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by

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The article "Supreme Court – Super Censor? by Francis B. Burch, Attorney General of Maryland, presents some of the arguments made by Mr. Burch to the United States Supreme Court in the case of Grove Press, Inc. v. Maryland State Board of Censors. *In that case, involving the motion picture "I am Curious (Yellow)," Mr. Burch was successful in persuading the Supreme Court, by a 4-4 vote of the Justices participating, to affirm the decision of the Maryland Court of Appeals that the motion picture was obscene.*

The members of the United States Supreme Court have seldom been so sharply divided as they have been in recent years in cases involving the question of what constitutes obscenity in books and motion pictures. The division among the Justices is accentuated today because the growing number of "X" rated films seems to be a matter of increasing concern to the public. Disagreement among the members of the Court in an area of such high public visibility is unfortunate because the resulting confusion and lack of understanding subjects the Court to much criticism, some of which is uninformed and unwarranted. However, some criticism may be justified in the light of the fact that confusion prevails not only among members of the public but also among the lower courts and lawyers who are attempting to understand and apply the standards for judging obscenity. This article seeks to discuss briefly the general state of the law in this area and to suggest several approaches which may be more workable for all parties concerned.

One of the few things which a majority of the Supreme Court has been able to agree upon in the obscenity area is that obscene materials are not protected by the constitutional guarantees of free speech. In *Roth v. United States,* the Court stated: "We hold that obscenity is not within the area of constitutionally protected speech or press."[1] However, the standards for judging what is obscene, and hence, not protected by the Constitution are by no means as clear as the Court's unequivocal statement in *Roth.* Most recently, lower courts have been following a three-point test in determining the obscenity of materials before them. Essentially, these courts have held that for materials to be obscene, the following three elements must coalesce: (a) the dominant theme of the material taken as a whole appeals to a prurient interest in

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1 354 U.S. 476, 485 (1957).

sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual materials; and (c) the material is utterly without redeeming social value.[2] The test outlined above is often referred to as having been established in the *Roth* decision as "restated with somewhat different emphasis perhaps by the Supreme Court in *A Book Named 'John Cleland's Memoirs of A Woman of Pleasure' v. Attorney General,* 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1, 5-6 (1966) . . . ."[3] Certainly the exact language used by the Supreme Court in *Roth* does not go as far as the three-point test. The standard set forth in *Roth* was: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[4] Obviously, the three-point test includes several elements which the Court did not mention in *Roth*. When and in what manner did the other elements, "patently offensive" and "utterly without redeeming social value," purportedly come into the law?

The "patently offensive test" appears to have come from the opinion of Mr. Justice Harlan in *Manual Enterprises v. Day.*[5] This "test", however, received the concurrence of only Mr. Justice Stewart in that case. Mr. Justice Brennan wrote an opinion concurring in the judgment for different reasons,[6] and Mr. Chief Justice Warren and Mr. Justice Douglas concurred in the opinion of Mr. Justice Brennan.[7] Mr. Justice Black concurred in the result without opinion;[8] Mr. Justice Clark filed a dissenting opinion.[9] Mr. Justice White and Mr. Justice Frankfurter took no part in the decision. A review of subsequent cases does not indicate that a majority of the Supreme Court has committed itself in any one case to the "patently offensive" test.

The "utterly without redeeming social value" test as applied to motion pictures apparently originated in the opinion of Mr. Justice Brennan in *Jacobellis v. Ohio,*[10] involving the French motion picture "Les Amants" ("The Lovers"). Here again, only Mr. Justice Goldberg concurred in the opinion, with Messrs. Justices Black, Douglas, White and Stewart concurring in the judgment only.[11] Mr. Justice Harlan

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[2] *See, e.g.,* Wagonheim v. Maryland State Board of Censors, 255 Md. 297, 304–05, 258 A. 2d 240, 253–44 (1969).

[3] Hewitt v. Maryland State Board of Censors, 254 Md. 179, 182, 254 A. 2d 203, 205 (1969).

[4] 354 U.S. at 489.

[5] 379 U.S. 478 (1962).

[6] *Id.* at 495.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 519.

[10] 378 U.S. 184 (1964).

[11] *Id.* at 196.

dissented,[12] as did Mr. Chief Justice Warren[13] and Mr. Justice Clark,[14] so that this "test" did not receive the approval of a majority of the Supreme Court. The "utterly without redeeming social value" test was repeated in *A Book Named "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney General.*[15] However, again the "test" did not receive the approval of a majority of the Supreme Court, the opinion of Mr. Justice Brennan receiving the approval of only Mr. Chief Justice Warren and Mr. Justice Fortas. Mr. Justice Clark, Mr. Justice White and Mr. Justice Harlan, in separate dissenting opinions in *Memoirs* observed that the social value test was "novel" and that only three members of the Supreme Court adopted it.[16] They further pointed out that such a test rejects the *Roth* test to which, as above indicated, a majority of the Supreme Court did agree.[17] In the case of *Redrup v. New York,*[18] the per curiam opinion of the Court was careful to state that the necessity of meeting the three-point test was a view held only by certain justices in *Memoirs.*[19] *Redrup* did not cite the three-point test as the test of the Supreme Court.

The definition of obscenity is not the only problem. Serious problems have been created by the Supreme Court's undertaking of what is, for all practical purposes, a de novo review of lower court decisions. The Court made the requirement of de novo review clear in *Jacobellis:*

> . . . [W]e reaffirm the principal that, in 'obscenity' cases, as in all others involving rights derived from the First Amendment guarantees of free speech, this Court cannot avoid making independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected . . . .[20]

In following this procedure of review, the Supreme Court practically assumes the role of a trial court, including judging the weight and credibility of the testimony of the witnesses. There is some question as to whether this kind of review is necessary or practical in view of the volume of cases which the Court must consider. There is also a question as to whether the relevant constitutional principles require that there be only one definition of obscenity promulgated by the Supreme Court and applicable to all of the states.

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12 *Id.* at 203.
13 *Id.* at 199.
14 *Id.*
15 383 U.S. 413 (1966).
16 *Id.* at 441, 455, 460.
17 *Id.*
18 386 U.S. 767 (1967), *rehearing denied,* 388 U. S. 924 (1967).
19 *Id.* at 770.
20 378 U. S. at 190.

Obviously, there is no simple answer to these complex problems. However, several members of the Supreme Court have suggested different approaches which appear to be legally sound and practicably workable. They deserve some consideration and could provide the beginnings of a way out of the present morass.

Both Mr. Justice Harlan and the former Chief Justice, Mr. Justice Warren, have, in several cases, suggested fundamental changes in the procedures followed by the Supreme Court in obscenity cases. The proposed changes could alleviate some of the difficulties in the present system. Mr. Justice Harlan has expressed concern over the constitutional ramifications of the Supreme Court sitting as the High Court of Obscenity and in the *Roth* case expounded his position as to the proper role of the Court in reviewing decisions of state courts. He said that the Supreme Court does not decide whether the state action—in the form of legislation—was wise but only whether it "so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power."[21] He emphasized his belief that state legislatures can make the policy determination that "pornography can induce a type of sexual conduct which a state may deem obnoxious to the moral fabric of society."[22] Proceeding from these views, Mr. Justice Harlan, in *Memoirs,* summarized his position on the proper role of the Supreme Court and the state courts as follows:

> . . . . From my standpoint, the Fourteenth Amendment requires of a State only that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards. As to criteria, it should be adequate if the court or jury consider such elements as offensiveness, pruriency, social value, and the like. The latitude which I believe the States deserve cautions against any federally imposed formula listing the exclusive ingredients of obscenity and fixing their proportions . . .[23]

Mr. Chief Justice Warren had difficulties with de novo review in obscenity cases. He would require that the Supreme Court affirm the decisions of the lower courts if the findings of those courts, based on an application of the *Roth* test, were supported by "sufficient evidence." Mr. Chief Justice Warren expressed his position in *Jacobellis* succinctly but eloquently:

> . . . I would commit the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgments made pursuant to the *Roth* rule, limiting myself to a consideration only of whether there is sufficient evidence in the

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21 354 U. S. at 501.
22 *Id.*
23 383 U.S. at 458.

> record upon which a finding of obscenity could be made . . . . [P]rotection of society's right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent de novo judgment on the question of obscenity. Therefore, once a finding of obscenity has been made below under a proper application of the *Roth* test, I would apply a 'sufficient evidence' standard of review - requiring something more than merely any evidence but something less than 'substantial evidence on the record . . . ' This is the only reasonable way I can see to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation . . . [24]

It is submitted that the combination of Mr. Justice Harlan's "rational standards" test combined with Mr. Chief Justice Warren's "sufficient evidence" test would relieve some of the workload of the Supreme Court. At the same time the utilization of these tests would be an implicit recognition of the ability of state courts to make sound judgments in this area of constitutional law. Of course, the decisions of the lower courts must be subject to review by the Supreme Court as the final arbiter of the Constitution. However, it is submitted that the state courts are both responsible for and capable of interpreting, enforcing and protecting constitutional rights without the necessity of the Supreme Court in the same case repeating the procedures followed by the reviewing courts below.

How would the adoption of Mr. Justice Harlan's "rational standards" principle affect the problem of the definition of obscenity? Presumably, it would give the state courts more latitude in choosing among the many definitions found in judicial decisions and elsewhere. The "rational" limitation on the standards applied by the lower courts implies that the Supreme Court would act to prevent both overly prudish definitions which would do violence to freedom of expression as well as overly loose ones. It could be argued that the Supreme Court would spend the time saved by elimination of de novo review in reviewing the large variety of definitions of obscenity propounded by the lower courts. Even assuming that the Court would be deluged with an infinite variety of definitions, in reviewing them it would be considering legal principles and not engaging in time-consuming de novo review. However, it is unlikely that the Court would have to spend a great deal of time in reviewing definitions of obscenity. The standards for fudging obscenity have been exhaustively discussed in many judicial decisions. The state courts are fully aware of the arguments for and

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[24] 378 U. S. at 202.

against the various definitions and are certainly capable of following standards which will be constitutionally acceptable.

An endorsement of Mr. Justice Harlan's "rational standards" test perhaps requires some statement as to what would constitute the most rational standard. It is submitted that, all things considered, the test set forth in *Roth*, without its modification in later cases, provides the most workable definition of obscenity. The standard set forth in *Roth* was, again: "whether to the average person, applying comtemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[25] "Without redeeming social value" should not be made an independent part of the test as it has been in later decisions. Its use in this manner promotes the protection of films into which social statements are inserted haphazardly for the sole purpose of seeking the right to display otherwise obscene material. This is not to say that "social value" has no place in the standards for fudging obscenity. Obviously, the constitutional rights of free expression on social issues must be given stringent protection. However, the proper place for "social value," as argued by Mr. Justice White in his dissenting opinion in *Memoirs,* is as a part of the determination as to whether the material in question is calculated to appeal predominantly to prurient interests.[26]

The observations set forth herein are not intended as a condemnation of the decisions of the Supreme Court in the obscenity area. The setting of standards by which obscenity is to be judged is a task of obvious complexity and difficulty. However, the present state of the law is unnecessarily confused and some action by the Court to clear the air seems appropriate. Moreover, the seeds of a solution can possibly be found in opinions written by various members of the Court. Perhaps the principles set forth in these opinions could provide a common ground for a new approach to some of the problems in the obscentiy area, an approach which would be acceptable to a majority of the Court. Hopefully, in the near future there will be guidance for lower courts and for lawyers in the form of an opinion in which a majority of the Court agrees on the disposition of the major issues of the definitions of obscenity and the procedures followed by the Court in reviewing obscenity cases.

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25 See note 4, *supra.*
26 383 U. S. at 462.