A LEGAL HISTORY OF OBSCENITY IN MASS COMMUNICATION MEDIA AND ITS RELATIONSHIP TO TELEVISION

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ABSTRACT

A LEGAL HISTORY OF OBSCENITY IN MASS COMMUNICATION MEDIA AND ITS RELATIONSHIP TO TELEVISION

By

Frederick Charles Kolloff

The concept of obscenity, chiefly as it applies to offensive sexual expression through mass media, has become a matter of increasing concern to television's audience, government officials, and the members of the television industry. According to a portion of the general public as well as to a number of government officials, there is a trend in some television programs to present an increased amount of questionable sexual material bordering on the obscene. Television's exhibition of "adult" motion pictures has been especially criticized.. The broadcaster is aware that the institution of governmental control over programming may be a result of this criticism. The broadcaster is also aware that he is subject to penalties under the provisions of Section 1464 of the United States Code which prohibits the broadcasting of profanity, indecent language, or obscenity.

On the other hand, in view of the broadcaster's present freedom to program as he wishes under Section 326 of the Communications Act of 1934, critics inside and outside the television industry have pleaded for a more

creative and meaningful, less bland and innocuous type of programming. This programming would furnish the television audience with more mature and socially valuable themes, including a realistic treatment of sex.

In view of these contradictory criticisms, the broadcaster should understand as clearly as possible what constitutes obscenity on television. Section 1464, however, offers no definition of obscenity in broadcasting. Also, in the absence of positive scientific evidence concerning the effects of alleged instances of obscenity on audiences, opinions regarding what is harmful tend to vary from individual to individual. Furthermore, what society in general considers offensive can vary with the progress of time.

In view of the relativity of the concept of obscenity as well as the necessity for the broadcaster to understand what program material might be considered legally obscene, this study reviews the legal regulation of obscenity, not only in radio broadcasting, but also in two of the older mass communication media. By these means it is the purpose of this study to explain what materials have legally been determined obscene and also the reasoning behind the determinations. This information provides valuable insight into the reasoning to be used by the Federal Communications Commission and the courts if, and when, a legal decision is necessary concerning a case of obscenity on television.

One section of the study reviews the legal regulation of obscenity in books of fiction and non-fiction, including not only American but also English regulation, since the latter greatly influenced court decisions and attitudes in the United States. A second section, restricted to the United States, deals with the regulation of obscenity in motion pictures. This regulation was influenced by that of literature and in turn influenced that of television. Each new medium introduces characteristics not contemplated by the regulations imposed on the previous media and therefore poses new challenges for the courts. A third and final section contains the major cases which have dealt with indecent language in radio broadcasting.

Although the decisions applied to older media serve as a basis for regulating an emerging one, the unique characteristics of the emerging medium appear to prevent the older regulations from being completely binding on it. This study indicates that the degree of leniency legally allowed regarding what constitutes obscenity in literature and, to a lesser degree, in the motion picture, cannot, at the present time, be applied to television in the United States.

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TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

Since television broadcasts are viewed in the home, potentially by all members of the family, the sexual morality of their content is an important concern of the general public, including, on one hand, those who would protect the young and impressionable from bad influences and, on the other, those who expect television to present life as it is and to expose its viewers frankly to significant moral issues.

Also concerned with sexual morality on television are the members of legislative, judicial, and regulatory bodies who are expected to insure that communication media operate in the public interest and who recognize that rules which were devised to control the morality of older media are not necessarily appropriate to the relatively new and obviously different medium of television.

Naturally the sexual morality of television programming is also a concern of the broadcasters, who jealously defend the freedom of expression granted their programming, yet are liable to penalties for presenting

material which is legally determined to be obscene. As evidence of its ability to police its industry without outside interference, the National Association of Broadcasters includes moral guidelines in its professional "N.A.B. Code."[1] But the existence of this code does not allay some members' apprehension that, starting with a possible effort to prevent obscenity, the government might exercise increasing censorship over television programming. Not only to avoid this eventuality, but also, of course, to know more certainly what constitutes programming in the public interest, broadcasters need to recognize as clearly as possible the boundary between legitimate program content and the legally obscene.

Obscenity--A Potential Television Problem

Although this boundary has not yet been crossed by any television program, it is likely to be approached ever more closely by telecasts of the more recent motion pictures.

Broadcasters have been scheduling an increasing number of motion pictures, having found them both popular and profitable. Sponsors have been attracted to the films by reports such as the TVQ survey of evening

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[1]This study refers to the National Association of Broadcasters' Television Code but does not examine it at length since the Code is not legal in nature. However, those portions of the Code dealing with sex are enumerated in Appendix B.

network programs, conducted annually for Broadcasting magazine by the Home Testing Institute, a marketing research firm.[2] When this survey compared the size of audiences attracted by various program types during October in the years 1963-1967 inclusive, it found that network movies scored highest in 1963, 1966, and 1967, and second highest in 1964 and 1965.

Furthermore, films are economical for the advertiser, as reported in the October 3, 1966 issue of Broadcasting magazine:

> Are feature films still a safe bet for the TV advertiser? Yes, says BBDO [advertising agency,] the agency that last winter issued a report documenting film efficiency in terms of cost, the relative freedom of risk to the advertiser, and the favor they attract among young adults.
>
> They are cost-efficient. From October 1965 to January 1966 the media analysts computed cost-per-thousand ranging from $3.59 to $3.75, 10% to 15% lower than average costs.
>
> Movies show no sign of audience saturation since increases in the number of features on network TV have not lowered the average rating.[3]

For reasons such as those just cited, television has been using motion pictures at an extremely rapid rate. In fact, during the present average week, all seven evenings contain one network film feature.

As broadcasters turn to Hollywood for new film features, however, they must face the problem that a

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[2]"Movies Hold Lead as Viewers' Favorites," Broadcasting, vol. 73, no. 19, November 6, 1967, pp. 40-41.

[3]"Feature Good for Advertising," Broadcasting, vol. 71, no. 14, October 3, 1966, p. 32.

great percentage of those available are "sophisticated" productions for "adult" audiences. The trend toward the production of such pictures has been encouraged by a shift in control of the film industry from major studios to independent producers, a relaxation of the Motion Picture Association of America (M.P.A.A.) Production Code, a relaxation of ratings by the National Catholic Office for Motion Pictures (NCOMP), and by increased competition with television and with the foreign film, both here and abroad. Coincidental with these factors are films containing nudity, suggested and actual sexual activity, and other morally questionable situations which, if exhibited on television for lack of alternative choices, may well raise charges of obscenity and the threat of increased government control.

Several members of the legislature have already raised the possibility of government interference in television programming due to an increased exhibition of "adult" motion pictures on television. When interviewed by magazine writer Leslie Raddatz, Senator Thomas J. Dodd (D., Conn.), chairman of the Senate Subcommittee to Investigate Juvenile Delinquency, said:

> . . . if the trash of the film industry gets on television, it will add a new complexity to an already complex situation. It will require a

whole new look at the television industry by Congress and the F.C.C.[4]

Other members of the legislature, while respecting the freedom of broadcast programming from government control as set down in Section 326 of the Communication Act of 1934, have warned the broadcaster of his responsibility to broadcast in the public interest or else to expect increased government control over programming. A sample of these warnings appears below:

> Representative Oren Harris (D., Ark.), chairman of the House Interstate and Foreign Commerce Committee, said, "We are against controlled communications and for freedom. But if some of these people [broadcasters] continue behaving the way they are, they're going to have the Government on their necks. The television stations are in the business of operating in the public interest, and if they don't know what the public interest is, they should lose their licenses."
>
> . . . . . .
>
> Senator John O. Pastore (D., R.I.) chairman, Senate Communications Subcommittee, has said, "Congress will not and cannot stand idly by and allow excesses or abuses to dominate this great medium, nor will it be stampeded by the cries of censorship every time an observation of a constructive nature is made to improve the quality of programming."
>
> . . . . . .
>
> Former Senator Kenneth Keating (R., N.Y.) has said, "As a lawyer, I am fully cognizant of the First Amendment rights enjoyed by communications media in this country, and I do not advocate Government control of the airwaves. As a father and a grandfather and a public servant, however, I know the Government cannot afford to turn its back on this problem as neglect will harm our young people and our society."[5]

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[4]Leslie Raddatz, "Coming Attractions: Smut in the Living Room?," TV Guide, vol. 13, no. 16, April 17, 1965, pp. 17-20.

[5]Ibid.

Senator Keating's concern for the potential harm to children caused by television's exhibition of sexually stimulating material (a basic element of legal obscenity) is shared by a portion of the general public. For instance, Detroit Free Press television critic, Bettelou Peterson cites a number of complaints from sincere and concerned parents:

> ". . . As a mother of teen-agers, I'm very much concerned with the moral state of our society. At least in the past you could relax a little when your family was together at home. Now, the 'new morality.' New morality my foot, the correct name is 'no morality.'" says Mrs. Earl Essenmacher.
>
> . . . . . .
>
> ". . . It is almost impossible to raise children with good morals with the strong outside influence of movies and TV. They are told that unless they drink, smoke and lead an immoral life, they just aren't living." - Mrs. John R. Mann, Farmington.
>
> . . . . . .
>
> Turning off the set at home isn't always effective, many point out. Other parents are more permissive or supervising adults are not at hand when children go visiting.[6]

The broadcaster who is aware of the criticism of a number of concerned parents and members of the legislature, is also aware of a different viewpoint, held by another portion of the public as well as by many television performers, writers, producers, and at least one member of the FCC. This group believes that television cannot continuously exhibit only the bland, the unrealistic, and the family type of programming. To do so, they

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[6]Bettelou Peterson, Detroit Free Press, November 4, 1967, p. 7-D.

say, is to ignore life as it is as well as to stifle television's creativity in drama and documentary presentations which may include sex and sexual relationships. The feelings of television's suppressed writers are expressed by television producer E. Jack Neuman:

> These dictums to eliminate sex and violence from drama are destroying drama. There's absolutely no serious work of literature that does not have violence and sex. And it's up to a writer to make the judgment as to how it is to be used - not a congressman! What are we trying to protect human beings from, anyway? Themselves? Sex is the driving force of every man and woman in this country.[7]

Likewise, the Smothers Brothers, of the Smothers Brothers' Comedy Hour, feel that the television comedian has a right to escape the confines of comic fantasy and, through satire, to furnish the television audience with material that enables their audience to examine its own actions and attitudes, including attitudes toward sexual matters. Time reports:

> The overriding problem as far as the brothers are concerned is that CBS, with its large commitment to the blandest sort of family shows, is out of tune with the times and with its audiences. "The whole country's in trouble," exclaims Tommy, "and we've started getting a kind of renaissance, in the arts, in living. Painters can reflect their society. And writers can. Why can't TV comedians?"[8]

Television broadcasters have also been criticized in a similar vein by former FCC Chairman E. William Henry.

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[7]Edith Efron, "Can TV Drama Survive?," TV Guide, vol. 13, no. 39, September 25, 1965, p. 18.

[8]"Snippers v. Snipers," Time, February 2, 1968, p. 57.

In a speech delivered before the National Association of Broadcasters in 1966, Henry said television broadcasters have too often ignored common sense and their own artistic integrity, in spite of their legal freedom, by deciding not to program socially important material produced by honest and creative artists, because they fear that the audience or government officials might complain.

> Consider the troublesome question of artistic integrity and good taste. In this area where the frontiers of freedom are always the scene of skirmishes, how have you acted? Too often, I suggest, routed by shadows, you break and run before a shot is fired in anger. Too often you surrender to pop-gun complaints as if they were the crack of doom. Too often the record here shows not only a lack of courage, but a lack of common sense.
>
> In other words, you have often failed to demonstrate the courage and maturity that we now expect of an industry that takes second place to none as a force in American life.
>
> Let me give you but one illustrative example. I recently watched an evening television movie called Room at the Top, a film that won many awards and received much praise several years ago. Those of you who saw it may remember that at one point the blustery, plain-spoken father of a young girl calls in the girl's suitor for lunch at the father's club. His daughter has become pregnant by the young man, and the father now insists that marriage is in order. He also insists that the young man dismiss forever an older woman with whom he has been having an affair. On the latter point, the dialogue thought not exactly as quoted here, went something like this:
>
> Father: And by the way, young man, I know your relationship with that older woman, and I'm telling you straight; Get rid of that (bloop)!
>
> Young Man: (heatedly) Don't ever use the word (bloop) when you speak of her!

Father: When I have a word that fits, I believe in using it.

And there sits the poor audience, wondering what in the name of all that's artistically honest the bloody word is!

This bloop-blip technique may be fine for selling razor blades, but is scarcely appropriate in an adult film on a controversial theme.

The freedom you enjoy today in programming your stations is unparalleled anywhere in the world. No government official can tell you what programs you should or should not put on the air--and none I know would want to. Though critics may wail and gnash their teeth, and F.C.C. Chairmen breathe fire and brimstone, the basic programming decisions remain yours. Under the magnificent unbrella of the First Amendment, the American broadcaster, and he alone, determines what our millions of listeners and viewers shall have the opportunity to see and hear. From sign-on to sign-off you are in the driver's seat. Your license puts you there.[9]

Coincidental with the criticism above, television has attacked many of society's taboos. Time magazine reviews television's attack by citing recent television comedy material:

(Johnny) Carson brought out a female impersonator in an ape's costume who did a striptease that was not merely questionable but overly graphic. At one point, a bouquet of flowers sprouted from the ape's crotch.

. . . . . .

The talk shows, by virtue of their late-night time slots, have always been determinedly naughty. Thus the chesty starlets, having nothing else to offer in the way of talent, feel that, to be invited back, they must devise new and more suggestive performances. On the same Carson show, for instance, Starlet Lee Meredith bounced out and did a bump-and-grind dance that all but singed the screen.

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[9]Address by E. William Henry, Chairman Federal Communications Commission before the National Association of Broadcasters, Chicago, Illinois, March 29, 1966.

> With NBC's new show, Laugh-In, starring comics Dan Rowan and Dick Martin, the pitch for new blue cheer has moved into prime time. Their material, . . . is alternately good, bad and just plain irreverent. . . . Guest Star Robert Culp explains his role as secret agent in I Spy, "I do a lot of undercover work," and girl replies: "Oh, don't you men ever think of anything else?" . . . Silly: "Tinkerbell is a fairy." Topical: "The pill stops inflation." Or childish: "Of all the fishes in the sea/ The one I like the best is bass/ He climbs on all the rocks and trees/ And slides down on his . . . hands and knees." On the Johnny Carson show last week he portrayed a newlywed couple on their wedding night. She (wonderingly): "Oh Harry, are we really married?" He (leeringly): "You're going to find out in a minute when I get this shoelace untied."[10]

Undoubtedly, Time summarizes, complaints concerning offensive television material will arrive on the television executive's desk. Many of these complaints will be from the predictable minority of oversensitive viewers while an increasing number will come from normal viewers. Thus, continues Time, "the real question is now how the taboos can be broken without bruising common sensibilities."[11] Since one test of legal obscenity demands a judgment as to whether the common sensibilities (or standards) of the community have been broken, a blatant attack of taboos may lead television to the courts.

The broadcaster, although still free of an obscenity charge, must carefully examine the alternatives to the criticism that television presents bland and uncreative

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[10]"Programming: Reasonable v. Raunchy," Time, February 9, 1968, pp. 53-54.

[11]Ibid.

programming. The alternatives, if practiced, may make television's potential problem of obscenity charges a reality. Stockton Helfrich, Director of the NAB Code Authority, cautions the broadcaster:

> Interestingly, broadcasting's not having been a target for obscenity charges indirectly requires evaluation along side the familiar criticism that broadcast fare is too bland. I doubt strongly that anyone so criticizing broadcasting would in the next breath outright argue for obscenity but such a critic might argue for more controversy, more daring and so on, all of which, depending on one's point of view, might lead to types of freedom of speech which some might consider to fall under obscenity.[12]

Television, then, has encountered a number of circumstances and pressures which have forced the medium closer to the potential problem of obscenity charges. The increased use of "adult" films, the increasing exploration of "reality" through drama and comedy, and the more frequent attack by television of society's taboos have made the subject of sex on television a concern of the general public, government officials and the broadcaster.

Both literature and the motion picture, even in their most responsible efforts to sincerely reflect and provoke society, have, in their histories, lost their freedom through obscenity court convictions.

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[12]Personal letter from Stockton Helffrich, Manager, New York, The Code Authority of the National Association of Broadcasters, June 19, 1967.

Thus, in order that the responsible broadcaster may continue to broadcast in the public interest, retain his freedom of broadcast speech, and remain free from charges of obscenity, he must be aware of the legal considerations in determining previous mass media material obscene and the relationship of these considerations to television.

Purpose and Assumptions of the Study

It is the purpose of this study, therefore, to establish in the mind of the broadcaster an understanding of legally defined "obscenity" and its potential relationship to television. This purpose will be accomplished by tracing the legal history of obscenity in literature and motion picture cases, as well as by reviewing Federal Communication Commission and court decisions involving free speech and indecent language in broadcasting.

The study must be based upon several assumptions. A primary assumption is that an obscenity charge against television may arise because of the uncertain limits of expressive freedom present in today's television.

A second assumption is that a future charge of obscenity against television must consider the existing legal principles concerning obscenity in the field of mass communication media. With this assumption, it follows that these legal principles should be gathered and presented and that they should not, and cannot, be ignored.

A third assumption must be made concerning the relationship between literature, motion pictures and television. All may be placed in the category of mass communication; that is, each exists for, and is rapidly available to, a large and undifferentiated number of people for the purpose of transmitting information or thoughts through some mechanical means at a relatively low cost per consumer. Each medium, however, differs in nature.

The relationship between these mass media may be understood when one considers the content of each medium. For instance, Marshall McLuhan in his book, Understanding Media: The Extensions of Man, observes any new medium in two ways. First the new medium produces a new environment which is imperceptible to society: it changes a person's way of perceiving events and, as a result, one's view of the world changes. This theory is only indirectly relevant to this study. However, McLuhan's further observations, based upon the first, depict the content of the new medium as the old medium.

> The "content" of any medium is always another medium. The content of writing is speech, just as the written word is the content of print, and print is the content of the telegraph. If it is asked, "what is the content of speech?" it is necessary to say, "It is an actual process of thought, which is in itself nonverbal."
>
> The close relation, then, between the reel [sic] world of film and the private fantasy experience of the printed word is indispensable to our Western acceptance of the film form. Even the film industry regards all of its greatest achievements as derived from novels, nor is this

> unreasonable. Film, both in its reel form and in its scenario or script form is completely involved with book culture.[13]

Similarly, ". . . the 'content' of TV is the movie."[14] Each medium, then, depends upon its predecessor(s). Television's content depends upon the motion picture (directly and indirectly) and the motion picture upon the print medium. In view of this theory, one may surmise that the basic literary theme of sexual expression, already a predominant motif in the motion picture, may well be transferred to television. Therefore, it may be hypothesized that, to a certain extent, the legal decisions reached concerning one medium could affect the decisions to be reached in another medium.

Fourth and finally, it is assumed that the sections reprinted below from the Communications Act of 1934 and Title 18 of the United States Code do not give adequate definition or legal direction to television's necessary concern with questions as to the limits (especially visual limits) of "good taste" in program material.

> Section 326 of the Communications Act of 1934: Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated

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[13]Marshall McLuhan, Understanding Media: The Extensions of Man (New York: McGraw-Hill Book Company, 1964), p. 8.

[14]Ibid., p. vii.

> or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.
>
> Section 1464 of Title 18, United States Code: Broadcasting Obscene Language. Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

It is therefore necessary to study previous legal decisions concerning mass media and the sexual aspects of obscenity in order to better define the limits of sex on television.

Previous Research

Previous research in the field of obscenity in television has been extremely limited. Only recently has there been comment on the "bad taste" exhibited on some television programs, usually of a subjective nature from viewers and critics.

Extensive material has been written concerning obscenity in literature and in motion pictures by authors such as Zechariah Chafee, Alec Craig, H. Montgomery Hyde, Morris L. Ernst and Terrence J. Murphy. This material has not to any great degree related to television. Answers to questions of the limits of television self-regulation have only been hinted by sources other than the National Association of Broadcasters' Television Code and the networks' own codes.

As a preliminary to the study of the legal history of obscenity in the communication media and its relationship to broadcasting, it is necessary to better define the concept to be used in the following study and to briefly trace a history of obscenity.

CHAPTER II

THE CONCEPT OF OBSCENITY

It has been stated that the purpose of this study is to provide an understanding of obscenity as it is legally defined today. However, the study of legally defined obscenity must be prefaced with an explanation of the term "obscenity" in order to properly introduce the reader to the subject matter.

The apparent difficulty in defining obscenity legally can be explained by the recognition of obscenity as a concept of the mind rather than a fixed reality. When a communication is criticized as obscene, it is being judged in accordance with a meaning in the mind of the critic. If a consensus among critics were possible, it would not even then fix the meaning of obscenity. Rather, the meaning of obscenity may vary between one period or one society and another. Or, to put it another way, the referents of the term are subject to change; what is called obscene in one set of circumstances may not be so called in another.

There is some disagreement about the antecedents of the term. According to The Oxford English Dictionary, it comes from the Latin obscaenus, which meant "adverse, inauspicious, ill-omened." Morris L. Ernst, however, traces the term "obscene" to the Latin obscena, which meant "that which may not be seen on the stage."[1] Despite their disagreement, both of these antecedents imply something injurious to society, hence subject to moral condemnation.

At present, "obscene" is defined by The American College Dictionary as "offensive to modesty or decency," and by Webster's Third International Dictionary as "disgusting to the senses, usually because of some filthy, grotesque, or unnatural quality."

Normally, the word is applied today only to excremental functions and to sexual matters; and of these, only the latter have figured in questions of morality in broadcasting.

Norman St. John-Stevas makes a distinction between "obscene" and some related terms. If "'immodest' is taken as the positive, 'indecent' may be described as the comparative, and 'obscene' as the superlative."[2] He also

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[1]Morris L. Ernst and William Seagle, To The Pure . . . A Study of Obscenity and the Censor (New York: The Viking Press, 1928), p. 21.

[2]Norman St. Johns-Stevas, Obscenity and the Law (London: Secker and Warburg, 1956), p. 2.

suggests that "obscene" is not necessarily equivalent to "pornographic." In current usage, that which is pornographic is purposely designed to stimulate sexual feelings and to act as an aphrodisiac, whereas that which is obscene excludes this intention, although it may have the same effect.

Theoretical Background

A broader concept of obscenity than that presented in dictionary definitions may be obtained from two books on censorship.

One of these, Censorship: Government and Obscenity by Terrence J. Murphy, cites the preference for reason over passion espoused by political philosophers from the ancient Greeks to the present day. An individual should be able to choose in a rational, non-emotional manner between alternatives which affect his destiny. Sexual arousal, however, tends to lower the sensibilities and encourage a neglect of long-term goals for the pleasures of the moment. Therefore, it is feared that the man who is constantly subjected to sexual arousal will increasingly disregard his responsibility for self-determination.[3]

As an early expression of this attitude, Murphy cites Plato's Republic, wherein Socrates, arguing about

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[3]Terrence J. Murphy, Censorship: Government and Obscenity (Baltimore: Helicon Press, Inc., 1963), p. v.

the kind of persons suited to rule their city, asks a companion:

> "Is there any communion between temperance and excessive pleasure?"
>
> "How could there be," said he (the companion), "when excessive pleasure sends a man out of his mind no less than pain!"
>
> . . . . . .
>
> "Can you name any pleasure greater and keener than bodily love?"
>
> "No," said he, "and none madder."
>
> "But the right love is to love the orderly and the beautiful soberly and in the spirit of music?"
>
> "Indeed it is," he said.[4]

As a later advocate of reason over passion in the body politic, Murphy quotes Abraham Lincoln:

> Passion has helped us; but can do so no more. It will in future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defense. Let these materials be molded into general intelligence, sound morality. . . [5]

According to Murphy, the greater number of reasonable citizens a society develops, the stronger will be that society. That strength depends, however, upon some regulation of the press, for a free press disseminates not only information for intelligent participation in a democratic society, but also emotional distractions. The

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[4]Eric H. Warmington and Philip G. Rouse, efs., Great Dialogues of Plato (New York: The New American Library of World Literature, Inc., 1956), p. 202.

[5]Murphy, op. cit., p. v.

problem becomes one of limiting emotional distractions while disseminating information to promote reason. Hence there is need for laws against the arousal of sexual emotions by published obscenity.

The other book referred to is Censorship: The Search for the Obscene by Morris L. Ernst and Alan U. Schwartz. These authors view moral attitudes regarding sexual behavior as being influenced by population balances, considered in relationship to economic welfare and territorial security. Two examples will suffice to explain this view.

First, as recently estimated, the number of Jews who left Egypt with Moses was approximately 3,600. This number was very small in comparison to the potential productivity of the Promised Land and to the numbers of enemies on its borders.

> Hence it became the way of life among the Jews, written into their laws and Bible, to frown upon and forbid all sexual relations and attitudes that would tend to limit the population. What the Jews needed was more people; thus, Solomon with his thousand wives and concubines, a real bit of extreme polygamy, was held up for admiration. On the other hand, the Hebrew ethic and law condemned adultery, onanism, masturbation, homosexuality, and all other practices unlikely to produce offspring and thereby give more fighting strength to the tiny tribes of Israel.[6]

The opposite situation was in effect later in history during the high period of Greek civilization:

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[6]Morris L. Ernst and Allan U. Schwartz, Censorship: The Search for the Obscene (New York: The Macmillan Company, 1964), p. 4.

> It was not much later that the Greek culture reached its fabulous heights. The Greeks possessed a large population for their relatively small land. We may surmise that they did not want a population explosion. Accordingly, their law condoned sexual relations such as homosexuality and lesbianism, which could not possibly produce off-spring. Thus we read of Sappho and the prestige of Lesbia. Male homosexuals held positions of highest esteem. There was no legal prohibition of adultery or fornication because, in some way that we have not yet been able to discern, it was recognized that mistresses were not so likely to become pregnant as were wives.[7]

Evident in these examples is the relative, changing nature of moral codes and, consequently, of the referents to which the term "obscenity" may be applied. In view of this relativity, obscene material might be defined in general terms as that which gives offense by reason of its variance from the accepted moral code, especially as applied to sexual behavior.

Development of the Concept of Obscenity

The concept of obscenity, at least as it exists today, could hardly have existed in the Greco-Roman world prior to the first century A.D. By today's standards, the ancient Greeks had an uninhibited attitude towards sex. Legal historian H. Montgomery Hyde reports, for instance, that:

> Representations of men and women enjoying various forms of sexual intercourse were depicted on the

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[7] Ibid.

> bottoms of children's drinking bowls and plates, so that they could have something amusing to look at when they were having their meals.[8]

The phallas was a standard part of comic actors' costumes. Statues in the form of phallic symbols were common on street corners, sometimes serving as altars before which young girls and married women prayed for fertility.[9] The gods (especially Zeus) were given to numerous infidelities. Sexual license marked the Bacchanalia and carried over into some of the ancient Roman religious celebrations.

But in time a new religion came to speak out against fleshly lust in the words of St. Paul:

> This I say then: walk in the Spirit, and ye shall not fulfill the lust of the flesh. For the flesh lusteth against the Spirit, and the Spirit against the flesh: and these are contrary the one to the other. . . .
> . . . . . .
> Now the works of the flesh are manifest, which are these: adultery, fornication, uncleanness, lasciviousness, idolatry, witchcraft, hatred, variance, emulations, wrath, strife, seditions, heresies, envyings, murders, drunkenness, revellings, and such like: of which I tell you before, as I have also told you in time past, that they which do such things shall not inherit the kingdom of God.[10]

It is well known how Christianity became established as the state religion of the Roman Empire and survived after

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[8]H. Montgomery Hyde, A History of Pornography (London: William Heinemann Ltd., 1964), p. 35.

[9]Ibid.

[10]Epistle to the Galatians

that Empire as the sole authority which linked the crumbled segments of that empire. Claiming domination over men's souls, it was able to preach the ideal of chastity throughout the western world, despite variations in its practice of that ideal. Some members of the clergy practiced extreme asceticism and mortification of the flesh, but there were also periods in which moral laxness has been reported, even among the highest prelates.

Such moral laxness was in part a stimulus for the Reformation and, in particular, for the rise of Puritanism, with which came a strict condemnation of earthly pleasure and a demand for its suppression. In the words of literary historian, George Ryley Scott, "The essence of Puritanism is suppression: it expresses itself in the denunciation and suppression of anything calculated to give pleasure to others."[11]

Thomas Wertenbaker, author of The Puritan Oligarchy, explains that:

> To the Puritans this world was little more than a testing ground for the next, God's people were to share in the divine, the eternal pleasures of Heaven; they must not permit themselves to be cheated of this supreme prize by reaching for the temporary, unreal pleasures of human existence. . .
> . . . . . .
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> This expression of life found its expression in the Puritan moral code. God in His mercy had plainly marked every one of Satan's booby-traps.

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[11]George Ryley Scott, "Into Whose Hands" An Examination of Obscene Libel in its Legal, Sociological and Literary Aspects (London: Gerald G. Swan Ltd., 1945), p. 21.

> He had given to mankind not only the Ten Commandments, but He had pointed out the narrow path to safety by tracing the journey of the saints along it. It was the duty of the State as well as of the Churches to protect the unwary and the weak by adding to God's admonitions man's prohibition of every sinful action, and to anticipate God's punishment by earthly punishments, the stocks, the whipping post, the branding iron, or the gallows.[12]

In line with the paragraphs just quoted, Puritan attitudes, as they are considered to survive today, are often blamed by contemporary liberals for unreasonable intolerance in matters of sex, for an exaggerated interpretation of obscenity, and for an overzealous insistence on subjecting obscenity, as they interpret it, to strict social control.

With respect to Puritanism in the seventeenth century, however, one must note a difference between preaching and practice of the theological ideals. Even in New England, as Wertenbaker indicates, it proved impossible to develop an ideal state wherein the morals of the Elect members of the congregations could be enforced on the many. And to the extent that Protestantism was an expression of developing individualism, it had to speak out against some kinds of governmental regulation. Thus, it was the Puritan John Milton who, in 1644, wrote Areopagitica, a strong plea to Parliament to repeal its order for the regulation of printing.

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[12]Thomas Jefferson Wertenbaker, The Puritan Oligarchy (New York: Grosset & Dunlap, 1947), p. 159.

When the Puritan is considered in the light of his practical concerns, rather more than his theology, it is possible to reach the following interpretation of his motives:

> It is no paradox to say that the Puritan had little conception of the modern sex censorship of literature. What attention he paid to obscenity in books arose merely from his inability as an earnest and practical-minded man to distinguish between lewdness in books and lewdness in life. He was against sexual immorality in life because he knew that a profligate life led to the undermining of the virtues of sobriety, frugality and industry which were indispensable to his labors for civilization. Thus he was always concerned about the bad example which a lewd book or play might set. He had no objections to the depiction of vice and sin provided it was bound up with the proper indignation. His attitude toward obscenities consequently differed little from the prohibitionist's objections to intoxicating liquor in its effects upon a man's efficiency. It had as yet no connection with the censorship of ideas and did not constitute part of the political function.[13]

If these were indeed the Puritan's views, they would seem to be reasonably similar to those of many modern Americans who support the legal control of obscenity in the public media of communication.

It is probable that the development of such public media of communication strengthened and expanded the concept of obscenity. Before the invention of printing, the production and consumption of literature had been virtually restricted to the clergy and was largely concerned with religious and moral texts. Similarly,

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[13]Ernst and Seagle, op. cit., p. 154.

medieval drama was developed under the auspices of the Church. But with the growing forces of individualism, the breakdown of feudalism, and the growing economic power of the bourgeoisie, literary and dramatic communication became more secular in content and authorship, and more widely consumed. Hence, there was more need to be concerned with its moral influence on the public. Similarly, there was more need to control its political influence on the public. Both interests, political and moral, had reason to establish legal regulation of the public media of communication. The history of that regulation, as it pertains to obscenity, will be commenced in the next chapter.

CHAPTER III

THE LEGAL HISTORY OF OBSCENITY IN LITERATURE

The development of obscenity law in the United States is intimately related to England's literary history. Therefore, it is necessary here to cite the developments of English obscenity law prior to the study of obscenity law in the United States. The following only briefly describes the developments of obscenity law in England and the United States through important legal cases. There are, of course, many sociological events which have influenced public and legal thought as it concerns the definition of obscenity. Indeed, legal decisions cannot be divorced from these important events. It is hoped that the following chapter will not only give a brief history of obscenity law as reflected in literature, but will also aid the reader in understanding the continual change that is inherent in such a subjective concept as "obscenity."

The Roots of English Literary Control

As previously noted, references to sex through erotic songs, jokes, drama, poems and riddles were accepted in the Grecian, Roman and Middle Age periods as legitimate aspects of culture. This was also the case in Anglo-Saxon culture.

In the Anglo-Saxon literature, obscenity made its printed appearance in the Exeter Book, the Vercelli Book and the Julian manuscript. These books were filled with obscene riddles as well as devotional and didactic works.[1] The Medieval Church warned its faithful members against the writing of heresy but made no mention of obscenity. Official ecclesiastical censorship was not instituted until after the Reformation. The concern of the church courts, again, was with the writings against the faith of the church but not against morals. For instance, The Decameron was banned in 1559, not because of its obscenity, but because of its satiric treatment of the clergy. By revision, the monks became magicians and the nuns of the story were suddenly noblewomen. These changes enabled the church to authorize the new edition although the obscenities remained.

The book production of England increased steadily during the fifteenth century with the invention of

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[1]Norman St. John-Stevas, Obscenity and The Law (London: Secker and Warburg, 1956), pp. 3-4.

printing. The Church, fearful of printing's influence and possible domination over the thought of the people, endeavored to take control of the books being printed. Therefore, in 1557, the Inquisition under Pope Paul IV drew up the first Index Librorum Prohibitorum, containing the titles of those books forbidden to be in the possession of any layman. The latest edition of the Index was released in 1948 by the Vatican.[2] Yet the concern of the Index appears to remain today as a guard against heresy and a protection of church prestige and not so must as a concern against obscenity.

In the Reformation countries, the control of books was taken over by Renaissance princes and the Reformed Church. It was this inclusion of the aristocracy that eventually led to the concept of government licensing. In 1538 Henry VIII gave the power of licensing control to the Star Chamber. The little power given to the Star Chamber does not appear to have been enforced. In 1556, however, Philip and Mary gave the Stationers' Company exclusive rights to printing under the agreement that they would search out all undesirable and illegal books. Unlike the Star Chamber, the Stationers' Company was very strong. Later, in 1559, Elizabeth confirmed the charter and further decreed that all books must be approved by

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[2]Alec Craig, Suppressed Books: A History of the Conception of Literary Obscenity (New York: The World Publishing Company, 1963), pp. 18-19.

the Archbishops of Canterbury and York. The decree also provided for the punishment of offenders and for the collection of licensing fees.[3]

The Elizabethans did not object to the obscenity contained in the writings of Shakespeare or his contemporaries during the sixteenth century. Indeed the Elizabethans took delight in coarse and robust writing. In view of these standards of taste, the state did little to surpress obscenity. However, during the latter part of Elizabeth's reign, the Puritans became more and more vocal concerning the immorality displayed on the stage and thereby prepared the way for a change in the public's taste.

In 1640 the Star Chamber was abolished, as were the ecclesiastical courts. Literature was briefly free of state and church control. In 1643, however, licensing was reintroduced by the Long Parliament and, as a result, John Milton, a Puritan, wrote Areopagitica in which he agreed that although certain books should be proscribed, censorship should be generally condemned. Although Milton's writing was ignored and licensing continued for the time being, the expression of the Puritan philosophy did result in a new seriousness in literature and was an influence in the discontinuation of licensing in the late seventeenth century.

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[3]St. John-Stevas, op. cit., pp. 7-8.

Meanwhile, the disbanded Star Chamber was replaced by the Licensing Act of 1662. This act continued the tradition of literary control against heretical and "generally offensive" books and pamphlets until it was allowed to expire in 1695 by a Parliament which thought the Act unenforceable. This expiration is generally considered to be the termination of the licensing era.[4]

During the early eighteenth century literature began to mirror the immorality of its aristocratic patrons. At the same time, the middle and lower classes replaced the private patrons as the reading majority. Due in part to Oliver Cromwell's Puritans during the seventeenth century, however, the new reading public of the eighteenth century became conscious of modesty and the sense of shame connected with sex. This attitude was to influence future English legal decisions regarding obscenity.

The Development of English Obscenity Law

With the termination of the Licensing Act of 1662, which had previously restrained the printing and distribution of pornographic books to some extent, the undisciplined literary underworld of England's Grubb Street flourished. One Grubb Street publisher of plagiarized and pornographic materials, Edmond Curl, was brought before the King's Bench at Westminster Hall in November

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[4]Craig, op. cit., p. 21.

of 1727 for publishing Venus in the Cloister or the Nun in her Smock.

The main result of Curl's arrest was the establishment of the new offense of common law called "obscene libel." (According to legal historian, St. John-Stevas, the word "libel" has no connection with its popular meaning but is used here as a result of its original derivation "libellus," a diminutive of "liber" or literally "a little book.")[5] Previously, in 1708, there had been an attempt to establish the new offense when a man names James Read published the pornographic The Fifteen Pleagues of a Maidenhead. However, Mr. Justice Powell dismissed the case with the following statement:

> This is for printing bawdy stuff, but reflects on no person or persons or against the Government. It is stuff not fit to be mentioned publicly; if there should be no remedy in the Spiritual Court, it does not follow there must be a remedy here. There is no law, to punish it. I wish there were but we cannot make law.[6]

However this statement was overruled by the Curl case twenty years later and the courts took over the jurisdiction of the ecclesiastical courts in the matter of pornography. During the trial, counsel for the defense based his argument on the Read decision. The prosecution, however, put forth the following statement:

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[5]St. John-Stevas, op. cit., p. 24.

[6]Ibid., p. 23.

> What I insist upon is that this is an offence at common law as it tends to corrupt the morals of the King's subjects and is against the peace of the King. Peace includes good order and government and that peace may be broken in many instances without an actual force: (1) if it be an act against the constitution of civil government, (2) if it be against religion, (3) if against morality. I do not insist that every immoral act is indictable such as telling a lie or the like, but if it is destructive of morality in general, if it does or may affect all the King's subjects, then it is an offence of a publick nature. And upon this distinction it is, that particular acts of fornication are not punishable in the Temporal courts and bawdy houses are.[7]

The argument was finally accepted by the court and Curl was condemned for publishing a pornographic book.

This judgment is of major importance because Curl's prosecution established the publication of obscenity as a misdemeanor of English common law. Previously obscenity had only been indirectly punished when and where it occurred with any criticism of religion or the State, or where it was suggested that some specific person had acted in an immoral or obscene manner. Moreover, never before had the general morals of the public been considered in a judgment.

In the years following Edmond Curl's legal landmark case, little concern for obscenity was expressed in the courts. Pornographic material flowed freely and those cases concerning obscene libel were treated lightly by the English Courts. John Cleland's Memoirs of a Woman of

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[7] Ibid.

Pleasure, although brought to court, was dismissed after the court guaranteed Cleland one hundred pounds each year if he would not repeat the offense.[8]

Therefore, obscenity, in a literary form, was less recognized by the state as a problem in the latter years of the eighteenth century. According to Alec Craig, the illiterate mass of England, ruled by an educated and sexually licentious aristocracy, provided an atmosphere for the spread of puritanism among the lower classes. The Industrial Revolution had created a new class of wealthy citizens who rose from the same lower classes and who subsequently brought their ideas of puritanism with them. The Evangelical Movement further restricted pleasure from the view of life of the new class. This restricted view grew. In 1787 George III issued a proclamation against all types of vice, including obscenity. Thankful citizens carried out the Proclamation by forming groups of their own for the same suppressive purpose.[9] Utilitarian ideals and Methodism, although separated on doctrinal grounds, were both common in their individualism, humanitarianism, and anti-traditionalism as well as their advocacy of a restricted view of life.[10]

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[8]Craig, op. cit., p. 33.

[9]Ibid., pp. 36-37.

[10]St. John-Stevas, op. cit., p. 32.

The trade in obscene books had increased greatly during the last years of the eighteenth century. Thus the Society for the Suppression of Vice, founded in 1802, was to seek out the publishers and distributors of obscene books as well as other blasphemous offenses.

After the Napoleonic Wars, a new flow of obscene literature found its way into England. In 1824 the Society won in its attempts to have inserted within the new Vagrancy Act a clause stating that a trial before the magistrate with fine and imprisonment was due anyone who had shown indecent or obscene material in public places. The effects of the Act were two-fold. First, prosecutions were indeed carried out under the new law (averaging approximately three per year) as well as sentence for imprisonment and fines (averaging one every eight months).[11] The second important effect was that the Act made the concealment of obscene materials necessary and, as a result, drove the distribution of the material underground. The addition to the Vagrancy Act, however, did not allow the destruction of the obscene materials by the court.

During the trial of a particularly lurid piece of material, Lord Campbell, Lord Chief Justice of England, felt that the court should be concerned only with those books which intended to corrupt the morals of youth and

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[11]H. Montgomery Hyde, A History of Pornography (London: William Heinemann Ltd., 1964), p. 167.

shock the common decencies. This consideration, Campbell thought, would eliminate books of acknowledged literary or artistic merit from being condemned. Lord Campbell introduced a bill in the House of Lords embodying this point. Following extensive amendments by the Commons, the bill became the Obscene Publications Act of 1857. The Act provided that in case obscene materials were being kept on the premises for the purpose of distribution, and an actual sale had been made, a search warrant could be issued and the material seized. The proprietor of the premises was then held responsible to show cause why the material should not be destroyed. This Act did not change the law as to what was obscene but rather strengthened it. The sale of obscene materials was also reduced to some degree by the destruction of the materials themselves.[12]

Books with literary merit, however, were still in jeopardy. The Act gave magistrates the power to order the destruction of books and prints if in their opinion their publication would amount to a "misdemeanor proper to be prosecuted as such."[13] Reputable authors writing for the educated public began to fear any publication of their works which included material that might have been considered obscene by the courts.

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[12]St. John-Stevas. op. cit., p. 66.

[13]Ibid.

A change in the test of obscenity was initiated by a case involving a Protestant pamphlet, the purpose of which was to discredit the Roman Catholic Church by quoting some confessors' works on moral theology. These works entered into detailed illustrations of married life. Henry Scott, a metal broker, received from the Protestant Electoral Union copies of these pamphlets, called The Confessional Unmasked, Shewing the depravity of the Roman Priesthood, the iniquity of the Confessional and the questions put to females in Confession. Scott sold them for religious purposes. Under the Campbell Act, two hundred and fifty copies were seized in 1867 by the justices of Wolverhampton. Scott was summoned to show cause why the pamphlets should not be destroyed. The Wolverhampton magistrate, Benjamin Hicklin, found that although the pamphlet was obscene and that the indiscriminate sale was contrary to the public moral good, Scott's motive in selling the pamphlets was an innocent one. The Roman Catholic church officials of England, however, did not appreciate the decision and asked for an appeal to the Queen's Bench. This appeal became the important The Queen v. Hicklin case. The Catholic churchmen challenged the lawfulness of the pamphlet's publication even though Scott's motive was judged excusable. The Court answered that the material was still considered to be obscene and therefore

unpublishable.[14] During this expected decision, Lord Chief Justice Cockburn gave his far-reaching and restrictive opinion as to the test of obscenity under the Campbell act.

> The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall.[15]

This test said, in effect, that a piece of material must be considered obscene if it could possibly corrupt the morals of a school girl. It could be judged upon individual passages regardless of its literary merits as a whole. If this definition was arbitrarily applied, it would condemn even scientific literature. Such was the case ten years later.

In 1877 Charles Bradlaugh and Annie Besant published an early edition of Charles Knowlton's Fruits of Philosophy: An Essay on the Population which contained an explanation of the physiology of sex in simple language and discussed the use of some methods of contraception. Both Bradlaugh and Besant were arrested. The trial took place on June 18, 1877. The jury found the publication obscene but did not condemn the publishers, Bradlaugh and Besant. The Lord Chief Justice instructed the jury that

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[14] Craig, op. cit., p. 44.

[15] Ibid.

their finding was a verdict of guilty and fined the defendants and sentenced them to imprisonment.[16]

Following the Bradlaugh and Besant case, an eminent jurist, Sir James Stephen, wrote the following in the Digest of the Criminal Law in 1877:

> I leave this note unaltered, but since it was written the case of R. v. Bradlaugh may be considered to have gone some way towards establishing a different principle, and to have invested juries to a certain extent with the powers of ex post facto censors of the Press so far as such publications on the relations of the sexes are concerned. I think that juries ought to exercise such a power with the greatest caution when a man writes in good faith on a subject of great interest and open to must difference of opinion, and when no indecency of language is used, except such as is necessary to make the matter treated of intelligible.[17]

Literature with merit was again on trial when on October 31, 1888, in the Central Criminal Court before the Recorder of London, Henry Vizetelly was charged with obscene libel with his publication of an English translation of Zola's La Terre.

Zola was a naturalistic writer and depicted the lives of his characters in all their selfishness, cruelty and sordidness. Although Zola's novels are now considered literary classics, an article in the April 21, 1888 journal Society called La Terre, "dirt and horror pure and simple," and continued; "In the French original its

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[16] Ibid., pp. 45-46.

[17] Ibid., p. 48.

sins were glaring enough in all conscience, but the English version needs but a chapter's perusal to make one sigh for something to take the nasty taste away."[18]

Through increasing pressure for prosecution by the public and critics, the trial began. The Solicitor-General, Mr. Poland, explained that twenty-one separate passages of "bestial obscenity" had been found and although the book was written with a "wholesome purpose of teaching, or with an innocent purpose of amusing, . . . this book was filthy from beginning to end."[19] After the Solicitor-General had read some of the marked passages from the book, the Recorder, or magistrate, made the following statement:

> There is a great distinction between this case and the Queen v. Hicklin. There the object of the publication was no doubt extremely good, but it was held, and very properly so, to be no answer. This book has been published for the sake of gain, and it is not necessary for me to say that it was deliberately done in order to deprave the minds of persons who might read the books. In my opinion they are of the most repulsive description. They are not of a seductive or a fanciful character, but repulsive and revolting to the last degree. Therefore, when a man who had a good character - which you say and which I am quite prepared to admit you deserve - finds that the opinion is entertained by the authorities that they are of this description, he could not do otherwise than express himself as you have done and undertake to withdraw them from circulation. This is the great object of such an inquiry as

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[18]George Ryley Scott, "Into Whose Hands" An Examination of Obscene Libel in its Legal, Sociological and Literary Aspects (London: Gerald G. Swan Ltd., 1945), p. 95.

[19]Ibid., p. 96.

> this. The sentence is that you be fined one hundred pounds and enter into your own recognizances in two hundred pounds to keep the peace and be of good behaviour for twelve months.[20]

Vizetelly resumed publication of translations of Zola's works and was subsequently prosecuted and sent to prison.

The turn of the century brought the beginning of change to the society which had been so immersed in Victorian propriety. Education had been constantly on the rise and writings such as Ibsen's plays affected educated people's ideas about the relations of the sexes. People became aware of Freud's ideas as well as of the emancipating ideas of H. G. Wells and Bernard Shaw. Matters of sexual ethics were not bluntly put forth in this period but rather implied as matters that should be considered in the future. The law intervened sporadically in its role as arbiter of public taste. Many prosecutions were carried out only to keep publishers and authors "in-bounds." The old Society for the Suppression of Vice was dead but was replaced by the National Vigilance Association as well as a Law Church body and the Public Morality Council.[21] As a result of the general relaxation, the circulation of obscenity began to increase.

In view of the increase, it was requested of the Secretary that the Lord Campbell Act be made more

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[20] Ibid., p. 97.

[21] St. John-Stevas, op. cit., p. 87.

stringent. In 1903 the Headmasters' Conference appealed for the suppression of the pornography that had been circulating in their schools and was readily available to boys and girls. And in 1907 the Council was busy suppressing "living statuary" in music halls. In 1908 a conference concerning indecent literature was held with members of Parliament, both Commons and Peers, in an effort to outline new legislation against obscenity. In the same year a Joint Select Committee of both the Houses of Parliament was appointed to investigate "lotteries and indecent advertisements." In general the Committee advocated the repeal of the many statutes dealing with pornography and the enactment of an act which would make all offenses summary under a uniform procedure. Thus for the first offense, all violators would be fined twenty pounds or receive one month's imprisonment and for the second offense, or sale to anyone under sixteen, would be fined one hundred pounds or receive six months' imprisonment.[22] The Committee also recommended the following:

> A provision should also be inserted to exempt from operation of the Act any book of literary merit of reputation or any genuine work of art. The Committee thinks it would be almost impossible to devise any definition that would cover this exception. In their opinion the decision in such cases should be left to the magistrate, but they believe that if a provision such as they recommend were inserted in the Act, a magistrate would be enabled to take into consideration all the circumstances

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[22] Ibid., p. 87.

> of the case and would be free from a supposed obligation to decide upon the decency or indecency of the particular literary or artistic work brought to its notice.[23]

With the outbreak of World War I, the proposed Bill was forgotten.

In view of the lack of enactment of the suggested bill, the National Vigilance Association carried on the traditions of the former organizations. For example, the Association urged the Government to charge John Long with unlawfully selling and uttering certain indecent and obscene libel in the book The Yoke by Hubert Wales. On December 14, 1908 Long's soliciters provided the Court with the promise to discontinue the sale of the book.[24]

Again in 1910 John Lane, a publisher of the English translation of Hermann Sudermann's Das Hohe Lied (The Song of Songs) agreed to withdraw the book from publication. The story was that of a prostitute named Lily Czepanek who did not receive proper puritan retribution for her sins but instead made a success of her profession. This fact and two or three incidents which were shocking to the public, condemned the book.[25]

The withdrawal of the book from publication was thus not uncommon in the early twentieth century. An

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[23] Ibid., p. 88.

[24] Scott, op. cit., p. 99.

[25] Ibid., p. 100.

order for the withdrawal of an "obscene" book was given regardless of the degree of creativity or the significance of the material.

In view of the above actions by the courts, it was not surprising that in 1923 Guy and Rose Aldred were prosecuted for publishing Margaret Sanger's Family Limitation, a sixteen page booklet giving the answers and explanations to several methods of birth control. Evidently the objectionable material was one of three line illustrations showing the proper placement of birth control equipment. The drawing, said Mrs. Sanger, had been copied from a medical textbook. The pamphlet had previously been published in the United States in 1914 as well as in countries including Spain, Italy, Poland, Hungary, China, Japan, Russia and Denmark. In Mexico, according to Mrs. Sanger, it had been distributed with every marriage license.[26] These facts, however, did not change the court's decision.

Public awakening as to the stringent and overpowering suppression of literature of worth began five years after the ruling against Mrs. Sanger's pamphlet, with the case against Miss Radclyffe Hall and her book, The Well of Loneliness. The main character, Stephen Gordon, is a lesbian and is presented as a martyr to the cause of homosexuality. The story's ending, which in literary

[26] Ibid., pp. 106-107.

opinion appears to be the book's redeeming factor, has a sincere and sympathetic appeal to society for the victims of nature. The book, upon its publication in 1928, was well received and praised. The Daily Telegraph of August 7, 1928 said: "The book must be accepted as a whole, and so accepted it is likely to excite two opposite opinions, according as the reader admits or denies the subjects as legitimate material for art."[27] The praise was consistent until the August 19, 1928, edition of the Sunday Express printed an article by James Douglas in which he said, "I would rather put a phial of prussic acid in the hands of a healthy girl or boy than the book in question. . . . What then is to be done? The book must be at once withdrawn."[28]

In view of the growing criticism to the book and the possibility of prosecution, publisher Jonathan Cape offered to withdraw the book. The Home Secretary agreed to the action and the book was withdrawn. The response to this action was rapid and loud. The Daily Herald campaigned against the government. Among the advocates for the continuance of the novel were Bernard Shaw and H. G. Wells.

A new edition of the novel was published in Paris. It was shipped to Dover and there Customs seized the

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[27]St. John-Stevas, op. cit., p. 98.

[28]Ibid., p. 99.

shipment. On November 9 the government applied for a destruction order under Lord Campbell's Act.

Following are excerpts from that trial that most clearly show the attitude of the law at that time:

> Norman Birkett . . . spoke in defense of the book: "Nowhere is there an obscene word or a lascivious passage. It is a sombre, sad, tragic, artistic revelation of that which is an undoubted fact in this world. It is the result of years of labour by one of the most distinguished novelists alive, and it is a sincere and high minded effort to make the world more tolerable for those who have to bear the tragic consequences of what they are not to blame for at all. In the course of the case I hope to be allowed to quote the views of critics in various reviews and newspapers, which constitute a chorus of praise from those well qualified to speak upon matters affecting literature in general. Further than that, there are in court people of every walk of life who desire to go into the witness box and to testify that this book is not obscene, and that it is a misuse of words for the prosecution to describe it as such."
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> At this point he was interrupted by the magistrate: "The test is whether it is likely to deprave or corrupt those into whose hands it is likely to fall. How can the opinion of a number of people be evidence?"
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> Norman Birkett: "I want to call evidence from every conceivable walk of life which bears on the test whether the tendency of this book was to deprave and corrupt. A more distinguished body of witnesses has never before been called in a court justice."
> The Magistrate: "I have the greatest doubt whether the evidence is admissible."
> Norman Birkett: "If I am not allowed to call evidence it means that a magistrate is virtually a censor of literature."

> The Magistrate: "I don't think people are entitled to express an opinion upon a matter which is for the decision of the court."
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> . . . . . .
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> Norman Birkett: [In questioning Mr. Desmond MacCarthy, then editor of "Life and Letters"] "In your view is it obscene?"
> The Magistrate: "No I shall disallow that. It is quite clear that the evidence is not admissible. A book may be a fine piece of literature and yet obscene. Art and obscenity are not disassociated at all. There is a room at Naples to which visitors are not admitted as a rule, which contains fine bronzes and statues, all admirable works of art, but all grossly obscene. It does not follow that because a book is a work of art it is not obscene. I shall not admit the evidence."[29]

In the course of the judgment, Sir Chartres Biron, the Magistrate, said the following:

> With regard to the point that the book is well written and therefore should not be subjected to these proceedings, that is an entirely untenable position. I agree that the book has some literary merits, but the very fact that the book is well written can be no answer to these proceedings because otherwise we should be in the preposterous position that the most obscene books would be free from stricture. It must appear to anyone of intelligence that the better an obscene book is written the greater the public to whom it is likely to appeal. The mere fact that the book deals with unnatural offences between women does not make it obscene. It might even have a strong moral influence. But in the present case there is not one word which suggests that anyone with the horrible tendencies described is in the least degree blameworthy. All the characters are presented as attractive people and put forward described in alluring terms.[30]

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[29] Ibid., p. 101.

[30] Ibid., p. 102.

Protests followed the final judgment but the decision was upheld and not until 1949 was the book republished and distributed in England.

Also in the year 1929 further attacks were made upon D. H. Lawrence. Lady Chatterley's Lover, published in Florence, was attacked by reviewers, as was his book, John Bull. The Post Office seized a manuscript of his poems Pansies and, in the same manner, his Introduction to his Volume of Paintings. However, as a result of a recommendation, the poems were not published and therefore no legal action was taken. In another instance, Lawrence's picture exhibition at Warren Galleries was raided by the police in July, 1929. As in the defense of The Well of Loneliness, expert testimony as to the artistic merits of the paintings was excluded from the court. The defendants promised to close the exhibition and the case was dismissed.[31]

This type of decision continued through the thirties in famous cases concerning James Hanley's Boy in 1934, Wallace Smith's Bessie Cotter in 1935, and Edward Charles' The Sexual Impulse in 1935.

The publication of Norman Mailer's The Naked and the Dead, the novel about American service life, brought an attempt to suppress the book in 1949. The Attorney-General, Sir Hartely Shawcross, however, refused to take

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[31] Ibid., p. 105.

action and on May 23, 1949 made the following rather ironic statement concerning government policy after a Sunday Times editorial accusing the book of being obscene:

> In cases of the kind involved here [said Sir Hartley] there are two public interests to which I must have regard. It is important that no publisher should be permitted to deprave or corrupt morals, to exalt vice or to encourage its commission. It is also important that there should be the least possible interference with the freedom of publication, and that the Attorney-General should not seek to make the criminal law a vehicle for imposing a censorship on the frank discussion or portrayal of sordid and unedifying aspects of life simply on the grounds of offense against taste or manners. While there is much in this most tedious and lengthy book which is foul, lewd and revolting, looking at it as a whole I do not think that its intent is to corrupt or deprave or that it is likely to lead to any other result other than disgust as its contents.[32]

The above statement appears to scorn those traits that the English magistrates, under the established obscene libel law interpretation, had been practicing for years. Here the opposite is considered instead, that is, that a publisher should be free from interference from the government, that the Attorney-General should not use the law as a device for censorship of frank discussions of the undesirable, and that the book should be judged as a whole.

It might well have been the effect of a 1953 Oslo conference of the International Criminal Police Commission that prompted a full-scale campaign against publishers

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[32] Ibid., pp. 110-111.

once again. It was concluded at this Conference that obscene literature was a contributory cause of the increase in sexual offenses since World War II.[33] Whatever the reason, it was this heavy attack as well as the growing public resentment of suppression beginning with Hall's The Well of Loneliness that finally brought reform to England's obscene libel law.

The Philanderer was a novel tracing the amorous adventures of Russell Conrad. Its release in the United States brought favorable reviews. However, a review published in New Statesman brought out the moral attitude of the book's main character, Conrad. In September of 1953 its circulation in certain libraries in the Isle of Man brought the book to trial, and the High Bailiff found the book obscene. Later in England the book was prosecuted once again and although the publisher, Werner Laurie, pleaded guilty to publishing obscene libel, the Chairman of Secker and Warboury, Frederic Warburg, decided to fight the outcome of the case.[34]

On June 29, the trial began at Old Bailey. The defendants pleaded not guilty. The judge, Mr. Justice Stable, instructed the jury to go home to read the entire book rather than the certain questionable passages. The

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[33] Ibid., p. 111.

[34] Ibid., p. 113.

charge to the jury offered a new interpretation of the term "obscene."

> He [Mr. Justice Stable] stressed the value to the reading public of accurate pictures of contemporary social conditions in other countries at a time like the present when ideas were in the melting pot, and pointed out that although the law was the same as in 1868 the jury had not to consider the effect of publishing the book at that time but its effect on society as it is today. Just because a book was not suitable reading for the decently brought-up young female of fourteen or a child in the nursery to read it was not, the judge declared, a criminal offense to make it available to the general public.[35]

Although the judgment was praised, it did not change future decisions. The case concerning September in Quinze was a case in point. The Magistrate, Sir Gerald Dodson, completely contradicted the standards that had been so promising in The Philanderer case. Lively public interest in three other cases, concerning the books, The Image and the Search (acquitted), The Man In Control (acquitted), and Julia (convicted) brought wide discussion.

Newspapers, periodicals, and radio reviews and discussion augmented the interest in the law of obscenity. In 1954 Graham Green feared the freedom of writers was lost and warned that the attitude then displayed was condemning any description of man's sexual nature as if sex itself was repulsive. Bertrand Russell, Harold Nicolson, Compton Mackenzie, J. B. Priestley, W. Somerset Maughan

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[35]Craig, op. cit., pp. 117-118.

among others, believed that the prosecutions were an attempt to deny authors, by police censorship, the right of describing real life.[36] In view of this controversy, the stage was set for reform.

In November of 1954 the Society of Authors demanded review of the obscene libel law and set up The Herbert Committee (originally presided over by Sir Alan Herbert) to recommend reforms. The Committee was made up of authors, publishers, printers, critics, lawyers and a Member of Parliament. The group drafted a Bill containing their recommendations. On February 3, 1955, these proposals were made public. Norman St. John-Stevas recalls the elements of the Bill:

> The principal reform proposed was to make the state of mind of the accused person an essential element in the offense, thus shifting the emphasis from "tendency" to "intention." The Bill made no attempt to define obscenity, but instructed juries and magistrates to take into account literary or artistic merit in all cases of obscene publication. On this point the Bill provided for the admission of expert evidence. The Bill repealed all existing obscenity statutes, but re-enacted the provisions of the Obscene Publications Act of 1857 with certain important modifications. Authors, publishers and printers were given a locus standi in the court to enable them to give and call evidence, and proceedings under the Act were speeded up. Destruction of obscene publications by the customs authorities was made dependent on the issuing of a destruction order by a magistrate, and uniformity in administration of the law was provided for by making all proceedings subject to consent of the Attorney-General.[37]

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[36] St. John-Stevas, op. cit., p. 120.

[37] Ibid., p. 121.

Acceptance was widespread for the proposed bill. However, the Bill was pushed aside because of its involvement with a "horror-comics" controversy. It was through similar complications that the Bill was waylaid from passage from its first introduction in March of 1955 to its final passage in 1959. On August 29, 1959, the Bill became the Obscene Publications Act of 1959 replacing the Obscene Publications Act of 1857.

The new Act contained basically what the Herbert Committee Bill had outlined. The Act made it an offense to publish an obscene article for gain (an "article" being defined as any matter to be read or viewed). An "article" would therefore include sound recordings and motion pictures. "Publishing" meant any attempt to make public any of the aforementioned "articles." Also a person, said the Act, could not be tried if he could prove that he had not been fully aware of the content of the published article. And, most important, the Act also established a new test of obscenity which was as follows:

> An article shall be deemed obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[38]

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[38]Craig, op. cit., p. 121.

It was also specified in the Act that no conviction would take place if it could be proved that the matter of the article was for the public good. This would include those works of science, literature and art, or learning. Finally, the new Act would admit as evidence the testimonies of literary, artistic or scientific experts.

The new law actually did little more than give statutory authority to that which had previously been held by Judges such as Mr. Justice Stable in the Philanderer case. One of the important elements omitted was the lack of the need for a sworn statement by the police that an actual sale of obscene materials had taken place. According to the Act the police had only to convince the issuing justice of a reasonable ground for suspecting the sale. The new Act also brought the actions of giving, lending, or showing within the realm of "publishing" which endangered private collections. Finally, the Post Office and Customs were not mentioned in the Law thus maintaining the seizure power to both.[39]

This is the present stage of the English law concerning obscenity. It is this history of English obscenity law that provided the basic foundation for obscenity law in the United States.

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[39] Ibid., p. 121-122.

The Development of Obscenity Law in the United States

Obscenity first appeared in American courts in 1815 when Jessie Sharpless was arrested and found guilty in a Philadelphia court for exhibiting for money the picture of a man and a woman in an "imprudent position." At that time there was no obscenity law; therefore, the case was decided upon judge-made principles. The case, in the opinion of the judge, was against public decency and tended to corrupt public morals.[40]

In 1821 the first obscenity case involving a book was brought to court in Massachusetts. The book was Fanny Hill or Memoirs of a Woman of Pleasure by John Cleland, published by Peter Holmes. With the book's reputation in England well known, Holmes was immediately found guilty.[41]

With the increase in literacy in America and the simultaneous decrease of clerical domination over the community, both the individual states and Congress began to enact statutory law concerning obscenity. Vermont was first in 1821. Connecticut and Massachusetts followed Vermont's example in 1834 and 1835 respectively.[42] These states had, under the United States Constitution, full

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[40]Morris L. Ernst and Alan U. Schwartz, Censorship: The Search for the Obscene (New York: The Macmillan Company, 1964), p. 14).

[41]Ibid., p. 15.

[42]Ibid., p. 18.

power over regulations concerning education, the family, and sexual behavior. However, it was up to the Federal Government to enact laws concerning interstate transportation of obscene material as well as its foreign import. Thus in 1842 the first limited Federal regulation against importation of obscenity was enacted.

Lord Campbell's Act of 1857 became the basis for obscenity law in America as well as in England. Basically what Sir Alexander Cockburn as Lord Chief Justice did to distort the philosophy of the Campbell Act in England, so Anthony Comstock, a young grocery clerk, did in America.

Comstock was fanatic in his drive against obscenity. His drive prompted him to form, with the YMCA, a Committee for the Suppression of Vice in 1872. Due to his lobbying, a Federal law governing obscenity in the mails (still in effect today) was passed (Section 1461 of Title 18, Ch. 71 United States Code).

The United States' definition of obscenity was similar to that in England. The first case to come before a United States court was in 1896. It defined obscenity as follows:

> The test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall.[43]

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[43] Ibid., p. 35.

For years to follow, the judicial reasoning behind obscenity law in the United States closely resembled that of England. For instance, the courts refused to discuss the particular parts of a book charged with being obscene lest the court records be exposed. Therefore, publishers and authors were often left completely ignorant of exactly what portions of their publications were being judged "obscene."

The United States Supreme Court began to establish its own definition of obscenity as a result of a decision in 1895 by a lower court which found Dan K. Swearingen guilty of mailing a copy of The Burlington Courier containing an "obscene" article. The United States Supreme Court, on the other hand, decided that the language of the article was course, vulgar and libelous but its relationship to sexual impurity was not present. Therefore the article was judged not to be obscene (because it lacked sexual references) and Swearingen was freed of the charge.[44]

Like the early history of English obscene libel law, publishers in the United States accepted the Comstock Laws (as the laws instituted by Anthony Comstock were called) as did publishers in England when faced with the Cockburn ruling. It was not until 1913 that an American publisher named Mitchell Kennerley decided to defend his

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[44] Ibid., p. 42.

own publication of Daniel Goodman's book, Hagar Revelly. The book was basically concerned with two shopgirls, one of whom turned to prostitution while the other remained pure. The story suggested that it was not mainly economic background that determined sexual vice as was the popular attitude of the time. Comstock read the seduction scenes within the book and felt that the book was obscene, apparently missing the moral of the book.[45]

The decision of the newly appointed judge, Learned Hand, in the Kennerley case shifted the American development of obscenity law from the test of obscenity pronounced by Lord Chief Justice Cockburn half a century earlier. Judge Hand's decision read as follows:

> I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, "obscene, lewd or lascivious." I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. . . . [T]he word "obscene"

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[45] Ibid., pp. 53-54.

> should be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now.[46]

Even though a different interpretation had been raised through the Kennerley decision, Judge Hand felt that he had no choice but to find the defendant guilty because of the precedents and the fact that he was a low-court judge.

Further progress in obscenity law was made when Raymond D. Halsey, a bookstore clerk, was arrested and brought to court by the Society for the Suppression of Vice for selling Mademoiselle de Maupin by Théophile Gautier. The Book had been written by a world renowned author of the nineteenth century. Halsey was acquitted at the trial but had decided to take the case to the Court of Appeals in New York for damages against the Society. Halsey won this battle, too.[47]

What was significant in this appeal was the Court's examination of the book. The Court took into consideration the reputation of the author, the fact that literary critics had held the book in high esteem since its first publication in 1835, and a reading of the whole book as opposed to limited passages.

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[46] United States v. Kennerley, 209F. 119 (1913).

[47] Ernst and Schwartz, op. cit., p. 56.

In 1929 People v. Friede dealt with The Well of Loneliness but the judgment was based upon The Queen v. Hicklin, mentioned above. However, the publisher, Friede, carried the fight to a three-man appellate court and won. The complete difference in judgments clearly shows the lack of a standard upon which an obscenity case was to be judged. The theme, one of lesbianism, was shocking to the public at the time. This theme, as well as the consideration of the community taste and the Cockburn test, gave the lower court a reason to condemn the book. Yet the higher court judges, with perhaps more sophisticated tastes, found the theme unobjectionable. Taste, then, could not be a standard for judgment.

The subject of sex had long been considered the prime ingredient of obscenity. But it was the United States v. Dennett case in 1930 that narrowed the subject of sex down to its proper place as far as the courts were concerned. In 1919, Mrs. Mary Dennett, having two growing sons of her own, believed that the emotional side of sex was being neglected both by the literature and by the parents of the time. She wrote a pamphlet, The Sex Side of Life, in an effort to furnish parents with material to give their youngsters. The pamphlet was well received by religious leaders, youth organizations, and parents alike. However, after the distribution of some twenty-five thousand pamphlets, the Post Office found the pamphlet

unmailable in 1926. Mrs. Dennet was charged with mailing obscenity, brought to court, found guilty and fined three hundred dollars.[48] The case was appealed to the Federal Circuit Court of Appeals in March of 1930. Judge Augustus N. Hand presided and, after hearing the facts, acquitted Mrs. Dennett.

This decision aided in determining what constituted obscenity. Briefly, Judge Hand explained that Mrs. Dennett had written a pamphlet for parents to give to children at the parents' discretion. Most important, Judge Hand explained, any article that dealt with sex might indeed arouse sexual desire under some circumstances but that the law did not prohibit everything that might arouse sexual impulses.

> We hold that an accurate exposition of the relevant facts of the sex side of life . . . cannot ordinarily be regarded as obscene. Any incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect. The tendency can only exist in so far as it is inherent in sex instructions, and it would seem to be outweighed by the elimination of ignorance, curiosity, and morbid fear.[49]

With the decisions of the Dennett and the Kennerley cases, there began a clearer definition of what constituted objectionable material as related to obscenity. Yet

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[48] Ibid., p. 81.

[49] United States v. Dennett, 39 F 2d 564 (1930), 569.

it was the case of the United States v. One Book Called 'Ulysses' (1933) that established a landmark decision in the fight for artistic freedom.

The book Ulysses by James Joyce was first published in 1922 in Paris. The book had a long history of legal problems prior to its entrance into the United States. Many critics thought Joyce's stream of consciousness work an important literary experiment. Yet, in spite of this thought, many men were imprisoned for publishing the book. Random House Publishing Company, in 1930, purposely sent a copy through United States Customs to be seized for violation of the Tariff Law of 1930 which allowed seizure of obscene books entering the country. This action by Random House allowed authorities to try the book itself rather than the seller or the publisher. The book was indeed seized for its use of Anglo-Saxon four-letter words and the bluntness of the stream of thought which involved many sexual allusions.

The case was tried by Judge Woolsey at the District Court in New York in 1933. The decision by Woolsey affirmed the use of expert testimony and a discussion of the book's purpose during a trial. In answer to the charge of its bluntness and of its use of four-letter words, Woolsey said:

> . . . in "Ulysses," in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist. I hold, therefore, that it is not pornographic.
>
> . . . . . .
>
> For his attempt sincerely and honestly to realize his [Joyce's] objective has required him incidentally to use certain words which are generally considered dirty words and has led at times to what many think is a too poignant preoccupation with sex in the thoughts of his characters.
>
> . . . . . .
>
> Accordingly, I hold that "Ulysses" is a sincere and honest book and I think that the criticism of it are entirely disposed by its rationale.[50]

Later in the decision Judge Woolsey said:

> The meaning of the word "obscene" as legally defined by the courts is: tending to stir the sex impulses or to lead to sexually impure and lustful thoughts.
>
> Whether a particular book would tend to excite such impulses and thoughts must be tested by the Court's opinion as to its effect on a person with average sex instincts - what the French would call l'homme moyen sensuel - who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law.[51]

It should be noted at this point that the emphasis for the test of the obscenity is whether a "person with average sex instincts" is affected rather than "into whose hands . . . it might fall," or a school-girl.

> . . . reading "Ulysses" in its entirety, as a book must be read on such a test as this, did not tend to excite sexual impulses or lustful thoughts but that its net effect on them was only that of

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[50] United States v. One Book Called "Ulysses," 5 F Supp. 182 (1933), 184.

[51] Ibid., p. 185.

somewhat tragic and very powerful commentary on the inner lives of men and women.

It is only with the normal person that the law is concerned. Such a test as I have described, therefore, is the only proper test of obscenity in the case of a book like "Ulysses" which is a sincere and serious attempt to devise a new literary method for the observation and description of mankind.[52]

Judge Manton dissented:

The decision to be made is dependent entirely upon the reading matter found on the objectionable pages of the book. . . . Who can doubt the obscenity of this book after a reading of the pages referred to, which are too indecent to add as a footnote to this opinion? Its characterization as obscene should be quite unanimous by all who read it. . . . No matter what may be said on the side of letters, the effect on the community can and must be the sole determining factor. . . . If we disregard the protection of the morals of the susceptible, are we to consider merely the benefits and pleasures derived from letters by those who pose as the more highly developed and intelligent? To do so would show an utter disregard for the standards of decency of the community as a whole and an utter disregard for the effect of the book upon the average less sophisticated member of society - not to mention the adolescent.[53]

The book was found to be admissible to the United States. However, the United States took the case to the Circuit Court of Appeals, but the decision was upheld by Circuit Judges Learned Hand and Augustus N. Hand.

This case, then, continued or established the principles that a book must be read as a whole, that the author's purpose is important, that critical opinions in

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[52] Ibid.

[53] St. John-Stevas, op. cit., p. 165.

judging a piece of literature are important and admissible, that words of all kinds may be used because they are only undesirable relative to time, and that the test is whether the "average man" of the community is affected rather than the test using the school-girl criterion.

The standard of the "average man" was, however, not followed in the United States v. Levine case of 1936. Esar Levine had sent advertisements for a number of books through the mail to a "blue-ribbon" list of people, that is, professional people. These books, he said, could not be "obscene" in the hands of those professional people. In the lower court the test was not admissible evidence since the judge held that the standard for obscenity was absolute. Levine was convicted.[54]

The case was appealed and Judge Learned Hand spoke for the majority of the court. The decision for reversal of the lower court opinion was primarily based upon Judge Hand's statement:

> The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands.[55]

In 1938 Life magazine published an article, accompanied with many photographs, entitled "The Birth of a Baby." Although the magazine's publisher, Roy Larsen,

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[54]Ernst and Schwartz, op. cit., pp. 108-109.

[55]United States v. Levine, 83 F 2d 156 (1946).

defended the article, a Catholic lay organization charged obscenity. The case was brought before the lower Criminal Court in New York City. The decision of the court included the following meaningful passages:

> Conceptions of what is decent or indecent are not constant. The early attitude of the Courts upon this subject is not reflected in the recent cases. The trends to be observed in the cases have mirrored changing popular attitudes. Recent cases illustrate the caution with which Courts have proceeded in this branch of the law to avoid interference with a justifiable freedom of expression.
>
> The gravamen of obscenity is the tendency of the matter to corrupt morals or to lower the standards of right or wrong concerning sexual behavior. The normal person must serve as a criterion, not the abnormal.
>
> Upon the trial of this action, Larsen produced as witnesses responsible public health authorities, welfare workers and educators who testified to the sincerity, honest and educational value of the picture story complained of. The prosecutor objected to the admission of this testimony. Strictly speaking, the contention of the People is correct. In a case such as this the jury or the triers of the facts must declare what the standard shall be. Such evidence is, however, rationally helpful and in recent years Courts have considered the opinions of qualified persons.[56]

The decision was for the acquittal of Larsen. The change in the community standards was re-enforced as was the principle of expert witnesses.

In 1946 the United States Supreme Court was confronted with a case involving the second class mailing privileges of Esquire magazine. The mailing privileges were denied by the Postmaster General on the grounds that

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[56]Ernst and Schwartz. op, cit., p. 116.

the articles and pictures contained in Esquire were "morally improper and not for the public welfare."[57] The injunction against the Postmaster General's order was sustained by the Court stating that "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."[58]

Several questions were raised as a result of the previous judgment. One of the first was the question of the constitutionality of the laws against obscene literature. Tests of the constitutionality received their highest attention when the publishers of Memoirs of Hecate County by Edmund Wilson were charged with obscenity.[59] The case was brought before a New York court in 1948. The lower court found the book obscene despite the testimony of Professor Lionel Trilling. The judgment was upheld on appeal and finally the case came before the United States Supreme Court. The issue at this point was that the constitutional guarantee of freedom of the press had not been allowed in the lower court's decisions. The court was equally divided (J. Frankfurter disqualified himself because of his friendship with Wilson) and judgment of the lower court held.

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[57] Hannegan v. Esquire, Inc., 327 US 146 (1946).

[58] Ibid.

[59] Doubleday and Company v. New York, 355 US 848 (1948).

The question of constitutionality was continued in 1949 by Judge Curtis Bok in the Pennsylvania Supreme Court at Philadelphia in the case of Commonwealth v. Gordon.[60] Nine authors had been accused of obscenity. Judge Bok's decision dismissed the indictments of the nine novels. Judge Bok reasoned that any statute penalizing obscenity could be applied only

> . . . where there is reasonable and demonstrable cause to believe that a crime or misdemeanour has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question; the opinion of anyone that a tendency thereto exists or that such a result if self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behaviour must appear beyond a reasonable doubt.[61]

However in June, 1957, Judge Bok's ruling (as it concerned the constitutional position of obscenity statutes) was defeated by the United States Supreme Court in the Roth v. United States[62] case. Samuel Roth had been charged and found guilty of violating postal laws by sending obscene circulars and advertising through the mails. A second case was to be decided upon with the Roth case. This case involved a man named Alberts who had been convicted in California for selling obscene writings.

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[60] Commonwealth v. Gordon, 66 D & C. 101 (1949).

[61] Craig, op. cit., pp. 141-142.

[62] Samuel Roth v. United States: David S. Alberts v. State of California, 354 US 476 (1957).

lberts maintained that the Fourteenth Amendment guar-
nteed him, within the state, the protection of the First
nendment.

Judge Brennan delivered the opinion of the court:

> The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.[63]

Judge Brennan argued that the original meaning of
he First Amendment protected the free interchange of
deas having the slightest redeeming social importance.
bscenity, however, is without redeeming social importance
nd therefore is not protected by the First Amendment.
et, as the lawyers for Roth and Alberts pointed out, the
ederal and State obscenity laws punish communications
hat incite impure sexual thoughts even though those com-
unications have not been proven to be connected with any
vert antisocial action. If thoughts are to be judged,
aid the lawyers, can one indeed determine what will sexu-
lly arouse one person and not another? And, the lawyers
sked, is it really the function of the government to
udge thoughts? Possibly obscene writing is denied the
se of tests to which other kinds of writings, (i.e.,

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[63] Ibid., 487.

writings with redeeming social importance) are entitled. These very tests should have been applied to the material in order to determine its obscenity.[64]

Judge Brennan made this statement:

> The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.[65]

Brennan then gave the new test for obscenity:

> Obscene material is material which deals with sex in a manner appealing to prurient interest, and the test is whether to the average person, applying contemporary community standards, the dominant theme of the materials appeals to prurient interest.[66]

The convictions of both cases were affirmed. The opinion of the majority generally eliminated obscenity from the protection of the First Amendment and denied the application of the "clear and probable danger" test which would require a causal relationship between the supposedly offending material and the antisocial behavior.

Justice Harlan, however, took issue with the "pruriency" definition of obscenity in the Roth case:

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[64] Ernst and Schwartz, op. cit., p. 205.

[65] Roth v. United States, op. cit., 487.

[66] Ibid.

> The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as "hard-core pornography." Nor do I think the statute can fairly be read as directed only at PERSONS who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography. Such a statute would raise constitutional questions of a different order. That being so, and since in my opinion the material here involved cannot be said to be hard-core pornography, I would reverse this case with instruction to dismiss the indictment.[67]

Interestingly, in 1961 the highest court in New York adopted Harlan's "hard-core pornography" test rather than the "pruriency" test given by Brennan in the People v. Richmond County News, Inc.

Justices Douglas and Black further argued against a basic assumption of the Roth case, that is, obscenity is not included under the protection of the First Amendment.

> I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be concerned with anti-social conduct, not with utterances. Thus, if 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. In other words, literature should not be suppressed merely because it offends the moral code of the censor.
>
> The legality of a publication in this country should never be allowed to turn on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the

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[67] Ibid., 500.

> community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.[68]

Finally Douglas and Black issued the following statement concerning the First Amendment and its relationship to obscenity:

> I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.[69]

In 1956 a Mr. Butler was arrested for selling "a book containing obscene, immoral, lewd, lascivious language or description, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." This was the language of the Michigan law (Section 343 of the Michigan Penal Code) enacted in order to prevent obscene material from falling into the hands of youth. However, the United States Supreme Court perceived the law not as simply forbidding direct sale of obscene materials to children, but also aimed at that material which might corrupt children.

Butler was convicted in a lower court in Detroit. The State Supreme Court refused to hear his appeal and, as a result, Butler took the case to the United States Supreme Court on the grounds that his rights under the Fourteenth

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[68] Ibid.

[69] Ibid.

Amendment (free speech and state interference) had been violated. On February 25, 1957, nine judges agreed to reverse the previous decision. Judge Frankfurter delivered the opinion:

> The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.
> . . . . . .
> 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. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. We are constrained to reverse this conviction.[70]

Another consideration was the "community standards" criterion which was included in Brennan's opinion of the Roth case. Harlan again takes issue with this standard by saying:

> It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation." Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming

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[70] Butler v. Michigan, 352 US 380 (1957), 383.

> danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.[71]

Even though the concept of community standards was strengthened by Harlan's opinion, the concept of the freedom of speech became endangered. If states had control over deciding which books would be considered obscene and which would not, no publisher could afford national distribution, fearing obscenity action in one state even though his publication was allowed in another. As a result, a publisher might drop the publication of a potentially questionable book, even though it was inherently not obscene, simply out of fear. On the other hand, Federal judgment is a one-time-only judgment.[72]

Even more probing a consideration of the community standard was put forth by Justices Douglas and Black in their opinion against the majority and Justice Harlan.

> The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law , . . abridging the freedom of speech, or of the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

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[71] Roth v. United States, op. cit., 487.

[72] Ernst and Schwartz, op. cit., p. 213.

> Any test that turns on what is offensive to the community's standard is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency "to excite lustful thoughts." This is community censorship in one of its worst forms.[73]

Yet another interpretation of "community standards," resulting from the Roth case and as far back as the Kennerley case, came from Mr. Justice Brennan's opinion in Jacobellis v. Ohio in which he described the phrase in the Kennerley case to mean not individual states and local communities but rather "the community," or the society at large or people in general. Thus the meaning of obscenity would change from time to time but not from town to town or community to community.

The tests laid down by the Roth case were made clearer in Manual Enterprises v. Day[74] in 1962. The company published certain homosexual magazines which were charged "obscene" under Federal postal censorship law. Justice Harlan delivered the opinion that these magazines were adjudged obscene because the lower courts thought that the Roth decision had established only one test of obscenity. That test was "whether to the average person, applying contemporary community standards, the dominant theme of the material as a whole appeals to prurient

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[73] Roth v. United States, op. cit., p. 487.

[74] Manual Enterprises v. Day, 82 S. Ct 1432 (1962).

interest." However, Harlan also included, as established in the Roth case, the concept of "patent offensiveness."

> To consider that the "obscenity" exception in "the area of constitutionally protected speech or press," does not require any determination as to the patent offensiveness of the material itself might well put the American public in jeopardy of being denied access to many worthwhile works in literature, science, or art. For one would not have to travel far even among the acknowledged masterpieces in any of these fields to find works whose "dominant theme" might, not beyond reason, be aimed to appeal to the "prurient interest" of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose as would bar from the mails all material, not patently offensive, which stimulates impure desires relating to sex. It is only material whose indecency is self-demonstrating and which, from the standpoint of its effect, may be said predominantly to appeal to the prurient interest that Congress has chosen to bar from the mails by the force of the statute.[75]

Summary

The controversy continues, but in general the courts have enabled literature to include the exploration of sex--as an inherent part of man's nature. It is well to review briefly the present characteristics of obscenity law in the United States as they have developed from the above cases:

1. Classics or those influential pieces, usually written in the past, are now relatively free from suppression.

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[75]Ernst and Schwartz, op. cit., p. 224.

2. A book is no longer judged upon portions of its contents; it is judged as a whole.
3. If a book can be proven to be of social importance, it will not be suppressed.
4. A book is judged as to its effect on the average men and not upon the most innocent, the abnormal or the young.
5. A book is judged according to its acceptability to "community standards," a term which, because of its subjectivity, remains legally undefined.
6. Obscenity differs from hard-core pornography through the "intent" of the author in writing the book.
7. The theme of the book is no longer a concern for judgment.
8. Scientific works and those dealing with sex education are no longer subject to seizure.[76]

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[76] Ibid., pp. 245-246.

CHAPTER IV

THE LEGAL HISTORY OF OBSCENITY IN MOTION PICTURES

The legal history of obscenity in motion pictures concerns not only obscenity in films, but also licensing cases which have clarified the legal rights of the motion picture. These cases establish necessary foundations for the relative freedom of the film today, as well as defining obscenity in today's visual medium.

Early Motion Picture Regulation

The motion picture, unlike literature, was not allowed an evolutionary period of development and maturation. Not long after Thomas A. Edison's Kinetoscope introduced motion pictures in the United States in 1894, "movies" were criticized by the public and even taken to court. The nickelodeon "movie" pantomime of a bride's wedding night was closed by a New York court order after being denounced as "an outrage upon public decency."[1]

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[1] People v. Doris, 14 App. Div. 117, 43 N.Y.S. 571 (1st Dept 1897).

Unlike a reading audience, the first audience of the "movie" was not sophisticated and educated. Rather, the majority of the audience were the working classes, the immigrants, and the children of the city. Moralistic concern for the motion picture by portions of the public, various church officials, and city government officials was immediate because of the sensational films released by the small industry. Like the early publishers of the Edmond Curl era, movie companies were in strong, undisciplined competition with each other, completely disregarding rivals' properties and creative efforts. As a result, the industry unintentionally brought the first of many legal restraints upon themselves.[2]

The pre-exhibition censorship of movies began in Chicago and New York in 1907. This introduction of prior restraint by local boards (non-governmental) as well as by local governments established a restrictive pattern from which the film industry was to suffer for years to come.[3]

Local individuals and committees endeavored to control the rapid influx of movies considered to be "immoral." As a result of the first censorship case, Block v. Chicago (1909), a charge was brought under a Chicago ordinance.

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[2]Richard S. Randall, Censorship of the Movies, The Social and Political Control of a Mass Medium (Madison: The University of Wisconsin Press, 1968), pp. 10-11.

[3]Ibid., p. 11.

against The James Boys and Night Riders for their "immoral" and "evil effects upon youthful spectators."[4] The Chicago ordinance was upheld by the Illinois Supreme Court.

Also in 1909 a group of New York citizens, in an effort to preview and evaluate motion pictures prior to their release as well as to curb government interference, formed the National Board of Censorship. The Board, however, was financially supported by the motion picture industry and, at the same time, extremely permissive in its decisions. As a result, the Board was viewed by the public and the press as a creature of the motion picture industry and consequently was not effective. The result was a series of licensing and censorship laws that the industry has never completely overcome.

Pennsylvania enacted the first of the state censorship laws in 1911, followed by Ohio and Kansas in 1913. New York produced a New York State Licensing Law in 1921 and, in 1922, Virginia followed New York's precedent by establishing a licensing process. A decade later, a Massachusetts statute allowed the state to approve or disapprove entertainment consistent with the character of Sunday observances. A Connecticut law required that all films be taxed and registered with the state tax commissioner. A Rhode Island law gave the local police power to

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[4]Block v. Chicago, 239 Ill. 251, 87 N.E. 1011 (1909).

require permits for films. Most of the above censorship laws ran uncontrolled and were commonly abused.[5]

In general, the laws provided for a board to view all films before their showing within the state. The films were judged showable if they were not obscene, sacrilegious, indecent, or tending to corrupt the morals of the youth. As with literature then, licensing appeared to prevent the dissemination of "harmful" material,

The Legal Rights of the Motion Picture

The inevitable question of the freedom of the medium under the First and Fourth Amendments to the Constitution arose at a time when only simple entertainment and sensationalism were available, bringing the highest profit to the producers and distributors. Because of the disorganization of the motion picture industry, the abuse of the self-regulation boards and the general questionable content of pictures, the industry, through the landmark case of Mutual Film Corporation v. Ohio,[6] lost its rights under the First and Fourth Amendments for years to come.

As noted, Ohio had enacted a censorship law which enabled a board to preview, for a fee, all films to be shown in Ohio prior to their release. The Mutual Film Corporation, a Detroit company, forced to submit its films,

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[5]Randall, op. cit., p. 11-13.

[6]Mutual Film Corporation v. Ohio Industrial Commission, 236 US 230 (1915).

fought back by maintaining that the requirements put an undue burden upon interstate commerce. The Corporation also charged that Ohio law failed to set precise standards by which a film was judged. Most importantly, the company continued, the law neglected the freedom of speech guaranteed under both the Ohio Constitution and the First Amendment of the United States Constitution.[7]

Judge McKenna delivered the majority opinion of the Supreme Court. The commerce argument was dismissed with the Court's assumption that once the films were in the hands of the exchange, such as Mutual Films, they were state property and could thus be regulated. In answer to the second accusation, the Court said that the experience and sense of men determined the precise judgment of a film and that the terms were not capricious or whimsical in nature. However, the most important statement from the Court as to the position of the motion picture under the First Amendment was as follows:

> The exhibition of motion pictures is a business pure and simple, originated and conducted for profit . . . not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion. They were mere representations of events, of ideas and sentiments published or known; vivid, useful, and entertaining, no doubt, but . . . capable of evil, having power for it, the greater

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[7]Ira H. Carmen, Movies, Censorship, and the Law (Ann Arbor: The University of Michigan Press, 1966), pp. 12-13.

because of their attractiveness and manner of exhibition.[8]

Richard S. Randall, in his book Censorship of the Movies, points out that McKenna's decision was based upon three lines of reasoning. First the decision noted that the film was primarily an entertainment medium rather than a medium of ideas: the nickelodeons reflected this viewpoint. Second, free speech doctrines were construed to be politically oriented. McKenna also saw the motion picture industry primarily as a profit-making business. But indeed all book publishers and newspaper publishers were in a business to make a profit. Undoubtedly what McKenna should have said was that, unlike books and newspapers, movies could not be thought of as a public service. Finally, McKenna said, movies had a special capacity for evil. This point has never been proven although common sense suggests that movies do possess unusual communicative powers and may contribute to evil.[9]

In relation to obscenity, this decision allowed various boards within the states (many made up of uneducated and oversensitive individuals) to censor not only what was "patently offensive" as far as sex was concerned, but also those films attempting to present an honest moral dilemma which necessarily included the use or the subject

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[8]Mutual Film Corp. v. Ohio Industrial Commission, op. cit., at 244.

[9]Randall, op. cit., pp. 19-20.

of sex. In other words, all references to sexual relations between a man and a women, no matter how honest, could be judged as obscene and thus, detrimental to the public's welfare.

Four years after the Mutual decision, the case of Schenck v. United States brought forth a decision that would in the future give censors a basis for limiting the exhibition of certain motion pictures. The General Secretary of the Socialist Party had been convicted of violating the Espionage Act by sending leaflets to future draftees urging them to resist the Conscription Act. The basis for the defense was the guarantee of the freedom of speech. However, Mr. Justice Holmes, in the opinion of the Court, said:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[10]

Censors applied this criterion in conjunction with Mutual's potential "evil effects" statement, and thus for many years succeeded in winning support for their suppressive decisions against motion pictures. In the censors' minds, then, a certain motion picture would present a "clear and present danger" if exhibited and therefore would lead to evil in the form of illegal acts within the community.

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[10] Schenck v. United States, 249 US 47 (1919).

According to Arthur Knight, during the decades following the Mutual and Schenck cases, films slowly began to mature.[11] A major influence was the foreign film. For instance, the Italian film Quo Vadis in 1912 was an unprecedented long film and was featured at a legitimate theater rather than at a nickelodeon. As a result, the middle class began to patronize the "legitimate" motion picture. American film producers followed their example by beginning to exhibit longer movies. Those suited to middle class morality allowed sex to be shown but demanded it properly condemned by the end of the film. Nudity in the films of this time was extremely rare, and generally films were quite chaste.

After World War I, American films were accepted throughout the world because of their light and frivolous themes, a welcomed difference from the war experiences of the other countries. However, any freedom gained by the film industry was quickly lost during the 1920's. A new and permissive morality was beginning to alarm the public, which viewed Hollywood as a source and purveyor of morality. At the same time, scandals involving famous movie actors and actresses erupted in Hollywood, thereby

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[11]Arthur Knight, The Liveliest Art, A Panoramic History of the Movies (New York: The New American Library of World Literature, 1959), p. 30.

providing "proof" that films should not be allowed their freedom.[12]

The influence of the foreign film was still prevalent during the Twenties. The morality of the Hollywood film was controlled by the Motion Picture Producers and Distributors of America, formed in 1922. The resulting Motion Picture Production Code was an attempt by the American film industry to regulate film morality. However, many films dealing with sex and not controlled by the Code came from Germany, France and Italy. In some cases, these films provided greater challenges and stimulation than those in America.[13]

The Thirties led film makers to emphasize sex in their pictures as an allurement for the Depression dollar. The development of sound in the industry demanded dialogue writers. Novelists and newspaper people were hired and, while the dialogue became more and more naturalistic, the motion picture became more unrealistic and staged. Sexual sadism, violence and gangsterism drew movies further away from artistic creativity than expected. As a result, a new Motion Picture Production Code was enacted in 1934. The threats of Federal censorship and the pressure groups, such as the Catholic church groups, forced the film

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[12] Ibid., pp. 107-116.

[13] Ibid., p. 117.

industry's acceptance of the self-regulating code.[14] Catholic churchmen and lay members formed the Episcopal Committee on Motion Pictures and shortly afterwards, the Legion of Decency. Since it had the power to threaten the industry by economic boycott, its requirements were often met.[15]

In the late Thirties the film became more sophisticated. Technical advances, including more sensitive film and faster lenses, afforded the industry opportunities to experiment to a greater degree. The increasing realism of fictional and documentary films led to themes of social concern. Such films included Pinky (which dealt with race relations), Gentlemen's Agreement (anti-Semitism), The Ox-Bow Incident (mob emotion), Lost Weekend (alcoholism) and many more.

Concern for the rights of free speech also increased during this period. President Roosevelt, in 1941, accorded motion pictures the same privileges as those of the press and radio. In the late 1940's the industry's emphasis on sex grew stronger and self-regulation began to decrease under pressure of competition with the foreign film maker and the spawning of independent producers. The big studios had less and less control over film content.

[14]See Appendix A for the latest Motion Picture Association of American Production Code.

[15]Ibid., p. 240.

The test of the mature film against legal restraints became more tense. In view of these technical and political events, the time for establishing the film's rights was drawing closer.

Several legal decisions were made that would influence the eventual free speech rights of the film. A decade after the Mutual decision, the Supreme Court found in Gitlow v. New York that the prohibitions contained in the First Amendment against abridgments of free speech by the Federal Government were applicable to state governments as well as under the due process clause of the Fourteenth Amendment.[16]

The 1931 case of Near v. Minnesota concerned an argument regarding a state's right to enjoin future issues of a newspaper on the basis of previously published defamatory statements. Such an action, said Chief Justice Hughes, would be prior-restraint of speech, thus violating the guarantee of the First Amendment. A remedy for statements of a defamatory nature did exist. Most important, however, the Chief Justice said that a publication containing classified military troop movements during times of war, obscenity, or incitements to acts of violence and overthrow of the government could be restrained. Yet there was no statement as to how prior restraint in these instances could be accomplished. Thus, although prior

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[16]Gitlow v. New York, 268 US 652 (1925).

restraint was not absolutely forbidden by the states, it must be used only in the most unusual circumstances.[17]

In Kovacs v. Cooper in 1949 it is interesting to note that Justice Black dissented in an opinion concerning legislation to prevent the use of sound trucks on the city's streets. Justice Black believed that censoring sound trucks was against the guarantees of the First Amendment because they were a means of communication just as were the protected means of "radio, press and the motion picture."[18] Thus the motion picture was in this decision, a means of communication protected under the First Amendment. Also it appeared that motion pictures were not to be licensed.

In 1948 Justice Douglas made an incidental statement that would almost assuredly set motion pictures free of the bonds of the Mutual decision in the near future. The case concerned an anti-trust suit against Paramount Pictures and their block booking practices. Justice Douglas observed: "We have no doubt that motion pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[19]

Four years later the final blow to the Mutual decision was given in Burstyn v. Wilson. The film The Miracle

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[17] Near v. Minnesota, 283 US 697 (1931).

[18] Kovacs v. Cooper, 336 US 77 (1949).

[19] United States v. Paramound Pictures, Inc., 334 US 131 (1948).

was made by Roberto Rossellini. The film dealt with a peasant girl seduced by a bearded stranger whom she imagined to be St. Joseph, resulting in a child whom she believed to be the Christ child. In conjunction with two other Rossellini films, the resulting trilogy, Ways of Love, won the best foreign language picture of 1950 as selected by the New York Film Critics Board. The film was granted a license in New York by the New York State Motion Picture Division and exhibited. A few days later, however, protests prompted the city commissioner to close the showing because it was "officially and personally blasphemous." The film's distributor, Joseph Burstyn, succeeded in having the license commissioner enjoined from any further interference with the showing of the film. After picketing by Catholics, bomb threats to the theater and finally revocation of the license by the State Board of Regents because the film was "sacrilegious," Burstyn took the matter to the New York courts. The Court of Appeals, however, found the "sacrilegious" censorship valid.[20]

In 1952 the United States Supreme Court heard the case and issued a decision that had been awaited with intense interest by the motion picture industry. The Court considered only whether motion pictures were protected by the Constitution and whether the censorship

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[20]Burstyn v. Wilson, 303 N.Y. 242 (1951).

standard of "sacrilegious" was legitimate. The opinion of the Court, delivered by Mr. Justice Clark, contained the following arguments:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. . . .
>
> It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.
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> It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.
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> For the foregoing reason, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in Mutual Film Corp. v. Industrial Comm., supra, is out of harmony with the views here set forth, we no longer adhere to it.
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> . . . . . .
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> Since the term "sacrilegious" is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state

> may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious."[21]

The question of the constitutionality of prior-censorship was still unanswered. However, the decision did aid in the development of more mature films. Sophisticated subjects were brought to the screen with less fear on the part of the motion picture producers and exhibitors.

Following the Burstyn decision, several cases concerned with licensing and prior-censorship were heard by the Supreme Court. These were Gelling v. Texas, 343 US 960 (1952); Superior Films v. Dept. of Education and Commercial Pictures v. Board of Regents, 346 US 587 (1954); Hombly Productions v. Vaughn, 350 US 870 (1955); Kingsley International Pictures v. Board of Regents, 360 US 684 (1959); Times Film Corp. v. Chicago, 355 US 35 (1961); and Freedman v. Maryland, 380 US 51 (1965). In all the above the power of the censor was cut back. In Kingsley, which concerned itself with the film adaptation of D. H. Lawrence's novel Lady Chatterley's Lover, the Court found that the licensing standard of "sexual immorality" was invalid. The New York Legislature had denied the film a license because it was feared that the film portrayed

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[21] Burstyn v. Wilson, 343 US 495 (1952).

adultery in a positive manner. The Court said that "sexual immorality" was indeed not necessarily "obscenity" or "pornography." The decision of the Court, as given by Mr. Justice Stewart, continued:

> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea - that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.
>
> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.[22]

This decision left states with prior-censorship laws in doubt.

A partial answer to the right of prior-censorship appeared when the Times Film Corporation distributed Don Juan, an adaptation of Mozart's opera Don Giovani. The Corporation challenged Chicago's licensing law after paying a license fee but refusing to submit the film for preview. The Corporation suggested that the Board might

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[22] Kingsley International Pictures v. Board of Regents, 360 US 684 (1959) 688.

act against the film if it wished, but only after its first exhibition. Justice Clark, delivering the opinion of the Court, found that although the city had a right to license films, a motion picture was entitled by constitutional protections to express its ideas at least once. Therefore Chicago's demand for the submission of the film prior to exhibition was void. However, Mr. Chief Justice Warren wrote a dissenting opinion with which Justices Black, Douglas and Brennan concurred. Portions of their opinion follow:

> . . . To me, this case clearly presents the question of our approval of unlimited censorship of motion pictures before exhibition through a system of administrative licensing. Moreover, the decision presents a real danger of eventual censorship of every form of communication be it newspapers, journals, books, magazines, television, radio or public speeches. . . . In arriving at its decision the Court has interpreted our cases contrary to the intention at the time of their rendition and, in exalting the censor of motion pictures, has endangered the First and Fourteenth Amendment rights of all others engaged in the dissemination of ideas.
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> . . . . . .
>
> I hesitate to disagree with the Court's formulation of the issue before us, but, with all deference, I must insist that the question presented in this case in <u>not</u> whether a motion picture exhibitor has a constitutionally protected, "complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." . . . The question here presented is whether the City of Chicago - or, for that matter, any city, any State or the Federal Government - may require all motion picture exhibitors to submit all films to a police chief, major or other administrative official, for licensing and censorship prior to public exhibition within the jurisdiction.
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> . . . . . .

> As the Court recalls, in Joseph Burstyn, Inc. v. Wilson . . . it was held that motion pictures come "within the free speech and free press guaranty of the First and Fourteenth Amendments." . . . Here, once more, the Court recognized that the First Amendment's rejection of prior censorship through licensing and previous restraint is an inherent and basic principle of freedom of speech and the press. Now the Court strays from that principle; it strikes down that tenet without requiring any demonstration that this is an "exceptional case," whatever that might be, and without any indication that Chicago has sustained the "heavy burden" which was supposed to have been placed upon it. Clearly, this is neither an exceptional case nor has Chicago sustained any burden.
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> . . . . . .
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> . . . The Court, in no way, explains why moving pictures should be treated differently than any other form of expression, why moving pictures should be denied the protection against censorship. . . . When pressed during oral argument, counsel for the city could make no meaningful distinction between the censorship of newspapers and motion pictures. In fact, the percentage of motion pictures dealing with social and political issues is steadily rising. The Chicago ordinance makes no exception for newsreels, documentaries, instructional and educational films or the like. All must undergo the censor's inquisition. Although it is an open question whether the impact of motion pictures is greater or less than that of other media, there is not much doubt that the exposure of television far exceeds that of the motion picture.[23]

In the above case, then, the majority had interpreted the Near decision as having sanctioned prior restraint by licensing. The minority, however, interpreted the Near decision as allowing prior restraint only where an utterance had already been shown to be obscene

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[23] Times Film Corp. v. City of Chicago, 365 US 43 (1961) 62-64.

as "exceptional" speech. If the latter were the case, any licensing system which required submission of films and penalized exhibitions of unsubmitted films would not be permissible restraint. It appeared to the minority that only one exhibition hardly enabled the ideas expressed in the film to adequately enter into the "marketplace of ideas."[24]

Following the Times case, lower courts did not uphold censors and states did not create new censorship boards as might have been expected. Before the Times case, in 1959, five states and forty-eight municipalities used prior censorship[25] as compared to four states and twenty-seven municipal boards in 1962.[26]

The Court reunited in their opinion four years later in a decision involving a Baltimore theater manager, Ronald Freedman. Freedman exhibited the film, Revenge at Daybreak, which contained no obscenity and was therefore constitutionally protected without first submitting it to the State Board of Censors for review and subsequent licensing. Freedman was convicted in Maryland and the case was carried to the Supreme Court.

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[24] Randall, op. cit., p. 37.

[25] 1959 International Motion Picture Almanac (New York, 1959), pp. 722-724.

[26] 1962 International Motion Picture Almanac (New York, 1962), pp. 733-735.

Although the decision of the court did not revoke the previewing requirement for films, it declared unanimously that the burden of proof was on the censors rather than on the exhibitor, and, that actual restraint could be imposed only after prompt judicial review. Therefore, a system of restraint was permissible for films as long as appropriate procedural safeguards existed and the films were outside the area of constitutional protection.[27]

Motion Picture Obscenity Cases

As a result of the cases above, motion picture censorship was narrowed to a point where obscenity became the only censorable standard. It is also important to realize that because of the cases reviewed above, the standard of obscenity was greatly narrowed to allow for freer portrayal of nudity and erotica. As a result, the censors lost many battles in the area of obscenity which would have been won were it not for the previous censorship cases.

According to Richard Randall, there appear to be seventeen movie censorship cases in four major categories since the Miracle decision in which the charge of obscenity was not sustained by the courts.[28] Several of the cases

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[27] Freedman v. Maryland, 380 US 51 (1965).

[28] Randall, op. cit., p. 63.

have been discussed above and will not be discussed further.

In the area of "immoral sexual behavior with or without nudity" were such cases as Times Film Corp. v. Chicago (1957), Kingsley International Pictures v. Board of Regents (1959) and Jacobellis v. Ohio (1964). In the lower court, too, various films were held not to be obscene. For instance in Audubon Films v. Board of Regents (1965)[29] a French film, Twilight Girls, involved lesbianism within a school for girls. The Board of Regents gave the following reasons for not granting a license to the film:

> The authors of the production devote most of the sequences to girls in the dormitory while they are going to bed, sleeping and getting up . . . [the story] revolves around two girls who are lesbians. Contrary to an order by the supervisor, they take their pajamas off; then there are various scenes in which the lesbians embrace and show their interest in this type of sex perversion. There is further exhibition of nudity and the girls take shower baths. From the beginning of this sequence, the type of presentation taken together clearly appeals to the prurient interest of the public.[30]

In 1957 The Miracle was found not to be obscene by an Illinois appellate court. The decision contained the belief that the film, whose central character was dressed in rags and whose personality had little charm, would not

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[29] Audubon Films v. Board of Regents, 15 N.Y. 2nd 802, 205 N.E. 2d 694 (1965).

[30] Variety, April 4, 1962, p. 13.

appeal to the sexual desires of the "average man." It was apparently felt that blatant glamour, instead, was an important influence in arousing sexual desire.[31]

In 1964 Nico Jacobellis, a Cleveland Heights, Ohio theater manager, was convicted under the Ohio Penal Code for possessing and exhibiting an obscene film, The Lovers. The motion picture involved a woman who, bored with her marriage and her life in general, left her husband and family for a young archeologist. The film built to an explicit love scene near the end of the picture.

The decision of the lower court was upheld by the Ohio Supreme Court and subsequently was appealed to the United States Supreme Court.

Justice Brennan delivered an opinion which was in reality a clarification of the Roth-Alberts decision in 1957. In Roth-Alberts, as will be recalled, obscenity was found not to be under the protection of the First Amendment because it was "utterly without redeeming social importance." It was also made clear that sex in art, literature, and in scientific works was not reason enough to deny the material constitutional protection. The Jacobellis decision emphasized the point that sex in material which expressed ideas or that had artistic, literary or scientific value, or social importance, was

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[31] American Civil Liberties Union v. Chicago, 13 Ill. App. 2d. 278, 141 N.E. 2d 56 (1957).

considered to be under constitutional protection. The Court also warned that a piece of material could not be condemned because only part of the motion picture (e.g. the love scene in the last reel of The Lovers) contained a prurient appeal. Obscenity, Brennan said, was "utterly without redeeming social importance" and that the material must be "substantially beyond customary limits of candor in describing or representing such matters" (sex, nudity, or excretion). Therefore The Lovers did not come under the purview of Roth-Alberts.

Justice Stewart, concurring, viewed what the Court defined as obscenity through the Roth-Alberts, Manual Enterprises and Jacobellis decisions, as "hard-core pornography." Stewart did not attempt to further define the type of material about which he was speaking but said, "I know it when I see it."[32]

It would appear from this case, then, that obscenity is an appeal to prurient interest which is utterly without social importance and which goes beyond customary limits of frankness. Brennan, however, said that the Court's definition as used by local juries would have "varying" meaning from time to time.

In the case of Trans-Lux Distributing Corp. v. Board of Censors, a 1965 Maryland case, the court found the film A Stranger Knocks, a Danish film, not obscene. The film-

[32]Jacobellis v. Ohio, 378 US 184 (1964).

contained two scenes of sexual intercourse between unmarried persons. The court (Maryland Court of Appeals) felt that the film was a serious work of art and that the general theme of the film, that of the death of a man, and a woman facing a possible murder charge, did not condone or make desirable the sexual relations exhibited in the film. Rather, said the court, the sexual relations were presented as undesirable.[33]

In United States v. One Carton Positive Motion Picture Film Entitled "491" (1966), a Swedish film, the Second Circuit Court of Appeals decided that, although various abnormal sexual acts by delinquent boys such as sodomy, intercourse with a prostitute, and homosexuality were depicted, the film was honestly trying to deal with current problems of a social nature.[34]

Another Swedish film, The Virgin Spring, was found to be obscene in Janus Films v. Fort Worth (1962) and affirmed by the Federal Court in 1962.[35] The reason for this finding was the film's extremely long and vivid rape scene.

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[33]Trans-Lux Distributing Corp. v. Board of Regents, 240 Md. 98, 213 A 2d 235 (1965).

[34]United States v. One Carton Positive Motion Picture Film Entitled "491", 247 F. Supp. 450 (S.D.N.Y. 1965), 367 F. 2d 889 (2n Cir. 1966).

[35]Janus Films v. Fort Worth, 354 S.W. 2d 597 (Tex. Civ. App. 1962), 163 Tex. 616, 358 S.W. 2d 589 (1962).

Randall's second classification, nudity without sexual behavior, includes, among others, two fictionalized nudist camp films. One film, Garden of Eden, in Excelsior Pictures v. Chicago (1960), was found not to be obscene because it showed nudism as a wholesome family affair and put forth the idea that clothing may promote an attitude of shame in regard to the naturalness of the body and its functions.[36]

In Fanfare Films v. Motion Picture Censor Board (1964), the Maryland Court of Appeals found Have Figure, Will Travel not to be obscene. The film portrays three girls practicing nudism outside a nudist camp upon a boat. Yet, because the girls did not involve themselves in any sexual activity and were seen nude only by each other, the film was cleared of the obscenity charge.[37]

Once again the Maryland Court of Appeals decided a film not obscene in Maryland Board of Censors v. Times Film Corp. (1957). The case dealt with the documentary Naked Amazon for which the Maryland Board of Censors had denied a license. Again the decision rested upon the fact that no sexual activity took place within the film. The

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[36] Excelsior Pictures v. Chicago, 182 F. Supp. 400 (N.D. Ill. 1960).

[37] Fanfare Films v. Motion Picture Censor Board, 234 Md. 454, 129 A. 2d 833 (1957).

film dealt with the nation's customs and rituals and not sexual themes.[38]

Nudity without sexual behavior appears to present no problem to the film makers. As long as the film's characters accept their nudity and are not sexually aroused themselves or stimulate other characters sexually, the courts feel that the "average man's" prurient interests will not be aroused.

Randall's third designation involves "dirty" words. In Columbia Pictures v. Chicago (1959), the motion picture Anatomy of a Murder used "rape" and "contraceptive" but was cleared of obscenity charges when the court explained that it did not feel that such words would arouse the salacity of the average viewer so as to outweigh the film's artistic presentation.[39]

In The Connection Co. v. Board of Regents (1962) stronger Anglo-Saxon language was used as slang by the heroine but was not held to be obscene.[40]

A United States precedent in this area of "dirty" language had, of course, been set in the Ulysses case in 1933 as the counsel of that case explained various four-letter words in historic terms.

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[38] Maryland Board of Censors v. Time Film Corp., 212 Md. 454, 129 A. 2d 833 (1957).

[39] Columbia Pictures v. Chicago, 184 F. Supp. 817 (N.D. Ill. 1959).

[40] The Connection Co. v. Board of Regents, 17 App. Div. 617, 230 N.Y. S. 2d 103 (3d Dep't 1962).

The last classification, "sex education," is almost surprising after such historic cases as the Sanger booklet of 1923 in England, the Dennet case, the Life case ("The Birth of a Baby") of 1938, United States v. One Book Entitled "Contraception" by Marie C. Stopes (1931). Yet the film Mom and Dad was refused a license by the State Board of Regents in New York because of a human birth sequence. The decision, however, was reversed by an Appellate Division of the State Supreme Court which held that the sequence was "scientific in level and tone, portraying under restrained and controlled conditions a human birth" and was not "indecent."[41]

Thus the above decisions permitting nudity and erotica appear to follow closely the precedents followed in the print media. The Supreme Court has increasingly allowed more and more sexuality in mass media through the years. Pertinent examples are One, Inc. v. Olesen in 1957 (the court upheld the mailability of One-The Homosexual Magazine); Sunshine Book Co. v. Summerfield in 1957 (court upheld mailability of two nudist magazines); and Mounce v. United States in 1957 (Court of Appeals reversed decision against imported nudist and student art magazines). Several "girlie" magazines were found not obscene by one

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[41] Capitol Enterprises v. Chicago, 260 F. 2d. 670, 674 (7th Cir. 1958).

Supreme Court decision in three 1967 cases--Redrup v. New York, Austin v. Kentucky, and Gent v. Arkansas.

Nudity today in major films is not uncommon. Yet the court decisions explain only what is not obscene in motion pictures. What is obscene must still be ambiguously derived from the above decisions, as the courts only infer what constitutes obscenity in the motion picture. Undoubtedly hard-core pornography in film would be censored by the court.

The Supreme Court, while saying that the motion picture, because of its "greater capacity for evil," cannot be governed by the same rules as the other types of speech media, has never fully explained its rationale. Its statements concern themselves in areas of censorship power rather than with obscenity per se.

It should be noted also that subject matter of contested films would have probably not brought court action if the same material were reproduced in print. Yet the increasing liberalization of the film industry follows proportionately the liberalization of the print media. As was noted in the previous chapter, literature gradually gained its freedom of expression over two hundred years. The motion picture, on the other hand, has been in existence for only a little more than sixty years. The relative freedom of the film could not have been accomplished if it were not based upon society's changing attitudes

towards sex and upon legal precedents forged by the print media.

Age Classification Censorship

Perhaps the most effective restriction placed upon the film exhibition industry is the labeling of movies as suitable or unsuitable for children. Local government or nongovernment agencies may classify pictures either at a compulsory or advisory level. In the United States the nongovernmental advisory form is the most popular. These agencies include the Film Board of National Organization, the "Green Sheet" (an organization of the motion picture industry in conjunction with several organizations), the National Catholic Office for Motion Pictures (formerly the Catholic Legion of Decency) as well as local organizations. Government classification remains in a few cities such as Chicago and Dallas.

The rationale for classification, of course, is to prevent susceptible youths from viewing motion pictures which might stimulate violent or sexual behavior. There are many precedents for disallowing youth certain privileges, such as driving automobiles or purchasing alcohol, among others. Yet a question arises in the limitation of a child's First Amendment rights. The Supreme Court has recognized, in Jacobellis v. Ohio the interests of the states and various cities in protecting children from

potentially harmful materials. Yet, as Butler v. Michigan pointed out, this fact does not mean that the material may be totally suppressed. There have been relatively few cases concerned with classification.[42] In these cases it has been found that the designation of films for "adults only" has not violated any constitutional guarantees of free expression. Above all, the city did not have to prove any causal relationship between the film and a child's actions.

Randall gives an example of classification in Chicago, limited to erotica and nudity, which condemns a film if:

> the picture, considered as a whole, has the dominant effect of substantially arousing sexual desires in any person less than seventeen years of age, or if the picture is indecent, or is contrary to contemporary community standards in the desription [sic] or representation of nudity or sex.[43]

The Supreme Court ruled on April 22, 1968, that local and state governments do have the power to protect minors from obscenity in motion pictures, books and other questionable materials. At the same time it struck down a Dallas, Texas, ordinance which classified motion pictures

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[42] Interstate Circuit v. Dallas, 366 F. 2d 590 (5th Cir. 1966) aff'g 249 F. Supp. 19 (N.D. Tex. 1965); Interstate Circuit v. Dallas, 402 S.W. 2d 770 (Tex. Civ. App. 1966); Interstate Circuit v. Dallas, 247 F. Supp. 906 (N.D. Tex. 1965); Paramount Film Distributing Corp. v. Chicago, 172 F. Supp. 69 (N.D. Ill. 1959).

[43] Randall, op. cit., p. 71 (Chicago Municipal Code, ch. 155, 5).

that it considered unsuitable for children under sixteen because the Dallas law was not narrowly drawn with reasonable and definite standards for its administration. Justice Marshall noted in the opinion of the Court that the Dallas ordinance was being used as a model for other cities and that this might result in the showing of completely inane motion pictures in view of the vagueness of the law. The case was taken to court by several exhibitors and United Artists Corporation in conjunction with the showing of the movie, Viva Maria.[44]

It is clear that age classification, while constitutional, must be drawn with precision to avoid the exhibition of "totally inane" pictures to the general adult public. Certain films, while not obscene according to the Roth-Alberts decision, may be deemed obscene when viewed by children.

Several obvious problems arise in age classification for motion pictures. Primarily it must be decided at what age a motion picture will harm a child. The age is sixteen or seventeen in most laws. Another problem is the enforcement of the age classification. The exhibitor may be led to believe a child is over the minimum age while in reality he in not.

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[44] Interstate Circuit, Inc. v. City of Dallas; United Artists Corporation v. City of Dallas, 390 US 676 (1968).

Summary

Court decisions through the years appear to have resulted in acceptance of the following general principles regarding motion picture exhibition:

1. The motion picture is now considered to be a free communications medium protected by the First and Fourteenth Amendments.
2. The motion picture is to be judged as a whole and not by individual scenes or words.
3. Motion pictures which are entertaining are also under protection since "What is one man's amusement, teaches another's doctrine" (Winters v. New York, 333 US 507 (1948).
4. Motion pictures may be licensed but only under certain procedural conditions.
5. Motion pictures may be classified "for adults only" as long as the standards for classification are not vague.
6. Obscenity is not considered to be under the protection of the free speech guarantees.
7. Obscenity as a term has been narrowed so that sex is not synonomous with obscenity and therefore ideas including sexual themes, as long as they are not patently offensive, have redeeming social value and do not appeal to the prurient interests of the average man, are permissible.

In view of the criteria concerning the suppression of obscenity the question must be raised as to the difference between, or similarity of, literature and the motion picture. It has been a general belief that the motion picture, in its simulation of reality, is potentially more dangerous than the printed page. The motion picture, it has been said, is a more powerful communicative medium. As Randall points out, the above cases concerning obscenity in the motion picture would probably have caused little if any concern had the same plots, words or acts been printed. The difference between the media may be attributed to the power and the level of their communication. A thought or idea must be physically acted out or physically implied in the film medium. As Randall realizes:

> This capacity for literal realism has been the special force and attractiveness of the movies since their nickelodeon days. Visibility and movement are the essence of a medium whose aim is the reproduction of the real world rather than its abstraction.[45]

The audience of the film need not expend the amount of intellectual effort required by the printed media. The viewer is a passive receiver in the motion picture theater.

> The plunging of the theater into darkness may signal a radical switching off of everyday reality, to absorb without effort the "other" reality of the screen. In many instances the viewer is watching performers with whom he has already established strong emotional ties. The

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[45]Randall, op. cit., p. 67.

> subrational, subcritical impact of the communication may also be reinforced by the social context in which the viewing takes place. What is seen on the screen may seem more authoritative or acceptable because of the public character of the theater and the attitudes manifested by the audience.[46]

During the last sixteen years the motion picture medium has been brought to a position where the limits of obscenity have been narrowed to a finer and still finer concept. Ephraim London, a veteran lawyer and expert in the area of censorship, has said:

> Today there's absolutely nothing you can't show or write about if it's done in good taste, absolutely nothing. If the courts judge something obscene, they are in effect making an aesthetic rather than a moral judgment. If the censorship rules of 1950 were in effect today, two out of every three films shown now would be banned.[47]

The present state of obscenity control or, as some regard the situation, extreme permissiveness, has far-reaching implications for the newest mass medium, television.

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[46] Ibid., pp. 67-68.

[47] "Anything Goes: Taboos in Twilight," Newsweek, November 13, 1967, p. 76.

CHAPTER V

OBSCENITY AND TELEVISION

It has been previously observed that past legal decisions have produced a series of precedents for the useful purpose of establishing a line between permissible and non-permissible sexual material, or obscenity, in the mass communication media. Yet a difficulty in consistency arises, because each medium has its own particular characteristics which must be taken into account in legal judgments. The characteristics of the media include, for example, the individual medium's type of audience, its availability to that audience, and its controlling agent(s). In other words, the nature of the medium influences its permissiveness.

Television must deal with the same dual basis for the judgment of its program material. That is, it must be judged not only on what has legally been defined as obscene through established legal precedents, but also upon the basis of the particular nature or characteristics of the medium. It is only through these dual considerations that realistic guidelines for questionable program material on television may be determined.

The Nature of Television

A significant element concerning the nature of television, and broadcasting in general, is its government control. The Radio Act of 1927 initiated government regulations of broadcasting as it is known today. Prior to the Act, the public was the victim of constant technical interference between radio communications. Public pleas for the elimination of the interference were directed to Herbert Hoover, then Secretary of Commerce, and other government officials. These pleas brought an increasing realization that the Radio Act of 1912 was an inadequate control over broadcasting. The Act gave the Secretary of Commerce no power over the assignment of radio frequencies, a broadcast station's power, period of broadcast or term of license.[1]

A series of radio conferences initiated by Secretary Hoover preceded the government's enactment of the Radio Act of 1927. The Act is based upon a philosophy resulting from the nature of the broadcast media. Although literature and the motion picture differ in the type of audience to which they are directed and their impact upon that audience, the differences between these media and television are far more evident.

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[1]Walter B. Emery, Broadcasting and Government: Responsibilities and Regulations (Michigan State University Press, 1961), p. 31.

The broadcast media use the electromagnetic spectrum, a "natural" resource belonging to the public. The government acts for the public in administering this resource. Since these frequencies are limited in number, television is not a "common carrier for hire" and is not available to all who wish to use the medium. Literature and the motion picture, on the other hand, are avilable to anyone wishing to express his opinion since, if he has the capital, he can provide his own facilities.

Because the broadcaster uses the public's ether, he must provide a service which is in the public interest. The other media are private endeavors, however, and do not demand the same consideration.

Unlike literature and the motion picture, television is legally available to all members of a family all of the time. This, of course, includes the children. There is no age classification.

Because of broadcasting's necessity to serve the public as well as its availability to the home and to children, Congress was impelled to enact a section within the Radio Act of 1927 which would prohibit the broadcasting of obscenity. Section 29 of the Act read as follows:

> Section 29. Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or conditions shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by

> means of radio communications. No person within the jurisdiction of the United States shall utter obscene, indecent, or profane language by means of radio communication.

The second sentence of this section was deleted by Public Law 772 which was passed by the 80th Congress, effective September 1, 1948, and was incorporated in Title 18 of the United States Code, Section 1464. It reads as follows:

> Section 1464: Broadcasting Obscene Language. Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Thus the broadcasting of obscenity is a federal crime. Furthermore, the Commission has the power to suspend the license of the broadcaster who has violated Section 1464 under the following sections of the Communications Act.

> Section 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall -
>
> (m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee -
>
> (D) Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language or meaning . . .
>
> Section 312 (b). Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of the Act, or Sections 1304, 1343 or 1464 or Title 18 of the United States Code, or (3) has violated or

> failed to observe any rule or regulation or the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

It should be noted that any decision made by the Commission may be appealed to a federal court.

The local station may also broadcast objectionable material received from its affiliated network. Although the Commission has no direct regulatory powers over the networks (chain broadcasters), it may act against stations engaged in chain broadcasting through Section 303 (i) of the 1934 Act.

> Section 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall -
>
> (i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting.

Prior to 1941 stations were bound to network contracts in such a way that it was virtually impossible to reject a network commercial program that was considered undesirable. Since the station licensee and not the network is legally responsible for programs broadcast under the Communications Act, it was necessary that a station be able to reject an objectionable program. In 1941, therefore, the FCC adopted chain broadcasting regulations which prohibited station contracts with a network which

did not allow the station rejection of undesirable programs.[2]

In order to determine whether the station has carried out its responsibility and service to the public, the Commission has the power to examine a station's past programming service. Many have argued, however, that this review contradicts the freedom from censorship and the free speech provisions guaranteed in Section 326.

The FCC has defined its terms and responsibilities regarding free speech in several cases. The FCC defined its concept of censorship, a deterring force in free speech, in its WBNX Broadcasting Co. Inc. case in 1948:

> Censorship is suppression of expression of views in advance of publication or deterring of expression of opinion entitled to protection of the First Amendment by threat of subsequent punishment, or requiring compliance with discriminatory licensing or taxing requirements as a prerequisite to any expression of opinion, or a mandatory requirement of compliance with an officially imposed viewpoint.[3]

The FCC had previously addressed itself to the problem of censorship in Great Lakes Broadcasting Co. (1928):

> In setting up standards of program quality the Commission is not transgressing the statutory prohibition against censorship or infringing the right of free speech. It desires to eliminate matters of private interest only to make room for matters of public interest. It is not imposing any prior restriction on utterances but is reserving the right to take into account

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[2] 1 RR pp. 53:242 and 658; Sections 3.135 and 3.658 (e).

[3] WBNX Broadcasting Company, Inc., 12 FCC 837 (1948).

> a station's past conduct, measured by the standard of public interest, convenience and necessity, in its future actions.[4]

In KFKB Broadcasting Association, Inc. v. Federal Radio Commission an application for renewal of the station's license was denied because of Dr. Brinkley's claims of medical cures for patients he had never met. His "revitalizing" operations, which he spoke about on the station, attracted many listeners to his "clinic" in Kansas. In its decision, the Commission said:

> The testimony in this case shows conclusively that the operation of Station KFKB is conducted only in the personal interest of Dr. John R. Brinkley. While it is to be expected that a licensee of a radio broadcasting station will receive some remuneration for serving the public with radio programs, at the same time the interest of the listening public is paramount, and may not be subordinated to the interests of the station licensee. A license to operate a radio broadcasting station is a franchise from the public, and the licensee is a trustee for the public. Station KFKB has not been operated in the interest of the listening public and we, therefore, find that public interest, convenience and necessity will not be served by granting the application for renewal of its license.[5]

This decision of the Commission was upheld by the United States Court of Appeals for the District of Columbia. The Court also held that the holding of a station in review of its past programming was not the same as prior restraint and therefore did not constitute censorship.

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[4] Great Lakes Broadcasting Company (FRC, Dec. 17, 1928), rev'd on other grounds 59 App. D.C. 197, 37 F. (2nd) 993.

[5] KFKB Broadcasting Association, Inc. v. Federal Radio Commission, 60 App. D.C. 79, 47 F. (2nd) 670 (1931).

Later in 1932 Reverand Dr. Shuller, owner of KGEF in Los Angeles, was denied an application for renewal on the grounds that he had broadcast attacks upon various religious organizations, public officials, various individuals and the courts. The Court of Appeals upheld the Commission's decision in 1932 by saying:

> If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theatre for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise . . .[6]

In 1943, as a result of the chain broadcasting regulations adopted by the Commission, the National Broadcasting Company charged the FCC with overstepping its bounds by limiting the right of free speech in spite of Section 326 and the guarantees of the First Amendment. The decision of the 1943 case, National Broadcasting Company v. United States, included the following statements:

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[6]Trinity Methodist Church, South v. Federal Radio Commission, 60 App. D.C. 79, 47 F. (2nd) 850 (1932).

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. . . . The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest," is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.[7]

"Indecent Language" Legal Cases in Broadcasting

The following cases of "indecent language" in broadcasting concern only auditory programming content. There are no legal precedents for television's visual obscenity. However, a review of "indecent language" cases in radio clearly show the powers and the criteria used by the courts and the FCC in broadcast obscenity cases.

The right of the Commission to review a radio or television station's past programming service may be applied to a station whose programming, while not meeting

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[7] National Broadcasting Company v. United States, 319 U.S. 190, 216-217 (1943).

the legal criteria of obscenity as developed in literature and motion pictures, has contained "off color," "vulgar," or "tasteless" program material.

On July 25, 1962, a major decision was handed down by the FCC in regard to the programming practices of radio station WDKD, Kingstree, South Carolina. Initially, E. G. Robinson, Jr. filed for renewal of his station's broadcast license and a license to cover a construction permit. Both were denied by Hearing Examiner Thomas H. Donahue in his initial decision of December 12, 1961.[8] The station subsequently filed exceptions to the initial decision and oral argument was held before the Commission on June 8, 1962.

Prior to the hearings, the Commission, upon receiving complaints from listeners, sent a letter to Robinson in May of 1960 concerning certain program material and requested a statement by Robinson with respect to the complaints. The reply to the Commission by Robinson contained a denial of his awareness of the Walker broadcasts. In a subsequent oral hearing conducted by Hearing Examiner Donahue, Robinson denied knowledge of the Walker broadcasts or of any complaints about such material. The hearing, however, produced witnesses who testified that they had, indeed, complained to Robinson.[9]

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[8] Palmetto Broadcasting Company (Initial Decision of Hearing Examiner), 33 FCC 265 (1961).

[9] Ibid., at 265-66.

Therefore, the Hearing Examiner's decision held that:

> (1) the licensee did misrepresent facts to the Commission and was lacking in candor; (2) that he failed to exercise adequate control over the station's programming; (3) that obscene, coarse, vulgar, and suggestive material susceptible of indecent double meaning was broadcast by Walker [Charlie Walker, announcer disc jockey who made statements in question] over the station; and (4) that in many areas of community broadcast needs, the station had failed to fulfill its responsibility.[10]

The Hearing Examiner dwelt upon the indecent language broadcast by the station's disc jockey, Charlie Walker. Audio tapes of some of the Walker broadcasts had been made by the operations manager and chief engineer of station WJOT in Lake City, South Carolina and subsequently sent to the FCC. (Portions of the contents are included in Appendix C.)

In response to the Hearing Examiner's charge of obscenity, Robinson contended that if the Commission found the Walker broadcasts obscene under the United States Code, 18 U.S.C. 1464, that the Commission would be acting "ultra vires" since the Code makes the broadcasting of obscene material a crime and determination of crime is for the courts to decide, not a regulatory agency. If the Commission found the Walker broadcasts to be less than obscene, continued Robinson, then the Commission would be violating the free speech protection included in the First

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[10] Palmetto Broadcasting Company, 33 FCC 250 (1962).

Amendment. The Hearing Examiner treated the accused language as obscenity. The Examiner also cited the amendment to the Communications Act, effective September, 1960, in which Congress gave the Commission authority to act on matters involving the violation of 18 U.S.C. 1464.

Robinson advanced a second argument in which he urged that the test for obscenity in Roth v. United States, 354 U.S. 476 must be adopted in this case, (i.e. "whether the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests"). In this case, said Robinson, Walker would not be guilty because Walker broadcast a great deal of material that was not vulgar and that the broadcasts, on the whole, were well accepted within the community. The Examiner answered Robinson's statement contending that while the Roth decision was applicable to the Postmaster General's criterion for determining material that may be mailed and for states to enforce state laws preventing origination and distribution of obscene materials, it was not meant to establish a test for every question of obscenity. The Examiner reviewed the circumstances of the Roth and the Alberts cases and then made a distinction in its application to broadcasting.

> The field of broadcast regulation is perhaps an area as ill adapted as any for employment of the Roth test. First, it must be remembered that, unlike the acquisition of books and pictures, broadcast material is available at the flick of a switch to young and old alike, to the sensitive and the indifferent, to the sophisticated

> and the credulous. Further, broadcast material is delivered on a route commonly owned by the public on a vehicle especially licensed to serve them and is received on property owned by the consignee. In short, there is a universality of utility and a public stake present in broadcasting wholly lacking in the kind of thing that was involved in Roth.
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> . . . . . .
>
> In determining obscenity in broadcasting, questionable material should not always have to be weighed within the context of everything else that is presented with it. Brief injections of erotica, pornography, or smut are enough to seriously prejudge, if not destroy, the general utility of radio and television.
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> . . . . . .
>
> The "shameful and morbid interest in sex so pervasive as to submerge any ideas of redeeming social importance" test and the requirement that the material in question to be obscene must exceed limits of tolerance imposed by current standards of a community certainly would appear to permit a lot of broadcast material to find first-amendment protection that nevertheless would be highly offensive to large segments of a listening or viewing audience.
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> . . . . . .
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> Insofar as the "dominant theme" requirement of the Roth test is concerned, when Walker's remarkable popularity with the local advertisers is taken into account . . . and it is recalled that his primary function over the air, along with musical records, was to serve as filler between spot announcements, it becomes pretty apparent that his principal appeal lay in his smut and that his smut signalized, characterized, and was in fact the dominant note in his broadcasts.[11]

The Examiner referred to previous testimony by local clergy, other broadcasters, an advertiser and a former partner of Robinson's, all of whom referred to Walker's broadcasts as "vulgar," "sexy," "suggestive," and "filthy."

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[11] Palmetto (Initial Decision), supra. at 297-99, 300.

Concerning the charge of indecent language, the Examiner concluded as follows:

> On the basis of the foregoing considerations, the examiner concludes that even under the Roth test the Walker broadcasts here at issue are obscene and indecent and, a fortiori, coarse, vulgar, suggestive, and susceptible of indecent double meaning. Without employing the Roth test, he holds the material in question obscene and indecent on its face.[12]

In the hearing before the Commission the issues were amended and presented as follows:

> 1. To determine whether in its written or oral statements to the Commission with respect to the above matters, the licensee misrepresented facts to the Commission and/or was lacking in candor;
> 2. To determine whether the licensee maintained adequate control or supervision of programming material broadcast over his station during the period of his most recent license renewal;
> 3. To determine whether the licensee permitted programming material to be broadcast over station WDKD on the Charlie Walker show, particularly during the period between January 1, 1960, and April 30, 1960, which program material was coarse, vulgar, suggestive, and susceptible of indecent, double meaning;
> 4. To determine the manner in which the programming broadcast by the licensee, during the period of his most recent license renewal, has met the needs of the areas and populations served by the station;
> 5. To determine whether, in light of the evidence adduced with respect to the foregoing issues, the licensee possesses the requisite qualifications to be a licensee of the Commission;
> 6. To determine whether, in light of the evidence adduced with respect to the foregoing issues, a grant of the above-captioned applications would serve the public interest, convenience, or necessity.[13]

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[12] Ibid., at 300.

[13] Palmetto supra. at 251.

The Commission's decision, unlike the Examiner's decision, emphasized not the questionable program material, but rather Robinson's misrepresentation to the Commission.

> On the basis of the record, we agree that Robinson knew the true character of the broadcasts and that his denials thereof were purposeful misrepresentations and false statements. . . . We find that in the circumstances of this case, the licensee's misrepresentations and false statements, in and of themselves, constitute grounds for denial of WDKD's application for renewal of license.[14]

The fact of abdication of station control over programming also disturbed the Commission.

> The Commission regards maintaining control over programming as a most fundamental obligation of the licensee. Robinson's failure to meet that fundamental obligation raises, therefore, a most serious question as to whether his renewal application should be granted. Were this issue considered by itself, it may be that a short-term renewal might be appropriate in the particular circumstances of this case.[15]

Only after denying renewal of WDKD's license on the grounds of Robinson's misrepresentation did the Commission discuss the indecent language charge. First the Commission defended its right to deal with Section 1464 of the Criminal Code. The Commission cited its rights to consider such criminal laws as upheld in FCC v. American Broadcasting Co., 347 U.S. 284,289, note 7.

> The "public interest, convenience, or necessity" standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding. In any event, the standard is sufficiently broad to permit the Commission to consider the applicant's past or proposed

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[14] Ibid., at 253. [15] Ibid., at 254.

> violation of a Federal criminal statute especially designed to bar certain conduct by operators or radio and television stations.[16]

However, the Commission avoided using its powers and thereby side-stepped a charge of obscenity against WDKD by disagreeing with the Examiner's combination of terms.

> The issue has been drawn not in terms of violation of section 1464 or of the statutory language ("obscene, indecent, or profane"), but rather in different terms - "coarse, vulgar, suggestive, and susceptible of indecent, double-meaning." We do not think these terms can be equated with the statutory "obscene" or "indecent."[17]

But, the Commission continued, even if the material broadcast could not be said to be obscene, the Commission constitutionally does have the right to consider such a preponderance of vulgar, coarse, suggestive, double-meaning programming as that broadcast by WDKD. If the Commission did not have the right, "the housewife, the teenager, the young child - all - would simply be subjected to the great possibility of hearing such patently offensive programming whenever they turn the dial."[18]

The Commission's decision went on to explain that the first amendment and censorship provision of Section 326 gave the Commission authority to act under the public interest standard but did not give the Commission the right to substitute its own taste for that of the public's or the

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[16] Ibid., at 255 n.5. [17] Ibid., at 255.

[18] Ibid., at 256.

broadcaster's. Therefore, said the Commission, it could not decide:

> [T]hat some pattern of broadcasts is "vulgar," "suggestive," "coarse," and "susceptible of indecent, double meaning" on the basis of our own taste or preference for what we believe should be broadcast. What we must find is that the broadcasts in question are flagrantly offensive - that by any standard, however reasonably weighted for the licensee, taking into account the record evidence, the broadcasts are obviously offensive or patently vulgar. In short, the licensee necessarily and properly has wide discretion in choosing <u>every</u> type of programming to be broadcast to meet the needs and interests of the public in his area. . . . It follows that in dealing with the issue before us, we cannot act to deny renewal where the matter is a close one, susceptible to reasonable interpretation either way. We can only act where the record evidence establishes a patently offensive course of broadcasts. It is, we think, incorrect to say that in so acting under the public-interest standard, the Commission poses any danger to free expression in the broadcasting field.
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> . . . . . .
>
> Clearly, this case presents that flagrant situation calling for drastic administrative action. The material broadcast, . . . is not "buffoonery and attempted bucolic badinage," as WDKD claims. We find that such material, on its face, is coarse, vulgar, suggestive, and of indecent double meaning. By any standards, it is flagrantly and patently offensive in the context of the broadcast field . . . and thus contrary to the public interest.
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> . . . . . .
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> Thus, we are not saying that a single off-color joke or program suffices to taint an entire operation. . . . We are saying that this licensee's devotion of so substantial a portion of broadcast time to the type of programming set forth in the examiner's decision is inconsistent with public interest and, indeed, represents an intolerable waste of the only operating broadcast facilities in the community. . .[19]

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[19] <u>Ibid.</u>, at 257-68.

An appeal was made to the U. S. Circuit Court of Appeals after Senator Johnson (D., S.C.) accused the Commission of overstepping its responsibilities and, as a result, persecuting small stations. E. G. Robinson, with Senator Johnson's support as well as that of the American Civil Liberties Union, was convinced that the Commission was violating the powers established in the Communications Act.

The decisions of the Federal Court in March of 1964, however, upheld the Commission's decision. It is interesting to note the absence of the indecent language charge in its decision.

> The Court of Appeals held that the willingness of applicant to deceive the Commission by representing that he lacked knowledge of the broadcast material which had been subject of complaints justified the refusal to grant the application on the basis that the applicant did not possess requisite qualifications to be a licensee and that the grant of his application would not serve the public interest.
> Affirmed.[20]

The Court reviewed the decisions of the Hearing Examiner and the Commission and agreed with the Commission's opinion that the licensee's misrepresentations "in and of themselves, constitute grounds for denial of WDKD's application for renewal of license." The Court's decision continued:

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[20] Robinson v. F.C.C., 334 F. 2d 534 (1964).

> In determining whether the grant of an application for license renewal will serve the "public interest, convenience, and necessity," . . . the Commission has a duty to consider the performance of the applicant in meeting the needs of the community. In discharging this duty in the present case, the Commission properly sought information concerning the applicant's broadcast material which had been the subject of complaints received by the Commission. Robinson's representations to the Commission that he lacked knowledge of the situation were contradicted by many witnesses. The record amply supports the Examiner's action in crediting the opposing witnesses and refusing to credit Robinson, and in concluding as a result that Robinson was guilty of misrepresentations.[21]

Circuit Judge Wilbur K. Miller in a concurring opinion, however, felt that the Court's decision did not go far enough. Miller, aside from adding information which further justified the Commission's and the Court's decisions concerning Robinson's misrepresentation, felt that the Walker program material did constitute violations of Section 1464. Miller also noted that Walker had previously been convicted of violating Section 1464 by a federal district court in 1963. Judge Miller says:

> Samples of his broadcasts are in the record. They constitute, I think, plain violations of the statute which denounces as criminal the uttering of obscene, indecent or profane language by means of radio communications.
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> . . . . . .
>
> Robinson's guilt under issue No. 3, [vulgar language] as found by the Commission, seems to me to be apparent from the record, and it goes without saying that the Commission was correct in finding, under issue No. 4 that the station's Charlie Walker programs did not meet the needs of the areas and

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[21] Ibid., at 536.

> populations served by the station. No area or population needs a radio program which violates the criminal statute to which I have referred.[22]

Judge Miller offered an excuse for the majority's omission of charging Robinson with violating Section 1464.

> Perhaps the majority refrained from discussing the other issues because of a desire to avoid approving any Commission action which might be called program censorship. I do not think that denying renewal of a license because of the station's broadcast of obscene, indecent or profane language - a serious criminal offense - can properly be called program censorship. But, if it can be so denominated, then I think censorship to that extent is not only permissible but required in the public interest. Freedom of speech does not legalize using the public airways to peddle filth.[23]

Judge Miller's reason for the Commission's and the Court's refusal to discuss the issue of obscenity appears to be correct when one reads Circuit Judge Wright's concurring opinion of the Court's decision to deny the appellant's petition for rehearing en banc.

> In his petition for rehearing en banc, appellant seeks to raise again the issue of censorship of program content by Government officials. He argues:
>
> "A majority of the present Supreme Court has made it clear that any examination into 'program content' by an administrative agency functioning under a broad 'public interest' or 'general welfare' standard contravenes First Amendment freedoms. Where administrative agencies, in the exercise of their licensing functions, 'judge the content of the words and pictures to be communicated,' the safeguards of the First and Fourteenth Amendments become applicable save in the exceptional case. Joseph Burstyn . . . (1952). A violation of the First Amendment arises where a government

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[22] Ibid., at 536-37. [23] Ibid., at 537.

> agency 'undertakes to censor the contents of the broadcasting." Kovacs v. Cooper, . . . (1949) (Jackson, J. concurring). 'Any examination of thought or expression in order to prevent publication of "objectionable material" is censorship. Farmers Educational [and Co-op] Union [of America, North Dakota Division] v. WDAY, Inc. . . . (1960). . .* * *
>
> "[Additionally], a basic concept runs throughout recent Supreme Court decisions to the effect that, since First Amendment freedoms need breathing space to survive, the government may regulate in this area 'only with narrow specificity'. . . . Accordingly 'stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech'. . . .* * *

Most important, appellant suggests that the absence of a ruling from this court on the Commission's powers of program review will be understood by the broadcasting industry as an endorsement of Commission censorship. A prediction of a law review writer is quoted:

> " * * * The court of appeals, in reviewing [Robinson], may uphold the Commission's action on some of the alternative grounds of decision. In this event, the limits on FCC authority will remain unclear, and its action in [Robinson] may prove a successful feint of regulation, whereby the FCC can affect program content even when it may not actually have authority to do so. * * *"

77 HARV. L. REV. 713 (1964).

I do not read the decision of this court to endorse program content regulation. . . . The opinion stated, "We intimate no views on whether the Commission could have denied the applications if Robinson had been truthful.". . . The concurring judge noted: "Perhaps as the majority refrained from discussing the other issues because of a desire to avoid approving any Commission action which might be called program censorship."

If the Commission were likely to undertake such program content review, en banc consideration would be justified. But this does not

> seem to recognize the First Amendment, statutory, and policy bases for protection of programming from the Government censor.[24]

Wright then quoted a portion of the Pacifica decision (reviewed below) in which the Commission realizes its responsibility in abstaining from judgments concerning the merits of a program and its responsibility in promoting the more effective use of radio in the public interest (Section 303 (g)).

Judge Wright continued:

> I see no need now to decide whether this statement exhausts the constitutional protection of free speech in broadcasting, or whether the Commission, in the quoted case and in the case before us, correctly applied the constitutional guarantees. It is enough now for me that the Commission realizes the vital importance of preserving both free speech and an atmosphere of freedom in these communications media. For this reason, I do not feel that an en banc consideration of this case is necessary.[25]

The Commission and the Court favored the judgment of the Robinson case upon grounds of misrepresentation and lack of public interest broadcasting rather than specific grounds of obscenity. In doing so, however, the Commission and the Court left the question of the Commission's power to revoke a license because of obscenity open to speculation.

Another case exemplified the Commission's reasoning when only isolated instances of questionable program material have been broadcast. The FCC was in a position

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[24] Ibid., at 537-38. [25] Ibid., at 539.

to decide upon requests for an initial license for KPFK and a license renewal for KPFA, KPFB and WBAI. Two of the stations (KPFK and KPFA) owned by the Pacifica Foundation, were charged with broadcasting questionable program material. Thus it was the purpose of the FCC to determine whether the stations were operating in the "public interest, convenience, and necessity." The complaints were as follows:

> . . . The principal complaints are concerned with five programs: (i) a December 12, 1959 broadcast over KPFA, at 10 P.M., of certain poems by Lawrence Ferlinghetti (read by the poet himself); (ii) The Zoo Story a recording of the Edward Albee play broadcast over KPFK at 11 P.M., January 13, 1963; (iii) Live and Let Live, a program broadcast over KPFK at 10:13 P.M. on January 15, 1963, in which the poem, Ballad of the Despairing Husband, was read by the author Robert Creeley; and (v) The Kid, a program broadcast at 11 P.M. on January 8, 1963, over KPFA, which consisted of readings by Edward Pomerantz from his unfinished novel of the same name. The complaints charge that these programs were offensive or "filthy" in nature. . . .[26]

The Commission said in its decision that; "[t]here is, we think, no question but that the broadcasts of the programs, The Zoo Story, Live and Let Live, and The Kid, lay well within the licensee's judgement under the public interest standard."[27] The Commission's decision continued reviewing Pacifica's rationale for broadcasting the three programs. The Zoo Story said Pacifica is "a serious work

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[26] Pacifica Foundation, FCC Memorandum Opinion and Order, 36 FCC 147 (1964).

[27] Ibid., at 148.

of drama" by a "provocative playwright" and "an honest and courageous play." As concerned The Kid, Pacifica observed that the author's reputation was in the public interest and that the unedited minor swear words broadcast "fit well within the context of the material being read and conform to the standards of acceptability of reasonably intelligent listeners." Pacifica stated that the program Live and Let Live would bring listeners face to face with the problem of homosexuality rather "than leaving the subject to ignorance and silence."[28]

The FCC then stated its rationale condoning the broadcast of the three programs:

> We recognize that as shown by the complaints here, such provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy, which has consistently sought to insure "the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole" . . . In saying this, we do not mean to indicate that those who have complained about the foregoing programs are in the wrong as to the worth of these programs and should listen to them. This is a matter solely for determination by the individual listeners. Our function, we stress, is not to pass on the merits of the program - to commend or to frown. Rather . . . it is the very limited one of assaying, at the time

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[28] Ibid., at 148-49.

> of renewal, whether the licensee's programming, on an overall basis, has been in the public interest and, in the context of the issue, whether he has made programming judgements reasonably related to the public interest. This does not pose a close question in the case: Pacifica's judgements as to the above programs clearly fall within the very great discretion which the Act wisely vests in the licensee. In this connection, we also note that Pacifica took into account the nature of the broadcast medium when it scheduled such programming for the late evening hours (after 10 P.M., when the number of children in the listening audience is at a minimum).[29]

Pacifica admitted, however, that portions of the Ballad of a Despairing Husband and the poems of Lawrence Ferlinghetti should not have been broadcast. They were broadcast, continued Pacifica, only because the station's drama editor did not carefully screen the selections.

> In view of the foregoing, we find no impediment to renewal on this score. We are dealing with two isolated errors in the licensee's application of its own standards - one in 1959 and the other in 1963. The explanations given for these two errors are credible. Therefore, even assuming, arguendo, that the broadcasts were inconsistent with the public interest standard, it is clear that no unfavorable action upon the renewal applications is called for. The standard of public interest is not so rigid that an honest mistake or error on the part of a licensee results in drastic action against him where his overall record demonstrates a reasonable effort to serve the needs and interests of his community. . . . Here again, this case contrasts sharply with Palmetto where instead of two isolated instances, years apart, we found that the patently offensive material was broadcast for a substantial period of the station's broadcast day for many years.[30]

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[29] Ibid., at 149.

[30] Ibid., at 150.

The case is summed up in the following portion of the decision:

> We find, therefore, that the programming matters raised with respect to the Pacifica renewals pose no bar to a grant of renewal. Our holding, as is true of all such holdings in this sensitive area, is necessarily based upon, and limited to, the facts of the particular case. But we have tried to stress here, as in Palmetto, an underlying policy - that the licensee's judgement in this freedom of speech area is entitled to very great weight and that the Commission, under the public interest standard, will take action against the licensee at the time of renewal only where the facts of the particular case, established in a hearing record, flagrantly call for such action. We have done so because we are charged under the Act with "promoting the larger and more effective use of radio in the public interest" (Section 303 (g)), and obviously, in the discharge of that responsibility, must take every precaution to avoid inhibiting broadcast licensees' efforts at experimenting or diversifying their programming. Such diversity of programming has been the goal of many Commission policies (e.g., multiple ownership, development of UHF, the fairness doctrine). Clearly, the Commission must remain faithful to that goal in discharging its functions in the action area of programming itself.[31]

It is important to notice that in the Pacifica decision the overall record of the station outweighed any disciplinary action which might have resulted from the station's self-admitted "mistakes." The question must be raised, however, as to the number of "mistakes" a station may be allowed before the station's overall record becomes detrimental to the public interest. The answer may be contained in the Palmetto case where years of "patently offensive material" was broadcast. The two cases appear

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[31] Ibid., at 150-51.

to constitute opposite poles of a continuum as concerns the indecent language situation.

The opposite poles of the continuum are not yet, by any means, well established. For instance, Commissioner Robert E. Lee, in his concurring opinion to the Pacifica decision, questioned the method used in the presentation of Live and Let Live, the one and a half hour program concerning homosexuality.

> I concur in the action of the Commission in granting the several applications of Pacifica Foundation. However, I feel constrained to comment on at least one program coming to our attention insofar as it may or may not reflect these stations' program policies.
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> Having listened carefully and painfully to a 1 1/2-hour tape recording of a program involving self-professed homosexuals, I am convinced that the program was designed to be, and succeeded in being, contributory to nothing but sensationalism. The airing of a program dealing with sexual aberrations is not to my mind, per se, a violation of good taste nor contrary to the public interest. When these subjects are discussed by physicians and sociologists, it is conceivable that the public could benefit. But a panel of eight homosexuals discussing their experiences and past history does not approach the treatment of a delicate subject one could expect by a responsible broadcaster. A microphone in a bordello, during slack hours, could give us similar information on a related subject. Such programs, obviously designed to be lurid and to stir the public curiosity, have little place on the air.
>
> I do not hold myself to be either a moralist or a judge of taste. Least of all do I have a clear understanding of what may constitute obscenity in broadcasting.[32]

Until obscenity in broadcasting is more clearly defined, the broadcaster must proceed with caution.

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[32] Ibid., at 152-53.

Summary and Conclusion

Although the Palmetto and Pacifica decisions present the power, and the reasoning, of the Federal Communications Commission when presented with cases concerning indecent language in the auditory broadcast medium of radio, the same basic powers and reasoning are available to the Federal Communications Commission when, and if, they are forced to deal with accused obscenity in television. It is of utmost importance that these legal principles be recognized.

Television, it has been observed, is controlled by a government regulatory agency which has the right to review a station's past programming. The agency cannot, by its own admission, pass on the merits of a particular program nor substitute its own taste for that of the broadcaster or the public. It may, however, make judgments in considering the overall record of the station's past service to the public or a station's past or proposed violation of a Federal criminal statute, e.g. Section 1464. These powers are not regarded by the courts as censorship or violations of the station's freedom of speech. If, in the licensee's judgment, says the Commission, a particular program is reasonably related to the public interest, the program is justified. The Commission has also said that even though a portion of the audience may be offended by some of the station's programming, it does not have the

right to rule such programming off the air through its licensing power.

Television is also a home medium available to children. The constant awareness by society of the supposed effects of media on children demands that television restrict its treatment of sex to an acceptable level. While the effects of sex via media on children are not completely known, society's attitude of caution persists.

Finally, since television uses public airways, the licensee is a trustee of the public. The degree of permissiveness towards sex that television presents must reflect society's standards, or the society will condemn that trustee through existing governmental regulation in favor of another trustee. Television's increase in permissiveness must follow society's evolutionary moral standards. This type of change in television is noted by the editor of Television magazine:

> Television's growing maturity would almost certainly shock anyone who hadn't looked at his set in the last five years. Yet it seems safe to say that the great majority of viewers is scarcely aware of it. Like age, which is not necessarily the same thing, maturity comes by an evolutionary process that goes undetected from day to day but is unmistakenly apparent when measured from year to year. . . . In a changing society, television has no choice but to change. Because of its nature, it carries special responsibilities and always should lag considerably behind the avant garde in many respects. The absence of any significant cries of outraged dignity suggests

> that, to date, television has been moving at pretty close to a proper pace with the times.[33]

It is not surprising that the FCC and the courts are reluctant to judge a station's programming obscene under Section 1464. The definition of obscenity is, after all, a product of literature and motion pictures and, as the Hearing Examiner's decision in Palmetto indicates, the definition is difficult to apply to the broadcast medium. For example, the Examiner suggests that any injection of smut, pornography or erotica into a program condemns the whole program. According to the Roth definition of obscenity, however, an entire work, such as a book or motion picture, may not be judged obscene because of brief erotic passages or scenes. The "average adult" criterion of the obscenity definition must also be questioned when applied to television because children are a part of the television audience. In "obscenity," too, the "morbid interest in sex must be so overwhelming as to submerge any ideas of redeeming social importance" and "that which is obscene must exceed the limits of tolerance of current community standards." Both of these criteria, realizes the Examiner, would permit a large amount of offensive material to find first amendment protection, "that nevertheless would be highly offensive to a large segment of a listening or viewing audience." "The field

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[33]"Editorial: The Widening Screen of TV Standards," Television, vol. XXV, no. 6, June, 1968, p. 68.

of broadcasting," suggests the Examiner, "is perhaps an area as ill adapted as any for employment of the Roth test."

Thus the test for obscenity developed by literature and motion pictures is inadequate when applied to television. The guidelines provided by the NAB Television Code, or their adaptation, are generally used by broadcasters to determine limits of sex on television. Yet the broadcaster may feel that these standards are not applicable or too restrictive when dealing with a particularly honest and mature treatment of sex on television. In the Code's place, however, there are no legal criteria concerning sex on television. Instead, the broadcaster, in the absence of legal precedents, must depend upon a predictable adaptation of the powers and reasoning used by the FCC and the courts in determining obscenity in radio broadcasting to television. The broadcaster must also depend upon the general concept of obscenity as furnished by years of legal decisions in other communications media.

The lack of guidelines provides a basis on which the traditionally "straight-laced" or "prudish" portion of the public may complain even with the most conscientious use of sex on television. Yet the broadcaster must not program to their level out of fear of government intervention while neglecting those who wish to see mature and

honest explorations of human sexuality. In doing so, the broadcaster would be submitting to censorship as undesirable as any legal restriction.

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APPENDICES

APPENDIX A

The Motion Picture Association of America Production Code

The motion picture industry first began self-regulation in the early 1920's as a result of intense criticism by the public and government. A list of "don'ts" and "Be Carefuls," developed in 1927, led to the first Motion Picture Production Code in 1930. The original code contained such headings as "Crime," "Brutality," "Religion," "Sex," "Vulgarity," "Obscenity," "Blasphemy and Profanity," and "Costumes."

In 1966 the Code underwent a complete change. Its long and bulky standards were limited to ten brief paragraphs:

> The basic dignity and value of human life shall be respected and upheld. Restraint shall be exercised in portraying the taking of life.
>
> Evil, sin, crime and wrong-doing shall not be justified.
>
> Special restraint shall be exercised in portraying criminal or anti-social activities in which minors participate or are involved.
>
> Detailed and protracted acts of brutality, cruelty, physical violence, torture, and abuse, shall not be presented.

Indecent or undue exposure of the human body shall not be presented.

Illicit sex relationships shall not be justified. Intimate sex scenes violating common standards of decency shall not be portrayed. Restraint and care shall be exercised in presentations dealing with sex aberrations.

Obscene speech, gestures or movements shall not be presented. Undue profanity shall not be presented.

Religion shall not be demeaned.

Words or symbols contemptuous of racial, religious or national groups, shall not be used so as to incite bigotry or hatred.

Excessive cruelty to animals shall not be portrayed and animals shall not be treated inhumanely.

In 1968 the Code's authorities authorized the labeling of films with certain advisory ratings. The ratings include, "G" films for general audiences; "M" for films that are suggested for mature audiences; "R" for films to which persons under sixteen will not be admitted unless accompanied by a parent or guardian; and "X" for films to which persons under sixteen will not be admitted.

APPENDIX B

The National Association of Broadcaster's Television Code

The Television Code of the National Association of Radio and Television Broadcasters was put into effect March 1, 1952. It has since been revised eleven times. The origination of the Code came from the precedents set by the motion picture and radio industries. Below are excerpts from the Code which deal with television's responsibilities and program standards as they relate, directly and indirectly, to the treatment of sex:

> Preamble - . . . It is the responsibility of television to bear constantly in mind that the audience is primarily a home audience, and consequently that television's relationship to the viewers is that between guest and host.
>
> . . . . . .
>
> He, [the television broadcaster] . . . is obligated to bring his positive responsibility for excellence and good taste in programming to bear upon all who have a hand in the production of programs, including networks, sponsors, producers of film and of live programs, advertising agencies, and talent agencies.
>
> I. Advancement of Education and Culture
>
> (7) It is in the interest of television as a vital medium to encourage and promote the broadcast of programs presenting genuine artistic or literary material, valid moral and social issues, significant controversial and challenging concepts and other

subject matter involving adult themes. Accordingly, none of the provisions of this code, including those relating to the responsibility toward children, should be construed to prevent or impede their broadcast. All such programs, however, should be broadcast with due regard to the composition of the audience. The highest degree of care should be exercised to preserve the integrity of such programs to ensure that the selection of themes, their treatment and presentation are made in good faith upon the basis of true instructional and entertainment values, and not for the purpose of sensationalism, to shock or exploit the audience or to appeal to prurient interests or morbid curiosity.

. . . . . .

II. Responsibility Toward Children

(2) Such subjects as violence and sex shall be presented without undue emphasis and only as required by plot development or character delineation.

. . . . . .

(4) He should develop programs to foster and promote the commonly accepted moral, social and ethical ideals characteristic of American life.

. . . . . .

IV. General Program Standards

(2) Profanity, obscenity, smut and vulgarity are forbidden, even when likely to be understood only by part of the audience. From time to time, words which have been acceptable, acquire undesirable meanings, and telecasters should be alert to eliminate such words.

. . . . . .

(16) Illicit sex relations are not treated as commendable. Sex crimes and abnormalities are generally unacceptable as program material.

The use of locations closely associated with sexual life or with sexual sin must be governed by good taste and delicacy.

. . . . . .

(28) The costuming of all performers shall be within the bounds of propriety and shall avoid such exposure or such emphasis on anatomical detail as would embarrass or offend home viewers.

(29) The movements of dancers, actors, or other performers shall be kept within the bounds of decency, and lewdness and impropriety shall not be suggested in the positions assumed by performers.

(30) Camera angles shall avoid such views of performers as to emphasize anatomical details indecently.

. . . . . .

V. Treatment of News and Public Events News

(5) Good taste should prevail in the selection and handling of news: Morbid, sensational or alarming details not essential to the factual report, especially in connection with stories of crime or sex, should be avoided. News should be telecast in such a manner as to avoid panic and unnecessary alarm.

. . . . . .

IX. General Advertising Standards

(1) . . . The principles of acceptability and good taste within the Program Standards section govern the presentation of advertising where applicable.

Source: Television Code of the National Association of Radio and Television Broadcasters (11th edition, August, 1966).

APPENDIX C

Sample Text of "Indecent" Material as Cited in Palmetto Broadcasting Case

The following are selections from the Examiner's Initial decision concerning Palmetto Broadcasting Co., 33 FCC 250 (1962). The following is a reproduction of material broadcast by disc jockey Charlie Walker on October 15 and 27, January 14 and 20, 1960 and on April 25, 1960 and generally represents the type of material broadcast over the station for a long period of time.

> Next Saturday it is we gonna have the big grand opening over at the new W. P. Marshall store in Greasy Thrill and we gonna come over there and let it all hang out. Course if we let it all hang out in Greeleyville, there ain't gonna be enough room over there for nothin' else, is there?
>
> If you're goin' to see a gal over in Poston you got to go see her after it gets dark: I mean you can't go over there in the daylight. And the reason you can't go over there in the daylight is because it is that them gals around Poston are so wild, you know. They're so wild that you have to sneak up on 'em in the dark * * * And the only thing about sneaking up on 'em in the dark it is that you is liable to make a mistake; well I mean like I did one night, I thought I was sneaking up on one of dem gals from Poston and I was sneaking up on a cow. And do you know it is that I didn't even know I had a cow until it is that it swatted a fly off the end of my nose with its tail. When it swatted a fly off the end of my nose with its tail I begin to get suspicious. I knew them gals in Poston couldn't do that.
>
> . . . . . .

Did you hear the one about the boy and the gal in the cow pasture? He was really lovin' that gal good. Boy he was lovin' that gal good. And it is that he was getting plenty whole-hearted cooperation. He was. He was lovin' that old gal good. She was givin' him something besides lovin'. She was givin' him whole-hearted cooperation. She was. And he decided that this is the gal for me; says "this is the gal I want to marry, right here." So he came right out and asked her. He says; "Darling," he says, "will you marry me?" And she says, "well I don't know." She says, "tell me do you want a home?" And he says, "honey," he says, "I'm a regular home body." And she says, "And, what about children?" And he says, "Oh," he says, "Honey, I just love children." And she says, "Well," she says, "in that case," she says, "I'll marry you if you like children. We'll be in business in about six months!" [Laughter.] They gettin' a head start!

It is you give me barbecued iced water and a green-eyed gal and I can go hard.

. . . . . .

You hear 'bout de gal dat had a brand new boy friend? And, well, it her brand new boy friend * * * and her brand new boy friend he had been coming over to see her a while, you know, and de gal's daddy decided that he'd better kinda lay down the law, you know, to his daughter's new boy friend, so he took the boy aside, you know, and he says, "Son," he says, "a man," he says, "a man should be the boss of his house" * * * and, he says, "I'm telling you, son, it won't take you long to find out that I'm the one who wears the pants in this family." And, the daughter's new boy friend says, "Oh, no, sir," he says, "I know that," he says, "I found it out last night, sir!" * * * And in October already.

. . . . . .

I seen something last night that I wanted. I wasn't too bashful to go get it, I was just too smart. She had her husband with her. My mama didn't raise no foolish young 'uns.

. . . . . .

Betsy, you're not producing, you're not. Betsy says give her time, she's not married yet. Now you know what I'm talking about.

. . . . . .

I used to go with this gal that worked in that five and dime over in Greeleyville and you know it is that I'd take the gal out you know and anytime it is I'd kiss the old gal or hug her or squeeze her or tease her she'd say "Will that be all, sir?" You see that's what they say all day long at the five and dime, will that be all, sir? I broke her of that habit though. It is that I broke her of that habit. It is that I got the ole gal to where she'd quit saying, "Will that be all sir?" She started saying, "That's enough, Charlie." You gotta break 'em.

. . . . . .

You know they always told me if you had a problem the best thing to do was to go home and sleep on it. It is. Now I'll give you just three-guesses what my problem is. I'll just give you three guesses as to what my problem is [Recorded girl's voice:] "Ain't you gonna kiss me" [Response in male voice:] "U'nh-u'nh." Well, that's my first problem right there. I get so tired of hearing that.

. . . . . .

I used to go out with a gal cause she had plenty of lovin' but now I go out with her cause she's got plenty of patience.

. . . . . .

I can remember back when I was single boy. It is that my britches used to be wrinkled all the time too, but the reason my britches was wrinkled when I was single is because gals was always sittin' on my lap and that's why it is that my britches was always wrinkled. Man, times do change. Now what I got in 'em's wrinkled.

I got some britches at home that it is that if the crease in those britches could talk * * * my wife woulda been done killed me a long time ago (FCC exhibit 2).

Source of the above examples: Initial Decision of Hearing Examiner Thomas H. Donahue (Adopted December 8, 1961), Palmetto Broadcasting Co., 33 FCC 278,79,80,81.