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Proof of Scienter in Criminal Obscenity Prosecutions

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INTRODUCTION

OVER THREE HUNDRED YEARS AGO, John Milton, in a famous essay directed against the licensing law then in effect in England, wrote:

> They are not skilful considerers of human things, who imagine to remove sin by removing the matter of sin; for, besides that it is a huge heap increasing under the very act of diminishing, though some part of it may for a time be withdrawn from some persons, it cannot from all, in such a universal thing as books are, and when this is done, yet the sin remains entire. Though ye take from a covetous man all his treasure, he has but one jewel left; ye cannot bereave him of his covetousness. Banish all objects of lust, shut up all youth into the severest discipline that can be exercised in any hermitage, ye cannot make them chaste that came not thither so. . . .[1]

Beginning in 1957 with the landmark case of *Roth v. United States*,[2] and continuing to the present, the courts and legislatures of this country have embarked on a determined, if somewhat confused, effort to prove Milton wrong. The social demand for the enactment and strict enforcement of obscenity laws, designed to remove both the material and its purveyors from society, has placed an enormous burden on the courts, which are charged with interpreting the vagaries of this country's obscenity laws as well as balancing the need for control of obscenity with constitutional freedoms.

The United States Supreme Court in *Roth v. United States*[3] held that the protective cloak of first amendment freedom did not extend to "obscenity." The Court in *Roth* failed, however, to determine with sufficient specificity what it meant by the term "obscenity," with the result that the Supreme Court has been forced on numerous occasions to clarify, analyze, characterize and finally redefine the meaning of that term.[4] Consequently, the lower federal and state courts have been largely preoccupied with the duty of interpreting the Supreme Court's most recent metaphysical pronouncement on obscenity, and applying it to fact situations before them.

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[1] MILTON, AREOPAGITICA (1644).
[2] 354 U.S. 476 (1957).
[3] *Id.* at 485.
[4] Jenkins v. Georgia, 418 U.S. 15 (1974); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Kois v. Wisconsin, 408 U.S. 229 (1972); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Ginsberg v. New York, 390 U.S. 629 (1968); Redrup v. New York, 386 U.S. 767 (1967); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 784 (1964); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959).

However, the issue of obscenity involves much more than a dispassionate evaluation of the quality of a book, movie, magazine or stage play. It also involves the real interests of individual defendants—publishers, projectionists, salesmen, corporate presidents, ticket takers—who are charged with the sale, distribution or exhibition of allegedly obscene material. A conviction for an obscenity violation subjects these defendants to possible incarceration, heavy fines, and almost certain economic disaster.

If the constitutional rights of an individual defendant charged with a violation of an obscenity statute are viewed, as they should be, *i.e.*, as a prime concern in the enforcement of obscenity legislation, certain critical issues are immediately presented. For example, what is the quality of evidence sufficient to meet the state's burden of proof in a criminal prosecution for violation of an obscenity statute? Does the nature of the state's burden of proof vary as the medium through which obscenity is presented changes? Does, or should, the law distinguish between the *types* of potential defendants in criminal obscenity prosecutions?[5]

The crucial issue to which the foregoing questions are all directly or tangentially related is that of proof of a defendant's *scienter* in any obscenity prosecution. *Scienter* is defined as "the defendant's previous knowledge of a state of facts which it was his duty to guard against, and his omission to do which has led to the injury complained of."[6]

In 1959, in the case of *Smith v. California,*[7] the Supreme Court determined that the inclusion in an obscenity statute of the element of scienter was a *sine qua non* for a valid conviction of a defendant charged with its violation. Since *Smith,* the Supreme Court has decided only a handful of cases in which the question of sufficiency of evidence necessary to sustain a finding of scienter on the part of defendants charged with obscenity violations has been presented.[8]

With this minimal guidance provided by the Supreme Court, the lower federal and state courts have been forced to promulgate their own evidentiary

[5] For example, should different standards be applied to store salesmen or movie projectionists than to corporate officials charged with obscenity violations?

[6] BLACK'S LAW DICTIONARY 1512 (4th ed. 1951).

[7] 361 U.S. 147 (1959).

[8] *See* Ginsberg v. New York, 390 U.S. 629 (1968); Mishkin v. New York, 383 U.S. 502 (1966); Ginsburg v. United States, 383 U.S. 463 (1966). In Redrup v. New York, 386 U.S. 767 (1967), the Court held that the materials on review could not constitutionally be adjudged obscene. However, two members of the Court (Harlan, Clark) would have dismissed the writ as improvidently granted since, in their view, certiorari was granted only "to consider the standards governing the application of the scienter requirement announced in Smith v. California, 361 U.S. 147, for obscenity prosecutions." *Id.* at 771 (Harlan, J., dissenting).

standards to satisfy proof of scienter in criminal obscenity prosecutions. The result has been the adoption, both judicially and legislatively,[9] of a maze of precedent and statutory presumptions designed to facilitate the showing of "constructive knowledge" by the defendant of the nature of the material he is charged with selling, showing, or distributing.

The purpose of this article is to examine, from both a constitutional and evidentiary standpoint, the concept of scienter in obscenity prosecutions. The Supreme Court decisions in this area will first be presented and analyzed. The judicial and legislative response to these decisions will then be examined. Finally, some suggestions will be offered regarding a possible resolution of the problems engendered by the concept of scienter in obscenity prosecutions.

THE SUPREME COURT AND SCIENTER

It has been suggested by several commentators[10] that, prior to the Supreme Court decision in the case of *Smith v. California,*[11] the element of scienter was neither a constitutional nor an evidentiary requisite for a successful conviction of one charged with a violation of an obscenity law. The dearth of authority cited in support of this assumption suggests, at best, that the problem of scienter in obscenity prosecutions had not been presented prior to *Smith* with sufficient regularity so that a definite standard could be formulated.

There were, however, several Supreme Court decisions prior to *Smith* which at least indicated the thinking of the Court on the issue of scienter in criminal prosecutions in general,[12] and in obscenity prosecutions in particular.[13] For example, in the case of *Nash v. United States,*[14] which involved a criminal prosecution for conspiracy to violate the Sherman Act, the defendants contended that the statute was unconstitutionally vague in that it "contained in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men."[15]

In dismissing the contention that the statute wrongfully punished honest misjudgment, Justice Holmes, writing for the Court, stated the following:

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[9] *See* ALA. CODE tit. 14, § 374 (15) (1966); N.Y. PENAL LAW § 235.10(2) (McKinney 1967); N.C. STAT. G.S. § 14-189.1(f) (1957); VA. CODE ANN. § 18.1.228(4) (1950).

[10] Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5 (1961) [hereinafter cited as Lockhart & McClure]; Note, *The Scienter Requirement in Criminal Obscenity Prosecutions,* 41 N.Y.U. L. REV. 791 (1966).

[11] 361 U.S. 147 (1959).

[12] *See* United States v. Wurzbach, 280 U.S. 396 (1930); Nash v. United States, 229 U.S. 373 (1913).

[13] Rosen v. United States, 161 U.S. 29 (1896).

[14] 229 U.S. 373 (1913).

[15] 229 U.S. at 376.

> [T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here, he may incur the penalty of death.[16]

In *United States v. Wurzbach,*[17] the defendant was charged with receiving sums of money from officers and employees of the United States for the "political purpose" of promoting his candidacy for nomination at a Republican party primary, in violation of the Federal Corrupt Practices Act.[18] In upholding the validity of the statute against a charge that it was impermissibly vague, the Court stated:

> Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.[19]

In both the *Nash* and *Wurzbach* cases, the Court distinguished between proof of an intent to commit the act, "mens rea," and intent to commit the act *with knowledge that it constituted a criminal offense,* holding that, while proof of the former was an essential element of the crime charged, as to the latter the defendant acted at his peril.

This distinction was applied in the case of *Rosen v. United States,*[20] which was the first Supreme Court decision in which the issue of scienter in criminal obscenity prosecutions was discussed. The *Rosen* case, although preceding *Smith* and its progeny by many years, remains today a precedent of considerable importance on the issue of scienter in obscenity prosecutions.[21]

In *Rosen,* the defendant was indicted for violating the federal obscenity mailing statute[22] in connection with his ownership and publication of the

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[16] *Id.* at 377.

[17] 280 U.S. 396 (1930).

[18] 18 U.S.C. § 208 (1925).

[19] 280 U.S. at 399.

[20] 161 U.S. 29 (1896).

[21] *See, e.g.,* Hamling v. United States, 418 U.S. 87 (1974). *See also* United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

[22] Act of July 12, 1876, ch. 186, § 3893, 19 Stat. 90 (1876), *as amended* 18 U.S.C. § 1461 (1958), provided that:

> Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, . . . and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles, or things may be obtained or made, . . . are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any

magazine *Broadway*. Although the precise nature of the alleged indecencies contained in the magazine were not detailed by the Court,[23] it was stated that the defendant's *modus operandi* was to cover the pictures of females appearing in the publication with lamp black that could easily be erased with a piece of bread.[24] The indictment charged that the defendant had "knowingly" deposited the allegedly obscene publication in the mail.

On appeal from his conviction, the defendant first contended that the indictment was fatally defective in that it failed to allege that he was aware of the obscene nature of the paper at the time he deposited it in the mail. The Supreme Court rejected this argument, stating the following:

> In their ordinary acceptation, the words "unlawfully, wilfully, and knowingly" when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing; and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it.[25]

More importantly, the defendant also contended that a charge of mailing obscene matter must be supported by *evidence* that the defendant knew or believed that the material could properly be characterized as obscene. The Court held that proof that the defendant was "aware of the contents" of the magazine was the measure by which the element of scienter was to be determined.[26]

That the Court in *Rosen,* in holding that "awareness of the contents" and not "belief in the obscenity of the material" was the appropriate test for

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> person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating, or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor....

[23] The Court stated that to precisely identify the alleged indecencies "[W]ould be offensive to the court and improper to spread upon the records of the court." 161 U.S. at 32.

[24] *Id.* at 31.

[25] *Id.* at 33.

[26] The Court then stated:

> The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States.... Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious.

Id. at 41-42.

scienter in obscenity prosecutions, did not completely resolve the problem is obvious. For example, *Rosen* did not answer the crucial question as to what type of evidence was sufficient to justify the legal conclusion that the defendant was "aware of the contents" of the material he was charged with selling, exhibiting, or distributing. The attempt to resolve that issue was left to *Smith* and its progeny.

In *Smith v. California,*[27] Eleazar Smith, a proprietor of a bookstore, was convicted of the possession in his bookstore of a book found upon judicial determination to be obscene. Smith was convicted under a Los Angeles City ordinance which made it 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 place of business where . . . books . . . are sold or kept for sale.[28]

The ordinance included no element of scienter in its definition, and had been construed by the lower courts as imposing an "absolute" or "strict" criminal liability.

On appeal,[29] the Supreme Court reversed Smith's conviction, holding the Los Angeles ordinance unconstitutional in that, by entirely dispensing with the requirement of scienter, it tended to inhibit constitutionally protected expression.

Justice Brennan, who wrote the plurality opinion in *Smith,* recognized that, while proof of *mens rea* was the rule rather than the exception in American criminal jurisprudence, there were areas where the states could legally create strict criminal liabilities without any element of scienter.[30] But the Court held that scienter could not be dispensed with in areas (such as obscenity) that touched on the constitutional right of expression. The Court stated:

> [I]f the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his

[27] 361 U.S. 147 (1959). For an excellent discussion and analysis of the Smith case see Lockhart & McClure, *supra* note 10, at 103-08.

[28] LOS ANGELES MUN. CODE § 41.01.1.

[29] 161 Cal. App. 2d 860, 327 P.2d 636 (1958).

[30] For example, in pure food and drug legislation, in which the public interest in food purity warrants the imposition of the highest standard of care on distributors. *Cf.* United States v. Balint, 258 U.S. 250 (1922).

> shop. It would be altogether unreasonable to demand so near an approach to omniscience.[31]

Having determined that scienter was an essential protection necessary to avoid the dangers of self-censorship, the Court in *Smith* was faced with the argument that this requirement would render the states impotent to regulate the distribution of obscene material, since proof of a bookseller's knowledge of the book's contents would be extremely difficult, if not impossible. To allay this fear, the Court in a crucial passage, through dictum, stated the following:

> Eyewitness testimony of a bookseller's persual of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial. We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse, whether there might be circumstances under which the state constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he had not, and what such circumstances might be.[32]

Justice Frankfurter, concurring in *Smith*, found this attempt by the plurality to delimit the ambit of scienter in obscenity prosecutions to be unsatisfactory. Recognizing that the *Smith* case carried implications and gave directions far beyond its particular facts,[33] Justice Frankfurter attempted to clarify the plurality opinion on the issue of the nature and quality of evidence sufficient to support a finding of scienter in criminal obscenity prosecutions. To this end, Justice Frankfurter stated:

> Obviously the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop . . . the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut. . . . [T]he requirement of scienter in an obscenity prosecution like the one before us does not mean that the bookseller must have read the book or must substantially know its contents on the one hand, nor on the other that he can exculpate himself by studious avoidance about its contents.[34]

The Supreme Court's decision in *Smith* in the last analysis, raised almost as many questions as it answered. For example, the Court did not distinguish

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[31] 361 U.S. at 153.

[32] *Id.* at 154.

[33] *Id.* at 161-62.

[34] *Id.*

between "awareness of the contents" and "awareness of obscenity,"[35] thus leaving the precise status of the *Rosen* case in considerable doubt.[36] This doubt created litigation,[37] and the issue was not resolved until the recent case of *Hamling v. United States*.[38] In addition, the Court in *Smith* attempted to establish broad evidentiary guidelines for a showing of scienter. The vagueness of these guidelines gave, in effect, a *carte blanche* to those with the legislative imagination[39] or the prosecutorial zeal[40] to attack the scienter problem within the ambit of the *Smith* decision.[41]

A case in point is *Jacobellis v. Ohio*,[42] where the defendant had been convicted for knowingly possessing an obscene film. The Ohio supreme court, in affirming Jacobellis' conviction, held that the term "knowingly" encompassed both scienter and a guilty purpose under Ohio's criminal obscenity statute.[43] Moreover, the Ohio supreme court, noting that the *Smith* decision "reserved . . . the question as to the extent of knowledge required,"[44] declared that: "To the dealer in what is commonly known as hard-core pornography there is little question. Such purveyors of obscenity can be *presumed to know* what *they are dispensing*."[45]

On appeal, the issue of scienter, and the judicial presumption announced by the Ohio supreme court were ignored by the United States Supreme Court and Jacobellis' conviction was reversed due to the application by the trial court of local community standards, rather than a national standard, in determining the obscenity of the film he was charged with possessing. Thus,

[35] For example, Justice Brennan considered, but did not resolve the question of "[W]hether honest mistake as to whether its contents *in fact constituted obscenity* need be an excuse. . . ." *Id.* at 154 (emphasis added). And Justice Frankfurter posed the question: "How much or how little awareness that a book *may be found to be obscene* suffices to establish scienter. . . ." *Id.* at 161-62 (emphasis added).

[36] *See* Lockhart & McClure, *supra* note 9, at 106-08. In fact, none of the opinions in *Smith* even cited the case of Rosen v. United States, 161 U.S. 29 (1896). This is a surprising oversight, and one which led commentators to conclude that the test of scienter in obscenity cases was whether or not the defendant was aware of the fact that the materials in his possession were legally obscene.

[37] *See, e.g.*, Huffman v. United States, 470 F.2d 386 (D.C. Cir. 1971); United States v. Brown, 328 F. Supp. 196 (D.C. Va. 1971); State v. Boyd, 35 Ohio App. 2d 147, 300 N.E.2d 752 (1972).

[38] 418 U.S. 87, at 102 (1974). Here, the Court held, following Rosen, that "awareness of the contents of the material" was a constitutionally permissible scienter standard in obscenity prosecutions.

[39] *See* notes 60-115 *infra* and accompanying text.

[40] *See* notes 115-71 *infra* and accompanying text.

[41] Thus rendering somewhat ironic the observation by Justice Douglas in *Smith* that "I see no harm, and perhaps some good, in the rule fashioned by the court which requires a showing of *scienter*." 361 U.S. at 169 (Douglas, J., concurring).

[42] 173 Ohio St. 22, 179 N.E.2d 777 (1962), *rev'd on other grounds*, 378 U.S. 184 (1964).

[43] Law of October 1, 1953, ch. 29, § 2905.34 (1953), Ohio Laws (repealed 1973).

[44] 173 Ohio St. at 25, 179 N.E.2d at 779.

[45] *Id.* at 26, 179 N.E.2d at 790 (emphasis added).

the Supreme Court decision in the *Jacobellis* case did nothing to clarify the issue of scienter presented by *Smith,* thus leaving intact the Ohio supreme court's holding in *Jacobellis, i.e.,* that purveyors of hard-core pornography are presumed to know what they are dispensing.[46] This case remains Ohio law.[47]

In 1966, the Supreme Court was presented with a case whose facts demanded a resolution of several scienter-related problems that had previously gone unanswered. In *Mishkin v. New York,*[48] the defendant had been convicted of preparing, publishing, and possessing obscene books with intent to sell them in violation of a New York obscenity statute,[49] which, on its face, did not require a showing of scienter. Defendant contended, *inter alia,* that his conviction should be reversed because: (1) the absence of a requirement of scienter in the statute violated *Smith;* and, (2) the proof of scienter was inadequate.

The Supreme Court rejected both contentions and affirmed the defendant's conviction. As to the alleged constitutional infirmity of the statute, the Court held the absence of a requirement of scienter on the face of the statute did not render it unconstitutional, since the New York Court of Appeals in a prior case[50] had authoritatively construed the statute to apply to "only those who are *in some manner aware* of the *character* of the material they attempt to distribute."[51] But more importantly, the Supreme Court in *Mishkin* for the first time gave its judicial *imprimatur* to a set of evidentiary facts as being sufficient to meet the state's burden of proof on the issue of scienter in obscenity prosecutions. The Court stated that the following facts sufficiently established proof of the defendant's scienter:

> [A]ppellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books.[52]

The Court did not attach particular significance to any of these factors, nor did it indicate whether they were cumulatively or individually sufficient to establish scienter in a particular case.[53] However, these factors, and

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[46] *Id.*
[47] State v. Saylor, 6 Ohio St. 2d 139, 216 N.E.2d 622 (1966).
[48] 383 U.S. 502 (1966).
[49] N.Y. PENAL LAW § 1141 (1909) (repealed by N.Y. PENAL LAW § 500.05 (McKinney 1967)).
[50] People v. Finkelstein, 9 N.Y.2d 342, 174 N.E.2d 470, 214 N.Y.S.2d 363 (1961).
[51] *Id.* at 345, 174 N.E.2d at 471, 214 N.Y.S.2d at 364 (emphasis added).
[52] Mishkin v. New York, 383 U.S. 502, 511-12 (1966).
[53] *But see* Ginsberg v. New York, 390 U.S. 629 (1968), where the Court reaffirmed its

others, were immediately seized upon by state and lower federal courts as welcome relief from the apparent strictures of *Smith*.[54]

In the case of *Ginzburg v. United States*,[55] the Supreme Court added one final consideration to the issue of scienter in obscenity prosecutions. In *Ginzburg*, the Court held that proof of "pandering"[56] of sexually related materials might be sufficient in a close case to support a finding of obscenity.[57] Although the Court in *Ginzburg* did not specifically determine whether and to what extent evidence of "pandering" would support a finding of scienter,[58] it became evident that proof of pandering was prima facie proof of both obscenity and scienter.[59]

The foregoing Supreme Court decisions—couched as they were in broad generic terms such as, "scienter," "pandering," and "constructive knowledge"—invited interpretation and clarification by both lower federal and state courts and legislatures. That response, fueled by the realization that obscenity was not entitled to first amendment protection, in the end has posed almost insurmountable barriers to the successful assertion of a scienter defense in an obscenity prosecution.

THE STATUTORY RESPONSE

The initial effect of the *Smith* decision was to force a critical examination and interpretation of existing obscenity statutes in light of the scienter requirement. In several states, obscenity statutes which failed to specifically include a scienter requirement in the statutory language were invalidated.[60] This result occurred, however, in a minority of jurisdictions.

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approval of the general "knowledge of the contents" test as a sufficient test of scienter. *Id.* at 644-45.

[54] *See* notes 115-71 *infra* and accompanying text.

[55] 383 U.S. 463 (1966).

[56] The Court defined *pandering* as "an exploitation of interests in titillation by pornography . . . through pervasive treatment or description of sexual matters." *Id.* at 475-76.

[57] *Id.* at 476-78. Among the significant evidentiary factors supporting a finding of *pandering* was the fact that the mailing addresses for defendant's publications included: "Blue Ball, Pa.," "Intercourse, Pa.," and "Middlesex, N.J."

[58] *Id.* at 467 n.8. The scienter issue was not presented to the Court in *Ginzburg*, since the parties had stipulated to scienter prior to trial.

[59] *See, e.g.*, United States v. Pinkus, 333 F. Supp. 928 (C.D. Cal. 1971); People v. Sarnblad, 26 Cal. App. 3d 801, 103 Cal. Rptr. 211 (1972); People v. Bloss, 27 Mich. App. 687, 184 N.W.2d 299 (1970).

[60] *See* State v. Kuebel, 241 Ind. 268, 172 N.E.2d 45 (1961); People v. Villano, 369 Mich. 428, 120 N.W.2d 204 (1963); State v. Burton, 349 S.W.2d 228 (Mo. 1961); State v. Griffith, 174 Ohio St. 553, 190 N.E.2d 907 (1963); State v. Wetzel, 173 Ohio St. 16, 179 N.E.2d 773 (1962); Cincinnati v. Marshall, 172 Ohio St. 280, 175 N.E.2d 178 (1961); Ellenburg v. State, 215 Tenn. 153, 384 S.W.2d 29 (1964); State v. Grump, 57 Wash. 2d 224, 356 P.2d 289 (1960), which declared the Indiana, Michigan, Missouri, Ohio, Tennessee and Washington state statutes and/or city ordinances unconstitutional for failing to expressly require *scienter*.

In most instances, existing statutes and ordinances were and have been construed so as to require scienter. Basically, two approaches have been implemented to preserve the constitutionality of statutes and ordinances under *Smith*. In the first place, courts have *construed* existing statutes and ordinances to require proof of scienter, thus incorporating scienter as an "implied element" in the statutory scheme.[61] This approach has also been used to sustain the validity of federal obscenity statutes. In *United States v. Zacher,*[62] the district court construed 18 U.S.C. Section 1462—the interstate transportation of obscenity statute—as containing the "implied element" of scienter.[63] And in *Tallman v. United States,*[64] the Seventh Circuit upheld a conviction for uttering obscene language over a radio communication, by construing the applicable federal statute to "impliedly require" proof of scienter.[65]

The second approach adopted by many courts has been to construe *existing* statutory language as sufficient to indicate a legislative intent to make scienter an essential element of the crime. Thus, courts have invariably construed the words "knowingly,"[66] and "intentionally,"[67] and "wilfully and lewdly"[68] to satisfy the *Smith* scienter requirement, and to authorize convictions based on proof of either actual or constructive knowledge.[69]

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[61] *See, e.g.,* Amato v. Ruth, 332 F. Supp. 326 (W.D. Wis. 1970); Engstrom v. Robinson, 317 F. Supp. 124 (S.D. Ala. 1970); Cohen v. State, 125 So. 2d 560 (Fla. 1960); Demetropolos v. Commonwealth, 342 Mass. 658, 175 N.E.2d 259 (1961); State v. Oman, 261 Minn. 10, 110 N.W.2d 514 (1961); State v. Hudson Co. News Co., 35 N.J. 284, 173 A.2d 20 (1961); State v. Jackson, 224 Ore. 337, 356 P.2d 495 (1960); State v. Chobot, 12 Wis. 2d 110, 106 N.W.2d 286 (1940).

[62] 332 F. Supp. 883 (E.D. Wis. 1971).

[63] *Id.* at 884. The court relied for this principle on Delaney v. United States, 199 F.2d 107, 117 (1st Cir. 1952), a pre-*Smith* case.

[64] 465 F.2d 282 (7th Cir. 1972).

[65] The statute involved was 18 U.S.C. § 1464 (1948), which provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[66] *See* United States v. Marks, 364 F. Supp. 1022 (E.D. Ky. 1973); ABC Books, Inc. v. Benson, 315 F. Supp. 645 (M.D. Tenn. 1970); Newman v. Conover, 313 F. Supp. 623 (N.D. Tex. 1970); Great Speckled Bird of Atlanta Cooperative Project v. Stynchcombe, 298 F. Supp. 1291 (N.D. Ga. 1969); State v. Jackson, 224 Ore. 337, 356 P.2d 495 (1960).

[67] *See* Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969); State v. Roufa, 241 La. 474, 129 So. 2d 743 (1961).

[68] *See* People v. Wepplo, 78 Cal. App. 2d 959, 178 P.2d 853 (1947).

[69] Of course, the required *scienter,* however worded, must relate to an *activity, i.e., traffic* in obscenity, that is not constitutionally protected. It is now well-settled that the mere knowing *possession* of obscene material cannot be punished. Stanley v. Georgia, 394 U.S. 557 (1969). *See also* Henley v. Wise, 303 F. Supp. 62 (N.D. 1969), wherein an Indiana obscenity statute prohibiting the "knowing possession of obscene material" was invalidated since it purported on its face to include material in the hands of "[P]rofessors and researchers in psychology, law, anthropology, art, sociology, history, literature and related areas. This prohibition is so sweeping as to put in violation of the law the famous Kinsey Institute at Indiana University." *Id.* at 67.

Moreover, several courts have strictly construed the *Smith* case as mandating scienter only where books or booksellers are involved, and have upheld statutes dispensing *entirely* with scienter when the alleged obscenity occurs in a different medium, such as films or motion pictures. In *Hosey v. City of Jackson*[70] and *McGrew v. City of Jackson,*[71] the plaintiffs sought injunctive and declaratory relief regarding the enforcement of a state obscenity statute which entirely dispensed with scienter.[72] In upholding the statute despite the absence of any scienter requirement, the court in *Hosey,* after examining the *Smith* decision, flatly held that:

> Such reasoning simply does not apply to motion pictures. It would be impossible for a book dealer to familiarize himself with the contents of all the books he offers for sale, and proof of guilty knowledge would certainly be a condition precedent to conviction. The exhibitors of motion pictures, however, cannot seriously contend any lack of knowledge of the contents of a particular film. It is relatively easy and also the responsibility of film exhibitors to preview a motion picture before releasing it for public showing. . . .[73]

The court in *McGrew* summarily rejected the lack of scienter argument by finding that it was "purely and simply another obscenity case . . ." in which the plaintiffs were seeking "to escape from their plight by claiming sensitive first amendment rights of free speech."[74]

While it is true that the *fact* of scienter might be less difficult to prove as the medium through which allegedly obscene matter is portrayed changes, it is a far different matter to dispense with the requirement and proof of scienter altogether. It is submitted that the *Hosey* and *McGrew* cases represent unwarranted and unconstitutional extensions of the *Smith* doctrine. Under the *Hosey-McGrew* rationale, a ticket-taker in a theatre could be convicted under the statute, notwithstanding the fact that it may have been the employee's first day on the job![75]

In addition to inviting judicial interpretation and construction of existing obscenity statutes in an effort to find therein the required element of scienter, the *Smith* decision has promoted the enactment of new statutory schemes

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[70] 309 F. Supp. 527 (S.D. Miss. 1970), *vacated,* 401 U.S. 987 (1971) for reconsideration in light of Samuels v. Mackell, 401 U.S. 66 (1971) and Younger v. Harris, 401 U.S. 37 (1971).

[71] 307 F. Supp. 754 (S.D. Miss. 1969), *vacated,* 401 U.S. 987 (1971).

[72] MISS. CODE ANN. Ch. 213, § 2286 (1920).

[73] 309 F. Supp. at 532.

[74] 307 F. Supp. at 758-59 n.6.

[75] A case in point is State v. Plant, No. B-732801 (C.P. Ohio, 1974) (unreported), wherein a ticket taker at a theater showing "Deep Throat" was acquitted of an obscenity charge on the grounds that it was her first day on the job.

which have attempted in diverse, and in many cases unique, ways to resolve the scienter problem.

The legislatures of several states[76] have, for example, passed obscenity statutes which define "knowingly" in language establishing a "reckless disregard" standard for evaluating the defendants' scienter. South Carolina's obscenity law defines "knowingly" as:

> . . . having knowledge of the contents of the subject matter or failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of such subject matter.[77]

And Texas' obscenity law provided that:

> A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.[78]

The "reckless disregard" standard has been tested and sustained by the courts,[79] which have relied on Frankfurter's *dictum* in *Smith* that one could not "insulate" himself from knowledge about a particular book and escape criminal liability.[80] In *State v. Watkins,*[81] the defendant challenged the South Carolina "reckless disregard" standard on the ground, *inter alia,* that it "enticed" him to attempt to justify his conduct in violation of the fifth amendment right not to testify. The Court rejected this argument, stating that the defendant's fear was "more imagined than real. The requirement is not impermissibly burdensome."[82]

And in *Morris v. United States,*[83] the Court, in affirming the convictions of the manager and a dancer at a local nightclub for violating a District of Columbia obscenity statute,[84] held that: "[T]he statute allows the appellants to remain ignorant of the illegality of the performance only at their peril, once they knew or had reason to know that they might be violating the statute."[85]

In addition to the "reckless disregard" scienter statutes, the legislatures of several states have enacted obscenity statutes which create statutory

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[76] *See* notes 77, 78 and 84 *infra* for a discussion of several such statutes.
[77] S.C. CODE ANN. § 16-414.1(d) (1962).
[78] Law of 1943, ch. 35 § 1 (1943) Tex. Laws (repealed 1973).
[79] *See* Movies, Inc. v. Conliski, 345 F. Supp. 780 (N.D. Ill. 1971); Morris v. United States, 259 A.2d 337 (D.C. Mun. Ct. App. 1969); State v. Watkins 259 S.C. 185, 191 S.E.2d 135 (1972); State v. Scott, 460 S.W.2d 103 (Tex. 1970).
[80] 361 U.S. at 161-62.
[81] 259 S.C. 185, 191 S.E.2d 135 (1972).
[82] *Id.* at 193, 191 S.E.2d at 143.
[83] 259 A.2d 337 (D.C. Mun. Ct. App. 1969).
[84] D.C. CODE ANN. § 22-2001 (Supp. 1969).
[85] 259 A.2d at 339.

exemptions from criminal prosecution for certain classes of potential defendants.[86] Most common among the exempted classes are motion picture operators, and projectionists. The statutory exemption does not apply, however, to any defendant who has a "financial interest" in the place of employment. Nor does it apply to a defendant whose duties exceed those of the exempt class. In general, courts have strictly construed these exemption statutes.[87] The impetus for this legislation probably came from the difficulty of proof of scienter when certain classes of employees are involved.

Perhaps the most controversial legislation in the obscenity-scienter area has involved the enactment of obscenity statutes which create a *presumption* of scienter upon proof of the possession, by a person, of a specified number of copies of certain obscene materials. Among the states which have enacted such statutes are North Carolina,[88] New York,[89] Ohio,[90] Florida,[91] and Virginia.[92] The constitutionality of these statutes has been extensively tested in the courts, and the results have been diverse.

In *Shinall v. Worrell,*[93] the plaintiffs sought a judgment declaring certain portions of the North Carolina obscenity statute unconstitutional. The statute provided for two presumptions regarding scienter:

(1) That a person who knowingly possessed more than three copies of obscene material was presumed to have the purpose to disseminate obscenity unlawfully;[94] and

(2) That a person who disseminates obscenity was presumed to know the existence of the parts, pictures or content of the material which rendered it obscene.[95]

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[86] CAL. PENAL CODE § 311.2(b) (West 1970); Law of 1943, ch. 35, § 1 (1943) Tex. Laws (repealed 1973); WASH. REV. CODE § 9.68.010 (1969). Illustrative of these statutes is § 311.26 of the California Penal Code, which provides:

> The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

[87] People v. Stout, 18 Cal. App. 3d 172, 95 Cal. Rptr. 593 (1971); West v. State, 489 S.W.2d 597 (Tex. Cr. App. 1973); State v. J-R Distributors, Inc., 82 Wash. 2d 584, 512 P.2d 1049 (1973).

[88] Law of 1885, ch. 125 § 3731 (1885) N.C. Laws (repealed 1971).
§ 14-189.1(d) (1965).

[89] N.Y. PENAL LAW § 235.10(2) (McKinney 1967) requires six copies.

[90] OHIO REV. CODE ANN. § 2905-38(A) (Page 1970) requires six copies.

[91] FLA. STAT. § 847.06(2) (1973) requires two identical copies or five total copies.

[92] VA. CODE ANN. § 18.1-228(4) (as amended, 1962) requires one item.

[93] 319 F. Supp. 485 (E.D.N.C. 1970).

[94] Law of 1885, ch. 125 § 3731 (1885) N.C. Laws (repealed 1971).

[95] N.C. GEN. STAT. § 14-189.1(f) (1965). *Id.*

The court in *Shinall* found both presumptions to be unconstitutional. As to the presumption of a purpose to disseminate from the fact of possession, the court found this defective in that there was no rational basis from which to assume that the presumed fact (guilty purpose) flowed from the proven fact (possession). As to the presumption of scienter from the fact of dissemination, the court found this unconstitutional because of its tendency to inhibit constitutionally protected expression.[96]

Interestingly, this latter presumption was later upheld by the North Carolina Appellate Court in *State v. McCluney,*[97] on the grounds that the statutory presumption of scienter was not absolute. Rather the court found that it was merely evidentiary, so as to permit, but not require, a finding of scienter. Although the court in *McCluney* was persuaded by the fact that the presumption of scienter was evidentiary and rebuttable, courts in several other jurisdictions have found constitutional deficiencies inherent in "evidentiary" presumptions of scienter.

In *Morrison v. Wilson,*[98] the court held that even a rebuttable presumption of scienter in Florida's obscenity statute[99] was unconstitutional in that:

> The presumption on its face violates the due-process clause, and the privilege an accused enjoys against being compelled to testify in a criminal case found in the Fifth and Fourteenth Amendments to the Constitution of the United States.[100]

Further, in *Grove Press, Inc. v. Evans,*[101] a federal district court in Virginia held unconstitutional a statutory presumption providing that: "Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section."[102] The court in *Grove Press* determined that this presumption was deficient in that it would "impute to every ultimate purchaser the intent to sell the item." The court then found that the presumption "arbitrarily embraces a conscientious retailer who seeks to weed out . . . obscene publications delivered to him by his wholesaler. . . ."[103]

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[96] 319 F. Supp. at 491.
[97] 11 N.C. App., 180 S.E.2d 419 (1971).
[98] 307 F. Supp. 196 (N.D. Fla. 1969).
[99] FLA. STAT. § 847.06(2) (1973).
[100] 307 F. Supp. at 199. Following this decision, the Florida legislature in 1971 enacted FLA. STAT. § 847.011(b), which provides that: "The knowing possession by any person of six or more identical or similar materials, matters, articles or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph." There is no reported decision testing the validity of this statute.
[101] 306 F. Supp. 1084 (E.D. Va. 1969).
[102] VA. CODE ANN. § 18.1-228(4) (1962).
[103] 306 F. Supp. at 1088. *See also* House v. Commonwealth, 210 Va. 121, 169 S.E.2d 572 (1969).

The statutory scienter presumptions which have been most frequently tested in the courts to date are those of New York's obscenity statute, which provides:

> (1) A person who promotes obscene material; or possesses the same with intent to promote it in the course of his business, is presumed to do so with knowledge of its content and character.
>
> (2) A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same.[104]

These presumptions have been consistently upheld as valid by the state and federal courts of New York.[105] In *People v. Kirkpatrick*,[106] the managers of two bookstores had been charged and convicted of promoting obscene material, with the evidence of scienter being supplied by the allegedly unrebutted statutory presumptions of scienter.[107] The defendants both owned large-volume bookstores, with one store carrying more than 10,000 different titles and 25,000 volumes of hard-cover and paperback books, while the other handled over 16,000 titles and from 50,000 to 60,000 volumes.[108] Despite the fact of the large-volume business, and the testimony of both defendants that they had ordered the material "blind" and had never read or discussed its contents with anyone, the appellate court affirmed the convictions. The court construed the statutory presumption of scienter as being rebuttable, but conceded that even a rebuttable presumption has a greater evidentiary effect than a permissible inference based on probabilities, because the presumption would require less in the way of probabilities to support it.[109] The court held, however, that the presumptions were properly applied to the defendants by the trial court. In addition the court rejected the "volume of business" as a factor negating scienter.[110]

The court in *Kirkpatrick* thus espoused a theory that, since "sound business practice" requires every bookseller to know his stock in order to survive economically, a rebuttable presumption that he did know it is constitutionally

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[104] N.Y. PENAL LAW § 235.10 (McKinney 1967).

[105] Overstock Book Co. v. Barry, 436 F.2d 1289 (2d Cir. 1970); Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y., 1969), *aff'd per curiam, sub. nom.*, New York Feed Co., Inc. v. Leary, 397 U.S. 98 (1970); People v. Hey, 71 Misc. 2d 155, 335 N.Y.S.2d 550 (Chautauqua Co. Ct. N.Y. 1972).

[106] 32 N.Y.2d 17, 295 N.E.2d 753, 343 N.Y.S.2d 70 (1973).

[107] 32 N.Y.2d at 28, 295 N.E. at 759, 343 N.Y.S.2d at 79 (1973) (Fuld, J., dissenting). In fact, the *only* evidence introduced at trial was that given by the purchasing police officers, that they had bought the magazine (*Zap Comix* No. 4), which contained the legend "Adults Only" on its cover, for 50 cents. 32 N.Y.2d at 28, 295 N.E.2d at 759, 343 N.Y.S.2d at 79 (Fuld, J., dissenting).

[108] *Id.*

[109] 32 N.Y.2d at 25, 295 N.E.2d at 757, 343 N.Y.S.2d at 76.

[110] *Id.*

justified. This rationale is an unwarranted and unconstitutional departure from the principles of the *Smith* case. In the first place, the *Smith* decision was predicated on the inhibiting effect that absolute liability obscenity statutes would have on first amendment rights, and was decided for the express purpose of eliminating problems of self-censorship inherent in such statutes. However, a statute which makes a presumption of scienter rebuttable is no less effective as a restraint. In either case, the bookseller is forced to become a censor, and the state is thus able to indirectly suppress what it could not suppress directly.

Secondly, the statutory presumption of scienter in obscenity cases inherently compels the defendant to testify in his own behalf in order to rebut the presumption in violation of the constitutional right of an accused not to testify. In taking the stand, a defendant runs the risk of supplying the prosecution with the evidence necessary to sustain a finding of "actual knowledge," even apart from the presumption of scienter.[111] That these arguments have to date been rejected indicates the insensitivity of some courts (and legislatures) to the rights of the accused in criminal obscenity prosecutions.

However, other states have enacted criminal obscenity statutes designed to insure that a criminal obscenity conviction is obtained only upon a finding of actual knowledge of, or notice to, the defendant. Illustrative of this type of statute is that of Alabama, which precludes any criminal prosecution for violation of the obscenity statutes:

> [U]nless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this chapter, and the accused has, after receiving such notice violated this chapter.[112]

This statute has been strictly construed by the Alabama courts. In *Bush v. City of Tuscaloosa,*[113] the conviction of a movie projectionist for violating a city obscenity ordinance was reversed on appeal, where the statutory notice had been sent to the manager of the theatre. The appellate court held that notice to the manager could not be deemed notice to the projectionist charged with violating the ordinance.

Ohio has a hybrid form of "notice" statute.[114] Under the Ohio statute, receipt of actual notice, in writing from the prosecuting attorney that certain

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[111] The appellate court in Kirkpatrick in fact held that the trial court correctly found that the defendants had actual knowledge of the contents of the magazines they were charged with promoting, in spite of the fact that the only testimony on the scienter issue was introduced by the defendants after they had taken the stand to rebut the statutory presumption of scienter!

[112] ALA. CODE tit. 14, § 374(16m)(a) (Supp. 1973).

[113] 276 So. 2d 629 (Ala. Crim. App. 1973).

[114] OHIO REV. CODE ANN. § 2905.38(B) (Page 1970).

material or performances are obscene, operates as a presumption of scienter in a later criminal prosecution. This "notice" only applies to "an owner or manager of a theatre, bookstore, magazine stand, or other commercial establishment engaged in the business of selling materials or exhibiting performances."[115] In addition, under Ohio's notice statute, the notice need not be personal—it can be effected by publication in a journal of general circulation in the county or city involved.

There is then considerable variety in the statutory schemes enacted pursuant to the *Smith* decision. These statutes have, in general, been upheld by the courts as a valid exercise of the states' power to limit obscenity. However, it is not in the area of statutory interpretation, but in the area of evidentiary standards, that the most significant pronouncements on the requirement of scienter in criminal obscenity prosecutions have emerged.

PROOF OF SCIENTER

Obviously, the most compelling and positive proof of a defendant's scienter in an obscenity case consists of testimony, of the defendant's statements or admissions regarding the material he is charged with selling, exhibiting, or distributing. In many instances, this is the *only* direct proof of scienter. To secure this type of evidence, law enforcement agencies frequently employ detectives and undercover agents to enter a bookstore or theatre, and elicit damaging statements and admissions by the proprietor or employee about the material in question, prior to its seizure and the defendant's arrest. The admission of these statements at trial is usually conclusive on the issue of scienter.

In *People v. Finkelstein,*[116] a detective who purchased two allegedly obscene books from the defendant's store told the defendant that the books were pornographic. The defendant responded: "I have seen much worse than this."[117] The court considered this voluntary admission, coupled with the obscenity of the books in question, as conclusive on the issue of scienter.[118]

And in *Kramer v. United States,*[119] an employee was questioned by an undercover agent in the store as to the respective merits of several films in the store. The employee's remark that one film "was the better one" was held by the court to be positive proof of scienter, notwithstanding other testimony that it was the employee's first day on the job.[120] Similarly, statements elicited from defendants by police agents that the material "showed everything,"[121]

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[115] OHIO REV. CODE ANN. § 2905.38(B) (1970).
[116] 11 N.Y.2d 300, 183 N.E.2d 661, 229 N.Y.S.2d 367 (1962).
[117] *Id.* at 303, 183 N.E.2d at 663, 229 N.Y.S.2d at 369.
[118] *Id.* at 304, 183 N.E.2d at 664, 229 N.Y.S.2d at 370.
[119] 293 A.2d 272 (D.C. Mun. Ct. App. 1972).
[120] *Id.* at 273, 274.
[121] State v. Vollmar, 389 S.W.2d 20 (Mo. 1965).

that the defendant had "dirtier books,"[122] that the books would "excite him,"[123] and that the books were "real good ones"[124] have been held probative of the defendant's actual knowledge of the material.

The elicitation and use of this type of testimony in criminal obscenity prosecutions raises several interesting issues. For example, can a defendant from whom damaging statements and admissions have been obtained claim that he has been entrapped? This defense has often been raised and, with one exception,[125] has been uniformly rejected by the courts.[126]

Another question raised by the elicitation of damaging statements through the use of undercover agents is whether or not such statements are suppressible due to the failure to give the *Miranda* warnings.[127] The only case which has extensively considered this issue is *United States v. Knight.*[128] In *Knight,* several New York detectives on October 7, 1965, observed Knight and his wife walking toward their car in a suspicious manner, and the detectives approached Knight and asked for his registration and license. Knight produced a rental agreement showing that the car had been leased from a California rental agency, but that the car was two weeks overdue. Under California law, any person who fails to return a vehicle within five days after it is due is presumed to have embezzled it.

Knight persuaded the detectives to accompany him to his apartment to confirm the fact that he had the car with the lessor's permission. Upon their arrival at Knight's apartment, the detectives observed a projector and screen set up, with film in the projector. Afer confirming the fact that the car was indeed "overdue," the detectives asked Knight what kind of films were in the projector. No *Miranda* warnings had been given at this point. Knight responded that the films were "dirty, as dirty as they can be,"[129] and proceeded to exhibit the films at the detectives' request. The detectives also found other pornographic photographs in a subsequent search of the room and Knight was then arrested for grand larceny and possession of pornographic material.[130]

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[122] State v. Childs, 252 Ore. 91, 447 P.2d 304 (1968).
[123] State v. Von Cleef, 102 N.J. Super. 102, 245 A.2d 495 (1968).
[124] Huffman v. United States, 470 F.2d 386 (D.C. Cir. 1971), *rev'd,* 502 F.2d 419 (1974).
[125] United States v. Kros, 296 F. Supp. 972 (E.D. Pa. 1969), wherein the defendant was found not guilty, by reason of entrapment, of sending obscene matter through the mail where government actively promoted the commission of the crime in question, first by placing its own enticing ad in a magazine and then maneuvering to insure that defendant, who had answered ad, would use the mail to deliver obscene films instead of exchanging them at personal meetings.
[126] *See* Annot., 77 A.L.R.2d 792 (1961).
[127] Miranda v. Arizona, 384 U.S. 436 (1966).
[128] 395 F.2d 971 (2d Cir. 1968), *cert. denied,* 395 U.S. 930 (1969).
[129] *Id.* at 972.
[130] Knight was indicted, *inter alia,* for interstate transportation of pornography in violation of 18 U.S.C. § 1465.

Subsequent to the arrest the city detectives called the F.B.I., and an agent came to the apartment, removed Knight's handcuffs, advised him of his constitutional rights, and was told by Knight that the film and photographs had been transported by Knight from California to New York. At trial, Knight unsuccessfully attempted to exclude his statement to the F.B.I. agent claiming that it was tainted because of the earlier failure of the city detectives to warn him properly of his constitutional rights.[131] The appellate court affirmed Knight's conviction assuming that even if the defendant's earlier statements were improperly elicited without adequate constitutional warnings, there was no "causal relation" between them and the later statements to the F.B.I. agent. In addition, the court held that no "coercive atmosphere" surrounded the defendant at the time the statements were made.[132]

Despite the *Knight* holding, one can easily visualize circumstances in which the elicitation of incriminating statements about the nature of the material possessed or offered for sale, would be inadmissible without *Miranda* advice. For example, a "coercive atmosphere" would certainly be present if a bookstore owner or operator responded to police interrogation about his knowledge of the contents of allegedly obscene material, while a police raid on the premises was in process pursuant to a court order. And incriminating statements would certainly be inadmissible, absent prior constitutional warnings, if a bookseller were *arrested prior* to questioning by police. Thus, an attorney faced with the use of incriminating statements by his client, in an obscenity prosecution, is well-advised to seriously evaluate the circumstances and atmosphere in which those statements were elicited. If those circumstances indicate that the incriminating statements were made in a "coercive atmosphere," a pre-trial motion to suppress the statements would be warranted.[133]

In addition to the defendant's direct statements to police or undercover agents concerning the nature of material he sells or exhibits, courts have frequently admitted advertising and signs as circumstantial evidence of scienter. The marking of an entrance or a certain portion of a bookstore as for "Adults Only" has been frequently held admissible to prove scienter.[134] And a sign in a bookstore stating that "You must be 21 to purchase," has been held to give rise to the reasonable inference that the defendant was aware

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[131] Defendant relied primarily on Westover v. United States, 384, U.S. 436, 494 (1966), a companion case to Miranda.

[132] 395 F.2d at 975.

[133] In Ohio, any objection to the admissibility of a defendant's statements must be raised by motion prior to trial or it is waived. Ohio R. Crim. P. 12(B)(3), 12(G).

[134] *See* People v. Adler, 25 Cal. App. 3d 24, 100 Cal. Rptr. 726 (1972); People v. Harris, 192 Cal. App. 2d 887, 13 Cal. Rptr. 542 (1961); Cherokee News and Arcade, Inc. v. State, 509 P.2d 917 (Okla. Crim. App. 1973); Orito v. State, 55 Wis. 2d 161, 197 N.W.2d 763 (1972).

of the contents of the books.[135] The advertising of a film as "X-rated—Potentially offensive to some people" has similarly been held as admissible on the issue of scienter.[136]

Material contained in circular and letter advertisements by defendants has also been admitted to show scienter. In *People v. Sikora,*[137] the defendants had set up a post office box in a bogus name for the receipt and distribution of their books. In addition, the defendants prepared and sent out descriptive flyers soliciting orders.[138] In affirming the defendants' conviction for violation of the Illinois obscenity law, the court stated:

> Selective's [the partnership defendant] method of doing business could reasonably be regarded as having been devised to insulate the managing partner from scienter. Selective apparently regarded its open evasion of the postal laws as an affirmative asset. . . .[139]

In *Womack v. United States,*[140] the defendant's intent to appeal to the prurient interests of homosexuals was held to be proven by evidence of a card file containing 40,000 names, a letter written by defendant referring to the master file as a "permanent sucker list," and another letter in which defendant wrote: "In 1958, physique fans want their truck driver types already cleaned up, showered and ready for bed."[141]

While the evidentiary use of titillating advertising, such as in *Sikora* and *Womack,* presents no discernible constitutional or evidentiary problem, it is submitted that the case is far different where signs which merely warn the public or attempt to limit access to adults are concerned. In the latter case, the owner or proprietor is damned if he does and damned if he doesn't. On the one hand, the use of "limited access" signs are admissible on the issue of the defendant's scienter. But on the other hand, the proprietor who *fails* to implement these signs and warnings runs a considerable risk of being convicted under a "sale to minors" obscenity law,[142] which in most cases is more severe in its penalty provisions than the statutes previously discussed.[143] An intolerable burden, tantamount in many instances to self-censorship, is thus placed on the bookseller.

From a reading of the many criminal obscenity prosecutions in various

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[135] Court v. State, 51 Wis. 2d 683, 188 N.W.2d 475 (1971).
[136] Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972).
[137] 32 Ill. 2d 260, 204 N.E.2d 768 (1965).
[138] *Id.* at 265, 204 N.E.2d at 771. *See also* United States v. Gudlach, 345 F. Supp. 709, 711 (M.D. Pa. 1972).
[139] 32 Ill. 2d at 267, 204 N.E.2d at 772.
[140] 294 F.2d 204 (D.C. Cir. 1961).
[141] *Id.* at 205.
[142] *See, e.g.,* N.Y. PENAL LAWS § 235.21-.22 (McKinney 1967).
[143] *See* discussion notes 60-115 *infra* and accompanying text.

jurisdictions, the impression is received that circumstantial evidence of scienter is limited only by the bounds of prosecutorial imagination. Perhaps the most important (or at least the most consistently used) circumstantial factor to show scienter is the defendant's ownership of, or proprietary interest in, the premises.[144] It is clear, however, that the fact of ownership or interest, standing alone, is not sufficient to show scienter.[145] In *Sokolic v. State*,[146] the defendant-president of a book company was convicted of distributing obscene materials. At trial, the only evidence connecting the defendant with the alleged offenses was his application to the City of Savannah for a business license as president of the Coastal Book Mart, Inc., dated July 1, 1969, almost two years prior to the alleged offense. The state had argued that this evidence was alone sufficient to show scienter under the "continuity doctrine," whereby a state of affairs once proved to have existed is presumed to continue unless some cause of change appears. There was no evidence at trial that the defendant had ever been in the bookstore. On appeal, the Georgia supreme court reversed the conviction, holding that the continuity doctrine does not apply to criminal cases, so that the state failed to prove scienter.[147]

Another circumstantial factor that is frequently found in obscenity cases in which scienter is discussed is the covers and titles of the books and magazines in question. Where the cover contains pictures of partially clad or nude males or females, courts have had little difficulty in finding scienter.[148] The court in *State v. Childs*[149] stated the following on the relationship between the cover of a book or magazine and proof of scienter:

> A seller who displays the cover makes a representation to the public of the book's contents. . . . Evidence of what is on the cover is therefore

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[144] United States v. Ewing, 445 F.2d 945 (10th Cir. 1971); Bullard v. State, 252 Ark. 806, 481 S.W.2d 363 (1972); People v. Adler, 25 Cal. App. 3d 24, 101 Cal. Rptr. 726 (1972); People v. Sarnblad, 26 Col. App. 3d 801, 103 Cal. Rptr. 211 (1972); State v. Onorato, 2 Conn. Cir. 428, 199 A.2d 715 (1963); Kaplan v. United States, 277 A.2d 477 (D.C. Ct. App. 1971); Blue Island v. Onorato, 2 Conn. Cir. 428, 199 A.2d 715 (1963); State v. Eakes, 206 N.W.2d 272 (S.D. 1973); Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972).

[145] *See* People v. Andrews, 23 Cal. App. 3d 1, 100 Cal. Rptr. 276 (1972). *But see* State v. I. & M. Amusements, Inc., 10 Ohio App. 2d 153, 226 N.E.2d 567 (1966), where the court held a corporation criminally liable on agency principles for the acts of its employees in exhibiting an obscene film. The court stated that "The knowledge of an agent acting within the scope of his employment will be attributed to the corporation in the ordinary operation of a motion picture theater." *Id.* at 274.

[146] 228 Ga. 788, 187 S.E.2d 822 (1972).

[147] *See also* Fishman v. State, 128 Ga. App. 505, 197 S.E.2d 467 (1973).

[148] United States v. Hochman, 277 F.2d 631 (7th Cir. 1960); Blue Island v. DeVilbios, 41 Ill. 2d 135, 242 N.E.2d 761 (1969); State v. Vollmar, 389 S.W.2d 20 (Mo. 1965); State v. Jungelaus, 176 Neb. 641, 126 N.W.2d 858 (1964).

[149] 252 Ore. 91, 447 P.2d 304 (1968).

relevant to a seller's knowledge of the contents. The cover and back are a form of circumstantial evidence which would be relevant even in the absence of a statute.[150]

The titles of and lurid statements on the front and back covers of publications have likewise been held to be circumstantial evidence of scienter.[151] In *State v. Shapiro,*[152] the court, in discussing the titles of over 270 books and magazines seized from the defendant's bookstore, stated that: "A perusal of the titles set forth in the schedule would indicate, without more, that an adequate showing of scienter was present."[153]

The physical condition and selling price of the item might also be of considerable importance on the issue of scienter. The fact that the allegedly obscene material is stapled shut or wrapped in cellophane has been held, in conjunction with other factors previously discussed, to permit the inference that the defendant was aware of the contents of the book.[154] And a similar result has occurred where the court found that the publication in question was selling at an obviously exorbitant price.[155]

Several cases demonstrate unique prosecutorial inventiveness in proving scienter in obscenity prosecutions. In *Cain v. Commonwealth,*[156] the state introduced testimony that, prior to the showing of an allegedly obscene film at the defendants' theatre, the defendants had: (1) changed the mode of operation of the theatre, including the alteration of its showing hours; and, (2) made cuts in the film. The Kentucky court of appeals held that this evidence was relevant to the issue of the defendants' knowledge of the nature of the film, and affirmed the convictions.

And in *United States v. Rubin,*[157] a prosecution for shipping obscene material in interstate commerce, the court held that the scienter of the defendant had been sufficiently proven by testimony of the defendant's attempt to exercise dominion and control over the freight shipment of allegedly obscene films, and his flight from a freight terminal after an unsuccessful attempt to pick up the films. The court held that the logical inference to be

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[150] *Id.* at 309.

[151] *See, e.g.,* United States v. Hochman, 277 F.2d 631 (7th Cir. 1966) (titles included *Sex Factory* and *Virgins Come High*); People v. Finkelstein, 11 N.Y.2d 300, 183 N.E.2d 661, 229 N.Y.S.2d 362 (1960) (titles were *Queen Bee* and *Garden of Evil,* coupled with titillating statements on front cover).

[152] 122 N.J. Super. 409, 300 A.2d 595 (1973).

[153] 122 N.J. Super. 413, 300 A.2d at 599, n.1.

[154] Court v. State, 51 Wis. 2d 683, 188 N.E.2d 475 (1971).

[155] *See* Orito v. State, 55 Wis. 2d 161, 197 N.W.2d 763 (1972) ($3.50 for a 22-page publication). *See also* United States v. Hochman, 277 F.2d 631 (7th Cir. 1960) ($3.00).

[156] 437 S.W.2d 769 (Ky. Ct. App. 1969), *rev'd per curiam,* 397 U.S. 319 (1970).

[157] 312 F. Supp. 950 (C.D. Cal. 1970).

drawn from the defendant's attempted dominion and control was that he knew the content of the packages.[158]

DEFENSES

In general, defendants charged with criminal obscenity violations have sought acquittal, insofar as scienter is concerned, by:

(1) Attacking the constitutionality of the statute or ordinance under which they were charged; or,

(2) Attacking the sufficiency of the evidence in relation to a showing of scienter.

For the most part, as has been seen, these attacks have been unsuccessful. The presence of more than one of the circumstantial facts previously discussed[159] has been held to warrant an inference that the defendant was aware of the contents and/or character of the material.

Obviously, since no conviction can be obtained, regardless of scienter, if the material itself is not obscene, a defense challenging the legal obscenity of the item in question frequently appears in the cases. A holding that the material is not obscene will obviate any discussion of scienter. But courts will "see through" attempts by distributors or publishers to disguise or disclaim obscenity by commingling obscene material with other material which has no logical relationship, but has some social value. An amusing example of this effort was provided by the court in *People v. Bloss*,[160] wherein the court discussed publications of erotic photographs containing a line drawing of a nude attributed to Michaelangelo, Matisse, or some other great master about every tenth page.[161] A defendant cannot insulate himself from a finding of scienter by reliance on such thinly disguised efforts of his publisher or printer.

Nor does it appear that a defense based upon the advice of counsel as to the non-obscenity of the material will be sufficient to insulate a defendant from criminal liability.[162] The infrequency of use of this argument suggests the extreme reluctance of attorneys to advise their clients on a matter as ethereal as the obscenity or non-obscenity of a particular item.

It might be recalled that in *Smith* the plurality expressly left open the

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[158] *See also* Gold v. United States, 378 F.2d 588 (9th Cir. 1967).

[159] See notes 134-58 *supra* and accompanying text.

[160] 27 Mich. App. 687, 184 N.W.2d 299 (1970).

[161] *Id.* at 696, 184 N.W.2d at 308. Also discussed by the court was an exhibit of a "girlie magazine" which offered its readers a recipe for a hot dog sauce which could be prepared simply by mixing ketchup and mustard. The recipe was offered along with 30 photographs of nudes lounging around a swimming pool. *Id.*

[162] Huffman v. United States, 470 F.2d 386, 391 (D.C. Cir. 1971), *rev'd*, 502 F.2d 419 (1974).

question of whether "honest mistake" would preclude a finding of scienter in a criminal obscenity prosecution.[163] Again, although this defense has not appeared frequently in the cases, it appears that at least one federal circuit[164] and one state[165] have accepted "honest mistake" as a valid defense to a finding of scienter.

Another possible defense suggested by one case is the defense of "diligent inquiry." In *Woodruff v. State,*[166] the defendant, the owner-proprietor of a small store in College Park, Maryland, was charged with the knowing possession of obscene matter with intent to sell. The defendant's store specialized in the sale of leather goods, posters and other objects of interest to young people, including underground newspapers. The allegedly obscene publication in question was the *Washington Free Press.* Approximately nine months before his arrest, the defendant had learned of the difficulties that the paper had encountered in an adjoining county (where he owned another store) and had discontinued the sale of the *Free Press* in that county pursuant to the advice of local authorities. However, the defendant continued selling the *Free Press* at his College Park store after contacting authorities there and learning that no action was contemplated against the paper or any other underground newspapers. The defendant's conviction was reversed by the Maryland Appellate Court, which noted the diligent efforts the defendant had made to ascertain whether the publication was objectionable. However, the court also found absent any "suspicious circumstances" from which scienter could be inferred.[167]

A mere showing by the state of a tangential connection between the defendant and the acts allegedly constituting the violation will not be sufficient to prove scienter. Thus, in *People v. Buckley,*[168] the court reversed the conviction of the president of the printing company which printed the magazine *Screw,* on the grounds that his relation to the publication was too attenuated to show or infer scienter.[169] And in *United States v. Astore,*[170] a federal appellate court reversed the conviction of a defendant who was charged with interstate transportation of obscene material, on the grounds that mere proof that the defendant was a passenger in a car containing obscene materials, coupled with

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[163] *See* note 32 *supra.*

[164] United States v. West Coast News Company, 357 F.2d 855 (6th Cir. 1966), *rev'd on other grounds, sub. nom* Aday v. United States, 388 U.S. 447 (1967). The Sixth Circuit approved of an instruction which would have required a finding of not guilty if the defendant was honestly mistaken as to the contents of any book or books. 357 F.2d at 862.

[165] State v. Lett, 114 Ohio App. 414, 178 N.E.2d 96 (1961). *But see* Cincinnati v. King, 168 N.E.2d 633 (Cincinnati Mun. Ct. 1960).

[166] 11 Md. App. 202, 273 A.2d 436 (1971).

[167] *Id.* at 218, 273 A.2d at 450.

[168] 65 Misc. 2d 917, 320 N.Y.S.2d 91 (1971).

[169] *See also* Luros v. United States, 389 F.2d 200 (8th Cir. 1968), where the court held that proof of defendant's role in approving and actual editing of the manuscripts submitted was not of itself actionable.

[170] 288 F.2d 26 (2d Cir. 1961).

the defendant's claim that he was unaware of the contents of the packages or the purposes of the trip, raised a reasonable doubt as to his scienter.[171]

CONCLUSION

While it is beyond cavil that obscenity is not entitled to first amendment protection and that the states may constitutionally regulate obscene material, the crucial problem occurs in balancing the states' *method* of regulating obscenity with the first amendment rights of those citizens whom the regulation affects.

To date, the scienter requirement of *Smith* has been uniformly interpreted as permitting an obscenity conviction on the grounds that the defendant was in some manner aware of the contents of the material he was charged with selling, exhibiting or distributing. This standard is entirely subjective, and most often is satisfied by the offering into evidence of a variety of circumstantial factors which courts feel are in some way probative of scienter.

The burden that this approach places on the citizenry is intolerable, and stems not from the fact that the result in any criminal obscenity prosecution is unpredictable, but from the fact that, at least insofar as scienter is concerned, a judicial or jury finding that scienter was present is almost a certainty. The decisions in the scienter area could indeed be collated into a handbook for prosecutorial success in proving scienter.

It is submitted that the *Smith* requirement of scienter can be consistently and constitutionally balanced with freedom of expression only by a requirement that proof of scienter depends upon a showing that the defendant knew that the material was "legally obscene." Only upon proof of actual knowledge that the material in question was legally obscene will the constitutional dangers inherent in the scienter-obscenity area be obviated.

It has been suggested[172] that the utilization of declaratory judgment or book libel proceedings by booksellers and theatre owners to determine the obscenity of material could be one method of determining in advance legal obscenity by adjudication. Following the adjudication of obscenity of a particular book, play, or movie, notice of such finding could be distributed to others in the local community,[173] and upon proof of receipt of such notice a finding of actual knowledge could be predicated. The major deficiency in this procedure is that it would place the primary burden of seeking a legal determination of obscenity *in the first instance* on the individual. This undertaking would be burdensome, time-consuming, and expensive, and it is extremely doubtful that it would be extensively utilized.

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[171] The defendant here was 67 years old, retired, unemployed and in ill health. These facts may have tempered the decision somewhat.

[172] Lockhart & McClure, *supra* note 9, at 106-07.

[173] The *area* of distribution would of necessity be continued to a "local community," and

A more practical solution would be to provide for the enactment of "obscenity notice" statutes, in which the state (or a political division thereof) would have the burden of initiating obscenity adjudication proceedings, with adequate notice and representation, against any allegedly obscene material. Following this adjudication, notice could then be given to any individual selling or distributing the material, and a criminal obscenity conviction would result only if the material was *thereafter* distributed to the public. The advantage of this procedure is that it would eliminate the self-censorship of allegedly obscene materials, while at the same time protect the state's interest in the control of obscene material. And while this scheme would be no less expensive, the expense could be placed where it belongs—on the state. As has been seen, such statutes have been enacted and successfully implemented.[174]

In *Stanley v. Georgia,*[175] the United States Supreme Court held that freedom of expression "[I]s so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws."[176] The conscientious adoption of this rationale mandates the elimination of total reliance on circumstantial evidence to prove scienter in obscenity prosecutions.

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such notice would probably not have a conclusive effect if given to one outside the local community. *See* Miller v. California, 413 U.S. 15 (1973).

[174] *See* notes 111-15 *supra* and accompanying text.
[175] 394 U.S. 557 (1969).
[176] *Id.* at 567-68.