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# The Law Of Obscenity In Virginia

## THE LAW OF OBSCENITY IN VIRGINIA

The law of obscenity has been one of the most volatile branches of criminal law in the last few years. Various standards for judgment have been advanced from 1708 until the present, and many statutory enactments have been invalidated for reasons which might seem anomalous.[1] This state of flux has presented the various state legislatures with a great many problems in the formulation of policy and standards for the judging of obscenity, and in the institution of criminal sanctions against the dissemination of literature which may have been adjudged obscene.

With changing criteria being applied as constitutional tests, state statutes valid at one time have become invalid with the adoption of new tests by the Supreme Court. Consequently, extensive state legislative activity has been required to keep abreast of the latest constitutional pronouncement. At its 1960 session the Virginia General Assembly adopted a new obscenity statute,[2] replacing the older one[3] declared unconstitutional by the state Supreme Court of Appeals in 1958.[4]

The publication of obscene literature was indictable at common law,[5] although in *Regina v. Read,*[6] decided in 1708, the English court refused to act on an indictment because it was of the opinion that this was an area in which the ecclesiastical, rather than the temporal, courts should be preeminent. However, this view was repudiated in 1727 by *Rex v. Curl,*[7] wherein it was stated that if a libel "tends to disturb the civil order of society, . . . it is a temporal offence."[8] Consequently, the publication of obscene works became indictable under the heading of *obscene libel.*

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[1]See generally Kronhausen and Kronhausen, Pornography and the Law (1959); Model Penal Code § 207.10, comment (Tent. Draft No. 6, 1957); Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40 (1938); Lockhart and McClure, Literature, the Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295 (1954); Rittenhouse, Obscenity and Social Status, 1 William & Mary L. Rev. 303 (1958); Symposium-Obscenity and the Arts, 20 Law & Contemp. Prob. 531 (1955).

[2]Va. Code Ann. §§ 18.1-227-236.3 (Supp. 1960).

[3]Va. Code Ann. §§ 18-113-113.1 (Supp. 1958).

[4]Goldstein v. Commonwealth, 200 Va. 25, 104 S.E.2d 66 (1958).

[5]1 Bishop, Criminal Law 367 (9th ed. 1923); 8 Holdsworth, History of English Law 337 (1926); 33 Am. Jur. Lewdness, Indecency and Obscenity § 4 (1941); 67 C.J.S. Obscenity § 7(a) (1950).

[6]Fort. 98, 92 Eng. Rep. 777 (K.B. 1708).

[7]2 Strange 788, 93 Eng. Rep. 849 (K.B. 1727).

[8]Id. at 850.

The first American decision in this field was the 1821 Massachusetts case of *Commonwealth v. Holmes*,[9] in which the defendant was convicted of obscene libel for the publication of the book *Memoirs of a Woman of Pleasure*. However, very few common law cases are to be found, and since the latter part of the nineteenth century most prosecutions in the United States have been based on statutory enactments.

The greatest problem in the field of obscenity has been the formulation of an adequate definition or test. The first serious attempt to establish such a test was in the 1868 English case of *Regina v. Hicklin*,[10] when Chief Judge Cockburn stated that the question was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[11] This famous statement, known as the *Hicklin Rule*, was adopted in this country in a modified form in *United States v. Bennett*,[12] which, in addition to restating the English rule, added the concept that if any *part* of a book were obscene, the entire book would be adjudged obscene.[13] Thus the first rule in the development of modern law on this subject is known as the *Hicklin Rule* or the *Partly Obscene Test*.

The second period in the formulation of a definite policy began in 1934 with the decision of the most important case in the American law of obscenity. *United States v. One Book Entitled Ulysses*[14] raised the question as to whether James Joyce's *Ulysses* should be prohibited from entering the United States under the obscene book clause of the Tariff Act of 1930.[15] Judge Woolsey, in the District Court for the Southern District of New York, decided that the book, taken as a whole, "did not tend to excite sexual impulses or lustful thoughts, but that its net effect . . . was only that of a somewhat tragic and very powerful commentary on the inner lives of men and women."[16] In affirming, the United States Court of Appeals for the Second Circuit strengthened Judge Woolsey's opinion by refusing to follow the *Hicklin Rule*, and by declaring that the proper test is "whether a publi-

[9]17 Mass. 336 (1821).
[10][1868] 3 Q.B. 360.
[11]Id. at 371.
[12]24 Fed. Cas. 1093 (No. 14571) (C.C.S.D.N.Y. 1879).
[13]Id. at 1102.
[14]72 F.2d 705 (2d Cir. 1934).
[15]Tariff Act of 1930, § 305(a), 46 Stat. 688, 19 U.S.C. § 1305(a) (1958).
[16]5 F. Supp. 182, 185 (S.D.N.Y. 1933).

cation taken as a whole has a libidinous effect."[17] The court elaborated as follows:

> "[W]e believe that the proper test of whether a given book is obscene is its *dominant effect.* In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence."[18]

This case established a new standard of obscenity—the *Obscene-in-its-Dominent-Effect Rule* or the *Wholly Obscene Test.*

Since the decision in *Ulysses,* many cases have advocated one of these two rules or variations of them. Most of the cases involving the constitutionality of obscenity statutes have arisen since 1934, and the problem of balancing the desire to prohibit the dissemination of obscene literature against the protection of free speech and press has become of primary importance.

It has never been thought that obscenity, as such, is protected by the guarantees of free speech and press. In *Chaplinsky v. New Hampshire*[19] Mr. Justice Murphy, by way of dictum, said:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting, or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[20]

Up to this time the Supreme Court had not been squarely faced with obscenity as a constitutional question. When it did arise, three essential problems were involved: (1) prior restraint; (2) certainty; and (3) the reasonableness of the statute. The doctrine of *Prior Restraint* was stated by Blackstone:

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."[21]

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[17]72 F.2d at 707.
[18]Id. at 708. (Emphasis added.)
[19]315 U.S. 568 (1942).
[20]Id. at 571-72.
[21]4 Blackstone, Commentaries *151-52.

In this country the first case to apply this doctrine expressly was *Near v. Minnesota ex rel. Olsen*,[22] in which the Court altered the principle slightly by stating that there were certain exceptions to the doctrine of *Prior Restraint*, one of these being obscenity.[23] Obscenity was not protected by the constitutional guarantees and could be controlled by the state through the exercise of prior restraint.

It was not long after *Near* that the Supreme Court began to realize that the statutes in this field were vague, and consequently the element of *certainty* soon developed as a necessary requisite of an obscenity statute. Up until that time the Court had rather generally upheld the state statutes. In a different context, but with applicable wording, *Pierce v. United States*[24] stated that a crime "must be defined with appropriate definiteness."[25] In *Winters v. New York*[26] the Supreme Court enlarged the *Pierce* doctrine, saying that there should be clear and unequivocal tests to ascertain guilt. In reversing the conviction of a person under a New York statute which prohibited the distribution of magazines consisting primarily of stories of lust and crime, the court stated:

> "When a legislative body concludes that the mores of the community call for an extension of the impermissible limits, an enactment aimed at the evil is plainly within its power, if it does not transgress the boundaries fixed by the Constitution for freedom of expression . . .[27] [but] . . . where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."[28]

In a similar vein, the Court has looked at the reasonableness of the standards established by the states, and has extended the constitutional protections of free speech and press to publications alleged to be obscene by invalidating statutes with tests which may be classed as unreasonable. For example, in *Butler v. Michigan*[29] the Supreme Court questioned the constitutionality of a statute which made it a misdemeanor to sell or make available to the general reading public any book containing obscene language tending to have a deleterious effect on the morals of youth. Mr. Justice Frankfurter, speaking for

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[22]283 U.S. 697 (1931).
[23]Id. at 716.
[24]314 U.S. 306 (1941).
[25]Id. at 311.
[26]333 U.S. 507 (1948).
[27]Id. at 515.
[28]Id. at 520.
[29]352 U.S. 380 (1957).

the majority, said that the Court had before it "legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[30] Later that year the Supreme Court also decided *Kingsley Books, Inc. v. Brown*,[31] which involved the constitutionality of a New York statute allowing injunctive relief against a defendant who sought to distribute allegedly obscene literature. In response to the objection that the statute violated the Constitution through the exercise of prior restraint the Court, in a five-to-four decision, stated that the statute was valid in that it provided for an adjudication of the question of obscenity before the injunction would be granted. Thus, the *Near* rule of prior restraint was distinguished.[32]

On the same day as *Kingsley*, the Court decided jointly the cases of *Roth v. United States*[33] and *Alberts v. California*.[34] These cases upheld the constitutionality of the federal and California obscenity statutes, but adopted a new standard for judging obscenity. The Court felt that the proper standard now should be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."[35] The *Hicklin Rule* was expressly rejected by the Court.[36] Thus the third rule for judging obscenity, known as the *Contemporary Community Standards Rule* or *Prurient Interest Test*, was created out of the *Ulysses* standard.

In the Fall of 1959 the Court decided *Smith v. California*,[37] which involved the conviction of a Los Angeles bookdealer under the city's obscenity ordinance. The ordinance made him criminally liable for the mere possession in his store of a book later determined to be obscene—*even if he had no knowledge as to the contents of the book.* The Supreme Court reversed, holding that *scienter* is a necessary requisite for a crime of this nature, and the lack of such would render a statute invalid. An ordinance of this nature, the Court said, would impose an unconstitutional limitation on the public's access to constitutionally protected matter, because the bookdealer would have to read every book before he could place it on the stand.

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[30]Id. at 383.
[31]354 U.S. 436 (1957).
[32]Id. at 445.
[33]345 U.S. 476 (1957).
[34]Ibid.
[35]Id. at 489.
[36]Ibid.
[37]361 U.S. 147 (1959).

The development of the law of obscenity in Virginia has closely paralleled its development in most other states of comparable size and nature. Virginia first passed an obscenity statute during the 1847-48 term of the General Assembly,[38] and the law remained substantially unchanged until it was challenged in the 1958 case of *Goldstein v. Commonwealth*.[39] This case drew into question the section prohibiting any person from disseminating literature "manifestly tending to corrupt the morals of youth. . . ."[40] In accordance with the determination of the *Butler* case, the statute was declared invalid by the Virginia Supreme Court of Appeals.

In order to fill the gap created by the invalidation of the statute, several bills were proposed during the 1960 session of the General Assembly. In drafting a statute the Assembly was primarily concerned with the enactment of a law which would meet the earlier objections enumerated by the United States Supreme Court. With these factors in mind, an amendment to the Code of Virginia was passed which repealed and replaced sections 18-113 and 18-113.1 with sections 18.1-227 through 18.1-236.3.

An examination of the recently enacted amendment discloses very readily the studied attempt to conform to the present state of the law in this field. For example, section 18.1-227 defines "obscene" thusly:

> "The word 'obscene' where it appears in this act shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, 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."[41]

The statute constantly prefaces sections with the words "Every person who knowingly,"[42] in an attempt to establish the requisite *scienter*. In addition, various individuals or institutions are exempted from the provisions of the act, such as museums of fine arts, schools, libraries, or institutions of higher learning which are supported by public appropriation.[43] The statute also incorporates a very interesting pro-

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[38]Acts of the Gen. Assembly of Va. 1847-1848, ch. 8, § 7.

[39]200 Va. 25, 104 S.E.2d 66 (1958).

[40]Ibid. Va. Code Ann. § 18-113 (Supp. 1958).

[41]Va. Code Ann. § 18.1-227 (Supp. 1960). Compare with definition in Model Penal Code § 207.10, comment (Tent. Draft No. 6, 1957).

[42]Va. Code Ann. §§ 18.1-228, -230, -231, -232, -235 (Supp. 1960).

[43]Va. Code Ann. § 18.1-236.2 (Supp. 1960). One criticism that may be leveled at this section is that the exemption is limited to institutions supported by public appropriations. The intent of the legislature is evident in attempting to prevent the creation of "schools" for the study of obscenity. However, it would seem that this

cedure for determining whether a book is obscene,[44] and every effort is made to insure a fair and reasonable adjudication in order to protect literature with cultural value, even to the extent of exempting from the statute persons "for whom the book may not have prurient appeal. . . ."[45]

The trend in the field of obscenity has been to narrow its scope and to increase artistic license,[46] with the result that a broader range of literature may be available to the public. This trend is in accord with the accepted constitutional doctrine advocating liberal protection of first amendment rights and privileges. The Virginia statute may well stand as the acceptable compromise between the interests of a moralistic society and the interests of free cultural expression.

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purpose could have been accomplished even though the list were extended so as to exempt institutions accredited by some recognized agency. As it now stands, a private institution, such as a college, could be prosecuted for the lending of obscene literature, whereas a college supported by public funds could not. It is interesting to point out that this could be of primary importance in a state like Virginia, which has an exceptionally large number of accredited private institutions.

[44]The statutory procedure allows for a judicial determination of the question of obscenity upon the instigation of either a private citizen or a City or Commonwealth's Attorney. A petition is filed with the court naming the book and alleging the obscene nature of the book. The court shall then make a preliminary examination of the book after which the petition is dismissed or an order to show cause is issued to interested parties for an adjudication of the question of obscenity. The author, publisher, and any other interested parties may file an answer, and a date will then be set for a hearing without a jury. At this hearing the court shall receive evidence, including expert testimony, as to the various factors to be taken into consideration for such determination. These will include: (1) the cultural value, if any, of the book considered as a whole; (2) the degree of public acceptance of the book; (3) the intent of the author and publisher; (4) the reputation of the author and publisher; and (5) the nature of the advertising and promotion of the book. At the conclusion of the evidence the court shall issue a written memorandum announcing the decision, and if the determination is that the book is obscene, the judgment will constitute scienter necessary for any subsequent handlers of the book. Va. Code Ann. § 18.1-236.3 (Supp. 1960).

[45]Va. Code Ann. § 18.1-236.3(8)(f) (Supp. 1960).

[46]For recent cases see Times Film Corp. v. Chicago, 272 F.2d 90 (7th Cir. 1959), cert. granted, 362 U. S. 917 (1960); Grove Press v. Christenberry, 276 F.2d 433 (1960); State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1960); State v. Miller, 112 S.E.2d 472 (W. Va. 1960).