ELEAZAR SMITH, Appellant,
v
PEOPLE OF THE STATE OF CALIFORNIA
—US—,4 L ed 2d 205, 80 S Ct—
(No. 9)

Constitutional Law sec. 9255 — *freedom of speech and press.*

1. The liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.

Constitutional Law sec. 925 — *freedom of press — commercial works.*

2. The free publication and dissemination of books and other forms of the printed word are protected by the constitutional guaranty of freedom of speech and press, irrespective of whether the dissemination takes place under commercial auspices.

Criminal Law sec. 6 — *mens rea.*

3. The existence of a men's rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.

Criminal Law sec. 6 — *power of the state — scienter.*

4. It is competent for the states to create strict criminal liabilities by defining criminal offenses without any element of scienter, though even where no freedom-of-expression question is involved, this power is not without limitations.

Constitutional Law sec. 925; *Evidence sec.* 88; *Taxes sec.* 142 — *freedom of speech — burden of proof — exemptions.*

5. While the states generally may regulate the allocation of the burden of proof in their courts, and it is a common procedural device to impose on a taxpayer the burden of proving his entitlement to exemptions from taxation, nevertheless, the application of this device will be struck down by the United States Supreme Court where it is being applied in a manner tending to cause even a self-imposed restriction of free expression.

Statutes sec. 38 — *seperability — freedom of speech.*

6. The usual doctrines as to the separability of constitutional and unconstitutional applications of statutes do not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution.

Constitutional Law sec. 925; *Statutes sec.* 17 — *vagueness — freedom of speech.*

7. Stricter standard of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril in such a situation, because the free dissemination of ideas may be the loser.

Constitutional Law sec. 925; *Food and Drugs sec.* 1 — *duty of care — freedom of speech.*

8. While there is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise by imposing upon them an absolute standard which will not hear a distributor's plea as to the amount of care he has used, the constitutional guaranties of the freedom of speech and of the press stand in the way of imposing a similar requirement on a bookseller.

Indecency, Lewdness, and Obscenity sec. 1 — *scienter.*

9. Common-law prosecutions for the dissemination of obscene matters adhere strictly to the requirement of scienter.

Evidence secs. 148, 914 — *knowledge — obscenity.*

10. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its obscene contents; the circumstances may warrant the inference that he was aware of such contents despite his denial.

Constitutional Law sec. 925 — *freedom of speech.*

11. The fundamental freedom 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.

Constitutional Law sec. 925 — *freedom of speech and press.*

12. The door barring federal and state intrusion into the area of freedom of speech and press cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

Indecency, Lewdness, and Obscenity sec. 1 — *power of state.*

13. The existence of a state's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power.

Constitutional Law sec. 930 — *freedom of press — indecent books — scienter.*

14. A municipal ordinance which, without requiring scienter, makes it a criminal offense for any person to have in his possession an obscene or indecent writing or book in a place of business where books are sold or kept for sale, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Federal Constitution.

Points from Separate Opinions

Criminal law sec. 6 — *scienter.*

15. The rule that scienter is not required in prosecutions for so-called public welfare offenses is a limitation on the general principle that awareness of what one is doing is a prerequisite for the infliction of punishment. (From separate opinion by Frankfurther, J.)

Indecency, Lewdness and Obscenity sec. 1 — *community standards.*

16. The determination of obscenity is for juror or judge, not on the basis of his personal unbringing or restricted reflection or particular experience of life, but on the basis of contemporary community standards. (From separate opinions by Frankfurther, J., and Harlan, JJ.)

Constitutional Law sec. 840 — *due process — evidence — obscenity.*

17. The due process clause of the Fourteenth Amendment is violated by exclusion, at the state trial of a bookseller for possession of obscene books in his shop, of evidence through duly qualified witnesses regarding the prevailing literary standards and the literary and moral criteria by which books relevantly comparable to the book in controversy are deemed not obscene. (From separate opinion by Frankfurther, J.)

Constitutional Law sec. 786 — *due process — hearing.*

18. Due process in its primary sense requires an opportunity to be heard and to defend a substantive right. (From separate opinion by Frankfurther, J.)

Constitutional Law sec. 840 — *due process — evidence — obscenity.*

19. The state conviction of a bookseller for having in his possession obscene books violates the process clause of the Fourteenth Amendment, where the trial judge turned aside every attempt by defendant to introduce evidence bearing on community standards. (From separate opinion by Harlan, J.)

APPEARANCES OF COUNSEL

Stanley Fleishman and *Sam Rosenwein* argued the cause for appellant.

Roger Arneberg argued the cause for appellee.

OPINION OF THE COURT

Mr. Justice *Brennan* delivered the opinion of the Court.

Appellant, the proprietor of a bookstore, was convicted in a California Municipal Court under a Los Angeles 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 was defined by the Municipal Court, and by the Appellate Department of the Superior Court, which affirmed the Municipal Court judgment imposing a jail sentence on appellant, as consisting solely of the possession, in the appellant's bookstore, of a certain book found upon judicial investigation to be obscene. The definition included no element of scienter — knowledge by appellant of the contents of the book — and thus the ordinance was construed as imposing a "strict" or "absolute" criminal liability. The appellant made timely objection below that if the ordinance were so construed it would be in conflict with the Constitution of the United States. This contention, together with other contentions based on the Constitution, was rejected, and the case comes here on appeal. 28 USC sec. 1257 (2); 358 US 926, 3 L ed 2d 299, 79 S Ct 317.

Almost 30 years ago, Chief Justice Hughes declared for this Court: "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. . . ." Near v Minnesota, 283 US 697, 707, 75 L ed 1357, 1363, 51 S Ct 625. It is too familiar for citation that such has been the doctrine of this Court, in respect of these freedoms, ever since. And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices. See Joseph Burstyn, Inc. v. Wilson, 343 US 495, 96 L ed 1098, 72 S Ct 777; Grosjean v American Press Co. 297 US 233, 80 L ed 660, 56 S Ct 444. Certainly a retail book seller plays a most significant role in the process of the distribution of books.

California here imposed a strict or absolute criminal responsibility on appellant not to have obscene books in his shop. "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." Dennis v United States, 341 US 494, 500, 95 L ed 1137, 1147, 71 S Ct 857. Still, it is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter-though even where no freedom-of-expression is involved, there is precedent in this Court that this power is not without limitations. See Lambert v. California, 355 US 225, 2 L ed 228, 78 S Ct 240. But the question here is as to the validity of this ordinance's elimination of the scienter requirement — an elimination which may tend to work as substantial restriction on freedom of speech. Our decision furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. The States generally may regulate the allocation of the burden of proof in their courts, and it is a common procedural device to impose on a taxpayer the burden of proving his entitlement to exemptions from taxation, but where we conceived that this device was being applied in a manner tending to cause even a self-imposed restriction of free expression, we struck down its application. Speiser v Randall, 357 US 513, 2 L ed 1460, 78 S Ct 1332. See Near v Minnesota, supra (283 US at 712, 713). It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. Thornhill Alabama, 310 US 88, 97, 98, 84 L ed 1093, 1099, 1100, 60 S Ct 736. Cf. Staub v. Baxley, 355 US 313, 2 L ed 302 78 S Ct 277. And this Court has estimated that stricter standards of permissible statutory vagueness may be applied to a statute having potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. Winters v New York, 333 US 507, 509, 510, 517, 518, 92 L ed 840, 846, 847, 850, 851, 68 S Ct 665. 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 Wieman v 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. The Court said of the elimination of scienter in this context: "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." Id. 344 US at 191.

Those principles guide us to our decision here. We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press. Roth v United States, 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304. The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if there in fact is to be found in his shop an obscene book. But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. Appellee and the court below analogize this strict-liability penal ordinance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example. We find the analogy instructive in our examination of the question before us. The usual rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the higest standard of care on distributors-in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used Cf. United States v Balint, 258 US 250, 252-254, 66 L ed 604-607, 42 S Ct 301. His ignorance of the character of the food is irrelevant. There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement of the bookseller. By dispensing with any requirement 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 the bookseller is criminally liable without knowledge of the contents, and the ordinance fullfils 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. It has been observed of a statute construed as dispensing with any requirement of scienter that: "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." The King v Ewart, 25 NZLR 709, 729 (CA). And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had 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 liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. 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.

It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsey discalim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law view itself as impotent to explore the actual state of a man's mind. See Pound, the Role of the Will in Law, 68 Harv L Rev 1. Cf. American Communications Asso. v. Douds 339 US 382, 411, 94 L ed 925, 950, 70 S Ct 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to wether its 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 circumstances might be. Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime.

We have said: "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 watchdog 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 interest." Roth v United States, supra (354 US at 488). This ordinance opens that door too far. The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power. Cf. Dean Milk Co. v Madison, 340 US 349, 95 L ed 329, 71 S Ct 295. It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution.

Reversed.

SEPARATE OPINIONS

Mr. Justice *Black*, concurring.

The appellant was sentenced to prison for possessing in his bookstore an "obscene" book in violation of a Los Angeles city ordinance. I concur in the judgment holding that ordinance unconstitutional, but not for the reason given in the Court's opinion.

The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an "obscene" book, even though he is unaware of its obscenity. The grounds on which the Court draws a constitutional distinction between a law that punishes possession of a book with knowledge of its "obscenity" and a law that punishes without such knowledge are not persuasive to me. Those grounds are that conviction of a bookseller for possession of an "obscene" book when he is unaware of its obscenity "will tend to restrict the books he sells to those he has inspected," and therefore "may tend to work a substantial restriction on freedom of speech." The fact is, of course, that prison sentences for possession of "obscene" books will seriously burden freedom of the press whether punishment is imposed with or without knowledge of the obscenity. The Court's opinion correctly points out how little extra burden will be imposed on prosecutors by requiring proof that a bookseller was aware of the book's contents when he possessed it. And if the Constitution's requirement of knowledge is so easily met, the result of this case is that one particular bookseller gains his freedom, but the way is left open for state censorship and punishment of all other booksellers by merely adding a few more words to old censorship laws. Our constitutional safeguards for speech and press therefore gain little. Their victory, if any, is a Pyrrhic one, Cf. Beauharnais v. Illinois, 343 US 250, 267, at 275, 96 L ed 919, 932, 936, 72 S Ct 725 (dissenting opinion).

That it is apparently intended to leave the way open for both federal and state governments to abridge speech and press (to the extent this court approves) is also indicated by the following statements in the Court's opinion: " 'The door barring federal and state intrusion into this area (freedom of speech and press) cannot be left ajar; it must be kept tightly closed and openeed only the slightest crack necessary to prevent encroachment upon more important interests.' . . . This ordinance opens that door too far."

This statement raises a number of questions for me. What are the "more important" interests for the protection of which constitutional freedom of speech and press must be given second place? What is the standard by which one can determine when abridgment of speech and press goes "too far" and when it is slight enough to be constitutionally allowable? Is this momentous decision to be left to a majority of this Court on a case-by-case basis? What express provision or provisions of the Constitution put freedom of speech and press in this precarious position of subordination and insecurity?

Certainly the First Amendment's language leaves no room for inference that abrigements of speech and press can be made just because they are slight. That Amendment provides, in simple words, that "Congess shall make no law . . .abridging the freedom of speech, or of the press." I read "no law abridging" to mean *no law abridging*. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly "beyond the reach" of *federal* power to abridge. No other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal agencies, including Congress and this Court, have power or authority to subordinate speech and press to what they think are "more important interests." The contrary notion is, in my judgment, court-made not Constitution-made.

State intrusion or abridgment of freedom of speech and of press raises a different question, since the First Amendment by its terms refers only to law passed by Congress. But I adhere to our prior decisions holding that the Fourteenth Amendment made the first applicable to the States. See cases collected in the concurring opinion in Speiser v Randall 357 US 513, 530, 2 L ed 1460, 1475, 7 S Ct 1332. It follows that I am for reversing this case because I believe that the Los Angeles ordinance sets up a censorship in violation of the First and Fourteenth Amendments.

If, as it seems, we are on the way to national censorship, I think it timely to suggest again that there are grave doubts in my mind as to the desirability on constitutionnality of this Court's becoming a Supreme Board of Censors, — reading books and viewing television performances to determine whether, if permitted, they might adversely affect the moral of the people throughout the many divesified local communities in this vast country. It is true that the ordinance here is on its face only applicable to obscene or indecent writing." It is also true that this particular

kind of censorship is considered by many to be "the obnoxious thing in its mildest and least repulsive form. . . ." But "illegitimate and unconstitutional practices get their first footing in that way. . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Boyd v United States, 116 US 616, 635, 29 L ed 746, 752, 6 S Ct 524. While it is "obscenity and indecency" before us today, the experience of mankind — both ancient and modern — shows that this type of elastic phrase can, and most likely will, be synonymous with the political, and maybe with the religious unorthodoxy of tomorrow.

Censorship is the deadly enemy of freedom and progress. The plain language of the Constitution forbids it. I protest against the judiciary giving it a foothold here.

Mr. Justice *Frankfurther*, concurring.

The appellant was convicted for violating the city ordinance of Los Angeles prohibiting possession of obscene books in a bookshop. His conviction was affirmed by the highest court of California to which he could appeal and it is the judgment of that court that we are asked to reverse. Appellant claims three grounds of invalidity under the Due Process Clause of the Fourteenth Amendment, He urges the invalidity of the ordinance as an abridgment of the freedom of speech which the guarantee of "liberty" of the Fourteenth Amendment safeguards against state action, and this for the reason that California law holds a bookseller criminally liable for possessing an obscene book wholly apart from any scienter on his part regarding the book's obscenity. The second constitutional infirmity urged by appellant is the exclusion of appropriately offered testimony through duly qualified witnesses regarding the prevailing literary standards and the literary and moral criteria by which books relevantly comparable to the book in controversy are deemed not obscene. This exclusion deprived the appellant, such is the claim, of important relevant testimony bearing on the issue of obscenity and therefore restricted him in making his defense. The appellant's ultimate contention is that the questioned book is not obscene and that a bookseller's possession of it could not be forbidden.

The Court does not reach, and neither do I, the issue of obscenity. The Court disposes of the case exclusively by sustaining the appellan't claim 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. Obviously the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop. No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut. How much or how little awareness that a book may be found to be obscene suffices to establish scienter, or what kind of evidence may satisfy the how much or the how little, the Court leaves for another day.

I am no friend of deciding a case beyond what the immediate controversy requires, particularly when the limits of constitutional power are at stake. On the other hand, a case before this Court is not just a case. Inevitably its disposition carries implications and gives directions beyond its particular facts. Were the Court holding that this kind of prosecution for obscenity requires proof of the guilty mind associated with the concept of crimes deemed infamous, that would be that and no further elucidation would be needed. But if the requirement of scienter in obscenity cases plays a role different from the normal role of men's rea in the definition of crime, a different problem confronts the Court. If, as I assume, the requirement of scienter in an obscenity prosecution like the one before us does not mean that the bookseller must have read the book or substantially know its contents on the one hand, nor on the other that he can exculpate himself by studious avoidance of knowledge about its contents, then, I submit, invalidating an obscenity statute because a State dispenses altogether with the requirement of scienter does require some indication of the scope and quality of scienter that is required. It ought at least to be made clear, and not left for future litigation, that the Court's decision in its practical effect is not intended to nullify the conceded power of the State to prohibit booksellers from trafficking in obscene literature.

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 the United States v Balint, 258 US 250, 65 L ed 604, 42 S Ct 301, has its appropriate limits. The rule that scienter is not required in prosecutions for so-called public welfare offenses is a limitation on the general principle that awareness of what one is doing is a prerequisite for the infliction of punishment. See Morissette v United States, 342 US 246, 96 L ed 288, 2S Ct 240. The balance that is struck between this vital principle and the overriding public menace inherent in the trafficking of noxious food and drugs cannot be carried over in balancing the vital role of free speech as against society's interest in dealing with pornography. On the other hand, the constitutional protection of non-obscene speech cannot absorb the constitutional power of the States to deal with obscenity. It would certainly wrong them to attribute to Jefferson or Madison a doctrine absolutism that would bar legal restriction against obscenity as a denial of free speech. We have not yet been told that all laws against defamation and against inciting crime by speech, see Fox v Washington, 236 US 273, 59 L ed 573, 35 S Ct 383 (1915), are unconstitutional as impermissible curbs upon unrestricable utterance. We know this was not Jefferson's view, any more than it was the view of Holmes and Brandeis, JJ., the originating architects of our prevailing constitutional law protective of freedom of speech.

Accordingly, the proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity. Out of regard for the State's interest, the Court suggests an unguiding, vague standard for establishing "awareness" by the bookseller of the contents of a challenged book in contradiction of disclaimer of knowledge of its contents. 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. As a practical matter therefore the exercise of the constitutional right of a State to regulate obscenity will carry with it some hazard to the dissemination by a bookseller of non-obscene literature. Such difficulties or hazards are inherent in many domains of the law for the simple reason that law cannot avail itself of factors ascertained quantitatively or even wholly impersonally.

The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity—a right implicit in the very nature of the legal concept of obscenity—to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. The two reasons coalsece, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the constitutional safeguards of due

process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than experts testifying to the state of the art in patent suits determine the patentability of a controverted device.

There is no external measuring rod of obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is "applying contemporary community standards" in determining what constitutes obscenity, Roth v. United States, 354 US 476, 489, 1 L ed 2d 1498, 1909, 77 S Ct 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporarry community standards." Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859. The difference derives from a shift in community feeling regarding what is to be deemed prurient or not prurient by reason of the efffects attributable to this or that particular writing. Changes in the intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, afford shifting foundations for the attribution. What may well have been consonant "with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time." United States v Kennerley (DC NY) 209 F 119, 120. This was the view of Judge Learned Hand decades ago reflecting an atmosphere of propriety much closer to mid-Victorian days than is ours. Unless we disbelieve that the literary psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of "due process", to exclude the constitutionally relevant evidence proffered in this case. The importance of this type of evidence in prosecutions for obscenity has been impressively attested by the recent debates in the House of Commons dealing with the insertion of such a provision in the enactment of the Obscene Publications Act, 1959, 7 & 8 Eliz 2, Ch 66 (see 597 Parliamentary Debates, H Comm, cols 1009, 1010, 1042, 1043; 604 Parliamentary Debates, H Comm, No. 100 (April 24, 1959), col 803), as well as by the most considered thinking on this subject in the proposed Model Penal Code of the American Law Institute. See ALI Model Penal Code, Tentative Draft No. 6 (1957), sec. 207.10. For the reasons I have indicated I would make the right to introduce such evidence a requirement of due process in obscenity prosecutions.

Mr. Justice *Douglas*, concurring.

I need not repeat here all I said in my dissent in Roth v. United States, 354 US 476, 508, 1 L ed 2nd 1498, 1520, 77 S Ct 1304, to underline my conviction that neither this book nor its author or distributor can be punished under our Bill of Rights for publishing or distributing it. The notion that obscene publications or utterances were not included in free speech developed in this country much later than the adoption of the First Amendment, as the judicial and legislative developments in this country show. Our leading authorities on the subject have summarized the matter as follows:

"In the United States before the Civil War there were few reported decisions involving obscene literature. This of course is no indication that such literature was not in circulation at that time; the persistence of pornography is entirely too strong to warrant such an inference. Nor is it an indication that the people of the time were totally indifferent to the proprieties of the literature they read. In 1851 Nathaniel Hawthorne's *The Scarlet Letter* was bitterly attacked as an immoral book that degraded literature and encouraged social licentiousness. The lack of cases merely means that the problem of obscene literature was not thought to be of sufficient importance to justify arousing the forces of the state to censorship." Lockhart and McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn L Rev 295, 324, 325.

Neither we nor legislatures have power, as I see it, to weigh the values of speech or utterance against silence. The only grounds for suppressing this book are very narrow. I have read it; and while it is repulsive to me, its publication or distribution can be constitutionally punished only on a showing not attempted here. My view was stated in the Roth Case, 354 US at 514:

"Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. Giboney v Empire Storage Co., 336 US 490, 498; Labor Board v Virginia Power Co., 314 US 469, 477, 478. As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lasciviousness thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless."

Yet my view is in the minority; and rather fluid tests of obscenity prevail which require judges to read condemned literature and pass judgment on it. This role of censor in which we find ourselves is not an edifying one. But since by the prevailing school of thought we must perform it, I see no harm, and perhaps some good, in the rule fashioned by the Court which requires a showing of scienter. For it recognizes implicitly that these First Amendment rights, by reason of the strict command in that Amendment—a command that carries over to the States by reason of the Due Process Clause of the Fourteenth Amendment—are preferred rights. What the Court does today may possibly provide some small degree of safeguard to booksellers by making those who patrol bookstalls proceed less high-handedly than has been their custom.

Mr. Justice *Harlan*, concurring in part and dissenting in part.

The striking down of local legislation is always serious business for this Court. In my opinion in the Roth Case, 354 US at 503-508, I expressed the view that state power in the obscenity field has a wider scope than federal power. The question whether scienter is a constitutionally required element in a criminal obscenity statute is intimately related to the constitutional scope of the power to bar material as obscene, for the impact of such a requirement on effective prosecution may be one thing where the scope of the power to prescribe is broad and quite another where the scope is narrow. 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. In my view then, the scienter question involves considerations of a different order depending on whether a state or a federal statute is involved. We have here a state ordinance, and on the meagre data before us I would not reach the question whether the absence of a scienter element renders the ordinance unconstitutional. I must say, however, that the generalities in the Court's opinion striking down the ordinance leave me unconvinced.

From the point of view of the free dissemination of constitutionally protected ideas, the Court invalidates the ordinance on the ground that its effect may be to induce booksellers to restrict their offerings of non-obscene literary merchandize though fear of prosecution for unwittingly having on their shelves an obscene publication. From the point of view of the State's interest in pro-

(*Continued next page*)

U. S. SUPREME COURT . . . (Continued from page 330)
tecting its citizens against the dissemination of obscene material, the Court in effect says that proving the state of a man's mind is little more difficult than proving the state of his digestion, but also intimates that a relaxed standard of mens rea would satisfy constitutional requirements. This is for me too rough a balancing of the competing interests at stake. Such a balancing is unavoidably required in this kind of constitutional adjudication, notwithstanding that it arises in the domain of liberty of speech and press. A more critical appraisal of both sides of the constitutional balance, not possible on the meager material before us, seems to me required before the ordinance can be struck down on this ground. For, as the concurring opinions of my Brothers Black and Frankfurter show, the conclusion that this ordinance but not one embodying some element of scienter, is likely to restrict the dissemination of legitimate literature seems more dialectical than real.

I am also not persuaded that the ordinance in question was unconstitutionally applied in this instance merely because of the state court's refusal to admit expert testimony. I agree with my Brother Frankfurter that the trier of an obscenity case must take into account "contemporary community standards," Roth v United States, 354 US 476, 489, I L ed 2d 1498, 1509, 77 S Ct 1304. This means that, regardless of the elements of the offense under state law, the Fourteenth Amendment does not permit a conviction such as was obtained here unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards. The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so it follows that due process — "using that term in its primary sense of an opportunity to be heard and to depend (a) . . . substantive right," Brinkerhoff-Faris Trust & Sav. Co. v Hill, 281 US 673, 678, 74 L ed 1107, 1112 50 S Ct 451 — requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier.

However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance. Where there is a variety of means, even though it may be considered that expert testimony is the most convenient and practicable method of proof, I think it is going to far to say that such a method is constitutionally compelled, and that a State may not conclude, for reasons responsive to its traditional doctrines of evidence law, that the issue of community standards may not be the subject of expert testimony. I know of no case where this Court, on constitutional grounds, has required a State to sanction a particular mode of proof.

In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside *every* attempt by appellant to introduce evidence bearing on community standards. The exclusionary rulings were not limited to offered expert testimony. This had the effect of depriving appellant of the opportunity to offer any proof on a constitutionally relevant issue. On this ground I would reverse the judgment below, and remand the case for a new trial.

ACCUSED MAY REMAIN AT LIBERTY UNDER ORIGINAL BOND AFTER CONVICTION AND DURING APPEAL

In a precedent-provoking decision, Judge Jesus P. Morfe of the Court of First Instance of Lingayen, Pangasinan recently ruled that an accused may continue to remain at liberty under his original bail bond after the rendition of judgment of conviction and during the period of appeal,

In its effect, Judge Morfe's ruling departs from the standard judicial practice of placing the accused into the custody of the law immediately after the reading of the judgment of conviction to him, unless then and there he appeals the decision and files a new bail bond for his provisional release during the pendency of the appeal.

Judge Morfe made the ruling in a criminal case for estafa (People of the Phil. vs. Floro C. Garcia and Alfredo R. Balagtas, Crim. Case No. No. 21257) following the oral manifestation of the counsel for the two accused therein of their intention to file a motion for reconsideration of the decision of conviction that was read in open court to the accused, accompanied with the verbal motion that in the meantime the accused be allowed to remain at liberty under their original bail bond.

In granting said verbal motion of the accused, Judge Morfe reasoned out that "to send an accused to jail for custody within the reglementary fifteen day period within which he can appeal the decision provided in Section 6 of Rule 118 will be tantamount to making him serve the sentence before it becomes executory". But an accused, Judge Morfe pointed out, cannot be so committed "unless he waives in writing his right to appeal and forthwith surrenders himself for the execution of the sentence imposed on him, or his bondsman surrenders him to the Court before the lapse of the period to appeal."

He also pointed out that as the bondsman of the accused did not appear at the reading of the judgment of conviction and did not surrender the accused to the court pursuant to sec. 16 (a) of Rule 110, "the bondsman will continue under the obligation of its bail to see to it that the accused appear before the court after the fifteen-day period mentioned in section 6, Rule 118 if the accused neither perfect his appeal during said period nor voluntarily surrender himself to the court for execution of its decision."

Judge Morfe also said that the term "conviction" contemplated in Sec 4, Rule 110 which gives rise to the ineffectivity of the original bail bond and the detention of the accused after the reading of the judgment of conviction, is a "conviction" that has become ripe for execution by virtue of the lapse of the fifteen-day period provided in sec. 6 of Rule 110. This conclusion finds support in Sec. 1 of Rule 118, which provides that 'from all *final judgments* of the Court of First Instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the Court of Appeals or to the Supreme Court as hereinafter prescribed.' The use of the term 'final judgment' in sec. 1 of Rule 118 implies that the judgment therein contemplated is one that has become ripe for execution by reason of the lapse of the fifteen-day period provided in sec. 6 of the Rule 118. Consequently, a convicted accused must begin to serve his sentence on the 16th day following promulgation of judgment, unless he perfect his appeal before the close of office hours of the 15th day."