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Leo Kanowitz

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LOVE LUST IN NEW MEXICO AND THE EMERGING LAW OF OBSCENITY*

LEO KANOWITZ†

In mid-March, 1969, Lionel Williams, a black teaching assistant in the University of New Mexico's English department, distributed to his two freshman English classes copies of six poems by the San Francisco poetess, Lenore Kandel. Williams told his students that the poems would be discussed at a later date. One of the poems, "Love Lust," dealt with the theme of oral-genital sex. Reflecting certain tendencies in modern poetry, Miss Kandel had rejected the use of elaborate metaphor and imagery in "Love Lust." The poem was therefore straightforward in delineating its theme, and employed several four-letter words in common usage to describe the male and female sex organs and the sexual practices that it treated.

The students in Lionel Williams' classes were by no means unprepared for that kind of poetry. At the beginning of the semester, Williams had announced that the course would deal with the literary expression of various aspects of lust—including greed, hate and power. The classes had first covered a number of uncontroversial works like Shakespeare's *King Lear*, an example of the blinding effect of lust for power. But later, they had read and discussed a variety of modern works. Among them were the collection of night-club routines entitled *The Essential Lenny Bruce*, the novel *Another Country*, by James Baldwin, and the play *The Dutchman*, by Leroi Jones.

The words in Lenore Kandel's "Love Lust" and the sexual practices it described had therefore been previously encountered by the classes in many of the works assigned for reading and discussion earlier in the semester. Most of the students had also at one time or another read similar matter in paperback books purchased at corner drugstores or supermarkets. And many were then reading outside class, the nation's number one bestseller, Philip Roth's *Portnoy's Complaint*, which, in its treatment of the sex theme, made "Love Lust" look rather pale.

Moreover, Williams had told his students on the first day of class that some of the works that would be studied in the course dealt with such themes as oral sex and often employed "four-letter words" in doing so. He had suggested that if anyone in the class felt he or

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† Professor, University of New Mexico School of Law.

she would have difficulty coping with such materials, they were free to transfer to another section of the course without penalty. Since there were about 75 sections of the course, Williams did not expect any difficulty in accommodating any students who wanted to transfer. In fact, several students transferred out of the class during the first week, but the overwhelming majority of them stayed.

It is not surprising, therefore, that though some students in Williams' classes were heard to murmur as they browsed through Lenore Kandel's poetry when it was distributed, none seemed to be greatly agitated at receiving the poems or by the announcement that they would be discussing them in later class sessions.

In marked contrast to this relatively calm reception of the "Love Lust" poem by Lionel Williams' students at the university was the hysterical outcry at the news of its distribution that was soon to erupt from thousands of other New Mexicans, including many of the state's public officials. Lionel Williams' casual distribution of these six poems in the classroom was to produce a series of shock waves in the state of New Mexico that continue to be felt as of this writing (January, 1970), and whose ultimate effects are still not discernible. Those shock waves have shaken the political, educational, moral and aesthetic assumptions of all New Mexicans, and have focused the state's attention upon the age-old conflict between town and gown.

Elsewhere I have given a detailed account of the Love Lust controversy in New Mexico.¹ Among other matters, that account treats of the intervention in the case by the Legislature and Governor of the State of New Mexico, and the relationship between Lionel Williams, Kenneth Pollack (another English department teaching assistant, also accused of alleged misdeeds, whose case was heard along with Williams' by a four-man special university advisory committee appointed by Ferrel Heady, President of the University of New Mexico) and their students. The account deals with the response of the community outside the university and that of the faculty, students and administrators at UNM itself, the ensuing legislative investigation of the state universities, the proposed "remedial" legislation, and the implications of the controversy for the general state of civil liberties in New Mexico and for the role of the universities in modern American society.

The present article, based on one of the chapters of that account, deals primarily with some of the legal aspects of the poem controversy. Specifically, the present subject is the relationship between

1. See note • *supra*.

that controversy and the emerging law of obscenity as developed by recent United States Supreme Court decisions in that area.

My own interest in this matter, aside from my general concern with the problem of the Bill of Rights as a law professor at the University of New Mexico, stemmed from my appointment as academic counsel for Lionel Williams and Kenneth Pollack to assist them in the hearing before the ad hoc advisory committee. That hearing lasted five days and several nights and resulted in a recommendation that the two teaching assistants be immediately reinstated to their classroom positions. After a delay of several days, during which the faculty of the Department of English promulgated specific rules governing the supervision of teaching assistants in that department—all of which rules had been previously accepted by Lionel Williams and Kenneth Pollack in discussions with the ad hoc advisory committee—President Heady accepted the recommendation of his committee and reinstated the pair. But before that had occurred, much else had taken place.

In the first few days and weeks following Lionel Williams' assignment of the Kandel poems, events unfolded at a rapid rate. By mid-April, the office of David Cargo, Governor of New Mexico, reported that over 10,000 letters on the poem had already been received from all parts of the state, and that the overwhelming majority opposed its use in the classroom and called for Williams' and Pollack's punishment. President Heady's office was the scene of continual conferences with community delegations, composed of businessmen, church groups and service organizations demanding disciplinary action against the two teaching assistants. On March 28th, an Albuquerque insurance executive and former director of the United States Chamber of Commerce reportedly told Heady: "If Williams had passed this kind of filth out to my daughter I don't think we would have to worry about Lionel Williams today."²

(Having just completed my book, *Women and the Law: The Unfinished Revolution*,³ which criticized sex-based discrimination in American law, I was continually struck by the insistence of outraged parents and community leaders upon the need to protect the innocence, if not ignorance, of their daughters, but never of their sons.)

On March 28, a noon rally was held on the campus mall in front of the student union building. The rally was attended by over 2,000 people, including Governor Cargo, who said that teachers ought to be able to teach in their classrooms without legislative interference, but decried the use of the Kandel poems. Cargo, present while "Love

2. Albuquerque Journal, Mar. 29, 1969, at A-6, col. 4.

3. L. Kanowitz, *Women and The Law: The Unfinished Revolution* (1969).

Lust" was read aloud to the assembled crowd, registered his displeasure at the event.

In a few short days after the story first broke, however, two related events occurred that were soon to end up in the federal and state courts of New Mexico. David Oliphant, an English instructor at New Mexico Junior College in Hobbs, New Mexico, wrote a letter to a Hobbs newspaper criticizing the legislature's decision to investigate the state universities as a result of the "Love Lust" poem incident. Specifically, Oliphant's letter had stated in part, "what is far the worst proof of idiocy is the legislature's proposal to spend \$50,000 to investigate the matter."⁴ Several days after the letter's publication, officials of New Mexico Junior College suspended Oliphant from his teaching position.

The second event took place in Albuquerque. Soon after the poem incident, Philip Mayne, owner and operator of the "Yale Street Grasshopper" bookstore near the UNM campus, was arrested. Mayne was charged with violating the city's obscenity ordinance for selling Lenore Kandel's *Word Alchemy*, the book containing "Love Lust."⁵ Not unexpectedly, customer demands for the book had risen sharply in the first few days of the controversy and Mayne had been enjoying a land office business in their sale.

Mayne's arrest was only one in a series of incidents that caused me to ponder the relationship between the use of the Kandel poem in the university's classrooms and the law of obscenity as it had evolved in the decisions of the United States Supreme Court over a number of years. Soon after the controversy broke, I heard that the Kandel book had been the subject of an obscenity prosecution in San Francisco, and that there had been a judicial determination that it was not, legally, "obscene." Checking that story out, I telephoned staff counsel for the Northern California chapter of the ACLU (American Civil Liberties Union) who had represented a book seller prosecuted for selling Lenore Kandel's *The Love Book*, an earlier volume of poetry, and not the one from which "Love Lust" poem had been taken. Unfortunately, I learned from him that the bookseller had been found guilty at the end of a six-week hearing, although the conviction was being appealed.

The news of the California trial was disappointing. True, an earlier judicial determination that Miss Kandel's book was "obscene" did not necessarily hurt our case. For one thing, it involved another book and another series of poems than those involved at

4. Albuquerque Journal, Mar. 29, 1969, at A-6, col. 1-2.

5. New Mexico Lobo, Mar. 31, 1969, at 1, col. 1.

UNM. For another, there were important factual distinctions between selling the book to the public at large and examining a poem in the privacy of a university classroom. And finally, there was the possibility that the lower court conviction in California would be reversed on appeal. But I still regretted the California result. Though a judicial holding that another work by Lenore Kandel was legally obscene would not necessarily hurt our situation at UNM, a determination that it was *not* obscene would have been very useful.

The law of obscenity is essentially a branch of American constitutional law. Though I did not teach that subject (my primary course assignments at the law school were in labor law, family law and federal jurisdiction), I had more than a casual interest in the field. In a way, every law teacher and most attorneys have a special interest in the field of constitutional law. Not only is it a basic field of law, but the decisions of the United States Supreme Court in this area are widely reported by the commercial press and often have a profound impact on the daily lives of us all. For these reasons, I had regularly kept up with most Supreme Court decisions as they were published, including many in the obscenity area.

The Supreme Court's performance in this field was, in my opinion, unsatisfactory. Over the years the Court had attempted to develop a test for deciding whether particular literary products were or were not protected by the free speech and free press guarantees of the U.S. Constitution's First Amendment (as a restraint on federal power) and Fourteenth Amendment (as a restraint on the power of the states). But the ultimate test, I believed, was impractical and unworkable, and would eventually have to be abandoned.

The classic statement of the legal test of obscenity is found in the Court's 1957 decision in *Roth v. United States*.⁶ In that case, the Court for the first time squarely held that "obscenity" was utterance outside "the area of protected speech and press,"⁷ while noting that earlier opinions of the Court had "assumed" that such matter was not so protected. Piecing together various pronouncements of the Court in *Roth* (more properly called *Roth-Alberts* because the decision also disposed of another case, *Alberts v. California*), the following definition of constitutionally unprotected obscenity emerged from that decision:

Obscenity exists if "to the average person, applying contemporary community standards, the dominant theme of the material taken as

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

7. *Id.* at 485.

a whole appeals to prurient interest"⁸ and is "utterly without redeeming social importance."⁹

Individual portions of that definition have been severely criticized by legal commentators. Difficult questions have been raised about the meaning of "average person;" about ascertaining what are "contemporary community standards;" about determining when the appeal to "prurient interest" (whatever that might mean) is a "dominant" rather than a subsidiary theme of the work in question; and whether the stimulation of sexual excitement may not itself be of "redeeming social importance."

But the most difficult part of the Court's obscenity definition in *Roth-Alberts* is that it appears to fly in the face of the First Amendment to the United States Constitution prohibiting federal interference with "freedom of speech" and "freedom of the press." Nowhere does the constitution limit such protection to only "clean" speech or "nonobscene" speech or speech that does not "offend" the community. Indeed, this was essentially the point stressed by Justices Douglas and Black in their vigorous dissent in *Roth-Alberts*.¹⁰

But aside from the questions about the constitutional soundness of the obscenity definition in *Roth-Alberts*, there is the additional problem raised by the meaning of that definition. Stripped of its rhetoric, the *Roth* definition appears to signify merely that a work will be legally obscene if the triers of fact—the jury or the judge—decide that in their opinion it is obscene. The fact of the matter is that obscenity is probably one of those concepts inherently incapable of meaningful definition. Justice Stewart suggested as much in his concurring opinion in the *Jacobellis* case, *infra* wherein, commenting upon the Court's opinion in *Roth-Alberts*, he observed that in those cases, the Court "was faced with the task of trying to define what may be indefinable."¹¹ In the same case, Chief Justice Warren, who has been more prone to uphold obscenity convictions than his fellow Justices, also conceded the difficulties in trying to develop a satisfactory definition of obscenity.

My own view is that attempts to compromise the absolute command of the First Amendment as applied to so-called obscenity renders the Amendment meaningless in that area. That, I believe, is the essential difficulty in the Court's effort to deal with allegedly

8. *Id.* at 488.

9. *Id.* at 484.

10. *Id.* at 511-12.

11. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

obscene speech, writing or artistic representation. I also believe that it will ultimately lead to an abandonment of that unworkable standard and a resurrection of the First Amendment to its rightful place in our constitutional scheme. Indeed, the Supreme Court's most recent pronouncement in the 1969 decision of *Stanley v. Georgia*,¹² which is discussed below, suggests very strongly that this may very well happen in the not too distant future.

But before examining the implications of *Stanley v. Georgia*, one should note the essential legal problem in determining whether what appears to be the absolute command of the First Amendment's free speech guarantee may be breached under any circumstances. The fact is that despite the apparent absoluteness of that command, governmental infringement of the right to speak has been recognized and accepted in a number of ways. The classic example, that a person is not permitted falsely to cry "Fire!" in a crowded theatre, suggests that important countervailing interests—in this case public safety—may sometimes permit a state to punish people for the words they speak. The law of defamation, under which persons may be punished criminally or held liable in a civil action for uttering untrue statements about another that injure the latter's reputation, is another example. The interest people have in the purity of their reputations is apparently regarded as socially more important than the constitutionally guaranteed right of free speech—although Justice Black, for one, has consistently asserted that even defamation actions are precluded by the free speech guarantees of the First Amendment.¹³

These examples suggest that if serious social harm can be discerned as emanating from the fact of speech itself, it may be curbed by either the state or federal governments. But when it comes to so-called obscenity, considerable difference of scientific opinion exists as to whether *any* social harm is caused by its publication. Indeed, a persuasive argument can be made that, rather than harming society, the dissemination of "pornographic" or "obscene" materials has the salutary effect of promoting peace and order in society. The recent Danish experience is a case in point. Progressively, Denmark has lifted all restraints on the publication and dissemination of "pornographic" writings, and now movies as well. Rather than leading to an increase in anti-social sexual behavior, liberalization of the restrictions on pornography has been followed by a dramatic decrease

12. 394 U.S. 557 (1969).

13. *New York Times v. Sullivan*, 376 U.S. 254, 293 (1963) (Black, J. concurring); see also H. Black, *A Constitutional Faith* 48-49 (1968).

in the rate of sex crimes and other sex-related anti-social conduct in that country.¹⁴ While at first, relaxation of governmental restrictions led to a marked increase in the sale and distribution of pornography, Danish booksellers soon found that they had large supplies of such material on their hands with few interested buyers. Once the "forbidden fruit" aura had been removed from these publications, Danes simply lost interest in reading them.

Whether reading of pornography can lead to social harm is at least debatable. At the same time, some scientists do believe that reading such literature can produce ill effects.¹⁵ Given this difference of informed opinion, many states have resolved it by imposing restrictions upon the publication, distribution, and sale of "obscene" matter. Even Justice Harlan, who dissented in the *Alberts* case on the ground that the federal government's power to restrict obscenity was more limited than the states', approved the state restrictions in *Roth* for the following rather interesting reasons:

There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree. Clearly it is not our function to decide this question. That function belongs to the state legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce to a type of sexual conduct which a State may deem obnoxious to the moral fabric of society. In fact the very division of opinion on the subject counsels us to respect the choice made by the State.¹⁶

The difficulty with this analysis is its acceptance of an any-rational-basis test for measuring the constitutionality of a state's infringement of *the basic civil right* of free speech. For in a long series of cases interpreting the due process and equal protection clauses of the United States Constitution, the Court has sharply distinguished between the power of the states to curb merely general economic

14. United Press International has reported that, over-all, Danish sex crimes in 1969 dropped 31 per cent from 1968 figures. *Albuquerque Journal*, Jan. 5, 1970, at A-9, col. 1. But police authorities in Copenhagen insist that serious sex crimes—rape and sexual assault—remained at the 1968 level, with the decline coming in such offenses as public indecency, voyeurism, male prostitution and the sale of pornographic material. *Id.*

15. For a general criticism of such conclusions, see Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 *Minn. L. Rev.* 1009, 1034-35 (1962).

16. *Roth v. United States*, 354 U.S. 476, 501-02 (1957).

activities, on the one hand, and what it has described as "basic civil rights," on the other.¹⁷

Infringements of the first type of activity have been upheld if a state could demonstrate any "rational basis" for doing so, though the members of the Court might personally disagree with the state's determination. To infringe a "basic civil right," without violating the federal constitution, however, the states have had to show more than a mere rational basis for their action. In such cases, they have had to demonstrate that there were *overwhelming* or *compelling* reasons for their legislation.¹⁸ Given the profound differences of opinion among psychiatrists and other scientific experts over the possible relationships between pornography and criminality or other anti-social behavior,¹⁹ and since the right to free speech is as basic as any of the other rights of citizenship in the states and nation, the Court's determination that the states may constitutionally restrict such writings appear to fly in the face of principles that it has enunciated in other areas.

Since the *Roth-Albert* decision, the Court has had several other occasions to consider the law of pornography. In 1959, the Court reviewed a conviction of a California bookseller under an ordinance imposing a strict criminal liability because he possessed a book found to be obscene, even though he had no knowledge of the book's contents. In that case, *Smith v. California*,²⁰ the Court, speaking through Justice Harlan, held that

By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . .²¹

In 1964, the Court decided the important case of *Jacobellis v. Ohio*.²² Although six of the Justices concurred in reversing an Ohio

17. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967).

18. See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

19. See Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009 *passim* (1962).

20. 361 U.S. 147 (1959).

21. *Id.* at 153.

22. 378 U.S. 184 (1964).

court's conviction of the manager of a movie theater, there was no majority opinion. Justice White concurred without an opinion and Justices Black and Douglas concurred on their familiar ground that the First and Fourteenth Amendments prohibit censorship for obscenity. However, under the principal opinion, written by Justice Brennan and joined by Justice Goldberg, several clarifying suggestions were made about the law of obscenity. The most important suggestion, for present purposes, was that efforts to weigh the social importance of challenged material against its prurient appeal were based on an erroneous view of the obscenity test. The *Roth-Alberts* formula, emphasizing that obscenity must be "utterly without redeeming social importance" to be stripped of constitutional protection, meant, in those Justices' opinion that if it contained *any* redeeming social importance, the challenged material could not be constitutionally censored. In Mr. Justice Brennan's words, "the constitutional status of the material [may not] be made to turn on a 'weighing' of its social importance against its prurient appeal for a work cannot be proscribed unless it is 'utterly' without social importance."²³

In 1966, the Supreme Court added a new dimension to the law of pornography. That year, in the case of *Ginzburg v. United States*,²⁴ a conviction of a publisher under a federal obscenity statute was upheld. Apparently conceding that the materials sent out by this publisher were themselves protected by the First Amendment, the Court nevertheless found Ginzburg to have violated the federal statute because of elements of "commercial exploitation," "pandering," and attempts at "titillation" in advertising efforts aimed at promoting the sale of those materials. Thus the motives and business activities of defendants in obscenity proceedings were suddenly made relevant factors on the issue of guilt or innocence.

Many other refinements were made in the law of obscenity by the Court's decisions in the last few years. In 1968, the Court held that a state may constitutionally prohibit the sale to minors of material defined to be obscene on the basis of its appeal to them, whether or not it would be obscene to adults.²⁵

But in 1969, almost at the moment that the State of New Mexico was being racked by the Love Lust controversy, the United States Supreme Court decided a case whose logical implications would not only have disposed of the Williams-Pollack cases, but would also

23. *Id.* at 191.

24. 383 U.S. 463 (1966).

25. *Ginsberg v. State*, 390 U.S. 629 (1968).

restore the free speech protection of the First Amendment to much of the challenged material previously held by the Court to be obscene. That case was *Stanley v. Georgia*.²⁶

Robert Eli Stanley was suspected by Georgia law enforcement officials of having engaged in illegal bookmaking activities. They procured a valid warrant to search Stanley's home, hoping to uncover bookmaking paraphernalia. Although finding very little sign of bookmaking activity, federal and state agents discovered three reels of film while looking through a drawer in an upstairs bedroom. Concluding that the films were obscene after viewing them, the state officers seized the films and later procured an indictment of Stanley for "knowingly hav(ing) possession of obscene matter" in violation of Georgia law.²⁷

On appeal, the United States Supreme Court reversed Mr. Stanley's conviction. "[M]ere private possession of obscene matter," stated the Court, "cannot constitutionally be made a crime."²⁸

Without purporting to overrule *Roth* and its progeny, the Court nevertheless asserted that the governmental interest in dealing with the problem of obscenity "cannot, in every context, be insulated from all constitutional protection."²⁹

In the words of Justice Marshall, speaking for the majority, the defendant was:

asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.³⁰

26. 394 U.S. 557 (1969).

27. *Id.* at 558.

28. *Id.* at 559.

29. *Id.* at 563.

30. *Id.* at 565.

Stated differently, no matter how obscene a book or film might be adjudged to be, the right to *acquire knowledge* is so sacrosanct that a state may not interfere with a person's pursuit of that knowledge in the privacy of his home.

There is another feature of the Court's opinion in *Stanley v. Georgia* that is also worth considering. Responding to Georgia's claimed right "to protect the individual's mind from the effects of obscenity," Justice Marshall first noted that this argument amounts to no more than insisting upon a right

to control the moral content of a person's thoughts . . . [a purpose] wholly inconsistent with the philosophy of the First Amendment. . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.³¹

Marshall then answered Georgia's argument that "exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence."³² There seems to be little basis for that assertion," said Marshall.

But more importantly, if the State is only concerned about literature inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . .'³³

Thus, the *possible* causative relationship between obscenity and antisocial behavior was insufficient to permit state infringement of the right to possess concededly obscene matter in the privacy of one's home. At the same time, the Court left open the possibility that that factor might justify a state's restrictions upon the commercial distribution of obscene matter, which might be subject to different objections—*e.g.*, that it might fall into the hands of children or "intrude upon the sensibilities or privacy of the general public."³⁴ For the latter proposition, Marshall cited the 1967 case of *Redrup v. New York*,³⁵ which was the name under which several cases were decided in one opinion. In *Redrup*, the Court intimated that people had a right to privacy that could be protected from

31. *Id.* at 565-66.

32. *Id.* at 566.

33. *Id.* at 566-67.

34. *Id.* at 567.

35. 386 U.S. 767 (1967).

publication of obscenity "in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."³⁶

Even if the *Redrup* principle applied to the "Love Lust" controversy, its test had been satisfied. For in both Lionel Williams' case and in that of Kenneth Pollack, students had been warned sufficiently in advance about the contents and style of the materials they would be reading. But the applicability of the *Redrup* principle to activities in a college or university classroom is open to question. The classroom differs from other public places. It plays a specific role in the pursuit of knowledge. Indeed, since the inviolability of the right to acquire knowledge, including knowledge of and about obscenity, is at the base of the Court's decision in *Stanley* that a state may not interfere with the possession of concededly obscene matter in the privacy of a person's home, then *a fortiori*, the university classroom, whose only reason for existence is to provide a place for the acquisition of knowledge, should be subject to the same protection. The Court has come close to saying that in a non-obscenity case decided that same year. In *Tinker v. Des Moines Independent Community School District*,³⁷ the Court stated,

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.³⁸

And elsewhere, the *Tinker* opinion contains language that is even more germane to the issues in the Williams-Pollack controversy:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. *In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.*³⁹ (Emphasis supplied.)

These were only some of the thoughts that occurred to me while

36. *Id.* at 769.

37. 393 U.S. 503 (1969).

38. *Id.* at 509.

39. *Id.* at 511.

reading the newspaper accounts of the *Stanley* decision in the midst of the poem controversy at UNM.

But the *Stanley* decision had even more far-reaching implications. If people may possess all manner of books, reading matter, and films in the privacy of their homes, then one would think that they would also have the right to *acquire* such materials in the first place. Besides writing one's own or occasionally receiving such materials as a gift, how else can one acquire them other than by purchase? If that is recognized, and unless the *Stanley* decision is itself overruled, the Court's earlier pronouncements on the right of state and federal governments to suppress the publication and dissemination of pornographic or obscene materials would appear to be headed for eventual overruling. Booksellers charged with knowingly selling obscene matter would be well advised to raise their purchasers' right to possess such material recognized in *Stanley*. To be sure, a bookseller might have some difficulties asserting the constitutional rights of someone not in the case, but those difficulties are not insurmountable. In *Griswold v. Connecticut*,⁴⁰ for example, the decision striking down a state's anti-contraception law, the defendant physician was permitted to raise the constitutional right of privacy of his patients that was infringed by the state statute as a defense to a charge of violating it. I would suggest that the relationship between a bookseller and a bookpurchaser is, for purposes of "standing," essentially similar to the relationship between the physician and his patient in the *Griswold* case.

If the Court should one day overrule its earlier decisions in the obscenity area, I will shed no tears. For along with many others, I support wholeheartedly the views expressed by Justice Stewart, dissenting in the 1966 *Ginzburg* decision:

Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself.⁴¹

40. 381 U.S. 479 (1965).

41. *Ginzburg v. United States*, 383 U.S. 463, 498 (1966) (Stewart, J. dissenting).