SUPREME COURT OF UNITED STATES

Sam Ginsberg

Vs.

State of New York

No. 47.

Argued Jan. 16, 1968.

Decided April 22, 1968.

Rehearing Denied June 3, 1968.

See 391 U.S. 971, 88 S.Ct. 2029.

[Syllabus from pages 629-630 intentionally omitted]

Emanuel Redfield, New York City, for appellant.

William Cahn, Mineola, N.Y., for appellee.

Mr. Justice BRENNAN delivered the opinion of the Court.

This case presents the question of the constitutionality on its face of a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.

Appellant and his wife operate 'Sam's Stationery and Luncheonette' in Bellmore, Long Island. They have a lunch counter, and, among other things, also sell magazines including some so-called 'girlie' magazines. Appellant was prosecuted under two informations, each in two counts, which charged that he personally sold a 16-year-old boy two 'girlie' magazines on each of two dates in October 1965, in violation of § 484—h of the New York Penal Law, McKinney's Consol.Laws, c. 40. He was tried before a judge without a jury in Nassau County District Court and was found guilty on

both counts.1 The judge found (1) that the magazines contained pictures which depicted female 'nudity' in a manner defined in subsection 1(b), that is 'the showing of * * * female * * * buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple * * *,' and (2) that the pictures were 'harmful to minors' in that they had, within the meaning of subsection 1(f) 'that quality of * * * representation * * * of nudity * * * (which) * * * (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.' He held that both sales to the 16-year-old boy therefore constituted the violation under § 484—h of 'knowingly to sell * * * to a minor' under 17 of '(a) any picture * * * which depicts nudity * * * and which is harmful to minors,' and '(b) any * * * magazine * * * which contains * * * (such pictures) * * * and which, taken as a whole, is harmful to minors.' The conviction was affirmed without opinion by the Appellate Term, Second Department, of the Supreme Court. Appellant was denied leave to appeal to the New York Court of Appeals and then appealed to this Court. We noted probable jurisdiction. [1967] USSC 202; 388 U.S. 904, 87 S.Ct. 2108, 18 L.Ed.2d 1344. We affirm.2

I.

The 'girlie' picture magazines involved in the sales here are not obscene for adults, Redrup v. State of New York, [1967] USSC 173; 386 U.S. 767, 87 S.Ct. 1414, 18 L.2d.2d 515.3 But § 484—h does not bar the appellant from stocking the magazines and selling them to persons 17 years of age or older, and therefore the conviction is not invalid under our decision in Butler v. State of Michigan, [1957] USSC 16; 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412.

Obscenity is not within the area of protected speech or press. Roth v. United States, [1957] USSC 100; 354 U.S. 476, 485[1957] USSC 100; , 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498. The three-pronged test of subsection 1(f) for judgment the obscenity of material sold to minors under 17 is a variable from the formulation for determining obscenity under Roth stated in the plurality opinion in A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts, [1966] USSC 47; 383 U.S. 413, 418[1966] USSC 47; , 86 S.Ct. 975, 977[1966] USSC 47; , 16 L.Ed.2d 1. Appellant's primary attack upon § 484—h is leveled at the power of the State to adapt this Memoirs formulation to define the material's obscenity on the basis of its appeal to minors, and thus exclude material so defined from the area of protected expression. He makes no argument that the magazines are not 'harmful to minors' within the definition in subsection 1(f). Thus '(n)o issue is presented * * * concerning the obscenity of the material involved.' Roth, 354 U.S., at 481, 77 S.Ct. at 1307, n. 8.

The New York Court of Appeals 'upheld the Legislature's power to employ variable concepts of obscenity'4 in a case in which the same challenge to state power to enact such a law was also addressed to § 484—h. Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668, appeal dismissed for want of a properly presented federal question, sub nom. Bookcase, Inc. v. Leary, 385 U.S. 12, 87 S.Ct. 81, 17 L.Ed.2d 11. In sustaining state power to enact the law, the Court of Appeals said, Bookcase, Inc. v. Broderick, 18 N.Y.2d, p. 75, 271 N.Y.S.2d, p. 952, 218 N.E.2d, p. 671:

'(M)aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of

unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.'

Appellant's attack is not that New York was without power to draw the line at age 17. Rather, his contention is the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor. He accordingly insists that the denial to minors under 17 of access to material condemned by § 484—h, insofar as that material is not obscene for persons 17 years of age or older, constitutes an unconstitutional deprivation of protected liberty.

We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. In re Gault[1967] USSC 114; , 387 U.S. 1, 13[1967] USSC 114; , 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as § 484—h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.

Appellant argues that there is an invasion of protected rights under § 484—h constitutionally indistinguishable from the invasions under the Nebraska statute forbidding children to study German, which was struck down in Meyer v. State of Nebraska, [1923] USSC 154; 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; the Oregon statute interfering with children's attendance at private and parochial schools, which was struck down in Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, [1925] USSC 168; 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; and the statute compelling children against their religious scruples to give the flag salute, which was struck down in West Virginia State Board of Education v. Barnette, [1943] USSC 130; 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628. We reject that argument. We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather § 484—h simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests * * *' of such minors. Mishkin v. State of New York, [1966] USSC 83; 383 U.S. 502, 509[1966] USSC 83; , 86 S.Ct. 958, 16 L.Ed.2d 56; Bookcase, Inc. v. Broderick, supra, 18 N.Y.2d, at 75, 271 N.Y.S.2d, at 951, 218 N.E.2d, at 671. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults * * *.' Prince v. Commonwealth of Massachusetts, [1944] USSC 52; 321 U.S. 158, 170[1944] USSC 52; , 64 S.Ct. 438, 444[1944] USSC 52; , 88 L.Ed. 645.6 In Prince we sustained the conviction of the guardian of a nine-year-old girl, both members of the sect of Jehovah's Witnesses, for violating the Massachusetts Child Labor Law by permitting the girl to sell the sect's religious tracts on the streets of Boston.

The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484—h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Commonwealth of Massachusetts, supra, at 166, 64 S.Ct., at 442. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, subsection 1(f)(ii) of § 484—h expressly recognizes the parental role in assessing sex-related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.

The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in Bookcase, Inc. v. Broderick, supra, 18 N.Y.2d at 75, 271 N.Y.S.2d, at 951, 218 N.E.2d, at 671. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, which had struck down the first version of § 484—h on grounds of vagueness. In his concurring opinion, 15 N.Y.2d, at 312, 258 N.Y.S.2d, at 392, 206 N.E.2d, at 334, he said:

'While the supervision of children's reading may best be left to their parents, the knowledge that parentalcontrol or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.'

In Prince v. Commonwealth of Massachusetts, supra, 321 U.S., at 165, 64 S.Ct., at 441, this Court, too, recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.' The only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by § 484—h constitutes such an 'abuse.'

Section 484—e of the law states a legislative finding that the material condemned by § 484—h is 'a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.' It is very doubtful that this finding expresses an accepted scientific fact.8 But obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase 'clear and present danger' in its application to protected

speech. Roth v. United States, supra, 354 U.S., at 486—487, 77 S.Ct., at 1309—1310.9 To sustain state power to exclude material defined as obscenity by § 484—h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors. In Meyer v. State of Nebraska, supra, 262 U.S., at 400, 43 S.Ct., at 627, we were able to say that children's knowledge of the German language 'cannot reasonably be regarded as harmful.' That cannot be said by us of minors' reading and seeing sex material. To be sure, there is no lack of 'studies' which purport to demonstrate that obscenity is or is not 'a basic factor in impairing the ethical and moral development of * * * youth and a clear and present danger to the people of the state.' But the growing consensus of commentators is that 'while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either.'10 We do not demand of legislatures 'scientifically certain criteria of legislation.' Noble State Bank v. Haskell, [1911] USSC 10; 219 U.S. 104, 110[1911] USSC 10; , 31 S.Ct. 186, 187[1911] USSC 10; , 55 L.Ed. 112. We therefore cannot say that § 484—h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.

II.

Appellant challenges subsections (f) and (g) of § 484—h as in any event void for vagueness. The attack on subsection (f) is that the definition of obscenity 'harmful to minors' is so vague that an honest distributor of publications cannot know when he might be held to have violated § 484—h. But the New York Court of Appeals construed this definition to be 'virtually identical to the Supreme Court's most recent statement of the elements of obscenity. (A Book Named 'John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Commonwealth of Massachusetts, [1966] USSC 47; 383 U.S. 413, 418[1966] USSC 47; , 86 S.Ct. 975, 977[1966] USSC 47; , 16 L.Ed.2d 1),' Bookcase, Inc. v. Broderick, supra, 18 N.Y.2d, at 76, 271 N.Y.S.2d, at 953, 218 N.E.2d, at 672. The definition therefore gives 'men in acting adequate notice of what is prohibited' and does not offend the requirements of due process. Roth v. United States, supra, 354 U.S., at 492, 77 S.Ct., at 1313, see also Winters v. People of State of New York, [1948] USSC 41; 333 U.S. 507, 520[1948] USSC 41; , 68 S.Ct. 665, 672[1948] USSC 41; , 92 L.Ed. 840.

As is required by Smith v. People of State of California, [1960] USSC 89; 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, § 484—h prohibits only those sales made 'knowingly.' The challenge to the scienter requirement of subsection (g) centers on the definition of 'knowingly' insofar as it includes 'reason to know' or 'a belief or ground for belief which warrants further inspection or inquiry of both: (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.'

As to (i), § 484—h was passed after the New York Court of Appeals decided People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470, which read the requirement of scienter into New York's general obscenity statute, § 1141 of the Penal Law. The constitutional requirement of

scienter, in the sense of knowledge of the contents of material, rests on the necessity 'to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity,' Mishkin v. State of New York, supra, 383 U.s., at 511, 86 S.Ct. at 965. The Court of Appeals in Finkelstein interpreted § 1141 to require 'the vital element of scienter' and defined that requirement in these terms: 'A reading of the statute (§ 1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised * * *.' 9 N.Y.2d, at 344 345, 214 N.Y.S.2d, at 364, 174 N.E.2d, at 471. (Emphasis supplied.) In Mishkin v. State of New York, supra, 383 U.S., at 510—511, 86 S.Ct., at 964, we held that a challenge to the validity of § 1141 founded on Smith v. People of State of California, supra, was foreclosed in light of this construction. When § 484—h was before the New York Legislature its attention was directed to People v. Finkelstein, as defining the nature of scienter required to sustain the statute. 1965 N.Y.S.Leg.Ann. 54 56. We may therefore infer that the reference in provision (i) to knowledge of 'the character and content of any material described herein' incorporates the gloss given the term 'character' in People v. Finkelstein. In that circumstance Mishkin requires rejection of appellant's challenge to provision (i) and makes it unnecessary for us to define further today 'what sort of mental element is requisite to a constitutionally permissible prosecution,' Smith v. People of State of California, supra, 361 U.S., at 154, 80 S.Ct., at 219.

Appellant also attacks provision (ii) as impermissibly vague. This attack however is leveled only at the proviso according the defendant a defense of 'honest mistake' as to the age of the minor. Appellant argues that 'the statute does not tell the bookseller what effort he must make before he can be excused.' The argument is wholly without merit. The proviso states expressly that the defendant must be acquitted on the ground of 'honest mistake' if the defendant proves that he made 'a reasonable bona fide attempt to ascertain the true age of such minor.' Cf. 1967 Penal Law § 235.22(2), n. 1, supra.

Affirmed.

APPENDIX A TO OPINION OF THE COURT.

New York Penal Law § 484—h as enacted by L. 1965, c. 327, provides:

s 484—h. Exposing minors to harmful materials

1. Definitions. As used in this section:

(a) 'Minor' means any person under the age of seventeen years.

(b) 'Nudity' means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) 'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical

contact with a person's clothed or unclothed genitals, public area, buttocks or, if such person be a female, breast.

(d) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) 'Sado-masochistic abuse' means 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.

(f) 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) 'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sellor loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitementSexual conduct or sado-masochistic abuse and which, taken as a whole is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

APPENDIX B TO OPINION OF THE COURT.

State obscenity statutes having some provision referring to distribution to minors are:

Cal.Pen.Code §§ 311—312 (Supp.1966); Colo.Rev.Stat.Ann. §§ 40 9—16 to 40—9—27 (1963); Conn.Gen.Stat.Rev. §§ 53—243 to 53—245 (Supp.1965); Del.Code Ann., Tit. 11, §§ 435, 711—713 (1953); Fla.Stat.Ann. §§ 847.011—847.06 (1965 and Supp.1968); Ga.Code Ann. ss 26—6301 to 26—6309a (Supp.1967); Hawaii Rev. Laws § 267—8 (1955); Idaho Code Ann. §§ 18—1506 to 18—1510 (Supp.1967); Ill.Ann.Stat., c. 38, §§ 11—20 to 11—21 (Supp.1967); Iowa Code Ann. §§ 725.4—725.12 (1950); Ky.Rev.Stat. §§ 436.100 436.130, 436.540—436.580 (1963 and Supp.1966); La.Rev.Stat. §§ 14:91.11, 14:92, 14:106 (Supp.1967); Me.RevStat.Ann., Tit. 17, §§ 2901—2905 (1964); Md.Ann.Code, Art. 27, §§ 417—425 (1957 and Supp.1967); Mass.Gen.Laws Ann., c. 272, §§ 28—33 (1959 and Supp.1968); Mich.Stat.Ann. §§ 28.575—28.579 (1954 and Supp.1968), Comp. Laws Mich. §§ 750.343—750.347; Mo.Ann.Stat. §§ 563.270 563.310 (1953 and Supp.1967); Mont.Rev.Codes Ann. §§ 94—3601 to 94 3606 (1947 and Supp.1967); Neb.Rev.Stat. §§ 28—926.09 to 28—926.10 (1965 Cum.Supp.); Nev.Rev.Stat. §§ 201.250, 207.180 (1965); N.H.Rev.Stat.Ann. §§ 571—A:1 to 571—A:5 (Supp.1967); N.J.Stat.Ann. §§ 2A:115—1.1 to 2A:115—4 (Supp.1967); N.C.Gen.Stat. § 14—189 (Supp.1967); N.D.Cent.Code §§ 12—21—07 to 12—21—09 (1960); Ohio Rev.Code Ann. §§ 2903.10—2903.11, 2905.34—2905.39 (1954 and Supp.1966); Okla.Stat.Ann., Tit. 21, §§ 1021—1024, 1032—1039 (1958 and Supp.1967); Pa.Stat.Ann., Tit. 18, §§ 3831—3833, 4524 (1963 and Supp.1967); R.I.Gen.Laws Ann. §§ 11—31—1 to 11—31—10 (1956 and Supp.1967); S.C.Code Ann. §§ 16—414.1 to 16—421 (1962 and Supp.1967); Tex.Pen.Code, Arts. 526, 527b (1952 and Supp.1967); Utah Code Ann. §§ 76—39-5, 76—39—17 (Supp.1967); Vt.Stat.Ann., Tit. 13, §§ 2801—2805 (1959); Va.Code Ann. §§ 18.1—227 to 18.1 236.3 (1960 and Supp.1966); W.Va.Code Ann. § 61—8—11 (1966); Wyo.Stat.Ann. §§ 6—103, 7—148 (1957).

Mr. Justice STEWART, concurring in the result.

A doctrinaire, knee-jerk application of the First Amendment would, of course, dictate the nullification of this New York statute.1 But that result is not required, I think, if we bear in mind what it is that the First Amendment protects.

The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a 'free trade in ideas.'2 To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.

When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others 'by way of sound trucks with loud and raucous noises on city streets.'3 And so it was that

my Brothers BLACK and DOUGLAS thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience.

I think a State may permissibly determine that, at least in some precisely delineated areas, a child5—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.

I cannot hold that this state law, on its face,7 violates the First and Fourteenth Amendments.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

While I would be willing to reverse the judgment on the basis of Redrup v. State of New York, [1967] USSC 173; 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515, for the reasons stated by my Brother FORTAS, my objections strike deeper.

If we were in the field of substantive due process and seeking to measure the propriety of state law by the standards of the Fourteenth Amendment, I suppose there would be no difficulty under our decisions in sustaining this act. For there is a view held by many that the so-called 'obscene' book or tract or magazine has a deleterious effect upon the young, although I seriously doubt the wisdom of trying by law to put the fresh, evanescent, natural blossoming of sex in the category of 'sin.'

That, however, was the view of our preceptor in this field. Anthony Comstock, who waged his war against 'obscenity' from the year 1872 until his death in 1915. Some of his views are set forth in his book Traps for the Young, first published in 1883, excerpts from which I set out in Appendix I to this opinion.

The title of the book refers to 'traps' created by Satan 'for boys and girls especially.' Comstock, of course, operated on the theory that every human has an 'inborn tendency toward wrongdoing which is restrained mainly by fear of the final judgment.' In his view any book which tended to remove that fear is a part of the 'trap' which Satan created. Hence, Comstock would have condemned a much wider range of literature than the present Court is apparently inclined to do.

It was Comstock who was responsible for the Federal Anti-Obscenity Act of March 3, 1873. 17 Stat. 598. It was he who was also responsible for the New York Act which soon followed. He was responsible for the organization of the New York Society for the Suppression of Vice, which by its act of incorporation was granted one-half of the fines levied on people successfully prosecuted by the Society or its agents.

I would conclude from Comstock and his Traps for the Young and from other authorities that a legislature could not be said to be wholly irrational2 (Ferguson v. Skrupa[1963] USSC 73; , 372 U.S. 726, 83 S.Ct. 1928, 10 L.Ed.2d 93; and see Williamson v. Lee Optical Co. of Okl., [1955] USSC 46; 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563; Daniel v. Family Sec. Ins. Co., [1949] USSC 21; 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632; Olsen v. State of Nebraska, [1941] USSC 106; 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305) if it decided that sale of 'obscene' material to the young

should be banned.

The problem under the First Amendment, however, has always seemed to me to be quite different. For its mandate (originally applicable only to the Federal Government but now applicable to the States as well by reason of the Fourteenth Amendment) is directed to any law 'abridging the freedom of speech, or of the press.' I appreciate that there are those who think that 'obscenity' is impliedly excluded; but I have indicated on prior occasion why I have been unable to reach that conclusion.4 See Ginzburg v. United States, [1966] USSC 49; 383 U.S. 463, 482[1966] USSC 49; , 86 S.Ct. 942, 953[1966] USSC 49; , 16 L.Ed.2d 31 (dissenting opinion); Jacobellis v. State of Ohio, [1964] USSC 164; 378 U.S. 184, 196[1964] USSC 164; , 84 S.Ct. 1676, 1682, 12 L.Ed.2d 793 (concurring opinion of Mr. Justice Black); Roth v. United States, [1957] USSC 100; 354 U.S. 476, 508[1957] USSC 100; , 77 S.Ct. 1304, 1321, 1 L.Ed.2d 1498 (dissenting opinion). And the corollary of that view, as I expressed it in Public Utilities Comm'n of District of Columbia v. Pollak, [1952] USSC 69; 343 U.S. 451, 467, 468[1952] USSC 69; , 72 S.Ct. 813, 823[1952] USSC 69; , 96 L.Ed. 1068 (dissenting opinion), is that Big Brother can no more say what a person shall listen to or read than he can say what shall be published.

This is not to say that the Court and Anthony Comstock are wrong in concluding that the kind of literature New York condemns does harm. As a matter of fact, the notion of censorship is founded on the belief that speech and press sometimes do harm and therefore can be regulated. I once visited a foreign nation where the regime of censorship was so strict that all I could find in the bookstalls were tracts on religion and tracts on mathematics. Today the Court determines the constitutionality of New York's law regulating the sale of literature to children on the basis of the reasonableness of the law in light of the welfare of the child. If the problem of state and federal regulation of 'obscenity' is in the field of substantive due process, I see no reason to limit the legislatures to protecting children alone. The 'juvenile delinquents' I have known are mostly over

Thus, Roth v. United States, supra, which involved both a challenge to 18 U.S.C. § 1461 (punishing the mailing of 'obscene' material) and, in a consolidated case (Roth v. United States (Alberts v. State of California), an attack upon Cal.Pen.Code § 311 (prohibiting, inter alia, the keeping for sale or advertising of 'obscene' material), was the first case authoritatively to measure federal and state obscenity statutes against the prohibitions of the First and Fourteenth Amendments. I cannot speak for those who preceded us in time; but neither can I interpret occasional utterances suggesting that 'obscenity' was not protected by the First Amendment as considered expressions of the views of any particular Justices of the Court. See, e.g., Chaplinsky v. State of New Hampshire, [1942] USSC 50; 315 U.S. 568, 571—572[1942] USSC 50; , 62 S.Ct. 766, 768—769[1942] USSC 50; , 86 L.Ed. 1031; Beauharnais v. People of State of Illinois, [1952] USSC 75; 343 U.S. 250, 266[1952] USSC 75; , 72 S.Ct. 725, 735[1952] USSC 75; , 96 L.Ed. 919. The most that can be said, then, is that no other members of this Court since 1957 have adhered to the view of my Brother BLACK and myself. 50 years of age. If rationality is the measure of the validity of this law, then I can see how modern Anthony Comstocks could make out a case for 'protecting' many groups in our society, not merely children.

While I find the literature and movies which come to us for clearance exceedingly dull and boring, I understand how some can and do become very excited and alarmed and think that something should

be done to stop the flow. It is one thing for parents5 and the religious organizations to be active and involved. It is quite a different matter for the state to become implicated as a censor. As I read the First Amendment, it was designed to keep the state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature. Anthony Comstock wanted it the other way; he indeed put the police and prosecutor in the middle of this publishing business.

I think it would require a constitutional amendment to achieve that result. If there were a constitutional amendment, perhaps the people of the country would come up with some national board of censorship. Censors are, of course, propelled by their own neuroses6 That is why a universally accepted definition of obscenity is impossible. Any definition is indeed highly subjective, turning on the neurosis of the censor. Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers of it.7 That, of course, is the danger of letting any group of citzens be the judges of what other people, young or old, should read. Those would be issues to be canvassed and debated in case of a constitutional amendment creating a regime of censorship in the country. And if the people, in their wisdom, launched us on that course, it would be a considered choice.

Today this Court sits as the Nation's board of censors. With all respect I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old.