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The problems arising under section 18 have been limited considerably in its short history. But the few areas in which issues arise still are the same areas in which the policy choice of the judiciary is most critical. The division between the majority and dissent in *Shupack* represents an accurate measure of the two philosophies which the practitioner must recognize in choosing his course of draftsmanship, whether it be in a comparable estate problem or in one entirely different. The policy choice of the courts in interpreting section 18 must be flexible and free to progress with the sociological and economic development of the people. Whether any policy change is forthcoming remains to be seen²⁷ but every indication would seem to point toward it.

Richard G. Birmingham

STATUTORY INNOVATION IN THE OBSCENITY FIELD

One of the most active areas in the field of constitutional law at the present time is concerned with legislative attempts at raising the nation's moral standards or, perhaps, preventing the lowering of the present standards¹ through the suppression of books which are considered to be a bad influence on the reading public. The cause of the present interest is undoubtedly the presence upon the scene of the "horror comic" age and the "paper bound book" era.² In attempting to suppress the objectionable matter, the New York courts have had resort to section 1141 of the Penal Law.³ However the threat of fines and imprisonment did not result in the removal of the offending books from the stands and

27. *In re Clark's Estate supra* note 8; This case has been appealed to the New York Court of Appeals where the disposition of the contentions may provide some indication of policy change in keeping with the rationale of *Shupack*. If the *Shupack* case is followed, both the *Clark* and the *Schrauth supra* note 12) cases would seem to be overruled.

1. H. R. REP. No. 2510, 82d Cong. 2d Sess. (1952).

2. AMERICAN BOOK PUBLISHERS' COUNCIL, BULLETIN No. 377. See *Book, Censorship and the Arts*, in CIVIL LIBERTIES UNDER ATTACK, 117-120 (1951). Activity in this field has not been restricted to the legislatures. Many private groups have entered the censorship scene using persuasion and boycott as their weapons. DRIVE FOR DECENCY IN PRINT, REPORT OF BISHOPS' COMMITTEE SPONSORING THE NATIONAL ASSOCIATION FOR DECENT LITERATURE (1939). For an interesting discussion and critical analysis of the methods and effectiveness of the National Association for Decent Literature see Harper's, Oct. 1956, p. 14-20 and the answer found in America, Nov. 3, 1956, p. 120-123.

3. This section attempts to bring within its scope all forms of dissemination through which obscene matter might get to a susceptible public. It deals with the sale, loan, gift, distribution, showing or transmitting of any "obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, phonographic record, picture, drawing, photograph, motion picture film, figure, image, phonograph record or wire or tape recording, or any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such character."

the legislature determined to find a more satisfactory solution to the problem⁴—a solution which would not run afoul of the First Amendment's guarantees of free speech and free press.⁵

Realizing that enjoining distribution of a book would be the most effective means of suppression, the legislature added section 22(a) to the Code of Criminal Procedure.⁶ This section provides for a civil injunctive proceeding which, in effect, tries the book for obscenity and if it is found guilty, the seller is compelled to surrender all his copies to the sheriff, who is directed to destroy them.

SECTION 22(a): AN APPRAISAL

Section 22(a) is clearly drawn;⁷ it avoids the problem of the overcritical administrative official endowed with the sole right of determining whether a book is obscene—it provides that the question of obscenity is to be decided by a judge with a full right of appellate review on the facts and on the law; it imposes no restraint on that which is to be written or published in the future; it makes no attempt at entering the field of politics⁸ and deals solely with matter which is *obscene*; it is closely patterned after section 1141 of the Penal Law and it is considered (or intended) that a publication subject to injunction under section 22(a) must be of the same character as would be subject to punishment under the criminal section, which has been held valid.

Before entering upon a discussion of the grave constitutional problems involved in any form of censorship and more particularly on the New York innovation, a comment on the similarity of section 1141 and section 22(a) is felt

4. REPORT OF NEW YORK STATE JOINT LEGISLATIVE COMMITTEE TO STUDY THE PUBLICATION OF COMICS, No. 37, p. 32 (1954). The Committee felt that section 1141 was not sufficient and that a susceptible reading public remained contaminated with pornographic filth and that some way had to be found to keep such material from an impressionable public.

5. Liberty of speech and the press which the First Amendment guarantees against abridgment by the Federal government is within the liberty safeguarded by the due process clause of the Fourteenth from invasion by state action. *Gitlow v. New York*, 268 U. S. 652 (1925).

6. Section 22(a) gives the Supreme Court jurisdiction to enjoin the sale or distribution of obscene prints and articles. The chief executive officer of the community initiates the proceedings. The section includes books "herein described or described in section eleven hundred forty-one of the Penal Law." Section 22(a) (5) provides that "Every person, firm or corporation who sells, distributes or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought . . . pursuant to the section is chargeable with knowledge of the contents thereof." Query as to the scope or constitutionality of this subdivision.

7. *Brown v. Kingsley Books*, 1 N. Y. 2d 179, 186, 134 N. E. 2d 461, (1956).

8. It was this feature which was fatal to the statute involved in *Near v. Minnesota*, 283 U. S. 697, 712 (1931).

necessary. Though the New York Court of Appeals in *Brown v. Kingsley Books*⁹ said that the book under fire in a civil action had to be of the same character as would be subject to criminal prosecution, in fact, the determination in each case will be quite different. In the civil action, the book's obscenity need be shown only by a preponderance of the evidence, while in a criminal action, it must be shown beyond a reasonable doubt. At least the quantum, if not the type, of evidence will be different in each case. In the criminal action there is also a determination of the obscenity by a jury¹⁰ which, in theory at least, insures against arbitrary action by one man whose ideas of obscenity may be above or below those of the general community in which the book is being sold.¹¹ In the civil action there is no provision for a jury determination of the question of obscenity. The determination is made by a judge whose decision is appealable to another body of judges but never does the average citizen receive an opportunity to express his views on the matter.

THE SCOPE OF THE FIRST AMENDMENT'S PROTECTION

The First Amendment was drafted with memories of England's licensors still fresh in the minds of the colonists.¹² It cannot be denied that the principal reason for the inclusion of the First Amendment in the Bill of Rights was to

9. 1 N. Y. 2d 179, 134 N. E. 2d 461 (1956). On appeal to the Supreme Court the *Brown* case has been combined with two other recent decisions dealing with the question of obscenity. In the *Brown* case the question certified is: Does the New York statute (section 22(a)) impose a prior restraint upon publication in violation of the First Amendment. *Alberts v. California*, 138 Cal. App. 2d Supp. 909, 292 P. 2d 90 (1956), dealt with a statute which made it unlawful to keep for sale or advertisement obscene or indecent books. The California courts declared that the statute was not unduly vague and that the bookseller's use of the U. S. mails to advertise obscene books does not render the state statute inoperative. The questions certified: Is the California statute void for vagueness? Does it place an unconstitutional limitation on free speech? Does the Federal power over the mails preclude application of the statute to the mailing of circulars and the keeping of books for sale by mail. The third case, *U. S. v. Roth*, 237 F. 2d 796 (2d Cir. 1957), is concerned with the Federal obscenity statute, 18 U. S. C. §1461, proscribing the mailing of obscene matter. The certified questions are: Does the statute violate the freedom of speech and press guaranteed by the First Amendment? Does it violate the due process clause of the Fifth Amendment? Does it violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the states and to the people.

10. However, since the criminal prosecution based on section 1141 involves only a misdemeanor, a defendant is not entitled to a trial by jury as a matter of right. N. Y. CONST. art. VI, §18 (1894); see *People v. Kaminsky*, 208 N. Y. 389, 394, 102 N. E. 515, 516 (1913). However, it is the practice, under section 1141, to give the defendant a jury trial. See *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635 (1884); *People v. Pesky*, 254 N. Y. 373, 173 N. E. 227 (1930); *People v. Eagle*, 203 Misc. 598, 117 N. Y. S. 2d 380 (Mag. Ct. 1952); *People v. Goldman*, 197 Misc. 290, 94 N. Y. S. 2d 535 (Sup. Ct. 1950).

11. Whether an object is obscene involves a question of community standards—a question which a jury composed of citizens drawn from all walks of life should resolve. *People v. Goldman*, 197 Misc. 209, 94 N. Y. S. 2d 535 (Sup. Ct. 1950).

12. *Lovell v. Griffin*, 303 U. S. 444 (1937); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936).

prevent any such licensing in America.¹³ But it must not be concluded that this was the sole reason¹⁴ and that therefore any and all subsequent restraints which were imposed subsequent to publication were to be tolerated.¹⁵ It was deemed that the very survival of this nation was dependent on each citizen being able to think freely and speak with restraints on this right being tolerated only to the extent necessary to prevent breaches of the peace.¹⁶ A freedom to think, speak or publish which ceased on utterance would, in reality, be no freedom at all since the restraint or punishment might prevent the utterance from being made originally.¹⁷ However, the problem of the breadth of the First Amendment freedoms has not been solved.

A NEW MODE OF CENSORSHIP

Section 22(a) was an important step forward for the advocates of censorship. It did not provide for the traditional type of restraint—the licensor who must approve the book before it can be published¹⁸—an obvious violation of the First Amendment guarantees; nor did it impose a criminal punishment subsequent to publication, which, though it punished the seller or distributor, left the book in circulation. Generally, the subsequent punishment statutes have been upheld, either because they are not felt to provide sufficiently grave deterrents to the exercises of the First Amendment freedoms, or because it was not felt that the imposition of punishment subsequent to publication was prohibited by the First Amendment.¹⁹

13. *Patterson v. Colorado*, 205 U. S. 454 (1907); *Near v. Minnesota*, 283 U. S. 697 (1931).

14. The Supreme Court in the *Near* case specifically pointed to the definition of freedom of speech and press as given by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity." 4 Bl. Com. 151, 152 (1765). The Court stated that this was not, however, the American concept but that something more was encompassed by the First Amendment. *Near v. Minnesota*, 283 U. S. 697, 714-715 (1931).

15. See Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 655 (1955). In *Ex parte Jackson*, 96 U. S. 727 (1877) an ordinance could not be saved because it related to distribution and not to publication. "Liberty of circulation is as essential to that freedom as liberty of publishing; indeed without circulation, publication would be of little value."

16. See Jefferson's Second Inaugural Address, March 4, 1815 wherein he stated that any improprieties which could not be redressed by a libel suit must look to the censorship of public opinion. See also ST. JOHN-STEVAS, *OBSCENTY AND THE LAW* 191 (1956); *DeJonge v. Oregon*, 299 U. S. 353, 365 (1937).

17. "Freedom of thought is worthless unless it goes with freedom of expression; thought is expression; an unexpressed thought, like an unlaid egg, comes to nothing. Given this freedom, then, other freedoms will follow." KALLEN, *THE LIBERAL SPIRIT* 133 (1948).

18. *Near v. Minnesota*, 283 U. S. 697 (1931).

19. *Patterson v. Colorado*, 205 U. S. 454, 462 (1907); *Commonwealth v. Blanding*, 3 Pick. 304, 313, 314 (1824).

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Section 22(a) neither provides for a prohibited prior restraint (as the term is generally construed), nor does it involve a subsequent punishment (the status of which is not definitely established). It imposes a subsequent restraint. Is this subsequent restraint violative of the First Amendment?

There would appear to be a simple way of upholding the Constitutionality of the section. This is the solution proposed by Judge Desmond in his concurring opinion in the *Brown*²⁰ case. He suggests that obscene matter is not protected by the First Amendment and therefore any statute which deals with this matter is constitutional. In the case of *Near v. Minnesota*²¹ there was dicta to the effect that even the restriction on prior restraints may be lifted when obscene matter is involved. Obscene matter was classified with defamatory matter and matter causing breaches of the peace as being beyond the scope of First Amendment protection. This would seem to be a valid classification only if obscene matter is likely to cause a breach of the peace (the falsity of this proposition will be discussed later) or if it can be said that lewd and obscene utterances are no essential part of any exposition of ideas and are of such slight social value that any benefit that may be derived from them is outweighed by the social interests in order and morality.²² This latter proposition would seem to be answered by the Supreme Court in the *Winters*²³ case (again, unfortunately, in dicta) that, though it may be true, that there can be seen nothing of any social value in the publications involved, they are entitled to the protection of a free press as much as the best of literature. If speech and press are really free, what possible justification is there for saying that a publication is not free or that certain speech is not protected other than the previously mentioned danger to public order? It would seem that there is no shorthand method of disposing of the problem raised by section 22(a).

Is it possible to uphold the section as the majority in the *Brown*²⁴ case did? Apparently feeling that the section involved a prior restraint, but not a restraint of sufficient seriousness as to invalidate the statute, the New York court held that the section was not an unconstitutional prior restraint on publication prohibited by the First Amendment. It seems a strange perversion of the term prior restraint to denominate something a prior restraint which clearly becomes effective only subsequent to publication. Traditionally it has been confined to restraints imposed

20. *Brown v. Kingsley Books*, 1 N. Y. 2d 179, 188, 143 N. E. 2d 461, 468 (1956).

21. 283 U. S. 697 (1931). Chief Justice Hughes stated that the doctrine of prior restraints would not be applied in exceptional instances. As examples of these instances he gave wartime, acts of violence and overthrow of the government and obscenity: "On similar grounds, the primary requirements of decency may be enforced against obscene publications." He cited no authorities for this proposition. Similar dicta may be found in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942) and *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952).

22. *Chaplinsky v. New Hampshire*, *supra* note 21 at 572.

23. *Winters v. New York*, 333 U. S. 507 (1948).

24. *Brown v. Kingsley Books*, 1 N. Y. 2d 179, 134 N. E. 2d 461 (1956).

prior to publication.²⁵ Can it now be said to embrace any restraint which occurs prior to the book's distribution to all who might wish to read it?²⁶ This indeed would be a strained interpretation and one which would most likely only find use where there is an attempt to fit a new restriction into an old familiar mold to facilitate its disposition. If the term is to have any meaning at all it should be confined to censorship which occurs prior to publication.²⁷ Section 22(a), a subsequent restraint, cannot be upheld as a "not so serious" prior restraint.

Can it be upheld, as a subsequent punishment statute is upheld, as being beyond the protection of the First Amendment? It is clear that any act which effectively puts a book out of the channels of distribution through which it reaches the reading public raises serious constitutional problems regardless of the name tag which is put on it. It cannot categorically be said that because the restraint involved is subsequent to publication it is without constitutional protection. The First Amendment embraces some subsequent punishments—depending on the nature of the act involved.²⁸ Section 22(a) cannot be upheld simply by saying it deals with a book only after publication and therefore, presents no constitutional problems.

It would also seem that there can be no justification of the section by saying that it does no more nor goes no further than a similarly worded criminal statute²⁹ when present thought indicates that the day may be approaching when even the criminal statute will have to defend its right to continue in existence.

CENSORSHIP AND THE FIRST AMENDMENT

It is not asserted that the rights guaranteed by the First Amendment are absolutes.³⁰ These rights may be restricted under proper circumstances, as may any constitutionally given right. The problem is thus not of whether freedom of speech

25. See *Poulos v. New Hampshire*, 345 U. S. 395 (1953); *Kunz v. New York*, 340 U. S. 290 (1950); *Cantwell v. Connecticut*, 310 U. S. 296 (1941).

26. There has been much criticism of the formalistic prior restraint-subsequent punishment idea. See *Previous Restraints Upon Freedom of Speech*, 31 COLUM. L. REV. 1148 (1931); Note, *Prior Restraint—A Test of Invalidity in Free Speech Cases?*, 49 COLUM. L. REV. 1001, 1006 (1949); Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 544 (1951). A thorough analysis of the entire prior restraints problem can be found in Emerson, *The Doctrine of Prior Restraints*, 20 LAW & CONTEMPT. PROBLEMS 648 (1955).

27. "I am of the considered opinion that when the court—after an adversary hearing—is able to read and examine the publication objected to, and acts judicially to enjoin their distribution, it is apparent that there is no previous restraint in the genuine historical and constitutional sense of that term." Judge Matthew M. Levy in *Burke v. Kingsley Books*, 208 Misc. 150, 162, 142 N. Y. S. 2d 735, 747 (Sup Ct. 1956).

28. *Near v. Minnesota*, 283 U. S. 697, 715 (1931).

29. *Brown v. Kingsley Books*, 1 N. Y. 2d 179, 186, 134 N. E. 2d 461, 466 (1956).

30. *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-2 (1942).

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and press may be abridged, but rather of when and how. It is only when the speech or publication provokes *activity* inimical to the public welfare that the right may be abridged and it is only when the danger to the state is sufficiently grave and proper safeguards are provided. When a statute attempts to restrain speech or publication it must justify its action as a valid exercise of the police power.³¹ The state, as in the usual police power cases, makes the initial determination that an evil exists. The means selected to eliminate the evil must be reasonably necessary and appropriate to attain the desired end.³² When the means selected involves the imposition of criminal sanctions, the statute must satisfy due process requirements and not be unduly vague.³³

In addition to satisfying the general requirements for the validity of a police measure, when the measure chosen to eliminate the evil involves a restraint on a First Amendment freedom, which freedoms are at the very basis of our society, additional requirements must be met. Speech can only be prohibited when the requirements of the "clear and probable danger" test are met.³⁴ It might be added, at this point, that the cases which have involved freedom of the press have not used the "clear and probable danger" approach.³⁵ There appears to be no reason why these two fundamental freedoms should receive different treatment in this area when they are treated together, under the heading of freedom of expression, in all other instances. The test should apply to both and it seems only a question of time before the Supreme Court gives sanction to this.³⁶ It might also be noted that when First Amendment freedoms are involved, a statute restricting them does not carry with it the usual presumption of constitutionality which a similarly enacted economic regulation possesses.³⁷

31. *Near v. Minnesota*, 283 U. S. 697 (1931).

32. *Wulfsohn v. Burden*, 241 N. Y. 288, 150 N. E. 120 (1925); *Defiance Milk Products Co. v. DuMond*, 309 N. Y. 537, 132 N. E. 2d 829 (1956).

33. If a statute includes the prohibition of some acts which are fairly within the protection of a free press, it is void. *Winters v. New York*, 333 U. S. 507 (1948) in which a part of section 1141 of the New York Penal Law was held unconstitutionally vague.

34. *Dennis v. United States*, 341 U. S. 494 (1951). See Hyman, *Judicial Standards for the Protection of Basic Freedoms*, 1 BUFFALO L. REV. 221 (1952).

35. However, see *Roth v. Goldman*, 172 F. 2d 788, (2d Cir. 1949) (concurring opinion) in which Judge Frank presents a thought provoking analysis of the entire obscenity problem.

36. The Pennsylvania courts appear to have accepted the rationale urged by Judge Bok in *Commonwealth v. Gordon*, 66 Pa. Dist. & Co. R. 101 (1949), that the clear and present danger test must be met in this area. *Commonwealth v. Figenbaum et al.*, 166 Pa. Sup. Ct. 120 (1950). "The right of *expression* beyond the conventions of the day is the very basis of a free society." Justice Frankfurter concurring in *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 156, 160 (1946). (Emphasis added).

37. *United States v. Carolene*, 304 U. S. 144, 152 (1938). The "Preferred Rights Doctrine" which gives a priority to the First Amendment freedoms has been propounded in *Thomas v. Collins*, 323 U. S. 516 (1946); *Schneider v. State*, 308 U. S. 147 (1939); *Cantwell v. Connecticut*, 310 U. S. 296 (1941).

THE EXERCISE OF POLICE POWER TO CURB IMMORAL ACTS

When a legislature determines that immoral acts are sufficiently detrimental to the public welfare to be prohibited, the means chosen to curb the objectionable *conduct* must be reasonably necessary and appropriate to achieve that end. Legislatures have selected various means of eliminating this evil—laws prohibiting prostitution, white slavery, and so on—but the means selected with which we are here concerned is a restriction on the literature which the public may read. To satisfy the minimal requirements to which every police power measure is subjected, it must be shown that a restriction on the publication is reasonably necessary and appropriate to attain the desired goal. It would seem that at this initial test, a publication restriction runs afoul of the Constitution since there is no reasonably conclusive evidence either that the reading or viewing of books causes the acts or that a restriction on the publication of books will lessen the commission of immoral acts.³⁸

But should this stumbling block be disregarded, the "clear and probable danger" test must still be met. There must be a clear danger that the expression involved will *cause* a substantive evil which the legislature has the right to prevent. The danger must be serious and probable. These factors must be weighed against the value of the speech involved.³⁹

GOVERNMENTAL RESTRICTIONS ON ACTS

To satisfy the "clear and probable danger" test the speech involved must cause an *act* which the legislature can proscribe. This fact seem to be forgotten by the courts⁴⁰ and legislatures⁴¹ when they deal with obscenity matters. One of the basic principles of our society is that the government functions by controlling the *acts*—not thoughts—of its members. A restriction is placed on man's activities, not his thoughts. Man is punished for what he does, not for what he thinks. It is the

38. See Alpert, *Censorship and the Press*, 52 HARV. L. REV. 40, 72 (1938); *Roth v. Goldman*, 172 F. 2d 788, 796 (2d Cir. 1949). (Concurring opinion.); Jahoda, THE IMPACT OF LITERATURE: A PSYCHOLOGICAL DISCUSSION OF SOME ASSUMPTIONS IN THE CENSORSHIP DEBATE (1954); Feder, COMIC BOOK REGULATION (UNIVERSITY OF CALIFORNIA, BUREAU OF PUBLIC ADMINISTRATION, 1955 LEGISLATIVE PROBLEMS No. 2). *Contra*, WERTHAM, SEDUCTION OF THE INNOCENT (1954).

39. *Dennis v. United States*, 341 U. S. 494 (1951).

40. The test of obscenity which is generally accepted by the New York courts is that set forth in *People v. Berg*, 241 App. Div. 543, 272 N. Y. S. 586 (2d Dep't 1934)—an obscene book is one that tends to corrupt the morals of youth or to lower the standards of right and wrong specifically as to sexual relations. To be deemed obscene the book must show sexual impurity and result in the exciting of lustful and lecherous thoughts and desires or tend to stir sexual impulses or to lead to sexually impure thoughts. In *People v. Muller*, 96 N. Y. 408 (1884) the test was whether it was calculated to excite impure imaginations.

41. See GA. CODE ANN. §26-6301a (1953). Obscenity is defined as "any literature offensive to chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed."

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function of law in any democratic society to maintain general public order by providing those restraints necessary to maintain order. It acts necessarily as a negative force preventing evil rather than as a positive force designed to foster good. When an attempt is made to raise the moral standards of the people—to purify man's thoughts, as it were—other organs must be looked to for leadership. There are institutions, including the churches, homes and schools whose function it is to deal with public morality. It is not to the law but to these institutions that regard must be had if the desire to strengthen man's moral standards is to be fulfilled.⁴² Therefore, it is not the function of the legislature to determine that reading a certain piece of literature will tend to arouse sexual *desires* or *thoughts* and that, therefore, the reading must be stopped. It is not *thoughts* or *desires* but only acts with which the legislature may concern itself.⁴³

Thus, under the Smith Act, Communists are not punished for what they *think*, nor is the academic discussion of communism prohibited. *Advocacy* is punished because it has been determined that advocacy presents a clear and probable danger of the doing of the acts.⁴⁴ When the serious consequences of acts of overthrow are considered it is recognized that the danger need not be so near as to be imminent before the speech involved, which is felt will cause the act, may be restricted.

But in the area of immoral relations, the evils resulting, even if the expression involved were transformed into acts, cannot compare, in gravity, with acts directed at the government's overthrow and thus the probability that the speech, which is to be restricted, will cause the act must be commensurately greater. The problem consists in weighing the values involved. When the value of free speech is balanced against the protection of the government—the scales are almost evenly balanced.⁴⁵ It is a close question as to which interest will have to be sacrificed and the extent of the sacrifice. But when the interest of the government in eliminating illicit sexual acts is weighed against the value of free speech, the scales balance heavily in favor of the protection of expression and almost no limitation on the right of expression can be tolerated to protect this essentially secondary interest.⁴⁶ Furthermore, as has been previously mentioned, there appear to be no accurate appraisals

42. See Murray, *Literature and Censorship*, Books on Trial, June-July 1956.

43. In a noted opinion by Judge Bok, in *Commonwealth v. Gordon*, 66 Pa. Dist. & Co. R. 101 (1949), it was said that there must be "a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication." See also the concurring opinion of Judge Frank in *United States v. Roth*, 237 F. 2d 796 (2d Cir. 1957) which is the most recent thorough survey in this area.

44. *Dennis v. United States*, 341 U. S. 494 (1951).

45. See note 44 *supra*.

46. The likelihood, however great, that a substantive evil will result cannot alone justify a restriction on free speech or press. The evil itself must be substantial. *Bridges v. California*, 314 U. S. 252 (1941). See Brandeis concurring in *Whitney v. California*, 274 U. S. 357 (1927).

of the effect which a book may have on its readers or as to how many of those guilty of committing immoral acts are aroused to such activity by reading books.⁴⁷ It would seem that in no sense can the requirements of the "clear and probable danger" test be met by statutes which place restrictions on the distribution of obscene matter. And thus section 22(a), as well as section 1141, appears to be unconstitutional.

THE VAGUENESS OF THE TERM "OBSCENE"

Even if one assumes that these insurmountable burdens could be met by the state—that the necessary causal links and requisite importance of the interest to be protected were present—the problem of how to describe, with sufficient definiteness, the material to be banned must be met.⁴⁸ It might appear academic to argue the merits of the use of the term "obscene" in this area, since for many years courts have easily disposed of objections to its use.⁴⁹ It cannot be denied that the concept of "obscenity" is, of necessity, vague since it is a moral determination which varies with the times.⁵⁰ But perhaps one can justify its use by applying to it the argument used to overrule objections to the use of the term "due process"—that in any particular era it is discernible with sufficient definiteness to withstand any constitutional challenge to its use. It is probably true that if one can describe this matter at all, using the term "obscene" is probably as good as any. It is not felt necessary to enter in and do battle with the problem of what is "obscene". Courts

47. See Lockhart and McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROBLEMS 587, 594 (1955). For a more comprehensive view by the same authors see Lockhart & McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1953). Censorship advocates frequently use the theme that these statutes are necessary to protect children from matter tending to corrupt their morals. A statute reflecting this view was recently struck down as not reasonably restricted to the evil with which it is said to deal. *Butler v. Michigan* —U. S.—, 77 S. Ct. 524 (1957). This reasoning may cause many similar statutes to fall.

48. *Winters v. New York*, 333 U. S. 507 (1948).

49. The answer of the New York courts has been: (1) "obscenity" is a common law term with a well understood judicial meaning. *Winters v. New York*, 333 U. S. 507 (1948). or (2) that while it is true that its bonds cannot be definitely established, the use of the word "obscene" will be upheld if, in looking at the whole book, the court finds that the book tends to lower the standards of right and wrong, specifically as to sexual relations. *People v. Wendling*, 258 N. Y. 451, 180 N. E. 169 (1932); *People v. Berg*, 241 App. Div. 543, 272 N. Y. Supp. 586 (2d Dep't 1934), *aff'd*, 269 N. Y. 514, 199 N. E. 513 (1935).

50. "Obscenity is a relative and subjective term describing the reaction of the human mind to a certain type of experience. Obscenity resides not in the thing contemplated but in the mind of the contemplating person." ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* 1, (1956). "The fundamental reason that obscene is not susceptible of exact definition is that such intangible moral concepts as it purports to connote vary in meaning from one period to another." CARDOZO, *PARADOXES OF LEGAL SCIENCE* 37 (1927).

NOTES AND COMMENTS

have varied their standards with some looking at the intent of the author⁵¹ and others looking at the effect on the reader; some look at passages of a book⁵² while others look at the effect of the entire book;⁵³ some look to the opinions of literary critics⁵⁴ and the place which the book has in the literary field⁵⁵ while others completely disregard this;⁵⁶ some feel that the effect of the book on the abnormal is to be looked to⁵⁷ while others feel that it is only the effect of the book on the normal average man that must be considered;⁵⁸ some place emphasis on the sincerity of purpose of the author⁵⁹—as seen through examination of the book or through external means. But regardless of the many problems involved in a determination of a book's obscenity, it is probable that if a censorship statute is to be overturned, it will not be on the grounds of vagueness.

CONCLUSION

If full effect is to be given to the freedoms guaranteed by the First Amendment, section 22(a) as well as section 1141 must be held to be unconstitutional. The rash of new statutes which are flooding the legislatures must cease. Obscene matter is protected by the First Amendment—just as is the best of literature. There appears to be a strong belief that that which is pornographic can be restricted without regard to the First Amendment, distinguishing it from obscenity because it is

51. Recent theory is that the court will only look at the author's *objective* intent which equates with the book's effect on others. *United States v. Ulysses*, 72 F. 2d 705 (2d Cir. 1934); *Parmelee v. United States*, 113 F. 2d 729 (D. C. Cir. 1940). An interesting recent development occurred in *Walker v. D'Alessandro*, — Md. —, 129 A.2d 148 (1957). A libel action was brought against the mayor of Baltimore, who had removed a painting from a municipal museum stating that the artist had painted an obscene picture. In overruling defendant's demurrer, it was held that this could be an imputation on the character of the author and the act was not protected by an absolute privilege since there was no statute authorizing the mayor to so act. It would seem that if libel prosecutions are to be allowed, the intent of the author will take on new importance. The question of an author's intent was also considered to be of importance in an action involving the Federal obscenity statute. *Sunshine Book Co. v. Summerfield*, 221 F.2d 42 (D. C. Cir. 1956).

52. This was true in those courts which followed the classic test of *Regina v. Hicklin*, 3 Q.B. 360, 371 (1868): "Whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall." This test was adopted in the United States in *United States v. Bennett*, 24 Fed Cas. 1093, No. 14,571 (S.D.N.Y. 1879); adopted by the New York Court of Appeals in *People v. Muller*, 96 N. Y. 408 (1884) and generally accepted (though vigorously denounced by Judge L. Hand in *United States v. Kennerly*, 209 F. 119 (D. C.D.C. 1913) until the decision in *United States v. Ulysses*, 72 F. 2d 705 (2d Cir. 1934).

53. *Halsey v. New York Soc. for the Suppression of Vice*, 234 N. Y. 1, 136 N.E. 219 (1922); *United States v. Levine*, 83 F.2d 156 (2d Cir. 1936).

54. *People v. Creative Age Press*, 79 N.Y.S. 2d 198 (Mag. Ct. 1948).

55. *United States v. Ulysses*, 72 F.2d 705 (2d Cir. 1934).

56. *People v. Dial Press*, 48 N.Y.S. 2d 480 (Mag. Ct. 1944).

57. *Regina v. Hicklin*, 3 Q.B. 360, 371 (1868).

58. *Commonwealth v. Gordon*, 66 Pa. Dist. & Co.R 101 (1949).

59. *United States v. Ulysses*, 72 F.2d 705 (2d Cir. 1934); *People v. Vanguard Press*, 84 N.Y.S.2d 198 (Mag. Ct. 1948).

deliberately designed to stimulate sex feelings and to act as an aphrodisiac whereas an obscene book has no such immediate and dominant purpose, although incidentally this may be its effect.⁶⁰ This will not be considered since it is the purpose of this writing to show that the present censorship statutes are unconstitutional. It will have to remain to be determined whether a narrowly-drawn statute can meet the "clear and probable danger" test.

June A. Murray

TEST FOR OCCUPATIONAL DISEASE

I. INTRODUCTION

The problem of recovery under workmen's compensation statutes for occupational diseases has been a thorny one since the inception of statutory liability in this area. Originally recovery was denied in most instances under the theory that such disablement was not the result of an accident, the latter being a pre-requisite for liability.¹ This result was somewhat tempered by equating diseases incurred as a consequence of sudden or fortuitous occurrences or of a traumatic event to injuries as a result of accidents.² However, even with this, a vast number of diseases incidental to employment were left uncovered for it is settled that there can be no recovery for disablement as a result of an occupational disease unless the workmen's compensation law specifically so authorizes.³

With the passage of time, the various states enacted specific legislation in this area⁴ until at the present time all but three states provide at least minimal coverage.⁵ These statutes may be divided roughly into two categories:⁶ those which

60. See JACKSON, *THE FEAR OF BOOKS* 121-135 (1932); ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* 2 (1956). *United States v. Ulysses*, *supra*, note 59. It is this writer's view that if section 22(a) were drafted so as to describe only "pornographic" matter (as was involved, concededly, in *Brown v. Kingsley Books*, 1 N. Y. 2d 177, 134 N. E. 2d 461 (1956)) the statute would be constitutional. See 6 BUFFALO L. REV. 155, 156, n.5, 157 (1957). This determination involves another fact question—What is pornographic and what is not? However this will bring an end to the prosecution of books which can be said to have *any* literary merit or which were written for any legitimate purpose. It would also appear that under such a statute, the intent of the author may take on added importance although the subjective element could be handled, as it is at the present time, by determining his intent as it may be gleaned from the book, itself.

1. *State ex rel. Cashman v. Sims*, 130 W.Va. 430, 43 S.E.2d 805 (1947).

2. *Elkhorn Coal Corp. v. Kerr*, 203 Ky. 804, 263 S.W. 342 (1924); *Renkel v. Industrial Commission*, 109 Ohio St. 152, 141 N.E. 834 (1923).

3. *Henry v. A. C. Lawrence Leather Co.*, 231 N.C. 477, 57 S.E.2d 760 (1950); *State ex rel. Cashman v. Sims*, 130 W.Va. 430, 43 S.E.2d 805 (1947).

4. *E.g.*, N. Y. WORKMEN'S COMPENSATION LAW § 3 (2).

5. Kansas, Mississippi and Wyoming do not provide for occupational disease coverage.

6. Most of the statutes have other differences within the two major categories. See, e.g., COLORADO STAT. ANN. c. 97, §451 (c), (e) wherein special requirements for recovery for silicosis are provided.