PROTECTION OF THE ADULTS' RIGHT TO PORNOGRAPHY

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For several years, the United States Supreme Court has struggled with the question of obscenity. The Court has been unable to adequately define the term and has not yet found a satisfactory method of control. Whether obscenity—that which is "foul; loathsome; disgusting . . . ."[1] or [o]ffensive to chastity of mind or to modesty . . . ."[2]—can be banned by law has long been an area of dispute.[3] The primary problem is not whether there exists that which is offensive or revolting but rather whether the majority can ban items from general distribution because of such offensiveness.

Pictures and representations of sexual organs and acts are the greatest areas of concern, although these are not the only subjects which could be considered obscene. What is considered obscene is subjective, the result of a personal emotional reaction, without a clear line between obscenity and artistic expression. This lack of clarity has led to the Court's problem of defining *legal* obscenity.

In *Roth v. United States*,[4] the Court declared that obscenity is not within the area of speech or press protected under the first amendment. To this effect are state[5] and federal[6] statutes providing criminal penalties for mailing, importation, broadcasting, transportation, or other dealings with obscenity.[7] Consequently, the Supreme Court in *Roth* attempted to define that to which it was denying constitutional protection. It adopted the following test of obscenity: "[w]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[8] Since that "defi-

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1 WEBSTER'S NEW INTERNATIONAL DICTIONARY 1681 (2d ed. 1954) (definition for "obscene").

2 BLACK'S LAW DICTIONARY 1227 (4th ed. 1951) ("obscene").

3 For an excellent history of censorship in England and the United States, see N. ST. JOHN-STEVAS, OBSCENITY AND THE LAW (1956).

4 354 U.S. 476 (1957).

5 *E.g.*, in Arizona, the pertinent statutes are ARIZ. REV. STAT. ANN. § 13-531 (1956) (indecent exposure); ARIZ. REV. STAT. ANN. § 13-531.01 (Supp. 1969-70) (definition of "obscenity"); ARIZ. REV. STAT. ANN. § 13-532 (Supp. 1969-70) (obscene or indecent pictures, figures, or writings); and ARIZ. REV. STAT. ANN. § 13-533 (1956) (seizure and treatment of obscene things).

6 The relevant federal statutes are 18 U.S.C. § 1461 (1964) (mailing obscene or crime-inciting matter); 18 U.S.C. § 1462 (1964) (importation or transportation of obscene matters); 18 U.S.C. § 1463 (1964) (mailing indecent matter on wrappers or envelopes); 18 U.S.C. § 1464 (1964) (broadcasting obscene matter); 18 U.S.C. § 1465 (1964) (transportation of obscene matter for sale or distribution).

7 For instance, ARIZ. REV. STAT. ANN. § 13-531.01 (Supp. 1969-70) was adopted in 1964, after Roth v. United States, 354 U.S. 476 (1957), and merely restates the holding of that case. This adds no clarity.

8 354 U.S. 476, 489 (1957) (footnote omitted).

nition" there has been no substantive change in the law of obscenity.

The most significant case since *Roth, Memoirs v. Massachusetts*,[9] is illustrative of the quagmire which now engulfs the law of obscenity. There was no majority opinion and no agreement among the Justices on the state of the law. Justice Brennan restated his opinion expressed in *Roth* that three elements must coalesce for an item to be obscene:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[10]

While Justice Brennan was joined in his opinion in *Roth* by four other Justices,[11] only two could agree with him in the *Memoirs* restatement.[12] Indeed, the state of disagreement was such that *Memoirs* inspired a total of seven opinions.

Justices Black [13] and Douglas,[14] in concurring opinions, stated that there was no federal power of censorship whatsoever. Justice Stewart, also concurring in *Memoirs* on the basis of his dissent in a companion case, *Ginzburg v. United States*,[15] stated that there was a power to censor "hard-core pornography," but that *Fanny Hill* was not within that classification.[16] He did not, however, add any clarity to his earlier statement:

> I shall not today attempt further to define the kinds of material I understand to be [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .[17]

Justice Black, dissenting in *Ginzburg v. United States*,[18] summed up the effect of *Memoirs*, *Ginzburg*, and *Mishkin v. New York*,[19] all handed down the same day:

> My conclusion is that certainly after the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the

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9 383 U.S. 413 (1966). The book concerned, commonly known as *Fanny Hill*, was J. CLELAND, MEMOIRS OF A WOMAN OF PLEASURE (1750).
10 383 U.S. at 418.
11 Justices Frankfurter, Burton, Clark, and Whittaker.
12 Chief Justice Warren and Justice Fortas.
13 383 U.S. 413, 421 (1966) (concurring, on basis of his dissenting opinion in Ginzburg v. United States, 383 U.S. 463, 476 (1966)).
14 383 U.S. 413, 424 (1966).
15 383 U.S. 463 (1966).
16 *Id.* at 499.
17 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
18 383 U.S. 463, 476 (1966).
19 383 U.S. 502 (1966).

area of 'obscenity' as that term is confused by the Court today.[20]

Such is the current state of the law of obscenity in the United States today. Cases since *Memoirs, Ginzburg*, and *Mishkin* add no clairty to the issue; the basic problem of what constitutes "legal obscenity" remains.[21] Presumably, since there was no agreement in *Memoirs*, the *Roth* test still stands, with the *Ginzburg* element of pandering being determinative in close cases.[22]

Juxtaposed against the confusion stemming from current court doctrine, the approach that Justices Black and Douglas would take has a great appeal. It therefore seems appropriate to consider whether, in light of the difficulty involved in defining obscenity plus the seemingly unequivocal command of the first amendment, censorship of an adult's

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[20] 383 U.S. 463, 480-81 (1966). Such uncertainty may be a danger. Justice Douglas, believes *any* test may impinge upon the freedom of expression:

> As a people, we cannot afford to relax that standard [of freedom of expression]. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless. Roth v. United States, 354 U.S. 476, 495 (1967).

[21] In addition to the confusion surrounding the legal aspects of obscenity, there is considerable doubt as to the alleged harmful social effects of pornography. Four common misconceptions concerning pronography are set out in Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655 (1964). The first misconception is that the reading of pornography leads to acts of violence; the second states that children may be kept free of knowledge of sex; thirdly, that normal people reject pornography; and, finally, that all pornography is uniform with a uniform effect. The empirical evidence supporting or rejecting these theses is limited and not persuasive. The opposing arguments, however, are impressive. Murphy, citing psychologist Rudolph Allers, argues that the most frequent reader of pornography is an introvert who obtains vicarious release for his sexual tensions by reading pornography, and that rather than inciting violence, the reading of pronography actually prevents it. *Id.* at 661 n.18. Murphy cites Alfred Adler as authority for an argument that children may not be kept free of knowledge of sex. *Id.* at 660 n.26, THE INDIVIDUAL PSYCHOLOGY OF ALFRED ADLER 442-43 (H. Ansbacher & R. Ansbacher eds. 1956). As to the third point, if it is true that "normal" people reject pornography, then it would follow that there is an overabundance of abnormal persons in the United States. This could be inferred from the large number of persons who queue for *X*-rated movies and from the large gross sales of allegedly pornographic materials. *See* N.Y. Times, Dec. 6, 1968, at 39, col. 8; June 9, 1969, at 58, col. 1; and July 7, 1969, at 26, col. 1. As to the fourth point, so many different types of pornography can be cited—motion pictures, books, prints, cards, or even medical textbooks, which were held obscene in United States v. Chesman, 19 F. 497 (C.C.E.D. Mo. 1881)—as examples that the uniformity argument fails. In a leading case, Commonwealth v. Gordon, 66 Pa. D. & C. 101 (Phila. C.P. 1949). Judge Bok argued that all pornography is not uniform since what is pornographic is determined by the reader and his outlook in reference to the material. In criticizing the rule laid down in Queen v. Hicklin, L.R. 3 Q.B. 360 (1868) (whether something is obscene is to be judged on the basis of those most susceptible to such material), Judge Bok said, "[s]trictly applied, this renders any book unsafe, since a moron could pervert to some sexual fantasy to which his mind is open the listings in a seed catalogue." 66 Pa. D. & C. at 125. These arguments are also dealt with in the most respected work in the field, Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960), and in J. PAUL AND M. SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 191-202 (1961).

[22] 383 U.S. at 474.

"right to receive"[23] is an unwarranted governmental intrusion into a constitutionally protected area. Toward this end, a brief discussion of previous governmental attempts at defining obscenity is presented to demonstrate the futility of the Supreme Court's undertaking in *Roth* as well as to support a new approach to the problem of definition. This new approach will also facilitate a workable distinction between adults and minors, a distinction which continues to be necessary. Finally, it will be argued that in view of the constitutional problems associated with any governmental effort in the area of censorship, a self-regulating system should be adopted by the publishing industry to effect the adult-minor distinction and in doing so to forestall any demand for continued governmental censorship.

THE ADULTS' RIGHT TO PORNOGRAPHY

To date, there have been myriad statutory attempts at a legal formulation of the types of obscenity that could or should be barred from reaching the public.[24] In the United States, the first effort at statutory regulation was the Tariff Act of 1842[25] which was directed to customs officials. The Act provided that:

> [T]he importation of all indecent and obscene prints, paintings, lithographs, engravings, and transparencies is hereby prohibited; and no invoice or package whatever, or any part thereof, shall be admitted to entry, in which any such articles are contained; and all invoices and packages whereof any such articles shall compose a part, are hereby declared to be liable to be proceeded against, seized, and forfeited, by due course of law, and the said articles shall be forthwith destroyed.

This law was later amended to bar "all indecent or obscene articles"[26]—no great victory for lucidity. In 1833, that year's Tariff Act prohibited the importation of "any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image . . . of an immoral nature . . . ."[27] Perhaps seeking precision, a 1909 statute added the word "filthy" to the list of prohibitions.[28] The current Tariff Act is substantially that of 1930,[29] the relevant prohibitions of which are:

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23 Stanley v. Georgia, 394 U.S. 557 (1969).

24 For an illustrated work on the subject, see A. GERBER, SEX, PORNOGRAPHY, AND JUSTICE (1965).

25 Act of Aug. 30, 1842, ch. 270, § 28, 5 Stat. 566-67.

26 Act of March 2, 1857, ch. 63, 11 Stat. 168-69.

27 Act of March 3, 1883, ch. 121, § 2491, 22 Stat. 489. Subsequent obscenity legislation without major change includes the Tariff Act of 1890, Act of October 1, 1890, ch. 1244, § 11, 26 Stat. 614-15; the Tariff Act of 1894, Act of August 27, 1894, ch. 349, § 10, 28 Stat. 549; and, the Tariff Act of 1897, Act of July 24, 1897, ch. 11, § 16, 30 Stat. 208.

28 Act of March 4, 1909, ch. 8, § 211, 35 Stat. 1129 (postal law).

29 19 U.S.C. § 1305 (1964) (originally enacted as Act of June 17, 1930, ch. 497, § 305, 46 Stat. 688).

> [A]ny obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral. . . .

While the statute clearly identifies the articles that are to be reviewed, what constitutes grounds for exclusion is not. It is significant, however, that this language in concert with its statutory predecessors swept Joyce's *Ulysses* within its prohibition.[30]

Most such statutory approaches have failed because they have not been clear enough to allow an accurate standard by which to judge future cases. For instance, the current federal obscenity statute declares to be "nonmailable matter" any "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance . . . ."[31] The statute imposes criminal sanctions for knowingly mailing such matter and it was under this statute that Ralph Ginzburg was convicted and sentenced for the mailing of *Eros*.[32] The problem with the statute is that it is phrased in subjective terms: "lewd," "lascivious," "filthy." What do these terms connote? This is not a question of semantics, but rather one of predictability. If one of the purposes of the statute is to place potential violators on notice, then the statute must adequately describe the proscribed behavior.[33]

Perhaps there is no adequate way to describe such material because there is no such thing as "obscenity."[34] If there is no such thing as a "dirty" (ergo, censorable) book, then perhaps all literature is entitled to the protection of the first and fourteenth amendments as an exercise of the freedom of expression. Such an interpretation is not without its advocates. In a dissent to *Ginzburg*, Justice Black gave his view that censorship is contrary to the mandate of the Constitution:

> Sex is a fact of life. Its pervasive influence is felt throughout the world and it cannot be ignored. Like all other facts of life it can lead to difficulty and trouble and sorrow and pain. But while it may lead to abuses, and has in many instances, no words need be spoken in order for people to know that the subject is one pleasantly interwoven in all human activities and involves the very substance of the creation of life itself. It is a subject which people are bound to consider and discuss whatever laws are passed by any government to try to suppress it. Though I do

30 *See* United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934) (book held to be not obscene because it had to be judged in its entirety).

31 18 U.S.C. § 1461 (1964).

32 *See* Ginzburg v. United States, 383 U.S. 463 (1966).

33 Numerous statutes have been held unconstitutional because of such vagueness; a summary is provided in Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968). *See generally* AMERICAN LAW INSTITUTE & AMERICAN BAR ASS'N, JOINT COMM. ON CONTINUING LEGAL EDUC., THE PROBLEM OF DRAFTING AN OBSCENITY STATUTE (1961).

34 Use of the phrase *sexually frank* as a substitute for "obscene," "pornographic," "dirty," etc., seems well-advised to eliminate the malign connotations of the less-clear descriptions.

> not suggest any way to solve the problems that may arise from sex or discussions about sex, of one thing I am confident, and that is that federal censorship is not the answer to these problems. . . . For myself I would follow the course which I believe is required by the Fifth Amendment, that is, recognize that sex at least as much as any other aspect of life is so much a part of our society that its discussion should not be made a crime.[35]

Earlier, in *Roth*, Justices Black and Douglas had joined in a dissenting opinion stating that there should be no punishment for obscenity and that all publications were entitled to the constitutional protection of the first and fourteenth amendments.[36]

The major problem with the *Roth* test is that it is not objective, necessitating in every challenge an interpretation to determine whether or not the item in question meets all three criteria. Therefore, the test does not provide the would-be author or publisher with a means to predict the legality of his work. For example, the test is framed in terms of prevailing community standards which are in a constant state of flux requiring continual judicial reevaluation of the level of such standards—which probably cannot be adequately measured at all. In his dissent to *Roth*, Justice Harlan stated, "Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another."[37] Yet the Supreme Court has held that the "community" in the test for patent offensiveness is the United States taken as a whole.[38]

The conclusion must be drawn that obscenity is undefinable. Since it is, there can be no predictability. Yet for an inroad on a clear constitutional mandate (such as obscenity is on the first amendment) to be upheld, it must be defined so as to provide predictability. Therefore, it can only be concluded that obscenity as a legal category must fail, with the result that no publication of whatever nature can be considered without the protection of the first amendment. Obviously certain publications may be in "bad taste" or "vulgar" to a majority of the population. Indeed the material may even be offensive because of religious beliefs. This, however, is still no excuse for censorship.

> Bad it may be, but badness in the abstract is not the test of speech we may suppress. Whatever the view of earlier times, our government today is not—cannot be—concerned *simply* with enforcing widely held religious precepts which inveigh against portrayal or contemplation in communication of sex stimuli on the ground that, purely as an intellectual abstraction,

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[35] Ginzburg v. United States, 383 U.S. 463, 481-82 (1966).
[36] 354 U.S. 476, 508 (1957). Justice Black repeats this sentiment in Smith v. California, 361 U.S. 147, 157-59 (1959).
[37] *Id.* at 505-06 (1957) (footnote omitted).
[38] Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

such stimuli are evil.[39]

By giving all publications constitutional protection, we eliminate the need for unclear standards and guarantee adults free access to the literature of their choice. It is an individual's decision as to whether certain items are too sexually frank to be to his liking; the first and fourteenth amendments provide that it is not the decision of his government. The contention is that words or pictures can be explicit—even to the point of being offensive to some or most—but they cannot be legally "obscene." They therefore would be within the protection of the first amendment and could not be banned or excluded from the mails.

The purposes of censorship as we know it today should be to protect children from obtaining the material and to protect adults from involuntary contact with it. It cannot be said that these are not legitimate. That children may be kept free from sexual knowledge is, however, simply naive.[40] Children have an innate curiousity about themselves and about those around them. No matter how strict the controls on sexually frank material, children will achieve a knowledge of the subject. What we should seek to prevent is a distorted view of sex as the first encounter. In other words, it may be desirable for us to prevent distorted "sex-in-fantasy" from occurring before "sex-in-reality."[41]

A SYSTEM OF RATINGS

Assuming the necessity for protecting the two interests just discussed, the question arises as to how this could be done without governmental interference and its attendant constitutional problems. A possible solution can be found from the experience of the motion picture industry.

In the not too distant past, a great hue and cry arose in the United States concerning the immediate need for censorship of the motion picture industry. The industry was widely accused of contributing to the alleged downfall of America by showing obscenity on the screen to anyone who could afford the price of admission. Many localities sought and received injunctions against the showing of certain motion pictures in their communities.[42] Yet, as certain members of the community sought to prevent the display of a film, the lines of people in front of the theaters grew; many evidenced a desire to see the same film that others sought to

[39] Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1013 (1962) (footnote omitted).

[40] THE INDIVIDUAL PSYCHOLOGY OF ALFRED ADLER 442-43 (H. Ansbacher & R. Ansbacher eds. 1956).

[41] Note, *Separate Obscenity Standard for Youth: Potential Court Escape Route From Its "Super-Censor" Role*, 1 GA. L. REV. 707, 713 (1967). This note, written prior to the adoption of the Code, focuses primarily upon films.

[42] *See* Gilman, *There's a Wave of Pornography, Obscenity, Sexual Expression*, N.Y. Times, Sept. 8, 1968, § 6 (Magazine), at 36, where a history of the problem is given with examples of court actions taken.

ban.[43] The response of the motion picture producers to this conflict was imaginative and successful. The industry, in seeking a method which would satisfy those who felt the motion pictures obscene and yet allow free access to those who desired to view them, produced the Motion Picture Association Code of Self-Regulation which is in effect today throughout the United States.[44] The mechanics of the Code are simple and inexpensive to administer. A producer voluntarily submits his film for classification. The industry then places one of four ratings on a motion picture before it is distributed to the theaters. Each of the ratings is symbolized by a letter, which is displayed wherever the film is shown or advertised. The ratings establish four classes of films:

G—All ages admitted, general audiences;
GP—All ages admitted, parental guidance suggested;
R—Restricted, under 17 requires accompanying parent or adult guardian;
X—No one under 17 admitted (age limit may vary in certain areas).[45]

The system applies to motion pictures released after November 1, 1968, and has been highly successful from a number of viewpoints. Most significantly, the clamor concerning frankness in films has waned.[46] It also appears that motion pictures are today being exhibited that might not have been permitted prior to the institution of the *G-GP-R-X* system of ratings. For instance, it is doubtful that "I Am Curious (Yellow)" would have been permitted to enter this country had there been no guarantee to the public that young persons would not be permitted to view the film.[47]

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[43] For a summary of the pornography recently available in New York City, see Weinraub, *Obscenity or Art? A Stubborn Issue*, N.Y. Times, July 7, 1969, at 26, col. 1. The popularity of "peep shows" is discussed in Shepard, *Peep Shows Have a New Nude Look*, N.Y. Times, June 9, 1969, at 58, col. 1. The commercial aspects of the area are discussed in Roberts, *Pornography in U.S.: A Big Business*, N.Y. Times, Feb. 22, 1970, § 1, at 1, col. 3.

[44] The system was announced by Jack Valenti, president of the Motion Picture Association of America, on September 20, 1968. N.Y. Times, Sept. 21, 1968, at 27, col. 1.

[45] Arizona Daily Star, March 1, 1970, § C, at 9, col. 1. The system underwent slight revision March 1, 1970. As originally instituted, the four classifications were "G, *M*, R, X." This was described in N.Y. Times, Oct. 8, 1968, at 49, col. 1. The change from "M" to "GP" was described by a spokesman for the industry as being necessary because of a general misunderstanding as to the meaning of the "M" rating. Arizona Daily Star, March 1, 1970, § C, at 9, col. 1.

[46] Of course, the motion picture industry is still subject to all of the existing federal, state, and local standards governing the dissemination of the material. These standards may not be very stringently enforced today as a result of the Code. For reactions to the system, see Simon, *Getting Furious Over 'Curious,'* N.Y. Times, Feb. 19, 1969, § 2, at 1, col. 1; and a reaction by Jack Valenti, N.Y. Times, March 2, 1969, § 2, at 17, col. 1.

[47] A resulting rash of sexually frank films is discussed in N.Y. Times, March 24, 1969, § 2, at 1, col. 1. "I Am Curious (Yellow)" has been held to be without redeeming social value because the sexual scenes were not related to the rest of the picture. Wagonheim v. Maryland State Bd. of Censors, 255 Md. 297, 258 A.2d 240 (1969), *prob. juris. noted, sub nom.* Grove Press, Inc., v. Maryland State Bd. of Censors, 38 U.S.L.W. 3369 (U.S. March 23, 1970) (No. 905).

The question to be considered in this comment is whether it is possible or advisable for a similar system to be instituted for the voluntary rating of magazines, books, and other commercially distributed printed matter. The desired result would be the free and unhampered distribution of all types of literature, including "hard-core pornography," thereby eliminating the need for governmental censors, but yet offering protection to children and preserving the adult's freedom to choose or reject pornography as he wishes.

If the free distribution of all literature to adults is to be protected, then some practical way must be developed to prevent the materials from coming into the hands of children against the wishes of their parents. Such a system must be uncomplicated and inexpensive to institute and administer in order to assure compliance by the industry and acceptance by the public. The voluntary system now in effect within the motion picture industry has met these requirements in its first year of use. The same ratings, with slight modification, could be used as the basis of the system for literature. For example, there could be three classes of books:

G—General;

R—Restricted, may not be purchased by anyone under age 17;

X—Restricted, may not be purchased by anyone under age 21.[48]

These ratings would be prominently displayed by the publisher on the cover of every book and magazine and in all advertisements for the publications. Enforcement would be by the retail bookseller. The *R* and *X* books and magazines could be shelved apart from the *G* items, and proof of age could be required for the purchase of any of the restricted materials.[49] The expense and inconvenience to the bookseller would be minimal.

The idea of two age levels of restricted literature—the *R* and *X* classes—takes into account that some books or magazines are fairly frank without being excessively offensive to many of the populace.[50] While a young person would be able to purchase *G* or *R* books, parents would then be able to supervise the type of matter the child was reading without reading the entire book themselves. It would necessarily be the decision

[48] The age limits in the *R* and *X* classifications are always subject to review. The age limits for the motion pictures vary from locality to locality. Similar local control can be provided by the publishers. It should be noted here that the number of classes has been limited to three. No necessity could be found for a fourth class, such as the *GP* class used in rating motion pictures.

[49] A similar proposal is made by Elison & Graham, *Obscenity: A Compromise Proposal*, 30 MONT. L. REV. 123 (1969), *reviewed* in 6 CRIM. L. RPTR. 2090 (Oct. 29, 1969). The authors propose that a cause of action arise in tort for invasion of privacy whenever there is involuntary contact with pornography.

[50] While a book like J.D. Salinger's *Catcher in the Rye* may have frank passages, it is the type of book that the average 16-year-old could handle. It is unlikely that such a book would distort a youth's ideas about sex. However, a magazine such as *Eros*, not intended for minors, would receive an *X* rating but could be seen by children if the child's parents felt the child possessed the requisite maturity.

of the parents whether their children were to have access to sexually frank materials. If they did so desire, they would be free to supply it themselves. Basically the system is already in effect; if the public has so readily accepted the system for films, there is no apparent reason why an extension into the field of printed matter would be objectionable.

The system could also be used for the voluntary control of mailing sexually frank matter. Any item or advertisement for an item which has an *R* or *X* rating could be required by the industry to be sent via registered mail, requiring a signature for delivery. Before the article could be received, the post office agent could be required to see proof of age of the recipient. Because such mailings could be done voluntarily once the Post Office Department made some provision for such a service, the problem of governmental interference with the freedom of expression could be avoided. The added cost of such service should be reasonable.

As noted above, an individual has, in reference to obscenity, the right to be free from *involuntary* contact with matter that he might find offensive.[51] His right does not go so far as to "protect" others from making their own decisions.[52] By placing appropriate ratings on mailed or commercially distributed materials that are verbally or pictorially sexually frank, the individual's right can be enforced without endangering another's right to free access to the publications of his choice.

THE ADMINISTRATION OF THE SYSTEM

One of the primary reasons for the success of the Motion Picture Association Code of Self-Regulation[53] is that it is a code of *self*-regulation. By voluntarily establishing, instituting, and enforcing the *G-GP-R-X* system, the industry has avoided the possible imposition of governmental standards, either objective[54] or subjective.[55] What this has meant is that the industry has been able to set its own standards for each of the ratings,

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[51] Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 851 (1964). Gerber suggests that dissemination of pornography should be controlled by statute, making it a crime to distribute sexually frank materials to minors or to admit minors to adult motion pictures. The article was written prior to the Code.

[52] Stanley v. Georgia, 394 U.S. 557 (1969), held that a state may not prohibit private possession of obscene matter:

> Given the present state of knowledge, the State may no more prohibit possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. *Id.* at 567.

[53] See notes 44 & 45 *supra* and accompanying text.

[54] For an example of an "objective" standard by which to judge obscenity, see N.Y. PENAL LAW § 484-h (McKinney 1967), which is proposed as a possible model law by P.M. Wall, *Obscenity and Youth: The Problem and a Possible Solution*, 1 CRIM. L. BULL. 28 (1965).

[55] In Memoirs v. Massachusetts, 383 U.S. 413 (1966), for example, the three-point test of appeal to prurient interest, patent offensiveness, and utter lack of redeeming social value, must be considered subjective.

virtually uninhibited by government.[56] So long as the public is content with the industry's opinions of the contents of its productions, there is little likelihood that the government will reenter the business of censorship. This is to the immediate benefit of the government (cost), the industry (freedom of expression), and the general public (availability of all types of films).

Thus, members of the publishing industry could effect the desired changes by adopting the proposed system of ratings voluntarily. If the system were to receive the same wide acceptance as was experienced by the motion picture industry, the publishers would be virtually free to publish anything they could sell and yet feel safe from governmental censorship.

Where might the industry find a functional standard if the objective and subjective standards have proven to be inadequate yardsticks? If, as has been proposed, there is no such thing as legal "obscenity," but merely some material more explicit than other material, then it becomes apparent that a definitive statement as to what will or will not be allowed to minors is nearly impossible to formulate.

Justice Stewart knows pornography when he sees it; the motion picture industry has demonstrated that it knows it when it sees it; and members of the publishing industry could be equally acute. The motion picture industry's success shows that the publishing industry could avoid arbitrary standards by voluntarily using its own judgment as to what to make available to minors. The decision will not be too difficult that a 12-year-old should not be allowed to purchase *Ulysses*.[57] Similarly, it is evident that *The Story of O*[58] could best be appreciated only by those who have reached the age of majority. With common sense, it is not too difficult to determine those books or magazines to which the young should not have easy access.[59]

Whether the members of the industry create an industrywide rating panel or simply promulgate a set of standards, or whether each individual publisher sets his own standards for each rating, is actually unimportant. The major tasks will be to place the ratings on the books and magazines

[56] Upon announcement of the Code, the N.Y. Times observed, "It is the fear of Federal, state or city classification that has moved the motion picture association to such frenzied classification activity." Sept. 21, 1968, at 27, col. 4.

[57] *Cf.* United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934) (*Ulysses* is an extremely explicit stream-of-consciousness chronicle of a young man's thoughts).

[58] P. REAGE, THE STORY OF O (S. d'Estrée trans. 1965) (this is the story of a young girl's wanderings through a sado-masochistic subculture).

[59] It follows that *Playboy* magazine could be purchased by those over 17 (*R* rating). While it prints photographs of nude females, it does not show them in abnormal contexts. *One—The Magazine for Homosexuals* would be rated *X* because of the abnormal relationship it portrays. *See* One, Inc. v. Olesen, 241 F.2d 772 (9th Cir. 1957), *rev'd per curiam*, 355 U.S. 371 (1958), *citing* Roth v. United States, 354 U.S. 476 (1957); *cf.* Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).

and to have those ratings accepted by the public so that the clamor for censorship may abate. If members of the industry fail to adopt some form of self-regulation, they may find themselves with an intolerably complex statutory or judicial formulation. Moreover, in order to prevent governmental intervention, the industry may decide to place books of a questionable nature into a more restricted class. By doing so, the industry would minimize the risk of opposition to the ratings by the general public.

An argument that might be posed against the inauguration of such a system is the possibility that it would be too expensive for the booksellers to maintain a separate section within their stores to house the *R* and *X* books and magazines. This may prove true for some retailers, but the majority of the books and magazines published in the United States today would fall within the *G* classification. To cease handling those materials that are more sexually frank is not likely to work a serious hardship upon the average bookseller. Drugstores, variety stores, and other small stores now dealing in magazines and books (usually paperbacks) will either find that the *R* and *X* market is lucrative enough to justify the extra cost of a separate department or they will cease handling them.

Another argument is that some mailers will not mark their product and thus there will be no way to protect children or adults from involuntary contact. It is, however, unlikely that so many legitimate businesses will distribute only *G* books and magazines as to make *R* and *X* items obtainable only through such mailers. Thus, the probable result will be the demise of these "smut peddlers" who would then have respectable competition; their product would no longer be so hard for adults to secure.

The success of such a system depends upon a means of self-enforcement. The integrity of the publishing industry would be severely impugned if such a system were placed in operation and then found unsuccessful for lack of lower-level cooperation. The industry would need sanctions for those who violated the code and sold proscribed materials to minors. The threat of the wholesaler independently halting supply of the restricted matter to the retailer should be a sufficient deterrent, as would the wholesaler being cut off by a publisher for not policing his retail outlets.[60] The market should continue to be lucrative and the would-be violator would probably be careful.

This question of sanctions raises problems of possible violations of antitrust laws. Although a seller of goods may sell to whomever he desires,[61] a rebuttable presumption of a conspiracy to restrain trade would

[60] The sanction in the motion picture industry for nonsubmission of a film for classification is an automatic *X* rating. N.Y. Times, Oct. 8, 1968, at 49, col. 3.

[61] Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13a (1964). There have, however, been challenges. *See* N.Y. Times, April 11, 1969, at 39, col. 7, where

arise upon the nearly simultaneous creation of such industrywide standards. Such a presumption would be bolstered by the creation of a rating board for the entire industry and by the notifications to retailers of similar sanctions by many publishers within a short period of time. The Sherman Antitrust Act makes it an offense for manufacturers to agree to halt sales to particular customers in restraint of trade.[62] The enforcement of the proposed system by halting sales to those who sell restricted matter to minors could be considered in restraint of trade, but it has long been held that *reasonable* restraints of trade are not violations of Section 1 of the Sherman Act.[63] It would seem that both the motion picture industry and the publishing industry could successfully argue that such action was reasonable as a measure to protect the rights of the public. It is likely that the public would tolerate such action.

The checking of proof-of-age identification poses no serious barrier; the liquor industry has not yet been put out of business by a similar, strictly enforced requirement. The added cost to the post office for checking identification could be added to the postage charge.

The proposal, if not voluntarily adopted, could be implemented by statute since the Supreme Court held in *Ginsberg v. New York*[64] that separate standards may be imposed for minors. These standards must be narrowly drawn, reasonable, and definite.[65] But if the system is adopted as a statute, then the argument becomes circular—can we *define* that thing that we are seeking to proscribe? Past experience has shown that we cannot.[66] This perhaps is the *raison d'être* of a voluntary system.

CONCLUSIONS

What has been proposed is a workable system, having been tested through more than a year's nationwide use by the motion picture in-

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the ACLU made the charge that the rating system posed a prior restraint on the theaters. Jack Valenti, president of the Motion Picture Association of America, responded to the charge and attacked the Roman Catholic rating system. Weiler, *Catholics Question Rating of Films*, N.Y. Times, May 15, 1969, at 40, col. 2. Earlier, a theater chain raised the possibility of antitrust problems. N.Y. Times, Nov. 11, 1968, at 59, col. 4.

62 15 U.S.C. § 1 (1964). *See* Kiefer-Stewart Co. v. Joseph E. Seagram and Sons, Inc., 340 U.S. 211, 214 (1951).

63 *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911), where the Sherman Act was interpreted as applying only to combinations resulting in *undue* restraints upon trade.

64 390 U.S. 629 (1968).

65 Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968).

66 Examples are the current three-point test in Memoirs v. Massachusetts, 383 U.S. 413 (1966), and the element of pandering required in Ginzburg v. United States, 383 U.S. 463 (1966). The revised Section 484-h of the N.Y. PENAL CODE (McKinney 1967) reads like a collection of normal and aberrant sexual behavior; for example, subsection 1(c) thereof states that " 'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttock or, if such person be a female, breast."

dustry. The system has proven itself acceptable to the public and implementation of the system has been shown to require minimal effort.

The benefits of the adoption of such a system would be numerous. The benefits to the public and to the industry have been discussed. The benefits to the courts would be immense; a great burden would be lifted from judicial shoulders. For years, the courts have been floundering for an adequate legal formulation for what constitutes legal obscenity. When enforcing such tests, it has never been clear whether first and fourteenth amendment guarantees were being abused. More than likely, Justices Black and Douglas are correct when they insist that censorship is per se unconstitutional. The volume of litigation has not yet successfully defined the subject matter at issue, but rather has put us deeper into a morass of subjectivity. Terms such as "lewd," "lustful," "lascivious," "obscene," or even "dirty" cannot be considered words of art. They are not adequately defined, but rather are described in terms of each other.[67]

What is necessary is fewer controls, not merely more succinctly stated standards. A member of the public is entitled to read as sexually frank a book or magazine as he desires; a publisher may print and disseminate whatever he thinks he will be able to sell. It is not for the government to proclaim that a few cannot read a book because most find it offensive.

The two immediate effects of the institution of a system of ratings are, first, to exclude children from access to material on an adult level and, secondly, to permit everyone to avoid involuntary contact with material they may find offensive.[68] The ultimate effects of such a system would probably be interesting although predictable to some extent. With the advent of the *G-GP-R-X* system in the motion picture field, many movies have been more sexually explicit than might have been permitted absent the system. It is likely that the same would occur with printed matter—concomitant with the institution of the system, there might be a flood of extremely explicit literature.[69] The effect of such a proliferation might be destruction of the market for such items. People tend to become blasé about things to which there is frequent exposure. This is not to say that an interest in sex will fade away; but it is possible that people have very short attention spans concerning printed or photographic matter dwelling upon the subject of sex. It may not take a great

[67] *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961): "lewd—vulgar, base, evil . . . sexually unchaste or licentious . . . inciting to sexual desire or imagination"; "licentious—marked by the absence of legal or moral restraints . . . marked by lewdness."

[68] Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 851 (1964).

[69] There already exists a considerable supply of this type of literature, though most of it is not in normal commercial distribution channels. *See* Cavanaugh, *This Flood of Filth*, 113 AMERICA 184 (1965).

deal of freely available sexually frank material, devoid of "redeeming social value," to satiate the public. The majority of people would probably cease purchasing after a relatively short time; their curiosities would have been satisfied. Such has been the experience in Sweden and Denmark, where virtually all restrictions concerning the sales and distribution of pornography have been eliminated. A decrease in the sales of such material has been observed.[70] In Denmark, the first step—removing the barriers from sale of written material—was so successful that two years later the restrictions on pictorial matter were lifted.[71] Furthermore, a drop in the number of sex crimes has been attributed to the legalization of pornography.[72]

It is possible that the long-range effect of managing sexual frankness in literature by such a system would be the elimination of the "dirty" syndrome, in which people are embarrassed by or ashamed of any verbal or pictorial depiction of the human body or its functions. Someday, perhaps the system could eliminate the need for any system whatsoever. People may become blasé enough about such matters to be able to impart an attitude in their children so healthy towards sex that it cannot be threatened by a printed word or picture.

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[70] Lee, *Danes and Swedes Are Moving Toward Greater Sex Freedom*, N.Y. Times, Nov. 6, 1968, at 44, col. 7 (sale of pictorial matter has, however, risen).

[71] N.Y. Times, July 2, 1969, at 4, col. 4.

[72] N.Y. Times, July 15, 1969, at 25, col. 5. The most recent report on developments in Denmark is Buckley, *Oh! Copenhagen!*, N.Y. Times, Feb. 8, 1970, § 6 (Magazine), at 32. Fewer than 30 cases of rape are prosecuted per year and the murder rate has dropped drastically. There is no indication that Danish society is falling apart—the divorce rate is still considerably below that of the United States.