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## Legal Censorship: Problems and Principles

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# Legal Censorship: Problems and Principles

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JOAQUIN G. BERNAS

**E**VER present in a society which guarantees freedom of expression is the danger of abuse of such freedom. This danger gives rise to a familiar institution—the official censor. Two factors in recent months have helped to attract public attention to the role of the censor. The first is the Revitalized Movie Censorship Law which took effect in 1962 and the second is the recent and as yet unresolved tangle Lady Chatterley had with customs officers. In the hope of averting pointless name-calling and mutual recriminations which generally accompany censorship debates, we propose in the following pages an invitation to a “dialogue” on the subject of two problems which lie at the heart of legal censorship: the problem of prior restraint and the problem of obscenity. An interchange of views on these two subjects can prove useful to judges and policy-makers who will have to grapple with the problems of censorship in our developing democracy.

The doctrine of prior restraint or, more exactly, the doctrine against prior restraint, grew out of the early struggle which the printed word had to wage against the jealous and tight control wielded by ruling authorities over the newly discovered medium of expression. The licensing laws of sixteenth and seventeenth century England which prohibited the printing and publication of any material unless duly licensed by the appropriate state or clerical functionary stood as the most formidable obstacle to the freedom of printers and writers. It was

not until the eighteenth century that freedom of the press from licensing became recognized as common law. The following is Blackstone's oft-quoted statement of the doctrine:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.<sup>1</sup>

As can be seen, the doctrine's chief concern is form, not substance. In other words, restrictions which are valid when imposed *post factum* are forbidden when imposed *ante factum*. Thus, while a post-publication libel suit may prosper, a pre-publication injunction against the libelous material will be denied. Though a person may be punished for falsely shouting "Fire" in a crowded theater, he may not be gagged before entering the theater just to make sure that he will not shout "Fire." This principle assumed the status of constitutional precept by the adoption of the First Amendment to the American Federal Constitution. It has found a place in Philippine constitutional law through section 8 of the Bill of Rights: "No law shall be passed abridging the freedom of speech, or of the press."

Is the principle of prior restraint absolute? A dictum of Chief Justice Hughes in *Near v Minnesota*<sup>2</sup> frequently cited in subsequent decisions suggests three possible exceptions. The first rests upon security reasons peculiar to war time conditions—the doctrine of prior restraint should not hinder a government at war from preventing "actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops." The second exception concerns public morality: "The primary requirements of decency may be enforced against obscene publications." The third exception: "The security of the community life may be protected against incitement to acts of violence and the

<sup>1</sup> 4 Blackstone 151-2. See T. I. Emerson "The Doctrine of Prior Restraint" 20 *Law and Contemporary Problems* 648-671.

<sup>2</sup> 283 U. S. 697, 716 (1931).

overthrow by force of orderly government." Of these three exceptions, the first justifies itself. As regards the second and the third, one writer has suggested that Chief Justice Hughes "merely intended to make the traditional point that seditious and obscene publications were subject to subsequent punishment as exceptions to the First Amendment."<sup>3</sup> We leave the problem at that. Of greater interest to us now is whether the prohibition against prior restraint extends to movies as well.

It is interesting to note that early American doctrine on freedom of expression did not extend the constitutional protection given to speech and the press to the movie industry. Mr. Justice McKenna, speaking for a unanimous court in 1915, characterized the motion picture industry as a business pure and simple. "They are mere representation of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."<sup>4</sup> It was not until 1952 in the *Burstyn* case<sup>5</sup> that the Supreme Court reversed this decision and placed the movie industry under the protection of the First Amendment. But 1961 brought the *Times Film* case<sup>6</sup> which posed a question crucial to the theory of prior restraint as applied to the movie industry: "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." The movie censor's basic authority was being challenged. The court's answer, by a 5-4 vote, was that the censor's authority must stand because there is no "absolute privilege against prior restraint under the First Amendment."

The question as posed and the answer as given are the majority's and it may be noted that they are but a repetition of Chief Justice Hughes' in the earlier *Near* case. We tend to agree with Chief Justice Warren who says in his dissent that the wrong question was asked. The correct question, Warren

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<sup>3</sup> *Op. cit.* 661.

<sup>4</sup> *Mutual Film Corp. v Ohio* 236 U.S. 230 (1915).

<sup>5</sup> *Burstyn v Wilson* 343 U.S. 495 (1952).

<sup>6</sup> *Times Film Corp. v Chicago* 29 U.S.L. Week 4120 (1961).

says, is "whether the city of Chicago—or, for that matter, any city, any State or the Federal Government—may require all motion picture exhibitors to submit all films to a police chief, mayor or other administrative official for licensing and censorship prior to public exhibition within the jurisdiction." The question as formulated by the majority was already answered in the negative as early as the *Near* case which held that prior restraint may be imposed in "exceptional cases." But the question not answered by the *Near* case and subsequent censorship cases and which the dissenters now ask is *whether, in order to ferret out these exceptional cases for purposes of suppression, a licensing system may be established.* The question thus posed highlights the full implication of prior restraint and of censorship. The subsequent paragraphs will present for the reader's consideration the rational bases upon which the opponents of prior restraint rest their case.

In democratic countries censorship laws have for their chief aim government protection of the morals of the populace, especially of the young. As far as this moral objective goes, the position of the proponents of censorship is unassailable. The protection of public morals has always been held to be a valid objective of statutes. The interest which the state has in the morals of its citizens has been pithily stated by Mr. Justice Swayne: "The foundation of a republic is the virtue of its citizens."<sup>7</sup> Most opponents of censorship accept this moral objective, but they deny that preventive censorship in the form of licensing systems is the proper means for attaining it. The proponents of censorship seek to attain their objective by prior restraint; the opponents seek to attain the same objectives by subsequent punishment.

As fundamental justification for the doctrine prohibiting prior restraint, Mr. Justice Douglas in his dissent in the *Times Film* case cites a passage from a recent book by the noted Jesuit theologian John Courtney Murray:

The freedom toward which the American people are fundamentally oriented is a freedom under God, a freedom that knows itself to be bound by the imperatives of moral law. Antecedently it is presumed

<sup>7</sup> *Trist v Child* 88 U.S. 441, 450 (1874).

that a man will make morally and socially responsible use of his freedom of expression; hence there is to be no prior restraint on it. However, if his use of freedom is irresponsible, he is summoned after the fact to responsibility before the judgment of the law. There are indeed other reasons why prior restraint on communications is outlawed; but none are more fundamental than these.<sup>8</sup>

Of these other reasons a classic one is that voiced by Tolstoy: "You would not believe how, from the very commencement of my activity, that horrible Censor question has tormented me. I wanted to write what I felt; but all the same it occurred to me that what I wrote would not be permitted, and involuntarily I had to abandon work. I abandoned, and went on abandoning, and meanwhile the years passed away."<sup>9</sup> Mr. Justice Douglas echoes the same sentiment: "One who writes cannot afford entanglement with the man whose pencil can keep his production from the market. The result is a pattern of conformity."<sup>10</sup> We are also told that as a result of the unpleasant encounter which *Tess of the D'Urbervilles* had with censors, Hardy never wrote another novel and turned instead to writing poetry.<sup>11</sup> But this classic argument does not appear strong when viewed in comparison with a regime of subsequent punishment. Slavish conformity can be brought about even by subsequent punishment, for even subsequent punishment becomes preventive (and is intended to be preventive) after its initial application.

More cogent, perhaps, is the argument drawn from the procedural safeguards of liberty. It is pointed out that if the government must proceed by prosecution, as it must if, for

<sup>8</sup> *We Hold These Truths* (1960) 164-5. It should be noted, however, that the writer cited recognizes that the First Amendment ban is subject to "exceptional cases." But, he adds, "censorship in the civil order ought to be a juridical process. In using the word 'juridical' I mean that the premises and objectives of the process should be defined in accord with the norms of good jurisprudence; and that the structure and workings of the process should be sustained by the consent of the community." *Loc. cit.*

<sup>9</sup> Cited in *Times Film v Chicago*, note 6.

<sup>10</sup> *Ibid.* 4123.

<sup>11</sup> N. St. John-Stevas "The Author's Struggles with the Law" 194 *The Catholic World* 350 (1962).

instance, the enforcement of Art. 201 of the Revised Penal Code which prohibits immoral publication is sought, all the safeguards of the rules of procedure come into play. The accused is presumed innocent, his guilt must be proved beyond reasonable doubt, he is entitled to a public trial, he has a right to confront his accusers, he is entitled to a trial before a judge who is not at the same time the prosecutor, and he is protected by the rules of evidence. All these become barriers in the way of public officials. But under a system of censorship, the story is different. We quote Mr. Chief Justice Warren:

The censor performs free from all of the procedural safeguards afforded litigants in a court of law. . . . The likelihood of a fair and impartial trial disappears when the censor is both prosecutor and judge. There is a complete absence of rules of evidence; the fact is that there usually is no evidence at all. . . . How different from a judicial proceeding where a full case is presented by the litigants.<sup>12</sup>

Are these observations on procedural safeguards applicable to Philippine censorship as presently structured? Those familiar with the functioning of our censorship board should be able to shed some light on this question. Any discussion of this subject cannot avoid consideration of the cardinal rights which, as our Supreme Court said in *Ang Tibay v CIR*,<sup>13</sup> must be respected in all administrative proceedings. It seems to us, moreover, that the "clear and present danger rule" may have a role to play in such a discussion. The rule, recently re-stated in a dictum of our court,<sup>14</sup> says that any curtailment of freedom of expression can be justified only on the ground that there is a clear and present danger of a substantive evil which the state has the right to prevent. It is true that the rule, like its less strict sister, the dangerous tendency rule, is substantive in nature; but it has a procedural implication of unconstitutionality of any limitation on expression. However, if one remembers that these rules were born in a context of conflicts over seditious and subversive speeches, it can also be asked whether or to what extent the rule has application in the area of legislation for the protection of public morals.

<sup>12</sup> *Times Film v Chicago*, *supra*, 4130.

<sup>13</sup> 69 *Phil.* 635.

<sup>14</sup> *American Bible Society v City of Manila* 54 O.G. 2187 (1957).

It would be futile, perhaps, if not also unwise, to challenge in the present social context the basic authority of the censor. Many factors weigh heavily against such a challenge, not the least of which are (1) the justification it has been given in the *Times Film* case by a Supreme Court whose attitude in recent years to sexual immorality has shown itself to be most liberal, (2) the community acquiescence which movie censorship has enjoyed in the Philippines since 1929,<sup>15</sup> and (3) the admittedly deteriorating moral standards even of local movies. But it is well to remember that the movie censorship board represents an official recognition of a difference between movies and other forms of communication media, a difference so radical as to warrant, in the mind of officialdom, a radically different treatment. A licensing system is proper for the movie industry; but a licensing system is not proper for the printed word. (We can ignore the restriction which the new censorship law places on movie advertisements as still basically a restriction on the movie industry and not on the press.) Such a radical difference in treatment will certainly give rise to the question whether motion pictures as communication media radically differ from other forms of communication. A discussion of this question will have to take into consideration the growing number of movies being used as vehicles for political and social thought and as artistic manifestations of the search for spiritual meaning as exemplified by artists like Fellini and Bergman. It will also have to consider the fact that our censorship law covers not only movies as drama or entertainment but also "educational, documentary, cultural, scientific, newsreel, industrial, sales, public relations and instructional films [Section 8 (2)]."

Other subjects for discussion are the standards for censorship set down by the law: "immoral, indecent, contrary to law and/or good customs or injurious to the prestige of the Republic of the Philippines [Sec. 3 (a)]." What do they mean? Are these norms precise enough for statutory use in the area of freedom of expression? A sample of the possible confusion that can arise from such norms is the recent encounter

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<sup>15</sup> Regarding the furor over "The Martin Luther Story" see Mendoza "Philippine Film Censorship Laws: An Appraisal" 31 *Philippine Law Journal* 665.

between a foreign movie company and the Foreign Office over the original script of "To Be a Man." This, perhaps, is not the best example because the Foreign Office seemed to have viewed the issue more as abuse of hospitality than anything else; but it is an example of how well-meaning people can differ in their interpretation of just what is meant by injury to the prestige of the Republic and its people. And therein lies a problem. Movie companies invest enormous sums in the production of a single picture and they do not wish to risk financial loss through failure to obtain a license for their product. They therefore look to the law for guidance. But if the norms set down by the law allow of themselves a variety of interpretations depending on the interpreter's point of view, the tendency is for the producer to play it safe, at the expense, perhaps, of other social values.

One answer which might be offered to this problem is that the Board of Censors will give the needed guidance to producers by more explicit rules and regulations. There, too, you have a problem. Does the business of clarifying a law which is on the face of it ambiguous belong to an administrative body? The old censorship board did just that and we would suppose that the new board will either keep the old rules or formulate new ones, if it has not done so yet. One wonders in retrospect whether the old rules could have passed muster before a court of law. One thing however which the reorganized board has in its favor is the fact that its attempt at a more composite and representative membership can better reflect the generally and currently accepted standards of public morality.

We now come to another sensitive spot in the area of censorship—the legal meaning of obscenity. 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."<sup>16</sup> 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. Indeed, this is not a

<sup>16</sup> *Roth v U.S.* 354 U.S. 476, 485 (1957).

novel jurisprudential discovery. But, having said that, the judicial problem is not thereby simplified. There still remains unanswered the core question of the growing number of obscenity cases: *What Is Obscene?*

In 1924, in the *Kottinger* case, our Supreme Court answered the problem with a statement which sounds to us now like an oversimplification. The words obscene and indecent, the court said, are "in common use and every person of average intelligence understands their meaning."<sup>17</sup> That is not of much help to those who have to look to the Supreme Court for guidance. However, the *Kottinger* case did contribute something to Philippine jurisprudence. It gave us a test for obscenity. It is a test borrowed from English jurisprudence *via* the American courts. This is the *Hicklin* test formulated by Lord Cockburn in the 1868 case of *Regina v Hicklin*:

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.

This is the rule still followed in the Philippines; this was the rule followed in many American courts until 1957.

The *Hicklin* rule, as can be seen, takes as its norm *the mind open to immoral influences*, the immature mind. Many critics have found that such a norm reduces adult reading "to the standards of a child's library in the supposed interest of a salacious few." In rejecting this norm, Justice Frankfurter wrote 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."<sup>18</sup> Hence, the norm which has now found favor with American courts is the "average" or "normal" person. Judge Woolsey has 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

<sup>17</sup> 45 *Phil.* 352 (1924).

<sup>18</sup> *Butler v Michigan* 352 U.S. 380, 383 (1957).

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."<sup>19</sup>

According to the *Hicklin* rule, moreover, as interpreted by some American courts, a piece of literary work could be suppressed on the basis of isolated obscene passages. This, too, became an object of severe criticism and, in 1933, Judge Augustus N. Hand dealt it the first forceful blow:

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 evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.<sup>20</sup>

The U.S. Supreme Court put an end to all doubts by rejecting, in the 1957 *Roth* case<sup>21</sup> the "isolated passages test" as long unconstitutionally restrictive of the freedoms of speech and press.

With this decision of the U.S. Supreme Court, the *Hicklin* rule fell and a new test was prescribed for the use of American courts. The test now used by American courts is "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The judge's instruction to the jury in the *Roth* case, reproduced by the Supreme Court, explains the rule:

. . . 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

<sup>19</sup> *U.S. v One Book Called "Ulysses"* 5 F. Supp. 182, 184 (1934).

<sup>20</sup> *Id.*, aff'd in 72 F 2d 705, 708 (1934).

<sup>21</sup> See note 16 *supra*.

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 in 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... 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.

We believe that this new rule is an improvement on the *Hicklin* rule. Our Supreme Court has not had in recent years an opportunity to take a second look at the *Hicklin* rule because the literary censorship cases that we have had so far have not gone beyond the Court of Appeals. But the opportunity might soon come to the Supreme Court. It is in this expectation that we propose to point out some of the legal problems which can confront obscenity censorship in the Philippines and to suggest some principles which cannot be ignored in our search for solutions.

Understandably, the chief and, indeed, laudable pre-occupation of the *Hicklin* rule is the suppression of *depraving* and *corrupting* influences. Of the words *deprave* and *corrupt* there are at least 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 reader or viewer will be caused to translate his thoughts into action. Third, they can mean that dissemination of the material tends to lower community standards of right and wrong, specially as to sexual behavior.

To these three meanings correspond three questions: 1) Is it proper for the state to try to regulate how and what men should think? 2) Supposing that reading about or viewing sexual propaganda leads to overt sex conduct, must the state concern itself with that resultant sex behavior which, though sinful, is not specifically public? 3) Since moral standards consist of moral beliefs and ideas regarding conduct, should the state give free range to attacks on these beliefs and ideas if such attacks do not immediately incite to criminal conduct?

The first question is easily answered and need not delay us. Civil law should legislate only what it can enforce and it can enforce only what it can judge—overt acts. The second question is further complicated by conflicting psychological opinions on the causal relation between sex crimes and exposure to pornography. When in 1961 the *Catholic World* sponsored a seminar on free speech and obscenity censorship, the participants agreed generally that further clinical studies were needed before this question could be resolved.<sup>22</sup> The third question is not wholly distinct from the first and the second and it clearly touches the heart of free speech. The U.S. Supreme Court had occasion to cope with this question when in 1959 a lower court ban on the French movie version of Lawrence's *Lady Chatterley* was elevated for review. The only question presented before the court was whether a ban could be sustained on the ground that the movie "alluringly portrays adultery as proper behavior" and as "right and desirable for certain people under certain circumstances." The court, through Mr. Justice Stewart, answered that the constitutional 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 the advocacy of socialism or the single tax."<sup>23</sup> But the court admitted two limitations to this rule: (1) The advocacy of the idea must not be conducted in a manner that is itself obscene; (2) Such advocacy must not amount to incitement to immediate illegal action.

We can see from all this that at the heart of the controversy is the question of effects of obscenity on individuals and on society. 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. For this reason there is a lesser degree for probability for students of human behavior to arrive at a common answer. But there is merit to the contention that those who belittle the deleterious

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<sup>22</sup> J. B. Sheerin "Free Speech and Obscenity Censorship" 194 *The Catholic World* 136 (1961).

<sup>23</sup> *Kingsley Pictures v N. Y. Regents* 360 U.S. 684, 689 (1959).

effect of obscenity come down to saying that the rights of free speech and free communication must be vigorously defended because they are practically inefficacious anyway. As one writer said: "There would seem to be no reasonable basis for saying 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 good character."<sup>24</sup> Thus, Justice Harlan comments that the State can reasonably suppose that over a 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, psychiatrists and penologists, Justice Harlan adds, counsels us to respect the choice of the State.<sup>25</sup> 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 antisocial sex conduct, when they are found to have insufficient offsetting value to society."<sup>26</sup> We would emphasize the words *antisocial* and *insufficient offsetting value to society*.

With regard to the problem of isolated passages, we shall merely reproduce here a passage from Father Harold Gardiner's *Norms For the Novel*:

...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."

...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

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<sup>24</sup> Schmidt "A Justification of Statutes Barring Pornography from the Mails", 26 *Fordham Law Review* 70, 74 (1957).

<sup>25</sup> *Roth v U.S.* *supra* 476.

<sup>26</sup> Lockhart and McLure "Censorship of Obscenity: The Developing Constitutional Standards" 45 *Minnesota Law Review* 384 (1960).

future readers with mental stability and moral poise enough to read books that are "realistic"....<sup>27</sup>

This brings up another question—the audience problem. The *Hicklin* rule took as its norm those "whose minds are open to corruption." Many found this unacceptable. The *Roth* test takes the "average adult" as the norm. But this, too, has its problems. First, the average person knows little and cares less about literary or aesthetic values; hence, there is danger of depriving the trained reader of legitimate fare. Second, there is what American writers call "black market or hard-core pornography," the only kind of obscenity which American law at present seems to prohibit. The principal characteristic of such material is the build up of autoerotic 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. But such material, a number of critics have observed, does not appeal to the prurient interest of average persons. Its appeal is rather to the sexually immature. Should the average person then be the norm?

It has been suggested that a variable obscenity test should 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, not necessarily by the author or producer, but by the purveyor. 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 the group is chosen and used as the test. Obscenity then becomes a relative term and the objections both to the "susceptible person test" and to the "average person test" are avoided. Our Supreme Court was perhaps thinking in this direction in the *Go Pin* case of 1955 when it said that, if the objectionable pictures had been exhibited in art galleries as works of art, there would have been no offense committed. Likewise, the classification of movies

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<sup>27</sup>Pp. 39-40 (1953).

into movies for general patronage and movies for adults only prescribed by the new law is a step in the same direction.

Still another problem is the matter of expert testimony. Our Court of Appeals in the *del Fiero* case<sup>28</sup> of 1950 said that experts in art or literature need not inform the courts as to whether a certain picture or writing is obscene or not. Such a statement bodes ill for literature and art. Certainly not all judges can qualify as literary or art critics and, for this reason, there should be place for the testimony of experts on the subject especially in difficult cases. 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." Such a test will necessarily exclude any vivid description of sexual material especially if couched in terms conventionally excluded from polite society. Being unconventional, the material will necessarily shock those who see in the object nothing but unconventionality, much in the 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. The shock can come from the fact that the artistry of the work has succeeded in conveying to the reader the stench and degradation of sin. Such a shock can be salvific.

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We have seen the problem posed by prior restraint and the problem of formulating a legal definition of the obscene. We have seen moreover that the problems arise chiefly from our adherence to the principle of freedom of expression. Have we, perhaps, yielded to the allurements of moral relativism in order to make our choice of freedom intelligible? Judge Moore, in his concurring and dissenting opinion in the case of the unexpurgated edition of Lawrence's controversial novel, made the observation that, under the fallacy of changing community standards, "by the time some author writes of 'Lady Chatter-

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<sup>28</sup> CA-GR 4467-R September 26, 1950.

ley's Grand-daughter,' Lady Chatterley herself will seem like a prim and puritanical housewife."<sup>29</sup> 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, as one writer puts it, "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."<sup>30</sup>

Finally, we need not add that what we have said is by no means an apologia for pornography. The writer is not unaware of the terrible threat against scandalmongers: "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 millstone hung about his neck." We do hope to have made clear, however, that there is need for a way of protecting children without doing harm to adults. The problems of censorship is not a simple case of libertines versus prudes, nor of literati versus philistines. But, as one writer noted, it would be lamentable for Catholics, with their venerable tradition of intellect, literature and art, to go over to the camp of the philistines.<sup>31</sup>

<sup>29</sup> *Grove Press v Christenberry* 276 F. 2d 433, 443 (1960).

<sup>30</sup> J. V. Dolan "Natural Law and Legislation" 16 *Laval Theologique Et Philosophique* 251 (1960).

<sup>31</sup> J. C. Murray *op. cit.* 173.