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involved" and "their constitutional rights." The court states: "[W]e are unable to join in the view that the petitioners' constitutional rights have been afforded them."[21] This pluralization of the term "right" plus the emphasis placed upon the right to communicate with counsel leads to the conclusion that this right is intended to be included among the constitutional rights referred to. Further, the court added that "due process of law implies the right and opportunity to be heard and to *prepare* for the hearing."[22]

Accordingly, in view of the strongly-worded North Carolina statute, the intimations of the North Carolina court in the *Wheeler* case, the long-standing decisions of courts in three other states, and the strong minority on the United States Supreme Court, it is submitted that the officer of the law in North Carolina would be wise to adhere strictly to both the letter and the spirit of this state's statute, and that any person who is accused of crime and who desires to contact counsel, friends, or relatives should be permitted to do so promptly and as soon as reasonably possible. To do otherwise might well be held in violation of a state constitutional[23] and statutory right as well as a denial of the federal guarantee of due process.[24]

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Constitutional Law—Obscenity Statute—Proof of Scienter

In *Smith v. California*[1] the defendant bookseller had been convicted under a Los Angeles city ordinance which made it unlawful "for any person to have in his possession any obscene or indecent writing, or book . . . in any place where . . . books . . . are sold or kept for sale."[2] Thus *scienter* was not an element of the crime. The United States Supreme Court reversed the conviction, holding that the ordinance was unconstitutional as a violation of the first amendment right of freedom of the press.[3] The Court reasoned that under the Constitution knowledge of the obscene contents was necessary for conviction of a crime involving

has the duty to make a "reasonable effort" on behalf of the defendant to contact his relatives. If one were to consider a relative as not necessarily either counsel or friend, the court could be interpreted as extending the accused's right in this respect. Therefore, one arrested logically could contact a minimum of three persons: (1) counsel, and (2) friend, both as provided in the statute, and (3) relative, as covered by the court's suggestion. The use of the plural term "friends" and "relatives" perhaps could authorize communication with more than one representative from each of these classes.

[21] *Id.* at 194, 105 S.E.2d at 621.

[22] *Id.* at 193, 105 S.E.2d at 621. (Emphasis added.)

[23] N.C. CONST. art 1, §§ 11, 17.

[24] Also, the North Carolina statute contains this provision: "Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court."

[1] 361 U.S. 147 (1959).

[2] LOS ANGELES, CAL., MUNICIPAL CODE § 41.01.1.

[3] U.S. CONST. amend. I.

possession of obscene literature because of the preferred status of constitutional guarantees of freedom of the press and speech.[4] Further, the Court stated that such an ordinance would force a bookseller to restrict the books he sells to those he has inspected, and this burden of self-imposed prior restraint would restrict constitutionally protected literature as well as obscene literature.[5]

The Court, in an opinion by Mr. Justice Brennan,[6] refused to pass on the question of what constitutes *scienter* saying only:

> We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind . . . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.[7]

It is settled that the sale of obscene literature is not protected by the first amendment.[8] The principal case, however, establishes that the possessor of obscene literature is protected to the extent that he cannot be convicted by a state of a crime involving obscene literature unless knowledge of the obscenity is a requisite of the crime.[9] The questions of the type and quantity of evidence necessary to prove such knowledge remain for future interpretation.[10] There are four cases that deal directly with these problems.[11]

In *State v. Miller*,[12] a case involving obscene pictures, the West Vir-

[4] Strict liability may be imposed by public welfare laws such as anti-narcotic or pure food laws. United States v. Balint, 258 U.S. 250 (1914); United States v. Sprague, 208 Fed. 419 (E.D.N.Y. 1913). However, such cases as these are distinguishable because first amendment freedoms are not involved.

[5] This decision seems sound. "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture." Roth v. United States, 354 U.S. 476, 495 (1957) (concurring opinion).

[6] There were three concurring opinions. Justice Black concurred in the result reasoning that any obscenity statute will restrict freedom of the press. 361 U.S. at 155-60. Justice Frankfurter concurred in the result, but questioned what would be needed to prove *scienter*. *Id.* at 160-67. Justice Douglas concurred in the result on the ground that freedom of expression can be suppressed only when that expression "is so closely brigaded with illegal action as to be a part of it." *Id.* at 168. Justice Harlan concurred in part and dissented in part. He would not have reached the *scienter* question but would have reversed on the ground that the trial judge excluded all evidence as to "contemporary community standards" with regard to the test of obscenity. *Id.* at 169-72.

[7] *Id.* at 154.

[8] Roth v. United States, 354 U.S. 476 (1957).

[9] The first amendment guarantees of freedom of speech and press are made applicable to the states by the due process clause of the fourteenth amendment. Near v. Minnesota, 283 U.S. 697 (1931).

[10] The Court recognized the problem. Justice Frankfurter said, "A bookseller may . . . be well aware of the nature of a book . . . without having opened its cover, or, in any true sense, having knowledge of the book." 361 U.S. at 164.

[11] United States v. Hochman, 175 F. Supp. 881 (E.D. Wis. 1959); People v. Wepplo, 78 Cal. App. 2d 959, 178 P.2d 853 (1947); People v. Schenkman, 195 N.Y.S.2d 570 (Ct. Spec. Sess. 1960); State v. Miller, 112 S.E.2d 472 (W. Va. 1960).

[12] 112 S.E.2d 472 (W. Va. 1960).

ginia Supreme Court distinguished *Smith v. California* on the facts, saying, "Certainly anyone who distributes such pictures would know what he is distributing and the element of scienter is not necessary in such a case."[13] Further the court held that knowledge of the character of the obscene pictures would be presumed and "the defendant may, by proper evidence, excuse or justify"[14] the distribution of such pictures.

In *People v. Schenkman,*[15] the only other reported case interpreting *Smith v. California,* four booksellers and a bookstore owner were prosecuted for illegal sale of obscene literature. The court discussed the sufficiency of the evidence relating to *scienter.* Though there was no direct evidence of knowledge on the part of the defendants, the court found as a fact that they had knowledge of the contents of the books relying on the following evidence: (1) Each of the four books found to be obscene was a paperback book priced at five dollars. (2) The titles of the books were "Queen Bee," "Succulent," "Garden of Evil," and "Bloomer Boy." (3) On the back of one of the books was the statement, "The kind of book you always wished could be published. Nothing is hidden . . . . A tale that is wider and more sizzling than a barrel of sly French novels. A Roman orgy is tame compared to some of the bedroom scenes."[16] The admission of such evidence and its sufficiency would seem to be in line with past decisions concerning obscenity statutes where *scienter* was a part of the definition of the crime.

In *United States v. Hochman*[17] the defendant was charged with knowingly taking from a common carrier copies of obscene publications transported in interstate commerce.[18] The district court held that there was sufficient evidence to justify the jury's finding of *scienter* in that the obscene books were paperback books selling for three dollars, the titles and illustrations were suggestive,[19] the defendant was a college graduate experienced in the book business,[20] and had personally selected the books from the shelves of a wholesaler.[21]

[13] *Id.* at 478.
[14] *Ibid.*
[15] 195 N.Y.S.2d 570 (Ct. Spec. Sess. 1960).
[16] The conversations between the defendants and the arresting officers were also admitted as evidence. One defendant had said that he sold the books to anyone who wanted to buy them. Another said that he did not think the books were so bad. Still another read to the officer from a medical work dealing with sex and stated that the questioned books were not as bad. The fourth said he knew the books were in the store for sale. The fifth is not reported as having said anything. *Id.* at 572-73.
[17] 175 F. Supp. 881 (E.D. Wis. 1959).
[18] In violation of 18 U.S.C. § 1462 (1958).
[19] The titles and illustrations, said the court, "are such as to put an intelligent person on notice of the type of books which they were." 175 F. Supp. at 882.
[20] It was not admitted in evidence nor mentioned in the opinion that the defendant had been convicted two years earlier of selling obscene material in violation of a state statute. State v. Hochman, 2 Wis. 2d 410, 86 N.W.2d 446 (1957).
[21] The court said, "The jury could believe that he at least thumbed through the books." 175 F. Supp. at 882.

In a 1947 California case, *People v. Wepplo*,[22] the state statute required that the seller know the character of the obscene work.[23] The book in question bore "no marks or indications of its character on the outside, nor was its title enlightening or even suggestive on the subject."[24] In the absence of other evidence of knowledge, defendant's conviction was reversed.

These four cases seem to raise several problems in regard to proof of *scienter*. The courts emphasized the fact that the books involved were paperbacks selling for from three to five dollars. The New York court in *People v. Schenkman* stated, "When, therefore, a paper covered book is sold by a book seller for $5.00, can it be truthfully said that he did not know that the sale was induced by the fact that the book contained hard core pornography . . . ?"[25] But it is evident that paperback books could be priced at five dollars because of their legitimate content rather than their pornographic content. Further, the outside of a book could be highly suggestive because of the title and statements on the cover, while in fact the contents could be completely innocent. Such a book would not be obscene because the whole work must be obscene before the book may be classed as obscenity.[26] Finally, a bookseller could be well educated and highly experienced in the book business, and yet, because of the number of books handled in his establishment have no knowledge of the contents of a particular book.

Thus far the North Carolina Supreme Court has not dealt with the problems concerning the type and quantity of evidence necessary to prove guilty knowledge in obscenity cases. However, in 1957 the North Carolina legislature adopted the American Law Institute's Model Penal Code provisions relating to obscenity.[27] This statute contains a provision that possession of obscene matter raises a presumption that the seller knows the contents.[28] This provision would seem to be clearly opposed to the spirit and letter of the decision in *Smith v. California*.[29] The state could introduce in evidence the obscene work, establish the fact that the defendant had possessed it, and this with the aid of the

[22] 78 Cal. App. 2d 959, 178 P.2d 853 (1947).
[23] CAL. PENAL CODE § 311.
[24] 178 P.2d at 858.
[25] 195 N.Y.S.2d at 576.
[26] Roth v. United States, 354 U.S. 476 (1957).
[27] MODEL PENAL CODE § 207.10 (Tent. draft No. 6, 1957) was incorporated as N.C. GEN. STAT. § 14-189.1 (Supp. 1959). See generally Note, 36 N.C.L. REV. 189 (1958).
[28] "A person, firm, or corporation who . . . possesses, or procures obscenity is presumed to know the existence of its parts, features or contents of the material which render it obscene." N.C. GEN. STAT. § 14-189.1(f) (Supp. 1959).
[29] In State v. Mapp, 166 N.E.2d 387 (Ohio 1960), the Ohio Supreme Court, by a four-to-three majority, held that a statute making knowing possession of obscene literature, with or without intent to sell, a crime was opposed to the general principles of *Smith v. California* in that such a blanket restriction would keep persons from reading many books for fear they might be obscene. Because of a provision of the Ohio Constitution, the statute was allowed to stand.

presumption would support a conviction if the defendant failed to rebut it. In this manner the defendant would be convicted without actual proof of *scienter*. Further this provision is in conflict with the Supreme Court's holding in *Speiser v. Randall*[30] which prohibits a state from shifting the burden of proof to the defendant when the crime charged involves a limitation placed upon freedom of speech. The analogy would seem clearly to be that the burden could not be shifted to the defendant when the statute involved a limitation placed upon freedom of the press. It is submitted that the legislature should reconsider this apparently unconstitutional provision.

CHARLES E. DAMERON III

Estate and Gift Taxation—Discretionary Trust—Grantor As Life Beneficiary

A useful and not uncommon trust arrangement is one that gives the trustee absolute discretion to pay income to the grantor or to accumulate it for the remaindermen. For additional flexibility a controllable power to invade principal is often lodged in the trustee to insure that the grantor will not be financially embarrassed should an unforeseen emergency arise. This Comment is concerned primarily with the federal estate tax consequences of such a trust although the basic gift tax consequences are developed as a corollary. Although it appears that the tax law affecting such trusts has not been definitively developed, trends in some areas seem clearly discernible. On the other hand, to the writer's surprise, many pertinent areas seem never to have been considered by the authorities.

For purposes of this Comment an inter vivos trust of the following basic outline will be assumed: the independent trustee has absolute discretion to pay income to the grantor for life or to accumulate; the trustee, pursuant to ascertainable external standards,[1] is empowered to invade principal for the grantor's benefit; the grantor has no other interests in or power over the trust; the remaindermen must survive the grantor; the trust is governed by North Carolina law.

The problem is whether the interests reserved by the grantor will cause inclusion of the corpus in his gross estate by virtue of the incomplete inter vivos transfer sections of the Internal Revenue Code of 1954, chiefly sections 2036(a)(1) and 2037. Also to be considered are the steps that the grantor of such a trust might take to rid himself of the tax-risky interests.

[30] 357 U.S. 513 (1958).

[1] *E.g.*, "support, maintenance, and educational needs." It has been held that a state court determination of what is or is not an ascertainable standard is not binding in federal tax cases. Michigan Trust Co. v. Kavanagh, 137 F. Supp. 52 (E.D. Mich. 1955). *Contra*, LOWNDES & KRAMER, FEDERAL ESTATE & GIFT TAXES 198 (1956), declaring that it is a matter of local law.