

# OBSCENITY REGULATION AND ENFORCEMENT IN ST. LOUIS AND ST. LOUIS COUNTY

The seemingly simple statement made by the United States Supreme Court, in *Roth v. United States*, "that obscenity is not within the area of constitutionally protected speech or press"<sup>1</sup> belies the innumerable problems raised by granting, to such an indefinite entity as "obscenity," an exception to the protection of the first amendment. The Supreme Court decisions make the headlines, but the problems and difficulties they create can more readily be seen on a local level. Thus the object of this note is to describe and assess the regulatory practices of St. Louis and St. Louis County with respect to "obscene matter." Special emphasis will be given to local procedure, problems, and difficulties in enforcing the law as it stands today. The history of obscenity regulation on a national level through a detailed study of Supreme Court decisions is not within the scope of this article.<sup>2</sup> Neither will postal obscenity regulation<sup>3</sup> nor the argument concerning the causal relation between obscenity and sex crime and immorality<sup>4</sup> be treated herein. The bulk of information contained in this note was derived from personal interviews with St. Louis City and County prosecutors and other officials, police officers, defense attorneys, and various members of local obscenity commissions.

## I. PROHIBITORY LEGISLATION

State, City, and County legislation prohibits the publication and dissemination of obscene literature.<sup>5</sup>

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1. 354 U.S. 476, 485 (1957).

2. For a more detailed discussion of obscenity regulation on a national level, see Note, *Non-Criminal Obscenity Regulation and Freedom of Expression*, 1962 WASH. U.L.Q. 475.

3. *Id.* at 505.

4. *Id.* at 476.

5. The City of St. Louis is an independent city under the Missouri Constitution, and is neither geographically nor politically a part of St. Louis County. MO. CONST. art VI, § 31: "The City of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with the provisions of this constitution."

St. Louis County is adjacent to the City of St. Louis; geographically it includes incorporated and unincorporated areas; but the legislative power of the County government over incorporated areas is restricted by the Missouri Constitution, unless extended by vote of a majority of the people in any incorporated area. MO. CONST. art. VI, § 18(c): The Charter may provide for the vesting and exercise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county *outside* incorporated cities . . . (Emphasis added.) Thus St. Louis

Missouri once had a two-fold statutory scheme, dating back to 1909, that provided a range of possible charges from a misdemeanor to felony for publishing or circulating obscene matter. However, in 1957, Mo. R.S. 563.270, the felony statute,<sup>6</sup> was amended<sup>7</sup> reducing the crime to a misdemeanor.<sup>8</sup> The reasons behind this amendment have not been discovered. It has been suggested that a felony conviction for publishing or circulating obscene matter might be difficult to attain and thus the impracticality of prosecution was perhaps the reason for the amendment.<sup>9</sup> Such reasoning appears questionable, however, because the already existing misdemeanor statute, Mo. R.S. 563.280,<sup>10</sup> prohibited the same acts forbidden by the

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COUNTY, MO., REV. ORDINANCES § 706.020 (Supp. 1963) provides that the prohibitive sections of this ordinance (§§ 706.070-.090) “. . . shall apply to the area of St. Louis County outside the incorporated cities.” (See note 37 *infra* for the status of a few St. Louis County incorporated areas in regard to obscenity legislation.)

6. MO. REV. STAT. § 563.270 (1949): . . . shall be deemed guilty of a felony, and on conviction thereof, shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years.

7. Mo. Laws 1957, at 374 (S.B. 19).

8. MO. REV. STAT. § 563.270 (1959):

Any person within this state who edits, publishes or disseminates a newspaper, pamphlet, magazine or any printed paper devoted mainly to the publication of scandals, whorings, lechery, assignations, intrigues between men and women and immoral conduct of persons or any person who knowingly has in his possession for sale or keeps or exposes for sale or distributes or in any way assists in the sale or gives away any such newspaper, pamphlet, magazine or printed paper, upon conviction, is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars, or by imprisonment in the county jail for a period not exceeding one year or by both fine and imprisonment.

9. Interview with Eugene P. Freeman, Associate City Counselor, City of St. Louis, Nov. 1963 [hereinafter cited as Freeman Interview]. Mr. Freeman is also legal counsel for the St. Louis Decent Literature Commission, co-counsel for the National Citizens for Decent Literature, and a member of the Executive Committee of the local chapter of Citizens for Decent Literature.

10. MO. REV. STAT. § 563.280 (Supp. 1963):

Every person who knowingly shall manufacture, print, publish, buy, sell, offer for sale or advertise for sale, or have in his possession, with intent to sell or circulate, or who knowingly shall give away, distribute or circulate any obscene, lewd, licentious, indecent or lascivious book, pamphlet, paper, ballad, drawing, lithograph, engraving, picture, photograph, model, cast, print, article or other publication of indecent, immoral or scandalous character, or shall write, print or publish, sell or circulate, any letter, handbill, card, circular book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, when, where, how, of whom or by what means any of the things herein mentioned can be had or obtained, and whoever shall print or publish in any newspaper any vulgar, scandalous, obscene or immoral pleadings or evidence in any case or proceeding before any court or tribunal whatever, shall, on conviction thereof, be fined not more than 1000 dollars nor less than 50 dollars, or be imprisoned not more than one year in the county jail, or both; but nothing in this section shall be construed so as to affect teaching in regular medical colleges, or public standard medical books, or reports of medical societies, or the practice of regular practitioners of medicine, or druggists in their legitimate business.

The statute quoted above is identical to the original misdemeanor statute except for the addition of “knowingly” and “who knowingly” in 1961.

felony statute.<sup>11</sup> Furthermore, since the amendment all local prosecutions under state statutes have been brought under the original misdemeanor statute, Mo. R.S. 563.280.<sup>12</sup> The amendment of Mo. R.S. 563.270 has met with disfavor from those who strongly advocate prohibitory legislation in the area of obscenity because it eliminated a statutory recognition of a complete range of punishment,<sup>13</sup> the presence of which might have induced voluntary regulation even if prosecution was impractical.

In September 1961, the Missouri Supreme Court reversed the St. Louis Court of Criminal Correction's conviction of a newsstand clerk for unlawfully possessing and selling an obscene magazine.<sup>14</sup> Following the test announced by the United States Supreme Court in *Smith v. California*,<sup>15</sup> the court held that Mo. R.S. 563.280 was unconstitutional because it lacked a requirement of scienter. Subsequent to the arrest but prior to the Missouri Supreme Court decision, the legislature amended Mo. R.S. 563.280 by twice inserting the term "knowingly."<sup>16</sup> The constitutionality of Mo. R.S. 563.270, the original felony statute, is questionable because it has not been amended since *Smith v. California*.<sup>17</sup> It does, however, contain the phrase "who knowingly has in his possession,"<sup>18</sup> which could be construed to include the necessary scienter, but which was probably only intended to require knowledge of the possession of the publication rather than knowledge of the contents of the publication. The questionable validity of this statute may be one reason it has not been utilized since 1961.

Since 1948 the City of St. Louis has had an ordinance prohibiting the exhibition or sale of any indecent or lewd publication to the general public and also prohibiting the performance of any indecent, immoral, or lewd representation.<sup>19</sup> This ordinance is retained today although the first part, pertaining to publications, is undoubtedly unconstitutional because scienter is not required. Although the constitutional issue was not raised, the part

11. Statute cited note 8 *supra* is identical to the felony statute except for the reduction of the crime to a misdemeanor in 1957. See note 6 *supra* for the original penal provision of the statute.

12. Freeman Interview; see, *e.g.*, *State v. Vollmar*, Complaint No. 70673, St. Louis Court of Criminal Correction (Sept. 20, 1963); *State v. Roots*, St. Louis County Police Report No. 63-28315, St. Louis County Prosecuting Attorney's File No. 6295, 6th Dist. Magis. St. Louis County (Arrest—July 22, 1963); *State v. Blagg*, No. B-2699, 4th Dist. Magis. St. Louis County (March 13, 1963).

13. Freeman Interview.

14. *State v. Burton*, 349 S.W.2d 228 (Mo. 1961).

15. 361 U.S. 147 (1959).

16. Mo. Laws 1961, at 334 (S.B. 194); statute as amended is quoted in note 10 *supra*.

17. Freeman Interview.

18. Statute cited note 8 *supra*.

19. St. Louis, Mo., Rev. Code § 789.010 (1960).

pertaining to performances was impliedly upheld by the St. Louis Court of Appeals recently when it reversed a case thereby convicting two of the defendants under that provision.<sup>20</sup>

In 1955 a bill was introduced in the City of St. Louis to prohibit the distribution of certain publications. Had it been enacted, that bill would have prohibited not only obscene publications but also those "advocating un-American or subversive activity." The bill created an agency with power to determine and prohibit violations and to subpoena and question witnesses, but with no provision whatever for notice, hearing, or review. City courts were to be required to accept the agency's recommendations as to guilt.<sup>21</sup> The City Counselor determined that the proposed bill was unconstitutional<sup>22</sup> and that office subsequently prepared St. Louis City Ordinance No. 47516 (April 18, 1955).<sup>23</sup> That ordinance prohibited the distribution to minors, in any way, of either obscene or indecent publications, or publications tending to incite minors to crime.<sup>24</sup> The overt display of such matter in any store was to be rebuttable prima facie evidence of a violation of the ordinance.<sup>25</sup> It also created a Board of Juvenile Review<sup>26</sup> (to be discussed *infra*).

On the basis of *Smith v. California*, the Missouri Supreme Court, in February 1961, reversed the conviction of a drugstore clerk for displaying, with intent to sell to minors, an obscene and indecent magazine, *The Dude*, under section 2 of St. Louis City Ordinance No. 47516.<sup>27</sup> The court held that ordinance unconstitutional because it lacked the scienter requirement. Little more than one month later the St. Louis Board of Aldermen passed an emergency ordinance, St. Louis City Ordinance No. 50284 (March 16, 1961),<sup>28</sup> prohibiting any person from "knowingly" dealing in obscene matter.<sup>29</sup> Unlike the 1955 Ordinance to which it was joined and

20. *City of St. Louis v. Mikes*, 372 S.W.2d 508 (Mo. 1963).

21. *Memorandum of Law—Relating to Obscene Matter in the City of St. Louis and the State of Mo.* (on file in St. Louis City Counselor's Office).

22. *Ibid.*

23. ST. LOUIS, MO., REV. CODE §§ 751.010-100, ch. 752 (1960).

24. ST. LOUIS, MO., REV. CODE §§ 751.020-030 (1960).

25. ST. LOUIS, MO., REV. CODE § 751.080 (1960).

26. ST. LOUIS, MO., REV. CODE ch. 752 (1960).

27. *City of St. Louis v. Williams*, 343 S.W.2d 16 (Mo. 1961).

28. ST. LOUIS, MO., REV. CODE §§ 751.110-150 (1960), now known as §§ 746.050-.080 (Supp. 1963).

29. ST. LOUIS, MO., REV. CODE § 751.120 (1960), now known as § 746.060 (Supp. 1963):

No person shall knowingly: produce, manufacture, or assist in any way to produce or manufacture, any obscene matter; or disseminate, transfer, circulate, distribute or exhibit, any obscene matter; or have, own, possess or exercise control, either solely or in combination, with intent to disseminate, transfer, circulate, distribute or exhibit, any obscene matter; or advertise, give notice, supply information where, how, of whom, or by what means possession, control, or use can be obtained or effectuated of any obscene matter.

which was not repealed at this time, this ordinance was not limited to minors. Thus, even if the first part of the 1948 Ordinance is unconstitutional,<sup>30</sup> this 1961 ordinance prohibits the same activities and is the basic city ordinance invoked by the City Counselor's office in all prosecutions dealing with obscene publications.<sup>31</sup> Another section of the 1961 City Ordinance prohibits "tie-in sales," the coerced receipt of suspected obscene matter.<sup>32</sup> There have been no prosecutions under this section either in the City or under a similar ordinance in the County.

In April 1963, all of the 1955 St. Louis City Ordinance No. 47516 was repealed.<sup>33</sup> No new legislation specifically directed at prohibiting the promulgation to minors of either crime publications or obscene publications was enacted. The only prohibitory sections of the 1963 Ordinance are those of the 1961 Ordinance which is incorporated therein.<sup>34</sup> All of the new sections of the 1963 Ordinance deal in detail with the creation, powers, and purposes of the Decent Literature Commission, which replaced the Juvenile Board of Review. The present St. Louis City Ordinance provides a penalty of not more than \$500 fine, or more than 100 days in jail, or both.<sup>35</sup>

St. Louis County's legislative scheme has followed that of the City very closely—in many respects verbatim. Thus in 1956 the County Council enacted County Ordinance No. 794<sup>36</sup> which, like the 1955 City Ordinance, prohibited the circulation to minors of obscene matter or of matter tending to incite minors to crime. The 1956 County Ordinance also established the Board of Review for Juvenile Readers whose format, powers, and duties were identical to those of the comparable City Juvenile Board of Review. In July 1963, the entire 1956 County Ordinance was repealed by County Ordinance No. 2961, known as the "Decent Literature Code."<sup>37</sup> No new

30. See note 19 *supra* and accompanying text.

31. See, e.g., *City of St. Louis v. Pheiffer*, Nos. 2387-89, Munic. Ct. of St. Louis Div. 1, May 21, 1963.

32. ST. LOUIS, MO., REV. CODE § 751-140 (1960) (now § 746.070 (Supp. 1963)):

No person shall, as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication require that the purchaser or consignee receive for resale any other article, book, or other publication reasonably believed by the purchaser or consignee to be obscene, nor shall any person deny or threaten to deny any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept such articles, books, or publications, or by reason of the return thereof.

33. St. Louis, Mo., Ordinance 51871, April 4, 1963 (now ST. LOUIS, MO., REV. CODE ch. 746 (Supp. 1963)).

34. See notes 29, 32 *supra*.

35. ST. LOUIS, MO., REV. CODE § 746.080 (Supp. 1963).

36. ST. LOUIS COUNTY, MO., REV. ORDINANCES ch. 706 (1958).

37. ST. LOUIS COUNTY, MO., REV. ORDINANCES ch. 706 (Supp. 1963). A check of a few of the incorporated cities in St. Louis County (see note 5 *supra* for explanation of why the County ordinance does not apply to incorporated areas) indicates that Univer-

sections specifically directed at distribution to minors were enacted. Scierter is required in the section of the new County Ordinance prohibiting dealing in obscene matter, the section is virtually the same as that enacted by the City in 1961.<sup>38</sup> The "tie-in sale" prohibition in the new County Ordinance is also similar to that of the City.<sup>39</sup> Also like the 1963 City Ordinance, this ordinance is primarily concerned with the creation, and the enumeration of the powers and duties, of the "Decent Literature Commission of St. Louis County," which replaced the Board of Review for Juvenile Readers. The new County Ordinance provides for a \$100-\$1000 fine, or not more than one year in jail, or both, for a violation.<sup>40</sup>

## II. REGULATORY LEGISLATION

The entity with the greatest capacity to effect the elimination of obscene literature from the St. Louis area would appear to be the obscenity commission. The reason for this is simple. Neither the City<sup>41</sup> nor the County<sup>42</sup> has enough manpower to check newsstands, drugstores, supermarkets, bookstores, etc. for questionable publications as a matter of police routine.

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city City, Clayton, Ferguson and Florissant have obscenity ordinances; however only Florissant's ordinance includes the element of scierter required by *Smith* and thus the other three ordinances are undoubtedly invalid. UNIVERSITY CITY, MO., MUNICIPAL CODE § 23-22 (1963); CLAYTON, MO., REV. ORDINANCES ch. 12, art. VI, § 12-38 (1962); FERGUSON, MO., CODE § 18-18-19 (1957); Florissant, Mo., Ordinance 1325, 1963. The Florissant ordinance is patterned after the St. Louis and St. Louis County obscenity ordinances and thus provides for the creation of an obscenity commission (see note 168 *infra* for a recent amendment directed specifically at circulation to minors). Ferguson attempted to create an obscenity commission recently but the proposed ordinance failed to pass.

38. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 706.070 (Supp. 1963); see note 29 *supra*.

39. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 706.080 (Supp. 1963); see note 32 *supra*.

40. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 706.090 (Supp. 1963).

41. Interview with Det. Charles Kranz, St. Louis Police Department, Liquor and Morality Section, Nov. 1936 [hereinafter cited as Kranz Interview]; Interview with Joseph L. Badaracco, Chairman, Local Chapter of Citizens for Decent Literature, Nov. 1963 [hereinafter cited as Badaracco Interview]. Mr. Badaracco indicated that Chicago has shown great improvement since 1962 when it became the beat officer's responsibility to check into and report all suspicious publications. Chicago Police Department Training Bulletin, Vol. III, No. 48, Nov. 26, 1962, states that if the beat officer suspects that obscene literature is being sold he should inspect the suspected publications at the place of business and if he has the ". . . slightest indication that the subject publication comes under the definition of obscenity" he is to file a full report to be followed up by a vice officer.

42. Interviews with Capt. H. C. Birmes and Lt. Austin B. Duke, St. Louis County Police Department, Dec. 1963 [hereinafter cited as Birmes or Duke interview]. Capt. Birmes stated that two narcotics officers periodically check drug stores and could include in their routine a check for publications being sold.

Almost all local police activity concerning obscene literature is initiated by complaints (usually anonymous)<sup>43</sup> received by the police department.<sup>44</sup> Whether the number of these initiating complaints has been related to the amount of activity of the local obscenity commissions is not known. However, the commissions' primary purpose has been to inform the general public of the nature and extent of objectionable publications in the community and to advise them to file complaints with local authorities if any such matter comes to their attention.<sup>45</sup>

The Board of Juvenile Review created in the City of St. Louis in 1955 was composed of seven citizens appointed by the Mayor to serve without pay.<sup>46</sup> It was empowered to gather information concerning the matter prohibited by the ordinance, to cooperate with all organizations in studying ways of preventing such publications from being made available to minors, to receive and consider complaints, to report violations to the chief of police, to recommend legislation, and to file an annual report of its activities.<sup>47</sup> In 1963, with the repeal of the Board of Juvenile Review, the Decent Literature Commission of the City of St. Louis was created.<sup>48</sup> The new commission is organized within the Department of Welfare with office space, materials,

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43. Kranz Interview.

44. *Ibid.* Duke Interview.

45. Freeman Interview; Badaracco Interview; Interview with Jack Schuler, Chairman, Decent Literature Commission of City of St. Louis, Dec. 1963 [hereinafter cited as Schuler Interview]; Interview with Ray T. Dreher, Member, Decent Literature Commission of St. Louis County, Treasurer, Local Chapter of Citizens for Decent Literature, Nov. 1963 [hereinafter cited as Dreher Interview]; Interview with Robert Basler, Chairman, Citizens' Council for Decency, Dec. 1963; Local Chapter of Citizens for Decent Literature, *The Law in the St. Louis Area Regarding Obscene Matter (1963)*; National Citizens for Decent Literature, *A Typical Speech, Typical Questions*, both on file with Decent Literature Commission of City of St. Louis; Keating, *Typical CDL Talk*, on file with Decent Literature Commission of City of St. Louis; Movie distributed by National Citizens for Decent Literature, *Perversion for Profit*, on file with Decent Literature Commission of City of St. Louis; Letter From Joseph L. Badaracco to St. Louis Area Residents Invited to the Local Chapter of Citizens for Decent Literature's Kick-off Banquet, Nov. 1963 [hereinafter cited as Badaracco Letter]. In the Badaracco Letter, the writer stated: "Its [CDL] formula for combating pornography is to acquaint the public with the large quantity of obscenity on magazine racks and available by mail, and to urge arrest and prosecution of those who violate our obscenity laws."

46. ST. LOUIS, MO., REV. CODE § 752.010 (1960).

47. ST. LOUIS, MO., REV. CODE § 752.030 (1960).

48. St. Louis, Mo., Ordinance 51871, April 4, 1963, codified as REV. CODE ch. 746 (Supp. 1963). The members of the Decent Literature Commission of the City of St. Louis, appointed by the Mayor, are: Jack Schuler, Chairman, member of Archdiocese of St. Louis; Martha S. Casey, public school teacher; Dr. Leonard J. Dierker, Head of Lutheran Education in St. Louis; Rabbi Bernard Lipnick, former President of Rabbinical Association of St. Louis; Herman P. Winkelmann, former Executive Manager of Retail Druggists of St. Louis; Wyvetter Hoover Younge, Lawyer; Gerald Engel, Metropolitan Church Federation.

supplies, and all appropriations to be derived from that department.<sup>49</sup> The employment of an administrative assistant is provided for<sup>50</sup> and the commission is specifically empowered to receive and use all funds and property from whatever source in furthering its purposes.<sup>51</sup> The powers and purposes of the new commission include all those of the old Board of Juvenile Review, but are more extensive and detailed.<sup>52</sup> The general purpose is more extensive because the commission is not limited to preventing obscene literature from becoming available to minors<sup>53</sup> but rather is empowered to "attempt in all possible ways to properly influence the community so as to safeguard

49. ST. LOUIS, MO., REV. CODE § 746.030 (Supp. 1963).

50. ST. LOUIS, MO., REV. CODE § 746.030 (Supp. 1963).

51. ST. LOUIS, MO., REV. CODE § 746.030(2) (Supp. 1963).

52. ST. LOUIS, MO., REV. CODE § 746.040 (Supp. 1963):

Powers and Purposes of the Decent Literature Commission.—The Commission shall:

1. Attempt in all possible ways to properly influence the community so as to safeguard the youth and general public of the City from the vice of obscene literature.

2. Cooperate with national, state, and municipal authorities, boards or commissions, with publishers, distributors, agencies, or dealers in publications and with voluntary agencies and organizations dedicated to the elimination of obscenity in printed form and delinquency as influenced by such printed obscenity, in the study of ways and means of preventing publications of the type described in Section 746.060 from having any effect or presence in the City of St. Louis.

3. Gather information and keep informed with regard to publications found within the City of St. Louis of the nature described in Section 746.060.

4. Provide a source of material for reference and disbursal purposes, including reference materials, films, exhibits, actual court evidence, information of outside references, library of pertinent speeches, and other such useful, informative, and educational data.

5. Provide a speakers bureau from interested persons or groups; a training school therefor; development of speech materials; and speech engagements coordination.

6. Encourage higher reading standards through cooperation with libraries, schools, and other interested persons, groups, and associations; dissemination of pertinent materials for supplementary and educational purposes to the public through these sources; and in general effect an enlightenment of the public to the present obscene literature problem through whatever source possible, public or private, individual, or group. The Commission shall take such positive or negative curative action as it shall deem proper so as to effectuate the intents and purposes of this chapter.

7. Expect and receive the aid and cooperation of all City offices and departments, the St. Louis Metropolitan Police Department, and the St. Louis County Board of Review.

8. Receive and consider, for public educational purposes, complaints as to the violation or alleged violation of Section 746.060 and Section 746.070, and shall report same to the Chief of Police of the City of St. Louis for his independent action thereon.

9. Make recommendations from time to time to the Mayor and the Board of Aldermen as to legislative enactments it may deem desirable in relation to obscene publications.

10. File annually a report with the Mayor and the Board of Aldermen relating its activities to date and analyzing the progress made in its estimation toward effecting the purposes of Chapter 746.

11. Any specified powers granted in this enactment are not to the exclusion of any proper powers reasonably inferable therefrom in the light of the reasons for and the purposes of the Decent Literature Commission; provided, however, nothing herein is to be construed to empower or authorize any unlawful censorship, or public pronouncements by the Commission in reference to any person or specific publication.

53. See note 24 *supra* and accompanying text.



the youth and general public of the City from the vice of obscene literature."<sup>54</sup> The enabling ordinance specifically provides that "nothing herein is to be construed to empower or authorize any unlawful censorship, or public pronouncements by the Commission in reference to any person or specific publication."<sup>55</sup>

The composition, powers, and duties of the now defunct St. Louis County Board of Review for Juvenile Readers, created in 1956,<sup>56</sup> and of the present Decent Literature Commission of St. Louis County,<sup>57</sup> were and are virtually identical with their counterparts in the City of St. Louis, except that there is no provision in the 1963 County Ordinance for an administrative assistant, office space, supplies, or any appropriations.

### III. ACTIVITIES OF THE DECENT LITERATURE COMMISSIONS

One of the main obstacles to a more effective functioning of these commissions has been a lack of funds.<sup>58</sup> Although created in 1956, the County Board never effectively put any program into action,<sup>59</sup> perhaps because of a lack of appropriations. As indicated above, the recent ordinance creating the new county commission is also lacking in any provision for appropriations. To what extent this will limit the commission's operations remains to be seen.

The City Board was active since its inception in 1955 in spite of the fact that it had no appropriations.<sup>60</sup> However, a few months prior to the enactment of the new City Ordinance in 1963, the Board threatened to cease operating unless the City provided financial support.<sup>61</sup> At that time the Mayor inquired into the Board's effect and was told by the Juvenile Division that the City was relatively better off due to its activities.<sup>62</sup> Thereupon the

54. ST. LOUIS, MO., REV. CODE § 746.040 (Supp. 1963).

55. ST. LOUIS, MO., REV. CODE § 746.040 (Supp. 1963).

56. See note 36 *supra* and accompanying text.

57. See note 37 *supra* and accompanying text. The members of the Decent Literature Commission of St. Louis County, appointed by the Supervisor, are: William H. Webster, Chairman, former U.S. Attorney; Dr. Joseph H. Summers, Head of English Department at Washington University; Sidney Smith, President of Retail Druggists Association; Ray T. Dreher, Treasurer of Local Chapter of Citizens for Decent Literature; G. Gordon Hertslet; Mrs. Charles W. Beintker; Dr. William M. Landau, President of the St. Louis Civil Liberties Committee. (Mrs. Beintker and Dr. Summers have resigned.)

58. Schuler Interview; Freeman Interview; Badaracco Interview.

59. Interview with Don Stohr, Deputy County Counselor, St. Louis County, Nov. 1963; Interview with William H. Webster, Chairman, Decent Literature Commission of St. Louis County, Nov. 1963 [hereinafter cited as Webster Interview].

60. Schuler Interview.

61. *Ibid.*

62. *Ibid.*

Mayor provided for a secretary for the Board, financed first out of his personal budget and later out of the Welfare Department budget as provided for by the 1963 City Ordinance.<sup>63</sup> The provision for appropriations in the 1963 City Ordinance has by no means ended the commission's battle for finances. Currently, besides the salary of the secretary, only \$215 has been appropriated for the commission, although \$3400 was requested.<sup>64</sup>

St. Louis area obscenity commissions have been greatly influenced and aided by Citizens for Decent Literature, a private organization created by an attorney, Charles Keating, in Cincinnati in the mid 1950's,<sup>65</sup> which has grown into a national organization. A St. Louis chapter was founded only a few months ago.<sup>66</sup> The announced purposes of the Citizens for Decent Literature and the St. Louis Decent Literature Commission are identical: "1. To create public awareness of the nature and scope of the problem of obscene and pornographic literature. 2. To encourage the reading of decent literature. 3. To expect the enforcement of the laws pertaining to obscene and pornographic literature. 4. To serve as a medium for accumulation and dissemination of information pertinent to the problem."<sup>67</sup> Thus "the battle is waged on two fronts—in the court of public opinion and in the court of law."<sup>68</sup>

The agency for creating public awareness and initiating the enforcement of prohibitory laws is the Speakers Bureau of the St. Louis Decent Literature Commission, which responds to requests from churches, PTAs, and other organizations for speakers, movies, or slides.<sup>69</sup> At present all requests made of either the county commission or the local Citizens for Decent Literature

63. *Ibid.* See note 49 *supra*.

64. Schuler Interview. The \$215 was appropriated as follows: \$50—postage, \$50—supplies, \$30—repairs, \$85—bookcase. The \$3400 requested appropriation was based on the following items: \$1500—publication of a booklet, \$300—Speakers Bureau publication, \$200—additional supplies, \$500—travel to conferences and conventions, \$900—to pay for three movies on loan from the National CDL.

65. SHEA, *PRINTED POISON* 16 (Distributed by GDL 1960).

66. St. Louis area officers of the Local Chapter of GDL are: Joseph L. Badaracco, Chairman; Jack J. Gilbert, Vice-Chairman; Gerald W. Cohen, D.S.C., Secretary; Ray T. Dreher, Treasurer (Mr. Dreher is also a member of the Decent Literature Commission of St. Louis County). Included among the members of this organization's Executive Committee are Eugene P. Freeman, Legal Counsel to the Decent Literature Commission of St. Louis, and the following members of the Decent Literature Commission of St. Louis: Dr. Leonard J. Dierker, Rabbi Bernard Lipnick, Jack Schuler, and Herman P. Winkelmann.

67. SHEA, *op. cit. supra* note 65, at 21. See Powers and Purposes of Decent Literature Commission, note 52 *supra*.

68. SHEA, *op. cit. supra* note 65, at 19.

69. Interview with Mrs. Marilyn Risha, former Secretary, Decent Literature Commission of St. Louis, Nov. 1963.

are referred to the city commission.<sup>70</sup> The speakers are volunteers who may base their presentations upon sample speeches and sample questions and answers provided by the Cincinnati Citizens for Decent Literature, and kept on file by the St. Louis Decent Literature Commission.<sup>71</sup> The three movies available were also obtained from the Cincinnati Citizens for Decent Literature.<sup>72</sup>

These presentations may begin by pointing out that the publication of obscene matter in the United States is a \$2,000,000,000 business annually, "sufficient to pervert an entire generation."<sup>73</sup> The audience is informed that obscenity is not protected by the first or fourteenth amendments and *Roth v.*

70. Webster Interview; Badaracco Interview.

71. Risha Interview, *op. cit. supra* note 69.

72. Schuler Interview. The three films are *The Accused*, *Pages of Death*, and *Perversion for Profit*. *The Accused* is a film of a Loretta Young television program involving newsstand obscenity. *Pages of Death* was produced by a Franciscan Order in California and is assertedly based upon a true occurrence. This film develops the character, family relationship, and teacher relationship of an eleven year old girl who is ultimately murdered as the result of a sexual attack by an upper-class teenage boy. The boy's parents are shown as having been against the passage of an ordinance prohibiting obscenity. *Girlie* magazines and *hard-core* slides are found by the police in the boy's room, much to his parents' surprise. When asked why he did it, the boy answers: "I don't know why I did it." No evidence is presented other than the boy's possession of the publications, yet the movie indicates, through statements by the police, that the magazines were the cause of the attack and that the newsdealer is as guilty as the boy.

*Perversion for Profit* is the film most widely shown in the St. Louis area. It was made by CDL through a \$40,000 donation by the Purex Co. This film is not a story as are the other two, but is a narrative which accompanies the display of various types of objectionable matter and which emphasizes the causal relationship between such matter and abnormal behavior. For example, at one point in this movie the narrator states:

I spoke with you before about the detailed instruction in perversion, and this would readily describe many of the paperbacks in page after page and descriptive passage after descriptive passage. The lesbian, the cunalinguist, the homosexual, is given his day both as to description of his acts with nothing left to the imagination, as well as apology and appeal for his kind. In fact, an invitation is extended to the reader of these pocketbooks to come join the fun. . . . [At this point the narrator reads a long selection from a paperback, *Sex Jungle*, the philosophy of which is ". . . to grab all the kicks we can . . ." among which are alcohol, dope, murder, and rape] . . . Again I repeat, Ladies and Gentlemen, that the purpose of showing these pictures and quoting from the material is not to shock you—it is to inform you of what is available on your newsstands, and what, very possibly, your children are reading. The materials you have seen are not a case of scraping the bottom of the barrel. They are actually mild compared to what every American child can pick up at his local store. The vast majority of this material is too indecent to show you or quote to you.

William Webster, Chairman, County Obscenity Commission, indicated that the newly appointed commission does not fully endorse *Perversion for Profit* because of some dissatisfaction with the content and method of presentation of the film. However, he stated that it is the best film available thus far in this area.

73. National Citizens for Decent Literature, A Typical Speech A-1, on file with Decent Literature Commission of St. Louis.

*United States* is further cited for a definition of and test for obscenity.<sup>74</sup> Speakers and the most used movie amply show and describe publications to the audience.<sup>75</sup> These publications, all presented as objectionable, are classified as follows: slick sheet, man's adventure, girlie, nudist, physique, pervert, some cheap paperbacks and hardbacks, and miscellaneous photographs.<sup>76</sup> A procedure suggested to speakers is to make representative purchases nearby in order to emphasize how close to home the problem is.<sup>77</sup> The speaker may tell the audience not to take his word for it but rather to look at the exhibits and judge for himself by answering the question: "Does it contravene your level of morality?"<sup>78</sup> Whether this invitation is extended or not, a major criticism of these speeches would seem to be that they do not really allow the audience to draw their own conclusions about the publications presented because the invitation is accompanied, both expressly and by innuendo, with a warning that their children, "once initiated into a knowledge of the unnatural, with the insatiable curiosity which is characteristic of youth, will continue to delve deeper and deeper into this illicit course of instruction in perversion, until their utter depravity is complete."<sup>79</sup> The hypothesis of a causal relation between obscene publications and sex crimes is presented as a fact, and is supported by an array of quotations from such organizations and people as the United States Senate Subcommittee on Juvenile Delinquency, Military Chaplains Association of the United States, National Association of Juvenile Judges, various psychiatrists,<sup>80</sup> and J. Edgar Hoover, who is frequently quoted as having said that "Sex-mad magazines are creating criminals faster than jails can be built to house them."<sup>81</sup> The causal argument moves on to less tenable ground by inferring causal relationships

74. *Id.* at A-4; Keating, *op. cit. supra* note 45; *Perversion for Profit, op. cit. supra* note 72.

75. *Ibid.*

76. A Typical Speech, *op. cit. supra* note 73, at A-2; *Perversion for Profit, op. cit. supra* note 72. A Typical Speech lists the following examples: (1) slick sheet—*Dude, Nugget, Hi-Life, Adam*; (2) man's adventure—*Male, Real Life, Man's Action*; (3) girlie—*Man, Nudist, Post*; (4) pervert—*Fabian, Saber, Exotique, Brummell, Fads & Fantasies*.

77. A Typical Speech, *op. cit. supra* note 73, at A-2.

78. *Id.* at A-4.

79. *Id.* at A-1; see Keating, *op. cit. supra* note 45.

80. Keating, Typical CDL Talk, on file with Decent Literature Commission of City of St. Louis; *Perversion for Profit, op. cit. supra* note 72; Decent Literature Commission of the City of St. Louis, *Who's the Target of Obscenity in Print* (1963); National Citizens for Decent Literature, Typical Questions, on file with Decent Literature Commission of the City of St. Louis.

81. Keating, Typical CDL Talk, on file with Decent Literature Commission of City of St. Louis; *Perversion for Profit, op. cit. supra* note 72; A Typical Speech, *op. cit. supra* note 73, at A-1.

between obscene publications and venereal disease, illegitimate children, homosexuality, and an increasing crime rate.<sup>82</sup> Obscenity, it is said, leads to moral decay, "and so we see a moral decay occurring in our society—the same type of rot and decay which caused sixteen of the nineteen major civilizations to pass as powers from the pages of history."<sup>83</sup> A typical presentation might also indicate that this moral decay, in turn, weakens our defenses against communism and might then conclude with the prayer, "O God deliver us Americans from evil."<sup>84</sup>

Throughout the presentation the audience is reminded that "the law is our weapon."<sup>85</sup> In order to utilize the law to its fullest extent, the audience is urged to do the following list of things: check your own home, promote good reading, check neighborhood outlets, call objectionable publications to the attention of the owner, report possible violations to the police, write letters to officials commending their efforts to enforce the law and urging further arrests and prosecutions, form or join other committees to educate the public to get enforcement of the laws.<sup>86</sup>

#### IV. LAW ENFORCEMENT—NOT CENSORSHIP: BANTAM BOOKS, INC. V. SULLIVAN

As already indicated, "unlawful censorship" and "public pronouncements" referring to any person or specific publications are expressly prohibited by ordinance in both St. Louis and St. Louis County.<sup>87</sup> The stated public policy of the local chapter of Citizens for Decent Literature is "Law Enforcement—*Not* Censorship,"<sup>88</sup> and law enforcement is also the stated goal of the city and county commissions.<sup>89</sup> The leaders of these organizations are sensitive to the charge of "censorship"; thus far they appear to have been careful to balance their obvious enthusiasm for the elimination of obscene publications with constitutional considerations of freedom of expression.<sup>90</sup> However, the activities of these organizations are still susceptible to unintentional, but nevertheless unconstitutional, restraints on freedom of expression

82. Keating, Typical CDL Talk, on file with Decent Literature Commission of City of St. Louis; *Perversion for Profit*, *op. cit. supra* note 72.

83. *Ibid.* See A Typical Speech, *op. cit. supra* note 73, at A-5.

84. *Perversion for Profit*, *op. cit. supra* note 72.

85. *Ibid.* Keating, Typical CDL Talk, on file with Decent Literature Commission of City of St. Louis.

86. *Ibid.* A Typical Speech, *op. cit. supra* note 73, at A-4,5,6; Typical Questions, *op. cit. supra* note 80.

87. City: see note 54 *supra* and accompanying text; County: ST. LOUIS COUNTY, MO., REV. ORDINANCES ch. 706 (1958).

88. Badaracco Letter.

89. See notes 45, 67 *supra* and accompanying text.

90. Dreher Interview; Schuler Interview; Webster Interview.

because of the delicate nature of the balance which must be maintained,<sup>91</sup> and because of the lack of a constitutional *modus operandi*. This problem is illustrated, and some guidelines are given, by the recent case of *Bantam Books, Inc. v. Sullivan*,<sup>92</sup> wherein the Supreme Court stated:

Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, . . . [citing *Smith v. California* and *Marcus v. Search Warrant of Property*] is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.<sup>93</sup>

That case challenged the activities of the "Rhode Island Commission to Encourage Morality in Youth," which was created by statute "to educate the public concerning any book . . . or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth . . . [and] to investigate and recommend the prosecution of all violations."<sup>94</sup> The Rhode Island Commission's practice was to notify distributors, in Commission stationery, that a majority of the Commission objected to the sale, distribution, or display of certain named books and magazines to those under the age of eighteen. The notice requested cooperation, but it also advised that lists of the objectionable publications were given to local police, and that it was the Commission's duty to recommend prosecution. A local policeman would usually visit the distributor shortly after he had received such a notice to check on his compliance. One wholesale distributor received thirty-five such notices. He reacted by returning unsold copies, cancelling pending orders, and refusing new orders, for the publications named by the Commission.<sup>95</sup> He stated that he cooperated in order to avoid being involved in a court proceeding. Four out-of-state publishers brought suit in Rhode Island for injunctive relief and declaratory judgment that the law creating the Commission and its practices were both unconstitutional

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91. Dreher Interview.

92. 372 U.S. 58 (1963).

93. *Id.* at 66.

94. *Id.* at 59, 60.

95. In this case, 106 different publications were held to be objectionable by the Rhode Island Commission. Most of these were magazines, such as *Rogue*, *Frolic*, and *Playboy*. However, some were paperback novels, including *PEYTON PLACE* and *THE BRAMBLE BUSH*.

under the first and fourteenth amendments. The Commission argued that it lacked power to apply formal legal sanctions, and hence its activities did not regulate or suppress, but simply exhorted distributors and advised them of their legal rights. The Supreme Court was not persuaded. The Court said that "informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."<sup>96</sup> The Court recognized that no publications were seized or banned, that no one was prosecuted, and that the Commission was limited to informal sanctions, but it stated that the record showed the Commission had succeeded in suppressing publications deemed objectionable by a simple majority of its members by threats of legal sanctions, and other means of coercion, persuasion, and intimidation. Even though the distributor could have refused to "cooperate" without violating any law, the Court held that his compliance was not voluntary because the notices were phrased like orders, included threats to prosecute, and were followed by police visits. "These acts and practices directly and designedly stopped the circulation of publications in many parts of Rhode Island."<sup>97</sup> In holding the activities of the Commission to be unconstitutional, the Court emphasized that a prior restraint carries a heavy presumption of unconstitutionality, and said it will be tolerated "only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."<sup>98</sup> Here there was neither judicial superintendence of the notices nor judicial review of the Commission's determination that a publication was objectionable. The Court concluded that, "Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against suppression of non-obscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."<sup>99</sup>

Whether an obscenity commission can ever constitutionally make direct contact with a dealer, distributor, or publisher is left unanswered. But the Court does say that private consultations between distributors and law enforcement officers is a valid enforcement technique if the purpose of such a consultation is to aid the distributor to comply with the law and thus avoid prosecution.

In the St. Louis area no formal attempt is currently being made by the ob-

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96. 372 U.S. at 67.

97. *Id.* at 68.

98. *Id.* at 70; See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

99. 372 U.S. at 70.

scenity commissions to contact publishers, distributors, or retailers directly.<sup>100</sup> Early in the existence of the St. Louis Board, a meeting was held with a representative of Pierce News Co., a main local distributor of publications, but no results were forthcoming and this approach has never been repeated.<sup>101</sup> In 1956, the St. Louis Board made contact with retailers in a fashion somewhat similar to that of the Rhode Island Commission. Envelopes addressed in bold type as "An Important Message for All Magazine Distributors and Retailers from St. Louis Board of Review for Juvenile Readers" were passed out by police officers to those dealing in questionable publications.<sup>102</sup> These envelopes appear to have contained a copy of the 1955 City Ordinance,<sup>103</sup> a small pamphlet entitled "Publications Disapproved For Youth by the National Office for Decent Literature—June 1956,"<sup>104</sup> and a letter from the

100. According to interviews with Mr. Schuler of the St. Louis obscenity commission and Mr. Badaracco of the local CIDL, neither organization has any plans for such contacts. However, William Webster, Chairman of the newly formed County Obscenity Commission, indicated that he thinks contacting retailers, in an effort to urge them to exercise discretion and accept responsibility, is important. He stated that he anticipated doing so but that the means had not as yet been formulated. Robert Basler, Chairman of the Citizens Council for Decency, indicated that the procedure used by that organization is for an individual living in the area, upon his own initiative, to lodge a complaint at a store selling offensive matter and ask cooperation in removing such matter. He stated that the store cooperates 9 out of 10 times but that if there is a refusal then a complaint is sometimes filed with the police.

101. Schuler Interview.

102. Obscenity File, St. Louis Police Department, Liquor and Morality Section; Kranz Interview; Schuler Interview.

103. See note 23 *supra* and accompanying text.

104. The National Office for Decent Literature is a Chicago organization. The September 1963 *NODL Newsletter*, which contains a list of "Publications Disapproved For Youth," is on file with the Decent Literature Commission of the City of St. Louis. The printed pamphlet is supplemented each month by a typed list of additional publications. On the back cover of the September *Newsletter* is printed "The NODL Code," as follows:

The NODL fulfills its function, in part, by offering to responsible individuals and organizations an evaluation of current comic books, magazines and pocket-size books based on clearly defined, objective standards. NODL indicates, however, that the *List of Publications Disapproved for Youth* is merely an expression of a publication's nonconformity with the NODL Code, and states categorically that it is not to be used for purposes of legal action, boycott or coercion. Publications listed as objectionable are those which:

- (1) Glorify crime or the criminal.
- (2) Describe in detail ways to commit criminal acts.
- (3) Hold lawful authority in disrespect.
- (4) Exploit horror, cruelty or violence.
- (5) Portray sex facts offensively.
- (6) Feature indecent, lewd or suggestive photographs or illustrations.
- (7) Carry advertising which is offensive in content or advertise products which may lead to physical or moral harm.
- (8) Use blasphemous, profane or obscene speech indiscriminately and repeatedly.
- (9) Hold up to ridicule any national, religious or racial group.

Besides listing objectionable books and magazines, this pamphlet also lists "Acceptable Comics" and "Recommended Recent Pocket-size Books." Some examples of *Publications*



St. Louis Board of Review, dated September 1, 1956. The letter, asking for the dealers' cooperation, indicated that an adverse effect upon minors was caused by obscene literature and, that the Board's obligation was "to see that the ordinance is carried out."<sup>105</sup> This procedure has not been repeated since 1956.<sup>106</sup> Thus stimulating public interest and support, and urging and initiating complaints, are the main activities of St. Louis area obscenity commissions at present. All subsequent action is left to the police department and city and county prosecuting authorities.

## V. PRE-TRIAL PROCEDURE:

### REQUIREMENTS AND RECENT CASES

The road to conviction for violating an obscenity statute or ordinance is made somewhat difficult by the Supreme Court's "insistence that regulations of obscenity scrupulously embody the most vigorous procedural safeguards . . . and that the freedoms of expression must be ringed about with adequate bulwarks."<sup>107</sup> Four Supreme Court cases embody the "procedural safeguards" and "adequate bulwarks" deemed necessary at present to sustain such a conviction. *Roth v. United States*<sup>108</sup> is the foundation case announcing the present definition and test of obscenity. *Manual Enterprises, Inc. v. Day*<sup>109</sup> extends the *Roth* test to include "patent offensiveness . . . an element which, no less than 'prurient interest,' is essential to a valid determination of obscenity. . . ."<sup>110</sup> But the issue of obscenity, requiring the application of tests and standards promulgated by these two cases, will not be reached if the procedural requirements of *Smith v. California*<sup>111</sup> and *Marcus v. Search Warrant*<sup>112</sup> are not followed.

*Smith v. California* makes scienter an essential element of an obscenity ordinance. The Court reasoned that convictions obtained without proof of

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*Disapproved for Youth* listed in the September *NODL Newsletter* are: Books—ANOTHER COUNTRY, AMBOY DUKES, BLACKBOARD JUNGLE, BUTTERFIELD 8, CHAPMAN REPORT, FOREVER AMBER, LADY CHATTERLY'S LOVER, LOLITA, PEYTON PLACE, TEN NORTH FREDERICK, TROPIC OF CANCER, TROPIC OF CAPRICORN; Magazines—*Cavalier*, *Dude*, *Man's Action*, *Man's Adventure*, *My Confession*, *My Romance*, *Playboy*, *Police Detective*, *Real Action*, *Rogues*, *Sir*, *Stag*, *Thrilling Confessions*.

105. Obscenity File, *op. cit. supra* note 102.

106. Schuler Interview.

107. See note 93 *supra* and accompanying text.

108. 354 U.S. 476 (1957).

109. 370 U.S. 478 (1962).

110. *Id.* at 482. In *Manual* the Supreme Court held three magazines, *Trim*, *MANual*, and *Grecian Guild Pictorial*, to be not obscene although they were admittedly designed to appeal to homosexuals. For a more detailed discussion and comparison of the *Roth* and *Manual* cases, see Note, 1962 WASH. U.L.Q. 486-91.

111. 361 U.S. 147 (1959).

112. 367 U.S. 717 (1961).

scienter would tend to create prior restraints on freedom of expression, because publishers, wholesalers, and dealers would tend to deal only in publications whose contents were familiar to them, thus greatly curtailing the reading matter available to the general public.<sup>113</sup> The Court, however, expressly refused to articulate the strength of its scienter requirement.<sup>114</sup> This uncertainty has thus far not greatly hindered the local prosecution of obscenity violations.<sup>115</sup> The prosecution has taken this uncertainty to mean that the required scienter can be shown by evidence indicating that the defendant knew the general nature of the contents of the publication, rather than that he knew the particular publication in question was in fact obscene.<sup>116</sup>

The burden of obtaining evidence of scienter has been upon the arresting officers because it is deemed unlikely that the defendant will testify to his guilty knowledge. The police in both St. Louis and St. Louis County are aware that they must attempt to secure evidence of scienter when making an arrest for violation of an obscenity law.<sup>117</sup> The procedure has been for a plain clothes officer to engage the clerk in conversation about his merchandise, or about some particular publications being purchased by the officer.<sup>118</sup> Incriminating statements elicited from the clerk are recounted by the ar-

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113. 361 U.S. 147, 153-54 (1959).

114. *Id.* at 154:

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 did not, and what such circumstances might be.

There is a possibility that the Supreme Court may clarify this situation soon. On the 1963-64 Supreme Court Docket (No. 11) is an appeal from the case of *Jacobellis v. Ohio*, 173 Ohio St. 22, 179 N.E.2d 777 (1962), concerning the obscenity of a movie, *Les Amants*. One of the questions presented is whether the Ohio obscenity statute violates the first and fourteenth amendments by providing for the punishment of an individual who may not have known the material exhibited was obscene, and who may have had cogent reasons for believing it was not obscene. 32 U.S.L. WEEK 3008.

115. Freeman Interview. *Contra*, Birmes Interview.

116. Freeman Interview.

117. Kranz Interview; Birmes Interview; Duke Interview.

118. Kranz Interview; see *e.g.*, *State v. Vollmar*, Complaint No. 70673, St. Louis Court of Criminal Correction (Sept. 20, 1963) (Defendant thumbed through a nudist magazine being sold to an officer and commented on the presence of "real nude women" therein); *State v. Roots*, St. Louis County Police Report No. 63-28315, St. Louis County Prosecuting Attorney's File No. 6295, 6th Dist. Magis. St. Louis County (Arrest—July 22, 1963) (Question: "Are there good-looking girls in it?" Answer: "Yes, I've looked in it."); *St. Louis County v. Uhlendorf*, 4th Dist. Magis. St. Louis County (*Sir*: jury verdict not guilty, Oct. 29, 1963; *Mister*: jury verdict not guilty, Dec. 10, 1963; *Playboy*: jury verdict not guilty, Jan. 28, 1964) (Defendant stated that he knew the magazines were "trash" but that that was what the public wanted).

resting officer testifying in subsequent trials.<sup>119</sup> Even if no statements are elicited, practically anything that distinguishes these publications from other publications offered for sale is thought to be sufficient constructive evidence to prove general awareness of their content.<sup>120</sup> Some of these distinguishing features are: (1) partially concealed placement in the store, such as a small out of the way area located behind other book cases and shelves, (2) a policy of not selling to minors,<sup>121</sup> (3) increasing the prices, (4) plastic covers that can not be opened in the store, (5) pictures and statements on visible cover. Thus the *Smith* case has had widespread local impact upon legislation, police procedure, and prosecution decisions.

However, the apparent lack of local awareness of the procedural requirements of *Marcus v. Search Warrant*<sup>122</sup> raises some questions about the constitutionality of procedures recently utilized in obscenity enforcement, particularly in St. Louis County. In *Marcus* a search warrant was issued, purportedly under the Missouri civil obscenity law,<sup>123</sup> authorizing the police to seize all "obscene" publications at several newsstands in Kansas City where sample purchases of "girlie" magazines had previously been made. Eleven thousand publications, representing some 280 different issues, were seized by the police. Final adjudication of the issue of obscenity was not concluded until two months after the seizure, and resulted in the return of 180 of the issues.<sup>124</sup> The United States Supreme Court, in holding this procedure to be violative of the fourteenth amendment, seemed to base its decision on two procedural requirements, namely: prior to seizure, a determination by someone other than a police officer that the material is obscene and a *prompt*, judicial determination of obscenity after the seizure. In *Marcus* the police had seized publications that were obscene by either of two standards: their own judgment of what was obscene, and inclusion on a list given them by a police lieutenant. The Supreme Court stated:

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119. *Ibid.*

120. Freeman Interview; Schuler Interview.

121. The *Uhlendorf* cases, cited in note 118 *supra*, illustrate an interesting paradox with reference to a defendant's policy of not selling certain publications to minors. Such a policy may aid the prosecution in constructing the necessary scienter requirement. Notwithstanding that, the defense in the *Uhlendorf* cases was as eager as the prosecution to impress the jury with this policy. One possible effect of such evidence is to put the defendant in a more favorable light in the eyes of the jury. Therefore, so long as the prosecution can prove scienter without it, evidence of a "no sale to minors policy" may well be more beneficial to the defense than to the prosecution.

122. 367 U.S. 717 (1961).

123. Mo. REV. STAT. § 542.380 (1959). See Note, 1962 WASH. U.L.Q. 498-505 for a full discussion of the "Search and Seizure as Prior Restraint" problem in relation to *Marcus* and the Missouri civil obscenity law.

124. 367 U.S. 717, 722-24 (1961).

As to publications seized because they appeared on the Lieutenant's list, we know nothing of the basis for the original judgment that they were obscene. . . . They [the police] were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity. . . . In consequence there were suppressed and withheld from the market for over two months 180 publications not found obscene. . . . [D]iscretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative.<sup>125</sup>

City police apparently are not cognizant of the *Marcus* case as such,<sup>126</sup> since at least 1960 (before *Marcus*) their procedure prior to arrest has included a determination as to the obscenity of sample purchases.<sup>127</sup> This prior determination is made by either the City Counselor's office or the Prosecuting Attorney's office.<sup>128</sup> Thus a complaint in the City initiates<sup>129</sup> an investigation which results in the purchase of sample publications for a prior determination of their obscenity. If any of these purchases is determined to be obscene, officers return to the store and casually engage the clerk in conversation in an attempt to elicit scienter.<sup>130</sup> Subsequently an arrest is made and a search incidental to the arrest is instituted.<sup>131</sup> The arresting

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125. *Id.* at 732-33.

126. Kranz Interview.

127. *Ibid.* Freeman Interview.

128. See, e.g., *State v. Vollmar*, Complaint No. 70673, St. Louis Court of Criminal Correction (Sept. 20, 1963). These prior determinations are usually made by or under the supervision of the Associate City Counselor, Eugene Freeman, or the Assistant Prosecuting Attorney, Vincent Vettori. Subsequent to distribution in the St. Louis area, Henry Miller's *TROPIC OF CANCER* underwent a prior determination as to obscenity by the City Counselor's Office at the request of Detective Charles Kranz, of the Liquor and Morality Section, who thought the book was obscene. After a three week perusal, that office found the book was not obscene in light of the current Supreme Court test. Thus no further action has been taken in regard to that book. Detective Kranz indicated to this writer that obscenity prosecutions in the City of St. Louis based upon picture type publications are being pursued only if "pubic hair and genitals" are displayed. Thus *girlie* magazines, such as the ones involved in the *Uhlendorf* cases in the County, are not being prosecuted in the City. This contention is borne out by the two most recent City cases in which only nudist magazines showing pubic hair and genitals were involved. *State v. Vollmar*, *supra*; *City of St. Louis v. Pheiffer*, Nos. 2387-89, Munic. Ct. of St. Louis Div. 1, May 21, 1963.

129. See notes 41-44 *supra* and accompanying text.

130. *State v. Vollmar*, Complaint No. 70673, St. Louis Court of Criminal Correction (Sept. 20, 1963).

131. *Ibid.* *Chicago Police Training Bulletin*, Vol. III, No. 47 (Nov. 19, 1962) indicates that Chicago's procedure is similar to that of St. Louis with one exception. Chicago procedure requires that "no arrest will be made without a summons or a warrant" whereas St. Louis' procedure has been to get the warrant after the arrest. Referring to the whole Chicago procedure, the *Bulletin* states: "The above procedure is necessary,

officers seize not only the matter deemed obscene in the prior determination but also any matter contained on a list of obscene publications put out by the Prosecuting Attorney and City Counselor.<sup>132</sup> And if any matter, not previously determined obscene and not contained on the list, is, in the judgment of the arresting officers, in the same category with the objectionable publications, it too will be seized.<sup>133</sup> Thus the City police procedure probably is consistent with that required by *Marcus* because the police officers are provided with a "guide to the exercise of informed discretion."<sup>134</sup>

In comparison with City procedure, County procedure is considerably less organized, coordinated and informed. In the County, police warnings of possible arrest and prosecution, and subsequent police checks, occasionally follow a complaint.<sup>135</sup> But, although there may be a theoretical liaison between county police and the County Counselor's and Prosecuting Attorney's offices for purposes of a prior determination of obscenity, two recent cases do not indicate County compliance with this requirement of *Marcus*. In

because each allegedly obscene magazine or each edition of an allegedly obscene paperback book must be judged solely by its content and not by its title or publisher."

132. Kranz Interview; see, e.g., *State v. Vollmar*, Complaint No. 70673, St. Louis Court of Criminal Correction (Sept. 20, 1963). Letterhead titled Metropolitan Police Department—City of St. Louis, Subject—Obscene Magazines, May 20, 1963:

The following is a list of obscene magazines obtained from the Prosecuting Attorney and the City Counselor. *Sundial*, *Naturist*, *Natural Nudist*, *Leisure*, *Nudist*, *Solus*, *Sundeck*, *Sun-Health*, *Sunnersport*, *Hellos*, *Helios*, *Tidlosa*, *Solis*, *Jymmos*, *Naturist-Life*, *Sun-Fun*, *Suntrails*, *Eden*, *Sunshine & Health*, *Glen-Eden*, *W-N-Nudist*, *Paradise*, *Sun Era*, *Sunscope*, *Nightcap*, *Naughty Nylons*, *Manhood*.

In *State v. Vollmar*, *supra*, there was prior determination of obscenity by Mr. Freeman as to *Conqueress Club Magazine* No. 5, *Western Nudist*, and individual photos. The above list was given to the police officers and Mr. Vettori advised them to "confiscate any and all books that are obscene." In addition to seizing all 27 of the magazines listed above, the officers also seized *Nudist Digest*, *Sunbather*, *Today's Nudist*, *Nudism*, *Nude*, *International Nudestour Guide*, *Human Bondage*, *Sex Perversion and Law*, human bondage photos, and some movies.

133. *Ibid.*

134. See note 125 *supra* and accompanying text.

135. Duke Interview. Lt. Duke is the County Police Department's "expert on smut" according to Capt. Birnes. According to Lt. Duke, the County is relatively clean of material coming under the purview of the new County obscenity ordinance; however, he feels that there is more objectionable material available now than ever before and thus he does not think the new County ordinance goes far enough. He is of the opinion that the presence of the President of the St. Louis Civil Liberties Committee on the County Obscenity Commission can only hinder its function, which he feels should be to cause the prosecution of *any* book which the Commission *alone* finds to be obscene. He is convinced that there is a direct causal effect between obscene matter and sex crimes and depravity. Referring to every kind of so called *borderline* publication beginning with men's adventure type magazines, he said: "So far as I'm concerned all of this stuff just leads to depravity. Any person who will handle the objectionable stuff will handle *hard-core*."

*State v. Roots*,<sup>136</sup> County police, acting upon the complaint of and in conjunction with Wellston police, seized 1306 books and magazines<sup>137</sup> from the Paper Back Book Store in Wellston; there had been no prior determination of the obscenity of any of these publications except the immediate judgment of the arresting officers. A motion to suppress evidence was granted<sup>138</sup> by Judge Enright, 6th District Magistrate, as to all the publications except one magazine, *The Body Shop*, which had been purchased by an officer prior to the arrest. Apparently this motion was granted on the basis of the holding of *Marcus* and a Louisiana federal court case.<sup>139</sup> In the other County case,<sup>140</sup> magazines were seized in a search of a confectionary incidental to an arrest for selling beer on Sunday.<sup>141</sup> The circumstances of this seizure may have prevented prior determination of obscenity, although it is uncertain whether this would matter under *Marcus*. If a motion to suppress evidence was made in this case, it was not allowed, at least, not as to four issues of magazines.<sup>142</sup>

Both City and County procedure seem to violate the second requirement of *Marcus*. This is because, as previously indicated, *Marcus* seems to require a prompt trial of the ultimate issue of obscenity within probably much less time than the two months taken by the trial court in that case.<sup>143</sup> Yet the time periods of all the recent local obscenity cases range from three to six months from the time the publications are seized until final judicial determination of the issue of obscenity.<sup>144</sup> During these periods, not only the partic-

136. St. Louis County Police Report No. 63-28315, St. Louis County Prosecuting Attorney's File No. 6295, 6th Dist. Magis. St. Louis County (Arrest—July 22, 1963).

137. The 1306 publications consisted of 424 different books and 30 different magazines, such as *French*, *Cocktail*, *Ultra*, *Adam*, *Vixen*, *Pix*, *Scarlet*, and *Playboy*. This mass seizure in effect closed the store.

138. Interview with Brick Storts, Assistant Prosecuting Attorney, St. Louis County, Dec. 1963; Interview with Lawrence Lee, Defense Attorney, Dec. 1963.

139. *Ibid.* In re Louisiana News Co., 187 F. Supp. 241 (E.D. La. 1960). The criterion used by the Louisiana police in making an independent determination of obscenity was the showing of "bare breasts" and "buttocks." The federal court ruled that this is an invalid procedure violative of the fourteenth amendment.

140. *St. Louis County v. Uhlendorf*, 4th Dist. Magis. St. Louis County (*Sir*: jury verdict not guilty, Oct. 29, 1963; *Mister*: jury verdict not guilty, Dec. 10, 1963; *Playboy*: jury verdict not guilty, Jan. 28, 1964).

141. Birnes Interview; Interview with Ernest Keathley, Assistant County Counselor, Jan. 1964.

142. The four magazines are: *Sir* (Sept. 1963); *Mister* (Sept. 1963); *Playboy* (June 1963—The Jayne Mansfield issue which has been the subject of litigation in other parts of the country); *Rogue* (Aug. 1963). All except *Rogue* have been the subject of acquittals as indicated in note 140 *supra*. The prosecution of *Rogue* is still pending and may be dropped due to the results of the other three cases.

143. See notes 124, 125 *supra* and accompanying text.

144. *State v. Vollmar*, Complaint No. 70673, St. Louis Court of Criminal Correction (seizure, March 21, 1963; fined \$1000 and costs, Sept. 30, 1963); *State v. Roots*, St.

ular publications seized are kept from the general public, but fear of further arrests and seizures effectively keeps identical issues, and perhaps similar publications, from being made available to the general public. Some or even all of the publications seized may ultimately be judicially declared obscene. But in the interim the determination by some person that the seized material is objectionable is a prior restraint on freedom of expression which *Marcus* holds to be unconstitutional if the interim period is excessive.

## VI. OBSTACLES TO THE SUCCESSFUL PROSECUTION OF OBSCENITY CASES

Notwithstanding the stringent pre-trial procedural requirements discussed above, the single most difficult obstacle to a conviction for violating an obscenity law is the application of the *Roth* test.<sup>145</sup> The major criticism<sup>146</sup> of this test centers upon the phrase "community standards." Questions presented in this regard are:<sup>147</sup> What are the geographical limits of the community in a particular case? What is a community standard? Is it the standard of a community now? Or is it what the standard ought to be? Two recent local cases, one in the City and one in County, illustrate the divergent

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Louis County Police Report No. 63-28315, St. Louis County Prosecuting Attorney's File No. 6295, 6th Dist. Magis. St. Louis County (seizure of 1306 publications, July 22, 1963; motion to suppress evidence granted as to all publications except one, Nov. 25, 1963); City of St. Louis v. Pheiffer, Nos. 2387-89, Munic. Ct. Div. 1 (seizure, Dec. 22, 1962; acquittal, May 21, 1963); St. Louis County v. Uhlendorf, 4th Dist. Magis. St. Louis County (seizure, July 21, 1963; see notes 140, 142 *supra* for disposition of the magazines involved herein).

145. *Roth v. United States*, 354 U.S. 476 (1957):

Definition of obscenity—"However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest." *Id.* at 487. Definition of prurient interest—" . . . material having a tendency to excite lustful thoughts . . . of persons, having itching, morbid, or lascivious longings . . . lascivious desire or thought . . . a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . ." *Id.* at 487 n.20. Test of obscenity—" . . . whether to the average person, applying contemporary community standards, the *dominant* theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.

146. Freeman Interview; Dreher Interview.

147. Freeman Interview. Mr. Freeman does not pretend to know what the correct test for obscenity should be, but he contends that the present *Roth* test is philosophically wrong, factually impossible, and not followed by the Supreme Court itself when it fails to recognize standards applied in the trial court. He believes that in order for the Supreme Court to approximate a correct test of obscenity it must look for the answer in unwritten, basic, inalienable rights in much the same manner as, he contends, the Court has done in civil rights cases. According to Mr. Freeman, the human dignity of man is assaulted by obscenity, and it should not as a matter of natural law be subject to such an affront.

results possible through difficulties in the application of the *Roth* test, particularly the correct meaning of "community standards."

The *Bunny Ware* case<sup>148</sup> raised the issue of whether a strip-tease performance in a St. Louis night club was obscene. After viewing movies and photographs of the performance, three witnesses for the City testified that it was below the moral standards of the City, whereas two witnesses for the defense found nothing objectionable. The defense submitted evidence that a movie, *Expresso Bango*, playing only a short distance away from the night club in question, depicted considerable female nudity. A motion picture of a short portion of *Kismet*, being performed at the St. Louis Municipal Opera, was also put into evidence by the defense because it contained an oriental dance featuring nearly-naked dancers. Evidence concerning other burlesque houses in St. Louis was also presented. Considering all of this evidence, the St. Louis Court of Criminal Correction held that the City had not made a case.<sup>149</sup> The only point raised by the City's subsequent appeal was "that the court's judgment was erroneous in that it reached the conclusion that the defendants were not guilty by giving weight to immaterial and irrelevant evidence."<sup>150</sup> The St. Louis Court of Appeals said that apparently the lower court had placed complete reliance on the defense evidence and had not passed on the particular issue before it. Such evidence "was of questionable value as a measure of the quality of the performance here considered. Community tolerance of obscenity does not establish community standards of morality or make obscenity less obscene."<sup>151</sup> But the court's treatment of the community standard problem ended with that statement. It went on to say that definitions of obscenity confuse rather than enlighten, boldly rejected *Roth* and *Manual Enterprises* as being "of little aid in formulating a definition of indecent, lewd, or obscene,"<sup>152</sup> and summed up by saying, "We are of the opinion that the Missouri Supreme Court, in *State v. Becker* . . . stated the manner in which the subject should be reviewed when it said: ' . . . judges may know what falls within the classification of the decent, the chaste and the pure in either social life or in publications, and what must be deemed obscene and lewd and immoral and scandalous and lascivious.'"<sup>153</sup> On this basis, the court viewed the movies

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148. *City of St. Louis v. Mikes*, 372 S.W.2d 508 (Mo. 1963).

149. The case was first tried in a municipal court, resulting in an acquittal which was appealed by the City.

150. *City of St. Louis v. Mikes*, 372 S.W.2d 508, 511 (Mo. 1963).

151. *Ibid.*

152. *Id.* at 512.

153. *Ibid.* In *State v. Becker* 364 Mo. 1079, 272 S.W.2d 283 (1954), the Missouri Supreme Court upheld a conviction of possession with intent to sell or circulate obscene matter under Mo. REV. STAT. § 563.280 (1949). The publications deemed ob-



and photographs of the performance and held that the ordinance had been violated. The performance was characterized as "nothing more than modern burlesque. . . . [A]s devoid of art and beauty as a garbage pail, and was just 'dirt for dirt's sake.'" <sup>154</sup> Therefore whether the performance in question fell beneath the community standard of morality is left unanswered by the court but the performance was most assuredly held to fall beneath the Judges' level of morality.

In St. Louis County, the decision in the first *Uhlendorf*<sup>155</sup> case, concerning the obscenity of an issue of *Sir* magazine, presented the same problem of community tolerance versus community standard. The jury found the defendant not guilty, but the foreman made a statement concerning the reasons for the verdict which indicated the jury found the magazine to be "extremely undesirable," but they could not find it objectionable to the "community as a whole" because similar matter is displayed in the movies, on TV, etc.<sup>156</sup> The foreman further stated that the jury felt there should be laws prohibiting this type of publication (girlie) and that such legislation should be directed at the distributor.<sup>157</sup> Whereas the appellate judges in the *Bunny Ware* case differentiated between community tolerance and community standard,<sup>158</sup>

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scene were nudist magazines (648 copies of *Solaire Universelle De Nudissime*, Vol. 1, No. 5, and 195 copies of *Sunshine and Health*) ". . . containing pictures and photographs of men, women and children in the nude with private parts completely depicted including the pubic hair . . . various nude and suggestive positions." *Becker* is cited approvingly in *Roth*, note 26, *supra*, as among those cases which had used a test similar to the one formulated in *Roth*, see note 145 *supra*. But it is not at all clear that the court applied such a test in *Becker*. The Missouri Supreme Court states: "These questions have been considered and tested objectively as to the effect of these publications in their entirety upon persons of average human instincts." *Id.* at 286. This statement is clearly anticipatory of the *Roth* test in regard to the elements of "dominant theme" and "average person," but the court goes on to state in the same paragraph that ". . . we may not disregard the unambiguous enactment which has as its obvious purpose the protection of the morals of the susceptible into whose hands these publications may come." And again the court states: "No college professor or other expert was required to determine whether these publications are obscene and offensive to good morals, or might arouse lustful desires, or encourage commission of crime by the susceptible man or woman, boy or girl." *Id.* at 287. Thus it appears that the Missouri Supreme Court was unable to completely depart from the susceptible person test of *The Queen v. Hicklin*, 3 Q.B. 360 (1868), and applied its own standards of morality rather than the community standard.

154. *City of St. Louis v. Mikes*, 372 S.W.2d 508, 512 (Mo. 1963).

155. *St. Louis County v. Uhlendorf*, 4th Dist. Magis. St. Louis County (Oct. 29, 1963).

156. *Ibid.*

157. *Ibid.* The defense attorney, although retained by Pierce News Co., the distributor, emphasized in his closing argument to the jury that if anyone should be prosecuted it should be the distributor and not the "little man." Apparently this argument appealed to the jury and was manifested in their decision.

158. See note 151 *supra* and accompanying text.

the jury in the *Uhlendorf* case equated one with the other. Thus because the St. Louis Court of Appeals held community tolerance irrelevant to determining community standards, there was a finding of obscenity, whereas because the *Uhlendorf* jury held its level of morality to be above the community tolerance, they could only find the publication "extremely objectionable" to themselves but not obscene to the "community as a whole."

If the jury was wrong in the *Uhlendorf* case, it was probably because of other obstacles to the successful prosecution of obscenity cases. As the law stands today, the determination of the community standard is at best a subtle, delicate, and difficult problem for judge or jury. Because the need is to ascertain the standard of the *community*, a jury may be a more reliable gauge than a judge.<sup>159</sup> Whether this be true or not, a jury needs all the learned and impartial assistance it can get. Such assistance is rendered by informed rulings on the admissibility of evidence, and by the court's instructions on the law in the case. However, if the proceeding is initiated in a Magistrate Court in Missouri, the jury may be impressed and confused by a great deal of irrelevant and immaterial evidence.<sup>160</sup> This situation is perhaps more likely in Magistrate Courts than in higher courts because of the retention under Missouri law of some non-lawyer magistrates.<sup>161</sup> Missouri law also prohibits magistrates from giving any instructions on or declarations of law.<sup>162</sup> Thus the only instructions about the law of obscenity given to a Magistrate Court jury will be those presented by the adversaries in their closing arguments.

Defendants in local obscenity cases, though only store clerks or small proprietors, always are represented by defense attorneys retained by either the distributor or publisher whose publications are involved in the suit.<sup>163</sup>

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159. If the jury is a more reliable gauge of "community standard" and "average person," then the frequent granting of the defendant's request for a waiver of trial by jury in obscenity cases may be an unavoidable obstacle to their effective prosecution. Of the St. Louis area cases discussed, only the *Uhlendorf* cases and *State v. Vollmar* had juries. In the former cases, the County magistrate wanted a jury; in the latter case, the defense had previously lost an obscenity case before the same judge sitting without a jury.

160. In all three *Uhlendorf* cases, cited note 140 *supra*, over prosecution's objection, the defense was repeatedly allowed to emphasize to the jury that the magazines had mailing privileges and copyrights granted by the United States government, in effect, according to the defense, giving them "the government's stamp of approval." "Why pick on poor Mr. Uhlendorf, a little confectionary owner? What is a man supposed to think when things come into his store through the mail, passed on by the U.S. government? Who is he to say that the U.S. government is wrong?"

161. MO. REV. STAT. § 482.030 (1959).

162. MO. SUP. CT. R. 22.09.

163. Pierce News Co. the main distributor in the St. Louis Area of publications involved in past obscenity prosecutions, and *Playboy Magazine*, retain local counsel to defend against any prosecutions in which their publications are involved.

Such high caliber representation is, perhaps, an additional obstacle to successful prosecution—but a highly worthwhile obstacle in light of the importance of protecting the right of freedom of expression.

#### CONCLUSION

Substantial activities in the St. Louis area concerning the regulation of obscenity have been undertaken by the obscenity commissions and the police. Through its Speakers Bureau, the primary function of the St. Louis Decent Literature Commission has been to attempt to inform the public concerning the alleged dangers and prevalence of objectionable matter and to urge the public to make complaints to the police so that existing prohibitory laws will be enforced. The St. Louis County Commission, recently created under a copy of the City Ordinance, presumably will function in a similar manner.

Enforcement of obscenity laws by St. Louis Police is initiated only by a complaint; the police rarely, if ever, act on their own initiative. The complaint is followed by: (1) surveillance, (2) purchase, (3) prior determination of obscenity by someone other than the arresting officers, (4) arrest and seizure of matter previously determined obscene, similar matter, and other matter contained on a list. Thus far, County Police enforcement procedure has failed to include a prior determination of obscenity by someone other than the arresting officers. Presumably this deficiency in enforcement procedure is due to inexperience in obscenity enforcement and will be rectified. It is questionable whether in City and County cases the time intervals between seizure and final determination of obscenity is brief enough to be constitutional under *Marcus*. Even if pre-trial procedures are constitutional the obstacles to successful prosecution of obscenity cases are many. The biggest of these is the difficulty in application of the *Roth* "community standard" test by judge or jury.

Neither the prime concern of the obscenity commissions, nor the recent local obscenity cases discussed herein, involve "hard-core pornography" but rather "borderline" publications, such as "girlie" and nudist magazines.<sup>164</sup> The complete and obvious lack of "even the slightest redeeming social importance"<sup>165</sup> of "hard-core pornography" has caused it to be condemned by practically all of society; thus in comparison to "borderline" material, "hard-core" presents no great problem because public opinion already favors the enforcement of laws against such matter. Whereas "borderline" publications are displayed and sold openly from many local newsstands and book-

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164. Of course there is again a gray area in distinguishing between *hard-core* and *borderline publications*; but this distinction is readily apparent if so-called *8 page bibles* and *stag* movies are compared with *girlie* or even nudist type magazines.

165. *Roth v. United States*, 354 U.S. 476, 484 (1957).

stores, and difficulties in prosecution are invariably encountered, "hard-core" is neither widely nor openly available, and arrests for dealing in such matter invariably result in pleas of guilty.<sup>166</sup>

If the United States Supreme Court were to clarify the law by expressly stating that only "hard-core" publications were unprotected by the first and fourteenth amendment, as some people believe its decisions already seem to indicate,<sup>167</sup> this would greatly simplify the prosecution of obscenity cases by eliminating the prime problem area of "borderline" publications. Placing "borderline" material outside of the legal realm of obscene matter need not change its objectionable nature in the hands of minors. Therefore, the educational potential of the obscenity commissions to (1) inform parents of the nature and contents of these objectionable (not obscene) publications, (2) inform parents of the possible dangers of such publications in the hands of minors, (3) attempt to improve reading standards and, (4) urge the enactment and enforcement of workable laws prohibiting objectionable matter from being disseminated to minors,<sup>168</sup> would remain.

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166. *State v. Blagg*, No. B-2699, 4th Dist. Magis. St. Louis County (March 13, 1963); *State v. Szuck*, St. Louis County Prosecuting Attorney's File No. 5261, 5th Dist. Magis. St. Louis County (Feb. 21, 1963). In both cases the obscene matter was *stag* movies depicting oral sodomy, intercourse, etc., and the defendants pleaded guilty to a charge of possession of obscene matter with intent to circulate under Mo. REV. STAT. § 563.280. That law provides for a maximum penalty of \$1000 and one year in jail; the penalties assessed in these two instances of obviously *hard-core* pornography would scarcely seem to be deterrent. In *State v. Blagg*, the State recommended only a \$75 fine and the court fined the defendant \$50, staying \$25. In *State v. Szuck*, where the movie showing had been a profit-making venture, complete with advertising, the defendant was fined \$1000 but \$750 was stayed by the Court.

167. Storts, *op. cit. supra* note 138; Note, 1962 WASH. U.L.Q. 489-91.

168. A recent New York case holds that a statutory ban on the sale to minors, but not to the general public, of books principally devoted to descriptions of illicit sex or sexual immorality does not violate the fourteenth amendment even if the banned book is not legally obscene. *People v. Bookcase*, 32 U.S.L. WEEK 2260 (N.Y. City Crim. Ct. Nov. 26, 1963). N.Y. PENAL LAW § 484-h (1963 Supp.) makes it a misdemeanor for anyone to ". . . willfully or knowingly . . . [circulate or intend to circulate] . . . to any individual under the age of eighteen (18) years . . . [any publication which is] . . . principally made up of descriptions of illicit sex or sexual immorality or which is obscene. . . ." (Emphasis added.) The defendant in *People v. Bookcase* claimed that the law "exercises censorship to the reading public" in violation of the holding in *Butler v. Michigan*, 352 U.S. 380 (1957). The New York court, however, correctly pointed out that in *Butler* the Supreme Court held a Michigan statute invalid because the statute made it a criminal offense to provide the *general public* with books having a potentially deleterious influence upon *youth*, thus in effect reducing the reading level of everyone to that of juveniles. Although New York also has a general obscenity statute, N.Y. PENAL LAW § 1141, the statute in question, N.Y. PENAL LAW § 484-h, is directed specifically to the circulation to *minors* of certain *objectionable* categories of publications. Thus this statute in no way restricts or reduces the availability of such publications to adults and therefore circumvents the prohibition of *Butler*. The statute has been up-

Currently, however, according to both St. Louis and St. Louis County police, the prevalence of publications falling under the purview of existing prohibitory legislation is not great.<sup>169</sup> At least one police officer believes that in comparison to a city like Chicago the St. Louis area is relatively clean.<sup>170</sup> Even if this conclusion about the relative absence of obscene publications from the St. Louis area were accepted, this would scarcely placate the enthusiasm of local obscenity commissions for ridding the area of whatever is present. Many of the people behind the push to eliminate obscene literature from the St. Louis scene are often unfairly accused of being "busybodies and bookburners." In fact, they are generally well informed citizens, many of whom are lawyers cognizant of the dangers of censorship. For the most part, they are motivated by a desire to protect their children from what they

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held by the New York court by analogy with many laws, such as liquor laws, enacted to protect health and welfare. Therefore under the New York statutory scheme, the courts may determine that a publication is not obscene and may be legally circulated to adults, but at the same time, on a different ground, it can be a violation to circulate that same publication to a minor.

Why, in the St. Louis area, the 1955 City Ordinance (see note 23 *supra*) and the 1956 County Ordinance (see note 36 *supra*), which were directed specifically at circulation to minors, were completely repealed and replaced by the present general obscenity ordinances is not clear. *Smith* only required the additional element of scienter. Perhaps a misinterpretation of *Butler v. Michigan* was the cause.

Florissant, Mo., an incorporated area in St. Louis County, recently amended its general obscenity ordinance (see note 37 *supra*) by adding the following provision "prohibiting the giving or selling of obscene or pornographic matter to persons under age of eighteen." Florissant, Mo., Bill No. 1431 (passed March 9, 1964):

It shall be unlawful for any person to willfully or knowingly sell, lend, give away, show, advertise for sale or distribute commercially to any person, under the age of eighteen (18) years or have in his possession with intent to give, lend, show, sell, distribute commercially, or otherwise offer for sale or commercial distribution to any individual under the age of eighteen (18) years any pornographic motion picture; or any still picture or photograph, or any book, "pocket book," pamphlet or magazine the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which consist of pictures of nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain or any article or instrument of indecent or immoral use.

For the purpose of this section "knowingly" shall mean having knowledge of the character and content of the publication or failure to exercise reasonable inspection which would disclose the content and character of the same.

MO. REV. STAT. § 563.310 (1963 Supp.) prohibits any person from knowingly circulating in any way ". . . to any minor child, any book, pamphlet, magazine, newspaper, story paper or other printed paper devoted to the publication or principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime. . . ." (Emphasis added.) The Missouri Supreme Court, in *State v. Burton*, 349 S.W.2d 228 (1961), categorized the statute as relating to the "sale of obscene literature to minors." Apparently no prosecutions under this statute have been made.

169. Birnes Interview; Duke Interview; Kranz Interview.

170. Birnes Interview.

believe to be a definite causal relationship between obscene literature and overt action—depravity, perversion, and sex crimes. Those critical of their activities and motivations should at least make themselves aware of the type of publications available over the counter at several stores in the St. Louis area.<sup>171</sup> To criticize the goal of an informed public urging the enforcement of existing obscenity laws is to quarrel with the Supreme Court's present holding that obscenity is not constitutionally protected expression. But the means to attaining this presently constitutional goal must be forever subject to critical analysis in order to prevent censorship and unlawful prior restraints on the fundamental right of freedom of expression.

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171. Advertisements in a particular magazine may be as objectionable as the pictures and stories. Ray T. Dreher, a member of the County Obscenity Commission and Treasurer of the local CDL, pointed out that an investigation of the advertisements in a man's adventure type magazine disclosed that many extremely divergent ads had the same mailing address. Thus a response to an apparently legitimate advertisement for a remedy for acne and pimples, directed at a juvenile audience, might result in a series of increasingly objectionable entreaties to purchase nude photos, etc.

*Ultra*, Vol. 1, Issue 1, page 54, a *girlie* magazine, carried the following advertisement: "Man and Wife Team—If you have a camera, you can earn the kind of money you have always dreamed of." Advertisements, such as the following ones taken from *Pix*, No. 1, 1963, are prevalent in *girlie* magazines available in some bookstores in both St. Louis and St. Louis County: Photos—" . . . luscious girls posed in fascinating positions, specially selected for their appeal"; Marital Relations Products for Men—" . . . you wear it externally . . . produce a sensation and satisfaction never thought possible"; Stag Stories—"The Midget and the Duchess," "The Young Lady and Her Dog," "I was Captive to Six Women," "Day in Life of a Traveling Salesman," "She Stoops to Conquer"; Illustrated Booklets—" . . . 8 page cartoon illustrations. . . ."; Stag Movies.

*Pix* was among those magazines seized at a County bookstore and subsequently suppressed from evidence in *State v. Roots* (see notes 136, 137 *supra* and accompanying text). A copy of this magazine was recently purchased over the counter at a mid-city bookstore where there was a selection of dozens of similar magazines. The back cover of this particular issue of *Pix* folds out into a board with 28 stops around the circumference from start to finish. The picture of a nude reclines in the center of the game board. The game is entitled "MAKE OUT . . . a game for the indoor sport!" The official rules state that: "The object of MAKE OUT is to *make it* around this field with a preselected *piece* or date, with the idea of making her . . . excuse us . . . *making out* as many times as possible." Some of the stops around the game board are: 9—"YOU MADE OUT. Too bad it happened so fast that you couldn't enjoy it. Next time be more alert"; 12—"Date sprinkles her lobster with Spanish Fly which you have cleverly concealed in salt shaker. YOU MAKE OUT SIX TIMES, CONGRATULATIONS"; 13—"Date used too much of the aforementioned aphrodisiac and is wearing you out"; 18—"Your date loves you. Too bad your zipper is stuck"; 19—"You decided to fight that zipper. Now it has caught on something and you can't release it. The pain is so excruciating that you must retire from the game at once"; 26—You MADE OUT once too often without precaution. Congratulations daddy."