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Obscenity: Police Enforcement Problems

John J. Sullivan

OBSCENITY: POLICE ENFORCEMENT PROBLEMS

JOHN J. SULLIVAN*

ONE OF THE MOST PERPLEXING PROBLEMS facing police departments throughout the country is enforcing the various state laws relating to the distribution of obscene material. The police often find themselves accused of being censors, or, on the other hand, of being lax in the suppression of materials which have a deleterious effect upon the community. Because of the sensitive constitutional questions involved, the highly technical aspects of the judicial definitions of obscenity and the various types of salacious material available, it has frequently become necessary for the police officer to seek legal counsel before taking police action.

In New York City, the Police Department may look to the five district attorneys or to the corporation counsel for assistance. However, because these sources are already overburdened, the Legal Bureau of the Police Department of the City of New York is frequently called upon to study suspect material and to recommend the appropriate police action to be taken. The Legal Bureau is staffed by five superior officers and fifteen police officers, all of whom are also attorneys-at-law. One of the many functions of the Legal Bureau is to study the law relating to obscenity so that members of the force can be kept properly informed and instructed. It is not a board of censors, nor do its members read through the various magazines and books that are circulated in the city seeking the titillating passages and directing the seizure of those that are offensive. Such is not the function of a police department. However, the Department cannot close its eyes to the flagrant violations of law which take place in the city, nor close its ears to the complaints received from irate citizens and anxious parents.

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* B.S., Manhattan College; LL.B., St. John's University; Lieutenant, New York City Police Department; Staff member of the Legal Bureau of the New York City Police Department.

The following discussion is not intended as a commentary on, or history of, the law relating to obscenity. Many learned articles have already been written on this subject.[1] However, in discussing the problems faced by New York law enforcement officers, it is necessary to point out the statutes and important judicial rulings which govern police action in this area.

New York Statutes

Section 1141 of the Penal Law deals with obscene prints and articles and provides, generally, that a person who distributes or possesses with the intent to show "any obscene, lewd, lascivious, filthy, indecent or disgusting" material is guilty of a misdemeanor. This section also makes it unlawful to advertise such material, or to hire another to aid in doing any of the prohibited acts or to pose for obscene pictures. In addition, subdivision 4 provides that the possession by any person of six or more identical or similar articles coming within the provisions of the section is presumptive evidence of a violation. A violation of this section is punishable by a sentence of not less than ten days nor more than one year imprisonment and/or a fine of not less than $150 nor more than $2,000 for the first offense. Increased punishments for second and third offenses are provided, with the maximum being imprisonment for an indefinite term of not less than six months nor more than three years and/or a fine of $5,000. This section of the Penal Law is the one most often utilized in prosecutions for the distributing of obscene material.

Another important law in the area is Section 484-h of the Penal Law; this section provides as follows:

> § 484-h. Sale to minors.—A person who willfully or knowingly sells, lends, gives away, shows, advertises for sale or distributes commercially to any person under the age of eighteen (18) years or has in his possession with intent to give, lend, show, sell, distribute commercially, or otherwise offer for sale or commercial distribution to any individual under the age of eighteen (18) years any pornographic motion picture; or any still picture or photograph, or any book, "pocket book," pamphlet or magazine the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains pictures of nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain or any article or instrument of indecent or immoral use shall be guilty of a misdemeanor.
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> For the purposes of this section "knowingly" shall mean having knowledge of the character and content of the publication or failure to exercise reasonable inspection which would disclose the content and character of the same.

With the enactment of this section in 1955, the legislative findings were expressed in Section 484-e of the Penal Law and stated that the publication, sale and distribution to minors of material devoted to the presentation of horror, violence, sex, nudity and immorality are:

(1) a causative factor of juvenile crime;

(2) a detriment to the ethical and moral development of adolescents;

(3) "a clear and present danger to the people of the state."

A close reading of section 484-h reveals the difficulties that confront the police offi-

[1] See, *e.g.*, Hayes, *Survey of a Decade of Decisions on the Law of Obscenity*, 8 CATHOLIC LAW. 93 (1962).

cer in enforcing it. Court decisions[2] have indicated that the material sold to a person under eighteen years of age need not meet the same tests of obscenity as required in Section 1141 of the Penal Law. However, a summary arrest cannot be made unless the violation takes place in the officer's presence.[3] Even then, the subjective opinion of the officer as to the nature of the item sold or given to the child is reviewable by the courts. Accordingly, where a police officer has not witnessed the offense, the Department has adopted the practice of referring complaining parents to a court when they allege a violation. Furthermore, to assure full protection of the rights of the seller of suspect material, even where the sale is witnessed by a police officer, it is the practice to ascertain the identity of the seller, to interview the parents of the child, and to present the suspect publication to a judge of the New York Criminal Court with a request for a court summons.

However, on July 10th, 1964, the New York Court of Appeals ruled that section 484-h was, at least in part, vague and so broad and obscure in its scope as to be unconstitutional. In *People v. Bookcase, Inc.*,[4] the court reversed the conviction of the appellants under Section 484-h of the Penal Law for selling *Fanny Hill* to a minor under eighteen years of age. The conviction was not predicated on the issue of obscenity, but was sustained under that portion of Section 484-h of the Penal Law which prohibited the sale to a minor 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. . . ." The court indicated that the issue was whether the legislature can constitutionally restrict the sale of books to minors under eighteen years of age for the reason that the materials contained therein are devoted principally to the subject of illicit sex or sexual immorality. These words were held to be too vague to apprise defendants of what they mean, and the court concluded:

> It seems to us that this statute is drawn so broadly as to render criminal, sales or other exhibition to the young of pictures and publications of all kinds which are principally devoted to these subjects, in however serious or dignified a manner, and, in our view, it is so broad and so obscure in its coverage as to abridge the constitutionally protected freedom of speech and of the press as well as the due process clauses in the Federal and State Constitutions.[5]

Did the court thus strike down the entire statute, or did it restrict itself to only that portion in issue? It would seem from the attitudes of the three dissenting judges that the entire statute was declared unconstitutional.

The Appellate Term of the New York Supreme Court recently reversed convictions for the sale of "girlie" magazines to minors under eighteen years of age, under the provision of the statute which prohibits the sale of any "magazine . . . which contains pictures of nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion. . . ." In

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[2] *E.g.*, People v. Finkelstein, 156 N.Y.S.2d 104 (Magis. Ct. 1955), *aff'd*, 12 App. Div. 2d 457, 207 N.Y.S.2d 389 (1st Dep't 1960), *rev'd on other grounds*, 9 N.Y.2d 342, 174 N.E.2d 470, 214 N.Y.S.2d 363 (1961).

[3] N.Y. CODE CRIM. PROC. § 177.

[4] 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964).

[5] *Id.* at 418, 201 N.E.2d at 19, 252 N.Y.S.2d at 440.

reversing the previous convictions, the court relied on the *Bookcase* decision which it interpreted as declaring all of section 484-h unconstitutional.[6]

Section 22-a of the Code of Criminal Procedure provides for a different approach to the suppression of obscene material. The district attorney or the corporation counsel may move for a court order enjoining the distribution of the obscene material and directing its seizure and destruction. While this proceeding is not criminal in nature, the same tests of obscenity that would apply in a criminal prosecution are applicable to the subject publications. In *Kingsley Books, Inc. v. Brown*,[7] this injunctive remedy was found to be constitutional and not a prior restraint upon publication.[8] However, in *Tenney v. Liberty News Distribs., Inc.*,[9] it was held that proceedings under this statute could not be *ex parte*, but that notice must be given the respondents before any injunctive relief could be granted. In a recent case, *A Quantity of Copies of Books v. Kansas*,[10] Mr. Justice Brennan criticized the seizure of some books under a Kansas statute which did not afford the defendant a hearing on the question of obscenity before the warrant issued. In his opinion, the Justice referred favorably to this New York injunctive procedure.

Proof of Scienter

In 1959 the United States Supreme Court ruled that a state law dispensing with the element of *scienter*—knowledge by the bookseller of the contents of a book—and imposing a strict criminal liability on a bookseller possessing obscene material had such a tendency to inhibit constitutionally protected expressions that it could not stand under the Constitution.[11] The Court thus imposed the rule that in a prosecution for the criminal distribution of obscene material, the state must show that the defendant had some knowledge of the nature of the material. This poses a serious problem to an investigating officer and is probably the ground on which most acquittals are based.

Although Section 1141 of the New York Penal Law does not specifically mention *scienter* as an element of the crime, the New York Court of Appeals has ruled that the statute is constitutional because the requirement of *scienter* is implied therein. The court stated:

> A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exercised, and a mere omission of the word "scienter" need not be construed as an attempt to eliminate that common-law element of the crime.[12]

Search Warrants

In *Marcus v. Search Warrant*,[13] the United States Supreme Court again indicated its concern with the constitutional

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[6] People v. Popick, (App. Term), 152 N.Y.L.J., Sept. 25, 1964, p. 14, col. 6; People v. Appelbaum, (App. Term), 152 N.Y.L.J., Sept. 25, 1964, p. 14, col. 6.

[7] 1 N.Y.2d 177, 134 N.E.2d 461, 151 N.Y.S.2d 639 (1956), *aff'd*, 354 U.S. 436 (1957).

[8] See Near v. Minnesota, 283 U.S. 697 (1931).

[9] 13 App. Div. 2d 770, 215 N.Y.S.2d 663 (1st Dep't 1961) (memorandum decision).

[10] 378 U.S. 205 (1964).

[11] Smith v. California, 361 U.S. 147 (1959).

[12] People v. Finkelstein, 9 N.Y.2d 342, 345, 17 N.E.2d 470, 471, 214 N.Y.S.2d 363, 364 (1961).

[13] 367 U.S. 717 (1961).

protections of freedom of speech and press " 'for material which does not treat of sex in a manner appealing to prurient interests.' "[14] General search warrants were issued for the seizure of obscene books and magazines "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene."[15] The warrants left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted obscene publications. The Court said:

> Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees.[16]

In keeping with the import of the decision in the *Marcus* case, *i.e.*, that judicial review of the suspect material before seizure is desirable, the New York City Police Department has established the practice of bringing suspect publications and photographs before a judge of the New York Criminal Court and presenting them to the court for its inspection along with an application for a search warrant. By this method, the officer's subjective determination as to the obscenity of the material is not the sole basis for any further police action that may be taken. This procedure has been proven effective in many prosecutions. Time consuming as it is, the practice eliminates one argument which might be raised by a defendant seeking dismissal of the charge.

It is interesting to note that where care is exercised in selecting the material which is to be the basis for a charge of selling obscene matter, the defendant will seek to avoid the obscenity issue by attempting to have the matter dismissed on other grounds, such as, unlawful search and seizure or the unconstitutionality of the statute in question. Furthermore, the decision of Mr. Justice Brennan in *A Quantity of Copies of Books v. Kansas*,[17] will no doubt give rise to arguments by defense counsel that even the above procedure is deficient since it does not afford the defendant an opportunity to be heard before a search warrant issues.

Pornography and Children

On September 21 and 22, 1964, the New York State Joint Legislative Committee studying the publication and dissemination of offensive and obscene material held hearings in New York City to discuss the effect of the recent *Bookcase* decision. Citizens, parents, a psychiatrist, priests, ministers, prosecutors and police officials (including the writer), in a unanimous chorus, called for a law which would prevent the dissemination of salacious material to young people. All agreed that such material has a deleterious effect on adolescents, and that unless the state legislature acts to close the gap left in the state law by the *Bookcase* decision, little, if anything, can be done by law enforcement officers to regulate the distribution of objectionable material to children.

The legislative committee expressed great interest in whether any of the witnesses believed that salacious literature had a causal connection with criminal activity among adolescents. All agreed that there

[14] *Id.* at 730, citing Roth v. United States, 354 U.S. 476, 488 (1957).

[15] *Id.* at 731-32.

[16] *Id.* at 733.

[17] 378 U.S. 205 (1964).

was no scientific way to measure such a causal relationship, but all were of the opinion that, at least as far as some adolescents were concerned, there was such a causal relationship. Mrs. Theresa Melchionne, Deputy Commissioner in charge of the Youth Program for the City of New York Police Department, related to the committee several incidents wherein delinquent acts, including male and female homosexual relations, were directly attributable to the childrens' exposure to salacious photographs.

Law enforcement officers are vitally concerned with the welfare of our children since they see, first hand, the terrible aftermath of delinquency. Their views must be given serious consideration when they point up a dangerous condition.

Operation Pornography

In *People v. Fried,*[18] the Appellate Division of the New York Supreme Court affirmed the conviction of a defendant for selling obscene photographs and a pocket-type novel entitled *College for Sinners.* The photographs of semi-nude females did not depict any sex acts nor were there any pictures of uncovered pubic areas. The females were posed with scant wearing apparel used to emphasize and sometimes distort the naked breasts and buttocks. The ruling that such pictures were obscene required that police action be taken against those dealing in this type of material.

In the Times Square area of New York City, some stores had thousands of such photographs for sale. Most of these were not as offensive as those proscribed by the *Fried* decision and the police were thus forced to resort to a "case-by-case process" of operation. The procedure of presenting the pictures to a judge with an application for a search warrant was utilized. As for those pictures that were not subject to police action, some are still available and are the source of many complaints by offended citizens who object to their sale.

The pocket book, *College for Sinners,* was representative of a particularly pernicious line of pocket novels that suddenly appeared in New York City. Published under the trade names of Midnight Reader or Nightstand Books, these books were concerned with perverse sex, sadism, lesbianism and group orgies in lurid detail. Again, the "case-by-case process" or "book-by-book process" was resorted to and several convictions have been obtained for the sale of books bearing such graphic titles as *Sin Sheet, Flesh Fix* and *Passion Party.* It is interesting to note that Nightstand Books were the subject of the seizure in *A Quantity of Copies of Books v. Kansas.*[19] However, there are countless offensive pocket novels published yearly which do not meet the test of criminal obscenity and thus are beyond the immediate concern of law enforcement officers. Furthermore, although some convictions have been recently obtained for the sale of a few "girlie" magazines which featured pictures of the type concerned with in the *Fried* case, two recent New York decisions seem to indicate that little can be done in regard to the sale of "girlie" magazines.[20]

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

[19] 378 U.S. 205 (1964).

[20] People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961); Larkin v. G.I. Distribs., Inc., 41 Misc. 2d 165, 245 N.Y.S.2d 553 (Sup. Ct.), *aff'd,* 19 App. Div. 2d 609, 241 N.Y.S.2d 159 (1st Dep't) (memorandum decision), *aff'd,* 14 N.Y.2d 869, 200 N.E.2d 768, 252 N.Y.S.2d 81 (1964) (memorandum decision).

Immediately following the *Fried* decision, the New York Police Department commenced "Operation Pornography." In the year that followed, almost 170 arrests were made for violations of Section 1141 of the Penal Law. New York County alone was the scene of 154 such arrests, and of the 102 cases which have been disposed of, 83 convictions have been obtained.[21] Under "Operation Pornography," the Deputy Commissioner in charge of the Youth Program was designated by the Police Commissioner to co-ordinate the Department's operations in enforcing obscenity laws. Members of the force assigned to plainclothes and youth patrol units were instructed to direct their attention to this area of enforcement, and various assistant district attorneys, especially in New York County, were assigned to handle these cases.

There is no problem as far as prosecutions for the true "hard core" pornography of the stag movie or French postcard variety; such material is universally deemed unlawful and only a few voices are heard to support the alleged constitutional right to distribute this filth. Such material is not sold openly and its viewers do not boast of their activities. Consequently, direct police action is not easily taken and careful and painstaking investigation is necessary to develop a criminal prosecution in such cases.

Conclusion

The most recent New York decisions may well have sounded the death knell for the enforcement of the laws against pornography as we have known them.[22] If *Tropic of Cancer* and *Fanny Hill* are not obscene, what book can be so considered? "Girlie" magazines are freely circulated and there is no law to regulate their sale to children. While broad guidelines concerning obscenity have been established by our appellate courts, seldom is unanimity found among judges applying these rules. How then can the law enforcement officer, the first line of defense against lawlessness, be expected to perform efficiently? Is he to arrest people who sell offensive material only to see the courts let them free? Or should he adopt an attitude of laissez-faire and hence allow the sale of anything anyone wishes to read? The choice is not his to make, for he has a sworn duty to enforce the laws of his state and country, regardless of his personal feelings. In enforcing these laws, he cannot disregard any limitations placed upon his actions by the courts or the legislature.

Furthermore, police action alone is not sufficient to stem the flow of salacious literature. It is a problem that must be met by the entire community. Strangely enough, the will of the majority does not always prevail in our society. Vocal minority groups can often exercise control because of their united action. However, various groups have been organized on a national and local scale to combat the distribution of pornography, such as, Citizens for Decent Literature and New York City's Operation Yorkville. Such groups have had an effect by educating the public and by expressing a community standard.

In June 1964, His Eminence Francis Cardinal Spellman, Archbishop of New York, called upon city officials to establish a citizens commission comprised of par-

[21] N.Y. County District Attorney's Office, Press Release, June 1, 1964.

[22] Larkin v. Putnam's Sons, 14 N.Y.2d 399, 200 N.E.2d 760, 252 N.Y.S.2d 71 (1964); People v. Bookcase, Inc., 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964).

ents, educators, business leaders, labor leaders, members of the business and political associations, lawyers and members of religious bodies. This commission would assume the civic and moral responsibility for taking necessary, appropriate and legal means of protecting the youth and family life of the City from the influence of salacious literature. Such a commission could very well result in the establishment of a united front against the distribution of salacious literature. However, such a commission cannot do the job alone, for it and the police must have the united support of all right-thinking people. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates."[23]

[23] Smith v. California, *supra* note 11, at 171.

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 machinery 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.

PROSECUTION PROBLEMS
(Continued)

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.