

Y4  
. C 73/2  
90-73

1041

90 Y4  
C 73/2  
90-73

KANSAS STATE UNIVERSITY LIBRARIES

THE COMMITTEE ON FILM CLASSIFICATION

GOVERNMENT  
Storage

HEARING  
BEFORE THE  
COMMITTEE ON COMMERCE  
UNITED STATES SENATE  
NINETIETH CONGRESS

SECOND SESSION

ON

S. Res. 9

TO CREATE A SPECIAL COMMITTEE TO BE KNOWN AS THE  
COMMITTEE ON FILM CLASSIFICATION AND TO CONSIST  
OF FIVE SENATORS APPOINTED BY THE VICE PRESIDENT  
OF WHOM NOT MORE THAN THREE SHALL BE MEMBERS  
OF THE MAJORITY PARTY

JUNE 11, 1968

Serial No. 90-73

Printed for the use of the Committee on Commerce



U.S. GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1968

KSU LIBRARIES  
A11900 502107 ✓

8/22/50  
8/22/50  
8/22/50

AY  
5/27/50  
EP-00

KANSAS STATE UNIVERSITY LIBRARY  
THE COMMITTEE ON FILM CLASSIFICATION

HEARING  
BEFORE THE  
COMMITTEE ON COMMERCE  
UNITED STATES SENATE  
NINETY-FOURTH CONGRESS  
COMMITTEE ON COMMERCE

WARREN G. MAGNUSON, Washington, *Chairman*

- |                                    |                              |
|------------------------------------|------------------------------|
| JOHN O. PASTORE, Rhode Island      | NORRIS COTTON, New Hampshire |
| A. S. MIKE MONRONEY, Oklahoma      | THRUSTON B. MORTON, Kentucky |
| FRANK J. LAUSCHE, Ohio             | HUGH SCOTT, Pennsylvania     |
| E. L. BARTLETT, Alaska             | WINSTON L. PROUTY, Vermont   |
| VANCE HARTKE, Indiana              | JAMES B. PEARSON, Kansas     |
| PHILIP A. HART, Michigan           | ROBERT P. GRIFFIN, Michigan  |
| HOWARD W. CANNON, Nevada           |                              |
| DANIEL B. BREWSTER, Maryland       |                              |
| RUSSELL B. LONG, Louisiana         |                              |
| FRANK E. MOSS, Utah                |                              |
| ERNEST F. HOLLINGS, South Carolina |                              |

FREDERICK J. LORDAN, *Staff Director*  
MICHAEL PERTSCHUK, *General Counsel*  
JOHN N. NASSIKAS, *Assistant General Counsel*  
JOHN D. HARDY, *Staff Counsel*

(II)

Printed for the use of the Committee on Commerce



## CONTENTS

### WITNESSES

|  | Page |
|--|------|
| Opening statement by the chairman-----   | 1    |
| S. Res. 9-----   | 2    |
| Smith, Hon. Margaret Chase, U.S. Senator from the State of Maine-----  | 3    |
| Mack, Rev. S. Franklin, associate director, United Church of Christ,<br>289 Park Avenue South, New York, N.Y.----- | 31   |
| Speiser, Larry, National Civil Liberties Union, 1424 16th Street NW.,<br>Washington, D.C.-----                     | 33   |

### WRITTEN STATEMENTS AND LETTERS

|  |    |
|--|----|
| Ashley, Hon. Thomas Ludlow, U.S. Representative from the State of Ohio-----  | 44 |
| Fore, William F., Broadcasting and Film Commission, National Council<br>of the Churches of Christ in the U.S.A.-----       | 49 |
| Hill, Rev. Morton A., S.J.-----  | 56 |
| Klein, Robert J., Meltzer & Schiffrin, Philadelphia, Pa.-----  | 49 |
| McGovern, Hon. George, U.S. Senator from the State of South Dakota--   | 43 |
| Pearce, Mrs. E. D., General Federation of Women's Clubs-----   | 47 |
| Ryan, Mrs. Edward F., chairman, National PTA Committee on Legisla-<br>tion, National Congress of Parents and Teachers----- | 55 |
| Spencer, Harry C., general secretary, Television, Radio, and Film Com-<br>mission-----                                     | 46 |
| Sullivan, Rev. Patrick J., S.J., director, National Catholic Office for<br>Motion Pictures-----                            | 47 |
| Valenti, Jack J., president, Motion Picture Association of America-----  | 45 |

### ADDITIONAL INFORMATION

|  |   |
|--|---|
| Memorandum on recent Supreme Court decisions on pornography----- | 6 |
|--|---|



## THE COMMITTEE ON FILM CLASSIFICATION

TUESDAY, JUNE 11, 1968

U.S. SENATE,  
COMMITTEE ON COMMERCE,  
*Washington, D.C.*

The committee met at 9:30 a.m., in room 5110, New Senate Office Building, Washington, D.C., Hon. Norris Cotton presiding.  
Present: Senators Cotton and Moss.

### OPENING STATEMENT BY THE CHAIRMAN

Senator COTTON. The committee will be in order.

Today, the Senate Commerce Committee begins hearings on Senate Resolution 9, submitted by Senator Margaret Chase Smith.

This resolution would create a special committee to be known as the Committee on Film Classification. The committee would consist of five Senators appointed by the Vice President, and not more than three of these Senators shall be members of the majority party.

Essentially, this resolution would direct the committee to research and investigate the actual and potential problems of film classification in this country and throughout the rest of the world. The committee would be further directed to gather factual data relating to the problems of film classification that would be of public interest and would also aid the Congress in enacting legislation contemplating limitations upon the exhibition of certain motion pictures to minors.

Finally, the resolution directs the committee to report the results of its studies and surveys to the Senate.

When submitting an identical resolution in the 89th Congress, Senator Smith remarked, and I quote:

We are all aware of the criticism being directed toward many of the movies that children are seeing today. That a marked increase in the use of shameful, perverted themes in our motion pictures has followed in the wake of judicial decisions over the past ten years is no longer debatable. Movies, it is said, are more adult than ever. While I will not quibble over what is adult and what is plainly offensive, I do share the concern of many of my fellow Senators over what can be done to reconcile the differences between the two forces that seem to collide when controls over motion pictures exhibited to the public are discussed; namely, those who wish to protect impressionable children and teenagers from erotic or violent motion pictures, and those who see in the prior censorship activities of state and local censor boards a threat to constitutional guarantees of free speech. To meet this widely discussed problem, I shall . . . submit legislation so designed as to steer a middle course between these two groups.

During the course of these hearings, the committee will hear testimony from a variety of interested groups. Their special knowledge in these most vital and sensitive areas will be of great assistance in our consideration of this resolution.

While the committee is, of course, fully aware of the difficulties in attempting to deal with the matters contained in moving pictures and television without invoking the type of censorship that comes in conflict with the freedoms of speech and press guaranteed in the Constitution, the acting chairman feels that Senator Smith has performed a distinct service by introducing this measure and thus focusing public attention on the problems in this field. A copy of the bill will be placed in the record at this point.

(S. Res. 9 follows:)

[S. Res. 9, 90th Congress, first session]

## RESOLUTION

*Resolved*, That there is hereby created a special committee to be known as the Committee on Film Classification and to consist of five Senators appointed by the Vice President of whom not more than three shall be members of the majority party.

Sec. 2. It shall be the duty of such committee to study and survey by means of research and investigation all of the problems of film classifications as they have appeared or may appear both in this country and elsewhere throughout the world, and to obtain all of the facts possible in relation thereto which would not only be of public interest but which would aid the Congress in enacting remedial legislation contemplating limitations upon the exhibition of certain motion pictures to minors, and to report to the Senate at the earliest practical date but not later than January 31, 1968, the result of such studies and surveys. No proposed legislation shall be referred to such committee and such committee shall not have the power to report by bill or otherwise have legislative jurisdiction.

Sec. 3. Said committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the session, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and to make such expenditures, not to exceed \$25,000 as it deems advisable.

Sec. 4. A majority of the members of the committee, or any subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, shall constitute a quorum for the purpose of taking testimony.

Sec. 5. For the purposes of this resolution the committee is authorized (1) to make such expenditures as it deems advisable; (2) to employ upon a temporary basis, technical, clerical, and other assistants and consultants: *Provided*, That the minority is authorized to select one person for appointment and the person so selected shall be appointed and his compensation shall be so fixed that his gross rate shall not be less by more than \$2,200 than the highest gross rate paid to any other employee; and (3) with the prior consent of the heads of the departments or agencies concerned, and the Committee on Rules and Administration, to utilize the reimbursable services, information, facilities, and personnel of any of the departments or agencies of the Government.

The following parties have requested that in lieu of a personal appearance, their statements be made a part of the record and they will be found at the end of the day's proceedings:

Motion Picture Association of America.

TRAFICO (Television, Radio and Film Commission/The Methodist Church, by Harry C. Spencer, general secretary.

General Federation of Women's Clubs, by Mrs. E. D. Pearce, president.

National Catholic Office for Motion Pictures, by Rev. Patrick J. Sullivan, S.J., director.

National Council of the Churches of Christ, by William F. Fore, executive director.

Hon. George McGovern, U.S. Senator from South Dakota.

Hon. Thomas Ludlow Ashley, Member of Congress, from Ohio.

Robert J. Klein, Meltzer & Schiffrin, Philadelphia, Pa.; National Congress of Parents and Teachers.

Rev. Morton A. Hill, S.J.

Senator CORRON. At this time, I should also mention that the committee has received a great deal of correspondence concerning this resolution. All of these letters and reports have been made part of the committee's official file on Senate Resolution 9.

The first witness is the author of the resolution, the Honorable Margaret Chase Smith of Maine, and the Chair welcomes Mrs. Smith and appreciates her appearing with us today.

#### STATEMENT OF HON. MARGARET CHASE SMITH, U.S. SENATOR FROM THE STATE OF MAINE

Senator SMITH. Mr. Chairman, I very much appreciate the opportunity to discuss with you Senate Resolution 9, which I introduced on January 11, 1967. The resolution was introduced only after long consideration and I believe it reflects a growing concern among parents, civic leaders, churchmen, law enforcement authorities, and educators across the land over the flood of violence, deviationism, sadism, and overemphasis on sex to which American youngsters are subjected week after week from movie screens.

At the outset, let me emphasize that this resolution does not offer a solution. Its purpose is to create a Senate committee that would search out facts as to the dimensions of the problem and inquire into methods by which others have dealt with it. The committee would write no legislation but merely report its findings to the Senate.

I would also like to allay the fears expressed by some on another point. It is not the intent of this resolution, nor would it be the business of the committee created under it, to bring about censorship of films in this country—censorship of one kind or another. The Supreme Court has ruled on the constitutionality of such efforts.

My growing concern, Mr. Chairman, is for the children of America, and that concern for our children was the sole factor which prompted me to introduce this legislation. Personally, I am opposed to censorship. Senate Resolution 9 is specifically drawn to avoid the challenge of censorship.

In the Supreme Court decisions striking down various censorship codes and laws, the Court has struck down at the same time barriers against showing noisome, objectionable, and sometimes damaging movies to children.

Mr. Chairman, I object strongly to the showing of an inordinate amount of violence, much of it in vivid color, to children. I believe, as Dr. Leonard Berkowitz of the University of Wisconsin does, that this exposure to sadistic violence has a deleterious effect on young children. Dr. Berkowitz, in his study, "Aggression: A Social Psychological Analysis," reports on tests made on children in controlled groups. These tests tend to indicate that children, exposed to violence on the screen, respond in a more aggressive manner to real-life frustrations than children not exposed to the screen violence.

There is no question but what children are exposed to a great deal of violence in movie theaters. In my Reader's Digest article last

December I cite an example of one Saturday matinee in which children could see among other things a young woman being decapitated by a shovel, and a rather scantily dressed young woman being held down on a table while four men drove a stake through her heart. In both of these scenes the blood was as red as only screen color can make it and the sounds of pleadings and agony came through loud and clear. There were dozens upon dozens of small children—few of them yet adolescent—in the audience.

In the movies involved both young women represented evil—one being a zombie, the other a vampire—and their brutal deaths lent an aura of good triumphing over evil to the horrors on the screen. It is no wonder that children exposed to such violence might well tend toward a more aggressive attitude when confronted with life's frustrations.

Violence is but one aspect of what many parents and other concerned people object to in the film diet provided young children. There is a growing tendency among some moviemakers to ignore reasonable restraints upon sexual behavior in pictures. And here I am not talking about the off-color nude movies shown in burlesque houses, but about movies playing at our best houses and in neighborhood theaters everywhere.

These movies pose a serious problem, the exact extent of which has not been determined. It would be my hope that the special Senate committee would come up with facts and figures on that, as well as an analysis of possible solutions.

One solution which has been adopted elsewhere has been film classification. Under this system adults would not be forbidden any movies. Children, however, would be excluded from pictures which are deemed unsuitable for them. This system has been adopted in most civilized nations of the world. It would be my hope that the Senate committee could determine how well it has worked elsewhere and whether the experience of others is applicable in the United States.

Mr. Chairman, it is evident that the movie industry itself, or at least some of its responsible spokesmen, feel classification is the answer. The Motion Picture Association of America under its president, Mr. Jack Valenti, has embarked on a limited classification program, designating some movies for adults only, some for mature young people, some as family audiences. The MPA has worked with outstanding church and civic leaders to achieve these designations and they are to be commended for their efforts.

Unfortunately, their program has not worked; nor can it be really successful without help from some outside authority.

For one thing, there is not industrywide participation in the MPA classification system. Independent producers and foreign moviemakers anxious to make money by whatever means available, just don't submit their films for review and MPA has no authority to force them to do so. Nor can MPA impose sanctions upon movie theater owners who refuse to accept the classification.

In the Washington area most movie advertisements carry a designation as to their suitability for specified audiences. In checking movie advertising in other areas, however, I found no such designations, and I checked New York, Chicago, and Los Angeles papers carefully.

Even within the Washington area I found that not all films carry a clear designation. There is still another category, "NR," meaning that the film has not yet been rated. Two such movies, "Teenage Mother," and "Girl on a Chain Gang," were advertised as playing in a drive-in theater just the other day in the Washington Post.

This sort of haphazard classification indicates an interest on the part of the Motion Pictures Association in doing something about the problem but they need help and I think the only real help they can get in protecting America's children is from the Congress. The committee proposal in Senate Resolution 9 is a starting point in providing that kind of help.

Such a committee could also, I believe, resolve another dilemma in which both the public and the motion-picture industry has found itself. In a number of cases involving film censorship the Supreme Court has suggested it would look with favor upon legislation setting up a system to protect children while permitting adults to see what they want to see. As late as on April 22 of this year Mr. Justice Marshall, writing for the Court in the *Interstate v. Dallas*, reiterated this point. He wrote, and I quote :

It is not our province to draft legislation. Suffice it to say that we have recognized that some believe "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of express." . . . and we have indicated more generally that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults.

Unfortunately, no community or State has yet been able to find language which regulates the showing of such films to youth but does not regulate its accessibility to adults. The committee that would be created under Senate Resolution 9 could gather together the legal talent necessary to find the wording that would satisfy the Court while still providing adequate protection to our children.

I feel strongly that such protection is needed. I know that most mothers of America feel the same way. To help them protect their children from this avalanche of violence and prurience, I urge your favorable consideration of this resolution.

Senator COTTON. Thank you, Senator, for your excellent statement and explanation.

Your bill is, of course, directed to moving pictures displayed in theaters and in drive-ins. Was it your purpose or do you believe any attempt should be made in the creation of such a committee to consider the problem of moving pictures that are also repeated or used on television?

Senator SMITH. I think that is an important point, Mr. Chairman. I also thought that it was better to take it step by step rather than trying to cover too much at the beginning.

I think if the committee takes testimony and goes into a study of this, they may come up with something to recommend rather than anything from me.

Senator COTTON. It would be a far greater problem to deal with the television than the public movies, wouldn't it?

Senator SMITH. Of course, children can see TV so much more easily than they can movies that I think the suggestion is very constructive and I would hope something would be done.

Senator COTTON. Section 2 of your resolution which was, of course, introduced some time ago, directs the Committee on Film Classification as a result of its studies and surveys "to report at the earliest practical date but not later than January 31, 1968," which has already passed. Since that date has passed, what date would you suggest to the committee to insert in this resolution?

Senator SMITH. I introduced the bill, as you have already stated, in January 1967, and I would think that probably January 31, 1969 would be a good date to substitute for the one that is in the resolution.

Senator COTTON. Section 5 of your resolution authorizes the committee to make "such expenditures as it deems advisable." Is this intended to be an open-ended authorization, or should we include a specific sum in the report?

Senator SMITH. Mr. Chairman, I would leave that to you and your committee. I think you would know better how to handle this. I would hope it would not be an open-end and I would not expect such a committee to make it so. I would think they would do what was necessary to be done in such a short time in a reasonable way with a reasonable staff.

Senator COTTON. I would expect if this committee reported the bill with an open-end authorization, knowing your splendid service on the Appropriations Committee, you would be the first to put a curb on it when it got to the Appropriations Committee.

Senator SMITH. Mr. Chairman, if I didn't, I am sure the chairman would do it.

Senator COTTON. Thank you, Mrs. Smith, and again may I say, speaking as one member of the committee, that I think you are rendering a very distinct public service in bringing this legislation to the Senate, and it serves to further alert the country to this problem which is becoming so serious.

Every act of violence such as the one that has taken place very recently and which is so vividly in the memory and the feelings of the American people today further accentuates the dangers to which you have referred.

Senator SMITH. Thank you, Mr. Chairman, very, very much. I would hope that the committee would see fit to set up or recommend the naming of a committee of five as suggested and that the chairman and the members would be as earnest and interested as the chairman of this committee is.

Senator COTTON. Thank you, Mrs. Smith.

Senator COTTON. I wish to insert a memorandum which discusses the decisions of the Supreme Court on pornography from 1954 to its most recent pronouncements in this area—*Ginsberg v. New York* and *Interstate Circuit, Inc. v. Dallas*. Both of these decisions were handed down on April 22 of this year.

(Library of Congress material follows:)

U.S. SUPREME COURT DECISIONS ON PORNOGRAPHY 1954 TO FEBRUARY 1968

(By Elizabeth Yadlosky, legislative attorney, American Law Division,  
Apr. 2, 1968)

INTRODUCTION

The United States Supreme Court on numerous occasions since 1954 has considered the legality of obscenity legislation enacted by federal, state and local governments.

This memorandum discusses the decisions of the Court on this subject during the period since 1954. There appears to have been a rather drastic change in the approach of the Court at least twice in these fourteen years. These changes will be described in more detail later in this memorandum but, summarized very briefly, the year 1957, the year in which the Court decided the *Roth* case and set forth what has come to be known as the "Roth" definition of obscenity, marks the first significant change in the attitude of the Court in this area.

For almost a decade after the *Roth* decision, the Court appears to have made no radical departure in its *Roth* approach to the obscenity problem. Then, in 1966, the Court again reassessed the problem and while not rejecting the *Roth* approach nevertheless appears to have departed somewhat from it in the *Ginzburg* and other cases decided at that time. These and other decisions are discussed below in chronological order.

#### PERIOD 1954 TO 1957

In the years immediately prior to the *Roth* decision in 1957, the consideration which the Supreme Court had given to obscenity problems was limited to a few motion picture censorship cases. The Court had held, just previous to this period, that motion pictures were entitled to the protection of the First Amendment, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

In 1954, the Court, in a single *per curiam* memorandum opinion, reversed two state court opinions which had upheld film censorship, *Superior Films, Inc. v. Department of Education of the State of Ohio* and *Commercial Pictures Corp. v. Regents of the University of the State of New York*, 346 U.S. 587 (1954). The Court gave no reason for its opinion, only citing *Joseph Burstyn, Inc. v. Wilson*, *supra*.

In the *Superior Films* case, the Division of Film Censorship of the Department of Education of Ohio had issued certificates forbidding the distribution of the films "M" and "Native Son" on the ground that they were harmful.

In the *Commercial Pictures* case, the Motion Pictures Division of the Department of Education of New York had refused to issue a license to the French picture "La Ronde" on the ground that it violated state censorship laws and that it was "immoral" and "would tend to corrupt morals."

Justice Douglas, with whom Justice Black agreed, wrote a concurring opinion in which they said that they could not accept the "argument of Ohio and New York that the government may establish censorship over moving pictures" (at page 588).

"The First and the Fourteenth Amendments say that Congress and the States shall make 'no law' which abridges freedom of speech or of the press. In order to sanction a system of censorship I would have to say that 'no law' does not mean what it says, that 'no law' is qualified to mean 'some' laws. I cannot take that step.

In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor."

In the following year, the Court again reversed a state censorship board, in *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955). Here the Kansas State Board of Review had disapproved the motion picture "The Moon Is Blue" on the grounds that it was too sexy, obscene, indecent or immoral or would tend to debase or corrupt morals. The United States Supreme Court reversed the censor without opinion on the authority of the *Burstyn* and *Superior Films* cases.

#### PERIOD 1957 TO 1966

With year 1957, came a new approach by the Court to the obscenity problem. On February 25, 1957, the Supreme Court handed down its decision in *Butler v. Michigan*, 352 U.S. 380. The case involved the sale of Griffin's "The Devil Rides Outside" to a policeman to test the then Michigan obscenity statute which prohibited the sale even to adults of books which might corrupt the morals of minors.

In a brief opinion delivered by Justice Frankfurter, the Supreme Court held unanimously that the Michigan statute was unconstitutional and violated the First Amendment right of free speech and press and the Fourteenth Amendment's due process clause since it reduced the adult population of Michigan to reading only what the state considered to be fit for children.

Then, several months later, on June 24, 1957, the Supreme Court handed down what is perhaps the most important decision on this subject in this period, *Roth v. United States*, 354 U.S. 476 (1957), rehearing denied 355 U.S. 852.

The *Roth* decision involved appeals from convictions in two different cases arising under two different statutes, one a federal statute, the other a state statute. The *Roth* case involved a federal criminal statute, 18 U.S.C. § 1461, which prohibits the mailing of obscene material. The other case, *Alberts v. California*, which was considered at the same time, involved the constitutionality of a provision of the California Penal Code making it a misdemeanor to sell or advertise obscene material.

Justice Brennan delivered the opinion of the Court and said it was the constitutionality of these two criminal obscenity statutes which was before the Court. Justice Brennan said:

"The dispositive question is whether obscenity is utterance within the area of protected speech and press.<sup>8</sup> Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press."

In disposing of the question, the Court rejected the contention that the First Amendment bars any censorship of any material and instead held that obscene utterances are not within the area of the First Amendment's constitutionally protected freedom of speech and press. The Court so held because it deemed obscenity to be "utterly without redeeming social importance" (354 U.S. at p. 484-5).

From this holding the conclusion has been drawn that properly drafted, properly administered laws designed to limit or prevent the distribution of legally obscene material would not be unconstitutional for the reason that they impose restraint of speech or press even though such restraint would be held to be unconstitutional if imposed on other types of utterances.

It was not until the *Roth* decision in 1957 that the Supreme Court established a constitutional standard for determining what is legally obscene, which standard all courts in this country would thereafter be required to apply; and herein lies another major significance of the *Roth* decision. The *Roth* definition of obscenity is now a part of the constitutional law which controls the determination of whether given material is "obscene" and thus properly subject to suppression or regulation by statute.

Prior to the *Roth* decision, there was no one uniform test of obscenity applied by all the courts. Many of the courts applied the "Hicklin" test. That test was laid down by the English courts and takes its name from an English decision, *Regina v. Hicklin*, LR 3 QB 360, 8 ERC 60 (1868). The English court in that case said that the test of whether material is obscene is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

Although many courts in the United States applied the *Hicklin* test, as, for example, the New York Courts and some of the lower Federal courts, see, for example, the statement in *People v. Richmond County News*, 9 NY 2d 578, 216 NYS 2d 369, 175 NE 2d 861 (1961); *United States v. Kennerley*, 209 F. 119 (1913) and other decisions cited by the Court at page 489 of the *Roth* decision, many other courts rejected the *Hicklin* test as, for example, the court in *United States v. One Book Entitled Ulysses*, 72 F. 2d 705 (1934).

In the *Roth* case, the Supreme Court considered and rejected the *Hicklin* test saying:

"The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." (354 U.S. at p. 489)

Instead of the *Hicklin* test the Supreme Court adopted what is now known as the *Roth* test:

"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (354 U.S. at p. 489, footnote omitted)

Applying this *Roth* test to the two cases before it, the Court concluded that the trial courts below had sufficiently followed the proper standard (at p. 489).

As regards the definition of obscenity in the *Roth* case, Chief Justice Warren concurred in the result but expressed doubts as to the wisdom of the broad

<sup>8</sup> No issue is presented in either case concerning the obscenity of the material involved. (354 U.S. at p. 481)

language used in the majority opinion. The Chief Justice stated his views as follows:

"The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

\* \* \* \* \*

"The defendant's in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide." (354 U.S. at pp. 495-6)

Justice Harlan concurred in the opinion in the *Alberts* case but dissented in the *Roth* case, expressing the view that the definition of obscenity as used in the different statutes should be controlling (at p. 507).

Justices Douglas and Black dissented in both cases, expressing the view that no expression, obscene or otherwise, can constitutionally be restricted unless "so closely brigaded with illegal action as to be an inseparable part of it." (Douglas dissent at p. 514).

Decided by the Court on the same day as the *Roth* case was *Kingsley Books Inc. v. Brown*, 354 U.S. 436 (June 24, 1957).

This involved an appeal from an action brought under section 22-a of the New York Code of Criminal Procedure which authorized the chief executive, or legal officer, of a municipality to invoke what Justice Frankfurter speaking for the Court described as a "limited injunctive remedy . . . under closely defined procedural safeguards" against the sale and distribution of obscene matter, which matter, if found in a final order to be obscene, might be destroyed. (354 U.S. at p. 437).

In an action brought under this statute, a state court sitting in equity had found that certain booklets including "Nights of Horror" and others, displayed for sale by the appellants, were obscene and enjoined further distribution of them and ordered their destruction.

The majority of the Court found the New York procedure to meet constitutional standards but Chief Justice Warren dissented saying that the same object may have a wholly different impact depending on the setting in which it is placed; that it is the manner of use should determine if given material is obscene and that it is the conduct of the individual which should be judged, not the quality of the art or literature and that to do otherwise is to impose a prior restraint and hence to violate the Federal Constitution. (354 U.S. at pp. 445-6).

Justice Douglas, joined by Justice Black, also dissented in the *Kingsley* case on the ground that an "injunction *pendente lite* gives the State the paralyzing power of a censor" and "does violence to the First Amendment." (354 U.S. 446).

The dissenters, in support of their views, pointed out that the judge or jury which finds the publisher guilty in New York City acts on evidence that might be quite different from evidence before the judge or jury that finds the publisher not guilty in Rochester. In New York City the publisher may have been selling his tracts to juveniles, while in Rochester he may have sold to professional people. The nature of the group among whom the works are being distributed may have an important bearing on the issue of guilt in any obscenity prosecution. Every publication, say the dissenters, is a separate offense which entitles the accused to separate trials. Juries or judges may differ in their opinions, community by community, case by case, and the publisher is entitled to that leeway under our constitutional system. (354 U.S. at pp. 446-7).

Justice Brennan also dissented in a separate opinion, saying that the absence in the New York obscenity statute of the right to a trial by jury is a fatal defect. (354 U.S. at pp. 447-8).

Also in the 1957 Term, the Supreme Court reversed, *per curiam* and without opinion, three convictions that had been affirmed by the federal courts below: *Times Film Corp. v. Chicago*, 355 U.S. 35 (Nov. 12, 1957), reversing 244 F. 2d 432 (7th Cir. 1957); *One, Inc. v. Olesen*, 355 U.S. 371, (Jan. 13, 1958), reversing 241 F. 2d 772 (9th Cir. 1957); and *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (Jan. 13, 1958), reversing 249 F. 2d 114 (D.C. Cir. 1957).

In the *Times Film* case, *supra*, Chicago authorities had censored a motion picture "Game of Love" which depicted illicit sex adventures, the censor finding it "immoral and obscene." The Supreme Court reversed on the authority of *Alberts v. California*, the companion case to *Roth*.

The *One, Inc.* case, *supra*, involved a magazine for homosexuals and the *Sunshine* case, *supra*, a magazine for nudists; both cited *Roth v. United States*.

The effect of the Court's decisions in these three cases was to afford the works involved the protection of the First Amendment.

In *Mounce v. United States*, 355 U.S. 180 (Dec. 9, 1957) the Court, in a case involving a Customs seizure of nudist magazines and art student publications, vacated the judgment reported below at 247 F. 2d 148 and remanded the case to the District Court for consideration in the light of the Court's decision in *Roth v. United States*.

In another *per curiam* decision, *Adams Newark Theater Co. v. City of Newark*, 354 U.S. 931 (June 24, 1967) the judgment of the New Jersey Supreme Court that an ordinance regulating burlesque shows was constitutional was affirmed. Justices Black and Douglas dissented. Chief Justice Warren would note probable jurisdiction and set the case for argument. Justice Brennan took no part in the decision.

The next opinion in this field in which the Court wrote an opinion was *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959).

Here, the Supreme Court reaffirmed that motion pictures are within the protection of the First and Fourteenth Amendments and held that the film version of "Lady Chatterley's Lover" could not be outlawed for being "immoral". The difficulty the Justices had in finding common ground is suggested by the fact that six different opinions were written.

Justice Stewart, speaking for the majority, held the statute void as a violation of the First Amendment because it restricted not obscenity, but the advocacy of ideas, here the idea that adultery may sometimes be proper.

Justices Black and Douglas, while concurring in the majority opinion, each wrote a separate opinion (at pp. 690 and 697).

Justice Clark concurred separately on the ground that the statute was too vague and therefore violated the requirement of due process (at p. 699).

Justices Frankfurter and Harlan concurred in separate opinions viewing the statute involved as constitutional but feeling it was misapplied in the instant case (at pp. 691 and 702).

Also decided in 1959 was *Smith v. California*, 361 U.S. 147 (Dec. 14, 1959), rehearing denied 361 U.S. 950. Although the holding was unanimous, four separate opinions were given.

In this case, the appellant, proprietor of a bookstore, was convicted of violating a Los Angeles city ordinance which was construed by the state courts as making him absolutely liable criminally for the mere possession in his store of books later judicially determined to be obscene even if he had no knowledge as to the contents of the books.

Justice Brennan, speaking for the Court, held that as thus construed and applied, the ordinance violated the freedom of the press which is safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action (pp. 148-155).

While obscene expression is not constitutionally protected, this ordinance imposed an unconstitutional limitation on the public's access to constitutionally protected matter. For, if the bookseller be criminally liable without knowledge of the contents, he will tend to restrict the books he sells to those he has inspected and thus a restriction will be imposed by the state upon the distribution of constitutionally protected as well as obscene books (pp. 152-154).

Justice Black concurred in a separate opinion in which he restated his view that all publications are entitled to First Amendment protection (at p. 157).

Justice Douglas, in a separate concurring opinion, expressed much the same views as Justice Black, namely, that the First Amendment protects all publications (at pp. 167-169).

Justice Frankfurter, in a separate concurring opinion, expressed the view that the Court should give some indication as to the scope and quality of the scienter

required (at page 162) and also that the due process clause of the Fourteenth Amendment was violated by the exclusion at the trial of evidence through duly qualified witnesses regarding the prevailing community standards, in determining obscenity. Such testimony, in his opinion, goes to the very essence of the defense and therefore to the constitutional safeguards of due process (p. 165).

Justice Harlan, in a separate opinion, concurred in part and dissented in part. He restated his view that the state has wider powers in obscenity regulation than does the federal government (at pp. 169-170). These views he had earlier expressed in the *Roth* case (354 U.S. at pp. 503-508). He agreed that evidence to support a conviction must establish that the work substantially exceeded the limits of candor set by contemporary community standards, saying that the "community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates . . . This being so, it follows that due process . . . requires a State to allow a litigant in some manner to introduce proof on this score. . . . In my opinion this conviction is fatally defective in that the trial judge . . . turned aside every attempt by the appellant to introduce evidence bearing on community standards. . ." (361 U.S. at pp. 171-2).

In 1961, in a case in which obscenity was not in issue but which bears on the general problem, the Court held that a provision requiring submission of motion pictures for examination or censorship prior to their public exhibition is not void on its face as violative of the First and Fourteenth Amendments.

*Times Film Corp. v. Chicago*, 365 U.S. 43 (Jan. 23, 1961) involved the municipal code of the city of Chicago. The plaintiff had applied for permission to exhibit a motion picture and a permit was refused on the ground that the picture had not been submitted for examination at the office of the commissioner of police as required. The code provides for a fine of \$50 to \$100 a day for exhibition of the film without a permit. *Times* alleged the ordinance was void on its face as a prior restraint in violation of the First and Fourteenth Amendments.

The Supreme Court held that there is no absolute freedom to exhibit any and every kind of motion picture even once, and that an ordinance requiring a motion picture producer to submit his films for examination by city officials in order to receive a permit to exhibit the picture to the public was not a prior restraint as prohibited by the First and Fourteenth Amendments. (365 U.S. at pp. 48-49).

Justice Clark, speaking for the Court, held that the petitioner's narrow attack on the ordinance did not require that any consideration be given to the validity of the standards set out therein. "The challenge here is to the censor's basic authority; it does not go to any statutory standards employed by the censor or procedural requirements as to the submission of the film." (365 U.S. at p. 47).

Chief Justice Warren, with whom Justices Black, Douglas and Brennan joined, dissented. These Justices agreed neither with the conclusion reached nor the reasons advanced for its support. The Court's decision, say the dissenters, "gives official license to the censor, approving a grant of power to city officials to prevent the showing of any moving pictures these officials deem unworthy of a license. It thus gives formal sanction to censorship in its purest and most far-reaching form, to a classical plan of licensing that, in our country, most closely approaches the English licensing laws of the seventeenth century which were commonly used to suppress dissent in the mother country and in the colonies . . ." (365 U.S. at pp. 55-56).

Justice Warren gave many examples of instances where censors banned motion pictures for a variety of reasons. (365 U.S. at pp. 69-72).

In separate dissenting opinion, Justice Douglas, with whom the Chief Justice and Justice Black concurred, expressed the view that censorship of movies is unconstitutional because it is a prior restraint and violative of the First Amendment. (365 U.S. at p. 78).

Also decided by the Court in 1961 was *Marcus v. Search Warrant*, 367 U.S. 717 (June 19, 1961). This case originated as a proceeding under Missouri statutes. Pursuant to Missouri law, a city police officer went to a state court and filed a sworn complaint that the appellants, sellers of magazines, kept "obscene" publications for sale.

In an *ex parte* proceeding, without granting appellants a hearing or even seeing any of the publications in question, and without specifying any particular publications, the trial judge issued search warrants authorizing the police to search appellant's premises and seize all "obscene" material.

It was almost two weeks after the seizure took place that the appellants were given a hearing and over two months after the seizure that a trial court found that of the publications seized, one hundred were obscene and one hundred eighty others not obscene, and ordered them returned to their owners.

Justice Brennan delivered the opinion of the Court and said that the question before the Court "is whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression." (367 U.S. at pp. 729-730).

The Court held that under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity and that the procedure followed by Missouri in this case "lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled" (367 U.S. at p. 731).

Justices Black and Douglas wrote a separate concurring opinion in which they said that the warrant used to search appellants' premises made no attempt specifically to described the "things to be seized" as the Fourteenth Amendment requires (367 U.S. at p. 738).

In *Manual Enterprises Inc. v. Day*, 370 U.S. 478 (1962), the Court again considered a case brought under 18 U.S.C. section 1461, the same section as was involved in the *Roth* case.

The Post Office Department had issued an order under that section banning magazines *MANual*, *Trim* and *Grecian Guild Pictorial* which consisted largely of photographs of nude male models designed to appeal to male homosexuals.

The Court below granted the injunctive relief requested but the Supreme Court reversed this judgment. Seven justices participated in the decision; Justices Frankfurter and White did not participate.

Justice Harlan, speaking for the Court, held that the *Roth* case did not establish a single test of obscenity, that to be obscene under the federal statute, material must be patently offensive on its face and had to have prurient appeal. He also felt that national standards of decency must control.

"On the issue of obscenity, as distinguished from unlawful advertising, the case comes to us with the following administrative findings, which are supported by substantial evidence and which we, and indeed the parties, for most part, themselves, accept: (1) the magazines are not, as asserted by petitioners, physical culture or "body-building" publications, but are composed primarily, if not exclusively, for homosexuals, and have no literary, scientific or other merit; (2) they would appeal to the "prurient interest" of such sexual deviates, but would not have any interest for sexually normal individuals; and (3) the magazines are read almost entirely by homosexuals, and possibly a few adolescent males; the ordinary male adult would not normally buy them.

"On these premises, the question whether these magazines are 'obscene,' as it was decided below and argued before us, was thought to depend solely on a determination as to the relevant 'audience' in terms of which their 'prurient interest' appeal should be judged. This view of the obscenity issue evidently stemmed from the belief that in *Roth v. United States*, 354 U.S. 476, 489, this Court established the following *single* test for determining whether challenged material is obscene: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (Footnote omitted.) On this basis the Court of Appeals, rejecting the petitioners' contention that the 'prurient interest' appeal of the magazines should be judged in terms of their likely impact on the 'average person,' even though not a likely recipient of the magazines, held that the administrative finding respecting their impact on the 'average homosexual' sufficed to establish the Government's case as to their obscenity." (370 U.S. at pp. 481-482, footnote omitted)

Justice Harlan then went on to say:

"We do not reach the question thus thought below to be dispositive on this aspect of the case. For we find lacking in these magazines an element which, no less than 'prurient interest,' is essential to a valid determination of obscenity under § 1461, and to which neither the Post Office Department nor the Court of Appeals addressed itself at all: These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecenty.' Lacking that quality, the magazines cannot be deemed legally 'obscene,' and we need not consider the question of the proper 'audience' by which their 'prurient interest' appeal should be judged."

(It was not to be until 1966 that the Supreme Court was to squarely rule on the question thought to be dispositive by the court below in the *Manual* case, namely, to decide whether material is obscene by its effect on the particular audience to which the material is directed.)

Justice Black concurred in the *Manual* case without opinion.

Justice Brennan, joined by Chief Justice Warren and Justice Douglas, would reverse the Postmaster General but for the reason that they did not think that § 1461 authorized the Postmaster General to exclude material from the mails based on his own administrative determination that it was obscene (at p. 519).

Justice Clark dissented in the *Manual* case in an opinion in which he said that since the magazines in question contained information as to where obscene material is obtainable, they are nonmailable for that reason and the question of whether the magazines are themselves obscene does not have to be decided (at p. 520). He would affirm the decision below (at p. 529).

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (Feb. 18, 1963) the United States Supreme Court held unconstitutional procedures adopted by the state of Rhode Island in an attempt to control the distribution of books considered to be undesirable to be read by young people.

The Rhode Island Legislature had created a commission to "educate the public concerning any book . . . or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of youth as defined [in other sections] and to investigate and recommend the prosecution of all violations of said sections."

The commission's practice was to notify a distributor that certain books or magazines distributed by him had been reviewed by the commission and had been declared by a majority of its members to be objectionable for sale, distribution or display to youths under 18 years of age. Such notices requested the distributor's "cooperation" and advised him that copies of the lists of "objectionable" material were circulated to local police departments and that it was the commission's duty to recommend prosecution of purveyors of obscenity.

Four out-of-state publishers of books widely distributed in the state sued in a Rhode Island court for injunctive relief and a declaratory judgment that the law and the practices thereunder were unconstitutional. The Supreme Court, Mr. Justice Brennan delivering the opinion, found that the effect of the commission's notices was to intimidate distributors and retailers and that they resulted in the suppression of the books listed.

The State Attorney General conceded that the notices listed several publications that were not obscene within the Supreme Court's definition of the term.

The Supreme Court, Justice Brennan speaking for the Court, held that this system of informal censorship violates the Fourteenth Amendment. The Fourteenth Amendment requires that regulation by the State of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line (pp. 59-72).

The Court found that the commission's practice provides no safeguards whatever against suppression of non-obscene and constitutionally protected matter, and that it is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon criminal sanctions, and which may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process (pp. 68-70).

The Court held that what Rhode Island has done, in effect, has been to subject the distribution of publications to a system of prior administrative restraints without any provisions for notice and hearing before publications are listed as "objectionable" and without any provision for judicial review of the commission's determination that such publications are "objectionable" (pp. 70-72).

Justice Douglas concurred in a separate opinion, reiterating his view that "the censor and First Amendment rights are incompatible" (at p. 72).

Justice Clark, in a separate opinion, concurred in the result but expressed the view that "the Court in condemning the Commission's practice owes Rhode Island the duty of articulating the standards which must be met, lest the Rhode Island Supreme Court be left at sea as to the appropriate disposition on remand." (at page 75). And later, Justice Clark said, "In my view the Court should simply direct the Commission to abandon its delusions of grandeur and leave the issuance of 'orders' to enforcement officials and 'the State's criminal regulation of obscenity' to the prosecutors, who can substitute prosecution for 'thinly veiled threats' in appropriate cases. See *Alberts v. California* (U.S.) *Supra*" (at p. 75).

If this suggestion were followed, it would leave the Commission free to publicize its findings as to the obscene character of a publication and to solicit support from the public to prevent obscene publications from falling into the hands

of juveniles, but the enforcement of the state obscenity laws would be left in the hands of prosecuting officials and courts (at p. 75).

Mr. Justice Harlan dissented, and expressed the view that the "Court's opinion fails to give due consideration to what I regard as the central issue in this case—the accommodation that must be made between Rhode Island's concern with the problem of juvenile delinquency and the right of freedom of expression assured by the Fourteenth Amendment" (p. 76) "Believing that the Commission, once advised of the permissible constitutional scope of its activities, can be counted on to conduct itself accordingly, I would affirm the judgment of the Rhode Island Supreme Court. . . ." (at p. 83).

On December 16, 1963, the Supreme Court in *Arnebergh v. Zeitlen*, 375 U.S. 957 (1963) refused to review the ruling below of the California Supreme Court, 59 ACA 930, 383 P. 2d 152, that the prurient appeal of the book "Tropic of Cancer" did not render it obscene under California statutes which limited by definition what is obscene to matter "utterly without redeeming social importance".

In *Smith v. California*, 375 U.S. 259 (Dec. 16, 1963) in a *per curiam* opinion, the Supreme Court reversed the judgment of the court below that the literary merit of isolated passages of "Tropic of Cancer", which the court found to be an otherwise obscene book, does not give it redeeming social importance. The Supreme Court vacated the judgment of the state court and the case was remanded to the Appellate Department of the Superior Court of California, County of Los Angeles, for further consideration in the light of the decision of the Supreme Court of California in *Zeitlen v. Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152.

*Jacobellis v. Ohio*, 378 U.S. 184 (1964) involved an appeal from a motion picture censorship case in which Jacobellis, the manager of a motion picture theatre in Ohio, had been convicted of possessing and exhibiting an obscene film in violation of Ohio law. His conviction had been affirmed by the Ohio Supreme Court and the question before the United States Supreme Court was whether the state courts had properly found the French film involved, "Les Amants" ("The Lovers"), to be obscene and hence not entitled to constitutional protection. The story depicted in the film described a bored woman who had abandoned her husband and family for a young man. The last reel contained an explicit, but fragmentary love scene.

Justice Brennan announced the judgment of the Court that the film involved was not obscene in an opinion in which Justice Goldberg joined. In line with its previous rulings, the Court held that:

"Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495. But in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, it was held that obscenity is not subject to those guarantees. Application of an obscenity law to suppress a motion picture thus requires ascertainment of the "dim and uncertain line" that often separates obscenity from constitutionally protected works (*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66)" (p. 187).

The question whether a particular work is obscene raises an issue of constitutional law and such an issue must be ultimately decided by the Supreme Court (pp. 187-190).

Motion pictures are within the constitutional ambit of the First Amendment guarantees of free speech and press (p. 187).

The test of what is obscene is that laid down in *Roth v. United States*, 354 U.S. 476, 489, namely, whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest (pp. 191-195).

What is meant by "contemporary community standards" in the foregoing test means contemporary national standards and not local standards (pp. 192-195).

The Court also made some suggestions as to how laws designed to curb the spread of objectionable material could be made more effective. The majority opinion suggested that such laws be designed specifically to prevent dissemination of objectionable material to children rather than attempting to suppress it totally (p. 195).

The Supreme Court reviewed the film in the light of the record made in the trial court, and concluded that "it is not obscene within the standards enunciated in *Roth v. United States* and *Alberts v. California*, which we reaffirm here" (p. 196).

Mr. Justice White concurred in the judgment without separate opinion.

Mr. Justice Black, with whom Mr. Justice Douglas joined, concurred with a separate opinion. Their reason for reversing was that a conviction for exhibiting

a motion picture abridges freedom of the press as safeguarded by the First Amendment, made obligatory on the states by the Fourteenth Amendment (pp. 196-7).

Mr. Justice Stewart, concurring, in a separate opinion, said that under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to "hard-core" pornography and observed that while he was not sure he could define hard-core pornography, "I know it when I see it and the motion picture in this case is not that" (p. 197).

Mr. Justice Goldberg concurred in a separate opinion. He also found the picture not obscene (p. 198).

The Chief Justice, joined by Mr. Justice Clark, dissented. They said that in this type of case, the Court is called on to resolve rights basic both to individuals and to society as a whole. Specifically, it is called on to reconcile the right of the nation and of the states to maintain a decent society and, on the other hand, the rights of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments. Neither the courts nor the legislatures have been able to evolve a truly satisfactory definition of obscenity. In other areas of the law, terms like "negligence," although in common use for centuries, have been difficult to define except in the most general manner. Yet the courts have been able to function in such areas with a reasonable degree of efficiency. The obscenity problem, however, is aggravated by the fact that it involves the area of public expression, an area in which a broad range of freedom is vital to our society and is constitutionally protected (p. 199).

"For all the sound and fury that the *Roth* test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the *Roth* case to provide such a rule."

The Chief Justice continued:

"It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of the individuals. . . .

"In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children" (pp. 200-201, footnote omitted). And later in his dissent Chief Justice Warren said: "I would commit the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgments made pursuant to the *Roth* rule, limiting myself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which a finding could be made, obviously the material involved cannot be held obscene. . . . Once a finding of obscenity has been made under a proper application of the *Roth* test, I would apply a 'sufficient evidence' standard of review—requiring something more than merely any evidence but something less than 'substantial evidence on the record [including the allegedly obscene material] as a whole.' . . . This is the only reasonable way I can see to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation.

"While in this case I do not subscribe to some of the State's extravagant contentions, neither can I say that the courts below acted with intemperance or without sufficient evidence in finding the moving picture obscene within the meaning of the *Roth* test. Therefore, I would affirm the judgment." (at p. 202-203).

Mr. Justice Harlan dissented in a separate opinion. In his view, "the States are constitutionally permitted greater latitude in determining what is bannable on the score of obscenity than is so with the Federal Government. See my opinion

in *Roth v. United States*, 354 U.S. 476, 496; cf. my opinion in *Manual Enterprises, Inc. v. Day* 370 U.S. 478. While, as correctly said in Mr. Justice Brennan's opinion, the Court has not accepted that view, I nonetheless feel free to adhere to it in this still developing aspect of constitutional law.

"The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws (cf. my dissenting opinion in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 76-77) and protection of genuine rights of free expression . . . . As to the states, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.

"On this basis, having viewed the motion picture in question, I think the State acted within permissible limits in condemning the film and would affirm the judgment of the Ohio Supreme Court." (pp. 200-203).

Decided the same day as *Jacobellis* was *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). In reviewing the Kansas case, the Supreme Court did not express an opinion as to whether the books in question were obscene but reversed the state court on the ground that the procedures followed by the State in seizing the books were constitutionally insufficient (at p. 208).

Under a Kansas statute authorizing the seizure of allegedly obscene books before an adversary determination of their obscenity and, after that determination, their destruction, the Attorney General of Kansas obtained a court order directing the sheriff to seize and impound, pending hearing, paperback novels. After hearing, the court issued a second order directing the sheriff to destroy the books. The Kansas Supreme Court held that the procedures met constitutional requirements and affirmed the court's order.

The Supreme Court reversed, holding that the procedures followed were constitutionally insufficient because they did not adequately safeguard against suppression of non-obscene books, but expressing no opinion on whether the Kansas court erred in holding that the novels involved were obscene (at p. 208).

Justice Brennan, delivering the opinion of the Court in which he was joined by Chief Justice Warren and Justices White and Goldberg, held that, "it is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles, and since P-K was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient. . . . State regulation of obscenity must conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 66; the Constitution requires a procedure 'designed to focus searchingly on the question of obscenity.' *Marcus*, p. 732. We therefore conclude that in not first affording P-K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient. . . ." (pp. 210-211).

Mr. Justice Black, with whom Mr. Justice Douglas joined, concurred in the judgment of reversal but did not find it necessary to consider the procedural questions. These two Justices were of the belief that the Kansas statute ordering the burning of the books was in violation of the First Amendment, made applicable to the States by the Fourteenth Amendment, against "abridging the freedom of speech, or of the press." (at pp. 213-214).

Mr. Justice Stewart concurred with the judgment but thought that the procedures followed would be constitutionally valid, at least with regard to the material which the judge "scrutinized." However, he also thought that the material involved was not "hard-core pornography," and thus it could not be constitutionally suppressed by any procedure the State adopted. (at pp. 214-5).

Mr. Justices Harlan and Clark dissented. They felt that the books in question had "been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner" and that the "State's criteria for judging their obscenity are rational" (p. 215).

The dissenters thought that the present case is governed by the principles serving to sustain the New York procedure involved in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 rather than those which condemned that followed by Missouri in *Marcus v. Search Warrant*, 367 U.S. 717. The operation of the Kansas statute

resembled the operation of a penal rather than a licensing law, since books are not as a matter of course subjected to prepublication state sanctioning but are reviewed only when the state has reason to believe licensing laws are: "There are built-in elements in any system of licensing or censorship, the tendency of which is to encourage restrictions of expression. The State is not compelled to make an initial decision to pursue a course of action, since the original burden is on the citizen to bring a piece of writing before it. The censor is a part of the executive structure, and there is at least some danger that he will develop an institutional bias in favor of censorship because of his particular responsibility. In a criminal proceeding, however, the burden is on the State to act, the decision-maker belongs to an independent branch of the government, and neither a judge nor a juror has any personal interest in active censorship. The Kansas practice is thus analogous to a system of penal sanctions rather than censorship in all three of these respects.

"One danger of a censorship system is that the public may never be aware of what an administrative agent refuses to permit to be published or distributed. A penal statute assures both that some overt thing has been done by the accused and that the penalty is imposed for an activity that is not concealed from the public . . ." (p. 223).

The dissenters agreed that "Any system of censorship, injunction or seizure may of course to some extent serve to trammel, by delaying distribution or otherwise, freedom of expression" but go on to say that "the delay argument seems artificial in the context of this case and in the area of obscenity generally. Both the incentive for officials to promote delay and the adverse consequences of delay are considerably less in this area than in the field of political and social expression. If controversial political writings attack those in power, government officials may benefit from suppression although society may suffer. In the area of obscenity, there is less chance that decision-makers will have interests which may affect their estimate of what is constitutionally protected and what is not. It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the topic of sex is of constant but rarely particularly topical interest. Distribution of "Ulysses" may be thought by some to be more important for society than distribution of the daily newspaper, but a one- or two-month delay in circulation of the former would be a small significance whereas such a delay might be effective suppression of the latter . . ." (pp. 224-225).

On the same day as the decisions in *Jacobellis* and *A Quantity of Books* were handed down, the Supreme Court handed down two *per curiam* opinions, one *Tralins v. Gerstein*, 378 U.S. 576 (1964) reversing 151 So. 2d 19, the other, *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964) reversing 156 SO. 2d 537.

In the *Tralins* case, the Florida District Court of Appeals had held that the dominant theme of the book "Pleasure Was My Business", which contains numerous descriptions of abnormal sex acts and indecent conversations supposed to have taken place in a Florida brothel, taken as a whole, exceeds the limits of tolerance imposed by current community standards of the average man respecting freedom of expression in matters concerning sex relations and appealed to prurient interest within the purview of the Florida obscenity statute.

In the *Grove Press* case, the Florida District Court of Appeals had held that the finding of the jury that Henry Miller's "Tropic of Cancer" is under the Florida statute banning obscene books was binding on the state appellate court.

The Court decided both the *Tralins* and *Grove Press* cases in *per curiam* opinions which, brief as they are, nevertheless reflect the difficulty of the various members of the Court in reaching complete accord on how obscenity problems are to be dealt with. In both cases, Justices Black and Douglas said they would reverse for the reasons stated in the opinion of Justice Black in *Jacobellis v. Ohio*, at page 196.

Justices Brennan and Goldberg said they would reverse for the reasons stated in the opinion of Justice Brennan in *Jacobellis*, at page 184. Justice Stewart would reverse for the reasons stated in his opinion in *Jacobellis*, at page 197. The Chief Justice, and Justices Clark, Harlan and White said they thought that certiorari should have been denied.

*Freedman v. Maryland*, 380 U.S. 51 (March 1, 1965) involved an appeal by one who had been convicted of exhibiting a motion picture without submitting it to the Maryland State Board of Censors for prior approval.

The Supreme Court in striking down the Maryland statute, Justice Brennan delivering the opinion for the Court, held that while the requirement of prior submission of a motion picture to a censorship board is not necessarily unconstitutional, citing *Times Film Corp. v. Chicago*, 365 U.S. 43, the Maryland procedure was unconstitutional chiefly because it failed to guarantee prompt judicial review of the censor's actions. To meet constitutional standards, the Court held, a film censorship law must place on the censor, not on the exhibitor, the burden of instituting legal proceedings, must require that any restraint on exhibition imposed prior to judicial proceedings be brief and must assure prompt court determination of whether the film is obscene.

Justices Douglas and Black concurred in a separate opinion, saying that "any form of censorship—no matter how speedy or prolonged it may be—is permissible. . . . I would not admit the censor even for the limited role accorded him in *Kingsley Brooks, Inc. v. Brown*, 354 U.S. 436 . . . Any authority to obtain temporary injunction gives the State 'the paralyzing power of a censor' . . . The regime of *Kingsley Books*' substitutes punishment by contempt for punishment by trial . . . I would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment" (380 U.S. 62).

Two weeks after the Maryland decision, the Supreme Court in *Trans-Lux Distributing Corp. v. Board of Regents*, 380 U.S. 259 (March 15, 1965), held, in effect, in a *per curiam* decision, that New York State's movie censorship procedures were also unconstitutional.

The New York State censorship authorities had refused to license for exhibition a Danish movie, "A Stranger Knocks," unless two scenes depicting sexual intercourse were deleted, on the ground that these scenes were obscene.

Again, the Court did not rule that movie censorship statutes, which require pre-exhibition licensing, are in themselves unconstitutional; only that such statutes must be surrounded by procedural safeguards.

In a brief order, the Supreme Court did not actually say that the New York procedure was unconstitutional, but it cited its Maryland decision in the *Freedman* case, *supra*. It did not rule whether the film was obscene.

Under the New York procedure which the Court found objectionable, the administrative ruling of the censor was final unless the person who wanted to show the film appealed it to the state courts. Thus, the burden of showing that the film should not be shown did not rest with the censorship authority. Further, its decision was final unless appealed.

#### PERIOD FROM 1966 TO 1968

In the introduction of this memorandum, reference was made to a major change in the attitude of the Court at least twice in the period under consideration.

The *Roth* case in 1957 marked the first major change. The year 1966 marked the beginning of the second major change in the attitude of the Court. For almost ten years after the *Roth* case was decided, most of the emphasis of the Court was on defining "obscenity" and on insisting that certain procedural safeguards be met in the enforcement of obscenity laws.

With the decisions of 1966, the Court further clarified the *Roth* test and also appears to have departed to a limited extent from its *Roth* approach. Prior to 1966, obscenity was to be determined by applying the criteria set forth in the *Roth* test as amplified by *Jacobellis* and later decisions. Under this approach the Court considered the materials as sufficient in themselves for the determination of the question of their obscenity. With the *Ginzburg* decision of 1966, the Court appears to have shifted its emphasis somewhat in applying both the *Roth* test and an additional test, namely, a consideration of the context in which a work is being distributed. The result of the new combined test appears to be that a given work may be held to be legally obscene when distributed in certain circumstances but not obscene when distributed in other circumstances.

With respect to clarifying the *Roth* test, one of the 1966 decisions made it clear that the Court felt that the three elements of the *Roth* test must coalesce, *A Book Named "John Cleland's Memoirs Of A Woman Of Pleasure"* v. *Att. Gen. of Mass.* 383 U.S. 413 (March 21, 1966).

This case involved an appeal from a decision of the Massachusetts court that a book commonly known as "Fanny Hill" is obscene. The book itself was on trial, not the publisher or distributor. The proceeding was a civil equity suit brought by the Attorney General of Massachusetts pursuant to General Laws of Massa-

chusetts, Chapter 272, §§ 28C-28H to have the book declared obscene. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Atty. Gen. of Mass.* The book purports to be the story of a young girl who becomes a prostitute.

As authorized by § 28D of the Massachusetts statute, G. P. Putnam's Sons, the publisher, intervened in the proceedings in behalf of the book, but did not claim the right provided by that section to have the issue of obscenity tried by a jury.

At the hearing, which was conducted in accordance with the usual course of proceedings in equity, the court received the book in evidence and also heard the testimony of experts who were, for the most part, professors of literature in various schools. The court also accepted other evidence such as book reviews, to assess the literary, cultural, or educational character of the book. This constituted the entire evidence; neither side offered any evidence as to the manner and form of its publication, advertisement, and distribution.

The trial judge entered a decree which adjudged *Memoirs* obscene and declared that the book is not entitled to the protection of the First or Fourteenth Amendments to the U.S. Constitution.

The United States Supreme Court, in reversing the holding of obscenity by the Massachusetts court, reviewed the *Roth* test and held that under the *Roth* test, as elaborated in subsequent cases, "three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The Massachusetts court had held that as to the "social value" test, a book which appeals to prurient interest and is patently offensive does not have to be "unqualifiedly worthless before it can be deemed obscene." 206 N.E. 2d at 406. The United States Supreme Court held that in this interpretation the Massachusetts court erred, that the correct test is that a book cannot be proscribed unless it is found to be utterly without redeeming social value. "Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard."

However, after having said this, the Court went on to hold that "It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. On the premise which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but rather that, as we elaborate in *Ginzburg v. United States*, *post*, pp. 7-10, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value. In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract and the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale, and publicity. All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panders because it so pervasively treats sexual matters cannot alter the fact—given the view of the Massachusetts court attributing to *Memoirs* a modicum of literary and historical value—that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value."

Justices Black and Stewart concurred in the result but for other reasons and Justices Clark, Harlan and White dissented.

Justice Clark expressed the view that while evidence of social importance is relevant to the determination of the ultimate question of obscenity, it does not constitute a separate and distinct constitutional test. Such evidence must be considered together with evidence that the material in question appeals to prurient interest and is patently offensive.

Justice Harlan dissented, finding the majority opinion inconsistent in that while it denied that social value may be weighed against or canceled by prurience or offensiveness, by its unwillingness to give a conclusive decision as to the obscenity of *Fanny Hill* it appeared to believe that the social value of a book may be negated if proof of pandering is present.

Justice White dissented saying that if "social importance" is to be used as in the prevailing opinion, obscene material would be immune if it has any literary style, or if it contains any historical references or language of a bygone day. Justice White said that he thought *Roth* counseled a contrary result, that is, that isolated bits of the work which might have some social value would not save a work from being characterized as obscene, that the character of a work is fixed by its predominant theme and is not altered by the presence of minor themes of a different nature. Further, that "social importance" should not be an independent test of obscenity but should be relevant only to determining the predominant prurient interest of the material.

Another clarification of the *Roth* test was offered by the Court in its decision in *Mishkin v. New York*, 383 U.S. 502 (March 21, 1966). This case involved an appeal from a conviction under the New York criminal obscenity law.

The United States Supreme Court, in affirming the sentence, held that the appellant was not prosecuted for anything he said or believed, but for what he did, for his dominant role in several enterprises engaging in producing and selling allegedly obscene books. The books which were involved portrayed sexuality in many guises. Some depicted relatively normal heterosexual relations, but more depicted such deviations as sadomasochism, fetishism, and homosexuality. Many had covers with drawings of scantily clad women being whipped, beaten, tortured, or abused. Most were photo-offsets of typewritten books written and illustrated by authors and artists according to detailed instructions given by the appellant. Such instructions included directions that the books be "full of sex scenes and lesbian scenes. . . . [T]he sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men. . . . [scenes which dealt] very graphically with . . . the darkening of the flesh under flagellation. . . ."

The books were printed with fictitious names for the publishers.

Appellant attacked §1141 of the New York Penal Law as invalid on its face, contending that it exceeds the First Amendment limitations by proscribing publications that are merely sadistic or masochistic, that the terms "sadistic" and "masochistic" are impermissibly vague and that the term "obscene" is also impermissibly vague.

The U.S. Supreme Court found that the New York courts have held that the terms "sadistic" and "masochistic" as well as the other objectives used in §1141 to describe proscribed books are synonymous with "obscene."

The Supreme Court further held that since the definition of "obscene" as used in §1141 delimits a narrower class of conduct than that delimited under the *Roth* definition and since it provides reasonably ascertainable standards of guilt, a challenge on this basis will not be sustained.

Appellant also objected that §1141 is invalid as applied (1) because the books he was convicted of publishing, hiring others to prepare, and possessing for sale were not obscene, and (2) because proof of scienter was inadequate.

The Court held that as to the nature of the material, state courts are free to adopt other definitions of obscenity only to the extent that those adopted stay within the bounds set by the constitutional criteria of the *Roth* definition. The New York courts have interpreted "obscenity" in §1141 to cover only so-called "hard-core pornography"; thus constitutional criteria are satisfied.

Appellant contended that the material, since it depicts various deviate sexual practices, does not satisfy the prurient appeal requirement because it does not appeal to a prurient interest of the "average person" in sex. The Court rejected this argument as "being founded on an unrealistic interpretation of the prurient-appeal requirement."

"Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, *Regina v. Hicklin*, [1868] L.R. 3 Q.B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-

appeal requirement to social realities by permitting the appeal of this type of material to be asserted in terms of the sexual interests of its intended and probable recipient group and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most susceptible person facet of the *Hicklin* test.

"No substantial claim is made that the books depicting sexually deviate practices are devoid of prurient appeal to sexually deviant groups . . ." The Court found the proof to the contrary to be compelling.

On the point of scienter, §1141 indicates that only those who are aware of the character of the material should be punished. The New York definition of scienter required by §1141 amply serves those ends, and therefore fully meets the demands of the Constitution.

Appellant's claim that all but one of the books were improperly admitted in evidence because they were fruits of illegal searches and seizures was not ruled on by the Court.

In the third case, *Ginzburg v. United States*, 393 U.S. 463 (March 21, 1966) rehearing denied 384 U.S. 934, the Court appears to have departed somewhat from its *Roth* approach in that it injected an additional element to the test, namely, a consideration of the circumstances in which the work is distributed. In the *Ginzburg* case the "pandering" of the work by the appellant was considered significant in finding that a borderline work was "obscene".

*Ginzburg* had been convicted by a federal judge, sitting without a jury, of violating the Federal obscenity statute, 18 U.S.C. §1461, making obscene matter nonmailable. Conviction for violating this section carries a penalty of a fine of not more than \$5000 or imprisonment of not more than five years, or both, for the first such offense.

The Court regarded as the only serious question before it whether the standards first enunciated in *Roth v. United States*, 354 U.S. 476, for determining whether the material was obscene were correctly applied by the lower courts.

The Court noted that "the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene." On this point, Justice Brennan, writing for the Court, said:

In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As in *Mishkin v. New York*, *post*, p. 502, and as did the courts below, 224 F. Supp., at 134, 338 F. 2d, at 14-15, we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal. The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute." (383 U.S. at pp. 465-6, footnote omitted).

The three publications in question were *Eros*, a hardcover magazine, *Liaison*, a bi-weekly newsletter, and the *Housewife's Handbook on Selective Promiscuity*, a short book. The issue of *Eros* specified in the indictment contains fifteen articles and photo-essays on the subject of love, sex, and sexual relations.

The specified issue of *Liaison* contains a prefatory "Letter from the Editor" announcing its dedication to "keeping sex an art and preventing it from becoming a science." The remainder of the issue consists of digests of two articles concerning sex and sexual relations which had earlier appeared in professional journals and an interview with a psychotherapist who favors the broadest license in sexual relationships. According to defendant's own expert it is entirely without literary merit.

The *Handbook* purports to be a sexual autobiography detailing with complete candor the author's sexual experiences from age 3 to 36. The text includes the author's views on sex, education of children, laws regulating private consensual adult sexual practices and the equality of women in sexual relationships. It was claimed at the trial that women would find the book valuable as a marriage manual or as an aid to the sex education of their children.

In addition to testimony as to the merit of the material in these three works, there was also "abundant evidence" to show that each of the accused publications was sold in the business of pandering which the Court defines as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." This evidence included testimony showing that the publisher sought to mail the works from such post offices as "Intercourse and Blue Ball, Pennsylvania," combined with the fact that the advertising stressed the sexual candor of the publications and openly boasted that the publishers would take full advantage of what they regarded as unrestricted license allowed by law in the expression of sex and sexual matters. The advertising for the *Handbook* consisted almost entirely of a reproduction of the introduction of the book written by a Dr. Ellis who, although he alludes to the book's informational value and its putative therapeutic usefulness, stressed the book's sexual imagery. Moreover, the solicitation was indiscriminate, not limited to those such as physicians or psychiatrists who might independently discern the book's therapeutic worth.

In addition, inserted in each advertisement was a slip labeled "Guarantee" and reading, "Documentary Books, Inc. unconditionally guarantees full refund of the price of 'The Housewife's Handbook on Selective Promiscuity' if the book fails to reach you because of U.S. Post Office censorship interference." Similar slips appeared in the advertising for "Eros" and "Liaison" and the Supreme Court found that this "highlighted the gloss petitioners put on the publications, eliminating any doubt what the purchaser was being asked to buy."

Evidence of this type was, in the Court's view, "relevant in determining the ultimate question of 'obscenity.'" The Court held that the "deliberate representation of petitioners' publications was erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." The Court observed that the "brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material." The Court went on to hold that "the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the market-place or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." (383 U.S. at pp. 470-1)

As to one of the works, the "Handbook," a number of witnesses testified that the work had some value; however, the Court held that this was not sufficient to avoid a finding that it was obscene because the publishers did not sell it to a limited audience or upon a claim of its supposed therapeutic or educational value but rather the publishers deliberately emphasized the sexually provocative aspects of the work.

The Court in evaluating its own decision said that: "All that will have been determined is that questionable publications are obscene in a context which brands them as obscene as that term is defined in *Roth*—a use inconsistent with any claim to the shelter of the First Amendment. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a difficult setting . . ." (383 U.S. at p. 475, footnote omitted).

The Court stressed that its "analysis simply elaborates the test by which the obscenity *vel non* of the material must be judged. Where an exploitation of the interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation." (383 U.S. at pp. 475-6).

Justice Black dissented not only on the ground that he does not believe that the Federal Government has any power to put any burden on free speech but also on the ground that the Court has in effect rewritten the Federal obscenity statute and imposed on Ginzburg standards and criteria that are not in the law, and this violates due process and also that the new guidelines are vague and meaningless. (383 U.S. at p. 477).

Justice Douglas dissented in a separate opinion. He does not think that the manner in which a work is advertised adds or detracts from the legality of the

book. He also feels that the books in question did not meet the *Roth* test in at least one respect, that is, that they are not "utterly without redeeming social importance."

Justice Harlan dissented in a separate opinion on the ground that the statute involved, 18 U.S.C. § 1461, prohibits sending through the mails only hardcore pornography and the works in question are not that.

Justice Stewart dissented in a separate opinion on the ground that Ginzburg was not charged with "commercial exploitation" or "pandering" or of "titillation" and to send him to prison for these acts is to deny him due process of law. The Court lacks the power to deny him the protection of the First Amendment because it disapproves of his sordid business, the Justice said.

On October 25, 1967, the United States Supreme Court considered the appeals in four obscenity cases and reversed the lower courts convictions in three of the four cases.

In *Connor v. City of Hammond*, 389 U.S. 48 (Oct. 23, 1967) the United States Supreme Court reversed, with one Justice dissenting, the obscenity conviction of a Louisiana news vendor who was convicted of selling "girlie" magazines and nudist publications.

*Potomac News Co. v. United States*, 289 U.S. 47 (Oct. 23, 1967) reversing 373 F. 2d 635 (4th Cir.) and *Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50 (Oct. 23, 1967) reversing 373 F. 2d 633 (4th Cir.) involved related appeals. In these two cases the Supreme Court reversed lower court rulings that had barred from the country as obscene and marked for destruction, a number of Danish nudist magazines that were reported intended for the male homosexual market. These included 19,500 copies of a magazine called "Hellenic Sun No. 11," 1,000 copies of "International Nudist Sun No. 16" and 3,000 copies of "Review International No. 6." Also banned were a few magazines featuring pictures of nude females.

In the fourth decision, *Fort v. City of Miami*, 389 U.S. 918 (Oct. 23, 1967) certiorari was denied and the State court decision was allowed to stand, with three Justices dissenting, of the conviction of a Miami sculptor who displayed in his yard lifesized statues of males and females in erotic embrace.

In disposing of these four appeals, the Justices gave no explanation other than to cite *Redrup v. New York*, 386 U.S. 767 which had been decided on May 8, 1967.

The *Redrup* case, supra, involved the combined appeals from three state court decisions, two of which involved violation of Kentucky and New York law respectively for selling allegedly obscene publications, and the third, an Arkansas civil proceeding in which certain magazines had been found obscene and their distribution enjoined. In the *Redrup* case, in a brief per curiam opinion, the Supreme Court reversed the state court convictions and held that the distribution of the publications in question was protected by the First and Fourteenth Amendments from governmental suppression. The reasoning of the majority of the Court in coming to this conclusion is summarized in the following paragraph:

"In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Massachusetts*, 321 U.S. 158; cf. *Butler v. Michigan*, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. Alexandria*, 341 U.S. 622; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451. And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463." (at p. 769).

Presumably, the Supreme Court in applying the *Redrup* reasoning to three of the four recent appeals found that as to these cases censorship would not be upheld because the statutes involved did not reflect a specific and limited concern for juveniles, nor was there an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, nor was there evidence of "pandering."

The petition for review by the Supreme Court was denied in the fourth case apparently because the Court found that there was an obtrusive publication of lewd material which amounted to an assault upon individual privacy.

A week later, the Supreme Court, on November 6, 1967, summarily threw out the obscenity conviction of a Redwood City, California bookstore owner who had been found guilty of selling a dozen photographs of semi-nude women. *Chance v. California*, 389 U.S. 89 (Nov. 6, 1967).

On January 29, 1968, in *Teitel Film Corporation v. Cusack*, Dckt. No. 787, the U.S. Supreme Court reversed the Supreme Court of Illinois decision reported at

38 Ill. 2d 53, 230 N. E. 2d 241 and held the Chicago motion picture licensing ordinance invalid.

In a per curiam opinion, the U.S. Supreme Court held that the Chicago ordinance violates constitutional standards in two respects: (1) the 50 to 75 days provided by the ordinance to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure "that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film," (2) the absence of any provision for a prompt judicial decision by the trial court violates the standard that "the procedure must also assure a prompt final judicial decision."

On January 16, 1968, the United States Supreme Court heard arguments in cases which involved the legality of two state statutes which were expressly designed to protect children from the effects of obscenity. The decisions have not yet been handed down in these two cases. Briefly, *Interstate Circuit Inc. v. Dallas and United States; United Artists Corp. v. Dallas*, Dckt. Nos 56 & 64, appeal from 402 S. W. 2d 770 (Tex. Civ. App. 5th Dist.) involved a Dallas, Texas ordinance that gives a nine member board of censors the authority to designate certain films not suitable for young persons under 16. Movie houses that show these films can be fined \$200 if they admit "young persons" unless they are accompanied by a parent or husband or wife. The film the Board found unsuitable for young people was "Viva Maria."

*Ginsberg v. New York*, Dckt. No. 47 involves an appeal from the New York Supreme Court, Appellate Term, 1st Dept. considering a New York State statute that makes it a crime to sell any material to children under 17 years of age that presents a salacious view of nudity, sexual conduct, or sado-masochistic abuse. In this case, the owner of a luncheonette and newstand was given a suspended sentence after he sold four "girlie" magazines to a 16 year old boy.

#### CONCLUSION

Summarizing the Supreme Court holdings of this period, from 1954 to 1957 there was little consideration given to the problem of obscenity by the Supreme Court.

In 1957, the *Roth* decision was handed down in which the Court accepted the proposition that obscenity is not protected by the First Amendment and laid down a test for determining what is legally "obscene".

In the years 1957 to 1966 most of the Court's attention was directed to applying the *Roth* test to given situations and to requiring procedural standards which would insure due process.

In 1966, the Court amplified its *Roth* test by saying that all three elements of the *Roth* test must coalesce in order for a work to be considered to be beyond the protection of the First Amendment. In other words, it must be established that in any given work (1) the dominant theme of the material taken as a whole must appeal to a prurient interest in sex; (2) the material must be patently offensive because it affronts contemporary community standards relating to the description of sexual matters and (3) the material must be utterly without redeeming social value. If any one of these elements is lacking, the material is protected by the Constitution and cannot be censored.

In 1966, the Court also clarified the *Roth* test by holding that to satisfy the prurient appeal requirement of the *Roth* test it is not necessary to establish that the material has prurient appeal for the normal person but the test is satisfied if it is established that the material has prurient appeal for the group for which it is intended. Here the Court appears to have departed from its earlier position as expressed in the *Manual* case.

The 1966 *Ginzburg* decision is considered significant because it establishes the proposition that an otherwise borderline work may be held to be obscene if it can be demonstrated that the work was exploited solely for its sordidness; it was this "pandering element" that the Court found to be objectionable.

In the several obscenity convictions appealed to the Court since the 1966 decisions, the Court has sustained the conviction in only one case, *Fort v. City of Miami*. Here certiorari was denied and no opinion was written. Possibly the conviction was allowed to stand because the work there objected to was displayed in the front yard and people who objected to it did not have an option of viewing it or not. In the other works, where the Court reversed the convictions people could buy them or not; they were not forced on those who objected to them.

## TABLE OF CASES ALPHABETICALLY

- Adams Newark Theater Co. v. City of Newark*, 354 U.S. 931 (1957).  
*Alberts v. California*—See *Roth v. United States*, 354 U.S. 476 (1957).  
*Arnebergh v. Zeitlen*, 375 U.S. 957 (1963).  
*Bantam Books v. Sullivan*, 372 U.S. 58 (1963).  
*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413 (1966).  
*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).  
*Butler v. Michigan*, 352 U.S. 380 (1957).  
*Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50 (1967).  
*Chance v. California*, 389 U.S. 89 (1967).  
*Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954).  
*Connor v. City of Hammond*, 389 U.S. 48 (1967).  
*Fort v. City of Miami*, 389 U.S. 918 (1967).  
*Freedman v. Maryland*, 380 U.S. 51 (1965).  
*Ginzburg v. United States*, 383 U.S. 463 (1966), rehearing denied 384 U.S. 934.  
*Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964).  
*Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955).  
*Jacobellis v. Ohio*, 378 U.S. 184 (1964).  
*Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).  
*Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959).  
*Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).  
*Marcus v. Search Warrant*, 367 U.S. 717 (1961).  
*Mishkin v. New York*, 383 U.S. 502 (1966).  
*Mounce v. United States*, 355 U.S. 180 (1957).  
*One, Inc. v. Olesen*, 355 U.S. 371 (1958).  
*Potomac News Co. v. United States*, 389 U.S. 47 (1967).  
*A Quantity of Books v. Kansas*, 378 U.S. 205 (1964).  
*Redrup v. New York*, 386 U.S. 767 (1967).  
*Roth v. United States*, 354 U.S. 476 (1957).  
*Smith v. California*, 361 U.S. 147 (1959).  
*Smith v. California*, 375 U.S. 259 (1963).  
*Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958).  
*Superior Films, Inc. v. Dept. of Education and Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954).  
*Teitel Film Corporation v. Cusack*, — U.S. — (1968).  
*Times Film Corp. v. Chicago*, 355 U.S. 35 (1957).  
*Times Film Corp. v. Chicago*, 365 U.S. 43 (1961), rehearing denied 365 U.S. 856.  
*Tralins v. Gerstein*, 378 U.S. 576 (1964).  
*Trans Lux Distributing Corp. v. Regents*, 380 U.S. 259 (1965).

## TABLE OF CASES CHRONOLOGICALLY

1952

- Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

1954

- Superior Films, Inc. v. Department of Education and Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (Jan. 18, 1954).

1955

- Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (Oct. 24, 1955).

1957

- Butler v. Michigan*, 352 U.S. 380 (Feb. 25, 1957).  
*Adams Newark Theater Co. v. City of Newark*, 354 U.S. 931 (June 21, 1957).  
*Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (June 24, 1957).  
*Roth v. United States* (together with *Alberts v. California*), 354 U.S. 476 (June 24, 1957).  
*Times Film Corp. v. Chicago*, 355 U.S. 35 (Nov. 12, 1957).  
*Mounce v. United States*, 355 U.S. 180 (Dec. 9, 1957).

1958

*One, Inc. v. Olesen*, 355 U.S. 371 (Jan. 13, 1958).  
*Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (Jan 13, 1958).

1959

*Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (June 29, 1959).  
*Smith v. California*, 361 U.S. 147 (Dec. 14, 1959), rehearing denied 361 U.S. 950.

1961

*Times Film Corp. v. Chicago*, 365 U.S. 43 (Jan. 23, 1961), rehearing denied 365 U.S. 856 (1961).  
*Marcus v. Search Warrant*, 367 U.S. 717 (June 19, 1961).

1962

*Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (June 25, 1962).

1963

*Bantam Books v. Sullivan*, 372 U.S. 58 (Feb. 18, 1963).  
*Smith v. California*, 375 U.S. 259 (Dec. 16, 1963).  
*Arnebergh v. Zeittlen*, 375 U.S. 957 (Dec. 16, 1963).

1964

*Jacobellis v. Ohio*, 378 U.S. 184 (June 22, 1964).  
*A Quantity of Books v. Kansas*, 378 U.S. 205 (June 22, 1964).  
*Tralins v. Gerstein*, 378 U.S. 576 (June 22, 1964).  
*Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (June 22, 1964).

1965

*Freedman v. Maryland*, 380 U.S. 51 (March 1, 1965).  
*Trans Lux Distributing Corp. v. Regents*, 380 U.S. 259 (March 15, 1965).

1966

*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413 (March 21, 1966).  
*Ginzburg v. United States*, 383 U.S. 463 (March 21, 1966), rehearing denied 384 U.S. 934.  
*Mishkin v. New York*, 383 U.S. 502 (March 21, 1966).

1967

*Redrup v. New York*, 386 U.S. 767 (May 8, 1967).  
*Connor v. City of Hammond*, 389 U.S. 48 (Oct. 23, 1967).  
*Potomac News Co. v. United States*, 389 U.S. 47 (Oct. 23, 1967).  
*Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50 (Oct. 23, 1967).  
*Fort v. City of Miami*, 389 U.S. 918 (Oct. 23, 1967).  
*Chance v. California*, 389 U.S. 89 (Nov. 6, 1967).

1968

*Teitel Film Corporation v. Cusack*, — U.S. — (January 29, 1968).

THE LIBRARY OF CONGRESS,  
 LEGISLATIVE REFERENCE SERVICE,  
 Washington, D.C.

APRIL 22, 1968 SUPREME COURT DECISIONS ON OBSCENITY

*Ginsberg v. New York* and *Interstate Circuit, Inc. v. Dallas*

Two decisions were handed down by the United States Supreme Court on April 22, 1968 which considered the question of the constitutionality of state legisla-

tion designed to protect young people from the bad effects which might result from their being exposed to obscene material.

One decision, *Ginsberg v. New York*, considered the question of the constitutionality, on its face, of a New York criminal obscenity statute, New York Penal Law §484-h, which prohibits the sale to minors under 17 years of age of material defined to be obscene to them even though the same material might not be obscene to adults.

In the case presented to the Court, a 16 year old boy purchased two "girlie" magazines at a luncheonette. The owners of the luncheonette were found guilty of violating the New York law.

The appellant's attack upon the New York law was not that New York was without power to draw the line at age 17, but that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor.

In defining the question before it, the United States Supreme Court said:

"We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. *In re Gault*, 387 U.S. 1, 13. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as § 484-h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors." (footnote omitted).

The Supreme Court then held that:

". . . . We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather § 484-h simply adjusts the definition of obscenity '. . . to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest . . .' of such minors. *Mishkin v. New York*, 383 U.S. 502, 509; *Bookcase, Inc. v. Broderick*, *supra*, p. 75. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms '. . . the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ." *Prince v. Massachusetts*, 321 U.S. 158, 170. In *Prince* we sustained the conviction of the guardian of a nine-year-old girl, both members of the sect of Jehovah's Witnesses, for violating the Massachusetts Child Labor Law by permitting the girl to sell the sect's religious tracts on the streets of Boston.

"The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that parents' claims to authority in their own households to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, *supra*, at 166. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, subsection 1(f) (ii) of § 484-h expressly recognizes the parental role in assessing sex related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."

The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in *Bookcase, Inc. v. Broderick*, *supra*, at 75. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of *People v. Kahan*, 15 N. Y. 2d 311 which had struck down the first version of § 484-h on grounds of vagueness. In his concurring opinion, 15 N. Y. 2d, at 312, he said:

"While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reason-

able regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults." (Footnotes omitted.)

\* \* \* \* \*

Later in the opinion, the Court said that in sustaining the state's power to exclude material defined as obscene by § 484-h "requires only that we be able to say that it was not irrational for the legislature to find that exposure to the material condemned by the statute is harmful to minors" and this despite the fact that whether such material is, in fact, harmful to children or not has not been scientifically demonstrated.

The Court also rejected with little additional discussion arguments that the statute involved is void for vagueness and that the necessary "scienter" or knowledge of the character of the material involved was lacking.

Justice Stewart concurred in the result in a separate opinion in which he said: "I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.

"I cannot hold that this state law, on its face, violates the First and Fourteenth Amendments." (Footnotes omitted.)

Justice Douglas wrote a dissenting opinion concurred on by Justice Black. In part, the dissenters said that it is one thing for parents and religious organizations to attempt to restrict the content of the material their children read and see and quite a different matter for the State to become involved in this kind of censorship.

The second decision, *Interstate Circuit, Inc. v. Dallas*, involved an appeal from a classification of the Motion Picture Classification Board established under the provisions of a Dallas, Texas ordinance that the motion picture "Viva Maria" was "not suitable for young persons."

The Dallas ordinance, adopted in 1965, establishes a Motion Picture Classification Board to classify films as "suitable" or as "not suitable" for children under 16 years of age.

The ordinance requires the exhibitor, before any showing of the film to file with the Board a proposed classification of the film together with a summary of its plot. If the Board agrees with the classification, or takes no action on it within 5 days, the classification is approved. If it does not agree, the exhibitor must project the film before the Board. Within 2 days thereafter the Board must issue its classification order.

If the exhibitor disagrees with the Board's order, he must file within 2 days a notice of nonacceptance. The Board is then required to go to court within 3 days to seek a temporary injunction and a hearing is required to be set on that application within 5 days thereafter. If an injunction does not issue within 10 days of the exhibitor's notice of nonacceptance, the Board's classification order is suspended.

The ordinance does not define the scope of judicial review of the Board's determination but the Court of Civil Appeals held that a *de novo* review of the trial court was required. If an injunction is issued or refused and either party wants to appeal, both parties and the court must cooperate to advance the case on the appellate court's docket.

The ordinance is enforced by a misdemeanor penalty, which may be applied against the exhibitor, the youth who obtains admission by falsely giving his age, and any person who sells or gives one under 16 a ticket. In addition, repeated offenses may cause the exhibitor to lose his license to show films.

The following are the substantive standards which are set in the ordinance:

"Not suitable for young persons" means:

"(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

"(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or

encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

"A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons,' the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

The Court held the standards set forth above to be unconstitutionally vague. The Court summarized its earlier relevant holdings as follows:

"We agree. Motion pictures are, of course, protected by the First Amendment, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), and thus we start with the premise that "[p]recision of regulation must be the touchstone," *NAACP v. Button*, 371 U.S. 415, 438 (1963). And while it is true that this Court refused to strike down, against a broad and generalized attack, a prior restraint requirement that motion pictures be submitted to censors in advance of exhibition, *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), there has been no retreat in this area from rigorous insistence upon procedural safeguards and judicial superintendence of the censor's action. See *Freedman v. Maryland*, 380 U.S. 51 (1965).<sup>9</sup>

In *Winters v. New York*, 333 U.S. 507 (1948), this Court struck down as vague and indefinite a statutory standard interpreted by the state court to be "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes . . ." *Id.*, at 518. In *Joseph Burstyn, Inc. v. Wilson*, *supra*, the Court dealt with a film licensing standard of "sacrilegious," which was found to have such an all-inclusive definition as to result in "substantially unbridled censorship." 343 U.S., at 502. Following *Burstyn*, the Court held the following film licensing standards to be unconstitutionally vague: "of such character as to be prejudicial to the best interests of the people of said city," *Gelling v. Texas*, 343 U.S. 960 (1952); "moral, educational or amusing and harmless," *Superior Films, Inc. v. Department of Education*, 346 U.S. 587 (1954); "immoral," and "tend to corrupt morals," *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954); "approve such films . . . which are moral and proper; . . . disapprove such as are cruel, obscene, indecent, or immoral, or such as tend to debase or corrupt morals," *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955).<sup>10</sup>

The vice of vagueness the Supreme Court held, is particularly pronounced where expression is sought to be subject to licensing. The Court repeated what it said in the *Burstyn* case, *supra*, (at p. 502) that the Constitution does not require "absolute freedom to exhibit every motion picture of every kind at all times and places". On the other hand, "the restrictions imposed cannot be so vague as to set the censor . . . adrift upon a boundless sea . . ." *id.* at p. 504.

Nor, said the Supreme Court, is the problem cured in the Dallas case merely because *de novo* review was afforded. The Board gave no reason for its determination. The state courts upheld the Board's action on a finding that the picture portrayed "sexual promiscuity" and therefore was obscene to children. The United States Supreme Court observed that the term "sexual promiscuity" is not defined in the Dallas ordinance and is not sufficiently precise so that those who are governed by the law and those who administer the law understand its meaning and application, concluding:

<sup>9</sup> See also *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

<sup>10</sup> There are numerous state cases to the same effect. See, e.g., *Police Commissioner v. Siegel Enterprises Inc.*, 223 Md. 110, 162 A. 2d 727, cert. denied, 364 U.S. 909 (1960) ("violent bloodshed, lust or immorality or which, for a child below the age of eighteen are obscene, lewd, lascivious, filthy, indecent or disgusting and so presented as reasonably to tend to incite such a child to violence or depraved or immoral acts"); *People v. Kahan*, 15 N.Y. 2d 311, 206 N.E. 2d 333 (1965); *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 201 N.E. 2d 14 (1964) ("descriptions of illicit sex or sexual immorality"); *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348, 121 A. 2d 584 (1956) ("sacrilegious, obscene, indecent, or immoral, or such as tend . . . to debase as corrupt morals"). In *Paramount Film Distributing Corp. v. City of Chicago*, 172 F. Supp. 69 (D.C. N.D. Ill., 1959), it was alternatively held that the standard "tends toward creating a harmful impression on the minds of children" was indefinite; that provision had no further legislative or judicial definition and is therefore unlike the statute in *Ginsberg v. New York*, *ante*, 390 U.S., at —, where the phrase "harmful to minors" is specifically and narrowly defined in accordance with tests this Court has set forth for judging obscenity.

"The vices—the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailment of the effectiveness of judicial review—are the same.

"It is not our province to draft legislation. Suffice it to say that we have recognized that some believe "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression," *Joseph Burstyn, Inc. v. Wilson, supra*, at 502, and we have indicated more generally that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. *Ginsberg v. New York, ante*. Here we conclude only that "the absence of narrowly drawn, reasonable and definite standards for the officials to follow," *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), is fatal." (Footnotes omitted.)

Justice Douglas concurred in a separate opinion in which Justice Black joined.

Justice Harlan dissented in a separate opinion saying:

"These cases usher the Court into a new phase of the intractable obscenity problem: may a State prevent the dissemination of obscene or other obnoxious material to juveniles upon standards less stringent than those which would govern its distribution to adults?

In No. 47, the *Ginsberg* case, the Court upholds a New York statute applicable only to juveniles which, as construed by the state courts, in effect embodies in diluted form the "adult" obscenity standards established by *Roth v. United States*, 354 U.S. 476, and the prevailing opinion in *Memoirs v. Massachusetts*, 383 U.S. 413. In Nos. 56 and 64, the *Interstate Circuit* cases, the Court strikes down on the ground of vagueness a similar Dallas ordinance, not couched, however, entirely in obscenity terms. In none of these cases does the Court pass judgment on the particular material condemned by the state courts.

Justice Harlan referred to the lack of uniformity of opinion among members of the Court on the subject of obscenity, say that the "subject of obscenity has produced a variety of views among the members of the Court unmatched in any other area of constitutional adjudication", and that "the upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decision's since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." He expresses his own view to be:

"I believe that no improvement in this chaotic state of affairs is likely to come until it is realized that this whole problem is primarily one of state concern, and that the Constitution tolerates much wider authority and discretion in the States to control the dissemination of obscene materials than it does in the Federal Government. Reiterating the viewpoint that I have expressed in earlier opinions, I would limit federal control of obscene materials to those which all would recognize as what has been called 'hard core pornography,' and would withhold the federal judicial hand from interfering with state determinations except in instances where the state action clearly appears to be but the product of prudish over-zealousness. See *Roth v. United States, supra*, at 496; *Manual Enterprises v. Day*, 370 U.S. 478; *Jacobellis v. Ohio, supra*, at 203; *Memoirs v. Massachusetts, supra*, at 455. And in the juvenile field I think that the Constitution is still more tolerant of state policy and its applications. If current doctrinaire views as to the reach of the First Amendment into state affairs are thought to stand in the way of such a functional approach, I would revert to basic constitutional concepts that until recent times have been recognized and respected as the fundamental genius of our federal system, namely the acceptance of wide state autonomy in local affairs."

Justice Harlan expressed disagreement with the majority of the Court with respect to the vagueness of the standards set in the Dallas ordinance.

#### Conclusion

The major significance of these two decisions appears to be that the United States Supreme Court will not hold as unconstitutional on its face a state statute which applies different standards for judging whether material is legally obscene (and therefore subject to regulatory action by the State) depending on whether the persons to whom the material is disseminated are very young or are adults, provided the statute is drawn so as to meet constitutional requirements as to precision (and presumably other constitutional requirements of due process).

MAY, 1968.

ELIZABETH YADLOSKY,  
Legislative Attorney.

Senator COTTON. The second witness is Rev. S. Franklin Mack, associate director, office of communication, United Church of Christ.

**STATEMENT OF REV. S. FRANKLIN MACK, ASSOCIATE DIRECTOR,  
OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST, NEW  
YORK, N.Y.**

Dr. MACK. Thank you, Mr. Chairman.

My name is Silas Franklin Mack. I am an ordained Presbyterian minister, currently employed as an associate director in the Office of Communication of the United Church of Christ. I was at one time director of films for the Broadcasting and Film Commission of the National Council of Churches and for 9 years prior to 1963 its executive director. I appear here today to speak for the Office of Communication of the United Church of Christ and within the framework of policies adopted by the broadcasting and film commission, of whose board of managers I am a member.

I want to make clear at the outset that in supporting Senate Resolution 9 we are not taking a position either for or against assumption by the U.S. Government of a regulatory role in film classification. It is our understanding that this is not at issue in these hearings. Section 2 clearly states in its concluding sentence that :

No proposed legislation shall be referred to such committee and such committee shall not have the power to report by bill or otherwise have legislative jurisdiction.

In other words, the possibility or desirability of a regulatory role by the Government is a bridge to be crossed at a later date. What is urgently needed now, and what we strongly support, is an opening up of the subject of film classification for the information of the public by such a comprehensive exploration as is proposed in section 2 of Senate Resolution 9.

In fairness to responsible elements in the entertainment film industry, it must be recognized that public attitudes are continually changing and that many things that were at one time held to be objectionable are now considered permissible. Aside from the caveats of local review boards, the film industry has lacked a clear statement of publicly supported guidelines. At the same time it is a matter of record that the industry's attempts at self-regulation through the maintenance of its own code authority of the Motion Picture Producers' Association—now I believe called the Motion Picture Association—have been minimally effective. Member agencies found ways to evade it by the setting up of subsidiary corporations and by production outside the United States. There are many films made by foreign companies coming into this country for which some system of classification needs to be found.

Senator COTTON. I note that Senator Smith is still in the room, and I wonder if she wouldn't like to sit up here with her assistant.

Proceed.

Dr. MACK. A comprehensive study of the problem of film classification and of the various ways in which it is being met is long overdue. If this was an urgent matter 10 or 15 years ago it is much more urgent now by reason of the fact that films made for theater showing are now

being seen on television in an ever-increasing portion of the broadcast day.

While it is obviously not a part of this inquiry, it is possible that some films made for theatrical showing should be so classified as to discourage their being shown on television. One of the arguments often advanced for a relaxation of taboos in film-making has been that the person who buys a theater ticket should be considered capable of judging for himself. No such protection is afforded the television home viewer. All the more reason, therefore, why a viable system of film classification should be sought.

We ask to be recorded as strongly supporting Senate Resolution 9.

Senator CORRON. Dr. Mack, your observation in the next to the concluding paragraph of your statement interests me because you touch on the problem of approaching this matter in regard to television.

I understand the present bill very wisely doesn't go into this at all. It simply establishes a committee to study the whole situation.

In spite of that fact, while we are here and considering the subject, have you given thought as to how something could be done to at least restrain the type of entertainment that comes over television without running smack into the problem of censorship and the freedom of speech?

Dr. MACK. Let me say two or three things, Mr. Chairman. The first is, I think Senator Smith was quite right in saying this thing has to be tackled a step at a time.

Secondly, I have given a great deal of thought to it, probably without an outcome commensurate with the amount of thought given. I do feel this, sir, and that is if a system of film classification were to be devised, films that were classified as unsuitable for viewing by children might not be as readily accepted for television viewing, and the television stations and networks would have a viable reason for choosing whereas now it perhaps would be rather difficult for them to give the reason why: it would be a personal, individual reason why they refused one film and accepted another.

I think the public and the motion picture theater owners, exhibitors and the television people need some guidelines, some point of reference, something that they can use to support their point of view or as an excuse for doing what they perhaps ought to have the courage to do without such assistance.

We all need, I think, guidelines.

Senator CORRON. In a hearing of this committee some time ago, I think a couple of years ago, not devoted to this particular subject, but in which entertainment did come under discussion, a representative of one of the networks—and I don't recall which one it was at that time—was questioned at some length here in the committee about the problem of the type of violent films and westerns and shooting films and that sort of thing to which children were sometimes subjected in television. I believe that the gentleman stated as far as possible it was their policy to have such films appear at a late hour at night when presumably—and remembering my own youth I say presumably—small children were in bed. He added, however, they couldn't always control when the station might choose to display their production.

I expect the Supreme Court would say if the Congress attempted to tell the film industry that a certain type of classification of films

they couldn't show prior to 10 o'clock or 11 o'clock at night that that would be censorship. That was one suggestion that was offered.

I think it has been the attitude certainly of those who represent the networks, that they share the solicitude we have in this matter. But they do find it difficult to control.

Dr. Mack, I noticed in the moving picture section of last Sunday's Washington Post the films were classified for "Adults," "Mature Young People," "Children," "General Audience," or "No Rating."

Are you familiar with this classification system and who does it?

Dr. MACK. No; I don't know who does it.

Senator COTTON. You are familiar with it?

Dr. MACK. Yes. This is in general use, I think, in some parts of the country.

Senator COTTON. Do you consider it effective and it should become more widespread?

Dr. MACK. Mr. Chairman, it seems to me we need a comprehensive system of classification that is not just the whim or the inspiration of a particular theater owner in a particular community. The reason I say that is the office in which I work has been, I think, as active as any vis-a-vis television and the public's responsibility to the television station which is reciprocal to the television station's responsibility to the public, and we have been trying to educate community leadership to take a responsible attitude toward what is shown on the air, but there has to be some common ground on which it stands, not that it is my opinion or somebody else's opinion or the National Association for Better Radio and Television's or something of that sort.

It does not have the status that a study of this sort would have. I think we need some common ground of the highest sort.

Senator COTTON. I would like to know who is going to decide between mature young people and young people?

Dr. MACK. Thirteen-year-olds think they are mature.

Senator COTTON. Senator Smith, while the committee isn't well attended, it would be better attended if they were not in executive session. I think it is a rule of the chairman that only members of the committee ask questions. We do not have a surplus of committee members here. I think I can take the liberty of inviting you to ask the witness any questions you wish.

Senator SMITH. Thank you, Mr. Chairman, I think you have covered it very well, and I will leave it to you.

Senator COTTON. Thank you, Dr. Mack. We appreciate your appearance.

Mr. Lawrence Speiser, American Civil Liberties Union, is the next witness.

**STATEMENT OF LAWRENCE SPEISER, AMERICAN CIVIL LIBERTIES UNION, 1424 16TH STREET NW., WASHINGTON, D.C.**

Mr. SPEISER. Mr. Chairman, I am here as the director of the Washington, D.C., Office of the American Civil Liberties Union. The sole purpose of our organization is to protect those rights which are set forth in the Bill of Rights of the U.S. Constitution.

We are here to express our concern over Senate Resolution 9. In our view, the creation of a Committee on Film Classification will inevitably

have a substantial and undesirable limiting effect on the freedom of expression, protected by the first amendment.

I have submitted a statement for the record. In summary, our views are that attempts at classification have inevitably had deleterious effects on freedom of speech.

The mere fact that the resolution is expressed in terms of developing methods of limiting distribution I think is an indication that the proposed committee will attempt to limit access rather than study the problem as to whether classification is a viable system. It seems to me there is built into the resolution itself an inclination as to the way it should operate.

Senator COTTON. Mr. Speiser, as we often say, this committee is in charge of communications. We are supposed to legislate on television and radio and the telephone, and we have no communications in this room. I find it difficult hearing you. Would you speak closer into the public address system?

Mr. SPEISER. I would not want to repeal the first amendment which requires both speaking and hearing I think in order to be effective.

The Supreme Court recently has had the problem of film classification before it in the case of *Interstate Circuit v. Dallas* and it demonstrated that a system of classification doesn't supply easy answers. This is a continuing problem in our society, for those who are concerned, and perhaps justifiably concerned, about the wide range of materials that are available both in the photographic field and in the written field. It is a problem that society has had from the beginning.

The question arises as to whether the proposed solutions are not worse than the problem that exists. We have a commitment in our society as a free society, which is set forth in the first amendment of the Constitution, and the proposals of classification which have been made in the past have not been able to pass constitutional muster.

Now, there is a difference, it seems to us, in an attempt by private groups to set up film classification systems that do not have the weight of Government behind it. The private groups can make recommendations. They do not have any kind of power to enforce the classification system. For those parents who want guidance as to films their children should see, the utilization of private groups who have developed standards to which the parents voluntarily adhere is one method out of this dilemma. That method is not an all-embracing one, it is true, and here it seems to me is the problem.

For those who want complete protection, in a free society you can never have complete protection. I might draw an analogy, for example, to the recent events, the tragic event in which Senator Robert Kennedy was killed. We could perhaps attempt to create a society where there is complete protection for the individual against any kind of violent action, but if we put into effect all of the kinds of strictures which would be necessary, including, I suppose, not having candidates in close contact to the people, and controls over suspected individuals who might do something without probable cause, you would no longer have a free society.

I am not saying there are things that can't be done to try to minimize the problems, but I am suggesting that for those who are looking for complete solutions to problems that exist, by the very nature of a free society, I do not believe they are available.

Senator Smith, I know of your concern, and you have been one of those who has been active in this field, and it seems to me you have approached it with a tolerance and a compassion which is commendable, but we are, as an organization, opposed to infringements, direct or indirect, on the first amendment, and we feel that your proposal would have that ultimate effect.

As you can see, I have wandered from my statement, and I wish to submit my statement for the record and have it printed in full.

Senator CORRON. The committee appreciates your summarizing, and your full statement will appear in the record.

(Full statement of Mr. Larry Speiser, follows.)

STATEMENT OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

I am Lawrence Speiser, Director of the Washington, D.C. Office of the American Civil Liberties Union. As you know, the ACLU is a private organization which devotes its entire resources to the protection of those rights guaranteed by the Bill of Rights of the U.S. Constitution. I am here today to express our concern over S. Res. 9. In our view, the creation of a Committee on Film Classification will inevitably have a substantial and undesirable limiting effect on freedom of expression, protected by the First Amendment.

Any system of film classification would involve the evaluation of motion pictures on the basis of their moral and emotional content and their subsequent designation as suitable or not suitable for specific age groups. Inasmuch as morality does not admit of objective measurement, and all emotional reactions are highly individualized, such an evaluation can only be based on subjective, personal interpretation. Thus, despite the current popularity of classification as the universal panacea for the constitutional problems caused by censorship statutes, classification is, in essence, just another form of censorship. Those who classify, like those who censor, will be making an individual subjective judgment which will substantially limit the ideas to which a given audience may be exposed.

In the area of censorship, the Supreme Court has made clear that the First Amendment severely limits the kinds of restraints which may be placed on motion pictures. See, e.g. *Freedman v. Maryland*, 380 U.S. 51 (1965). Due process and the First Amendment require adherence to strict procedural safeguards and place the burden of proving obscenity or unacceptability on the would-be censor. Such safeguards are necessary to protect the free exchange of ideas and avoid the chilling effect on free expression of prior restraints in the form of censorship. It is largely because of the difficulties of designing an effective censorship system which would pass constitutional muster, that censorship proponents have turned to film classification as an easier means of accomplishing their ends.

Apparently the somewhat simplistic rationale is that since filmmakers are not entirely foreclosed from reaching audiences, and only youngsters are foreclosed from access to some films which they may wish to see, First Amendment problems are avoided. Needless to say, the First Amendment is not applicable only to those over 16 or 18 or 21 years of age, (See, *Interstate Circuit v. Dallas*, 36 L. W. 4309 (April 22, 1968)). Nor is it restricted to instances where expression is entirely suppressed. (*Bantam Books v. Sullivan*, 372 U.S. 58 (1963).)

The recent Supreme Court decision in the case of *Interstate Circuit v. Dallas*, *supra*, demonstrates that a system of classification does not afford any easy answers. There the court invalidated a Dallas ordinance under which motion pictures were classified as suitable or not suitable for young persons. Despite the attempt in the ordinance to set forth specific criteria by which to make that determination, the Court found the ordinance to be unconstitutionally vague. While it, of course, declined to say that no classification ordinance could meet the requirements of due process, an examination of the carefully written Dallas ordinance evidences the insurmountable difficulties, and the ultimate impossibility of designing such an ordinance.

The many constitutional difficulties encountered in an attempt to establish any system of film classification are, in our view, compounded by the very tenuous assumptions upon which the entire concept is based. These include both the assumption that it is reasonable and practicable to pass judgment as to the

suitability of a motion picture for all persons under a certain age, and the assumption that it would be reasonable and practicable for all parents to accept this official judgment as fitting and proper for their children. There is little, if any, scientific or sociological basis for such assumptions. Chronological age is a hopelessly unreliable index to the intellectual, emotional and social maturity of a person. Many 16 year old youngsters have the emotional maturity of a 21 year old. Very likely just as many "adults", over the age of 21, or even 30, have the emotional maturity of teenagers. More importantly, it is up to parents not governmental agencies, to decide what films their children should see. The divergent views of parents on this subject are so numerous that it would be impossible for any official in authority to formulate a consistently wise policy.

It is no answer to argue that the state shares the responsibility of parents for the well-being of children. While there are instances in which activities which are clearly protected by the First Amendment when engaged in by adults have been allowed to be regulated with respect to children, these are cases in which the dangers from which the children were to be protected were clear and present and the connection between the activity and those dangers are established. See, e.g. *Prince v. Massachusetts*, 321 U.S. 153 (1943). No connection has ever been established, however, between exposure to films which some adults view as "immoral", and harmful effects on the child. Indeed, there is a substantial body of expert opinion to the contrary. For example, in considering a possible connection between films, comics, television and other media and juvenile delinquency, Judge Meszar of the Juvenile Court of Gary, Indiana has stated that:

"My staff and I considered the effects of entertainment, but in our three years of study, we have been unable to unearth that first bit of evidence which would be used to indict motion pictures."

Similarly, U.C.L.A. Professor of Psychology, Franklin Fearing, has said,

"It is easy to reduce the uneasiness which we all feel in the present turbulent world by blaming films. This is a scapegoating mechanism with which social psychologists are already familiar."

We do not argue that there cannot or may not be a causal relationship between certain printed or exhibited material and anti-social behavior, but we do insist that in the absence of clearly demonstrable proof, there is no basis either for the assumption that such a relationship exists, or for enactment of legislation resting on this assumption.

We recognize that S. Res. 9, under consideration today, would not establish a system of film classification. It would merely establish a committee to study and survey the problems which would be involved in such a system. While some may argue that a mere study cannot be objectionable in terms of any impact on free expression, we feel that there will be very real practical effects.

First and foremost, we note that the very wording of the resolution establishing this "study" committee has loaded the dice in terms of the ultimate enactment of legislation resulting in such a system. The stated purpose of the Committee is to obtain all of the facts possible ". . . which would aid the Congress in enacting remedial legislation contemplating limitations upon the exhibition of certain motion pictures to minors. . . ." In other words, it has already been determined that remedial legislation is both necessary and desirable. With this we disagree. Moreover, we cannot help but note, without wishing to be facetious, that under the ground rules of "Commissionmanship" to use the term of Elizabeth Brenner Drew in a recent article in *Atlantic Monthly* any committee, having been given the kind of stated mission referred to a moment ago, which came out with a report totally devoid of legislative recommendations would have to consider itself a failure. For this reason, support of a resolution such as this is a very real first step towards the setting up of a classification system and must be viewed as an endorsement of such a system.

In conclusion, it is important to note that any system of classification of motion pictures, whether compulsory or totally advisory, and whether ultimately proven to be constitutional or not, is going to have a very real limiting effect on the communication of ideas through the medium of motion pictures. A filmmaker, whether motivated by hope of monetary gain or interested only in artistic achievement, will have to decide what and how he proposes to film in terms of the established classification scheme. Rather than run the risk of being foreclosed from a significant portion of the movie-going public, he might choose to produce nothing but the innocuous. Similarly an exhibitor may choose to exhibit nothing but the inane. We will all be the poorer as the result.

One need only recall some incredible examples of books which have been censored at one time or another, to see that current community standards are an unacceptable guide of the acceptability of ideas or expression. At one time or another various states or countries have banned such books as the Bible, the works of William Shakespeare, and Walt Disney's Mickey Mouse and Donald Duck. Great classics of American literature, such as Mark Twain's "Huckleberry Finn" and Nathaniel Hawthorne's "The Scarlet Letter" have in the past been banned in states of the United States. Surely it would have been as unwise and as erroneous to classify these as unsuitable for young persons, as it was to ban them entirely. We therefore urge that this Committee not take the first step toward establishing a nationwide system of film classification and the national standards of orthodoxy in expression which would inevitably result.

Senator CORRON. Mr. Speiser, in your statement you say "creation of a Committee on Film Classification will inevitably have a substantial and undesirable limiting effect on freedom of expression, protected by the first amendment."

Later, I believe, you elaborate on this statement.

In view of the very limited nature of this resolution that is, the committee would have no legislative jurisdiction, it would merely make a study of the problem of film classification here and throughout the rest of the world, and it might, therefore, conclude classification would be unworkable or undesirable. In view of this I wonder if phrases such as "inevitably have a substantial and undesirable limiting effect on freedom of expression" aren't a little strong.

Mr. SPEISER. I am relying on the past experience of committees and commissions—the terms have been used interchangeably—which have been theoretically set up to study the problem. Generally, the authorizing resolutions go beyond the scope of merely studying the problem to determine if something should be done. In the obscenity field this would be to determine if there is a causal relationship between obscene materials and antisocial conduct.

The proponents of measures of this kind have not been content with that kind of a provision. For the committees and the commissions which have been set up in the past, the experience, as far as I know, has universally been that they have created a list of those publications, those communications which they feel are outside the pale.

The Gathings committee, for example, in the House of Representatives ended up in that fashion, although it was merely a committee of Congress and did not have legislation passed.

The Rhode Island Commission involved in the *Bantam Books v. Sullivan* case, the Commission To Encourage Morality in Youth, went beyond that, and used indirect pressures to pressure booksellers from carrying certain kinds of books.

Over on the House side when it had the bill to establish a Commission on—originally entitled "Obscene and Noxious Material"—but finally changed to the Commission on Obscenity and Pornography—I know the House committee did send out letters to publishers whom it was clear were felt to be beyond the pale.

I am suggesting that a governmental unit of this kind does have powers that are broad. Here the subpoena power is granted, and it seems to me that that does represent a potential threat.

My "inevitability" phrase is based on the past experience with committees or commissions that have been set up in similar fields.

Senator CORRON. May I say to you that during 22 years in Congress it has been my experience that while the committees of Congress and

commissions involving those outside Congress—and I have seen many of them established, served on a few myself—while once in a while you have some two or three strong personalities on such study groups who become crusaders for this and that, the tendency is all the other way. I have almost gotten into the state of mind when I see something referred to as a study of kissing it goodbye because the end result is a voluminous report that is filed away somewhere in the Archives, and I have sometimes thought the surest way to kill an active consideration of a subject was to refer it to a study group.

So this apprehension of merely having a committee study a problem—I am not here to argue with you but merely to say it seems to me a rather farfetched danger, and I think it might well be said that no subject that involves the welfare of any group in this rather complex society which has developed should be feared.

When we get to the point where we don't dare to study anything for fear of violating some constitutional rule or some dogma of the past, why, aren't we getting ourselves into a situation where we are not able to meet with the problems of the modern day?

Mr. SPEISER. I would draw a distinction between the usual kinds of commissions or the great majority of commissions and commissions and committees which are suggested in the first amendment field. It is because of the sensitivity of the first amendment that committees, particularly governmental committees with subpoena powers, can have an effect in their study which is far beyond merely looking at the problem.

There certainly was no objection on our part, organizationally, for the Presidential Commission to study crime and law enforcement in our society. Constitutional rights were clearly involved in that study. They made some recommendations that we disagreed with; many of them we thoroughly agreed with. There were dissenting views in it. They were concerned with constitutional problems. However, this was not a governmental study into a first amendment area, and here is where I would draw a line.

It was suggested, for example, when the presently existing Commission on Obscenity and Pornography was being considered, that perhaps Congress could accomplish the same thing by providing funds for contracts to universities to study the problem. Then you would not have this concern of governmental pressure affecting the field it was studying. I would suggest the same thing could be done here.

Senator CORTON. Your objection is because this calls for a group from Congress?

Mr. SPEISER. Exactly. It is not only the question of government, but it is also a group from Congress, and I might suggest that Congressmen, as a whole, are quite responsive to concerns in the area of obscenity, dirty books, and dirty pictures. Saying "no" is not a popular position to take. I do not feel there should be laws on that subject nor do I think there should be classification.

I think that it requires a unique amount of courage on the part of a Congressman and a Senator to take a position against what might be a popular majority in urging that there should be no kind of limitation in this field. I think that Congressmen, as political animals, are quite subject to that kind of pressure, whereas I think that a university, with a tradition of seeking truth no matter where it leads, would not have that kind of concern.

Senator COTTON. I won't argue with you as to whether we are political animals or not.

Mr. SPEISER. The phrase was not meant to be a derogatory one. It was merely a descriptive one.

Senator COTTON. However, in this connection; namely, the adverse effects creation of such a committee would have on freedom of expression, protected by the first amendment, what about the *Ginsberg* decision? The *Ginsberg* decision appears to stand for the proposition that it is constitutionally permissible for the State to accord minors a more restrictive right than that assured to adults to judge and determine what they may see.

Mr. SPEISER. I will concede it was the holding in the case.

Senator COTTON. It was a holding rather than *obiter dicta*.

Then the Supreme Court, which is certainly zealous, I would think, most people would agree, in the protection of the rights of the individual and of the rights in the Constitution, has held there was nothing wrong in Congress considering—and that is all that is in this resolution—considering drawing a distinction between entertainment for adults and entertainment for children.

Mr. SPEISER. I think I would have to concede, Mr. Chairman, that as far as what the present state of the law is, in light of this second *Ginsberg* case and the *Interstate* case, that probably the setting up of such a committee would not be held to be unconstitutional assuming there was some way of testing it. I think that may very well be true.

Senator COTTON. The *Ginsberg* case was a holding rather than dictum, but while you are on the subject, in the *City of Dallas* case there was strong language, perhaps in the form of dictum, to the effect that the State may constitutionally regulate the dissemination to juveniles of, and their access to, movies objectionable as to them which the State could not regulate as to adults.

Would you agree with that?

Mr. SPEISER. Yes, I think essentially. However, that is dictum in the *Dallas* case.

Senator COTTON. I agree with that.

Mr. SPEISER. But even with that—let me make sure I state clearly the position of our organization—even though the Supreme Court has made those twin holdings, we do not necessarily agree with those decisions and feel particularly with regard to the *Ginsberg* case that it was not a good decision. But accepting the law as it is, the argument that I am making to this committee in the light of those two decisions is the policy question, of whether if you are going to study the question of film classification, whether a committee composed of Senators with a mandate as set forth in this bill, which says, "which would aid the Congress in enacting remedial legislation contemplating limitations upon the exhibition of certain motion pictures to minors" is not going to start out with a preordained conclusion.

Combine that with the fact that the Congress has the tendency not to be as objective in this field as I think a study of this question warrants. I would suggest that if Congress wants to have a study of the effectiveness and the disadvantages, perhaps, of film classification that the way to do it would be to provide funds to go to a university or some independent research group, to study that problem and report back to Congress rather than have a committee of Congress do it.

Senator COTTON. Would you favor this bill if no Member of Congress served on the committee, that it must be an outside panel?

Mr. SPEISER. I would not favor the bill even though Congressmen were excluded. I don't think that Congressmen and Senators should be second-class citizens in our society. In any event, I would not favor the bill if it continued to be a governmental committee with the subpoena power, the powers that you have here, in studying the problem.

Senator COTTON. You have an inherent distrust of the objectivity of Members of Congress.

Mr. SPEISER. No, on the contrary, I trust their motivations, but I am also aware, I think, of the pressures on them, particularly in a sensitive field like this.

Senator COTTON. I am sorry, I apologize, I have got to go in and vote in executive session, and I think Mrs. Smith would like to make a brief statement.

I have to go in, if you will excuse me, and vote on a matter in executive session inside. Mr. Hardy, would you continue the questioning?

Mr. HARDY. Mr. Speiser, you state, "An examination of the carefully written Dallas ordinance evidences the insurmountable difficulties, and the ultimate impossibility of designing such an ordinance."

I am wondering if these difficulties are really insurmountable and their design really impossible?

Mr. SPEISER. I think so. I couldn't prove it at the present time, and I suppose the answer is I will have just to wait and see what other suggestions come up. The problem of obscenity or "near-obscenity" has been one that has been with society for its entire existence, and we have played around with formulae which have been under analysis and they don't stand up.

There is always difficulty of application, and particularly in this area where it is clear that what is desired is the labeling of something that is not obscene—near that level, but not. Here the factors, the judgments that are to be made are going to be even more subjective, it seems to me.

Mr. HARDY. When you start using words "insurmountable" and "impossible to design"—for example, I wonder the court upheld the penal statute in the *Ginsberg* case which did set down guidelines in this area. That is why I wondered. They were able to do it in the *Ginsberg* case, and it withstood the constitutional question, it was a penal statute, it carried a criminal conviction.

I just question your use of the words "insurmountable" and "impossible to design" in view of the *Ginsberg* case.

Mr. SPEISER. I guess my position has to be that the description of what was to be used in determining obscenity as far as minors are concerned in the *Ginsberg* case is, it seems to me, silly. They have these descriptive terms that must have all kinds of exceptions in order to—

Senator COTTON. We have gone into quite a bit of this with this witness, and I don't want to limit the examination, but I am going to be compelled to go back into the committee on some rather important matters, and I think that we have more or less sufficiently and substantially brought out the points of the witness, and may I say that your statement is an interesting statement and presents a very interesting point of view both as regards the Congress and the Supreme Court.

We thank you.

If you desire to add anything to your statement, we will be glad to receive it in writing and put it in the record as your statement.

Mr. SPEISER. Thank you, Mr. Chairman. I don't believe there is anything further I can say or do wish to submit. I appreciate your interest and your attention.

Senator COTTON. Senator Smith.

Senator SMITH. Mr. Chairman, I am going to take advantage of your kind offer to ask questions simply to make a statement.

I would like to comment on this statement which I read of the representative of the American Civil Liberties Union and I also want to thank Mr. Speiser for his personal references to me.

I have long supported measures to protect civil liberties, and with respect to his reference to Congress, a committee of Congress, I made a declaration of conscience on June 1, 1950, in which I upheld the right to hold unpopular beliefs, and that was as a Member of Congress.

Mr. SPEISER. Mrs. Smith, I am well aware of that, and I think you are to be commended for that even 18 years after. I think it was a remarkable statement, and was certainly laudatory.

Just this further note. I recognize the difficulty in your making that statement at that time, and I think that this probably might be true as well in this particular field. All I am saying is it prevents approaching it in an abject fashion with the same kinds of pressures which existed on you in 1950, because I think the kinds of pressure which existed on Congress then exist in this field in 1968.

Senator SMITH. I find it rather ironically inconsistent for an organization dedicated to the protection of civil liberties to oppose the civil liberty of having a study of film classification. This resolution does not propose film classification. It proposes a study of film classification, in which study both the opponents of film classification as well as the proponents could express their views.

To me, Mr. Chairman, it is a distortion of anticensorship to oppose even granting the liberty of a study of film classification.

Senator COTTON. I thank you.

May the Chair state that the Reverend Morton A. Hill, S.J., of 980 Park Avenue, New York, N.Y., had intended to appear here. He has telephoned us saying he is unable to come. The record will remain open for 1 week in order to receive any additional statements.

Is that satisfactory to you, Senator?

Senator SMITH. Yes, sir.

Senator COTTON. You haven't any other specific witnesses that you would like to appear before the committee?

Senator SMITH. I have none in mind.

Senator COTTON. If you should, we can reopen the hearings; otherwise, for 1 week the record will remain open for submissions. That certainly includes the Reverend Morton A. Hill if he should desire to file a statement.

If there are no other persons present who desire to be heard, the committee is now adjourned.

(Whereupon, at 11 a.m., the committee was adjourned.)

It is a pleasure to add nothing to your kind letter, we will be glad to  
have in a year and more in the year of your kind letter.  
I am sure that the Chairman of the Board will be glad to have  
the kind letter of yours to which I refer in your kind  
letter of the 10th of the month.

I am sure that the Chairman of the Board will be glad to have  
the kind letter of yours to which I refer in your kind  
letter of the 10th of the month.

I am sure that the Chairman of the Board will be glad to have  
the kind letter of yours to which I refer in your kind  
letter of the 10th of the month.

I am sure that the Chairman of the Board will be glad to have  
the kind letter of yours to which I refer in your kind  
letter of the 10th of the month.

I am sure that the Chairman of the Board will be glad to have  
the kind letter of yours to which I refer in your kind  
letter of the 10th of the month.

I am sure that the Chairman of the Board will be glad to have  
the kind letter of yours to which I refer in your kind  
letter of the 10th of the month.

I am sure that the Chairman of the Board will be glad to have  
the kind letter of yours to which I refer in your kind  
letter of the 10th of the month.

I am sure that the Chairman of the Board will be glad to have  
the kind letter of yours to which I refer in your kind  
letter of the 10th of the month.

I am sure that the Chairman of the Board will be glad to have  
the kind letter of yours to which I refer in your kind  
letter of the 10th of the month.

## ADDITIONAL LETTERS AND STATEMENTS

U.S. SENATE,  
COMMITTEE ON AGRICULTURE AND FORESTRY,  
Washington, D.C., June 19, 1968.

HON. WARREN G. MAGNUSON,  
*Chairman, Senate Commerce Committee, Room 5202,  
Old Senate Office Building, Washington, D.C.*

DEAR WARREN: It is my understanding that the Senate Commerce Committee held hearings last year on Senate Resolution 9, an act in which I am greatly interested. I would very much appreciate it if you could include the enclosed statement in the hearing record.

With kind regards, I am  
Sincerely,

GEORGE MCGOVERN.

I am grateful to the committee for giving me the opportunity to submit my views on Senate Resolution 9, an act which I consider to be of the utmost importance.

First of all, let me say that I am in favor of prompt consideration and passage of S. Res. 9 as I feel that it would be a significant step in the Federal effort to curb the alarming growth in juvenile crime.

The incidence of crime in America, and in particular its commission by young people is one of the most serious problems facing our country today. The annual growth in the number of serious crimes committed in the United States is, to say the least, frightening. Many people speak of the growing crime rate, but few I think, realize just how serious the situation is. The Federal Bureau of Investigation has reported that in 1965 there were 2,780,000 serious crimes reported in this country, an increase of 5 percent over the year before. Moreover, youngsters between the ages of 15 and 21 had the highest crime rate of any age group, and even more significantly, it is among young people that the crime rate is growing most rapidly. We can hardly expect our young people to grow up to be model citizens if early in life they acquire the habit of breaking the law.

This is not to say, however, that this trend is irreversible, for it is not. Experience with new methods of dealing with youthful offenders, as in Chicago, has shown that the increase in juvenile crime rates cannot only be stopped, but reversed.

But most of these new methods are aimed at preventing juvenile offenders from breaking the law again. On the whole they do not deter the first offender. What is needed is a national re-evaluation of a peculiar American ethos which so often elevates the criminal to a position of status and which looks upon violence as an almost legitimate means of last redress. It is my hope that S. Res. 9 may begin such a reappraisal.

Although it is extremely difficult to assess the psychic effects on our young people of what they see in the media, it seems evident that there is at least some correlation between the increasing amount of violence in the movies and the spiraling incidence of juvenile crime.

This is borne out by the findings of the Subcommittee to Investigate Juvenile Delinquency in its report entitled "Television and Juvenile Delinquency—A part of the Investigation of Juvenile Delinquency in the United States." The subcommittee concluded in part, that, "Television programs which feature excessive violence tend to reinforce overly aggressive attitudes and drives in juvenile viewers where such attitudes and drives already exist. Filmed violence has been shown to stimulate aggressive actions among normal viewers as well as among the emotionally disturbed. This applies to adults as well as to children, but the effect is most pronounced on the latter. . . . Children can learn to perform aggressive acts by exposure to such acts on television." These conclusions are based upon testimony of experts in psychiatry such as Dr. Frederic Wertham and youth workers such as Msgr. Joseph E. Schieder, National Director of the Catholic Youth Organization who testified, "I, for one, do not hesitate to echo the sentiments of the Attorney General of the United States, as reported recently, that

the portrayal of crime and violence is 'a major factor' governing the appalling increase of juvenile delinquency."

I believe that the findings of the subcommittee in regard to the effects of television on the young are equally applicable to the movies. The Congress of the United States has an obligation to investigate the effects of violent "entertainment" on the growing number of serious crimes committed by the young, and to take action if and where it is necessary.

Mr. Chairman, this is a serious national problem and it demands our attention. As Senator Smith pointed out in her opening testimony before this committee, S. Res. 9 is not an attempt at censorship, but reflects a growing concern among many elements in society—parents, civil and religious leaders, law enforcement authorities and educators—over the flood of "violence, deviationism, sadism and over emphasis on sex to which American youngsters are subjected week after week from movie screens."

Parents today have no way of knowing—except through advertising by the film makers themselves—just what their children are seeing when they go to the movies. A classification system designed by Congress would provide parents with the information they now lack.

I believe that the special committee envisaged by S. Res. 9 would go at least part way toward reversing the current trend in juvenile crime.

---

STATEMENT FROM THE HONORABLE THOMAS LUDLOW ASHLEY, MEMBER OF CONGRESS

Mr. Chairman, it is a pleasure to be able to present my views to your Committee in support of Senator Smith's Resolution to create a special committee to be known as the Committee on Film Classification. I am firmly convinced of the need for this Committee's work to be done as quickly as possible.

Mr. Chairman, I don't think there's any doubt in anyone's mind that this country is facing a crime crisis of gigantic proportions and this situation didn't come about overnight. We must stem this appalling epidemic and we must act in every area which has contributed to this illness.

A week doesn't go by that I don't hear from parents in my Congressional District who are deeply concerned about the types of films showing in the local movie theaters across the country. The Saturday afternoon movie is still a national passtime for youngsters and it is not adequate to say that parents and parents alone are responsible for the quality and content of the films their children are permitted to view.

Furthermore, eminent psychologists, church leaders and other professionals working in the field of juvenile delinquency and emotionally disturbed children have been telling us for some time that the constant exposure to an inordinate amount of violence has a deleterious effect on young children.

In the Report issued by the Senate Subcommittee to Investigate Juvenile Delinquency, pursuant to S. Res. 274, 88th Congress, Second Session, are recorded the views of Dr. Frederick Wertham, the noted psychiatrist who has devoted much of his life to the problems of children. He perhaps comes as close as any specialist to reflecting the views of those child health experts who deplore the impact of filmed crime and violence on children. He has said:

"I am convinced that the moving visual image on the movie or TV screen, complete with sound, has a much greater impact on most children than the images they conceive in their own mind's eye from reading a story or having one read aloud to them. My conviction is based on interviews with the children, their day-dreams, drawings, play and games. 'Live action' on the screen, particularly cruel or horrifying, works directly on the child. Identification with a character may be almost overpowering. When reading a violent story in book form, a child is protected by the limits of his own imagination, to which, in even the grisliest fairy story, something is left. On the screen, violence and horror are spelled out . . . Seeing the same or similar plot on the screen is more complete and more potent experience. Whether they completely understand it or not, they have a vivid visual image of it."

Former Attorney General Katzenbach has also indicated his views that the portrayal of crime and violence is a "major factor" governing the appalling increase of juvenile delinquency. Supporting this position is Msgr. Joseph E. Schieder, National Director of the Catholic Youth Organization who has had a long and direct association with young people and their problems.

Just as it is abundantly clear that piecemeal efforts by States and communities to stem the unprecedented traffic in firearms have been ineffective and that Federal action is needed, so is it clear that the haphazard classification efforts on the part of the Motion Pictures Association have not been successful in diking the flood of violence, sadism, deviationism and the like to which American youngsters are subjected week after week from movie screens.

Senator Smith's Resolution does not offer a solution. Its purpose is simply to create a Senate Committee that would give us the facts as to the dimensions of the problem and compile information on methods by which others have dealt with it. We will then be in a position to act on the Committee's findings.

Mr. Chairman, let me make it clear that I am unalterably opposed to censorship but I fail to see where the proposal to create this much needed Committee lends itself to the suggestion of censorship of films in this country.

The work cut out for the Committee to be created under S. Res. 9 is urgently needed now and I genuinely hope that your Committee will act accordingly.

---

STATEMENT OF JACK J. VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA

This Association is for any study whose purpose it is to learn more about anything that could be of benefit to the Nation.

We call your attention to the fact that at this very moment there is in being the President's Commission on Obscenity and Pornography whose work would be duplicated in large part by S. Res. 9. Senator Karl Mundt fought for a decade to bring about this inquiry and his efforts were successful in this congressional session when the Mundt bill created the President's Commission on Obscenity.

The Motion Picture Association of America was included among those groups, organizations and individuals who support the Mundt legislation.

The stated aims for the Commission are "to establish an advisory commission whose purpose shall be, after a thorough study which shall include a study of the causal relationship of such materials to anti-social behavior, to recommend advisable, appropriate, effective and constitutional means to deal effectively with such traffic in obscenity and pornography."

Throughout the Act Congress was aware of the importance of studying the effect, if any, of obscenity and pornography on minors. In declaring its policy Congress stated that the Federal government has a responsibility "to determine whether such materials are harmful to the public and particularly to minors."

Not only motion pictures, but all media would be embraced in the Commission's work—and not only classification studied, but other possible avenues of approach which might be more effective.

Following congressional approval of the resolution last October, the President announced shortly after the first of this year the eighteen members of the panel. Its chairman is the very distinguished William Lockhart, Dean of the Law School of the University of Minnesota and an acknowledged authority in the field of obscenity law. The other seventeen are men and women who have had wide experience in the fields of juvenile problems. Significantly, the legislation specifically authorizes the Commission to employ the services of other psychiatrists, sociologists, psychologists, criminologists, jurists, lawyers, and others with special competence to make the study an in-depth, scientific exploration of the entire problem. Its recommendations may be expected, therefore, to be soundly based and meaningful. To carry out its three year directive, the Commission has proposed to this Congress a budget of \$1,279,000, which I understand is at this very time under consideration by the appropriate committees.

The MPAA has no quarrel with the study proposed at this hearing except it would duplicate in cost, effort and aim this on-going study in a deep and revelatory probing of obscenity. The question this Committee must decide is: Does the Congress choose to undertake a *second* study overlapping in objective and energy a project already in work?

But the overpowering fact that any study, any commission or any community must keep visible is this: The idea of censorship and/or classification *by law* is alien to the beliefs of our free society. The notion that a board, sanctioned by law, can issue pronouncements that would legally set cultural standards and moral judgments for the entire community is simply unacceptable to rational people who choose to be free and responsible.

What makes censorship/classification by law rather than self-regulation so dangerous is that no one knows where to stop, or can tell us what are the standards, where are the boundaries, who are the watchers, and *who* would watch *them*. Repression by law without precise guides becomes intellectual and artistic tyranny.

Moreover, if motion pictures are to be so judged, what about other forms of communication, some of them reaching far more millions than see movies? Where does one draw the line as to what will be judged, and how, and how much?

The largest danger under law is the lack of precise definitions as the Supreme Court itself has declared. What is the difference between what is acceptable and what is not? What is permissible and what is not? The censors and the classifiers would be hard to put to gauge the classic works of literature and art. The Supreme Court has been able to define obscenity only as "prurient" and devoid of "redeeming social value".

And is there not the other danger that in an effort to censor communications by law we may find ourselves honoring the lowest common denominator and wind up creating what Mr. Justice Marshall called the "inane". We then fall into creative quicksand the more we struggle to fasten legal coercion onto cultural standards, the deeper we sink into a community blandness.

What is believable, reasonable and workable is voluntary self-regulation. We have always worked this way best in America. The Congress, the courts and the people have deemed it unwise to use the bludgeon of the law to shape the beliefs of the community.

It is in that spirit of voluntarism that I inform this hearing about a proposed voluntary film rating program now being constructed by essential segments of the American motion picture industry. This plan of self-regulation, still not finally detailed, would work in the following fashion:

A film rating administration would be set up by the motion picture industry, in which certain films not suitable for the immature because of treatment of sex or violence would be rated RESTRICTED and from which all children under the age of 16 would be barred, unless accompanied by a parent. Exhibition, led by the National Association of Theater Owners, would voluntarily abide by this restrictive rating. Other producers and distributors, not members of the MPAA, are also being brought into this program.

Additionally, the industry, through the MPAA, would intensify its campaign to give more information about motion pictures through all available channels.

Those of us in the leadership of the motion picture industry understand very well our obligation to the community in which we live and work. The objective of the MPAA, long held and deeply felt, is to insure the freedom of the screen, and to insist always that this gift of freedom be responsible.

---

TRAFICO TELEVISION, RADIO AND FILM COMMISSION,  
*Nashville, Tenn., May 28, 1968.*

To: The Senate Committee on Commerce, Hearing on Senate Resolution 9.

HONORABLE SIRS: The United Methodist General Conference in session in Dallas, Texas, on May 1, 1968, did consider and adopt a resolution with reference to the church's responsibility toward the mass media including motion pictures.<sup>1</sup>

For your consideration, I quote a part of this resolution:

We call upon appropriate agencies and institutions throughout our society to undertake more intensive studies on the effect of mass media on personality with particular emphasis on such factors as value formation, morality, social and anti-social behavior, and character development.

I. We affirm our adherence to the principle of freedom of expression as a right of every person.

The exercise of this freedom requires that:

1. Freedom of expression, whether by spoken word, printed work, or any artistic medium, should be exercised within a framework of social responsibility.
2. Freedom of expression through radio and television is essential and granted the broadcaster by the people. It must be exercised with the limits of the responsibility defined by the Communications Act of 1934 (as amended).

<sup>1</sup> Entire statement is published in the Daily Christian Advocate, Dallas, Tex., May 1, 1968, p. 475.

3. The broadcaster is rightly responsible for the content of all programming. The broadcaster, however, is subject to the licensing power of the Federal Communications Commission, which is charged with representing the public interest.

4. We commend the efforts of certain broadcasters to control and improve commercials and programming through the self-regulatory codes for radio and television of the National Association of Broadcasters.

5. Similarly, motion picture producers should exercise their freedom of artistic expression with a keen sense of responsibility for the welfare of society, supported by a vigilant self-regulation within the industry.

6. The Church must oppose precensorship of an artistic expression, but should insist that the artist-producer remain subject to punitive action by the courts for violation of laws against obscenity and pornography.

7. The free-enterprise, commercial approach to television, radio and films has produced a rich and varied supply of entertainment, educational and cultural programs needed in a pluralistic society. At the same time, we encourage the intercultural exchange of films and programs, as well as educational and public television, which meet the needs of minority audiences and public concerns. We endorse the development of the Public Broadcasting Corporation and the experimental Public Broadcasting Laboratory.

8. We urge the appropriate agencies of the United Methodist Church to study the implications of satellite communications systems in their effect on social development in the United States and other nations.

I believe that it is the spirit and intent of this resolution to support any such efforts by the government to study the problems of film classification.

Thank you for your consideration.

Respectfully submitted,

HARRY C. SPENCER,  
*General Secretary.*

---

STATEMENT OF MRS. E. D. PEARCE, GENERAL FEDERATION OF WOMEN'S CLUBS

This is a statement in support of Senate Resolution 9 which would create a special Senate Committee on Film Classification whose duty shall be to obtain all facts possible in relation to film classification for use by the Congress in enacting legislation "contemplating limitations upon the exhibition of certain motion pictures to minors." The special Committee's duties would be finished after supplying the results of their research to the Congress. After that, it would be up to the Congress to determine what, if any, "limitations upon the exhibition of certain motion pictures to minors" might be. It is hoped that the research done by such a Committee as S. Res. 9 would create could ultimately lead the Congress to seriously consider devising some method, which is acceptable to all concerned, of classifying films shown in the United States.

Let it be clear that our support of S. Res. 9 does not suggest that the members of the General Federation of Women's Clubs seek now or that we will seek in the future a Federal Government program of censorship of motion pictures—nor would we support any legislation which would infringe upon an adult's right to see any motion picture he chooses to see. S. Res. 9 does not in any way provide for or lay the ground work for film censorship—nor does it provide for any controls over the motion picture industry. The ultimate aim of S. Res. 9 is only film classification. Such classification would give parents some basis on which to judge whether or not a certain motion picture is or is not the type they wish their children or they themselves to view.

Whatever the Congress (or perhaps even the motion picture industry) may later decide to do about film classification, the research done by the Committee which would be created by S. Res. 9 would be of invaluable aid.

---

STATEMENT OF THE REVEREND PATRICK J. SULLIVAN, S.J., DIRECTOR OF THE NATIONAL CATHOLIC OFFICE FOR MOTION PICTURES

The National Catholic Office for Motion Pictures would support Senate Resolution 9 which would create a Special Committee on Film Classification to study the problems of film classification in order to assist Congress in enacting remedial legislation which would limit the exhibition of certain motion pictures to minors.

On December 7, 1962 The Roman Catholic Bishops Committee for Motion

Pictures (under which NCOMP functions) issued a statement titled "Advisory Film-Classification, A Contemporary Obligation of Society." This statement represented a public expression of a viewpoint which had been communicated many times previously to the motion picture industry. In substance it says:

(1) Film classification, as a rational method of protecting minors from films that are unsuitable for their level of maturity, is necessary.

(2) The practice of *voluntary advisory* classification by the film industry itself is preferred.

(3) "Wherever exhibitors refuse to adopt a satisfactory practice of voluntary classification, this Committee will lend its support to enabling legislation in the States which would authorize state or municipal education departments or other suitable agencies to publish *advisory* classifications of films appropriate for children. We shall urge that the actual work of classification be entrusted to departments or agencies of proved qualification and competence, and which enjoy the respect and confidence of parents."

We attach a copy of a pamphlet, *Film Classification*, in which the complete text of the aforementioned Statement will be found on pages 15-23.

On September 28, 1966, on the occasion of the publication of a new Production Code by the Motion Picture Association of America, the Chairman of the Bishops' Committee for Motion Pictures issued a statement in which he supported the provision made in the New Code for voluntary classification. We enclose a pamphlet, *Films 1966*, issued by NCOMP, in which the text of this statement will be found on pages 38-39.

After more than a year and a half of the existence of voluntary classification by the M.P.A.A. what is our evaluation of its success?

The simple truth is that voluntary industry classification has not succeeded. The "Suggested for Mature Audience" label of the Production Code (SMA) is neither understood by the public nor honored by the industry. Even an educated eye has difficulty finding this logo in film advertising. Exhibitors are not known commonly to discourage minors from patronizing SMA films. Moreover, the number of instances in which members of the MPAA release films through the legal fiction of a subsidiary, when they are unable to obtain even a ASM approval for them from their own Production Code, is increasing. With the exception, until now, of Paramount every member company of the MPAA has engaged in this evasive practice. It is a practice which hardly encourages public confidence in the major industry's profession of self-regulation.

But even if the MPAA effectively enforced voluntary classification for all product of its member companies, there remains the acerbating problem of independently produced and distributed films. These are not only much more numerous in recent years but also are receiving much more screen time than ever before—especially in theatres catering to youthful audiences. Crude eroticism and brutal violence characterize many of these films.

A special note must be taken of the "sexploitation" or "nudie" films which are no longer restricted to the "grind houses" of the 42nd streets of our large cities but are now being widely booked in neighborhood theatres and drive-ins.

Finally, if an objective study of all films released in the last two years were made, including Code-approved and non-Code product, it would be found that the majority of these motion pictures were, by every reasonable standard, unacceptable for youthful audiences. The industry's response to this problem is that real family and youth pictures, with few exceptions, do not sell; hence they cannot be made. A policy predicated upon such commercial motivation makes sense in terms of dollars and cents but has little relevance to a responsible exercise of artistic freedom of expression.

Yet freedom of utterance, which includes artistic expression, is most important and must be defended by every American. It is for this reason that we continue to hope that the entire film industry (producers, distributors and exhibitors) may at long last cooperate in creating and effectively implementing a voluntary system of film classification. The experience which we have had during the last ten years, however, suggests that government must give an assist.

We, therefore, submit that the Special Committee on Film Classification, if approved, should carefully study whatever proposals for voluntary classification the film industry may be prepared to make. At the same time, however, the Special Committee would be well advised to consider what legislation would be necessary in order to insure that industry classification would be implemented at the box-office. It appears to us that the British system could afford some light in this matter.

Specifically our option would be for legislation that would incorporate the following provisions:

(1) That every film publicly exhibited in the United States be required to bear a classification so that films unsuited to minors under the age of 18 be prohibited to them, unless they be accompanied by a parent.

(2) That the classifications issued by the Production Code Authority be accepted in this matter.

(3) That films not classified by the Production Code Authority be submitted for classification purposes to a government board.

This statement is respectfully submitted.

PATRICK J. SULLIVAN, S.J.,  
Director, National Catholic Office for Motion Pictures.

---

BROADCASTING AND FILM COMMISSION,  
NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.,  
New York, N.Y., April 26, 1968.

HON. WARREN G. MAGNUSON,  
Chairman, Senate Committee on Commerce, U.S. Senate,  
Washington D.C.

MY DEAR SENATOR MAGNUSON: We understand that the Senate Committee on Commerce is planning to hold hearings on Senate Resolution 9, early in May.

The Broadcasting and Film Commission of the National Council of Churches urges the establishment of a Select Committee to study the feasibility of a system of film classification, with the understanding that we reserve judgment on the substantive issues involved until such time as the Select Committee is established and holds its hearings on the matter.

We have a long history of concern for the responsibility for the public welfare. Our organization has worked closely with the Motion Picture Association of America in this regard, through offices on both the east and west coasts. We were involved in the new code and industry self-regulation system plans. We have generated interest in commercial films through annual awards and through film education programs. We are interested in protecting our children from banal and salacious films, but also interested in protecting the freedom of the serious film maker to say what he wants, the right of every adult to see whatever film he wants. Thus we believe a study such as the one proposed in Resolution 9, is imperative, and we hope to be able to contribute to its deliberations at the appropriate time.

I respectfully request that this statement be made a part of the hearing record on the resolution.

Very truly yours,

WILLIAM F. FORE.

---

MELTZER & SCHIFFRIN,  
Philadelphia, Pa., June 13, 1968.

HON. MARGARET CHASE SMITH,  
Senate Office Building, Washington, D.C.

DEAR SENATOR SMITH: I read with interest the recent *New York Times* account of your proposal for a special committee to study the feasibility of mandatory film classification in this country.

This is a subject with which I am especially conversant. I would be delighted to be of assistance to you, or to the committee.

I am enclosing a Xerox copy of the concluding few pages of a recent Law Review article of mine on the subject of film classification, which analyzes the American law and draws some pertinent lessons from the British experience. Incidentally, judging from the *Times*' account of Mr. Valenti's statement, my prediction as to Hollywood's reaction to "local classification" would seem to be borne out. If you would like to see a copy of the entire article (which is rather lengthy), please let me know. I should point out that Mr. Justice Marshall relied heavily on this article in his recent Opinion in the *Interstate Circuit* case.

In addition, I expect to be in London for at least a week in late August. I have already made arrangements to visit with John Trevelyan, Secretary of the British Board of Film Censors, with whom I have carried on extensive corre-

spondence. If there are any questions which you would like me to put to him, I would be delighted to do so.

Yours truly,

ROBERT J. KLEIN.

Enclosure.

#### IV. FILM CLASSIFICATION FOR THE UNITED STATES

No American jurisdiction may censor motion pictures generally according to standards designed to protect youth. This would be to "reduce the adult population . . . to [viewing] only which is fit for children."<sup>100</sup> A few municipalities, however, have experimented with rough classification schemes.

Advocates of movie classification argue that it imposes no restriction on the content of speech, but only a limitation on the character of the audience. This is put too broadly, for the right to speak and the right to be heard are not easily separable. The Court's attention to the unobstructed circulation of protected material should have settled that point.<sup>101</sup> More plausibly, one commentator has suggested that classification is consistent with the premises of free expression, because "the liberal ethic presupposes an adult society with a certain minimum of education and the ability . . . to make fine discriminations."<sup>102</sup> In that case, a very limited infringement on first amendment guarantees might be outweighed by the state's concededly great interest in the protection of children.<sup>103</sup>

None of these arguments proved persuasive in the first court test of classification by age in this country. In *Paramount Film Distrib. Corp. v. City of Chicago*,<sup>104</sup> a local ordinance permitted the censor board to license a film for exhibition to persons over twenty-one, if it tended toward "creating a harmful impression on the minds of children, where such tendency as to the minds of adults would not exist."<sup>105</sup> Paramount challenged the restricted licensing of *Desire Under the Elms*, based on the well-known play by Eugene O'Neill. The court granted injunctive relief, agreeing that the quoted standard was hopelessly vague. If the ordinance were read to forbid the exhibition of "obscene" or "immoral" motion pictures, the court continued ". . . it is apparent that . . . [those terms] express absolute concepts. . . . None . . . can change with the age of the beholder."<sup>106</sup> Finally, it found the twenty-one-year-old age limit arbitrary and unreasonable.

The Supreme Court, however, has recently abandoned the view that what is "obscene" may not change with the susceptibility of the perceiver.<sup>107</sup> While it refused to sanction, in the abstract, a test which looked simply to "sexually immature adults," a well-drafted classification ordinance might meet with court approval. *Jacobellis* intimated as much:

We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material. . . . State and local authorities might well consider whether their ob-

<sup>100</sup> *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

<sup>101</sup> See, e.g., *A Quality of Copies of Books v. Kansas*, 378 U.S. 205, 213 (1964).

<sup>102</sup> Note, *For Adults Only: The Constitutionality of Government Film Censorship by Age Classification*, 69 *YALE L.J.* 141, 148 (1959).

<sup>103</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>104</sup> 172 F. Supp. 69 (N.D. Ill. 1959).

<sup>105</sup> *Id.* at 70.

<sup>106</sup> *Id.* at 71.

<sup>107</sup> *Mishkin v. New York*, 383 U.S. 502 (1966). To be sure, *Mishkin* focused on "material designed for and primarily disseminated to a clearly defined . . . group, rather than the public at large." *Id.* at 508. (Emphasis added.) If the Court adheres to that formulation of "variable obscenity," a film may be entitled to full constitutional protection unless, as is exceedingly rare, it is primarily aimed at an audience of young people. Of course, the issue in *Mishkin* was whether the defendant's books should have been banned from general circulation. The intended audience of a film may be less significant than its actual audience if the state merely seeks to forbid minors access to it, while permitting its free circulation in the adult community.

The "variable obscenity" approach was also employed in *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957), holding certain books and photographs not "obscene" within § 305(a) of the Tariff Act of 1930, 46 Stat. 688 (1930), 19 U.S.C. § 1305(a) (1965), because the materials were imported solely for the use of scholars at Indiana University, engaged in a bona fide study of human sexual behavior.

jectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children. . . .<sup>198</sup>

Furthermore, an age-classification scheme might be able to pass the tests of *Freedman v. Maryland*.<sup>199</sup> A state may still insist that all films be submitted in advance of public exhibition. If the labelling process were itself to require adversary hearings and judicial supervision it would prove so cumbersome as to be almost unworkable. If, on the other hand, a specific classification served only a warning function, while remaining open to challenge in the event of a later prosecution, the scheme might prove constitutionally acceptable. Of course, a classification scheme designed to serve only a "warning function" could carry a substantial unearned increment of deterrence in practice. If fear of criminal prosecution inhibited the circulation of marginally protected work, the procedure might prove constitutionally defective, under the doctrine of *Bantam Books v. Sullivan*.<sup>200</sup>

Quite recently, in *Interstate Circuit Inc. v. City of Dallas*,<sup>201</sup> the Court of Appeals for the Fifth Circuit canvassed a number of these questions. In the fall of 1965, Dallas enacted a motion picture classification ordinance whose complex procedural machinery conforms roughly to the requirements of *Freedman v. Maryland*.<sup>202</sup> Before exhibiting any film within the city, the local theater owner must offer his own evaluation ("suitable" or "not suitable" for children under sixteen) to the Classification Board. If the Board disputes his determination, and if he remains adamant, it must seek an immediate injunction restraining exhibition of the film to children. The Board must waive all notice required by statute and join in any motion to advance the cause upon the docket, in order to insure a speedy final determination in the courts.<sup>203</sup>

Although the Fifth Circuit upheld the constitutionality of the Dallas ordinance, its labelling procedure is flawed in two respects.<sup>204</sup>

<sup>198</sup> 378 U.S. 184, 195 (1964). Cf. *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71, 218 N.E. 2d 668, 271 N.Y.S. 2d 947, appeal dismissed sub nom. *Bookcase, Inc. v. Leary*, 385 U.S. 12, rehearing denied, 385 U.S. 943 (1966). There, in the context of a broadside challenge "limited solely to the power of the State to pass such statutes," New York's Court of Appeals upheld the constitutionality of an act penalizing the sale of obscene matter to children under seventeen. As described by Judge Keating, the statutory definition is of narrow scope. It aims at material which "(1) predominantly appeals to the prurient, shameful or morbid interest of minors, (2) is patently offensive to prevailing standards of what is suitable for minors, and (3) is utterly without redeeming social importance. . . ." 18 N.Y. 2d at 76, 218 N.E. 2d at 672, 271 N.Y.S. 2d at 952-53. Query whether "standards of what is suitable for minors" (rather than "standards among minors") is a constitutionally proper test?

See also *People v. Tannenbaum*, 18 N.Y. 2d 268, 220 N.E. 2d 783, 274 N.Y.S. 2d 131 (1966). There, in the context of a criminal conviction, the New York Court of Appeals upheld the constitutionality of a companion statute, proscribing sale of obscene matter to children under eighteen. The operative statutory definition of "obscenity" in *Tannenbaum* was: material "posed or presented in such a manner as to exploit lust for commercial gain and . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes. . . ." 18 N.Y. 2d at 271, 220 N.E. 2d at 786, 274 N.Y.S. 2d at 135. With some difficulty, Judge Keating attempted to assimilate this "concededly imprecise" language into the "pandering" concept announced in *Ginzberg v. United States*, 383 U.S. 463, 467 (1966). His conclusion that the "statute gives clear and unequivocal warning of the conduct to be avoided" seems hardly defensive, 18 N.Y. 2d at 273, 220 N.E. 2d at 787, 274 N.Y.S. 2d at 136.

<sup>199</sup> 380 U.S. 51 (1965).

<sup>200</sup> 372 U.S. 58 (1962). See text accompanying notes 131-34 *supra*.

<sup>201</sup> 366 R. 2d 590 (5th Cir. 1966).

<sup>202</sup> 380 U.S. 51 (1965).

<sup>203</sup> Judge Thornberry offers a fuller exposition of the mechanics of the ordinance:

The exhibitor files a proposed classification prior to exhibition. If the Board fails to act within five days, the proposed classification is considered approved. If the Board is not satisfied, it must view the film at the "earliest time practicable," give the exhibitor opportunity to support his proposal, and make its decision within two days thereafter. If any exhibitor files notice of non-acceptance of the Board's classification within two days after its filing, it then becomes the Board's duty to seek a temporary and permanent injunction from the Dallas district court within three days and to apply for hearing on the temporary injunction within five days. If the exhibitor requests that the matter be considered on the merits of the permanent injunction at the hearing the Board must waive its application for temporary injunction and join the exhibitor's request. If the injunction is granted and the exhibitor appeals to the Court of Civil Appeals, the Board must waive all statutory notices, file its reply to the exhibitor's brief within five days, and join the exhibitor in any motion to advance the cause on the docket. Similar provisions apply to appeal by the exhibitor to the Texas Supreme Court and to appeal by the Board from adverse decisions of the district court or the Court of Civil Appeals. If no injunction has been granted within ten days of notice of an exhibitor's non-acceptance, the Board's order is suspended, 366 F. 2d 590, at 600.

<sup>204</sup> The original scheme also provided for issuance of a special license to exhibitors who wished to show films classified as fit for adults only. That license was made revocable for repeated violations of the ordinance. Judge Hughes, in the district court, struck down this provision, correctly observing that such a penalty would abridge the right of adults to view films concededly not obscene as to them, 249 F. Supp. 19, 25 (N.D. Tex. 1965).

First, if the Board rejects a proposed classification, the burden shifts to the exhibitor to file a "notice of non-acceptance" of the Board's determination. Only then need the Board resort to the judicial process. Filing such notice is really equivalent to initiating litigation, a burden the exhibitor should not have to bear under *Freedman*. The result is that acquiescence in the Board's decision through inaction is made too easy and too attractive. Knowing it will not always face a court challenge, the Board may be tempted, in addition, to disapprove marginal films as a matter of policy.

Second, although the ordinance purports to require speedy appellate review, its language to that effect is precatory only. Dallas, of course, cannot compel the state courts to adjust their dockets to suit the city's special needs. Furthermore, it is difficult to reconcile Judge Hughes' finding in the trial court<sup>205</sup> (that a final determination can be obtained from the Texas Supreme Court in less than thirty-five day) with the fact that the recent *Viva Maria* litigation took place that time to run its full course.<sup>206</sup>

The question of the proper standard to be applied by the Classification Board also proved difficult. Originally, the Dallas ordinance had defined "not suitable for young persons" as:

(1) Describing or portraying brutality, criminal violence or depravity in such manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extramarital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.<sup>207</sup>

The link with "incitement" to anti-social action was substantially weakened, however, in a later paragraph: "A film shall be considered 'likely to incite or encourage' crime, delinquency, or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted."<sup>208</sup>

As Judge Hughes recognized, these standards were far too broad, even under the "variable obscenity" approach. She therefore held the phrase "Not suitable for young persons" to be valid only to the extent that:

. . . such films are obscene when viewed by an audience of young persons. . . . A film that is obscene when viewed by an audience of young persons is one which, to the average young person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest, substantially goes beyond the customary limits of candor in description or representation of such matters to the average young person, and is utterly without redeeming social importance.<sup>209</sup>

So construed, the definitional section of the ordinance should pass constitutional muster. But one may well doubt the propriety of this wholesale exercise in judicial redrafting, especially as the local Classification Board seems determined to adhere to the ordinance as written.<sup>210</sup>

The principal remaining difficulty with the Dallas ordinance is its failure to bring film distributors, as well as exhibitors, under the umbrella of its procedural safeguards. It is simply inaccurate to say, as Judge Thornberry does, that this is unnecessary because their interests are identical, or nearly so.<sup>211</sup> The distributor's financial stake is greater because, in a city like Dallas, a single film will invariably play at a large number of neighborhood theaters. Furthermore, the distributor's resources and, therefore, presumably, his willingness to undertake litigation are greater. Finally, he is less likely than a local theater owner to bow to pressure groups within the community. The national distributor could, therefore, serve a valuable function in "policing" the administration of an ordinance which is easily and obviously susceptible of abuse.

Assuming the objections noted above could be adequately refuted or overcome, however, they go only to the abstract constitutional permissibility of a scheme such as the one Dallas has adopted. Whether age classification would be a de-

<sup>205</sup> 249 F. Supp. 19, at 25.

<sup>206</sup> Brief for Columbia Pictures, *et al.* as Amici Curiae, pp. 24-25, 366 F. 2d 590 (5th Cir. 1966).

<sup>207</sup> 366 F. 2d 590, at 592.

<sup>208</sup> *Ibid.*

<sup>209</sup> 366 F. 2d 590, at 593.

<sup>210</sup> See Brief for Columbia Pictures, *et al.* as Amici Curiae, pp. 8-9, *supra* note 206.

<sup>211</sup> 366 F. 2d 590, at 601.

sirable means of regulating motion pictures in the United States is another question. Here, the British experience may prove enlightening.

Classification schemes entail the obvious practical difficulty of requiring exhibitors to exclude adolescents without interfering with the admission of adults. London cinemas have discovered young boys dressed in older brothers' clothing; some carrying unlighted cigarettes, others even armed with faked birth certificates.<sup>212</sup> However, these are discriminations which many shopkeepers (liquor dealers, for example) are called on to make. The constitutional requirement of *scienter* would probably protect a theater manager who honestly misjudged a child's age.<sup>213</sup>

In a recent New York decision, however, that State's Court of Appeals upheld the constitutionality of an act apparently "imposing strict liability on [a] bookseller for the . . . sale of obscene matter to a minor. . . ." <sup>214</sup> Without requesting any proof of age, the defendant, Tannenbaum, had sold two copies of a magazine, "Candid," to a seventeen-year-old boy. Judge Keating's opinion is disappointing because it blurs certain important distinctions. Principally, it fails adequately to differentiate between the seller's duty of inquiry and genuine strict liability. Thus, although it concludes that the act imposes absolute liability for sale to a minor, it also notes: "The eye of experience easily perceives the difference between an infant and an adult. Where the area greys, *inquiry is required.*" <sup>215</sup> Hopefully, *Tannebaum* will be distinguished in a subsequent prosecution if the bookseller shows that he made an honest mistake because he was affirmatively misled by the purchaser, or because the purchaser's appearance was not such as to put a reasonable man on notice as to his probable minority.

Strict accountability for the sale of liquor or contaminated food is, of course, an imperfect analogy in this area. An excess of caution on the part of a seller of books can pose a real threat to enjoyment of the first amendment's guarantees. Courts should be alert to safeguard the right of the adult reader, however youthful he may appear, to unobstructed circulation of material which, as to him, is protected expression.

The real danger in classification is that it can result in a general, informal "censorship" whose touchstone is "suitably for adolescent audiences." Economic loss to the exhibitor or to the producer (in the case of a nationwide scheme) could easily deprive adult audiences of films not certified as fit for juvenile consumption.

The British Board of Film Censors denies that classification operates as a restriction on adult entertainment:

Some "X" films are very profitable, and they can be so because recent surveys have shown that about 70% of the normal cinema audience are between the ages of 16 and 34. Apart from this, a really attractive movie can be profitable in any category.<sup>216</sup>

Nevertheless, it is clear that the Rank Organization, which controls one of the two major theater circuits in England, has deliberately refused to make or screen any film bearing an "X" certificate.<sup>217</sup> Since the larger cinemas depend on family audiences, the judgment is a matter of economic common sense. But it is also clear that any domestic distributor "looking for an outlet for his film knows that he hasn't a hope of getting his money back if he is denied a circuit release. . . ." <sup>218</sup> In consequence, many producers "who make 'X' films for the British market have to fall back, in part, on the custom of rather specialized types of cinema—some of which will not accept films that they consider to be insufficiently pornographic." <sup>219</sup>

In 1955 Mr. Michael Croft submitted a script based on his novel, *Spare the Rod*, to the British Board of Film Censors. The novel dealt with an inefficiently run school and the moral deterioration of its teachers. The Board proposed an "X" certificate for the film, on the ground that such subjects should not be debated

<sup>212</sup> FORD, CHILDREN IN THE CINEMA 98 (1939). The "A" film presents its own peculiar problems. In some London districts, "youths of 17 or 18 hang around the cinema entrances, waiting in the role of 'adult guardians,' to find girls 14 or 15 who want to see the film, and towards whom the youths have intentions which may not be indicated until they are side by side in the blackness of the cinema." *Id.* at 100.

<sup>213</sup> See e.g. *Smith v. California*, 361 U.S. 147 (1959).

<sup>214</sup> *People v. Tannenbaum*, 18 N.Y.2d 268, 220 N.E.2d 783, 274 N.Y.S.2d 131 (1966).

<sup>215</sup> 18 N.Y.2d at 274, 220 N.E.2d at 788, 274 N.Y.S.2d at 137. (Emphasis added.)

<sup>216</sup> Letter to Robert J. Klein from the Secretary, BBFC, March 24, 1966.

<sup>217</sup> *X in a Spot*, 174 ECONOMIST 20 (1955). It is not clear whether Rank still adheres to this policy. No statement is available from Associated British Pictures, the other major circuit.

<sup>218</sup> Houston, *The Power of the Circuits*, Sight and Sound, No. 4, p. 174 (1963).

<sup>219</sup> *X in a Spot*, *supra* note 217, at 20.

before children of school age. Shortly thereafter, plans for completing the picture were dropped. Mr. Croft then wrote to the *Spectator*:

Since the publicity over this film I have been approached by two independent producers. The censorship has borne fruit; one producer would like to make the film as a "quickie" with a "good sex angle," viz., between the young teacher and a girl pupil, so that it could be sold as "the sexiest school film ever;" the other producer would like to use the title but rewrite the story so that it would be sure of an "A" certificate. To these suggestions I have made the obvious reply.<sup>220</sup>

It may be assumed that Mr. Croft's case is not unique. According to the *Economist*, in 1955, "[We are] drawing perilously near to the stage where . . . no film with a serious social purpose can be made in Britain at all. . . ." <sup>221</sup> In fact, the situation has improved somewhat since the introduction of the "X" certificate. British companies were daring enough to produce a mere four of the first seventy-three films which the Board licensed for exhibition to adults only.<sup>222</sup> In 1965, however, twenty-five per cent of the "X" films released in England were British-made.<sup>223</sup>

## V. CONCLUSION

The plain lesson of the British experience is that motion picture classification may impose a censorship as rigorous and suppressive as the system it is designed to replace. To the extent that this has not happened in England, much credit is due to the intelligence and independence of the British Board of Film Censors, and the flexibility of their announced standards. In the past, no American censorship agency, private or public, has demonstrated a similar adaptive capacity. Nothing in the American experience suggests that a classification scheme would work as well here in practice as in theory it ought to.

If other cities should choose to follow the example of Dallas, as seems likely, the consequences for the film industry and the American public are not altogether unpredictable. Britain's experience suggests that the powers of a "classification" agency, however clearly defined at the outset, are not easily limited in practice. The tendency is to abandon mere labelling in favor of the total prohibition of youthful audiences from offensive films (the "X" certificate).

With its authority thus augmented, the "classification" board wields formidable powers. A local exhibitor, for example, who loses a potential family audience (the effect of an "X" classification), learns a costly lesson in the economics of "objectionable" motion pictures. In the future, he will be prepared for informal, off the record bargaining where four or five hundred feet of film may be cut in return for a general certificate of approval. The result, as Boston residents may have already learned, can be an especially bland movie fare.

It is also safe to predict that Hollywood's reaction to haphazard local "classification" would parallel that of British producers in 1912.<sup>224</sup> The larger companies would hastily arouse what is now the industry's sleepy watchdog—the "Valenti Office." Like the British Board of Film Censors, that organization could then exercise a substantial and direct influence on the content and production of all major films with a hope of commercial success. A good deal would then depend on the intelligence and flexibility of Mr. Valenti's staff members.

If the United States does not move in the direction of "classification," informal regulation through threat of arrest will continue to exercise a significant check on the freedom of local exhibitors. This sort of control is potentially more destructive than "classification," because it tends to focus on the representation of "improper" conduct and ideas as well as exaggerated sexuality; because it admittedly seeks to protect the adult as well as the youthful viewing public; and because its front-line administrators are generally police officers.

If the movies seem so much more vulnerable than books, it is because differences in the two media make them so. A Hollywood production is usually a team effort, commercially motivated and representing a substantial capital investment. The producer is, first of all, a businessman, and the director, unlike the author of a book, is rarely an artist of such stature as to be able effectively to defend the integrity of the finished work. At the local level, moreover, a published book can only be suppressed. An indelicate film can always be cut.

Movies and books obviously appeal to different kinds of audiences. Films are thought to pose a greater threat to the young precisely because so large a percent-

<sup>220</sup> 194 SPECTATOR 15 (1955).

<sup>221</sup> *X in a Spot*, 174 ECONOMIST 20 (1955).

<sup>222</sup> *Report on the 'X'*, Sight and Sound, No. 3, p. 123 (1954).

<sup>223</sup> Letter to Robert J. Klein from the Secretary, BBFC, March 24, 1966.

<sup>224</sup> See text accompanying notes 140-41 *supra*.

age of the audience is made up of children. Only those who read easily and well buy books—presumably a literate, sophisticated, adult audience. Finally, exhibitors are far more susceptible to local pressures than are booksellers. They are licensed, for example, at the outset, and informal administrative sanctions, quite apart from the penalties of the criminal law, are thus available to the censor.

These are points which it would be well for the courts to consider, as the movies are subjected to increasing formal and informal regulatory pressures. It is only in this context, after all, that the importance of the first amendment's guarantees to the medium of the motion picture can be fully appreciated.

---

STATEMENT SUBMITTED BY MRS. EDWARD F. RYAN, CHAIRMAN, NATIONAL PTA COMMITTEE ON LEGISLATION, NATIONAL CONGRESS OF PARENTS AND TEACHERS

Mr. Chairman and Members of the Committee, on behalf of National PTA, we appreciate very much indeed your holding hearings on this important matter, and the privilege of testifying in support of the resolution. I am Mrs. Edward F. Ryan, chairman for legislation of the National Congress of Parents and Teachers, whose approximately eleven million memberships are spread in fifty states, the District of Columbia, and the overseas dependents schools of the European Area.

Our members have been deeply concerned for several years with the increasing proportion of current films which they feel threatening to the welfare of youthful viewers, and with the difficulty for parents in identifying those which are appropriate entertainment. Two recent national conventions have adopted resolutions expressing the strongest concern with the damaging effects upon children and youth of the unhealthy and perverted sex, violence, and cruelty portrayed in current films.

In a period when value standards have grown increasingly confused, parents and teachers work hard to educate children and young people in moral and humane behavior. Models are of the utmost importance, and extrascholastic education is as potent in its effects as that consciously developed in home and school.

There is ample evidence of the ill effects of screening perverted sex, violence, and cruelty in creating deep emotional disturbance and distorting behavior. The Senate committee which investigated violence in television found that children tend to act out what they see, with a clear connection between TV violence and juvenile delinquency. Several years ago Boston's WBZ, in cooperation with community agencies, taped and aired excerpts from several hours of interviewing delinquent boys and girls about pornographic films they had viewed in their activities. The gist of it was that the youngsters were persuaded by the films to do what they had seen. According to current reputable press reviewers, the essential elements of yesterday's pornography are surpassed in today's "experimental" films, and even some general releases. An article in the June 17 *Wall Street Journal* describes even the film makers given pause by witnessing children terrified by their films.

Parents have different problems according to the ages of their children: (1) to govern what younger children will see, and (2) to furnish through appropriate discussion and suggestion guidance to adolescents for whom close supervision is no longer possible or wise. For various reasons parents are handicapped in assessing the suitability of films their children might see. Previewing is out of the question for most parents; press reviews may be missed or inadequate. Further, the growing number of films with problematical content tends to overwhelm parents who are slow to become aware of changes in standards from their own movie-going days.

National PTA is and always has been opposed to censorship. Nevertheless the responsibility for films which reach American children and youth is not the sole burden of parents, and in our view is shared by more than those who produce and sell such films. We have long urged wide and well publicized appraisal of the offerings of mass media, and in line with this policy view the proposal of classification with considerable interest. We should like at least to know its desirable and undesirable possibilities. We are aware of some of the questions which have been raised, and believe it fully appropriate that these questions be thoroughly explored for the benefit of the American public.

For instance, constitutional issues have been raised, although the U.S. Supreme Court itself appears to have invited effort for protection of children. These issues and their implications should be fully explored. It is further objected that classification, like censorship, would limit ideas, since current film audiences tend

to be largely youthful; the inference that youthful audiences should be testing ground for ideas which tend to pervert character in itself needs clarification. Still other questions in our minds are: whether or not an authority is needed to impose and regulate classification, what criteria are desirable, who would decide those criteria, and what means of changing criteria could be developed and maintained.

We hope very much that your committee will give favorable consideration to Resolution 9; education outside schools is fully as potent as education within schools, for which our society has long since taken responsibility. We support the study within this context, and appreciate this opportunity to offer our views.

---

STATEMENT OF REV. MORTON A. HILL, S.J.

My name is Father Morton A. Hill, S.J. Although I am a member of the Commission on Obscenity and Pornography recently appointed by the President, and have worked in this area for the past six years, I am testifying solely in my capacity as clergyman and private citizen.

I want to compliment the Committee on Commerce for holding these hearings on Senate Resolution 9 to create a special committee consisting of five senators to investigate all the problems of film classification, especially as it affects youth. In my opinion, such a study will be most valuable—in fact, the anguished voice of the community cries out for it. Fathers and Mothers desire to know in advance whether a particular film is suitable for their children and adolescents. Adults desire to know from some impartial body whether a particular film is disgusting and indecent in whole or in part before they sit down and view it themselves. In fact, many, many adults have stopped “going to the movies” simply because they are disgusted with film makers’ preoccupation with sex, sin, perversion and violence. As a priest I am appalled at the obscenity that has engulfed our nation because it is evil itself and incites to violence, drug usage, fornication, adultery and perversion; and violates the law of God. As a citizen, I fight it because it is destroying the nation’s moral fiber and contributing to what some have labelled as our “sick society.”

Having commented on the desirability of approaching this problem from a national congressional level by establishing such a special committee, I would like to suggest some of the areas in which such a Committee might concentrate its studies:

(1) Are the Supreme Court tests for Obscenity in books and magazines appropriate norms for Motion Picture Films?

I refer this Committee to the report of the Citizens’ Anti-Pornography Commission<sup>1</sup> of the City of New York which was appointed by the Mayor of that City in 1964 “to investigate the increasing public display of obscene and pornographic material.” That commission read and studied books found not to be obscene by our Courts applying the decisions of the United States Supreme Court. Among these books were “Tropic of Cancer” and “Fanny Hill.” Here is what the commission said about these books:

“TROPIC OF CANCER”

“The Commission, in its analyses, found the following between pages 2 and 6 of that novel. (I repeat, on the first six pages alone.)

“13 references to or descriptions of the female genitals.

“8 references to or descriptions of the male genitals.

“4 vivid descriptions of unnatural sexual copulation.

“1 reference to unnatural acts with four different types of animals.

“1 description of female masturbation.

“1 reference to lesbianism.”

Is this Senate Film Classification Committee prepared to accept or apply the same Supreme Court tests for motion pictures as for books? Will they classify this degeneracy as fit for even adults because some amoral critics are prepared to say it is not “utterly without redeeming social importance”?

<sup>1</sup> See Report of Mayor’s Anti-Pornography Commission, City of New York, April 1965. See also “Obscenity and the Law,” New York Law Forum, vol. X, No. 3, September 1964, pages 297 to 306, where Judge Scleppi of the Court of Appeals of the State of New York remarks:

I cannot believe that the moral standards of the average normal person in our society have become so low and degraded as established by the “Tropic of Cancer,” “Fanny Hill,” “The Lovers” and similar decisions.

Let me read you an excerpt from the Mayor's Committee report on "Fanny Hill" by John Cleland:

"*Fanny Hill* describes the sexual activities of a super-sexed girl starting at age 15—the book ends when she is 19—prostituting herself for a period of 4 years. The book covers approximately 50 different acts of sexual intercourse, one act for every 5½ pages. The book contains 4 scenes of violent, bloody rape and defloration, two sex orgies, one composed of 4 couples performing before three couples in turn. Among the sexual acts described, there is masturbation, flagellation and seduction by the girl or the boy. The author describes sexual acts vividly, arousing prurient interest \* \* \*"

I remind this Committee that the *Jacobellis* Case<sup>2</sup> does not stand for the proposition that the act of sexual intercourse may be actually depicted on the screen.

(2) The Second Area for consideration is the fact that films are shown on television and here we have the "Captive Audience" both young and old. Surely the same Supreme Court tests cannot be applied even by the Supreme Court. Where material is placed on the mass media, it is in a sense imposed on the public. This is especially true in the case of television which is piped into the homes of millions of families and can be turned on by a family member—including children—whether it is wanted in the home or not. Furthermore, a particular use of the airwaves preempts the use of those frequencies for other purposes and uses up a part of a limited number of frequencies available, which belong to all the people. This is relevant to films classification because a significant proportion of television time is used for films.

In this respect, material alloying sex with violence in such a way as to pander to enjoyment of cruelty is particularly harmful. In such cases such material has been sent out—often unsolicited—through the mails on a large scale as part of a commercial enterprise. In some instances this has been complete with requests for do-it-yourself torture pictures to be returned to the seller in exchange for more booklets showing the most excruciating tortures and portraying them as enjoyable.<sup>3</sup> The Supreme Court has held that material of this type is obscene and can validly be controlled.<sup>4</sup> Obviously, the precise effect of such material cannot be proved scientifically because no one can ascertain what among the infinite number of causes of human behavior brings about a specific result. At the same time, such information as is available suggests that this type of material contended to direct sexual tension and energy which is blocked from expression in other ways into deviant channels.<sup>5</sup> There is evidence that Adolf Hitler and some of his adjutants were influenced by an orientation of this type.<sup>6</sup>

Here I remind the Committee that the statutes on our books for 100 or more years both at the Federal level and in the 50 states prohibit obscenity *itself* as an evil. They do not proceed on the theory that you must prove some additional anti social effects. I urge that the Film Classification Committee not go down that blind alley of looking for a cause-effect syndrome. The Supreme Court does not even require it. In the Roth case it said, "Obscenity is not within the protected area of free speech."

(3) The Third Area is to consider how to classify to protect our youth and still permit the flow of adult fare. In this connection, I draw the attention of this Committee to the recent case of *Ginsberg v. New York*<sup>7</sup> decided by the Supreme Court of the United States on April 22, 1968, where the Court said that under a properly drawn statute material "harmful to minors" may be proscribed—in other words, upholding the "variable obscenity" concept.

Among the remaining thoughts I would leave with the Committee are the following:

<sup>2</sup> *Jacobellis v. Ohio*, 374 U.S. 184 (1964); See also 14 Buffalo Law Review, "Roth Goes to the Movies" at p. 519:

"A close examination of the opinions of the Justices (of the Supreme Court) makes it clear that they may be quite unwilling to allow actual portrayal of sexual activity."

<sup>3</sup> See Brief for the United States, *United States v. Klaw*, 350 F. 2d 155 (2d Cir. 1965).

<sup>4</sup> *Mishkin v. New York*, 383 U.S. 502 (1966).

<sup>5</sup> See, e.g., Wertham, *Seduction of the Innocent* (1953); Berkman, "Are there Behavioral Effects of Pornography," 21 Am. Psychologist 695 (1966); Wertham, "Mass Media and Sex Deviation," in *Sexual Behavior and the Law* 829 (Slovenko ed. 1965); Walters, "Implications of Laboratory Studies of Aggression for the Control and Regulation of Violence," 364 Annals 60, 61-66 (March 1966) and authorities cited; Symposium—"The Psychologist as an Expert Witness," 21 Am. Psychologist 657 (1966).

<sup>6</sup> See Bullock, *Hitler: A Study in Tyranny* 108-09 (Bantam ed. 1961); Shirer, *The Rise and Fall of the Third Reich* 186-87 & n. 6 (Crest ed. 1960).

<sup>7</sup> Indeed, some experts have gone so far as to assert that "in all of us, there are sadomasochistic impulses which, if not controlled, can pass into the area of sexual deviation." Caprio & Brenner, *Sexual Behavior: Psycho-legal Aspects* 232 (1961).

Recent Supreme Court decisions indicate that it is the abuse of the mass media of communication on a large-scale commercial basis which is most significant.<sup>8</sup> Where the sole dominant appeal of films purveyed through the mass media is to sick and unhealthy interest in a symbiosis of sex and violence. And where the use of scarce airwaves belonging to the public is involved, we have a right to expect that such material will not deprive the public of valuable and meaningful programs. Indeed, the constitutional basis of regulation of broadcasting, which saves it from being itself an unconstitutional violation of freedom of the press, is the fact that frequencies are scarce.<sup>9</sup> Thus, use of scarce frequencies for degradation of the value of human existence might justify citizens' intervention to protest renewal of licenses for the offending parties.<sup>10</sup>

It would also be helpful if consideration were given to a federal statute permitting United States Attorneys to obtain injunctive relief against violation of the mail—obscenity,<sup>11</sup> mail fraud<sup>12</sup> and broadcasting obscenity<sup>13</sup> statutes. This would permit a more rapid adjudication than administrative procedures and would offer a supplement to criminal prosecution. Such an approach would be in accord with recent discussions of the need for quick judicial rulings on matter claimed obscene in order to assure procedural safeguards.<sup>14</sup>

Another step which could be very important would be the development of an impartial citizen body to review and comment on the performance of the mass media so that they can fulfill their highest promise for the people. Such a body need have no official powers, even to warn anybody.<sup>15</sup> Such a proposal was made in the *Report of the Commission on Freedom of the Press* in 1947. Consideration should be given to taking it up again now.

In conclusion, I urge this Committee on Film Classification be established and that it reestablish the role of Congress in making the law in this field. The American public is sick of obscenity and needs protection for its children. Use the recent *Ginsberg* Case to keep children away from what you would not desire your children to see! Don't permit any scenes on television that you would not permit to be depicted on a public street! Let good taste be the guide and not a preoccupation with legalistic concepts of the bounds of free speech. I also ask permission to file, as an appendix to my remarks, the very pertinent *Report of the Committee on Obscenity*<sup>16</sup> appointed by the Mayor of the City of New York.

<sup>8</sup> *Ginzburg v. United States*, 383 U.S. 463 (1966); *Mishkin v. New York*, 383 U.S. 502 (1966).

<sup>9</sup> See *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943), cf. *Givens*, "Refusal of Radio and Television Licenses on Economic Grounds," 46 Va. L. Rev. 1391 (1961).

<sup>10</sup> *Office of Communication of United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. CIR 1966); Note, "Regulation of Program Content by the FCC," 77 HARV. L. REV. 701 (1964).

<sup>11</sup> 18 U.S.C. Secs. 1461, 1463.

<sup>12</sup> Cf. *United States v. Zovluck*, 274 F. Supp 385 (S.D.N.Y. 1967).

<sup>13</sup> 18 U.S.C. 1464.

<sup>14</sup> See *Freedman v. Maryland*, 380 U.S. 51 (1965) PAUL & SCHWARTZ, Federal Censorship: Obscenity in the Mail (1961).

<sup>15</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and recommended by the New York Commission in 1965. See Footnote 1 above.

<sup>16</sup> The report referred to has been made part of the committee's official file on S. Res. 9.



