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Obscenity: *Roth* Goes to the Movies

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injury to another, the court could take into account the relevant circumstances such as the degree of relationship between the parties, the severity of the injury and the proximity of the plaintiff to the scene. Once the court determines whether a duty should be imposed, the jury, under the usual standards for determining the weight of the evidence, could then decide whether the defendant failed in his duty. Liability would result if the defendant, in the circumstances of the case, should have reasonably foreseen fright or shock severe enough to cause substantial injury in a normally constituted person. Such an approach, recommended by numerous authorities,[98] adopted in the English courts,[99] and advanced by the dissent in the *Amaya* decision,[100] would obviate the necessity for the mechanical rules surrounding the claims for mental distress at the apprehension of injury to another.

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OBSCENITY: *ROTH* GOES TO THE MOVIES

In 1915 the United States Supreme Court held that movies were no more than a form of commercial entertainment, and were not to be regarded in the same class as other communication media.[1] It was not until 1952 that the Court reversed this judgment and held that motion pictures clearly convey information and thought, and thus are entitled to the guarantees of free speech provided by the first and fourteenth amendments.[2] However, the Court was quick to add that "it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas."[3] Thus it becomes proper to ask which movies will not receive the protection of the Constitution. This comment will concern itself with movies that contain material relating to sex, and the possible limitations[4] of the protection which may be afforded to them.

In *Roth v. United States*,[5] the United States Supreme Court held that if the presentation of the material falls within the category of "obscenity [it] is not within the area of constitutionally protected speech or press,"[6] because

98. Blessing, *The Right to Mental Security*, 16 U. Fla. L. Rev. 540, 568 (1964); Brody, *supra* note 90; 2 Harper & James, Torts 1035-38 (1956).
99. Owens v. Liverpool Corp., [1939] 1 K.B. 394.
100. 59 Cal. 2d 295, 316, 379 P.2d 513, 526, 29 Cal. Rptr. 33, 46.

1. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 244 (1915) (". . . [T]he exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded . . . as part of the press of the country or as organs of public opinion."
2. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). See note 12 *infra*.
3. *Id.* at 502-03.
4. *E.g.*, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). See generally, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Near v. Minnesota, 283 U.S. 697 (1931); American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954).
5. 354 U.S. 476 (1957).
6. *Id.* at 485.

obscenity is "utterly without redeeming social importance."[7] But Mr. Justice Brennan, writing for the majority,[8] pointed out that "sex and obscenity are not synonymous . . . [and the] portrayal of sex, *e.g.*, in art, literature and scientific works, . . . [is entitled to] the constitutional protection of freedom of speech and press"[9] if such portrayal does not fall into the unprotected classification of obscenity. The court then set forth as an approved[10] test for obscenity "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[11]

Motion pictures have been held to come within the protection of the first amendment as forms of expression.[12] The *Roth*[13] test, though first recognized in a case involving erotic literature has now also been utilized by the courts to determine whether or not motion pictures are obscene.[14] However, the precise issue of what the "dominant theme of the material taken as a whole"[15] means when applied to movies has not yet been fully answered by the Court. It is clear that courts must read and consider the whole book[16] or magazine,[17] and not merely isolated passages before condemning the work. Books that contain passages that have vividly described the sexual act of intercourse, mentioning in detail every facet of the activity, including descriptions of the genitals have been protected.[18] However, the Supreme Court has not yet been asked to decide whether a similar, isolated portrayal would be protected on a movie screen in

7. *Id.* at 484. See Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Supreme Court Rev. 1, 7.

8. Joined by Justices Frankfurter, Burton, Clark and Whittaker. Mr. Chief Justice Warren concurred in result, and Mr. Justice Harlan concurred in a companion case, Alberts v. California, but dissented in Roth v. United States. Mr. Justice Douglas was joined in dissent by Mr. Justice Black.

9. Roth v. United States, 354 U.S. 476, 487 (1957).

10. *Id.* at 489.

11. *Ibid.* See generally Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 49-58 (1960).

12. In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) the Court concluded "[T]hat expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Comm'n*, *supra* [236 U.S. 230 (1915)], is out of harmony with the views here set forth, we no longer adhere to it." See United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

13. See note 11 *supra* and accompanying text.

14. Jacobellis v. Ohio, 378 U.S. 184 (1964). See also Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684 (1959); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957); Columbia Pictures Corp. v. City of Chicago, 184 F. Supp. 817 (N.D. Ill. 1959); American Civil Liberties Union v. City of Chicago, 13 Ill. App. 2d 278, 141 N.E.2d 56 (1957).

15. See note 11 *supra* and accompanying text.

16. *E.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). See also Butler v. Michigan, 352 U.S. 380, 382 (1957).

17. *E.g.*, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); One, Inc. v. Olesen, 355 U.S. 371 (1958), *reversing*, 241 F.2d 772 (9th Cir. 1957); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), *reversing*, 249 F.2d 114 (D.C. Cir. 1957). *But see* 1 Chaffee, Government and Mass Communications 217 (1947).

18. *E.g.*, Larkin v. G. P. Putnam's Sons, 14 N.Y.2d 399, 200 N.E.2d 760, 252 N.Y.S.2d 71 (1964) ("Fanny Hill"). But *cf.* People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963) ("Tropic of Cancer").

light of the fact that movies must be judged on the basis of the dominant theme taken as a whole.[19] The Court has extended the constitutional freedom of expression protection to movies containing a scene which showed the face of a woman experiencing sexual orgasm[20] but has not yet been asked whether a movie containing a scene showing a complete clinical examination of fornication, for example, is permitted even though the movie's dominant theme does not fall within the prohibited category set down by the *Roth* test. It will be the purpose of this comment to examine this problem in light of the decisions of the Court.

The Supreme Court, in *Jacobellis v. Ohio*,[21] considered the movie "Les Amants" ("The Lovers"). The movie contained a scene which showed a woman's facial expressions during sexual orgasm ". . . induced, suggested off screen, by cunnilingus."[22] The Ohio Supreme Court had divided the film into eighty-seven minutes of "vapid drivel"[23] and ". . . three minutes of complete revulsion during the showing of an act of perverted obscenity."[24] In reversing the conviction of Jacobellis for possessing and exhibiting an obscene film, the United States Supreme Court applied the *Roth* test to movies for the first time. Mr. Justice Brennan, delivering the opinion of the Court, reaffirmed the *Roth* standard and also recognized that in order for material to be classified as obscene it must go ". . . substantially beyond customary limits of candor in description or representation . . ." of matters relating to sex.[25] A seemingly further requirement appeared to be established in that material ". . . that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection."[26]

Thus the Court, in applying *Roth*, made it clear that the test also included artistic value and limits of candor in the determination of obscenity.[27] It would seem from *Jacobellis* that the material must be without artistic value, *and* exceed the customary limits of candor *and* must have as its dominant theme an appeal to an average man's prurient interest, when viewed as a whole, by the national[28] community.[29] Each portion of the test must be satisfied in order

19. Jacobellis v. Ohio, 378 U.S. 184 (1964).
20. *Ibid.*
21. 378 U.S. 184 (1964).
22. Note, 39 N.Y.U.L. Rev. 1063, 1079 (1964).
23. Jacobellis v. Ohio, 173 Ohio St. 22, 28, 179 N.E.2d 777, 781 (1962).
24. *Ibid.*
25. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).
26. *Ibid.*
27. See Note, 39 N.Y.U.L. Rev. 1063, 1064 (1964).
28. Jacobellis v. Ohio, 378 U.S. 184, 192-95 (1964): "We thus affirm the position taken in *Roth* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard." *Id.* at 195. Mr. Chief Justice Warren in his dissent made it clear that he did not agree: "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." *Id.* at 200. See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 108-14 (1960).
29. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).

to deny material constitutional protection. In examining "Les Amants" Mr. Justice Brennan noted that the film received favorable as well as unfavorable reviews, and was rated by two critics of national stature as among the best films of the year.[30] He further concluded that the movie ". . . is not obscene within the standards enunciated in *Roth v. United States*. . . ."[31] Thus on June 22, 1964 the United States Supreme Court ruled that a movie showing the facial expressions of a woman during orgasm induced by cunnilingus was not obscene.

Less than three months earlier a similar problem had faced the New York Court of Appeals. The Board of Regents of the University of the State of New York directed the elimination of two scenes from the motion picture "A Stranger Knocks" before granting a license to the Trans-Lux Distributing Corporation for the exhibition of the film. In so directing, the Board applied New York's motion picture licensing statute[32] which requires an examination of motion picture films and the issuance of a license for their exhibition "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of

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30. *Id.* at 196. For an interesting discussion of the problems relating to the evaluation of critics see Note, 39 N.Y.U.L. Rev. 1063 (1964).

31. Jacobellis v. Ohio, 378 U.S. 184, 196 (1964).

Mr. Justice Stewart, in a concurring opinion, forthrightly said: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197.

Mr. Justice Goldberg noted that "the love scene deemed objectionable is so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed." *Id.* at 197-98.

Mr. Justice Brennan, before concluding his opinion for the Court, felt warranted to make the following comment:

> 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, the effect of which would be to "reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination. *Id.* at 195.

See generally Note, *"For Adults Only": The Constitutionality of Governmental Film Censorship by Age Classification*, 69 Yale L.J. 141 (1959).

32. N.Y. Educ. Law § 122 provides:

> The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.
>
> § 122a 1. For the purpose of section one hundred twenty-two of this chapter, the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts desirable, acceptable or proper patterns of behavior. Compare Freedman v. Maryland, 85 S. Ct. 734 (1965); Trans-Lux Distrib. Corp. v. Bd. of Regents of the Univ. of the State of New York, 85 S. Ct. 952 (1965).

such a character that its exhibition would tend to corrupt morals or incite to crime. . . ."[33]

> The first scene presents a man and a woman on a beach embracing and caressing one another, and ends in a view of the head and shoulders of the woman with facial expressions indicative of orgasmic reaction. The second scene presents the woman astride the man on a bed. Their bodily movements are unmistakably those of the sexual act and the woman's face again registers emotions concededly indicative of orgasm. This scene is the dramatic climax of the picture because of the coincidence of the woman's passion with her sudden realization, through the exposure of a tell-tale scar, that the man is her deceased husband's murderer. As respondent's [Trans-Lux] affidavit puts it: 'The climax is a groan of pleasure and pain, a dramatic and eloquent expression of the persistent ambivalence in the relationship.'[34]

The Appellate Division annulled the Board's determination in a memorandum decision noting that the sexual acts are implied rather than demonstrated and are an integral part of the movie.[35] The four judge majority[36] directed the licensing of the film. The New York Court of Appeals reversed, holding that the two scenes must be eliminated before a license may be issued.[37] Judge Burke, writing for the majority, found the "filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibitation as similar conduct if engaged in on the street."[38] By thus labeling the scenes conduct and not speech the court avoided the need to apply the *Roth* test.[39] Judge Burke seems to have asserted the following: fornicating in the public street is con-

33. *Ibid.*

34. Trans-Lux Distrib. Corp. v. Bd. of Regents of the Univ. of the State of New York, 14 N.Y.2d 88, 90, 198 N.E.2d 242, 243, 248 N.Y.S.2d 857, 858 (1964).

35. Matter of Trans-Lux Distrib. Corp. v. Bd. of Regents of the Univ. of the State of New York, 19 A.D.2d 937, 244 N.Y.S.2d 333 (3d Dep't 1963). The case was ordered transferred to the Appellate Division in accordance with the provisions of N.Y. Civ. Prac. Act § 1296 now N.Y.C.P.L.R. § 7804. Record, pp. 2-3.

36. Bergan, P. J., Gibson, Reynolds and Taylor, J. J., in the majority; Herlihy, J., dissenting.

37. Trans-Lux Distrib. Corp. v. Bd. of Regents of the Univ. of the State of New York, 14 N.Y.2d 88, 198 N.E.2d 242, 248 N.Y.S.2d 857 (1964).

38. *Id.* at 92, 198 N.E.2d at 245, 248 N.Y.S.2d at 860. Compare Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). See note 12 *supra* and accompanying text. For a discussion of the reasons given for laws banning obscenity and public displays of immorality see Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963).

39. Trans-Lux Distrib. Corp. v. Bd. of Regents of the Univ. of the State of New York, 14 N.Y.2d 88, 96, 198 N.E.2d 242, 247, 248 N.Y.S.2d 857, 863 (1964): "[B]ecause the material assigned as obscene in this case is not, in my view, speech, as opposed to conduct, it need not come within the test laid down in *Roth v. United States* (354 U.S. 476, *supra*) that, in speech cases, obscenity must be the dominant theme of the work as a whole." Compare Roth v. United States, 354 U.S. 476, 487 (1957). *But see* Excelsior Pictures Corp. v. Regents of the Univ. of the State of New York, 3 N.Y.2d 237, 144 N.E.2d 31, 165 N.Y.S.2d 42 (1957) which held that a movie showing the activity of nudes of both sexes at play in a nudist camp must be licensed. This private conduct could be banned if done on Judge Burke's public street as may public fornication. The nudes were in a private camp and the couple in "A Stranger Knocks" were in a private house but yet in the latter the scenes were adjudged conduct and in the former protected by freedom of speech. Excelsior Pictures Corp. v. City of Chicago, 182 F. Supp. 400 (N.D. Ill. 1960).

duct and may be proscribed because of its danger to society.[40] This danger also applies to filmed representations of conduct and thus they may also be proscribed. Judge Scileppi, in his concurring opinion went a step further: ". . . the dominant theme test is, I believe, inapplicable to motion pictures. The two offending scenes must be judged separately as would still photographs."[41] Judge Williams,[42] noting the contention that the production must be considered as a whole, found "its over-all merit . . . not such as to support scenes of obscenity. And the contention that the two scenes of visible sexual intercourse are necessary to maintain the high cultural level of the picture speaks little for the social value of the production 'as a whole.' "[43] Judges Dye, Fuld and Van Voorhis dissented and voted to affirm upon the majority memorandum opinion in the Appellate Division.[44]

It seems clear, upon examining the scenes from "A Stranger Knocks" in light of the protected scene in "Les Amants" that the majority view of the New York court may not be sustained. Both movies showed only the face of a woman during sexual orgasm. Although Trans Lux's appeal to the Supreme Court was successful and the New York court was reversed, the per curiam decision[45] indicates that the issue of obscenity was never reached. The sole case cited[46] was decided, not on any issue of obscenity, but on the procedural delay compounded by a movie licensing statute in Maryland that is quite similar to that of New York.[47]

The Supreme Court, having protected movies that show the face of a woman during orgasm may presumably now be asked to protect a film that contains a scene that shows the entire body during a sexual act. The major question, therefore, is whether the *Roth* test, as described in *Jacobellis*, will protect movies that contain a scene or even several scenes, portraying with clinical detail an act of fornication, fellatio or cunnilingus, for example, and not merely the facial reflections of the act.

The constitutional requirement that obscenity be determined by the dominant theme of the material considered as a whole, and not by isolated passages, is applicable to motion pictures and plays as well as to books.[48] However, it was not until 1964 that the Supreme Court, in *Jacobellis*, decided this precise

40. See Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963).

41. Trans-Lux Distrib. Corp. v. Bd. of Regents of the Univ. of the State of New York, 14 N.Y.2d 88, 99, 198 N.E.2d 242, 249, 248 N.Y.S.2d 857, 865-66 (1964).

42. Designated pursuant to N.Y. Const. art. VI, § 2(a) in place of Judge Bergan, disqualified because of his having decided the case in the Appellate Division. See *supra* note 36.

43. Trans-Lux Distrib. Corp. v. Bd. of Regents of the Univ. of the State of New York, 19 N.Y.2d 88, 99, 198 N.E.2d 242, 249, 248 N.Y.S.2d 857, 866 (1964).

44. In the Matter of Trans-Lux Distrib. Corp. v. Bd. of Regents of the Univ. of the State of New York, 19 A.D.2d 937, 244 N.Y.S.2d 333 (3d Dep't 1963).

45. Trans-Lux Distrib. Corp. v. Bd. of Regents of the Univ. of the State of New York, 85 S. Ct. 952 (1965).

46. Freedman v. State of Maryland, 85 S. Ct. 734 (1965).

47. *Supra* note 32.

48. See cases cited note 14 *supra*.

point. Although in 1959 the Court reversed New York's censorship[49] of the movie "Lady Chatterley's Lover," it found the case in such a procedural posture as to make the determination unnecessary. Professors Lockhart & McClure noted that the movie contained "scenes which showed the gamekeeper-lover help Lady Chatterley unbutton her blouse and unzip her dress, reach with his hand under her dress to note that she had come to him with no undergarments and caress her buttocks, and which showed them lying in bed in an apparent state of undress before and after consummation of their love."[50] The New York Appellate Division had held that, in applying constitutional standards, *Lady Chatterley's Lover* was not obscene.[51] This decision was reversed by the New York Court of Appeals,[52] but in so doing the Court subtly recast the issue. The Board of Regents, the Court of Appeals said, had denied a license to *Lady Chatterley's Lover* because the statute required such denial to "motion pictures which are immoral in that they *portray* 'acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior.' "[53] Then, the New York Court ruled that the state may refuse to license a motion picture that "alluringly portrays adultery as proper behavior"[54] even though it is not obscene[55] and further found the film did just that.[56] Thus on appeal to the United States Supreme Court, the precise issue of whether this scene was obscene was not raised.[57] "The Court of Appeals [having] unanimously and explicitly rejected any notion that the film is obscene"[58] the Supreme Court reversed the determination of New York's highest court that the movie may not be licensed because of the alluring portrayal of adultery as proper behavior. Thus it was quite unnecessary for the Supreme Court even to view the film in order to hold that New York may not "prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior."[59]

Two years earlier, the Supreme Court failed to give us any firm guide lines when, in its now famous series of *per curiam* decisions,[60] it reversed without

49. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of The State of New York, 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958).

50. Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 Utah L. Rev. 289, 294 (1961).

51. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 4 A.D.2d 348, 350, 165 N.Y.S.2d 681, 683-84 (3d Dep't 1957).

52. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958).

53. *Id.* at 351, 151 N.E.2d at 197, 175 N.Y.S.2d at 40. (Emphasis in original.)

54. *Id.* at 358, 151 N.E.2d at 201, 175 N.Y.S.2d at 46.

55. *Id.* at 361, 151 N.E.2d at 203, 175 N.Y.S.2d at 48.

56. *Ibid.*

57. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684 (1959). Mr. Justice Stewart, writing for the majority, was joined by Mr. Chief Justice Warren and Justices Black, Douglas and Brennan. The remaining four Justices concurred in result. See Lockhart & McClure, *supra* note 11, at 40-42.

58. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684, 686 (1959).

59. *Id.* at 688. See Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Supreme Court Rev. 1, 28.

60. Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957), *reversing* 244 F.2d 432 (7th Cir. 1957); Mounce v. United States, 355 U.S. 180 (1957), *reversing* 247 F.2d 148

opinion a United States Court of Appeals decision[61] upholding obscenity censorship of the motion picture "The Game of Love." The movie was described by the United States Court of Appeals as follows:

> . . . from beginning to end, the thread of the story is supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts. In the introductory scenes a flying start is made when a 16-year-old boy is shown completely nude on a bathing beach in the presence of a group of younger girls. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age. The erotic thread of the story is carried, without deviation toward any wholesome idea, through scene after scene. *The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized.*[62]

Examining the four objectionable movies[63] which the Supreme Court has protected one finds that fornication or similar activity was not in fact shown but instead was suggested or mirrored in the face of an actress. A close examination of the opinions of the Justices makes it clear that they may be quite unwilling to allow actual portrayal of sexual activity. Mr. Justice Clark provided a hint when he found that "no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray *acts* of sexual immorality, perversion or lewdness.' If New York's statute had been so construed by its highest court I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters."[64] Mr. Justice Stewart[65] took pains to make clear that the Court had based its conclusion on the fact that the New York Court of Appeals decision rejected "any notion that the film is obscene"[66] and that the license was denied because the film "approvingly portrays an adulterous relationship, *quite without reference to the manner of its portrayal.*"[67] Mr. Justice Harlan granted "that the abstract public discussion or advocacy

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(9th Cir. 1957); One, Inc. v. Olesen, 355 U.S. 371 (1958), *reversing* 241 F.2d 772 (9th Cir. 1957); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), *reversing* 249 F.2d 114 (D.C. Cir. 1957).

61. Times Film Corp. v. City of Chicago, 244 F.2d 432 (7th Cir. 1957).

62. *Id.* at 436. (Emphasis added.)

63. Trans-Lux Dist. Corp. v. Bd. of Regents of the Univ. of the State of New York, 85 S. Ct. 952 (1965). ("A Stranger Knocks"); Jacobellis v. Ohio, 378 U.S. 184 (1964) ("Les Amants"); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684 (1959) ("Lady Chatterley's Lover"); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957) ("The Game of Love").

64. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684, 702 (1959). (Emphasis in original.)

65. *Supra* note 57.

66. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684, 686 (1959).

67. *Id.* at 688. (Emphasis added.)

of adultery, *unaccompanied by obscene portrayal* or actual incitement"[68] may not be proscribed.

Such care in limiting their opinions may suggest the Justices realized that they might very well be faced with a much different problem if it were argued that the manner of portrayal itself was obscene. By thus leaving this question open, the court could, in an individual case by case formulation,[69] examine the area of portrayal using the dominant theme test.

Roth AND A PROPOSED MODIFICATION

At one time isolated passages were considered sufficient to deprive material of protection from censorship if they affected even the most susceptible persons.[70] This test, frequently attacked by courts,[71] was finally rejected in 1957 in *Roth v. United States*.[72] No longer could mere isolated descriptions or phrases justify a denial of constitutional freedom of speech. The courts must now examine how the "dominant theme of the material taken as a whole"[73] appeals to the average man's prurient interest. Although the Supreme Court gave birth to the *Roth* test in a case involving alleged pornographic literature the Court has now applied it to movies as well.[74]

However, it is clear that the inclusion of a vivid *description* of sexual activity within a book is not quite the same as its vivid *portrayal* upon the screens of our nation's theaters.[75] While the idea has not been expressly articulated by the courts, it may be argued that when dealing with motion pictures a stricter version or application of the *Roth* test may be needed. There would be justifiable alarm should motion picture directors be allowed to insert into their movies portrayals of sexual activity that are not germane to the dominant theme. When requiring that a book be judged as a whole, courts frequently

68. *Id.* at 705. (Emphasis added.)

69. *Id.* at 696. "But, except in capital cases, we have to thread our way. Term after Term, through the particular circumstances of a particular case . . . in order to ascertain whether due process was denied in the unique situation before us."

70. Regina v. Hicklin, [1868] L.R. 3 Q.B. 360. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well have encompassed material legitimately treating sex. See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 49 (1960); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 392 (1954).

71. *E.g.*, United States v. Kennerley, 209 Fed. 119, 120-21 (S.D.N.Y. 1913) in which District Judge Learned Hand wrote his now famous attack on the *Hicklin* test.

72. 354 U.S. 476 (1957).

73. *Id.* at 489.

74. See cases cited note 14 *supra*.

75. Although the Supreme Court has not yet held any motion picture to be obscene, the Court did uphold the constitutionality of Newark, New Jersey city ordinances which prohibited lewd, obscene or indecent shows and performances. Adams Newark Theater Co. v. City of Newark, 354 U.S. 931 (1957). See Bickel, *The Least Dangerous Branch* 140 (1962): ". . . [M]otion pictures may be deemed different even from television in impact and most signally in the numbers and nature and situation of any single audience; movies, like the theater, address themselves to groups of people in public places, not to the individual in the home." See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 93-94 (1960).

refer to the relevance of the passages alleged to be obscene.[76] The "relevancy of the objectionable parts to the theme"[77] is a "persuasive piece of evidence"[78] in determining the dominant effect of the book.[79] If the questioned portions are found to be relevant to the theme, courts tend to hold the book not obscene.[80] Conversely, if the parts are deemed irrelevant, the book is usually found to be obscene.[81]

Books that contain lurid passages, sprinkled throughout and not intending to convey a specific mood, have been denied constitutional protection.[82] Books that use such descriptive passages to create and further a desired mood, such as D. H. Lawrence's "Lady Chatterley's Lover" have been protected.[83] Thus it may be suggested that the courts should examine the relevancy of the objectionable scene within a movie just as in the past they have examined the relevancy of such material within challenged literature. It may be further suggested that the courts will require a much higher degree of relevancy in light of the requirement that the scene may not go beyond the customary limits of candor.[84] Should the offensive scene be deemed irrelevant to the dominant theme of the movie there seems to be little justification for protecting it from the censor's shears. This higher requirement may stem from two reasons. When a reader encounters such a passage in a book he is free to use his own imagination in visualizing the activity described. He may picture the behavior as luridly as he desires, but he need not dwell on the description if he finds it too offensive. While it is true that a momentary glimpse of lurid behavior may not be as offensive as a lingering close-up, the behavior still remains offensive. On the other hand, should the activity be displayed upon a movie screen the viewer has no effective way to limit its impact. He must sit through the scene, even though he finds it to be blatantly offensive, or leave the theatre. The problem of a relevance requirement for movies can be explained by comparing a movie version to the original passage in the book. The author may require considerable dialogue and descriptive narrative to establish for the reader the desired mood or character behavior. But a picture may well be worth a thousand words. The

76. *E.g.*, United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934); Attorney General v. Book Named "Forever Amber," 323 Mass. 302, 81 N.E.2d 663 (1948).

77. United States v. One Book Entitled "Ulysses," 72 F.2d 705, 708 (2d Cir. 1934).

78. Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 346 (1954).

79. *E.g.*, United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934); Attorney General v. Book Named "Forever Amber," 323 Mass. 302, 81 N.E.2d 663 (1948). See Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 346 (1954).

80. *E.g.*, Grove Press, Inc. v. Christenberry, 175 F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960) ("Lady Chatterley's Lover").

81. *E.g.*, People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963) (Henry Miller's "Tropic of Cancer").

82. *Id.* at 124, 192 N.E.2d at 716-17, 243 N.Y.S.2d at 6 (1963).

83. Grove Press, Inc. v. Christenberry, 175 F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

84. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).

movie may more readily create the same desired impact on the viewers without portraying each detail described in words by the author. It follows that frequently much of the description required by written material would be irrelevant (and possibly also unnecessary) to the artistic creation of a movie.

The second issue arises when the objectionable activity is found to be relevant to the dominant theme, such as Lady Chatterley's adulterous behavior with her lover. Certainly a pristine heroine would have created a far different work of literature than that intended by Lawrence. However, a clinical examination of such behavior need not always be *necessary* to convey the desired theme. In 1945, Massachusetts[85] held the book "Strange Fruit" to be obscene because the court found the author could convey her message without the inclusion of the objectionable material.[86] In the light of *Roth*, a more satisfactory test would allow determination of the relevancy of the objectionable portion to the theme as a whole by considering the ". . . author's sincerity of purpose, a standard of relevancy that recognizes what is sometimes called 'literary necessity'—the author's need to use whatever words and passages he feels will produce the *over-all* effect he hopes to achieve."[87]

Certainly the insertion of an objectionable scene into a movie must also be necessary if the scene is to survive.[88] For example, should the director of a movie wish to convey the dramatic effects of rape upon its victim it would not be necessary to show the actual penetration. The face of the actress could conceivably better portray the pain, shock and embarrassment of the deed than a crude examination of the specifically violated areas. The application of these two requirements, relevancy and necessity, may seem to place the courts in the difficult position of instructing authors how to formulate their theme and how to convey it.[89] However, such requirements would tend to prevent objectionable activity from being cast upon the movie screen. Since the Supreme Court has already taken upon itself the necessity of determining the artistic value of a literary endeavor,[90] it may also examine the relevancy and necessity of objectionable inclusions. In determining the relevancy and necessity of the objectionable portions the court could examine the author's sincerity of purpose.[91] The application of this test would afford examination of the author's testimony or that of expert witnesses regarding the over-all effect desired and that actu-

85. Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945). *But see* Roth v. United States, 354 U.S. 476, 489 n.26 (1957).

86. *Id.* at 557, 62 N.E.2d at 847 (1945): "[T]he matter which could be found objectionable is not necessary to convey any sincere message the book may contain. . . ."

87. Lockhart & McClure, *Censorship of Obscenity: The Developing Community Standards*, 45 Minn. L. Rev. 5, 91 (1960).

88. *Id.* at 94.

89. *Id.* at 91.

90. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). See United States v. One Book Entitled "Contraception," 51 F.2d 525, 527 (S.D.N.Y. 1931); United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934). See generally Note, 39 N.Y.U.L. Rev. 1063 (1964).

91. Lockhart & McClure, *supra* note 87, at 91.

ally created by the inclusion of the offensive material.[92] As Judge Clark,[93] writing of D. H. Lawrence's "Lady Chatterley's Lover" pointed out:

> Obviously a writer can employ various means to achieve the effect he has in mind, and so *probably Lawrence could have omitted some of the passages found "smutty" by the Postmaster General and yet have produced an effective work of literature. But clearly it would not have been the book he planned, because for what he had in mind his selection was most effective,* as the agitation and success of the book over the years have proven. In these sex descriptions showing how his aristocratic, but frustrated, lady achieved fulfillment and naturalness in her life, he also writes with power and indeed with a moving tenderness which is compelling, once our age-long inhibitions against sex revelations in print have been passed. . . .
>
> The same is true of the so-called four-letter words found particularly objectionable by the Postmaster General. These appear in the latter portion of the book in the mouth of the gamekeeper in his tutelage of the lady in naturalness and are accepted by her as such. Again this could be taken as an object lesson at least in directness as compared to the smirk of much contemporary usage, which (perhaps strangely) does not seem to have offended our mailmen. *In short, all these passages to which the Postmaster General takes exception—in bulk only a portion of the book—are subordinate, but highly useful, elements to the development of the author's central purpose.* And that is not prurient.[94]

Examining a Hypothetical Scene in Light of *Roth* and of its Relevancy and Necessity

Recognizing that the Supreme Court may well be reluctant to allow the actual sexual activity to be portrayed on the screen, will the *Roth* test permit its deletion? *Roth* requires only that the dominant theme of the material viewed *as a whole* must not appeal to the prurient interest. Assume a director began a motion picture with beautiful scenery and aesthetic commentary on the magnificence of the Grand Canyon. Progressing from the Grand Canyon our director shows the mental and physical benefits of outdoor recreation. While advocating the pleasures of such activity he vividly portrays the actor and

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92. *Id.* at 93-94. A questioned scene in a motion picture may be just as relevant to its dominant theme as the challenged episodes and words in the unexpurgated edition of *Lady Chatterley's Lover.* Indeed, the need for this requirement is particularly acute with motion pictures because of the ease with which censors can and do order the deletion of particular scenes before exhibition of the film, a technique not applicable to books which as a practical matter must be accepted or rejected as a whole. This does not mean that the visual impact of a motion picture is to be disregarded, or that a motion picture can show sexual scenes with as much frankness as they may be described in books. But it does mean that scenes in motion pictures cannot be considered in isolation, apart from their relevance to the dominant theme of the motion picture considered as a whole.

93. Circuit Judge Charles E. Clark of the United States Court of Appeals, Second Circuit.

94. Grove Press, Inc. v. Christenberry, 276 F.2d 433, 438-39 (2d Cir. 1960). (Emphasis added.)

actress having sexual intercourse with a complete lack of inhibition. Assume further that this portrayal runs for only a few short minutes and for the remainder of the film our heroes continue to enjoy the scenery and their vacation in nature. Applying *Roth*, the director would argue, the film is constitutionally protected. The dominant theme of the movie is how beneficial it is to commune with nature. Surely, he argues, this theme appeals to no one's prurient interest. Defending the questionable scene, he again points to *Roth* and argues that the material must be viewed as a whole and a two-minute isolated segment of objectionable portrayal within a two-hour movie is not sufficient cause to deny its licensing.

It may be suggested that a way to prevent this offensive material from creeping into our films under the alleged protection of the *Roth* test is to require that the inclusion of the scene be *relevant* and *necessary* to convey the central theme of the movie. Examining our hypothetical movie in light of these two additional requirements will provide a more justifiable result. The inclusion of the questioned scene is not relevant to the dominant theme. The benefits of sexual activity are not relevant to the benefits of nature. But assuming for the sake of argument that the insertion of such a scene is relevant, is the actual portrayal *necessary?* It can be shown that in order to convey the sexual act it is not necessary to portray the entire act. Many movies have conveyed such activity without resort to its graphic portrayal.

Thus is it suggested that the Court when viewing motion pictures that contain a scene or several scenes that portray sexual activity apply a modified test: Is the insertion of the challenged scene relevant and necessary to convey a dominant theme, even though such a theme viewed as a whole, would not appeal to the prurient interest of the average person applying contemporary, community standards?

Conclusion

The Supreme Court is cautiously charting its course through the murky waters of obscenity. It has done so painstakingly to avoid sweeping generalizations that might prove to be useless in new situations. The Court has indicated that not all movies will be protected by the first and fourteenth amendments. It is suggested that the problems involved in the censorship of motion pictures are peculiar to that medium of communication. Pornographic scenes should not be protected by virtue of their being surrounded by innocuous material. Such scenes should be required to be relevant to the dominant theme and further, to be necessary to convey such a theme. The writer is confident that each dominant theme, found to be protected by the *Roth* test, can be expressed without resorting to clinical examinations of sexual behavior.

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