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Constitutional Law--The Problem with Obscenity

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Constitutional Law—The Problem With Obscenity

> There will always be battle in the area of free opinion; there always has been since Plato thought that Homer should be expurgated and said so. I believe in the constant workings of these jaws of natural censorship and am willing to work my own as a part of the process . . . . I know of no more important time for courageous good taste than when there is not much of it about. Liberty is easier to win than to deserve, and if it is treated as either a license or a vacuum, the police will come or the walls will fall.[1]

Restraints on freedom of thought and expression have long been regarded as fundamentally incompatible with the democratic ideal. However, even the most ardent supporter of a literal interpretation of the first amendment is willing to recognize the validity of certain restraints on freedom of expression.[2] Prior to 1957, such restraints were imposed upon "words which are likely to incite to a breach of the peace, or with sufficient probability tend either to the overthrow of the government by illegal means or to some other overt anti-social conduct."[3] In 1957, the area of restraint was enlarged to include that which tends to excite prurient interests, *i.e.*, the "obscene."[4]

In the United States today, no less than at other times and places, qualifications on freedom imposed in the name of public morals have come under heavy attack. Historically, morals are derived from mores — customs which are deemed essential to the well-being of the group. Their very elusiveness renders controversy inevitable. The resultant clashes are dramatically apparent in those instances where unconventional modes of expression collide with sexual censorship. In a society such as ours, where the law plays such an important role, it is only natural that the subject should be put to the test our system has adopted for the settlement of conflict.

The Law expresses the feelings of the community, and the community has expressed its disapproval of the "obscene." However, the Law, unlike the politician, cannot choose the middle road. It must either enter the field and attempt to affect it entirely, or choose not to enter. Once it has made the choice to enter, as it has done in the area of obscenity, the Law must establish certain minimums of conduct and maximums of control. Herein lies the problem, for the

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1. Statement by Judge Curtis Bok, for the American Library Association — American Book Publishers Counsel, Westchester Conference on the Freedom to Read, quoted in Larrabee, *The Cultural Context of Sex Censorship*, 20 L. & CONTEMP. PROB., 672, 688 n.73 (1955).

2. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Statement by Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919).

3. United States v. Roth, 237 F.2d 796, 802 (2d Cir. 1956) (concurring opinion).

4. Roth v. United States, 354 U.S. 476 (1957). This decision seems, for the present, to have put to rest any argument that obscenity was in the area of constitutionally protected speech or press and could be interfered with only when it created a clear and present danger to some interest which the state or federal government has a right to protect.

subject of obscenity is one of the most elusive and difficult concepts known to the law.

What is the Ultimate Purpose of the Obscenity Laws?

The evils aimed at by obscenity legislation, and by the courts in applying this legislation to literature, have seldom been clearly stated. For the most part, what is talked about is the effect that "obscene" literature has upon its readers. Often suggested is the offensive or shocking effect upon the reader;[5] however, more commonly mentioned is the danger of stimulating impure sexual thoughts or sexual conduct contrary to the laws or accepted moral standards of the community.[6] In addition to these supposed effects upon individuals, another evil has sometimes been mentioned — the danger that literature challenging the accepted moral standards of the community might actually bring about a change in the community standards.[7] Only slight consideration need be given to this "danger" since such a view is contrary to the very purpose for guaranteeing freedom of expression. A democratic society must be free to perfect its own standards of conduct and belief, and any risk which may possibly be involved does not justify censorship on such a basis.

Any harm which might come from offending or shocking the sensitive reader is also worth only slight consideration, since the harm which might result is only minor and is considerably outweighed by the value of free expression. Literature that might offend the sensitive seldom offends, for the sensitive seldom read such literature. Further, to those few readers who will be offended by what they read, the shock to their decency is usually very trivial. They might become embarassed or momentarily shocked and distressed, but any such reaction is usually of short duration and causes no serious harm.

It can thus be seen that the basic evil aimed at is either the danger of stimulating impure sexual thoughts or of stimulating sexual conduct contrary to the accepted moral standards of the community. There has been no real effort, however, to consider these two evils separately. As a result, much confusion exists as to the ultimate purpose of obscenity regulations. Is the mere stimulating of impure thoughts in the mind of the reader, without any risk that these thoughts will be translated into action inconsistent with moral stand-

5. See Besig v. United States, 208 F.2d 142 (9th Cir. 1953); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945).

6. These two quite different tests are often confused by the courts. See notes 25-29 *infra* and accompanying text.

7. See United States v. Bennett, 24 Fed. Cas. 1093 (No. 14,571) (C.C.S.D.N.Y. 1879); Commonwealth v. DeLacy, 271 Mass. 327, 171 N.E. 455 (1930); People v. Dial Press, Inc., 182 Misc. 416, 48 N.Y.S.2d 480 (Magis. Ct. 1944) (D. H. Lawrence's *The First Lady Chatterley*).

ards, in itself a sufficient evil to justify regulation? Or, is it the inconsistent conduct which we are attempting to prevent? The relative weight that should be given to each of these evils when thrown into balance against the loss to society from such regulation requires critical consideration. It is with an examination of these evils and some of the difficulties involved in proscribing what is termed "obscene," that this note is concerned.

INHERENT PROBLEMS IN OBSCENITY REGULATION

The Problem of Definition

The difficulties begin with the definition of the word "obscene." In most, if not all, of those states which have statutes relating to obscenity,[8] the term is defined by adding one or more of the following words: disgusting, filthy, indecent, immoral, impure, lascivious, lewd, licentious, and vulgar.[9] These words have no objective meaning.[10] Dictionaries often define them in terms of one another.[11] They achieve reality only "through assumed standards of social sexual behavior or assumed theories of cause-and-effect."[12] In practice, therefore, the only meaning any of these terms can have is that given them by the material so described. To this extent, the law of obscenity is the sum of the cases tried with respect to it. It is not until a particular book or other type of literature is declared by the courts to be "obscene" that one is able to define the definition, and then only as to a particular set of facts.

This case by case method of defining the "obscene" is not the only way of effecting sex censorship. Censorship can be accomplished through boycott or other forms of extralegal coercion.[13] If the method of defining the obscene seems illogical when done on a case by case method by the courts, it is even more illogical when done by these extralegal forces. To prove the point, the definition used by one local Detroit official was: "If I feel that I wouldn't want my thirteen-year-old daughter reading it, I decide it's illegal."[14] The

8. Only New Mexico and Alaska do not have such statutes.

9. See Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 MINN. L. REV. 295, 320 (1954).

10. "Few words are as fluid and vague in content as the six deadly adjectives — *obscene, lewd, lascivious, filthy, indecent,* and *disgusting* — which are the basis of censorship. No two persons agree on these definitions." ERNST & SEAGLE, TO THE PURE . . . A STUDY OF OBSCENITY AND THE CENSOR vii (1928).

11. Obscene — "impure, unchaste, indecent, lewd, offensive to senses, repulsive, disgusting, foul, filthy, calculated to corrupt. . . . " BLACK, LAW DICTIONARY (4th ed. 1957).

12. Larrabee, *The Cultural Context of Sex Censorship,* 20 L. & CONTEMP. PROB. 672, 674 (1955).

13. Examples are numerous. For a complete discussion of these extralegal forces see: Note, *Extralegal Censorship of Literature,* 33 N.Y.U.L. REV. 989 (1958); Lockhart & McClure, *Literature, The Law of Obscenity, and The Constitution,* 20 L. & CONTEMP. PROB. 587 (1955); Note, *Entertainment: Public Pressures and The Law,* 71 HARV. L. REV. 326 (1957).

14. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 77 (1956).

same official then added: "Mind you, I don't say it is illegal in fact. I merely say that in my opinion it would be violative of the law to distribute it. The distributors usually cooperate by withholding the book."[15]

Roth v. United States:[16] *The Most Recent Definition by the Supreme Court*

The *Roth* case seems to make two things clear: first, obscenity is not within the area of constitutionally protected free speech; and second, the test for judging obscenity is whether to the average person applying a community standard, the dominant theme of the publication taken as a whole, appeals to prurient interests. However, as clear as this pronouncement may seem to be, the Court has opened the door to more problems than it has solved. What is meant by the use of the words "prurient interest"? Has the Court adopted a test which intends to protect against sexual thoughts or desires alone, without any regard to inconsistent conduct? What is the "community standard" to be applied? Is it the standard of the community in which the literature was published, or is it some other community, and, if so, what is that other community?

It would appear from the test adopted in the *Roth* case, that the evil sought to be prevented by the regulation of "obscene" literature is that of stimulating impure thoughts, without any concern for conduct. The judge's charge in the *Roth* case was: "It must tend to stir sexual impulses and lead to sexually impure thoughts."[17] Thus, as construed by the Court, it would seem that the statute involved in the *Roth* case[18] provided criminal punishment for inducing no more than thoughts or desires, the ultimate effect of such regulations being to drastically curtail the protection of the first amendment. The creation of normal sexual desires is, in itself, neither immoral nor contrary to accepted sex standards.

Assuming that the test adopted in the *Roth* case is to protect the reader from such lustful thoughts alone, without any regard to the effect on conduct, is all literature which arouses such thoughts subject to regulation? In *Grove Press, Incorporated v. Christenberry,*[19] decided in 1959, an attempt was made to answer this question. In holding that D. H. Lawrence's *Lady Chatterley's Lover* was not obscene under the test laid down in the *Roth* case, the court said:

> Even if it be assumed that these passages [describing sexual intercourse in great detail] and this language [four-letter Anglo-Saxon words used quite frequently] taken in isolation tend to arouse shameful, morbid

15. *Ibid.*
16. 354 U.S. 476 (1957).
17. Record, p. 25, United States v. Roth, 237 F.2d 796 (2d Cir. 1956).
18. 18 U.S.C. § 1461 (1958).
19. 175 F. Supp. 488 (S.D.N.Y. 1959).

> and lustful sexual desires in the average reader, they are an integral, and to the author necessary part of the development of theme, plot and character. The dominant theme, purpose and effect of the book as a whole is not an appeal to prurience or the prurient minded. The book is not "dirt for dirt's sake." Nor do these passages and this language submerge the dominant theme so as to make the book obscene even if they could be considered and found to be obscene in isolation.[20]

From this decision it appears that not every work which arouses lustful thoughts or desires is "obscene," but only those which have for their *dominant* purpose the arousing of such thoughts or desires. Such a test, however, still leaves the ultimate decision up to the courts. As soon as the appellate level is reached the courts are forced into the role of censors, determining the dominant purpose of the author. The advisability of the courts becoming official censors — reading books and magazines and viewing television and movies to determine whether the author had for his dominant theme the promotion of lustful thoughts and desires[21] — is as doubtful as the test itself.

The test for judging obscenity adopted in the *Roth* case presents a further definitional problem. What is the "community standard" by which "obscene" literature is to be judged? Is it a nationwide standard? Is it a statewide standard? Or, is it a local standard?

The mores of the community are inevitably the result of the interaction of many human activities which are the components of the basic concepts of morality. These human activities, such as marriage, divorce, non-marital relations, profanity, and many others, not only vary from state to state, but from local community to local community. Artistic expression considered shocking in remote rural areas may be deemed passé in large urban centers. On the other hand, every-day occurrences on the farm may shock those who are not familiar with the animal world. The diversity of mores and folkways in this country is the food upon which our democratic system grows.

The simple fact is that, as concerns moral attitudes, there is no national or state "community." If such be the case, is not the question answered, since only the local community remains? In obscenity regulation, unfortunately, the answer is not that simple. How do we determine what is the local community? Is it the community in which the literature is published? Is it the community in which it is read? Or, is it the community in which the literature is sold? Must a publisher, who is interested in publishing a particular book or other type of literature, determine the moral attitude of every community in which he wishes to sell such literature, before he can safely publish and sell the work?

These and many other questions present themselves. The only

20. *Id.* at 500-01.

21. Smith v. California, 361 U.S. 147, 159-60 (1959) (concurring opinion).

conclusion that can safely be made is that, in the final analysis, the community standard is that applied by the courts on a case by case method.

Due Process: The Void-for-Vagueness Problem

It is suggested that the uncertainties of the obscenity laws previously discussed render them unconstitutional under the fifth and fourteenth amendments. The due process clauses of both amendments forbid the imposition of criminal sanctions where punishment is dependent upon chance, as it is under these laws. When the result of a proceeding under such regulation depends upon subjective value-judgments of juries, and upon happenstance of history or geography, there is no "ascertainable standard of guilt."

In answer to the argument that the statutes involved in the *Roth* case did not provide a reasonably ascertainable standard of guilt and, therefore, violated the constitutional requirement of due process, the Court stated that "the Constitution does not require impossible standards; all that is required is that the 'language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' "[22] Further, the Court said that the boundaries for judging obscenity give adequate warning of the conduct proscribed and are sufficiently definite to allow judges and jurors to administer the law.[23]

However, the Court, when faced with a somewhat different, but no more precise restraint on freedom of expression than was involved in the *Roth* case, said in *Winters v. New York:*

> The standard of certainty in statutes punishing for [criminal] offenses is higher than those depending primarily upon civil sanctions for enforcement. The crime "must be defined with appropriate definiteness" . . . . There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment . . . .[24]

The meaning of the legislation involved in obscenity regulation cannot be ascertained even by men of superior intelligence, for the judges and juries are left to create their own standard in each case.

The Effect of Thoughts on Conduct

The most obvious omission in all of the decisions in the area of obscenity is any explanation as to why literature stimulating sexual thoughts or desires is sufficiently harmful to the public interest to be called "obscene." Apart from the possibility that sexual thoughts may stimulate sexual behavior contrary to accepted standards, there

22. Roth v. U.S., 354 U.S. 476, 491 (1957).

23. *Ibid.*

24. 333 U.S. 507, 515 (1948).

seems to be no reason that justifies regulation of the "obscene." It is for this reason that most authorities feel that behind all the decisions is the thought of protecting the reader from improper sexual behavior.[25] However, in spite of this feeling, the *Roth* case — the Supreme Court's most recent pronouncement on the subject — seems to dispel entirely this idea.

Conceding for the sake of argument that there is the feeling of protection from improper sexual conduct behind all the decisions in the area, how real is this threat? Only during the last several years have the effects of printed matter on readers been studied to any extent. No study has been made which has shown the causal connection between reading the "obscene" and improper sexual conduct. Moreover, "no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior."[26]

Nor has it been demonstrated that youthful readers, who are supposed to be most susceptible to influence, are affected by such material.

> Those who would ban books argue that particularly books make for juvenile delinquency or crime, induce violence and sadism, corrupt taste, promote sexual perversion, distort human values, subvert political loyalties, provoke disrespect for the law, produce demeaning stereotypes of groups and, in general, make sin even more attractive than it ordinarily is. When evidence is put forward to support these claims, it is at best thin and questionable; more characteristically, it is entirely absent.[27]

Where an effect is so out of proportion to its supposed cause, the conclusion must inevitably follow that other factors are of greater force.

> We start with the proposition that an interest in pornography is seemingly not the molder of a man's personality but the reflection of it. Indeed, certain psychological experiments suggest that one who finds pornographic elements in allegedly obscene books is very likely to discover them also in apparently innocuous books, through a process of self-selection and emphasis that the reader himself brings to the words. The same process of self-selection — this tendency to read and see what accords with pre-existing interests — probably controls the effects of reading as well as the determination of what will be read. The fact that "sex maniacs" may read pornography does not mean that they became what they are because of their reading, but that their reading became what it is because of them. Their personality, according to modern scientific findings that confirm a proposition stated long ago by the Jesuit fathers, was probably basically formed before they ever learned to read.[28]

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25. See Lockhart & McClure, *Obscenity in The Courts*, 20 L. & CONTEMP. PROB. 587, 592-93 (1955).

26. *Id.* at 595.

27. MCKEON, MERTON & GELLHORN, THE FREEDOM TO READ 76 (1956).

28. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 61-2 (1956).

Since, at the present time, there exists no positive information on the relationship between impure thoughts and overt sexual conduct, it would appear that the courts are not justified in upholding obscenity regulation, unless they are not concerned with the effects of "obscene" literature on conduct. From the decision in the *Roth* case, the only reasonable conclusion that can be made is that it is the erotic stimulation, and not its effect on conduct, which is the basis of obscenity regulation.[29]

Enforcement

For a long time, much was made of the distinction between a statute calling for "prior restraint" and one calling for subsequent criminal punishment.[30] The former alone, it was said, raised a question of constitutionality under the first amendment. With only a very few exceptions the strict rule against prior restraint has been applied by the Supreme Court.[31] However, in the area of obscenity regulation the majority of the Court has not reached, in practice, results consonant with the theory.

Briefly, the doctrine of prior restraint deals with official restrictions imposed upon speech or other forms of expression before actual publication, whereas subsequent punishment is a penalty imposed after the communication has been made as a sanction for having made it. Constitutionally, the doctrine holds that the first amendment forbids the federal government to impose any system of prior restraint, with certain exceptions,[32] in any area of expression that is within the boundaries of the amendment. By incorporating the first amendment into the fourteenth amendment, the same limitations are applicable to the states.

By upholding the validity of obscenity regulation which is not sufficiently definite so as to advise a person of the standard of conduct required of him, the court has actually furthered the exercise of prior restraint. "Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, fear of prosecution."[33] If the definition of obscenity were sufficiently certain, fear might deter restricted types of publications. However, obscenity is incapable of such a definition. Almost any book which deals with sex in an unconventional manner may very well be subject to prose-

29. For a more thorough examination of this problem, see ELLIS & BRANCALE, THE PSYCHOLOGY OF SEX OFFENDERS (1956); KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES (1954); Lockhart & McClure, *Obscenity and The Courts,* 20 L. & CONTEMP. PROB. 587 (1955).

30. For a good discussion of both terms, see Emerson, *The Doctrine of Prior Restraint,* 20 L. & CONTEMP. PROB. 648 (1955).

31. *Id.* at 660-69.

32. *Id.* at 648-49.

33. Record, Fol. 69, p. 84, United States v. Roth, 237 F.2d 769 (2d Cir. 1956).

cution and punishment. As a result, the prosecutor wields immense power which, in fact, results in prior restraint.[34]

A further problem encountered in the enforcement of obscenity regulation is that of scienter — the knowledge required to charge a man with the consequences of his act. In *Smith v. California*,[35] it was held that possession alone of an "obscene" writing or book was not sufficient to meet the constitutional requirements of due process and that some element of scienter was necessary. However, as to the question of what degree of knowledge is requisite to a constitutionally permissible prosecution for possessing an "obscene" book, the Court declined to answer, saying that the question was not before them at this time.[36] Interestingly, Mr. Justice Frankfurter, in his concurring opinion, protested the Court's failure to handle this problem. He said:

> If, as I assume, the requirement of scienter in an obscenity prosecution like the one before us does not mean that the bookseller must have read the book or substantially know its contents on the one hand, nor on the other that he can exculpate himself by studious avoidance of knowledge about its contents, then, I submit, invalidating an obscenity statute because a state dispenses altogether with the requirement of scienter does require some indication of the scope and quality of scienter that is required.[37]

A problem analogous to that presented in the *Smith* case recently confronted the Ohio Supreme Court. In *State v. Mapp*[38] the defendant was convicted under an Ohio statute[39] which prohibits any person from *knowingly* having in his possession or under his control lewd or lascivious books and pictures. Although the court upheld the conviction of the defendant under this statute, it did so only because it lacked the necessary majority to hold the statute invalid under the Ohio Constitution.[40] Four of the six judges felt that the statute was constitutionally invalid.

Under the statute, mere "knowing possession," without the possessor having for his purpose the sale, lending, giving away, exhibiting or publishing, is prohibited. The majority stated:

> If anyone looks at a book and finds it lewd, he is forthwith, . . . guilty of a serious crime . . . . [A]s a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded.[41]

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34. For instances of such prior restraint see BLANSHARD, THE RIGHT TO READ 184-86 (1955).

35. 361 U.S. 147 (1959).

36. *Id.* at 154.

37. *Id.* at 162 (concurring opinion).

38. 170 Ohio St. 427 (1960).

39. OHIO REV. CODE § 2905.34 (Supp. 1959).

40. OHIO CONST. art. 4, § 2.

41. State v. Mapp, 170 Ohio St. 427, 433 (1960).

What then, is required in order to have a constitutionally permissible statute? The question has yet to be adequately answered. It is clear that under the ruling in the *Smith* case, mere possession alone is not sufficient; some degree of knowledge is required. Also, it seems evident that studious inspection is not required. Is mere knowing possession enough to have a constitutionally permissible statute? According to the majority in the *Mapp* case, it is not. If such legislative prohibition were valid, it might very well discourage people from even looking at books and pictures, for if they did, and such books or pictures were determined to be of a lewd or lascivious character, they would be subject to punishment under such a statute.

THE CULTURAL PROBLEM

To add to the difficulties involved in formulating any law dealing with obscenity is the problem of the effect of any such law upon the American culture. In this country, as one notable author so expertly puts it, ". . . the American popular culture is saturated with sexual images, references, symbols, and exhortations. . . ."[42]

> Expecting much of sex, but feeling as individals that much is denied them, Americans, as a mass, create in the substance of suppressed desire the remarkable symbolic figures that are found here as in no other culture. The existence of "the great American love goddess" is more often noted than explained. . . . She is most often a movie star though her talents as an actress and the merits of the films in which she appears are plainly immaterial. Her primary function is widely understood but rarely mentioned — that is, to serve as the object of autoerotic reverie. She represents, in brief, the commercial exploitation of the assumption that the American public is composed largely of Peeping Toms.[43]

Thus, it seems that what is today readily acceptable in fact becomes unacceptable when put on paper. Blood and guts are tolerated by society, except when combined with sexual love; great profit is made from sex through advertising, *e.g.*, the women's underwear that is advertised so far beyond its market that we are daily surrounded by the feminine figure tightly constrained in a bra and panties; homosexuality is the favorite subject of many a "clean" joke; and, generally, our society produces a great deal that, if properly identified, would be called more perverse than it cares to think about. All of these are permitted, and yet society seeks to remove the normal thoughts and desires of one sex for the other. The problem is being further distorted by the enactment of laws calculated to suppress sexual thoughts, for in effect, by so doing, our society is diminishing the healthy and accentuating the sick.

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42. Larrabee, *The Cultural Context of Sex Censorship*, 20 L. & CONTEMP. PROB. 672, 683 (1955).

43. *Id.* at 687.

PROSPECTIVE

If society continues to suppress that which is calculated to arouse sexual feelings and desires to all but those who are willing to break the law, then it can have no complaint if the result is the cessation of artistic quality in this country.

If, as many believe, something must be done to suppress this intangible thing called "obscenity," it is believed that such suppression can not be adequately achieved through the legislature or the courts, but must be achieved through self-censorship. It is firmly believed that the American people have the ability to recognize "smut" and to reject it without the help of the public censor.

As the majority in the *Smith* case admitted, "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene. . . ."[44] Since this is true, is it not a very good reason for leaving closed, as to the "obscene," the doors barring federal and state intrusion into the area of constitutionally protected free speech and press?[45]

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44. Smith v. California, 361 U.S. 147, 154-55 (1959).

45. The statement to which this refers was first made by the Court in *Roth v. United States*, 354 U.S. 476, 488 (1957). The Court said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and *opened only the slightest crack necessary* to prevent encroachment upon more important interests." (Emphasis added.)