1973

The Legal Status of Sexually-Oriented Material in the State of Illinois

John Philip Novak
Eastern Illinois University

PAPER CERTIFICATE #2

TO: Graduate Degree Candidates who have written formal theses.

SUBJECT: Permission to reproduce theses.

The University Library is receiving a number of requests from other institutions asking permission to reproduce dissertations for inclusion in their library holdings. Although no copyright laws are involved, we feel that professional courtesy demands that permission be obtained from the author before we allow theses to be copied.

Please sign one of the following statements:

Booth Library of Eastern Illinois University has my permission to lend my thesis to a reputable college or university for the purpose of copying it for inclusion in that institution's library or research holdings.

Feb 17, 1973
Date

I respectfully request Booth Library of Eastern Illinois University not allow my thesis be reproduced because _____

_____

_____

_____ _____

Date Author

pdm

The Legal Status of Sexually-Oriented

Material in the State of Illinois
(TITLE)

BY

John Philip Novak

THESIS

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF

Master of Arts

IN THE GRADUATE SCHOOL, EASTERN ILLINOIS UNIVERSITY
CHARLESTON, ILLINOIS

1973
YEAR

I HEREBY RECOMMEND THIS THESIS BE ACCEPTED AS FULFILLING
THIS PART OF THE GRADUATE DEGREE CITED ABOVE

2/16/73
DATE

2/16/73
DATE

DEPARTMENT HEAD

Censorship reflects a society's lack of confidence in itself. It is the hallmark of an authoritarian regime. Long ago those who wrote our First Amendment chartered a different course. They believe 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 a free society to which our Constitution has committed us, it is for each to choose for himself. . . .

Justice Stewart
Ginzburg v. United States

TABLE OF CONTENTS

LIST OF TABLES

INTRODUCTION

The question of obscenity[1] often provokes an emotional response from the public sector and political authorities. Two schools of thought generally dominate the controversy concerning obscenity. Some claim that sexual expression, whether in literature or films, is a manifestation of freedom of expression under the provisions of the First Amendment and that censorship would contravene such fundamental principles. On the other hand, some perceive obscenity to be a contributing factor toward our moral decay. Whatever the reasons, concern has been expressed over the availability of sexually oriented material in this country.

Prior to 1957, state and local governments assumed a major role in regulating the distribution of obscene material. The federal government also exercised authority in regulating the distribution of such material under its postal statute. Each state government was provided with statutes and ordinances designed to protect public morals and ferret out the "smut merchants". It should also be noted that definitions of what is obscene probably varied from state to state. Undoubtedly, problems arose with respect to drawing the fine line between obscene

---

[1]For a scholarly viewpoint on obscenity, see William Lockhart and Robert McClure, "Obscenity Censorship: The Core Constitutional Issue--What is Obscene?," 7 UTAH L. REV. 289-303 (1961).

and constitutionally protected material.

Since the historic Roth decision, however, the United States Supreme Court has assumed the role of final arbiter of obscenity statutes and ordinances. The Court, in addition, has attempted to define what is obscene in the constitutional sense. As a result, the highest judicial body of this land has virtually produced a confusing picture, often rendering decisions with a hiatus of opinions on this seemingly insoluble problem. The situation has been exacerbated because the state enforcement machinery has been obligated to adhere to the Court's mandates. Thus, an increasingly complex situation has developed. The two major purposes of this study are to: (1) examine and analyze Supreme Court and Illinois appellate court decisions, both substantive and procedural, and (2) review the impact of these cases on a number of prosecuting attorneys located within rural and metropolitan counties in Illinois

It should be pointed out that this study will focus on a descriptive method of interpretation. In effect, each salient decision will be reviewed to ascertain the disposition of the term "obscene" within the meaning of the constitution. Finally, the cardinal aim of analyzing the Illinois decisions is to determine whether such cases conflict or comply with the federal decisional law.

CHAPTER I

THE FEDERAL OBSCENITY DECISIONS

The Constitutional Standard is Presented - Roth

In 1957, the Supreme Court of the United States rendered two important decisions pertaining to the question of obscenity. In Roth,[1] the petitioner was convicted under a federal obscenity statute[2] for sending allegedly obscene materials through the mail. Alberts,[3] on the other hand, was convicted of violating a California statute making it a punishable offense to write or produce any obscene or indecent material.[4] At issue was whether the alleged obscenity of the materials fall within the precinct of First Amendment freedom of expression.

Writing for the majority, Mr. Justice Brennen noted that as far back as 1792, a substantial number of the states had statutes providing for criminal punishment against obscenity. With this in mind,

---

[1] 354 U.S. 476 (1957).

[2] 18 U.S.C. Section 1461.

[3] 354 U.S. 476.

[4] CAL. PENAL CODE ANN. 1955, Section 311.

Justice Brennen took the position that all areas of free expression are not absolute; that the Supreme Court had never extended absolute protection was extrapolated from prior litigation.

Distinguishing between obscenity and ideas, Mr. Justice Brennen recognized that even the most unpopular and unconventional ideas must be afforded the full protection of the political system, so long as they do not infringe upon other areas of expression.[5] However, he noted that obscenity was proscribed by many sovereignties:

> But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreements of over 50 nations, in the obscenity laws of all 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956.[6]

Consequently, the Associate Justice ruled that ". . . obscenity is not within the area of constitutionally protected speech or press."[7] Justice Brennen rejected the idea to use the "clear and present" danger test insofar as obscenity is not protected speech.[8]

---

[5] 354 U.S. 481-482.

[6] Id. at 484-485.

[7] Id. at 485. The Court did not ascertain the quality of the material as to be obscene under the test that was prescribed. Brennen wrote: "No issue is presented in either case concerning the obscenity of the material involved."

[8] See Beauharnais v. Illinois, 343 U.S. 266 (1951). Also, interested parties may consult Morris Ernest and A. Schwartz, Censorship: The Search for the Obscene (New York: The Macmillan Co., 1964), p. 205.

In establishing the criteria for determining whether material is obscene or not, Justice Brennen offered this proposition:

> Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner dealing with prurient interest. Material is obscene if (1) to the average person, (2) applying contemporary community standards, (3) the dominant theme of the material taken as a whole appeals to prurient interest.[9]

The Court also concurred in the American Law Institute's definition of obscenity as consonant with the concept of obscenity established in the present case:

> 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 excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.[10]

It was further held that the federal law constituted a proper exercise of the postal power as authorized by Congress and the California law did not impinge against federal postal operations.

The concurring opinion of Chief Justice Warren is significant insofar as it differs from Brennen's standards for determining alleged obsenity. He expressed his opinion thusly:

> . . . . It is not the book that is on trial, it is a person. The conduct of the defendant is the central issue, not the obsenity of a book or picture. The nature of the material is, of course, relevant as an attribute of the defendant's conduct, but the

---

[9] 354 U.S. at 489.

[10] American Law Institute, Model Penal Code Section 207.10. Tentative Draft No. 6, 1957.

> materials are thus placed in a context from which they draw color and character.[11]

An "environmental" test, therefore, would be more conducive to any governmental suppression of obscene material. It should also be recognized that Chief Justice Warren's opinion represented the inception of the contextual obscenity principle.

Justice Harlan, who also filed a concurring opinion, deviated from the majority for a variety of reasons. First, he advanced the argument that the breadth of Brennen's opinion was too sweeping to such an extent that the Court assumed the role of classifying material as obscene through the use of the prescribed standards. Moreover, he assumed that the Supreme Court, in construing the federal statute involved in Roth, should use the following criteria: (1) the First Amendment; (2) the extent of federal interest in sexual morality; and (3) the danger of a single uniform standard of censorship.[12] All things considered, Mr. Justice Harlan asserted that the federal power to regulate obscenity only falls within the area of "hard core" pornography.[13] In addition, the statute construed in Roth was unconstitutional since it

---

[11]374 U.S. 476 at 494 (Warren, C.J., concurring).

[12]See Tucker, "The Law of Obscenity--Where Has It Gone?," 22 U. FLA. L. REV. 547, 557 (1970).

[13]This term usually denoted the graphic and explicit depiction of any sexual act. It will be mentioned at various times throughout this study. See, cf. W. Lockart and R. McClure, "What is Obscene," 7 UTAH L. REV. 296-302 (1961).

could be applied to other than "hard core" pornography. Harlan agreed that constructing a national obscenity standard would impose federal authority in areas of state control. His rationale for this argument rests with the idea that all states may not treat sexual expression in a similar manner.

In dissenting, Justice Douglas, with whom Justice Black concurred, insisted that the provisions of the First Amendment are absolute.[14] This could be read to mean that governmental attempts to restrain speech and press contravened rights secured to Roth and Alberts by the Constitution. Both Justices flatly rejected the majority's assertion that obscenity is not within the area of constitutionally protected speech. Moreover, Douglas averred that the Constitution limits the government to evaluate the "redeeming social importance" of any ideas.[15] If certain illegal action can be linked with obscene material, federal and state authorities, acting in pursuance of the police power, may then suppress freedom of expression. According to Douglas, a lack of information exists showing any effect of obscene literature on human behavior.[16]

---

[14]Cf. T. Emerson, "Toward a General Theory of the First Amendment," 72 YALE L. J. p. 937-39 (1963).

[15]See Tucker, "The Law of Obscenity," 22 (1970) p. 558.

[16]354 U.S. at 511.

The Progeny of Roth

After deciding Roth, the Supreme Court was again confronted with a host of new obscenity litigation. In the period from 1957 to 1958, four controversies were adjudicated. As a result, the Court elaborated on its explanation of the relevance of the term "constitutionally obscene."

An examination of these cases[17] merits some attention to the extent that the Court had reversed, per curiam, each lower court decision, thus constricting the constitutional standard of obscenity. The litigation concerned a film suggesting sex, a nudist magazine, a homosexual publication, and the authority of federal customs inspectors. Acting on each case individually, the Court ruled in favor of the publishers, basing their opinion on the content of the Roth-Alberts decision. The judiciary decided that obscenity must represent a significant aspect of the material in question, thus establishing an effectual definition of obscenity.

Shortly after 1959, the federal judiciary handed down a multitude of decisions, which had the effect of delimiting the applicability of the term "obscene."

The Kingsley case[18] is significant because the Court ruled

---

[17] See Times Film Corporation v. City of Chicago, 244 F. 2d 432 (7th Cir. 1957), rev'd, 355 U.S. 35 (1957); Sunshine Book Co. v. Summerfield, 249 F. 2d 118 (D.C.Cir. 1958), rev'd, 355 U.S. 372 (1958); One, Inc. v. Otto K. Oleson, 241 F. 2d 777 (9th Cir. 1958), rev'd, 355 U.S. 372, (1958) and Mounce v. United States, 247 F. 2d 148 (9th Cir. 1957), rev'd, 355 U.S. 180 (1958).

[18] Kingsley Corporation v. Regents of the University of New York, 360 U.S. 684 (1959).

that a state could not ban the showing of a motion picture entitled Lady Chatterley's Lover. The question to be decided by the Supreme Court was whether the advocacy of unorthodox sexual practices, in this case adultery, constituted speech which was protected by the First Amendment.

The Regents of the University of New York denied a license to the applicants for showing the motion picture; the action was made in pursuance of a specific provision of a New York State Education Law. The reason spelled out by the Regents concerned itself with the presentation of adultery as a "desirable, acceptable and proper pattern of behavior."[19] The petitioner appealed to a New York court, whereupon, the court ruled in favor and instructed the License Division to issue a permit for the film's exhibition. The Regents appealed, however, and their action was sustained by a court of appeals.

The appellate court concentrated on the theme of the film and described it as follows:

> The dominant theme of the film may be summed up in a few words--exhaltation of illicit sexual love in derogation of the restraints of marriage. Their complete surrender to the baser instincts was presented as triumph over the social mores. Their decision to live in adultery was quietly heralded as a conquest of love over the "form" of marriage.[20]

As a result of analyzing the film, the court of appeals reported

---

[19]See H. Clor, Obscenity and Public Morality (Chicago: University of Chicago Press, 1969), pp. 44-60.

[20]151 N.E. 2d 183 at 199.

that the picture, as reviewed by the Regents, was ". . . utterly immoral in its theme, and that it presented adultery as proper behavior, was entirely correct as measured by the standards of our community. . ."[21] Consequently, the license was finally denied to the petitioner, after which he sought relief in the United States Supreme Court.

Writing for the majority, Justice Potter Stewart held that the New York statute was punishing the mere advocacy of an idea, namely that adultery may be a satisfactory form of conduct, thus violating the fundamental principles of freedom of expression.[22] The First Amendment was designed to prohibit states from suppressing the advocacy or expression of an idea. Accordingly, the statute was voided.

Insofar as the Supreme Court voided the statute, the majority failed to concern itself with the power of a state to require films to be licensed prior to exhibition. Justice Frankfurter asserted that the Court was abstaining from its authority to apply the freedom of expression clause on an individual case basis. Since there was no criteria to apply to each litigation, the federal adjudicatory body had the authority to review individual cases.[23]

The Supreme Court in 1962 focused its attention on the applica-

---

[21] Id.

[22] 360 U.S. at 688.

[23] Id. at 696.

bility of the federal postal statute.[24] The case[25] to be reviewed involved the authority of the Postal officials to withhold the delivery of publications which appeal to sexual interests of a specific group, male homosexuals.

After examining the material in question, the Postal authorities concluded that the matter was obscene; whereupon, the plaintiff sought relief in the federal courts. In both appeals, the federal district and appellate courts upheld the ruling of the Post Office. This action prompted the petitioner to seek relief in the United States Supreme Court.

Justice Harlan, writing for the majority, was of the opinion that the test of obscenity as prescribed in Roth required additional criteria. If material were to be classified as obscene under the First Amendment, it not only had to appeal predominantly to prurient interest, but also must be "patently offensive" or "indecent."[26] Moreover, Harlan recognized that obscene material must go beyond customary limits of candor in describing or representing such matters.[27] Justice Harlan, therefore, found that patent offensiveness and prurient interest[28]

---

[24]18 U.S.C. Section 1461.

[25]Manual Enterprises v. Day, 370 U.S. 478 (1962).

[26]Id. at 483.

[27]See Tucker, "The Law of Obscenity," p. 558.

[28]This dual test proposed by Justice Harlan is identical to the test represented in the American Law Institute's Model Penal Code, No. 6 (1957), Sec. 207.10 (2).

must both be demonstrated to establish that matter is obscene under the federal statute.

Concomitantly, the Associate Justice assumed that since the Court was construing a federal statute, the "relevant community" phrase under Roth was, in essence, the nation. This judgment was based upon the fact that the federal anti-obscenity statute reached all segments of the country.[29]

In the final analysis, the Justice focused his attention on the content of the material in question. The magazines depicted photographs of nude males situated in provocative positions that suggested a sexual theme. In some instances, two males posed together implying intimate contact. Harlan was convinced that the publications appealed to the "prurient interest" of homosexuals.[30] In his opinion, however, neither "sordid motives" of the publisher nor the "dismally unpleasant, uncouth, and tawdry" nature of their content rendered them obscene.[31] For this reason, Justice Harlan concluded that the depiction of male nudes is no more obnoxious to the eye than those of the female anatomy that society tolerates.

A perusal of this particular litigation indicates that the doctrine expanded in Roth is now supplemented with the "patently offensiveness"

---

[29] 370 U.S. at 488 (1962).

[30] Id. at 490.

[31] See Tucker, "The Law of Obscenity," p. 559.

concept. The student of public law should take cognizance of the fact that this decision provided a further delimitation of the meaning of "obscenity".

In 1964, the Supreme Court in Jacobellis v. Ohio[32] provided another supplemental concept to the obscenity case law. In this case, the plaintiff was convicted under an Ohio statute for exhibiting an allegedly obscene motion picture.[33] The state court found the film in question to be obscene and observed that:

> . . . The dominant theme of sex is brought into . . . focus . . . . It tantalizes the sexual appetite, ... portraying the characters in protracted love play . . . . Very little. . . is left to the imagination. Lurid details are portrayed to the senses, sight and hearing.[34]

Justice Brennen, delivering the opinion of the Court, took a different point of view and noted that the motion picture depicted a woman bored with marriage, finally meeting an archeologist and falling in love. The last portion of the film describes an explicit love scene between the two people and Brennen noted that the state based its argument solely on this passage.

Although the majority could not agree on a consistent opinion, Justice Brennen sought to define a new test for obscenity and to elucidate the "community standards" phrase. He stated that the Roth test

---

[32] 378 U.S. 184 (1964).

[33] The film was entitled "Les Amants" ("The Lovers").

[34] State v. Jacobellis, 175 N.E. 2d at 125.

was far from perfect. All things considered, the Associate Justice treated obscenity in a new context. He said:

> . . . obscenity is excluded from. . . constitutional protection only because it is "utterly without redeeming or social importance," and that "the portrayal of sex, e.g., in art, literature and scientific works is not itself sufficient reason to deny material the constitutional protections of freedom of speech.[35]

Brennen converted the test of the utter lack of "redeeming social importance," language which in Roth had seemed merely descriptive of obscenity, into a test of obscenity vel non.[36] Thus, material depicting sex that advocates ideas of literary, scientific or artistic value or any other form of social importance may not be stigmatized as obscene.[37]

He went further in Jacobellis and stated that the "contemporary community standards" aspect of the Roth test meant national rather than local community standards.[38] However, Brennen was extremely concerned with the states' interest in controlling such material. States may control the dissemination of obscene material, but it was recognized that complete suppression would be unwarranted.[39]

---

[35]378 U.S. 184, at 191 (citing Roth at 484, 487).

[36]See David E. Engdahl, "Requiem for Roth: Obscenity Doctrine is Changing," 68 MICH. L. REV. 185, 190 (1969).

[37]378 U.S. at 191. (Emphasis in the original).

[38]Id. at 192-95.

[39]Justices Brennen and White were concerned over the availability of such material to children. They approved of state laws designed to prohibit such activities. See also Butler v. Michigan, 352 U.S. 380 (1957).

In the last analysis, Mr. Justice Stewart, who also concurred with the reversal, argued that only hard-core pornography may be punishable as a criminal offense. He argued:

> I shall not attempt to define the kinds of material within the shorthand description, and perhaps I can never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.[40]

A short time after Jacobellis, the Court reversed two obscenity convictions from the lower courts. The Tralins[41] case was concerned with the novel Pleasure Was My Business in which a lower court found the publication obscene as applicable to the federal obscenity criteria. On the other hand, the Grove Press[42] case dealt with the famous novel Tropic of Cancer. Reversing each per curiam, the majority cited the rationale set forth in Jacobellis; however, there were obvious differences of opinion.[43]

In 1965, the United States Supreme Court decided another obscenity case[44] in which the film A Stranger Knocks was enjoined from being exhibited by an appellate court ruling. It was noted that the film showed two scenes of a man and woman simulating sexual conduct

---

[40] 378 U.S. at 197 (Emphasis added).

[41] Tralins v. Gerstein, 378 U.S. 576 (1964).

[42] Grove Press Inc. v. Gerstein, 378 U.S. 577 (1964).

[43] See 378 U.S. 184, 196, and 197.

[44] Trans-Lux Distributing Corporation v. Board of Regents, 380 U.S. 259 (1965).

similar to that of a climactic orgasm. The Court, nevertheless, invalidated the ruling, citing the Freedman[45] case as the only controlling law.

The three aforementioned cases are significant in spite of the absence of any rationales because the subject matter depicted a greater amount of sexual behavior than those of Ginzburg, Mishkin, and Memiors.

Thus, up to 1966 the Supreme Court had not upheld one obscenity conviction. Furthermore, it is apparent that the Court experienced difficulty when confronted with the obscenity question. This situation may have been the result of its members' lack of consistency in determining a valid test for the legal suppression of obscene materials.

Contextual Obscenity

The Supreme Court in 1966 reversed the trend and assumed a new posture in the obscenity arena. Some have commented to the extent that the members of the Court were reacting to public opinion.[46] Others have held that Justice Brennen conformed to the Chief Justice's viewpoint, thus becoming the spokesman for the new majority.

The Ginzburg[47] decision of 1966 is crucial for a variety of reasons. For the first time since Roth, the Court, in a five to four decision,

---

[45]Freedman v. Maryland, 380 U.S. 51 (1965). The Court voided a state scheme for censoring films on procedural grounds.

[46]An example of the adverse public opinion is demonstrated by the congressional cacophony over Justice Fortas' obscenity opinions during the hearings on his nomination for Chief Justice.

[47]Ginzburg v. United States, 383 U.S. 463 (1966).

upheld the conviction of Ralph Ginzburg, a publisher, for using the mails to send sexual material designed to titillate the erotic desires of its customers. This decision represented an extreme interpretation of the test expounded in Roth because it was predicated upon the concept of "pandering", which was defined as follows: "The commercial exploitation of erotica solely for the sake of its prurient appeal, to catch the salaciously disposed."[48] It should be noted that this quotation is quite similar to that of Chief Justice Warren's opinion in Roth.[49]

Justice Brennen delivered the opinion of the Court, observing that Ginzburg was engaged in a sordid business of pandering. Brennen, moreover, made reference to two elements of such pandering: (1) the nature of Ginzburg's mailing addresses,[50] and (2) his publicizing methods. Brennen based his alteration of Roth on a prior case that was concerned with an individual using the mails to exploit the prurient interest of sex.[51] Concomitantly, Brennen observed that the nature of

---

[48] Id. at 466, 471, 472.

[49] The defendants . . . . were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide. 354 U.S. 476, 495-96 (1957), quoted in 383 U.S. at 467.

[50] The distribution points for the material were Blue Ball and Intercourse, Pennsylvania, and Middlesex, New Jersey.

[51] Interested parties may examine United States v. Rebhunn, 109 F. 2d 512 (1940).

commercial dissemination could aid in determining whether or not the material was obscene. Thus, this scheme for determining obscenity was incorporated into the Roth test.

Ralph Ginzburg and his three corporations were convicted in a lower court for violating the federal obscenity statute.[52] The publications, Liaison, Eros, and The Housewife's Handbook on Selective Promiscuity[53] contained various photographs, articles, and essays representing human sexuality. One such photograph in the Handbook depicted a black man and a white woman posing nude in various positions of intimate contact. There were, however, no graphic or explicit protrayals of sexual behavior. The conviction was sustained in the United States Court of Appeals. A writ of certiorari was granted.

It may be assumed that the dissenting opinions of Ginzburg indicate a substantial weakness upon which the majority opinion rests. Justice Black argued that the Court was rewriting the federal obscenity law. He said that Ginzburg was actually "...having his conviction and sentence affirmed upon the basis of a statute amended by this Court for violation of which amended statute he was not charged in the courts below."[54] In addition, he asserted that in applying the tests of obscenity, an individual value-

---

[52] 18 U.S.C. Section 1461.

[53] During the course of the trial, expert witnesses testified in behalf of Ginzburg, asserting that the publications had a vast amount of literary and artistic value. See 224 F. Supp. 129 (E.D. Pa. 1963).

[54] 383 U.S. at 477.

judgment is made of the questioned material. Black noted that there is a myriad of opinions concerning the nature of obscenity. He also stated that Ginzburg was being criminally punished for distributing sexual material which neither he nor anyone else knew were criminal. As a result, Black reiterated his view that governments may only suppress expression when it is inseparable from illegal conduct.

Mr. Justice Harlan's dissent focused on the proposition that the Supreme Court erred in its judgment because he thought that only "hard-core"[55] pornography could be prohibited from the mails. He was of the opinion that the material did not constitute hard-core pornography. Moreover, Harlan assailed the Court for its interpretation of the federal statute, noting that the majority opinion was "an astonishing piece of judicial improvisation."[56] Harlan argued that Ginzburg was entitled to a new trial in which the government would have to establish the publisher's intentions of pandering lewd and lascivious thoughts.[57]

Stewart's dissent closely paralleled Harlan's except for the fact that he presented a somewhat lengthy description of "hard-core" pornography.[58] Stewart further observed that the defendant was denied

---

[55]See 354 U.S. at 507, Harlan believes that hard-core pornography can be suppressed by the federal statute. He offers no concise definition, however, of what the term denotes.

[56]383 U.S. at 495.

[57]Id. at 496.

[58]Id. at 499.

due process of law insofar as the federal statute did not explicate whether "commercial exploitation," "pandering" or "titillation" constituted a criminal offense.[59]

Reaffirming his position on freedom of expression, Justice Douglas pointed out that the First Amendment embraces all forms of ideas. He was also of the view that the materials presented at bar were not obscene. Douglas went on to construct an analogy between Ginzburg's publications and contemporary advertising methods.[60] It was his firm belief that a publication should be judged on its contents and not on the motives or inclinations of the publisher.

To recapitulate, Ginzburg[61] was convicted of pandering, that is, appealing to the sordid interests of sex through the mailing of his publications. The Supreme Court did not rule on the alleged obscenity of the articles and magazines. Rather, the Court formed a construct of a publisher's intent when dealing with sexually-oriented literature. However, the Court imposed this limitation on the pandering concept:

> . . . . Only in "close cases" will evidence of commercial exploitation be probative with respect to the nature of the material in question and thus satisfy the Roth test.[62]

---

[59] Id. at 499, 500.

[60] Douglas found no distinction between an advertisement with sexy girls selling a product and the contents of Ginzburg's magazines. Id. at 483.

[61] For an interesting discussion of the Ginzburg decision, see Notes and Comments, "More Ado About Dirty Books," 75 YALE L.J. 1382-1394 (1966).

[62] 383 U.S. at 474.

Thus, if an erotic publication's prurience is doubted by the Court, evidence that the purveyor has deliberately emphasized its prurient appeal may be decisive.[63]

Another major case[64] was decided on the same day as Ginzburg. Edward Mishkin was convicted of violating New York's obscenity statute. The publications were written by Mishkin's employees and eventually placed on the open market.

Accounting for the content of the publications, Justice Brennen first observed that they depicted various aberrations of sexual behavior.[65] In other words, some of the material portrayed women experiencing great pain or being submitted to whippings and torture. These types of publications were commonly known as sado-masochistic or "bondage material." It was also recognized that Mishkin's employees were instructed to create descriptive and perverted scenes of sexual behavior that would presumably appeal to certain groups of deviant people.

In his defense Mishkin claimed that his publications dealing with sado-masochism should be classified as material which does not appeal to the prurient interests of "normal" persons; the Court was now faced with the question of whether material having a prurient

---

[63]See Clor, Obscenity and Public Morality, p. 558.

[64]Mishkin v. New York, 383 U.S. 502 (1966).

[65]Id. at 505.

appeal to deviates is obscene.

In response to this contention, Justice Brennen acknowledged that the material was clearly designed to appeal to a deviant sexual group, which thus satisfied the Roth test where the dominant theme of the material taken as a whole appeals to the prurient interest in sex of members of that group.[66] The Justice observed that the publisher had knowledge of the content of the material; this observation was supported by Mishkin's instructions to his employees, requiring them to create specific works dealing with the sexually bizarre.

Brennen also indicated that the intentions of Mishkin could be equated with the "pandering" rule in Ginzburg. It was concluded that the publications in question produced the same titillation as mentioned in the previous case. The only difference, however, was that Mishkin's material appealed to a specific group of persons.

Filing his dissent, Justice Black asserted that the Court was assuming the role of a legislative body, reviewing each case on an individual basis, and trying to decide what the term "obscene" means.[67] He was of the opinion that such an "unpopular" and "unwholesome task" should not be assumed by the Supreme Court.

In review, the Ginzburg and Mishkin decisions indicate that the Supreme Court had adjusted the Roth test to conform to a particular

---

[66] Id. at 509.

[67] 383 U.S. at 517.

audience and manner of advertisement. This variation[68] was utilized in Mishkin by focusing on the prurient appeal to a specific sub-group. In Ginzburg, on the other hand, the Court concentrated on the method of advertising and the intent of the publisher. Hence, it seems that the United States Supreme Court has departed from a fixed standard to one of diversity. In essence, the nation's highest adjudicatory body has now assumed kaleidoscopic qualities when confronted with the seemingly impossible question of obscenity.

The third companion case involved John Cleland's novel Memoirs of a Woman of Pleasure.[69] The Attorney General for the State of Massachusetts had sought a declaratory judgment to determine the obscenity of the book. Many scholars of English literature acclaimed the novel;[70] however, this failed to convince the Massachusetts court. The state court found the publication obscene since it refused to recognize the social importance test as a viable criteria to ascertain whether or not the book was obscene.[71]

On appeal, the United States Supreme Court reversed in a six

---

[68]For a discussion of the variable obscenity standard, see W. Lockart and R. McClure, "Censorship of Obscenity: The Developing Constitutional Standards," 45 MINN. L. REV. 5 (1960).

[69]Memoirs v. Massachusetts 383 U.S. 413 (1966) [hereinafter cited as Fanny Hill].

[70]Some even hailed the work as a ribald classic. The novel depicted the sexual adventures of a young girl; certain passages described sexual intercourse in vivid detail.

[71]206 N.E. 2d at 406.

to three decision and held that the Massachusetts court had erroneously applied the social value test in Roth. Justice Brennen, writing for the Court, argued that Fanny Hill was interpreted to possess only a "modicum of social value."[72] However, the essence of Brennen's holding was that all three elements under Roth must coalesce:

> A book cannot be proscribed unless it is found to be utterly without redeeming social value. . . even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal criteria is to be applied independently: the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness.[73]

According to Brennen, however, the reversal did not hold that the book could not, under any circumstances, be classified as obscene.[74] If, for example, the material possessed prurient appeal, was patently offensive, possessed a modicum of social value, and had been commercially exploited, it could be suppressed. On the other hand, if the material had met all of the requisite criteria but had not been commercially exploited, it could not have been suppressed. Justice Brennen concluded that Fanny Hill did not fit into the latter classification.

The dissents by Justices Clark and Harlan illustrate the continuing disparities of opinions among the members of the Court. Clark argued that the majority opinion in Ginzburg and Mishkin had added a

---

[72] 383 U.S. at 419.

[73] Id. at 419 (Emphasis in the original).

[74] See Tucker, "The Law of Obscenity" 22 (1970) p. 565.

new dimension to the Roth standard. Instead of applying the social importance test, he insisted that Roth had only two constitutional requirements:

> (1) the book must be judged as a whole, not by its parts, and (2) it must be judged in terms of its appeal to the prurient interest of the average person, applying contemporary community standards.[75]

Clark also found that the book's prurient appeal undoubtedly lacked redeeming social importance and concluded that the publisher's purveyance of carnal interests constituted governmental suppression, as was decided in Ginzburg and Mishkin.

In his dissent, Justice Harlan stressed that Fanny Hill was not "hard-core pornography", which would prevent the federal government from suppressing it. Harlan did advocate that since the material was offensive, some amount of state control could be justified without contravening the First Amendment. This dual standard prompted Justice Harlan to express an acrimonious statement concerning the establishment of constitutional criteria for determining obscenity:

> The central development that emerges from the aftermath of Roth v. United States, 354 U.S. 476, is that no stable approach to the obscenity problem has yet been devised by this Court.[76]

In 1967, the Supreme Court consolidated three cases[77] into one

---

[75] 383 U.S. 413, 442 (Clark, J., dissenting).

[76] Id. at 458.

[77] Redrup v. New York, 386 U.S. 767; Austin v. Kentucky, 384 U.S. 916; Gent v. Arkansas, 384 U.S. 937.

decision, resulting in the reversal of the lower courts' convictions.[78] The judiciary announced the decision in Redrup which involved an examination of the scienter requirement.[79]

In a per curiam decision, the Court reviewed the materials in question and held that the states failed to present the following issues: (1) a statute limited to juvenile protection; (2) material imposed unwillingly upon an individual's privacy; and (3) evidence of pandering.[80] Thus, in these cases the Court assumed the following positions: (1) the material was not constitutionally obscene; (2) the First and Fourteenth Amendments protected the dissemination of such publications; and (3) the scienter element was not considered.[81]

Justice Harlan's dissent emphasized that the Court had evaded the scienter issue for which the cases were brought up for review. He also asserted that the Court had directly avoided any interpretation of the obscenity statutes.

Subsequent to Redrup, the Court became involved in a plethora

---

[78]The materials pertaining to these cases were common "girlie magazines."

[79]The scienter question was first put to a test in Smith v. California, 361 U.S. 147 (1959). It was held by the Court that an individual could not be criminally punished for selling an obscene work unless it were proven that he knew it to be obscene.

[80]386 U.S. at 770.

[81]Id.

of obscenity litigation,[82] ultimately reversing many lower court decisions. The Court issued its opinions in the form of memorandum decisions. Some of the types of material involved were paper-back, pulp-type books describing lucid passages of sexual intercourse, sodomy and other perversion. In all of these decisions, the Court cited only Redrup.

On the other hand, a considerable amount of the reversals involved movies and magazines[83] that depicted photographs of nude males and females posing in suggestive positions.[84] In addition, the magazine Exclusive[85] portrayed women in black stockings and garter belts which had the effect of accentuating the pubic area. Again, the rationale for the Court's decisions was the Redrup ruling.

Effects of Sexual Material: Adult--Minor Disparities

The Court, in 1968, was faced with a significant question of whether a state could make a distinction on the basis of age of the prospective reader. In Ginsberg,[86] the defendant was convicted under a

---

[82] Books Incorporated v. U.S., 358 F. 2d 935 (1st Cir. 1967); A State v. A Quantity of Books, 416 P. 2d 703, rev'd per curiam, 388 U.S. 452 (1967); U.S. v. West Coast News Company, 357 F. 2d 855 (6th Cir. 1966).

[83] Schackman v. Arnebergh, 387 U.S. 427 (1967).

[84] Potomac News Co. v. Virginia, 389 U.S. 47 (1967).

[85] Central Magazines, Limited v. U.S., 389 U.S. 50 (1967).

[86] Ginsberg v. New York, 390 U.S. 629 (1968).

New York obscenity statute that prohibited the knowledgeable selling of material to minors under the age of seventeen. It was held that if the material was deemed obscene it would therefore be harmful to minors. An Appellate Court of New York held that Ginsberg had violated the law for two specific reasons: (1) the content of the magazines conformed to statutory descriptions, and (2) the material was harmful to minors since it portrayed nudity and directly appealed to the prurient interest, was patently offensive, and utterly lacked social importance.

Speaking for the Court, Justice Brennen sustained the conviction and observed that the "girlie magazines" were not obscene to adults since the statute did not preclude the sale of such material to adults. By the same token, the state had utilized a variable definition of obscenity ". . . by permitting the appeal of this type of material to be assessed in terms of sexual interest. . ."[87] of persons under seventeen. For this reason, the majority decided that in situations where children are being exposed to sexual material, the state may impose reasonable restraints on the sale to juveniles of matters relating to sex.

Although citing a lack of conclusive evidence linking anti-social conduct and obscene material, the Court nevertheless upheld the statute as a proper exercise of the state's police power. It was recognized that the state had legitimate concern in safeguarding minors from ob-

---

[87] 383 U.S. at 502, 509.

scene material.

Reaffirming their prior arguments, Justices Black and Douglas dissented, pointing out that all forms of obscenity fall within the pale of the First Amendment provisions. Justice Douglas also stressed that the Court was assuming the role of the "Nation's board of censors."[88] He concluded:

> . . . . I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and, second, to have any considered judgment as to what deleterious or beneficial impact of a particular publication may have on minds either young or old.[89]

Justice Fortas, who also filed a dissent, could not draw any distinction between the material in the present case and that in Gent v. Arkansas.[90] Fortas was puzzled as to material read by seventeen year olds transforming into obscene material read by sixteen year olds. He urged that the Court must determine a proper standard under Roth to protect youth. Moreover, Fortas indicated that the petitioner had been wrongfully prosecuted for selling magazines which he had a right to sell because: (1) there was an absence of any pandering to children, and (2) the state was thereby limiting free access to books and other publications.

---

[88] 390 U.S. at 656.

[89] Id.

[90] 386 U.S. 767 (1967) supra.

The Interstate Circuit[91] case was the last significant decision during the 1968 term. In this controversy, a Motion Picture Classification Board, acting under the authority of a Dallas ordinance, reviewed and classified the film Viva Maria as "not suitable for young persons."[92] This specific classification prohibited individuals under sixteen from viewing the movie. An exhibitor challenged the constitutionality of the ordinance on grounds of vagueness.

Writing for the majority, Justice Thurgood Marshall[93] held that the city ordinance was unconstitutional because of the "vice of vagueness" rule.[94] It was observed by Marshall that in prior cases the Supreme Court has sustained regulations requiring exhibitors to submit films before a review board.[95] However, the Court had also ruled that such boards must maintain procedural guarantees[96] and act in an equitable fashion.

The Court reported that the exhibitor could not determine the

---

[91]Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968).

[92]Id. at 678.

[93]Justice Marshall's appointment filled a vacancy left by Justice Clark's retirement.

[94]This concept has been applied to many statutes before the Court. It refers to statutes so vague that men of average intelligence have to guess at their meaning and differ as to their application. See United States v. Cohen Grocery Co., 255 U.S. 81 (1921).

[95]See Times Film Corporation v. Chicago, 365 U.S. 43 (1961).

[96]Freedman v. Maryland, 380 U.S. 51 (1965) infra.

meaning of "not suitable for young persons." Vague standards and a lack of the definition of the phrase "sexual promiscuity" induced the Court to strike down the Dallas ordinance. The majority concluded that in order for officials to apply standards correctly, "reasonable and definite" statutes must be developed.

In his dissent, Harlan reiterated the dual concept concerning the regulation of obscenity; he observed that the states possess greater discretion in regard to regulating obscene materials. He also noted that the ordinance was not vague since ". . . the Court demanded greater precision of language from . . . Dallas than the Court itself can give . . ."[97]

Stanley: A New Direction in Obscenity Law?

Up to the time of the Stanley case, the members of the United States Supreme Court have demonstrated an obvious inconsistency of opinion in obscenity cases, particularly social importance test. Stanley v. Georgia[98] may have provided a new approach to obscenity regulation. Its decision could thus have far reaching implications for the Roth doctrine.

Acting under authority of a search warrant, police entered the home of Stanley and searched the premises for alleged bookmaking

---

[97] 390 U.S. at 709.

[98] 394 U.S. 557 (1969). See Note, "First Amendment: The New Metaphysics of the Law of Obscenity," 57 CAL. L. REV. 1257, 1268 (1969).

paraphernalia. Finding no gambling material, the police then discovered three reels of film[99] located in the bedroom. Using Stanley's projector and screen, the authorities viewed the films and concluded that they were obscene. Shortly thereafter, Stanley was arrested in pursuance of Georgia's obscenity statute for ". . . knowingly having possession of obscene matter."[100] He was later indicted, tried and convicted. The Supreme Court of Georgia affirmed the conviction, whereupon the defendant appealed to the Supreme Court. The paramount question on appeal was whether the state could criminally punish individuals for private possession of obscene matter.

Writing for five members of the Court, Justice Marshall reversed, holding that mere private possession of obscene material does not constitute a crime. Noting that this litigation was the first of its kind in the obscenity realm, Marshall distinguished between distribution and private possession of obscene material:

> In this context we do not believe that this case can be decided on Roth. Roth and its progeny certainly do mean that the First and Fourteenth Amendment recognize a valid governmental interest in dealing with the problem of obscenity . . . . [But] Roth and the cases following it discerned such an "important interest" in the regulation of commercial distribution of obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.[101]

---

[99]The materials were of the "stag film" nature.

[100]GA. CODE. ANN. SECTION 26-6301 (Supp. 1968).

[101]394 U.S. at 563, 564.

Marshall stressed that there is a fundamental right to receive information and ideas, regardless of their social worth.[102] A state that regulates what one may see or hear abridges the "right to be free . . . from unwanted governmental intrusions into one's privacy."[103] Upholding the individual's right to privacy, Justice Marshall observed that the appellant 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.[104]

The Georgia statute, as it was understood by Marshall, was an attempt to protect the minds and morals of its citizens from obscene material. The Court rejected this argument and summarized the spirit of the Stanley opinion:

> 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 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.[105]

The state of Georgia had submitted another argument stating that the law was valid insofar as it would prevent deviant sexual behavior.

---

[102] Id. at 564.

[103] Id.

[104] Id. at 565.

[105] Id.

It added that such material would induce anti-social conduct.[106] The Court overcame this claim, citing a lack of empirical evidence and the abstention of the "clear and present danger" test in Roth.[107]

Justices Stewart, Brennen, and White concurred in the opinion, but on different grounds. They insisted that the seizure of the films was repugnant to Fourth Amendment protections. They also noted that the warrant did not describe the films; these justices observed that the action of the officials constituted a clear violation of the Fourth and Fourteenth Amendments.[108]

To conclude, the Supreme Court has professed the following viewpoints: (1) the private possession of obscene material, viewed in the home of an individual, is afforded full constitutional protections under the First and Fourteenth Amendments, and (2) the Roth decision is not impaired by this ruling; the states still retain broad powers to regulate obscenity.

What can one extrapolate from the Stanley decision? First, this rule entitles a person to read or view whatever literature he desires in the precinct of his own home. If an individual enjoys the right to receive all information and ideas, then, does another individual have

---

[106] See "Private Possession of Obscene Material," 83 HARV. L. REV. I, 149-50 (1969).

[107] 394 U.S. at 567.

[108] Id. at 569-572.

the right to disseminate ideas to this person? Some have assumed that the right to receive is contingent upon the right to distribute.[109]

Roth concerned itself with the distribution of obscene materials and, as already noted, its progeny was concerned with the same issues. It seems that the Court has placed itself in an awkward position, upholding private possession but affirming some convictions for distribution. The dilemma, as this author describes it, must be re-evaluated in light of Roth. The subsequent decisions may aid in facilitating a more lucid perspective of obscenity law.

More importantly, the Stanley decision indicates a willingness on the part of the United States Supreme Court to place obscene literature under constitutional protection. However, Roth explicitly held that obscenity is outside the pale of First Amendment protection. Some scholars believe this to be a classic rejection of the two-level theory of obscenity.[110]

From Rowan to Rabe

With the effects of Stanley still undetermined, the Supreme Court entered the 1969 term with a degree of ambivalence toward obscenity and First Amendment protections. Perhaps the most significant

---

[109] See Note, "First Amendment," 57 CAL. L. REV. 1268-1280 (1969); R. Karre, "Stanley v. Georgia: New Directions in Obscenity Regulation?," 48 TEX. L. REV. 646 (1970).

[110] Id.

decision that term concerned the right of an unwilling recipient's complaint about obscene material sent through the mail.

In Rowan,[111] Chief Justice Burger, speaking for a unanimous Court, upheld the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967.[112] The statute provided that a person who receives in the mail a pandering advertisement considered to be sexually arousing may request the Post Office to secure an order prohibiting all further mailings to the addressee.[113]

Rowan, presumably, was the owner or manager of several large order mailing houses in the California area. He alleged that the statute abridged the right to communicate through the mail. In deciding the case, Chief Justice Burger utilized a balancing of interests test; the Justice asserted that the home owner's right to be free from obnoxious material far outweighed the sender's interest in communication through the mails. Additionally, it was noted by the Court that the receiver of such material has unfettered discretion to determine whether it is objectionable or not.

The legislative history of the statute was examined, whereupon

---

[111] Rowan v. United States Post Office Department, 397 U.S. 728 (1970).

[112] 39 U.S.C. Section 4009 (Supp. IV, 1969).

[113] Id., Section 4009 (6). The order further requires the sender to delete the addressee's name from the mailing list. If the mailer persists, the Postmaster may initiate a hearing to determine whether a violation had occurred.

the Court agreed that no scheme of censorship had been delegated to the Post Office. Conversely, the statute was explicitly designed to protect the privacy of homes from unwarranted intrusion of sexually oriented material.

Burger asserted that if such material was allowed to enter the homes of unwilling recipients, it would constitute a form of trespass. He stated that:

> Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the King may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.[114]

With respect to protecting children from such material, the Chief Justice emphasized that the statute provided a protective wall which would prevent the penetration of offensive ideas. He summarized:

> We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are captives outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.[115]

Mr. Justice Brennen and Justice Black filed a concurring opinion, noting that this statute could give plenary discretion to parents in

---

[114] 397 U.S. at 737.

[115] Id. at 738.

respect to even political, religious, or other views.

The Rowan[116] decision is implicitly related to the rule espoused in Stanley. While private possession of obscene material is constitutionally protected, in this ruling the Court seemed to indicate a reluctance to sanction unlimited availability of obscene matter. Moreover, one can infer that the Court has delegated its authority of determining "pandering" or other tests of obscenity to the recipient of such materials.

During its 1970 term, the Court handed down a number of obscenity decisions involving statutory construction and customs seizures.

The first case[117] was concerned with the exhibition of the film I Am Curious (Yellow) in which the state of Massachusetts secured an an indictment under its anti-obscenity law.[118] The defendants were convicted of possession of obscene films for the purpose of exhibiting them. Upon receipt of this communication, the operator of the movie house brought suit in a federal district court, submitting that the statute was unconstitutional insofar as no prior adversary hearing was held to determine the alleged obscenity. Moreover, the appellees claimed that the standards set forth in the statute had not allowed the motion picture to be defined within the limits of Redrup,[119] and provided no way any

---

[116]See "Private Citizen's Power to Terminate Mailings from Specified Senders," 84 HARV. L. REV. I, 117-127 (1970).

[117]Byrne v. Karalexis, 401 U.S. 216 (1971).

[118]MASS. GEN. LAWS c. 272 Section 28A.

[119]386 U.S. at 769 supra.

future defendant could ". . . know the work to be obscene." A three-judge federal court granted the defendants injunction relief on the grounds that further abstention from exhibiting the movie would show irreparable harm.[120] The state appealed, and the Supreme Court noted probable jurisdiction.

In a per curiam decision, the Court vacated and remanded the case to the appropriate federal court. It was observed that the district court had erred in issuing the injunction since there was no threat to the appellee's federally protected rights ". . . that cannot be eliminated by his defense against a single criminal prosecution."[121] Justices Brennen, White, and Marshall joined in a dissent, commenting that the decision should have been reversed because they found the state had neither harassed nor intervened with the showing of the film.

The last two companion cases of the term were decided on the same day. Their reversal indicates a reaffirmation of the Roth doctrine. These salient decisions merit close scrutiny because they may clarify the meaning of Stanley.

In pursuance of a federal statute,[122] customs officials seized thirty-seven photographs[123] from the luggage of one Milton Luros. A

---

[120] 401 U.S. at 219. Their argument centered around the proposition that further delay would result in a substantial loss of business.

[121] Id. at 220.

[122] 19 U.S.C. Section 1305a.

[123] U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971).

hearing was held by a United States Attorney, seeking forfeiture of the purported obscene material. Luros, however, argued that the hearing took too long, whereupon he filed a counterclaim asserting that the materials were not obscene and challenged the validity of the statute. The district court found for Luros, holding that the law failed to provide procedural safeguards set forth in Freedman, and the material in private possession was protected under Stanley.

The Supreme Court reversed, observing that the procedural question concerning the time limit between seizure and judicial resolution was conducted in a proper manner. To save the statute from invalidation, the majority required a prior judicial hearing to provide 14 days to initiate a forfeiture hearing and 60 days for the completion of those hearings.[124]

The Court then concentrated on the more important question of whether the photographs seized constituted material in private possession as expounded in Stanley. The majority observed that the lower court misinterpreted the meaning of Stanley, and ruled that a considerable difference existed between reading pornography in the home and possessing imported pornography for eventual commercial dissemination.[125]

---

[124] 402 U.S. at 374.

[125] Luros, upon seizure of the photos, had stipulated that he intended to use the material in a book called Kama Sutra, which would later be published and sold on the open market.

Justice White further noted that Congress may prohibit the importation of obscenity from a foreign commerce by the lawful removal of such matter from a traveler's luggage, even though intended for private use.[126] He concluded:

> That the private user under Stanley may not be prosecuted for possession of obscenity in his home does not mean he is entitled to import it . . . free from the power of Congress . . . Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of . . . illegal materials when his possession of them is discovered during a search.[127]

Justices Harlan, Stewart, and White issued a concurring judgment.

In his dissent, Justice Marshall argued that the approach in Stanley should have been applied to the present case; that is, obscenity protected by the constitution when in the privacy of one's home should not be differentiated from a group of photographs in an individual's personal luggage.

Mr. Justice Black also filed a dissent in which he vehemently denounced the majority's ruling for a lack of consistency on the contextual definition of obscenity. Furthermore, he insisted that, since no one can properly define it, all forms of obscene material fall under the umbrella of the First Amendment.

Moreover, Black questioned whether the Court could distinguish private possession of material from the possession of imported material

---

[126] 402 U.S. at 376.

[127] Id. (Emphasis added).

in a person's luggage. He offered this succinct observation:

> It would seem to me that if a citizen had a right to possess "obscene" material in the privacy of his own home he should have the right to receive it voluntarily through the mail . . . . The mere act of importation . . . can hardly be more offensive to others than is private perusal in one's home. The right to read and view literature and pictures at home is hollow indeed if it does not include a right to carry that material privately in one's luggage when entering the country.[128]

The meaning of this specific litigation indicates that the Court has retreated somewhat from what was decided in Stanley. To reach such a result, the Court had to interpret Stanley along narrow lines, refusing to follow the implications of a First Amendment rationale, which would have protected dissemination.[129] In addition, the majority's rationale seems to imply that proscribing the importation of obscene material dilutes the constitutional mandate of the right to receive ideas. Thus, in Thirty-Seven Photographs, the Supreme Court turned away from sanctioning an unlimited access of obscene material for private possession.

Another significant question was presented in United States v. Reidel;[130] an individual was convicted for using the mails to transmit obscene materials to consenting adults. Reidel was sending copies of The True Facts about Imported Pornography through the mails to speci-

---

[128] Id. at 381.

[129] See "Mailing and Importation of Obscene Materials," 85 HARV. L. REV. II, 229-237 (1971).

[130] 402 U.S. 351 (1971).

fied adults who had answered his advertisement in a magazine. The authorities promptly arrested him for violating the federal anti-obscenity statute,[131] after which he filed a counterclaim contending that his First Amendment rights were violated because the sale was a constitutionally protected delivery. The federal district court held that the statute violated the defendant's right to send material to consenting adults.

Speaking for the majority, Justice White disagreed with the lower court's decision, noting that the circumstances surrounding his case were almost identical to those in Roth. It should be noted that in Roth, ". . . obscenity is not held to be in the area of constitutionally protected speech or press."[132] White emphasized that Roth was not overruled, that it served as the controlling law in the instant case.

Stressing the importance of Roth again, Justice White observed that the states retain broad power to regulate obscenity, absent private possession. He stated:

> Nothing in Stanley questioned the validity of Roth insofar as the distribution of obscene material was concerned . . . . the Court had no thought of questioning the validity of Section 1461 as applied to those who, like Reidel, are disseminating obscenity through the mails and who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home.[133]

---

[131] 18 U.S.C. Section 1461.

[132] 354 U.S. at 485.

[133] 402 U.S. at 354-355.

The district court, it has already been noted, gave Stanley too wide a sweep by inferring that the right to receive information and ideas means the right for someone to deliver such data and concepts to him.[134] White emphasized that, if the Court were to adhere to this method of reasoning, Roth would be "effectively scuttled". Thus, it was held by the Court that, whatever the scope of one's right to receive material, as set forth in Stanley, ". . . . it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here--dealings which Roth held unprotected by the First Amendment."[135]

Justices Harlan and Marshall concurred in the opinion, whereas Justices Black and Douglas dissented on grounds similar to those elucidated in Thirty-Seven Photographs.

In review, the Court reversed the lower court's decision on the grounds that Stanley was interpreted too broadly. It was also held that Roth was not impaired by the Stanley rule, thus leaving the doctrine in effect to adjudicate the present case. Finally, the commercial dissemination of obscene material, as distinguished from mere private possession, was held to be outside the realm of First Amendment protections.

This analysis now focuses on the most recent obscenity decision[136]

---

[134] Id. at 355.

[135] Id.

[136] Rabe v. State of Washington, 92 S. Ct. 993 (1972).

rendered by the Supreme Court. At issue is a Washington statute alleged by the plaintiff to be unconstitutionally void for vagueness.

The petitioner in this controversy owns and operates a drive-in movie theater. On one particular occasion, the theater offered for exhibition the motion picture Carmen Baby which portrayed sexually frank scenes, but contained no explicit sexual behavior. A police officer viewed the film for a few days, after which he obtained a warrant for Rabe's arrest pursuant to Washington's obscenity statute. Some time later Rabe was convicted by the Superior court and this conviction was affirmed by the state supreme court. The United States Supreme Court granted a writ of certiorari.

In a per curiam decision, the Supreme Court recognized that the Washington Supreme Court had determined the obscenity of the movie under circumstances other than the previous tests set forth by the Court.[137] It was noted that if the Roth standard were used, the motion picture would have passed the definitional obscenity test if the viewing audience were consenting adults.[138] Nonetheless, it was observed that the Washington Supreme Court had found Carmen Baby to be obscene within the "context" of its exhibition.

The Court then addressed the question of vagueness. It was reported by the Court that a statute may avoid vagueness when ". . . fair

---

[137] 354 U.S. 476; 383 U.S. 413, supra.

[138] 92 S. Ct. at 994.

notice of certain conduct is proscribed."[139] With this in mind, the majority observed that the law made no mention of the "context" or location of the film. Thus, the operator of the theater was convicted of a charge somewhat different from the one he allegedly violated.[140] In addition, the Washington Court's interpretation of the statute provided criminal punishment for exhibiting the film outdoors, whereas an indoor showing would be immune from prosecution. The Supreme Court held that the statute was impermissably vague because ". . . of its failure to give him fair notice that criminal liability is dependent upon the place where the film is shown."[141]

In conclusion, the Court had taken these positions: (1) a state must be cognizant to mention specifically whether a film or publication can be determined obscene by its contextual attributes; and (2) a state cannot justify due process of law when a person is convicted under a charge different from that type of conduct the statute proscribed.

A Capsule Review

One can now assume with confidence that since Roth, the members of the Court have adopted a variety of positions when confronted with the problem of obscenity; these are summarized below.[142]

---

[139] Id. at 994.

[140] Id.

[141] Id.

[142] See P. Magrath, "The Obscenity Cases: Grapes of Roth," SUP. CT. REV. 56-57 (1966).

1. Justices Black and Douglas believe that all material is protected by the constitution, except in situations where illegal conduct is directly associated with a particular form of expression.

2. Justice Stewart believes that the federal and state governments can only suppress material deemed hard-core pornography.

3. Justice Harlan assumes a dual role; at the federal level, hard-core pornography is suppressible; at the state level, material may be restrained if it is deemed prurient.

4. Chief Justice Warren and Justices Brennen and Fortas take the position that prurient appeal, patent offensiveness, and utter lack of social value must coalesce before material may be suppressed at both levels of government. In addition, constitutional protection is withdrawn if the material is commercially exploited to the extent of accentuating its pruriency.

5. Justices Clark and White believe material may be suppressed when its dominant interest, as a whole, appeals to the prurient.

The incorporation of exploitative context and predominant audience to whom material is directed into the obscenity tests (Ginzburg and Mishkin) certainly broadened the scope of obscenity prosecutions.

Subsequent to Redrup, the Supreme Court had further limited the amount of material within the constitutional meaning of the word "obscene," and was reluctant to apply the "contextual obscenity standard" set forth in Ginzburg. Moreover, the Court indicated a desire

to apply the "variable obscenity" rule when upholding statutes providing for the protection of juveniles from sexual literature.

Since the eventful Stanley decision, the United States Supreme Court has assumed these additional positions: (1) whatever type of material an individual reads or views in the privacy of his own home is sanctioned by the First and Fourteenth Amendments; (2) addressees receiving obscene literature in the mail may request the Post Office to terminate such mailings by imposing a prohibitory order upon the sender; (3) Roth has been reaffirmed in that a distinction exists between sending obscene material through the mails and examining pornography in the home; and (4) the importation of obscene materials can be prohibited by Congressional authority, even though such importation may be intended for private use.

Thus, the Court has refused to allow an unlimited access to obscene materials. Although state and federal regulation of obscenity stops at the door to one's home, commercial distribution and importation are subject to governmental scrutiny. In effect, what the Court has said since Stanley is this: a person may use pornography within the sanctuary of his home, but he must choose channels of availability other than through commercial distribution or importation from a foreign source.

CHAPTER II

A PERUSAL OF FEDERAL PROCEDURAL OBSCENITY DECISIONS

This chapter focuses on federal cases pertaining to procedural aspects of obscenity prosecutions. In essence, the following pages will examine the administration of obscenity laws, censorship boards, and procedures employed to secure evidence in obscenity litigation.

Prior Restraint

Our constitutional heritage has witnessed many attempts to suppress the activities of the printing press. In colonial England and America, powerful interests often practiced the method of restraining certain speech prior to publication. This has been commonly known as a prior restraint upon the publication of printed matter. As a result, the press has waged a never-ending battle against this form of suppression, upholding its fundamental right of free speech and press.[1]

It is against this background that the classic Near[2] case must

---

[1] Freedom of speech and press is not absolute. See Jack Plano and Milton Greenberg, The American Political Dictionary (New York: Holt, Rhinehart and Winston, Inc., 1967), pp. 63-66.

[2] Near v. Minnesota, 283 U.S. 697 (1931).

be read. The decision marked the first time that a state law was struck down as violative of freedom of the press. At issue was the "Minnesota gag law" that proscribed newspaper printings which were "scandalous, malicious, defamatory, or obscene."[3] The district attorney invoked the state statute because of a series of articles that attacked certain public officials with gross neglect of duty or malfeasance in office.

In a divided opinion, the Supreme Court held the law as repugnant to the First and Fourteenth Amendments. It was specifically noted that although the material may have fanned the flames of scandal, the threat to the liberty of the press was a more serious public evil. Moreover, the federal judiciary ruled that the law was unconstitutional even though an inquiry was not made into the truth of the charges contained in the printed articles. In effect, the landmark decision "nationalized" the free speech and press clauses of the First Amendment, thus affording judicial protection from national or state impairment.

The first case[4] pertaining to obscenity involved the administration of an obscenity section of the New York Code of Criminal Procedure. The section authorized an official to use a "limited injunction" against the sale and distribution of matter found to be obscene by the court. If the defendant failed to produce the material in question, an

---

[3] Id. at 698.

[4] Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

order could be issued for its seizure.[5] The appellant challenged the authority of the order, alleging that the seizure of material constituted a prior restraint of free expression.

Justice Frankfurter spoke for the majority and observed that protection from prior restraint is not unlimited. Since the law went into effect after the publication of the material, Frankfurter held that it assured the dealer protection from an injunction unless he ignored a court order seeking to determine the obscenity of the literature. The convictions were upheld, and thus a form of prior restraint was sanctioned on the premise that "primary requirements of decency may be enforced against obscene publications."[6]

Chief Justice Warren dissented, asserting that the methods employed by the police were based upon their own interpretation of what is "unfit for public use,"[7] thus judging what is obscene in the absence of any standard.[8] Justice Brennen dissented, noting that the statute lacked any provision for a jury trial. Brennen was of the opinion that the jury trial best reflects the sentiments of a specific community which would therefore be consonant with the contemporary community standards test.[9]

---

[5] Id. at 442.

[6] Id. at 440.

[7] Id. at 445.

[8] Justices Douglas and Black also dissented stressing that the seizure of such materials without a hearing clearly violated the provisions of the First Amendment.

[9] 354 U.S. at 448.

Search Warrants I

The validity of search warrants in obscenity cases came before the Court in Marcus v. Search Warrants.[10] This case involved the issuance of a search warrant by a magistrate from the state of Missouri. On the warrant were the places to be searched and the articles to be seized; no adversary hearing was required prior to the issuance of the warrant. The magistrate was required to set a date for a hearing on the obscenity of the material; however, no time limit was set.

In writing the majority opinion, Brennen noted that the warrant was overly broad because the police officials had unfettered discretion in deciding what materials were obscene. In addition, he recognized that the police authorities did not choose to submit the material to a magistrate for any evaluation of the contents. Brennen decided that states may not use whatever methods possible to decide what is obscene under a constitutionally protected search.[11] Finally, the Court overruled the state's argument that the obscene material was comparable to " . . . gambling paraphernalia or other contraband for the purposes of search and seizure . . ."[12]

---

[10] 367 U.S. 717 (1961).

[11] Id. at 731.

[12] Id. at 730-31.

State Censorship

The question of state censorship arose in a case[13] concerning the Rhode Island Commission to Encourage Morality in Youth, a body which was statutorily empowered to educate the public concerning obscenity and recommend prosecution of all violations of the obscenity statute. Max Silverstein, the appellant in this case, was notified numerous times by the commission that a quantity of his books[14] were found objectionable to the sale or distribution to youth under eighteen years old. Wishing to avoid trouble, Silverstein retracted all copies of the publications from circulation and informed the authorities of this action. The appellant sought to invalidate the law and obtain injunctive relief from further curtailment of the materials in question.

Justice Brennen, in the majority opinion, observed that the commission sought to restrain the distribution of certain material without any judicial determination of its contents. This prompted Brennen to conclude that the commission was maintaining an informal method of prior restraint explicitly in contravention of the Fourteenth Amendment. Thus, the Court upheld an injunction against the commission.

Justice Clark concurred, noting that the Supreme Court had not prescribed any standards for Rhode Island to meet. Clark urged

---

[13]Bantam Books v. Sullivan, 372 U.S. 58 (1963).

[14]The publications in question were copies of Playboy, Rogue, and Frolic.

that the commission should retain its advisory capacity, but leave the issuance of "orders" to law enforcement officials.

Mr. Justice Harlan dissented, expressing support for the state to exercise its police powers to control the juvenile obscenity problem. He maintained that the majority's decision would preclude a legitimate interest of the state. Moreover, Harlan noted than several essays linked a causal relationship between "obscenity" and juvenile delinquency, and on these grounds he would have affirmed the Rhode Island decision.

Search Warrants II

The Supreme Court first examined the question of prior adversary hearings in the Quantity[15] case. The Attorney General of Kansas obtained an order directing a police official to procure and impound, pending a hearing, copies of pulp-type novels at a newsstand. Afterwards, the federal district court directed another order for the destruction of 1,715 books.

Justice Brennen, in writing the majority opinion, found that the procedures employed by the state had "chilling" effects upon constitutional safeguards of free expression. It was the Court's position that the appellant was denied a hearing prior to the issuance of the warrant, thus violating procedural due process of law. The Court

---

[15] A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964).

also rejected the contention that obscene material is contraband and therefore reversed the decision of the Kansas court.[16]

Motion Picture Censorship

Motion picture censorship boards came under close scrutiny in the Freedman[17] decision. A film was exhibited at a theater without first being submitted for review before a State Board of Censors. The petitioner submitted that such a procedure constituted a prior restraint on protected expression. Under the law, the Board could censor a movie without judicial review, save for an order from the Maryland courts reversing the Board's decision.[18] The Court also observed that the burden of the procedure was placed on the exhibitor.

Writing for the Court, Justice Brennen agreed with the petitioner's claims, holding the procedure constituted a prior censorship of motion pictures.[19] According to the Court, the burden of proof should rest with the state when determining whether or not the plaintiff engaged

---

[16]In a concurring opinion, Justice Stewart cited his well-known hard-core pornography postulate; he asserted that if the books were found hard-core, then the seizure of the material would be a legitimate exercise of power by the state. 378 U.S. at 215.

[17]Freedman v. Maryland, 380 U.S. 51 (1965).

[18]During the course of the Board's review, no time limit or prompt judicial review was established.

[19]It should be pointed out that the classic Burstyn v. Wilson, 343 U.S. 495 (1952), decision placed motion pictures under the provisions of the First Amendment.

in criminal expression. Brennen further pointed out that although a state may review a film prior to its showing, a decision of the Board should not affect a final determination of the protected speech.[20]

However, in this decision the Court left unsolved the question of whether or not an adversary hearing should be required prior to an injunction, warrant, or other method of prior censorship.

Search Warrants III

In Lee Art Theatres, Inc. v. Virginia,[21] the Supreme Court again confronted the prior adversary hearing question. One copy of a film was seized by state officers from the place of business owned by the appellant. He was later convicted under a state law for possessing and exhibiting lewd and salacious films. The materials were seized in pursuance of a warrant issued by a justice of the peace. It was reported that the judge did not even view the film prior to the issuance of the warrant.

Filing a brief per curiam decision, the Court avoided the prior adversary hearing requirement and held that a police officer's conclusory assertions that a film was obscene did not satisfy the requirements of a search warrant. Moreover, it was decided that in the absence of judicial scrutiny of the materials, the actions of the officials

---

[20]Brennen, however, implied that Maryland could pattern a statutory scheme similar to the one prescribed in Kingsley.

[21]392 U.S. 636 (1968).

constituted an arbitrary, capricious, and unreasonable search. The Court left open the question of whether in film cases a judge should peruse a motion picture before issuing an ex parte[22] warrant.

In his dissent, Justice Harlan asserted that a police officer should be qualified to seize material prior to an obscenity hearing. He also assumed the position that police officers are just as capable as a magistrate when determining probable obscenity.[23]

Obviously, the Supreme Court has not ruled on a specific procedure of seizing obscene material prior to an adversary hearing. This hiatus of opinion indicates that procedures may be devised as each specific case comes before the Court. The important question remains: should a prior adversary hearing be held before the issuance of a warrant or injunction? One suggested alternative to the problem would be to examine a film or book only during those hours when the public is not normally viewing the material.[24]

Search Incident to a Lawful Arrest?

On June 23, 1969, the Court decided a case[25] in which no war-

---

[22] A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person with adversary interests. Black's Law Dictionary (St. Paul, Minnesota: West Publishing Co., 1933), p. 705.

[23] 392 U.S. at 683.

[24] See Notes, "Prior Adversary Hearings on the Question of Obscenity," 70 COLUM. L. REV. 1403, 1419 (1970).

[25] Von Cleef v. New Jersey, 395 U.S. 814 (1969).

rant was used during a search. The state argued that the search of the defendant's entire house was incident to a lawful arrest.[26]

Von Cleef was arrested in pursuance of a New Jersey statute prohibiting the possession of obscene publications. Without a warrant, the police searched the entire 16-room house and found several thousand articles that were later ruled as admissable evidence. The trial court convicted the appellant; he then sought relief under the Fourth Amendment in the state supreme court, which affirmed the conviction.

In a per curiam decision, the majority noted that if the rule set forth in Chimel[27] was to be applied retroactively, the actions of New Jersey would have been declared an illegal search and seizure. Nevertheless, it was held that the circumstances surrounding the arrest constituted a mass seizure and was wholly inconsistent with the Fourth Amendment.[28] It was ruled that the governing principles of Rabinowitz[29] were incompatible with the facts in the present case. Accordingly, the Court reversed the conviction and remanded the case for a new trial.

---

[26]This is only one exception to the use of search warrants. Police may, upon a lawful arrest, search only the "immediate area" for evidence in connection with an alleged criminal offense.

[27]See Chimel v. California, 395 U.S. 752 (1969).

[28]395 U.S. at 816.

[29]U.S. v. Rabinowitz, 339 U.S. 56 (1950).

Postal Administrative Proceedings

In January of 1971, the Supreme Court consolidated two cases into one opinion.[30] The case involved a federal statute[31] authorizing the Postmaster General to return mail to the sender or refuse the payment of postal money orders in connection with the commercial distribution of allegedly obscene matter. Another statute[32] provided that the Postmaster General, upon probable cause, could secure injunctive relief in a federal court, directing the detention of the seller's incoming mail pending an administrative hearing.

In both instances, the Postmaster General invoked the statutes against two sellers of allegedly obscene magazines. The appropriate district court ruled against a temporary restraining order and held the statutes void because they failed to provide procedural guarantees.

Justice Brennen, in authoring an eight-man majority opinion, held that the statutes lacked the procedural safeguards expounded in Freedman.[33] Reaffirming its position in Freedman, the Court declared that the statutes ignored specific guidelines for prompt judicial determination of the obscenity of the material before it was enjoined from being mailed; it was also noted that the statute failed to provide any

---

[30] Blount v. Rizzi, 400 U.S. 410 (1971).

[31] 39 U.S.C. Section 4006.

[32] 39 U.S.C. Section 4007.

[33] 380 U.S. 51 supra.

judicial review of the administrative hearings. This decision was very similar to Freedman in which the administrative decision also had a censoring effect of finality.[34] Thus, it was held that the statutes constituted a form of prior restraint of free expression and that they clearly violated the First and Fourteenth Amendments.

Federal Intervention in State Obscenity Proceedings

Dyson v. Stein[35] presented the question of a federal district court intervening in a state criminal proceeding.[36] Stein was the owner of the newspaper Dallas Notes and was arrested after a search[37] of his house had produced a quantity of obscene pictures. Shortly thereafter, criminal proceedings were brought against him in a state court.

Stein immediately filed suit in a federal court, seeking injunctive relief against the obscenity statute, whereupon a federal district court granted relief and held the statute unconstitutional.

In a per curiam decision, the Supreme Court vacated and remanded the case because the district court failed to show any irreparable

---

[34] 400 U.S. at 417-418.

[35] 401 U.S. 200 (1971).

[36] A similar case was decided during the 1970 term. See Perez v. Ledesma, 401 U.S. 82 (1971).

[37] The police seized everything except his furniture. At one point, they confiscated a poster of Mao Tse-Tung, hardly an obscene photography.

injury to Stein. This decision was based upon prior cases involving federal intervention affecting pending criminal prosecutions.[38]

Significant in this case is Justice Douglas' lengthy and often rancorous dissent. First, he insisted that the police did not know what materials were obscene. The police seized everything, effectively putting him out of business. Douglas characterized the raids as ". . . . search and destroy missions in the Vietnamese sense of the phrase."[39] He would have ruled the search and seizure as an illegal state action.

Secondly, Douglas reasserted his prior views on obscenity statutes, reading the First Amendment in an absolute manner so as to prohibit governmental suppression of all types of expression. He was of the viewpoint that obscenity statutes are so vague and ambiguous that not even an average person could comprehend their meanings. Douglas provided this conclusion:

> In these criminal cases dealing with obscenity, we leave people confused and in the dark as to whether they are or are not criminals. Criminal laws must give fair warning; and a person receives no real warning when he crosses the line between lawful and the unlawful, under the Texas statute or under the standard approved by the Court.[40]

Conclusion

A review of the federal procedural obscenity decisions indicates

---

[38] See Samuels v. Mackell, 401 U.S. 66 (1971) and Younger v. Harris, 401 U.S. 37 (1971).

[39] 401 U.S. at 204.

[40] Id. at 214.

the following positions:

1. Although a state can sanction some form of prior review of motion pictures, basic procedural guarantees must be afforded to the exhibitor. In essence, a censor's judgment should not be final; a prompt judicial determination should be made available. Moreover, the burden of proof rests with the state when ascertaining whether or not a person engaged in obscenity.

2. Law enforcement authorities may not exercise broad discretion to seize whatever material they may think as obscene. In other words, a magistrate should meticulously evaluate whether probable cause is justified prior to the issuance of a warrant.

3. Allegedly obscene material is not comparable to narcotics or gambling apparatus. Authorized searches should be conducted in a manner similar to an ordinary search for stolen money, weapons, etc.

4. The Court has avoided the issue of whether an adversary hearing on the alleged obscenity of material be required prior to the issuance of a warrant or injunction. It seems evident that the Court is constructing procedural guidelines as each case arises.

CHAPTER III

ILLINOIS CASE LAW PERTAINING TO OBSCENITY

This chapter will review the Illinois Supreme and appellate courts' interpretations of the state obscenity statute[1] and municipal ordinances. An analysis of substantive case law will precede a review of the procedural cases.

Introduction

Prior to Roth-Alberts, the states had only ruled on the obscenity of films, books, and other materials. At this juncture, it would seem desirable to examine two cases decided before 1957 so that the reader may understand what standards were used in Illinois to determine the obscenity of a publication.

In 1954, the Supreme Court of Illinois ruled on the validity of a motion picture censorship ordinance imposed upon exhibitors by the City of Chicago.[2] The exhibitors sought to show the movie The Miracle but were required to obtain a permit prior to its showing. The police

---

[1]The statute, which appears on page 69, will be referred to in a variety of cases.

[2]American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585, appeal dismissed, 348 U.S. 979 (1957).

commissioner determined that the film was obscene and denied them a license.[3] The primary reason for the denial was based upon the finding that the film depicted ". . . immorality, obscenity, depravity, criminality, incitement to riot, hanging, lynching, . . . or burning of a human being. . . ."[4]

Sustaining the validity of the censorship ordinance, the state supreme court ruled that the state has a compelling interest to prevent any overt sexual conduct portrayed by a film. The court prescribed a definition of obscenity for motion pictures; it stated that

> . . . . a motion picture is obscene . . . . when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal, average person.[5]

On the other hand, the majority was disturbed with the censoring procedures employed by the city. It was observed that the police commissioner had made a final decision concerning the film's alleged obscenity; he functioned as the ultimate censor. This method was rejected and the case was remanded to a trial court for a precise application of the ordinance.

The same ordinance came under attack in the Times Film[6]

---

[3]The mayor also affirmed the decision.

[4]3 Ill. 2d at 336.

[5]Id. at 347.

[6]Times Film Corporation v. City of Chicago, 139 F. Supp. 837 (N.D. Ill. 1956), aff'd, 244 F. 2d 432 (7th Cir. 1957), rev'd per curiam, 355 U.S. 35 (1957).

case in which a federal district court relied on the American Civil Liberties Union decision to uphold the validity of the ordinance. The plaintiffs requested a permit to exhibit the film The Game of Love.[7] However, the commissioner of police, upon viewing the film, denied the permit on the grounds that it was not acceptable to standards of moral decency. The corporation brought suit in the federal court alleging that the ordinance imposed a prior restraint on free speech and was vague and ambiguous.

Before the federal bench, a report was submitted on behalf of the plaintiffs, contending that the film did not arouse sexual desire or lustful thoughts within the definition of the ACLU case. Furthermore, it was claimed that the state's interest in preventing the arousal of sexual thoughts in normal persons was not sufficient to justify any form of prior restraint on freedom of expression.[8]

In answering these arguments, the federal judiciary noted that the dominant theme of the movie was sexual, for it emphasized an illicit relationship between a boy, an older woman, and a younger girl. It was ruled that within the definition of obscenity in the ACLU case, the film expressed a theme of sexual activity solely designed to arouse lascivious thoughts.

Focusing on the question of whether a state's interests justify

---

[7]The film did not explicitly portray sexual activity; rather, it depicted a romance between a young boy and a mature woman.

[8]139 F. Supp. at 839.

a prior censorship of expression, the judiciary cited Chaplinsky[9] in which it was held that free speech is not unlimited and that certain kinds of expression may be legitimately suppressed by the state. Thus, the United States District Court held that a state may not have to wait until a movie is shown before subjecting it to judicial review.[10]

The contention that the ordinance was vague was also met by the court. The bench noted that "obscene" is synonymous with "immoral," thus providing a definitive standard of conduct to support a criminal conviction. Additionally, it was held that to void the ordinance for vagueness would be to undermine the state's police power in the area of health and morals.[11] The court sustained the validity of the city ordinance.

These two cases have provided insight into Illinois obscenity decisions prior to Roth. The American Civil Liberties Union decision provided the Illinois courts with a standard for determining the alleged obscenity of materials. The definition set forth in ACLU is quite similar to the doctrine laid down in Roth, except for the fact that certain words like "prurient" and "community standards" are not used. In ACLU, the court sanctioned a form of prior restraint when it was established that the state had a legitimate interest in the morality of its

---

[9]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[10]139 F. Supp. at 841 (Emphasis Added).

[11]Id.

citizens. A year later, however, the United States Supreme Court reversed the decision on the grounds that the statute did not provide procedural safeguards.[12]

After 1957, the Illinois appellate courts were to be affected by a number of obscenity decisions rendered by the United States Supreme Court. A review of these decisions now becomes necessary to determine the direction of the state's obscenity statute and municipal ordinances.

Substantive Case Law

Chicago's obscenity ordinance was challenged in the Kimmel case[13] in which a bookstore owner was convicted of selling two obscene books. The publications Campus Mistress and Born to be Made were determined by a trial court jury to be obscene as defined by the local ordinance.[14] The defendant appealed for these reasons: (1) the ordinance violated the right of free speech; (2) the evidence failed to establish either the obscenity of the material or scienter on the part of the defendant, and (3) the ordinance omitted the "utterly without social

---

[12] 355 U.S. 35 (1957).

[13] City of Chicago v. Charles Kimmel, 31 Ill. 2d 202, 201 N.E. 2d 386 (1964).

[14] CHICAGO, ILL., CODE SECTION 192.9 (1939): It shall be unlawful for any person knowingly to exhibit, sell, print . . . circulate, publish, distribute . . . any obscene book, . . . Obscene is defined as follows: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.

importance" test.

The Illinois Supreme Court first observed that in Roth and subsequent cases no exact or precise definition of what is obscene had been devised. In addition, it was noted that in Roth the United States Supreme Court upheld the statute, even in the absence of the "utterly" test of obscenity. It was also held that the city ordinance was a valid means of determining obscenity because the present standards were proper to secure a conviction.

Kimmel also submitted that the trial court did not establish any evidence of community standards when judging the book to be obscene. The Court answered this contention by noting that the defendant offered no evidence to the contrary and no testimony of the literary merits of the publications.

An examination of the publications was then conducted by the Court. It held that although the material did deal with sexual activity, both books did meet the "social importance" test because they contained philosophical arguments on the problems of alcoholism. The Court based its decision to review the literature on the standards expounded in Jacobellis. Furthermore, it was found that the test of obscenity set forth in many of the United States Supreme Court decisions guided them in respect to the obscenity of these materials.

For these reasons, the Illinois Supreme Court ruled that the books did exhibit some amount of social value and did not "go sub-

stantially beyond customary limits of candor".[15]

People v. Sikora[16] represents a significant attack upon the constitutionality of Illinois' obscenity statute.[17] In this case, Mrs. Sikora, a manager of a retail book enterprise, was convicted in the Circuit Court of Cook County for the sale of obscene books. The defendant appealed, submitting that the state statute was repugnant to the federal constitution.

In the Illinois Supreme Court, the defendant asserted that section 11-20 of the state obscenity law was constitutionally infirm because irrelevant interpretations of evidence were used to make a determination of obscenity.

Mrs. Sikora also challenged the social importance test expounded in Roth and Jacobellis. The defendant contended that such a test of artistic, literary or social value would be ". . . irrelevant and would have no bearing on the determination of whether or not the allegedly

---

[15]31 Ill. 2d at 210.

[16]32 Ill. 2d 260, 204 N.E. 2d 768 (1965).

[17]ILL. REV. STAT. ch 38, par. 11-20 (1963): A person commits obscenity when, with knowledge of the nature or content thereof, ... sells, delivers, provides, offers, ... publishes, exhibits, ... creates, buys, procures, or . . . . advertises obscene matter with intent to disseminate it in violation of this Section or of the penal laws or regulations of any other jurisdiction . . . .

A thing is obscene if considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .

obscene material is obscene."[18] Rejecting this argument, the highest court of Illinois cited Justice Brennen's opinion that obscene material must be "utterly without redeeming social value."[19] The Kingsley case supported this holding because in it the United States Supreme Court recognized that such evidence is essential to a constitutional determination of obscenity. Furthermore, if there is an absence of any such evidence on which to make a judgment on the social value, a ". . . determination must be made from an examination of the material in question.[20]

It was observed that some justices favor a national standard and others favor local standards. The Illinois Supreme Court, nevertheless, upheld the lower court's appraisal of the material insofar as it was ascertained in terms of community standards in the United States today, particularly since no evidence of any local or statewide standard was introduced at the trial.

Mrs. Sikora additionally brought forward the argument that her knowledge of the obscene quality of the books had not been established by the state. After an extensive review of the defendant's advertising practices, it was found that some books were sent in unmarked wrappers; some flyers stated that a few of the materials were banned from

---

[18] Id. at 263.

[19] 378 U.S. at 191 supra.

[20] 32 Ill. 2d at 263.

the mails. Moreover, some of the descriptions of the books were termed "sex-hungry," "passionate," "torrid love," "lascivious," "lustful," and "orgiastic."[21] The defendant also testified that she never saw any of the books in question. She usually received an order with code numbers assigned to a respective book and sent this order along with a number to the shipping room for filling. On the basis of these facts, the majority found that: (1) "eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents;"[22] (2) the defendant was engaged in a bookselling enterprise specializing in material of a clearly salacious character; (3) advertising circulars describing the nature of the books were known by the defendant; and (4) scienter was sufficient enough to establish that the defendant was selling non-general books of an obscene nature. Consequently, the state's highest tribunal held that the defendant was sufficiently aware of the nature of the material to establish scienter.[23]

The Illinois Supreme Court then shifted its attention to the alleged obscenity of the three books. Relying on the standards set forth in Roth and subsequent decisions, the court held that Lust Campus,

---

[21] Id. at 264.

[22] Smith v. California, 361 U.S. 147, 154 (1959).

[23] It was held that a bookseller cannot "exculpate himself by studious avoidance about a book's contents . . ." Id. at 162.

Passion Bride, and Crossroads of Lust appealed to a prurient interest of sex. It was further ruled that the materials concentrated on explicit portrayals of normal and abnormal sexual relations and that neither book attempted to discuss any relevant problem that confronts society. In conclusion, the Illinois Supreme Court ruled that:

> Without their obscenity they would interest no one and would perform no function. All obscenity is essentially escapistic; it can not be allowed to justify itself on that basis.[24]

In 1966, the Illinois Supreme Court handed down an obscenity decision[25] involving a violation of the Municipal Code of Chicago. In the circuit court, the booksellers were exonerated of the charges because of insufficient proof of scienter; however, the corporate publisher was found guilty and given a fine of approximately two hundred dollars.

The cardinal issue was whether the books were obscene as defined by the governing ordinance. The controlling law was based on the constitutional standards in Roth, Jacobellis, and Kimmel.[26] The court expressed great concern with the perplexing problems of protecting the individual from salacious matter without arbitrarily curtailing the constitutional guarantees of free speech and free press.

---

[24] 32 Ill. 2d at 268. A Chicago lawyer suggests that all state courts should refrain from adjudicating obscenity cases. See M. Port, "Standards of Judging Obscenity--Who? What? Where?" 46 CHICAGO BAR REC. 405 (1965).

[25] City of Chicago v. Universal Publishing and Distributing Corporation, 34 Ill. 2d 250, 215 N.E. 2d 251 (1966). See also People v. Charles Kimmel, 35 Ill. 2d 244, 220 N.E. 2d 203 (1966).

[26] 31 Ill. 2d 202 supra.

In order to judge the alleged obscenity of the material in this case, the Court drew a distinction between Sikora and Kimmel. The publications in the former case were judged obscene to the extent that the contents dealt with sexual perversions, violence, and because the materials were totally devoid of any social, literary, artistic, or scientific importance. Materials in Kimmel, although portraying sexual encounters, were found to exhibit some amount of social value. On the basis of these past decisions, the material in this 1966 case was found to be less "patently offensive" than those held obscene in Sikora. This summary was provided:

> . . . [t]he material here contains substantially less violence, there is less abnormal sexual conduct, the descriptions of both normal and perverted sexual episodes are less bizarre and the total effect less erotic. . . . [n]o cunnilingus or oral-genital contact is described . . . . no masturbation, flagellation, masochism or acts of sadism, no homosexual conduct is involved, and no voyeurism is discussed.[27]

In conclusion, the Illinois Supreme Court has held that material dealing with sexual activity, absent perversion, violence and depravity, is constitutionally protected under the provisions of the First Amendment. The Court, therefore, has adopted the position that sexual material discussing alcoholism, suicide, obesity, and impotence has redeeming social importance.

The question of whether nudist magazines fall within the definition of obscenity was presented in the Biocic[28] case. The defendant

---

[27] 34 Ill. 2d at 256.

[28] People v. Biocic, 80 Ill. App. 2d 65, 224 N. E. 2d 572 (1967).

was indicted for the sale of two nudist magazines, Nudist Colorama 3 and Utopia, in the Circuit Court of Cook County. The trial judge found that the publications were not obscene according to statutory definitions; whereupon the case was appealed to the Illinois Appellate Court for the Second Division.

At bar the state submitted that the materials in question were obscene since they were sold in a place of business that featured racks of numerous "girlie type" magazines and exhibited movies of nude women. Responding to this contention, the judicial body took note of the environment in which the magazines were sold and held that the state law does provide evidence to determine obscenity, but such evidence serves only as a guide to the types of evidence which may be considered. It was observed that the trial judge considered this type of evidence but he ruled that ". . . obscenity is not a literary contagion which one book can get from another."[29] In other words, one publication is immune from the alleged obscenity of another, even though both are lying next to each other on a magazine stand.

Using the Roth formula, the appellate court then considered the character of the magazines in question. The court reported that, in spite of the fact that the publications contained pictures of nude men, women and children in which their genitalia were clearly exhibited, these materials did possess some social value because they contained

---

[29] Id. at 71.

expositions concerning nudist living. Various articles in the magazines espoused the virtues of the human body and advocated a healthy outlook toward the au naturel. There were no indications of sexual activity, eroticism, or morbid or shameful interests in sex. These magazines treated nudism as an acceptable facet of our culture and were therefore held to possess socially redeeming qualities.[30]

In a final attempt to reverse the original decision, the state asserted that as a result of the Ginzburg decision, the defendant should have been found guilty of the crime of obscenity because of the context in which the magazines were sold. However, the state appellate court overcame this assertion, noting that the indictments only charged the individual with selling obscenity per se, not ". . . through the form and method of the sale engaged in by the defendant."[31] The appellate court affirmed the circuit court's decision.

People v. Romaine[32] can be reviewed for two reasons. First, the conviction dealt with the pandering concept; and second, the famous novel Fanny Hill was questioned for its purported obscenity. The defendant who sold the book was convicted of violating Illinois' obscenity statute in a circuit court, which is a general trial court in the Illinois judicial system; he then directly appealed to the Illinois Supreme Court

---

[30] Id. at 70.

[31] Id. at 72.

[32] 38 Ill. 2d 325, 231 N.E. 2d 413 (1967).

because defense counsel asserted that the book was protected by the First Amendment and there was no evidence of pandering involved.

The Illinois Supreme Court first observed that a Chicago police officer made the purchase in the defendant's bookstore. The character of the marketing was not conducted in any manner that indicated titillation or pandering to the sordid interests of the customers. The novels were merely lying on a table marked "New Books," clearly open to any passerby's view. Based on these facts and Ginzburg, the Court recognized that there was no evidence of exploiting the prurient interests of sex, and it consequently ruled that ". . . since there is no such evidence, the character of the book must be determined from its contents, unaffected by the conditions under which it was sold."[33]

Focusing on the character of the novel in question, the Illinois Supreme Court noted that some courts throughout the country were rendering conflicting decisions as to the alleged obscenity of this book. Nevertheless, it was stated that the United States Supreme Court decision in Memoirs[34] seemed to resolve the issue.

In the high state court, testimony was introduced to the effect that the publication had both literary and historical importance. The

---

[33] Id. at 327.

[34] The high court overturned a Massachusetts ruling that although the book possessed a minimum of literary value, it did not possess any social importance. Furthermore, the Supreme Court held that before a book can be proscribed, it must be utterly without redeeming social value. 383 U.S. 413 supra.

state, on the other hand, offered no evidence to the contrary; rather, the state argued that if the book, as a whole, appeals to the prurient interest and goes beyond the limits of candor in description and representation, the publication cannot have any socially redeeming qualities which would provide it with First Amendment protection.[35] Responding to this argument, the Court observed that the nation's highest judicial body has repudiated such a theory. Consequently, it was decided that the Memoirs and Redrup[36] rulings could not support a judgment of conviction in the present case.

On November 22, 1968, the Illinois Supreme Court handed down the DeVilbiss[37] ruling which concerned a violation of the City of Blue Island's ordinance[38] prohibiting the exhibition and selling of obscene publications.[39] The defendant was convicted of obscenity in a Cook County Circuit Court. Subsequently, the bookseller challenged the ordinance in the state supreme court, alleging that it denied to him the fundamental rights of free speech and press as secured by the First Amendment. The defendant first submitted that neither the character

---

[35]38 Ill. 2d at 328.

[36]A state may only exercise power to suppress a narrowly and clearly identifiable class of material. 386 U.S. 767 supra.

[37]City of Blue Island v. DeVilbiss, 41 Ill. 2d 135, 242 N.E. 2d 761 (1968).

[38]BLUE ISLAND, ILL., ORDINANCE No. 1983, sec. 1.4 (4).

[39]The books were entitled Lesbian Lust, Homo Sweet Homo, Any Sex Will Do, and Flesh Whip.

and contents of the books nor his knowledge of the material provided sufficient evidence to sustain his conviction. He also asserted that the Blue Island ordinance was constitutionally deficient because it omitted the "utterly without social value" criteria set down in Roth.

The Illinois Supreme Court initially observed that in Kimmel this same Court stressed that the federal constitution did not require impossible standards for determining obscenity. Moreover, the Court noted that the language in the ordinance provided an appropriate warning as to the ". . . proscribed conduct when measured by common understanding and practices."[40] Thus, the Court concluded that it would be impractical to incorporate every subtle distinction of constitutional declaration into a statutory explanation and held that the ordinance was in harmony with the standards defined in the state law.

The appellant also challenged section 1.4(4) of the ordinance which dealt with obtaining evidence to show "the degree, if any, of public acceptance of the material in this State." He argued that this section unconstitutionally authorized the trial judge to determine his guilt on the basis of what the judge believed to be the public sentiments concerning such materials in Illinois. The Illinois Supreme Court observed that the United States Supreme Court has never resolved the issue of whether to imply a local standard or a national standard.[41]

---

[40] 41 Ill. 2d at 137.

[41] Moreover, views identical to those in the instant case were presented in the Sikora and Cusack cases, 1965 and 1968, respectively; in both instances, the Illinois Supreme Court did not rule on the Illinois community standards issue since no evidence of any statewide or local standards was introduced.

On the basis of this position, the high state court ruled that there was no further need to determine what standards were applicable.

Finally, the defendant charged that the state failed to establish scienter concerning the obscene quality of the materials in question. The Court noted this contention and observed that a review of the circumstances surrounding the conviction would be necessary to resolve the issue. The four books, it was reported, contained illustrated covers of partially clad men and women and descriptive language designed to appeal to lascivious thoughts. The books were displayed in an area with similarly illustrated and captioned materials. However, the defendant testified that he did not read or have any knowledge of the contents of the publications, and he even refused to sell these materials to persons under the age of twenty-one. Basing its opinion on Smith,[42] the Illinois Supreme Court held that the publications provided sufficient evidence to warrant the establishment of scienter.

The Court then turned to the question of whether the materials themselves were obscene. Each publication was found to resemble those judged obscene in the Sikora case. Observing that the books were ". . . replete with accounts of homosexual activity, masturbation, flagellation, oral-genital contacts, rape, voyeurism, masochism, and

---

[42] Smith v. California, 361 U.S. 147, 154 (1959). It was ruled that despite a bookseller's denial ". . . the circumstances may warrant inference that he was aware of what a book contained."

sadism,"[43] the Court held that the materials were obscene and appealed solely to the prurient interest; thus, it was ruled that these materials clearly violated the standards set forth in the city ordinance, and DeVilbiss' conviction was upheld.

City of Chicago v. Geraci[44] was the only substantive obscenity litigation adjudicated during the 1970 term. The defendants had been convicted of violating Chicago's obscenity ordinance for knowingly exhibiting and selling obscene material; all eleven appeals were consolidated into this opinion in which all of the defendants alleged that the publications were constitutionally protected.

Although the Illinois Supreme Court had previously upheld the validity of the city ordinance, it could not avoid making an independent constitutional judgment as to whether the materials constituted obscene or protected speech. Also, the Court noted that the publications were not sold or publicized in any fashion that would exploit their purportedly obscene contents. Therefore, the materials were broken down into categories to facilitate an impartial constitutional determination of obscenity.

The first category of materials consisted of pictorial magazines depicting nude male and female models in which attention was focused on their genitals; however, there was no indication of any explicit

---

[43] 41 Ill. 2d at 142.

[44] 46 Ill. 2d 576, 264 N.E. 2d 153 (1970).

sexual conduct. As for the magazines featuring nude males, the Court implied that their intent was designed to appeal to homosexuals. Citing a number of United States Supreme Court decisions,[45] the supreme judicial body reversed each conviction involving materials which depicted nude males and held that such magazines were federally protected expression. Similarly, the convictions involving female magazines were also reversed.

In another category of publications involving sado-masochism, violence, and brutality, the defendents urged the Illinois Supreme Court to hold the statute not obscene since the one magazine involved portrayed no sexual relations. The Court subsequently rejected this argument on the grounds that the material possessed excessive sexual aberrations, implied bloodshed, and that it contained not the slightest amount of social importance.[46] This decision was rendered in spite of the direction of the holdings in Mishkin[47] and Redrup;[48] the Court was unable to locate any prior United States Supreme Court litigation which

---

[45]See Manual Enterprises v. Day, 370 U.S. 478 (1962); Central Magazine Sales Ltd. v. United States, 389 U.S. 50 (1967) and Potomac News Co. v. United States, 389 U.S. 47 (1967) supra.

[46]46 Ill. 2d at 582.

[47]In that litigation, the Court upheld the convictions of similar publications because "pandering" was involved. 383 U.S. 502 supra.

[48]The reader will recall that the publications in Redrup were constitutionally protected, irrespective of what obscenity test was applied. 386 U.S. 767 supra.

dealt with this category of material as extreme. Thus, the Illinois Supreme Court made an independent determination of obscenity because of the varied interpretations handed down by the United States Supreme Court.

Finally, the novel Love Together was reviewed by the Court. This particular work depicted vivid and explicit sexual conduct. Although an introduction by a doctor was provided to "place the novel into some psychological perspective,"[49] the Illinois Supreme Court held the novel to be obscene because it appealed to a prurient interest in sex.

Two significant issues were raised in City of Moline v. Walker.[50] First, a Rock Island Circuit Court dismissed complaints against the defendant for selling obscene books and declared that the City of Moline was arbitrarily trying to suppress material that citizens read. Second, the circuit court held that the sale of obscene material to adults is now within the precinct of the First Amendment.[51] Moline then appealed directly to the Illinois Supreme Court.

The defendant first submitted that the Moline ordinance was hostile to the constitution because it omitted the following three criteria which were elucidated in Redrup: (1) the statute failed to provide a concern for juveniles; (2) the statute lacked any suggestion of obscene

---

[49] 46 Ill. 2d at 583.

[50] 49 Ill. 2d 392, 274 N.E. 2d 9 (1971).

[51] Id. at 393.

material being thrust upon an unwilling recipient so as to make it impossible to avoid exposure to it; and (3) the statute did not mention any evidence of "pandering".[52] In answering these contentions, the Court maintained that Reidel[53] had overruled these criteria which the defendant had asserted should have been incorporated into Moline's obscenity ordinance. Moreover, the Reidel decision effectively reaffirmed Roth and construed Stanley[54] in the narrowest fashion. The Illinois Supreme Court noted that Justice Harlan's concurring opinion in Reidel rejected the proposition that the First Amendment carries the "right to receive" obscene material through any channel of distribution provided that safeguards are taken to prevent the dissemination to unwilling adults and children.[55] Concomittantly, it was observed by this Court that with respect to obscenity laws involving children and unconsenting adults, the authority to affect changes in such laws "lies with those who pass, repeal, and amend statutes and ordinances . . ."[56] The Supreme Court of Illinois concluded that the Reidel decision, ". . . in effect, overruled Redrup and leaves Roth intact without the Redrup restrictions."[57]

---

[52] Id. at 395.

[53] 402 U.S. 351 supra.

[54] The essence of Stanley means that private possession of obscene material in one's home is constitutionally sanctioned. 394 U.S. 557 supra.

[55] 402 U.S. at 357.

[56] Id.

[57] 49 Ill. 2d at 396. The restrictions in Redrup centered around the idea that these provisions must be incorporated into obscenity statutes: protection of juveniles and unwilling adults from obscene material, and the "pandering" concept.

Hence, the judgment of the lower court was reversed and remanded for further proceedings.

The Illinois Supreme Court, in another opinion announced on the same day as Walker, decided that the contemporary community standards criterion was applicable on a statewide, but not a county-by-county standard. In the Butler[58] case, the defendant was convicted in the Vermilion County Circuit Court of violating the state obscenity statute for showing the movie Vixen. The movie was exhibited in a number of theaters throughout the state.

In the circuit court, the jury was instructed to determine the movie's alleged obscenity in accordance with the state obscenity statute. There were no instructions given to the jury as to the "scope or breadth of the community by whose contemporary standards the alleged obscenity of the film was to be judged."[59] However, the judge and the State's Attorney instructed the jury that they could find the motion picture obscene if it offended the community standards of Vermilion County.

Before the Illinois Supreme Court, the defendant claimed that the circuit court had erred in applying a countywide standard in determining the film's obscenity. Reviewing Roth and Jacobellis, the supreme court reported that there have been inconsistencies with respect to what type of community standard to apply. Some justices have ad-

---

[58] People v. Butler, 49 Ill. 2d 435, 275 N.E. 2d 400 (1971).

[59] Id. at 436.

vocated national standards; others favor local standards; and still others advocate that all obscenity is protected by the First Amendment. Whatever the interpretations, the high state court found it unnecessary to determine which standard had been mandated by the federal courts. The judiciary then focused on subsection (c) (4) of the state obscenity law which concerned the admissability of evidence and the "degree, if any, of public acceptance of the material in this state."[60] In interpreting this subsection, it was held that the trial court misconstrued the application of the community standards criterion. Accordingly, the Illinois Supreme Court reversed the conviction and held that the statute contemplated a statewide standard and not a standard that varies from one county to another.[61]

On March 21, 1972, the Illinois Supreme Court issued its most recent decision[62] concerning obscenity regulation. Three judgments from the Circuit Court of Winnebago County were consolidated for argument and opinion. In each instance, the defendants were charged with and convicted for selling allegedly obscene books. As a result, they immediately appealed to this Court seeking relief to dismiss the charges on the grounds that: (1) no prior adversary hearing was held on the question of obscenity; (2) the distribution of such material to

---

[60] ILL. REV. STAT. ch. 38, par. 11-20 (c) (4) 1969.

[61] 49 Ill. 2d at 438.

[62] People v. Ridens, 51 ILL. 2d 410, 282 N. E. 2d 691 (1972).

adults is constitutionally protected; (3) section 11-20 (6) of the state anti-obscenity law is vague because it is not compatible with United States Supreme Court decisions; and (4) the state failed to define a criminal offense. Another defendant argued that the Moline city ordinance was violative of the federal constitution on similar grounds.[63]

The Illinois Supreme Court initially recognized that the Moline ordinance was consistent with standards for judging obscenity under the Roth doctrine. Insofar as section 11-20 (6) of the state law was concerned, the Court examined its construction and upheld its validity based on the Kimmel and Sikora decisions. It was further claimed by the defendants that the ordinance and statute were deficient because they should have provided proof to show that the publications were thrust upon unconsenting adults or minors. This allegation was also met with rejection since the state supreme court's ruling in Walker refused to incorporate these restrictions into statutory definitions of obscenity.

Defendants also advanced the position that the state had failed to provide additional testimony or evidence in determining the obscenity of the magazines because the plaintiffs had introduced only the offending publications in court. The defendants asserted that this would place the court in a position of a ". . . self-appointed censor of published materials . . .," contrary to constitutional protections.[64]

---

[63] Id. at 413.

[64] Id. at 415.

Since there was no testimony introduced other than the pictorial magazines, the Illinois Supreme Court ruled that "in the absence of such evidence, the triers of fact are the exclusive judges of what the common conscience of the community is."[65] Thus, the magazines alone provided sufficient evidence to secure a judicial determination of obscenity.

The contention that an adversary hearing on the question of obscenity was required prior to the issuance of the warrants was also brought before the Court. The defendants cited the Kimmel[66] case in which a conviction was overturned because of unreasonable seizure; however, the state supreme court noted that no search or seizure was conducted in the present case. Conversely, the arrest was made after the police officers purchased the materials, and the defendants' businesses were not impaired. Thus, the Court found this allegation inapplicable.

Subsequently, the Court turned to the propriety of the trial court's ruling that the materials in question were obscene as defined in the city ordinance and state statute. It was observed that the magazines contained color pictures of nude male and female models posed in seductive embraces with their legs spread so as to accentuate the genital area. There was no indication of any sexual activity, but the

---

[65] Roth v. U.S. 354 U.S. at 490, supra.

[66] 34 Ill. 2d 578.

Court maintained that sexual relations in the photographs were "suggested and imminent."[67] The contents of the magazines were summarized:

> The models in many instances have their hands, or mouths, close to another's genitals, suggestive of abnormal sexual conduct. The females are posed with their heads close to the male sex organ, and vice versa . . . . s everal naked models are photographed while lying on top of one another . . . . two females are shown fondling one male. In these pictures, the focal point is the genitals of the parties.[68]

All things considered, it was held by the Illinois Supreme Court that the materials fell within the definition of obscenity and did not possess the slightest modicum of redeeming social value.

Summary

A perusal of the major Illinois obscenity decisions reveals the following positions:

1. The Roth and subsequent decisions set forth by the United States Supreme Court have been closely adhered to in Illinois obscenity cases involving statutory definitions. Moreover, the "socially redeeming value" criteria of obscenity has been construed to exclude a limited amount of obscene material. City ordinances, however, have been upheld even in the absence of such criteria.

2. Material dealing with sex is constitutionally protected as long as it is devoid of explicit sexual behavior, violence, sadomaso-

---

[67] 51 Ill. 2d at 417.

[68] Id.

chism, and perversions. In addition, nudity is not synonymous with obscenity; that is, material espousing the virtues and philosophy of nudism has redeeming social importance.

3. The intentions and advertising practices of a publisher or bookseller have been considered as significant with respect to securing a judicial determination of obscenity.

4. The high state court has read Reidel to overrule the Redrup restrictions. In other words, it has been decided that obscenity statutes and ordinances that do not incorporate provisions mentioning juveniles, unwilling adults, and "pandering" are constitutionally valid.

5. There seems to be some amount of confusion as to whether a local or national community standard should be applied to obscenity litigation. Thus, the Illinois Supreme Court has avoided the issue because the United States Supreme Court has not ruled on which standard is applicable. More specifically, it has been held that community standards in Illinois refer to the entire state; thus such standards on a statewide basis cannot vary from county to county.

Within the last two years, however, the Illinois Supreme Court has rendered some confusing opinions concerning what types of material can be proscribed. On the one hand, it has been noted that material depicting violence, bloodshed, and excessive sexual aberrations may be legally suppressed, even if such material does not describe explicit sexual conduct. On the other hand, material that lacks the aforemen-

tioned, but portrays sexual relations in a "suggestive and imminent" manner may also be proscribed. Thus, the high court of Illinois has indicated a willingness to prohibit the distribution of material that does not describe or represent graphic sexual behavior. Some authorities would consider this to be a broadening of the state's power to legally suppress material of a different degree in comparison to "hard-core pornography."

Procedural Case Law

In 1961, a United States Circuit Court of Appeals vacated a federal district court's ruling on the administration of Chicago's censorship ordinance. Zenith International Films,[69] the appellant in this case, was offered a limited permit to show the movie The Lovers. The permit was issued contingent upon the deletion of several sex scenes that had been found obscene by the police commissioner's review board. A hearing resulted in an abortive attempt to resolve the situation, after which the mayor was consulted on the issue of the permit. Subsequently, the mayor declined an appeal on the motion picture's exhibition. The corporation then filed suit in a federal district court, seeking both injunctive and declaratory relief. The corporation also asserted that the ordinance was a prior restraint on free expression and provided no definite standards whereby to judge the alleged

---

[69] Zenith International Film Corporation v. City of Chicago, 183 F. Supp. 623 (N.D. Ill. 1960), vacated, 291 F. 2d 785, (7th Cir. 1961).

obscenity. The district court ruled that the methods applied to determine obscenity and procedures involved were consistent with the United States Supreme Court's ruling in Roth and Kingsley, respectively. The plaintiff appealed.

The appellate court concentrated on the question of prior restraint. It was observed that fundamental in the principles of orderly justice are fair and adequate administrative procedures. Applying this proposition to the present case, the court found that the procedures employed were to the contrary. The court offered its explanation in this form:

> . . . . Zenith has been deprived of its right to a full hearing . . . . There was no opportunity for any sort of fair hearing before municipal authorities; Zenith had no opportunity to present evidence of contemporary community standards; the . . . officials failed to view the film as a whole . . . . thus . . . they could not apply the proper standards; there was no de novo hearing before the Mayor; the sole group that saw the film was a Film Review Board whose procedure does not allow for a hearing; no safeguards to preclude any arbitrary judgment . . . . and . . . Zenith was given no indication why the city found the film to be "obscene and immoral".[70]

The court found that because of the aforementioned instances the procedural due process guarantees set down in Kingsley[71] had been violated. The case was remanded to the district court ordering the city to permit the exhibition of the whole film or grant a hearing with standards consonant with due process of law.

---

[70] 291 F. 2d at 790.

[71] 354 U.S. 436 supra.

Is the search of a defendant's apartment incidental to his lawful arrest? This question was answered by the Illinois Supreme Court in People v. Burnett.[72] The defendant was convicted for unlawfully possessing obscene photographs. Prior to the arrest, a deputy coroner entered Burnett's home and was entertained by two nude women who performed a ". . . lewd and lascivious show"[73] in return for twenty dollars. Three policemen then arrived on the scene and arrested Burnett and the women; following this, the police searched the whole apartment and discovered a small tin box in the bedroom closet. The authorities requested Burnett to open the container, whereupon the police found a number of obscene photographs.

The Illinois Supreme Court first observed that a search incident to a lawful arrest is authorized only when ". . . . it is necessary to protect an arresting officer from attack, to prevent the prisoner from escaping, or to discover fruits of the crime."[74] On this issue, the Court determined that the search and seizure of the tin box was not necessary to protect the authorities or prevent Burnett's escape. Hence, the high state court ruled that the trial court erred in the denial of a motion to suppress the evidence.

Another major case concerning the seizure of a quantity of

---

[72]20 Ill. 2d 624, 170 N.E. 2d 546 (1960).

[73]Id. at 625.

[74]Id.

allegedly obscene books involved one Gilbert Kimmel,[75] an owner of a bookstore in Chicago, who was charged with possession of obscene books with the intent to commercially disseminate such material. Acting under the authority of an Illinois obscenity statute,[76] police officers, armed with a search warrant, proceeded to Kimmel's bookstore and seized a large quantity of obscene books. During the search, the law enforcement officials seized more than was stipulated on the search warrant. As a result, 1500 copies of allegedly obscene books and magazines were confiscated. The trial court judge rebutted arguments concerning the constitutionality of the statute and the methods employed during the search.

The Supreme Court of Illinois sustained the constitutionality of the statute, but ruled on the purported illegal search and seizure. It was first recognized that only four books were listed on the warrant, whereas the authorities had seized over 130 separate titles. The Court ruled that the police had used the warrant as a "....license for a general search, and they took advantage of their presence in the bookstore to ferret out and seize whatever they considered to be contraband."[77]

The supreme court held that police officers conducting an ad hoc

---

[75] People v. Kimmel, 34 Ill. 2d 578, 217 N.E. 2d 785 (1966).

[76] ILL. REV. STAT. chap. 38, par. 11-20 (a) 1963.

[77] 34 Ill. 2d 578 at 582. The principle elements used to support this finding were from the Marcus and Stanford decisions. 367 U.S. 717 supra; 379 U.S. 476 (1965).

determination of obscenity without an opportunity for deliberation was incompatible with Fourth Amendment provisions. The Court also observed that the warrant was designed to suppress any future sales of the books since the warrant specifically instructed the police to ". . . seize all copies . . . " of the materials in question.[78] Such a broad restriction without a hearing could not, in the Court's opinion, be harmonious with First Amendment freedoms.

To recapitulate, the Illinois Supreme Court took these positions: (1) a search warrant must specifically describe the place, person, and articles to be searched or seized; (2) an ad hoc determination of obscenity by police officers without a hearing is inconsistent with First Amendment protections; and (3) alleged obscene materials are not the same as contraband, i.e., narcotics and gambling paraphernalia.

The City of Chicago's motion picture ordinance again came under attack in the Cusack[79] case. The Motion Picture Appeal Board denied a permit to exhibit the movies Rent a Girl and Body of a Female[80] in public theaters throughout the Chicago area. As a result, the appellants filed suit in the Illinois Supreme Court, seeking relief on the grounds that: (1) procedures for administering the ordinance violated

---

[78] 34 Ill. 2d at 584.

[79] Cusack v. Teitel Film Corporation, 38 Ill. 2d 53, 230 N.E. 241, rev'd per curiam, 390 U.S. 139 (1968).

[80] The trial court found the movies to appeal to deviant interests in sex.

procedural due process and freedom of expression, and (2) the films were not obscene.

Chief Justice Solfisburg of the Illinois Supreme Court affirmed the circuit court's decision and ruled that the time period[81] from the initial submission of the silm to the final decision of the appeal board constituted no violation of prior restraint or due process of law. Moreover, it was found that the film exhibitors had been provided with ample opportunities for a full judicial review and resolution which the court viewed as reasonably necessary to insure an ". . . . intelligent and careful consideration by both the Film Review Section and the appeal board of the material in question."[82]

The aspect of the procedure that the Court questioned most was the time period allotted the state to initiate permanent injunction proceedings after the permit had been denied. It was noted that the city took ten days to file for injunctive relief, whereas a circuit court rule allowed only five days for such a proceeding. Nevertheless, the Illinois Supreme Court treated this delay as not inconsistent with First and Fourteenth Amendment protections. The Court cited Freedman, and concluded that the appellant's contentions of abridged constitutional rights could not be measured in terms of days or weeks since the film

---

[81] The ordinance provided for a maximum of 50 days to final judicial resolution; however, both films required 68 and 190 days, respectively.

[82] 38 Ill. 2d at 64.

corporation caused some of the delays in the hearings.[83]

Focusing on the alleged obscenity of the films, the Court first noted that guidelines had been established for determining obscenity by the United States Supreme Court in Roth and subsequent cases. The appellants, on the other hand, challenged the trial court's application of certain standards to the films. Overruling this complaint, the Illinois Supreme Court held that the lower court judiciously applied the standards in a proper fashion. Moreover, the Court took considerable pains to discuss the complexity and difficulty involved in establishing an adequate definition of obscenity.

However, the Illinois Supreme Court agreed with the appellants' argument that the ". . . material's intent to arouse sexual desire in the average person" would not provide a sufficient basis for determining a particular film to be obscene.[84] Although this assertion provided some basis for the film corporation's argument, it did not persuade the court to hold that the company had been denied its constitutional rights. Thus, the Illinois Supreme Court upheld the ordinance[85] and

---

[83] Id. at 63.

[84] Id. at 68-69.

[85] This decision was overturned one year later by the United States Supreme Court on the grounds that: (1) the 50 to 57 days provided by the ordinance failed to specify ". . . a brief time period to either issue a license or go to court to seek an injunction," and (2) ". . . failed to assure a prompt final judicial decision to minimize the deterrent effect of an interim and possibly erroneous denial of a license." 390 U.S. at 141.

affirmed the obscenity of the films because they were merely stories of one sexual encounter after another.

Conclusion

With respect to the procedural cases involving obscenity, the Illinois Supreme Court has indicated that motion picture censorship ordinances are constitutionally valid, provided that the administration of such ordinances affords the individual a prompt and impartial judicial determination and a reasonable exercise of due process of law. In effect, the state supreme court has been prompted to follow the letter of the Kingsley and Freedman decisions.

The decisions on searches and seizures in obscenity cases have additionally subscribed to the United States Supreme Court's ruling in Marcus. The high state court has maintained that police may not use a warrant as a general search to seize what they think to be as obscene material. In the final analysis, the Illinois Supreme Court has avoided the prior adversary hearing issue. It can be assumed that this position reflects a reluctance to decide on the question because the United States Supreme Court has not set forth any definitive ruling.

CHAPTER IV

IMPACT ANALYSIS UPON PROSECUTORS IN OBSCENITY DECISIONS

Introduction

A relatively new approach within the field of judicial behavior is that of impact analysis.[1] This method has prompted numerous political scientists and sociologists to scrutinize various aspects of the legal process. In effect, it has contributed to the construction of several theoretical frameworks[2] from which to analyze the impact a judicial decision has upon individuals or groups affected by the decision. These "actors" in the political milieu usually comprise public officials, enforcement personnel, interest groups, and the individual citizen.

Recent developments of impact analysis have produced beneficial

---

[1]Stephen L. Wasby has written an extensive volume concerning impact analysis; see The Impact of United States Supreme Court Decisions: Some Perspectives (Homewood, Illinois: Dorsey Press, 1970).

[2]For an elaborate application of the Eastonian systems analysis, readers should consult Sheldon Goldman and Thomas P. Jahnige, The Federal Courts As A Political System (New York: Harper and Row Publishing Company, 1971).

results. Robert Birkby[3] of Vanderbilt University studied the impact of the Schempp[4] decision upon local school districts in Tennessee. He found that a greater portion of the respondents had actually evaded the Supreme Court's ruling. In addition, Thomas Barth conducted a survey of the attitudes and viewpoints of Wisconsin district attorneys, legislators, law enforcement officials, and booksellers with respect to some of the major Supreme Court obscenity decisions.[5] Theodore Becker has edited a book containing numerous empirical studies of impact analysis.[6] Many of the articles provide an extensive investigation into the effects of some of the Supreme Court's landmark civil liberties decisions.

In summary, impact analysis has attempted to aid social scientists and political scientists in their efforts to ascertain the effects a specific court decision has upon the relevant actors within the political environment. Future research may significantly augment empirical analyses with the judicial process.

---

[3]Robert Birkby, "The Supreme Court and the Bible Belt: Tennessee Reaction to the 'Schempp' Decision," 10 Midwest Journal of Political Science 304-19 (1966).

[4]374 U.S. 203 (1963). It was ruled that Bible-reading and recitation of the Lord's Prayer in public schools are violative of the religion clauses of the First Amendment.

[5]Thomas E. Barth, "Perception and Acceptance of Supreme Court Decisions at the State and Local Level," 17 Journal of Public Law 308-50 (1968).

[6]Theodore Becker, ed., The Impact of Supreme Court Decisions (New York: Oxford Press, 1969).

Objectives of the Study

The cardinal purpose of this chapter is to measure and ascertain the attitudes and viewpoints of a select number of county prosecuting attorneys who are involved with the enforcement of Illinois's obscenity statute. More specifically, the following are the objectives of this investigation:

1. To measure the impact a specific obscenity decision has upon the enforcement of the state law. In other words, do the respondents perceive these decisions as beneficial, detrimental, or as having no effect upon the enforcement of the state obscenity law?

2. To determine how prosecuting attorneys evaluate Illinois' existing obscenity law; that is, should additional legislation be provided to broaden the scope of obscenity enforcement?

Hypotheses Employed

The following hypotheses were employed to correspond to each question in the survey.[7]

1. The frequency of obscenity litigation will be greater in urban than in rural counties.

2. The more urban[8] a county the greater will be the variety of

---

[7]See Appendix infra.

[8]According to the United States Bureau of the Census, a given area that exceeds a population of 50,000 is classified as a Standard Metropolitan Statistical Area (SMSA). Thus, in this study, an urban county will be equivalent to an SMSA. Rural counties will indicate a population of less than 50,000. See Table 1.

sexually-oriented material.

3. The more urban a county is, as measured by population, the more probable it is that a prosecuting attorney will have an accurate knowledge of obscenity decisions.[9]

The counties included in this survey are listed in Table 1.

TABLE 1

COUNTIES AND THEIR POPULATIONS[10]

Rural Counties	Population	Urban Counties	Population
Clark	16,082	Champaign	162,107
Coles	47,336	Macon	123,926
Effingham	24,365	McLean	103,308
Jefferson	31,067	Peoria	193,981
Saline	25,194	Sangamon	159,432
Williamson	47,552	St. Clair	279,601

The amount of data obtained in this survey was based on questionnaires mailed to twelve county district attorneys in the state of Illinois. The questionnaires were mailed to six urban and six rural counties in early June of 1972. Prosecutors from Saline, Effingham, and Sangamon counties failed to respond to the survey. Thus, a total

---

[9] In addition to examining knowledgeability of obscenity cases, this investigation will also examine the extent to which prosecutors from the most urbanized counties make comments concerning the Illinois obscenity statute.

[10] Luman H. Long, ed., The World Almanac (New York: Newspaper Enterprise Association, 1971), pp. 447-8.

of 75 per cent of the questionnaires were returned.[11]

A major reason why prosecuting attorneys were selected for this survey is that they are generally cognizant of the relevant state and federal obscenity decisions. Moreover, these states attorneys are primarily involved with the enforcement of the state obscenity law.

Frequency of Obscenity Prosecutions

The first question in the survey deals with the amount of obscenity cases within a respective county. The respondent was confronted with this question: About how many obscenity prosecutions are handled by you in your jurisdiction? Approximately 80 per cent of the respondents from the urban counties indicated that, on the average, two to five cases are prosecuted yearly. Most of the respondents did not indicate what type of cases were prosecuted. However, one stated that he had successfully enjoined the operation of an adult book store and an X-rated movie from a drive-in theater.

Seventy-five per cent of the respondents from the rural counties indicated that they had never prosecuted any obscenity cases. Furthermore, no attempt was made on their part to complete the questionnaire. One respondent went so far as to indicate that a case could not be won. This response undoubtedly reflects the confusion and frustration en-

---

[11]It is this author's opinion that future studies be supplemented with personal interviews. Extreme difficulty was encountered with respect to obtaining responses from the district attorneys.

countered by a prosecutor when attempting to suppress material which he considers to be obscene.

Two glaring exceptions remain, however. A prosecuting attorney from the most heavily populated county surveyed in this study indicated that no obscenity cases were pending or ever adjudicated within his jurisdiction; he even "...contemplated none in the future." In contrast, a respondent from a rural county stated that he had been successful in winning four obscenity lawsuits and that he had obtained "...satisfactory remedies in approximately ten additional cases through investigative and administrative efforts."[12] Thus, the skeletal evidence obtained in this modest survey indicates that the relative size of a given jurisdiction has no relationship to the frequency of obscenity litigation.

Diversity of Sexually-Oriented Material

This portion of the questionaire is concerned with the variety of sexually-oriented material in obscenity prosecutions. More specifically, the respondents were asked to identify certain kinds of sexual material present within their respective counties. The categories are as follows:

1. "girlie" magazines
2. nudist magazines

---

[12]These inconsistencies might be explained by a number of unique demographic variables that are characteristic of specific counties. A university situated in a rural town could indicate an increase in the availability of sexual material. Given the above exceptions, however, it can be assumed that obscenity litigation was more frequent within urban rather than rural jurisdictions.

3. pulp novels
4. sado-masochistic materials
5. films
6. others _____(please explain)

Eighty per cent of the respondents from urban counties indicated a variety of sexual material within their jurisdictions;[13] only 25 per cent indicated a variety of such material in rural counties. From the aforementioned data, the evidence suggests that the second hypothesis would appear to be confirmed, namely that a greater diversity of sexually-oriented material does exist within the more urban counties.

Impact of Judicial Decisions

In this part of the questionnaire, six major federal obscenity decisions were mentioned in order to determine their possible impact upon obscenity enforcement within the respondents' jurisdictions. The respondents were requested to indicate their interpretations of the decisions by checking the appropriate space. The responses were then coded and placed into the following categories:

Positive	1. Greatly helped
	2. Helped
Negative	3. Hindered
	4. Greatly hindered
Neutral	5. No response
	6. Decision had no effect

[13] Motion pictures depicting sexual behavior and paper-back novels received the highest number of responses.

Federal Decisions

The respondents were first asked to indicate whether the Roth-Alberts[14] decision had any discernible impact upon obscenity enforcement. The data exhibited in Table 2 indicates a neutral attitude concerning the Roth-Alberts decision. Moreover, 75 per cent of the respondents from the rural counties took no position on the case.

TABLE 2

REACTION OF PROSECUTING ATTORNEYS TO ROTH-ALBERTS

Response	Number		Per Cent	
	Urban	Rural	Urban	Rural
Positive			40%	25%
Greatly helped	0	0		
Helped	2	1		
Negative			20%	0%
Hindered	1	0		
Greatly hindered	0	0		
Neutral			40%	75%
Had no effect	1	0		
No response	1	3		
Total N = 9	5	4	100%	100%

[14]This historic case marked the first time the United States Supreme Court dealt with the obscenity issue. Obscenity, in the Court's language, is designed to appeal to the prurient interest of sex, thus constitutionally excluding it from federally protected expression.

One urban county respondent stated that the decision "had no effect", but said it was incorporated into the Illinois obscenity statute. In effect, according to the respondents, the 1957 decision aided enforcement personnel in their attempts to proscribe obscene material. To summarize, 40 per cent urban and 25 per cent rural county prosecutors perceived Roth-Alberts as beneficial to the enforcement of the state's obscenity law.

Table 3 indicates the response to the Jacobellis decision.

TABLE 3

REACTION OF PROSECUTING ATTORNEYS TO JACOBELLIS

Response	Number		Per Cent	
	Urban	Rural	Urban	Rural
Positive			0%	0%
Greatly helped	0	0		
Helped	0	0		
Negative			60%	0%
Hindered	3	0		
Greatly hindered	0	0		
Neutral			40%	100%
Had no effect	1	1		
No response	1	3		
Total N - 9	5	4	100%	100%

That ruling was concerned with a book's social worth. It was held by

the Court that before a work can be deemed obscene, it must be "utterly without social value". Sixty per cent of the respondents from the urban counties revealed that the decision hindered or had no effect upon enforcement of the statute. More importantly, not one respondent stated that Jacobellis had a positive effect upon obscenity prosecutions.

The reactions to Ginzburg and Mishkin are noted in Tables 4 and 5, respectively. Ginzburg, it will be recalled, criminally prohibited a publisher's advertising practices with respect to selling sexual literature. Thus the Ginzburg ruling provided enforcement machinery with an additional means of securing obscenity convictions.

TABLE 4

REACTION OF PROSECUTING ATTORNEYS TO GINZBURG

Response	Number		Per Cent	
	Urban	Rural	Urban	Rural
Positive			60%	25%
Greatly helped	0	0		
Helped	3	1		
Negative			0%	0%
Hindered	0	0		
Greatly hindered	0	0		
Neutral			40%	75%
Had no effect	1	0		
No response	1	3		
Total N = 9	5	4	100%	100%

Mishkin, in addition, punished the sale of sexual material designed to appeal to a specific group of people.

TABLE 5

REACTION OF PROSECUTING ATTORNEYS TO MISHKIN

Response	Number Urban	Number Rural	Per Cent Urban	Per Cent Rural
Positive			60%	25%
Greatly helped	0	0		
Helped	3	1		
Negative			0%	0%
Hindered	0	0		
Greatly hindered	0	0		
Neutral			40%	75%
Had no effect	1	0		
No response	1	3		
Total N = 9	5	4	100%	100%

Sixty per cent of the urban prosecutors responded favorably to the rulings. Again, only one respondent from the rural counties indicated that both decisions aided obscenity enforcement.

The next case that was mentioned in the questionnaire was the Stanley[15] decision. In 1969, the Supreme Court held that mere private

[15]The decision generated a great amount of controversy. Legal publications were intimating that the right to receive ideas parallels the right to distribute them. See "Private Possession of Obscene Material," 83 HARV. L. REV. I, 149-50 (1969).

possession of sexually-oriented material does not constitute a criminal offense. With respect to obscenity enforcement, this ruling barred authorities from seizing obscene literature within an individual's home.

Eighty per cent of the urban respondents signified that the decision had no effect upon enforcement of the law. One hundred per cent of the rural respondents indicated a "no response" or "neutral" position. The evidence seems to indicate that the prosecutors in the most urbanized counties surveyed in this investigation have a more accurate knowledge of federal obscenity decisions.[16]

TABLE 6

REACTION OF PROSECUTING ATTORNEYS TO STANLEY

Responses	Number		Per Cent	
	Urban	Rural	Urban	Rural
Positive			0%	0%
Greatly helped	0	0		
Helped	0	0		
Negative			20%	0%
Hindered	1	0		
Greatly hindered	0	0		
Neutral			80%	100%
Had no effect	3	1		
No response	1	3		
Total N = 9	5	4	100%	100%

[16]This conclusion appears to be valid; based on available data, however, a more elaborate study could reveal additional important relationships.

United States v. Reidel was the last federal obscenity decision. This ruling sanctioned Congressional authority to prohibit the mailing of obscene material to consenting adults.[17] The reaction to the decision indicates a general consensus that it aided in the enforcement of obscenity laws, for 80 per cent of the urban prosecutors responded favorably to Reidel. The reactions are coded in Table 7.

TABLE 7

REACTIONS OF PROSECUTING ATTORNEYS TO REIDEL

Responses	Number		Per Cent	
	Urban	Rural	Urban	Rural
Positive			80%	25%
Greatly helped	0	0		
Helped	4	1		
Negative			0%	0%
Hindered	0	0		
Greatly hindered	0	0		
Neutral			20%	75%
Had no effect	0	0		
No response	1	3		
Total N = 9	5	4	100%	100%

[17] In the opion of this author, the decision should have no effect on the enforcement of state obscenity statutes. Rather, it is concerned with a federal postal statute. The respondents, however, seemed to concur with the ruling.

Reactions to Supplementary Decisions

This segment of the questionnaire was concerned with obscenity decisions other than the ones mentioned in the survey. The respondents were then asked this question: "Are there any supplementary state or federal decisions which have had an impact on your obscenity prosecutions?"

It should be specifically noted that all of the rural respondents failed to indicate whether any supplementary decisions had an impact upon obscenity enforcement. This probably reflects the greater infrequency of obscenity prosecutions within rural jurisdictions. In contrast, 80 per cent of the urban respondents cited the Ridens case in which it was held that portraying sexual relations as "suggested and imminent" is obscene. One of the attorneys offered this interpretation: "... the decision clarified the right to arrest and burden of proof for the prosecution." This is a correct interpretation of the decision because the Illinois Supreme Court ruled that the pictorial magazines alone provided sufficient proof to support a conviction of obscenity. Another individual commented that the Geraci case is beneficial to the enforcement of the state obscenity law. The Geraci case dealt with a variety of sexually-oriented material. The high state court distinguished between the contents of each as a factor contributing to their conviction and protection. He noted that "...Geraci spelled out what types of material can be proscribed."

To conclude, hypothesis number 3 tends to be confirmed because the rural respondents failed to indicate any discernible impact. For the most part, this evidence lends support to the assumption that the urban prosecutors were considerably more knowledgeable about recent state obscenity prosecutions than their rural counterparts.

Viewpoint Toward Existing Obscenity Statute

The remaining portion of the survey deals with the attitudes and positions concerning Illinois' obscenity law. Moreover, the questions were designed in connection with attempting to substantiate hypothesis number 3. The respondents were asked to comment on whether the existing statute needed any additional provisions that would facilitate obscenity prosecutions. Questions 4, 5, and 6 are related to this area.

Question number 4 reads as follows: "The State of Illinois needs to develop additional legislation which will prevent the distribution of obscene material to all adults." The respondents were asked to agree or disagree with this statement; additional space was provided for explanatory comments. Eighty per cent of the urban prosecutors indicated that the existing obscenity statute was sufficient. However, one responded that some measure should be adopted to "...prevent X-rated movies from being exhibited at outdoor theaters." In contrast to the urban prosecutors, only 25 per cent of the rural prosecutors agreed that the statute was adequate. Seventy-five percent of the rural respondents offered no response. Table 8 clearly indicates the results.

TABLE 8

	Comment	No Comment
Urban	80%	20%
Rural	25%	75%

Rural = 4
Urban = 5

N = 9

The fifth question was a follow-up to question number 4. It stated, "The State of Illinois needs to develop additional legislation which applies only to the distribution of obscene materials to juveniles while at the same time allowing adults to view or read any material they please." Approximately 80 per cent of the urban prosecutors disagreed with the proposition; however one respondent indicated that such legislation is "plausible" and "capable of being enforced". Twenty-five per cent of the rural county prosecutors responded unfavorably to the question; the remaining 75 per cent did not respond to the proposition. The data is presented in Table 9.

TABLE 9

	Comment	No Comment
Urban	80%	20%
Rural	25%	75%

Rural = 4
Urban = 5

N - 9

Question number 6 was also concerned with additional obscenity legislation. It stated, "The State of Illinois should develop additional legislation which will prevent the distribution of obscene materials to both vulnerable[18] adults and minors." Eighty per cent of the urban respondents indicated an unfavorable response. One urban respondent, however, indicated that such legislation was feasible. On the other hand, twenty-five per cent of the rural respondents offered a negative reaction to the question. Again, 75 per cent of the rural prosecutors indicated no response. The data is presented in Table 10.

TABLE 10

	Comment	No Comment
Urban	80%	20%
Rural	25%	75%

Rural = 4
Urban = 5 N = 9

The data presented in Tables 8, 9, and 10 reflect varying degrees of knowledgeability concerning obscenity legislation. It is clear that the prosecutors from the urban counties made more comments concerning the statutes than did the prosecutors from the rural counties; this would

[18]The word "vulnerable" denotes persons who might be damaged by exposure to sexually-oriented material. In other words, the viewing of this material could induce anti-social behavior, i.e., forceable rape, voyeurism, and exhibitionism.

appear to indicate a greater knowledgeability on the part of the urban prosecutors. Moreover, the neutral responses seem to indicate their knowledgeability of obscenity legislation.

Although the data reveals that urban prosecutors tend to be more knowledgeable about obscenity, respondents from both jurisdictions seemed to express a considerable measure of cohesion on those questions pertaining to obscenity legislation. The apparent similarities seem to indicate a reluctance to support any additional obscenity legislation.[19]

Conceptions of "Obscenity" and "Hard-Core Pornography"

The seventh question in this study relates to definitions concerning obscenity and hard-core pornography. The prosecutors were asked: "How would you distinguish between obscene material and hard-core pornography?" This question was designed to determine whether any general consensus existed among the respondents.

Eighty per cent of the urban county respondents did not attempt to define either term. One respondent, however, remarked that "... hard-core pornography can be included within the definition of obscenity ...more erotic variety of obscene material."

Fifty per cent of the rural county prosecutors did not assume

---

[19]It is this author's personal opinion that such responses are indicative of the difficulty in properly securing a judicial determination of the nature of obscenity.

any position. Yet, the remaining 50 per cent did respond to the question. One stated that "...no distinction exists from a legal standpoint." Another prosecutor indicated that he "...can't define it....it's disgusting."[20]

In the last analysis, the "neutral" positions assumed by a large percentage of both the rural and urban prosecutors indicates an obvious unwillingness to form any conception of the two terms, namely, pornography and obscenity. This consensus clearly reflects the confusion that pervades every aspect of the obscenity controversy in the legal arena.

Conclusion

This modest survey of nine individuals who are involved with the enforcement of Illinois' obscenity statute can be summarized in the following manner:

1. It was found that the frequency of obscenity prosecutions was greater in the urban jurisdictions. But, it is important to note that one rural respondent prosecuted more obscenity cases than any of the urban county prosecutors. In addition, a respondent from the most heavily populated urban county had never prosecuted a single obscenity case. Although the evidence seems to indicate that urban prosecutors handle more obscenity cases than their rural counterparts,

---

[20]It should be noted that this prosecutor has never received a single obscenity complaint.

the exceptions noted above do not lend strong support to the proposition that obscenity cases exist at a higher rate in urban areas.

2. In contrast, there is a positive relationship between the variety of sexual literature and the degree of urbanism within a given county.

3. A large majority of urban county prosecutors seemed to agree upon what they considered as positive, negative, and neutral impacts of the various United States Supreme Court obscenity decisions utilized in this survey. This evidence lends support to the proposition that urban prosecutors are more knowledgeable about the nature of obscenity. In essence, the urban prosecutors exhibited a greater accuracy of knowledge concerning the relevant obscenity decisions.

Approximately 75 per cent of the rural respondents failed to perceive any impact of these obscenity decisions. It would seem that this lack of knowledge concerning obscenity decisions probably reflects the fact that a great number of them had never prosecuted any obscenity cases. Thus, this limited data suggests that there may be a positive relationship between the frequency of obscenity litigation within a given county and the accuracy of the respondent's interpretation of an obscenity decision.

4. Sixty per cent of the urban respondents exhibited some knowledge of supplementary state obscenity cases. Those who cited Ridens and Geraci reflected an accurate knowledge of these decisions. There-

fore, on the basis of this limited data, there would appear to be a positive relationship between those active in obscenity prosecutions and an accurate knowledge of recent state obscenity decisions.

5. There is considerable agreement among the urban county prosecutors that the state obscenity statute is adequate. Despite this position, some 20 per cent of the urban respondents have expressed the view that the existing Illinois law should be broadened to prevent the exhibition of X-rated films at outdoor theaters. One prosecutor went even further; he indicated a desire for more emphasis on preventing the distribution of obscene materials to minors and susceptible adults.[21] Seventy-five per cent of the rural respondents failed to comment on the state statute.

6. Finally, 80 per cent of the urban respondents failed to formulate any conception of obscenity and hard-core pornography. In addition, 50 per cent of the rural prosecutors offered no comment. This sketchy evidence suggests a pattern among both groups of attorneys, namely that the respondents seem to be confused concerning the concepts of obscenity and hard-core pornography.[22]

---

[21] This respondent failed to define the term, "susceptible adult".

[22] This author is of the opinion that the inability of these respondents, both urban and rural, to formulate a definition of obscenity or hard-core pornography reflects the failure of the federal and Illinois judicial systems to develop adequate standards in evaluating what might be considered obscene.

CHAPTER V

GENERAL CONCLUSIONS

With the advent of the historic Roth decision, the United States Supreme Court has been inundated with a mass of obscenity litigation. The Court has valiantly attempted to objectively define the term "obscene", but has wallowed in a mire of confusion, chaos, and public hostility. As a result, no clear majority opinion exists among the members of the Court. The breadth of these opinions has ranged from complete protection to state proscription and to suppressing only what has been termed "hard-core pornography." Out of this perplexity, however, the Court has professed that material can be determined obscene if it appeals to the prurient interest of sex, is patently offensive, and is utterly without socially redeeming qualities. It is important to note that the justices do not entirely agree on any of the aforementioned criteria..

Up until the Ginzburg decision, the Court did not sustain one conviction of obscenity. The vast diversity of material brought before the Court has only served to exacerbate any attempts to formulate a viable conception of obscenity. Ginzburg, however, opened a new

avenue to obscenity enforcement. It ruled that, in addition to the standard tests of obscenity, the advertising practices and intentions of a publisher can be used to secure a judicial determination of obscenity. This "pandering" rule has undoubtedly facilitated efforts to punish individuals who create and disseminate such material. But since that time, the Court has been reluctant to employ the doctrine.

Within the last few years, the Supreme Court has indicated a desire to proscribe material which describes or represents graphic sexual behavior. Moreover, the Court has expressed great concern with respect to shielding juveniles and unwilling adults from exposure to sexually-oriented material.

In 1969, the Court placed itself in an awkward position when it held that an individual may read or view sexually-oriented material within the sanctuary of his own home. The implications were apparent; if one could read this material, then someone should be able to distribute it to him. Thus, the Supreme Court was faced with the situation of completely abolishing all restraints on the dissemination of such material. Yet, two decisions of the 1970 term clarified this matter. The Court effectively reaffirmed its prior position as expounded in the landmark Roth decision. With this in mind, the present status of sexually-oriented material is that standards can be used to determine obscenity, but law enforcement attempts to suppress such material stops at the door to one's home. Therefore, an individual can peruse whatever

material he pleases provided that he chooses modes of distribution other than commercial distribution and importation from a foreign source.

A review of the Illinois obscenity decisions indicates that the high state court has voluntarily followed the mandates of the Supreme Court. In addition, it has agreed with the variety of standards used to determine obscenity. At times, however, the Illinois Supreme Court has revealed a considerable amount of confusion surrounding the issue. It may be pointed out that the uncertainty among the members of the United States Supreme Court has permeated the lower courts. A clear example of this is the latest state obscenity conviction. The Supreme Court of Illinois asserted a willingness to make an independent determination of obscenity by ruling that material depicting sexual conduct as "suggested and imminent" is obscene. This seems to suggest a broadening of the state's police power to criminally punish material that does not explicitly portray sexual activity.

The chapter concerning impact analysis upon prosecuting attorneys in the area of obscenity enforcement revealed some significant although tentative results. It was found that the more urban a county, the greater will be the variety of sexual material and frequency of obscenity prosecutions.

Another salient pattern appeared. A majority of the urban county prosecutors exhibited greater knowledgeability about obscenity

decisions, and the extant Illinois statute than did their rural counterparts.

BIBLIOGRAPHY

BIBLIOGRAPHY

Articles and Periodicals

Barth, Thomas E. "Perception and Acceptance of Supreme Court Decisions at the State and Local Level," Journal of Public Law, 17 (1968), 308.

Birkby, Robert. "The Supreme Court and the Bible Belt: Tennessee Reaction to the 'Schempp' Decision," Midwest Journal of Political Science, 10 (1966), 304.

Emerson, Thomas I. "Toward a General Theory of the First Amendment," Yale Law Journal, 72 (1963), 877.

Engdahl, David. "Requiem for Roth: Obscenity Doctrine is Changing," Michigan Law Review, 68 (1969), 185.

Karre, Richard A. "Stanley v. Georgia: New Directions in Obscenity Regulation?," Texas Law Review, 48 (1970), 646.

Lockart, William and McClure, Robert. "Censorship of Obscenity: the Developing Constitutional Standards," Minnesota Law Review, 45 (1960), 5.

_____, William and McClure, Robert. "Obscenity Censorship: The Core Constitutional Issue--What is Obscene?," Utah Law Review, 7 (1961), 289.

"Mailing and Importation of Obscene Materials," Harvard Law Review, 85 (1971), 229.

Magrath, Peter. "The Obscenity Cases: Grapes of Roth," Supreme Court Review, 7 (1966), 48.

"More Ado About Dirty Books," Yale Law Journal, 75 (1966), 1364.

Port, M. L. "Standards of Judging Obscenity--Who? What? Where?," Chicago Bar Record, 46 (June 1965), 405.

"Prior Adversary Hearings on the Question of Obscenity," Columbia Law Review, 70 (1970), 1403.

"Private Citizen's Power to Terminate Mailing from Specified Senders," Harvard Law Review, 84 (1970), 117.

"Private Possession of Obscene Material," Harvard Law Review, 83 (1969), 147.

Sinclair, Kent. "The First Amendment: The New Metaphysics of the Law of Obscenity--Stanley v. Georgia," California Law Review, 57 (1969), 1257.

Tucker, E. W. "Law of Obscenity--Where has it gone?," Florida Law Review, 22 (1970), 547.

Books

Becker, Theodore L. (ed.). The Impact of Supreme Court Decisions. New York: Oxford University Press, 1969.

Clor, Harry M. Obscenity and Public Morality. Chicago: University of Chicago Press, 1969.

Ernest, Morris and Schwartz, A. Censorship: The Search for the Obscene. New York: The Macmillan Co., 1964.

Goldman, Sheldon and Jahnige, Thomas. The Federal Courts as a Political System. New York: Harper and Row, 1971.

Long, Luman H. (ed.). The World Almanac. New York: Newspaper Enterprise Association, 1971.

Plano, Jack and Greenberg, Milton. The American Political Dictionary. New York: Holt, Rhinehart and Winston Inc., 1967.

Wasby, Stephen L. The Impact of the United States Supreme Court. Homewood, Illinois: The Dorsey Press, 1970.

Laws, Statutes, and Court Reports

Illinois

Callaghan's Illinois Digest.

Illinois Appellate Reporter Second Series.

Illinois Digest.

Illinois Law and Practice.

Illinois Reporter.

Illinois Reports Second Series.

North Eastern Digest.

North Eastern Reporter Second Series.

Smith-Hurd Annotated Statutes.

United States

American Jurisprudence Proof of Facts.

American Jurisprudence Second Series.

American Law Reports Annotated Third Series.

Federal Code Annotated.

Federal Reporter Second Series.

Federal Supplement.

Seventh Decennial Digest.

Supreme Court Reporter.

United States Code Annotated.

United States Law Week.

United States Supreme Court Reports.

Miscellaneous

American Law Institute. Model Penal Code, Section 207.10 (2), New York Tentative Draft No. 6, 1957.

TABLE OF CASES

Cases Continued.

FREEDMAN v. MARYLAND, 380 U.S. 51 (1965).

GINSBERG v. NEW YORK, 390 U.S. 629 (1968).

GINZBURG v. UNITED STATES, 383 U.S. 463 (1966).

GROVE PRESS v. GERSTEIN, 378 U.S. 576 (1964).

INTERSTATE CIRCUIT INC. v. DALLAS, 390 U.S. 676 (1968).

JACOBELLIS v. OHIO, 378 U.S. 184 (1964).

KINGSLEY BOOKS v. BROWN, 354 U.S. 436 (1957).

KINGSLEY INTERNATIONAL PICTURES CORPORATION v. REGENTS OF THE UNIVERSITY OF NEW YORK, 360 U.S. 684 (1959).

LEE ART THEATER INC. v. VIRGINIA, 392 U.S. 636 (1968).

MANUAL ENTERPRISES v. DAY, 370 U.S. 478 (1962).

MARCUS v. SEARCH WARRANT, 367 U.S. 717 (1961).

MEMOIRS v. MASSACHUSETTS, 383 U.S. 413 (1966).

MISHKIN v. NEW YORK, 383 U.S. 502 (1966).

MOUNCE v. UNITED STATES, 247 F. 2d 148 (9th Cir. 1957), rev'd, 355 U.S. 180 (1958).

NEAR v. MINNESOTA, 283 U.S. 697 (1931).

ONE, INC. v. OTTO K. OLESON, 241 F. 2d 777 (9th Cir. 1958), rev'd, 355 U.S. 372 (1958).

PEOPLE v. BIOCIC, 80 Ill. App. 2d 65, 224 N.E. 2d 572 (1967).

PEOPLE v. BURNETT, 20 Ill. 2d 624, 170 N.E. 2d 546 (1960).

PEOPLE v. BUTLER, 49 Ill. 2d 435, 275 N.E. 2d 400 (1970).

PEOPLE v. GILBERT KIMMEL, 34 Ill. 2d 578, 217 N.E. 2d 785 (1966).

PEOPLE v. RIDENS, 51 Ill. 2d 410, 282 N.E. 691 (1972).

PEOPLE v. ROMAINE, 38 Ill. 2d 325, 231 N.E. 2d 413, (1967).

PEOPLE v. SIKORA, 32 Ill. 2d 260, 204 N.E. 2d 768 (1965).

PEREZ v. LEDESMA, 401 U.S. 82 (1971).

POTOMAC NEWS COMPANY v. VIRGINIA, 389 U.S. 47 (1967).

RABE v. STATE OF WASHINGTON, 92 S.Ct. 993 (1972).

REDRUP v. NEW YORK, 386 U.S. 767 (1967).

ROTH v. UNITED STATES, 354 U.S. 476 (1957).

ROWAN v. UNITED STATES POST OFFICE DEPARTMENT, 397 U.S. 728 (1970).

SCHACKMAN v. ARNEBERGH, 387 U.S. 47 (1967).

STANLEY v. GEORGIA, 394 U.S. 557 (1969).

SUNSHINE BOOKS COMPANY v. SUMMERFIELD, 249 F. 2d 118 (D.C. Cir. 1958), rev'd, 355 U.S. 372 (1958).

TIMES FILM CORPORATION v. CITY OF CHICAGO, 139 F. Supp. 847 (N.D. Ill. 1956), aff'd, 244 F. 2d 432 (7th Cir. 1957), rev'd, 355 U.S. 35 (1957).

TIMES FILM CORPORATION v. CITY OF CHICAGO, 365 U.S. 43 (1961).

TRALINS, v. GERSTEIN, 378 U.S. 576 (1964).

TRANS-LUX DISTRIBUTING CORPORATION v. BOARD OF REGENTS, 380 U.S. 259 (1965).

UNITED STATES v. REIDEL, 402 U.S. 351 (1971).

UNITED STATES v. THIRTY-SEVEN PHOTOGRAPHS, 402 U.S. 363 (1971).

UNITED STATES v. WEST COAST PUBLISHING COMPANY, 357 F. 2d 855 (1st Cir. 1966).

VON CLEEF v. NEW JERSEY, 395 U.S. 814 (1969).

ZENITH INTERNATIONAL FILM CORPORATION v. CITY OF CHICAGO, 183 F. Supp. 623 (N.D. Ill. 1960), vacated, 291 F. 2d 785 (7th Cir. 1961).

APPENDIX

Obscenity Questionnaire--Prosecuting Attorneys

OBSCENITY QUESTIONNAIRE

Name _____

A. 1. About how many obscenity prosecutions are handled by you in your jurisdiction?

2. What types of material are involved in most of your obscenity cases? (You may check one or more)

( ) "girlie" magazines
( ) nudist magazines
( ) pulp novels
( ) sado-masochistic materials
( ) films
( ) others (please explain) _____

3. The following questions concern some major federal obscenity decisions. Please indicate what the impact of each decision has had on your obscenity prosecutions by checking the appropriate box.

The Roth-Alberts decisions (obscenity is not within the area of protected speech).

( ) greatly helped
( ) helped
( ) had no effect
( ) hindered
( ) greatly hindered

The Jacobellis decision (before material can be proscribed, it must be "utterly without social importance").

( ) greatly helped
( ) helped
( ) had no effect
( ) hindered
( ) greatly hindered

The Ginzburg decision (advertising practices and intent of publisher to exploit and titillate matters of sexual description can be used to determine a work obscene).

( ) greatly helped
( ) helped
( ) had no effect
( ) hindered
( ) greatly hindered

The Mishkin decision (a state may proscribe material directed at the sexual interests of a clearly defined deviant sexual group).

( ) greatly helped
( ) helped
( ) had no effect
( ) hindered
( ) greatly hindered

The Stanley decision (private possession of obscene material is constitutionally protected).

( ) greatly helped
( ) helped
( ) had no effect
( ) hindered
( ) greatly hindered

The Reidel decision (Congress may prohibit the mailing of obscene materials to consenting adults).

( ) greatly helped
( ) helped
( ) had no effect
( ) hindered
( ) greatly hindered

B. Please indicate your opinion of each of the following statements; if you wish to explain your response, please place your comment in the space provided below each question.

4. The state of Illinois needs to develop additional legislation which will prevent the distribution of obscene materials to all adults.

   Why or Why not?

5. The state of Illinois should develop additional legislation which applies only to the distribution of obscene materials to juveniles while at the same time allowing adults to view or read any material they please.

   Why or Why not?

6. The state of Illinois should develop additional legislation which will prevent the distribution of obscene materials to both vulnerable adults (that is, persons who might be damaged by exposure to such material) and minors.

   Why or Why not?

7. How would you distinguish between obscene material and hard-core pornography?

8. Are there any supplementary State or Federal decisions which have had an impact on your obscenity prosecutions?