowledge that if we do not do so, they will also seep through into the hands of the immature.

One change, however, should be made in our general obscenity section. A defense should be provided, *with the defendant having the burden of establishing it,* as to items possessed or sold *solely* for scientific or other technical purposes *and* offered *solely* to the appropriate technical audiences. The defense must be clearly articulate and delimited, however, lest it immunize pseudo-scientific works, archly published in scientific format. If the law is to develop soundly in the area of obscenity, uninhibited discussions among lawyers, psychologists, and sociologists should be fostered. *The Catholic Lawyer,* for instance, not sold to the general public, but directed at audiences of those technically trained, should not have to deal solely in descriptions. "Real evidence" should be freely available, so that no ambiguity exists as to what is being discussed.

In the obscenity debate, the absolutists —those who pump for untrammeled freedom—often rest their arguments on the *Lady Chatterly* and *Ulysses* examples. Crude whipping and torture pamphlets, dank "girlie" magazines, and boorish "strip-tease nudes" are rarely seen by libertarians crying "censorship"—or by legislators, or even appellate judges! Truly, in the pros and cons of obscenity enforcement, one illustration is often more potent than are thousands upon thousands of

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[28] See Schwartz, *The Model Penal Code: An Invitation to Law Reform,* 49 A.B.A.J. 447, 455 (1963). Professor Schwartz was one of the reporters for the American Law Institute project.

[29] The writer has criticized the proposed model and its draftsmen for their many impracticalities. See Kuh, *A Prosecutor Considers the Model Penal Code,* 63 COLUM. L. REV. 608 (1963).

[30] For instance, the Code would remove all penal sanctions from so-called "perverted" sexual conduct between consenting adults.

[31] See Butler v. Michigan, 352 U.S. 380 (1957).

words; concrete discussions are more revealing—and more practical—than are the abstract ones. Photographs and reprints of items that have been the subject of criminal charges should be usable in appropriate forums without fear of coming within a penumbra of doubtful legality. The audience for whom the matter is *in fact* (not *in fiction*) intended should be a factor considered by a general obscenity statute.

Limitations on Appellate Delay

In the first part of this article, I discussed the extent to which interminable appellate lag enervates meaningful obscenity enforcement. It is delightful when attorney adversaries are able to extend courtesies to one another. But in the face of statutes specifying that appeals are to be taken within thirty days, the administration of criminal justice is torpedoed when these periods stretch to almost as many months. This mockery is pernicious when the convicted defendants professionally engage in criminal conduct, and possibly use the appellate grace period to continue that conduct—conceivably in order to raise funds with which to pay their attorneys!

Legislation is in order, I believe, to preclude the parties from stipulating to extend appellate time beyond a certain point, possibly an additional sixty days. Such legislation might also limit the number of extensions that the appellate courts could thereafter grant, specifying that such extensions were only to be granted upon motion, for cause shown. Lastly, it should require that any violation of such timetables results in the automatic dismissal of the appeal, or a reversal of the conviction, depending upon which party was unready to proceed with the appeal.

Commercial Sale to Minors

The keystone of any program in the obscenity area is that program's effectiveness in *keeping objectionable items from being foisted upon children.* What is deemed "objectionable," however, is likely to vary with the age of the youngster and with the standards and beliefs of those charged with his up-bringing. Generally, items dealing with nudity and sexual activity are the type that substantial numbers of parents and educators would wish either to keep from the immature or at least to review selectively before their charges are exposed to such material. Yet, to other proudly sophisticated parents, it is only sexual "guilt" that is the harmful factor; to them complete freedom about nudity and sex is likely to lessen such "guilt." Obviously, no statute can make it unlawful to sell to a minor items that *his* particular parents may deem objectionable—such legislation would make each set of parents a two-person sub-legislature whose personal preferences would determine when penal statutes were being violated. Something more precise is needed.

A firm foundation for a highly explicit statute dealing with sex, nudity and the young is found in community recognition of parental responsibility in these areas. Legislation that unequivocally confers upon parents and educators carte blanche in exposing their own youngsters to sex and nudity, while simultaneously penalizing peddlers who interfere, for personal profit, with such authority, is capable of being extremely specific. Such legislation would *not* be dealing with "obscenity," and all the uncertainty and flexibility that term involves. It would deal expressly with "nudity" and "sex," whether or not ob-

scenely presented. We prohibit adults from *selling* cigarettes and alcohol to children, although in moderation these items may be harmless; I see no reason why we must allow them to sell nude pictures or sex stories to those of tender years, as harmless as the particular pictures or written items may be. As a statute enjoining such sales would *not* be barring the general trade in items that might or might not be obscene, but would merely estop those who would *commercially* supply them *to the young,* its constitutionality, hopefully, should not be in danger. Below I have outlined such a statute on sale to the young that has much, I believe, in the way of reasonableness to recommend it.

Firstly, the statute should limit its protective cloak to those youngsters whom our community traditionally and specially shelters—in New York City, those who are under sixteen. These are the young who are still in school,[32] who are not permitted in moving picture houses unescorted,[33] and whose morals and health are particularly subject to protection from impairment.[34] If the cut-off age were to be greater, to the point that it were to embrace those who although young might well be out of school, or married, or in military service, or gainfully employed on a full-time basis, it would become more difficult to argue that the statutory purpose was the protection of "children."

Second, the statute should be limited in its interdiction to those "outsiders" who *sell* to youngsters. It should, explicitly, exclude from its embrace those in parental relationship to the child, and schools regularly attended (including their employees and agencies), that may furnish, or sell, the young items in connection with the educational curriculum. Bona fide museums and public libraries should be excluded. A statute with such exclusions would unequivocally declare that parents, schools, and other educational facilities were not being stripped of their rights to exercise their own best judgment in terms of what their young charges would have ready access to Classics—ancient or modern—that might have erotic passages, and paintings and statues of nudes, or pictures of them, would not be barred to the young; children would merely be unable to purchase commercially these items—or other less classical materials—from private profiteers.

Third, the statute should be extremely explicit as to just what was barred. The tabooed categories should include the following:

a) any items containing photographs or other representations of persons in the nude or of female persons with breasts exposed;

b) any items containing a multiplicity of photographs or other representations of persons scantily clad, and posed in such a manner that it is clear that the item is designed to exploit sex and arouse lust;

c) any items describing or depicting human acts of sexual intercourse, or other acts involving contact with genital areas.

Books such as Hawthorne's *Scarlet Letter* and plays such as Shaw's *Mrs. Warren's Profession* (both mentioned in the majority opinion voiding the key phrase of Section 484-h of the Penal Law) could be

[32] N.Y. EDUC. LAW § 3205.
[33] NEW YORK, N.Y., ADMIN. CODE § B32-28.0 (1957).
[34] N.Y. PEN. LAW §§ 483, 483-b.

freely sold; although adultery and fornication may be vital to their themes, there are no passages descriptive of the sex act contained in either.

The proposed statute would effectively bar sales of "girlie" magazines to the young, but would not interfere with those daily "News" centerspreads that occasionally feature one or two pictures of boldly decolletaged Miss Universe contestants.

Would the proposed limitations threaten the news dealer, *selling* "Life"—let us say — when a particular issue showed the breasts of either a Hollywood starlet or an Australian bush-woman? They would. It is, of course, unlikely as a practical matter that such a one-shot seeming violation in a family magazine of broad general interest would lead to prosecution. Moreover, some would argue that even such enlightening items as may appear in "Life" should be kept from offspring, unless the parents wish to make them available. But, in the interest of cautiously aiding the proposed legislation along the constitutional road, the statute might well contain a proviso dealing with such isolated items; it could declare it to be a defense to a prosecution for the sale of objectionable material to youngsters that the seemingly offending matter, in context, formed merely a minor and incidental part of an otherwise non-offending whole and served some clearly apparent purpose therein other than titillation. The burden of sustaining this defense might, reasonably, be placed upon the defendant.

It is submitted that a statute conforming generally to this outline would go far towards meeting the danger that many believe obscenity and quasi-obscenity pose to youth. Such a statute would be relatively simple—and certain—for courts to apply, habituated as are the judges to more abstruse guides, such as "contemporary community standards," and "appeals to the prurient interest."

Public Display of Objectionable Items

For more than half a century, New York State has had a statutory ban on public displays of any "placard, poster, bill or picture [which] shall tend to demoralize the morals of youth or others or which shall be lewd, indecent, or immoral."[35] That statute, however, has been rarely invoked. The reasons seem clear: its use of the terms "lewd, indecent, or immoral" parrot New York's general obscenity statute, and in so doing apply the same standard therein provided. Hence, the public display ban is no broader in coverage than is that existing under the basic obscenity law, which—of course—makes it a misdemeanor to "show" obscene items to anyone. (The phrase "shall tend to demoralize the morals of youth" is either void under the *Butler* case[36] or is invalid for vagueness, being considerably more uncertain than that statutory language struck down in the *Bookcase* case.)[37] As this existing display statute, therefore, does not authorize legal action against any items not actionable under the more familiar general statute, the more basic law is the one more commonly invoked.

But, in the area of *public display,* why must "obscenity" be the standard? Public nudity is, today, legally offensive; "indecent exposure" statutes are actively enforced.[38] But there is little logic to declaring it crim-

[35] N.Y. PEN. LAW § 1141-a.
[36] Butler v. Michigan, *supra* note 31.
[37] People v. Bookcase, Inc., *supra* note 19.
[38] N.Y. PEN. LAW § 1140.

inal when one person, alone, displays him —or herself publicly in the nude (or close to it), while at the same time we hold it lawful for a merchant to blazon dozens of nude, or semi-nude cardboard life-sized photographs in order to entice the public into his third-run movie house. It would seem that a carefully drawn statute dealing with the public display of objectionable items might focus on *nudity* when displayed for commercial — not artistic — purposes, rather than on "obscenity."

Would a statute banning public displays of pictured nudity be sustained as constitutional? Again, one cannot be certain until the appellate mountains have thundered and—possibly by a majority of one—have determined that issue. But, at the very least, the constitutionality of a "reasonably" drawn statute should be arguable.

The statute should explicitly recognize that it is dealing with a "nuisance." Noxious views, assailing the sense of vision, are—it seems to me—just as distasteful as are noxious odors, that assail the sense of smell, or noxious noises, that assail the sense of hearing. All, equally, should be actionable nuisances.

The statute should limit its proscription to nudity that is used to sell something, not nudity used as civic decoration. Figures carved on monuments, publicly exhibited, whatever their state of disarray, should not—of course—be compelled to don figleaves. Females, uncovered and unjacketed, on magazine covers and record jackets, displayed in shop windows and magazine stands, should be within the ban. This distinction between the artistic and the commercial (whether or not done with artistry) could readily be phrased by language banning "representations of persons in the nude, or of females with breasts exposed, which are exhibited primarily in connection with the sale of a product or products, or type of product or services, and not primarily for artistic or civic purposes."

It should be clear that the ban that is contemplated is not on the sale or the offering for sale of anything, but solely on the *display to the passing public* of nudity. This limitation should be pointedly articulated; language might define the public nuisance as existing when the pictorial representations are "exposed or displayed in such manner as to be visible and legible *from a public thoroughfare.*"

A statute along these lines would strike a balance. If enacted and enforced, our communities would seem less honky-tonk and less sexually preoccupied; their "moral tone" would be improved. Yet the merchant's right to display boldly—within his shop and not directed at the innocent by-passers—would continue, and the public's right to buy would be unimpeded.

Conclusion

One thing is clear. Enacting statutes along the lines suggested will not solve "the obscenity problem."

The program I have suggested will be too moderate to please those who see all flesh as a catastrophe to youth, and as a dark temptation to adults. It will seem too extreme to those who see all governmental controls on absolute freedom of expression as the creeping progenitor of fascism.

But it will be a program that neither ignores the public clamor, nor truckles to it by painting with a broad brush in the area of obscenity. Rather, it seeks out those festering spots that exist, and en-

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deavors to minister to them. It will be a program that, hopefully, can be enforced by police, prosecutors, and the courts with a degree of clarity that, today, is by-and-large wanting in the area of obscenity.