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A REQUIEM FOR REQUIEMS: THE SUPREME COURT AT THE BAR OF REALITY

Stanley K. Laughlin, Jr.*

The Law is not a homeless, wandering ghost. It is a phase of human life located in time and space.

—M. R. Cohen, *Reason and Law*

IN the December 1969 issue of the *Michigan Law Review*, Professor David Engdahl, in an article entitled "Requiem for Roth,"¹ became the most recent writer to tell us that current obscenity dogma is less than satisfactory, and to propose a fresh approach. Professor Engdahl thus picked up a cudgel in a battle that probably began six thousand years ago in some cave in Asia Minor. A wall artist, tired of drawing twelve-legged water buffalo, decided to try his hand at *homo sapiens* in his sporting moments. Hauled before the tribal council, the primordial graffitist muttered something about the social importance of his work. A few tribesmen nodded approval; but the elders modestly rearranged their loincloths and wagged their heads, speaking ruefully of the decadence that threatened the very foundation of civilization as cavemen knew it. When the council rendered a verdict (probably a conviction, since very little erotic cave art has been found), somebody suggested that the council's standards were vague and unrealistic and proposed a new formulation.

Proposals for "new standards" in obscenity cases would not be particularly troublesome but for the fact that the Court has occasionally listened to them. When it has, it has often complicated the situation further. Professor Engdahl modestly asserts that his proposals are not really new, but are "familiar" standards, "detailed with new precision."² In essence, he suggests abandonment of the "incorporation" approach to the fourteenth amendment—an approach which we are told "has muddied the waters of constitutional jurisprudence . . . ever since Justices Black and Douglas joined the Court."³ According to Engdahl, the Court has never "*genuinely* endorsed" this "doctrine of Black and Douglas."⁴ Professor Engdahl

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1. Engdahl, *Requiem for Roth: Obscenity Doctrine Is Changing*, 68 MICH. L. REV. 185 (1969).

2. *Id.* at 235.

3. *Id.* at 202.

4. *Id.* at 203 (emphasis added).

proposes a return to a "substantive due process" theory which is akin to, but is not in fact, the "ordered liberty" concept established in *Palko v. Connecticut*⁵ and tenaciously kept alive by Justice Harlan.

Inasmuch as Engdahl's proposals involve far more than the obscenity area in their implications, it seems less than likely that they will be adopted. However, with President Nixon diligently pursuing his purpose of "balancing" the Supreme Court with "strict constructionists," all things are possible. In my opinion, such dubious revisionism is neither a proper response to the obscenity problem nor at all called for at this critical juncture in American history.

I. THE WAKE OF ROTH

It is true that the test set out in *Roth v. United States*⁶ is moribund. In a sense it was stillborn. While five Justices, only one of whom remains on the Court, joined in the majority opinion in *Roth*, that case only adumbrated certain considerations that later were forged into what has come to be known as the *Roth* test. No sooner did the forging process begin than the Court became fragmented on this issue, and a majority of the Justices has never since concurred in the test—certainly not in a compatible formulation of it. Today, it is not clear that anyone on the Court adheres to the test, other than its parent and guardian, Justice Brennan. The "requiem" for *Roth*, Professor Engdahl suggests, has been played in three recent obscenity cases, *Ginzburg v. United States*,⁷ *Ginsberg v. New York*,⁸ and *Stanley v. Georgia*.⁹ In a way, each of these cases can be attributed to an effort on the Court's part to utilize the suggestions of academic commentators aimed at improving or clarifying constitutional standards for obscenity.¹⁰ Dean Lockhart and Professor McClure were explicitly given credit for the concept of "variable obscenity"¹¹ which formed the Court's conceptual basis in

5. 302 U.S. 319 (1937).

6. 354 U.S. 476 (1957).

7. 383 U.S. 463 (1966).

8. 390 U.S. 629 (1968).

9. 394 U.S. 557 (1969).

10. With regard to the role that legal theoreticians have played in bringing the constitutional doctrine on obscenity to its present state, it bears passing mention that the core of the *Roth* test was borrowed from a tentative draft of the American Law Institute's Model Penal Code. See 354 U.S. at 487 n.20.

11. Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What Is Obscene?*, 7 UTAH L. REV. 289 (1961). Dean Lockhart is currently chairman of the special Federal Commission on Obscenity and Pornography, created by Congress in 1967 and scheduled to report by July 31, 1970.

Ginsberg v. New York,¹² but their ideas could also explain the other two cases as well. Each case proceeds on the premise that the constitutional law of obscenity could be made more rational if the Court focused less on the nature of the erotic material per se and looked more to the context in which it became the subject of a lawsuit.

Of the three cases only *Stanley* can be said to have added clarity to the law. There is certainty in the rule that private possession of even hard-core pornography, for personal use in one's own home, is constitutionally protected. *Stanley* presents civil-liberties lawyers and professional obscenity lawyers with many opportunities to build greater protection on its base. For example, one can argue that *Stanley* implies support for a constitutional right to carry pornography home for private use, to display it noncommercially to one's friends, or to supply it for such use. The case may also portend changes outside the area of erotica, in areas such as that involving the "perpetration" in private of consensual "morality" offenses. Of course, the decision should not be criticized solely on the basis that it may be extended, for law is made of such stuff.

Ginzburg v. United States,¹³ on the other hand, is the most demonstrably unsatisfactory application of the contextual approach. By adding the element (or quasi-element) of "pandering,"¹⁴ it simply injected another problematical criterion into an area already overstocked with such futility-producing criteria. To everyone except Ginzburg, the most tangible result of that case has been the practice of publishers to place on even the hardest-core pornography legends proclaiming the serious, benign, scientific, artistic, and educational nature of its purpose.¹⁵ It is to be hoped that the "pander-

12. 390 U.S. at 635 n.4.

13. 383 U.S. 463 (1966).

14. 383 U.S. at 471, 475-76.

15. For example, the January 26, 1970, issue of *SCREW, THE SEX REVIEW* contains the following legend, mostly in fine print, in a small black box on the front cover:

WARNING, ADULT TYPE SEX MATERIAL

THIS LITERATURE IS NOT INTENDED FOR MINORS AND UNDER NO CIRCUMSTANCES ARE THEY TO VIEW IT, POSSESS IT, OR PLACE ORDERS FOR THE MERCHANDISE OFFERED HEREIN.

To THE NEWSDEALER: You are warned not to sell this newspaper to a minor. If you do it will be ground for refusal to serve you with future issues. The editors of this newspaper have made every effort to insure that the contents of this publication are not obscene or pornographic under the law, common sense, or contemporary standards of candor in sex.

DO NOT PURCHASE SCREW IF YOU WANT PORNOGRAPHY!

Another publication, *EROTICA*, depicting males and females and pairs of females embracing with exposed genitalia, contains the following legend, [reprinted in part]:

for mature adults . . . as a pictorial representation of phases and mores of our contemporary society Editorial content is not to be construed as descriptive or to condone any action.

ing" rule of *Ginzburg* will simply fade away. By contrast, *Ginsberg v. New York*¹⁶ has touched off a spate of legislative activity, both federal and state; but unfortunately, its future promises only more confusion.¹⁷ In that case, Justice Brennan formulated the issues in such a manner as to permit him to proclaim in abstract form the principle that there can be a separate constitutional standard for those erotic materials that are made available to minors. Despite Justice Fortas' urging,¹⁸ Justice Brennan did not even suggest the outlines of that separate standard. In response to Justice Brennan's opinion, legislative draftsmen, following a time-honored practice, have slavishly copied the bizarre New York statute involved in that case, despite the fact that the *Ginsberg* decision never clearly approved the statute as such.¹⁹

16. 390 U.S. 629 (1968).

17. The New York statute involved in *Ginsberg* [Law of June 7, 1965, ch. 327, 1 [1965] Laws of N.Y. 1066, as amended, N.Y. PENAL LAW §§ 235.20-21 (McKinney 1967)], and reprinted as an appendix to that case at 645-47 and in Engdahl, *supra* note 1, at 195 n.66, takes an unusual and largely dysfunctional approach to the problem of erotica and minors. First, it sets forth a detailed and rather bizarre catalogue of subjects that *might* be considered obscene. That catalogue includes such gems as "the female breast with less than fully opaque covering of any portion thereof below the top of the nipple" and "flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed." This portion of the statute seems to be in line with the idea of Mr. Richard H. Kuh that obscenity can be defined "objectively," that is, by specification of the physical scenes to be proscribed. R. KUH, FOOLISH FIGLEAVES (1967). Kuh is still urging this position on legislative committees. 28 CONG. Q. 757 (1970). The New York legislature, however, recognized that the catalogue approach alone would be unworkable. For example, the first phrase quoted above from the statute could prevent minors from viewing many works of art long considered acceptable even for the very young. The second phrase could be applied to a wide variety of patently nonobscene material, such as a circus picture depicting the pretended arrest of one clown by another. Consequently, the New York legislature added a modified *Roth* test to the statute—modified to make a hypothetical minor the touchstone with regard to contemporary standards of candor, prurient interest, and social importance. This latter, operative portion of the statute makes the catalogue largely superfluous.

18. 390 U.S. at 673-75 (Justice Fortas, dissenting).

19. As Justice Brennan interpreted the record in *Ginsberg*, the appellants' counsel attacked the statute "on its face," thus relieving the Court of the responsibility of determining whether the particular erotic materials that formed the basis for *Ginsberg's* conviction could constitutionally be banned as "harmful to minors." As Justice Fortas pointed out in dissent, this was a dubious process for at least two reasons. First, it may have broken with the Court's tradition of not allowing counsels' position to have an undue influence on the Court's stewardship of constitutional law. See A. BICKEL, THE LEAST DANGEROUS BRANCH (1962), particularly at 133-43. Second, it left government and citizens with very little guidance as to the emerging standards in this area. 390 U.S. at 671-73 (Justice Fortas, dissenting). In fact, it can fairly be said that, by passing upon the New York statute in such abstract formulation, the Court did not approve even the statute itself. For while the concept of the statute—a different constitutional standard when minors are involved—is now judicially sanctioned, the statute could prove to be constitutionally unworkable in any subsequent concrete case. Certainly, insofar as the statute is modeled along *Roth* lines, it poses all the same problems

Thus, *Roth* is indeed dead, although perhaps not beyond resurrection. But before talking about further reforms, one might profitably try to look at the shape of the phoenix that has arisen from its meager ashes. One need not accept the mystical view of common-law jurists that law always exists on every subject, in order to accept the proposition that previously existing legal doctrines cannot be abandoned without giving some hint of what now exists in their place, even if it is simply the outline of the void created by their departure. A few vague and unrelated principles, then, can be drawn from the cases which have eroded *Roth*. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*²⁰ seems to imply that material containing even a scintilla of redeeming social importance will normally be protected—a position which appears to bring the Court close to Justice Stewart's hard-core-pornography test. *Redrup v. New York*²¹ tells us that soft-core, and even not-so-soft-core, pornography is acceptable because, in the Court's view, it meets contemporary national community standards. *Ginsberg v. New York* warns us that we are on shaky grounds when we deal with minors; and *Ginzburg v. United States* instructs us to be discreet with respect to our sales techniques, even if we are not discreet with regard to what we have for sale. Finally, *Stanley* tells us that if we can get our pornography home, we are home free.

Assuming (as a matter of convenience rather than conviction) that the Nixon appointees to the Court will tend toward a more restrictive, rather than a less restrictive, attitude regarding erotic materials, these rules do not seem to be in imminent danger of change. In *Memoirs* six Justices concurred in the result, while three dissented. Two of the majority have departed; but so has Justice Clark, a dissenter, and he was replaced by Justice Marshall, the author of the *Stanley* opinion. Of the two dissenters in *Redrup* only Justice Harlan remains, with Justice Clark now replaced by the apparently more tolerant Marshall. In *Stanley* three Justices withheld opinion on the obscenity issue because they felt that the conviction should have been reversed on the grounds of an illegal search and seizure. There is, however, no reason to think that any

which that case presented. Engdahl asserts that *Ginsberg* held that rationality is the only limit on legislative action concerning distribution of erotica to minors. Engdahl, *supra* note 1, at 196. He cites pages 641 to 643 of the opinion in support of that assertion. *Id.* at 196 n.74. But Justice Fortas and many others saw no such connotation in the passages referred to.

20. 383 U.S. 413 (1966)

21. 386 U.S. 767 (1967)

of those three Justices (Stewart, White, and Brennan) would necessarily vote to overrule *Stanley*. Furthermore, the presence in the *Stanley* majority of Justice Harlan, with his deference to states' authority, should act to stabilize that opinion.

II. TRUTH REDISCOVERED

Now back to Professor Engdahl. As noted previously, he begins with an attack on the "incorporation" approach to the fourteenth amendment—the doctrine which he claims has muddied constitutional waters and which "no majority of the Court has ever genuinely endorsed."²² That assertion is quite misleading. While only Justice Black and perhaps Justice Douglas continue to assert the wholesale incorporation or "shorthand version of the Bill of Rights" theory, it is generally accepted that most of the operative provisions of the Bill of Rights have been "selectively" incorporated. For example, none of the current Justices, save Harlan and now apparently Burger,²³ has ever suggested that the fourteenth amendment provides weaker protection of freedom of expression against state action than the first amendment provides against federal action. Professor Engdahl prefers to call selective incorporation the "guidance" doctrine²⁴—a characterization which is accurate insofar as it describes the process by which incorporation takes place. Rather than holding that the due process clause is simply a coded reference to the Bill of Rights, the Court has acknowledged that the first eight amendments, as developed through the case law, usually provide the best available definitions of due process and liberty.

Of course, there has been debate about what "incorporation" means. For instance, Justices Harlan and Frankfurter fought this battle in the area of search and seizure. Although *Wolf v. Colorado*²⁵ adopted the prohibition against illegal search and seizure as part of the fourteenth amendment's protection, it was not until *Mapp v. Ohio*²⁶ that the exclusionary rule was incorporated into the due process clause. Even after that case, the question arose, in *Ker v. California*,²⁷ as to what extent the federal case law and statutes defining illegal search and seizure should be made applicable to state action. While the federal statute at issue in *Ker* was deemed to

22. Engdahl, *supra* note 1, at 203.

23. See *Carlos v. New York*, 396 U.S. 119 (1969).

24. Engdahl, *supra* note 1, at 204 n.102.

25. 338 U.S. 25 (1949).

26. 367 U.S. 643 (1961).

27. 374 U.S. 23 (1963).

be irrelevant insofar as it set a supraconstitutional standard for federal officers, it is generally understood that incorporation entails utilization of all *relevant* Bill of Rights doctrine in similar state-action cases.

While Engdahl makes a plausible argument that early cases such as *Gitlow v. New York*²⁸ and *Whitney v. California*²⁹ suggest that there is a weaker protection for free speech against state action than there is against federal action, the immediate response to his admonition that such cases should not be "dismissed as archaic"³⁰ is: "Why not?" The fact that the approach of those cases is one which "has been obscured and then forgotten, rather than deliberately rejected"³¹ is hardly an adequate reason for their revival. The case-books are "full of clinkers" that went the same way. The more relevant question is, what is wrong with incorporation, or, alternatively, why is some other approach preferable?

One problem with incorporation, according to Engdahl, is that although it was originally designed to supplant the "obstructionist" use of substantive due process by the *laissez-faire* Old Guard, it has not really done that.³² This proposition is erroneous both as to the origin of the incorporation doctrine and as to its effect. Obstructionism was initially eliminated by substituting, as the touchstone of substantive due process, the flexible standard of "rationality" for judicially created "liberties," such as "freedom to contract" and "freedom to follow a lawful occupation."³³ Incorporation, on the other hand, was advanced as a foil to the rationality concept of due process, when it became apparent that the concept of judicial restraint was being used to strip the fourteenth amendment of its real substance—the protection of civil rights and liberties against hostile state action.³⁴ While one must concede that there is considerable validity in Justice Frankfurter's frequent protestations that the difference between obstructionism and vigilant judicial

28. 268 U.S. 652 (1925).

29. 274 U.S. 357 (1927).

30. Engdahl, *supra* note 1, at 207.

31. *Id.*

32. *Id.* at 202.

33. Compare *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937), with *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923). Professor Engdahl may have been misled by some of Justice Black's latter-day pronouncements on the limiting aspects of the incorporation doctrine. See *Griswold v. Connecticut*, 381 U.S. 479, 507, 509-10 (1965) (Justice Black, dissenting). See also *Adamson v. California*, 332 U.S. 46, 68 (1947) (Justice Black, dissenting).

34. See *Adamson v. California*, 332 U.S. 46 (1947) at 68 (Justice Black, dissenting), and at 123 (Justice Murphy, dissenting).

protection of liberty is primarily in the eye of the beholder,³⁵ it is nevertheless clear that the Court has seen through the haziness of this distinction well enough to prevent incorporation from resurrecting review of so-called "economic-relations cases."³⁶ For better or worse, a fourteenth amendment claim is virtually dead when it is classified as "economic." Thus, Professor Engdahl is simply wrong in concluding that incorporation failed to eliminate the obstructionist use of substantive due process.

A lucid and persuasive exposition of the nature and purpose of the incorporation process is set forth in a footnote to Justice White's opinion in *Duncan v. Louisiana*:³⁷

In one sense recent cases applying the provisions of the first eight amendments to the states represent a new approach to the "incorporation" debate. Earlier the Court can be seen as having asked . . . if a civilized system could be imagined that would not accord the particular protection. . . . The recent cases, on the other hand, have proceeded on the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems The question thus is whether given this kind of system a particular procedure is fundamental Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the states as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but it is fundamental in the context of the criminal processes maintained by the American States.³⁸

While state criminal *process* was of "immediate relevance for the case"³⁹ there under consideration, this approach toward incorporation need not be limited to that context. If liberty requires models in a relatively closed system such as criminal process, can anyone seriously argue that guidelines are superfluous in the free-wheeling body politic, or that worthy traditions are any less deserving of perpetuation simply because they touch on an aspect of life other than criminal trial procedure?

35. See Frankfurter, *Self-Willed Judges and the Judicial Function*, in AN AUTOBIOGRAPHY OF THE SUPREME COURT 441 (A. Westin ed. 1963).

36. See Reich, *The New Property*, 73 YALE L.J. 733 (1964). Engdahl's argument to the contrary is based upon the point, so intriguing to law students, that if the due process clause of the fourteenth amendment incorporates the Bill of Rights absolutely *in toto*, it incorporates a mirror-image of itself in the fifth amendment.

37. 391 U.S. 145 (1968).

38. 391 U.S. at 149-50 n.14.

39. 391 U.S. at 149-50 n.14.

III. WHY ANYBODY CAN TAKE AN OATH TO SUPPORT THE CONSTITUTION

It finally emerges that the real reason that Professor Engdahl does not like incorporation is that, despite his apparent admiration of Justice Harlan and his scorn of Justices Black and Douglas, he is something of a literalist (and, of course, who is not).

Careful attention to the language of the Constitution may try the patience of some who prefer recourse to dogmatic generalities; but if a written constitution is to have genuine meaning, the language of the document must be relevant in constitutional adjudication. We are not bound to the unascertainable "intent of the framers"; moreover "it is a *constitution* we are expounding," that is, it is "a constituent act [which has] called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." But whatever construction we might put upon it, we are not free to disregard the language of the document. Faithfulness to language dictates neither "conservative" nor "liberal" interpretation, but it does provide the only basis to legitimate whatever ultimate decision is made.⁴⁰

Engdahl has some difficulty with the line between literalism and "expounding a constitution [which has] called into life a being." His very next sentence after the above quotation is, "Life, property, and *corporal* liberty are protected by the fourteenth amendment."⁴¹ The reconciliation between Professor Engdahl's literalism on the one hand and his preference for Justice Harlan over Justices Black and Douglas on the other, is that since the fourteenth amendment literally refers only to "due process" (not to free speech or free press), the literalist approach to the problem of protecting free expression against state action should be one of a more flexible standard of "substantive due process."

Professor Engdahl's earlier favorable reference to Justice Harlan might suggest that they would both come out at about the same place. This is not true. Nearly everyone has assumed that adoption of Justice Harlan's *Palko* formulation regarding state regulation of erotica would result in far greater latitude for state suppression of such material than is available to the federal government.⁴² Review

40. Engdahl, *supra* note 1, at 214. (Citations to Justices Marshall and Holmes omitted.)

41. *Id.* (emphasis added).

42. This includes Justice Harlan himself who wrote: Federal suppression of allegedly obscene matter should, in my view, be constitutionally limited to that often described as "hard-core pornography" . . . State obscenity laws present quite a different order . . . From my standpoint, the

of state action on the basis of fundamental fairness is simply a prevention-of-atrocities doctrine.⁴³ Thus, Justice Harlan would require only that states act "rationally" in suppressing erotica. Presumably Anthony Comstock appeared rational to many.⁴⁴

Professor Engdahl, on the other hand, has in mind a much more vigorous concept of substantive due process. Much of his discussion in this portion of his article is concerned with enumerating factors involved in an adjudication based on substantive due process. Substantive due process has been simply stated as a requirement that the legislation in question be a rational means to a legitimate end. Professor Engdahl points out that this test can be broken down⁴⁵ into such considerations as (1) "the legitimacy of the state interest,"⁴⁶ (2) "the substantiality of a legitimate state interest,"⁴⁷ and (3) "[t]he means-to-end relationship between the legislation and the state interest."⁴⁸ However, under his final consideration—(4) "the effect of countervailing interests"⁴⁹—Professor Engdahl reveals that all the hubbub over incorporation may be just a tempest in a teapot: "The greatest interest to be weighed against any state interest claimed to justify state suppression of expression, however, is the interest of a free people in the freedom of speech itself."⁵⁰

What the incorporation problem is all about is determining when countervailing interests ought to be taken into account. When no defined personal right exists, substantive due process requires only that the state act rationally—which in our pluralistic society means that it may do virtually anything.⁵¹ When a countervailing

Fourteenth Amendment requires of a state only that it apply criteria rationally related to the accepted notions of obscenity and that it reach results not wholly out of step with current American standards As to the States, the due latitude my approach would leave them insures that only the unusual case would require plenary review and correction by the Court.

Memoirs v. Massachusetts, 383 U.S. 413, 457-58 (1966) (dissenting opinion).

43. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952).

44. *Jacobellis v. Ohio*, 378 U.S. 184, 203-04 (1964) (Justice Harlan, dissenting); cf. Justice Douglas' dissent in *Ginsberg v. New York*, 390 U.S. 629, 650 (1968), arguing that even the greatest excesses of Comstock could pass a rationality test.

45. The scientific method encompasses both the processes of empiricism and reductionism. Empiricism usually uncovers the fact that things are more complicated than they seem. Reductionism attempts to resimplify things by finding unifying concepts at a deeper level. Thus the process is complementary and progressive. The trouble with semantic legal analysis is the danger of going back and forth over the same ground.

46. Engdahl, *supra* note 1, at 228.

47. *Id.* at 232.

48. *Id.* at 233.

49. *Id.* at 234.

50. *Id.*

51. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

right does exist, by incorporation or otherwise, the state must show a "compelling" interest.⁵² The compelling interest in the case of free expression is alleviation of a "clear and present danger that [the words] will bring about the substantive evils that Congress has a right to prevent."⁵³ It is true, as Engdahl points out, that penumbral rights, such as privacy,⁵⁴ can occasionally be cut from whole cloth—that is, they can be based upon values not specifically alluded to in the Constitution. But why advocate cutting them from whole cloth, when the venerable Bill of Rights supplies sturdier material? Nothing would be simplified or even necessarily changed in result by Engdahl's reform. The Court would simply undermine its doctrinal framework for the protection not only of erotica but of free expression *in toto*, at a time when that protection is needed as never before.

IV. ECHOES OF THE THIRTIES

Engdahl concedes that Congress has the power to regulate the interstate transportation of prostitutes,⁵⁵ thus accepting *Hoke v. United States*,⁵⁶ but he denies that it has *delegated power* under the commerce clause to regulate the interstate shipment of erotica, except when the recipient is nonconsenting.⁵⁷ In this discussion his reasoning becomes a bit tortured. First, he affirms a truism: that the mere fact that Congress can regulate a subject, such as prostitution or erotica, when that subject has a connection with, or an effect on, interstate commerce does not mean that it has general power over the same subject when that subject has "no connection with or effect upon interstate commerce."⁵⁸ Then he states: "The same illogic necessary to sustain such bootstrap omnicompetence would be necessary to sustain federal obscenity legislation under even the broadest interpretation of the clear and present danger test."⁵⁹ The reference to the clear and present danger test is simply poor analysis. That Congress cannot exercise its power under the commerce clause in derogation of the first amendment is also a self-evident truth. But it adds nothing to clarity of thinking to attempt to speak

52. *Sherbert v. Verner*, 372 U.S. 398 (1963).

53. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

54. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

55. Engdahl, *supra* note 1, at 218.

56. 227 U.S. 308 (1913).

57. Engdahl, *supra* note 1, at 219-20.

58. *Id.* at 218.

59. *Id.* at 219.

of a first amendment limitation on power in terms of a lack of delegated power under article I.⁶⁰

The problem of standards is, however, more than academic (in the pejorative sense). In the near future, Congress may quite possibly pass new federal obscenity legislation dealing with offerings to minors, based upon Congress' belief that *Ginsberg v. New York* offers the federal government as well as the states some additional freedom to regulate.⁶¹ The Justices might well be laughed off the bench if they strike down such legislation on the basis of a lack of congressional power under the commerce and postal clauses.

V. LIFE, SEX, AND FREEDOM

The Bill of Rights offered us an experiment in legally sanctioned freedom of expression—an experiment that was not really begun until the twentieth century. Even now it is only grudgingly accepted by a majority of American citizens. The majority has usually believed that at least three areas ought to be permanently excluded from the experiment: sedition, libel, and obscenity. For historical reasons each of these areas was treated differently. Obscenity, it was once said, is outside the protective scope of the first amendment because by definition it is devoid of social importance.⁶² But Justice Holmes told us that the experiment in freedom is an experiment in life itself,⁶³ and Freud told us that sex is most relevant to life. Still, the majority has generally believed that the practice of sex should be relegated to the marital bedroom, or to the discreet affair, with discussion and depiction of it relegated to the locker room and latrine walls.

In a cautious effort to open up the public arena for "serious" discussion the Court once held that such discussion, if it takes place in a tasteful manner, is fully protected by the first and fourteenth

60. The analysis also does not explain why Congress could regulate the interstate shipment of erotica to unwilling recipients. Engdahl refers to the "right of privacy," but none of the cases cited indicates that Congress has been delegated the power to legislate protection for the right of privacy. Of course, it is possible to say that what the federal courts can adjudicate Congress may legislate. See *Panama R.R. v. Johnson*, 264 U.S. 375 (1924). But why such an inchoate power as this could override the first amendment when the formidable commerce power cannot is also left unexplained. It is possible to make an intellectually satisfying argument against the general use of the commerce power to regulate for patently noncommercial objectives, but Engdahl does not make that argument.

61. See H.R. 11,031, 91st Cong., 1st Sess. (1969) and S. 2073, 91st Cong., 1st Sess. (1969), which have the backing of the Administration.

62. R. KUH, *FOOLISH FIGLEAVES* 17-21 (1967).

63. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (dissenting opinion).

amendments.⁶⁴ Naturally, since sex is fun (or something like fun), the purveyors of fun for fun's sake followed the Court's decisions with as close an eye as did the heavy-minded Lawrences and Joyces. Finally, some people began to believe that sex is not only fun but good fun; and good fun,⁶⁵ it seems, has redeeming social importance in and of itself. Still others argued, somewhat persuasively, that even the hardest-core pornography may have value, even if only to show that once we have had our fill of the forbidden fruit, we will learn that it is not really all that much; and we will then turn to a search for a more realistic attitude toward this most vital of life forces.⁶⁶

Nevertheless, this remains a minority position, and the majority today is in no mood to accept minority opinion lightly. The pertinent questions are what the Court can, should, and will do next in its continuing quest to preserve breathing room for minority views. It is submitted that the time has come for the Court to hold that the Constitution permits no censorship or suppression of erotica in the case of its distribution to consenting adults. There is no substantial evidence that legalized distribution of even hard-core pornography is socially or even personally harmful,⁶⁷ and there is some evidence that its suppression may have detrimental effects.⁶⁸ Strong popular support for control of erotica was formerly based upon the following paradigm, which appealed to "common-sense" analysis: A person with strong sexual drives becomes sexually aroused by viewing erotic literature or an erotic performance; and unable—for personal, social, psychological, or financial reasons—to find anyone willing to satisfy his aroused drives, he forces his attention on an unwilling victim. Deeper analysis, however, disproves this paradigm. First, it has been shown that when we deal with the violent sex criminal, we are dealing with a small, abnormal element.⁶⁹ The Kronhausen study indicated that many of these people tend to have strong inhibitions against sexual fantasies and that often their conduct is an "acting out" of drives never allowed to

64. *Kingsley Intl. Pictures Corp. v. Regents*, 360 U.S. 684 (1959). The earlier cases following *Roth* seemed to be mere extensions of this principle, that is, they recognized that an artist might need to discuss or depict sexual conduct, to some limited extent, in order to make his point about sex.

65. See, e.g., L. ULLERSTAM, *THE EROTIC MINORITIES* (1966).

66. E. KRONHAUSEN & P. KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 263 (1959).

67. See *Memoirs v. Massachusetts*, 383 U.S. at 424, 431-33 (Justice Douglas, concurring) and the authorities cited therein.

68. E. KRONHAUSEN, *supra* note 66, at 261-89.

69. FBI, *UNIFORM CRIME REPORTS FOR THE UNITED STATES* 11-13 (1968).

reach consciousness.⁷⁰ Second, empirical evidence, and common sense, indicate that sexual stimuli are relative and omnipresent.⁷¹ If this is so, then the quantity of sexual stimuli is, for the most part, constant; it is only its nature that changes.⁷² In any event, the law has recognized, since it rejected *Regina v. Hicklin*,⁷³ that it cannot attempt to keep the community free from any sexual stimulus that might affect a deranged mind.

The argument that pornography promotes introversion and disrupts more desirable interpersonal contacts⁷⁴ flounders because it fails to prove which is the cause and which is the effect. It may be more likely that those who turn excessively to pornography are already blocked against desirable interpersonal relationships. Pornography may in fact provide a release for such persons and have the desirable result of preventing the eruption of violent, destructive, and antisocial interpersonal encounters.⁷⁵

An initially provocative argument against pornography was made last year by Harry Clor.⁷⁶ The essence of Clor's thesis is that pornography degrades human life in a world that already values human life too little. Clor candidly admits that his argument applies to many materials which do not possess an overtly sexual theme; hence he would expand his definition of obscenity to include materials depicting or describing such things as torture, brutality, mutilation, or morbidity, even if no overtly sexual motif appears. But Clor proves too much. While everyone might agree that much that is written, spoken, or depicted today degrades the human condition, everyone would not agree on which particular items are degrading. The experiment in freedom of expression does not allow us to impose majority judgment as to what does and does not degrade humanity. Thus, as Clor himself concedes, there is no clear basis for distinguishing between degrading material that is overtly sexual and other degrading material.⁷⁷

70. E. KRONHAUSEN & P. KRONHAUSEN, *supra* note 66, at 261-89.

71. The Kronhausen study indicated that normal persons were sexually stimulated by such variegated phenomena as warm sand and the sound of a pistol shot. *Id.* at 276-77. See also *Roth v. United States*, 354 U.S. 476, 509 (1957) (dissenting opinion).

72. 383 U.S. at 433. See also Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655 (1964).

73. L.R. 3 Q.B. 360 (1868). The *Hicklin* case provided that material be judged by the effect of an isolated excerpt upon "particularly susceptible persons." Early American courts adopted this standard but later decisions rejected it in favor of the "average person" standard employed in *Roth*. See *Roth v. United States*, 354 U.S. 476, 488-89 (1957), and cases cited therein.

74. Lockhart & McClure, *supra* note 11, at 296-97.

75. E. KRONHAUSEN & P. KRONHAUSEN, *supra* note 66, at 261-89.

76. H. CLOR, *OBSCENITY AND PUBLIC MORALITY* (1969).

77. Clor cites passages from Sartre's *Erostratus* and Joseph Heller's *Catch-22* to

Practice in many places has come close to eliminating censorship for the adult reader. Indeed, one might suggest that only enough condemnation and restriction remain to sustain the titillating effect of forbiddenness. *Stanley v. Georgia* has not been a particularly controversial opinion. Despite the reputed conservative backlash, even spokesmen for "decent literature" groups no longer stress the issue of adult censorship; rather, the debate today focuses principally on minors. But the Court needs a reasonably sound doctrinal underpinning for the elimination of adult censorship. *Memoirs* put us on the right track. Since erotica is no longer presumptively without redeeming social importance, the distinct constitutional treatment historically given to it is no longer justifiable.⁷⁸ Consequently, the clear and present danger test should apply. Having come that far, it is relatively easy to take the next step and to concede that no proof of a clear and present danger can be adduced in the case of any erotica disseminated to adults.⁷⁹ Such a result has certainty, and is surely more soundly grounded than would be any result based either upon a revisionist view of congressional power under the commerce clause or upon a "revitalized" old-style substantive due process.

VI. PROTECTING THE MODEST

Elimination of restrictions on the dissemination of erotica to adults leaves us with two remaining problems: (1) erotica and the unwilling audience, and (2) erotica and minors. The former problem seems easier to manage. It is quite possible, and apparently prac-

illustrate his concept of degradation. CLOR, *supra* note 76, at 227-32. I think it is clear from the context that he is citing Sartre and Heller as people who make the same point with fiction which he makes with expository writing. Yet it would not be difficult at all for the more censorially inclined to get the idea from Clor that Heller and Sartre themselves ought to be suppressed. Indeed, in the case of Heller, it would not even be unreasonable for the censor to conclude that he had an ally in Clor (although Clor denies it). The passage from *Catch-22* discussed by Clor is the crucial one in which Yossarian opens his friend Snowden's flak suit and discovers that Snowden's insides have been literally pulverized by a piece of shrapnel. Yossarian thus discovers the "secret" that "[t]he spirit gone, man is garbage." J. HELLER, *CATCH-22* 450 (1962). Heller obviously believes that man must accept this fact and build value on it. Clor, at least, suggests that it should be kept a secret. In fairness, it must be admitted that Clor makes a defense of Heller, based upon Clor's understanding of Heller's intention; but it will have to be left to the reader of Clor and Heller to resolve the adequacy of the premise and conclusion.

78. *Memoirs v. Massachusetts*, 383 U.S. at 419:

A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against or cancelled by its prurient appeal or patent offensiveness.

79. 383 U.S. at 424, 431-33 (Justice Douglas, concurring).

tical, to advertise the availability of erotica in a most discreet way.⁸⁰ The current concern over using sex to sell products that are not overtly sexual, such as automobiles, is probably more of a social problem than a legal one. Advertisers, seeking the mass market, are unlikely to exceed the *actual* current community standard of candor.

Some problems may be created by the existence of what might be called sexual evangelists—that is, persons who feel a need to “liberate” the more inhibited by forcing erotica on their attention. It is tempting to dismiss this issue by saying that a small but extant body of the law of free speech deals with the problem of proselytizing an unwilling audience.⁸¹ But the erotic evangelist is unique, because while a political or religious tract or portrayal may be viewed and rejected, the erotic liberator can win at least a partial victory over the unwilling audience simply by having his materials viewed. In the case of erotica, the medium is not only the message, but the medium is in a sense an end in itself. Thus, historical tradition can be recognized and the balance struck in favor of the reluctant viewer. It is perhaps not unreasonable to require that the proselytizers for sexual liberation utilize more traditional discourse rather than taking the “direct action” of displaying erotica to the unwilling.

Several considerations, however, should be kept in mind in dealing with erotica and the unwilling audience. First, it must be remembered that nuisance is the evil being attacked and thus that the penalties invoked should be mild. Furthermore, care must be taken that laws preventing the display of erotica to an unwilling audience are not used for harassment. Finally, the courts must be on guard to ensure that such laws are not twisted in application so as to make the materials unavailable to *willing* audiences.

VII. WOULD YOU WANT YOUR DAUGHTER TO READ ONE?

Finally, we come to the most perplexing problem—erotica and the child. Whether or not erotica is harmful to children involves, to some extent, the same considerations involved in determining whether or not it is harmful to adults. While all would agree that young minds are generally more impressionable than adult minds,

80. A shop directly across the street from the Ohio State University law school has a sign which reads simply “BOOKSTORE, ADULT BOOKS AND MOVIES.”

81. See, e.g., *Public Util. Commn. v. Pollak*, 343 U.S. 451 (1952); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

how they should be impressed is another question. Some believe that man is born good and that unhealthy attitudes are cast upon him by his elders. Others believe that man is born a craven animal or marred by original sin and must be taught civilized values. This problem is still today more metaphysical than scientific.⁸² Even after one chooses a side on this issue, there is room for debate on the problem of erotica and the child. If one assumes that man is born good, it is still unclear whether free access to erotica is a liberating or a corrupting stimulus for children. Similarly, one can be consistent with the "need to be civilized" view of man by looking upon the suppression of access to erotica either as the inculcation of good morals or as the inculcation of sexual neurosis.⁸³ In either case, one consideration appears inescapable: because of the slow physical maturation of human beings, children are inevitably subject to the influence of adults; and thus adults inevitably choose influences for them. Justice Brennan sounded a familiar American, and I believe libertarian, chord in *Ginsberg* when he said that our system recognizes the initial right of parents to do the choosing.⁸⁴ It is not entirely specious to say that laws restricting distribution of erotica to minors may be necessary in order to offer parents that choice.

The primary danger of such laws is that they may be used to harass the distribution of constitutionally protected materials to adults. For example, legislation making felonious the mailing of material deemed "harmful to minors" into any home in which a child under eighteen resides would obviously affect all distribution, since the burden of producing guaranteed "adult only" mailing

82. For a discussion of the legal and social problems generated by the conflict between the Apollonian and the Dionysian views of life, see generally, Laughlin, *LSD-25 and the Other Hallucinogens: A Pre-Reform Proposal*, 36 GEO. WASH. L. REV. 23 (1967).

83. In footnote 10 of *Ginsberg* (390 U.S. at 642), Justice Brennan cites Dr. Wilford Gaylin, *Book Review*, 77 YALE L.J. 579, 592-93 (1968). The worst that Dr. Gaylin has to say with regard to harmful effects of erotica on children is that:

It is in the period of growth [of youth] when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control—it is in this period, undramatically, and with time, that legalized pornography might conceivably be damaging.

Dr. Gaylin goes on to distinguish between legalized erotica and blackmarket pornography by suggesting that the former may have a more harmful impact on children since they will deem it to have parental approval. Whether or not this conclusion is psychologically sound, it raises fundamental jurisprudential problems (as Dr. Gaylin himself notes). It is basic to liberal society that the society does not fully approve of all that it permits. To posit the opposite would by necessity lead to the corollary that the law can permit only that of which the dominant elements of society fully approve—the antithesis of libertarian government.

84. 390 U.S. at 639.

lists would be insurmountable. Applying the "less drastic means" approach,⁸⁵ it is not unreasonable to suggest that the problem could be handled by requiring that there be identifying marks on the envelopes and by giving parents the responsibility of requiring their children not to open mail marked "adult." Adult bookstores should not be any more difficult to police than adult taverns. Certainly some erotica would find its way into children's hands without parental consent, but it always has. Libraries could permit the use of a parental authorization to admit minors into "mature" areas. In the schools the availability of erotic materials would normally be a political problem, for boards of education ordinarily set school reading standards somewhere near contemporary community standards, influenced to some degree by more liberal-minded educators. The problem of the dissenting teacher would arise in the larger context of an academic-freedom question.⁸⁶

The Court, however, cannot escape the problem of setting constitutional definitions of "harmful to minors," for there are always those who wish to reach the youth market right up to the outer limits of constitutional permissibility. These groups generally fall into two classes. The first is the commercial interests; and with them I find little difficulty in allowing the community to apply its contemporary standards, so long as parents or guardians are able freely to procure restricted materials for their own wards. The second group is a part of a larger movement, many of whose members are themselves "minors," which believes that the current definition of minority is set at too high a level and that some persons currently categorized as minors should be exposed to the adult market place of ideas. As in the case of the dissenting teacher, this is part of a larger problem, which in this situation probably entails recognizing the evolution downward of the age of responsibility; and thus the problem cannot and should not be solved solely in terms of laws dealing with erotica.⁸⁷

85. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

86. The problem of the respective spheres of authority of teachers and school administrators in choosing classroom material has been a frequent source of dispute within the teaching profession at both the secondary and higher-education levels. L. JOUGHIN, *ACADEMIC FREEDOM AND TENURE* 105-06 (1967).

87. This is not to say that a unified definition of majority is the only plausible answer to the problem. It may be that majority can be set at different ages for different purposes. However, there are certain logical nexuses between certain activities so far as majority is concerned. For example, it is surely not totally untenable to suggest that those who are compelled to fight a war for a democratic nation should have a vote in selecting the leaders who determine whether such a war should be fought. Similarly, the age at which youth should be exposed to unshielded discussion of vital social issues cannot be completely separated from the age at which they can consider the full range of adult materials dealing with sex.

I have purposefully discussed this aspect of the problem from a policy-making point of view, for I think that this is the only practical way in which the Court can handle it. On the doctrinal level, it seems that *Ginsberg v. New York*⁸⁸ can be read as a simple recognition of the special tripartite relationship of government, minors, and the Constitution, bearing in mind the admonition of *In re Gault*⁸⁹ that the Constitution is not "for adults only." In this light, the foregoing considerations can be seen as the parameters of "clear and present danger" for situations in which minors are involved.

VIII. KEEPING THE EYE UPON THE RAIL

Constitutional problems are, at heart, social and political problems; and the Supreme Court is inextricably involved in a larger political and social struggle. Despite Justice Frankfurter's yearning for the atmosphere of a Hyde Park—an atmosphere devoid of any need for the legal protection of free expression⁹⁰—that atmosphere does not in fact prevail. Furthermore, the abdication of judicial responsibility in this area has inexorably led to the encouragement of an attitude of repression, rather than to Justice Frankfurter's hoped-for development of legislative responsibility in the protection of civil liberties.⁹¹

The Court's power is finite (in fact tentative), and its resources are exhaustible. Public respect for its process is its capital. But I believe that it succeeds best by dealing straightforwardly with the social problems which it confronts, as they relate to the substantive principles embodied in the Constitution: "If we cannot use reason to critique the substantive value of the Court's decisions, it is paradoxical that we should waste so much of it on the trappings."⁹²

88. 390 U.S. 629 (1968).

89. 387 U.S. 1 (1967).

90. Frankfurter, *supra* note 35, at 436. See also L. HAND, *THE BILL OF RIGHTS* (1959).

91. It is quite possible to accept Justice Frankfurter's and Judge Hand's premises without accepting their conclusions. Thus, one can accept the premise that the best safeguard for civil liberties lies in an enlightened public conscience, and one can also accept the proposition that the institution of judicial review has contributed to an attitude of constitutional irresponsibility on the part of nonjudicial officials and perhaps even the public at large. But at the same time one can reject, on the basis of logic and empirical evidence, the idea that judicial self-restraint encourages legislative responsibility. Neither Frankfurter nor Hand suggested abolishing the institution of judicial review. So long as judicial review exists, legislators will construe the upholding of dubiously constitutional action as a victory and as encouragement for more and further action of the same nature, despite the Court's protestation that its action is based on "judicial restraint." See Frankfurter, *supra* note 35; L. HAND, *supra* note 90; Baldwin & Laughlin, *The Re-Appportionment Cases, A Study in the Constitutional Adjudication Process*, 17 U. FLA. L. REV. 301 (1964).

92. Laughlin, *Comments on Powell v. McCormack*, 17 UCLA L. REV. 97, 103-04 (1969).

Lawyers and laymen alike recognize that the Court must utilize doctrines and rules of decision making in principled adjudication. Those rules are best trusted when they are based upon time-tested principles, or rationally evolved from such principles, or when they are proved by empirical evidence or sound reasoning to be superior to existing principles. Too many academic commentators overlook this fundamental tenet of constitutional adjudication when they propose their intricate new jurisprudences.