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SURVEY OF A DECADE OF DECISIONS ON THE LAW OF OBSCENITY†

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PERCEPTIVE NON-LAWYERS are asking: "What is happening to the law of obscenity? What are the lawyers and judges doing to it? It appears that the legislatures and the executive agencies are trying to do a good job of controlling a social evil, but they are being frustrated by judges and lawyers. Every time we read the papers these past few years, some obscenity law has just been upset. Now *we're* getting upset. We have children, and the sex environment in this country is getting pretty intrusive. It wasn't like this when we were kids; there wasn't any trouble enforcing laws against obscenity then. The federal constitution hasn't changed. So what's happening?"

In trying to answer that question for lawyers and non-lawyers alike, it will be useful to survey the principal cases of the past decade. They will show that the non-lawyers are correct: there has been nothing like the past ten years in the history of what Mr. Justice Brennan describes as a universal agreement that obscenity should be legally restrained. American legislatures at municipal, state, and national levels have long since acted to impose such legal restraints. Their action demonstrates their belief that obscene materials in fact existed in their political unit in appreciable quantities, at popular prices, and with ready accessibility to the general public; the materials therefore constituted a significant social evil (and not merely an occasion of sin for individuals), which

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† This article was originally written for oral delivery at a dinner concluding a one-day conference of federal, state and local officers concerned with the enforcement of laws on obscenity in the New England States area, sponsored by the Rhode Island State Youth Commission at Newport, Rhode Island, in October of 1961, under the direction of Mr. Albert McAloon, the Executive Director of the Commission. A substantial number of those in attendance were non-lawyer professional people. The talk was intended to be informal and was addressed to both the lawyers and the non-lawyers in the audience. The writer has elected to maintain the same approach in this article because of the utility which the article may have for the many non-lawyers in local citizens' groups throughout the country.

social evil adversely affected the general welfare of their community. They must also have thought that the particular form of legal control which they devised was practical, that the public would support it, and that it would in fact control the social evil without at the same time creating *other* social evils equally damaging to the general welfare of their community. Only during the past decade have these laws been shattering on the rock of the federal constitution. The fact is that today the federal constitution as presently construed has made the law a slender reed indeed on which to lean for the effective social control of the universally conceded social evil of obscenity.

The truth is that, under the federal constitution today, the protection which American law can afford against the social evil of obscenity is minimal; on the other hand, there is still *some.*

To answer the question of what is happening to our laws on obscenity, one would, the writer thinks, start in 1952 with the case of *Joseph Burstyn, Inc. v. Wilson*[1] which litigated, among other issues, the federal constitutionality of a New York film licensing statute which directed that certain types of films should not be licensed for public exhibition: those which, in whole or in part, were obscene, indecent, immoral, inhuman, corruptive of morals or incitational to crime, or sacrilegious. The film "The Miracle" was refused a license for being sacrilegious, and the United States Supreme Court held that the state law which directed such refusal was in violation of the due process clause of the fourteenth amendment, because the adjective "sacrilegious" was unreasonably vague when used to control forms of communication within the guarantees of free speech and free press in the first amendment. For the first time, this case brought films, which were being subjected to state licensing control, within the protection of the federal constitution, thereby overruling a 1915 decision in *Mutual Film Corp. v. Industrial Comm'n*[2] that films which were being subjected to state control were *not* within the protection of the federal constitution. The focus of both cases is usually said to be whether films constituted a form of free speech within the protection of the first amendment; in 1915 the answer had been no, but in 1952 it was yes. But even if the answer in 1915 had been yes, the same result as that reached in *Mutual Film* might still have been reached, because the "due process" clause of the fourteenth amendment had not then been construed to impose upon states the same restrictions in respect of free speech which the first amendment imposed upon the federal government. This was a development which did not occur until *Gitlow v. New York*[3] ten years later.[4]

[1] 343 U.S. 495 (1952).

[2] 236 U.S. 230 (1915).

[3] 268 U.S. 652 (1925).

[4] Nor does it seem to have occurred to anyone in 1915 that, though films were not a federally protected form of free speech, the state laws might still be in violation of the fourteenth amendment's due process clause, not for infringing on free speech, but for being so vague and indefinite in describing films which would not be licensed as to make it unreasonably difficult for a film producer or exhibitor to determine for himself whether his film would or would not be licensed, so that his property, if not licensed, could be regarded as having been taken by the state laws without due process. In the later *Burstyn* case, this view of the possible operation of the due process clause seems to have been accepted only because the films were first held to be a form of speech within the protection of the first amendment.

As a result of the *Burstyn* decision, for five years after 1952 the protectors of free speech had great sport sniping at adjectives in state film licensing statutes which had gone unchallenged for thirty-five years, but which were now suddenly obsolete because they described movies in terms which were unconstitutionally vague and indefinite. The attack expanded to pick up similar flaws in laws relating, not to movies, but to publications and even to live stage presentations, all of which had always been within the ambit of constitutionally protected free speech. The first decisions were in the federal courts, but later, of course, state supreme courts fell into line on the federal issue.

For example, in *Gelling v. Texas*,[5] a Texas statutory phrase "prejudicial to the best interests of the people" proved too vague. In *Superior Films, Inc. v. Department of Educ.*,[6] an Ohio statute failed for vagueness by requiring licensable films to be of a "moral, educational, or amusing or harmless character." In *Commercial Pictures Corp. v. Regents of the University of New York*,[7] New York failed again for vagueness with the adjective "immoral" and the clause "would tend to corrupt morals." In *Holmby Prods., Inc. v. Vaughn*,[8] a Kansas statute failed for vagueness on the phrase "obscene or immoral." In *Hallmark Prods., Inc. v. Carroll*,[9] Pennsylvania's Supreme Court struck down for vagueness the whole following litany: "sacrilegious, obscene, indecent or immoral or such as tend to debase or corrupt morals."

It was at this stage, in mid-1957, when legislators were beginning to wonder whether even Roget's *Thesaurus* could come up with a constitutionally definite adjective or adjectival phrase, that the celebrated consolidated cases of *Roth v. United States* and *Alberts v. California* were decided by the United States Supreme Court.[10] An adequate adjective was finally found — adequate not alone when applied to movies but even when applied to publications, and adequate as well in state as in federal laws. It was the single, simple adjective "obscene." It had appeared before both in the *Holmby* and *Hallmark* cases, but conjoined to inadequate words and not in stark solitude.

The *Roth-Alberts* decision must be explored in detail because it is indeed a landmark decision in the recent history of the law of obscenity — the primary basis for such minimal protection as the law can extend to a community, conformably to the federal constitution.

In the *Roth* case, Mr. Roth was indicted by a federal grand jury on twenty-six counts which charged him with the knowing deposit in the mails of certain publications declared by Congress to be nonmailable — namely, obscene advertising circulars and an obscene book — all in violation of a federal obscenity statute prohibiting the knowing deposit for mailing of (among other things) any obscene, lewd, lascivious or filthy book or other publication of an indecent character. The defendant was tried by a jury in the Federal District Court for the Southern Dis-

[5] 343 U.S. 960, *reversing per curiam* 157 Tex. Crim. 516, 247 S.W.2d 95 (1952).
[6] 346 U.S. 587 (1954), *reversing per curiam* 159 Ohio St. 315, 112 N.E.2d 311 (1953).
[7] 346 U.S. 587 (1954), *reversing per curiam* 305 N.Y. 336, 113 N.E.2d 502 (1953).
[8] 350 U.S. 870, *reversing per curiam* 177 Kan. 728, 282 P.2d 412 (1955).
[9] 384 Pa. 348, 121 A.2d 584 (1956).
[10] 354 U.S. 476 (1957).

trict of New York and convicted on four of the twenty-six counts. He appealed to the Court of Appeals for the Second Circuit, which affirmed his conviction.[11] The United States Supreme Court then granted his petition for writ of certiorari and brought the case up for final review.[12]

In the *Alberts* case, Mr. Alberts was conducting in the Los Angeles area a mail-order business of selling books, which books he advertised solely by mailed circulars. A complaint was filed against Alberts charging him under the California Penal Code with the misdemeanor of wilfully and lewdly keeping for sale certain obscene books, and of writing and publishing an obscene advertisement of those books. Alberts waived a jury and was convicted in a bench trial in the Municipal Court of the Beverly Hills Judicial District. He appealed to the Appellate Department of the Superior Court of California in and for the County of Los Angeles, which affirmed his conviction.[13] The United States Supreme Court then noted probable jurisdiction and took the case for final review of the federal constitutional issues raised below.[14]

Because the principal federal constitutional issues raised in each case were the same, the Supreme Court consolidated the cases for oral argument and for decision. By a vote of 6-3 in the *Roth* case and of 7-2 in the *Alberts* case, the convictions were affirmed in a decision delivered for the majority by Mr. Justice Brennan.[15]

Mr. Justice Brennan noted that in neither case was there any issue presented as to the obscenity of the material involved, *i.e.*, the application of the respective obscenity statutes to the materials involved was in effect conceded. The only issues, then, related to the federal constitutionality of the obscenity statutes themselves. Two of these federal constitutional issues were common to both cases; in addition, each case presented one further individual constitutional issue.

The two common issues were characterized by Mr. Justice Brennan as primary and secondary:

(1) The primary common issue was whether the respective criminal statutes regulating obscene publications violated the freedoms of speech and press protected against federal encroachment by the first amendment and protected against state encroachment by the fourteenth amendment.

(2) The secondary common issue was whether the respective criminal statutes regulating obscene publications violated the due process guaranteed by the fifth and fourteenth amendments respectively, in that the word "obscene" described the prohibited publication too vaguely to serve as a proper standard for criminal conduct because the word did not mean the same thing to all people everywhere and all the time.

The additional individual issue in the *Roth* case was whether the federal obscenity statute violated the ninth and tenth amendments in that the power to regulate

[11] Roth v. United States, 237 F.2d 796 (2d Cir. 1956).

[12] Roth v. United States, 352 U.S. 964 (1957) (per curiam).

[13] People v. Alberts, 138 Cal. App. 2d 909, 292 P.2d 90 (1956).

[14] Alberts v. California, 352 U.S. 962 (1957) (per curiam).

[15] The Chief Justice concurred in the result of each case. Mr. Justice Harlan concurred in the *Alberts* case, but dissented in the *Roth* case. Mr. Justice Douglas dissented in both cases, in which dissent he was joined by Mr. Justice Black.

obscenity was not delegated to the federal government but was reserved to the states or to the people. Parenthetically, the Court rejected this contention on the ground that the federal power to control obscenity was reasonably incident to the express federal power over mails and commerce.

The additional individual issue in the *Alberts* case was that the federal obscenity statute pre-empted the whole field of control of obscene publications in relation to the mails, so that the California statute, if applied to this strictly mail-order defendant, would violate the supremacy clause of the federal constitution. Parenthetically again, the Court rejected this contention on the ground that the California statute covered many areas of conduct not covered by the federal statute and did not interfere with federal control of the mails.

In raising the common issues, the defendants' sequence of thought was this:

(1) There is no legal definition of "obscene" sufficiently definite (and sufficiently amplified by standards for the guidance of enforcement officials) to comply with the constitutional requirement of due process in a criminal proceeding.

(2) Even if there were such a definition of "obscene," all publications (whether obscene or not) come within the scope of the freedoms of speech and press protected directly or indirectly by the first amendment. As so protected, there is only one way to justify their restraint and that is by proving that they pose a critical danger of antisocial conduct.[16] No such proof has been made, if indeed any such proof can ever be made.

As noted, for Mr. Justice Brennan and the majority, the dispositive question was whether obscenity is utterance within the area of first amendment-protected freedom of speech and press. To that question, he gave the answer: "We hold that obscenity is not within the area of constitutionally protected speech or press."[17] And the reasons he gave were three:

(1) As a matter of legal precedent, though the Supreme Court had never squarely so held, in several prior cases it had assumed that obscenity was not within the protection of the first amendment.

(2) As a matter of constitutional history, the unconditional wording of the first amendment was *not* intended in 1791 to protect every utterance without exception. Specifically, in 1791, obscenity was outside the pale, as were libel, and profanity or blasphemy.

(3) As a matter of functional operation, first amendment protection of speech and press was designed to assure the unfettered interchange of ideas for effective political and social change demanded by the people. Hence, all ideas having even the slightest redeeming social importance are protected, no matter how controversial, unorthodox, or hateful to prevailing opin-

[16] The phrase "clear and present danger" was used, but the writer avoids the phrase because it may introduce a needless distraction as to the present status of that "doctrine." The relevant point here is simply that the Court has held that there are situations in which even first amendment-protected freedoms must submit to appropriate restraint: if it can be proved that the protection afforded by the first amendment to the exercise of one of its preferred freedoms will clearly cause imminent danger to social causes which, under given unusual circumstances, are even more important to the common good, then the normally preferred and protected freedom must submit to such restraint as is reasonably necessary for, and reasonably adopted to, the preservation of the more important value, but no more.

[17] Roth v. United States, 354 U.S. 476, 485 (1957).

ion they may be, unless, under certain circumstances, they are excluded from protection because of their encroachment upon the limited area of even more important social interests. But obscenity has always been regarded as utterance wholly lacking any redeeming social importance. There is really universal agreement that obscenity should be restrained, as witness the International Agreement for the Suppression of the Circulation of Obscene Publications signed by over fifty nations including our own, and as witness the statutory obscenity controls in all our states, and in the federal government from 1842 to date.

And because obscene utterance is not within the scope of first amendment protection, it is unnecessary to consider the critical-danger qualification for utterance which *is* so protected. Hence, no first amendment constitutional guarantees are violated merely because these convictions were had without any proof that the obscene utterance would perceptibly create a critical danger of antisocial conduct, or has induced, or probably would induce, such conduct.

To the secondary constitutional contention that there was no legal definition of "obscene" sufficiently definite to meet the requirement of due process in a criminal proceeding, Mr. Justice Brennan held that American case law had developed a sufficiently definite meaning, which he stated as follows: "Obscene material is material which deals with sex in a manner appealing to prurient interest."[18] The Model Penal Code's definition of "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion" appears in a footnote.[19]

Mr. Justice Brennan proceeded to say that modern American cases had also formulated *standards* for determining obscenity which limit the concept so as adequately to safeguard the first amendment-protected freedoms of speech and press for material which deals with sex in a manner which does *not* appeal to prurient interest. Certain standards initially used by earlier English cases proved unduly restrictive of the protected freedoms because they permitted material to be adjudged obscene merely by the effect of an isolated excerpt on particularly susceptible persons. But the present standards formulated by the modern American cases are proper and may be expressed as follows: the test of obscenity is whether, to the average person, applying contemporary community standards, the dominant theme of the questioned material, taken as a whole, appeals to prurient interest. These standards make the concept "obscene" a reasonably ascertainable norm for criminal guilt, sufficiently precise to afford adequate notice of what conduct is prohibited and so not violative of due process, even though there will be marginal cases wherein their application will be difficult. In these present cases, however, the trial courts followed the proper standards and

[18] *Id.* at 487.

[19] There was no significant difference, in Mr. Justice Brennan's opinion, between this judicial meaning of obscene and the definition tentatively proposed in the American Law Institute's Model Penal Code in these words: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . and if it goes substantially beyond customary limits of candor in description or representation of such matters." *Id.* at 487 n.20.

used the proper definition.[20]

Mr. Justice Douglas, for himself and Mr. Justice Black, dissented chiefly because, under the standards of obscenity accepted by the majority of the Court, criminal punishment may be meted out to a person for trafficking in a publication which merely provokes lustful thoughts, without any proof that those thoughts are ever translated into overt antisocial conduct, which conduct alone constitutes the proper area for governmental controls. No one is even sure that sexually impure thoughts do cause sexually impure antisocial actions. But in any event, public control of the mere stimulation of sexual thoughts or desires, apart from any objective antisocial conduct, can never justify the social loss resulting from the interference with literary freedom which is necessarily entailed. Government is to concern itself with conduct, not with mere utterances. Hence, freedom of expression can be restrained only if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. But, as to mere speech itself, freedom is absolute. Nor is the constitutional test of control of obscenity avoided by holding that the obscene is not within the protection of the first amendment. Except for the libelous utterance in the *Beauharnais v. Illinois* case,[21] the Court has never resolved problems of free speech and press by placing any form of expression beyond the pale of the first amendment. And as against the value of free expression, neither court nor community has any competence to judge that a mere expression has no redeeming social importance; to permit that is to permit judicial and community censorship.

The writer thinks that this dissent can be understood to make this principal point: While no showing of any critical danger need be made in order to justify the criminal restraint of obscene publications (because the majority has held that the obscene is not within the protection of the first amendment), still *some* showing must be made that the obscene exerts *some* adverse effect on the general welfare, because there is no justification for *any* restrictive legislation other than its contribution to the common good. Hence, the constitutional guarantee of *substantive due process* is the constitutional test now involved. In this sense, the restraint must be "closely brigaded with illegal action" in order to meet that test.

On that understanding, the writer agrees with the thrust of the dissent. But the diffi-

[20] The Chief Justice concurred in the result of both cases, but stressed the point that the decisions should be narrowly construed to mean merely that the government can constitutionally punish persons plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. Mr. Justice Harlan dissented in *Roth* but not in *Alberts* because:

1. The federal government has no substantive power over sexual morality. What powers it has in that area are merely incidental to its power over the mails and over foreign and interstate commerce, whereas the state has direct plenary police power over sexual morality.

2. The federal government is more immediately controlled by the first amendment guarantees of free speech and press than is a state. The latter is so controlled only indirectly through the substantive due process concept of ordered liberty in the fourteenth amendment.

3. Federal control of obscenity, involving, as it would, one standard for the whole nation, presents a real danger of a deadening uniformity, which would be tolerable only for the worst hard-core pornography, which was not the sort of material involved in the *Roth* case.

[21] 343 U.S. 250 (1952).

culty then turns out to be that Mr. Justice Douglas will accept, as proof that obscenity exerts a harmful effect on the general welfare, objectively verified evidence only. As he sees it, the great mass of opinion evidence (to the effect that obscenity erodes and subverts public morality in the long run, and so harms the general welfare of society) is not probative, whether it comes from experienced experts or from the common man (who, the writer suggests, in this area of the practical moral judgment, has the built-in competence of a social conscience in a being social by nature).

To summarize: Thanks to the *Roth* decision, we now know squarely for the first time that neither federal nor state criminal regulation of obscene publications (as obscene is therein defined and supplemented with standards) is inherently unconstitutional as a violation of first and fourteenth amendment-protected freedoms of speech and press. On the contrary: the adjective "obscene," as defined and standardized, *is* sufficiently definite for constitutional use as a due process standard of criminal liability; and obscene publications, as defined, are not within the protection of the first and fourteenth amendments, for which reason no showing of any critical danger to the general welfare need be made in order to justify the restraint of such publications through governmental control by postpublication criminal prosecution.

The *Roth-Alberts* decision was a most important turning point in the modern law of obscenity. But it also proved to be merely the beginning of a continuing process of legal clarification which now became necessary to enable one to understand and to use the newly developed concept of the obscene. In the subsequent cases, the focus shifted to the question of whether the definition and the standards of obscenity had been correctly applied by the lower courts to the questioned materials. It immediately became clear that, on this issue, the United States Supreme Court would make its own independent determination by itself applying the definition and standards to the materials without permitting the determinations of the lower courts to influence its judgment at all. Three per curiam reversals launched another series of upsets of decisions of lower courts; all simply cited the *Roth-Alberts* case. The respective materials were the French film "Game of Love,"[22] an issue of the nudist magazine *Sunshine and Health,*[23] and an issue of a homosexual magazine called *One.*[24]

The case of *Kingsley Int'l Pictures Corp. v. Regents of the University of New York,*[25] though not an "obscene" case, shed additional light on the approach of the United States Supreme Court. This case concerned the movie "Lady Chatterley's Lover." The New York Court of Appeals decided that the film was *not* obscene; for that reason, it was still within the protection of the first amendment. Even as so protected, however, in alluringly portraying adultery as proper social behavior and as right and desirable conduct for certain people under certain cir-

[22] Times Film Corp. v. City of Chicago, 355 U.S. 35, *reversing per curiam* 244 F.2d 432 (7th Cir. 1957).

[23] Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), *reversing per curiam* 249 F.2d 114 (D.C. Cir. 1957).

[24] One, Inc. v. Olesen, 355 U.S. 371 (1958), *reversing per curiam* 241 F.2d 772 (9th Cir. 1957).

[25] 360 U.S. 684 (1959).

cumstances, it violated a new provision of New York's amended film licensing statute. That provision directed that no license be issued to films which presented acts of sexual immorality, perversion, or lewdness as being desirable, accepted or proper patterns of behavior. The United States Supreme Court reversed the New York court on the ground that the standard of approvingly presenting an adulterous relationship without any reference to the *manner* of its portrayal permitted exactly the type of censorship which the first amendment was designed to prevent, namely, censorship of the mere advocacy of the *idea* that adultery under certain circumstances might be acceptable behavior, without any effort to incite anyone to adultery by the *manner of presentation* of the idea. While, as stated above, the case is not an "obscene" case, it is worth noting for its emphasis on the manner of presentation of an idea as a factor of controlling constitutional importance even for material within the protection of the first amendment.

The case is equally significant by reason of a concurring opinion by Mr. Justice Frankfurter in which there is an effective formulation of the "balancing" doctrine which he had been developing in respect of freedoms protected by the first amendment — a doctrine which Mr. Justice Douglas and Mr. Justice Black view with disapproval as a judicial effort to subject first amendment freedoms to the limitations of reason rather than regarding them as the absolute freedoms which the language of the amendment, taken literally, would appear to establish that they are. Mr. Justice Frankfurter said:

> The real 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.[26]

The next case of *Smith v. California*[27] continued the succession of reversals for laws purporting to control obscenity. This case struck, not at a mere application of a California statute to a particular problem, but at the statute itself for its failure to require *scienter* as an essential element of a bookseller's crime of possessing obscene publications for sale in his bookshop. In other words, to be constitutionally unobjectionable, a statute must require that the person in possession of obscene publications know the contents of the publications,[28] or be reasonably chargeable with such knowledge, before he can constitutionally be convicted of the crime of possessing them. The reason is that criminal liability without that added circumstance would compel him to examine *all* his books, and would make him fearful to exercise his freedom to stock the *nonobscene,* which timidity would in turn limit the access of the general public to the nonobscene. In a concurring opinion, Mr. Justice Frankfurter thought that the Court owed the nation some idea of what the Court meant by the *scienter* it required, because to require too much *scienter* would make the legal control ineffective, whereas to require too little would make the protection of normal freedom ineffective.

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[26] *Id.* at 694. Mr. Justice Frankfurter also noted his view, which Mr. Justice Harlan shared, that judges cannot escape the instance-by-instance, case-by-case application of the due process clause.

[27] 361 U.S. 147 (1959).

[28] He must know, not that the contents are obscene, but simply what the contents are or what their nature is.

Mr. Justice Frankfurter also thought that the defendant must be enabled effectively to defend on the ground that the book in his shop was not in fact obscene. To do that, he must be permitted to enlighten the trier of facts as to the contemporary community literary and moral standards. And, in turn, to do that, he must be permitted to introduce expert testimony as to what those standards are (though not the expert's opinion as to the ultimate fact of the obscenity of the material in question, because that would usurp the proper function of the trier of facts). There is no other way to avoid the objectionable result of having the trier himself determine what those standards are on the purely subjective basis of his own experience, if any, in the community.[29]

The writer closes this almost unbroken string of judicial detections of legislative and executive faults with the case of *Grove Press, Inc. v. Christenberry*,[30] a 1960 decision of the Court of Appeals for the Second Circuit holding that the original, unexpurgated edition of the book "Lady Chatterley's Lover" could not be barred from the mails because it was not obscene; it did not, as a whole, *predominantly* appeal to prurient interest. By far the most important aspect of the case was its position as to the scope of appellate review, under the Federal Administrative Procedure Act, of an administrative determination of obscenity. The court held that it could review the Post Office Department's determination *fully,* both as to the law and as to the facts (1) because the issue of obscenity was purely an issue of law, and (2) because the "substantial evidence" rule did not apply when, as in the *Grove Press* case, there was no dispute as to what the evidence was.

Judge Hoffman in the Federal District Court for the Northern District of Illinois had occasion in 1961 to wrestle with that same problem in *Big Table, Inc. v. Schraeder*.[31] That case held that an administrative determination of the Post Office Department that a quarterly magazine called *The Big Table* was obscene and therefore unmailable under Section 1461 of Title 18 of the United States Code, was not supported by substantial evidence in the administrative record as a whole, and must be set aside. In reaching this holding, Judge Hoffman had to decide what the "substantial evidence" rule was in this setting. He began by ruling that, under the *Roth-Alberts* decision, and despite *Grove Press* to the contrary, the issue of obscenity is an issue of ultimate fact and not an issue of law. This fact issue, moreover, is not one as to which the Administrative Procedure Act permits a de novo judicial determination. Hence, even though no dispute exists as to what the evidence is, the reviewing court is bound, not indeed by the administrative determination or conclusion of the ultimate fact, but rather by the existence of substantial evidence in the administrative record as a whole which supports that administrative determination or conclusion. And "substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support the administrative conclusion. The judicial review available under these conditions is a *full* review, but it may not be a de novo

[29] Note that the size of the community may easily become a very pertinent consideration; the larger the community, the more difficult it will be to determine its standards.

[30] 276 F.2d 433 (2d Cir. 1960).

[31] 186 F. Supp. 254 (N.D. Ill. 1960).

finding of facts. Nor does the alleged denial of constitutional rights operate to enlarge the reviewing procedure in any respect. The *Grove Press* case appears to misunderstand what the "substantial evidence" rule is when it finds the rule inapplicable simply because there is no dispute as to what the evidence is.

The primary evidence, Judge Hoffman said, was the magazine itself. The need to determine the dominant appeal of the magazine permitted evidence as to its literary setting, but it was doubtful in his mind whether any evidence of contemporary community standards was admissible. The hearing examiner had excluded any evidence of contemporary community standards, and Judge Hoffman refused to rule that that exclusion was error. But the absence of any such evidence in the record was not a fatal defect, because it would be presumed (in the absence of evidence to the contrary) that the administrative officer would, since he was legally required to do so, make his determination in the light of those standards, which (again in the absence of evidence to the contrary) he would further be presumed to know and to respect from his very status as a member of the community.

On this matter of the admissibility of evidence as to contemporary standards, the strongest position in favor of admitting such evidence is that of Mr. Justice Frankfurter in his concurring opinion in *Smith v. California:* the Justice makes it a constitutional requirement of due process to admit such evidence.[32] The 1959 case of *Poss v. Christenberry*[33] held by implication that such evidence was admissible, but did not make its admissibility a constitutional requirement. The third view is that such evidence is conclusory in nature and therefore barred, because it usurps the function of the trier of facts. As noted, Judge Hoffman was doubtful as to the admissibility of such evidence and refused to hold that the Post Office hearing examiner's exclusion of the evidence was error.

The reader will note that the most perplexing adjective problems are now muddying the enforcement of obscenity control laws, vying with the equally difficult substantive problems of the correct application of the definition and standards of obscenity. Coupled with the complexities of the definition and standards themselves, these are the reasons why the writer suggests that the area for effective legal control of obscenity exists, but is a very narrow area. Should other states follow the holding of a very recent New York case that the word "obscene" in the New York statute now encompasses "hard-core pornography" only, the area will become even narrower.[34]

A few more cases must now be noted which are as truly landmark cases as the *Roth-Alberts* cases. They concern still another complicating facet of the legal problem of the valid control of obscenity: the legality of *particular methods* of control. All relate to the celebrated 1931 case of *Near v. Minnesota* ex rel. *Olson,*[35] which

[32] In further stating that the admissibility of *expert testimony* of contemporary community standards was also a constitutional requirement of due process, Mr. Justice Frankfurter did not have the support of Mr. Justice Harlan, who saw no need to focus on any particular type of evidence. Smith v. California, 361 U.S. 147, 165 (1959) (concurring opinion).

[33] 179 F. Supp. 411 (S.D.N.Y. 1959).

[34] People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

[35] 283 U.S. 697 (1931).

held that an injunction against future issues of a publication, nine past issues of which had carried criminal libels, was an unconstitutional restraint of free press. There can be no such restraint prior to publication.

In *Kingsley Books, Inc. v. Brown,*[36] decided by the United States Supreme Court in 1957 along with the *Roth-Alberts* cases, the Court held that a New York injunctive remedy against the sale or distribution of obscene publications in New York was not an unconstitutional prior restraint. The New York statute provided for a quick trial and judicial decision of the issue of obscenity in the injunction proceeding; it was also construed to authorize a temporary injunction pending the joinder of issue in the principal proceeding. Speaking for the Court, Mr. Justice Frankfurter thought that the practical impact on the freedom of the distributor or retail dealer was actually less drastic than the impact of the traditional postpublication criminal conviction.[37] The absence of a jury in the equitable action was not significant because in New York the sale or distribution of obscene materials is only a misdemeanor and in New York no jury trial is available for misdemeanors; hence, the defendant in the injunctive proceeding could not have received a jury trial in the traditional criminal proceeding either. In dissent, Mr. Justice Brennan thought that a jury trial should be a constitutional requirement in an obscenity case because a jury finding on the issue of obscenity is so especially apt as to be essential to due process.

[36] 354 U.S. 436 (1957).

[37] A postpublication criminal conviction is a criminal sentence with jail term and probation on the condition that defendant cease publication of obscene materials. *Id.* at 444.

In the 1961 case of *Times Film Corp. v. City of Chicago,*[38] the United States Supreme Court held that a municipal ordinance which required the submission of all films to public officials for viewing prior to the issuance of a required license for exhibition, with the proviso that no license should be issued for certain types of films, did not of itself impose an unconstitutional prior restraint on free speech or free press. For the majority, Mr. Justice Clark formulated the issue as being whether there is a constitutional freedom to exhibit any and every film at least once. The majority held that there is no such freedom, with the *caveat* that the answer was for movies only. The Chief Justice wrote a vigorous dissent (in which Justices Black, Douglas, and Brennan joined) to the effect that the majority had accepted censorship in its most objectionable form of administrative licensing, and had done so without any showing of a reasonable necessity for this most dangerous method of control.[39]

But each of these cases has already been refined by still later cases which point up vulnerable aspects of each basically constitutional method of control.

[38] 365 U.S. 43 (1961). For the earlier holding of the Illinois Supreme Court on the over-all constitutionality of the Chicago ordinance in a case which was not taken to the United States Supreme Court, see American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954).

[39] Note the very recent holding of the Pennsylvania Supreme Court in William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 173 A.2d 59 (1961) that the Pennsylvania state censorship of films violated the Pennsylvania constitution as well as the United States Constitution, a decision which the United States Supreme Court then refused to review. 368 U.S. 897. There is, of course, no inconsistency whatever between this refusal to review and the holding in *Times Film Corp.*

In *Zenith Int'l Film Corp. v. City of Chicago,*[40] the Court of Appeals for the Seventh Circuit ordered the District Court to grant a mandatory injunction for the issuance of a license to exhibit the film "The Lovers" in Chicago unless the City immediately afforded certain procedural safeguards in the operation of its film licensing process. Specifically, there must be a full hearing at the administrative level which will let the petitioner show that the film does not offend contemporary community standards. In addition, the only viewing of the film as a whole in the entire administrative process had been by a Film Censor Board, for which Board the ordinance made no express provision, so that there were no standards for the selection of the personnel of the Board and no requirement that the Board give any reasons for its administrative determination. The court noted especially that the United States Supreme Court in the *Times Film* case had not approved the *standards* established by the ordinance for the denial of a license, thus hinting at another area of vulnerability in addition to that of procedural due process.[41]

In *State* ex rel. *Beil v. Mahoning Valley Distrib. Agency, Inc.,*[42] an Ohio Court of Common Pleas construed, and upheld as construed, an Ohio statute like that of New York establishing an injunctive remedy and expressly including authorization for a temporary restraining order against sale and distribution in Ohio pending the quick judicial determination of the obscenity of the materials. At the request of the prosecutor, the temporary order may be issued by the court forthwith and without bond; in this respect, the statute lacks New York's provision for preliminary notice (and, presumably, hearing). The Ohio statute also goes a step beyond the New York statute by adding a provision designed to permit Ohio to get jurisdiction over corporations foreign to Ohio, and not authorized to do business in Ohio, which nevertheless distribute, or publish for distribution, into Ohio printed materials for sale at retail in Ohio.[43] The court held that neither the temporary restraining order nor the permanent injunction constituted an unconstitutional prior restraint. The court, incidentally, found a special problem in Ohio arising from the absence of a jury trial in the injunctive proceeding. In Ohio, the distribution of obscene materials is a felony, and not merely a misdemeanor as in New York. But, under the Ohio constitution, a jury trial is required for a felony only when the punishment may be imprisonment, or a criminal fine in excess of fifty dollars. Since an injunction is neither, the court held that the absence of a jury trial was not fatal to the constitutionality of the statute.

In dictum, the court took pains to say that, to the extent to which (if at all) the statute purported to authorize an ex parte issuance of the temporary order without a

[40] 291 F.2d 785, *reversing* 183 F. Supp. 623 (N.D. Ill. 1960).

[41] The city of Chicago has just adopted an amended ordinance on licensing movies designed to meet the objections of the Court of Appeals in the *Zenith* decision.

[42] 169 N.E.2d 48 (Ohio Ct. C.P. 1960).

[43] The most interesting efforts to achieve jurisdiction over persons and corporations outside the state, whose activities result in statutory violations within the state, is to be found in the Model Obscenity Statute proposed by the American Periodical Distributors' Association. This statute as proposed, however, has such serious flaws that the writer opposes its adoption in any state without extensive amendments.

hearing and before the service of summons, it violated adjective due process. Again, by way of dictum,[44] the court expressly left open the constitutionality of the issuance of the temporary order even after the service of process (including the type of service provided for corporations) and hearing. In addition, the court noted that no issue had been raised as to the statutory time limits on the judicial proceeding, and that the order for the seizure and destruction of the copies of the publication (after the judicial determination of its obscenity and the entry of the permanent injunction) related solely to the existing copies of the publication and not to copies, if any, published thereafter. The dicta all point to actual or potential flaws in a statute establishing the injunctive method of control.

A third case, *Marcus v. Search Warrant,*[45] is important because it struck down a Missouri statute attempting to establish a collateral method of control, and because it contains a penetrating discussion of the New York injunctive method. Under the Missouri statute, a complainant seeking a warrant to search for and to seize obscene material files ex parte a sworn complaint with a judge or magistrate of a court having original jurisdiction to try criminal offenses. In the complaint he alleges "positively and not upon information or belief" that obscene material is being held or kept for sale or distribution in a described place within the territorial jurisdiction of the judge or magistrate, or he alleges evidentiary facts from which the judge or magistrate determines the existence of probable cause to believe that obscene material is being so held or kept. Thereupon, the judge or magistrate, without any preliminary hearing, shall issue a search warrant directed to a peace officer commanding him to search the described place and to seize and bring before the judge or magistrate the described personal property. The descriptions must be of sufficient particularity to enable the peace officer readily to ascertain and identify the place and the material. The judge or magistrate must also then fix a date between five and twenty days after the seizure for a hearing to determine whether the seized material is obscene. In the interim, the peace officer retains possession of the seized material. At the hearing, the owner of the material may appear and defend. Notice of the hearing is given by posting a copy on the described place and by delivering a copy to any person claiming an interest in the seized material whose name is known either to the peace officer or to the complainant, or by leaving a copy of the notice with any member of such person's household over the age of fifteen years. No time limit is fixed within which the judge or magistrate must render his decision after the hearing. Should the decision be that the material is obscene, the judge or magistrate must order the material destroyed; should the decision be that the material is not obscene, he must order its return to its owner.

In *Marcus,* on complaint of a police officer "of his own knowledge" (after investigation but without the attachment of any supporting materials) that obscene materials were being kept at described places for sale and distribution, search warrants were issued on October 10 by a circuit

[44] The issue did not arise, since the defendant consented to the entry of an injunction pendente lite.

[45] 367 U.S. 717 (1961).

court judge. They were executed the same day by seizing 11,000 copies of 280 publications. The judge fixed October 17 for the hearing and continued it to October 23. Timely motions to quash the evidence were made on the grounds that the statutorily authorized procedures violated the first and fourteenth amendments of the federal constitution because (1) the statute failed to provide for any notice or hearing judicially to determine the obscenity of the materials *before* their seizure, and (2) since the personalty was described in the warrants merely as obscene materials, the peace officer serving the warrants necessarily had to make a determination of their obscenity, whereas such determination is constitutionally required to be made by a judge only. At the hearing, the judge found 100 of the 280 publications to be obscene and 180 not to be obscene. On appeal, the Missouri Supreme Court sustained the validity of the statute,[46] but the United States Supreme Court reversed.

Mr. Justice Brennan's opinion for the majority noted that the power of a state to suppress obscenity and the fact that obscenity is not within the protection of the first amendment does not mean that there is no constitutional bar to any form of practical exercise of that power which may impinge upon the protection afforded by the first amendment to the *nonobscene*. Specifically, this Missouri statutory procedure lacked the safeguards which due process demands to assure nonobscene publications the constitutional protection which they enjoy. The search warrants were issued on mere conclusory allegations of a single complainant without any independent judicial scrutiny or supervision. Moreover, the warrants were general in describing the personalty merely as obscene materials and in failing to specify any particular publications. The determination of what is legally obscene is a very complex judgment, which was here sought to be made by peace officers without any guides, standards, or special qualifications as to hundreds of publications on the spot; the result, as later judicially determined, was an interference with 180 nonobscene publications for two months.

Mr. Justice Brennan then pointed out that the Missouri procedure as a collateral method of control of obscenity was readily distinguishable from the New York injunctive method of control basically approved in *Kingsley Books, Inc.*, because the New York method provided the very procedural safeguards which the Missouri method lacked. The New York complaint named a particular publication and attached a copy, and the temporary restraining order (as well as the permanent injunction) ran against that named publication only. In Missouri, the complaint merely described the personalty as obscene materials, no copies were attached, and the warrants authorized the seizure of all obscene publications found in the described place. In New York, there was no interim seizure of the materials; and if the defendant (as he had the capacity to do) violated the temporary restraining order, there is no New York decision holding that such conduct could not then be defended by a subsequent judicial determination that the publication was not in fact obscene. Hence, in New York there is no impairment of public access to, and constitutional protection of, the nonobscene in the interim between the issuance of

[46] Search Warrant v. Marcus, — Mo. App. —, 334 S.W.2d 119 (1960).

the temporary restraining order and the final judicial determination. In Missouri, the defendant's materials were taken away from him prior to any judicial determination of their obscenity, and he could not act in the interim, nor could the public have access to the materials in the interim. In addition, the Missouri statute lacks any time requirement for the prompt rendering of the judicial decision.[47]

This survey of cases on the law of obscenity throughout the past decade demonstrates that the key cases establishing the very restricted area of constitutional legal control which presently exists are *Roth-Alberts, Times Film Corp.,* and *Kingsley Books, Inc. Roth-Alberts* is the basic case; it established that the adjective "obscene" was constitutionally definite as a basis for the customary method of legal control through postpublication criminal liability, and that the obscene, as defined and standardized, was not within the protection of the first and fourteenth amendments to the federal constitution. *Kingsley Books* and *Times Film* established the basic federal constitutionality of two other specific methods of controlling the obscene: the injunctive method of New York for publications, and the film licensing method of Chicago. At the same time, very stringent limitations have been imposed on all these constitutionally valid methods of legal control by the independent successive judgments of trial and appellate courts as to the proper application of the complex definition and standards of obscenity to specific questioned materials, by the strong emphasis on adjective due process in all the methods of control and on the necessity for procedural safeguards for the nonobscene, by the requirement of *scienter,* by the extension of strict procedural safeguards to the issuance of search warrants, and by the restriction of the meaning of "obscene" in one state to hard-core pornography only.

To the non-lawyers (and lawyers?) who think that judges and lawyers have gone much too far in hamstringing legislatures and executive officers and agencies in their efforts legally to control a serious social evil, this survey of cases may contribute understanding, if not reassurance. On the other hand, the present state of the law of obscenity is not without some social compensations. Personal freedoms, which are the key values in our society, have been made more secure from governmental interference; and the method of community pressure through voluntary citizens' groups acting extralegally, but not illegally, remains for development.

In this context the 1957 Annual Statement of the American Catholic Hierarchy on Censorship[48] stands as a statement truly remarkable for its clarity, its moderation, and its perception. The statement pointed out that any governmental censorship necessarily impinges on the individual's freedom to communicate (which stems from his basic right to know), and that this freedom is absolutely essential to the development not only of the individual but

[47] Mr. Justice Black and Mr. Justice Douglas concurred in a separate opinion which rested upon the grounds that general search warrants violate the fourth amendment, that the limitations of the fourth amendment have been imposed upon the states by the due process clause of the fourteenth amendment, and that the federal exclusionary rule as to evidence illegally seized has been extended to the states as a constitutional requirement.

[48] Reprinted in 56 CATHOLIC MIND 180 (1958).

of the democratic state. This freedom to communicate, of course, has obvious social implications, which require that the freedom be exercised within the limitations imposed by the equal freedom of others in society and by the general welfare. It is inevitable, however, that *legal* restraints on individual freedoms can be but minimal; civil law will define any limitation on freedom as narrowly as possible, and the limitation must clearly be necessary for the common good. The American legal system has always been dedicated to the principle of minimal restraint—to curb less rather than more, to hold for liberty rather than for restraint. Thus do we best safeguard our basic freedoms. It follows that, owing to the exigencies of free speech and free press, a communication may not be legally punishable, but may yet defy the moral standards of the great majority of the community. Between the legally punishable and the morally evil, there is a great gap. To accept as morally inoffensive all that is legally unpunishable would be to lower greatly our moral standards. Civil legislation of itself is not an adequate standard of morality. It is for this reason that we need private agencies to evaluate communications on the basis of moral standards higher than those practicable for civil law, and then to publicize their evaluations and to seek by legal means the cooperation of like-minded persons in the vindication of their rights as parents and citizens. The right, by legal means, to speak out for good morals is not challengeable in our democracy.