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## Freedom from Obscenity

Norman A. Erbe\* and Arlo F. Craig, Jr.\*\*

INTEREST IN OBSCENITY LAWS,<sup>1</sup> in the reason and purpose for their being, their efficacy in achieving the ends for which they are intended, the threat their existence and enforcement pose to the freedoms of speech and press, and the attitude of the courts toward them, seems to be at a new high.<sup>2</sup> Obscenity is universally condemned throughout the United States.<sup>3</sup> Yet law enforcement officers who attempt to enforce obscenity laws invariably are accused of "censoring" and "book burning."<sup>4</sup> A good many of such charges come from persons whose ox is being gored—persons who have a pecuniary interest in having obscenity laws ignored rather than enforced. However, such charges also come from well-intentioned individuals who sincerely believe that criminal prosecutions for the dissemination of obscenity are a threat to individual freedoms. The purpose of this article is to discuss obscenity laws from a propitious point of view, pointing out the sound basis for their existence and enforcement, and examining some of the arguments made against them.

### The Extreme View

Persons opposed to the enforcement of obscenity statutes like to term such enforcement "censorship." A particularly bitter view of "censorship" was stated thus in a recent article critical of obscenity laws generally:

Any censorship of obscenity has almost always been both irrational and indiscriminate. Perhaps the best explanation for this fact lies in the personal characteristics of the censor. He is rarely an educated person who understands and appre-

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<sup>1</sup> Perhaps it would be more accurate to use the term "anti-obscenity statutes," rather than "obscenity laws," to describe statutes aimed at preventing the dissemination of obscene material. Nevertheless, throughout this article the term "obscenity laws" will be used to indicate statutes whose purpose is to prevent the dissemination of obscenity.

<sup>2</sup> One indication of this is the fact that the United States Supreme Court has handed down opinions on six obscenity cases since 1957. See notes 7, 8, 9, 67, 71 and 72, *infra*.

<sup>3</sup> "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 the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956." *Roth v. United States*, 354 U. S. 476, 484, 485 (1957).

<sup>4</sup> 105 Cong. Rec. 8230, 8231, 8232 (1959).

ciates the nature and function of imaginative literature. He is often an emotionally disturbed and intemperate person with a paranoid personality. His attention is focused on smut, and since he looks for it, he finds it everywhere. Indeed, his continued existence may depend on his ability to turn it up. In either case, he is so much interested in smut that he cannot, even if he had the ability, see the good at all.<sup>5</sup>

Such an image obviously is unrealistic. Enforcement of obscenity laws does not connote "censorship." The majority of citizens want the dissemination of obscenity prevented.<sup>6</sup> They want to enjoy freedom from obscenity.

### Obscenity Laws Constitutional

Certainly the most encouraging recent development in the law of obscenity, to persons interested in preventing the dissemination of obscene material, was three United States Supreme Court decisions, handed down on June 24, 1957. These decisions, *Roth v. United States*,<sup>7</sup> *Alberts v. California*,<sup>8</sup> and *Kingsley Books, Inc. v. Brown Corporation Counsel*,<sup>9</sup> held constitutional a federal obscenity statute,<sup>10</sup> a state obscenity statute,<sup>11</sup> and a

<sup>5</sup> Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 371, 372 (1954).

<sup>6</sup> The Post Office Department received over 50,000 complaints in 1957 from parents whose children received solicitations for obscene material through the mail. 104 Cong. Rec. 5743, 5744 (1958).

<sup>7</sup> 354 U. S. 476 (1957).

<sup>8</sup> Reported with *Roth v. United States*, 354 U. S. 476 (1957).

<sup>9</sup> 354 U. S. 436 (1957).

<sup>10</sup> 18 U. S. C. § 1461. The applicable portion cited by the Court in its footnote is as follows:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both . . ."

<sup>11</sup> West's Cal Penal Code Ann., 1955, § 311. The applicable portion cited by the Court in its footnote is as follows:

"Every person who wilfully and lewdly, either:

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or

(Continued on next page)

state statute<sup>12</sup> providing for summary, injunctive action to

(Continued from preceding page)

book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

"4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . .

"6. . . . is guilty of a misdemeanor . . . ."

<sup>12</sup> New York Code of Criminal Procedure. (L. 1941, ch. 925), as amended in 1954 (L. 1954, ch. 702), § 22. The applicable portion cited by the Court in its footnote is as follows:

"§ 22-a. Obscene prints and articles; jurisdiction. The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

"1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

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

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

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

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

remove obscene material from circulation. These decisions were the first Supreme Court cases that faced head on the issue that previously cast doubt upon the enforcement of obscenity statutes: does the enforcement of an obscenity statute providing criminal sanctions for publishing, printing or distributing obscene matter infringe upon the freedom of speech and press guaranteed by the Constitution? Although the answer had been suggested many times previously,<sup>13</sup> it had never before been clearly answered. The unequivocal statement in *Roth* dispelled any doubts. Justice Brennan stated, ". . . [T]his Court has always assumed that obscenity is not protected by the freedoms of speech and press . . ."<sup>14</sup> This point of view was also expressed in *Kingsley*, in which the Court stated, "And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene."<sup>15</sup> Obscenity has no value and is therefore not protected by the Constitution.<sup>16</sup> Not only is obscenity valueless, it is antagonistic to the social value of preventing a public display of the offensive and protecting the recognized standards of morality.<sup>17</sup> There are, therefore, good reasons for restraining it.

### Reasons for Obscenity Statutes

A common tactic of persons opposed to the enforcement of obscenity statutes is to make a frontal attack on the reason and purpose for the existence of such statutes. Representative of these attacks are: (1) the sociological attack; (2) the "no effect" attack; (3) the restraint of creativity attack; and (4) the no historical basis attack.

(1) *Sociological Attack*. The sociological attack on obscenity statutes is based upon the undeniable fact that what is culturally taboo in one society may be a ceremonial, open rite with a deep religious significance in another society.<sup>18</sup> This theory would have us believe that therefore, since obscenity is merely "cul-

<sup>13</sup> *Beauharnais v. Illinois*, 343 U. S. 250, 266 (1952); *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571, 572 (1942); *Hoke v. United States*, 227 U. S. 308, 322 (1913); *Robertson v. Baldwin*, 165 U. S. 275, 281 (1897); *United States v. Chase*, 135 U. S. 255, 261 (1890); *Ex Parte Jackson*, 96 U. S. 727, 736, 737 (1878).

<sup>14</sup> 354 U. S. at 481.

<sup>15</sup> 354 U. S. at 440.

<sup>16</sup> *Roth v. United States*, *supra*, note 3, at 484, 485.

<sup>17</sup> ". . . the law wants to prevent the senses of citizens from being offended by sights and sounds which would be seriously objectionable to a considerable majority and greatly interfere with their happiness." 1 Chafee, *Government & Mass Communication* 196 (1947).

<sup>18</sup> LaBarre, *Obscenity: An Anthropological Appraisal*, 20 *Law & Contemp. Prob.* 533 (1955).

turally defined," it should not be restrained.<sup>19</sup> The fallacy of this reasoning is that most, if not all, of our criminal statutes are "culturally defined." If the majority of citizens, through the legislative process, declare they want obscene material restrained, the mores of the Zuni Indians should not prevent the enforcement of these statutes.<sup>20</sup>

(2) *No Effect Attack.* The late Judge Jerome Frank, of the Second Circuit Court of Appeals, stated the thrust of the "no effect" attack upon obscenity statutes in a 1956 case.<sup>21</sup> Although Judge Frank's opinion was labeled as concurring, in a case which upheld a conviction of sending obscenity through the mails, in reality it was a dissent in everything except the result.<sup>22</sup> In it he stated most of the arguments against the enforcement of any obscenity statute. The major thesis of his argument was that, even though such statutes may aim at a desirable end, it cannot be shown with any reasonable probability that obscene publications tend to have any effect upon healthy, normal, average adults.<sup>23</sup> In essence, this theory contends that what a person reads has no effect upon his thinking or his actions.<sup>24</sup> Robert Maynard Hutchins and other educators of the "great books" school would hardly agree with Judge Frank on this point.<sup>25</sup> Granted that reading or viewing obscene material does not cause a chemical reaction, which results in an immediate sex crime, it does not seem reasonable to believe that exposure to obscene material has no effect whatsoever.<sup>26</sup>

(3) *Restraint of Creativity.* A more esoteric attack upon obscenity statutes is the allegation that the enforcement of these statutes makes writers hesitant to write what they feel, and thus restricts the freedom of the mind essential to creativity and good

<sup>19</sup> Larrabee, *The Cultural Context of Sex Censorship*, 20 *Law & Contemp. Prob.* 672 (1955).

<sup>20</sup> It may be significant that New Mexico, the home of the Zuni Indians, is the only state that does not have a general obscenity statute. See footnote 16, *Roth v. United States*, *supra*, note 3.

<sup>21</sup> *Roth v. United States*, 237 F. 2d 796 (2d Cir. 1956), the Circuit Court decision in *Roth v. United States*, 354 U. S. 476 (1957).

<sup>22</sup> For a thorough discussion of Judge Frank's opinion, see Schmidt, *A Justification of Statutes Barring Pornography From The Mail*, 26 *Fordham L. Rev.* 70 (1958).

<sup>23</sup> 237 F. 2d at 802.

<sup>24</sup> *Id.*, at 811.

<sup>25</sup> Hutchins, *The Great Ideas, A Syntopicon Of The Great Books* (1952).

<sup>26</sup> Dr. Nicholas G. Frignito, Chief Neuro-psychiatrist and Medical Director of the Philadelphia Municipal Court, testified before a Congressional subcommittee that pornography often causes antisocial, delinquent and criminal activity. Staff of Subcomm. on Postal Operations, House Comm. on Post Office and Civil Service, *Obscene Matter Sent Through the Mail* 17 (Comm. Print 1959).

literature.<sup>27</sup> Although it is essential to protect the right to communicate through the arts, freedom is not license. Restrictions upon free speech and free expression through the libel laws have never been held unconstitutional.<sup>28</sup> Obscenity is restrained because it is judged to have no value and is not worthy of communication.

(4) *No Historical Basis.* Another argument made against obscenity statutes is that there is no sound legal, historical basis for such law. Many critics advancing this argument date the birth of American obscenity laws as after the Civil War, and place the responsibility for such laws on Anthony Comstock.<sup>29</sup> However, obscenity was punishable at common law.<sup>30</sup> There was a prosecution for the distribution of obscene literature in the English common law courts in 1727.<sup>31</sup> As early as 1712 the Massachusetts Bay Colony made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon."<sup>32</sup> In 1821 a conviction for the publication of an obscene book was upheld in Massachusetts,<sup>33</sup> in 1857, Lord Campbell's Act, an obscenity statute, was enacted in England.<sup>34</sup> From this, it seems implausible to argue that obscenity statutes are without precedent.

### Test for Obscenity

Another tack taken by critics of obscenity statutes is that the test for obscenity cannot be framed within a workable definition that will convey an exact meaning.<sup>35</sup> At times courts have experienced difficulty in phrasing a definition to pinpoint precisely what is within the purview of a statute. Reasonable persons know what is obscene; the legislators know what evil they are trying to restrain; usually the enforcement officers know what violates the intent and spirit of the statute. The problem has been a semantical one—to express words in a style which will convey precisely the test for the recognition of obscenity. Such a test is necessary because most statutes simply prohibit the dissemination

<sup>27</sup> St. John-Stevas, *Obscenity, Literature and the Law*, 3 *Catholic Law* 301 (1951).

<sup>28</sup> *Beuharnais v. Illinois*, *supra*, note 13.

<sup>29</sup> Ernest & Lindey, *The Censor Marches On* (1940); Broune & Leech, *Anthony Comstock* (1927).

<sup>30</sup> *State v. Miller*, 112 S. E. 2d 472, 477 (W. Va. 1960).

<sup>31</sup> *Rex v. Curl*, 2 *Strange* 788, 93 Eng. Rep. 849 (K. B. 1727).

<sup>32</sup> *Acts and Laws of the Province of Mass. Bay Colony*, CV § 8 (1712).

<sup>33</sup> *Commonwealth v. Holmes*, 17 *Mass.* 335 (1821).

<sup>34</sup> *Obscene Publications Act*, 20-21 *Vict. C.* 83 (1857).

<sup>35</sup> Abse, *Psychodynamic Aspects of the Problem of Definition of Obscenity*, 20 *Law & Contemp. Problems* 572 (1955).

of obscene material and leave the definition of obscene to the courts.<sup>36</sup>

One of the first tests for obscenity was spelled out in *Regina v. Hicklin*,<sup>37</sup> an English case. Lord Chief Justice Cockburn stated:

I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences; and into whose hands a publication of this sort may fall.<sup>38</sup>

This so-called "Hicklin Rule" was soon accepted as the test by American courts<sup>39</sup> and universally applied for many years.<sup>40</sup> It was first challenged in the federal courts by Judge Augustus Hand in *United States v. One Book Called "Ulysses."*<sup>41</sup> Judge Hand stated that the proper test should be the "dominant effect" of the material.<sup>42</sup> After this decision, some state courts also began to challenge the "Hicklin Rule." In Massachusetts, long a leader in the prosecution of pornography peddlers, the "Hicklin Rule" was repudiated and a different test applied in *Commonwealth v. Isenstadt*.<sup>43</sup> The Isenstadt test was the effect upon the persons the material reached.<sup>44</sup> Still another test was applied in *Volanski v. United States*,<sup>45</sup> in which the determining factor was held to be the effect upon a person with average sex instincts.<sup>46</sup> The controversy concerning the correct test was settled in *Roth*, in which the Supreme Court set out a comprehensive and clear definition that has been accepted by both federal<sup>47</sup> and state<sup>48</sup> courts. The *Roth* test is:

<sup>36</sup> See *Swearingen v. United States*, 161 U. S. 446, 450 (1895), where the Supreme Court stated that the words "obscene," "lewd" and "lascivious," used in an obscenity statute, are synonymous.

<sup>37</sup> LR 3 Q. B. 360 (1868). The material held obscene was an anti-Catholic book entitled, "The Confessional Unmasked."

<sup>38</sup> *Id.*, at 371.

<sup>39</sup> The first American case to recognize the Hicklin Rule was *United States v. Bennet*, 24 Fed. Cas. 1093, No. 14, 571 (C. C. S. D. N. Y. 1879).

<sup>40</sup> By 1913 the Hicklin Rule had become so universally accepted that Judge Learned Hand stated in *United States v. Kennerly*, 209 Fed. 119, 120 (S. D. N. Y. 1913), that although he did not agree with it, he felt constrained to follow it.

<sup>41</sup> 5 F. Supp. 182 (S. D. N. Y. 1933), *aff'd*, 72 F. 2d 705 (2d Cir. 1934).

<sup>42</sup> *Id.*, at 707. "While any construction of the statute that will fit all cases is difficult, we believe the proper test of whether a given book is obscene is its dominant effect."

<sup>43</sup> 318 Mass. 543, 62 N. E. 2d 840 (1945).

<sup>44</sup> *Id.*, at 549.

<sup>45</sup> 246 F. 2d 842 (6th Cir. 1957).

<sup>46</sup> *Id.*, at 844.

<sup>47</sup> *United States v. Keller*, 259 F. 2d 54, 57, 58 (3d Cir. 1958); *Alexander v. United States*, 271 F. 2d 140, 145, 146 (8th Cir. 1959).

(Continued on next page)

[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.<sup>49</sup>

This test, which lays out in simple terms the elements necessary to constitute obscenity, should make it easier to enforce obscenity statutes. Even this definition is not self-executing, of course. A determination of what is or is not obscene is necessarily somewhat subjective. There is no litmus test for obscenity. But with a clear-cut standard to apply, juries should be able to make a determination no more subjective than determinations in other criminal cases.

### Prior Restraint

Another charge sometimes made against obscenity statutes is that they violate freedom of the press by their very existence, because individuals know that if they disseminate obscene matter they will be prosecuted, and are thus deterred from printing or distributing books or magazines that they otherwise would print or distribute.<sup>50</sup> This, it is said, constitutes a violation of freedom of the press.<sup>51</sup> Such a charge shows a lack of agreement with the premise upon which freedom of the press is based. Freedom of the press is not an absolute right.<sup>52</sup> There is no right to print and distribute with impunity libelous or obscene matter.<sup>53</sup> Freedom of the press guarantees only the right to publish without any prior restraint.<sup>54</sup> Prior restraint is restriction before publication, as opposed to punishment subsequent to publi-

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<sup>48</sup> *State v. Sul*, 146 Conn. 78, 147 A. 2d 686 (1958); *State v. Kowan*, 156 N. E. 2d 170 (Ohio 1958); *Commonwealth v. Moniz*, 155 N. E. 2d 762 (Mass. 1959); *People v. Brooklyn News Co., Inc.*, 12 N. Y. Misc. 2d 768, 174 N. Y. S. 2d 813 (1958).

<sup>49</sup> *Roth v. United States*, *supra* note 3, at 489. The Court cited the American Law Institute Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957) as a good definition of obscenity. It provides: "Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing tests of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties."

<sup>50</sup> Gellhorn, *Individual Freedom and Governmental Restraints* (1956).

<sup>51</sup> *Id.*

<sup>52</sup> "Liberty of speech, and of the press, is also not an absolute right." *Near v. Minnesota*, 283 U. S. 697, 708 (1931).

<sup>53</sup> *Beauharnais v. Illinois*, *supra*, note 13.

<sup>54</sup> Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Problems* 648 (1955).

cation.<sup>55</sup> It is possible that the threat of subsequent punishment may prevent publication from being made. That of course is the intent of a criminal statute; to prevent the crime from occurring. *Near v. Minnesota*,<sup>56</sup> the landmark case in freedom of the press, where the doctrine of prior restraint<sup>57</sup> was set out, adopted the English concept. The *Near* case quoted Blackstone's<sup>58</sup> statement:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.<sup>59</sup>

### Threat of Prosecution

It has been argued that any statement by a law enforcement officer that an obscenity law will be enforced is a prior restraint.<sup>60</sup> This conclusion is based upon the premise that the threat of prosecution is as great, or perhaps greater, a deterrent to publishing and distributing as actual prosecution.<sup>61</sup> Better-reasoned authorities do not agree.<sup>62</sup> The fact that retail distributors of books or magazines refuse to handle certain titles when they know that the obscenity laws of their jurisdiction are being enforced does not mean that a prior restraint has been placed upon those titles. A more reasonable explanation is that retailers recognize the nature of the publications and do not care to break the law.<sup>63</sup>

### State Statutes

The decisions in *Roth*, *Alberts* and *Kingsley*, although encouraging, were not an indication that the Supreme Court has given free rein to the states in enacting and enforcing obscenity laws. In fact, since 1948 the numerical score in state statutes

<sup>55</sup> *Id.*

<sup>56</sup> 283 U. S. 697 (1931).

<sup>57</sup> However, the term "prior restraint" had been used previously in *Patterson v. Colorado*, 205 U. S. 454, 462 (1907).

<sup>58</sup> 4 Bl. Com. 151, 152.

<sup>59</sup> *Near v. Minnesota*, *supra*, note 52, at 713, 714.

<sup>60</sup> *H. M. H. Publishing Co. v. Garrett*, 151 F. Supp. 903 (W. D. Ohio 1953).

<sup>61</sup> *Extralegal Censorship of Literature*, 33 N. Y. U. L. Rev. 989, 1007-1008 (1958).

<sup>62</sup> *Four Star Publications, Inc. v. Erbe*, 181 F. Supp. 483 (S. D. Ia. 1960); *Magtab Publishing Company v. Howard*, 169 F. Supp. 65 (W. D. La. 1959).

<sup>63</sup> *Four Star Publications, Inc. v. Erbe*, *supra*, note 62 at 489.

held unconstitutional is four to three against. In two decisions before the *Roth*, *Alberts* and *Kingsley* triumvirate, the Court struck down state statutes in two cases that had great significance beyond the borders of the states involved. In *Winters v. New York*,<sup>64</sup> a statute<sup>65</sup> prohibiting the sale or possession with intent to sell of certain obscene material was held unconstitutional as too vague and uncertain to meet the standards of definiteness required of criminal statutes. This decision effectively invalidated sections of the obscenity laws of at least twenty-four states.<sup>66</sup> And in *Butler v. Michigan*,<sup>67</sup> the Court held unconstitutional a state statute<sup>68</sup> which forbade the distribution of obscene materials "tending to the corruption of the morals of youth."<sup>69</sup> The Court based its decision upon the theory that the statute reduced the adult population of Michigan to reading only what is fit for youth. Such a statute, stated in the Court, is to ". . . burn the house to roast the pig."<sup>70</sup> In decisions since *Roth*, the Court in 1959 held violative of the First and Fourteenth Amendments a determination by the Motion Picture Division of the New York Education Department that the motion picture "Lady Chatterley's Lover" was obscene and not entitled to an exhibition license.<sup>71</sup> In *Smith v. People of the State of California*,<sup>72</sup> the Supreme Court held unconstitutional a Los Angeles ordinance prohibiting the possession, in certain places, of obscene material.<sup>73</sup> This ordinance, which had no scienter element, was

<sup>64</sup> 333 U. S. 507 (1948).

<sup>65</sup> New York Penal Law, § 1141, subsection 2.

<sup>66</sup> *Winters v. New York*, *supra* note 64, at 522, 523 (dissent).

<sup>67</sup> 352 U. S. 380 (1957).

<sup>68</sup> Michigan Penal Code, § 343.

<sup>69</sup> *Butler v. Michigan*, *supra* note 67, at 383.

<sup>70</sup> *Id.*

<sup>71</sup> *Kingsley Corporation v. Regents of the University of the State of New York*, 360 U. S. 684 (1959).

<sup>72</sup> 361 U. S. 147 (1960).

<sup>73</sup> Los Angeles, Calif. Municipal Code, § 41.01.1

"It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in any of the following places:

- "1. In any school, school-grounds, public park or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;
- "2. In any place of business where icecream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or post-cards are sold or kept for sale;
- "3. In any toilet or restroom open to the public;
- "4. In any poolroom or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public;
- "5. In any places where phonograph records, photographs, motion pictures, or transcriptions of any kind are made, used, maintained, sold or exhibited."

said to thus impose a strict liability which would tend to restrict the dissemination of books which were not obscene.<sup>74</sup> The Court stated in a footnote<sup>75</sup> that common law prosecutions for the dissemination of obscene matter required scienter, as did the California statute sustained in *Alberts v. United States*.<sup>76</sup> The effect of this decision upon the many state statutes which do not have a scienter requirement may be far-reaching.<sup>77</sup>

Even though favorable cases are numerically one less than the unfavorable ones, the recent Supreme Court decisions undoubtedly have strengthened the position of obscenity laws. The *Roth* and *Alberts* decisions sustaining the constitutionality of obscenity statutes, as such, were basic. The *Kingsley* decision provided an answer to a great need in the enforcement of obscenity laws, an expeditious procedure for getting a judicial determination of whether matter charged as obscene by an enforcement officer actually comes within the prohibition of the statute. Unfortunately, the effect of citing material as violative of an obscenity statute too many times simply multiplies its circulation. The New York statute<sup>78</sup> solved this by providing that the chief executive or the legal officer of a municipality may bring an action for an injunction to prevent the sale or distribution of obscene matter. The person against whom the action is brought is entitled to a trial on the issues one day after the joinder of issue and to a decision within two days after the end of the trial. Anyone who sells or distributes such material after service of notice of such an action is chargeable with knowledge of the nature of the allegedly obscene matter. A conviction under a somewhat similar<sup>79</sup> statute was recently sustained in Missouri.<sup>80</sup>

<sup>74</sup> *Smith v. People of the State of California*, *supra* note 72, at 152.

<sup>75</sup> *Id.*, footnote 9.

<sup>76</sup> *Supra*, note 11.

<sup>77</sup> Some state statutes do have a scienter requirement, of course; i.e., Texas Penal Code, § 527, which states the person charged with the violation must "... knowingly have in his possession for sale." In *Bennett v. State*, 311 S. W. 2d 826 (Texas 1958), a conviction was reversed because the indictment omitted the word "knowingly." But in *People v. Shapiro*, 6 N. Y. App. Dec. 271, 177 N. Y. S. 2d 670 (1958), the Court upheld an obscenity conviction under a statute which did not require scienter, and stated that the common law requirement of scienter in the indictment and proof of any crime was not necessary in obscenity statutes.

<sup>78</sup> *Supra*, note 12.

<sup>79</sup> Mo. Rev. Stat., § 542.380 (1949). This statute is not patterned after the New York statute; it was enacted in 1909, and is much broader. However, although its procedure had been used against gambling devices previously, no decision in which it was used against printed matter reached the Missouri Supreme Court until 1960, in *Search Warrant of Property at 5 W. 12th St. v. Marcus*, 334 S. W. 2d 119 (Mo. 1960). The *Kingsley* decision was there cited as controlling. 334 S. W. 2d at 123.

<sup>80</sup> *Search Warrant of Property at 5 W. 12th St. v. Marcus*, *supra*, note 79. The Court there compared the Missouri and New York statutes, 334 S. W. 2d at 123.

## Federal Statutes

The federal courts have been strict in dealing with the violators of federal obscenity laws. Both the Post Office Department<sup>81</sup> and the Customs Service<sup>82</sup> have the power to restrict the dissemination of obscenity. However, both of them have encountered difficulties at times in enforcing their statutes. For example, Postmaster General Summerfield was unsuccessful in his attempt to restrain "Lady Chatterley's Lover,"<sup>83</sup> and former Postmaster General Hannegan was equally unsuccessful in keeping *Esquire* magazine out of the mails.<sup>84</sup> The Customs Service has its job complicated by determining what is art or scientific material and thus exempt from the law.<sup>85</sup> The Supreme Court has struck down all efforts to prosecute any material which may be in any way construed as promoting an idea, even if that idea be nudism,<sup>86</sup> adultery<sup>87</sup> or homosexuality.<sup>88</sup> Congress recently strengthened the postal obscenity laws by the amendment of 18 U. S. C. § 1461<sup>89</sup> to permit the prosecution of obscenity peddlers who use the mail at the point of receipt, as well as at the point of deposit.<sup>90</sup> This amendment is particularly significant in view of the *Roth* test of "contemporary community standards," so that the material may be judged at the place it is received, rather than where mailed. Most obscene material sold through the mail originates in New York or Los Angeles,<sup>91</sup> which undoubtedly have different community standards than Minnesota or Kansas.

<sup>81</sup> 18 U. S. C. §§ 1461-65 (1958).

<sup>82</sup> 19 U. S. C. § 1305 (1958).

<sup>83</sup> *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (1960). This decision is printed on the cover of paper bound copies of "Lady Chatterley's Lover."

<sup>84</sup> *Hannegan v. Esquire*, 327 U. S. 146 (1946).

<sup>85</sup> See *United States v. 31 Photographs*, 156 F. Supp. 350 (S. D. N. Y. 1957), where obscene photographs for the Institute for Sex Research, Inc., at Indiana University, Bloomington, Indiana were held to be scientific material.

<sup>86</sup> *Sunshine Book Company v. Summerfield*, 355 U. S. 372 (1958), revg. 249 F. 2d 114 (D. C. Cir. 1958).

<sup>87</sup> *Kingsley Corporation v. Regents of the University of the State of New York*, *supra*, note 71.

<sup>88</sup> *One, Inc. v. Olesen*, 355 U. S. 371 (1958), rev'g 241 F. 2d 772 (9th Cir. 1957).

<sup>89</sup> 72 Stat. 962.

<sup>90</sup> Illustrating the purpose accomplished by this amendment are two cases which arose in the Eighth Circuit. In *United States v. Ross*, 205 F. 2d 619 (8th Cir. 1953), an indictment for violation of 18 U. S. C. A. § 1461 was dismissed on grounds that venue was improperly laid in Kansas, the point of receipt. The proper venue was said to be California, the point of deposit. In *Alexander v. United States*, 271 F. 2d 140 (8th Cir. 1959), in which the material was mailed in New York and received in Minnesota, the Court sustained a conviction laid in Minnesota.

<sup>91</sup> 105 Cong. Rec. 6605, 6606 (1959).

## Conclusion

There is an increasing awareness of the need for strict enforcement of obscenity laws. Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation, recently addressed a letter to all law enforcement officers in the United States, pointing with alarm at the increase in obscene material available.<sup>92</sup> Postmaster General Summerfield is aggressively enforcing the federal obscenity laws regarding matter sent through the mails.<sup>93</sup> State and local officials are cracking down on the smut merchants.<sup>94</sup> Even this increased emphasis upon enforcement activities will have to be intensified, however, if we are not to be inundated under a flood of obscenity. Since World War II, commercialized obscenity has been a half billion dollar a year business in the United States.<sup>95</sup> It has far outgrown its back-of-the-poolroom days. Pornography is an immensely profitable business.<sup>96</sup> It has doubled in the past five years.<sup>97</sup> It would be naive to believe that the individuals who traffic in it will exert any voluntary restrictions upon themselves, when some purveyors of pornography now write directly to young children, soliciting business.<sup>98</sup> In a time when concern is expressed over what has been alleged to be a lack of a national purpose, a decreasing standard of morality, and a corruption of traditional values, defenders of obscenity do not stand upon substantial ground. Probably the most insidious aspect of the open dissemination of obscenity is the perverted view it presents to the young.<sup>99</sup> The human mind is shaped and influenced by its surroundings. If obscenity is openly peddled and tacitly condoned, this expression of societal approval gives status and recognition to the attitudes represented by the obscenity. No ordered society can afford such a challenge to its accepted standards. It is to be hoped that enforcement of obscenity laws will be sharply increased in the future, so that citizens can be assured of freedom from obscenity.

<sup>92</sup> See *Four Star Publications, Inc. v. Erbe*, *supra*, note 65, 181 F. Suppl. at 485, 486.

<sup>93</sup> 105 Cong. Rec. 16451, 16452, 16453 (1959).

<sup>94</sup> For a narration of the action taken against obscene material in Iowa by the author, as Attorney General of Iowa, see *Four Star Publications, Inc. v. Erbe*, *supra*, note 62.

<sup>95</sup> 105 Cong. Rec. 6605, 6606 (1959).

<sup>96</sup> Total cost to produce one popular magazine, that sells for fifty cents, is fifteen cents. A publisher of one such magazine started with an investment of \$10,000 and within four years was grossing \$3,500,000 a year. Report of the New York State Joint Legislative Committee studying the publication and dissemination of offensive and obscene material 123, 124, Legislative Document No. 85, New York (1958).

<sup>97</sup> 105 Cong. Rec. 12649, 12650 (1959).

<sup>98</sup> 105 Cong. Rec. 8230, 8231, 8232 (1959).

<sup>99</sup> See *Four Star Publications, Inc. v. Erbe*, *supra*, note 62, 181 F. Supp. at 485, 486 for the views of J. Edgar Hoover on this point.