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OBSCENITY MAY NOT BE A FOUR-LETTER WORD, but such words are frequently the response of scholars attempting to uncover logic or meaning in this area of United States law. In short, to interpreters of American jurisprudence — jurists, lawyers and laymen — obscenity is becoming a dirty word.

From 1967 through 1970 the Supreme Court of the United States seemed to be charting a liberating and new, but fairly predictable, course. Obscenity convictions, especially in state prosecutions involving adult possession or distribution of materials, were set aside in sizable numbers by the Supreme Court. But this spring, the Court appeared to change its course again, thwarting those optimists who have seriously attempted to find logic or consistency in the development of the law of obscenity.

First, the 1970 term saw the Supreme Court explicitly abandon its more permissive progression and return to its 1957 decision in *Roth v. United States*[1] for guidance in defining obscene materials.[2] Under *Roth,* once materials are defined as obscene, they do not fall within the protective sweep of the first amendment.[3] Second,

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1. 354 U.S. 476 (1957).
2. *See* United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971), discussed at pp. 237 to 242 *infra.*
3. 354 U.S. at 484.

the term also saw the Court return to its pre–1965 posture of demanding federal abstention from intervening in state obscenity prosecutions.[4] Since mid–decade and the famous *Dombrowski* case,[5] an increasing number of federal courts had intervened in state cases at the trial stage, invalidating both statutes and administrative procedures on first and fifth amendment grounds. After the spring of 1971, however, because of Supreme Court fiat, defendants in obscenity prosecutions generally will be forced to exhaust their state remedies before seeking the traditionally more libertarian federal court interpretation of obscenity standards.

These two developments would seem to spell serious trouble for defendants in state obscenity cases. Whereas as recently as the autumn of 1970 many libertarians were prepared to predict that soon possession of hardcore pornography by adults or distribution to consenting adults of anything short of hardcore pornography would come inside the protection of the Bill of Rights,[6] today there is far less optimism. In place of that optimism is confusion, and some consternation.

Is the Supreme Court moving in a new direction, or is it merely returning to some of the standards it developed in the late 1950s and early 1960s? It is the purpose of this article to attempt to answer these questions and others. By outlining the several developmental stages in which the law has moved since 1957, and by viewing more recent Supreme Court decisions in that context, it is hoped that a pattern will emerge from which conclusions may be drawn as to the state of the law of obscenity. To those ends, it may be seen that the development of the law of obscenity has, to date, passed through five distinct stages. In the initial stage, the Court was primarily concerned with developing a workable definition of obscenity, culminating in the *Roth*[7] and "Fanny Hill"[8] decisions; thereafter, the focus changed from defining obscenity to controlling conduct which, because of its categorization as "pandering," removed from the protective ambit of the first amendment that material which would presumably be held to be non–obscene if standing by itself. The third stage in the development of the law of obscenity produced a dichotomy in the treatment of obscene material; by using the concepts of "overbreadth" and "private possession," the Court appeared

4. *See* Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971), discussed at pp. 229 to 236 *infra*.
5. Dombrowski v. Pfister, 380 U.S. 479 (1965).
6. *See, e.g.*, Engdahl, *Requiem for Roth: Obscenity Doctrine Is Changing*, 68 MICH. L. REV. 185 (1969).
7. Roth v. United States, 354 U.S. 476 (1957).
8. Memoirs v. Massachusetts, 383 U.S. 413 (1966).

to be carving out an area of obscenity which, although perhaps unprotected, was nevertheless not susceptible to state regulation or proscription. More recently the Court has begun to retrace its steps by reapplying the abstention doctrine and, finally, by abandoning the concept of a "Brand X" type of obscenity, which was not controllable by the states, in favor of a more strict application of the *Roth* doctrine. This article will be divided into sections which follow that development.

I. BACKGROUND: "DEFINING" OBSCENITY, FROM *Roth* TO "FANNY HILL"

The origin of the modern law of obscenity in the United States, as attorney Stanley Fleishman has noted,[9] may be traced to a thoughtful concurring opinion in 1956 by the late Judge Jerome Frank of the Court of Appeals for the Second Circuit. In that case, affirming the conviction of Samuel Roth under the basic federal obscenity statute,[10] Judge Frank declared:

> The troublesome aspect of the federal obscenity statute . . . is that (a) no one can now show that with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults, and (b) that under that [federal] statute . . . punishment is apparently inflicted for provoking in such adults, undesirable sexual thoughts, feelings, or desires — not overt[ly] dangerous or anti-social conduct, either actual or probable.[11]

Although Judge Frank denounced the "exquisite vagueness" of obscenity statutes, Roth's conviction stood, and his attorney's conten-

9. Fleishman, *Witchcraft and Obscenity: Twin Superstitions,* WILSON LIBRARY BULL., April 1965, at 4.

10. 18 U.S.C. § 1461 (1970). This section makes it a crime to mail "obscene or crime-inciting matter," including the following:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance; and
>
> Every article or thing designed, adapted, or intended for providing abortion, or for any indecent or immoral use; and
>
> Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and
>
> Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and
>
> Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing.

11. United States v. Roth, 237 F.2d 796, 802 (2d Cir. 1956), *aff'd,* 354 U.S. 476 (1957).

tions that such statutes were unconstitutionally vague restraints on speech and press were unsuccessful. The Supreme Court of the United States then granted certiorari.[12]

As the Supreme Court of the United States upheld Roth's conviction, Justice William J. Brennan, Jr., in his majority opinion, laid down the test for defining obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[13] Elsewhere in his *Roth* opinion, Justice Brennan wrote words which were then merely dicta, but which were to have great significance in subsequent cases:

> All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties [of free speech and press] . . . .[14]

Some ideas, however, were not included under constitutional protection: Justice Brennan wrote that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[15] In point of historical fact, it does not seem that the Founding Fathers were much concerned about obscenity and pornography. Then, as one historian has observed, "babes, ladies, and even the most saintly of the clergy, in jest and in ordinary conversation, used language which today would startle an aviation mechanic."[16] Furthermore, it might be noted that the men who made the American Revolution could not have been too concerned about sexually explicit literature; the Continental Congress in 1776 appointed the author of the salty *Speech of Polly Baker* as the new nation's first postmaster general. His name? Benjamin Franklin.[17]

The legal significance of *Roth* rested not so much in its definition of obscenity as in its rejection of the notion that obscenity was protected by the first amendment. At the same time, however, the

12. 352 U.S. 964 (1957). The Court, in Alberts v. California, 352 U.S. 962 (1957), also noted probable jurisdiction over an obscenity case brought under a California statute, CAL. PENAL CODE § 311 (West 1952). The *Roth* and *Alberts* cases were decided simultaneously by the Court.

13. 354 U.S. at 489.

14. *Id.* at 484. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966), which adopted the idea that to be actionable, obscene material must be "utterly without redeeming social value." 383 U.S. at 418.

15. 354 U.S. at 484.

16. C. SHIPTON, ISAIAH THOMAS, PRINTER, PATRIOT AND PHILANTHROPIST 2 (1948).

17. United States v. Roth, 237 F.2d 802, 806 (1957) (Frank, J., concurring), *citing* C. VAN DOREN, BENJAMIN FRANKLIN 150–51, 153–54 (1938).

Court liberalized earlier standards for defining obscenity[18] and started down the path to becoming what Justice Robert Jackson had called in 1948 the "High Court of Obscenity."[19]

Two minority opinions in *Roth* deserve special attention because they accurately forecast developments to come after 1957 in the law of obscenity: Chief Justice Earl Warren's concurring opinion, and Justice John Marshall Harlan's concurring–dissenting opinion. Chief Justice Warren agreed with the majority that both Samuel Roth and David Alberts should be punished for dealing in salacious materials. He stated, however, that the issue in this and other obscenity cases was not the character of a book, but was, instead, the conduct of the defendant. The Chief Justice wrote:

> The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw their color and character. A wholly different result might be reached in a different setting.[20]

Because the Chief Justice believed that both Roth and Alberts had participated in "the commercial exploitation of the morbid and shameful craving for materials with prurient effect,"[21] he added that the federal and state governments could constitutionally punish such conduct. In 1967, ten years after Chief Justice Warren wrote that concurring opinion, the Supreme Court began to embrace a viewpoint on punishing *conduct* which was close to Mr. Justice Warren's 1957 statement.[22]

While Justice Harlan's minority opinion went off in several directions, the benefit of hindsight permits the conclusion that the Justice's most significant observations were directed toward the governmental level at which obscene matter should be controlled, rather than a definition of such matter. Justice Harlan asserted that the states, not the federal government, should have the principal job of controlling sexually explicit materials.[23]

Subsequent cases between 1957 and 1966 attempted to refine the definition of obscenity as advanced in Justice Brennan's majority

18. This earlier standard was embodied in the famed old "Hicklin Rule," as stated by Lord Chief Justice Cockburn: "whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall." L.R. 3 Q.B. 360, 370 (1868), *adopted by U.S. Courts in* United States v. Bennett, 24 Fed. Cas. 1093, 1103–04 (No. 14,571) (C.C.S.D.N.Y. 1879); *see also* Commonwealth v. Friede, 271 Mass. 318, 320, 171 N.E. 472, 473 (1930).

19. *See* Lewis, *Sex and the Supreme Court,* ESQUIRE, June 1963, at 82.

20. 354 U.S. at 495 (Warren, C.J., concurring).

21. *Id.* at 496.

22. *See, e.g.,* Redrup v. New York, 386 U.S. 767 (1967); Stanley v. Georgia, 394 U.S. 557 (1969), discussed at pp. 219 to 224 *infra.*

23. 354 U.S. at 505–06 (Harlan, J., concurring in part, dissenting in part).

opinion in *Roth.* In 1962, for example, in *Manual Enterprises v. Day,*[24] Justice Harlan wrote that magazines designed for a homosexual audience were "dismally unpleasant, uncouth and tawdry," but not obscene and unmailable. Here, Justice Harlan added another term, "patent offensiveness," to the lexicon of obscenity law. He wrote:

> These magazines cannot be deemed so offensive on their face as to affront current community standards of decency — a quality that we shall hereafter refer to as "patent offensiveness" or "indecency." Lacking that quality, the magazine cannot be deemed legally "obscene . . . ."[25]

Another phrase in the *Roth* definition of obscenity — "community standards" — got a working over by the Court in the 1964 case of *Jacobellis v. Ohio.*[26] The phrase was given a "national contemporary community standards" emphasis by Justice Brennan in writing that a film, *Les Amants,* was not obscene. Justice Brennan rejected contentions that the "contemporary community standards" phrase in the *Roth* test implied "a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises."[27] His argument, however, did not convince a majority of the Court, because only one other justice, Arthur Goldberg, agreed that there should be a "national standard." Three other justices who joined in holding the film not obscene did so on other grounds.[28] Some of the implications of the continuing absence of a national standard will be discussed at greater length in Part IV of this article.[29]

Fanny Hill, the *piece de non-resistance* in John Cleland's *Memoirs of a Woman of Pleasure,* is indeed a hardy old tart. Cleland's book, written in England in 1749, was, in 1821, the first book to be the subject of an obscenity prosecution in America.[30] Some 145 years

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24. 370 U.S. 478 (1962).

25. *Id.* at 482.

26. 378 U.S. 184 (1964).

27. *Id.* at 191.

28. *Id.* at 196. Justices Black and Douglas, joining in a concurring opinion, maintained that the conviction of the appellant would be an unconstitutional abridgement of freedom of the press. Justice Stewart concurred on the basis that the Constitution protects all but hard-core pornography, which he admittedly could not define. ["But I know it when I see it." *Id.* at 197 (Stewart, J., concurring).]

29. The Supreme Court, via the case of Miller v. California, unreported, *cert. granted,* 401 U.S. 992 (1971) (No. 1288), is expected to decide this term whether a national or local standard is to be used in defining obscenity.

30. Commonwealth v. Holmes, 17 Mass. 336 (1821). An even earlier American obscenity case involved "a lewd, scandalous, and obscene painting." Commonwealth v. Sharpless, 2 S & R 91 (Pa. 1815).

later, the Supreme Court of the United States, despite the erotic novel's enthusiastic description of more than 30 sex acts,[31] held that the *Memoirs of a Woman of Pleasure* was not obscene because "[a] book can not be proscribed unless it is found to be *utterly* without redeeming social value."[32] Justice Brennan then summed up the Court's 1966 view of tests for obscenity:

> We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" . . . . Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[33]

From *Roth* in 1957 through the 1966 decision in the "Fanny Hill" case, the Supreme Court's preoccupation was with content, and with the problem of classifying or defining — and then prohibiting — obscenity.

II. CONTROLLING CONDUCT, FROM *Ginzburg* TO *Stanley*, 1966–1969

After delivering the Court's decisions in the "Fanny Hill' and *Mishkin*[34] cases on March 21, 1966, Mr. Justice Brennan then turned — with evident revulsion — to the case of *Ginzburg v. United States*.[35] *Ginzburg* represented a new departure for the Court in obscenity cases: the content of the materials involved was treated as being of little consequence; instead, Justice Brennan made the conduct of the defendant pivotal to upholding Ginzburg's conviction. Justice Brennan wrote:

> [T]he question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and [we] assume without deciding that the prosecution could not have succeeded otherwise.[36]

31. *See, e.g.*, the shocked dissent by Justice Clark, Memoirs v. Massachusetts, 383 U.S. 413, 445 (1966).

32. *Id.* at 419 (emphasis supplied by the Court).

33. *Id.* at 418.

34. Mishkin v. New York, 383 U.S. 502 (1966). The Court in that case declared that the prurient appeal of the material was to be judged with reference to the "target group" for whom the material is intended.

35. 383 U.S. 463 (1966).

36. *Id.* at 465–66.

It is perhaps understandable that a number of the Court's members might take notice of Ginzburg's conduct. Ginzburg, evidently believing that the *Roth* test made it safe for him to peddle his wares, boasted of the sexual content of three publications: *Eros,* an expensive hard cover magazine resembling an *American Heritage* for the oversexed; *Liaison,* a bi-weekly newsletter devoted to keeping sex an art and preventing it from becoming a science; and a "short book" titled *The Housewife's Handbook on Selective Promiscuity.* One of Ginzburg's advertisements claimed:

> EROS handles the subjects of Love and Sex with complete candor. The publication of this magazine — which is frankly and avowedly concerned with erotica — has been enabled by recent court decisions ruling that a literary piece or painting, though explicitly sexual in content, has a right to be published if it is a genuine work of art.
>
> EROS is a genuine work of art.[37]

Justice Brennan made explicit reference to "abundant evidence" from Ginzburg's trial in federal district court "that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering — 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' "[38] It was also noted, as evidence of "pandering," that Ginzburg had sought — and been denied — mailing privileges in the colorfully named towns of Intercourse and Blue Ball, Pennsylvania. Ginzburg finally succeeded in getting mailing privileges in Middlesex, New Jersey.[39]

Brennan's majority opinion drew infuriated dissents from four members of the Court, Justices Black, Douglas, Harlan and Stewart. Justice Black declared:

> Only one stark fact emerges with clarity out of the confusing welter of opinions and thousands of words written in this and two other cases today. That fact is that Ginzburg, petitioner here, is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal.[40]

Justice Potter Stewart was equally emphatic, writing that Ginzburg "was not charged with 'commercial exploitation'; he was not charged

37. *Id.* at 469 n.8.
38. *Id.* at 467.
39. *Id.*
40. *Id.* at 476 (Black, J., dissenting).

with 'pandering'; he was not charged with 'titillation.' "[41] A conviction on such grounds, Justice Stewart argued, was a denial of due process.[42] Similarly, Justice Harlan asserted that the Court's majority had in effect rewritten the federal obscenity statute in order to convict Ginzburg, and added that he considered the newly created "pandering" concept to be unconstitutionally vague.[43] Justice Douglas added his own outraged dissent, arguing that:

> The advertisements of our best magazines are chock-full of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyers' attention to lotions, tires, food, liquor, clothing, autos and even insurance policies. . . . And I do not see how it adds to or detracts . . . from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it. I cannot imagine any promotional effort that would make chapters 7 and 8 of the Song of Solomon any the less or any more worthy of First Amendment protection than does their unostentatious inclusion in the average edition of the Bible.[44]

Despite such angry words, it appears in retrospect that the *Ginzburg* decision may have been a mixed curse.[45] The switch from looking at content to looking at a defendant's conduct was highly important. Early in 1967, in the wake of more highly publicized cases such as *Ginzburg,* the Supreme Court issued a cryptic but important per curiam decision known as *Redrup v. New York.*[46] *Redrup* made little splash when first decided, but it became, for a time, a precedent of major importance in overturning obscenity convictions.

41. *Id.* at 500 (Stewart, J., dissenting).
42. *Id.*
43. *Id.* at 494 (Harlan, J., dissenting).
The concept of pandering may be clarified somewhat this term in the case of *Rabe v. Washington,* in which the Supreme Court has recently granted certiorari. Rabe v. Washington, 79 Wash. 2d 254, 484 P.2d 917, *cert. granted,* 40 U.S.L.W. 3190 (U.S. Oct. 26, 1971) (No. 71-247). In that case, petitioner Rabe was convicted under a Washington obscenity statute, WASH. REV. CODE § 9.68.010 (1961), proscribing the knowing exhibition of obscene matter. Petitioner owned a drive-in motion picture theater where he was showing the film *Carmen Baby.* The picture screen faced several neighboring houses and a public highway. Although it was admitted by the Supreme Court of Washington that only portions of the picture were obscene, 79 Wash. 2d at 256, 484 P.2d at 919, the court held, *citing* Redrup v. New York, 386 U.S. 767 (1967), that "movies which are obscene only in part may be constitutionally suppressed under state obscenity laws when the movie is commercially exhibited in such a way that it intrudes upon the privacy of nonconsenting citizens who cannot as a practical matter avoid being exposed to the film." 79 Wash. 2d at 258, 484 P.2d at 921. Thus, although the Washington statute made no reference to pandering sales, Mr. Rabe's conviction was upheld on that basis alone.
44. *Id.* at 482–83 (Douglas, J., dissenting).
45. Although libertarians have raised many objections to the manner in which Ginzburg was convicted, five years afterwards he had still not paid his fine or served a day in jail. N.Y. Times, Feb. 4, 1971, at 44, col. 8.
46. 383 U.S. 767 (1967). *See* Teeter & Pember, *The Retreat from Obscenity, Redrup v. New York,* 21 HASTINGS L.J. 175 (1969).

In less than two years after it was announced, *Redrup* was cited as controlling or as an important force in reversing a total of 35 obscenity convictions.[47] A more recent accounting by O. John Rogge has emphasized *Redrup's* importance: *"Redrup* became the password, as it were, for the reversal of obscenity convictions."[48]

Redrup has been an important precedent, although the Supreme Court did not apply it with any sort of consistent exactitude. In less than three pages, *Redrup's* anonymous majority opinion said that because a majority of the Court could not agree on a test for judging obscenity, three lower court convictions were to be reversed:[49]

> Two members of the Court [Black and Douglas] have consistently adhered to the view that a State is utterly without power to suppress, control or punish the distribution of any writings or pictures upon the ground of their "obscenity." A third [Stewart] has held to the opinion that a State's power in this area is narrowly limited to a distinct and identifiable class of material. Others [Warren, Fortas, and Brennan] have subscribed to a not dissimilar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and (c) the material is utterly without redeeming social value." Memoirs v. Massachusetts, 383 U.S. 413, 418–419. Another Justice [White] has not viewed the "social value element as an independent factor in the judgment of obscenity. Id., at 460–462 (dissenting opinion).
>
> Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand. Accordingly, the judgment in each case is reversed.[50]

The Court indicated in *Redrup* that there could be four reasons for upholding a conviction for obscenity:

(1) Where the publication is "hardcore pornography" or without redeeming social value, perhaps as defined by former Solicitor General — now Supreme Court Justice — Thurgood Marshall. Marshall's definition spoke of

> [s]uch materials . . . [as] photographs, both still and motion picture, with no pretense of artistic value, graphically depicting

47. Teeter & Pember, *supra* note 46, at 176.
48. Rogge, *Williams v. Florida: End of a Theory,* 16 VILL. L. REV. 607, 614 (1971).
49. 386 U.S. at 770–71.
50. *Id.*

> acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizzare manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value.[51]

(2) Where there is evidence of "pandering sales" — even of matter not deemed hardcore — as in *Ginzburg v. United States;*[52]

(3) Where there is a statute reflecting a "specific and limited state concern for juveniles;"[53] and

(4) Where there is "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for the unwilling individual to avoid exposure to it."[54]

Redrup was perceived by some judges as a whittling away, to some extent, of the 1957 declaration in *Roth* that if something were to be defined as obscene, it could have no constitutional protection. For example, Ohio Judge Gilbert Bettman wrote in December of 1967[55] that Justice Marshall's definition of hard-core pornography, as promulgated by Justice Stewart,[56] had been adopted by the Supreme Court of the United States. Bettman contended that *Redrup* meant that "any ordinary book or magazine seller . . . is constitutionally protected against prosecution for material, other than hard-core pornography. . . ."[57] Similarly, a court of appeals in the State of Washington ruled: "[a]s we read *Redrup,* offensive, worthless, prurient material is not to be civilly suppressed or to be the essential element of a criminal conviction unless the material is clearly 'hard-core' pornography or unless the accused possessor has conducted himself in a clearly proscribed manner."[58]

On the other hand, it is conceivable that *Redrup* was merely another step in the process of defining obscenity which was started — in recent times at least — in *Roth.* In other words, perhaps what

51. *Quoted in* Ginzburg v. United States, 383 U.S. 463, 499 n.3 (1966) (Stewart, J.).

52. *See* p. 218 *supra.*

53. Ginsberg v. New York, 390 U.S. 629 (1968).

54. Redrup v. New York, 386 U.S. 767, 769 (1967), *citing* Breard v. Alexandria, 341 U.S. 622 (1959), *and* Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952).

55. State v. J. L. Marshall News Co., 13 Ohio Misc. 60, 232 N.E.2d 435 (C.P. 1967).

56. *See* note 42 and accompanying text *supra.*

57. 13 Ohio Misc. at 62, 232 N.E.2d at 436.

58. State v. Cox, 3 Wash. App. 700, 708, 477 P.2d 198, 203 (1970), *citing* Stanley v. Georgia, 394 U.S. 557, 563 (1969).

Justice Brennan was attempting to describe in his 1957 definition of obscenity was hard-core pornography, and in fact, while concern with the conduct of defendant was certainly a new element in the law, the other aspects of the short *Redrup* opinion were merely a new expression of an idea started in *Roth*. But the basic problem in *Redrup,* which will be discussed later, was that for the first time the Supreme Court identified *two* different kinds of obscenity.

Two years after *Redrup,* in *Stanley v. Georgia,*[59] the Supreme Court took *Redrup's* implications and seemed to go even further in the direction of providing some constitutional protection for sexually explicit literature. We now turn to a brief discussion of *Stanley v. Georgia.*

Stanley v. Georgia

In 1966, a Georgia state investigator and three federal agents, operating with a federal search warrant, entered the home of Robert E. Stanley. The warrant stated that the officers were looking for bookmaking records and money used in a wagering business. While poking through a desk drawer in Stanley's upstairs bedroom, the searchers found not bookmaking evidence but three reels of eight millimeter film. Using a projector and screen handily found in a nearby room, the officers treated themselves to a free movie. The investigators asserted that the films were obscene and Stanley was subsequently charged with possession of obscene matter in violation of Georgia law.

Georgia's courts ruled that the films were obscene and that the seizure of the three reels was "incident to a lawful search." Georgia's supreme court added that to convict Stanley of possessing obscene materials, it was not necessary to show that he planned to sell, distribute, or circulate them.[60] Later, when Georgia contested Stanley's appeal from his conviction, the state argued that under *Roth v. United States,* "obscenity is not within the area of constitutionally protected speech or press."[61] Therefore, it was argued, Georgia could deal with obscenity as it saw fit, controlling it just as it restricts other materials harmful to the welfare of its citizens.

The Supreme Court of the United States unanimously and emphatically rejected Georgia's arguments, even though for the purposes of the case the Court assumed that the films were obscene. In writing the Court's opinion, Justice Thurgood Marshall con-

59. 394 U.S. 557 (1969).

60. Stanley v. State, 224 Ga. 259, 260–62, 161 S.E.2d 309, 310–12 (1968).

61. 354 U.S. at 485.

ceivably could have decided the case on the basis of an unconstitutional search and seizure.[62] Instead, however, Justice Marshall chose to base his decision on the concepts of freedom of expression and the right of privacy. Justice Marshall crippled Georgia's argument that *Roth* had declared obscenity outside the bounds of protected speech by distinguishing the *Stanley* case from *Roth*. "None of the statements cited by the Court in *Roth*," he wrote, ". . . were made in the context of a statute punishing mere private possession of obscene material. . . ."[63] The cases cited, he continued, concerned the public distribution of obscene matter. A state certainly has the ability to deal with the problems of obscenity, the Justice wrote, but there are some circumstances in which "mere categorization" of material as obscene is insufficient to permit state action. Obscenity cannot, he said, in every instance "be insulated from all constitutional protections."[64] The constitution protects the "right to receive information and ideas."[65]

> Whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.[66]

The Marshall opinion in *Stanley* has caused a good deal of perplexity not so much because of what the Associate Justice said, but because of things he did not say. At first glance, the decision appears to be merely a negative extension of the *Redrup* reasoning. And it certainly is that. *Redrup* asserted that prosecution could succeed if distribution was conducted in such a manner as to constitute an assault upon the privacy of an unwilling recipient. *Stanley* asserted that because the defendant was not bothering anyone else he could not be prosecuted.

That, however, may well be an oversimplified explanation of the opinion. In addition, Justice Marshall said that in some cases obscenity should receive constitutional protection.[67] This appears to be the first time the Supreme Court has ever said that sometimes obscenity may be deserving of shielding from the Constitution. But is it? The problem lies not completely with Marshall. Equally to

62. *Cf.* Mapp v. Ohio, 367 U.S. 643 (1961).
63. 394 U.S. at 560–61.
64. *Id.* at 563.
65. *Id.* at 564.
66. *Id.* at 565.
67. *Id.* at 564–65.

blame is the unknown author of the per curiam majority opinion in *Redrup* — the Justice who for the first time in the history of the Court began talking about two different kinds of obscenity. On the one hand he wrote of "hard-core pornography" — the kind of obscenity without redeeming social value. This can be suppressed without constitutional objection. On the other hand he discussed another kind of obscenity — "Brand X," if you will — which can only be presumed to be "non-hard-core pornography." Such non-hard-core pornography can also be suppressed, if it is marketed improperly. Obviously, the mystery author of the opinion was not suggesting that every other kind of material, from Grimm's Fairy Tales to a book of recipes, could be constitutionally suppressed if sold to juveniles, or if there was evidence of pandering sale or distribution which invaded privacy. But this second class of "Brand X" pornography was never described or even labeled. It just somehow popped into existence in the *Redrup* majority opinion.

It is this lack of precision, resulting from the virtually unspoken belief that there is this "Brand X" obscenity, which has created problems in understanding the *Stanley* opinion. When Justice Marshall asserted that in some situations obscenity will be protected by the first amendment, what kind was he talking about: hard-core or "Brand X?" If he included hard-core pornography — material utterly without redeeming social value — then *Stanley* is clearly the ultra-libertarian high-water mark in obscenity law. But if Marshall was referring to the other kind of obscenity, to "Brand X" obscenity, then *Stanley* is merely an extension — albeit a confusing one — of *Redrup*.

Justice Marshall never made it clear in his opinion in *Stanley* as to which kind of obscenity he was referring. This ambiguity has created great confusion, especially in the lower courts, about what *Stanley* really means. Finally, one might unearth the "hard cases make bad law" truism once again. *Stanley*, in retrospect, seems to have been more of a privacy case than an obscenity case. Perhaps in eagerness to state a right to be secure against search and seizure — even if one does possess films which are utterly without redeeming social value — Mr. Marshall's opinion said at once too much and too little.

III. TWO FLEETING PROMISES FROM *Redrup* AND *Stanley*, 1968–1970: "OVERBREADTH" AND "PRIVATE POSSESSION"

The authors have elsewhere noted that in *Redrup*, the Court seemed to be grasping for a "standard of conduct," and that it might

indeed be easier to judge conduct than to divine whether or not a particular piece of material is obscene.[68] We perceived Justice Stewart's use of a strict definition of hard-core pornography — that which has no redeeming social value — as amounting to protection for a good many sexually preoccupied materials. We argued that "the stringent definition of 'hard-core pornography' advanced by Justice Stewart could be little protection for a distribution of material that was seen by a court to be an invasion of privacy, a sale to a minor, or a 'pandering' sale."[69]

Similarly, *Stanley* has been viewed as an important precedent because the Supreme Court for the first time granted at least limited constitutional protection to the possession of admittedly obscene material (of one kind or another), so long as the material was possessed and used in private. In *Stanley,* as we have seen, the fact situation was limited to Mr. Stanley's home and bedroom, although some of Justice Marshall's language overturning the conviction ranged beyond Stanley's abode.

Two of the more interesting concepts for which *Redrup* and *Stanley* were invoked in overturning obscenity convictions may be conveniently labeled "overbreadth" and "private possession." Brief discussion of these two concepts, intended to be suggestive rather than exhaustive, follows.

A. "Overbreadth"

Consider an obscenity case arising from assertion of federal power to regulate imports.[70] This case, rather jadedly named *United States v. Articles of "Obscene" Merchandise,*[71] arose when several items addressed to Fred Cherry were seized by United States Customs inspectors upon entry at the port of New York. Circuit Judge Leonard Moore, speaking for a three-judge federal court, declared 19 U.S.C. section 1305 to be unconstitutionally overbroad because it forbade the importation of obscene materials regardless of their intended use.[72] He declared that two uses of obscenity were constitutionally protected: private use and "non-commercial exchange with 'like-minded adults.' "[73]

68. Teeter & Pember, *supra* note 46.
69. *Id.* at 187.
70. Under 19 U.S.C. § 1305(a) (1970), the importation of "immoral articles," including books, papers, pictures, drawings or the like which are "obscene and immoral," as well as "any drug or medicine or any article whatever for the prevention of conception" is prohibited.
71. 315 F. Supp. 191 (S.D.N.Y. 1970).
72. *Id.* at 196.
73. *Id.*

Similarly, United States District Judge James E. Doyle of Madison, Wisconsin held a statute forbidding interstate transportation of obscene materials to be impermissibly overbroad.[74] Judge Doyle found 18 U.S.C. section 1462 to be overbroad because it did not distinguish between transportation which presents danger to minors or the danger of intruding upon the privacy of adults from transportation which does not bring about such dangers.[75] Judge Doyle here grounded his decision upon *Stanley's* statement that there is a right to receive information and ideas, regardless of their social worth.[76] Judge Doyle declared that government "cannot indirectly prevent an individual from receiving obscene matter for permissible uses by making it a crime to disseminate or transport the materials to him."[77]

In other cases where similar reasoning could have been used to free defendants in obscenity cases or to free materials from the clutches of government, however, the "overbreadth" argument has failed to stop prosecutions. A prime example of this failure is *Gable v. Jenkins.*[78] Gable, a book and magazine distributor, relied on *Stanley* in contending that a Georgia statute[79] prohibiting distribution of obscene material "to any person" was unconstitutonally overbroad. In *Gable,* the three–judge district court quoted Justice Brennan's statement in *Stanley* that state power to control obscenity does not extend to controlling mere private possession at home. The court added that Brennan's quote from *Stanley* indicated a desire on the part of the Supreme Court to limit *Stanley* to its facts — private possession in the home of three reels of eight millimeter film.[80] Therefore, the three–judge court declared that decisions of the Supreme Court of the United States allowing the regulation of obscenity "would appear to demand a holding that [the Georgia obscenity statute] is constitutional."[81] The decision in *Gable* was upheld by the United States Supreme Court in a miniscule per curiam decision dated April 20, 1970.[82] Justices Black and White dissented,

74. United States v. B & H Distrib. Corp., 319 F. Supp. 1231 (W.D. Wis. 1970).

75. *Id.* at 1236.

76. *Id.* at 1235, *quoting* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

77. *Id.* at 1235.

78. 309 F. Supp. 998 (N.D. Ga. 1969), *aff'd,* 397 U.S. 592 (1970).

79. GA. CODE ANN. § 26–2101(a) (1970).

80. 309 F. Supp. at 1000.

81. *Id.* at 1001.

82. 397 U.S. 592 (1970). For another case where the "overbreadth" argument did not succeed in stopping obscenity prosecutions, *see, e.g.,* United States v. Ten Erotic Paintings, 311 F. Supp. 884 (D. Md. 1970). In that case, the court held that "most assuredly, *Stanley* in no way dealt with congressional power to regulate importations into this country of obscene material." *Id.* at 886. *See also* United

and Justice Douglas, who might have been expected to dissent, took no part in the case.

While the overbreadth argument had limited legal success, discussion of it demonstrates the impact which the *Redrup* and *Stanley* decisions had on the lower courts — an impact which resulted at least partly from the lack of precision in the opinions of the Supreme Court.[83] Three later Supreme Court cases,[84] to be discussed in Section IV of this article, have effectively crushed the "overbreadth" argument.

B. "Private Possession"

Stanley, as we have seen, at the very least applied to "mere private possession" of sexually related materials in one's own home. Some judges, however, evidently were hopeful that in *Stanley's* logic they could find a rationale for adding the right to *receive* ideas as well as the right to have books or films at home. Some of the judges were of the impression, after reading *Stanley* and *Redrup,* that many situations which in the past would have been legally proscribed would now be permitted. For example, *Stanley* asserted that private possession at home is not punishable. It seemed logical, therefore, that if there was no intent to sell such matter, mere private possession outside the home, in an office or car would be legal as well.[85] In the alternative, using standards set down in *Redrup,* would it not be possible to legalize the sale of erotic books and pictures from a store where minors are not permitted and where the existence of "adults–only" material is plainly announced?[86] Finally, consider the theater exhibition of an X–rated film such as *I Am Curious (Yellow).* This activity would also seem to be permissible, since the advertising has been scrupulously free from pandering influences, minors are not permitted to enter the theater, and ample warning of the content of the film is made clear to adult patrons.[87]

These three situations all seemed quite plausible under some readings given to *Redrup* and *Stanley.* Some libertarians, in fact, might have begun to sense the dawning of a new, more mature era.

States v. A Motion Picture Film Entitled "Pattern of Evil," 304 F. Supp. 197 (S.D.N.Y. 1969).

83. *See* pp. 225 to 226 *supra.*

84. Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971).

85. *See, e.g.,* Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), *vacated and remanded sub. nom.* Dyson v. Stein, 401 U.S. 200 (1971) ("private possession" in an office).

86. *See, e.g.,* United States v. Articles of "Obscene" Merchandise, 315 F. Supp. 191, 195–96 (S.D.N.Y. 1970).

87. Karalexis v. Byrne, 306 F. Supp. 1363, 1365–66 (D. Mass. 1969), *vacated and remanded,* 401 U.S. 216 (1971).

Some of the readings of *Stanley*[88] indeed have a number of points of similarity to recommendations advanced in the *Report of the Commission on Obscenity and Pornography*.[89] Consider the Commission's advice:

> The Commission recommends that federal, state, and local legislation prohibiting the sale, exhibition or distribution of sexual materials to consenting adults should be repealed.[90]

The *Report* added that "[t]he Commission believes that there is no warrant for continued governmental interference with the full freedom of adults to read, obtain or view whatever such material they wish."[91] This latter finding was reached on the basis that the study group was unable to find evidence that "obscene" matter had harmful psychological effects on adults.

Freedom for adults, in the Commission's view, should not mean similar liberty for juveniles:

> The Commission recommends the adoption by the States of legislation . . . prohibiting the commercial distribution or display for sale of certain sexual materials to young persons. Similar legislation might also be adopted, where appropriate, by local governments and by the federal government for application in areas, such as the District of Columbia, where it has primary jurisdiction over distributional conduct.[92]

The Commission also urged the adoption of state and local legislation to prohibit public displays of sexually explicit materials, and expressed approval, in principle, of the 1970 Postal Reorganization Act.[93]

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88. *E.g.*, United States v. Articles of "Obscene" Merchandise, 315 F. Supp. 191 (S.D.N.Y. 1970); Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), *vacated and remanded*, 401 U.S. 216 (1971); Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), *vacated and remanded sub. nom.* Dyson v. Stein, 401 U.S. 200 (1971).

89. REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

90. *Id.* at 51. Twelve of the Commission's seventeen members subscribed to this view.

91. *Id.* at 52.

92. *Id.* at 36. Fourteen Commission members joined in this recommendation. The specific legislation recommended by the Commission is set forth in the "Drafts of Proposed Statutes" in Section III of the Commission's Report. *Id.* at 76–78.

93. *Id.* The Postal Reorganization Act, 39 U.S.C. §§ 1735 to 1737 (1970), authorizes the Post Office to compile and maintain current lists of persons who have declared that they do not wish to receive certain defined materials, and makes such lists available at cost to mailers of unsolicited advertisements. Mailers would be prohibited from sending the sexually explicit material as defined through the mails to persons appearing on the Post Office Department's lists. REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 81 (1970). The Federal Anti-Pandering Act, 39 U.S.C. § 4009 (1970), allows a mail recipient to protect himself from unwanted solicitations, but only after he has received at least one such advertisement. Also, his complaint to postal inspectors under the 1968 Act would protect him only against mail coming from one particular source.

The *Report,* and a majority of the Commission, was denounced roundly by conservative clergymen and by politicians up to and including President Nixon and Vice–President Agnew.[94] Despite such utterances of horror at the works of the Commission (which had been appointed by President Johnson under Congressional mandate), it may be seen that a number of lower courts, using passages from *Redrup* and *Stanley,* moved toward bringing about some of the Commission's majority's recommendations. It cannot be said, of course, that the Commission was a causal factor; some of the cases cited above had already been decided by the time the Commission's Report was made available early in 1970. Those lower courts, tying doctrines such as "overbreadth" and "private possession" to language within *Redrup* and *Stanley,* made such occurrences as "adults only" circulation of salacious literature or viewing of sex–laden films — with or without "redeeming social importance" — seem quite likely. But such was not to remain the case as the Supreme Court demonstrated in a series of short but remarkable decisions this past spring.

IV. BACK TO THE STATES: *Perez v. Ledesma, Dyson v. Stein,* AND *Byrne v. Karalexis*

A. Perez v. Ledesma[95]

August M. Ledesma and his co–defendants were operating a newsstand in the Parish of St. Bernard, Louisiana, where they offered for sale what the state described as obscene books, magazines, and playing cards. The newsstand proprietors were charged with violating a Louisiana statute[96] and a St. Bernard Parish Ordinance.[97] The defendants sought a judgment in the United States District Court for the Eastern District of Louisiana, asking that the state statute be declared unconstitutional. Furthermore, the defendants sought federal intervention to enjoin further prosecutions under the statute. Accordingly, a three–judge panel was convened.[98] The court refused to declare the statute unconstitutional, but did rule that the arrests and the seizure of material were invalid because no prior hearing had been held to determine whether or not the material was

94. *See Porno Report Becomes Political Football,* PUBLISHERS WEEKLY, Oct. 12, 1970, at 34.

95. 401 U.S. 82 (1971).

96. LA. REV. STAT. ANN. § 14:106 (1971).

97. St. Bernard, La., Parish Ordinance 21–60, Nov. 2, 1960 (repealed March 2, 1971), and replaced by St. Bernard, La., Parish Ordinance 5–71 (March 2, 1971), *adopting* LA. REV. STAT. ANN. § 14: 106 (1971).

98. 304 F. Supp. 662 (E.D. La. 1969), ***rev'd in part, vacated and remanded in part,*** 401 U.S. 82 (1971).

obscene. The court ordered the suppression of the evidence and return of the material to the defendants.[99] The state then appealed the ruling to the Supreme Court of the United States. Since it was the Supreme Court's reassessment of its approach to the doctrine of federal intervention, more than a change in its stand on the substantive law of obscenity, that is responsible for what well may be a halting of the Court's libertarian trend, a brief background of the intervention doctrine is essential before further analysis of the case itself.

While the intervention doctrine was not unknown before 1965, it was in that year that the Supreme Court renewed and strengthened its application in *Dombrowski v. Pfister.*[100] In *Dombrowski,* the defendants asked that a three-judge panel stop the state from prosecuting them for violation of a sedition statute.[101] The district court refused on grounds of abstention, saying that federal courts should avoid interfering in state prosecutions. The Supreme Court reversed, citing *Ex Parte Young.*[102] Justice Brennan, speaking for the Court in *Dombrowski,* stated that federal courts could enjoin state prosecutions when unconstitutional state acts were being enforced against the petitioning parties.[103]

Use of the intervention doctrine and the three-judge panel has had at least two results. First, the doctrine was found useful in a great many legal areas,[104] including that of obscenity, where defendants could often find a sanctuary in the three-judge panels to escape state prosecutions. As a natural consequence, state power was diluted in this area, and state appellate courts were precluded from making the initial determination of the constitutionality of their own statutes. In the eyes of many persons, especially Justice Harlan as may be seen from his dissenting opinions in most of the more libertarian obscenity cases, this denial was a violation of the fundamental tenets of federalism. The second result of the increased use of the intervention doctrine was an extreme crowding of federal court calendars. This effect was particularly pronounced in the Supreme Court; the courts of appeals, which had traditionally acted as buffers in this

99. *Id.* at 667–70.

100. 380 U.S. 479 (1965).

101. Dombrowski v. Pfister, 227 F. Supp. 556 (E.D. La. 1964), *rev'd,* 380 U.S. 479 (1965).

102. 209 U.S. 123 (1908).

103. 380 U.S. at 483–89. The vote was 5–2, with Justices Black and Stewart taking no part. Justices Harlan and Clark dissented.

104. The evident purpose behind the *Dombrowski* decision was to provide a vehicle for intervention in the civil rights area where southern officials were using clearly unconstitutional means in harassment efforts. It is important to note that this doctrine was not used extensively until the latter half of the last decade — after many of the major obscenity decisions had been handed down.

regard, were bypassed as a result of the doctrine which provides for direct appeal to the United States Supreme Court. Both results were onerous in many ways, especially to new Chief Justice Warren Burger who warned federal judges in January, 1971, that they must exercise more discretion in convening special three-judge court panels.[105] Justice Black, speaking for the Court in *Perez,* alerted the litigants at the outset that the answer to this case was to be found in a series of other cases decided the same day. Using decisions such as *Younger v. Harris,*[106] Justice Black wrote that those cases showed when it is appropriate for a federal court to intervene in the administration of a state's criminal laws. He added that thanks to such cases, "the disposition of this case [*Perez v. Ledesma*] should not be difficult."[107]

Justice Black then announced that the doctrine of abstention should be applied in *Perez* and similar cases, declaring that, in the future, federal courts will abstain from premature interference in state cases.[108] So saying, the Court seemed to heave an almost audible gasp of relief, retreating from the burdensome task of being the nation's nine-man board of censors. The new doctrine also signaled the movement of the Court to new ground, and it seems destined that this new posture will cast a long shadow on the law of obscenity. In explaining the position now adopted by the Court, it is necessary to discuss the *Younger* case which deserves special attention nevertheless because it involves one of those old talismans of intolerance, a state criminal syndicalism law.

In that case, John Harris, Jr., had been indicted in a California court, charged with violation of the state statute which made it a crime to advocate the use of violence or other unlawful methods to effect a change in government or in the ownership of industry.[109] Harris contended that prosecution under that statute, a relic of the distant past, violated his rights of free speech and press. He filed a complaint in federal district court seeking an injunction against the prosecution initiated by Los Angeles County District Attorney Evelle J. Younger. A three-judge federal panel enjoined the prosecution on the grounds that the syndicalism act was impermissibly vague and overbroad.[110]

105. N.Y. Times, Jan. 20, 1971, at 13, col. 6.
106. 401 U.S. 37 (1971).
107. 401 U.S. at 82-83.
108. *Id.* at 83.
109. CAL. PENAL CODE §§ 11400, 11401 (West 1970).
110. Younger v. Harris, 281 F. Supp. 507 (C.D. Cal. 1968), *rev'd,* 401 U.S. 37 (1971).

The state appealed and the Supreme Court reversed the lower court ruling. Writing for the court, Justice Black declared:

> Since the beginning of this Country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.
>
> . . . .
>
> The precise reasons for this long-standing public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.[111]

Justice Black thus held that even if the California Criminal Syndicalism statute were unconstitutional on its face, a federal court should not interrupt a prosecution under that statute in the absence of a showing that the prosecution involved bad faith or harassment or that the defendant would suffer irreparable harm.[112]

So, as Justice Black suggested in the beginning of his opinion for the Court in *Perez v. Ledesma,* a majority of the Court had already made up its mind on abstention doctrine grounds. Justice Black stated:

> There is nothing in the record before us to suggest that Louisiana officials undertook these prosecutions other than in a good-faith attempt to enforce the State's criminal laws. We therefore hold that the three-judge court improperly intruded into the State's own criminal process and reverse its orders suppressing evidence in the pending state prosecution . . . .[113]

Then, as if to emphasize this new direction in obscenity cases, the Supreme Court issued brief per curiam decisions in *Dyson v. Stein*[114] and *Byrne v. Karalexis.*[115]

B. Dyson v. Stein

Brent Stein was publisher of an "underground" Dallas, Texas, bi-weekly newspaper bearing the surprisingly colorless (for under-

111. 401 U.S. at 43, 44.
112. 401 U.S. at 46, 47. *See also* Samuels v. Mackell, 401 U.S. 66 (1971).
113. Perez v. Ledesma, 401 U.S. 82, 89 (1971).
114. 401 U.S. 200 (1971).
115. 401 U.S. 216 (1971).

ground papers) name of *Dallas Notes*. Stein's office was searched twice by Dallas police, and the gleanings from these incursions resulted in two misdemeanor charges against the publisher. Stein was charged with possessing obscene "paper" and "pictures" contrary to the Texas Penal Code.[116] A three-judge federal court found section one of the Texas statute to be overbroad, prohibiting legal as well as illegal conduct.[117] The court ruled that the statute failed to confine itself "to a context of public or commercial dissemination,"[118] adding that section one of the Texas statute made mere private possession of obscene material a crime, contrary to the interpretation of *Stanley* relied upon. "[I]n our opinion," said the three-judge court, *Stanley* suggests that obscenity is deprived of first amendment protection only in the context of "public actions taken or intended to be taken with respect to obscene matter."[119] Thus, at the district court level, *Stein* moved beyond *Stanley v. Georgia's* "right to receive information and ideas," because *Stanley's* fact situation only dealt with possessing pornography in the privacy of one's own home, not one's office. The three-judge court found two sections of the Texas statute to be unconstitutional and issued injunctions against the prosecution of Stein.

The Supreme Court of the United States, however, toppled the injunctions, clearing the way for state prosecution of Stein to resume. The Court said that federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment, "is proper only where irreparable injury is threatened."[120] Because the district court had made no findings of any "irreparable injury" to Stein, the case was sent packing back to Texas.

The one dissent in *Dyson v. Stein* was registered by Mr. Justice Douglas who found that the prosecution involved police conduct which amounted to the requisite bad faith and harassment needed to allow federal court intervention. Justice Douglas described the two Dallas police searches of the *Dallas Notes* office as "search-and-destroy missions in the Vietnamese sense of the phrase."[121] Mr. Douglas heatedly contended that the seizure of materials, which included photographic enlargers, typewriters, and two tons of the newspaper, were tactics taken to close down the paper. He added:

116. TEX. PENAL CODE art. 527 (1952).

117. Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), *vacated and remanded sub. nom.* Dyson v. Stein, 401 U.S. 200 (1971).

118. *Id.* at 607.

119. *Id.* at 606.

120. Dyson v. Stein, 401 U.S. 200, 203 (1971).

121. *Id.* at 204.

> If this search–and–destroy technique can be employed against this Dallas newspaper, then it can be done to the New York Times, the Washington Post, the Seattle Post–Intelligencer, the Yakima Herald–Republic, the Sacramento Bee, and all the rest of our newspapers. . . .
>
> Government certainly has no power to close down newspapers. Even censorship — whether for obscenity, for irresponsible reporting or editorials, or otherwise — is taboo.[122]

Vigorously invoking constitutional prohibitions against pre–publication censorship or prior restraint,[123] Justice Douglas expressed his by now familiar judicial views on the topic of obscenity. However, in the third obscenity case the Supreme Court decided on February 23, 1971, *Byrne v. Karalexis,*[124] Justice Douglas had no voice at all. He "took no part in the consideration or decision" of *Byrne* because that case involved the film *I Am Curious (Yellow),* distributed by a firm for whom Douglas had done a bit of writing — that General Motors of erotic literature, Grove Press.[125]

C. *Byrne v. Karalexis*

At the district court level, a three–judge panel assumed that *I Am Curious (Yellow)* was obscene, although it was not made clear whether it was hard–core or "Brand X" obscenity. On June 3, 1969, the owners and operators of a Boston theater exhibiting the film were indicted for showing an obscene film in violation of a Massachusetts statute.[126] In response, the owners and operators of the theater sued in United States District Court for the District of Massachusetts to declare the statute unconstitutional and to enjoin any further state prosecutions for exhibiting the film.[127] The three–judge court, with one judge dissenting, granted a preliminary injunction forbidding execution of sentence in the state prosecution then pending, or the starting of any future prosecutions.[128] By stipulation of counsel, the

122. *Id.* at 206, 207.
123. *Id., citing* Near v. Minnesota, 382 U.S. 697 (1931).
124. 401 U.S. 216 (1971).
125. N.Y. Times, April 28, 1970, at 30, col. 5. Grove Press publishes *Evergreen Review,* a magazine which printed a long segment from Justice Douglas' book, *Points of Rebellion.* Justice Douglas' seemingly innocent act of publishing his work in a Grove Press publication takes on a different perspective when viewed in the light that this action will force the outspoken libertarian to refrain from participating in any case involving the publisher, an active litigant in the area of obscenity. With Justice Douglas missing, crucials votes could end in a four–four split, upholding the ruling of a lower court. Even more serious, however, is that Justice Douglas' keen mind and sharp tongue will be missing in the days ahead when many important obscenity questions could arise.
126. MASS. ANN. LAWS ch. 272, § 28A (1968).
127. Byrne v. Karalexis, 306 F. Supp. 1363 (D. Mass. 1969), *vacated and remanded,* 401 U.S. 216 (1971).
128. *Id.*

district court had accepted that the viewing public had been sufficiently warned — by an X–rating, among other things — of the possible offensive nature of the film, and that the film had not been advertised in a "pandering" manner. Furthermore, it was also stipulated that no minors had been permitted to enter the theater and view the film.[129] In ruling for the theater, Circuit Judge Bailey Aldrich questioned exactly how far *Stanley* was intended to go. Was *Stanley* to be narrowly limited to "mere private possession of obscene material?" Judge Aldrich wondered whether *Stanley* was "the high–water mark of a past flood, or . . . the precursor of a new one."[130] The judge decided that *Stanley* cancelled the *Roth* ruling that obscenity is not within the area of constitutionally protected speech or press. *Roth,* he added, had denied that a clear and present danger of the creation of anti-social conduct need be shown in order to sustain a conviction for obscenity. *Stanley,* to Judge Aldrich, changed the aspect of *Roth.* Judge Aldrich said *Stanley* meant that

> [O]bscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure . . . . Had the court considered obscenity harmful as such, the fact that the defendant possessed it privately in his home would have been of no consequence.
>
> . . . .
>
> . . . *Roth* remains intact only with respect to public distribution in the full sense . . . restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier. A constitutional right to receive a communication would seem meaningless if there were not a coextensive right to make it . . . .
>
> . . . If a rich Stanley can view a film, or read a book, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.[131]

In a per curiam decision, the Supreme Court by–passed the logic of Judge Aldrich's arguments, overturning the injunction and remanding the case for further prosecution at the state level. The Court ruled that because the district court was without the guidance

129. *Id.* at 1365.

130. *Id.* at 1366.

131. *Id.* at 1366–67.

provided by *Younger v. Harris*[132] and *Samuels v. Mackell*,[133] cases also decided on that same date of February 23, 1971, the lower court's judgment should be vacated and the case remanded.[134] Justice Brennan, joined by Justices White and Marshall, dissented from the per curiam majority opinion, saying that *Byrne v. Karalexis* should not have been vacated and remanded. Instead, argued Justice Brennan, the decision of the district court should have been *reversed.*

The Supreme Court's February 23, 1971, decisions in *Perez, Dyson,* and *Byrne* mean that defendants in obscenity prosecutions cannot expect helpful intervention from federal courts to short-circuit state prosecutions. Instead, defendants will be required to exhaust their remedies in state courts unless they can somehow meet the difficult burden of proof to show that they are suffering from a prosecution that is harassing or undertaken in bad faith. The importance of this Supreme Court action is difficult to measure. It is, however, easy to overemphasize such procedural aspects. After all, the Court is merely insisting upon a reversion to the status quo prior to the mid-1960s. Important obscenity cases, which resulted in new freedom for publishers, found their way into federal courts through more traditional means.[135] Therefore, revitalization of the doctrine of abstention should make things little, if any, different than they were six years ago.

At the same time, however, any impediment to enjoyment of fundamental freedoms must be looked upon with some disdain and fear. State courts have traditionally been reluctant to adopt the more liberal Supreme Court's obscenity standards. The return of abstention is likely to reinforce this behavior and perhaps to give state judges confidence to be even more conservative than they were in the past with little fear of a scolding from the federal bench. Crucial to the ultimate importance of the doctrine of abstention is the outcome of *Miller v. California*[136] this term, when the Supreme Court will be asked to squarely decide the issue of whether the community standards referred to in *Roth* are national or local standards. If the answer the Court gives is that local standards must be enforced, and if defendants have no refuge in the federal courts, then it could indeed be the beginning of an eclipse of first amendment rights in this area.

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132. 401 U.S. 37 (1971).
133. 401 U.S. 66 (1971).
134. Byrne v. Karalexis, 401 U.S. 216, 220 (1971).
135. *See* note 104 and accompanying text *supra.*
136. Unreported, *cert. granted,* 401 U.S. 992 (1971) (No. 1288).

V. RE-EMPHASIZING *Roth*: *United States v. Thirty-Seven Photographs* AND *United States v. Reidel*

In recent years, some observers perceived that bit-by-bit the 1957 case of *Roth v. United States*[137] was losing its influence over the law of obscenity. David E. Engdahl, for example, saw *Stanley v. Georgia*[138] and subsequent cases as being the beginning of the end: "the symphony which seems to be emerging is a requiem for *Roth.*"[139] The requiem was highly premature, because *Roth* is alive and doing well, having been explicitly resuscitated by the Supreme Court's May 3, 1971, decisions in *United States v. Thirty-Seven Photographs*[140] and *United States v. Reidel.*[141] The cases emphasized in the preceding section of this article — *Perez, Dyson,* and *Byrne* — all gave *state* prosecutions renewed vigor. In *Thirty-Seven Photographs* and in *Reidel,* Justice White's majority opinions made it clear that *federal* statutes against the circulation and distribution of obscenity are still viable. To do this, Justice White and the colleagues who joined with him had to cast off some language from *Stanley v. Georgia* which suggested that under some circumstances, obscenity might be a constitutionally protected expression.[142]

A. United States v. Thirty-Seven Photographs

In *Thirty-Seven Photographs,* Milton Luros returned from Europe on October 24, 1969, carrying the pictures in question in his luggage. Customs officials seized the photographs as obscene, and on November 6, 1969, the United States attorney initiated proceedings in United States district court for forfeiture of the material.[143] It was stipulated that some or all of the thirty-seven photographs were to be published in a hard cover edition of *The Kama Sutra,* a famed book of erotica candidly describing a large number of sexual positions. Luros denied that the photographs were obscene, and demanded that a three-judge court be convened to issue an injunction against the enforcement of the United States statute prohibiting the importation of obscene material.[144] The three-judge court declared the statute to be unconstitutional and enjoined enforcement of it against the

137. 354 U.S. 476 (1957).
138. 394 U.S. 557 (1969).
139. Engdahl, *supra* note 6, at 185.
140. 402 U.S. 363 (1971).
141. 402 U.S. 351 (1971).
142. *See* p. 227 *supra.*
143. 402 U.S. at 366.
144. 19 U.S.C. § 1305(a) (1970). *See* note 70 *supra.*

thirty-seven photographs, which were ordered returned to Luros.[145] The court invalidated the statute on two grounds; first, that the section did not meet procedural requirements, and second, that under *Stanley v. Georgia* the statute could not be validly applied to the seized photographs.[146]

On appeal to the Supreme Court, five Justices joined Justice White on the point of procedural requirements in following the traditional judicial maxim that an attempt should be made to construe statutes in such a fashion as to make them constitutional. The Court then declared that it was possible to interpret the law in a manner which would "bring it in harmony with constitutional requirements."[147] Administrative censorship, by motion picture screening boards or by an agency such as the Post Office department, meets constitutional standards if "a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship."[148] Justice White was joined in the majority opinion by Justices Burger, Blackmun, and Brennan, with Justices Harlan and Stewart concurring as to the constitutionality of procedures under 19 U.S.C. section 1305(a); the decision thus signified no change in the law so far as procedural requirements were concerned.

Justice White then turned to Luros's second claim of unconstitutionality, based on *Stanley v. Georgia.* He wrote:

> On the authority of *Stanley,* Luros urged the trial court to construe the First Amendment as forbidding any restraints on obcenity except where necessary to protect children or where it intruded itself upon the sensitivity or privacy of an unwilling adult. Without rejecting this position, the trial court read *Stanley* as protecting, at the very least, the right to read obscene material in the privacy of one's own home and to receive it for that purpose. It therefore held that §1305(a), which bars the importation of obscenity for private use as well as for commercial distribution, is overbroad and hence unconstitutional.[149]

Justice White rejected the trial court's finding, saying that *Stanley* should not have been read as immunizing from seizure at a port of entry obscene materials intended solely for private use. He added that *Stanley's* declaration that a private user may not be prosecuted for possession of obscenity in his home does not mean that he is

145. United States v. Thirty-Seven Photographs, 309 F. Supp. 36 (C.D. Cal. 1970), *rev'd and remanded,* 402 U.S. 363 (1971).

146. *Id.* at 37-38.

147. 402 U.S. at 368.

148. *Id.* at 367. *See also* Blount v. Rizzi, 400 U.S. 410 (1971); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Freedman v. Maryland, 380 U.S. 51 (1965).

149. 402 U.S. at 375.

"entitled to import obscenity from abroad free from the power of Congress to exclude noxious articles from commerce."[150]

> *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 unprotected, but illegal, materials when his possession of them is discovered during such a search. . . . Whatever the scope of the right to receive obscenity adumbrated in *Stanley,* that right, as we said in *Reidel,* does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, *nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution.*[151]

The italicized phrase in the preceding quotation brought forth concurring opinions from both Justices Harlan and Stewart. Mr. Harlan noted that Luros had admitted that he was importing the photographs for commercial purposes, and asked whether Luros should be allowed to raise the question of constitutional privilege to import for private use. He added: "I would hold that Luros lacked standing to raise the overbreadth claim."[152]

Justice Stewart agreed with Justice White's opinion that the first amendment does not prevent the seizure, at the nation's borders, of obscene materials imported for commercial dissemination. However, he cautioned:

> I would not in this case decide, even by way of dicta, that the Government may lawfully seize literary material intended for the purely private us of the importer. The terms of the statute appear to apply to an American tourist who, after exercising his constitutionally protected liberty to travel abroad, returns home with a single book in his luggage, with no intention of selling it or otherwise using it, except to read it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley v. Georgia* . . . .[153]

B. United States v. Reidel

Thirty-Seven Photographs, however, was not nearly so explicit about the rejection of libertarian readings of *Stanley v. Georgia* as was *United States v. Reidel.*[154] Norman Reidel was indicted on April

150. *Id.* at 376.
151. *Id.* (emphasis added).
152. *Id.* at 378 (Harlan, J., concurring).
153. *Id.* at 379 (Stewart, J., concurring). *See* Note, *First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 910 (1970).
154. 402 U.S. 351 (1971).

15, 1970, on three counts of having violated the federal statute against mailing obscenity.[155] Each count represented the mailing of a single copy of *The True Facts About Imported Pornography,* and one of these copies had been mailed to a postal inspector (who was over the age of 21) who had responded to a newspaper advertisement. Reidel asked in district court that the indictment against him be dismissed, urging that the statute was unconstitutional. The trial judge, assuming for purposes of the mailing that the book was obscene, granted Reidel's motion to dismiss on the ground that Reidel had made a constitutionally protected delivery, and therefore the statute section involved was unconstitutional as applied to him.[156]

Justice White, speaking for the majority of the Court, returned to the *Roth* approach of handling obscenity. The Court reaffirmed the holding that "obscenity is not within the area of constitutionally protected speech or press . . . ."[157] Justice White added that *Roth* has not been overruled and remains as the law governing Reidel's case, for Reidel, like Roth, had been charged with use of the mails to distribute obscene material. It then remained for Justice White to attempt to distill clarity out of the confusion in the majority opinion in *Stanley.*

> Stanley v. Georgia . . . compels no different result [in the *Reidel* case]. There, pornographic films were found in Stanley's home and he was convicted under Georgia statutes for possessing obscene material. This Court reversed the conviction, holding that the mere private possession of obscene matter cannot constitutionally be made a crime. But it neither overruled nor disturbed the holding in *Roth.* Indeed, in the Court's view, the constitutionality of proscribing private possession of obscenity was a matter of first impression in this Court, a question neither involved nor decided in *Roth.*[158]

The majority opinion further declared that nothing in *Stanley* questioned the validity of *Roth* so far as distribution of obscene material was concerned. Justice White, finding clarity where others found confusion, wrote: "Clearly the Court had no thought of questioning the validity of section 1461 as applied to those who, like Reidel, are routinely disseminating obscenity through the mails . . . ."[159] Justice White declared that Reidel could make no claim similar to that in *Stanley* about governmental intrusion into the privacy of his home. He added:

155. 18 U.S.C. § 1461 (1970). *See* note 10 *supra.*
156. 402 U.S. at 355.
157. *Id.* at 354, *quoting* Roth v. United States, 354 U.S. 476, 485 (1957).
158. 402 U.S. at 354.
159. *Id.* at 354–55.

> The District Court ignored both *Roth* and the express limitations on the reach of the *Stanley* decision. Relying on the statement in *Stanley* that "the Constitution protects the right to receive information and ideas . . . regardless of their social worth." 394 U.S., at 564, 89 S. Ct. at 1247, the trial judge reasoned that "if a person has the right to receive and possess this material, then someone must have the right to deliver it to him." He concluded that § 1461 could not be validly applied "where obscene material is not directed at an unwilling public, where the material such as in this case is solicited by adults . . . ."
>
> . . . .
>
> Whatever the scope of the "right to receive" referred to 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.[160]

Four other Justices joined in the opinion of the Court in *Reidel.* Two others — Justices Harlan and Marshall — agreed firmly that the right to privately possess obscene materials did not carry with it a "right to receive" such materials.[161]

Only two — Justice Black and Justice Douglas — were willing to complain about Justice White's reading of *Stanley* and about the consequent return to *Roth.* Justice Black's dissent declared:

> I particularly regret to see the Court revive the doctrine of Roth v. United States that "obscenity" is speech for some reason unprotected by the First Amendment. As the Court's many decisions in this area demonstrate, it is extremely difficult for judges or any other citizens to agree on what is "obscene." Since the distinctions between protected speech and "obscenity" are so elusive and obscure almost every "obscenity" case involves difficult constitutional issues. After *Roth* our docket and those of other courts have constantly been crowded with cases where judges are called upon to decide whether a particular book, magazine, or movie may be banned. I have expressed before my view that I can imagine no task for which this Court of lifetime judges is less equipped to deal.[162]

Clearly in *Reidel* and *Thirty-Seven Photographs,* the Supreme Court attempted to tidy up some of the judicial debris left behind by the *Stanley* and *Redrup* decisions. One way of explaining the Court's shift of direction is on the basis of a philosophical change of heart, a realization that it had gone too far and must now begin to moderate its position. Another possible explanation for these decisions is that

160. *Id.* at 355.
161. *Id.* at 358–59 (Harlan, J., concurring).
162. *Id.* at 379–80 (Black, J., dissenting).

the members of the Supreme Court, with the exception of Justices Black and Douglas who have spoken in absolutes, are nearly as confused as everyone else about the problem and have fumbled uncertainly for a judicial pathway out of the swamp of obscenity law. In any event, the Court's decisions in *Reidel* and *Thirty-Seven Photographs* emphasized that *Roth v. United States* is back in business, and that the substantive law of obscenity has changed very little since the late 1960s.

VI. CONCLUSIONS

In a recent cartoon, one judge faced another, and said (with a pontifical expression): "I know it's obscenity if it makes my Adam's apple bobble." With the law of obscenity, minds boggle as Adam's apples bobble, and yesterday's confusion forever seems to turn out to be today's chaos.

As recently as January of 1971, there did seem to be hope that the Supreme Court of the United States would bring a bit more order to that troubled area of law and there were even glimmers that the Court was headed on a new, liberal course. Indeed, it seemed that the Court's wish to retreat from writing such frequent obscenity decisions could be seen in lines of cases drawing upon *Redrup v. New York*[163] and *Stanley v. Georgia.*[164] As discussed in Section II of this article, the Court suggested in *Redrup* and *Stanley* that in the absence of antisocial conduct such as selling sexy reading materials to juveniles or advertising in a pandering or privacy-invading manner, obscenity prosecutions could not succeed. Such interpretations of *Redrup* and *Stanley,* however, are now out of the question thanks to the Supreme Court's decisions of the spring of 1971.

It is now evident that *Redrup* and *Stanley* did far less to change the law of obscenity than most people believed shortly after those decisions were handed down. If we conceive of *Redrup* and *Stanley* in the same vein as *Roth,* a major change in direction for the Court, then we can conceive of *Ledesma, Byrne, Stein, Reidel* and *Thirty-Seven Photographs* in the same vein as *Manual Enterprises, Freedman, Fanny Hill,* and *Jacobellis.* The second waves of cases in both instances were attempts to clarify the major policy pronouncements of the first wave.

Redrup and *Stanley,* however, needed even more clarification than did *Roth. Redrup,* for example, suggested that there are two kinds of obscenity, but only defined one: hard-core pornography.

163. 388 U.S. 767 (1967).
164. 394 U.S. 557 (1969).

Redrup appears to have envisioned a kind of Utopian society in which people who deal in obscenity would nicely follow the rules laid down in the decision. Such a society, of course, does not and doubtless will not ever exist. There will always be those persons who attempt to place themselves at the fringes of the law and who will continue to create judicial headaches, problems insoluble by a short set of judically prescribed guidelines.

The confusion of *Redrup* was carried over to *Stanley*. Justice Marshall and the majority of the Court apparently did not consider problems which would arise by granting to man the right to read whatever he pleases in his own home. How would this material get into the home if it were not purchased? And if there were a purchaser, then obviously there must be a seller and a publisher. Their activities, to continue the line of such reasoning, must also be condoned. That a number of lower courts made such an extrapolation from *Stanley* was natural. Many scholars did so as well. An additional lack of precision has been generated by unanswered questions lurking within *Stanley*. For example, what kind of obscenity *is* insulated by the first amendment?

Justice White's opinions in *Reidel* and *Thirty-Seven Photographs* suggest that while some new standards were set, any thought of a bold, new liberal approach to the problems of judicial evaluation of obscenity is a pipedream at this time. Certainly we could read more into the two opinions in *Reidel* and *Thirty-Seven Photographs* than really exists — this is always a danger. Justice White, however, was far less ambiguous than was Marshall in *Stanley,* for example, indicating perhaps that at least some members of the Court had not meant *Stanley* to abandon the *Roth* standards. At any rate, it seems quite certain that *Roth* is still the standard which will guide the law.

Roth implies that there is such a thing as obscenity which can be defined and constitutionally proscribed. This definition is, of course, a legal fiction which would have us believe that obscenity is, as Justice Harlan wrote with some pique, "a particular *genus* of speech and press, which is as distinct, recognizable and classifiable as poison ivy is among plants."[165] It is ironic that none of the recent cases have added significantly to the attempt to define obscenity found in *Roth* and its progeny. Little has been gained in this area in the past five to six years.

The single case which did work toward defining obscenity was *Redrup,* suggesting that there are two kinds of obscenity, one called

165. Roth v. United States, 354 U.S. 476, 497 (1957) (Harlan, J., concurring and dissenting).

hard-core pornography which lacks any redeeming social value, and "Brand X". "Brand X" is as yet undescribed, but it is somehow not quite so bad as hard-core, and can be proscribed only if the conduct of the seller or the distributor falls to certain levels.[166] It is hoped that if the Supreme Court makes no other strides in the law of obscenity during its current term, it will try to add clarification to the puzzling "two kinds of obscenity" aspect of *Redrup*.

The Court's diminution of the power of lower federal courts to intervene in state proceedings (*cf. Perez, Dyson,* and *Byrne*) will have a serious impact upon defendants in obscenity cases, but will probably have little impact upon the law. The rejuvenation of the doctrine of abstention will not change the substantive law of obscenity, but booksellers, publishers, theater owners and the like must prepare themselves for greater legal problems as state power in this area once again becomes significant. In addition, if the Supreme Court should decide in *Miller v. California*[167] that local rather than national community standards are the yardstick for measuring obscenity, then the number of successful prosecutions should increase dramatically. If the Supreme Court is interested in getting out of the business of hearing obscenity cases, a ruling that local standards are the measure would facilitate such an escape. In other respects, however, the insistence upon use of the doctrine of abstention is merely a move back to the standards of the Sixties.

The Court also seems to be seeking outside guidance for its future course. An indication of its frustration and confusion as well can be seen plainly in the comments of Justice White concerning the trends in the law:

> It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age.[168]

Justice White noted that the concepts involved in the law of obscenity are elusive, and that the statutes involved are "inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and courts. . . ."[169] He urged that a basic reassessment of the area is essential, and then declared that the task of re-

166. Redrup v. New York, 386 U.S. 767, 770-71 (1967).
167. Unreported, *cert. granted,* 401 U.S. 992 (1971) (No. 1288).
168. United States v. Reidel, 402 U.S. 351, 357 (1971).
169. *Id.*

structuring obscenity laws belongs to *"those who pass, repeal, and amend such ordinances."*[170]

While this plea for legislative restructuring of the law of obscenity was doubtless heartfelt, the authors of this article fear that few if any legislatures will follow Justice White's lead, at least in the foreseeable future. Legislators are subject to re–election, and a representative's vote to repeal or liberalize obscenity statutes would probably result in that person being voted out of office at the next election. One can almost hear the campaign slogan: "Congressman X voted for smut."

While waiting vainly for legislative guidance, confused scholars must comfort themselves with the knowledge that many lower courts are also baffled by what the Supreme Court is doing or trying to do in defining pornography. Students of obscenity law learned long ago that logic and reason are not hallmarks of this area of American jurisprudence. That we are more confused than ever today is perhaps a sign of the times. The door into Alice's mad Wonderland is clearly open. The question is, does it lie in our path . . . or have we already, unwittingly, crossed the threshold?

170. *Id.* (emphasis added).