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CUMULATIVE SCALING AS A METHOD FOR ANALYZING JUDICIAL BEHAVIOR A CRITIQUE AND AN EXAMPLE

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Since C. Herman Pritchett's seminal work, *The Roosevelt Court, A Study in Judicial Politics and Values, 1937-1947,*[1] a near revolution has taken place in the study of what has been traditionally known as the field of public law. Beginning in the 1950's, a group of post World War II trained political scientists began to apply the theory and methodology of allied disciplines in an effort to create a political *science* of public law. Essentially, these scholars are asking why the Supreme Court makes the decisions that it does and not what decisions has the Supreme Court made.[2]

The disciplines which the judicial behavioralists have most heavily borrowed from are Sociology, Economics, and Psychology. Sociology has provided group theory, applied and reflected in the work of Walter Murphy[3] and Eloise Snyder.[4] The rational calculus in decision-making has been taken over from economic theory and employed primarily by Glendon Schubert.[5] From psychology has come cumulative scaling, a methodology which measures the intensity and consistency of individual attitudes. Again, Schubert is the leading political scientist utilizing this tool in the study of judicial decision-making.[6]

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[1] New York, Macmillan, 1948.

[2] Glendon, Schubert, *Quantitative Analysis of Judicial Behavior,* Glencoe, The Free Press, 1959, p. 11.

[3] See his *Elements of Judicial Strategy,* Chicago, University of Chicago Press, 1964.

[4] "Political Power and the Ability to Win Supreme Court Decisions," *Social Forces,* 39 (1960), pp. 36-40; "The Supreme Court as a Small Group," *Social Forces,* 36 (1958), pp. 232-38; "Uncertainty and the Supreme Court's Decisions," *American Journal of Sociology,* 65 (1959), pp. 241-45.

[5] Schubert has applied game theory to the question of granting certiorari in F.E.L.A. petitions. See his *Quantitative Analysis of Judicial Behavior,* pp. 210-254. This study has been extended in his article, "Policy Without Law: An Extension of the Certiorari Game," STANFORD LAW REVIEW, 14 (1962), pp. 284-327. In addition, Schubert has used game theory in analyzing the roles of Chief Justice Hughes and Justice Roberts in the "revolution" that occurred on the Court in 1937. See Schubert, *op. cit.,* pp. 192-210.

[6] Schubert's magnum opus using the scaling technique is in his *The Judicial Mind,* Evanston, Northwestern University Press, 1965.

This paper will focus on cumulative scaling as a research tool of judicial behavior. In general, we are interested in whether the scaling technique is a fruitful method of inquiry leading to increased understanding of the judicial decision-making process. Clearly, if the new methodology does not provide us with *new* knowledge, the investment of resources necessary to learn and employ the techniques has been wasted.

Our approach in this paper is threefold:

(1) An explanation of the scaling technique and what it purports to demonstrate
(2) A critique of the methodological assumptions underlying this approach
(3) Exemplification of the tool through the presentation of a scalogram based on Supreme Court decisions concerning obscenity from 1957 to 1966.

Scalogram analysis was first developed by Louis Guttman for the study of the attitudes of soldiers during World War II.[7] It presumes that a specific attitude can be isolated and that a series of questions concerning that attitude will evoke a consistent reply on the part of the respondent. A simple example (one not dealing with an attitude, however) will illustrate the underlying logic of the technique. If we asked a person who was six feet tall whether he was at least five feet tall, five and one-half feet tall, and six feet tall, we would expect affirmative responses to all three questions and a negative response to the subsequent question of whether he was over six feet in height. Similarly, we postulate that a series of Supreme Court cases centering on some specific question, say the deprivation of a civil liberty, will evoke a set of generally consistent responses from a given justice depending upon the extent and degree of deprivation outlined in the facts of the case. However, given imperfect information, faulty communications, and the possibility of other variables intervening, we would not expect a perfect set of responses. Whether the attitude we are scaling does in fact scale depends then upon the application of two statistical tests, the Coefficient of Reproducibility and the Coefficient of Scalability.

If we turn to the obscenity decisions for a moment, we would expect that a justice who insists that there be no restrictions on freedom of expression would consistently vote *against* governmental programs of

[7] Samuel Stauffer *et al., The American Soldier: Studies in Social Psychology in World War II*; Vol. IV: *Measurement and Prediction,* Princeton, Princeton University Press, 1950.

regulation notwithstanding whether they were extreme or moderate. For another less rigid justice, scaling should reveal his breaking point where he shifts from voting in favor of the right to read to the consideration of the needs of the society. Finally, a justice who believes that any literary reference to sex is inimical to the interests of the society could be expected to respond positively to all censorship efforts by the government.

Before a scalogram can be constructed, it is necessary to define the primary variable to be tested. We are interested in whether the Court as a collectivity and the justices as individuals have a consistent position on the extent to which Americans have the right to read literature and view films which contain references to sexual activity. We were led to this question after having read the decisions in chronological order and from that approach finding what appeared to be uncertainty and inconsistency on the part of the court as well as certain individual justices. If the obscenity cases do scale, then our hypothesis is negated. The formulation of hypotheses to be tested is a problem independent of scalogram construction and design, although an understanding of scalogram theory and method would appear to be essential to the formulation of reasonable hypotheses.

The first step in constructing the scalogram is to list the votes of all justices in each case. In our example, a vote in favor of the defendant or the plaintiff is a vote in favor of the right of unrestricted reading. Conversely, a vote against the defendant indicates a restrictive attitude.

Next, the cases are grouped according to the division of the Court in the following way. The 9-10 cases, followed by 8-1, 7-2, 6-3, 5-4, 4-5, 3-6, 2-7, 1-8, 0-9. *The position of any given case on the scale is a function of the manner in which the Court divided on the question.* Theoretically, the assumption in scaling is that the total vote of the Court determines how extreme the deprivation of the individual's right was. A unanimous court voting *in favor* of the defendant implies severe deprivation. A unanimous Court voting *against* the defendant suggests a frivolous appeal with virtually no deprivation. An 8-1 split implies greater deprivation than a 7-2 split, and so on. In other words, we have postulated that the degree (or extent) of deprivation is directly related to the Court's division.

In cases where less than a full Court has participated, the decision is grouped with the most nearly corresponding full court division. For

example, a 6-2 split is grouped either with the 7-2 or 6-3 category. We can sometimes decide which specific group the decision ought to be associated with by reviewing the non-participating justice's past voting record. We make the following rule for 4-3, 4-2, 2-4, and 3-4 splits. They must always be grouped in a way which does not alter the actual outcome. For example, a 4-3 division must be grouped with the 6-3 or 5-4 cases and *never* with the 4-5 group. The reason for this requirement is that, for most primary variables a student will want to scale, the distinction between *pro* and *con* cases is critical to the interpretation of the scalogram.

Clearly, the theory underlying the grouping of cases is of questionable validity. Can we be confident that a voting division of 9-0 rather than 5-4 indicates the existence of greater deprivation in the first rather than the second case? Tannehaus points out that such divisions can often be explained just as plausibly in a variety of other ways.[8]

> To take but one illustration, whether a civil liberties issue of high, moderate, or low intensity results in a unanimously favorable, unanimously unfavorable, or sharply divided court can well depend on the presence of other dimensions such as serious jurisdictional problems, federalism, the overruling of previous precedent, the exercise of executive power in crisis, a competing civil liberty, and the like.

In other words, the validity of scaling Supreme Court decisions hinges upon a methodological assumption which may be at least partially unreliable.[9]

Having systematically arranged the cases according to the technique just outlined, the next step is to rank the justices according to their scale position. We define scale position for any justice as the number of the last scaled case in which he consistently voted positive. By consistency, we require that of the responses to the left of his scale position, at least half are positive, and to the right of his scale position at least half are negative. Scanning Table I, we note that Justice Harlan is the only one to whom we must apply the rule and he meets our requirements since more than half of his votes to the left of his scale position are positive.

[8] Joseph Tannehaus, "The Cumulative Scaling of Judicial Decisions," 79 HARVARD LAW REVIEW 1591 (1966).

[9] Schubert, having anticipated this criticism, answers in the following way: "We think that the manifestly high pitch of intensity frequently expressed in 5-4 *marginal decisions* must be explained in terms of the reinforcing effects of the dynamics of group behavior, rather than as a function of the intensity of individual attitudes in such cases." *Quantitative Analysis of Judicial Behavior,* pp. 286-287.

TABLE I
OBSCENITY DECISIONS 1957-66

Scale Position	Justice	Scale Position	Case No. A: 1	4	5	7	9	6	8	11	3	10	2	12	Scale Score	Total Votes per Justice	Total Inconsistencies per Justice
			1	2	3	4	5	6	7	8	9	10	11	12			
12	Black		+	+	+	+	+	+	+	+	+	+	+	+	1.	12	0
12	Douglas		+	+	+	+	+	+	+	+	+	+	+	+	1.	12	0
12	Stewart			+	+	+	+	+	+	+		+		+	1.	9	0
11	Harlan		+	+	+	[−]	[−]	+	[−]	[−]	[−]	+	+	−	.83	12	5
9	Brennan		+	+	+	+	+	+	+	+	+	−	−	−	.5	12	0
9	Warren		+	+	+	+	+	+	[−]	+	+	−	−	−	.5	12	1
8	Fortas									+		−		−	.33	3	0
7	Goldberg					+	+		+							3	0
7	White					+	+	*	+	−	−	−		−	.17	6	0
4	Clark		+	+	+	+	−	−	−	−	−	−	−	−	.34	12	0
3	Frankfurter		+	+	+			*			−		−	−	.5	5	0
3	Whittaker			+	+						−		−	−	.5	4	0
1	Burton		+								−		−	−	.67	3	0
1	Reed		+											−	.67	1	0
Division of Votes +			9	9	9	8	7	6	6	6	4	4	3	3		106	
Division of Votes −			0	0	0	1	2	1	3	3	5	5	6	6			
No. of Inconsistencies per case			0	0	0	1	1	0	2	1	1	0	0	0			6

LEGEND

+—Voted in Favor of Defendant
−—Voted Against Defendant
*—Did Not Participate in Decision
Blank—Not on Court at Time of Decision
[ ]—Inconsistent Vote

CR=1-5/70=.93
CS=1-6/26=.75

A See Appendix for List of Cases
1. Butler v. Michigan, 353 U.S. 380, 77 S. Ct. 524, 1 L.Ed.2d.412 (1957). In favor of Plaintiff. Opinion—Frankfurter.
2. Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d.1498 (1957) Against Defendant. Opinion—Brennan.
3. Kingsley Books Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L.Ed.2d.1469 (1957). Against Defendant. Opinion—Frankfurter.
4. Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L.Ed.2d.205 (1959). In favor of Defendant. Opinion—Brennan.
5. Kingley International Pictures Corp. v. Regents, 360 U.S. 684, 79 S. Ct. 1362, 3 L.Ed.2d.1512 (1959). In favor of Defendant.
6. Manuel Enterprises Inc. v. Day, 370 U.S. 478, 82 S. Ct. 1432, 8 L.Ed.2d.639 (1962). In favor of Defendant. Opinion—Harlan.
7. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L.Ed.2d.584 (1963). In favor of Defendant.
8. Jacobelis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L.Ed.2d.793 (1964). In favor of Defendant. Opinion—Brennan.
9. A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed.2d.809 (1964). In favor of Defendant. Opinion—Brennan.
10. Ginzberg v. United States, 383 U. S. 463 (1966). Against Defendant. Opinion—Brennan.
11. A Book Named "John Cleland's Memoirs of a Woman of Pleasure," v. Attorney General of the Commonwealth of Massachusetts, 383 U. S. 413 (1966). In favor of Defendant.
12. Mishkin v. New York, 383 U. S. 502 (1966). Against Defendant. Opinion—Brennan.

For justices who have identical scale positions (Black, Douglas; Brennan, Warren; Goldberg, White; Frankfurter, Whittaker; Burton, Reed in our example), the following rules for breaking ties have been adopted:

(1) Assign the higher position to the justice with the larger number of positive votes.
(2) If (1) fails to break the tie, assign the higher position to the justice with the least number of negative votes.
(3) If the tie still remains, position the justices alphabetically.

We have now established our matrix. The decisions have been placed horizontally and the justices ranked vertically. We must now apply the two statistical tests to see if the variables under consideration, do, in fact, scale.

The Coefficient of Reproducibility (CR) measures the percentage of all votes cast which are consistent. Mathematically stated, $CR = 1 - \frac{\text{number of inconsistent votes.}}{\text{total number of votes}}$[10] By convention, a $CR \geqq .9$ has been established as indicating that the attitude scales unidimensionally. The CR test, however, has troublesome problems associated with it. A large number of unanimous or near-unanimous decisions in the set of cases under study inevitably leads to satisfying the requirements of the test. Obviously there can be no inconsistencies in 9-0 or 0-9 cases because of the way in which we have grouped the cases. In addition, the probabilities of inconsistency in 7-2 and 2-7 decisions are quite low for the same reason.

Because of this methodological bias, a new test was devised by Herbert Menzel.[11] This test is known as the Coefficient of Scalability (CS) which measures the percentage of potentially inconsistent votes that are in fact consistent. A $CS \geqq .6$ has been established by convention as indicating the existence of a scalable attitude. Unfortunately, the CS test also has a bias associated with it if the set of cases under study contains a large number of 5-4 splits. Tannehaus[12] argues that CR's and CS's are too easily obtained. That is, we may be scaling nonsense and obscuring it under the mantle of the Mathematical Mystique.

The preceding discussion makes it clear that the methodology of cumulative scaling and the assumptions that must be made in scaling (particularly, the assumption dealing with the positioning of the cases) casts serious doubt on the reliability of this approach. We must ask the obvious question, "Why scale?" We shall argue in the remainder of this paper through our analysis of the obscenity decisions that scaling, in spite of its problems, is a fruitful method of inquiry. The array of data in the matrix does point up some non-obvious propositions which tend to be obscured in a simple reading of the opinion. We can make some

[10] We eliminate in this measure all decisions where 80% or more of the justices were on one side in order to reduce the probabilities of creating an artificially high CR.

[11] Herbert Menzel, "A New Coefficient for Scalogram Analysis," 17 Public Opinion Quarterly 268-280 (1953).

[12] Joseph Tannehaus, *op. cit.*, pp. 1592-1594.

modest observations about the Court as a group without claiming that our interpretation is truly *scientific.* Moreover, we feel we can predict future court behavior in this area from our data and at end of the paper, we shall set out some propositions for prediction. In general, then, we are stating boldly that our understanding of the Court's attitudes on obscenity has been significantly increased through the employment of the scaling techniques.

Table I presents the scaled matrix for the obscenity decisions. The array of data satisfies both statistical tests having a CR of .93 and a CS of .75. However, we are skeptical of the scale for reasons made clear in our critique of the methodology above. In addition, there is another problem which must be identified. The rule in scaling is that there must be a minimum of ten cases in which two or more justices dissented. Eliminating the 9-0 and 8-1 decisions reduces our set of cases to eight, two below the minimum. This scale, then, is properly described as a quasi-scalogram. It is possible, nevertheless, to arrange the data in the form of a scalogram as long as one understands that less powerful inferences can be drawn.[13]

Since we are interested in decision-making by the personnel on the current Court, we can eliminate from consideration Justices Goldberg, Frankfurter, Whitaker, Burton, and Reed, all of whom have left the Supreme Court.

There were six inconsistent votes registered in this group of cases, five by Justice Harlan and one by the Chief Justice. Justice Harlan's scale position of 11 places him in a more liberal position on this question than either Brennan or Warren. On the other hand, his negative votes in *Bantam Books, A Quantity of Copies of Books, Jacobelis, Fanny Hill,* and *Kingsley Books* involve regulatory activities more restrictive than the Roth case, his last positive vote and presumably his breakpoint. How do we account for his erratic behavior?

If we turn to the opinion data, we discover that Harlan's perception of the crucial question is not what we have scaled at all. The issue for him is federalism and the crucial variable is whether the federal government or the states are engaged in the regulation. His votes in favor of *Roth* and *Ginzberg* in actions brought by the United States illustrate his oft-stated position that the federal government's power to regulate obscenity

[13] Glendon Schubert, "Civilian Control and Stare Decisis in the Warren Court," in Schubert, ed. *Judicial Decision-Making,* Glencoe, The Free Press, 1963, p. 58.

is very limited. In cases involving federal regulation, he subscribes to the Stewart position (to be described later in this paper) that only hard-core pornography can be suppressed.[14] For Harlan, it is in the nature of our federalism that the states are empowered to protect society from the deleterious effects of obscene material. His position is worth quoting at some length.[15]

> My premise is that in the area of obscenity the Constitution does not bind the states and the Federal Government in precisely the same fashion. This approach is plainly consistent with the language of the First and Fourteenth Amendment and, in my opinion, more responsive to the proper functioning of a federal system of government in this area . . . . Federal suppression of allegedly obscene matter should, in my view, be constitutionally limited to that often described as 'hard core' pornography.
>
> State obscenity laws present problems of quite a different order. The varying conditions across the country, the range of views on the need and reasons for curbing obscenity, and the traditions of local self-government in matters of public welfare all favor a far more flexible attitude in defining the bounds for the States. 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. . . . There is plenty of room for disagreement in this area of constitutional law. Some will think that what I propose may encourage states to go too far in this field. Others will consider that the Court's present course unduly restricts state experimentation with the still elusive problem of obscenity. For myself, I believe it is the part of wisdom for those of us who have the 'final word' to leave room for such experimentation, which indeed is the underlying genius of our federal system.

The remaining inconsisent vote was registered by Chief Justice Warren in *Jacobelis v. Ohio.* In that case, the manager of a motion picture theatre had been convicted of violating an Ohio obscenity statute for showing a French film entitled "The Lovers." The film was alleged to be obscene because of several sexual references and depictions. On appeal, the U.S. Supreme Court reversed the conviction with Warren in dissent. Since scalogram theory prescribes that the intensity of deprivation was greater in this case than in subsequent cases in which the Chief Justice voted in favor of the defendant, we must account for this inconsistency.

[14] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts,* 383 U.S. 413 (1966).
[15] *Id.*, p. 27-29.

His dissent provides us with a satisfactory answer. Warren is in dissent in *Jacobelis* in terms of neither the facts nor the constitutional law involved. Rather he uses this case as a platform to plead with his brethren to get out of the business of censorship except for those cases where serious curtailment of liberty has occurred.[16]

> In light of the foregoing, I would reiterate my acceptance of the Roth test: Material is obscene and not constitutionally protected against regulation and proscription if to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest. I would commit the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgement made pursuant to the Roth rule, limiting myself to a consideration of whether there is sufficient evidence in the record upon which a finding of obscenity could be made . . . . *Protection 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 judgement on the question of obscenity* . . . .[17] This is the only way I can see to obviate the necessity of this Court sitting as the Super Censor of all the obscenity purveyed throughout the nation.

That the Court has accepted for review cases since *Jacobelis* illustrates that Warren's recommendation was not adopted. In the later cases, Warren resumed the judicial role of assessing the facts and applying the test. His breakpoint comes in *Ginzberg* where he applies the Roth test and presumably adopts the new dimension added to that test by Justice Brennan for the majority.

Justice Clark's position presents us with no troublesome analytical problem. He scales consistently shifting to a negative position following *Bantam Books Inc. v. Sullivan.* His utter distaste for the "peddlers of filth" is outlined in an enraged dissent in *A Book Named "John Cleland's Memoirs"* which gives the libertarians little reason to believe they could ever obtain his vote in cases involving alleged obscenity.

Justice White has participated in only six of the twelve cases under study. Like Harlan, White seems to make a distinction between federal and state regulation although he did join the majority in *Ginzberg.* In *A Book Named "John Cleland's Memoirs,"* he stated:[18]

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[16] *Jacobelis v. Ohio,* 378 U.S. 184 (1964).
[17] Emphasis added.
[18] Note 14 *supra.*

> But if a state insists on treating *Fanny Hill* as obscene and forbidding its sale, the First Amendment does not prevent it from doing so . . .

Fortas's recent appointment to the Court provides us with very sketchy data for making an assessment of his attitudes on the question of obscenity. In the three cases in which he has participated, he has joined the majority voting in favor of the defendant in *A Book Named "John Cleland's Memoirs"* and against *Ginzberg* and *Mishkin.* Clearly, as a newcomer to the Court, he is in the process of working out his position on all questions, this one included. We can only say at this moment that he seems to subscribe to and accept the validity of the Roth test.

Brennan, whose general attitude on civil liberties might have led one to believe he would have scaled higher (certainly higher than Harlan, for example), has a certain amount of ego-involvement in cases of this nature. Not only is he the author of the Roth test, but its chief amplifier. It was Brennan writing for the majority in *Ginzberg* who added the new dimension of pandering into the test. Clearly, his civil libertarian position in this area is relative subject to the application of his own test.

Turning now to Black, Douglas, and Stewart (all of whom have identical scale positions) we can treat Black and Douglas as one unit but Stewart's position must be analyzed separately.

In no instance has either Black or Douglas voted in favor of suppression. Having adopted an absolutist position, they would have the court place alleged obscene material under the protection of the First Amendment where the clear and present danger test could be applied if such material led to the commission of antisocial acts. In their opinion, all forms of censorship are prohibited by the First Amendment. Douglas joined by Black in a concurring opinion in *Friedman v. Maryland* incisively states their position.[19]

> I do not believe any form of censorship—no matter how speedy or prolonged it may be—is permissible . . . If censors are banned from the publishing business, from the pulpit, from the public platform—as they are—they should be banned from the theatre . . . . I would put an end to all forms and types of censorship and give free literal meaning to the command of the First Amendment.

Justice Stewart, however, does accept the exclusion of obscene materials from First Amendment protection. His difficulty with his brethren on the Court centers on the difficult question, "What is obscenity?" For

[19] 380 U.S. 51 (1965).

Stewart, obscenity is *hard-core* pornography. And he knows it when he sees it.[20]

> I have reached the conclusion, which I think is confirmed at least by negative implications in the court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .

In *Ginzberg,* Stewart again returns to the problem of defining the qualities of obscenity:[21]

> There does exist a distinct and identifiable class of material in which all of these elements [here, referring to elements of the Roth test] coalesce. It is that, and that alone which I think government might constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hard-core pornography, without further trying to define it.

Stewart has finally accepted a definition which satisfies his sense of propriety by adopting the description of obscenity outlined by the Solicitor-General in his brief in the *Ginzsberg* case.[22]

> Such materials include photographs, both still and motion pictures, with no pretense to artistic value, graphically depicting 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 bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment . . .

Stewart's acceptance of this definition would seem to imply that he has a zone of indecision at which point he would vote in favor of suppression of the material. It is interesting to note, however, that that

[20] Note 16, *supra.*
[21] *Ginzberg v. United States,* 383 U.S. 463 (1966).
[22] *Ibid.*

kind of obscenity has never reached the Court for review and given the nature of its private, underground circulation, probably never will.

In summary, then, we can expect the following behavior from the Court on future cases involving alleged obscene matter.

(1) Black and Douglas will always vote in favor of the defendant or against suppression at least (if ever) until the Court brings obscenity under the protection of the First Amendment.
(2) Stewart will invariably join Black and Douglas since it is unlikely the Court will ever review materials falling within his definition of hard-core pornography.
(3) Harlan will join the above group in all *federal prosecutions* but will side with those below in *state prosecutions.*
(4) Brennan, Warren, and White will continue to apply the Roth test usually finding against the defendant in cases similar to Ginzsberg[23] and *always* in cases similar to Mishkin.
(5) Clark will *always* vote against the defendant except in those cases where the prohibition is manifestly unfair.[24]

In federal prosecutions the Court will initially split 4 (Douglas, Black, Stewart, Harlan)—4 (Clark, Warren, Brennan, White) with Fortas's position uncertain. The application of the Roth test then will determine the outcome in light of what was said in (4) above.

In state prosecutions, the proponents of unrestricted reading face a more difficult court. For the liberals on the bench will lose the support of Harlan, thereby requiring that they pick up two votes from the Roth test appliers.

[23] We hedge here with the phrase "usually finding against the defendant" because Ginzberg constitutes the zone of indecision at least for Warren and Brennan.
[24] It is extremely unlikely that Clark would dissent alone, for example.