STATE OF OHIO : IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
: SS
No. 25303
CUYAHOGA COUNTY :

STATE OF OHIO :

Plaintiff-Appellee :

: BRIEF OF THE CLEVELAND
-vs- CIVIL LIBERTIES UNION
: AMICUS CURIAE
NICO JACOBELLIS

Defendant-Appellant :

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INTRODUCTORY STATEMENT

This Amicus, The Cleveland Civil Liberties Union, a branch of the American Civil Liberties Union, is devoted to the preservation of civil liberties, - primarily as set forth in the Bill of Rights and the 14th Amendment, and as further protected by the Ohio Constitution. Therefore, this brief will only be concerned with those issues of this case that, in our opinion, arise from the constitutional considerations.

SYNOPSIS OF ARGUMENT

In the opinion of amicus, the judgment of the lower court should be reversed for the following reasons:

1. Section 2905.34 R.C.* (upon which the indictment is founded) is unconstitutional since it makes punishable as a felony the same acts as are punishable under Section 2905.342 as a misdemeanor. The result is that the defendant was deprived of equal protection of the laws.

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* All references herein to Ohio Statutes are to Sections of the Revised Code.

2. Section 2905.34 is unconstitutional in making mere possession of "obscene" material a felony.

3. The conviction is founded upon an unconstitutional construction of Section 2905.34 to-wit: That knowledge of the "obscene" nature of the film on the part of the defendant was not necessary.

4. The Roth case prescribes the constitutional limits within which the circulation of so-called obscenity may be penalized. The Lovers does not meet the Roth Test and therefor if Section 2905.34 is construed so as to authorize conviction for circulation of such non-Roth material, such construction renders Section 2905.34 unconstitutional.

ARGUMENT

1. SECTION 2905.34 (UPON WHICH THE INDICTMENT IS FOUNDED) IS UNCONSTITUTIONAL SINCE IT MAKES PUNISHABLE AS A FELONY THE SAME ACTS AS ARE PUNISHABLE UNDER SECTION 2905.342 AS A MISDEMEANOR. THE RESULT IS THAT THE DEFENDANT WAS DEPRIVED OF EQUAL PROTECTION OF THE LAWS.

Sections 2905.34 and 2905.342 make unlawful the same act, namely: the selling, renting, giving away or exhibition or the having in possession or control of an obscene motion picture. All of the elements of the two crimes defined by these statutes are exactly the same except that Section 2905.34 condemns such an act if done "Knowingly" whereas Section 2905.342 omits that word.

However, in order to give Section 2905.342 a construction that will make it constitutional the word "Knowingly" must be supplied. In Smith vs California, 361 U. S. 147 (1959). It was held that a Los Angeles Ordinance which merely provided that it was unlawful "for any person to have in his possession any

obscene or indecent writing***" violated the First Amendment to the Federal Constitution because it did not require knowledge of the contents of the material. Also, see Ohio vs Mapp, 170 O.S. 427 (1960). Accordingly in State vs Warth a prosecution (Municipal Court of Dayton #197261,1960) under Section 2905.342 for the exhibition of the very same movie, which is involved in this case, the court charged the jury: "The statute makes the mere exhibiting or having possession or control over an obscene picture film unlawful. But, I charge you further that the defendant must have had knowledge of the contents of the material." The Court of Appeals of Montgomery County in reviewing that case dealt at length with this question and showed that the State had proven knowledge on the part of the defendant in the case. (State vs Warth No. 2576) The result of such construction of Section 2905.342 i.e. including knowledge as a necessary element, is to make all elements of Section 2905.34 and Section 2905.342 exactly the same. However, a violation of Section 2905.34 is a felony, punishable by imprisonment up to seven (7) years, whereas a violation of Section 2905.342 is a misdemeanor punishable by imprisonment up to only six(6) months. Therefore, when there is a commission of the acts that are encompassed by both the aforementioned statutes, somebody in the government has the authority to determine under which statute the prosecution shall be brought. Thus, we have a clear violation of the fundamental concept of a government of law not of men. The Fourteenth Amendment guarantees to all people the equal protection of the

laws. II O.Jur. 2d, Constitutional Law, Section 668. If a proscuting attorney can, for the doing of the same acts, proceed against one person for the commission of a felony and another for committing a misdemeanor, the law has certainly not protected both of them equally. Yet that is exactly what happened here as evidenced by the prosecution for the showing of The Lovers in this case as a felony and in the Warth case as a misdemeanor.

The Ohio cases: in re Cooper 134 O.S. 40 (1938) and Salvage vs Alvis 109O.A. 523 (1959), sometimes cited on this issue, are not in point because they do not involve statutes having exactly the same elements.

In Oregon vs Pirkey. 203 Oregon 697, 281, P. 2nd, 698 (1955). It was held that a statute which delegated to the Grand Jury or a Magistrate the power to determine whether to charge the defendant with a felony or a misdemeanor for issuing a check with insufficient funds in the bank, was unconstitutional. The court held that the statute involved violated the equal protection clause of both the Oregon and the Federal Constitution. Similarly, in Olsen vs Delmore, 48 Wash. 2d, 545, 295 P. 2d, 324 (1956). the Supreme Court of Washington held a statute unconstitutional which gave to the prosecuting officials discretion whether to bring charges for violation of the Uniform Fire Arms Act either as a gross misdemeanor or as a felony. The Court said (page 327): "A statute which prescribes different punishments or degrees of punishment for the same act committed under the same circumstances by persons in like situations, is violative

of the equal protection laws of the Fourteenth Amendment of the United States Constitution. Similarly, in Oregon vs Cory, 282 P. 2d, 1054 (Oregon 1955), a statute was held unconstitutional because (page 1056) "The exercise of an absolute discretion is vested in the District Attorney ***. In other words, the fate of persons ***who have committed the same acts under the same circumstances and in like situations is determined by the whim and caprice of the District Attorney." (For a recognition of this rule of law in the Federal Courts see: Deloria vs Rahay, 252 Fed. 2d 768 (9th Cir. 1958).)

It seems to us that the very fate of our democracy depends on the preservation to all men of equality at law. Certainly there is no equality between a prosecution and conviction for a felony and a prosecution and conviction for a misdemeanor - for that reason alone Section 2905.34 is unconstitutional.

2. SECTION 2905.34 IS UNCONSTITUTIONAL IN MAKING MERE POSSESSION OF "OBSCENE" MATERIAL A SERIOUS CRIMINAL A FELONY.

Section 2905.34 makes it a felony merely knowingly to possess or have under one's control obscene matter. The law does not even distinguish between cases where the defendant purposefully acquired possession and where he merely obtained such possession unwittingly. State vs Mapp, 170 Ohio St. 427. We contend that insofar as the conviction herein is based on mere possession, it violates the United States and Ohio Constitutions.

The Narcotics case, United States vs Balint, 258 U. S. 250, has often been cited in support of the contention that mere possession of contraband material can be punished. The defendant was charged with failing to pay tax on narcotics and it was urged on behalf of the defendant that he had been deprived of due process in that there was no proof of intent or guilty knowledge on his part. The United States Supreme Court upheld the conviction, however, citing as precedents tax cases, pure food cases and others where the emphasis is "evidently upon achievement of some social betterment rather than punishment of the crimes as in cases of mala in se". (page 252). In Morissett vs United States, 342 U. S. 246, the Court narrowed the so-called Balint Rule somewhat and quoted with approval an opinion written by Justice Cardoza (when he sat on the New York Court of Appeals) in which it was held that the prime consideration in dealing with unintentional violations of penal statutes was the penalties prescribed thereto -- mere fines being on a completely different footing than imprisonment. In Wieman vs Uppegraff, 344, U. S. 183, it was held that a person who intentionally joined an organization but had no knowledge of the activities or purposes of the organization could not by reason of such membership be denied public employment. This decision was based on the due process clause.

Futhermore, statutes involving mere possession of obscene matter are certainly repugnant to the First Amendment and, therefore, void. When the freedoms guaranteed by the First Amendment are involved the statutes dealing with them must be scrupulously examined

to make certain that the said freedoms are not unduly interfered with. United States vs C. I. O., 335 U. S. 106. Cantwell vs Connecticut, 310 U.S. 296. Thomas vs Collins, 332 U.S. 516 Smith vs California, supra, as aforesaid, involved a Los Angeles Ordinance which make it unlawful for any person to have in his possession any obscene book. Justice Brennan speaking for the Court said that the failure to include the element of scienter as a necessary element of the crime voided the Ordinances. In his concurring opinion Justice Frankfurter said (page 162). "Of course there is an important difference in the scope of the power of a State to regulate what feeds the belly and what feeds the brain." The doctrine of United States vs Balint, has its appropriate limits. The rule that scienter is not required in prosecutions for so-called public welfare offenses is a limitation of the general principle that awareness of what one is doing is a pre requisite for the infliction of punishment. See Morissett vs United States, 342 U.S. 246."

In Kilbourne vs State, 84 U.S. 247, the Supreme Court held that scienter or knowledge was a necessary element of a crime such as is here involved. In that case the prosecution was for violation of a statute which provided in part "whosoever buy, received or unlawfully has in possession any of the aforesaid articles shall be punished by***". The Court said in invalidating that statute that the legislature did not have the constitutional authority to enact such legislation.

In view of the foregoing, it is submitted that Section 2905.34 in making mere possession of "obscene" materials is an unconstitutional infringement of the First Amendment Freedoms and that it violates the due process clause.

3. THE CONVICTION IS FOUNDED UPON AN UNCONSTITUTIONAL CONSTRUCTION OF SECTION 2905.34 TO-WIT: THAT KNOWLEDGE OF THE "OBSCENE" NATURE OF THE FILM ON THE PART OF THE DEFENDANT WAS NOT NECESSARY.

Section 2905.34 under which the defendant was indicted and convicted provides in part that "no person shall Knowingly . . . exhibit . . . or . . . have in his possession or under his control an obscene, lewd or lascivious book . . . (or) motion picture film . ." The defendant was indicted on two counts under the provisions of the foregoing section of the Revised Code in that he (1) unlawfully and knowingly had in his possession and under his control a certain obscene, lewd and lascivious motion picture film to-wit: "Les Amants" (or The Lovers) and (2) unlawfully and knowingly exhibited a certain obscene , lewd and lascivious motion picture film to-wit: "Les Amants" (of The Lovers). The Court in finding the defendant guility as charged on both counts of the indictment, found that the said motion picture film is obscene, lewd and lascivious and that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film. " (Emphasis added throughout).

We ask that the court closely consider the significance and meaning of the word "Knowingly" as used above. The question is whether the requirement of guilt is (a) merely that the defendant knowingly possess or exhibit an article which is ultimately adjudged to be obscene or (b) that the defendant possess or exhibit such article knowing it to be obscene. The distinction is critical. The first interpretation would require only a showing that the defendant know the contents of the article; the second interpretation would require a showing that he knew it to be obscene.

Insofar as the case at bar is concerned the choice of interpretations is all important. The defendant admitted that he viewed the film prior to the public showing for which he was indicted. Indeed, it was partly on the basis of this viewing that he formed his own judgment that the film was not obscene. Therefore, under the evidence, if all that is required is a knowledge of the contents the defendant would be guilty. But if the State is required to prove that the defendant know the film to be obscene it is equally clear that the defendant should have been acquitted.

There was unrefuted evidence that the picture had been highly praised by many critics, that it had won several awards, that it had been approved and found not to be obscene by the U.S. Bureau of Customs, that the picture had been shown in many U.S. cities, and that the Defendant was informed as to all of this before he caused the picture to be shown.

On the other hand there is no evidence whatsoever that there had been any adjudication by any court or administrative body that the film was obscene, nor even that there was any pending prosecution on the grounds of its obscenity at the time of its exhibition by this defendant.

The accepted canon of construction pertaining to criminal laws requires that they be interpreted strictly against the State and in favor of the accused 15 O. Jur. 2nd 253, Criminal Law 20. This alone would warrant a construction that would require actual knowledge of obscenity. Other generally accepted principles of criminal law require the same conclusion - Guilt of crime generally presupposes criminal intent 15 O. Jur. 2nd 2647 Criminal Law 28. Criminal intent is a subjective factor, State vs Taylor 83 O.A. 76, and requires knowledge, Smallson vs State 7 O.S. 250 (1836), frequently characterized as "guilty Knowledge." Whether such "guilty knowledge" is a necessary element of a statutory offense has to be determined from the statutory language "in view of its manifest purpose and design." 14 Am. Jur. 785 Criminal Law 24. The "manifest purpose and design" of this statute is such as to make its violation malum in se rather tah malum prohibitum. Section 2905.34 is intended to protect the public against the ills engendered by those, who for the sake of profit, would knowingly sell or exhibit smut. Certainly it is not intended to make every seller of books and exhibiter of films act at his peril when in good faith he may choose to sell a given book or exhibit a given film. A contrary interpretation of the statute would clearly be in conflict with the United States Constitution because the United States Supreme Court has stated "a man may the less be

required to act at his peril here, because the free dissemination of ideas may be the loser."

What then is "guilty knowledge"? It can only be knowledge that the article has been judicially (or perhaps administratively) determined to be obscene, or at the very least, knowledge of facts from which one ought to conclude that the matter would be so found if the issue should arise.

Close examination of Smith vs California, supra including all five of the opinions, makes this conclusion inescapable. Defendant, a proprietor of a bookstore in Los Angeles, was convicted under a city ordinance which makes it unlawful "for any person to have in his possession any obscene or indecent writing. (or) book . . .in any place of business where . . . books . . . are sold or kept for sale." The offense had been defined by the California courts as to exclude any element of scienter. The United States Supreme Court reversed on the ground that the absence of the scienter requirement tended "to work a substantial restriction on freedom of speech" and that the ordinance was for that reason unconstitutional.

The Court said that the ordinance would tend to restrict the dissemination of books which are not obscene, "by penalizing the character of the books they sold . . . By dispensing with any requirement of the knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents,

and the ordinance fulfils its purpose, he will tend to restrict the books he sells to those he has inspected: and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." Id. at page 211.

It is true that the Supreme Court expressly reserved judgment "on what sort of mental element is requisite to a constitutionally permissible prosecution," but we submit that the Supreme Court has by necessary inference clearly indicated at least the answer to our question.

In the very passage in which it reserves judgment on the point the Court suggests the question "whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse." Id. at page 212. The Court is obviously concerned with knowledge of whether the "contents in fact constituted obscenity."

Earlier in its opinion the Court states that -

> "Very much to the point here, where the question is the elimination of the mental element in an offense, is this Court's holding in Wicman vs Updegraff. 344 US 183. 97 L ed 216, 73 S Ct 215. There an oath as to past freedom from membership in subversive organizations, exacted by a State as a qualification for public employment, was held to violate the Constitution in that it made no distinction between members who had, and those who had not, known of the organization's character." Id. at page 210.

The distinction drawn in the offending statute in Wicman was not between persons who knew merely the identity of the organization, and those who did not, but between those who knew its character and those who did not.

The logic of the Smith holding is such that knowledge of obscenity must be the test. Suppose that the test were merely knowledge of contents, and suppose further that a bookseller does in fact familiarize himself with the contents of every book in his shop. Suppose that as to several books he has some hesitancy on the ground that a law enforcement officer, a prosecutor, or a court, might find them obscene. The bookseller, it may be supposed, in good faith does not believe that these books, taken as a whole, appeal to the prurient interest of the average man, taking into account contemporary community standards (the test of obscenity laid down by the Supreme Court in the Roth case). Yet would he not remove these books from display and from sale in order to be absolutely certain not to expose himself to prosecution? Would he not, in fact, thus limit himself to those books which were so far outside the prescribed area of obscenity as to be utterly incapable of giving offense? Would he not resolve every doubtful instance in favor of self-censorship? And would not the public be the victim, in exactly the same manner and to the same extent as under the Los Angeles ordinance which, for that very reason, was held invalid by the Supreme Court?

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." Smith, Supra at page 211.

Would not an exhibiter of films, to bring the question into the setting of the instant case, if he may be criminally liable without knowledge of a film's obscentiy, tend to restrict himself to films which have won universal critical acclaim, with

no negative critique whatever, (and even this may not protect him), or, worse yet, to films which had been previewed and approved by law enforcement officers? Would not this inevitably result in some films being withheld from exhibition though they are not in fact obscene? And thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene matter. See Smith, Supra. at page 211.

The Supreme Court is concerned that -

> "If the contents of bookshops and periodical stands were restricted to material of which their proprietors made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liabitity, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." Id. at page 211.

This would be the result a fortiori if the seller limited himself to those which he has inspected and found beyond all doubt to be "clean," to those he is certain would be approved. It is easier to make a physical inspection than it is to decide whether the inspected matter is or is not obscene.

Mr. Justice Frankfurter, in one of four concurring opinions, summarized the Court's disposition of the case by saying that the Court held that the "liberty protected by the Due Process Clause of the Fourteenth Amendment precludes a State from making the dissemination of obscene books an offense merely because a book in a bookshop is found to be obscene without some proof of the bookseller's Knowledge touching the obscenity of its contents. . . The Court accepts the

settled principle of constitutional law that traffic in obscene literature may be outlawed as a crime. But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable with knowledge of the obscenity." Id. at page 215. (emphasis added).

That Mr. Justice Harlan takes exactly the same view of the meaning of the Court's decision is obvious from the following statement:

> "Proof of scienter may entail no great burden in the case of obviously obscene material; it may, however, become very difficult where the character of the material is more debatable." Id. at page 220.

In this context it is clear that scienter refers to knowledge of the contents themselves. For if all that was required is proof of the knowledge of the contents, the character of the material (as being clearly obscene or more debatable) would have no bearing on the difficulty of proof. It is only if the guilt requires knowledge of obscenity that it is easier to prove knowledge in the case of "obviously obscene material" than in the case of material the character of which is "more debatable."

In the same connection Mr. Justice Frankfurter observes that " A bookseller may of course, be well aware of the nature of a book and its appeal without having opened its cover, or in any true sense, having knowledge of the book." Id. at page 217. It would seem undeniable that the converse is equally true, i.e. that one may have opened the cover of a book and per used the contents, or even have read it carefully, and still not have clear knowledge of its obscenity. This is true because the conclusion by the reader that

the book is obscene depends not only on what he reads in it but upon his judgment and upon what he knows of its reputation. The reader, seeking to appraise for himself whether the book is obscene, will evaluate its dominant theme and attempt to determine whether that theme in the light of contemporary community standards appeals to his prurient interest. Moreover, the conscientious reader seeking to make such an appraisal will be influenced in his conclusion by what he may know of the critical repute of the book. The conclusion which he reaches in good faith, based upon his examination, will constitute the state of his "Knowledge." This entire line of argument is undeniably applicable to the case at bar. Thus, in the light of all of the foregoing the Smith case is directly germane. For although the Supreme Court expressly reserved the question of "what sort of mental element is requisite," it did not reserve the question of whether that element relates to the knowledge of the contents or rather the knowledge of obscenity itself. It is clear from the Court's opinion, as the same was interpreted by three concurring Justices in their separate opinions, that whatever the element of knowledge which may ultimately be required it is knowledge of obscenity and not merely knowledge of the contents.

In the penultimate paragraph of its opinion the Court reserved the question -

> "whether honest mistake as to whether the book's contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstaces might be." Id. at 212.

We respectfully submit that these questions can be answered only in one way: that under some circumstances "honest mistake" will be an excuse and that under some circumstances the State might require that a bookseller or exhibitor of films "investigate further." In the case at bar defendant did not rely merely on his own judgment. He acquainted himself with the critical repute of the film and knew that although it had been subject to some criticism it had on the whole been highly praised by reputable critics who could be relied upon not to confuse art with obscenity.

We conclude that a conviction under Section 2905.34 Ohio Rev. Code requires proof that the defendant have knowledge of the obscenity of the material in question. This conclusion will give rise to an obvious question, i.e. if the scienter required is knowledge of obscenity, how can the State ever obtain the first conviction with reference to any particular work of literary or motion picture art? The question is fair, but can it be answered? Proof of the required knowledge will not always necessitate a prior conviction and knowledge thereof. The first defendant can be convicted if the work is in fact found to be obscene and if the prosecution can prove that the defendant know or should have known that it is obscene. How can the prosecution establish this fact? It can do so under any one of three circumstances which come to mind -

(1) If the material in fact is in the class generally known as "hard core pornography, " 1.e. if it is so obscene that it would be almost universally so adjudged;

(2) if it has in fact been universally or nearly universally so adjudged, by reputable critics, or

(3) if, though there have been no convictions in connection with the particular work, there have been convictions (to defendant's knowledge) in connection with work so similar in character as to give warning to defendant that the work in question might also be found obscene.

On the other hand, in the absence of these circumstances defendant cannot be said to have knowledge of obscenity, even though he might have a specific knowledge of the work's contents, if he had concluded, in good faith, that it was not obscene. If this test means that some guilty persons will escape punishment, better that this be the case than that innocent persons should be convicted, particularly in view of the inevitable limitations which would be imposed upon freedom of speech and of press. If the courts are to err in this connection it is best that they should err on the side of upholding the constitutional guarantees. All doubt as to the meaning of the statute should be resolved in the same spirit.

4. THE ROTH CASE PROSCRIBES THE CONSTITUTIONAL LIMITS WITHIN WHICH THE CIRCULATION OF SO-CALLED "OBSENITY" MAY BE PENALIZED. THE LOVERS DOES NOT MEET THE ROTH TEST AND THEREFOR IF SECTION 2905.34 IS CONSTRUED SO AS TO AUTHORIZE CONVICTION FOR CIRCULATION OF SUCH NON-ROTH MATERIAL, SUCH CONSTRUCTION RENDERS SECTION 2905.34 UNCONSTITUTIONAL.

Ever since the Supreme Court decided the case of Roth v. United States, 354 U.S. 476, (1957) it has been generally agreed that that opinion establishes the "constitutional definition" of obscenity. The test enunciated by the Supreme Court in that case is:

> "whether to the average person, applying comtemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" Id. at 489.

What is meant by referring to this test as a "constitutional definition" is this: any matter which does not fall within the defintion cannot be constitutionally suppressed: nor can its distribution be prosecuted. By the same token any statute which deals with obscenity and which, as defined or applied, would tend to make illegal the sale of material falling outside the definition would thus be rendered unconstitutional.

In the course of its opinion the Court made several statements by way of elucidation and qualification upon the test laid down. It is these statements which make it clear that the definition was not merely formulated by way of interpretation of the statute, but rather was laid down in order provide a constitutional limitation upon the power of the State to suppress literary materials. Thus the Supreme Court stated:

> " All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interest." Id. at 484.

The Court then states:

> " That obscentiy is not within the area of constitutionally protected speech or press." Id. at 485.

but the Court goes on to say:

> "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." Id. at 487.

and finally, the Court stated:

> " The fundamental freedoms of speech and press have contributed greatly to the development and well - being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar: it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." (Emphasis added). Id. at 488.

The Court then goes on to lay down the test already quoted. The rule laid down however is inherently difficult to apply. How extreme need material be in order to fit through the "slightest crack" which the Roth case opened? When does the treatment of sex appeal to prurient interest and when does it not? Obviously the purport of these questions is to raise the further question of whether the motion picture film in issue in this case is "obscene" under the definition laid down by Roth. We submit that it is not obscene under that definition, and therfore, if the Ohio courts were to apply and interpret Secion 2905.34 in such a manner as to include this motion picture within the prescribed area the statute

itself would be unconstitutional.

The Roth definition is fraught with difficulty and perhaps creates more problems than it solves. We are, however, fortunately not limited to that opinion itself in order to ascertain its meaning. Shortly following the decision in the Roth case, three cases came to the Supreme Court which raised the question of the application of the Roth definition of obscenity to specific materials. In all three cases the courts below had obviously attempted to follow the Roth test. The effect of these cases and the way in which the Supreme Court disposed of them are highly significant and most pertinent to the case at bar. The cases referred to are: One, Inc. v. Olesen.355 U.S. 371, (1958): Sunshine Book Co. vs. Summerfield, 355 U.S. 372, (1958): and Times Film Corp. vs. Chicago, 355 U.S. 35, (1957).

In each of the three cases the material involved seems considerably more "obscene" than anything in The Lovers.

The material in One, Inc. was described by the Court of Appeals for the Ninth Circuit as follows:

> " It conveys information to the homosexual or any other reader as to where to get more of the material contained in 'One.'
> " An examination of 'The Circle' clearly reveals that it contains obscene and filthy matter which is offensive to the moral senses, morally depraving and debasing, and that it is designed for persons having lecherous and salacious proclivities.
> " The picture and the sketches are obscene and filthy by prevailing standards. The stories 'All This and Heaven Too' and 'Not Til the End', pages 32-36, are similar to the story 'Sappho Remembered', except that they relate to the activities of the homosexuals rather than lesbians. Such stories are obscene, lewd and lascivious. They are offensive to the moral senses, morally depraving and debasing."
> One, Inc. v. Olesen, 241 F. 2d 772, 778 (9th Cir. 1957).

The Court of Appeals condemned such materials as obscene. The material in Times Film Corp. v. Chicago was described by the Court of Appeals for the Seventh Circuit in these terms:

> " The film, as an exhibit in this case, was projected before and viewed by us. We found that from beginning to end, the thread of the story is supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts. In the introductory scenes a flying start is made when a 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls. On that plan the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age. The erotic thread of the story is carried, without deviation toward any wholesome idea, through scene after scene. The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized.
>
> " We do not hesitate to say that the calculated purpose of the producer of this film, and its dominant effect, are substantially to arouse sexual desires." Times Film Corp. v. City of Chicago, 244 F. 2d 432, 436 (7th Cir. 1957).

No one could deny that the film in question in Times Film Corp. was a far more extreme transgression of the ordinary rules of decency than anything in The Lovers.

The third case following Roth was Sunshine Book Company v. Summerfield 128, F. Supp. 564 (D.C.D.C. 1955). 249 F.2d 114 (D.C. Cir.,1957). The District Court Judge followed meticulously the standards laid down by the majority opinion in the Roth case. He examined each nude in the magazine and attempted to determine which would arouse prurient thoughts. He condemned some and passed others and finally held that the

magazine as a whole was obscene. The Circuit Court of Appeals, three judges, dissenting, affirmed.

The Supreme Court in all three of these cases granted certiorari and, without permitting argument or the submission of briefs and without a written opinion, reversed all three cases on authority of the Roth case.

It would seem to appear from these three cases that the Supreme Court in effect held that obscentiy, as defined in the Roth case means "hard core" pornography. Clearly The Lovers does not fall within that category.

Therefore we submit that this film possessing far more than "the slightest redeeming importance" - is not obscene under the Supreme Court definition and that Section 2905.34, if it were applied and interpreted in such a manner as to permit a conviction for the exhibition of The Lovers, would be unconstitutional.

CONCLUSION

We urge that the court reverse the judgment of the lower court for all of the foregoing reasons.

The freedoms threatened by convictions such as this one are of dominant importance. Unless some great danger to society or some great criminality are involved, the various issues should be resolved in favor of liberty and freedom.

No proof has been offered or even referred to that the exhibition of such films as the Lovers leads to illegal activity

of any kind. There is likewise a conspicuous lack of proof of a guilty mind on the part of the defendant.

Under such circumstances, the force of our great traditions should tip the scales in favor of the protection of our constitutionally guaranteed freedoms and away from an impairment of individual liberty.

Respectfully submitted,

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