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Constitutional Law -- Freedom of Speech -- Obscenity 1958-1960

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NOTES

CONSTITUTIONAL LAW — FREEDOM OF SPEECH — OBSCENITY 1958-1960*

Introduction

The problem of obscenity, as has been indicated by developments in the past two years, is one which concerns both local and federal government as well as religious and social groups. As might be expected, in an area which involves a delicate balancing of the public interest in free speech with the public interest in the moral fabric of society, there has been a wide divergence of views, not only as to what action should be taken in the case of obscene literature or motion pictures but also as to whether or not a particular book, picture or pamphlet is actually obscene. It is the purpose of this section of the Religious Institutions and Values Survey to examine the legal developments in this field since 1958. Among the more important problem areas which will be discussed are whether obscene publications are constitutionally protected, the problem of prior restraint, the question of measures which may be taken to protect youth from material which, although not likely to be morally detrimental to adults, might quite possibly have a deleterious effect upon youth, and the question of who shall decide what is and what is not obscene.

The Free Speech Issue

It was not until *Roth v. United States*¹ in 1957 that obscenity was held by the Supreme Court of the United States to be not within the area of constitutionally protected speech and press. While the Court in earlier cases had reviewed obscenity convictions, the direct question of whether or not the First and Fourteenth Amendments protected obscene material by guaranteeing the freedom of the press and freedom of speech against governmental infringement had never been directly passed upon.² However, some of these earlier cases did contain dicta to the effect that obscenity was not entitled to the protection of the Constitution.³

The *Roth* case was actually a review of two lower court cases. In *United States v. Roth*⁴ the Second Circuit affirmed the conviction of a businessman engaged in the publication and sale of books, photographs and magazines on an indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute.⁵ The defendant contended *inter alia*

* Final installment in THE LAWYER'S 1960 *Religious Institutions and Values Survey*.

1 354 U.S. 476 (1957).

2 See cases cited *id.*, at 481, n. 9.

3 See cases cited *id.*, at 481.

4 237 F.2d 796 (2nd Cir. 1956).

5 18 U.S.C. § 1461 (1958).

Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and —

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both

that the provisions of this statute violated the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." In *People v. Alberts*⁷ the defendant, who conducted a mail-order business, was convicted under a complaint charging him with keeping for sale obscene and indecent books, and with writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code.⁸ The defendant contended that the applicable provisions of the California statute infringed the freedoms of speech and press as incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.⁹ The Supreme Court of the United States affirmed both convictions. Mr. Justice Brennan, writing for the court, declared that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."¹⁰ Mr. Justice Harlan concurred in the *Alberts* result, but dissented from the *Roth* holding and declared that the substantive powers of the federal government did not include the power to regulate and control obscenity.¹¹ Mr. Justice Douglas, with the concurrence of Mr. Justice Black, dissented declaring he would give the First Amendment the sweep of its absolute terms and that he would not create an exception to permit the censorship of allegedly obscene literature.¹² He remarked:

[I]f the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. . . .

The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.¹³

Despite the broad declaration by the majority in *Roth* that obscenity was not constitutionally protected, other intriguing questions involving the measures which might be taken to suppress obscene literature without violating the First Amendment remained to be decided. It was, for example, not until the decision in *Smith v. People*¹⁴ that the Supreme Court declared that the element of scienter, *i.e.*, knowledge by a bookseller of the obscene contents of a book—could not be ignored.¹⁵ The Court, in striking down a conviction under a Los Angeles ordinance¹⁶ imposing strict criminal liability on a bookseller in whose possession there was found obscene

6 U. S. CONST. amend. I.

7 138 Cal. App. 2d Supp. 909, 292 P.2d 90 (1955).

8 Every person who wilfully and lewdly, either . . .

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure . . .

6. . . . is guilty of a misdemeanor CAL. PEN. CODE, § 311.

9 U. S. CONST. amend. XIV, § 1.

10 354 U.S. at 484.

11 *Id.* at 496-508.

12 *Id.* at 508-14.

13 *Id.* at 513.

14 361 U.S. 147 (1959).

15 *People v. Shapiro*, 177 N.Y.S.2d 670 (1958) held that scienter was not required. But *Moens v. United States*, 267 Fed. 317 (D.C. 1920) required knowledge; and see cases cited in *Commonwealth v. Blumenstein*, 396 Pa. 417, 153 A.2d 227, 228 (1959). A.L.I. MODEL PENAL CODE § 207. 10 (7) (Tentative Draft No. 6, 1957).

16 LOS ANGELES, CAL., MUNICIPAL CODE § 41.01.1:

INDECENT WRITING, ETC. — POSSESSION PROHIBITED: It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind

material, did so on the ground that such an ordinance might "tend to work a substantial restriction on freedom of speech." The Court reasoned:

By dispensing with any requirement of knowledge of the contents of the books on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the book he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.¹⁷

Smith, by ruling out the possibility of imposing strict criminal liability upon those selling obscene literature, raises interesting problems in regard to the enforcement of "obscenity" statutes. The Court left undecided the question of "How much or how little awareness that a book may be found to be obscene suffices to establish scienter, or what kind of evidence may satisfy the how much or the how little. . . ."¹⁸ The problem of proof in *Smith* invites speculation on the constitutionality of a provision recommended by the American Law Institute in the obscenity section of the Model Penal Code. This provision requires scienter but creates a rebuttable presumption that a person who disseminates obscene material knows of the existence of those portions of the material which render it obscene.¹⁹ The majority in *Smith*, in referring to the problem of proof, declared:

Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in providing his awareness of its contents. *The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.*

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; *whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be* (Italics added).²⁰

In this regard it is interesting to note that the majority in *Smith* referred to the Model Code provision in a footnote which declared: "Common law requirements for the dissemination of obscene matter strictly adhered to the requirement of scienter."²¹ This might indicate approval of the Model Code provision.

Another free speech question which has not yet been definitively settled by the Supreme Court is whether or not the Constitution permits prior restraint of obscene material. In *Near v. Minnesota*²² the Supreme Court barred as unconstitutional the granting of a permanent injunction against the publication of a newspaper found to be scandalous and defamatory. The Minnesota courts had upheld such an injunction granted under the provisions of a Minnesota statute.²³ The court held that such an injunction was an unconstitutional restraint upon the

17 361 U.S. at 153-54.

18 *Id.* at 161.

19 "A person who disseminates obscenity or who with purpose to disseminate creates, buys, possesses or procures obscenity is presumed to know the existence of those parts, features or contents of the material which render it obscene." A.L.I., MODEL PENAL CODE § 207.10(7) (Tentative Draft, No. 6, 1957).

20 361 U.S. at 154.

21 *Id.* at 153, n. 9.

22 283 U.S. 697 (1931).

23 MINN. SESS. LAWS 1925, ch. 205 § 1:

Any person who . . . shall be engaged in the business of regularly or cus-

liberty of the press guaranteed by the Fourteenth Amendment. However, the court was careful to point out:

[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. . . .

[T]he primary requirements of decency may be enforced against obscene publications.²⁴

This dictum from *Near* was relied upon by Mr. Justice Frankfurter in his opinion for the court in *Kingsley v. Brown*²⁵ which held that a New York statute²⁶ authorizing an injunction *pendente lite* against the sale and distribution of allegedly obscene material did not violate constitutional safeguards. Mr. Justice Frankfurter declared that the phrase "prior restraint" was not a "self-wielding sword." He distinguished *Near* upon the dual grounds that: (1) Minnesota had empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found to be offensive, whereas in the instant case

tomarily producing, publishing or circulating, having in possession, selling or giving away

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical is guilty of a nuisance . . . may be enjoined.

24 283 U.S. at 716.

25 *Kingsley Books v. Brown*, 354 U.S. 436 (1957).

26 N.Y. CRIM. PROC. § 22-a

Obscene prints and articles; jurisdiction. The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints or articles, as hereinafter specified:

1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town, or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons or complaint in an action brought by such officer of any city, town, or village pursuant to this section is chargeable with knowledge of the contents thereof.

the courts had enjoined only the future dissemination of a particular publication alleged to be obscene pending a trial upon the issues.

(2) *Near* involved not obscenity but matter found to be derogatory to a public officer. The fact that the *Kingsley* decision was by a five to four margin has led one commentator to express the "hope" that this decision is not the Supreme Court's last word on the subject.²⁷ Mr. Chief Justice Warren dissented on the ground that the manner of use should determine obscenity and, therefore, the conduct of the individual defendant, rather than the quality of art or literature, should be tried. Justices Black and Douglas found an encroachment upon First Amendment freedoms, and Mr. Justice Brennan found a fatal defect in the failure of the obscenity statute to provide for a right to trial by jury. What is needed in the area of "prior restraint" is a clearer determination of the meaning of the term. It would seem that it should be restricted to the type of thing which was involved in *Near*, i.e., prohibition of the mere publication of future materials, and should not be extended to include the activities which were involved in *Kingsley v. Brown*. In the light of *Roth*, the decision in *Kingsley* seems warranted. The law should enjoin the distribution of books which have been published, and deemed obscene after such publication and judicial proceedings based upon full knowledge of the material in question. If the definition is so restricted, it will become possible to say, categorically, that "prior restraint" is not permitted by the First Amendment.

Thus far the cases which we have considered dealt with problems of obscene literature. It has been suggested that motion pictures may require a different treatment.²⁸ First Amendment protection was at first denied to motion pictures because the exhibition of film was a business conducted solely for profit.²⁹ However, this position was progressively modified,³⁰ until, in 1952, the Supreme Court, in the *Burstyn* case,³¹ held motion pictures to be within the protection of the First and Fourteenth Amendments. In *Burstyn* a state was not permitted to ban a picture found to be "sacrilegious." Since this decision state cases banning motion pictures have been summarily reversed,³² but neither the *per curiam* reversals nor the *Burstyn* decision decided that a state may not censor or license motion pictures found to be obscene.³³ In view of the ruling in the literature cases, that obscenity is not within the protection of the First Amendment, and the testing of motion picture cases by the *Roth* definition of obscenity,³⁴ it would seem that obscene motion pictures are no greater protection than obscene literature.³⁵

27 PRITCHETT, *THE AMERICAN CONSTITUTION* 411 (1959).

28 If there be a capacity for evil [in the motion picture] it may be relevant in determining the permissible scope of community control. . . . Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own particular problems. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952).

29 *Mutual Film Corporation v. Industrial Commissioner of Ohio*, 236 U.S. 230 (1915).

30 *U.S. v. Paramount Picture*, 343 U.S. 131, 166 (1948) (dictum): "We have no doubt that moving pictures like newspapers and radios, are included in the press whose freedom is guaranteed by the First Amendment."

31 *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

32 *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957); *Holmby Production Inc. v. Vaughn*, 350 U.S. 870 (1955); *Superior Films v. Department of Education*, 346 U.S. 587 (1954); *Gelling v. Texas*, 343 U.S. 960 (1952).

33 In reversing the latest motion picture case the Court carefully pointed out that the state court had "unanimously and explicitly rejected any notion that the film is obscene," and cited *Roth. Kingsley Int. Pic. Corp. v. Regents*, 360 U.S. 684, 686 (1959).

34 *Roth* was cited in *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957) and again in *Kingsley Int. Pic. Corp. v. Regents*, 360 U.S. 684 (1959). But see *Commonwealth v. Blumenstein*, 396 Pa. 417, 153 A.2d 227 (1959) which appeared to disregard much of the language approved in *Roth*.

35 FRAENKEL, *THE SUPREME COURT AND CIVIL LIBERTIES* 33-35 (1960). In *Times Film Corp. v. Chicago*, 272 F.2d 90 (7th Cir. 1959), the pleadings were framed in such a manner as to force the court to answer the question whether a motion picture licensing status was

A Definition and Its Application

The need for a definition of obscenity which sets up fairly definite standards that may reasonably be relied upon as a guide for future conduct is twofold. First, the due process clause requires such a definition as a prerequisite for the imposition of criminal liability.³⁶ Secondly, since the Supreme Court has held that "obscenity" is not protected by the free speech and press guarantees of the Constitution, the courts have need of such a definition to guide them in determining whether or not these constitutional guarantees may be invoked in each particular factual situation.

It was not until the decision in *Regina v. Hicklin*³⁷ in 1868 that a common law court attempted to enunciate a test for obscenity. The court there announced the test as being: "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."³⁸ As this test was subsequently applied it became one under which isolated and distinct passages of a publication could be the basis for a finding of "obscenity," and depended only on the court's belief that the publication was capable of reaching a hypothetical person to whom it might be morally harmful.³⁹ This "isolated passage" application of the *Hicklin* doctrine was subsequently repudiated in *United States v. One Book Entitled Ulysses*,⁴⁰ where the Second Circuit declared that "the proper test of whether a given book is obscene is its *dominant effect*."⁴¹ (Italics supplied).

This was the state of the law when the Supreme Court in *Roth v. United States*,⁴² in addition to answering the question of whether or not obscenity was protected by the Constitution, supplied a new definition of obscenity. The Court declared the proper test to be: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."⁴³

The Court elaborated upon what was meant by "prurient interest" by referring⁴⁴ to the American Law Institute's Model Penal Code which provides:

. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., 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 matters⁴⁵

In the recent "Lady Chatterley's Lover" movie case,⁴⁶ the Supreme Court pointed out that this definition of "obscenity" does not encompass the advocacy of ideas, however unpopular or unconventional they may be. The picture in question had "struck at the very heart of constitutionally protected liberty," namely, the and proper pattern of behavior. The Court stated⁴⁷ that New York had ruled that the picture was not obscene⁴⁸ and declared that the State, in banning the picture

constitutional. The Seventh Circuit refused to answer, labelling the issue "abstract." Certiorari has been granted. 80 Sup. Ct. 672 (1960).

36 *Winters v. New York*, 333 U.S. 507 (1948); see FRAENKEL, *THE SUPREME COURT AND CIVIL LIBERTIES* 63-64 (1960).

37 L.R., 3 Q.B. 360 (1868).

38 *Id.* at 371.

39 See *U.S. v. Rosen*, 161 U.S. 29 (1895).

40 72 F.2d 705 (2nd Cir. 1934), affirming 5 F.Supp. 182 (S.D. N.Y. 1933).

41 *Id.* at 708.

42 354 U.S. 476 (1957).

43 *Id.* at 489. The *Hicklin* rule was discarded by the court as being now "unconstitutionally restrictive of the freedoms of speech and press."

44 *Id.* at 487, note 20.

45 A.L.I., *MODEL PENAL CODE* § 207.10(2). (Tentative Draft No. 6, 1957).

46 *Kingsley Int. Pic. Corp. v. Regents*, 360 U.S. 684 (1959).

47 360 U.S. at 686.

48 Whether the New York court did so rule is open to question. See the decision by Judge Conway in *Kingsley Int. Pic. Corp. v. Regents*, 175 N.Y.S.2d 39, 151 N.E.2d 197 (1958).

But see *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959), where a

had "struck" at the very heart of constitutionally protected liberty," namely, the freedom to advocate ideas.⁴⁹ The plain implication of this decision is that it is the manner of portrayal, rather than the ideas portrayed, which controls the legal definition of obscenity.

Despite this clarification of the definition of obscenity there remain problems in regard to the application of the definition to particular classes of situations. One of these problem areas concerns material which, though it could be found to be obscene in relation to the average man in the community, serves a valid literary or educational purpose as to certain groups. Although the Supreme Court in *Roth* quoted with seeming approval the following portion of the trial judge's charge to the jury — ". . . The test is not whether it . . . would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved . . ." — at least one lower federal court has indicated that the average person in the community test does not apply where the material alleged to be obscene is destined for the hands of a group with a valid non-prurient interest.⁵² In this case, which was decided not long after *Roth*, the government sought the confiscation and destruction of certain photographs, books, and other articles under the provisions of the Tariff Act of 1938.⁵³ The materials, which the court assumed to be pure pornography without any literary merit, had been imported by the Institute for Sex Research, Inc., at Indiana University for the purpose of furthering its study of human sexual behavior. The court, in refusing to allow the government to impound it the data, held that because of the limited audience which would have access to the material, the average-man-in-the-community test was inapplicable. Such a test, the court declared, was applicable only where the material was to be distributed to the public. Viewed in this light, the court remarked that the average man test was but a particular application of a broader rule which judges the material by its appeal to all those it is likely to reach.⁵⁴ The court noted the argument of the government that such a decision would render the prohibition of the Tariff Act unworkable but replied that it failed "to see why it should be more difficult to determine the appeal of the libelled matter to a known group of persons than it is to determine its appeal to an hypothetical 'average man.'" ⁵⁵

A somewhat related question arises in regard to legislation enacted to prevent the dissemination of material which, although not obscene under the average man test, is dangerous to children.⁵⁶ The Supreme Court has considered the question of general restrictions, but it has not directly ruled upon the validity of a restriction limited to children. In *Butler v. Michigan*⁵⁷ the Court held that a Michigan

federal district court lifted a ban which had been placed upon the mailing of the book, "Lady Chatterley's Lover," by the Postmaster General. The court specifically held that the book did not come within the meaning of obscenity as used in the federal obscenity statute.

49 360 U.S. at 688.

50 See *Id.* at 688: "Rather the New York Court of Appeals tells us that the relevant portion of the New York Education Law requires the denial of a license to any motion picture which approvingly portrays an adulterous relationship, *quite without reference to the manner of its portrayal.*" (Italics added).

51 354 U.S. at 490.

52 United States v. 31 Photos, 156 F. Supp. 350 (S.D.N.Y. 1957).

53 46 Stat. 688 (1930), 19 U.S.C. § 1305(a) (1958).

54 As an alternate ground for its decision the court noted the possibility of holding that a conditional privilege existed in favor of scientists and scholars to import material which would be obscene in the hands of the average person. 156 F. Supp. at 358. Compare A.L.I., MODEL PENAL CODE § 207.10(4)(b) (Tentative Draft No. 6, 1957), exempting a "dissemination to institutions or individuals having scientific or other special justification for possessing such material."

55 156 F. Supp. at 359.

56 See Note, "For Adults Only": *The Constitutionality of Governmental Film Censorship by Age Classification*, 69 Yale L.J. 141 (1959) for an excellent analysis.

57 352 U.S. 380 (1957).

statute⁵⁸ which made it a crime to distribute to the general public material which was morally detrimental to minors violated the due process clause of the Fourteenth Amendment. Mr. Justice Frankfurter, in an opinion for the court, declared: "We have before us 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."⁵⁹ A natural implication of this language may be that if the legislation had been reasonably restricted to the evil, *i.e.*, if it had merely provided for punishment in cases of distribution to minors, it would have been constitutional. This interpretation is given added weight by the Court's reference to the fact that the conviction was not under an available statute which specifically made criminal the distribution of obscene material to minors.⁶⁰

There is language in the *Roth* case which might appear to indicate a contrary result. In referring to the "average man in the community" test, the majority approved the trial judge's instruction that: "The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish. . . ." ⁶¹ However, it again should be noted that the court was there dealing with a question of general censorship rather than a limited restriction upon distribution.

The Supreme Court of Rhode Island recently has upheld the constitutionality of a statute⁶² which prohibits the distribution of obscene publications to persons under eighteen years of age.⁶³ The Court distinguished the *Butler* case on the ground that the Michigan statute there involved did not limit its prohibition to sales to minors.⁶⁴ However, the court did not indicate whether it was applying a special test of obscenity or whether the material in question satisfied the average-man-in-the-community test. A system of limited censorship of motion pictures directed to the protection of minors was held unconstitutional in *Paramount Film Distributing Corporation v. City of Chicago*,⁶⁵ the court expressly rejected a test of obscenity which was based upon the effect of the movie in question upon the average person twenty-one years of age. Petitioner had been granted only a limited license to show the film, "Desire Under the Elms," to persons over twenty-one, pursuant to the provisions of an ordinance of the City of Chicago.⁶⁶ The federal district court held the ordinance to be unconstitutional, resting its decision upon three grounds: (1) a motion picture cannot be obscene as to juveniles and not as

58 MICH. STAT. ANN. ch. 286a § 28.575 (1954), repealed by Pub. Acts 1957, No. 265.

59 352 U.S. at 383. See also *Goldstein v. Commonwealth*, 200 Va. 25, 104 S.E.2d 66 (1958), in which a Virginia statute, similar to that of Michigan, was held unconstitutional on the basis of *Butler*. Nevertheless, one lower New York Court without discussing the implications of *Butler*, has sustained a conviction under a statute prohibiting the general distribution of obscene literature where it was found that the normal distribution of the magazine would place it in the hands of youth. Noting that the statute did not make fitness for youths' reading the test for all literature, the court declared "it cannot be supposed that the legislature intended to give youth less protection than the community as a whole by the general proscription of that which is obscene." *People v. Richmond County News Inc.* 13 Misc.2d 1068, 179 N.Y.S.2d 76, 81 (1958).

60 352 U.S. at 383, referring to MICH. STAT. ANN. ch. 286a § 28.337 (1938).

61 *Roth v. United States*, 354 U.S., at 490 (1957).

62 R. I. GEN. LAWS ANN. 11-31-10 (1956).

63 *State v. Settle*, 156 A.2d 921 (R.I. 1959).

64 *Id.* at 926. Cf. *Katzev v. County of Los Angeles*, 52 Cal.2d 360, 341 P.2d 310 (1959); *Adams v. Hinkle*, 51 W.2d 763, 322 P.2d 844 (1958). The laws struck down here applied broadly to all comic books regardless of their content.

65 172 F. Supp. 69 (N.D. Ill. 1959).

66 CHICAGO, ILL., MUNICIPAL CODE § 155-5 (1939) this code provides in pertinent part:

In all cases where a permit for the exhibition of a picture . . . has been refused . . . because the same tends toward creating a harmful impression on the minds of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age, the commissioner of police may grant a special permit limiting the exhibition of such pictures . . . to persons over the age of twenty-one years. . . .

to adults; (2) the statutory standard was hopelessly indefinite; (3) the age limit of twenty-one was unreasonable. In reflecting the test of the statute, *i.e.*, effect upon those under twenty-one, Judge Sullivan, speaking for the court, declared:

Assuming for the moment (without deciding) that the words "obscene and immoral" have a definite and clear meaning, it is apparent that they express absolute concepts. A picture is either "obscene" ("offensive to taste; foul; loathsome") or it is not. And this is true of the other standards mentioned in section 155-4. For example, a picture either does or does not "portray lack of virtue of a class of citizens of any race, color, creed or religion." None of these criteria can change with the age of the beholder. To say, as the Ordinance does, that a thing may be "immoral" so far as one group of persons is concerned does violence to the English language.⁶⁷

The decision appears open to immediate criticism because of its hasty rejection of limited censorship. As has been indicated above, neither *Roth* nor *Butler* foreclosed such a possibility, and *Butler* contained implications that such censorship would be held constitutional. Furthermore, at least the American Law Institute, which has on several occasions been cited with approval by the Supreme Court in obscenity cases,⁶⁸ does not seem to agree with Judge Sullivan that it is so "apparent" that the word obscenity expresses an "absolute concept," and that any variation in meaning for different age groups "does violence to the English language."⁶⁹ The need for special protection for minors especially in regard to motion pictures, as well as the legal basis therefor, has been incisively analyzed elsewhere.⁷⁰

Another major question which has arisen in regard to the application of the *Roth* definition of obscenity is: "Who shall decide what is and what is not obscene?" The Supreme Court has not directly ruled upon this question. It has, however, reversed *per curiam* several recent decisions from the Courts of Appeals in which findings of obscenity has been sustained.⁷¹ It is possible to conclude that some of these reversals resulted from a review of the facts by the Supreme Court and an original finding by that Court that the material involved was not obscene.⁷² This would be consistent with opinions expressed elsewhere by Mr. Justice Frankfurter⁷³ and Mr. Justice Harlan.⁷⁴ On the other hand, such an approach has been criticized.

67 172 F. Supp. at 71.

68 *Roth v. United States*, 354 U.S. 476 (1957); *Smith v. California*, 361 U.S. 147 (1959).

69 See A.L.I., MODEL PENAL CODE, § 207.10(2) (Tentative Draft No. 6, 1957).

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the circumstances of its dissemination to be specially designed for or directed to such an audience."

See also *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D. N.Y. 1957), where the court held that material which was concededly obscene under the average man test was not obscene when the recipient was the Kinsey Institute for Sex Research.

70 Note, "For Adults Only": *The Constitutionality of Governmental Film Censorship by Age Classification*, 69 *Yale L.J.* 141 (1959). The article concludes that "if the ultimate purpose of banning 'obscene' material is the protection of society from its influence, obscenity should depend upon the susceptibility of the exposed group." *Id.* at 145.

71 *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957); *Mounce v. United States*, 355 U.S. 180 (1957), vacating 247 F.2d 148, (9th Cir. 1957) which reversed 4 N.Y.2d 349; *One, Incorporated v. Olesen*, 355 U.S. 371 (1958), reversing 241 F.2d 772 (4th Cir. 1957); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958), reversing 249 F.2d 114 (D.C. Cir. 1957).

72 See 26 U. CHI. L. REV. 309 for a discussion of the possible reasons for the reversals of these cases.

73 See the concurring opinion of Mr. Justice Frankfurter in the "Lady Chatterley's Lover" movie case, approving such an "instance by-instance, case-by-case" approach. *Kingsley Int. Pic. Corp. v. Regents*, 360 U.S. 684, 696-97 (1959).

74 The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppressable within constitutional standards. Since these standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

In agreeing to strike down New York's ban on the movie "Lady Chatterley's Lover," Mr. Justice Black remarked:

I . . . but add a few words because of concurring opinions by several Justices who rely on their appraisal of the movie . . . for holding that New York cannot constitutionally ban it. . . . If despite the Constitution [Black would strike down all prior censorship of movies] . . . this nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found.⁷⁵

Mr. Justice Harlan in the *Roth* case would have struck down the federal obscenity statute, as applied, because of the inappropriateness of a single uniform application of the obscenity test for the Nation. He warned that "The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted." And Mr. Justice Brennan has declared that in these cases the question of obscenity should be submitted to the jury. He reasons:

The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards.⁷⁶

Conclusion

As the preceding section has indicated, only material with the legal definition of obscenity can and should be controlled by governmental action. Such action is justified by the interest of the state in public morality. Yet the Supreme Court has held that the State interest in morality does not permit it to suppress the advocacy of immoral ideas, the presentation of which cannot be characterized as "prurient," a decision probably justified as a safeguard upon the rights of free speech. But, in regard to certain impressionable segments of the population, especially children a program of limited censorship, it is submitted, is completely in order.

Such limited control is as far as the state may go under the First and Fourteenth Amendments.⁷⁷ For those who desire to place greater limitations upon the action of publishers and distributors of books and pictures, and producers and distributors of motion pictures, the answer lies in the formation of and adherence to vocal private groups and a non-governmental design to build up public sentiment against morally objectionable displays and publications. With this as an objective such organizations as the Legion of Decency, the National Organization for Decent Literature, and the Churchmen's Commission for Decent Publications will continue to serve a worthwhile function by promoting discipline and restraint in the choice of reading material and motion pictures.

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Roth v. United States, 354 U.S. 476, 497 (1957) (concurring in part, dissenting in part).

75 Kingsley Int. Pic. Corp. v. Regents, 360 U.S. 684, 690 (1959).

76 Kingsley Books v. Brown, 354 U.S. 436, 448 (1957) (dissenting opinion). Mr. Justice Brennan's position was rejected by the majority of the Court.

77 A disposition in this direction has been recognized, at least on the administrative level. See Manual Enterprises, Inc., Post Office Dept. No. 1/246 (28 April 1960), 28 U.S.L. WEEK 2570 (May 17, 1960). The department's order, barring from the mails a magazine for homosexuals, seems to have relied more on the emotional reaction of the rather small group to whom the magazine was directed than to the average man in the community.