the Absence of Proof that the Risk of Fire was Thereby Increased. *Herrera v. National Union Fire Ins. Co., Inc.,* (CA) 57 O.G. 4272, June 5, -962 75

Transportation — A Passenger Who Gets Off the Carrier to Help Push It Ceases to be Such and His Right to Recover Damages for Injury Suffered Thereby Must be Resolved on the Theory of Culpa Aquiliana and not Culpa Contractual. *Galvez v. De la Victoria,* (CA) 57 O.G. 6061, Aug. 21, 1961 76

LAND REGISTRATION AND MORTGAGES

Public Land Act — In the Repurchase of Lands Acquired as Homesteads, the Vendee is not Entitled to Expenses for Levelling, Clearing and Fixing Dikes, not Being Necessary nor Useful Expenses. *Cabal v. Clayton,* (CA) 57 O.G. 3749, May 15, 1961 76

REMEDIAL LAW

Civil Procedure — The Period of Redemption under Section 26, Rule 39, Rules of Court, may be Extended under Special Circumstances. *Bautista v. Ago,* (CA) 57 O.G. 4927, July 3, 1961 77

Criminal Procedure — The Requirement that a Motion to Quash must be in Writing is Merely Directory and may be Set Aside whenever Justice Demands It. *People v. Ballena,* (CA) 57 O.G. 3331, May 1, 1961 77

Evidence — Dreams have Probative Value in the Establishment of the Existence of a Crime, Being Closely Related to Previous Actual Experiences. *People v. Labiano,* (CA) 57 O.G. 3336, May 1, 1961 78

Provisional Remedies — The Rule that a Court has no Power to Interfere with the Judgment or Decree of Another Court of Concurrent Jurisdiction Does not Apply to the Power to Dissolve a Writ of Attachment. *Pazcoguin v. Dantes,* (CA) 57 O.G. 4108, May 29, 1961 78

BOOK NOTE

Paras: III Civil Code of the Philippines Annotated 80

ANSWERS TO 1962 BAR EXAMINATION QUESTIONS

Commercial Law 82
Criminal Law 87
Land Registration and Mortgages 94

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PROBLEMS AND PRINCIPLES TOWARD A LEGAL DEFINITION OF THE OBSCENE

*Joaquin G. Bernas, S.J.**

When the issue of obscenity found in any medium of communication is brought before a court for adjudication, the court is faced with a dilemma. On the one hand it must respect the freedoms of speech and the press guaranteed by the Constitution. On the other hand it must recognize the duty of the state to protect the public against the social evil presented by the purveyance of pornography. How avoid the two horns? Or, is the dilemma a mere figment of judicial imagination?

For a judicial bystander upon whose head neither praise nor blame will fall for a decision, the problem might appear unreal, especially because, in a case which has now become a landmark in American obscenity cases, the U.S. Supreme Court declared in unequivocal language that "obscenity is not within the area of constitutionally protected speech or press."[1] To suppress what is obscene, therefore, to censor it, to prohibit it, is not a violation of constitutional freedom but a legitimate act of government. But the judicial problem does not end thereby. The problem is merely focalized on what really is the core question of obscenity cases: WHAT IS OBSCENE? The subsequent pages will show what answer has been given to this question by the U.S. Supreme Court and by the Philippine Supreme Court and Court of Appeals. This done, an attempt will be made to isolate the roadblocks which legal development still has to hurdle.[1a]

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* Ll.B. Ateneo de Manila, 1962.

[1] *Roth v U.S.* 354 U.S. 476, 485 (1957); *Alberts v. California* 354 U.S. 476, 485 (1957). The same decision pronounced, as a corollary, that since obscenity is not constitutionally protected, it does not enjoy the benefits of the "clear and present danger rule." *Id.* 486-7.

[1a] It is interesting to note that the U.S. Supreme Court has struck down quite a number of censorship standards for being vague or indefinite. Such for example were the standards "sacrilegious" (*Burstyn v Wilson* 343 U.S. 495 (1952), "prejudicial to the best interests of the people of said City" (*Gelling v Texas* 343 U.S. 960 (1952), "immoral" (*Commercial Pictures Corp v Regents* 346 U.S. 587 (1954),

I

THE OBSCENE IN AMERICAN LAW

a. Definitions

In the *Roth* and *Alberts* opinion, the U.S. Supreme Court defined obscenity as "material which deals with sex in a manner appealing to prurient interest."[2] This was further explained in a footnote as "material having a tendency to excite lustful thoughts."[3] The Court likewise cited Webster's definition of "prurient": "...Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd..."[4] It likewise accepted the definition of obscenity suggested in the American Law Institute's Model Penal Code, s. 207.10(2):

> ...A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters...[5]

b. The *Hicklin* Test

These explanations and sub-explanations, however, do not serve as convenient guides for the classification of material presented for adjudication. For this reason, courts have invariably resorted to various tests in the form of verbal formulae by means of which they evaluate the "obscene" contents of a piece of writing. In 1868, in the English case of *Regina v Hicklin*, which arose out of a prosecution for obscene libel for the publication of an anti-catholic piece entitled "The Confessional Unmarked," Lord Cockburn wrote out the verbal formula now known as the Hicklin rule:

> I think the test of obscenity is this, whether the tendency of the matter charged as obscene 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.[6]

"harmful" (*Superior Films Inc. v. Dept. of Education* 346 U.S. 587 (1954), "sexual immorality" (*Kingsley International Pictures Corp v Regents* 360 U.S. 681 (1959). But the category "obscene" remains. It is not vague, it is not indefinite. The term "conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices." *Roth v U.S., Alberts v California, supra*, citing *U.S. v Petrillo* 332 U.S. 1, 7, 8.

[2] *Roth v U.S., Alberts v California, supra*, 487.

[3] *Id.*, footnote 20.

[4] *Id.*

[5] *Id.*

[6] L.R. 3 Q.B. 360 (1886). For purposes of criminal prosecution, the English practice seems to be different from the American. In the former, there is a presumption that the accused intended the consequences of his act. The presumption, however, is not irrebuttable. "The presumption of intention is not a proposition of ordinary good sense." (*Hosegood v Hosegood* 1 T.L.R. 735 (1950). One judge expresses this presumption thus: "...when, from the act committed, an immediate intention of a particular character would be implied, the party doing the act is not exempted by reason of some other paramount intention of a different description, which actually operated upon his mind. The only question, therefore, would appear to be, what is the intention which may fairly be implied from the act of offering for indiscriminate sale a work dealing with subjects of a filthy nature. (*Steele v Brannan* L.R. 7 C.P. 261. 271 (1872). See J. E. Hall Williams *Obscenity in Modern English Law* 20 LAW AND CONTEMPORARY PROBLEMS 634-5 (1955). American law, on the other hand, requires of the prosecution a showing of *scienter*. The reason: "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected matter as obscene literature." (*Smith v California*, 361 U.S. 147, 153 (1959).

The Hicklin rule was adopted by some American courts and ignored by many. The chief criticism leveled against it was that, by making the minds of susceptible persons the gauge for censorability or non-censorability of materials, the rule reduced adult reading "to the standards of a child's library in the supposed interest of a salacious few." Hence, this aspect of the Hicklin rule was finally rejected by the U.S. Supreme Court in *Butler v Michigan*. Speaking for a unanimous court, Mr. Justice Frankfurter said that to quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence" is "to burn the house to roast the pig."[8] The gauge which many courts found more acceptable was the "average" or "normal" person. Judge Woolsey described such a person as one "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 learned man in the arts' on questions of invention and patent law."[9]

The Hicklin rule, moreover, as adopted by some American courts, admitted the "isolated passages test," i.e., a book could be rejected on the basis of isolated obscene passages without regard to the total effect of the entire work. Already, in 1933, Judge Augustus N. Hand forcefully and explicitly repudiated this rule:

> While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evi-

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[7] *U.S. v Kennerly* 209 Fed. 119 (1914).

[8] 352 U.S. 380, 383 (1957). The statute declared unconstitutional was one which banned books which contain "obscene, immoral, lewd, lascivious language, or descriptions, *tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.*

[9] *U.S. v One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (1934).

dence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.[10]

The Supreme Court put an end to all doubts by branding the "isolated passages test" as unconstitutionally restrictive of the freedoms of speech and the press in that it "might well encompass material legitimately treating of sex."[11]

c. The *Roth* and *Alberts* Test

With the "susceptible person test" and the "isolated passages test" of the Hicklin rule rejected, the *Roth* and *Alberts* opinion adopted as its own a test which many American courts[12] had already been using: "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[13] The judge's instruction to the jury in the Roth case, reproduced by the Supreme Court, explains the test well:

> The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or the highly educated or the so called worldly-wise and sophisticated indifferent and unmoved...
>
> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.
>
> In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children.[14]

d. End of Ideological Obscenity

In 1959, the U.S. Supreme Court added a further refinement to the Roth-Alberts rule. The Court of Appeals had upheld the banning of the

[10] *Id.*, aff'd in 72 F. 2d 705 (2d Circ. 1934), 708. See also Lockhart and McLure, *Literature and the Law of Obscenity and the Constitution*, 38 MINNESOTA L. REV. 295, 327-8.

[11] *Roth v U.S.*, *Alberts v California*, *supra*, 489.

[12] See *id.*, footnote 26.

[13] *Id.* 489.

[14] *Id.* 490.

French movie version of H. D. Lawrence's "Lady Chatterley's Lover" because, although not obscene, it "alluringly portrays adultery as proper behaviour" and as "right and desirable for certain people under certain circumstances." The Supreme Court accepted these findings[15] but refused to ban the picture. It did not agree with the holding of the lower court that a picture which advocates an idea "which is contrary to the moral standards, the religious precepts, and the legal code of the citizenry" could be banned.[16] Mr. Justice Stewart, writing for the court, said:

> 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.[17]

The court, however, admitted two limitations to this rule: (1) The advocacy must not be conducted in a manner that is itself obscene; (2) Such advocacy, to be constitutionally protected, must not amount to incitement to immediate illegal action.[18]

To sum up, then, by the Roth-Alberts opinion three rules were definitely established: (1) Appeal to prurient interest must be measured by the effect of the work not on susceptible persons but on the average person; (2) The material must exceed the limits of tolerance imposed by contemporary standards of the community with respect to freedom of expression in matters concerning sex; (3) The material must be judged by its dominant theme as a whole and not by isolated passages. A fourth rule was added by the *Kingsley* case: (4) Mere advocacy of a behaviour which is immoral by contemporary standard is also constitutionally protected, provided such advocacy is not itself obscene and does not amount to incitement to immediate illegal action.

e. What Is Not Obscene?

With all these rules, however, we are brought not much farther than where we were at the start. What is obscene? What is material which appeals to prurient interest? Neither the Roth-Alberts opinion nor the Kingsley case has shed much light on these questions. The rules enunciated have merely indicated the broad boundaries of any permissible definition of obscenity under the American Constitution and have opened the door

[15] *Kingsley Pictures Inc. v N. Y. Regents*, 360 U.S. 684, 688 (1959).

[16] *Id.*

[17] *Id.* 689.

[18] *Id.* In other words, if the advocacy itself is not conducted in a manner that is obscene, the "clear and present danger rule" must be applied. But when the advocacy is itself obscene, the "clear and present danger rule" has no place because obscenity is not constitutionally protected.

barring state intrusion into the protected area of free speech and press "only the slightest crack necessary."[19] The crack must be slight, indeed; for, while there are no Supreme Court decisions which can illustrate what in the concrete is obscene, the Supreme Court decisions, decided on the strength of the Roth-Alberts opinion, which declare certain materials as *not* obscene clearly indicate that in the minds of the Justices the scope of obscenity is very narrow.

In the case, for instance, of *Times Film Corporation v City of Chicago*[20] the Supreme Court held that the movie "The Game of Love" was not obscene. The lower court in condemning the picture had described it thus:

> ... the thread of the story is supercharged with lewdness generated by a series of illicit sexual intimacies and acts. In the introductory scenes a flying start is made when a 16 year old boy is shown completely nude in a bathing beach in the presence of a group of younger girls. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age. The erotic thread of the story is carried, without deviation toward any wholesome idea, through scene after scene. The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized. The words spoken in French are reproduced in printed English on the lower edge of the moving film. None of it palliates the effect of the scenes portrayed.[21]

The Supreme Court, without opinion but by a mere reference to the Roth-Alberts opinion, reversed the lower court decision.

In the case of *U.S. v 4200 Copies International Journal*, the publications in question were "nudist publications designed to portray nudist practices and to secure new converts to the movement."[22] In finding the publications obscene the district court said:

> Although the avowed purpose of the books is to explain the nudist movement, its principles and practices, there are relatively very few photographs of the mixed groups of all ages which ordinarily would be found in a nudist park. The great preponderance of the illustrations depicts shapely, well-developed young women appearing in the nude, mostly in front exposures.[23]

The other materials submitted for examination were issues of *Modelstudier*, a publication which ostensibly supplied models for art students. The court said: "They contain many large closeup, full front-view photographs

[19] *Roth v U.S., Alberts v California, supra,* 488.
[20] 355 U.S. 35 (1957).
[21] 244 F. 2d 432, 436 (1957).
[22] 134 F. Supp. 490, 493 (1955).
[23] *Id.*

of nude men and women, plainly showing the genital and pubic areas."[24] The court of appeals upheld the findings of the lower court[25] but the Supreme Court, in *Mounce v U.S.*, reversed and remanded the case "for consideration in the light of Roth v United States."[26]

In the case of *One v Olesen*,[27] the publication involved had the colorful designation "The Homosexual Magazine." The court of appeals found the October 1954 issue of the magazine obscene chiefly on the basis of three items it carried which the court described thus:

> The article "Sappho Remembered" is the story of a lesbian's influence on a girl only twenty years of age but "actually nearer sixteen in many essential ways of maturity," in her struggle to choose between a life with the lesbian, or a normal married life with her childhood sweetheart. The lesbian's affair with her room-mate while in college, resulting in the lesbian's expulsion from college, is recounted to bring in the jealousy angle. The climax is reached when the young girl gives up her chance for a normal married life to live with the lesbian. . .[28]
>
> The poem "Lord Samuel and Lord Montagu" is about the alleged homosexual activities of Lord Montagu and other British Peers and contains a warning to all males to avoid the public toilets while Lord Samuel is "sniffing round the drains" of Piccadilly (London). . .[29]

The third item was an advertisement giving information as to where to get more of the material contained in the magazine.[30] The decision of the lower court was likewise reversed by the Supreme Court.[31]

In *Sunshine Book Co v Summerfield*[32] the lower court found the following pictures obscene:

(a) a picture of a man on water skis, taken at some distance. His genitalia are clearly revealed, appearing in the center of the picture.[33]

(b) The man. . . is standing with a side view. By artful use of shadow his face is completely obliterated, his entire pubic area is obliterated by the shadow, but prominently shown in front of the pubic area and against this dark background is his male organ; the corona of the penis is clearly discernible; in fact, even a casual observation of it indicates that the man is circumcized. . .[34]

(c) The woman to the left is a woman of middle age. She has very large thighs. The pubic hair is clearly shown. Her right thigh is particularly noticeable because, though there are trees nearby, the formation which appears on the thigh

[24] *Id.*
[25] 247 F. 2d 148 (1957).
[26] 355 U.S. 180 (1958).
[27] 241 F. 2d 772 (1957).
[28] *Id.* 777.
[29] *Id.*
[30] *Id.* 778.
[31] 355 U.S. 371 (1958).
[32] 128 F. Supp. 564 (1955).
[33] *Id.* 571.
[34] *Id.*

is not that of shadow, it appears to be matted varicose veins that cause her to be grotesque. . .[35]

(d) The picture shows a very clear sunburnt "V" at her neck—V-shaped sunburn —whereas the rest of her skin is white as the snow on which she stands. . . She has large elephantine breasts that hang from her shoulder to her waist. They are exceedingly large. The thighs are very obese. She is standing in snow, wearing galoshes. But the part which is offensive, obscene, filthy and indecent is the pubic area shown.

... The hair extends outwardly virtually to the hipbone. It looks to the court like a retouched picture because the hair line instead of being straight is actually scalloped or in a half-moon shape, which makes the woman grotesque, vile, filthy, the representation is dirty, and the court will hold that picture is obscene in the sense that it is indecent, it is filthy...[36]

(e) The photographer in taking the picture has caused the two girls to turn to a side view and the sunshine clearly shows the fine, soft texture of pubic hair of the adolescent girls. . .[37]

Again the Supreme Court reversed the lower court's decision.[38]

It will be remembered that prior to these reversals and in a decision to which these very reversals made reference, the Supreme Court had stated in no uncertain terms that obscenity did not enjoy constitutional protection.

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinions —have the full protection of the guarantees unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . .

We hold that obscenity is not within the area of constitutionally protected speech or press.[39]

Evidently, by placing the materials described above under the protection of the First Amendment, the court has made itself understood as saying that these materials are not obscene. Two writers suggest that "the Court must have made an independent examination of the materials and found that censorship of the materials violated constitutional requirement."[40]

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[35] *Id.*
[36] *Id.* 572.
[37] *Id.*
[38] 355 U.S. 372 (1958). One reason given for regarding hair as obscene is this: "...this is largely because it did not appear in the classic nude; and it did not appear there because the prevailing custom was to remove the hair from the body. This is not our custom; but it is the custom in our art, and to depart from it is, therefore, to be obscene." Abraham Kaplan, *Obscenity as an Aesthetic Category,* 20 LAW AND CONTEMPORARY PROBLEMS 544, 553 (1955).
[39] *Roth v U.S., Alberts v California, supra,* 484-5.
[40] Lockhart and McLure, *op. cit.,* 34.

What, then, in the concrete is obscene? This the Court has not yet explained. The Court might have explained or illustrated it in the foregoing reversals, but it did not; and, it has been observed, wisely did the Court so restrain it itself:

. . . The Court has now moved into an area in which no court yet has satisfactorily explained the basis for its obscenity decisions. It is charting a new course in a very difficult and treacherous area. It is more likely to chart a true course that will avoid dangerous shoals in the future if it gains substantial experience in dealing with difficult cases before it makes an effort to verbalize its standards for determining what is obscene...[41]

Hence, thus do matters stand now in American law. The French movie version of "Lady Chatterley's Lover" or the unexpurgated edition of the novel might have given the Supreme Court the opportunity to verbalize its standards, but, when the movie came up, the only issue raised was ideological advocacy of immoral conduct[42] and, when the lower court decided in favor of the unexpurgated novel,[43] the state did not appeal.

II

The Obscene in Philippine Law

There is not one reported decision of the Philippine Supreme Court involving obscene literature. There are in fact only three reported obscenity decisions: *People v Kottinger,*[1] *People v Go Pin,*[2] and *People v Padan.*[3] The first was a prosecution under Section 12 of Act No. 277 and the last two under Article 201 of the Revised Penal Code.

1. *Supreme Court Cases*

a. Definitions and Tests

The statutes cited do not attempt to define obscenity. This is, because, in the words of the Supreme Court, "The words 'obscene or indecent' are themselves descriptive. They are words in common use and every person of average intelligence understands their meaning."[4] The *Kottinger* case, however, did make an attempt at definition by borrowing from American jurisprudence: "The word 'obscene' and the term obscenity may be defined as meaning something offensive to chastity, decency, or

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[41] Lockhart and McLure *Obscenity Censorships: The Core Constitutional Issue What is Obscene?* 7 UTAH L. REV. 289, 294 (1961).
[42] *Kingsley v N. Y. Regents* 360 U.S. 684 (1959).
[43] *Grove Press Inc. v Christenberry* 276 F. 2d 433 (1960).
[1] 45 Phil. 352 (1954).
[2] G.R. L-7491 August 8, 1955.
[3] G.R. L-7295 June 28, 1957.
[4] *People v Kottinger, supra,* 357.

delicacy. 'Indecency' is an act against good behaviour and a just delicacy."[5] It is a definition which is very broad, very untechnical and most unhelpful. Subsequent decisions have not added to it anything in the way of improvement.

The chief contribution of the *Kottinger* case to Philippine jurisprudence consists in the obscenity tests which it likewise borrowed from American jurisprudence:

> . . . The test ordinarily followed by the courts. . . is whether the tendency of the matter charged as obscene is to deprave or corrupt those whose minds are open to such immoral influences and into whose hands a publication or other article charged as being obscene may fall. Another test of obscenity is that which shocks the ordinary and common sense of men as an indecency.[6]

These are the tests still followed by Philippine courts.

b. Relative Obscenity and Redeeming Social Values

The case of *People v Go Pin*[7] has two noteworthy contributions to offer: a relative theory of obscenity and a theory of redeeming social values.

The case involved movie shorts which the lower court characterized as possessing "only slight degree of obscenity, indecency and immorality." We are not told, however, in what this obscenity precisely consisted. The accused had pleaded guilty to a charge under Article 201 of the Revised Penal Code. In upholding the lower court's decision the Supreme Court made these observations on the exhibition of nudes:

> . . . If such pictures, sculptures and paintings are shown in art exhibits and art galleries for the cause of art, to be viewed and appreciated by people interested in art, there would be no offense committed. However, the pictures here in question were used not exactly for art's sake but rather for commercial purposes. In other words, the supposed artistic qualities of said pictures were being commercialized so that the cause of art was only of secondary or minor importance.

The court further said that those who went to see the pictures upon payment of a fee were most likely more interested in "satisfying their morbid curiosity and taste, and lust, and love for excitement, including the youth who because of their immaturity are not in a position to resist and shield themselves from the ill and perverting effects of these pictures."

There seems to be in this decision a definition of a crime — the crime of commercially offering material dealing with sex to satisfy "morbid curiosity and taste, and lust, and love for [sexual] excitement." The decision thus suggests that material dealing with sex, which may be legitimate material under certain circumstances, can be the subject of a crime if exploited for illegitimate purposes. Thus the outcome is made to depend, not so much on the character of the object itself, as on the manner of purveyance and on the intended audience.[8] This does not mean, however, that under such a dispensation the law can do without a satisfactory definition of or test for obscenity or that the intent of the purveyor is always material. When the material being purveyed by the defendant is patently obscene, proof of criminal intent is unnecessary.[9] It is only in border-line cases that the relative obscenity theory should find application.

The second contribution of the *Go Pin* case is its recognition of redeeming aesthetic values. It recognizes that there are people who can perceive "the element of art" and derive legitimate aesthetic "inspiration in the showing of pictures in the nude, or the human body exhibited in sheer nakedness as models or in tableaux vivants." There, however, the Court stops; it does not say when alleged art is really a masqueraded pandering to the baser passions.

The *Padan case*[10] does not help to clarify this question inspite of its reiteration of the theory of redeeming values. The defendants in this case were prosecuted for performing carnal intercourse for the benefit of paying viewers. The Court concluded that the act inspired and caused "nothing but lust and lewdness" and, therefore, was obscene. Must one conclude from this that for a thing to be obscene it must be assessed in its totality and that its total effect must be unmitigated lust and lewdness? The Court of Appeals, as will be shown later, seems to have answered this question in the negative; but the *Padan* case offers no answer. The most that can be deduced from this decision is that this particular act of the defendants inspired and caused "nothing but lust and lewdness." The Court did not say that what inspires or causes less is not obscene.

2. *Court of Appeals Cases*

In the choice of definitions and tests of obscenity, the Court of Appeals has merely followed the lead of the Supreme Court. In its ap-

[5] *Id.* 356; 29 Cyc. 1315; 8 R.C.L. 312.

[6] *Id.*

[7] See *supra*, note 2

[8] This is but another way of saying that in a prosecution for obscenity it is not a picture or a publication which is on trial but a person. The central issue is the conduct of the defendant.

[9] But intent may be "an important factor in the determination of the penalty." *People v del Fiero* CA-GR 4467-R September 26, 1950.

[10] See supra, note 3. The Court said: "In those cases (stills and moving pictures), one might yet claim that there was involved the element of art; that connoisseurs of the same, and painters and sculptors might find inspiration in the showing of pictures in the nude, or the human body exhibited in sheer nakedness as models or in tableaux vivants. But an actual exhibition of the sexual act, preceded by acts of lasciviousness, can have no redeeming feature. In it, there is no room for art. . ."

proach to obscene literature, however, — an opportunity which the Supreme Court has not yet had — the Court of Appeals has thrown in some significant contributions chiefly in the cases of *People v del Fiero*[11] and *People v Gatbonton.*[12]

a. The *del Fiero* Case

In the former case, the controverted piece was a reprint in the Star Reporter of a portion of Steinbeck's novel "To A God Unknown" — a portion realistically portraying a carnal act had by a man with his sister-in-law. In convicting the accused the Court quoted the trial judge's evaluation:

> A cursory examination of its contents will be more than sufficient to arrive at the conclusion that it is highly obscene. Far from entertaining, or interpreting truth, as claimed, the article in shamelessly describing with all its naked reality the provocation of an ignoble woman to a man who easily yields to her carnal craving, in effect excited the lust of any person reading it, particularly if he is young. Rather than entertaining its readers, the article stirred up their vile passions, thereby perverting them and polluting their minds with impure thoughts.

The Court then went on to make the following observations:

First, courts do not need the aid of experts:

> . . . Experts in art and literature need not inform the courts as to whether a certain picture or writing is offensive to decency and public morals, since these are matters which fall within the range of ordinary intelligence and courts are certainly qualified to pass upon their nature. Guided by the foregoing standard, we have no hesitancy to state that the quotation... is offensive to decency and morals. Any person possessing a fair knowledge of the English language, reading the article in question, cannot help but gather from it a clear, complete, vivid and scandalous picture of a carnal act had by a man with his sister-in-law,—hence, a piece of literature filthy and unfit to be read by anyone with a sense of decency and morality.

Second, literary merit is not a valid defense: "A book may be entirely indecent and obscene, no matter how great its author or how fascinating its literary style."

Third, there is a suggestion that an obscene passage might be saved by the total effect of the work if the passage is published in its complete context. This we gather from the following passage:

> Appellants have not been prosecuted for selling or exhibiting the novel "To A God Unknown." They are being indicted for reprinting, reproducing, exhibiting and giving away a portion of said novel depicting a sexual scene that is unquestionably lewd or lecherous. Whatever therefore is the literary merit of the entire novel and whatever fame its author may have in the literary world is unavailable as a defense for these appellants. . ."

[11] CA-GR 4467-R September 26, 1950.
[12] CA-GR 25736-R October 7, 1959.

Fourth, the motive of the publisher is immaterial: "... whatever motive may have prompted appellant Padilla to print it — whether to defend his own style, or interpret realism or to entertain the readers of his column — is no excuse at all. The all-important question is whether the quotation published is obscene or offensive to morals."

b. The *Gatbonton* Case

In the case of *People v Gatbonton*, the Court of Appeals had opportunity to consider a literary work in its entirety. The piece in question was the short-story "Fairy Tale for the City" by a noted local literary figure, Estrella Alfon, published in the August 21, 1955 issue of *This Week Magazine*. The story tells of a man, estranged from his wife, who helps a young girl through high-school. On the night of her graduation, the young girl offers her body to her benefactor. The story then goes on to describe in intimate details three carnal acts had between the man and the young girl.

The accused contended that this was merely a literary entertainment piece, was not intended to provoke lascivious thoughts or lustful desires, and, considered as a whole, was not obscene. The court answered:

> . . . It is to be noted, however, that the author took pains to portray in vivid colors the carnal act between the man and the young girl, even their whispered conversations preliminary to the act, during the act, and subsequent thereto, adding as a spicy detail the intimate feeling of the girl when her maidenhead was broken. There is no real necessity for the author to describe and dwell at length on the act of copulation, unless the purpose is to cater to the base and lascivious instincts of the reader and to provoke obscene thoughts and lascivious desires. The salient and dominant feature of the story is the sexual act vividly described and portrayed by the author, and this description is obviously obscene, offensive to morals, and taints with obscenity the whole story irrespective of its literary merits.

What has the *Gatbonton* case contributed? Has it said that a piece of writing can be declared obscene on the basis of *isolated passages?* One of the arguments put up by the defendants was that the short-story, *considered as a whole,* was not obscene. In disposing of this argument the Court, after admitting that there are authorities who hold that the piece must be considered as a whole, said that other authorities judge the publication "by the language complained of," as did this same court in the *del Fiero* case.

Homer seems to have nodded. The *del Fiero* case did not consider Steinbeck's novel as a whole, not because of any doctrinnaire reasons, but because the defendants had published only a portion of Steinbeck's novel. There was, therefore, no occasion for considering the entire novel. As the court itself said: "Appellants have not been prosecuted for selling

or exhibiting the novel To A God Unknown. They are being indicted for reprinting, reproducing, exhibiting and giving away a portion of said novel..." There was therefore no occasion for considering the entire novel even if the court had wanted to. The acceptance, therefore, of the "isolated passages test" by the *Gatbonton* case is not supported by the *del Fiero* case. Besides, such acceptance by the *Gatbonton* case is inconclusive, because the court did consider Alfon's story in its totality and came to the conclusion that the "salient and dominant feature of the story" was the carnal act obscenely portrayed which "taints with obscenity the whole story."

III

Problems and Principles

In the preceding pages we have shown the present state of obscenity decisions both in the Philippines and in the United States. It is obvious that in both jurisdictions the subject is in a state of flux. It is likewise obvious that more ink has flowed for the cause in the United States than here. The voices of dissent in the United States are more vocal and more articulate, perhaps, partly because of a greater consciousness of the constitutional issues involved, partly because of a lesser degree of agreement on ultimate moral issues, and, perhaps, largely because of more substantial financial interests involved. Recent developments in the local entertainment and publishing scene in the Philippines seem to indicate rumblings in the distance. Witness, for instance, the recently enacted Revitalized Movie Censorship Law. It is with these developments in mind that the subsequent pages are offered with the view to pointing out the legal problems confronting obscenity censorship in the Philippines while at the same time suggesting some principles which cannot be ignored in the search for solutions to such problems. Our purpose will be not so much to offer solutions as to invite discussion.

1. *The Problem of Definitions*

One serious problem is the formulation of a rule of law to define what is obscene. The problem is not easy and the cooperation of experienced legal draftsmen is urgently needed. The definition of obscenity as "something offensive to chastity, decency or delicacy"[1] is much too broad to be of any legal use. *Pericolosum est definire,* says the cautionary Latin adage. The reason is that a good definition should fit *every* case that falls within the scope of the class to be defined and *only* those cases. To define obscenity as something offensive to delicacy would amount to adopting as a rule of criminal law a rule for conversation proper to a

[1] *People v Kottinger* 45 Phil. 352, 356 (1924).

community of reverend mothers. How disastrous such a rule can be to free press is easily imagined. Our courts, however, need not be criticized for adopting the above definition which was not intended and has in fact never been used for purposes of criminal prosecution. Nonetheless, a better definition would be useful, although not more useful than a test which courts can apply in criminal cases.

2. *The Problem of Tests*

Our Courts have expressed a preference for Chief Justice Cockburn's 1868 brainchild, the *Hicklin* test: whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands it may fall.[2] With uniformity courts have held that they will not consider the *intention* of the writer or publisher but only the *tendency* of the matter published. Of the words *deprave* and *corrupt* there are three possible meanings. First, they can mean that the tendency of the material is to arouse lascivious thoughts in the mind of the reader or viewer. Second, they can mean that the person will be encouraged to translate his thoughts into action. Third, they can mean that dissemination of the material tends to lower community standards of right and wrong, specifically as to sexual behaviour. Hence arise several questions.

a. Effect on Thoughts

What kind of desires, imaginations, thoughts and impulses are impure, lascivious, lecherous, lewd, libidinous, lustful, obscene, sensual? Thoughts of normal sexual intercourse? Of intercourse in wedlock or out of wedlock? Or only thoughts of sexual perversion?[3] Certain enough the moral theologian will have an answer to these questions. But even after these questions are answered together with the further question of *whose* moral theologian (a legitimate question in a pluralist society) there still remain others. Must moral law on thoughts be legislated into positive law? Would there not thus be a dangerous governmental encroachment into constitutional territory verging on thought control? And even if the thoughts aroused are indeed bad, is the evil thus created sufficient to warrant official public sanction? Should not the matter be left rather, in accordance with the principle of subsidiarity, to the individual conscience, to the family, to the church or to the school? Besides, what degree and kind of stimulation does it take to arouse thoughts about sex? Justice Douglas tells of a questionnaire sent to college and normal school women graduates asking them what things they found most stimulating sexually.

[2] *Id.*

[3] See Lockhart and McLure, Literature, *The Law of Obscenity and the Constitution,* 38 MINNESOTA L. REV. 95, 329-331 (1954).

Of 409 replies; 9 said music; 18 said pictures; 29 said dancing; 40 said drama; 95 said books; and 218 said MEN![4]

The American Law Institute's Model Penal Code tries to avoid probing into the material's effect on thought by considering a thing obscene "if, considered as a whole, its predominant appeal is to prurient interest." And *prurient interest* it explains as "a shameful or morbid interest in nudity, sex, or excretion" or "an exacerbated, morbid, or perverted interest growing out of the conflict between the universal social controls of social activity." And a thing *appeals* to prurient interest if "of itself" it has "the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters."[5] The U.S. Supreme Court adopted this concept of the obscene[6] but in the same breath it said that "material having a tendency to excite lustful thoughts" is obscene.[7] Hence, American law, as does Philippine law, still considers the effect on thought.

b. Effect on Conduct

Similar questions are also asked regarding an object's effect on conduct. When is a person's conduct depraved or debauched morally? When he engages in normal intercourse? In or out of wedlock? Or only when he engages in sexual perversion? And even if sexual thoughts or feelings stirred by the obscene should issue into overt conduct, still, Judge Frank observes, "it does not necessarily follow that that conduct will be anti-social. For no sane person can believe it socially harmful if sexual desires lead to normal, and not anti-social, sexual behaviour."[8] There is, moreover, a conflict of psychological opinions as to the causal connection between exposure to obscenity and criminality. There are those who consider obscene books not as aphrodisiacs but as safety valves protecting society from crime and outrage. "Catholics may well not accept this view," one prominent English Catholic lawyer observes, "but they should bear in mind the caution expressed by St. Augustine in his treatise *De Ordine* when he warns against the socially harmful effect of the total suppression of such institutions as bawdy houses. The elimination of one form of social evil may result in the creation of another."[9]

c. Effect on Community Moral Standards

What of obscenity's possible effect on community moral standards? This is usually referred to as the problem of ideological obscenity. American law seems to have put an end to this concept by its decision in the *Lady Chatterley's Lover* case where the Supreme Court said that the Constitution "protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."[10] Philippine law, on the other hand, punishes those "who shall publicly expound or proclaim doctrines openly contrary to public morals."[11] Thus, besides the problems of framing a generally acceptable ideological standard concerning sexual behaviour and of finding out what degree of frankness in such matters the community allows (and in this matter there can exist a great difference from local community to local community), there is, for our courts, the added problem of deciding whether or to what extent advocacy of immoral conduct is protected by the Constitution. Once again the courts may be faced with the choice between the "dangerous tendency rule" and the "clear and present danger rule."

d. Cause and Effect Relation?

All these — effect on thought, on conduct, on moral standards — have brought about a debate as to the cause and effect relation between obscenity on the one hand and, on the other, bad thoughts, bad conduct and deterioration of moral standards. Is there a cause and effect relation between them? Cause and effect in this connection are, of course, inaccurate and metaphorical, because, on the postulate of human free will, one man or one book cannot properly be called the cause of another man's sin or corruption;[12] else, where the sin or where the crime? At the most, obscenity can furnish the occasion for sin or corruption. And there is merit to the contention that those who belittle the deleterious effect of obscenity come down to ultimately saying that the rights of free speech and free communication must be vigorously defended because they are practically inefficacious. "There would seem to be no reasonable basis for arguing that pornographic literature never or rarely induces pornographic attitudes and conduct while arguing at the same time that good literature induces good conduct or helps to mold good character."[13] Yet, did not Augustine's conversion begin with the words "Tolle, lege"?[14] Thus, Justice Harlan comments that the State can reasonably suppose that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. The very division among critics, sociologists, psyciatrists and penologists, Justice Harlan adds, counsels us to respect the

[4] *Roth v U.S., Alberts v California*, 354 U.S. 476, 509 (1957), dissent.
[5] See Lockhart and McLure, *op. cit.* 316-8.
[6] *Roth v U.S., Alberts v California* 354 U.S. 476, 487.
[7] *Id.* 487, note 20.
[8] *U.S. v Roth*, 237 F. 2d 796, 811 (1957).
[9] St. John-Stevas, *Obscenity, Literature and the Law*, 3 THE CATHOLIC LAWYER 301 (1957).

[10] *Kingsley v Regents*, 360 U.S. 684, 89, (1959).
[11] Article 201, REVISED PENAL CODE.
[12] Schmidt, *A Justification of Statutes Barring Pornography from the Mail*, 26 FORDHAM L.R. 70, 79 (195).
[13] *Id.* 74.
[14] See GARDINER, CATHOLIC VIEWPOINT ON CENSORSHIP 50-51 (1958).

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6 *Roth v U.S., Alberts v California* 354 U.S. 476, 487.
7 *Id.* 487, note 20.
8 *U.S. v Roth*, 237 F. 2d 796, 811 (1957).
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12 Schmidt, *A Justification of Statutes Barring Pornography from the Mail*, 26 FORDHAM L.R. 70, 79 (195).
13 *Id.* 74.
14 See GARDINER, CATHOLIC VIEWPOINT ON CENSORSHIP 50-51 (1958).

choice of the State.[15] In the absence of sufficient evidence, another writer adds, "some leeway should be left for permissible banning of books reasonably thought likely to lead to anti-social sex conduct, when they are found to have insufficient offsetting value to society,"[16] We would emphasize the words *antisocial* and *insufficient offsetting value to society.*

e. The Isolated Passages Test

Another problem which the *Hicklin* rule presents is the approval it gives to the isolated passages test. In American law, Judge Augustus N. Hand was the first to give this test a major blow.[17] The U.S. Supreme Court followed suit in the *Roth* and *Alberts* cases [18] and adopted the "dominant theme test;"[18] but it is not clear whether the test for allowing obscene portions is merely *relevancy* or *necessity* to the dominant theme or *literary necessity.*[19] There is no Philippine Supreme Court decision on the subject; but the Court of Appeals has expressed a preference, though inconclusively, for the "isolated passages test."[20]

It is interesting to note that the position of the Court of Appeals is more strict than Canon Law on the subject. Canon 1399 prohibits books which *ex professo* treat of obscene matters.[21] Commenting on this provision one writer says: "For a book to be prohibited, it is necessary that from its whole tenor the author's intention is evident of teaching the reader about sins of impurity and arousing him to libidinous acts."[22] Another author writes that obscenity must be the "principal purpose of the author or the principal scope of the work."[23] Still another says that the obscenity must be explicit, prominent and the direct intention of the author.[24] The same author adds this observation:

> . . . We are concerned here simply with the question of grounds for issuing blanket condemnations and I am firmly convinced that not a few Catholics, readers and critics, do considerable harm to the reputation of Catholic intelligence by forgetting that any normal, balanced reader can be solidly enough grounded in faith and morals and taste not to find some vulgar expressions or some frankly descriptive passages sources of "mental or moral infection."

[15] *Roth v U.S., Alberts v California,* 354 U.S. 476.
[16] Lockhart and McLure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINNESOTA L. REV. S. 501-2, concurring and dissenting.
[17] See *supra,* Chapter I, note 10 and text.
[18] 354 U.S. 476, 489.
[19] Lockhart and McLure, *op. cit.* 92.
[20] *People v Gatbonton,* CA-GR 25736-R October 7, 1959.
[21] For an extended treatment of the subject, see GARDINER, *Moral Principles*
[22] "...ut prohibitus sit liber, requiritur ut ex tota ejus indole appareat scribentis intentionem lectorem de peccatis turpibus instruendi et ad libidinem excitandi." NOLDIN, DE PRAECEPTIS DEI ET ECCLESIAE 658 (1926).
[23] BOUSCAREN AND ELLIS, CANON LAW DIGEST, 716 (1946).
[24] GARDINER, NORMS FOR THE NOVEL, 38 (1953). See also BURKE. WHAT IS THE INDEX? 37 (1952).

> . . . If that be not true then Catholic education is raising hot-house plants indeed. Not that we ought to have courses in vulgarity as a part of our curriculum so that Catholics will recognize it when they meet it, but our courses in both literature and religion ought to equip future readers with mental stability and moral poise enough to read books that are "realistic.". . .[25]

f. The Audience Problem

This brings up another question arising from the *Hicklin* rule — the audience problem. The *Hicklin* rule applies the words *corrupt* and *deprave* to "those whose minds are open to such immoral influences." The reference is to those who are, either chronologically or mentally, young and immature. Such a rule has been rejected by U.S. courts as ultimately reducing the adult population to reading only what is fit for children.[26]

In its stead, the *Roth* and *Alberts* decision has made the *average adult* the norm, the French's *l'homme moyen sensuel* who Judge Woolsey says should play the role of hypothetical reagent as does the reasonable man in the law of torts.[27] Philippine decisions on the subject are not clear as to what kind of person should be the hypothetical reagent. One should consider the probable effect on "the family, made up of men and women, young boys and girls."[28] Expressions like: "including the youth who because of their immaturity are not in a position to resist and shield themselves,"[29] or "exerting a corrupting influence specially on the youth of the land,"[30] or "especially if he happens to be a young man or young woman"[31] do not necessarily mean that Philippine courts take the susceptible person as their norm. But Philippine acceptance of the *Hicklin* rule probably indicates an acceptance of the "susceptible person test."

Even the "average adult test," however, has its difficulties. First, the average person knows little and cares less about literary or aesthetic value; hence, there is danger of depriving the trained reader of legitimate fare if the average person should be taken as the norm. Secondly, there is what American writers call "black market or hardcore pornography," the only kind of obscenity which American law at present seems to prohibit. [32] The sole purpose of hard-core pornography "is to nourish erotic fantasies or, as the psychiatrists say, psychic autoeroticism."[33] Margaret Mead defines it as "words or acts or representations which are

[25] GARDINER, *op. cit.,* 39-40.
[26] *Butler v Michigan,* 352 U.S. 380, 383-4 (1957).
[27] *U.S. v One Book Called "Ulysses",* 5 F. Supp. 182, 184.
[28] *People v. Kottinger,* 45 Phil. 352, 359 (1924).
[29] *People v Go Pin,* GR L-7491 August 8, 1955.
[30] *People v Padan,* GR L-7295 June 28, 1957.
[31] *People v Gatbonton, supra,* note 20.
[32] Lockhart and McLure, *Obscenity Censorship: The Core Constitutional Issue — What is Obscene?,* 7 UTAH L.R. 289, 294.
[33] Lockhart and McLure, *The Developing Constitutional Standards, supra,* 65.

calculated to stimulate sex feelings independent of the presence of another loved and chosen human being."[34] The principal characteristic of such material is the build up of erotic excitement by constantly keeping before the reader's mind a succession of erotic scenes featuring consented seduction, defloration, incest, permissive-seductive parent figures, profanation of the sacred, taboo words, supersexed males, nymphomaniac females, Negroes and Asiatics as sex symbols, homosexuality and flagellation.[35] But such material as one writer observes, does not appeal to the prurient interest of average persons. Its appeal is rather to the sexually immature.[36] Should the average person then be the norm?

It has been suggested that a variable obscenity test be employed. The "hypothetical reagent" should not be fixed. Under such a test, the material will be judged by its appeal to and effect upon the audience to which the material is primarily directed. There is thus little place for the "susceptible person test" or for the "average person test." The important thing is the type of audience to which the appeal is directed. Once such an audience is determined, a hypothetical person typical of such an audience is chosen and used as the test. Obscenity then becomes a relative term and the objections both to the "susceptible person test" and the 'average person test" are avoided.[37] It will be noted that our Supreme Court seems to be thinking in this direction in the *Go Pin* case where the Court said that, if the pictures had been exhibited in art galleries as works of art, there would have been no offense committed.[38]

Obviously such a test has its advantages: but it presents practical difficulties in law enforcement.[39] A step towards an application of this test seems to be the mandatory classification of movies into movies *for adults* only and movies for *general patronage* required by Section 6 of the Revitalized Movie Censorship Law.

g. Expert Testimony

Still another problem is the matter of expert testimony. Our Court of Appeals has said that experts in art or literature need not inform the courts as to whether a certain picture or writing is obscene or not.[40] Does this mean that expert testimony on the subject will always be excluded? A positive answer to this question can have serious consequences especially in literature. Certainly, not all judges can qualify as literary critics and, for

[34] See *Id.* 62.
[35] KRONHAUSEN, PORNOGRAPHY AND THE LAW, 178-237 (1959).
[36] Lockhart and McLure, *The Developing Constitutional Standards, supra*, 72-73.
[37] *Id.* 77-80.
[38] *Supra*, note 29.
[39] Lockhart and McLure, *op. cit.* 81-84.
[40] *People v del Fiero*, CA-GR 4467-R September 26, 1950.

this reason, there should be place for the testimony of literary experts, especially in difficult cases.

> ... in dealing with literature, we must go to those who know what literature is before we can safely deal with difficult cases. The nature and function of literature itself must be grasped before judgments about literature can reasonably be made. And to know literature is not easy. That the task of a doctor in comprehending medicine is an awesome one we realize from the years the doctor must spend in study; the task of a critic in making even a start in comprehending literature is, if only we could come to realize it, even more awesome.[41]

The position taken by the Court of Appeals arises, perhaps, from an acceptance of the second test furnished by the Supreme Court in the *Kottinger* case: "Another test of obscenity is that which shocks the ordinary and common sense of men as an indecency."[42] Such a test will necessarily exclude any vivid description of sexual material especially if couched in terms conventionally excluded from polite discourse. Being unconventional, the material will necessarily shock those who see in the object nothing but unconventionality, much in the same manner that classical music can sound to the untrained ear as nothing but a cacophony of jarring notes. But not everything that shocks is pornographic. Once more we quote from a literary critic:

> The work of James Joyce, for example, at its early appearance could not be distinguished, in the minds of many readers, from pornography. His depiction of depraved men and women engaged in lustful activities shocked and disgusted many decent readers, and they banned and burned his books in the conviction that these works were themselves evil.
>
> What they did not perceive was that the shock and disgust emanate from the pages of Joyce's novels, which does not happen in pornography. All the powerful apparatus of a master artist—the diction, the imagery, the structure, above all the sounds and rhythms—convey the stench and degradation of sin. Joyce does not preach; he sees evil and expresses it. Nothing here can of itself entice the reader into sin. This is a look into hell, and such a look as St. Theresa once pointed out, can be both fascinating and salutary . . .[43]

This, of course, is by no means an apologia for pornography. Nor is it an advocacy of indiscriminate dissemination of adult literature. The author is not unaware of the terrible threat against scandal mongers: "And if anyone hurts the conscience of one of these little ones that believe in Me, he had better have been drowned in the depths of the sea, with a milestone hung about his neck". Nor for that matter need we agree with the author's evaluation of the worth of Joyce. But the point is certainly

[41] Boyle, *Literature and Pornography*, 193 THE CATHOLIC WORLD, 295, 296 (1961).
[42] 45 Phil. 352, 356 (1924).
[43] Boyle, *op. cit.* 301.

made clear that there is need for finding a way of protecting children without harming adults.

Conclusion

That the State should concern itself with the control of material deleterious to morals is not only legitimate but even obligatory. Mr. Justice Swayne pithily stated the reason: "The foundation of a republic is the virtue of its citizens."[1] Every government, for this reason, has always claimed *police power* as an instrument for the protection of public morals. And in its effort to protect children and those who are *ad instar puerorum,* the state asserts what is called patria potestas. It cannot therefore be said that the state is powerless as against an individual writer or artist claiming absolute freedom of expression. The unequivocal pronouncement of the U.S. Supreme Court to the effect that obscenity is not constitutionally protected is not a novel jurisprudential discovery. But the all-important question remains: What is obscene? Certainly this paper has not answered the question. It has merely pointed out some of the many difficulties that legislators and judges will have to hurdle.

That this author should admit the existence of such difficulties might shock some. Although this is not the place for an *apologia pro vita mea,* we hasten to add a very pertinent quotation:

> A preliminary answer is furnished by the principle, basic to jurisprudence, that morals and laws are differentiated in character, and not co-extensive in their functions. It is not the function of the legislator to forbid everything that the moral law forbids, or to enjoin everything that the moral law enjoins. The moral law governs the entire order of human conduct, personal and social; it extends even to motivations and interior acts. Law, on the other hand, looks only to the public order of human society; it touches only external acts, and regards only values that are formally social. For this reason, the scope of law is limited.[2]

It is with this basic distinction in mind that the difficulties have been pointed out.

The *Roth* and *Alberts* decision adopted the following as the test for obscenity: whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The phrase "contemporary community standards" has been singled out for criticism. Judge Moore, in his concurring and dissenting opinion in the case of the unexpurgated edition of *Lady Chatterley's Lover* made the observation that, under the fallacy of changing community standards, "by the time some author writes of 'Lady Chatterley's Grand-daughter,' Lady Chatterley herself will seem like a prim and puritanical housewife."[3] But we need not have recourse to moral relativism as the rationale for modern liberties. The modern liberties enshrined in the Bill of Rights are not dogmatic propositions but practical judgments. Our choice in favor of these liberties "means only that, given the circumstances of a particular society and its culture, these political freedoms have been judged to be the normal conditions of progress, and that on the basis of experience, historical memories, prudent fears, and its concept of the happy life, a people has preferred the risk of liberties abused to the risk of committing to the public power the authority to decide what it may read and say."[4]

[1] *Trist v Child,* 88 U.S. 441, 450 (1874).
[2] Murray, *Literature and Censorship,* 54 CATHOLIC MIND 665, 670-1 (1956).

But there is another consideration which justifies a certain degree of relativism in penal legislation. It is true that moral principles, rooted as they are in immutable essences, do not change. But the moral climate of a community does change in such a manner that a degree of frankness and manner of presentation which can shock a community of a given moment and cultural orientation may cease to be so shocking at a given time. And this changing social climate has relevance in the area of criminal law. Criminal law relies largely on coercion for its effectivity. But a law that does not reflect the accepted social climate cannot be coerced and therefore is ineffective. The *De Adulteriis Coercendis* of Augustus did little to limit the activities of the Messalinas. And an ineffective criminal law has a doubtful reason for existing because it can only bring discredit upon law itself and thus doubly confound the confusion. For then

> liberty plucks justice by the nose;
> The baby beats the nurse, and quite athwart
> Goes all decorum.

Finally, we might add a word from Jacques Leclerq of the Catholic University of Louvain: "In short, it may be said that no government has ever succeeded in finding a balanced policy of combating unhealthy sexual propaganda without injuring legitimate freedom or provoking other equally grave or worse disorders."[5]

But this need not stop us in our search for solutions to our problems, solutions which will reflect our own community's accepted standards of public morality and at the same time safeguard the other equally valid values of a democratic society.

[3] *Grove Press v Christenberry,* 276 F. 2d 433, 442 (1960).
[4] DOLAN, *Natural Law and Legislation,* 16 LAVAL THEOLOGIQUE ET PHILOSOPHIQUE, 238, 251 (1960).
[5] See MURRAY, *op. cit.* 668.