PROVINCIAL JUDGES

# Journal

## DES JUGES PROVINCIAUX

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THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES


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# President's Page

It is hard to believe that three months have passed since I took over this office and a busy three months they have been. Since the Vancouver Conference I have had the priviledge of attending the annual meetings of the Provincial Associations of Alberta in Kananaskis, Newfoundland in St. John's and Quebec in Laval. I was very impressed with the quality of the educational programs presented at each of these meetings. As you know, judicial education is one of the prime reasons for the existence of this Association. However, because of the vastness of the country and the perennial problem of finances it is simply not realistic to leave the task of continuing judicial education of all judges to the National Association. While we may be justifiably proud of the programs presented by this Association in the form of the New Judges School held annually in Quebec, the Atlantic Conference and the programs of the Western Judicial Centre, they are not enough. Local programs will and must continue to exist and improve. From my observations I am satisfied that continuing judicial education of Provincial Court Judges is alive and well in Canada thanks to all of the above programs.

While on the topic of judicial education let me bring you up to date on the status of the Canadian Judicial Centre project. The first meeting of the Interim Management Board was held in Ottawa on September 15, 1987. The agenda included budgetary considerations, formal incorporation of the Centre, selection of site, selection of executive director, terms of reference for employment of staff and interim administration. Some matters were resolved and some deferred until the next meeting. Funding for the Centre will be shared 50% by the Federal Government and 50% by the Provincial Governments. The formal legal status of the Centre will be that of a non-profit corporation established under the Canada Corporations Act. The site has not been determined although nine law schools across the country have expressed interest in providing accommodation. The executive director is to be a judge either Provincially or Federally appointed, prepared to serve at least three years and preferably bilingual with previous educational and administrative experience. The tentative start-up date for the Centre is set for April 1, 1988. A further meeting of the board was to have been held on December 1, 1987, however, was postponed until January since arrangements for provincial contributions to the funding of the Centre are not

J'ai peine à croire qu'il y déjà trois mois que j'ai mon nouveau poste; j'ai certainment été trés occupé. Depuis la conference à Vancouver, J'ai eu la chance d'assister à la réunion annuelle des associations provinciales de l'Alberta à kananaskis, de Terre-Neuve à St.-Jean et du Québec à Laval. J'ai été trés satisfait de constater la qualité des programmes d'éducation présentés à chacune de ces réunions. Comme vous le savez, l'éducation judiciaire est une des raisons premières pour laquelle notre Association existe mais à cause de l'étendue de notre pays et de problèmes financiers constants ce n'est simplement pas réaliste de laisser à l'Association Nationale, la tâche de compléter l'éducation judiciaire de tous les juges. Bien que nous sommes, à juste titre, fières de notre programme ''La nouvelle école des juges'', tenu annuellement au Québec, la Conférence Atlantique et les programmes du centre judiciaire de l'Ouest ne suffisent pas. Les programmes locaux doirent continuer et même s'améliorer. D'aprês mes observations je suis satisfait du programme offert aux juges des cours Provinciales à travers le Canada grâce à tous ceux mentionnès ci-haut.

A propos, j'aimerais apporter plus de précision quant au statut du projet de Centre Canadien Judiciaire. La premiêre réunion du ''comité intérimaire de la gérance'' tenue à Ottawa le 15 septembre 1987. On retrouvait à l'ordre du jour des sujets tels que les considérations budgétaires, l'incorporation officielle du Centre, le choix d'un site et du directeur executif, le systême de références quant à l'emploi du personnel et de l'administration interimaire. Certains sujets ont été réglés par contre d'autres ont dû être remis à la prochaine réunion. Le financement du Centre est reparti comme suit: 50% par le gouvernment fédéral et 50% par le provincial. Le centre aura le statut légal officiel d'une corporation sans but lucratif tel que stiplué dans la loi sur les corporations canadiennes. Le site n'a pas encore été déterminé bien que 9 écoles de droit à travers le pays se sont portées volontaires. Le directeur exécutif sera un juge choisi au niveau fédéral ou provincial, pour un terme de 3 ans, bilingue de préférence et ayant une expérience administrative. Le premier avril, 1988 est une tentative de date pour les débuts d'opération du centre. Une réunion subséquente qui devait avoir lieu le premier décembre a été reportée en janvier étant donné que les arrangements quant à la contribution financière provinciale ne sont pas tout à fait terminés d'assisterai à cette réunion en tant que représentant de l'associa-

yet complete. I shall attend that meeting as representative of this Association and will report further news in the next issue of the Journal. We have been assured that the Federal Government does not intend to limit its funding of our Association on account of its support for the Centre but at this point it is not known what position the various Provinces may take concerning their funding of judicial education. You may be confident that I will do all in my power to ensure that the Centre, if and when it is finally established, is designed and will function to meet the needs of Provincial Court Judges.

The topic of judicial remuneration across the country remains a burning issue. When one considers that Provincial Court Judges from Nfld. to B.C. are, with some exceptions, doing the same work it is hard to conceive of any rationale for a disparity in remuneration. It is equally hard to rationalize the great disparity which now exists in remuneration between Provincially and Federally appointed judges. This issue is being seriously addressed by our Committee on Judicial Compensation and it is hoped that we will be able to arrive at a national position respecting judicial benefits for Provincial Court Judges at the next meeting of our executive which takes place in Montreal in March.

Finally, I wish to express my appreciation for the hospitality shown to me everywhere by those who hosted me during my travels. And to all members of the Association may you have a Happy and prosperous New Year.

tion et vous ferez part des détails dans un numéro subséquent de ce journal. On nous a fait savoir que le government fédéral désire nous supporter et peut être même nous offrir des fonds supplémentaires malheureusement la position des diverses provinces en ce qui a trait au financement de l'éducation judiciaire reste encore à décider. Je ferai tout ce qu'il y a en mon pouvoir pour assurer le bon fonctionnement du centre lorsque tous les détails seront déterminés, et j'espère que le tout sera à l'entière satisfaction de tous les juges des Cours Provinciales.

Le sujet de remunérations judiciaires demeure, à travers le pays, un sujet plein de controverse. Si l'on considére que tous les juges provinciaux que ce soit de la Terre-Neuve ou de la Columbie Britannique sauf quelques exceptions, font le même travail pourquoi existe-t-il une telle disparité de rémunération? Il est également difficile d'expliquer l'écart de salaire entre les juges nommés au fédéral ou au provincial. Notre comité s'est penché très sérieusement sur ce sujet de compensations judiciaires et nous espérons adopter une attitude "nationale" concernant les bénéficis judiciaires des juges des Cours Provinciales lors de notre prochaine réunion à Montréal en mars prochain.

Enfin j'aimerais remercier tous ceux qui m'ont si gentiment reçu au cours de mes récents voyages. Je souhaite donc tous les membres de notre Association une Bonne et Heureuse Année.

## REGISTRATION FORM

### C.A.P.C.J. ANNUAL MEETING
### Chateau Halifax, Halifax, Nova Scotia

### September 10-14, 1988

NAME OF JUDGE: _____

NAME OF COURT: _____

MAILING ADDRESS: _____

_____

TELEPHONE: _____

NAME(S) OF GUEST(S): _____

_____

_____

**Hotel Accommodation Required:** Number of Nights _____

Single ($75) _____ Double ($75) _____ Suite ($165-$275) _____

**NOTE:** If a suite is requested, please contact the Chateau Halifax directly (902) 425-6700, to make specific arrangements for type of suite **AND** send this form to Judge Roscoe.

**Arrival:** Date_____Time_____Via_____
Reservations will be held until 6 p.m. on date of arrival. Late arrivals must be guaranteed by a credit card:

Type of Card: _____ Card # _____ Expiry Date: _____

**Registration Fee:** Judges $185.00 Guests $75.00

REGISTRATION DEADLINE JULY 4, 1988

**Mail This Form To:** Judge Elizabeth Roscoe
Family Court of Nova Scotia
P.O. Box 1473-N
Halifax, N.S.
B3K 5H7

Confirmation of hotel accommodation will be sent to you by Chateau Halifax.

Do you like lobsters? YES _____ NO _____

Does your guest? YES _____ NO _____

# In Lighter Vein

As every judge who has conducted any civil trials of motor vehicle collision cases knows, the majority of such trials seem to involve fact situations wherein the judge is asked to believe that both drivers were proceeding along, each on his own side of the road, obeying all traffic laws, when a head-on collision occurred.

We have been able to come up with a few exceptions to this amazing phenomenon, however, and we now pass them along, hopefully for your amusement:

> The accident occurred when I was attempting to bring my car out of a skid by steering into the other vehicle.
>
> I had been learning to drive with power steering. I turned the wheel to what I thought was enough and found myself in a different direction going the opposite way.
>
> I was backing my car out of the driveway in the usual manner, when it was struck by the other car in the same place it had been struck several times before.
>
> I was on my way to the doctor with rear-end problems when my universal joint gave way, causing me to have an accident.
>
> I was taking my canary to the vet when it got loose in the car and flew out the window. The next thing I saw was his rear-end and then there was a crash.
>
> As I approached the intersection, a stop sign suddenly appeared in a place where no stop sign had ever appeared before. I was unable to stop to avoid the collision.

The trial was for attempted murder; the victim had been stabbed three times and was now on the stand undergoing examination-in-chief; the crown attorney was attempting to establish the requisite *mens rea* when the following exchange occurred:
Q. Why did you have to struggle with him to get the knife?
A. Because he was attempting to stab me again.
Q. How did you feel at this point? (No pun here I am certain.)
A. Very nervous.
Q. Why?
A. Well, when someone sticks a knife in your back, you're gonna feel kinda nervous.

(Judge Hudson of British Columbia gets credit for the following gem.)

An accused was charged under s. 36(2) of the Liquor Control Act — a minor in a liquor store:
**The Court:** Do you understand the charge?
**The Accused:** Yes.
**The Court:** Do you appreciate there's a minimum penalty of a $100.00 fine?
**The Accused:** I don't appreciate it, but I understand it, Sir.

Judges are often the butt of public criticism but consider this little example which appeared in the English *Morning Chronicle* on December 3, 1824.

> King Alfred was famous for destroying all the wolves in the kingdom and hanging up forty corrupt judges in one year. If his present Majesty would exert the same authority among the Justices of the Peace I am inclined to think next Quarter Sessions should have very thin benches throughout the kingdom.

One day, the Judge was having a particularly difficulty session, having run into a succession of more than usually fractious accused when, to top the session off, a well-known agitator was next to come before him. The accused continued his unruly ways while the Judge exercised as much self-restraint as he could in trying to keep the man from disrupting proceedings. Finally, not being able to calm the man down, the Judge momentarily lost patience and in an exasperated tone issued the following classical edict:
"Mr. Jones, I know it's difficult for you but if you can't be civil, please be as civil as you can!"

Then there was this father who came home unexpectedly to find that his teen-age daughter was acting as a hostess for a marijuana party. Things were turned on and it was gas, man. The irate father approached his daughter, and tore the marijuana cigarette out of her mouth and said:
"What is a joint like this doing in a nice girl like you?"



# Editorial Page

While it may be premature to categorize the recently held Annual Meeting of Newfoundland Provincial Court Judges as a watershed event in the process of judicial development throughout this country it did constitute, I believe, a significant contribution to that process.

The public perception of judges seated on thrones surrounded by imposing stacks of law books making decisions in splendid isolation may have clothed us with an aura of omnipotence but there are few of us who will not admit to ourselves and to our colleagues that as 'gods and goddesses' we lack one essential ingredient, that of lasting for aye, and as 'queens and kings, empresses and emperors' we are often without clothes.

But on to the annual meeting of Newfoundland Provincial Court Judges. Actions such as the bold and innovative step of inviting various interest groups involved in the area of child sexual abuse to take part in a symposium based entirely on that subject and sponsored by Newfoundland Provincial Court Judges may not be without its hazards. The increased scrutiny by the public of participating judges, attendant upon such actions, is an added dimension to the judicial decision making process requiring clear thinking and innovative interpretation of judicial boundaries, but then, such has always been the stuff of a progressive judiciary.

With this first perhaps tentative but nonetheless positive step behind us, and as a guide for others to follow, it is well to compliment those whose foresight made is possible. Judge Owen Kennedy and his committee deserve a sincere vote of confidence for making Newfoundland the birthplace of a second important event in the history of Canadian Provincial Court Judges.

**Judge Ronald L. Jenkins**
**Provincial Editor, Newfoundland**

For more than a year a Committee on Judicial Independence, headed by Judge Hiram Carver of Nova Scotia, assisted by Judge Robert Fowler of Newfoundland, researched the independence of our judiciary.

That committee made its final report to our Association at is annual meeting in September. What the committee found through its work was a great diversity of law among the various provinces as it pertains to the Provincial Courts.

Because of space limitations in the last issue of the Journal that was the only committee report not included. The fruit of the labour of that committee was a draft "Model Act" which the committee suggested might serve as a guideline for our collective future aims and aspirations.

The Committee deserves commendation for its efforts as anyone who reads the "Model Act" will easily see that a great deal of time and effort was expended on its preparation.

As long as there must be a separate Act for Provincial Courts, this model would, no doubt, serve a useful purpose to bring a greater semblance of uniformity across the nation. We wonder, however, if the time has not come when we should be encouraging courts of justice legislation that gives greater cohesiveness not only to Provincial Courts but also to Provincial. County and Superior Courts. Why should all courts in the various provinces and territories not exist under one "Courts Act" similar to the present situation in Ontario. After all, "justice is justice" in whatever court it is dispensed.

**Judge M. Reginald Reid**
**Editor-in-Chief**

# News Briefs

**NATIONALLY**

In the September issue under this heading three of our members were reported as having been made honourary Life Members at our annual meeting at Vancouver on September 5, 1987.

In fact there were four members inducted into that exhalted order. It was through genuine inadvertance that the name of His Honour judge Douglas E. Rice was left off the list of those members so inducted.

It was stated concerning Judges Langdon and Dubienski that their contributions to our Association needed no elaboration in explaining how they came to be made honourary members. That is certainly true of them but it is even more true of Judge Rice because he served not only as President of our Association during 1986-87 but he also served many many years as Executive Director and Treasurer which made him directly responsible for keeping the machine oiled and running.

We have already personally extended our sincerest apologies to Judge Rice for this gravest of oversights and we do so now once again publicly.

**ONTARIO**

**Appointments**

His Honour Judge Donald Kalikowski, Oshawa, effective July 17th, 1987.

**SASKATCHEWAN**

**Appointments**

His Honour Judge Douglas Orr, effective August 4, 1987.

Her Honour Judge Marian A. Wedge moved from the Provincial Court to the Court of Queen's Bench to become Madam Justice Wedge, effective July 13, 1987.

**Retirements**

Associate Chief Judge E.C. Boychuk, effective October, 1987, retired early after 20 years in the Provincial Court of Saskatchewan. He was the first Chief Judge of the Provincial Court and was also the first Ombudsman and first Chairman of the Public Utilities Review Commission for Saskatchewan.

Her Honour Judge Tillie Taylor, effective November, 1987, after 27 years in the Provincial Court of Saskatchewan. She was the first woman appointed to the Saskatchewan Bench and the first Chairman of the Human Rights Commission of Saskatchewan.

**BRITISH COLUMBIA**

From British Columbia comes a report that as of November 21, 1987 a new Executive took office in their Provincial Association.

As of that date the new slate of officers is as follows:

President: His Honour Judge D.B. Overend
Vice-President: His Honour Judge J.B. Paradis
Treasurer: His Honour Judge S.W. Enderton
Secretary: Her Honour Judge J. Auxier

**— NOTICE —**

**1988 C.A.P.C.J. CONFERENCE**
**Chateau Halifax**
**Halifax, Nova Scotia**

**SEPTEMBER 10, 1988 to**
**SEPTEMBER 13, 1988**

*"Now is not too early to plan your attendance!"*

CONTACT:
Judge Robert Ferguson
'88 Conference Chairman
Provincial Court (Family Division)
P.O. Box 785, Sydney, N.S. B1P 6J1

Tel.: (902) 564-5363



argued and applied in the consideration of Sentencing.

As mentioned earlier, Ruby is as unsettled as many of us on 'our approach' and the need for reform. (Example: *Sentencing Reform a Canadian Approach 1987*). but, to persue these concerns would have meant confusing theory and reform with practical application which would have been detrimental to the initial purpose or objective of the book.

In conclusion, then, I would like to echo Allan Manson's summary to his review of the 2nd edition, *Queen's Law Journal*, p. 195:

> Sentencing is not an academic text but rather a valuable aid to practitioners becoming sensitized to factors and issues which may be apparent in a given case, and which should be developed and placed before the court.

The collection of authorities is extensive. The comments made about various cases are comprehensible and illustrative. As well as encouraging a more sophisticated and informed approach to Sentencing submissions by counsel, one can hope that the book will encourage others involved with the Sentencing system to continue questioning the validity of its foundation.

In this latest edition, Mr. Ruby has once again made a valuable contribution to the legal Profession.

> The two most engaging powers of an author: New things are made familiar and familiar things are made new. (Samuel Johnson)

It is submitted the author has demonstrated such capacity.

## NOTICE

8th Commonwealth Magistrates' Conference
**CANADA**

(at the invitation of the Judiciary of Canada)

Place: Chateau Laurier Hotel, Ottawa

Time: September 18th - 24th, 1988

Who May Attend: This conference is organized by the Comonwealth Magistrates' Association, and is open to all Commonwealth Magistrates and judges as well as others interested in the administration of justice in the courts of the Commonwealth.

**TOPICS FOR DISCUSSION**

(1) *Problems facing the Judiciary*
One of the continuing concerns of the CMA, this covers their independence of the executive and immunity from popular pressures, security of person and tenure, maintenance of discipline in Court, the need for speed in the administration of justice without it detracting from the quality of the justice rendered, etc.

(2) *Legal Pluralism*
The problems which arise from the recognition of a variety of local customary and/or religious laws as well as the national or territorial law. also the problems caused by ethnic and cultural diversity such as occur on many commonwealth countries where there has been substantial immigration.

(3) *Sexual Offenses*
An examination of the definition of such offenses and the proper treatment of offenders. Included will be such serious offenses as rape, incest and offenses involving juveniles, and those such as indecent assaults.

**POST CONFERENCE TOURS**

There will be a choice of three separately priced tours for delegates wishing to see something of Canada after the conference is over.

Tour No. 1 goes to Montreal and Quebec City, No. 2 to Algonquin Park and Toronto, and No. 3 entitled the Simon Fraser tour is the most far-ranging going west to Calgary, the Rockies and British Columbia.

Full details on costs, accommodations, etc. are available from: CMA, 28 Fitzroy Square, London W1P 6DD.

# Sentencing: (Third Edition)

**by Ruby, Clayton C.**
**Butterworths, Toronto (609 pages)**

**Book Review**
**by Judge J. Kean**
**Provincial Court of Newfoundland**

When invited to review this text my initial response was one of caution and hesitation. But, judges make critical decisions about the lives of people in criminal courts on a daily basis-especially in Sentencing. As a decision-maker I have justification (legal) for responding.

The criminal justice system has as its fundamental purpose the identification of those who have acted in ways that are unacceptable to society and on whom, as a result, certain sanctions can be imposed. These sanctions, why and how they are imposed, and under what principled direction, is the subject matter of Ruby's text. At the outset the author acknowledges that the objective is:

> to set out and analyze principles, so that more effective submissions can be made with a view to assisting the sentencing judge.

The Sentence, of course, has to reflect adequate submissions and the controlled exercise of discretion grounded on principles. The person sentenced, and the public, must be clearly informed as to the principles underlying the Sentence and the reason for that sanction.

The author in Chapter I, sets out the fundamentals on which the purpose of the test is built - The General Principles of Sentencing. They are:

(a) Protection of Society;
(b) Deterrence (specific and general);
(c) Reform and Rehabilitation;
(d) Retribution - this being rejected as an acceptable principle.

In addressing the application of these principles by Canadian courts, the author, throughout, questions their efficacy -

who is being protected, deterred or rehabilitated?

Ruby does not answer this question, of course, because to do so would invite battle with differing philosophical positions and academic concepts which would "intrude upon the practical business of sentencing," a position he likewise attributes to Canadian courts. To his credit, though, Ruby does acknowledge that there exists an incredible over-use of the criminal sanction and that the answer to controlling conduct may not lie in Sentencing but rather in the approach to criminal law generally.

The author then proceeds to apply the general principles to finding an appropriate Sentence, Chapter II. Actually, the remainder of the text could be subtitled under this heading. However, for practical reasons one can understand why this is not so - to afford organization to the abundance of information detailed to the reader, Ruby, throughout the course of his text, examines factors which are or have been considered in the Sentencing process, including:

(a) The offence (particular gravity; mitigation and aggravation);
(b) The offender (factors particular to him/her);
(c) Circumstance of the commission;
(d) The victim;
(e) The community as a whole; and
(f) Matters which should not be considered.

all of which are supported by leading court decisions. In this edition the author has presented some rearranging and blending of some subtopics. The chapter on *Corporate Crime* is new, as well as the subtopics on *Weapons - Criminal Negligence Causing Bodily Harm - and Death, Drinking and Driving, Trade Offences, and Second Degree Murder*. Additionally, extended coverage is given to *Drug Offences; offences against the Administration of Justice, Fraud and Related Offences, Manslaughter, Attempted Murder* (the error in the penalty has also been corrected), *Assault and Wounding, Sexual Offences and Offences against Property*. The new sections accommodate statutory changes since the second edition and, as well, represent important familiar offences to be considered in the *Range of Sentences*..

Mr. Ruby, in this edition, sets out to heighten the understanding of Sentencing. He has done so with skill, creativity and able expression. he has not detracted from the realm of realism for a broader philosophical or academic analysis. The book is a valuable tool for judges and practitioners. It does not provide a formula for any particular Sentence - nor does the author set out to provide one but it does provide analytically considered principles which can be adequately



# THE BILL OF RIGHTS AND BENEVOLENT DESPOTISM: A LOOK AT THE SUPREME COURT'S ROLE IN EDUCATION, REGULATION OF ATTORNEY ADVERTISING AND OBSCENITY

**Joseph R. Weisberger***

## I. Benevolent Despotism and its Effect Upon the Founding Fathers

On october 25, 1760, the ancient announcement rang forth throughout the British domains: "The King is dead; long live the King." The bells pealed and the varied inhabitants of the British Isles and their dominions beyond the sea looked to the future. The new King, unlike his grandfather, George II, was oriented by reason of his British birth and education toward his island realm rather than his ancestral domain of Hanover in Germany[1]. The War of the Austrian Succession had ended favorably to British interests, and the Seven Years War on the continent and in North America and India was drawing to a successful conclusion due to the energetic conduct of the British government by William Pitt[2]. "Rule, Britannia" was the order of the day, and the handsome young King was determined to exercise control of his government and to obey the oft repeated injunction of his mother, "George, be a king[3]." At the start of George III's reign, British institutions were extravagantly admired not only at home, but by the great thinkers of the day including Voltaire, Montesquieu and Diderot. Blackstone in his Commentaries, of which the first volume appeared in 1765, warmly praised the parliamentary system. George III referred to "the beauty, excellence and perfection of the British Constitution as by law established.[4]" With the best intentions in the world, George III began with every reason for optimism one of the most calamitous reigns in English history[5].

Throughout Europe, the feudal system and the royal central governments struggled for supremacy. The foundations of the modern state were in the process of formulation and construction. On the North American continent an adventure group of colonists, mostly derived from Great Britain, were becoming restive and discontent. Since the threat of France and her North American colonists in Quebec, together with their allies among the Indian tribes, had largely been removed by the Treaty of Paris in 1763, the stage was set for disenchantment with the King and the governing structure of the mother country. Indeed, the principal point of irritation between the American colonies and their liege lord, Parliament, and its ministers were the British attempts to tax the colonists so that they might share in the significant expense of defending the colonies against the aggressive French expansion. In this attempt to share the expenses of the Seven Years War (referred to in North America as the French and Indian War), the vast majority of the British public felt that the position of the King and his ministers was not unreasonable.[6] In spite of the universal admiration bestowed upon the English constitutional monarchy, for a number of reasons the colonists in America chose to sever the relationship. At first they alleged a series of violations of their rights as Englishmen and, later, sought complete independence, evidencing a clear desire to create upon these shores a representative popular government of a type not theretofore experienced in the history of the world.

After a brief experiment with a loose confederation of thirteen states, it became apparent to the former colonists that a more effective type of government was required. The ability of ordinary people to govern themselves was on trial before the world. To justify their capacity of self-government, the formulation of an effective union became essential. Thus, a constitutional convention assembled in Philadelphia on the second Monday of May 1787.[7] After much travail, a document of government based upon the philosophic ideas underlying the works of Rousseau and

*Mr. Justice Weisberger is an Associate Justice of the Supreme Court of Rhode Island. In September, at the annual meeting of the CAPCJ, Justice Weisberger delivered a masterful address along the lines of this article in which he suggested that judges and courts are ill-suited to the role of policy makers and that they probably do not want such a role in any event because of the potential negative effect on their independence. This article is now published with the permission of Mr. Justice Weisberger.

[1] R. White, Europe in the Eighteenth Century 177 (1965).

[2] *Id.* at 179-80.

[3] W. Durant & A. Durant, Rousseau and Revolution Part 10 of the Story of Civilization 669 (1967).

[4] S. Andrews, Eighteenth Century Europe: The 1680s to 1815 246-47 (1964).

[5] *Id.* at 688.

[6] Durant & Durant, supra note 3, at 709. It should be noted that the debt incurred by the royal government in the prosecution of the Seven Years War amounted to L140,000,000. The colonists themselves had incurred an aggregate debt of L2,500,000. From an English point of view, taxation without specific representation seemed reasonable enough, since for centuries Englishmen had accepted taxation by Parliament even though most of them had no direct voice in the election of its members. *Id.* at 709. For example, as late as 1801, out of an estimated population of 9,000,000 souls in Great Britain, there were approximately 245,000 wo were privileged to exercise the franchise. Durant & Durant, supra note 3, 684-85.

[7] M. Farrand, The Framing of the Constitution 1-12 (1912).

Montesquieu was established which provided for effective legislative, executive and judicial branches while allowing for all of the compromises necessary to preserve the rights of the people and of the states.[8]

Nonetheless, many leaders among the erstwhile colonists felt that the proposed constitution was defective in that it contained no specific declaration of rights which would secure the liberties of the individual against this formidable and powerful new central government. James Madison, who had been the leading spirit in the drafting of the new Constitution, and Alexander Hamilton, who had been a strong supporter of the new government, together with John Jay, sought to convince the former colonists through the Federalist Papers that in the event the Constitution was approved, one of the first tasks of the new Congress would be the proposal of amendments which would establish a Bill of Rights similar to that adopted in England as a part of the Act of Settlement of 1689. True to the promises contained in the Federalist Papers, such a Bill of Rights was promulgated by the first Congress and ratified in 1791.

When the Constitution of the United States was initially formulated in 1787, and when the Bill of Rights contained in the first ten amendments was promulgated in 1791, the framers of both of these basic documents of government were greatly influenced by the then current ideas produced by political thinkers collectively known as the "Philosophes." These men of letters believed that human reason, if appropriately applied, could solve or at least ameliorate the many problems which plagued the human condition.

Political thinkers such as Rousseau, Montesquieu, Diderot and Voltair also brought great influence to bear upon the monarchs of their day. Indeed, Frederick the Great of Prussia, Maria Theresa of Austria, her son Joseph II, and Catherine the Great of Russia became known as benevolent despots because of the unique political and social reforms which they tried to effectuate in their respective domains — at least partly as a result of the philosophy of the enlightenment. Further, it might be argued that these autocrats, influenced as they were by the great political thinkers of the day, constituted a significant force for progress in attempting to free a great part of Europe from the restraints and onerous tyrannies of feudalism. The enlightened despots were characterized by their unusual force of intellect, their capacity for hard work, and their genuine motivation to improve the condition of their subjects.[9]

Although Catherine the Great of Russia and Frederick the Great of Prussia were widely acclaimed as benevolent despots, and both brought progress with varying degrees of success to their respective nations, probably the quintessential benevolent despot was Joseph II, son of Maria Theresa, Archduke of Austria, King of Hungary and Bohemia, Ruler of the Austrian Netherlands (Belgium), King of the Romans and Holy Roman Emperor, and Ruler of portions of Italy and France. At his accession to the throne in 1780, he had as his backdrop the prestige of centuries of the Hapsburg family's ascendency in Europe.[10] His sole desire was to put into operation his burgeoning ideas for eliminating feudalism improving education, promoting religious tolerance, laying a foundation for economic and financial development, increasing the share of produce to be retained by the peasants after payments to their landlords, to the state and to the church, liberalizing the laws of censorship, and increasing generally the freedom of his subjects.[11] He worked at a pace so intense that he died at the age of forty-eight, exhausted and frustrated by his failure to achieve most of his goals. In spite of his autocratic powers.

> [h]e commanded faster than he could convince; he sought to achieve in a decade what required a century of education and economic change. Basically it was the people who failed him.. They were too deeply rooted in their privileges and prejudices, in their custom and creeds, to give him the understanding and support without which in such challenging reforms, his absolutism was impotent.[12]

Although George III of England was considered a constitutional monarch,[13] rather than a benevolent despot, he too was greatly influenced by the rational ideas of the enlightenment and was most desirous of being a good king. He was a paragon of virtue in his private life and toiled resolutely in government.[14]

Political philosophers of the day greatly admired the enlightened monarchs and considered them to be the vehicle through which the social

[8] *Id.* at 196-210.

[9] See Durant & Durant, supra note 3, at 499 (commenting on Frederick the Great). Referring to the zealousness of Frederick the Great, the authors state:
> No ruler in history ever worked so hard at his trade except perhaps his pupil, Joseph II of Austria the son of Maria Theresa — also considered an enlightened despot. Frederick disciplined himself as he did his troops, rising usually at five, sometimes at four, working till seven, breakfasting, conferring with his aides till eleven, reviewing his palace guard, dining at twelve-thirty with ministers and ambassadors, working till five, and only then relaxing into music, literature, and conversation ... He allowed no family ties to distract him, no court ceremonies to burden him, no religious holidays to interrupt his toil.

Durant & Surant, *supra* note 3, at 499.

[10] See Andrews, *supra* note 4, at 45; F. Heer, The Holy Roman Empire 122-75 (1968).

[11] Durant & Durant, *supra* note 3, at 354-65.

[12] Durant & Durant, *supra* note 3, at 365.

[13] See Andrews, *supra* note 4, at 246.

[14] Durant & Durant, *supra* note 3, at 688.



commences to suffer from lack of control and becomes rude, arrogant and utterly distasteful upon the Bench. He/she becomes a "know-it-all" and, to coin a phrase, a *prima donna absolutus*.

**Coping with Stress**

Once the characteristics or symptoms are seen, it is then incumbent upon the judge and his/her colleagues to recognize the problem for what it is and not be afraid to discuss the problem, and to bring it out into the open. Positive action is required to forestall serious results, such as marriage break-up, alcoholism, drug addiction, and even suicide.

Action should be taken immediately to look for professional help. Personal action can take the form of a conscientious lowering of pressures from work, finances or whatever others there may be, by seeking help and guidance of others. Change reading habits, attempt meditation, revive old contacts and friends, and if there is any suggestion of over-consumption, lower alcohol and coffee intake; develop a regime of exercise.

Above all, it is necessary for each person, be he/she a judge or otherwise, to be true to himself/herself and seek help if necessary. The result will be a greater ability to cope with stress on the job.

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"There are two things against which a Judge ought to guard — precipitancy, and procrastination. Sir Nicholas Bacon was made to say, which I hope never again to hear, that a speedy injustice is as good as justice which is slow."

Clark, M.R. in *Atherton v. Worth* (1764) I Dick 365, 377

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# Stress in the Court*

**By Associate Chief Judge Ian Dubienski**
**Provincial Court of Manitoba**

**Causes**

(a) The primary cause of stress among judges is the very nature of the job. The recently appointed judge is suddenly confronted with a new life at approximately middle age when adjustment is not easy. From an active professional vocation characterized by constant involvement with the public, one must adjust to a quiet, steady pace with a certain amount of monotony.

The judge must adapt himself/herself to a new social environment restricted to his/her own group and a considerably reduced scope amounting almost to an isolated existence. Gone are the visits to the pubs and watering holes; and gone are the active involvements with associations that might conflict with his/her position as a jurist. His/her day to day relationships are primarily with other members of the judiciary, and the staff.

Also created, in spite of advance notice, are the financial problems of having to live on a fixed salary, usually reduced, with no increments due to extra work.

All this together with the frustration of no feedback as to whether or not what one does accomplishes anything.

(b) Secondly, a judge is confronted with an ever-increasing workload with little public support. Systems and programs call out for adjustment and support from the public and politicians, all of which seems to be met with indifference, suspicion, and jealousy. The family finds itself caught up in the problems of a judge spending many hours away from home on circuits, writing judgments, and attending educational seminars. Also present is the problem of having to face the criticism of the public without any opportunity of response.

Appointments are now being made at a much earlier age, with the result that because of the hum-drum, unexciting existence, there is a grave danger of the judge meeting the mid-life crisis and all its implications. More and more, the judiciary is confronted with separations and divorces, a matter almost unheard of a decade ago. Alcoholism continues to be a problem.

(c) Thirdly, judges having been schooled in the law, have been instructed in the traditional ways; now, they are being confronted with new ideas and the new technologies and their mysteries. It is with great effort that they are able to assimilate and understand what is happening and to be able to appreciate how it can be adapted to assist the judiciary in its work.

(d) Fourthly, the conscientious judge does his/her job to the best of his/her ability and makes decisions based on his/her skill and knowledge of the law, humanity and technical matters. But, not always are the decisions accepted by the public and many judges find it difficult to accept the criticism that follows, not from their colleagues and Courts of Appeal, but from the general public and the media.

Having discussed the causes, Justice Kirby then turned to the characteristics and symptoms that one could recognize in his/her fellow judges or in himself/herself.

**Symptoms**

Psychologically and clinically, there is often a lack of ability to concentrate, a bland approach to life — this proceeds for some time until physical manifestations appear, such as indigestion, nausea and chest pains. Eventually, the judge

(***EDITOR'S NOTE:** Job stress among judges has long been recogniated as a very real problem, given that workloads are ever incresing, public demands upon the judiciary are more demonstrated and judges are being appointed at an earlier age, making them more susceptible to occupational burn-out. This topic can be seen cropping up in justice circles across Canada. One such recent instance was at a meeting of the Canadian Bar Association in August, 1986. Judge Dubienski attended that meeting where the Honourable Mr. Justice M.D. Kirby, president of the Court of Appeal in New South Wales spoke on the topic of stress in the Courts during a luncheon on Judges' Day. Judge Dubienski has made a precis of the main points of Mr. Justice Kirby's address, which precis, because of the timeliness and instructiveness of the matter, is reproduced herein).



and economic climate of Europe would improve. However, it was here that the framers of the American system, although influenced by the philosophes, diverged from them and chose a different path. The new Americans generally regarded with suspicion any strong central government. Their experience with the government of George III, led by such ministers as Lord North, impressed upon them the need to create a series of checks and balances which would prevent too much authority from being exercised by one agency.[15] Basic to the idea of checks and balances was the concept of federalism; not only was the new central government to be subjected to internal checks and balances by the distribution of powers among the executive, legislative and judicial branches of government, but also the new government was to be limited to the powers specifically delegated to it.[16]

Initially the Bill of Rights was designed as a limitation upon federal rather than state power and was expected to guarantee that the new federal government would be kept within well defined limits.[17] It was, indeed, not until 1925 that the first amendment was considered to be a limitation upon state power as well.[18] In the less than sixty years following the application of the first amendment as an inhibition upon state government, however, the Supreme Court of the United States has, with the most noble of motivations, centralized within itself and its surrogates in the federal judiciary virtually absolute power to determine, under the rubric of first amendment guarantees of individual freedom, the validity of state legislative, judicial and executive operations. It will be the purpose of this article to point out the growth and the result of benevolent despotism exercised by the Supreme Court of the United States in matters of regulation which were, at the time of the founding of the Constitution and for a century and a half thereafter, the exclusive domains of state and local governments. The three areas that will be discussed are (1) local control over education; (2) regulation of the practice of law by the highest courts of the several states; and (3) regulation or prohibition of obscenity. I shall attempt to establish that in each of these areas the Court has created, although with the best of intentions, a chaotic non-person's land of unmanageable distinctions, strict judicial scrutiny, and paralysis of equally well-intentioned state attempts at regulation and coherent governance.

**II. The First Amendment and Education**

The Supreme Court's most recent effort to exercise control over the education process is found in *Island Trees Union Free School District v. Pico.*[19] In that case, a board of education of a New York school district decided to remove certain books from the libraries of a high school and a junior high school within the district.[20] The school board deemed these books to be " 'anti-American, anti-Christian, anti-Semitic, and just plain filthy.' "[21] After removal of the books, several students brought a section 1983 action in the federal district court, which granted summary judgment in favor of the school board.[22] The district court held that the school board removed the books because they were "irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students."[23] A divided three-judge panel of the United States Court of Appeals for the Second Circuit reversed the judgment of the district court and remanded the case for a trial on the merits.[24] The opinion upon which the judgment was based held that, at least at the summary judgment stage, the school board had not offered sufficient justification for its action, and concluded that the plaintiffs should have been offered an opportunity to persuade a finder of fact that the ostensible justification was simply a pretext for the suppression of free speech.[25]

In confronting this issue, the Supreme Court of the United States delivered a plurality opinion written by Mr. Justice Brennan and joined by Justices Marshall and Stevens.[26] Essentially, the

[15] See generally The Federalist No. 47, at 312-20 (J. Madison)

[16] Article X of the amendments to the Constitution specifically provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

[17] See Wolf v. Colorado, 338 U.S. 25, 26 (1949); Palko v. Connecticut, 302 U.S. 319, 323 (1937); Twining v. New Jersey, 211 U.S. 78, 87 (1908).

[18] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[19] 102 S. Ct. 2799 (1982).

[20] *Id.* at 2804.

[21] *Id.* at 2803.

[22] *Id.* at 2802-04.

[23] Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 392 (1979), rev'd, 638 F.2d 404 (2d Cir. 1980), aff'd, 102 S Ct. 2799 (1982).

[24] Pico v. Board of Educ., Island Trees Union Free School Dist., 638 F. 2d 404, 419 (2d Cir. 1980), aff'd, 102 S Ct. 2799 (1982). Each of the judges of the court of appeals filed a separate opinion. See id. at 406. 419, 432.

[25] *Id.* at 418-19.

[26] See 102 S. Ct. at 2802. Justice Blackmun concurred in this opinion in part, and concurred in the judgment. *Id.* at 2812. Justice White concurred in judgment. *Id.* at 2816. Chief Justice Burger filed a dissenting opinion in which Justices Powell, Rehnquist and O'Connor joined. *Id.* at 2817. Justice Powell filed a dissenting opinion. *Id.* at 2822. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice Powell joined. *Id.* at 2827. Justice O'Connor filed a separate dissenting opinion. *Id.* at 2835.

plurality indicated that there was a distinction between removal of books from a school library and the acquisition of such books.[27] Moreover, the plurality held that a genuine issue of fact was presented regarding the motivations of the school board in removing the books.[28] The opinion asserted that the local school officials had the right and discretion to determine the contents of school libraries and to impart as an attribute of the educational process "respect for authority and traditional values be they social, moral or political."[29] Nevertheless, the plurality held that students have a right to receive information and stated that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' "[30]

Earlier in the plurality opinion Justice Brennan had attempted to draw a distinction based upon the school board's intentions:

> If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*. On the other hand, respondents implicitly concede that an unconstituional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar ... And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible."[31]

The dissenters expressed vigorous disagreement with this somewhat abstruse rule governing the operation of duly constituted local school authorities. All the dissenters found it impossible to recognize a valid distinction between removal and acquisition of books. Chief Justice Burger's comments might be encapsulated as follows:

> Stripped to its essentials, the issue comes down to two important propositions: *first*, whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and *second*, whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library. In an attempt to place this case within the protection of the First Amendment, the plurality suggests a new "right" that, when shorn of the plurality's rhetoric, allows this Court to impose its own views about what books must be made available to students.[32]

Justice Powell's dissenting opinion included an appendix which contained Circuit Judge Mansfield's summary of excerpts from the books at issue. The summary showed the explicitly vulgar nature of at least portions of certain of the books. Justice powell viewed the plurality decision "with genuine dismay," and suggested that it would corrode the school board's authority and effectiveness. He suggested that it is inappropriate to require a school board to promote ideas and values repugnant to a democratic society or to teach such values to children.

> In different contexts at different times, the destruction of written materials has been the symbol of despotism and intolerance. But the removal of nine vulgar or racist books from a high school library by a concerned local school board does not raise this specter. For me, today's decision symbolizes a debilitating encroachment upon the institutions of a free people.[33]

Justice Rehnquist in his dissent was critical of the new rights apparently created, and asserted that he found the very existence of a right to receive information in the junior and senior high school settings to be wholly unsupported by past decisions of the court "and inconsistent with the necessary selection process of elementary and secondary education."

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[27] *Id.* at 2805-06.

[28] *Id.* at 2806.

[29] *Id.*

[30] *Id.* at 2810 (quoting West Virginia v. Barnette, 319 U.S. 624, 642 (1943)).

[31] *Id.* (footnotes omitted).

[32] *Id.* at 2817.

[33] *Id.* at 2823



cause, and in any event no Provincial Court Judge shall be arbitrarily or unreasonably transferred.

(2) Where a Provincial Court Judge does not consent to such transfer, he may apply to the Judicial Council to hear and determine the issue and upon receipt of such application the Judicial Council shall hear and determine the issue and such determination shall be final.

(3) Where the Judicial Council hears an issue concerning the transfer of a Provincial Court Judge, the Chief Judge of the Provincial Court shall not sit as a member of the Judicial Council where the transfer is being made on the recommendation of the Chief Judge.

**PROVINCIAL COURTS COMMITTEE**

25 (1) There shall be an independent committee to be known as the Provincial Courts Committee, composed of three members, of whom

(a) one shall be appointed jointly by the Provincial Judges' Association, Criminal Division, Family Division, and Civil Division;

(b) one shall be appointed by the Lieutenant Governor in Council;

(c) one to be the chairman, shall be appointed jointly by the bodies referred to in clauses (a) and (b).

(2) The function of the Provincial Courts Committee is to inquire into and make recommendations to the Lieutenant Governor in Council respecting any matter relating to the salary, remuneration, allowances, pensions and benefits of Provincial Court Judges.

(3) The Provincial Courts Committee shall make an annual report of its activities to the Lieutenant Governor in Council.

(4) Recommendations of the Committee and its annual report under subsection (2) and (3) shall be laid before the Legislative Assembly if it is in session or, if not, within fifteen days of the commencement of the next ensuing session.

(5) The recommendation of the Provincial Court's Committee in relation to salaries shall be binding on all parties including the Provincial Legislature and the Judges of the Provincial Court.

**EXECUTION OF PROVINCIAL COURT ORDERS**

26 The state shall ensure the due and proper execution of orders and judgments of the court; but supervision over the execution of orders and judgment process shall be vested in the judiciary.

**REPRESENTATION BY COUNSEL FOR PROVINCIAL COURT JUDGES**

27 A judge being a defendant in any suit arising out of his or her judicial duties shall be represented by counsel of his or her choice; and such counsel shall be compensated for his or her services from the Consolidated Revenue Fund of the province.

**TERM BEFORE HOLDING POLITICAL OFFICE**

28 No Provincial Court Judge shall be permitted to present himself or herself as a candidate for any political office in Canada within twelve months after his or her resignation.

**TERM BEFORE PERMITTED TO APPEAR BEFORE PROVINCIAL COURT**

29 No Provincial Court Judge shall be permitted to appear before any Provincial Court in the province or territory of his or her appointment as a barrister within two years after his or her resignation or removal from office.

good behaviour condition under which he was appointed or by reason of infirmity is incapable of performing his or her judicial duties, order that the Chief Judge or the judge be removed from office and that where appropriate he or she cease to be paid any further salary.

(2) Notwithstanding subsection (1) the Judicial Council may order

(a) where the Chief Judge or the judge has not been suspended that he or she be suspended for a definite period of time with or without any salary;

(b) where the Chief Judge or the judge has been suspended that he or she be suspended for a further period of time, with or without any salary;

(c) the Chief Judge or the judge be reinstated with or without a reprimand;

(d) the Chief Judge or the judge be granted a leave of absence with or without any salary for such period as the Judicial Council, in view of all the circumstances of the case, may consider just and appropriate;

(e) the complaint be dismissed;

(f) that the judge be compensated for all or part of the costs incurred by the judge relating to the inquiry.

**APPEAL FROM JUDICIAL COUNCIL ORDER.**

15 (1) A judge ordered to be removed from office under s. 14(1) may, wihin 30 days after the date of mailing to him or her or personal service on him or her of the notification, appeal to the Court of Appeal on any issue of fact or law or mixed fact and law in the same manner as an appeal to that court from the Supreme Court; and the decision of the Court of Appeal on an Appeal under this section is final.

(2) Any order made by the Judicial Council under s. 14(2) shall be final and not be the subject of appeal.

**REMOVAL FROM OFFICE OF CHIEF JUDGE OR JUDGE**

16 Where an appeal under Section 15(1) has been dismissed or the time allowed for appeal has expired, the Governor in Council

(a) shall by order remove the Chief Judge or the judge from office.

(b) shall make the order or decision public by filing with the prothonotary for the county in which the judge resides a copy of the order or decision.

**INQUIRY TO BE HELD IN PRIVATE.**

17 An inquiry under this Act shall be held in private.

**RULES OF PROCEDURE RE JUDICIAL COUNCIL**

19 The Judicial Council may from time to time determine rules of procedure respecting its proceedings.

**IMMUNITY OF JUDICIAL COUNCIL**

20 No action or other proceeding for damages shall be instituted against the Judicial Council or any member thereof for any act done in good faith in the execution or intended execution of its or his duty.

**CLERKS FOR PROVINCIAL COURT**

21 There shall be such Clerks for the Provincial Court (Criminal Division), the Provincial Court (Family Division) and the Provincial Court (Civil Division) [where applicable] as are considered necessary.

**SECURITY OFFICERS FOR PROVINCIAL COURT**

22 (1) The Sheriff shall be an officer of the court and shall obey the orders of the court including all orders for the enforcement of its process.

(2) The Sheriff shall provide the necessary security for the court and the personnel therein.

**IMMUNITY OF PROVINCIAL COURT JUDGE**

23 A Provincial Court Judge shall have the same immunity from civil proceedings as does a Judge of a Superior Court of Criminal Jurisdiction and shall be compensated for any costs incurred in maintaining such immunity.

**TRANSFER OF PROVINCIAL COURT JUDGE**

24 (1) No Provincial Court Judge shall be transferred from one judicial center to another without his or her consent or without just



> As already mentioned, elementary and secondary schools are inculcative in nature. The libraries of such schools serve as supplements to this inculcative role. Unlike university or public libraries, elementary and secondary school libraries are not designed for free-wheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas. Thus, Justice Brennan cannot rely upon the nature of school libraries to escape the fact that the first amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas.[34]

In light of the myriad inconsistent principles of law set forth in the plurality and dissenting opinions, it can scarcely be a subject for surprise that, upon remand, the Island Trees Union School Board voted in August 1982 to return the nine books to the shelves of the school library. The sole limitation was a statement by the board that librarians in the four Nassau County communities covered by the district would be rquired to send notes to parents whose children seek out the books.[35] Thus, the mystifying diffusion of directions caused the board to surrender and, perhaps, abdicate the very function which even the plurality recognized that it must and should exercise. Nevertheless, one can readily understand that the procedural and substantive hurdles seemed so formidable to members of this unit of local government as to make the contest too difficult to carry to its ultimate objectives.

Prior to *Island Trees*, the Court had decided other cases on first amendment grounds which restricted the authority of school boards to require or control action by students. *Tinker v Des Moines School District*[36] held that school authorities could not prevent students from symbolically expressing their political views by wearing black arm bands.[37] *West Virginia v Barnette*[38] forbade school authorities from requiring students to salute the flag.[39] In no case, however, had the Court previously recognized the right of students to receive particular ideas in a school setting.

It is obvious even to the nonexpert in educational matters that the choice of every book contained in a school library must be based upon a determination of its suitability for educational purposes. This determination must be made whether the book is to be acquired or to be removed. Although Mr. Justice Brennan in *Island Trees* made some vague allusions to the advice of experts,[40] school officials have a nondelegable responsibility analogous to the obligations of judges to make their own decisions. They may consider the advice of experts, but ultimately the decision must be that of the officers who have been elected or appointed for such purposes. Thus, the plurality recognized and approved a duty on the part of school board members to make content determinations based upon the social and educational values which they seek to impart. At the same time, however, the plurality required that such officials abjure any intention of suppressing ideas, even ideas which they consider unsuitable for children of school age. A mere statement of this proposition discloses the impossibility of its application.

Let us suppose that a school committee seeks to elevate the literary tastes of junior high school students and therefore stocks the shelves of a school library solely with the works of novelists of the English Romantic and Victorian periods. All twentieth century works are excluded therefrom, save those selected by a panel of experts and approved by the committee as being illustrative of preeminent excellence in the use of language. Let us further suppose that no detective novels, adventure stories, or science fiction novels are permitted unless they meet the foregoing criteria. All of these would be content-based determinations, but with no motivation to suppress political ideas or to cast a pall of orthodoxy, except on the basis of educational suitability. Would such a determination meet the somewhat delphic requirements of the plurality? It is difficult indeed to predict, but a good guess might be that those federal district courts interpreting the *Island Trees* case might feel impelled to substitute their judgment for that of the school board and, after a lengthy trial, might further feel impelled to make their own book selections. One may question whether such a result is a significant improvement over the choices that would be made by the local school authorities. This type of benevolent despotism by the judiciary, whether state or federal, can only succeed in confusing and irritating both local authorities and their con-

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[34] *Id.* at 2832

[35] Providence Journal Bulletin, Aug. 14, 1982, at A-3, col. 1.

[36] 393 U.S. 503 (1969).

[37] *Id.* at 514.

[38] 319 U.S. 624 (1943).

[39] *Id.* at 642.

[40] 102 S. Ct. at 2811.

stituencies, without perceptibly furthering the underlying purposes of individual freedom of expression.

In January 1982, the United States District Court for the District of Maine entered a memorandum decision enjoining preliminarily a local school committee from banning a book entitled *364 Days* from the Woodland High School library.[41] The book is described in the decision as containing "coarse language consisting principally of expletives devoid of prurient connotation." In a footnote, the trial judge suggests that "the word," an Anglo-Saxon "f" word, immediately became the focal concern in the "dirty word' debate over the appropriateness of retaining the book in the school library. A number of "s" words, "p" words and "b" words, as counsel referred to them, as well as profane uses of "Jesus Christ" and "God," were likewise cited as objectionable. Although these words were of such a quality that the district court judge did not choose to spell them out fully in his decision, he found explicitly and implicitly that the removal of this book from a school library impinged upon significant first amendment interests and should be enjoined. His opinion might be summed up accordingly: "The important principles of federalism, soundly approached, do not require that federal courts cede their constitutional role to local school boards."[42] The judge, unlike some members of the *Island Trees* Court, did not seem to be troubled by the school committees' ceding to the federal courts their role in education. The decision to prohibit the ban was based upon the usual grounds of overbreadth and inadequacy of procedural safeguards applied in the making of the school board's determination. It might be regarded almost as a postulate that local school boards in New England, as elsewhere, are not likely to have the sophistication to apply procedural safeguards and explain their decisions consistent with standards normally acceptable and applied in judicial proceedings.

On March 8, 1983, *Scheck v Baileyville School Committee* was dismissed with prejudice upon the filing of a stipulation of settlement and dismissal. The terms of the stipulation provide that the book entitled *365 Days* by Ronald Glasser shall remain within the woodland High School Library. The stipulation further provides for a fairly complex set of regulations governing the committee's Challenged Materials Policy. Generally, the stipulation provides for a review committee which shall be appointed at the start of each school year. The review committee and its activities are to be monitored by a professor at the University of Maine who will serve for a period of seven years from the date of the stipulation and will oversee the implementation of the policy involving any future challenges to a library resource. A parent may restrict a minor child from reading or viewing any specific library resource to be utilized as an extracurricular activity. However, this restriction may be overridden by the committee "when it appears that the parental permission at issue may violate State or Federal law." The provisions of the stipulation shall prevail wherever there is an inconsistency between the provisions of the stipulation and the school committee's Contested Materials Policy. In order to achieve this somewhat ambiguous result, the school committee was required to pay plaintiffs' counsel fees and expenses in the amount of $14,000 in addition to its own legal expenses. One wonders whether the Baileyville School Committee will be able to carry out its responsibilities concerning library materials selection more efficiently as a result of this judicial intervention.

It is unclear whether this exercise of benevolent despotism will ultimately be beneficial either to the federal judicial system or to the thousands of school districts throughout this land where local officials are struggling to elevate tastes and to develop a vocabulary which may express ideas with more precision and accuracy than would be accomplished by easy resort to profanity, vulgarity and the ubiquitous four-letter Anglo-Saxon words. The Supreme Court has often spoken eloquently of the chilling effect of governmental regulation upon first amendment rights and, therefore, requires a precision of regulation that avoids the discouragement of protected activities.[43] One might suggest that the Court consider the chilling effect of abstruse and arcane mandates to legitimate state and local governmental authorities which may prevent them from carrying out the very tasks which the Court recognizes as basic to their purpose.

### III. Regulation of the Practice of Law: Attorney Advertising

Historically the practice of the law has been governed by state authorities under the ultimate guidance of the highest court of the state. Accordingly, controls over solicitation and advertising by attorneys have long been subject to the states' oversight.[44] In the 1977 landmark case of

[41] Sheck v. Baileyville School Committee, 530 F. Supp. 679 (D. Me. 1982) (Mem.).

[42] *Id.* at 693.

[43] See, e.g., Blount v. Rizzi, 400 U.S. 410, 417 (1971); Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1966); NAACP v. Button, 371 U.S. 415, 433 (1963); Speiser v. Randall, 357 U.S. 513, 525 (1958).

[44] Bates v. State Bar of Arizona, 433 U.S. 350, 362 (1977).



for an investigation and report, or the Judicial Council is proceeding to hold an inquiry in respect of a judge, the Judicial Council or the Chief Judge may suspend the judge pending the result of the investigation or inquiry, as the case may be.

(4) Where a complaint in respect of the Chief Judge has been referred under subsection (2) for an investigation and report, or the Judicial Council is proceeding to hold an inquiry in respect of the Chief Judge, the Judicial Council may suspend the Chief Judge pending the result of the investigation or inquiry, as the case may be.

(5) Notwithstanding subsection (3), the Chief Judge may suspend a judge where the Chief Judge believes immediate action is necessary.

(6) Within ten days of suspending a judge under subsection (5), the Chief Judge shall request the Judicial COuncil to investigate the circumstances giving rise to the suspension and to take the appropriate action.

(7) The Chief Judge or a judge suspended under this section shall receive his salary while suspended unless otherwise recommended by the Judicial Council.

**INQUIRY BY JUDICIAL COUNCIL**

10 (1) Notwithstanding any other provisions of this Act where the Judicial Council receives a complaint from the Minister alleging that the Chief Judge or a judge, or from the Chief Judge alleging that a judge, has acted in a manner which constitutes a breach of the good behaviour condition under which he holds office or by reason of infirmity is incapable of performing his or her judicial duties, it shall hold an inquiry.

(2) Where the Judicial Council receives a report on a complaint referred under subsection 9(2) for an investigation and report, it shall, upon receiving the report, consider the report and;

(a) if under consideration of the report, a majority of the members of the Council consider the complaint to be frivolous, vexatious or unfounded, or to have been resolved in a manner satisfactory to the Council, it may dismiss the complaint accordingly; or

(b) it may decide to proceed to hold an inquiry in respect of the complalint.

**NOTICE BY JUDICIAL COUNCIL**

11 Where the Judicial Council proceeds to hold an inquiry into a complaint, it shall give, or cause to be given, to the judge in respect of whom the inquiry is to be made at least 30 days' notice in writing stating;

(a) particulars of the complaint; and

(b) the date, time and place of the inquiry.

**REPRESENTATION BY LEGAL COUNSEL FOR MINISTER AND JUDICIAL COUNCIL AND PROCEDURE FOR OFFERING EVIDENCE BY CHIEF JUDGE OR JUDGE.**

12 (1) Where the Minister makes a complaint under subsection 10(1) he may appoint legal counsel to act on his behalf and to appear and present evidence at the inquiry.

(2) The Judicial Council may engage services of such persons as it seems necessary for carrying out its duties, and also the services of legal counsel to aid and assist it in the conduct of any inquiry relating to a complaint hereunder.

(3) The Chief Judge or a judge in respect of whom the Judicial Council is holding an inquiry shall be afforded an opportunity by himself or his counsel of being heard thereat, of cross-examining witnesses and of adducing evidence on his own behalf.

**FILING OF JUDICIAL COUNCIL REPORT**

13 The Council, after an inquiry under section 10 has been completed, shall where the subject of the inquiry was a judge, report its conclusions and submit the record of the inquiry to the Governor in Council, the Chief Judge and the judge in respect of whom the inquiry has been held and shall, where the subject of the inquiry was the Chief Judge, report its conclusions and submit the record of the inquiry to the Governor in Council and the Chief Judge.

**ORDERS OF JUDICIAL COUNCIL**

14 (1) On the conclusion of the inquiry the Judicial Council may, where it finds the Chief Judge or a judge acted in a manner which constituted a breach of the

(3) A judge acting in any capacity described in sub-section (2) above, when so authorized, shall not accept any salary, fee, remuneration, or other emolument other than reasonable travelling or other expenses incurred by him or her while acting in such capacity.

**RETIREMENT.**

5 (1) Every Provincial Court Judge shall retire upon attaining the age of sixty-five years.

(2) Notwithstanding sub-section (1), a judge who has attained the age of retirement under sub-section (1) may, upon his or her request with the annual approval of the Chief Judge of the Provincial Court and upon such terms and conditions as the Chief Judge of the Provincial Court may direct, continue in office as a full-time or a part-time Provincial Court Judge until he or she has attained the age of seventy years.

(3) Retirement age shall not be altered for Provincial Court Judges in office without their consent.

(4) A judge may at any time resign his or her office by delivering to the Minister a Notice in writing signed by him or her.

**ESTABLISHMENT OF JUDICIAL COUNCIL**

6 (1) A Judicial Council is hereby established for the purpose of this Act.

(2) The member of the Judicial Council shall be not less than seven in number and shall be appointed by the Provincial Legislatures recognizing the unique circumstances of the individual provinces.

(3) Where the Judicial Council is investigating a matter in relation to, or on behalf of any Chief Judge of the Provincial Court, that Chief Judge shall not sit as a member of the Judicial Council in determining the matter but there shall be an interim member appointed by the Chairman to continue the inquiry.

(4) The Governor in Council may authorize payment to Council members who are not judges of an allowance for their duties on the Council in an amount he or she considers appropriate.

(5) A majority of the members of the Judicial Council constitutes a quorum and is sufficient for the exercise of all the jurisdiction and powers of the Judicial Council.

**FUNCTIONS OF JUDICIAL COUNCIL.**

7 (1) The functions of the Judicial Council are:

(a) to consider all proposed appointments of Provincial Court Judges and make a report thereon to the Minister;

(b) receive and, where necessary, investigate complaints against a judge or the Chief Judge;

(c) review and report upon any matter referred to it by the Minister;

(d) consider and make recommendations for the improvement of the quality of the judicial services of the court;

(e) preparation and revision in consultation with the judges, of a code of ethics for the judiciary;

(f) receive and, where necessary, investigate complaints made to it by a judge relating to the judge's judicial duties and to make such recommendations to the Minister or the Chief Judge as it deems appropriate.

**COMPLAINTS RESPECTING CHIEF JUDGE OR A JUDGE**

8 (1) A complaint respecting the Chief Judge or a judge shall be made to the Chairman of the Judicial Council in writing in such form and in such manner as the Judicial Council may require.

(2) A person who has made a complaint under subsection (1) may, with the consent of the Judicial Council, withdraw the complaint.

**COMPLAINTS TO JUDICIAL COUNCIL**

9 (1) Where the Judicial Council receives a complaint that a majority of the members thereof considers to be frivolous or vexatious, it shall dismiss the complaint and advise the complainant accordingly.

(2) Where the Judicial Council receives a complaint that it does not dismiss under subsection (1), it may refer the complaint to any person who the Judicial Council deems fit for an investigation and report.

(3) Where a complaint in respect of a judge has been referred under subsection (2)



*Bates v State Bar of Arizona*,[45] the Supreme Court cited with approval the position which it took in *Goldfarb v. Virginia State Bar*.[46] "The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been officers of the courts."[47] Nevertheless, pursuant to the extension of first amendment protection to commercial speech,[48] the Bates Court held that the first amendment barred the State Bar of Arizona and the Arizona Supreme Court from completely prohibiting advertising by attorneys.[49] The Court thus voided the application of a state disciplinary rule, modeled upon the American Bar Association's Code of Ethics, that prohibited the appellants Bates and O'Steen from advertising the price of routine services performed by their legal clinics. Yet, in delivering this prohibition against the State Bar of Arizona and its supreme court, the Court used cautionary language which tended to narrow the sweep of its decision: "In holding that advertising by attorneys may not by subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way."[50] The Court expanded its reference to regulation by stating that false, deceptive or misleading advertising is subject to restraint, that advertising claims as to the quality of services may be inherently misleading, that there might be restraints on inperson solicitation and that there may be "reasonable restrictions on the time, place and manner of advertising."[51]

Chief Justice Burger and Justices Powell, Stewart and Rehnquist dissented from this first amendment ban upon the prohibition of advertising of fees for routine services. Perhaps the views of the dissenters were most succinctly expressed by the opinion of Justice Powell when he observed:

> Although the Court appears to note some reservations ..., it is clear that within undefined limits today's decision will effect profound changes in the practice of law viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective states to oversee the regulation of the profession have been weakened. Although the Court's opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to the advertising of undefined "routine legal services." In my view this result is neither required by the First Amendment, nor in the public interest.[52]

Later in his dissenting opinion Justice Powell noted that restrictions as to the time, place and manner of advertising for professional services should have a significantly broader reach than would be appropriate to standardized products dealt with in other commercial speech cases. Nevertheless, he asserted that the constitutionalizing of price advertising was likely to give rise to significant problems, pointing out the difficulties of governing the advertising efforts of 400,000 lawyers throughout the nation and warning that the bar might be incapable of effectively policing this activity.[53]

It did not take long before exacerbation of relationships between federal and state courts based upon the asserted right to advertise began to surface. The Supreme Court of Virginia had already been sued by the Consumers Union of the United States for refusing to allow lawyers to provide fee information for its legal directory.[54] After its opinion in *Bates v. State Bar of Arizona*, the United States Supreme Court vacated the judgment of a three-judge district court which had held for the consumer group and remanded the case for further consideration in light of *Bates*.[55] Upon reconsideration, the three-judge panel found Virginia's disciplinary rule unconstitutional on its face and permanently enjoined the defendants from enforcing it.[56]

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[45] 433 U S. 350 (1977).

[46] 421 U.S. 773 (1975).

[47] *Id.* at 792.

[48] Virginia State Bd. Pharmacy v. Virginia Citizens Consumer council, 425 U.S. 748, 765 (1976).

[49] 433 U.S. at 384.

[50] *Id.* at 383.

[51] *Id.* at 384.

[52] *Id.* at 389 (Powell, J., concurring and dissenting).

[53] *Id.* at 396.

[54] Consumers Union of United States, Inc. v. American Bar Ass'n, 427 F. Supp. 506 (E.D. Va. 1976). In accordance with the American Bar Association Model Rules from which it had been derived, disciplinary rule 2-102(A)(6) of the Virginia Code of Professional Responsibility completely banned advertising by lawyers. *Id.* at 510-11. Consumers organizations sought declaratory and injunctive relief, challenging the constitutionality of the prohibition on first amendment grounds. *Id.* at 508-09. A three-judge panel of the federal district court held for the consumers group. *Id.* at 523. The ABA petitioned the United States Supreme Court for review. Consumers Union of United States, Inc. v. American Bar Ass'n, 433 U.S. 917, 917 (1977).

[55] Consumers Union of United States, Inc. v. American Bar Ass'n, 433 U.S. 917, 917 (1977).

[56] *Id.*

In the course of this litigation the consumer group was given declaratory and injunctive relief as well as the award of counsel fees against all defendants, including the state supreme court members in their official capacities.[57] Upon appeal to the United States Supreme Court, a unanimous opinion written by Justice White was issued holding that the members of the Supreme Court of Virginia were immune from suit in their legislative (rule making) and judicial capacities but that they were not immune from suit in their enforcement capacity.[58] The Court found that it was an abuse of discretion for the district court to award counsel fees against the Supreme Court of Virginia for its failure to amend the rules relating to advertising, since that was a penalty imposed for an action within the court's rule-making or legislative function.[59] Justice White suggested, however, that if the district court had held that the Virginia court acted in its enforcement role, the award of counsel fees would not have been a violation of either judicial or legislative immunity.

Consequently, the signal went forth that state courts which in their enforcement capacities, purported to regulate attorney advertising, might be subjected to injunctive and declaratory relief as well as liability for substantial counsel fees in civil rights actions brought pursuant to section 1983 of Title 42 of the United States Code. Moreover, as Justice White suggested in *Consumers Union*, although judges defending against section 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities,[60] the Court had never held that judicial immunity insulates judges from declaratory or injunctive relief with respect to their judicial acts.[61]

In any event, the rationale of the *Consumers Union* case combined with the language of section 1983 placed state supreme courts in a most difficult position. If a court continued to attempt to regulate advertising by attorneys within the perceived constraints of *Bates v. State Bar of Arizona*, that court risked being hailed before a single federal district judge (or under certain circumstances a three-judge court), as defendants subject to possible injunction and liability for substantial counsel fees. Probably no status could be more demeaning to a state court of last resort than subjecting itself to this kind of rough review process after attempting to resolve highly debatable issues with something far less than clear guidance from the United States Supreme Court. Nevertheless, some of the courts tried.

Following *Bates*, the Supreme Court of Rhode Island amended its disciplinary rules (which like those of Virginia and most other states were based upon the American Bar Association's Model Code) and adopted a provisional rule which regulated advertising by attorneys in accordance with the *Bates* limitations as the Rhode Island court perceived them to be.[62] This rule permitted the advertising of routine services by attorneys and, as modified in 1979, also permitted, with some restrictions, advertising over radio and television. While this rule was in force, the court's disciplinary board filed a report with the court charging a local law firm with a violation of the rule because it had utilized the inside back cover of a telephone directory to advertise its services.[63] In addition, the board noted that the advertisement listed approximately thirteen areas of the law in which the firm was prepared to render legal services. The disciplinary board charged that such a listing implied claims of expertise and specialization in those areas and was thus a violation of the rule's prohibition against advertising claims of expertise.[64] The Rhode Island Supreme Court initially dismissed the petition for disciplinary action but directed the law firm to discontinue the advertisement at the earliest possible moment.[65] Soon thereafter, the law firm sought a reconsideration of the order; briefs were filed and counsel for both the board and the law firm appeared before the court in chambers.[66] The Rhode Island court issued an opinion in which it held that advertising by attorneys was limited to that section of the yellow pages which carries the designation "Lawyers." Justice Kelleher on the court's behalf expressed the following rationale for this determination:

> We believe that the Supreme Court, in recognizing an attorney's First Amendment right

[57] *Id.* at 1058, 1063.

[58] Supreme Court of Va. v. Consumers Union of United States, Inc., 446 U.S. 719, 738 (1980).

[59] *Id.*

[60] *Id.* at 735: see Stump v. Sparkman, 435 U.S. 349, 359-60, 364 (1978); Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

[61] Supreme Court of Va. v. Consumers Union of United States, Inc., 446 U.S. at 738-39.

[62] Carter v. Lovett & Linder, Ltd., 425 A.2nd 1244, 1245 (R.I. 1981). Provincial Order No. 11 of the Rhode Island Supreme Court Rules was adopted on January 12, 1978, and modified on October 26, 1979, to permit advertising by radio and television with restrictions. *Id.*

[63] *Id.* Provisional Order No. 11 restricted advertisement to specific media, one such restriction being the yellow pages of the telephone directories. *Id.*

[64] *Id.* at 1246.

[65] *Id.* at 1245.

[66] *Id.*



# Model Act (Provincial Court)

**INTERPRETATION.**

In this Act,

(a) "Clerk" means a Chief Clerk, a clerk, or deputy clerk of the Provincial Court and includes a clerk acting under the provisions of the *Criminal Code of Canada* and *The Young Offenders Act of Canada;*

(b) "Judge" means a judge of the Provincial Court appointed under this Act and includes a Chief Judge, associate Chief Judge and assistant Chief Judge;

(c) "Chief Judge" means the judge appointed under this Act as the Chief Judge of the Provincial Court;

(d) "Judicial Council" means the Judicial Council for the Judges of the Provincial Court;

(e) "Provincial Court" means the Provincial Court of a province and includes the Territorial Courts;

(f) "Minister" means the Minister of Justice or the Attorney General and where the Minister of Justice and Attorney general for the Province exist coincidentally means both.

**APPOINTMENT OF JUDGES**

1 (1) The Lieutenant Governor in Council on the recommendation of the Minister, may appoint such Provincial Court Judges as are considered necessary.

(2) No person shall be appointed as a Provincial Court Judge unless he or she has been a member in good standing of the Bar of one of the provinces of Canada for at least ten years.

(3) No person shall be recommended by the Minister for appointment as a Provincial Court Judge unless the Judicial Council has first made a favourable report thereon.

(4) No person shall be recommended by the Judicial Council to be a judge of the Provincial Court until one year has passed since holding political office in either a Federal Parliament or a Provincial Legislature.

**HOLDING OFFICE DURING GOOD BEHAVIOUR**

2 A Provincial Court Judge shall hold office during good behaviour.

**DESIGNATION OF CHIEF JUDGE AND ASSISTANT CHIEF JUDGE**

3 (1) The Lieutenant Governor in Council shall designate one Provincial Court Judge to be Chief Judge;

(2) The Chief Judge:

(a) shall have general supervision and direction over the sittings of the Provincial Court, including the assignments of the judicial duties of the court;

(b) shall have charge at all times of the general policy of the Provincial Court in judicial matters;

(c) shall, without restricting the generality of the above, co-ordinate, apportion and administer the work of the judges who, subject to the provisions of this Act, shall comply with such orders and directions.

(3) The Lieutenant Governor in Council may designate one or more Provincial Court Judges as Assistant Chief Judges to perform those functions that are delegated them by the Chief Judge of the Provincial Court.

**EXTRAJUDICIAL APPOINTMENTS**

4 (1) A Provincial Court Judge shall devote his or her whole time to the performance of his or her duties as a judge, except as authorized by sub-section (2) hereof.

(2) No Provincial Court Judge shall Act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceedings or engage in any other extrajudicial functions unless same has first been approved by the Chief Judge of the provincial Court.

are pending in Congress many pieces of legislation and constitutional amendments which seek to limit the Court's power of control over such emotionally charged issues as school prayer, abortion, and even criminal procedure. The Court's tendency, previously manifested by the benevolent despots, to exercise authority over a profusion of questionable functions with less than consummate skill and effectiveness, risks those functions which a court may perform better than any other agency — the power to guarantee rights of the individual in instances where the rightness of their cause is scarcely debatable.[138] This peril was foreseen by Mr. Justice Frankfurter more than thirty years ago when he observed:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.[139]

Another very wise and perceptive member of the Court, Justice Robert Jackson, expressed similar sentiments prior to ascending to the Bench:

> It is precisely because I value the role that the judiciary performs in the peaceful ordering of our society that I deprecate the ill-starred adventures of the judiciary that have recurringly jeopardized its essential usefulness ... by impairing its own prestige through risking it in the field of policy, it may impair its ability to defend our liberties.[140]

At some point in the development of consitutional adjudication it should be recognized that there is more to freedom than the protection of crime-prone, aberrant and misanthropic members of society. In extending the mantle of constitutional immunity to pornographers and other purveyors of the vulgar and profane, significant disadvantages may be visited upon the quality of life of the majority of our citizens. A most important freedom, upon which American institutions were largely based, is the right of people to govern themselves through their popularly elected representatives. This right has been badly impaired in the last twenty years, often for reasons of highly debatable quality. In the long run, the freedom of the majority may be ignored only at the peril of government. Even though the popular will may be considered ill-advised, the benevolent despots found to their frustration and discomfort it would not be overcome even by autocratic power.

In reviewing the Supreme Court's somewhat doubtful knight errantry in the field of book banning, constitutionalizing professional advertising, and its record in controlling or not controlling obscenity, it is far from evident that local or state authorities could not have struck as adequate, if not a superior, balance between liberty and license. The strength of the Court lies solely in its wisdom. Its wisdom rests largely in its restraint.

[138] *See, e.g.*, Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (vitality of constitutional principles must not yield because they are unpopular); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (segregation of schools on basis of race constitutes denial of equal protection of laws).

When the Court in these cases prohibited racial segregation in the schools, it took an action which state authorities and the other branches of the federal government had consistently refused to take for nearly a century. It is true that a great segment of public opinion in the southern and border states was opposed to the Court's courageous decision. In this instance, there was a sufficient quantum of basic human rights and liberties at stake in order to justify this confrontation. Conversely, it is highly questionable that the first amendment incremental benefits to be derived from the Court's protection of pornographic materials and professional advertising are worthy of shattering the edifice of prior regulatory structures erected by agencies such as the Congress, state legislatures and state courts.

[139] Dennis v. United States, 341 U.S. 494, 525 (1951).

[140] R. Jackson, The Struggle for Judicial Supremacy 322-24 (1941).



> to advertise, never intended to sanction a competitive struggle over which attorney or law firm would receive the advertising industry's accolade for having the biggest, best, and in the case at bar, most colorful ad in the category reserved for the legal profession.[67]

To give the law firm the benefit of any doubt as to any lack of precision in the language of Provinsional Rule No.1 in respect to advertising within the yellow pages, no sanction was imposed. The court went on to hold, however, that the specification of thirteen areas of the law in which the firm was prepared to render service contained an implied suggestion of expertise which, in the absence of any specialization certification in Rhode Island, was not permitted under the provisional order. The law firm brought suit in the United States District Court for the District of Rhode Island on behalf of its members and other attorneys similarly situated.[68] The action was certified as a class action consisting of "all lawyers and law firms within the State of Rhode Island, who are presently publishing, who have contracted to publish and/or in the future intended to publish advertisements which list areas of law in which the lawyers and/or law firms practice."[69]

The federal district judge, as required by section 1983 of Title 42 of the United States Code, exercised his independent judgment to determine whether defendants, including the members of the Supreme Court of Rhode Island, had deprived the plaintiffs of their rights under the first amendment as construed in *Bates v. State Bar of Arizona*.[70] He concluded that a limitation of attorney advertising to the lawyers section of the yellow pages was unduly restrictive and that avoidance of a "competitive struggle over which attorney or law firm would receive the advertising industry's accolade for having the biggest, best, and most colorful ad" was an insufficient basis for such a restriction.[71] In so holding, he cited *Metromedia, Inc. v. City of San Diego*.[72] In that case a city ordinance permitted on-site commercial advertising by sellers of products and services, but prohibited, with certain specified exceptions, other commercial advertising and noncommercial communications using fixed-structure signs.[73] The Supreme Court held that this prohibition was unconstitutional on its face because it preferred certain types of commercial speech over noncommercial speech.[74] The applicability of this case to lawyer advertising is somewhat obscure. Although the Rhode Island federal district judge held that confining lawyer advertisements to a single location of the yellow pages was an improper restriction upon commercial free speech, he disclaimed in a footnote any inference that lawyers' offices might henceforth be permissibly designated by flashing neon signs or rotating beacons.[75] Finally, the district court judge agreed with the Rhode Island Supreme Court that the listing of thirteen areas of the law in which services would be rendered by the law firm was a suggestion of expertise and, therefore, inherently misleading.[76] As a potential solution he proposed a process for certification of specialities, a matter then under consideration by the Rhode Island court.

Both plaintiffs and defendants appealed to the Court of Appeals for the First Circuit.[77] While the appeal was pending, the Supreme Court decided *In re R__ M. J__*,[78] in which it determined, in an opinion by Mr. Justice Powell, that listing the areas of law practice was not implicitly deceptive, without more, and that only advertising which is inherently misleading or that has been proven to be misleading may be prohibited or restricted.[79] Faced with this apparent grave narrowing of the areas of regulation allowed under first amendment restrictions, the Supreme Court of Rhode island made an orderly but nearly total retreat. After an analysis of the opinion in *In re R__ M. J__*, Provisional Order No. 11 was suspended and the court promulgated Provinsional Order No. 17, which purports to prohibit only advertising "that is deceptive, fraudulent, or mis-

[67] *Id.*

[68] See Lovett & Linder, Ltd. v. Carter, 523 F. Supp. 903, 904 (D.R.I. 1981).

[69] *Id.* Pursuant to the Rhode Island Supreme Court's directive in Carter v. Lovett & Linder, Ltd. 425 A.2nd 1044 (R.I., 1982), the plaintiff discontinued advertising on the back cover of the local yellow pages. *Id.* at 904. In the 1981 yellow pages directories plaintiffs published a similar half page notice in the "Lawyers" section, but the notice contained a sentence which disclaimed any expertise or specialization. *Id.*

[70] *Id.* at 910; see Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

[71] 523 F. Supp. at 910.

[72] 453 U.S. 490 (1981).

[73] *Id.* at 495-96.

[74] *Id.* at 521.

[75] 523 F. Supp. at 910 n.3.

[76] *Id.* at 911

[77] Lovett & Linder, Ltd. v. Carter, Nos. 81-1830, 81-1831 (D.R.I. June 3, 1982) (Memorandum vacating and remanding, and order dismissing as moot).

[78] 102 S Ct. 929 (1982).

[79] *Id.* at 937. The Court also observed: "There may be other substantial state interests as well that will support carefully drawn restrictions." *Id.* at 938. However, in the murky context of the entire opinion, it would be very difficult to conceive of what those substantial interests might be.

leading."[80] As a result of these actions by the Rhode Island Supreme court, the Court of Appeals entered an order vacating the judgment of the district court and remanding the case to that court with directions to dismiss it as moot.[81] This holding was without prejudice to the plaintiffs' right to seek costs and attorneys fees pursuant to section 1988 of title 42 of the United States Code.[82].

Although the federal district court and the Court of Appeals for the First Circuit treated the Rhode Island Supreme Court with due consideration in light of principles of comity, the damage to the prestige of the highest court of a state by being brought before a single federal district judge as defendants to relitigate a conscientious determination of highly debatable issues is incalculable. The inevitable result of such occurrences will be to discourage state courts from regulating lawyer advertising even in instances where deception and fraud are suspected. Indeed, it is conceivable that deceptive trade practices among attorneys will be prosecuted solely under general state laws without reference to the disciplinary procedures normally invoked in respect to members of the Bar.[83] In any event, under the present constraints, the highest court of a state will act at its peril in regulating advertising by attorneys — especially if its rules or statutory authority may be interpreted as giving that court the right to act in an enforcement capacity. Such centalization of authority in the federal courts coupled with sanctions for error to be imposed upon the regulatory court or agency would be worthy of benevolent despotism at its best.

In his dissent in *Bates v. State Bar of Arizona* Justice Powell observed that "the Court's imposition of hard and fast constitutional rules as to price advertising [forecloses] ... [o]ne of the great virtues of Federalism ... the opportunity it affords for experimentation and innovation, with freedom to discard or amend that which proves unsuccessful or detrimental to the public good."[84] It is interesting to note that the author of these words of wisdom is also the author of the opinion in *In re R__ M. J__*. It is also ironic that a former president of the American Bar Association should sound the death knell of professional restraint in advertising by lawyers.[85]

## IV. The Regulation of Obscenity

During much of the nineteenth century and the early decades of the twentieth century, obscenity and explicit and pornographic materials were intensively regulated or forbidden by state and federal governments. Nevertheless, a flourishing current of ideas crowned by literary efforts, scientific discoveries, and economic and social developments were characteristics of this period. In recent years, however, the quality of life has drastically changed in the United States. Explicit sexual portrayals assault our senses in every conceivable milieu. R-rated movies and X-rated movies are found everywhere. Even television, particularly cable and pay TV, project into the American living room sexual adventures which many find patently offensive during that period normally devoted to family viewing.

One might almost compare the desert of tasteless motion picture and television entertainment as analogous to the operation of Gresham's Law in economics. According to Gresham's Law bad money drives good money out of the market. By the same token, it has become the fashion in American entertainment to substitute explicit sex, shocking violence or a combination of the two for imagination, plot, ingenuity, and style. Whether one stands at Times Square in New York or on Main Street in a typical American city, the assault upon one's senses develops nostalgic memories of a more elegant, if more inhibited period. What, if anything, has this to do with the first amendment and the central control of the Supreme Court of the United States?

Interestingly enough, the central control of obscenity by the Supreme Court began on a note which denied first amendment protection to materials defined as obscene. In *Roth v. United States*,[86] Mr. Justice Brennan, speaking for a majority of the Court, held that neither the first nor the fourteenth amendments to the United States constitution protected obscenity against federal or state regulation or prohibition. In making this determination the Court, as it necessarily was required to do, gave for the first time a national authoritative definition of the term: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or

[80] Lovett & Linder, Ltd. v. Carter, Nos. 81-1830, 81-1831 (D.R.I. June 3, 1982) (memorandum vacating and remanding, and order dismissing as moot).

[81] *Id.*

[82] *Id.* This attempt to regulate lawyer advertising cost the state of Rhode Island $13,000 in fees paid to plaintiff's counsel.

[83] *See, e.g.*, R.I. Gen. Laws § 6-13.1 (1969 Reenactment) (may exempt legal services under provisions of § 6-13.1-4 which purports to exempt transactions regulated under laws administered by "other regulatory body or officer").

[84] 433 U.S. at 403 (Powell, J., concurring in part and dissenting in part).

[85] In light of *In re R__ M. J__*, does Judge Boyle's comment about neon signs or rotating beacons have any persuasive force?

[86] 354 U.S. 476 (1957).

[87] *Id.* at 487 n.20 (quoting and adopting definition of abscenity set forth in Model Penal Code).



> tolerates much wider authority and discretion in the States to control the dissemination of obscene materials than it does in the Federal Government. Reiterating the viewpoint that I have expressed in earlier opinions, I would limit federal control of obscene materials to those which all would recognize as what has been called "hard core pornography," and would withhold the federal judicial hand from interfering with state determinations except in instances where the state action clearly appears to be but the product of prudish overzealousness. And in the juvenile field I think that the Constitution is still more tolerant of state policy and its applications. If current doctrinaire views as to the reach of the First Amendment into state affairs are thought to stand in the way of such a functional approach. I would revert to basic constitutional concepts that until recent times have been recognized and respected as the fundamental genius of our federal system, namely the acceptance of wide state autonomy in local affairs.[129]

Although the Court has attempted in *Miller* and *Ferber* to give the states somewhat more freedom in determining standards, it is still engaged in an attempt to fill all state and local authorities into a Procrustean bed, the dimensions of which even the Court itself has failed to prescribe.

## V. Conclusion

Perhaps the most magnificent hallmark of American constitutional government is the doctrine of supremacy of law. This doctrine has clothed the Supreme Court of the United States with unquestioned power to make final constitutional adjudications affecting the federal, executive and legislative branches of government. From *Marbury v. Madison*[130] to *United States v. Nixon*,[131] this doctrine of ultimate judicial power has been accepted even under the most trying circumstances. Consider the strength of a constitutional tribunal which successfully declared that the President of the United States, Commander in Chief of the Armed Forces, head of the executive branch of government — including the appointing authority of all federal marshals who enforce court decisions, must comply with an order of a court to turn over tapes to a trial court, even though both he and the Court knew that this compliance would bring about his political ruin. When in the prior history of the world has such a powerful official (who was not known for his self-immolation or altruism) subjected himself to an institution whose only power was in its judgment? Not since the Holy Roman Emperor, Henry IV, came to Canossa as a penitent and humbled himself before Pope Gregory VII in 1076 has such a display of power based upon other than military force been witnessed.[132]

The difficulty with power, however, is its tendency to create adverse reactions in those over whom it is exercised. It is precisely for this reason that the framers of our federal Constitution attempted to utilize the system of checks and balances to guarantee that no branch of the central government would acquire or exercise absolute power. In this article, I have only attempted to analyze the results of the Supreme Court's exercise of ultimate authority in three areas of first amendment supervision.

Similar analyses can be made in the area of criminal law wherein the Court has created, since *Mapp v. Ohio*,[133] a national constitutionally-imposed system of criminal procedure.[134] By virtue of the selective incorporation process the court exercises suzerainty over virtually every aspect of state, as well as federal, criminal process. Moreover, the Court has constitutionalized elections in the several states;[135] it has constitutionalized the law of libel and slander, to the discomfort of public officials and public figures;[136] and it has elevated freedom of the press above national security save in the most limited and compelling of circumstances.[137]

Taking into account the unquestioned historical fact that the American people and their leaders in 1787 and 1791 rejected a strong central monarchial government and even an omnipotent parliament, one should not wonder that there

[129] *Id.* at 707-08 (Harlan, J., concurring and dissenting) (citations omitted.).

[130] 1 Cranch 137 (1803).

[131] 418 U.S. 683 (1974).

[132] Heer, *supra* note 10, 58-59

[133] 367 U.S. 643 (1961).

[134] In *Mapp v. Ohio* the Court adopted an exclusionary rule which prohibited the admission of any evidence obtained in violation of the fourth amendment prohibition of unreasonable searches and seizures. *Id.* at 646-47. Two years later in Ker v. California, 374 U.S. 23 (1963), the Court determined that standards applicable to state and federal searches and seizures would be identical. *Id.* at 33. This holding was buttressed in respect to searches pursuant to warrants in Aguilar v. Texas, 378 U.S. 108, 110,115-16 (1964). Consequently, the criminal procedure of each state is controlled by interpretations of constitutional requirements emanating from the Supreme Court of the United States. for example, recently in Payton v. New York, 445 U.S. 573 (1980), the Court found invalid a statutory rule allowing a warrantless entry into a dwelling house to effectuate an arrest based upon probable cause, although the Court conceded that twenty-eight states had such a rule and that common law commentators such as Blackstone and Coke were in disagreement about the legality of such warrantless arrests. *Id.* at 589-90, 598-99.

[135] *See* Reynolds v. Sims, 377 U.S. 533, 557-58 (1964); Baker v. Carr, 369 U.S. 186, 201 (1962).

[136] *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 152-55 (1967); New York Times v. Sullivan, 376 U.S. 254, 279-83 (1964).

[137] *See* New York Times Co. v. United Staes, 403 U.s. 713, 726-27 (1971).

of Appeals was understandably concerned that some protected expression, ranging from medical text books to pictorials in National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.[122]

The Court then applied the rule established in *Broadrick v. Oklahoma*,[123] that one to whom a statute is constitutionally applied may not challenge that statute even though it may conceivably be unconstitutionally applied to others in situations not before the Court.[124] As the New York Court of Appeals had pointed out, however, the New York regulation was aimed at pure speech and portrayal and not conduct-related regulation as was the statute in question in *Broadrick*. Thus, in respect to child pornography at least, the overbreadth doctrine was severely restricted to reach a result which appeared appropriate to all of the Justices. All members of the *Ferber* Court concurred in the result.[126] Justices Brennan and Marshall were not willing to accept the majority's assertion, however, that the value of serious contributions to art and literature depicting sexual conduct by children is de minimis.[126] Nevertheless, all concurred that the *Ferber* depictions could appropriately be forbidden by the New York statute.

Perhaps the very necessity to promulgate a special rule to prohibit and protect against portrayal of masturbation, bestiality and sexual conduct by children is eloquent testimony of the protection given by judicial decisions to broad areas of portrayals that might under earlier standards, including the *Roth* standard, have been unprotected by the first amendment. An examination of the Court's performance since 1954 discloses a shocking lack of collegiality in dealing with the control over state and local regulation of pornography. Having constitutionalized and gathered unto itself the ultimate authority over this subject matter, the Court proceeded to pile confusion upon confusion. Ultimately, it became necessary to restate the standards in *Miller* and then redefine them in *Ferber* to give states the freedom to control child pornography more effectively than general pornography.

In so doing, the Court has probably outraged public opinion and has created this aspect of the first amendment in a new image and likeness. This creation would have shocked James Madison and his fellow framers of the Bill of Rights and has developed contours and formations quite beyond the recognition of those worthy gentlemen of the Age of Enlightenment.[127] It was an attribute of benevolent despots that they were unable to achieve their goals because of the inability of one central body to contain and manifest perfect wisdom and persuasive powers. Although at first blush it may appear that the Supreme Court of the United States is far removed from the benevolent despots of the eighteenth century, it has attempted to exercise largely absolute authority in many areas of government heretofore placed in the hands of state authorities and other branches of the federal government.

Perhaps the most practical suggestion made to the Supreme court concerning the different interests of the federal and state governments in the control of pornography and obscenity was made by Justice Harlan in his concurring and dissenting opinion in *Inter-state Circuit v. Dallas.*[128] Justice Harland first observed that an examination of the Court's decisions on obscenity since *Roth* could produce in the examiner only a sense of utter bewilderment. he further pointed out that the Court had expended an inordinate amount of time and effort perusing and passing upon pornographic material, which he characterized as "miserable stuff," for the rather doubtful purpose of second guessing prior determinations by state courts. This time and effort, he asserted, was ill spent in view of the fact that no substantial free-speech interests were really at stake if one concedes that obscenity may be controlled or prohibited. He then presented a formula designed to lead the Court from the current state of bewildering chaos:

> I believe that no improvement in this chaotic state of affairs is likely to come until it is recognized that this whole problem is primarily one of state concern, and that the Constitution

[122] 102 S. Ct. at 3363.

[123] 413 U.S. 601 (1973).

[124] 102 S. Ct. at 3660.

[125] *Id.* at 3364-65. Justices Brennan and Marshall filed separate opinions as did Justices Stevens and O'Connor. *Id.* Justice Blackmun merely concurred in the result. *Id.* at 3364.

[126] *Id.* at 3365 (Brennan, Marshall, JJ., concurring).

[127] See L. Levy, Legacy of Suppression 34 (1960).

[128] 390 U.S. 676 (1968).



excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters ..."[87] Although this definition seemed reasonable and even workable, the consensus which produced a majority began gradually to disintegrate. In less than a decade the Court was unable to muster a majority to support a redefinition of obscenity in *Memoirs v. Massachusetts*.[88] The new definition, adopted by a plurality, stated:

> [A]s elaborated in subsequent cases, three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[89]

The plurality opinion thus required that a book must be found utterly without redeeming social value to be condemned as obscene.

At the time of *Memoirs*, the Justices of the Supreme Court might be characterized in terms of their obscenity opinions in the following manner. Justices Black and Douglas asserted consistently that neither state nor federal governments had the power to regulate any sexually oriented matter on the ground of obscenity;[90] Mr. Justice Harlan believed that the federal government could only control distribution of "hard core" pronography but that the states had more latitude under rationally established criteria to ban material which treated sex in a fundamentally offensive manner;[91] Mr. Justice Stewart regarded "hard core" pornography as the only type of obscenity which was subject to proscription by either state or federal law. In a concurring opinion in *Jacobellis v. Ohio*,[92] Justice Stewart made the oft quoted statement: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it ..."[93] In the same case, Mr. Justice Brennan, joined by Mr. Justice Goldberg, suggested that the limits of candor of expression must be determined by a national standard.[94] Chief Justice Warren, with whom Mr. Justice Clark joined in dissenting observed that "there is no provable 'national standard' and perhaps there should be none."[95] Instead, he asserted, obscenity should be defined by reference to community standards. Justice White concurred only in the judgment.[96] Thus, by the time of *Memoirs v. Massachusetts*, only three Justices (Justice Brennan, Chief Justice Warren and Justice Fortas) were prepared to support the new definition.

So complete was the philosophic disarray of the nine Justices that it was necessary to adopt an unprecendented ad hoc technique in determining obscenity cases. In *Redrup v. New York*,[97] the Court in a per curiam opinion reversed convictions for dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene. In addition to *Redrup*, thirty-one other cases were disposed of in this fashion.[98] In this context of confusion and ambiguity, the Supreme Court again attempted to meet the challenge of what Mr. Justice Harlan had called the "intractable obscenity problem."[99]

In *Miller v. California*,[100] the Court formulated yet another definition of the term "obscene," reaffirming the principles of *Roth* but rejecting the third element of the three-pronged test of *Memoirs*. This new formulation was expressed as follows:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. We do not adopt as a con-

[88] 383 U.S. 413 (1966).

[89] *Id.* at 418.

[90] *See, e.g.*, Ginsburg v. United States, 383 U.S. 463, 476, 482 (1966) (Black, Douglas, JJ., dissenting); Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (Black, J., concurring); Roth V. United States, 354 U.S. 476, 508 (1957) (Douglas, J., dissenting).

[91] Jacobellis v. Ohio, 378 U.S. 184, 203 (1964) (Harlan, J., dissenting).

[92] 378 U.S. 184 (1964).

[93] *Id.* at 197.

[94] *Id.* at 195.

[95] *Id.* at 200.

[96] *Id.* at 196.

[97] 386 U.S. 767 (1967).

[98] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83 n.8 (1973) (citing the 31 cases).

[99] Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harland, J., concurring and dissenting).

[100] 413 U.S. 15 (1973).

stitutional standard the " 'utterly without redeeming social value'; " test of *Memoirs v. Massachusetts*; that concept has never commanded the adherence of more than three Justices at one time. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.[101]

The Court furnished two examples of what a state statute could define for regulation under part (b) of the standard: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[102] The Court also adopted a community standard for determining obscenity. Chief Justice Burger observed in writing for the Court: "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact."[103] But by 1973, many of the states had already been "chilled" to the point where they had largely abandoned any attempt to regulate obscenity. For example, the Rhode Island Supreme Court in *In re Seven Magazines*[104] adopted the national standards espoused by Mr. Justice Brennan, and attempted to compare a series of magazines which had been found obscene by a justice of the superior court with the books and depictions which had been summarily found not obscene in a series of ad hoc determinations by the Supreme Court of the United States.[105] The court stated: "The question for us is not whether the magazines and the photographs are inexcusably vulgar, filthy, revolting and disgusting — and that they are in our judgment — but whether they are obscene in the constitutional sense as defined by the United States Supreme Court."[106] The Supreme Court of Rhode Island found that these materials did not constitute hard core pornography and, therefore, it was necessary to have expert testimony to establish the obscenity.

In all likelihood, the opinion of the Supreme Court of Rhode Island might have been different under the new standards promulgated in *Miller v. California*.[107] In *Miller* The Court had recognized that there was no national standard and further that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine and Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."[108] The United States Supreme Court suggested in *Paris Adult Theatre I v. Slaton*[109] that it was not necessary to require expert evidence that the materials were obscene when the materials themselves were placed in evidence. The Court went on in a footnote to state:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand ... No such explanation is needed by jurors in obscenity cases; indeed, "the expert witness" practices employed in these cases have often been made a mockery out of the otherwise sound concept of expert testimony.[110]

The reconstruction of community standards and the notion that hard core pornography may speak for itself came after many state courts had been given conflicting and contrary guidance, or lack thereof, from prior cases. In *Paris Adult Theatre I*, for example, a trial judge in Georgia, even though he assumed that the obscenity of the materials at issue had been established, was of the opinion that showing obscene materials

[101] *Id.* at 24-25 (citations omitted).

[102] *Id.* at 25.

[103] *Id.* at 31-32.

[104] 107 R.I. 540, 268 A.2d 707 (1970).

[105] *Id.* at 543-44, 268 A.2d at 709-11. These magazines were described in the opinion as of three separate types. Candy, commonly known as a "girlie magazine," contains pictures of nude or scantily clad women so posed as to focus on the pubic area or the breasts; Big Boys displays frontal views of nude or semi-nude males with emphasis on the penis; and Jaybird Happenings and Naked Nuts contain photographs of mixed groups of either nude or partially clad males and females posed so as to draw attention to their genitalia. In some instances the sexual organs of the male and female are in close proximity to each other, and at other times the penis is in close juxtaposition to the breasts of the female. Other than the captions accompanying the photographs, there was little textual material. Id at 542, 268 A. 2nd at 708.

[106] *Id.*

[107] 413 U.S. 15 (1973).

[108] *Id.* at 32.

[109] 413 U.S. 49 (1973).

[110] *Id.* at 56 n.6.



in adult theatres from which minors were excluded was constitutionally permissible.[111] The Supreme Court of Georgia unanimously reversed and the case was remanded by the United States Supreme Court for reevaluation in light of the new standards set forth in *Miller*.[112] Justice Douglas, however, dissented in *Paris* on his usual grounds. Justice Brennan, joined by Justices Stewart and Marshall, dissented on the theory that a definition of obscenity in terms of physical conduct, in light of the Court's prior opinions, cannot provide sufficient clarity to afford fair notice and avoid a chill on protected expression.[113] Therefore, Justice Brennan asserted, both state and federal governments were prevented by the first amendment from suppressing even obscene sexually oriented materials in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults. In effect, save for very limited areas, he would have precluded suppression of obscenity.

Nevertheless, the clarification contained in *Miller* served as an invitation to many states to reassess their attempts to control or regulate pornography. To this end, thirty-seven states and the District of Columbia either legislatively or judicially incorporated the *Miller* test for obscenity.[114] It must be noted, however, that in the interim between the ad hoc adjudication of the *Redrup* period and the reestablishment of a majority in *Miller*, community standards of candor had significantly changed. That which would have been patently offensive in 1954 might not be so determined subsequent to 1973. The bombardment of largely unregulated pornography had to some extent done its work in dulling the senses of local communities to its impact.

An example of heightened sensitivity to first amendment protections and lessening sensitivity to pornography is the recent case of *New York v. Ferber*.[115] Many purveyors of pornography searching for new ways to titillate the prurient interests of their customers have specialized in a new form of "art," emphasizing pornographic activities by children. Many states, in reliance upon the compelling interest of government in the protection of youth, have attempted to prohibit and apply criminal sanctions to the distribution of child pornography, whether or not the conduct depicted meets the *Miller* definition of obscenity.[116] Additionally, fifteen states prohibit the dissemination of such material if it meets the definition of obscenity.[117] In the *Ferber* case, New York purported, by virtue of section 263.15 of its Penal Code, to make punishable as a class C felony the use of a child in a sexual performance. The statute prohibited any performance which includes sexual conduct by a child less than sixteen years of age and defined sexual conduct as: "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals."[118] Depiction or portrayal of conduct within the foregoing definition of child pornography was forbidden and punishable as a crime whether or not such activity met the definition of obscenity.

The New York Court of Appeals determined that the New York statute was overbroad in that it might include depictions in medical books and other educational publications.[119] Although the material disseminated by Ferber was clearly the sort that a legislature could constitutionally prohibit, the New York Court of Appeals allowed Ferber's overbreadth challenge recognizing the first amendment exception to the standing doctrine established by the Supreme Court that allows one to challenge an overly broad statute even if the conduct of the person making the attack is clearly unprotected.[120] Moreover, the court held that the statute was underinclusive since it failed to protect child employees from engaging in other types of acts which the New York legislature has found to be dangerous to their welfare.[121]

In responding to the overbreadth challenge, the Supreme Court asserted that the statute in question was not substantially overbroad and stated:

> While the reach of the statute is directed at the hard core of child pornography, the Court

[111] *Id.* at 57.

[112] *Id.* at 70.

[113] *Id.* at 101 (Brennan, J., dissenting).

[114] *See* New York v. Ferber, 102 S. Ct. 3348, 3354 n.7 (1982) (listing jurisdictions which have adopted Miller test).

[115] 102 S. Ct. 3348 (1982).

[116] *Id.* at 3351.

[117] *Id.* at 3351 n.2.

[118] *Id.* at 3351 (quoting N.Y. Penal Law § 263.15 (McKinney 1977).

[119] People v. Ferber, 52 N.Y. 2d 674, 681, 422 N.E.2d 523, 526 (1981).

[120] *Id.* at 676, 422 N.E. 2d at 524; *see, e.g.*, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980); Gooding v. Wilson, 405 U.S. 518, 521 (1972); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

[121] 52 N.Y.2d at 680-81, 422 N.E. 2d at 526; see also Eronznik v. City of Jacksonville, 422 U.S. 205, 212-14 (1975) (ordinance making it a public nuisnace for drive-in movies to show films containing nude scenes when scenes visible from public streets not a permissible exercise of police power for protection of children).