Florida Law Review

Volume 22 | Issue 4 Article 3

May 1970

The Law of Obscenity--Where Has It Gone?

Edwin W. Tucker

THE LAW OF OBSCENITY – WHERE HAS IT GONE?

EDWIN W. TUCKER*

Some writers have already sounded the death knell for the law of obscenity. It died, they say, sometime during the 1960's at the hands of the Supreme Court.[1] Proponents of "decency" and "morality" complain of the supposed rampant escalation of sexual degeneracy taking place throughout the land.[2] In some parts of the country "topless" dancers are being challenged by "topless-bottomless" performers.[3] Motion pictures proclaimed boldly and proudly as major breakthroughs in the candid treatment of sex relations, the use of so-called "locker room language," and the exhibition of the bare human body enjoy short-lived landmark status. Gradually, they are challenged by new films ushered in amidst pronouncements ridiculing that which has gone before, belittling prior efforts as too guarded, too prudish, too childish, too out of touch with reality. *Oh! Calcutta!,* for the moment, reigns supreme in the theater of nudity. But, is its more candid, more libertine, more "true to life" successor already in the wings, waiting to disrobe? Avant-

* B.A. 1948, New York University; LL.B. 1951, Harvard University; LL.M. 1963, J.S.D. 1964, New York University; M.A. 1967, Trinity College (Hartford); Member of the Bars of the State of New York, Southern and Eastern Federal District Courts in New York, Court of Appeals (Second Circuit), Supreme Court of the United States; Professor of Business Law, University of Connecticut.

1. "So far as writers are concerned there is no longer a law of obscenity." C. REMBAR, THE END OF OBSCENITY 490 (1968). Does government have a legitimate interest in regard to what is said or published? For a negative response, *see* Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 COLUM. L. REV. 391 (1963).

2. Expressions of concern in this area can be found in *Hearings Before the Subcomm. on Postal Operations of the Committee on Post Office and Civil Service,* (H.R.), 91st Cong., 1st Sess., ser. 91-12, pt. 1, at 1-74 (1969). *See also* 115 CONG. REC. E 5676-77, E 5739-40, E 5814-5715, E 5870, E 5904-05 (1969) (remarks of Congressman Dulski). In Oct. 1967 President Johnson approved Pub. L. No. 90-100, 81 Stat. 253. The Commission, an advisory body to the Congress, was directed to study and report on the "causal relationship" of obscene and pornographic materials to "antisocial behavior," and "to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic." Congress asked the Commission "to evaluate and recommend definitions of obscenity and pornography."

3. In *In re* Giannini, 69 Cal. 2d 208, 209-10, 446 P.2d 535, 536-37, 72 Cal. Rptr. 655, 656-57 (1968), the court ruled that topless dancing per se "before an audience for entertainment cannot be held to violate the statutory prohibitions of indecent exposure and lewd or dissolute conduct in the absence of proof that the dance, tested in the context of contemporary community standards, appealed to the prurient interest of the audience and affronted standards of decency generally accepted in the community." However, in City of Portland v. Derrington, 451 P.2d 111 (Ore. 1969), *cert. denied,* 38 U.S.L.W. 3170 (U.S. Nov. 11, 1969), the court sustained an ordinance that made it "unlawful for any female person to appear or be in a place where food or alcoholic beverage is offered for sale for consumption on the premises, so costumed or dressed that one or both breasts are wholly or substantially exposed to public view." "Topless" dancing was not seen as "a mode of expression," but "conduct" that government can regulate. For a like result *see* Jones v. City of Birmingham, 224 So. 2d 922 (Ala. 1969).

garde publishers are riding a crest of sexual success. Publishers in general are avidly devoting themselves to a production of an endless flow of material dedicated to describing various feats of sexual activity and nudity, within a context of four letter words.

The law of obscenity, however, is not dead. Too many persons have mistaken complexity, diversity, and change as evidence of its demise. During the past two decades a fragmented Supreme Court, time and again speaking through a plurality rather than a majority, has haphazardly constructed a body of constitutional principles in the obscenity area. The inability of a majority of the justices to arrive at a formula that can be readily stated and consistently applied lends an aura of accuracy to the assertion that there can no longer be any constitutional constraints grounded on obscenity. Disagreement, inconsistency, and vacillation are not, however, synonymous with a carte blanche approach to the individual's liberty to listen, to read, to see, to speak, and to publish under the first and fourteenth amendments.

This article has a twofold purpose: first, to explore the development of the Supreme Court's tests of the constitutionality of federal and state obscenity laws; and second, to analyze the current Supreme Court definition of obscenity under the first and fourteenth amendments.[4] Many questions remain unanswered, for example, the question of obscenity in the context of television broadcasting.[5] Future members of the Supreme Court may revert

4. Since courts time and again have considered the meaning of "obscene" in the context of various other issues, a number of such other issues will be tangentially referred to in the course of this article. How they are treated has an impact on the meaning ascribed to "obscene." Vagueness of a statutory directive is an issue frequently dealt with by the courts. The Supreme Court, sustaining the use of "obscene" in a statute, pointed out that procedural due process " 'does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' " Roth v. United States, 354 U.S. 476, 491 (1957). "Sacrilegious" has been condemned as too vague a standard. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). In Rabeck v. New York, 391 U.S. 462 (1968), the Supreme Court struck down as unconstitutionally vague a state penal law that "prohibited the sale of 'any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes . . . .' " The court, in Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968), found unconstitutionally vague an ordinance that set a standard of "not suitable for young persons." The word "immoral" has been found to be too vague a standard. State v. Reese, 222 So. 2d 732 (Fla. 1969).

5. The Federal Communications Commission is expressly denied any "power of censorship over the radio communications or signals transmitted by any radio station." 47 U.S.C. §326 (1964). Commenting on this statutory limitation placed on the Commission the Supreme Court has said: "Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communications." Farmers Educ. Cooperative Union of America v. WDAY, Inc., 360 U.S. 526, 529-30 (1959). When the Court first ruled that motion pictures are protected by the first amendment, it acknowledged that the motion picture was the kind of medium that might, under certain circumstances, be treated somewhat differently from other media for constitutional purposes. "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). In a

to one of the already voiced but unpopular positions, thus elevating a minority view to that of a majority. During the 1970's variations of earlier pronounced principles may appear. In such a setting all omissions must be carefully considered.[6] Due to the various shades of disagreement that mark the thinking of the Court, even moderate paraphrasing can be hazardous. Today's principles relate to particular words and phrases that, even if slightly altered, can produce telling effects. Since the principles are many, varied, and always intimately related, the end product—the final enumeration—resembles a collage. The constitutional principles governing obscenity are loosely related, but related they are. One must keep in mind that he is dealing with bits and parts that when assembled, will present an appearance of oneness — interlacing, although not very neatly, with one another.

IN THE BEGINNING

The answer to a question posed in the abstract often differs from the answer given to the very same question when it requires a particularized response. Such a dissimilar dichotomy is found in the way the Supreme Court has described the power of government over obscenity both when it alluded to the power in dicta and when it had to finally come to grips with the precise query: What is the nature and extent of the police power when it is used to proscribe speech and press on the ground that the spoken or written word and words are obscene? The criterion of constitutionality contained in the dicta was expressed in terms of "reasonableness."

In *Chaplinsky v. New Hampshire*[7] the Court sustained a conviction under a state law that prohibited "any offensive, derisive or annoying word" to another person on "any street or other public place," or calling another "by

similar vein, in Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 386-87 (1969), Justice White, speaking for the Court, citing *Burstyn,* stated: "[A]lthough broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of a new media justify differences in the First Amendment standards applied to them." Of special relevance to the law of obscenity is the following portion of Justice White's opinion: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social, political, *esthetic,* moral, and other items and experiences which is crucial here." (Emphasis added.) *Id.* at 390. "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. §1464 (1964). This section has withstood a challenge to its constitutionality on the ground that it contravenes the tenth amendment; the court finding it a valid exercise of the power of Congress over interstate commerce. Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966).

6. Newcomers to the Court may share all or a portion of the thinking of past and present members of the Supreme Court. Because change in the membership of the Court will undoubtedly proceed at an above average rate for the next several years, one seeking a definition of "obscene" must pay close attention to the ideas expressed to date by members of the Court. "Why" a case was decided the way it was, rather than "how" it was decided, must be assigned prime importance in one's analytical approach if he is to arrive at a viable definition of "obscene."

7. 315 U.S. 568 (1942).

an offensive or derisive name." The defendant was charged with publicly having called a city marshal "a God damned racketeer" and a "damned Fascist." The contention that the statute contravened the fourteenth amendment was hastily brushed aside. Justice Murphy, speaking for a unanimous Court, found that the statute had not been applied so as to "substantially or unreasonably" infringe "upon the privilege of free speech." Freedom of "expression" had not been "unduly" impaired. "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances."[8] Stating that there were "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem" the Court cited as examples "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." In sharp contrast to what was to follow, Justice Murphy wrote:[9]

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Winters v. New York[10] foretold the general direction the Supreme Court was to take in the decades ahead. While the dissenters spoke of the reasonableness of the state's prohibition, the majority condemned the challenged statute as vague, striking it down as violative of the fourteenth amendment.[11]

---

8. *Id.* at 571.

9. *Id.* at 572. In State v. Ceci, 255 A.2d 700 (Del. Super.), the court sustained breach of the peace convictions based on the public distribution of leaflets headed: "Up Against the Wall M..... F....." Public use of such "obscene language to attract attention to a constitutionally protected message" was not beyond state control. The leaflets gave notice of a planned "teach-in" and carried a message that objected to the Vietnam War. In Cain v. Commonwealth, 437 S.W.2d 769, 775 (Ky. 1969), *reversed*, 38 U.S.L.W. 3369 (U.S. Mar. 24, 1970), the court suggested that when a tribunal must decide if challenged material is immune from government regulation it asks: "Is it beneficial?" rather than, "Is it harmful?" The *Cain* court added: "Certainly no benefit can come to any individual or any society by the use or dissemination of pornographic and obscene material." In dissent, a jurist pointed to what he saw as "the duty of the state to protect the local moral fabric of its people through its police power . . . . Freedom of speech we should and must have but it is not a right to be obscene." *Id.* McCauley v. "Tropic of Cancer," 20 Wis. 2d 134, 151, 121 N.W.2d 545, 558 (1963). In Kingsley Int'l Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684 (1959), the Court found unconstitutional a state's denial of a license to display a film on the ground that it presented adultery in a desirable light. The Court refused to find that a state possessed power to purge ideas with which it may disagree.

10. 333 U.S. 507 (1948).

11. *Id.* at 509. The majority, reflecting the Court's finely tuned sensitivity to restraints on speech and press pointed out that a statute that limited "freedom of expression" violated "an accused's right" not only "under procedural due process" but also one's right to "freedom of speech and press . . . . [A] statute limiting freedom of expression" must "give fair notice of what acts will be punished." The blending of due process and the first

The section of the New York Penal Law before the Court made it a misdemeanor to possess, with the intent to sell, magazines that included "accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."[12] As construed by the highest state court, the act forbade "the massing of stories of bloodshed and lust in such a way as to incite crime against the person."

Justice Frankfurter's dissenting opinion was consistent with *Chaplinsky*. He spoke of the respect that must be paid to state legislative decisions in the handling of crime and its prevention. Since the state's action was neither reckless nor unreasonable, it was immune from federal judicial attack. The Court could not, under the "fundamental fairness" formula prescribed by the Due Process Clause, second-guess the state on such matters.[13]

The Court, however found that the act "did not limit punishment to the indecent and obscene" as formerly understood. The state had created a new crime but had failed to give "effective notice of new crime" as required by due process. This defect was not cured by the construction of the statute by the state's highest court. Significantly, the Court rejected Murphy's emphasis on the protection of morality and order. The fourteenth amendment was not limited to the protection of the "exposition of ideas." Justice Reed wrote:[14]

> The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

The first sentence of the above quotation has been used repeatedly by members of the Court in obscenity cases. The Court has not accepted, however, what appears to have been Reed's belief that the dicta in *Chaplinsky* was in fact the law. Alluding to state regulation of printed matter, he

---

amendment is consistent with the Court's view that freedom of speech and press are "preferred rights" under the Constitution. For a discussion of the early evolution of the "preferred position" concept *see* Kovacs v. Cooper, 336 U.S. 77, 90-93 (1949) (Frankfurter, J., concurring).

12. N.Y. PENAL LAW §1141 (McKinney 1944).

13. By invoking the "fundamental fairness" doctrine Frankfurter chose to adapt the thinking found in Palko v. Connecticut, 302 U.S. 319, 328 (1937), to the law of obscenity. In *Palko* the Court refused to find that the fourteenth amendment included all the guarantees found in the original Bill of Rights. Justice Cardozo, writing for the Court, found that the amendment decreed a standard of "ordered liberty" for state action rather than a table of particulars against which to measure the constitutionality of state behavior. Under a test of "ordered liberty," when state action was challenged, the Court would ask in regard to the state's behavior: "Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'?" In Benton v. Maryland, 395 U.S. 784 (1969), the Supreme Court overruled *Palko*. The impact of *Benton* on the law of obscenity is considered in note 99 *infra*.

14. Winters v. New York, 333 U.S. 507, 510 (1948).

declared: "They are equally subject to control if they are lewd, indecent, obscene or profane."[15]

In *Beauharnais v. Illinois*[16] the Supreme Court specifically analyzed the power of government to deal with obscenity. The Court refused to set aside a conviction under a state statute that, in part, prohibited the offering for sale, or the exhibiting in a public place of "any lithograph . . . which publication . . . portrays depravity, criminality, unchastity or lack of virtue of a class of citizens, of any race, color . . . which said publication or exposition exposes the citizens of any race, color . . . to contempt, derision, or obloquy . . . ."[17]

The accused was found guilty of having exhibited in a public place a publication that portrayed "depravity, criminality, unchastity or lack of virture of citizens of Negro race and color and which exposes [*sic*] citizens of Illinois of the Negro race and color to contempt, derision, or obloquy . . . ."[18]

Justice Frankfurter, speaking for the Court, reiterated the proposition voiced in *Chaplinsky* that certain forms of speech are of such little value that constitutionally they may be barred. He viewed the statute as an outgrowth of legitimate state concern because past tensions between blacks and whites in Illinois had led to violence and destruction. Due process does not, said Frankfurter, require a state crimnal statute to be struck down unless it is established that it embodies a scientifically correct solution.[19] States may experiment with and adopt means that are subsequently proved erroneous. Since states are entrusted with broad power to deal with local crimes, the federal judiciary may not substitute its judgment for that of a state legislature so long as the penal law in question is rational and fundamentally fair.

The Court again took the position that obscenity is not "within the area of constitutionally protected speech." Accordingly, asserted Frankfurter, "it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger' " when dealing with obscene material.[20] Subject to but one recently announced exception, the principle that the "clear and present danger" test has no place in the law of obscenity retains the support of a majority of the Court.[21]

---

15. *Id.*

16. 343 U.S. 250 (1952).

17. *Id.* at 251, *quoting* 38 ILL. REV. STAT. §471 (1949).

18. Beauharnais v. Illinois, 343 U.S. 250, 252 (1952).

19. Courts when deciding whether legislation is to be struck down, in general invoke a test of reasonableness. Commonwealth v. Leis, 243 N.E.2d 898 (Mass. 1969) (the court rejected a challenge to a state law outlawing the possession of marijuana). In Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 218 N.E.2d 668, 271 N.Y.S.2d 947 (1966), the court respected a legislative determination that certain kinds of literature might contribute to juvenile crime and impair the moral and ethical development of the young.

20. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

21. *See* text accompanying notes 88-92 *infra*. Those members of the Court who insist that a "clear and present danger" test be employed to test the validity of governmental control of obscenity cite as authority Supreme Court decisions dealing with government curbs on speech and press in areas invariably involving unpopular political-economic philosophies. *See* Dennis v. United States, 341 U.S. 494 (1951); Near v. Minnesota, 283 U.S. 697

Justice Jackson, dissenting separately, expressed a number of constitutional standards that, in various forms, continue to be voiced by some members of the Court. He contended that the fourteenth amendment does not place the same kind of restriction on state action as the first amendment imposes on the federal government. The fourteenth amendment, in his opinion, demands state compliance with a standard of "ordered liberty," but with a major qualification; a state may curb speech only if the "clear and present danger" standard is satisfied. Jackson saw no reason to treat obscene speech differently from other speech. Even when dealing with obscenity upon which a conviction is based the state has the burden of establishing that the utterance constitutes a "clear and present danger to those substantive evils which the legislature has a right to prevent."[22] Here, the trial court had not applied the clear and present danger test.

Justice Jackson criticized the state court's refusal to admit evidence that the accused claimed would have established the truth of his utterances. As far as Jackson was concerned, rules of evidence do not fall beyond the concern of the federal judiciary when reviewing state action involving a restriction on speech or press. While Jackson questioned the defendant's ability to prove the truth of his assertions, he condemned the state procedure that denied him the opportunity to do so. Jackson's thinking was diametrically opposed to the position taken by Justice Murphy in *Chaplinsky*. There, Murphy maintained that the kind of evidence a defendant could use in a state proceeding, as well as the adequacy of the evidence necessary to sustain a conviction in the area of speech, were "questions for the state court to determine." At present, Justice Jackson's thinking in this regard more closely resembles the thinking of the Court than does Murphy's.

Dissenting in *Beauharnais,* Justice Douglas assumed that the first amendment circumscribes state action in the same way it delimits the power of the federal government. Speech and press enjoy a "preferred position" under the first amendment. Eschewing a rule of reason, he read the Constitution as guaranteeing speech and press an absolute freedom from the police power of the state except in those instances in which the "clear and present danger" test has been met. Alluding to Holmes' classic statement, Douglas acknowledged that government "might call a halt to inflammatory talk, such as the shouting of 'fire' in a school or theatre." To be constitutionally permissible, a state's curb on speech must leave "no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster."[23] On this occasion the state's restriction failed to pass muster. Justice Douglas continues to abide by these same views almost two decades later, never having indicated any second thoughts about his position in *Beauharnais.*

(1931); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919) (Justice Holmes' dissent, in which Justice Brandeis concurred); Schenck v. United States, 249 U.S. 47 (1919). For a discussion of a "clear and present danger" test as a criterion of the constitutionality of government action, *see* Engdahl, *Requiem for* Roth: *Obscenity Doctrine is Changing*, 68 MICH. L. REV. 185 (1969).

22. Beauharnais v. Illinois, 343 U.S. 250, 299 (1952). (Jackson, J., dissenting).

23. *Id.* at 285 (Douglas, J., dissenting).

According to Justice Black, the majority, by employing a " 'rational basis' " criterion, had downgraded the first amendment. In distinguishing *Chaplinsky* he pointed out that there the Court was dealing with an individual's remarks vis-à-vis another individual, in a public place, in a setting in which a fight might have resulted. Here, defendant had distributed material that was directed at a group. States may not, Black insisted, experiment with curbs on "what opinions Americans can express." Illinois had undertaken "state censorship," and this a state may not do however beneficient its motives might be. "I think," he wrote, "the First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases.' "[24] He looked askance at placing freedom of speech and press "at the mercy of a case-by-case, day-by-day majority of this Court." He perceived a far greater danger flowing from government regulation of speech and press than from a milieu in which speech and press were completely free from government control. Black, like Douglas, has never varied from his position in *Beauharnais*.

In *Chaplinsky, Winters,* and *Beauharnais,* the Court failed to consider the precise substantive rules of constitutional law that govern state and federal regulation of obscenity. However, the thinking expressed in these cases did serve as the point of departure for members of the Court when finally they did speak out on the extent to which the Constitution prohibits federal and state regulation of obscenity. Working in a peripheral area, the Court had cast the die.

THE PRESENT STATE OF THE LAW

From Roth *to* Redrup

The *"Roth* doctrine" originated in two companion cases that, for the purpose of decisional format, were treated together. In *Roth v. United States*[25] the Court sustained a federal obscenity statute;[26] in *Alberts v. California*[27] it sustained a state obscenity statute.[28]

In *Roth* the Court held that "obscenity is not within the area of constitutionally protected speech or press."[29] Justice Brennan, speaking for the

24. *Id.* at 276 (Black, J., dissenting).

25. 354 U.S. 476 (1957).

26. In part, the statute declared "to 'be nonmailable' matter . . . . [e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character." To "knowingly" deposit such matter "for mailing or delivery" subjected one to a fine of "not more than $5,000 or imprisonment not more than five years, or both."

27. 354 U.S. 476 (1957).

28. The California statute made it a misdemeanor to "wilfully and lewdly" keep "for sale . . . any obscene or indecent writing, paper, or books . . . ."

29. Roth v. United States, 354 U.S. 476, 485 (1957). While the Court spoke about obscenity, and affirmed both convictions, it did not decide that the material dealt with by the defendants was obscene under the test it prescribed. In footnote 8 to his opinion, Justice Brennan wrote: "No issue is presented in either case concerning the obscenity of

Court, distinguished between obscenity and ideas. Obscenity is "utterly without redeeming social importance." Ideas, on the other hand, regardless of their merit or unorthodoxy, intrinsically possess some "redeeming social importance." Brennan felt that the "clear and present danger" test did not apply to obscene matter because obscenity "is not protected speech."

"[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest."[30] Material is obscene if (1) "to the average person," (2) "applying contemporary community standards," (3) "the dominant theme of the material taken as a whole appeals to prurient interest."[31]

Justice Brennan voiced concern with possible excesses of state and federal regulation of speech and press. He cautioned that "ceaseless vigilance" is essential "to prevent [the] erosion [of freedom of speech and press] by Congress or by the States." In oft-repeated words he admonished:[32]

> The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon most important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

Chief Justice Warren, concurring separately, contended that the setting in which a book is sold should influence a court's decision as to whether it is obscene. He agreed that obscene material falls outside the pale of constitutionally protected speech or press and saw obscenity as a "social problem" that, under particular circumstances, warranted state or federal action. Ob-

---

the material involved." However, while some members of the Court decided that a decision need not be made as to the nature of the material, other members did choose to look beyond the statute. Chief Justice Warren referred to the behavior of the defendants. Justice Harlan insisted that to arrive at a result the Court had to examine the material and decide if it was obscene. He asserted that he read the book involved in *Alberts,* having done so to determine whether California had violated what he viewed as the constitutional limit of state power. Similarly, in a dissenting opinion, written to apply to both Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 711 (1968), and Ginsberg v. New York, 390 U.S. 629 (1968), Justice Harlan wrote: "Although the Court finds it unnecessary to pass judgment upon the materials involved in these cases [having based its decision in each case on the constitutionality of the statute, and no more] I consider it preferable to face that question."

30. Roth v. United States, 354 U.S. 476, 487 (1957). Justice Brennan, in footnote 20, set forth a number of definitions of the word "prurient." Included were: "[M]aterial having a tendency to excite lustful thoughts. . . . 'Itching; longing; uneasy with desire or longing; of persons having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . . .'" He quoted from the Model Penal Code, §207.10 (2) Tent. Draft No. 6 (1957): "'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.'"

31. Roth v. United States, 354 U.S. 476, 489 (1957). Justice Brennan did not number the criteria. The numbers have been added.

32. *Id.* at 488.

jecting to a constitutional standard tied to content, he spoke in favor of an "environmental" test. In his opinion; "it is not the book that is on trial; it is a person." It is "[t]he conduct of the defendant" that determines whether government may constitutionally exercise its police power, rather than "the obscenity of a book or picture." Warren contended that such a test presented the least danger to the undesirable suppression of art, literature, and science.[33] Certainly content is relevant, but only "as an attribute of the defendant's conduct" rather than as a determinant of whether the material in question is constitutionally protected. The "setting" in which an accused carries on his activity should determine whether he was trafficking in obscene material. Here, the Chief Justice found that the defendants "openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for material with prurient effect."[34] Such conduct, declared Warren, can be punished by the federal or state government acting within a sphere of constitutional competence. Ten years later this "environmental" approach gained the limited approval of a majority of the Court.[35]

Justice Harlan concurred with the Court in *Alberts,* but voted for reversal in *Roth.* When called upon to decide whether an accused has been denied his freedom to speak or publish, an appellate court, in Harlan's opinion, should not follow the traditional approach to the scope of appellate review. Justice Brennan had employed a general definition of obscenity to determine the lawfulness of government action. Under such an approach, appellate review might be limited to a determination of whether the lower court or courts had properly applied the prescribed test. Justice Harlan did not believe that employment of a general definition of obscenity to test a lower court decision satisfied the demands of the first and fourteenth amendments. When reviewing a lower court decision the Supreme Court has a "responsibility" to "determine for *itself* whether the attacked expression was 'suppress-

33. In Regina v. Hicklin, L.R. 3 Q.B. 360, 367 (1868), Chief Justice Cockburn, during an exchange of comments with his fellow justices, spoke of an environmental or setting test, commenting: "A medical treatise, with illustrations necessary for the information of those whose education or information the work is intended, may, in a certain sense, be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited for any one, boys and girls, to see as they pass. The immunity must depend upon the circumstances of the publication." In *Hicklin* the court ruled that a portion of a book could render the entire work obscene and subject one to punishment under the terms of a statute that prohibited the keeping of obscene books for sale. In *Roth* Justice Brennan pointed out that he did not approve of the *Hicklin* approach, which, he wrote, permitted material to be adjudged obscene "merely by the effect of an isolated excerpt upon particularly susceptible persons." Roth v. United States, 354 U.S. 476, 489 (1957).

34. Roth v. United States, 354 U.S. 476, 496 (1957) (Warren, C.J. concurring).

35. *See* text accompanying notes 53-61 *infra.* The Supreme Court of Pennsylvania has referred to Chief Justice Warren's approach as a "variable approach to obscenity" rather than a "setting" or "environmental" approach. Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 233 A.2d 840 (1967). In Ginsberg v. New York, 390 U.S. 629 (1968), the Supreme Court spoke of "variable obscenity" to describe a standard that permitted a legislature to set one standard for adults and another for juveniles.

able.' "[36] Each case must be decided on an individual basis, for whether material is obscene "involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind."[37] Jurors are not to be treated as the final arbiters on the question of obscenity. In each instance the response to the question is a matter of fact for "independent" judicial determination. Judges are obliged to personally scrutinize the challenged material and then independently decide if it is obscene. Under Harlan's test lower court determinations on the issue of whether material is obscene, whether made by jury or judge, go for naught!

Refusing to find that the first amendment, in its pristine form, applied to state action, Harlan invoked the *Palko* "ordered liberty" test to decide the constitutionality of the state statute and the conviction of the accused. In the vein of *Chaplinsky, Winters,* and *Beauharnais* he acceded to the competence of California to deal with "sexual morality." While one might question the validity of the state's approach as found in the statute under which Alberts had been convicted, the state's action was not so inconsistent with the demands of "ordered liberty" that the statute ran afoul of due process. Having read the challenged material, Justice Harlan found "its suppression would [not] so interfere with the communication of 'ideas' in any proper sense of that term that it would offend the Due Process Clause."[38]

Justice Harlan believed that the federal statute under which Roth was convicted had to be tested in terms of (1) the first amendment; (2) the extent of federal interest in sexual morality; and (3) the danger of a single uniform standard of censorship. Harlan classified congressional interest in sexual moraliy as "attenuated." A nationwide rule of censorship presented a far greater danger than state censorship laws. Material outlawed in one state might not be outlawed in another. In Harlan's opinion the federal power allowed Congress to deal only with " 'hard-core' pornography." Federal regulation of material that might do nothing more than stir up " 'thoughts' " was barred by the first amendment. The statute as construed by the majority was unconstitutional since it could be applied to other than " 'hard-core' pornography." In part, Harlan attributed his narrow approach to the federal power to the consequences that could flow from federal action. While the federal government could impose a single "blanket ban" across the entire nation, individual states are limited geographically and might espouse different attitudes toward the treatment of sex.[39]

---

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

37. *Id.* at 498.

38. *Id.* at 503.

39. At times state courts, deciding whether a book is obscene, have arrived at different results when ruling on the same book. In People v. Fritch, 13 N.Y.2d 119, 124, 192 N.E.2d 713, 717, 243 N.Y.S.2d 1, 6 (1963), *Tropic of Cancer* was found to be obscene, " 'hard-core pornography,' dirt for dirt's sake." A like result was arrived at in Grove Press, Inc. v. Gerstein, 156 So. 2d 537 (3d D.C.A. Fla. 1963), *reversed*, 378 U.S. 577 (1964). In Larkin v. G.P. Putnam's Sons, 14 N.Y.2d 399, 200 N.E.2d 760, 252 N.Y.S.2d 71 (1964), the same court that handed down *People v. Fritch* concluded that *Fritch* had been overruled by the Supreme Court's decision in *Grove Press, Inc. v. Gerstein.* The Supreme Court of California

In dissenting, Justice Douglas, with whom Justice Black concurred, viewed the first amendment as proscribing both federal and state action. The amendment's command is absolute: speech and press are free from government control. All forms of censorship, regardless of motive or purpose, regardless of whether the challenged utterance deals with religion, philosophy, politics, economics, or sex, are unconstitutional. Spurning the principle that obscenity lies outside first amendment protection, Douglas argued that the Constitution does not permit government to evaluate the " 'redeeming social importance' " of *any* ideas. Thoughts alone, or the arousal of thoughts, cannot be punished. In advocating a stringent "clear and present danger" standard, Douglas wrote: "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it."[40]

In 1966 the Court reworked *Roth* to the extent that the newly formulated standard appears to be a kind of *Catch 22* definition of obscenity. However, the initial pronouncement approved by a majority of the Court in *Roth* is still not without support. Regardless of the definition used, obscenity, according to most of the Court, is not protected by the first and fourteenth amendments. *Roth* has been refashioned to include, under some circumstances, the thinking Chief Justice Warren and Justice Harlan expressed in their dissenting opinions in *Roth*. Justices Douglas and Black continue to stand alone in support of a constitutional principle that the first and fourteenth amendments protect all utterances, obscene or otherwise, unless the demands of a clear and present danger test are satisfied.

In *Manual Enterprises, Inc. v. Day*,[41] as in *Roth*, the Court focused on the breadth of the federal power to deal with obscenity.[42] Justice Harlan insisted that *Roth* did not stand for the proposition that a publication that appeals to the prurient interest could, if it met the other two demands of *Roth*, be treated as obscene. *Roth* required something more. If material were to be classified as obscene under the first amendment it not only had to appeal predominantly to prurient interest, but it also must be "patently offensive" or "indecent." Justice Harlan treated this latter requisite as interchangeable with the phrase: "[I]t goes substantially beyond customary limits of candor in describing or representing such matters."[43] To be obscene in the constitutional sense material had to be "offensive on . . . [its] face."

Since a federal statute was involved, absent any contrary directive and without deciding if Congress could in fact decree a narrower geographic area, Harlan concluded that under *Roth* the "relevant 'community' " was the

in Zeitlin v. Arnebergh, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963) and the Supreme Court of Wisconsin in McCauley v. "Tropic of Cancer," 20 Wis. 2d 134, 121 N.W.2d 545 (1963), each decided that *Tropic of Cancer* was not obscene.

40. Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting).

41. 370 U.S. 478 (1962).

42. Here, as in *Roth*, the defendant was accused of having violated 18 U.S.C. §1461 (1964). *See* note 18 *supra*. In part, certiorari was granted to consider the petitioner's claim that *Roth* had not been correctly interpreted and applied by the district court and the court of appeals.

43. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 486 (1962).

nation. Without deciding "[w]hether 'hard-core' pornography, or something less . . . [was] the proper test" of obscene versus nonobscene. Harlan found that the magazines in question "taken as a whole . . . [did not go] beyond the pale of contemporary notions of rudimentary decency."[44] In his opinion, neither the "sordid motives" of the publisher nor the "dismally unpleasant, uncouth, and tawdry" nature of their content rendered them obscene. *Roth,* said Harlan, was intended "to tighten obscenity standards." The door to government control, under *Roth,* was to be opened " 'only the slightest crack necessary to prevent encroachment upon more important interests.' "

Justice Harlan's view that *Roth* prohibits regulation of speech or press unless the material dealt with is "patently offensive on its face" has become an intricate part of the *Roth* doctrine. Similarly, there has been some Court support for the proposition that when the propriety of federal or state action is under scrutiny, the "community" mentioned in *Roth* is, as Harlan suggested, national in scope.

In *Jacobellis v. Ohio*[45] Justice Stewart noted the difficulty in elucidating just what is meant by "obscene." He invoked a narrow intuitive test suggesting that perhaps obscene was "undefinable." "Criminal laws" in his opinion "are constitutionally limited to hard-core pornography."[46] Only by

---

44. *Id.* at 489.

45. 378 U.S. 184 (1964).

46. In a footnote Justice Stewart referred to People v. Richmond County News, Inc., 9 N.Y.2d 578, 587, 175 N.E.2d 681, 686, 216 N.Y.S.2d 369, 376 (1961), suggesting that the definition used by that court could serve as a statement of what he meant by the term "hard-core pornography." In *Richmond County News, Inc.* the court described pornographic material as follows: "It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' . . . it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty.' " This court used the terms "obscene" and "pornographic" interchangeably, but it did not use the term "hard-core pornography."

In a dissenting opinion in Ginzburg v. United States, 383 U.S. 463, 499 (1966), Justice Stewart wrote: "In order to prevent any possible misunderstanding, I have set out in the margin a description, borrowed from the Solicitor General's brief, of the kind of things to which I have reference [when speaking of hard-core pornography]." " 'Such materials include photographs, both still and motion picture, with no pretense of 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 . . . .' " (emphasis added).

In People v. Pinkus, 256 Cal. App. 2d 941, 63 Cal. Rptr. 680 (1967), the court, having viewed what it called a " 'stag party' type film," affirmed a conviction under a state obscenity

examining the material does one know whether challenged material meets this test. In holding the state action unconstitutional he wrote: "But I know it when I see it [hard-core pornography], and the motion picture involved in this case is not that."[47]

Justice Brennan, with whom Justice Goldberg concurred, adhered to *Roth* and declined to follow on "hard-core pornography – have a look, examine, and see" test. As he read *Roth*, obscenity fell beyond constitutional protection because " 'it is utterly without redeeming social importance.' " In light of what was to follow, special note must be taken of Brennan's "utterly without" approach, under which material is shielded by the Constitution from government interference only if it is found to be "utterly without redeeming social importance." Thus, material dealing with sex that would not ordinarily be protected can acquire immunity if, in addition to its obscene treatment of sex, it also contains material that advocates ideas or has "literary or scientific or artistic value or any other form of social importance."[48] Brennan felt that the "bad" portions of the material should not be balanced against the "good" and thereby subject the entire work to government control. According to Brennan, "the constitutional status of the material [may not be] made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance."[49] According to Brennan, the "contemporary community" standard adopted in Roth might vary from time to time.[50] Geographically, it was a national rather than a local standard.

Justice Brennan shunned a "sufficient evidence" test that would ordinarily preclude factfinding on the Supreme Court level. Rather than treat obscenity as a fact question, Brennan believed it the duty of every Court member to

---

statute. It categorized the film as " 'hard-core pornography' " using the same type of standard alluded to by Justice Stewart. In City of Youngstown v. DeLoreto, 19 Ohio App. 2d 267, 275, 251 N.E.2d 491, 498, 48 Ohio Op. 2d 393, 401 (1969) the court likewise utilized Justice Stewart's view of what constituted "hard-core pornography." Distinguishing it from art, the court said: "True art conveys a thought, a speculation, or a perception about the human condition. Pornography is pictures of sex organs and their usage devoid of all other meaning – the personality having no place. They bear in upon one in a sense of increasing ugliness and degradation of the human being. Pornography is not art, no matter how pretty the colors."

47. Jacobellis v. Ohio, 378 U.S. 184, 197 (1963).

48. *Id.* at 191 (Brennan, J., concurring).

49. *Id.* at 191.

50. *Id.* at 193. In Commonwealth v. Baer, 209 Pa. Super. 349, 355, 227 A.2d 915, 919 (1967), the court, speaking of the "fluid standard" used to test whether material is constitutionally protected, wrote: "Mid-Victorian mores or even the morality and understanding of a generation ago are inappropriate guidelines to the limits of protected expression today. It may be, as some have suggested, that our modern sensibilities have been blunted by the massive emphasis of sexually provocative material on television and in the cinema . . . . Such, whether we approve or disapprove, is the temper of our times. . . . [referring to the publications in issue, the court continued] Vulgar and tawdry they may be, but so is much in our society. Since '[t]he community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates' . . . appellants' convictions cannot stand."

examine the material personally. In his judgment the state had improperly classified the challenged film as obscene.

As in prior and subsequent cases, Justices Black and Douglas sternly opposed government participation in censorship. Fiery exception was taken to a constitutional standard that made the Supreme Court, in Black's words, a " 'Supreme Board of Censors.' "

Justice Harlan accepted, as a constitutional principle in the sensitive areas of speech and press, his judicial duty to determine independently whether challenged material was obscene. He reiterated his belief that under the fourteenth amendment a state has a far broader latitude to deal with speech and press than Congress has under the first amendment. The test ordained by the fourteenth amendment is one of rationality. Justice Harlan believed the Court should not disturb a state result based upon "rationally established criteria for judgment of such material." As did Justice Stewart, Harlan lectured on the difficulty of verbalizing what is obscene, indicating that, in the last analysis, how material is categorized depends on how it "happens to strike the minds . . . of a majority of the Court." Having viewed the film, Harlan found that the state's action did not violate the fourteenth amendment.

Chief Justice Warren, in dissent, expressed support of *Roth,* but read it as establishing a "rule of reason." When it alluded to "community," *Roth* referred to a local rather than to a national standard.[51] As in his separate opinion in *Roth,* Warren argued in favor of an "environmental" test linking the Court's decision to the intended use of the material. If it were intended for literary, scientific, or artistic purposes the material is immune from government control. If it were concocted to treat sex in a manner calculated to reap profit, the material may be treated as nothing more than smut, falling outside the pale of constitutional protection.

So long as the lower federal or state courts afforded procedural due process and invoked *Roth* as he understood it, Warren contended that the only issue to be decided by the Supreme Court was "whether there is sufficient evidence in the record upon which a finding of obscenity could be made." Warren termed "sufficient evidence" to mean more than a "mere modicum

51. Jacovellis v. Ohio, 378 U.S. 184, 200 (1963) (Warren, C.J., dissenting). In State v. Childs, 447 P.2d 304 (Ore. 1968), *cert. denied,* 394 U.S. 931 (1969), the court approved of an approach to "community" that was synonymous with the nation. In *In re* Giannini, 69 Cal. 2d 208, 446 P.2d 535, 72 Cal. Rptr. 655 (1968); McCauley v ."Tropic of Cancer," 20 Wis. 2d 134, 121 N.W.2d 545 (1963); City of Youngstown v. DeLoreto, 19 Ohio App. 2d 267, 251 N.E.2d 491, 48 Ohio Op. 2d 393 (1969), the court saw the relevant community as the state. In Olsen v. Doerfler, 14 Mich. App. 428, 165 N.W.2d 648 (1969), the court approved of community in terms of the county in which the case was tried. In Nissinoff v. Harper, 221 So. 2d 747 (1st D.C.A. Fla.), *cert. denied,* 221 So. 2d 947 (Fla. 1968), the word "community" was thought of as the views of the people who resided at the place where the case was tried. In Cain v. Commonwealth, 437 S. W. 2d 769, 773 (Ky. 1969), *reversed sub nom.,* Cain v. Kentucky, 397 U.S. 319 (1970), the court approving of the trial court's refusal to allow an expert from New York to testify as to his opinion about the film in question, wrote: "It was inconceivable that he could have a better opinion of the community standards of Louisville, Kentucky, than the twelve jurors sworn to try the case."

of evidence . . . something more than merely any evidence but something less than 'substantial evidence on the record [including the allegedly obscene material] as a whole.' "[52] The Chief Justice disapproved of Supreme Court jurists sitting as censors, deciding anew the obscenity issue in each case. He found in *Jacobellis* that the state courts had not acted without sufficient evidence in ruling the film, intended to be used for commercial purposes, obscene.

Justice Goldberg, in a concurring opinion, remarked that the exhibitors of the film could not be "criminally prosecuted unless the exaggerated character of the advertising rather than the obscenity of the film is to be the constitutional criterion." Two years later the Court, in *Ginzburg v. United States*,[53] took cognizance of the context in which material was disseminated in deciding if it could be ruled obscene. The Court in *Ginzburg*, as well as in *Mishkin v. New York*[54] heeded Warren's call for an environment test.

In *Ginzburg* Justice Brennan, speaking for the Court, ruled that under *Roth* material might be condemned as obscene under federal law even though it might otherwise be constitutionally protected, if the seller had advertised the material in a fashion calculated to arouse the prurient interest of prospective customers. In Brennan's opinion " 'if the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite,' the work is pornographic."[55] He quoted with approval from Chief Justice Warren's separate opinion in *Roth* wherein Warren articulated a setting standard. Brennan cautioned that the Court did not consider the making of profit to be a relevant factor. What is relevant under *Roth* is the issue of pandering. He summed up the majority's position as follows:[56]

> Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.

---

52. Jacobellis v. Ohio, 378 U.S. 184, 202-03 (1964) (Warren, C.J., dissenting). In the following cases state courts opted for the "sufficient evidence" test: Nissinoff v. Harper, 221 So. 2d 747 (1st D.C.A. Fla.), *cert. denied*, 221 So. 2d 747 (Fla. 1968); Felton v. City of Pensacola, 200 So. 2d 842 (1st D.C.A. Fla. 1967). In Jones v. City of Birmingham, 224 So. 2d 922, 924 (Ala. 1969), the appellate court saw its function as more narrow than the standard of Chief Justice Warren. "[T]he sufficiency of the evidence is not within the scope of appellate review . . . . Whether or not that conduct conveyed any idea of redeeming social importance was a question of fact." The conduct in question was "topless dancing." In McCauley v. "Tropic of Cancer," 20 Wis. 2d 134, 121 N.W.2d 545 (1963), a dissenting judge voted to affirm the trial court since its result was "not against the great weight and clear preponderance of the evidence."

53. 383 U.S. 463 (1966).

54. 383 U.S. 502 (1966).

55. Ginzberg v. United States, 383 U.S. 463, 471 (1966).

56. *Id.* at 476. Here, as in Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), the Court granted certiorari to decide if the trial court properly interpreted and applied "the

Four members of the Court dissented. Justice Stewart objected that the Court had gone beyond *Roth* and Justice Harlan's assertion in *Manual Enterprises, Inc. v. Day* that material had to be patently indecent in order to be subject to government regulation. He insisted that under *Roth* nothing less than hard-core pornography could be outlawed. Since the material in question did not fall within this category, it was constitutionally protected. Justice Harlan took issue with the majority's willingness to consider the conduct, attitude, and motives of a defendant in deciding whether he had mailed obscene material. According to Harlan, the federal statute condemned the *mailing* of obscene material and not the marketing technique used by an accused. The federal government, under the Constitution, could bar from the mails nothing less than hard-core pornography. Not having dealt with such material the accused could not be punished. Justice Douglas reiterated his belief that the first amendment did not proclaim a rule of reason. Rather, it barred "all regulation or control of expression." He took issue with a test tied to "an advertising technique as old as history." Besides specifically taking issue with the standard utilized by the Court, Justice Black denied that government possessed power to regulate the expression of ideas or views not inescapably enmeshed with conduct.

Speaking for the Court in *Mishkin* Justice Brennan applied the pandering principle to affirm a conviction under a state criminal statute. The statute prohibited the publication and sale of obscene material as well as the hiring of persons to prepare such material. Under state law "obscene was synonymous with hard-core pornography," which, Justice Brennan pointed out, "is more stringent than the *Roth* definition" of obscenity.[57] The defendant had employed persons to prepare the challenged materials that he sold in his bookstore, and had told such persons: " '[T]he sex scenes had to be very strong, it had to be rough . . . [and] clearly spelled out.' " He directed the employees to make the sex scenes " 'unusual sex scenes between men and women, and women and women, and men and men,' " to deal with " 'sex in an abnormal and irregular fashion.' "[58] In Brennan's opinion the accused's own evaluation of the material, under *Ginzburg,* was to be considered in deciding whether the material was constitutionally protected. Striking out at what he clearly regarded as distasteful commercial exploitation of sex by the defendant, Brennan described the finished books as "cheaply prepared paperbound 'pulps' " that had a sales price "several thousand percent above costs."

Justice Brennan disregarded the contention that since some of the books depicted "deviant sexual practices, such as flagellation, fetishism, and lesbianism" they were constitutionally protected under *Roth.* The appellant argued that the state had not satisfied *Roth* because such books "do not appeal to a prurient interest of the 'average person' in sex, that 'instead of stimulating

---

standards . . . first enunciated in *Roth* . . . ." As in *Roth,* the defendant was charged with violating 18 U.S.C. §1461 (1964).

57. Mishkin v. New York, 383 U.S. 502, 508 (1966). Brennan *cited* People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

58. Mishkin v. New York, 383 U.S. 502, 505 (1966).

the erotic, they disgust and sicken.'" Brennan interpreted *Roth* as authorizing the outlawing of material directed at "the sexual interests of its intended and probable recipient group."[59] He cautioned, however, that for the purposes of *Roth* the word "group" must be defined in more specific terms than "sexually immature persons." He pointed out that defendant had not made a "substantial claim . . . that the books . . . [which depicted] deviant practices are devoid of prurient appeal to sexually deviant groups." He summed up the new graft on *Roth*:[60]

---

59. *Id.* at 509. The Supreme Court has not interpreted the first and fourteenth amendments as proclaiming distinct treatment for homosexualism, lesbianism, or various forms of hetrosexual human relationships. *See* Ginsberg v. New York, 390 U.S. 629 (1968), wherein the Court, if it chose, could have explored the advisability of employing different standards for different types of sexual relationships.

60. Mishkin v. New York, 383 U.S. 502, 508 (1966). Justice Brennan pointed out that there was proof, in addition to the accused's own evaluation of his material, that "the books' prurient appeal" did in fact satisfy *Roth* so far as it was directed at "a clearly defined deviant sexual group." *Id.* He cited United States v. Klaw, 350 F.2d 155, 166 (2d Cir. 1965). In *Klaw* the court asserted that when the prosecution charges that material is obscene, not because of its purported prurient appeal to the average person but because of its prurient appeal to a "deviant segment of society whose reactions are hardly a matter of common knowledge," expert evidence in the record is necessary to sustain a conviction. The court noted that while particular stimuli might stir deviants a court might not take judicial notice that such stimuli are obscene. "'[O]bviously, the issue of what stirs the lust of the sexual deviate requires evidence of special competence.'"

Courts have differed as to the need of the prosecution to offer expert evidence when it claims that material is obscene because it appeals to the prurient interest of the average man. "Since the film speaks for itself and screams out for all to hear that it is obscene, no expert testimony was needed to enable the trial judge to properly conclude that it met the three-fold constitutional test of obscenity established by the Supreme Court." Lancaster v. State, 256 A.2d 716, 720 (Md. 1969). *But see* Dunn v. Maryland State Board of Censors, 240 Md. 249, 213 A.2d 751 (1965). In State v. Childs, 447 P.2d 304 (Ore. 1968), *cert. denied*, 394 U.S. 931 (1969), the court rejected the argument that the Constitution requires in every case expert testimony "with respect to each element of obscenity." In People v. Pinkus, 256 Cal. 2d 941, 63 Cal. Rptr. 680 (1967), the court found that: "None of the three films is so esoteric that expert opinion evidence is necessary to interpret it to the average juror." *Id.* at 684. In *Pinkus* the court ruled that an accused does not have a constitutional right to offer oral expert testimony to refute a charge that the material he dealt with was obscene.

Justice Harlan in Smith v. California, 361 U.S. 147, 172 (1959), in a separate opinion, asserted: "However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard." While he would not say that oral expert testimony offered by a defendant on his behalf must be admitted, being "constitutionally compelled," Harlan did assert that a state "is not privileged to rebuff *all* efforts to enlighten or persuade the trier." *Id.* at 172. *Compare* Landau v. Fording, 245 Cal. 2d 820, 54 Cal. Rptr. 177 (1966), *aff'd*, 388 U.S. 456 (1967). In Cain v. Commonwealth, 437 S.W.2d 769 (Ky. 1969), *reversed sub nom.*, Cain v. Kentucky, 397 U.S. 319 (1970), the court rejected the contention that the trial court had been in error to exclude "expert opinion testimony" offered by the defendant. In Attorney General v. A Book Named "Naked Lunch," 351 Mass. 298, 299, 218 N.E.2d 571, 574 (1966), the majority was of the opinion that the defendant might offer expert testimony in his defense. While the appellate court was not bound, the jurists could not simply "ignore serious acceptance of . . . [the book in question] by so many persons in the literary community." A dissenting jurist, calling the book "literary sewage," remarked: "Our experience with allegedly pornographic works over the years here in Massachusetts has revealed that there is no dearth of

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.

Justice Black again dissenting, insisted that the Court was "without constitutional power to censor speech or press regardless of the particular subject discussed." He stated he did not read the challenged material in this case or in *Ginzburg*. Even if "censorship of views about sex or any other subject" was constitutional, he opposed saddling the Court with the "irksome . . . and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members of the Court what pornography (whatever that means) is too hard core for people to see or read." If such power must be vested in government, he suggested it "be vested in some governmental institution or institutions other than this Court."[61]

On the same day the Court announced *Ginzburg* and *Mishkin* it handed down *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General.*[62] In *Memoirs* a state court decision adjudging *Fanny Hill* obscene was reversed. Justice Brennan, joined by the Chief Justice and Justice Fortas, concluded that the state court had erroneously applied the social value criterion contained in *Roth*. The state supreme judicial court had stated it did not interpret the social importance test as requiring that a book which appeals to prurient interest and is patently offensive must be " 'unqualifiedly worthless before it can be deemed obscene.' "[63] Brennan disagreed, pointing out that under *Roth* all "three elements must coalesce":[64]

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

Justice Brennan asserted the reversal did not hold that the book could not, under any circumstances, be classified as obscene. The result might be different if it were established "that the book was commercially exploited for the sake of its prurient appeal, to the exclusion of all other values . . . ." Under such circumstances one could conclude "that the book was utterly without redeeming social importance." This construction of *Roth*, in Brennan's opinion, did not eliminate the utterly devoid of social value criterion. But, when a seller's "sole emphasis is on the sexually provocative aspects of his publication, a court could accept his evaluation at its face

---

experts ready to leap to the defence [*sic*] of such of them as have come under scrutiny from time to time." *Id.*

61. Mishkin v. New York, 383 U.S. 502, 516-17 (1966) (Black, J., dissenting).
62. 383 U.S. 413 (1966).
63. *Id.* at 419.
64. *Id.* at 419.

value."[65] In this instance the trial court had not been pressed to explore the circumstances under which it was produced and marketed.

In dissenting, Justice Clark displayed deep displeasure with "the continuous flow of pornographic material reaching" the Court "and the increasing problem States have in controlling it." He said *Fanny Hill* was "too much even for me."[66] To him, *Roth* did not isolate an " 'utterly without redeeming social value' test" as "a separate and distinct test." He insisted that *Roth* had but "two constitutional requirements: (1) the book must be judged as a whole, not by its parts, and (2) it must be judged in terms of its appeal to the prurient interest of the average person, applying contemporary community standards."[67] Clark found that the book's "repeated and unrelieved appeals to the prurient interest of the average person leaves it utterly without redeeming social importance." He concluded that the publisher had "published this obscenity — preying upon prurient and carnal proclivities for its own pecuniary advantage." As to the scope of appellate review, Clark approved of the sufficient evidence test voiced in Chief Justice Warren's dissent in *Jacobellis*.

Justice Harlan, dissenting, alluded to the lack of agreement that continued to plague the Court. "Two Justices believe the First and Fourteenth Amendments absolutely protect obscene and nonobscene material alike," while one "believes that neither the States nor the Federal Government may suppress any material save for 'hard-core pornography.' " As he read *Roth* it "stressed prurience and utter lack of redeeming social importance." As a result of *Ginzburg* and *Mishkin*, *Roth* had undergone a significant transformation: pandering was added to a test of obscenity. "Patent offensiveness" was likewise an addition to *Roth*. "Given this tangled state of affairs," wrote Harlan, he felt "free to adhere to the principles" he first set forth in his separate opinion in *Roth*. Consequently, Congress, under the first amendment, might not ban *Fanny Hill* from the mails. However, under the fourteenth amendment a state might treat *Fanny Hill* as obscene. Justice Harlan wrote:[68]

> [T]he 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 considers such elements as offensiveness, pruriency, social value, and the like.

---

65. *Id.* at 420 (Clark, J., dissenting).

66. *Id.* at 441. When deciding, as a matter of law or constitutional judgment, that a book, photograph, drawing, or film is obscene, courts insist that the judges refrain from abiding by a personal or subjective test. Repeatedly, judges insist they have put aside their personal views and arrived at their decision by objectively applying the described frame of reference. See People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961), and Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 233 A.2d 840 (1967). In United States v. Motion Picture Film Entitled "491," 367 F.2d 889 (2d Cir. 1966), the court cautioned that judges do not possess "dictatorial powers" to suppress material that they find personally objectionable.

67. "Memoirs" v. Attorney General, 383 U.S. 413, 442 (1966) (Clark, J., dissenting).

68. *Id.* at 458 (Harlan, J., dissenting).

Justice Harlan believed the Supreme Court should administer this standard on a case-by-case basis. He did not favor a standard that would permit the testimony of experts to be controlling nor, apparently, did he approve of a sufficient evidence standard.

In a separate dissenting opinion, Justice White objected to elevating the "utterly without redeeming social importance" concept found in *Roth* to a distinct criterion status. He thought *Roth* permitted regulation of obscene material *"because* it is inherently and utterly without social value," and that it ordained a test tied to a book's predominant theme, not to one that was keyed to "minor themes of a different nature." White viewed as improper the designation of social importance as an independent test of obscenity. As he read *Roth* " 'social importance' . . . is relevant only to determining the predominant prurient interest of the material, a determination which the court or the jury will make based on the material itself and all the evidence in the case, expert or otherwise."[69] White quoted from that portion of *Roth* that drew upon *Chaplinsky*: it had never been thought that the lewd and obscene raised any constitutional problem. Under *Roth,* he wrote, "legislatures, courts, and juries" are free to exercise their judgment, but not in an unrestricted fashion. While he did not use the term "rule of reason" there can be little if any doubt that White favored a rule of reason. In his opinion a state was free to treat *Fanny Hill* as obscene and to forbid its sale.

From Redrup *to* Stanley

Redrup v. New York[70] was but one of three cases announced simultaneously. Each raised a question of state power. In two, the defendants assailed criminal convictions, while in the other the appellant appealed from a civil judgment that ordered destruction of magazines he held for sale. In the course of reversing all three cases the Court announced two new categories of permissible state action. One was based on the unique power of a state to control the bahavior of young people; the other reflected the Court's concern with the invasion of privacy. The Justices made a succinct one-sentence statement about each principle, expanding at length upon neither. Each statement was followed by a citation of two authorities.

In expressing the first principle, the Court, citing as authority *Prince v. Massachusetts*[71] and *Butler v. Michigan,*[72] said: "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles." In *Prince,* a divided Supreme Court sustained a state penal law that prohibited boys under twelve years and girls under eighteen years from offering to sell newspapers, magazines, or periodicals in a public place, as well as prohibiting one from furnishing such material with the knowledge that the minor would engage in the prohibited conduct. The

69. *Id.* at 462 (White, J., dissenting).
70. 386 U.S. 767 (1967).
71. 321 U.S. 158 (1944).
72. 352 U.S. 380 (1957).

statute further barred a parent or guardian from compelling or permitting a minor to engage in such activity. The defendant, a guardian of a nine-year-old girl, allowed the youngster publicly to offer for sale religious material that the defendant had obtained and offered for sale. The defendant claimed her conviction violated the fourteenth amendment on the grounds that it denied her religious liberty and parental rights.

Writing for the Court, Justice Rutledge asserted that protecting the welfare of children is a societal interest. Society could ensure "that children [are to] be both safeguarded from abuses and given opportunities for growth into free and independent well developed men and citizens."[73] He insisted that rights of religion and parenthood are not "beyond limitation . . . the state as *parens patriae*" could act "to guard the general interest in youth's well being." The Court distinguished between state regulation of adult behavior and the behavior of children, stating: "The state's authority over children's activities is broader than over like actions of adults . . . . What may be wholly permissible [conduct] for adults . . . may not be for children . . . ."[74]

In *Butler v. Michigan*[75] the Court struck down a state obscenity conviction. The Michigan statute made it illegal "to sell . . . any book . . . [or] picture . . . containing obscene, immoral, lewd, or lascivious language . . . tending to incite minors to violent or depraved or immoral acts . . . ." The trial judge found that the defendant had violated the statute by selling to an adult a book that had a potentially deleterious influence upon youth. Without exploring the breadth of the state's powers, Justice Frankfurter found the statute was "not reasonably restricted to the evil with which it is said to deal." With the avowed purpose of protecting juveniles, the state had in effect reduced "the adult population of Michigan to reading only what is fit for children." By alluding to *Butler* the Court in *Redrup* was clearly advising states that while separate restrictions might be imposed upon the kind of material that might not be offered for sale to juveniles, legislators were obliged to carefully distinguish their treatment of materials that might not be marketed to adults.

As for the second principle, the Court said: "In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."[76]

In *Breard v. Alexandria*[77] the Court spoke of the duty of local government to protect "its citizens against the practices deemed subversive of privacy and quiet." The defendant, a door-to-door salesman, contended he had been denied his first amendment rights because of an ordinance that required that he obtain the homeowner's consent prior to his going to the door. The

73. Prince v. Massachusetts, 321 U.S. 158 (1944).
74. *Id.* at 169.
75. Butler v. Michigan, 352 U.S. 380 (1957).
76. Redrup v. New York, 386 U.S. 767, 769 (1967).
77. 341 U.S. 622 (1951).

Court acknowledged that merely because the accused was engaged in a commercial venture, he was not denied per se, the protection of the first amendment. However, said Justice Reed, the first and fourteenth amendments are not "absolutes . . . . Rights other than those of the advocates are involved." Only by adjusting various rights could there be "both full liberty of expression and orderly life." Reed distinguished an earlier case, in which the Court set aside a similar conviction, on the ground that there the defendant had not engaged in a commercial transaction but in the free distribution of religious materials. According to Reed "the conveniences between some householders' desire for privacy and the publisher's right to distribute publications" door-to-door had to be balanced. The collision of rights between the hospitable housewife and the possibly persistent solicitor, in the Court's opinion, could, if local government chose, be resolved in favor of the housewife.

In *Public Utilities Commission v. Pollak*[78] the Court ruled that a passenger was not denied a constitutional right when the Commission failed to ban the reception of radio broadcasts on busses in service. The volume of the transmission was high enough to be heard but not so high as to "interfere substantially with the conversation of passengers." The first amendment, the Court observed, does not guarantee "a freedom to listen only to such points of view as the listener wishes to hear." Nor does the fifth amendment "secure to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home . . . . The liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others."[79]

By citing *Breard* and *Pollak* the Court in *Redrup* obviously wished to focus attention on the fundamental distinction between one's right to privacy in his home and in a public place. Consistent with the first amendment, the right to be free from obscene material being thrust upon one in his own home may be a right that the government may protect by placing some curb on the distribution of objectionable printed material. The power of government, however, is considerably less in regard to the suppressing of material in a public place, regardless of how objectionable it may be to particular individuals who happen to be present at the time of its distribution.[80]

---

78. 343 U.S. 451 (1952).

79. *Id.* at 465.

80. Senator Mansfield (D. Mont.) has spoken in favor of legislation designed to allow a homeowner to free himself from unwanted exposure to obscene material, which may arrive in his mail. See 115 CONG. REC. S. 8571-72, S. 13973, S. 16136-37. He introduced S. 3220, 91st Cong., 1st Sess., (1969), which requires senders to mark the envelope or cover with the words: "The Enclosed Material May Be Obscene or Offensive to the Addressee." The bill sets forth the circumstances under which such markings must be made and the penalties for the failure of a sender to do so. Does one who deals with printed or other forms of written material do so at his risk, always subject to possible conviction under an obscenity statute whether he knew the nature of the material or not? No. In Smith v. California, 361 U.S. 147 (1959), the Court ruled that one might not be constitutionally convicted of unlawfully trafficking in obscene material unless in the course of the trial it is

After having stated the two principles considered above, the Court in *Redrup* noted the absence of "evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States* . . . ."[81]

In regard to both cases the Court found "the distribution of the publications" was protected by the first and fourteenth amendments "from governmental suppression, whether criminal or civil, in personam or in rem." The Court then proceeded to pinpoint the differences in opinion of the members of the Court as to the actual demands of the first and fourteenth amendments as follows:

> (1) the contention of Justices Black and Douglas that states have no "power to suppress, control, or punish the distribution of any writing or pictures upon the ground of their 'obscenity' ";
> (2) Justice Stewart's "opinion that a state's power in this area is narrowly limited to a distinct and clearly identifiable class of materials";
> (3) the view of Justice Brennan, with whom Chief Justice Warren and Justice Fortas agreed, that under *Roth* a state may not suppress material unless it is "patently offensive" and is "utterly without redeeming social value" with the coalescence of the three elements mentioned in *Memoirs;*[82]
> (4) the view of Justice White that the " 'social value' element [is not to be treated] as an independent factor . . . ."[83]

---

established that the accused did so knowingly. Absent a showing of scienter — the existence of a *mens rea* — a conviction under an obscenity statute cannot stand.

39 U.S.C. §4009 (1964) provides that one who "mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailing of such materials to" addressees who have made a request of the Postmaster General for a prohibitive order. In Rowan v. United States Post Office Dep't. 300 F. Supp. 1036 (C.D. Cal. 1969), *aff'd,* 397 U.S. 728 (1970), a three-man bench sustained the statute, referring to "an unwilling recipient's right to privacy," *citing* Breard v. City of Alexandria, 341 U.S. 622 (1951).

81. Redrup v. New York, 386 U.S. 767, 769 (1967).

82. The concurrence of the Chief Justice is, of course, subject to his approval of an "environmental" approach and a "sufficient evidence" standard of appellate review.

83. The Court in Redrup v. New York, 386 U.S. 767, 771 (1967) (Harlan, J., dissenting), describing Justice Stewart's view, wrote: "A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material." Then, alluding to Justice Brennan's position, the Court said: "Others have subscribed to a not dissimilar standard . . . ." This portion of the opinion was, in the opinion of the court in Luros v. United States, 389 F.2d 200, 205 (8th Cir. 1968), a "specific indication that a majority of the Supreme Court adopts standards 'not dissimilar' to banning only 'hard-core' pornography." Similarly, in State v. J. L. Marshall News Co., 13 Ohio Misc. 60, 232 N.E.2d 435 (1967), the court expressed the view that *Redrup* established that anything less than "hard-core" pornography was constitutionally protected. *Contra,* Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), *prob. juris. noted,* 396 U.S. 954 (1969); State v. Reese, 222 So. 2d 732 (Fla. 1969); Hewitt v. Maryland State Bd. of Censors, 253 Md. 277, 254 A.2d 202 (1969). In Stanley v. Georgia, 394 U.S. 557 (1969), the Court did not indicate that *Roth* had been altered to shield anything other than "hard-core pornography" from government regulation.

Regardless of which of the tests might be applied in the three cases, the Court held that none of the judgments could stand.

Justice Harlan, with whom Justice Clark joined, dissented on procedural grounds. In his opinion, the Court had improperly proceeded to consider the question of the obscenity of the publications.

In *Ginsberg v. New York*[84] the Court raised *Redrup* to significant precedential status. The defendant was convicted under a statute that prohibited one from knowingly selling " 'to a minor' under 17 . . . 'any picture . . . which depicts nudity . . . and which is harmful to minors,' and . . . any 'magazine . . . which contains . . . [such pictures] and which, taken as a whole, is harmful to minors.' "[85] The appellant challenged the constitutionality of the statute and his conviction on the ground that a state could not make a distinction on the basis of the age of a prospective reader.

In delivering the Court's opinion, Justice Brennan asserted that the material in issue was "not obscene for adults," citing *Butler*. The statute did not run afoul of *Butler v. Michigan*, since it did not prohibit the sale of the material to persons seventeen years of age or older. The majority abided by the postulate that "[o]bscenity is not within the area of protected speech or press." A state, if it wished, could adopt a " 'variable concept of obscenity.' " It could, when dealing with juveniles, adjust the demands of *Roth* as they were spelled out in *Memoirs*. *Prince v. Massachusetts* was extensively cited to support the proposition that a state possessed greater power when it regulated what children might "read or see" about sex than when it undertook to regulate adult conduct. Favoring the adoption of a rule of reason, the majority contended that reasonable state restraints on the sale to juveniles of material concerning sex are acceptable under the first amendment. What may be constitutionally protected for adult purposes may not be for minors. Here, the state had not acted irrationally. To sustain state action it need not be scientifically established that the action is correct. As it had done previously, the Court rejected the need, in obscenity cases, to invoke a "clear and present danger" test of constitutionality.

Justice Stewart, concurring in the result, found that the statute was not unconstitutional on its face. He was of the opinion that a state "may deprive children of other rights – the right to marry, for example, or the right to vote – deprivations that would be constitutionally intolerable for adults." He compared a child to "someone in a captive audience." Neither, in his opinion, are "possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[86]

Justice Douglas, with whom Justice Black concurred, dissented. Douglas did not fear that material, which some persons might classify as obscene, could have a debasing influence on the young. Insisting that the first amendment banned any governmental interference with speech or press, Douglas disapproved of a rule of reason to test the validity of a statute designed to

84. 390 U.S. 629 (1968).
85. *Id.* at 634, *citing* Butler v. Michigan, 352 U.S. 380 (1957).
86. Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring).

shield minors from obscenity. While parents and religious organizations might engage in censorship schemes, government may not. Douglas foresaw the Court sitting as the "Nation's board of censors," a task for which it was not qualified.

Justice Fortas, dissenting, refused simply to consider the face of the statute. In his opinion the Court's duty was to decide whether the material sold by the defendant was in fact obscene. While he did not disagree with a " 'variable obscenity' " test, he insisted that the Court could not affirm the conviction without defining what obscene means in terms of the young.[87] This was not a case of pandering of vulgar materials upon a juvenile. The sixteen-year-old to whom the material was sold had purchased it at the request of his mother. On the basis of *Redrup* and *Ginzburg,* Fortas voted to reverse the conviction.

All the above cases have involved a challenge to federal or state action by an individual somehow engaged in commercial activity. In the course of the proceedings the accused invoked his right to speak or to publish, or the right of prospective readers or viewers to choose to hear and to read what they wished. In *Stanley v. Georgia,*[88] the Supreme Court, for the first time, ruled on the right of an individual to possess obscene material for personal use in his own home.

The Court ruled that the first and fourteenth amendments prohibited government from making "the mere private possession of obscene matter . . . a crime." While *Roth* remained unimpaired its assertion that "obscenity is not within the area of constitutionally protected speech or press' was held not to apply to "mere private possession of obscene materials." *Roth* and its progeny related only to "the regulation of commercial distribution of obscene material."

Justice Marshall, who delivered the opinion, spoke of a constitutional "right to receive information and ideas . . . regardless of their social worth." He declined to draw a "line between the transmission of ideas and mere entertainment." Here the challenged matter, three reels of film, was discovered in the defendant's home. There was no evidence that the accused intended to share it with others. While instances might arise in which government might lawfully intrude into the privacy of one's home, this was not such an instance. Marshall quoted from a dissenting opinion of Justice Brandeis: "[The Constitution protects one's] 'beliefs . . . thoughts . . . emotions and . . . sensations . . . . The makers of the Constitution . . . conferred [on individuals] as against the Government, the right to be let alone . . . .' "[89] The defendant maintained he had "the right to read or observe what he pleases – the right to satisfy his intellectual and emotional needs

87. Justice Fortas' insistence that the court shun abstractions and deal with specifics raises the same kind of question other members of the court have raised on other occassions. *See* note 29 *supra.*

88. 394 U.S. 557 (1969). *See* Comment, *Constitutional Law: Possession of Obscene Material in the Home is Constitutionally Protected,* 22 U. FLA. L. REV. 138 (1969).

89. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

in the privacy of his own home." He claimed he had "the right to be free from state inquiry into the contents of his library." Marshall agreed:[90]

> 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. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Justice Marshall denied that a state could, under the first amendment, control the moral content of a person's thoughts. Bare possession of obscene material might not be outlawed by a state because it might lead to antisocial behavior or could assist the state in the control of illegal sales of obscene material. While the clear and present danger test was not applicable in cases of public dissemination of obscene material, it does apply to cases involving private possession. Here the state had not shown a danger the film "might fall into the hands of children . . . or that it might intrude upon the sensibilities or privacy of the general public."[91]

Justice Black concurred in the result since he did not believe possession of any reading matter or movie film, "whether labeled obscene or not," could be made a crime under "the First Amendment, made applicable to the States by the Fourteenth."

Justice Stewart, who was joined by Justices Brennan and White, also concurred in reversing the conviction. They did not reach the obscenity question, however. The films, in Stewart's opinion, had been "seized in violation of the Fourth and Fourteenth Amendments," and therefore "were inadmissible in evidence."[92]

---

90. Stanley v. Georgia, 394 U.S. 557, 565 (1969). In Ackerman v. United States, 293 F.2d 449 (9th Cir. 1961), the court found 18 U.S.C. §1461, note 26 *supra*, applied to private correspondence.

91. Stanley v. Georgia, 394 U.S. 557, 567-68 (1969). In Stein v. Batchelor, 300 F. Supp. 602, 659 (N.D. Tex. 1969), *prob. juris. noted*, 396 U.S. 954 (1969), the three-man bench found unconstitutional a state that made "mere possession of obscene material" unlawful. Citing *Stanley*, the court found that the statute was "overbroad," failing to "confine its application to a context of public or commercial dissemination."

92. Stanley v. Georgia, 394 U.S. 557, 572 (1969) (Stewart, J., concurring). Justice Stewart cited the landmark case of Mapp v. Ohio, 367 U.S. 643 (1961). In *Mapp* the Court abandoned the *Palko* "ordered liberty" standard and ruled that a state might not rely upon illegally seized evidence to convict an accused. On the same day the Court decided *Mapp*, it handed down Marcus v. Search Warrant, 367 U.S. 717 (1961). In *Marcus*, under state law, a magistrate issued a warrant, after submission to him of an affidavit. Officers thereafter seized a quantity of printed material that the state court found to include obscene as well as nonobscene material. In the opinion of the Supreme Court the state procedure did not adequately protect free speech and press. It permitted state police officers to decide what to seize and what not to seize. The Court also pointed out that the owner was "not afforded a hearing before the warrant" was issued. The *ex parte* arrangement, under the circumstances was found to be objectionable.

The court expanded upon *Marcus* in A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964). On this occasion the Court found defective a practice that allowed state officers to seize any items they viewed as obscene without the defendant first being afforded

CONCLUSION

Except for Justices Douglas and Black the Supreme Court has clung, although at times tenuously, to the announcement in *Chaplinsky* that obscenity is outside the pale of constitutional protection. Justices Black and Douglas alone insisted that absent a close tie between the spoken or written word and action, regardless of the way in which sex is treated, speech and press are free from any form of governmental control. Regardless of the circumstances, any form of censorship, except for a stringently applied "clear and present danger" standard, contravenes the Constitution.

The other members of the Court have indicated they agree, in some form, with the premise that there are certain kinds of ideas, thoughts, expressions, and photographs that deal with sex in a particular fashion, which government, under some circumstances, may constitutionally bar from public distribution and observation. Some opinions express the belief that the best interests of society demand that certain moral standards be maintained. "Moral" in this context means that persons are not free to treat sex in any way they choose – that there are certain do's and do not's, which morality demands. Supreme Court justices have paid scant attention to why they act as they do, assuming instead that everybody knows why. Perhaps they act as they do because of their religious belief, the way in which they view the human psyche, or merely a personal notion of what is right and what is wrong. The Justices may take for granted a myriad of reasons, all good and valid, which allegedly need not be expressed. Only recently has Justice

---

a hearing on the question of the obscenity of the seized materials prior to issuance of the warrant that provided for the seizure. In Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968), the Court ruled inadmissible film seized pursuant to a warrant granted on the basis of an affidavit that contained "conclusory assertions" that the materials to be seized were obscene. The Court refrained from deciding if an issuing magistrate was obliged, prior to granting a warrant, to view the challenged film.

In Van Cleef v. New Jersey, 395 U.S. 814 (1969), *reversing* State v. Van Cleef, 102 N.J. Super. 102, 245 A.2d 495 (1968), the Court struck down a conviction under a state obscenity law. The search, which yielded the purportedly obscene material, was conducted after the arrest of the defendant. In the opinion of the Court the search was not a lawful search incident to an arrest since it was far too sweeping to meet the demands of the fourth amendment. In City of Youngstown v. DeLoreto, 19 Ohio App. 2d 267, 281 N.E.2d 491, 48 Ohio Op. 2d 393 (1969), the taking of material from a bookseller by police officers was sustained. The court ruled that *Marcus* and *Lee Art Theatre, Inc.* were distinguishable since here the accused had not objected to the police officers when they informed him that they were removing the material from his shop. In South Florida Art Theatres, Inc. v. State, 224 So. 2d 706 (4th D.C.A. Fla. 1969), the issuing magistrate heard testimony about the film in question before he issued the warrant. The court distinguished *Lee Art Theatre, Inc.* on the ground that in *Lee* the magistrate issued the warrant only after receipt of "conclusory assertions." The unique nature of printed material under the Constitution was pointed out in Dykema v. Bloss, 169 N.W.2d 367, 375 (Mich. 1969), wherein the court said: "Printed matter is treated differently than gambling equipment because gambling equipment is contraband, *per se*. Printed matter may or may not be obscene based upon consideration of the entire contents of each publication."

Douglas chosen to express his views.[93] A number of lower court judges have done likewise.[94]

As the membership of the Supreme Court changes during the 1970's, the Tribunal will undoubtedly find itself once again involved in drawing new lines, in breathing new meaning into already announced principles.[95] The

93. "Some people think that 'obscenity' is not protected by the Free Speech and Free Press Clauses of the First Amendment. They believe that both Congress and the States can set up regimes of censorship to weed out 'obscenity' from literature, movies, and other publications so as to rid the press of what they the judges deem to be beyond the pale. I have consistently dissented from that court but not because, as frequently charged, I relish 'obscenity.' . . . 'Obscenity' certainly was not an established exception to free speech and free press when the Bill of Rights was adopted . . . . It is a relatively new arrival on the American scene, propelled by dedicated zealots to cleanse all thought." Byrne v. Karalexis, 90 S. Ct. 469, 471-72 (1970).

94. One of the most pointed objections to the current state of the law can be found in the dissenting opinion of Judge Musmanno in Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 223, 233 A.2d 840, 858 (1967). Incensed that the majority failed to find the book *Candy* "legally obscene," he wrote: "The Supreme Court of Pennsylvania had an opportunity in this case to unlimber some heavy artillery in fighting for American morality; it had unlimited freedom to pour devastating fire into the forces that would destroy the very foundations of decency, purity and wholesome conduct upon which our American society is founded; it had the clearest chance to draw from the armory of the law the weapons which would beat back those who, for greed and lucre, would poison the minds of the youth of our Commonwealth . . . . The Majority of this Court retired from the field of battle without firing a shot. It did more. It encouraged the foul foe to smash more effectively at the bastions of American decency; it unfurled a flag of impeccability and authority over the invading filthy battalions; it supplied to each hoodlum in the putrid expeditionary force a bar of Ivory Soap which made him, according to the Majority's reasoning, 99½% pure!" After pointing out that the court could have found the book obscene and asking "Whom would such a decision have hurt or offended?," Musmanno wrote: "No one but those who are heaping up sordid dollars, as a rake gathers up rotten leaves in an abandoned and unseeded garden."

In Larkin v. G.P. Putnam's Sons, 14 N.Y.2d 399, 402, 200 N.E.2d 760, 765 (1964), Justice Scileppi, dissenting, expressed consternation about the state of the law in saying: "It is important to remember that the history of control of obscenity has deep roots in Anglo-Saxon traditions, and laws forbidding obscene publications are at least as old as printing . . . . The majority opinion here, in my view, sounds the death knell of the long-honored standards of American decency which have remained an integral part of our national heritage."

"The morals of the citizens of a nation determine that nation's progress and the length of her very life. All thinking men realize that if we cherish our great nation, if we love her, and would have her prosper and be a great force for good in this world—it is imperative that her ideals and morals be maintained on a high plane." Dykema v. Bloss, 169 N.W.2d 367, 375 (Mich. 1969). *But see* Zeitlin v. Arnebergh, 59 Cal. 2d 901, 905, 383 P.2d 152, 155, 31 Cal. Rptr. 800, 803 (1963) and State v. J. L. Marshall News Co., 13 Ohio Misc. 60, 62, 232 N.E.2d 435, 437 (1967). In *Zeitlin* the court expressed a fear that unless courts moved with "utmost caution" they would "only invite defeat and only impair man's most precious potentiality: his capacity for self-expression." In *J.L. Marshall News Co.* the court declared: "[I]n a democratic society, except in the prohibition of clearly definable acts of aggression by one member of society against another, the law cannot enforce morality, however desirable such an aim might be. The burden of teaching man to choose the good and reject the evil must rest as it traditionally has on the family, the school and the church. It cannot be gainsaid that this is the only sound foundation."

95. If Judge Clement F. Haynesworth, Jr. had gathered sufficient support in the United

Court will find it difficult to "verbalize" adequate standards in this area.[96] As scientific, mathematical, computer-age man craves certainty, his quest for preciseness in the law of obscenity is destined to fail. As some members of the Court have stated, what is and what is not obscene is a matter of personal taste. Neat, precise, carefully worded principles hold no promise of successfully transforming the law of obscenity into a stronghold of objectivity. Perhaps Justice Stewart's assertion that he knows "hard-core pornography" when he sees it, is the most outspoken and relevant judicial admission to date.

Presently many insist that the moral fabric of the Nation is in a serious state of decay. The treatment of sex, they say, must be kept within circumscribed limits of acceptability. They are calling for more action on the federal level, and these entreaties have been greeted with some success. President Nixon has joined those who are calling upon Congress to enact acceptable legislation restricting commercial ventures that focus on the purveying of material dealing with sex.[97] The kind of legislative action sought is based on

---

States Senate to be confirmed as a member of the Supreme Court, he probably would have been an addition to that sector of the Court that has taken a more liberal view of the power of government to suppress material on the basis of its obscene nature. As the Chief Justice of the Fourth Circuit he wrote two opinions that affirmed lower court findings that material fell outside the pale of constitutional protection. United States v. Potomac News Co., 373 F.2d 635 (4th Cir. 1967), *reversed, per curiam,* (Warren, C.J., dissenting); Potomac News Co. v. United States, 389 U.S. 47 (1967); United States v. 392 Copies of a Magazine Entitled "Exclusive," 373 F.2d 633 (4th Cir. 1967), *reversed, per curiam,* (Warren, C.J., voting to affirm); Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967).

96. The inability of the Supreme Court to concoct a test of reasonable certainty to determine whether challenged material falls within or outside the pale of constitutional protection has given rise to a "comparative analysis" or "book weighing" technique. When having to decide whether a particular book is or is not obscene in the constitutional sense, lower courts have undertaken to use as a frame of reference material that the Supreme Court already found to come within the protection of the first or fourteenth amendments. In Larkin v. G. P. Putnam's Sons, 14 N.Y.2d 399, 403, 200 N.E.2d 760, 762, 252 N.Y.S.2d 71, 74 (1964), the court, comparing the material in question with material previously passed on, wrote: "It is not easy to distinguish the cases on the basis of real differences in the material under scrutiny. Still the decisions are not whimsical and haphazard judicial choices, but resulted in each case from earnestly searching out the significant constitutional issues." In State v. Childs, 447 P.2d 304, 308 (Ore. 1968), *cert. denied,* 394 U.S. 931 (1969), the court said: "We have examined other available contemporary 'pulp' books such as 'Lust Pool' and 'Shame Agent' which were approved in *Redrup v. New York* . . . and find the book under present consideration to have been written with considerably less restraint." In *In re* Panchot, 70 Cal. 2d 105, 108, 448 P.2d 385, 387, 73 Cal. Rptr. 689, 691 (1968), the court said: " 'Given the materials to which the Supreme Court has accorded constitutional protection, we cannot withhold such protection here.' " *See also* Olsen v. Doerfler, 14 Mich. App. 428, 165 N.W.2d 648 (1969); State v. J. L. Marshall News Co., 13 Ohio Misc. 60, 232 N.E.2d 435 (1969); House of Commonwealth, 210 Va. 120, 169 S.E.2d 572 (1969). In view of the use of a "comparative" approach, it would appear that a defendant, seeking to refute a contention that material is obscene, might offer evidence of other books in circulation in the "community" to establish the standard of the average man. The possibility of excessive introduction of books, and the competence of the trial judge to decide the question of admissibility of other books was considered by the Supreme Court of New Jersey in State v. Van Cleef, 102 N.J. Super. 102, 245 A.2d 495 (1968).

97. On May 5, 1969, the President sent a message to the Congress in which he said: "American homes are being bombarded with the largest volume of sex-oriented mail in

the principles enunciated by the Supreme Court allowing some form of government regulation of obscenity. Authorization for constitutional government action, whether on the federal or state level, is found primarily in the areas of juveniles, privacy, and pandering. Some strength can also be found in the prevailing definitions of obscenity.

The "utterly without" standard places a minimum restriction on material that may be distributed to adults in the absence of pandering and the invasion of an adult's privacy. A supporter of the "hard-core pornography" school presumably will favor striking down government action on occasions when a supporter of the "utterly without" school would. Thus, the "utterly without" test is closely akin to the "hard-core pornography" school. However, the question remains whether material can have some "redeeming social value" if it is "hard-core pornography."

Proponents of the "environmental" or "setting" school have enjoyed substantial success. The pandering, juvenile, and privacy categories reflect approval of some form of an environmental approach to obscenity. Recognition of these areas as distinct categories also reflects a quantum of success for the advocates of a "rule of reason." But the rationalists would undoubtedly go much farther than the environmentalists in sustaining government control of particular sorts of speech and press. Proponents of a "rule of reason" would more easily find societal interests paramount to free speech and press than those who stress environment over content. The thinking of both schools clearly blends in regard to the breadth of appellate review of obscenity cases. Environmentalists as well as rationalists could accept, and on occasion have accepted, the "sufficient evidence" test. So far, the members of these two schools have been unable to persuade a majority of the Court to invoke the "sufficient evidence" test. *De novo* consideration and independent judicial judgment still characterize the thinking of the Court.[98]

history." He asked that Congress make it a federal crime to "use the mails or other facilities of commerce to deliver to anyone under 18 years of age material dealing with a sexual subject in a manner unsuitable for young people . . . . or to use the mails, or other facilities of commerce, for the commercial exploitation of a prurient interest in sex through advertising." He asked Congress to supplement 39 U.S.C. §4009 (1964), note 48 *supra*, to facilitate persons obtaining prohibitory orders. For the full text of the President's message, and a copy of his proposed legislation, *see* H.R. Doc. No. 91-114, 91st Cong., 1st Sess. (1969). In his State of the Union Message on January 22, 1970, the President pointed to pornography as an area in which "the Federal Government has a special responsibility it should fulfill . . . ."

98. Under the *de novo* principle, is there anything more than an advisory role for a jury in obscenity cases in those instances in which it fails to return a verdict of not guilty or acquittal? Patently a jury cannot bind an appellate tribunal that undertakes to apply its own constitutional judgment as to whether the material in question is obscene. In People v. Clark, 304 N.Y.S.2d 326, 328 (1969), the court asserted: "The determination of obscenity is a question of law for the court to decide." In United States v. A Motion Picture Film Entitled "Pattern of Evil," 304 F. Supp. 197, 201 (S.D.N.Y. 1969), the court denied a motion for summary judgment. "If . . . issues of material fact are raised in respect of each of the three elements of obscenity, summary judgment on affidavits and exhibits is inappropriate and a trial of the issues is requisite. The expert opinions submitted as evidence are in confiict on the point whether social value inheres to this film." Query: Does it matter what the experts say if it conflicts with the court's "constitutional judgment"?

Firmly entrenched is the principle that each member of the Court must, in every obscenity case, examine the challenged material and then arrive at a personal judgment as to whether the book, magazine, film, or picture is obscene in the constitutional sense.

A foreseeable concomitant of the Court's acknowledged respect for privacy was the adoption of the *Stanley* principle. Under *Stanley* an individual, in the privacy of his own home, may wallow in obscenity, free from government interference, unless a "clear and present danger" test is satisfied. In the years ahead, *Stanley* may serve as a vehicle to expand the liberty to speak and to publish whatever one wishes. In *Stanley* the Court acknowledged a right to receive. Can a right to disseminate be any narrower than a right to receive? Any restriction on dissemination must impair one's right to receive. At present it is not possible to perceive what use, if any, the Court will make of *Stanley* to further shed speech and press of government control.

The attractiveness of *Roth* in a democratic society is apparent. If one accepts the proposition that majority rule is good, then a test tied to contemporary community standards and the average person must be favorably received. Ideally, if a majority in a democracy desires a particular standard regarding the treatment of sex, why not let them have it? Would they not be entitled to it under a doctrinaire approach to participatory democracy? But, as with other aspects of the constitutional principles governing obscenity, this concept abounds with danger and uncertainty. What of minority rights and the proposition that persons should not have the right to impose their standards on others by resorting to governmental force? Independent of this and similar questions remains the difficulty of applying *Roth,* assuming that one wishes to do so. How can members of the Court actually determine level of tolerance acceptable to the present day average man insofar as the treatment of sex is concerned? Where should the judges look to gauge the sympathies of a population in excess of 200 million persons, of various beliefs, spread across a vast geographic expanse? Should the jurists look to theologians; humanists; city, state, and federal legislators; lower court judges; motion picture producers; publishers; school newspapers; associations for decency; associations for liberty; communes; nudist colonies; Broadway; off-Broadway; far-off-Broadway; book store owners – to whom? Perhaps *Roth* is unreal, perhaps it is impossible to apply. Perhaps it simply stands, as already pointed out, for a subjective standard of constitutional doctrine.

What most members of the Court apparently agree on, although not unanimously, is that the fourteenth amendment applies the same restrictions to state action as are imposed upon the federal government. This seems to be the one principle in the law of obscenity that is not in danger of being shunted aside during the 1970's.[99]

99. Justice Harlan appears to have gained the support of Chief Justice Burger for his dual approach to obscenity under the first and fourteenth amendments. In Carlos v. New York, 396 U.S. 119 (1970), Chief Justice Burger joined Justice Harlan in dissent. The Court, *per curiam,* reversed a lower court judgment in which the petitioner had been convicted of violating a state obscenity statute, *citing* Redrup v. New York, 386 U.S. 767 (1967). The Chief Justice and Justice Harlan were of the opinion that certiorari

Reading and viewing in the 1970's promises to be exciting. So too will be the Supreme Court's decisions as to what persons may and may not be barred from reading or viewing.[100]

should not have been granted but, since the Court granted review, they were of the opinion that the judgment should be affirmed. They cited Harlan's opinions in *Roth* and *Memoirs*. Harlan's insistence on a dual standard, one for the federal government and one for the state government, is consistent with his vigorous disagreement with the result the Court arrived at in Benton v. Maryland, 395 U.S. 784 (1969), wherein *Palko* was overruled. Dissenting in *Benton*, Harlan wrote: "I would hold, in accordance with *Palko v. Connecticut* . . . that the Due Process Clause of the Fourteenth Amendment does not take over the Double Jeopardy Clause of the Fifth, as such. Today *Palko* becomes another casualty in the so far unchecked march toward 'incorporating' much, if not all, of the Federal Bill of Rights into the Due Process Clause . . . . I . . . raise my voice again in protest against a doctrine which so subtly, yet profoundly, is eroding many of the basics of our federal system." *Id.* at 808-09.

100. One of the questions yet to be answered is: "Will 'I Am Curious—Yellow' make the Late Show uncut?" As yet there is no definitive answer as to whether it can even make all of the Nation's local movie theatre screens uncut. Courts have arrived at different results as to whether the film falls within the pale of constitutional protection. In United States v. A Motion Picture Film Entitled "I Am Curious—Yellow," 404 F.2d 196, 200 (2d Cir. 1968) the court did not find that the three elements, spoken of in *Memoirs, supra,* coalesced. It did not find that "the dominant theme of the material taken as a whole appeals to the prurient interest in sex" nor that it was "utterly without redeeming social value." It was found to come "within the ambit of intellectual effort that the First Amendment was designed to protect." *Contra,* Wagonheim v. Maryland State Bd. of Censors, 38 U.S.L.W. 2267 (Gen. Nov. 11, 1969). The Supreme Court may have the opportunity to rule on the question in the near future, *see* Byrne v. Karalexis, 90 S.Ct. 469 (1970).