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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

FURTHER MEMORANDUM SUBMITTED BY LEAVE OF COURT.

On December 3, 1956, this Court, by order, granted appellant leave to file a further memorandum in the above-entitled cause. 25 L. W. 3168.

The circumstances which led to the granting of the aforesaid order were briefly as follows: On October 16, 1956, this Court heard argument in *Butler v. Michigan,* No. 16, October Term, 1956. A summary of the argument was thereafter published on October 23, 1956. 25 L. W. 3117-3118. It appeared from the aforesaid summary that this Court was concerned with the constitutional validity of a state criminal statute which punished the sale of "obscene" books. This is an issue

which has never been definitely decided by this Court,* but which is now particularly raised in the cause herein.

In the *Butler* argument, questions were raised by members of this Court as to whether the term "obscene" was a sufficient criterion of guilt within the due process and free speech requirements of the Constitution of the United States. Counsel in *Butler* appeared to think that it was, agreeing that "'obscene' satisfies the Winters case." Counsel stated that the best constitutional test which counsel could arrive at for the term "obscene" was "dirt for dirt's sake" (as opposed, apparently, to "art for art's sake"). In reply to an inquiry as to why "obscene" was less vague than "immoral," counsel replied: "I think people deal with earthy things and over years of experience get what is permissible through experience." It was apparently upon the basis of the aforesaid reasoning that counsel agreed that "obscene" may be "a satisfactory test even though it is not as precise as an algebraic equation." 25 L. W. 3117-3118.

Following the argument in *Butler,* appellant here moved for leave to intervene in the said cause, or, in the alternative, for consolidation of the cause herein with *Butler.* Appellant urged that the aforesaid position taken in

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*"Yet I think it not improper to set forth, as I do in the Appendix, considerations concerning the obscenity statute's validity which, up to now, I think the Supreme Court has not discussed in any of its opinions. I do not suggest the inevitability of the conclusion that that statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation." *United States v Roth* (C. A. 2), unreported, Frank, J., concurring, cert. pend. No 582

Butler was directly contrary to the position taken by appellant in the instant proceeding; that appellant contended here that the term "obscene" was unconstitutionally vague and unconfined and a censorial proscription of ideas and speech in violation of the First and Fourteenth Amendments to the Constitution; that one of appellant's principal issues in the instant cause would be seriously adversely affected if, without adversary presentation or argument, this Court should determine that "obscene" is a constitutionally satisfactory standard; that since appellant Butler did not take the position that "obscene" is unconstitutionally vague, and since this is a question of great importance transcending in law and reach the interests of the parties in *Butler,* and since a correct determination of the issue is vital to the appellant in the cause herein, the appellant should be afforded the relief sought The motion for leave to intervene, or to consolidate, was denied with "leave to file a further memorandum in No. 61." 25 L. W. 3168.

Statement.

California makes it a punishable offense for any person to write, compose, publish, sell, keep for sale or distribute *any book* which is "obscene or indecent." Cal. Pen. Code, Sec. 311, subd. 3. It is also made a crime to advertise such "obscene or indecent" book. Cal. Pen. Code, Sec. 311, subd. 4. California construes the statute as meaning that a book is "obscene or indecent" if the book "has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire."

People v. Wepplo, 78 Cal. App. 2d Supp. 959, 961, 178 P. 2d 853.* Under the statute as thus construed, appellant has been convicted of keeping for sale by mail and for advertising by mail "obscene and indecent" books. Precisely which of the books, so advertised and sold by appellant, come within the law's interdiction in this case, the State has failed to indicate. [J. S. pp. 6-8.]**

On this phase of his appeal, appellant has invoked the jurisdiction of this Court on three broad grounds of constitutional importance, raising fundamental questions which have not heretofore been decided by this Court. These contentions may be summarized as follows: (1) The statute on its face, and as construed, deprives appellant of his liberty and property without procedural due process of law because its language is so vague and indefinite as to fail to give notice of required conduct to those who would avoid the penalties of the statute, and to guide a judge and jury in the application of the statute; (2) The statute on its face, and as construed, deprives appellant of his liberty and property without substantive due process of law in that the statutory language is so broad and sweeping that the sanctions of the statute may be applied, and have been applied herein, to opinions,

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*The State makes no distinction in the class of readers of the books,—age, profession, or otherwise. If the books are in fact "obscene", judged by their "contents", then, according to the State, the books are not any less "obscene" because literary critics praised the books as works "of literary merit" or because the "public library" had copies of them. The question whether any particular book is "obscene" or "indecent" is, according to the State, primarily one of "fact", to be decided by the jury. *People v Wepplo, supra,* pp. 961-2.

**The reference "J. S." is to appellant's Jurisdictional Statement on file herein.

beliefs and conduct within the protection of the First Amendment; (3) The statute on its face, and as construed, is a punitive censorship law abridging speech, press, opinions and beliefs which the State is without power to enact under the First and Fourteenth Amendments to the Constitution. In all the aforesaid respects, appellant claims that the statute on its face, and as construed, deprives appellant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

This memorandum is intended solely to outline some of the weighty factors which must be considered in determining the constitutional issues here involved. No attempt has been made to present a detailed analysis of the questions involved which only a definitive brief and oral argument can present after acceptance of jurisdiction of the cause by this Court. The object of this memorandum is to make it clear that the constitutional issues here involved are so important and run so deep that this Court should not attempt their solution without benefit of full adversary presentation and argument. The fundamental question here raised was avoided by appellant in *Butler* with counsel's concession that the term "obscene" in a criminal statute was sufficient to meet the criterion of guilt necessitated by the due process and free speech requirements of the Constitution of the United States. The position of the appellant here is directly to the contrary, as his Jurisdictional Statement indicates, and it is to a consideration of the broader issues which arise from appellant's position here that this memorandum is directed.

I.

The Statute, on Its Face and as Construed, Is Void Because so Vague as to Offend Procedural Due Process of Law and to Violate Freedom of Speech and Press.

It has, of course, been settled by this Court that where the language of a State statute is so obscure that it fails to give adequate warning to those subject to its prohibitions as well as to provide proper standards for adjudication, the statute cannot stand consistent with the due process requirements of the Constitution. The statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties; must be definite enough to guide the judge and jury in the application of the statute and the attorney defending the accused charged with a violation of the law. *International Harvester Co. v. Kentucky,* 234 U. S. 216; *Connally v. General Construction Co.,* 269 U. S. 385; *Cline v. Frink Dairy Co.,* 274 U. S. 445; *Champlin Refining Co. v. Commission,* 286 U. S. 210; *Lanzetta v. New Jersey,* 306 U. S. 451. See also, *United States v. Cohen Grocery Co.,* 255 U. S. 81.

A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, "violates the first essential of due process of law." *Connally v. General Construction Co., supra,* p. 391. "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff,* 344 U. S. 174, 176. Moreover, not only is statutory certainty an essential element of due process, but without it an accused is deprived of

any information as to the nature and cause of the accusation made against him in the particular case. The confluence of the basic principles of the Fifth and Sixth Amendments are thus subsumed into the due process provisions of the Fourteenth Amendment. *Cline v. Frink Dairy Co.,* 274 U. S. 445, 458. Finally, it is submitted that a conviction under a concededly vague criminal statute is an adjudication outside "the law," not under it. It is impossible to adjudicate where statutory terms are indefinite, vague and obscure. There is in such case no way of knowing of what an accused was convicted, and no appropriate basis exists for appellate review. In such cases, judges and juries are not determining whether an accused has come near to or crossed "the line" fixed by the law; a concededly vague statute fixes no line and judges and juries are simply legislating retrospectively whether or not the accused by his conduct has committed a "crime" in the peculiar estimation of the judge and jury. When the real issue submitted to a jury is "legislative, not judicial," a violation of the Fourteenth Amendment occurs. *Cline v. Frink Dairy Co.,* 274 U. S. 445, 457.

Moreover, all of the foregoing is especially true and compelling within the domain of law affecting liberty of thought and expression. The vice of a vague law is multiplied many times when it seeks to interdict not merely conduct but freedom of expression, thought and belief. These are the very life arteries of democratic society and government, and if they are severed or destroyed there is grave injury to the whole process of free living. Vagueness in laws punishing the distribution of books—the written word—is particularly damaging to

society. Chief Justice Marshall expressed this thought in a letter to Talleyrand:

> "The genius of the constitution, and the opinions of the people of the United States, cannot be overruled by those who administer the Government. Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence, and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America." The Life of John Marshall, Albert J. Beveridge, Vol. II, pp. 329-30.

In the foregoing premises is the law in the instant case sufficiently definite and clear to meet the commands of procedural due process and to respect the guarantees and requirements of free speech and press? Are persons reasonably informed as to what the state commands or forbids? It is submitted that upon analysis the statute at bar proscribing "obscenity" cannot meet the constitutional tests.

A. The Dictionary Affords No Ascertainable Standard of Guilt.

The key words in the statute are the words "obscene" and "indecent." Indeed, these are the only two terms which fix the standard applicable to interdicted books. What is an "obscene" book? What is an "indecent" book? The dictionary makes the following answer:

> "Obscene: 1. Offensive to taste; foul; loathsome; disgusting. 2. Offensive to chastity of mind or to modesty; expressing or presenting to the mind or view something that delicacy, purity, and decency forbid to be exposed; lewd; indecent; as, *obscene* language, dances, images."
>
> * * * * * * * *
>
> "Indecent: Not decent; specif; unbecoming or unseemly; indecorous; as, *indecent* haste—morally unfit to be seen or heard; offensive to modesty and delicacy; as *indecent* language.
>
> Syn. Immodest; impure; gross, obscene. See improper."
>
> Webster's *New International Dictionary* (2nd Ed. unabridged).

It is doubtful that any serious contention can be made that such dictionary definitions make clear what was obscure before. "The multiplication of adjectives is often a sign of uneasiness." Ernst and Seagle, *To The Pure . . . A Study of Obscenity and the Censor* (N. Y., 1928), p. 191. It confounds the vice of vagueness to define "obscene" as something "offensive to taste," or as some presentation to the mind "that delicacy, purity and decency forbid to be exposed." To say that a book is "indecent" when it is "morally unfit to be seen or heard" is about as clear—and about as profound—as to

say that "virtue is its own reward" or "business is business." "Bad books . . . are books which have a bad effect." *The Impact of Literature: A Psychological Discussion of Some Assumptions of the Censorship Debate* (1954) by Dr. Jahoda and Associates, p. 8. Such definitions are no more than "square blocks" where all sides are equal and parallel.

California has not been unaware that the statute on its face is but a trap for the unwary. It has therefore attempted to aid the statutory premises by giving notice to all those who write, sell, or keep books for sale that the words "obscene" and "indecent" have a particular meaning purportedly less elusive than the statutory words would appear to have. A book is "obscene" only if it has a substantial tendency to "deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire." We put to one side at this point the question as to what constitutes a "substantial tendency" within the intendment of the law, or what is meant by the words "deprave or corrupt." We examine the key phrases in the statute: —"lascivious thoughts and lustful desire"—for it should be noted that the book will be proscribed only if it corrupts and depraves its readers by inciting these "thoughts" and "desire."

All that remains now is to "take the dictionary down from the shelf" and find the answers.

> "*Lascivious:* 1. Wanton; lewd; lustful. 2. Tending to produce voluptuous or lewd emotions.
>
> Syn.—Licentious, lecherous, libidinous, salacious.*

* * * * * * * *

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*The dictionary gives an example of the use of the word: "The lascivious pleasing of a lute. Shak."

"*Lustful:* 1. Full of, or excited by lust; as, a lustful man; characterized by lust; provocative of lust. 2. Strong; lusty.

Syn.—Lecherous.

"*Lust:* Sensuous desire; bodily appetite; specif. and most commonly, sexual desire, as a violent or degrading passion. Longing or intense desire; eagerness to enjoy."

Webster's *New International Dictionary* (2nd Ed., unabridged).

It is obvious that all attempts to resort to dictionary definitions are fruitless. A "lascivious thought" or "wanton thought" or "voluptuous thought" are the same abstractions. It would appear that a "lustful desire" may be a "sexual desire, as a violent or degrading passion," but a specific description of this form of emotion might baffle even a Freud or a Kinsey.

We have not exhausted all the lexicographers, modern and ancient. See, Scott, G. R., *Into Whose Hands* (Lord, 1945), pp. 24-25. They will be found upon inspection to present the same tautological references. It is impossible to determine from the dictionary what is and what is not "obscene" or "indecent" in literature and art, or what is or what is not a "lascivious thought" or "lustful desire" which some book will have a "substantial tendency" to awaken in a reader to the point of "corrupting and depraving" him. The words have as many meanings as there are languages, countries, communities, localities, mentalities, conceptions and temperaments.

B. The Judicial Precedents Offer No Ascertainable Standard of Guilt.

If there is any unifying theme which runs through the "obscenity" decisions, it is this: The courts have been unable to provide a definition of the "crime." Coupled with this confession of failure has come conviction by guesswork on the part of both judge and jury. Since conceptions of "obscenity," "indecency," "lust" and "lasciviousness" depend not on reason but emotion, the reactions of each individual to the contents of a book are influenced not only by the customs or reactions of society, but by geography, environment, by fashion, by a person's own psychological, physical and mental makeup, by his own religious, educational, family and group relationships—social, economic and political. It is for these reasons that a book adjudged "obscene" in one country is ranked as a "classic" in another; that what was "obscene" yesterday is allowed free circulation today; that what one judge or jury condemns, another approves—and this, sometimes in the same community and at the same time. [J. S. pp. 15-19.] See, Schroeder, T., *"Obscene" Literature and Constitutional Law* (N. Y., 1911); Ernst and Seagle, *To the Pure . . . A Study of Obscenity and the Censor* (N. Y., 1928); Scott, G. R., *"Into Whose Hands," An Examination of Obscene Libel in its Legal, Sociological and Literary Aspects* (Lord, 1945); Craig, A., *The Banned Books of England* (Lord, 1937); Haight, A. L., *Banned Books: Informal Notes on Some Books Banned for Various Reasons at Various Times and in Various Places* (N. Y., 1955).

No rule of *law* can be distilled from the judicial precedents. Definitions of such terms as "obscene" and "indecent" remain as unintelligible after a reading of the

precedents as before. To a large extent, these decisions appear to reflect no judgments under rules of law, but the varying personal prejudices of different men with differing "moral" and "aesthetic" backgrounds. "Not any of these laws define 'obscenity' or say what it is in literature, or prescribe any test to identify it in literature. That vests the court with an over-all control, or, as some say, censorship of 'obscene' literature . . . the courts have gone on through the years construing and interpreting the inhibitory words of these statutes generally to agree with their own ideas of what was or was not 'obscenity' . . . How is this test to be applied? How is a court or jury to know if on reading a literary work sex ideas arise in the minds of the readers and, if so, whether they are pure or impure for according to this test, it is only lustful or impure sex ideas with which courts and juries are concerned." *State v. Lerner,* 81 N. E. 2d 282, 285-286 (Ohio).

Other courts have also acknowledged the elusiveness of the problem. Thus: "The exact point at which language becomes obscene or filthy cannot be determined by any standard test, but it is rather a matter of opinion to be ascertained by the use of ordinary common sense and reason, taking into account the circumstances in which the matter is employed." *Comm. v. Donaducy,* 167 Pa. Sup. 611, 613, 76 A. 2d 440. "Comprehensive and complete as are these tests, their application in a given case is by no means easy. Indeed it is not indulging in hyperbole to say that no more difficult or delicate task confronts a court than that arising out of the interpretation and application of statutes of this sort. . . . Our attention has been directed to two decisions in other jurisdictions in which the book in question has been held not

to be obscene under statutes somewhat similar to ours. . . . A discussion of these decisions would not be profitable." *Attorney General v. The Book Named "God's Little Acre,"* 326 Mass. 281, 283, 285, 93 N. E. 2d 819. "The definitions all lead to the dead-end of a subjective determination." *Bantam Books, Inc. v. Melko,* 25 N. J. Sup. 292, 307, 96 A. 2d 47. "The most cursory survey reveals that despite the extensive consideration which the courts have given it, the concept of obscenity remains elusive. . . . The general course of decisions indicates that the work in question is approached as an aggregate of different effects, and the determination turns on whether the salacious aspects are so objectionable as to outweigh whatever affirmative values the book may possess." *American Civil Liberties Union v. Chicago,* 3 Ill. 2d 334, 343, 346, 121 N. E. 2d 585. "That statutes concerning obscenity are usually broadly worded so as to cover all possible methods of bringing the attention of decent persons to obscene papers, pictures, or articles. . . . The word 'obscene' not being a technical term of the law, and not being susceptible of exact definition in its judicial or legal use, this question must in any given case be submitted to the jury as a question of fact and the finding of the court, sitting as a jury, as in the instant case, may not be disturbed if that finding is sustained by testimony sufficient to support that conclusion by an ordinary man of average intelligence." *Hadley v. State,* 205 Ark. 1027, 1030, 172 S. W. 2d 237. "The criterion of decency is fixed by time, place, geography and all the elements that make for a constantly changing world . . . the test that the book is required to meet is the measure of public opinion in the City of New York in the year 1935 . . . the task of the judge is to record the tides

of public opinion. . . . My duty is to act as an observer and recorder—not as regulator." *People v. Miller,* 155 Misc. 446, 447, 279 N. Y. Supp. 583.

Although many state courts, including California, do not adopt the more "liberal" tests formulated by Judges Hand and Woolsey in the federal courts, it may be pertinent to inquire here whether the so-called "Hand rule" provides any more definite standard by which an author or bookseller can determine whether the contents of a book are "obscene" or "indecent", or will tend to incite "lascivious thoughts" or "lustful desire" in their readers. It must always be remembered, it is respectfully submitted, that the issue here is plainly not one of literary criticism. An author can suffer "a fate worse than death" from a review in the literary section of the New York Times as well as from a judge or jury. We are dealing here with the punishment of "crime" under the law, the fixing of the stigma of criminality upon persons in accordance with principles and standards embedded in a Constitution which itself reflects the historical will of an entire nation. In *United States v. Kennerley,* 209 Fed. 119, 121 (D. C. N. Y., 1913), Judge Hand stated: "If there be no abstract definition, such as I have suggested, should not the word 'obscene' 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. If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence." Judge Hand returned to this same theme in *United States v. Levine,* 83 F. 2d 156, 157 (C. A. 2, 1936): "Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a

syllogism of which they are to find only the minor premises, but really a small bit of legislation *ad hoc,* like the standard of care." Judge Hand conceded that such determinations are usually the result of "the personal aberrations of the jurors", but he thought that the most one could do to avoid such subjective reasoning was to give the jury a series of "cautions"—if the book were old, its accepted place in the arts must be regarded; if new, the opinions of competent critics must be considered; the effect upon "all" whom it is likely to reach must be decided, not the effect upon any "particular class."

It was soon evident that these views could not clarify that which was intrinsically vague. In *Parmelee v. United States,* 113 F. 2d 729, 732 (C. A. D. C., 1940), the court thought that the "critical point" test enunciated by Judge Hand was perhaps "the most useful definition", but it stated: "But when we attempt to locate that critical point in the situation of the present case, we find nothing in the record to guide us except the book itself." Actually, the concept that within the area of speech and thought specification of what is permissible may be relegated—avowedly and by open concession—to "legislation *ad hoc*" by juries or trial courts after-the fact is particularly violative of the most basic fundamentals of liberty of thought and speech once it is openly expressed. To countenance such is to countenance avowedly total and arbitrary power of regulation over speech and thought by punitive bodies of the state—censorship power in uttermost conceivable measure. Judge Frank has always been critical of Judge Hand's concept and formulation. In *Roth v. Goldman,* 172 F. 2d 788 (C. A. 2, 1949), Judge Frank stated that he had his "doubts" about the equipment of a jury to determine the "social sense of what is right" at "any given

time." "For any particular single jury may not at all represent the 'average' views of the community, especially on such a subject." *supra,* p. 795, n. 30. Only recently Judge Frank, in a provocative and learned opinion, again expressed his dissatisfaction with a standard of "the average conscience of the time." *United States v. Roth,* unreported (C. A 2, 1956), cert. pend. No. 582, Oct. Term 1956 In *Walker v. Popenoe,* 149 F 2d 511, 513 (C. A. D. C., 1945), Judge Edgerton questioned whether the legislature could constitutionally confine discussion of sex within the limits which it conceives "to be good for the community" Judge Bok in *Commonwealth v. Gordon,* 66 D. & C. 101 (1949) rejected the notion that anyone can tell instinctively what is or is not obscene. "The idea that instinct can be resorted to as a process of moral *stare decisis* reduces to absurdity." (p. 116). Rejecting the notion of an "aggregate sense of the community", the learned Court suggested his own notion of the social sense of the community. "I believe that the consensus of preference today is for disclosure and not stealth, for frankness and not hypocrisy, and for public and not secret distribution. That in itself is a moral code." (p. 118). But whether "the community" believes in frankness or hypocrisy is beside the point because in the area of thought and desire, majority rule simply does not apply. This is as true of sexual thought and desire as it is of political and religious thought and desire.

In the light of all the aforesaid, it would appear that reliance in the law upon the general notions of persons in the community as to what is "indecent" or "obscene", as a criterion of guilt, is unacceptable and fruitless.

The suggestion by Judge Hand that juries in "obscenity" trials inevitably engage in fact in a "small bit of legislation *ad hoc*" is supported by an examination of the cases.

It would be futile to deny that what happens in such cases is that judge and jury enact crimes *ex post facto*. There is simply no way of knowing whether a book is "obscene" or "indecent" until a jury of twelve persons declare that it is "obscene and indecent". It is difficult to believe that Judge Hand would hold that, consistent with due process of law under the Fourteenth Amendment, a jury may be permitted to abandon its fact-finding function and engage in legislation in a criminal trial. Clearly, this Court held otherwise in *Cline v. Frink Dairy*. The reference to "standard of care" and "negligence" makes it more likely, however, that Judge Hand is equating prosecutions under laws which expose a citizen to conviction for indeterminate crimes with prosecutions under "obscenity" laws.

There are, of course, laws against disorderly conduct, breach of the peace, reckless driving, general drunkenness, etc. But the equation of such laws with laws punishing the sale of "obscene" or "indecent" books which incite to "lascivious thoughts" or "lustful desire" is fallacious. Regulating drunkenness and its likes is not akin at all to regulating literature and freedom of expression. Such matters are as poles. The value-premises of society differ as to such *totally*. What applies to the one will not as such apply to the other by any token whatsoever. In regulating such things as drunkenness, breach of peace, negligence or disorderly conduct, the values of society are largely one-sided, and an error or two in drawing too constrictive a line is a mishap of relatively small consequence. But it is otherwise entirely when it comes to misdrawing the line as to liberty of speech and expression. Misdraw or inaccurately draw the line there and society can condemn—and in history has condemned—not unimportant matters but the works and words of genius, the fruits

of mind such as Keats, Shelley, Rabelais, Swift, Pepys, Milton and Defoe.

Moreover, there are objective factors in judging such subjects as negligence, drunkenness, breach of peace and disorderly conduct which can be taken as guides; there are only subjective factors in judging literature for "obscenity", constantly shifting and variable. This fundamental distinction has been uniformly noted by jurists as well as the text writers in this area.

> "But in the first place, however uncertain are such laws as we have mentioned, there are always some objective factors which may be taken as guides. There is in a drunkenness arrest the prisoner's breath and the unsteadiness of his limbs, which may be observed from contact with him. When he is accused of reckless driving, it is possible to inquire into the turns of the road, the condition of the weather and the amount of traffic."
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> Ernst and Seagle, *To the Pure . . . A Study of Obscenity and the Censor* (N. Y., 1928), p. 209.

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> "It has been pointed out elsewhere that the meaning of terms fundamental in the law of property, of words like 'murder', 'arson' and 'mayhem' in the law of crimes, and even of 'negligence' have remained relatively constant. Not so with 'obscenity' or 'obscene', whose meaning has undergone changes, particularly in recent decades. In making a broad and all-inclusive definition of 'obscene', censor and judge alike, are to employ the language in *Joseph Burstyn, Inc. v. Wilson,* 343 U. S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952), 'set adrift upon a boundless sea amid a myriad of conflicting currents . . ., with

no charts but those provided by the most vocal and powerful . . ."

Bantam Books, Inc. v. Melko, 25 N. J. Sup. 292, 307, 96 A. 2d 47.

"One can say what constitutes murder, or robbery, and anyone is well aware, before he commits the crime, exactly what it is and what it implies. One cannot say what constitutes an 'obscene libel' *until it has been perpetrated and judged to be an obscenity by another party* . . . In other words, because of the impossibility of defining what constitutes obscenity, often *the judge creates the crime which he elects to judge."*

Scott, G. R., *Into Whose Hands* (Lord, 1945), p. 26. (Italics author's.)

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"The inherent evil of murder is apparent, but by what apparent, inherent standard of evil is obscenity to be judged, from book to book?"

Judge Bok in *Commonwealth v. Gordon,* 66 D. & C. 101, 117.

* * * * * * * *

"The word 'obscene', like such words as delicate, ugly, lovable, hateful, etc., is an abstraction not based upon a reasoned, nor sense-perceived, likeness between objectives, but the selection or classification under it is made, on the basis of similarity in the emotions aroused, by an infinite variety of images; and every classification thus made, in turn, depends in each person upon his fears, his hopes, his prior experience, suggestions, education, and the degree of neuro-sexual or psycho-sexual health. . . . It follows that to each person the 'test', of criminality, which should be a general standard of judgment, unavoid-

> ably becomes a personal and particular standard, differing in all persons according to those varying experiences which they read into the judicial 'test'."
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> Schroeder, T., *"Obscene" Literature and Constitutional Law* (N. Y., 1911), pp. 277-8.

It would appear, therefore, that it is impossible to cull from the plethora of precedents a uniform judgment as to the meaning of such terms as "obscene" or "indecent". The complexity of the problem is only deepened by the attempts to control the "personal aberrations" of the jurors. There is no logic in urging that a "classic" will not arouse a "lascivious thought" while a poorly written book will. The opposite may be the case. All that can be said is that some courts are endeavoring to save a portion of our art and literature from the vagaries of an "obscenity" statute. Literary critics are not always agreed on what is "art" and what is "dirt", for the instances are legion when "dirt" has come to be hailed as "art". To substitute the effect on "all persons" for the effect on "any" person means either dubious reliance on opinion polls or reliance on the "normal" man, a man who in the ephemeral area of "sexual purity" even a Diogenes would be hard put to find.*

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*In an early case, an accused was charged with committing an act injurious to "public morals" by leaving his wife and children without support The court stated. "We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court and jury The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment The law is simply null. The Constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed." *Ex parte Jackson,* 45 Ark. 158, 164 (1885).

C. The Historical Precedents Offer No Ascertainable Standard of Guilt.

Reliance upon the "common law" or general history in an effort to determine the meaning of "obscenity" appears misplaced. What can be drawn from an examination of the past in the area of "obscenity" is merely the absence of any valid standards, the lack of logic and consistency in the censorship of art and literature. Indeed, the concept of "obscenity" appears to be of comparatively modern growth.

1. Prior to the eighteenth century, writings which at a later date might well have been considered "obscene", were freely circulated. Shakespeare is only one example. Up until the eighteenth century, the chief concern of the Church and State were writings marked by "impiety" and "treason". The early common law apparently did not treat literature as "obscene" unless the writings in content threatened the established religion or the established State. In 1708, the first case of an "obscene libel" appears, but Lord Holt stated: "A crime that shakes religion, as profaneness on the state, etc. is indictable; but writing an obscene book, as that entitled 'Fifteen Plagues of a Maidenhead' is not indictable, but punishable only in the spiritual court." *Regina v. Read,* 11 Mod. 143, 205 (Q. B. 1708).

The only other cases in the eighteenth century are *Rex v. Curl,* 2 Strange 789 (K. B. 1727) and *Rex v. Wilkes,* 4 Burr. 2527 (K. B. 1770). In the *Curl* case, the court sustained the indictment upon the ground that religion was part of the common law. The *Wilkes* case appears to have been politically inspired. Wilkes allegedly published a poem described by his opponents as an "obscene, impious libel." "It may be summarized with safety that,

up to this point, obscenity in literature had not been the concern of the courts; it is offenses against religion which have comprised the issues. . . . There is no definition of the term. There is no basis of identification. There is no unity in describing what is obscene literature, or in prosecuting it." Alpert, L. M., *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40, 44, 47 (1938). See also, Schroeder, *"Obscene" Literature and Constitutional Law* (N. Y., 1911), Ch. III, pp. 33-41.

At the time, therefore, when America separated from the mother country there seems little warrant for asserting that "obscenity" was "well known and understood in the common law."

2. Were there any basis for asserting that a common law existed in England concerning "obscenity" prior to the founding of this country, it appears clear that such common law would not have been accepted by the forefathers. In the first place, "for us to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press'." *Bridges v. California,* 314 U. S. 252, 264. There is clearly a reflection of the spirit of the times in Jefferson's statement that "some degree of abuse is inseparable from the proper use of anything. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding to proper fruits." *Jefferson's Works,* Vol. 4, p. 544.

In the second place, the founding fathers appear to have had a lusty view of life, and concern over "sexual purity" did not appear to be of pressing importance. See

the opinions of Judge Frank in *Roth v. Goldman,* 172 F. 2d 788 (C. A. 2, 1949) and *United States v. Roth,* unreported (C. A. 2, 1956), cert. pend. No. 582, October Term, 1956. See also, Judge Bok in *Commonwealth v. Gordon,* 66 D. & C. 101, 120 (1949). Monesquieu, whose writings markedly influenced the thinking of the early colonists (See, Elliott's *Debates in the State Conventions on the Adoption of the Constitution*), stated in *The Spirit of Laws* that when "manners and customs are to be changed, it ought not to be done by laws". Book XIX, Ch. XIV. Edward Livingston, engaged in a revision of the Penal Code of Louisiana, decided to omit altogether that whole class of offenses designated as *contra bonos mores,* "leaving the whole class of indecencies to the correction of public opinion". He found himself unable "to decently accuse and try a man for indecency". From the difficulty of defining the offense, Livingston held that "a fanatic judge, with a like-minded jury, will bring every harmless levity under the lash of the law". Hunt, C. H. *Life of Edward Livingston* (N. Y., 1864), pp. 289-91.

3. The genesis of the modern American "obscenity" statutes is therefore not to be found in the "majestic common law" nor in the stirring history of the founding of the Republic. In their origin, these laws were the product of the rise of "Victorianism" in the middle nineteenth century in England, and shortly thereafter imported into this country largely through the efforts of one Anthony Comstock, who "obtained or inspired passage of obscenity laws throughout the country." Judge Goldmann in *Bantam Books, Inc. v. Melko,* 25 N. J. Supp. 292, 311, 96 A. 2d 47. With such inauspicious beginning, it may be doubted, it is respectfully submitted, that the

modern "obscenity" statutes should be afforded the veneration which old age sometimes receives. Moreover, "Victorianism" and "Puritanism" have their own political, social and economic explanations. G. Rattray Taylor, *Sex in History* (Lond. 1954), pp. 205-224.

In a consideration of the history of these movements from about the 1850's to the present time and their grotesque attacks upon art and literature, it is doubtful that the term "obscene" gets precision because "people deal with earthy things and over years of experience get what is permissible through experience". The list of works banned during the last hundred years in accordance with the principles of "Comstockery" would, in many cases, read "like civilization's honor roll"—and why these works were banned, and others were not, remains a mystery. Ernst & Lindley, *The Censor Marches On* (N. Y., 1940), p. 228.

It was not then until 1857 that the progenitor of the modern "obscenity" statutes came into being. Lord Campbell's Act (20 and 21 Vict.) was intended as a protection solely for children against "pornographic" books, pamphlets and pictures. The debates in the House of Commons were sharp, with the author of the bill unable to define any "obscene" writing other than that "calculated to shock the common feelings of decency in any well regulated mind". Opponents of the bill argued that the indefiniteness of the statute would lead to perversions of its limited purpose, and ten years later this proved true when the statute was invoked in *Regina v. Hicklin,* L. R. 3 Q. B. 360 (1868). Alpert, L. M., *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40 (1938); Ernst and Seagle, *To the Pure* (N. Y., 1928), Ch. VI—; *Bantam Books, Inc. v. Melko,* 25 N. J. Sup. 292, 309-311, 96 A. 2d 47.

Lord Chief Justice Cockburn in *Hicklin* considered the anti-religious tract there involved as dangerous to growing sons and daughters. He announced his test for "obscenity" (contrary to Lord Campbell's purpose) as whether "the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". Shortly thereafter, the decision was embraced by the American courts—and by the Vice Societies—and permeated the rulings of the courts until the more recent efforts to alleviate the harshness of the rule. As we have pointed out above, the *Hicklin* rule, as well as all of its different variations, remain in essence a mishmash of ponderous generalities, indefinite and incomprehensible, with an author, publisher or bookdealer subject constantly to the mere whim, bias or mercy of court and jury. Alpert, L. M., *supra,* p. 70.

In addition, on this phase of the discussion—the relation of history to the question of vagueness in this "obscenity" statute—some corollary considerations merit attention. Problems relating to the significance of the First Amendment in our constitutional system did not seriously arise to confront this Court until the 1920's when espionage prosecutions were instituted during World War I. It was not until 1925 in *Gitlow v. New York,* 268 U. S. 652, 666, that this Court expressed the view that freedom of speech and of the press were among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment. Since that time, this Court has never failed to indicate the vital necessity for representative government in the freest expression of opinions, beliefs and ideas Therein, this Court has stated, lies the security of the Republic. In *Burstyn, Superior*

Films and *Holmby* this Court made clear, at least, that fundamental freedoms cannot depend on the unfettered decisions of men governed only by a vague and ambiguous law. The terms "sacriligious", "immoral" and "obscene" have not met the constitutional test in the areas of "previous censorship".* With such a recent history, we respectfully submit that the statute herein can merit no additional approval or obtain additional definiteness because of its longevity. Rather, it would appear that the aforesaid judicial history has only cast the meaning of the terms "obscene" and "indecent" in this State statute in a more obscure light.

History, therefore, sheds no light on the meaning of the statute here involved. It should be noted that there is a paucity of precedents in California on the meaning of "obscene" and "indecent" in the law. The *Wepplo* case is about the only one (decided in 1947) prior to the case herein. The same situation exists in other states. There are practical reasons for this situation, not the least of which is that very few authors and publishers relish a charge of "obscenity" and "indecency" in the public forums, and will often censor themselves or accept censorship rather than go through painful litigation, and, secondly, because the charges are usually instituted against a bookseller who, rather than suffer the stigma placed on his entire business, simply removes the interdicted books from his shelves. Thus, the statute has reached a "ripe

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*Following the decisions of this Court, the Pennsylvania Supreme Court in *Hallmark Productions, Inc v. Carroll,* 384 Pa 348, 121 A. 2d 584 (1956), held that the statute authorizing an administrative body to pass upon "sacriligious, obscene, indecent, or immoral" motion pictures, or such as "tend to debase or corrupt morals", was void as offending the due process clause of the Fourteenth Amendment.

old age", avoiding persistent attack because of the very ambiguity of the language which makes it deserving of attack.

D. There Is No Scientific Data Available to Afford Any Ascertainable Standard of Guilt.

The issue here may be stated somewhat as follows: Is "obscenity" a matter of sense perception, discoverable by uniform and objective standards, existing in the nature of things, or does it exist entirely within the "mind's eye", dependent not upon the letter of any general scientific law, but in each person according to his own whims and prejudices, varying personal experiences and different degrees of intelligence about sex relations?

It is plain that profound sociological and scientific analyses of society and individuals in society are necessary before one can completely deal with the challenging questions arising out of attempts to regulate sexual ideas, relations and behavior Within the confines of this memorandum, an extended discussion is not possible. All that can be done is to suggest some of the problems which arise in this area, particularly as they arise in the prosecution under the instant statute, and to discuss to what extent the scientists have agreed on answers to questions in this field.

Since the State has not definitively expressed the purpose of the statute, we are left only to an examination of its provisions. It would appear from the language of the law that its purpose is to prevent the sale of books which tend to arouse in their readers "lascivious thoughts" or "lustful desire". It may also be conjectured that the real object of the statute is to avoid possible "sexual misconduct" or other "anti-social" conduct by preventing persons

from becoming "corrupt and depraved" through such "lascivious thoughts" and "lustful desire". Whatever the real object of the statute, it must be immediately apparent that it raises more questions than it answers.

Without attempting to explore the entire nebulous area of sexual "purity" and "impurity", the question which immediately arises is to what extent do written books arouse sexual ideas of an "impure character"? No scientist appears to know the answer, though most who have written on the subject have indicated that there is little support for the exaggerated claims made by the vice societies in this area. Fundamentally, this is so because notions of "modesty" and "sex purity" have variations of an individual and societal character. As Ernst and Seagle point out in their chapter on "The Enigmas of Literary Decency", there are temporal, spatial, language, age and other considerations which make answer in this field completely impossible. *Supra,* pp. 38-65.

The stimulii in this field of "lustful desire" seem to be as varied as the responses. Most students of the subject seem to be agreed that there are so many variables here involved, that it is simply idle to isolate books as a motivating cause. "The sexually stimulative effect of erotic literature is enormously exaggerated. Literature occupies a very inferior position in the list of aphrodisiacs. There are many far more potent influences on sexual libido. Dancing exerts a powerful aphrodisiacal effect; so does alcohol; so does woman's dress; so does perfume. Yet no one suggests the prohibition or suppression of any of these aphrodisiacs on the ground of its "corrupting influence" or its power of inciting sexual passion. Indeed, the most powerful sexual stimulant of all, intimate contact of the sexes, it is impossible, in any extended or

complete sense, to guard against." Scott, G. R., *Into Whose Hands* (Lord, 1945), p. 5* Moreover, to ascribe the stimulation of sex images to books, while ignoring newspapers, radio and television, is to ignore reality.

Judge Frank in *United States v. Roth,* unreported (C. A. 2, 1956), cert. pend. No. 582, Oct. Term 1956, recounts a summary of the conclusions of the social scientist, Dr. Jahoda, on a report made by Dr. Jahoda and associates entitled "The Impact of Literature: A Psychological Discussion of Some Assumptions in the Consorship Debate" (1954). The Jahoda Report finds it virtually impossible to determine the impact of literature on the mind of the reader. "Some evidence suggests that the particular

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*"Thus, books on sexual psychology tell us of men who are so 'pure' that they have their modesty shocked by seeing a woman's shoe displayed in a shop window, others have their modesty offended by hearing married people speak of retiring for the night; some have their modesty shocked by seeing in the store windows a dummy wearing a corset, some are shocked by seeing underwear, or hearing it spoken of otherwise than as 'unmentionables'; still others cannot bear the mention of 'legs', and even speak of the 'limbs' of a piano" Schroeder, *supra,* p. 275.

"As a curiosity, and also to underline the continuous change of views in this area it may be worth mentioning here that all reading of novels, not only of 'bad' ones, was once considered as undermining the power of resistance of every woman. One Bostonian who in 1819 published a weekly *Something* under the pseudonym Nemo Nobody, Esq had this to say about the subject: 'A young man acquainted with the world might say, show me any young woman who is a constant novel reader, and I will seduce her, and the task, horrid as it is, would be easy accomplished Examine the general opinions of even young men, and you will find that the more females are found to be addicted to novel-reading, the less are they esteemed virtuous, examine the opinions of elders, and you will find the less are they esteemed sensible. A devotion to novel-reading indicates a mind of an inferior capacity and grovelling exercise; it encourages not, but weakens its energies, it causes it to waste its essence on phantoms, when it should by it invigorate realities'" *The Impact of Literature A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954), Dr. Jahoda and Associates, p. 11, n. 8.

communications which arrest the attention of an individual are in good part a matter of choice. As a rule, people do not expose themselves to everything that is offered, but only to what agrees with their inclinations."

Perhaps all one can do in the light of the aforesaid is to agree with Judge Bok: "I can find no universally valid restriction on free expression to be drawn from the behavior of 'l'homme moyen sensual', who is the average modern reader It is impossible to say just what his reactions to a book actually are. Moyen means, generally, average, and average means a median between extremes. If he reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanic's Lien Act while his sensuality is high, things will stand between him and the page that have no business there." *Commonwealth v. Gordon,* 66 D. & C. 101, 137 (1949).

Plainly, if it is impossible to determine the effect of literature on the mind of a reader so far as his sex reactions are concerned, it becomes more difficult to determine whether books, acting on the mind, are the cause of "sex misconduct". Nevertheless, it should be noted that even on a basis of *arguendo,* no scientific evidence is available to support a finding of a nexus between literature and "sex misconduct". In the first place, there is no agreement as to what "sexual misconduct" is envisaged. Sexual images, no matter how "impure", will probably not be proscribed if they lead to marriages. Is any relation with the opposite sex, other than marriage, the object of the statute? Is it some sex deviation like homosexuality? The complexity of the problem is shown by the difficulty which even experts in the field of criminal law have when

dealing with "sexual offenses".* Judge Frank has pointed out in *United States v. Roth, supra,* that it is impossible to assert with any assurance that "obscenity" represents a ponderable causal factor in sexually deviant adult behavior. "What little competent research has been done, points definitely in a direction precisely opposite to that assumption."

It is submitted, therefore, that the statute herein, on its face and as construed, sets no definable standards by which persons, judges, juries or lawyers can determine what it is the law forbids or permits. Neither the dictionary, judicial precedent, the common law, history or science offer any ascertainable standard of guilt. In operation and effect, the law permits the creation of *ex post facto* crimes by the "finders of fact". Conviction under such a statute operates to deprive an accused, as it has in this case, of every essential element of procedural due process of law.**

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*"At the present time 11 of the 48 states have no fornication statutes, and only 18 punish a single act of intercourse between unmarried persons (four of these by fine alone) . . . American penal laws against illicit intercourse are generally unenforced . . We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor Such matters are best left to religious, educational and other social influences. . . . In sum, the major issue of policy in this field is whether to abandon immoral law altogether as a device for regulating voluntary heterosexual behavior, or to attempt to restrict the liability to certain classes of behavior involving an identifiable secular evil which can be effectively controlled by penal law." American Law Institute, *Model Penal Code,* Tentative Draft No 4 (April 25, 1955), pp 204-10.

**The history of liberty has largely been the history of observance of procedural safeguards." *McNobb v. United States,* 318 U. S. 332, 347.

II.

The Statute Upon Its Face, and as Construed, Permits the Punishment of the Exercise of Freedom of Speech and Press and Acts as a Censorial Control of Free Expression in Art and Literature, Depriving Persons of Their Liberty and Property Without Substantive Due Process of Law.

The great significance which this Court places upon the free exercise of freedom of speech and freedom of the press in the United States needs no lengthly elucidation and has been mentioned earlier. The libertarian, humanitarian and utilitarian values of these freedoms in a democratic society have often been stressed. It is not too much to say that the decisions of this Court emphasizing the importance of speech and press in the advancement of truth, science and art has the unbroken and impressive support of all the leading figures in the history of civilization. "The mind is in chains when it is without the opportunity to choose. One may argue, if one please, that opportunity to choose is more an evil than a good. One is guilty of a contradiction if one says that the opportunity can be denied, and liberty subsist. At the root of all liberty is the liberty to know. . . . Experimentation there may be in many things of deep concern, but not in setting boundaries to thought, for thought freely communicated is the indispensable condition of intelligent experimentation, the one test of its validity." Cardozo, *The Paradoxes of Legal Science* (N. Y., 1928), pp. 104-5.

Thus, this Court has held that the rights of free speech and a free press "are not confined to any field of human interest". *Thomas v. Collins,* 323 U. S. 516, 531. "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but

they chose to encourage a freedom which they believed essential if vigorous enlightenment were ever to triumph over slothful ignorance." *Martin v. Struthers,* 318 U. S. 141, 143. One of the prerogatives of American citizenship is the right to criticize—"and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States,* 322 U. S. 665, 674. Hence, a community may not suppress "the dissemination of views because they are unpopular, annoying or distasteful. . . . That would be a complete repudiation of the philosophy of the Bill of Rights." *Murdock v. Pennsylvania,,* 319 U. S. 105, 116. "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut,* 310 U. S. 296, 310.

Because, therefore, of the wide scope which the Constitution gives to the exercise of freedom of speech and press, statutes will be held void upon their face where they do not specifically aim at evils within the allowable area of state control, but, on the contrary, sweep within their ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. *Thornhill v. Alabama,* 310 U. S. 88. Such statutes operate as an overhanging threat to free discussion *Bridges v. California,* 314 U. S. 252, 296. A vague and indefinite statute which permits the punishment of the

exercise of free speech, and by its inexact terms discloses a threat to that freedom, *inherent in the very existence of the statute,* offends the Constitution. *Stromberg v. California,* 283 U. S. 359; *Carlson v. California,* 310 U. S. 106. And, where a statute as construed by the state courts seriously invades the First Amendment rights, it is immaterial that it also may be given a scope which does not infringe upon that right. *Terminello v. Chicago,* 337 U. S. 1.

As we have endeavored to demonstrate in Point I above, the state statute here on its face, and as construed, is not narrowly drawn. We have pointed out that it is neither limited in the class of readers nor in the contents of the books. We have also shown that the "evil" at which the statute is purportedly directed is obscure and undefinable. Aside from the absence of any proof that such "evil" exists, it would appear clear from the aforesaid that a state is without power under the Constitution to control the "lascivious thoughts" and "lustful desire" of its citizens. "Thus the (First) Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection." *Cantwell v. Connecticut,* 310 U. S. 296, 303.

It is only some "conduct," clearly defined, which a state has power to control. The statute here makes no attempt to set forth the "evil conduct" which the statute is intended to prevent. We are left to guess, and as we have shown, that guess must be extremely tentative because there is no proof that books necessarily lead to

"lascivious thoughts" or "lustful desire," nor that these thoughts and desire lead to any "conduct" at all. Moreover, assuming that "conduct" does emanate from such "thoughts" and "desire," we can only guess at the type of conduct which the state considers "sexually illegal," and we can only speculate as to the extent to which "lustful desire" directly incites such "sexual misconduct." It is submitted, therefore, that if an "evil" exists, the state has made no effort to confine the provisions of the law to the specific "evil." For these reasons, we do not reach in this case, it is respectfully submitted, questions revolving around "morality" and "licentiousness" in broad societal terms. If there is any area where "obscene" books can be shown or reasonably believed to provoke unlawful "conduct," the state has made no attempt to delimit the area. Both Judge Frank in *United States v. Roth, supra* and Judge Bok in *Commonwealth v. Gordon* endeavored to show that such "conduct" statute could be narrowly drawn within permissible constitutional limits. Other writers assert that no such "obscenity" statute can be drawn, nor should it be. See, Alpert, L. M., *Judicial Control of Obscene Literature, supra,* pp. 70-76. That fundamental question is not reached here because this statute patently has not been "canalized" and falls squarely within the condemnation of the First and Fourteenth Amendments.*

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*A different question is presented when specific language (whether denominated as "obscene", "profane", "lewd" or fighting words") directly and intentionally incites to acts of violence by the persons to whom, individually, the language is addressed See, *Chaplinsky v. New Hampshire,* 315 U. S 568 The state has the power to prevent direct incitements to riot or to physical attacks upon others But the "evil" must be specific and specifically described. On the other hand, a great variety of conduct cannot be

III.

The Statute, on Its Face and as Construed, Constitutes a Punitive Censorship Statute Which the State Is Without Power to Enact Under Our Constitutional System.

A statute as vague and indefinite as the one herein, with its inherent tendency to inhibit the flow and reception of ideas, opinions and beliefs, is a censorship statute, no more compatible with the Constitution because it punishes after the expression of an idea than the stifling of the idea before it is given expression. As was stated in appellant's Jurisdictional Statement [p. 14], "a standard even for subsequent criminal punishment cast in so vague and indeterminate a manner as to permit the enforcer to exercise, assert or threaten arbitrary, discretionary and unconfined power of enforcement, as at bar, is unconstitutional, and is as censorial in consequence and effect as is arbitrary power in form of prior restraint." Such issues which may arise as to distinctions between previous restraint and subsequent punishment by a state in limited areas of speech directly inciting to unlawful conduct or materially injuring specific individuals has no bearing here where the statute is unconfined and vagrant, directly threatening the exercise of constitutional freedoms. "Where the First Amendment applies, it is a denial of all governmental power in our Federal System." *Marsh v. Alabama,* 326 U. S. 501, 511.

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swept into a statute under a general and indefinite characterization (*Cantwell v Connecticut,* 310 U. S 296, 308), nor, as in the instant case, can the forbidden "conduct" be entirely omitted from the statute with the executive and judicial arms of government left free in their own discretion to determine when an "obscene book" will lead to a "lustful desire" and in turn to "sexual misconduct." The dangers to free thought are too great under such circumstances.

The question is, therefore, whether a statute so vague and unconfined as the one herein, acting as a pervasive censor of all books written, published, sold and distributed in the State, can be justified as an exercise of the "police" power of the State. As against the contention that it may should be weighed the serious consequences of such a censorship statute.

(a) The social functions of books is profound. Their function is to disseminate ideas and emotions "not moralities." Alpert, L. M., *Judicial Censorship of Obscene Literature, supra,* p 75. Indeed, it it only through the development of ideas, that changes in morals are brought about. If literature is restricted in the enunciation of sex ideas, one of its functions will be destroyed to society's loss.

(b) Serious damage may be done to the health and welfare of the community by censorship of "obscene" literature. The history of literary censorship shows that the struggle against veneral diseases has been considerably retarded by the stigma of "obscenity." The same dogma has been responsible for the breakup of many marriages, and the physical and mental deterioration of the lives of many young persons unversed in the requirements of sex relations. The damage done to society in these respects is irretrievably great. Schroeder, *"Obscene" Literature and Constitutional Law* (N. Y., 1911); Ernst and Seagle, *To the Pure* (N. Y., 1928).

(c) The effect of such "moral" censorship as is involved here is the prosecution of many of the most famous works of art, often of great genius and vital moral worth. The category of censored books runs from the *Bible* through Gibbon's *Decline and Fall of the Roman*

Empire, Swift's *Gulliver's Travels,* Stowe's *Uncle Tom's Cabin* and Remarque's *All Quiet on the Western Front.*

(d) Censorship of this nature abridges the exercise of fundamental freedoms of speech and press, without which a democratic society cannot long endure. It does precisely what every vital restriction of free speech does in the long run. It drives attempts to obtain reforms in sex morals underground, and by suppressing such reforms, transforms them only into anarchistic "sex revolutions." Moreover, while purporting to suppress "obscene" literature, in crazy quilt fashion, the censor succeeds only in suppressing a free press in the same absurd fashion. The erosion of fundamental rights weakens the entire base of our constitutional system.

(e) Censorship feeds upon itself. The zeal for "fresh cases" is indefatigable. It has a corrupting influence on those who exercise the power. The censor constantly attempts to justify its existence, bringing within the orbit of "obscene," "smut" and "dirt" new books and writings. There is also the tendency under the guise of "obscenity" to prosecute the political and social non-conformist or even particular personal enemies. Many of the social evils of civilization are largely caused by the censor. It is stultifying and it is futile. Censorship is in essence repressive, and repression of social sores lead only to their extension and consolidation.

> "The virtue which the world wants is a healthful virtue, not a valetudinarian virtue—a virtue which can expose itself to the risks inseparable from all spirited exertion—not a virtue which keeps out of the common air for fear of infection and eschews the common food as to stimulating. It would be indeed absurd to attempt to keep man from acquiring

> those qualifications which fit them to play their part in life with honour to themselves and advantage to their country, for the sake of preserving a delicacy which cannot be preserved—a delicacy which a walk from Westminster to the Temple is sufficient to destroy." MacCauley, *Critical and Historical Essays* (1943), Vol. III, p. 256.

(f) The premises that obscenity laws are valid because allegedly directed only at suppressing "dirt for dirt's sake" is not only demonstrably disproven, but additionally in itself represents a very important misconceiving of the basic-most values and purposes of free thought and expression in a free society.

In a society grounded on individual liberty the people must be allowed to decide for themselves which books are good and which bad As a nation we have staked our all on the "power of reason" and the ability of the people to choose wisely between good and evil. See Holmes—Brandeis dissenting in *Abrams v. United States,* 250 U. S. 616, and concurring in *Whitney v. California,* 274 U. S. 357. As the "ultimate tribunal" the people must daily choose good from bad in the most vital and widespread areas. They must choose between good and bad leaders; good and bad policies; good and bad laws.

Why then may they not be trusted to choose between good and bad books? If we cannot trust the people to choose which books they will read how can we trust them to govern themselves? The fact is that democracy *works* in the area of sex literature and art as nobly, and well as it does in politics. Finally, not to trust men with freedom to judge and choose in the area of sex literature and art would ultimately destroy the entire democratic base for freedom in any sphere.

Judge Frank asserted this position in scholarly fashion in *United States v. Roth, supra:*

> "According to our ideals, our adult citizens are self-guardians, to act as their own fathers, and thus become self-dependent. When our governmental official act towards our citizens on the thesis that 'Papa knows what's good for you,' they enervate the spirit of the citizens: To treat grown men like infants is to make them infantile, dependent, immature."

He then drew upon the great thinkers of all time to support this proposition. Thus:

Milton said in Aeropagitica:

> "We censure them for a giddy, vicious and unguided people in such sick and weak (a) state of faith and discretion as to be able to take down nothing but through the pipe of a censor . . . The great art lies to discern what the law is to bid restraint and punishment, and in what things persuasion only is to work."

Jefferson wrote to Dupont de Nemours:

> "We both consider the people as our children, but you love them as infants whom you are afraid to trust without nurses, and I as adults whom I freely leave to self government."

De Tocqueville observed:

> "No form or combination of society has yet been devised to make an energetic of a community of pusillanimous and enfeebled citizens."

Goethe warned:

> "Man is easily accustomed to slavery and learns quickly to be obedient when his freedom is taken from him."

Carl Becker remarked:

> "Self government and the spirit of freedom that sustains it, can be maintained only if the people have sufficient intelligence and honesty to maintain them with a minimum of legal compusion. This heavy responsibility is the price of freedom."

Judge Frank concluded with Jefferson's advice:

> "The only completely democratic way to control publications is through non-governmental censorship by public opinion."

Conclusion.

The aforesaid are some of the factors which should weigh heavily in considering the constitutionality of an "obscenity" statute. It was because the appellant in *Butler* appeared largely to overlook these considerations in the oral argument before this Court that the appellant herein moved for permission to intervene in *Butler,* or in the alternative, for a consolidation of the two causes. It is hoped that this further memorandum will persuade this Court to invoke jurisdiction in the instant case so that the important constitutional questions presented may be weighed and answered. The issues would appear to be of paramount public importance.

It should also be noted, finally, that appellant Alberts raises here two additional questions of grave constitutional importance not heretofore decided by this Court. See, Jurisdictional Statement, pages 23-24 and 25-31.

By reason of the vague and indefinite sweep of the statute, the prosecutor and the judges have been unable to agree which of the books herein are "obscene." Appellant stands convicted of keeping for sale by mail and advertising by mail, "obscene books" but which of the "obscene" books has resulted in affirmance of his conviction, appellant does not know. On this basis, appellant might be prosecuted again for subsequent possession of the same collection of books without being able to plead his former judgment of conviction. Moreover, the state's action manifestly conflicts with federal control of the mails in an area where Congress has occupied the field, and thus undermines the supremacy provisions of the Constitution.

This Court, it is respectfully submitted, should take jurisdiction, hear and decide the appeal herein. The judgment of conviction should be reversed.

Respectfully submitted,

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