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A Blueprint for Censorship of Obscene Material: Standards for Procedural Due Process

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A BLUEPRINT FOR CENSORSHIP OF OBSCENE MATERIAL: STANDARDS FOR PROCEDURAL DUE PROCESS

I.

INTRODUCTION

Censorship, or prior restraint upon speech and press, has long plagued our judicial system and continues to do so. The First Amendment of the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." In 1644, John Milton assailed an Act of Parliament which provided for censorship of the press. He contended that every man has the right to make public his honest views, without previous censure, and stated that it would be impossible to find any man base enough to accept the office of censor and at the same time good enough to perform his duties.[1] Blackstone, in declaring the Common Law of his day, stated that the liberty of the press consisted in laying no previous restraints upon publication. However, if one published "improper, mischievous or illegal" material, he was subject to criminal sanctions.[2] Faced with these problems of the English Common Law, our forefathers sought to preserve inviolate the freedom of speech and press to all.

II.

ABSORPTION OF THE FIRST AMENDMENT INTO THE FOURTEENTH

The First Amendment was readily acknowledged as protecting freedom of speech and press from abridgment by the Federal Government, but considerable doubt surrounded the individual states' obligation to afford the same protection to the First Amendment freedoms.[3] However,

1. MILTON, APPEAL FOR THE LIBERTY OF UNLICENSED PRINTING (1644).

2. 4 BLACKSTONE'S COMMENTARIES 145 (1876).

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publication, and not in freedom from censure from criminal matter when published. Every free man 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 consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects.

3. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922). Mr. Justice Pitney, speaking for the Court, stated: "[N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' or the 'liberty of silence'. . . ."

in 1925, the Supreme Court stated that: "For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[4] Two years later, this dictum became the accepted doctrine[5] which was to be applied extensively.[6] The Court has subsequently held that municipal ordinances adopted under state authority constitute state action and must strictly conform to constitutional standards.[7] In *Cantwell v. Connecticut,* the Court decided, without dissent, that even though a judicial remedy was available for abuses in a system of licensing, such a system amounted to a prior restraint upon the freedoms of speech and press. The Court held that a statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.[8] Although generally regarded as the keystone of liberty, the freedoms of speech and of the press are not absolute; they are subject to abuse by individuals who use them to disseminate those materials which possess no redeeming social value, and for such abuse sanctions must be imposed.

III.

LIBERTY OF SPEECH AND PRESS NOT UNCONDITIONAL

An individual's freedom from previous restraints has never been regarded as absolute. The Court in *Near v. Minnesota,* stated that, although freedom of speech and press are fundamental liberties, "the protection even as to previous restraint is not absolutely unlimited."[9] In *Roth v. United States,* the Court observed that in the light of ". . . history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance."[10] Though this protection is not unlimited, it proscribes, at least, governmental adoption of those procedures which tend to impinge upon constitutionally protected expression.[11] It has been suggested that "what is needed is a pragmatic assessment of its operation in particular circumstances. The generalization

4. Gitlow v. New York, 268 U.S. 652, 666 (1925).
5. Fiske v. Kansas, 274 U.S. 380 (1927).
6. Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Smith v. California, 361 U.S. 887 (1960); Speiser v. Randall, 357 U.S. 513 (1958); Staub v. City of Baxley, 355 U.S. 313 (1958); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Grosegean v. Amer. Press Co., 297 U.S. 233, 243, 249 (1936).
7. Staub v. City of Baxley, 355 U.S. 313 (1958); Lovell v. Griffin, 303 U.S. 444 (1938).
8. 310 U.S. 296, 306 (1940); Near v. Minnesota, 283 U.S. 697 (1931).
9. 283 U.S. 697, 716 (1931).
10. 354 U.S. 476, 483 (1957).
11. Manual Enterprises v. Day, 370 U.S. 478 (1962).

that prior restraint is particularly obnoxious in civil liberties cases must yield to more particular analysis."[12]

From what might be characterized as an atmosphere of aversion to prior restraints, and over the vigorous dissenting opinions of Justices Black and Douglas,[13] the Supreme Court has given its sanction to two cases[14] in particular, which, in effect, provide for "constitutional censorship." Although there is admonition in *Roth* that "the door . . . into this area [the First Amendment] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests,"[15] the censor's foot now appears to have opened the door permanently. In *Bantam Books v. Sullivan,* Mr. Justice Clark observed that *Times Film Corp. v. City of Chicago* is not inconsistent with the Court's traditional attitude of disfavor toward prior restraints of expression,[16] since the Court therein decided only that prior restraints were not unconstitutional *per se* and that the *Times Film* holding was expressly confined to motion pictures.

IV.

PROCEDURAL DUE PROCESS — THE KEY TO CENSORSHIP

"The essence of justice is largely procedural,"[17] for "civil liberties like substantive law itself, frequently inhere in the interstices of procedure and are none the worse for it."[18] This is essentially the basis for the opinion of Chief Justice Warren in *Jacobellis v. Ohio.* He observed that law enforcement agencies often do only that which is easy in the enforcement of legislation in the area of free speech.

> As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity. Thus, enforcement agencies must realize that there is no royal road to enforcement; hard and conscientious work is required.[19]

Freedoms of expression are vulnerable to gravely damaging, yet barely visible, abuses[20] and consequently regulations of obscenity must scrupulously embody the most rigorous safeguards. Such a constitutionally re-

12. Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533, 539 (1951).
13. Freedman v. Maryland, *supra* note 6, at 61 (1965).
14. Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Kingsley Brooks, Inc. v. Brown, 354 U.S. 436 (1957).
15. Roth v. United States, 354 U.S. 476, 488 (1957).
16. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).
17. 1 DAVIS, ADMINISTRATIVE LAW TREATISE 506 (1st ed. 1958).
18. Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533, 554 (1951).
19. 378 U.S. 184, 202 (1964). (Dissenting opinion of Mr. Chief Justice Warren, Mr. Justice Clark concurring.)
20. *Ibid.*

quired procedure must focus searchingly on the question of obscenity,[21] but a state is not, by any means, to be considered free to adopt whatever procedures it desires in dealing with obscenity. It must be ever conscious of the possible consequences for constitutionally protected speech.[22] The Supreme Court has, in effect, arrived at the conclusion that "[F]reedom of expression can be suppressed if, and to the extent it is so closely brigaded with legal action as to be an inseparable part of it."[23] The essence of the problem ". . . is the formulation of constitutionally allowable safeguards which society may take against evil without impinging upon the necessary dependence of a free society on the fullest scope of free expression."[24] The line to be drawn between unconditionally guaranteed speech and speech which may be regulated is fine,[25] dim and uncertain[26] and calls for "sensitive tools."[27]

A great many courts and scholars have sought to devise a test for designating material protected or unprotected, obscene or not obscene. Obscenity is not to be afforded the constitutional protection rendered to speech and press.[28] The test developed by the Supreme Court in *Roth* for the identification of obscene material is ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interest," that is, "having a tendency to excite lustful thoughts."[29] In *Roth,* the Court applied the above test to materials being considered under the Federal Postal Law[30] as well as under a California obscenity statute,[31] acknowledging that both Federal and State laws regulating obscenity must be equipped with the same safeguards. The *Roth* decision dealt solely with a test for literature being examined under a criminal statute which provided for a jury trial. The question whether this test is adequate for application in a civil proceeding which does not provide for a jury trial remains to be answered.

Certain ramifications of the *Roth* test have been clarified. In *Manual Enterprises v. Day,*[32] the Supreme Court considered the situation in which the allegedly obscene literature was limited to a particular class, homosexuals. The Court stated that, in applying the rule of *Roth v. United States,*[33] the requirement of "patent offensiveness" refers to the offensiveness of the material to the standard of the national community. While this material was patently offensive to the national standard of

21. Marcus v. Property Search Warrant, 367 U.S. 717, 732 (1961).
22. *Id.* at 731; Speiser v. Randall, 357 U.S. 513, 525 (1958).
23. Roth v. United States, *supra* note 15, at 514 (1957).
24. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 694 (1959).
25. Speiser v. Randall, 357 U.S. 513, 525 (1958).
26. Bantam Books, Inc. v. Sullivan, *supra* note 16, at 66 (1963).
27. Speiser v. Randall, *supra* note 25, at 525 (1958).
28. Bantam Books, Inc. v. Sullivan, *supra* note 16, at 66 (1963).
29. Roth v. United States, *supra* note 15, at 486 (1957).
30. 62 STAT. 768, 18 U.S.C. § 1461 (1948).
31. CAL. PENAL CODE § 311. This section has been amended to make knowledge a necessary part of the offense, see CAL. PENAL CODE § 311(a)-(e).
32. 370 U.S. 478 (1962).
33. 354 U.S. 476, 489 (1957).

decency,[34] it did not appeal to the prurient interest of the average person and was therefore not obscene.

Another interpretation would limit the *Roth* test to the identification of materials known as "hard-core" pornography.[35] Mr. Justice Stewart believes that by negative implication in the Supreme Court's decisions since *Roth* and *Alberts,* that ". . . under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography."[36] It is regrettable that Mr. Justice Harlan failed to persuade the Court to shift to the new and apparently narrower concept of hard-core pornography.[37] One court has defined "hard-core pornography" as material which ". . . focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification."[38] It has also been described as "dirt for dirt's sake"[39] or "dirt for money's sake,"[40] but these definitions provide little in the way of standards by which to judge material, and both scholars and the Courts are destined to encounter the same difficulties in their quest for a clear definition of this term that they did with "obscenity."[41]

V.

PROTECTION OF FUNDAMENTAL FREEDOMS

The Supreme Court has held that a state may not superimpose a civil sanction, aimed at the regulation of obscenity, upon a similar criminal sanction. Such duplication would render the latter unnecessary, and thus eliminate the safeguards of the criminal process. Such a "form of regulation creates hazards to protected freedoms markedly greater than those that attended reliance upon criminal law."[42] In *Bantam Books,*

34. Manual Enterprises v. Day, *supra* note 11, at 488 (1962). Although the Court held this to be the standard used in the application of a federal statute, it is submitted that the national standard of decency should be applied to state statutes as well since fundamental freedoms are involved. See Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 112-14 (1960).

35. Manual Enterprises v. Day, 370 U.S. 478, 489 (1962); People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

36. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964).

37. Roth v. United States, *supra* note 15, at 508 (1957). However, it is to be noted that Mr. Justice Harlan would permit the states to provide for a greater degree of restraint upon such materials than he would the Federal Government. He would limit the Federal Government to the control of "hard-core" pornography while permitting the states to use a broader standard. See also, Kalven, *The Metaphysics of the Law of Obscenity,* THE SUP. CT. REV. 39 (1960).

38. People v. Richmond County News, Inc., 9 N.Y.2d 578, 586, 175 N.E.2d 681, 686, 216 N.Y.S.2d 369, 376 (1961). The court held that prohibitions of NEW YORK PENAL LAW § 1141 apply only to "hard-core pornography."

39. United States v. One Book Called "Ulysses," 54 F. Supp. 182, 184 (S.D. N.Y. 1933).

40. Kingsley Int'l Pictures Corp. v. Regents, *supra* note 24, at 692 (1959).

41. Jacobellis v. Ohio, 378 U.S. 184, 201 (1964). (Dissenting opinion of Mr. Chief Justice Warren, Mr. Justice Clark concurring.)

42. Bantam Books, Inc. v. Sullivan, *supra* note 16, at 70 (1963).

Inc. v. Sullivan, the Court considered a system of prior administrative restraints by a State Commission, a non-judicial body, designed for the dual purpose of (1) educating the public concerning obscene publications which tend to corrupt youths, and (2) recommending prosecution. It was empowered to notify distributors of publications which it found to be objectionable and to warn them that failure to cooperate would result in a recommendation of prosecution. This statute was condemned as an invalid prior restraint and intimidation leading to suppression.

The Court's reasons provide, by way of negative implication, certain procedural safeguards essential for protection of the fundamental freedoms. There must be a provision for notice and hearing before the Commission is permitted to list the publications as objectionable. Opportunity for prompt judicial review of the Commission's findings must also be available. Mr. Justice Clark criticized the Court for dropping "a demolition bomb on the Commission's practice without clearly indicating what might be salvaged from the wreckage." Mr. Justice Clark believes that such a statute would be constitutional if it did not permit the Commission to order prosecution of certain individuals. The Court held that any system of prior restraints comes to it bearing a heavy presumption of constitutional invalidity.[43] To Justices Black and Clark, no indulgence in presumptions is necessary in regard to prior restraints. They would forbid any such activity, for they believe that First Amendment rights and the censors are incompatable. Authors, publishers, and vendors could be subjected to sanctions for violating a valid criminal law which is applied after publication and distribution, but would be protected by the procedural safeguards of the Bill of Rights, including trial by jury.[44] The doctrine appears to be a choice of the lesser of two evils; the danger of violating the First Amendment freedoms overrides the danger from dissemination of unprotected literature prior to criminal prosecution.

VI.

DEVISING A CONSTITUTIONAL APPROACH

A. *Formulating Constitutional Statutes*

1. *Scienter*

A statute seeking to restrain obscenity must provide for, or be judicially construed[45] to require, proof of scienter as an essential element in any prosecution for its violation. However, knowledge by a bookseller of the obscene or indecent character of the material possessed by him may

43. *Id.* at 70; Near v. Minnesota, 283 U.S. 697 (1931).
44. *Id.* at 70; *See also* Smith v. California, 361 U.S. 147, 160 (1959). Concurring opinion by Mr. Justice Black: "Censorship is the deadly enemy of freedom and progress. The plain language of the Constitution forbids it. I protest against the Judiciary giving it a foothold here."
45. Smith v. California, 361 U.S. 147 (1959), *rehearing denied,* 361 U.S. 950 (1960).

often be proved by circumstantial evidence;[46] actual knowledge of the contents of the material is not a *sine qua non* to establish scienter.[47] Mr. Justice Brennan speaking for the Court in *Smith v. California,* indicated that some cimcumstances require a bookseller or distributor to investigate material in his control or explain his failure to do so.[48]

The Model Penal Code[49] requires that one must knowingly or recklessly sell, deliver, or provide, or offer or agree to sell, deliver, or provide such material. This qualification takes the form of a rebuttable presumption; that is, one who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly and recklessly, and he bears the burden of proving otherwise. It is clear that eyewitness testimony of a bookseller's perusal is not essential in proving his awareness of its contents. It is submitted that the Model Penal Code provides the most constitutionally acceptable approach to this problem, but the specifity of construction of such a statute presents problems which must be considered in the light of the First and Fourteenth Amendments.

2. *Specificity in Construction*

A statute which aims to restrain publication, distribution, or presentation of obscene materials must meet certain basic standards of construction and specificity. The prohibited acts must be so defined as to exclude legitimate exercises of the constitutional freedoms of speech and press. The statute must be reasonably restricted to the evil with which it deals; therefore, one which prohibits distribution to the general reading public of books containing obscene language tending to corrupt the morals of youth fails, since it arbitrarily curtails the constitutional liberties of adults. This statute concerned general distribution and its nullification does not preclude a state from labeling such material "for adults only."[50]

The terms of a penal statute creating a new offense must be sufficiently explicit to inform those subject to them what conduct on their part will render them liable. They cannot be so vague that men of common intelligence must guess at their meaning and differ as to their application. Such inadequacies violate the most essential conceptions of due process of law.[51] The meaning of the words must be sufficiently well known to

46. State v. Andrews, 150 Conn. 92, 186 A.2d 546 (1962); Cohen v. State, 125 So. 2d 560 (Fla. 1960); Demetropolos v. Commonwealth, 342 Mass. 658, 175 N.E.2d 259 (1961); State v. Oman, 261 Minn. 10, 110 N.W.2d 514 (1961); People v. Finkelstein, 9 N.Y.2d 342, 174 N.E.2d 470, 214 N.Y.S.2d 363 (1961); State v. Jackson, 224 Ore. 337, 356 P.2d 495 (1960).

47. State v. Sul, 146 Conn. 78, 147 A.2d 686 (1958).

48. Smith v. California, *supra* note 45, at 154.

49. MODEL PENAL CODE § 251.4(2) (Proposed Official Draft 1962).

50. Butler v. Michigan, 352 U.S. 380 (1957). This has been referred to as the shift of audience test which declares that the average adult is the constitutionally required audience. Kalven, *The Metaphysics of the Law of Obscenity,* THE SUP. CT. REV. 7 (1960).

51. Connally v. General Constr. Co., 269 U.S. 385 (1924); Int'l Harvester Co. v. Kentucky, 234 U.S. 200, 221 (1913).

afford a cognizable standard of illegality.[52] "A failure of a statute limiting freedom of expression to give fair notice to what acts will be punished and such a statute's inclusion of prohibitions against expression, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of the press."[53] Thus, a statute[54] which forbids the selling, giving away, or distribution of material devoted to the publication of, and principally made up of, "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust, or crime" was declared unconstitutional for failure to give adequate notice to those affected.[55]

B. *Constitutional Administration*

1. *Burden of Persuasion*

Generally, the states are empowered to regulate procedures under which their laws are carried out, which include placing the burden of persuasion; but, in so doing, they may not offend "some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."[56] A state may not provide that the finding of an indictment, or the proof of the identity of an accused will create a presumption that all of the facts essential to guilt exist.[57] The burden of producing evidence may shift, but only after the State has "proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."[58]

The Supreme Court has also struck down state statutes which unfairly shift the burden in civil cases.[59] Although due process may not always compel the full formalities of a criminal prosecution before criminal advocacy can be suppressed, the state's procedures must be adequate to safeguard against invasion of free speech and press.[60] The state must carry the burden of producing evidence in the first instance, and of persuading the fact finder at the conclusion of the trial.[61]

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52. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925); United States v. Cohen Grocery Co., 255 U.S. 81, 92 (1921).

53. Fox v. Washington, 236 U.S. 273, 277 (1915).

54. NEW YORK PENAL LAW § 1141.

55. Winters v. New York, 333 U.S. 507, 519–20 (1948); see also Fox v. Washington, 236 U.S. 273 (1915).

56. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

57. Tot v. United States, 319 U.S. 463, 469 (1943).

58. Morrison v. California, 291 U.S. 82, 88, 89 (1934).

59. Western & A. R. Co. v. Henderson, 279 U.S. 639 (1929).

60. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

61. Speiser v. Randall, 357 U.S. 513, 526 (1958).

2. Trial by Jury

Trial by jury is guaranteed in all criminal cases,[62] but "the Due Process Clause does not subject the States to the necessity of having trial by jury in misdemeanor prosecutions."[63] Since, in *Kingsley Books, Inc. v. Brown,* the defendants did not request a jury, the Supreme Court has not been compelled to deal with this question.[64] In *Kingsley,* the New York statute[65] provided for a jury trial at the discretion of the court; their verdict would be only advisory, to be followed or rejected by the trial judge as he deemed proper. Mr. Justice Brennan, in his dissent in *Kingsley,* states that obscenity statutes should afford the defendant a jury determination on the issue of obscenity and that a statute that does not so provide fails to properly effect the standard necessary to safeguard rights arising from the Constitution.[66] In this case, the judge still must decide whether reasonable men might differ on the issue of obscenity before delegating the question to the jury.[67] Since the average man is represented by the jury and not by a judge, logic dictates implementation of the jury's expertise for the issue of obscenity.[68] The jury, which represents a cross-section of the community, has a special aptitude for reflecting the view of the average person. Thus, the jury's consideration of the question of obscenity provides a particularly competent application of the standard enunciated by the Supreme Court in *Roth.*[69]

This approach has been adopted by the Model Penal Code. In preserving the independent judgment of the court, the Code requires the court to determine whether an issue exists as to obscenity and to ". . . dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."[70] If the court finds an obscenity question present, the defen-

62. U.S. CONST. art. III, sec. 2.
63. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 444 (1957).
64. *Id.* at 443, 444.
65. Compare NEW YORK CIVIL PRACTICE ACT § 430 with NEW YORK CITY CRIMINAL COURT ACT § 31, sub. 1(c) and sub. 4.
66. Kingsley Books, Inc. v. Brown, *supra* note 60, at 448 (1957). (Dissenting opinion of Mr. Justice Brennan.)
67. Parmelee v. United States, 113 F.2d 729, 731 (D.C. Cir. 1940); United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930).
68. Kalven, *The Metaphysics of the Law of Obscenity,* THE SUP. CT. REV. 39 (1960).
69. Kingsley Books, Inc. v. Brown, *supra* note 60, at 448 (1957); See also Chafee, *Censorship of Plays and Books,* 1 BILL OF RIGHTS REV. 16, 23 (1940):

> Accordingly my conclusion, both as to plays and books, is that decisions on the issue of indecency should be made by the citizens themselves through qualified juries. The practical problem is to make such jury verdicts more convenient than the ordinary criminal prosecution, so as to lessen the risks of honest theatre owners, producers, publishers, and booksellers who are anxious to obtain legal determinations before going ahead.

70. MODEL PENAL CODE § 251.4 (Proposed Official Draft 1962). See comment to this section:

> What we preserve in the present draft is the independent judgment of the court on the question of obscenity without impairing defendant's right to a jury trial. The action of the Supreme Court of the United States in a series of obscenity cases after the Roth decision indicates the large extent to which the question of obscenity is one of law in any case, because of the application of the First Amendment.

dant's right to a jury trial is maintained since he may demand such a procedure. It is submitted that the fundamental freedoms of speech and press should be afforded no less than this degree of protection.

3. *Independent Judicial Review*

The aim of law makers in drafting censorship statutes is to provide federal, state and municipal authorities with a quick and effective system of restraint. Although the threat of criminal sanctions possesses some deterrent value, a system which provides for restraint prior to the dissemination of objectionable materials is clearly more effective. However, before such a restraint is issued, constitutional safeguards necessitate evaluation of the obscenity charge by some competent authority. The most qualified candidate for this inglorious but necessary task is the judiciary. A judge is learned in the law, skilled in its application, and a member of the community which is to accept or reject the material in question. However, though he may be the best qualified, his individual prejudices and incompetencies might so affect his decision that adequate protection would not be accorded our fundamental freedoms. Thus, perhaps a three judge court is the most appropriate vehicle to determine the issue within constitutional bounds.

Further problems befall the legislator who would properly devise the function of that administrative body known as a censorship board. Such a board should not be permitted to pass any final judgment on the issue of obscenity since this would subvert the function of the court. However, the Board could, to some extent, screen questionable materials prior to their presentation to the court. The problem is drafting the appropriate limitations for the board's activities, so that any action they do take will not be a restraint prior to judicial determination. Finally, questions remain as to the manner of issuing these initial restraints, provisions for immediacy of court decision concerning them, and right to appeal from such decisions. Surveying the recent cases may present guidelines for a feasible aproach to these problems.

VII.

WHAT WILL THE COURT ALLOW?

A. *Books and Literature*

"Prior restraint" has been defined as administrative controls prior to any publication, such as licensing or other duress forbidding publication prior to approval by public officials.[71] Unfortunately, the Supreme Court has provided little in the way of specific requirements for a constitutional system of prior restraint.

71. William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 173 A.2d 59 (1961).

In *Kingsley Books, Inc. v. Brown*,[72] a five to four decision savoring of prior restraint,[73] the Court approved, as a valid limitation, a system which provided for an equity proceeding which was deemed equivalent to a prosecution. Under the New York procedure,[74] law enforcement officers could obtain a limited injunction (1) ordering a bookseller to refrain from distribution of material judicially declared obscene, and (2) providing for seizure and destruction of all copies thereof. Closely defined procedural safeguards accompanied the remedy and provided for (1) an *ex parte* hearing by a judge on the issue of obscenity of specific materials presented to him, prior to issuance of a limited injunction; (2) notice to the seller that sale of the questionable material before the trial may subject him to penal consequences; this arises from the limited injunction;[75] (3) provision on the day of complaint for defendants to show cause within four days why the injunction *pendente lite* should not be issued; (4) right to trial of the issue within one day after joinder of issues; (5) decision in two days after the conclusion of the trial. A further provision required a court to exercise an independent check prior to the imposition of any restraint, and the restraints could affect only named publications.

The Court's approval rested upon the provision for adequate notice, judicial hearing, and fair determination of the issue of obscenity. However, in effect, the threat of penal sanction prior to an adversary proceeding exists. "Any system of censorship, injunction, or seizure may, of course, to some extent serve to trammel by delaying distribution or otherwise, freedom of expression; yet so may the threat of criminal prosecution as the Court noted in *Kingsley Books*."[76] Thus, one must conclude that a statute providing for an *ex parte* hearing prior to any injunction or notice of intent to prosecute fulfills the constitutional requirement that judicial determination of the issue be made prior to any restraint of speech or press. Although not decided in *Kingsley*, it is submitted that an administrative censorship commission, made up of qualified and duly appointed officials could also submit questionable materials to an appropriate court for an *ex parte* hearing, with the limitation that such submission be prior to any threats or coercive tactics on the part of the commission. The *Kingsley* scheme appears to provide for constitutional censorship, but it is questionable whether an *ex parte* hearing affords due process to a fundamental liberty.

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72. 354 U.S. 436 (1957).

73. Freedman v. Maryland, 380 U.S. 51, 62 (1965). Mr. Justice Douglas, with whom Mr. Justice Black concurred, stated:

> I would not admit the censor even for the limited role accorded him in Kingsley Books, Inc. v. Brown. . . . Any authority to obtain a temporary injunction gives the State 'the paralyzing power of a censor.' The regime of Kingsley Books substitutes punishment by contempt for punishment by jury trial. I would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment. (Citations omitted.)

74. NEW YORK CODE OF CRIMINAL PROCEDURE § 22(a).

75. The value of this safeguard is questionable in that it serves as a deterrent against distribution prior to an adversary proceeding.

76. A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964).

B. Times Film Corp. *to* Freedman — *Censorship of Motion Pictures*

That motion pictures are within the free speech and free press guaranty of the First and Fourteenth Amendments is clear.[77] Justices Black and Douglas stated in a *per curiam* opinion that ". . . the First Amendment draws no distinction between the various methods of communicating ideas."[78] These two Justices also consider motion picture censorship in advance of publication as wholly void, and insist that only inflexible application of this doctrine will save the Supreme Court from deciding such issues on an *ad hoc* basis. However, the majority of the Court in *Times Film Corp. v. City of Chicago,* has held that censorship of motion pictures is not unconstitutional *per se.*[79] Although entitled to the same basic safeguards as other types of communication, motion pictures present unique problems which call for variations of the approved procedure of *Kingsley Books, Inc. v. Brown.*

In the case of motion pictures, preview by the distributor or exhibitor can be expected prior to any public presentation. He can be expected to know its content. Further, a motion picture's impact upon its audience is immediate and a great number of viewers may be exposed to it in a short period of time.

In the *Times* case, injunctive relief was denied a motion picture distributor who contended that censorship in advance of exhibition was void on its face as equivalent to a prior restraint against publication. The distributor sought to compel a municipal censor to license a film without its submission for approval. The Court maintained that, although motion pictures are included within the speech and press guarantees of the First and Fourteenth Amendments, there is no absolute freedom to exhibit once publicly, since it has never been held that all prior restraints on speech are invalid. This, in effect, is all that the *Times* case held, and it must not be read too broadly in examining the problem of legitimate standards upon which a municipality may reject a film for public distribution.

In *Zenith Int'l Film Corp. v. City of Chicago,*[80] the Chicago movie censorship statute was once again put to the test and, this time, failed as a violation of procedural due process of law. These procedural inadequacies were (1) the exhibitor was not accorded a full and fair hearing, including an opportunity to defend the nature of the material; (2) he was granted no opportunity to present evidence of contemporary community

77. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 502 (1952); United States v. Paramount Pictures, 334 U.S. 131, 166 (1948). *But see,* Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 108 (1960).

It has been suggested that the requirement of scienter could be given a more limited application in respect to motion picture exhibitors, since exhibitors can reasonably be required to know the content of a motion picture before exhibiting it.

78. Commercial Pictures Corp. v. Regents, 346 U.S. 587, 589 (1954).

79. 365 U.S. 43 (1961).

80. 291 F.2d 785 (7th Cir. 1961).

standards; (3) no standards were stipulated for the selection of members of the Film Review Board; (4) responsible city officials failed to view the film as a whole; (5) there were no safeguards to preclude an entirely arbitrary judgment on the Board's part; (6) the appeal to the mayor did not provide for a hearing *de novo;* (7) no statement issued to explain refusal of the permit. The Court concluded that the ". . . *Times Film* case does not provide *carte blanche* authorization for *ad hoc,* unfair, abortive municipal licensing procedures," but it does recognize the city's power to impose prior restraints on movies. However, the system must guarantee that no unreasonable strictures on individual liberty will result from its application.[81]

Pennsylvania fared no better than Chicago in its attempt to provide the "proper system." In *William Goldman Theatres, Inc. v. Dana,*[82] the Pennsylvania Supreme Court declared the Motion Picture Control Act[83] unconstitutional. The statute was quite comprehensive and required (1) that the film be registered forty eight hours prior to the first showing, (2) that the exhibitor furnish an exact copy of the film upon request of the Commission, (3) that a majority vote of the Board of Censors could disapprove it or label it unsuitable for those under seventeen years of age. Right of appeal to the Board and to a reexamination in the presence of two Board members was assured in addition to right of appeal to the Court of Common Pleas of the proper county. Criminal sanctions authorized for violation of the act were a fine of $400 to $1000 or a prison sentence not exceeding six months.

In declaring the act unconstitutional, the Pennsylvania Supreme Court considered a number of procedural pitfalls in the drafting of censorship statutes. The requirement that the film be registered forty eight hours prior to exhibition was declared a prior restraint and consequently repugnant to the Constitution. A fee for such registration was considered an unconstitutional licensing of free speech. Concerning the lack of provision for a jury trial, the court stated that constitutionally protected rights are not to be so adroitly subverted and that the issue of obscenity is to be decided by ". . . an impartial jury of the vicinage . . ." and not "by the artful device of granting administrative officials the power to disapprove the utterance if they think it is obscene. . . ."[84] The Commission was composed of three persons selected by the governor without statutory standards for education or competency. Such deficiency rendered its composition unconstitutional. The Commission, in effect, supplanted the jury's function, but no provision was made for challenge, peremptorily or for cause.

With respect to independent judicial determination, the statute provided for an appeal to the court of common pleas from the Commission's

81. Times Film Corp. v. City of Chicago, *supra* note 79, at 50.
82. 405 Pa. 83, 173 A.2d 59 (1961).
83. PA. STAT. ANN. tit. 4, § 70.1-14 (1959).
84. 405 Pa. 83, 95, 173 A.2d 59, 65 (1961).

decision, but did not provide for a trial on the issue of obscenity. Procedural due process was further violated by the provision for criminal sanctions, without proof of obscenity, but upon the mere showing of an unregistered or unapproved film. These findings were, in effect, recommendations and should be taken as such by state and municipal lawmakers, especially those in Pennsylvania.

In its most recent decision[85] in this area, the Supreme Court held a Maryland Statute[86] unconstitutional because of the following provisions: (1) upon the censor's disapproval of the film, the *exhibitor* was to assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression; (2) once the film was disapproved, exhibition was prohibited pending judicial review, however protracted; and (3) no assurance of prompt judicial determination existed. The Court specified three procedural safeguards essential to a movie censorship statute if it is not to be repugnant to the First Amendment. First, the statute must place the burden of instituting judicial proceedings upon the censor. Second, any restraint prior to judicial review can be imposed only briefly in order to preserve the *status quo.* Third, provision must be made for prompt judicial review. The Court also held that a State may require submission of a film prior to its showing, but this ". . . requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination. . . ."[87]

VIII.

CONCLUSION

Prior restraint by an administrative or law enforcement agency is not permitted. Censorship boards or commissions may be set up, if standards of education and competency of its members are designed to guard against arbitrary decisions. Decisions by such commissions may not be used to threaten a publisher, distributor, or vendor. It is submitted that decisions by such commissions should be used only to aid law enforcement agents in obtaining possibly objectionable material. Such materials should then be presented to a judge and subjected to at least an *ex parte* hearing as required by *Kingsley Books, Inc. v. Brown.* If the judge in an *ex parte* hearing finds the material obscene, the defendant should be entitled to an immediate full hearing before any limited injunction is issued. If, after the hearing, the judge believes the material to be obscene, there should be a provision for a trial by jury within a few weeks. Whether the action is civil or criminal, it must provide adequate safeguards for our fundamental freedoms.

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85. Freedman v. Maryland, 380 U.S. 51 (1965).
86. MD. ANN. CODE art. 66A, § 2 (1957).
87. Freedman v. Maryland, *supra* note 85, at 58.