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## OBSCENITY: FROM *HICKLIN* TO *HICKLIN*?

*Frank W. Smith, Jr.\**

Modern advances in printing, distribution and advertisement have accentuated an old problem of social and legal significance—what, if anything, should be done to control obscene publications?<sup>1</sup> Increased concern with the problem has been shown not only by organizations active in this area, by numerous articles and books which have recently been written, but also by the courts, highlighted by the recent *Ginzburg*,<sup>2</sup> *Mishkin*<sup>3</sup> and *Fanny Hill*<sup>4</sup> cases. These cases have been hailed by some as a license for a full scale war on the “smut peddlers”<sup>5</sup> and by others as a caution to proceed slowly.<sup>6</sup> The obscenity problem brings into focus questions and considerations facing the law in this and many other areas today: (1) Are there tentative or working definitions of goals? (2) What means

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1. That obscene publications are a problem is well documented by Rogers, *Police Control of Obscene Literature*, 57 J. CRIM. L. & P. S. 430, 457-568 (1966). Such publication is a multi-million dollar business annually, estimated to be \$18 million a year in paperback books alone. Rogers catalogues the recent development in the obscene: from emphasis in early 1962 on “normal” heterosexual activity, to increased emphasis on the “abnormal”—lesbianism, sado-masochistic behavior, and homosexuality—since that time.
2. *Ginzburg v. United States*, 383 U.S. 463 (1966).
3. *Mishkin v. New York*, 383 U.S. 502 (1966).
4. *Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413 (1966).
5. Armstrong, *A Victory Over the Smut Peddlers*, READERS DIGEST, February 1967, p. 147.
6. Ablard, *Obscenity, Advertising, and Publishing: The Impact of Ginzburg and Mishkin*, 35 GEO. WASH. L. REV. 85, 90-92 (1966), indicates that the policy of the Post Office Department and the Department of Justice will be one of restraint.

and alternatives are available to reach such goals? (3) Are present approaches oriented to such goals or merely hold-overs from periods with different priorities of concerns and values? (4) What are the results under present methods—are they creating greater hazards than those “cured”? (5) Is the problem a valid concern for control by legal processes or is it an area which should be left to other means of influencing and controlling behavior?

With the foregoing in mind, an observation made by the reporters for the Model Penal Code in their study of control of obscenity by means of criminal sanctions is pertinent:

Church tribunals no longer have power to punish, but the question of properly limiting the power of the secular courts remains in part a matter of distinguishing secular from spiritual concerns, since not all matters of the spirit, fit for religious guidance or control, may be usefully or safely entrusted to police and courts. The boundary between secular and spiritual controls can never be drawn permanently or with absolute precision. Allocation of responsibility between state and church, or between state and individual, shifts with changing political conditions.<sup>7</sup>

*The Past Approach to Obscenity:  
The Hicklin Era<sup>8</sup>*

Although a common law court as early as 1663 had held the obscene conduct of Sir Charles Sedley in ex-

7. MODEL PENAL CODE § 207.10, at 6 (Tent. Draft. No. 6, 1957).

8. For a detailed account of this, see Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938); Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

hibiting himself nude on a balcony and throwing down a bottle of "offensive liquor" among the people of Covent Garden as punishable by fine,<sup>9</sup> until the early 1700's, punishment for obscenity was almost exclusively the concern of the ecclesiastical courts of the Church of England. The common law courts, even as late as 1708, held in *Queen v. Read* that:

A crime that shakes religion, as profaneness on the stage is indictable, but writing an obscene book as that entitled "The Fifteen Plagues of a Maidenhead" is not indictable, but punishable only in the Spiritual Courts.<sup>10</sup>

However, by 1727, in *Rex v. Curl*<sup>11</sup> it was held that publication of an obscene libel was punishable as a common law libel as being "against the peace in tending to weaken the bonds of civil society, virtue and morality."<sup>12</sup> It has been suggested that up to this time, the primary concern had been with offenses against religion, not obscenity itself.<sup>13</sup>

Lord Campbell, best known for legislation bearing his name in the tort field, was largely responsible for the first English legislation dealing with obscenity which was passed in 1857.<sup>14</sup> The act was "intended as a protection

9. *Sir Charles Sydlies Case*, 1 Keble 620, 83 Eng. Rep. 1146 (K. B. 1663).

For an account of the somewhat amusing details of the case, see Alpert, *supra* note 8, at 41-42.

10. 11 Mod. 142, 88 Eng. Rep. 953 (1708).

11. 2 Str. 789, 93 Eng. Rep. 849 (K. B. 1727).

12. *Id.* at 791.

13. Alpert, *supra* note 8, at 44.

14. Lord Campbell's Act, with revisions made by Parliament in 1959, along with the common law and *Hicklin*, remains the basic law on obscenity in England. See MODEL PENAL CODE, *supra* note 7, at 86; Rice, *The Youth-Obscenity Problem—A Proposal*, 52 KY. L. J. 429, 437-8 (1964); Comment, *Religious Institutions and Values: A Legal Survey—1964-66*, 41 *Notre Dame Law.* 681, 755, n. 608 (1966).

for children against the abundant pornographic pamphlets, books then in circulation.”<sup>15</sup> Lord Campbell is said to have used tactics, not unknown to other politicians, of “putting ‘the law Lords’ in a position of supporting his bill or else being attacked as advocates of vice.”<sup>16</sup>

Lord Campbell’s Act produced a case decided in 1868 by the Court of the Queen’s Bench which was to cast a long shadow on the law of obscenity for much of the next century. *Queen v. Hicklin*<sup>17</sup> arose out of the political and religious infighting of the time in England. The defendant, Henry Scott, was a member of the Protestant Electoral Union whose purpose was to

protect against those teachings and practices which are un-English, immoral and blasphemous, to maintain the Protestantism of the Bible and the liberty of England and to promote the return to Parliament of men who will assist them in these objects, and particularly will expose and defeat the deep-laid machinations of the Jesuits, and resist grants of money for Romish purposes.<sup>18</sup>

To promote these purposes of the Society, Scott sold a pamphlet, *The Confessional Unmasked, showing the depravity of the Romish priesthood, the iniquity of the confessional and the questions put to females in confession*.

Lord Campbell’s Act, 20 & 21 Victoria C. 83, S.1, provided that obscene materials, books, prints, etc., could be seized and destroyed upon proof that such articles had been sold or distributed and were of “such a character and description that the publication of them would be a

15. Alpert, *supra* note 8, at 51.

16. *Id.* at 51-52, n. 29.

17. Law Reports, 3 Q.B. 359 (1868).

18. *Id.* at 360.

misdeemeanor and proper to be prosecuted as such."<sup>19</sup> The basic assumption of the act was that the publication of obscene materials was punishable as a common law misdemeanor. In determining whether Scott's publication of the materials could be punished as a misdemeanor and thus sustain the seizure, Lord Cockburn laid down the *Hicklin* test of obscenity:

. . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.<sup>20</sup>

The court, apparently accepting the good motives of Scott, in holding that the pamphlets could be destroyed even though there was no pecuniary gain to Scott, found that half of the pamphlet dealing with "casuistical and controversial questions" was not obscene, but that the remainder was obscene as relating to "impure and filthy acts, words and ideas." Several of the judges acknowledged that censorship of obscenity by criminal punishment must depend on the circumstances of the publication, anticipating a problem to face later courts.

Thus under the *Hicklin* test, material which was partially obscene could be suppressed by seizure and destruction if a part *tended* to deprave and corrupt those minds open to such immoral influence.

The first reported case in the United States was *Commonwealth v. Holmes*<sup>21</sup> in 1821, involving a book, *Memoirs of a Woman of Pleasure*, in which the Massachusetts Supreme Judicial Court held that "an obscene libel was a common law offense and punishable as a crime." Ironically, this is probably the same book, commonly called

19. The text of the statute is found *Id.* at 360.

20. *Id.* at 369.

21. 17 Mass. 335 (1821).

*Fanny Hill*, involved in the most recent decision of the Supreme Court of the United States.<sup>22</sup>

According to Lockhart & McClure,<sup>23</sup> prior to the Civil War there were few reported decisions involving obscene literature in the United States. They suggest this probably was not an indication that such literature was not available nor that there were no attempts at censorship. For example, Nathaniel Hawthorne's now classic, *The Scarlet Letter*, was bitterly attacked as an "immoral book that degraded literature and encouraged social licentiousness."<sup>24</sup> A suggested reason for this dearth of cases was that obscene literature was not thought to be a problem of sufficient importance to justify arousing the forces of the state to censorship.<sup>25</sup>

Following the Civil War "the voice of the reformer was heard in the land,"<sup>26</sup> and the first real campaign in the war on obscenity began in the United States. Anthony Comstock, under the banner of "Morals, Not Art or Literature" began, much like his English counterpart Lord Campbell, to rid America of obscenity. Largely due to his efforts, Congress, in 1873, passed the Comstock Act broadening the existing legislation dealing with prohibitions against importation of obscene material and use of the mails for the transmission of obscenity. The Comstock Act was amended in 1876 to grant the Post Office censorship powers to confiscate obscene materials found in the mails and to penalize mailers of such by means of non-delivery.<sup>27</sup>

22. See Douglas' concurring opinion in *Fanny Hill*, 383 U.S. at 425, n. 1.

23. *Supra* note 8, at 324.

24. *Id.* at 325.

25. *Ibid.*

26. *Ibid.*

27. For a survey of federal statutory developments, see Cairns, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1010, n. 2, (1962). See also *United States v. Klaw*, 350 F.2d 155, at 160-163 (2d Cir. 1965).

The real import of the *Hicklin* rule was brought out in its adoption in 1879 by a federal court in *United States v. Bennett*,<sup>28</sup> apparently the first reported case in the United States to adopt the *Hicklin* rule. In a criminal prosecution, reportedly instigated by Anthony Comstock, brought under the provisions of the Comstock Act making it a crime to deposit an obscene publication in the mails, the trial judge in his charge to the jury had used the *Hicklin* definition of obscenity. The judge had further charged that the question of obscenity turned upon the alleged obscene passages and not the publication taken as a whole. In its charge, which was approved on appeal by the circuit court, the court stated:

There has been some discussion in this case, tending in the direction of the argument, that, if the general scope of the book was not obscene, the presence of obscene matter in it would not bring it within this statute. Such is not the law. If this book is, in any substantial part of it, obscene . . . then it is non-mailable under this statute and defendant is guilty . . . I have given you the test; it is not . . . [whether it tends] to deprave your minds or the minds of every person . . . It is within the law if it would suggest impure and libidinous thoughts in the young and the inexperienced.<sup>29</sup>

In applying *Hicklin*, the court thus stressed that it was a "partly obscene test" and to be judged in terms of "tendency," not actual effect, to deprave the most susceptible—the young and inexperienced.

A question which was to plague many later courts presented no difficulty to the *Bennett* court, which dismissed it by saying:

28. 24 Fed. Cases, No. 14,571 (S.D.N.Y. 1879).

29. *Id.* at 1102.



Of course, freedom of the press, which, I think, was alluded to, has nothing to do with this case. Freedom of the press does not include freedom to use the mails for the purpose of distributing obscene literature, and no right or privilege of the press is infringed by the exclusion of obscene literature from the mails.<sup>30</sup>

The *Hicklin* rule was so emplanty by 1913 that Judge Learned Hand in *United States v. Kennerly*,<sup>31</sup> a criminal prosecution against the publisher of *Hagar Revelly*, a novel presenting the life of a young woman in New York compelled to earn her living, said:

That test [*Hicklin*] has been accepted by the lower federal courts until it would be no longer proper for me to disregard it. *U.S. v. Bennett*, 16 Blatch 338, Fed. Cas. No. 14,571; *U. S. v. Clarke* (D.C.), 38 Fed. 500; *U.S. v. Harmon* (D.C.), 45 Fed. 414; *U.S. v. Smith* (D.C.), 45 Fed. 478.<sup>32</sup>

Despite this, Hand was constrained to make a cogent criticism of the test:

I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, "obscene, lewd, or lascivious." I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests

30. *Id.* at 1101.

31. 209 Fed. 119 (S.D.N.Y. 1913).

32. *Ibid.*

of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few. . . . Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.

Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time.<sup>33</sup>

Thus Judge Hand aptly pointed out that the test should not be one which reduces the public to reading that which is fit only for children but that the test should be a dynamic, changing test representing a balance between contemporary standards and what is clearly obscene. Apparently, many courts both before and after *Kennerly* shared these views of Hand and ignored or otherwise circumvented the restrictive "partly obscene" rule of *Hicklin*.<sup>34</sup>

33. *Id.* at 120-121.

34. Lockhart & McClure, *supra* note 8, at 327.

The first significant challenge and break in the *Hicklin* rule arose in 1933-34, from a book by James Joyce, hailed by many as a classic. The federal government attempted in *United States v. One Book Called Ulysses*<sup>35</sup> to prohibit importation of the book into the United States under federal statutes providing for confiscation and destruction of obscene material sought to be imported. The district judge, as trier of fact, accepted the definition of obscene as material "tending to stir the sex impulses or to lead to sexually impure and lustful thoughts,"<sup>36</sup> but made significant changes in determining if *Ulysses* met such definition. The court said, "Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts . . . who plays, in this branch of legal inquiry, the same role as does the 'reasonable man' in the law of torts. . . ." The court, in elevating the standard to that which tends to deprave the average, thereby met the thrust of Judge Learned Hand's criticism that the *Bennett* and *Hicklin* tests for censorship of obscenity would reduce the general population to reading that which is fit only for the most susceptible—the least common denominator. Further, a point considered, yet dismissed by the *Hicklin* court,<sup>37</sup> was, ". . . the intent with which the book was written, for . . . in any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was . . . pornographic, that is, written for the purpose of exploiting obscenity."<sup>38</sup> The trial court found that the book did

35. 5 F. Supp. 182 (S.D.N.Y. 1933).

36. *Id.* at 184.

37. Lord Cockburn in *Hicklin* had dismissed the argument as to lack of *mens rea* by saying, "where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act." *Supra* note 17, at 372. Cockburn also acknowledged Scott did not act for pecuniary gain.

38. *Supra* note 35, at 183.

not have "the leer of the sensualist" and concluded that it was not obscene. The court also suggested that the *net* effect of the book must be obscene.

On appeal,<sup>39</sup> Judge Augustus N. Hand clearly considered that the district court had found the book not obscene, taken as a whole. Even though the appellate court conceded parts were obscene, it felt that "the *net* effect even of portions most open to attack . . . is pitiful and tragic, rather than lustful."<sup>40</sup> The majority stated that "the question in each case is whether a publication taken as a whole has a libidinous effect."<sup>41</sup> The court specifically refused to follow the partly obscene test of *Hicklin* and established its own test and the relevant considerations:

We believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.<sup>42</sup>

Some have said that *Ulysses* is one of the most important decisions in the American law on obscenity.

*Hicklin*, however, was not buried by *Ulysses* without the dissent of Judge Manton who argued that *Hicklin*, *Bennett* and *Kennerly* should be followed, which he con-

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39. *United States v. One Book Entitled Ulysses*, 72 F. 2d 705 (2d Cir. 1934).

40. *Id.* at 707.

41. *Ibid.*

42. *Id.* at 708.

sidered had been approved by the Supreme Court in *Rosen v. United States*.<sup>43</sup> Manton queried,

And are we to refuse to enforce the statute . . . because of the argument "obscenity is only the superstition of the day—the modern counterpart of ancient witchcraft"? Are we to be persuaded by the statement made by the judge below in an interview with the press, "Education, not law, must solve problems of taste and choice of books"?<sup>44</sup>

### *The Constitutional Era*

With the establishment of the Obscene in its Dominant Effect Rule in *Ulysses*, with its consideration of social values, the complexity of the problem became much more evident. Up to *Ulysses*, the significant cases had not been those of the Supreme Court but of other courts.

The Bill of Rights expressly set forth certain rights, privileges and freedoms which could not be infringed upon by Congress and the federal government. Among these rights were "freedom of speech" and "freedom of the press" guaranteed by the first amendment. A question, to some degree still unresolved,<sup>45</sup> is to what extent is the first amendment a restriction on the states through the fourteenth amendment? In 1925, in *Gitlow v. New*

43. 161 U.S. 29 (1896).

44. *Supra* note 39, at 711.

45. Harlan, under his concept of federalism, views the fourteenth amendment as having a less restrictive impact on state control of obscenity than does the first amendment on the federal government. Most of the other Justices seem to assume that the first and fourteenth apply with equal impact, in the control of obscenity, to the state and federal governments. For Harlan's view see discussion regarding *Roth, infra*, page 308-311 and *Ginzburg, infra*, page 324-325.

*York*,<sup>46</sup> where a New York penal statute relating to advocacy of criminal anarchy was questioned, the Court in dictum said:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the first amendment from abridgment by Congress—are among the fundamental personal rights and “liberties” protected by the due process clause of the fourteenth amendment from impairment by the States.<sup>47</sup>

This view seems also to have been accepted by the Supreme Court in *Fiske v. Kansas*.<sup>48</sup> These statements foreshadowed a more active role by the Court in reviewing state regulation of obscenity. However, from *Ulysses* to shortly after World War II, although some cases were decided by the United States Supreme Court, there was little of landmark significance in the development of the law of obscenity.

In 1948 the Supreme Court in *Doubleday & Co. v. New York*<sup>49</sup> was presented with the question of the constitutionality of state censorship of obscenity. Doubleday had been convicted in the New York courts of publishing an obscene book, *Memoirs of Hecate County* by Edmund Wilson, a well known literary critic.<sup>50</sup> Doubleday appealed to the United States Supreme Court relying on the first amendment, as applicable to the states by the fourteenth, and argued that literature dealing with sex problems and obscenity could be suppressed only if the publication created a “clear and present danger.” However,

46. 268 U.S. 652 (1925).

47. *Id.* at 666.

48. 274 U.S. 380 (1927).

49. 335 U.S. 848 (1948).

50. For a detailed account of the case, see Lockhart & McClure, *supra* note 8, at 295-301.

the Supreme Court was evenly divided,<sup>51</sup> did not resolve the problem and issued no opinion, thus affirming Double-day's conviction.

But in 1957 the deadlock was broken in *Butler v. Michigan*,<sup>52</sup> which was unusual in the field of obscenity for its near unanimity of opinion with Justice Frankfurter speaking for eight of the justices and Justice Black concurring in the result. The background of *Butler*, as given by Lockhart & McClure,<sup>53</sup> is quite interesting. This was a pre-arranged test of a Michigan statute which prohibited under penal sanction the sale, even to adults, of obscene material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."<sup>54</sup> The book questioned was John H. Griffin's *The Devil Rides Outside*. The test used by the prosecutor to determine if he should prosecute was quite basic: "If he didn't want his thirteen-year-old daughter reading it, it was illegal."<sup>55</sup> The defendant was found guilty in the Recorder's Court in Detroit of selling an obscene book. The defendant then applied for leave to appeal to the Supreme Court of Michigan, which consented to the granting of the application "because the issues involved in this case are of great public interest, and because it appears that further clarification of the language of . . . [the statute] is necessary."<sup>56</sup> The appeal, however, was denied. In the United States Supreme Court the defendant's argument was based on the first and fourteenth amendments. The precise basis for the holding of the Court is hard to determine from the opinion, but

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51. Justice Frankfurter did not participate in the decision.

52. 352 U.S. 380 (1957).

53. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 13-18 (1960).

54. MICHIGAN PENAL CODE, § 343. The text of the statute is found in the report of the case, *supra* note 52, at 381.

55. Lockhart & McClure, *supra* note 53, at 15.

56. *Supra* note 52, at 382.

the following appears to be the salient portion of Justice Frankfurter's opinion:

It is clear on the record that appellant was convicted because Michigan . . . made it an offense for him to make available for the general reading public (and he in fact sold to a police officer) a book that the trial judge found to have a potentially deleterious influence upon youth. The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. Indeed, the Solicitor General of Michigan with characteristic candor, advised the Court that Michigan has a statute specifically designed to protect its children against obscene matter "tending to the corruption of the morals of youth." But the appellant was not convicted of violating this statute.

We have before us legislation not reasonably restricted to the evil with which it is said to deal. *The incidence of this* enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.<sup>57</sup>

Thus, *Butler* quite clearly marked the death of *Hicklin*, at least insofar as it could be used as a test of what material could be proscribed for general circulation. In doing so, the Court picked out the precise weakness which

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57. *Id.* at 382-384.



Judge Learned Hand had objected to some forty years earlier.

The impact of *Butler* was felt almost immediately. Several states repealed statutes which were probably unconstitutional under the *Butler* ruling, and other states acted after their statutes had been invalidated by court decisions.<sup>58</sup> In Virginia the provisions of Virginia Code Annotated 1950, § 18-113, almost identical to the statute involved in *Butler*, were challenged in *Goldstein v. Commonwealth*.<sup>59</sup> The Supreme Court of Appeals, relying on *Butler*, said:

We are of opinion that so much of Code, § 18-113 as undertakes to provide a standard of judging obscenity dependent upon the undesirable effect the offensive material may have upon youth is unconstitutional and invalid. Since the conviction of the appellant was based upon such a standard, we are constrained to reverse the judgment appealed from.<sup>60</sup>

Following this, in 1960 the General Assembly of Virginia enacted a comprehensive statute to deal with obscenity.<sup>61</sup>

Having broken the logjam in *Butler*, the Supreme Court in two decisions some three months later was faced with a flood of unanswered questions. By then the unanimity of the Court had disappeared, and in the journey through the shoals and rapids, most of the justices took different rafts, so that to the present it is difficult to tell which raft is in the mainstream. The two decisions, *Roth*

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58. Lockhart & McClure, *supra* note 53, at 17-18.

59. 200 Va. 25, 104 S.E. 2d 66 (1958).

60. *Id.* at 29.

61. VA. CODE ANN. 1950 § 18.1-227-236. For a comment see 17 WASH. & LEE L. REV. 322, 327-28 (1960).

v. *United States* and *Alberts v. California*,<sup>62</sup> were decided together and produced four written opinions. In *Roth* the constitutionality of the federal statute prohibiting the mailing of obscene material was questioned, and in *Alberts* the California Penal Code prohibiting sale of obscene material was challenged. In both cases the statutes were upheld and the convictions affirmed. Brennan, speaking for the majority, stated:

[T]he dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.<sup>63</sup>

In Brennan's view it was clear from the history of the first amendment that, despite its unconditional phrasing, it was not intended to protect every utterance.<sup>64</sup> What is the significance of thus classifying "obscene speech" as not speech or expression within the meaning of the first amendment? By adopting this "two-level theory"<sup>65</sup> of

62. 354 U.S. 476 (1957). For an excellent account of these cases see Lockhart & McClure, *supra* note 53, at 19-29; Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUPREME COURT REVIEW 1 at 7-28 (1960).

63. *Supra* note 62, at 481. Brennan noted that no question was presented as to the obscenity of the material involved in either case.

64. *Id.* at 483. Kalven, *supra* note 62, at 9, expressed great difficulty with the logic of this approach. For a rebuttal of the historical argument see Douglas, concurring in *Fanny Hill*, *supra* note 4, at 428-430.

65. In doing so the majority relied on its holdings that libel is not speech within the protection of the first amendment, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Schenck v. United States*, 249 U.S. 47 (1919). An outstanding authority, Kalven, *supra* note 62, at 17 expressed concern with this formulation: "It [*Roth* majority] is un-

speech, Brennan avoided a difficult question which was argued in *Roth* and which had earlier been argued but undecided in *Doubleday*.<sup>66</sup> The argument was that the traditional test of when speech may be restrained under the first amendment—the “clear and present danger” test—should apply in obscenity cases.<sup>67</sup> It has been seriously questioned whether any such danger of anti-social conduct resulting from obscene material can be shown from any empirical data or other reliable source. Indeed, many writers conclude that there is no provable relationship between use of pornographic materials and anti-social conduct.<sup>68</sup> If the “clear and present danger” test were applied to obscenity, the probable result would be that no obscene publication could be suppressed.<sup>69</sup>

In disposing of the freedom of expression considerations, Brennan stated: “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing

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satisfactory, too, because in an effort to solve the small problem of obscenity, it gave a major endorsement to the two-level theory that may have unhappy repercussions on the protection of free speech generally.”

66. See discussion on *Doubleday*, *supra* page 301.

67. Query as to whether *Dennis v. United States*, 341 U.S. 494 (1951) modifies the traditional test and introduces a “balancing” factor by saying at 510, “In each case [courts] must ask whether the gravity of evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” For a discussion of this, see Lockhart & McClure, *supra* note 8, at 363-368.

68. For an excellent survey of the studies made of the relationship of obscenity and pornography to conduct, see Cairns, Paul & Wishner, *supra* note 27; Rogers, *supra* note 1, at 431-438. At best the “evidence” seems to be inconclusive, and there is a great need for study in this area.

69. The American Civil Liberties Union, which has been quite active in opposing censorship, has admitted in its *amicus* briefs that this is the probable result. Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L. J. 127 at 131, n. 19 (1966).

climate of opinion—have the full protection of the guaranties.”<sup>70</sup>

Brennan then made an attempt to define obscenity:

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest, [adding by way of a footnote] *i.e.*, material having a tendency to excite lustful thoughts . . . We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code, § 207-10(2) (Tent. Draft No. 6, 1957) *viz.* “. . . 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 . . . .”<sup>71</sup>

In speaking of the *Hicklin* rule, Brennan said: “Some American courts adopted this standard, but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>72</sup> He acknowledged that such a test met constitutional requirements.

These comments of Brennan—“slightest redeeming social importance,” “predominant appeal to prurient interest” and “substantially beyond contemporary community standards”—spawned later controversy: Are they indispensable and independent elements for censorship?

70. *Roth, supra* note 62, at 484.

71. *Id.* at 487. Equating of the Model Penal Code's definition with the various definitions established by cases seems to do injustice to the Code as was pointed out by Harlan's dissent in *Roth, supra* note 62, at 499.

72. *Id.* at 489.

Chief Justice Warren concurred in the result in *Roth* and *Alberts* but would have limited the decision to the facts of the cases. He expressed concern with the broad language used by Brennan and feared that it might be applied to the arts, sciences and communication generally. Warren made a significant observation:

That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight States as well as Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or work exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.<sup>73</sup>

Warren argued that the central issue was the conduct of the defendant, not the book or material. To Warren both defendants were purveying matter openly advertised to appeal to the erotic interest of customers and were engaged in commercial exploitation of prurient interests.

Justice Harlan concurred in the result in *Alberts* but dissented in *Roth*. Harlan had serious misgivings with what he considered the majority formula: obscenity is not within the area of protected speech and press and is a classifiable genus of speech. In Harlan's view this reduced the *constitutional* question of whether a particular book can be suppressed to a question of fact to be re-

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73. *Id.* at 495.

solved by the finder of fact. To Harlan, each book sought to be suppressed raises individual constitutional questions to be resolved finally by an appellate court for itself and the responsibility for making the constitutional determination in each case can not be avoided by relegating it to a factual labelling of "obscene" by the trier of fact.

For Harlan, *Roth*, dealing with federal statutes, posed a different problem than *Alberts*, involving a state statute. Harlan considered the scope of review in *Alberts* to be narrow:

We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We can inquire only whether the State action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power . . . . The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of "ordered liberty."<sup>74</sup>

The California legislature, in Harlan's opinion, would not be irrational in determining that pornography can induce sexual conduct obnoxious to the moral fabric of society and could reasonably draw the inference that indiscriminate dissemination of such materials would have an eroding effect on moral standards. He further stated:

Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided. Since the domain of sexual morality is pre-eminently a matter of state concern, this Court

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74. *Id.* at 501.

should be slow to interfere with state legislation calculated to protect that morality.<sup>75</sup>

*Roth*, however, presented to Harlan a question under the first amendment significantly different from that of state legislation under the fourteenth:

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. . . ." Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State may be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books. Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterly's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But

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75. *Id.* at 502.

the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book."<sup>76</sup>

Harlan, following this concept of federalism, expressed the view that federal statutes could constitutionally reach only "hard-core" pornography. He would have reversed Roth's conviction, because the material was not "hard-core" and because the federal government has no power to bar sale of books because they might lead to any kind of "thoughts."

Douglas and Black dissented in both *Roth* and *Alberts*, arguing that the convictions could not be upheld under "the First Amendment, which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States."<sup>77</sup>

They expressed the opinion that:

[B]y these standards [used in *Alberts*] punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded that speech to be punishable must have some relation to action which could be penalized by government. This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. . . . To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment. . . . If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But

76. *Id.* at 505-506.

77. *Id.* at 508.



it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.<sup>78</sup>

The gist of Douglas and Black's argument was that government should be concerned with anti-social *conduct*, not utterances or thoughts. To Douglas, the first amendment should allow protests even against the moral code that the standard of the day sets for the community; but to suppress expression, it must be so "closely brigaded with illegal action as to be an inseparable part of it." Douglas' view is that:

The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position. . . . I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.<sup>79</sup>

From *Roth* in 1957 to 1966, the status quo prevailed to a large extent, if there was any "status" during that time. Several cases dealing with obscene publications found their way to the United States Supreme Court, but, apparently from the diversity of opinion within the Court, did not result in written opinions. These *per curiam* opinions all reversed convictions, including those involving a nudist and a homosexual magazine.<sup>80</sup> The im-

78. *Id.* at 509-510.

79. *Id.* at 514.

80. *Mounce v. United States*, 355 U.S. 180, reversing 247 F.2d 148 (9th

fact of these *per curiam* decisions, however, indicated to law enforcement officials the reach of freedom of expression and the narrow limits of censorship of obscenity. It became apparent that law enforcement officials could move with assurance only against "hard-core" pornography.<sup>81</sup>

Following these *per curiam* decisions, the Court decided a significant case which reflected the Court's thinking on "ideological" or "thematic" obscenity. In *Kingsley International Pictures Corp. v. Regents of University of New York*,<sup>82</sup> the New York courts had denied a license to a French film version of *Lady Chatterly's Lover* because it portrayed acts of sexual immorality—adultery—"as desirable, acceptable or proper patterns of behavior" even though the film was not obscene.<sup>83</sup> The Supreme Court was unanimous in reversing, although various opinions and grounds for the reversal were expressed. The majority opinion of Stewart held that the action of New York unconstitutionally infringed on the basic guarantee of freedom to advocate ideas. As Brennan had pointed out in *Roth*, the freedom to advocate unorthodox, controversial or even ideas hateful to the prevailing climate have the full protection of the constitutional guarantees.

Many proponents of censorship were shocked by the

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Cir. 1957) ("art" magazine); *One, Inc. v. Olsen*, 355 U.S. 371 (1958), reversing 241 F.2d 772 (9th Cir. 1957) (homosexual magazine); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958), reversing 249 F.2d 114 (D.C. Cir. 1957) (nudist magazine). For comment on these cases see Kalven, *supra* note 6, at 42-44; Lockhart & McClure, *supra* note 53, at 32-39.

81. Gerber, *A Suggested Solution to the Obscenity Problem*, 112 U. PA. L. REV. 834, 842 (1964), concluded that only hard-core pornography was obscene. Federal officials appear to have come to the same conclusion. Lockhart & McClure, *supra* note 53, at 35, n. 170.

82. 360 U.S. 684 (1959).

83. *Id.* at 686-7.

decision which they considered had given constitutional protection to "ideological" obscenity and the advocacy of what, by many, would be considered immoral ideas. Some congressmen said that the Court had endorsed adultery. Other persons said the Court was anti-Christian and part of a pro-Communist conspiracy.<sup>84</sup>

During the period between *Roth* and *Ginzburg*, the Court decided a case in 1959 which, although it did not contribute to the developing concept of obscenity, may yet have a significant effect on censorship of obscenity by means of criminal sanctions. *Smith v. California*<sup>85</sup> reversed a conviction under a municipal ordinance which had been construed to impose absolute or strict criminal liability on a book dealer for possession of an obscene book without requiring any element of scienter.

Brennan spoke for a majority of five in saying:

By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.<sup>86</sup>

Brennan took great pains to point out that *Smith* was

84. Gerber, *supra* note 81, at 842; Lockhart & McClure, *supra* note 53, at 42.

85. 361 U.S. 147 (1959).

86. *Id.* at 153.

not deciding "what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock" but that a complete elimination of all mental elements from the crime would not meet constitutional requirements.<sup>87</sup>

Another case decided during this period of turmoil within the Court is worthy of note. The written opinion in *Jacobellis v. Ohio*<sup>88</sup> probably represents the views of only Brennan and Goldberg, but gives some insight into Brennan's view of *Roth*. Jacobellis had been convicted in Ohio of possessing and exhibiting an obscene film entitled *Les Amants* or *The Lovers*. This conviction was reversed by the United States Supreme Court. To Brennan, the dispositive question was whether the state court had properly found the film obscene and thus not entitled to protection of the first and fourteenth amendments. Brennan faced the suggestion that obscenity was a factual determination and that the Supreme Court's only function on review was to determine, as in other areas, whether the ruling below was supported by sufficient evidence. To this Brennan replied:

The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an

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87. Kalven, *supra* note 6, at 35-40, discusses the case and suggests a dilemma is presented by the scienter requirement; the vagueness of what is obscene (casually dismissed in *Roth*) may abort efforts to prove scienter. If the prosecution has to prove "knowledge" as scienter, the burden would be an almost impossible one in the case of a bookdealer.

88. 378 U.S. 184 (1964).

issue of constitutional law. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of "no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case."<sup>89</sup>

Thus, Brennan seemed to have come very close to accepting Harlan's view that each case presents a constitutional question, not one of fact, to be determined ultimately by the Court. Thus, this results in making the Supreme Court the final arbiter of what is obscene.<sup>90</sup> If this is true, what is the role and function of a jury, thought to be endowed with special competency in discerning the "community standard" of obscenity?<sup>91</sup> Is the jury merely to act as a "screening committee" which

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89. *Id.* at 187.

90. For a strong criticism of this view of the Court's assuming "an impossible task" of applying an "impossible test" (*i.e.*, a "national community standard") and making an independent decision in each obscenity case, see O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAW. 1 (1964). They suggest the question is one to be left to the jury under proper instructions—whatever the Supreme Court ultimately decides are proper instructions on obscenity. O'Meara and Shaffer admit that a jury could not reflect a "national standard" which to them is pure fiction. This view is shared by several members of the Court. See discussion *infra*, page 318-319. Query as to whether the standard is national, see *infra*, page 318-319, 324.

91. Brennan dissenting in *Kingsley Books Inc. v. Brown*, 354 U.S. 436, 448 (1957), suggested a jury trial was necessary in obscenity cases: "The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant of right a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene."

determines if the questioned material goes beyond community standards? What then is the function of the court? Is it to determine if there is sufficient evidence to go to the jury? Is it to weigh the obscenity against other considerations in determining the constitutionality of the censorship as may be suggested by *Dennis*?<sup>92</sup> Certainly there is much to be said for a court's having the final decision here when such fundamental concerns as free press, free speech and free expression must be considered in conjunction with what may be other valid community interests and social concerns. Many juries may be unaware of such constitutional considerations or may easily lose sight of them.<sup>93</sup>

Brennan in *Jacobellis* went on to emphasize, as he had in *Kingsley International Pictures*,<sup>94</sup> that:

[O]ur recognition in *Roth* [was] that obscenity is excluded the constitutional protection only because it is utterly without redeeming social importance . . . [material] dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any form of social importance, may not be branded as obscenity. . . . Nor may the constitutional status of the material 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."<sup>95</sup>

Thus Brennan seemed to say that "utterly" means

92. *Supra* note 67.

93. It is not difficult to find intelligent, concerned people who consider the problem to be a simple one of "getting rid of the dirty books," unaware that legitimate, basic questions of freedom of expression are involved. One is reminded of the early case of *Bennett v. United States* where the court quite easily stated, "There is no question of freedom of the press." See *supra*, page 295-296.

94. *Supra* note 82.

95. *Supra* note 88, at 193.

precisely what it says. Brennan continued to say that "it should also be recognized that the *Roth* standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matters.' This was a requirement of the Model Penal Code test that we approved in *Roth*." Further, Brennan suggested that the "contemporary community standard" of *Roth* is not a local one, but is "society at large, the public, or people in general."<sup>96</sup>

Justice Stewart concurred in *Jacobellis*, acknowledging that *Roth* was susceptible to several interpretations, but expressed the view that censorship, under the first and fourteenth amendments, is limited to "hard-core pornography," which Stewart did not define beyond saying, "I know it when I see it, and the motion picture involved in this case is not that."<sup>97</sup>

Chief Justice Warren, joined by Clark, dissented believing that *Roth* had established a workable standard, not without its problems which, much like "negligence," must be tempered with a rule of reason. More significantly, Clark and Warren felt that the "community standard" of *Roth* meant community standard, not a national standard, which to them was a standard that was not provable. Warren acknowledged and seems to accept that the result of such a standard might well be the banning of a book in one community but not in another.<sup>98</sup> To

96. *Id.* at 201.

97. *Id.* at 197. Query as to whether such a definition would meet due process requirements. Later, in *Ginzburg*, Stewart, without attempting to define "hard-core," gave a description of "hard-core." 383 U.S. at 499, n. 3.

98. Would such an approach allow for the flexibility and experimentation urged by Harlan? On the other hand, how could a publisher of questionable material determine the community standard of numerous communities? Would this in itself have an inhibiting effect on distribution of questionable material which would not be obscene?

Warren and Clark, the role of the Supreme Court in obscenity cases, under the *Roth* rule, should be limited to a review of whether there was "sufficient" evidence for a finding of obscenity, and the Court would thus not act as the ultimate censor. On this basis Warren and Clark would have affirmed the conviction. Warren again expressed his concern with quibbling over definitions of obscenity while "those who profit from the commercial exploitation of obscenity continue to ply their trade unmolested." To Warren the use to which materials are put should be considered: "a technical or legal treatise on pornography may well be inoffensive under most circumstances but obscene when sold or displayed to children."<sup>99</sup>

Although *Jacobellis* raised more questions than it answered, the relatively quiet water which had existed from 1957 was churned into white water in June of 1966 by a torrent of 14 opinions handed down in *Ginzburg*,<sup>100</sup> *Mishkin*<sup>101</sup> and *Fanny Hill*.<sup>102</sup> From the diversity of opinions, it is difficult to determine what course the Court is charting for the future. Perhaps the safest comment is that the Court has not yet realized any unanimity as to what port it is headed for, nor a course to plot.

*Ginzburg*, the most publicized of the three, involved a prosecution for mailing, in violation of federal statutes, three publications allegedly obscene: a magazine entitled *Eros*, a newsletter called *Liason*, and *The Housewife's Handbook on Selective Promiscuity*. Ralph Ginzburg, the publisher-defendant, was a New Yorker, but the criminal prosecution was initiated not in New York but in Philadelphia under an amendment to the obscene mail statute, made in 1958, which permitted prosecution not only where

99. *Supra* note 88, at 201.

100. *Supra* note 2.

101. *Supra* note 3.

102. *Supra* note 4.



the obscene material is mailed, but where it is received.<sup>103</sup> Ginzburg had waived a jury and was found guilty by the trial judge.<sup>104</sup> After it was affirmed by the Court of Appeals,<sup>105</sup> it was brought to the Supreme Court. Five justices voted to affirm the conviction with four dissenting. Brennan again spoke for the majority, but the previously expressed views of Warren stand out clearly in the opinion. The second paragraph of the opinion contains much of what is significant in *Ginzburg*:

In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. . . . [W]e view the publications against a background of commercial exploitation of erotica solely for the sake of their

103. 18 U.S.C. 3237. Is talk of a "national" community standard academic in the case of a publication mailed to points all over the United States, and a prosecutor is free to select the most favorable community? Warren and Clark appear to think this is the case. Indeed, Ralph Ginzberg has suggested that this is precisely what happened in his case and that Philadelphia was picked for its favorable climate as it was in the midst of a crusade against "smut." For Ginzburg's account of the case, see *Fact Magazine*, vol. 2, no. 3, May-June, 1965. For an outstanding study of the statute, see *Multi-Venue and the Obscenity Statutes*, 115 U. PA. L. REV. 399 (1967). The constitutionality of the multi-venue statute is currently being challenged. See Ablard, *supra* note 6, at 91, n. 33.

104. 224 F. Supp. 129 (E.D. Pa. 1963).

105. 338 F. 2d. 12 (3d Cir. 1964).

prurient appeal. The record in that regard amply supports the decision of the trial judge . . .<sup>106</sup>

What was this background which made these publications the "stock in trade of the sordid business of pandering"? *Eros* had sought mailing privileges from the post offices in Intercourse and Blue Ball, Pennsylvania, and had obtained such privilege from Middlesex, New Jersey. According to the majority, the "leer of the sensualist" permeated the advertisement of the publications, circulars stressed the sexual candor of the publications, and the publishers emphasized that they would take full advantage of the unrestricted license they felt the law allowed. The solicitation for subscriptions and sales was widespread and apparently indiscriminate.<sup>107</sup> From this Brennan concluded:

The deliberate representation of petitioner's publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for any saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the market place or a spurious claim for litigation purposes. Where the purvey-

106. *Supra* note 2, at 465-466.

107. Ginzburg himself admitted that mailing lists obtained from other magazines were used for advertisement for *Eros*. FACT Magazine, *supra* note 103.

or's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. . . . The fact that they are used as a subject of pandering is relevant to the application of the *Roth* test.<sup>108</sup>

Is the Court suggesting that because of the offensive character of the advertisement and circulars sent out, which in many cases would be received unsolicited, the publications may be held to be obscene? It should be noted that the government at the trial had stipulated that the circulars were themselves not obscene.<sup>109</sup> Is the Court suggesting that, in a close case, "pandering" will swing the balance? If so, why only in a close case? Brennan later stated: "We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test."<sup>110</sup> Or is the Court in effect saying that if the purveyor "labels" it as obscene by advertisement appealing to the prurient interest, then the Court will accept that evaluation? The Court later, in pointing out that its pandering test would not necessarily be a blanket suppression of materials found obscene, said: "All that will have been determined is that questionable publications are obscene in a context which brands them as obscene as that term is defined in *Roth* . . ."<sup>111</sup> In other words, without the pandering the materials might not be obscene. The Court also stated in reference to the *Handbook*: "They proclaimed its obscenity; and we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a

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108. *Supra* note 2, at 470-471.

109. *Id.* at 465, n. 4.

110. *Id.* at 474.

111. *Id.* at 475.

whole obscene. . . ."<sup>112</sup> Has the Court returned in some respects to the "partly obscene test" of *Hicklin*?<sup>113</sup> Clearly the Court has said the pandering aspect is a part of the *Roth* test. How can this be squared with the "utterly without redeeming social importance" requirement of *Roth* which Brennan in *Kingsley Books* indicated was not a weighing process?

Black dissented in *Ginzburg*, restating his view that the federal government "is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct)."<sup>114</sup> However, Black had other basic objections to the *Ginzburg* conviction. To Black (a view also shared by Harlan) *Ginzburg* was being convicted by an *ex post facto* rewriting of the federal statute by the adoption of standards not contemplated by Congress, with the result that *Ginzburg* was convicted under an "amended" statute on which he had not been charged in the trial court.<sup>115</sup> Further, Black felt that the guidelines established by the majority in *Ginzburg* were so vague as to be meaningless, leaving an accused's fate to the whim of the trier of fact.<sup>116</sup> For Black, the judgment as to

112. *Id.* at 472.

113. Or even a wholly "non-obscene test"? The majority seemed to consider that the obscenity of the material itself was immaterial if there was pandering. How can the language in a "close case" be reconciled? The trial judge had concluded that only 4 of 15 articles in *Eros* were obscene. *Id.* at 471.

114. *Id.* at 476.

115. Ablard, *supra* note 6, at 89 points out that the brief of the Solicitor General did not even make the argument regarding advertisement in *Ginzburg* but argued that the material was obscene within the *Roth* definition. Ablard suggests that the pandering concept and stress on conduct was not a totally new direction in the law of obscenity but was a refinement of Warren's dissent in *Roth*. *Id.* at 88. One may well agree with this, but can a dissenting opinion justify *ex post facto* amending of a criminal statute?

116. Black's interpretation of *Ginzburg*, *Mishkin* and *Fanny Hill* was that three things must be proven to establish material as obscene: (1)

“prurient appeal” is so subjective as to produce no hope for uniformity in enforcement. Black further found no guidance as to whether the “community standards” are world-wide, nation-wide, section-wide, state-wide, county-wide, precinct or township-wide. In the final analysis he found it would be a personal judgment, the product of the attitude of the particular individual and place where the trial is held.

Harlan would have reversed Ginzburg’s conviction under his view that the federal government can constitutionally ban only “hard-core pornography.” He had additional difficulty with the majority ruling:

The First Amendment, in the obscenity area, no longer fully protects material on its face non-obscene, for such material must now also be examined in the light of the defendant’s conduct, attitude, motives. This seems to me a mere euphemism for allowing punishment of a person who mails otherwise constitutionally protected material just because a jury or a judge may not find him or his business agreeable. Were a State to enact a “panderer” statute under its police power, I have little doubt that—subject to clear drafting to avoid attacks on vagueness and equal protection grounds—such a statute would be constitutional. . . . What I fear the Court has done today is in effect to write a new statute, but without the sharply focused definitions and standards necessary in such a sensitive area. Casting such a dubious gloss over a straightforward 101-year-old statute is for me an astonishing piece of judicial improvisation.

It seems perfectly clear that the theory on which these convictions are now sustained is quite dif-

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appeal to the prurient interest, (2) patently offensive and (3) no redeeming social value. *Supra* note 2, at 478-480.

ferent from the basis on which the case was tried and decided and affirmed.<sup>117</sup>

Stewart dissented, restating his view expressed in *Jacobellis* that only "hard-core pornography" could be suppressed. He believed that the material in *Ginzburg* was not hard-core and would have reversed the conviction. He also set forth his view on the meaning of the first amendment:

Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can truly be strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me, may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself.<sup>118</sup>

Douglas, dissenting in both *Ginzburg* and *Mishkin*, would go even further with this "freedom of choice" idea:

Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some. . . . Why is it unlawful to cater to the needs of

117. *Id.* at 494-495.

118. *Id.* at 498.

this group? They are, to be sure, somewhat off-beat, nonconformist, and odd. But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like "rock and roll." Some are "normal," some are masochistic, some deviant in other respects, such as the homosexual. . . . But why is freedom of the press and expression denied them? Are they to be barred from communicating in symbolisms important to them? When the Court today speaks of "social value," does it mean a "value" to the majority? Why is not a minority "value" cognizable? The masochistic group is one; the deviant group is another. Is it not important that members of those groups communicate with each other? . . . If we were wise enough, we might know that communication may have greater therapeutical value than any sermon that those of the "normal" community can ever offer. But if the communication is of value to the masochistic community or to others of the deviant community, how can it be said to be "utterly without any redeeming social importance"? . . . Catering to the most eccentric taste may have "social importance" in giving that minority an opportunity to express itself rather than to repress its inner desires. . . . How can we know that this expression may not *prevent* anti-social conduct?<sup>119</sup>

Brennan again wrote for the majority in *Mishkin*<sup>120</sup> in upholding Mishkin's conviction under a New York statute for publishing and possessing obscene books with intent to sell them. In the opinion of the majority, Mishkin was convicted not for what he said or believed but for his conduct in producing and selling some 50 "pulp" books, many dealing with deviations such as sadomacho-

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119. *Id.* at 489-491.

120. *Supra* note 3.

ism, fetishism, and homosexuality. Many of the books had covers showing scantily clad women being whipped, beaten, tortured or abused. One author testified that Mishkin insisted that the books be "full of sex scenes and lesbian scenes . . . the sex had to be very strong . . . it had to be clearly spelled out . . . the sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men . . . sex in an abnormal and irregular fashion."<sup>121</sup> Mishkin had provided the authors with a text on abnormal sex behavior as a source of material.

The majority took the view that the New York courts, in the statute involved, had interpreted obscene to cover only "hard-core pornography" which the majority considered more stringent than the *Roth* definition and thus within constitutional bounds.

One of Mishkin's arguments was somewhat novel. He argued that the material on flagellation, fetishism and lesbianism was so bad that it did not appeal to the average person's prurient interest and "instead of stimulating the erotic, they disgust and sicken." Brennan responded to this argument by saying:

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. . . . We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the

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121. *Id.* at 505.



recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test.<sup>122</sup>

Stewart again dissented believing that the material was not hard-core. Black also dissented, expressing his view that the Court was without constitutional power to censor speech or press, regardless of the particular subject discussed. Black also felt that if there must be censorship the federal judiciary was the least appropriate branch of government to take over such responsibilities.

*Fanny Hill*<sup>123</sup> also elicited a diversity of views, with five written opinions. *Fanny Hill* was not a criminal prosecution, as in *Ginzburg* and *Mishkin*, but was an *in rem* proceeding brought under Massachusetts statutes to have the book declared obscene. The Massachusetts Supreme Judicial Court had affirmed the finding that *Fanny Hill* was obscene.<sup>124</sup> However, this was reversed by the United States Supreme Court. Brennan, in an opinion joined by Fortas and Warren, voted for reversal. They concluded that the Massachusetts court had misinterpreted and misapplied an element of the *Roth* test. The Massachusetts Supreme Judicial Court had said: "We do not interpret the 'social importance' test as requiring that a book which appeals to prurient interest and is

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122. *Id.* at 508-509. Is the Court re-introducing a form of the *Hicklin* "least common denominator" test, *i.e.*, appeal to the prurient interest of a deviant group? From the last sentence of the quote it would appear that the Court felt it was avoiding this aspect of *Hicklin*.

123. *Supra* note 4.

124. *Attorney General v. A Book Named John Cleland's Memoirs of a Woman of Pleasure*, 349 Mass. 69, 206 N.E. 2d 403 (1965). Under the Massachusetts statute this finding would have been conclusive in Massachusetts in subsequent actions. The practical effect of such an *in rem* finding would be a banning of the book throughout Massachusetts.

patently offensive must be unqualifiedly worthless before it can be deemed obscene."<sup>125</sup>

To this Brennan replied:

The Supreme Judicial Court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional 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.<sup>126</sup>

Brennan pointed out that *Memoirs (Fanny Hill)* was being judged in the abstract and that circumstances of production, sale and publicity had not been considered, but stated that such factors would be relevant in determining if a book is constitutionally protected and as in *Ginzburg* "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value."<sup>127</sup>

125. *Id.* at 72.

126. *Fanny Hill*, *supra* note 4, at 419.

127. *Ibid.* From the tone of the opinion and some of the language used, the writer gets the impression that a significant number of the Court would be quite unwilling to uphold an abstract *per se* determination of obscene. Brennan, speaking for the "majority" said that in judging in the abstract all possible uses would have to be considered, but that a book found not obscene in the abstract could be obscene under the pandering concept. Gerber, *supra* note 81, at 855, suggested prior to *Fanny Hill* that the law should develop to the point where nothing would be obscene in the abstract. In the comment, *Religious Institutions and Values*, *supra* note 14, at 771, this conclusion was drawn: "Far more importantly *Ginzburg*—along with *Fanny Hill* and *Mishkin*—may signal the beginning of the end of obscenity regulation premised on the nature of the material alone." Query, why did Bren-

Douglas concurred in the result, but preferred to base reversal on his view that the "First Amendment does not permit the censorship of expression not brigaded with illegal action" although he considered the record devoid of any proof that the book was "utterly without redeeming social importance." To Douglas the absolute terms of the first amendment were to guarantee freedom of expression of dissenters and minorities but "censorship is the most notorious form of abridgment. It substitutes majority rule where minority tastes or viewpoints were to be tolerated."<sup>128</sup>

Justice Clark felt constrained to speak out in dissent: "I have 'stomached' past cases for almost ten years without much outcry. Though I am not known to be a purist—or a shrinking violet—this book is too much even for me."<sup>129</sup> Clark felt that the opinion of Brennan in *Fanny Hill* was adding to the *Roth* test in which Clark had been the deciding vote. In Clark's view *Roth* had established only a two element test: the book must be (1) judged as a whole, and (2) judged in terms of its appeal to the prurient interest of the average person applying contemporary community standards.<sup>130</sup>

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nan select *Fanny Hill* to emphasize "utterly without redeeming social value" rather than *Ginzburg*? In *Ginzburg* part of the material clearly had social value. See *supra* note 113.

128. *Fanny Hill*, *supra* note 4, at 427.

129. *Id.* at 441.

130. Clark's formula of *Roth* seems to be this: Dominant appeal taken as a whole + prurient appeal by community standards = obscenity of such slight social value that it is not constitutionally protected. Clark's view does find some support in the language used by Brennan in *Roth*. Would Clark's position be more tenable, in the light of the language of *Roth*, if his formula were: Dominant appeal + prurient appeal judged by community standards = utterly without redeeming social value, therefore not within the protection of the first amendment? Brennan's *Fanny Hill* formula seems to be: Dominant appeal taken as a whole, which appeals to prurient interest + patently offensive by contemporary community standards + utterly without redeeming social value = obscenity not within the protection of the first amendment.

Clark acknowledged that Brennan had referred to “utterly without redeeming social value” in *Jacobellis*, but argued that it had not been suggested as a requirement until *Fanny Hill*. Clark suggests that Brennan’s “utterly without redeeming social value” requirement has re-introduced the question of whether there is any relationship between obscene publications and anti-social conduct.<sup>131</sup> Clark said:

The question of anti-social conduct thus becomes relevant to the more limited question of social value. Brother Brennan indicates that the social importance criteria encompasses only such things as the artistic, literary, and historical qualities of the material. But the phrasing of the “utterly without redeeming social value” test suggests that other evidence must be considered. To say that social value may “redeem” implies that courts may balance alleged esthetic merit against the harmful consequences that may flow from pornography. . . . It at least anticipates that the trier of fact weigh evidence of the material’s influence in causing deviant or criminal conduct, particularly sex crimes, as well as its effect upon the mental, moral and physical health of the average person.<sup>132</sup>

Harlan would have upheld the finding in *Fanny Hill* under his view that the fourteenth amendment controls in state censorship of obscenity and 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.”<sup>133</sup>

131. This was one of the problems which was ducked by *Roth*’s evasion of the “clear and present danger” test. See *supra*, pages 305-306.

132. *Fanny Hill*, *supra* note 4, at 451. Douglas would argue that obscenity itself may have social value. See *infra*, pages 325-326.

133. *Id.* at 458.

White, in dissent also, read *Roth* as establishing a two element formula for obscenity: predominant theme appeals to the prurient interest + exceeding customary limits of candor=utterly without redeeming social value which is, therefore, not within the protection of the first amendment. In White's view "social importance" is not an independent test "but is relevant only in determining the predominant prurient interest of the material . . ."<sup>134</sup>

### *The Aftermath*

Justice Harlan, dissenting in *Fanny Hill*, made this observation: "The central development that emerges from the aftermath of *Roth* . . . is that no stable approach to the obscenity problem has yet been devised by this Court."<sup>135</sup> If this observation is true, perhaps part of the fault is that a stable approach has not yet been presented to the Court. To the writer the pandering concept introduced in *Ginzburg* is a laudable development in many respects. However, one may disagree with the judicial amending of the statute and feel that the change should have come from the legislative branch. It is apparent that the Court has been influenced by the American Law Institute's Model Penal Code. In *Roth* the Model Penal Code definition of obscenity was inserted by Brennan, although he suggested it made no change in the case law definition. The pandering concept is the heart of the Model Penal Code approach to control of obscene publications.<sup>136</sup> The pandering concept and *Fanny Hill* make it

134. *Id.* at 462.

135. *Id.* at 455.

136. "The gist of the offense we envisage, therefore, is a kind of 'pandering,'" MODEL PENAL CODE § 207.10 at 14 (Tent. Draft No. 6, 1957). For a discussion of the Model Penal Code approach see Schwartz, *Morals Offenses and the Model Penal Code*, 63 COL. L. REV. 669 (1963). Gerber, *supra* note 81, at 838, says that the Model Penal Code which appeared shortly before *Roth* merely served to compound the confusion.

clear that obscenity is not a constant, but a variable depending on yet unknown factors. In this respect, the shift of emphasis, if there has been a shift, from the material itself, to the conduct of the panderer may be a welcome development. Such an emphasis would put the approach to obscenity nearer to the traditional concern of criminal law—anti-social conduct.<sup>137</sup> On the other hand, has the pandering concept merely pushed the battleground from the book to the bookdealer or publisher? What is “pandering” and how much exploitation of sex and erotica is permissible? Much legitimate advertisement makes use of “sex appeal.” *Ginzburg* suggests the advertisement itself need not be obscene. Is pandering a variable—the same in Berkeley as in the “Bible Belt”? Is it to be used only in close cases? How is the pandering concept reconciled with Brennan’s element of “utterly without redeeming social value”? At this point whether Brennan’s view on this will prevail is not clear, as Brennan apparently spoke only for himself and two others. The question of whether it is to be a “national standard” is still unresolved and in the view of Clark and Warren a national standard does not exist and could not be applied if it did. Even the question of whether there should be any censorship is still being debated by the Court. The previously unresolved questions and the additional questions raised by *Ginzburg*, *Mishkin* and *Fanny Hill* are legion and have been adequately dealt with elsewhere.<sup>138</sup>

Before considering alternatives to whatever approach the Supreme Court may be taking, and considering what should be done, the aims or justification of censorship of obscenity should be considered to give some basis for evaluation.

137. See comment, *Religious Institutions and Values*, *supra* note 14, at 771.

138. See especially Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUPREME COURT REVIEW 1; Monahan, *supra* note 69; Sebastian, *Ob-*

*Censorship—Why?*

Unfortunately, courts, legislatures, and proponents have failed to clearly articulate the justification or reasons for censorship. Treatment of the aims of censorship has been left primarily to writers and opponents of censorship who have suggested reasons and then proceeded to refute the validity of their rationale. The liberal "free speech-free press" opponents of censorship have many times appeared to win by default, being more articulate in expounding the dangers of censorship and the virtue of free unlimited expression. The values of freedom of expression are unquestioned. Free speech, in its broad sense, is the testing ground and crucible of thoughts, ideologies and political, social and religious philosophies and theories—popular and unpopular, just and unjust, good and bad—and the medium through which the rights and needs of the minority, as well as the majority and dissenters are protected and respected. The hope and belief is that out of such free exchange will come innovations and progress, "wisdom" and "good." Douglas<sup>139</sup> and Stewart<sup>140</sup> have clearly challenged with an alternative: Are we willing to live by this ideal of the first amendment? Is this what Brennan is trying to say with his "utterly without redeeming social value" requirement? That is, if the expression contains any idea or thought—good or bad, accepted or unaccepted—it is immune from censorship and cannot be banned in the abstract and in the proper context? Is Brennan grasping for what may be unobtainable, to keep all that has the slightest thematic value, yet to ban that which contributes nothing? As Harlan asked, is social value in expression

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*scenity and the Supreme Court: Nine Years of Confusion*, 19 STAN. L. REV. 167 (1966).

139. *Supra*, page 312.

140. *Supra*, page 325.

limited to propounding of ideas and thoughts? What is and how do we judge "social value"? Douglas in reply would ask, may not pornography be of social value to those who have an interest in its prurient appeal? May it not be of therapeutic or cathartic value reducing anti-social conduct? White would ask, does not the fact that people buy and use pornography show its social value? Will banning of the "bad" tend to suppress the "good"? The dividing line is not clear and uncertainty as to where the line can and will be drawn under penal threat may well have an inhibiting effect.<sup>141</sup> In the area of obscenity, at some point there must be a balancing of the values of free expression against any curbing of unlimited expression to protect other values of society. I submit that this is what Brennan is attempting to do in moving toward banning nothing in the abstract but banning some things used in the wrong context. What then are the values of society that censorship seeks to protect?<sup>142</sup>

(1) Offensiveness. The argument here is that to many

141. It should be noted that the rationale of *Smith v. California*, *supra* note 85, holding unconstitutional a statute which required no element of scienter, was the indirect inhibiting effect of the statute.

142. The best discussion of the goals or aims of censorship are: Lockhart & McClure, *supra* note 8, at 368-387; Sebastian, *supra* note 138 at 172-176; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COL. L. REV. 391 (1963). The latter is an excellent treatment of the moral and religious factors involved in censorship of obscenity. Henkin's position, somewhat simplified, is that obscenity regulation is legislation aimed at "sin." He concludes: "Laws against obscenity reflect values of morality, decency, and modesty inherited from an earlier age and from religious ancestors. These laws reflect, too, assumptions about the nature of character and morals. They assume a concept of 'corruption of morals' and assume that obscene material has such a corrupting effect." *Id.* at 411. For a reply to this see Schwartz, *supra* note 136, at 669-673. The best apology for censorship is found in the comments of the Model Penal Code, *supra* note 7. It is indeed unfortunate that more proponents of censorship do not inform themselves about what the reporters of the Model Penal Code say in defense of their position. They might speak with a better voice.



persons, pornography and obscene material are offensive and shocking and that therefore the state may protect citizens from such offensive material. The quick rejoinder made to this, in the area of written material, is that one is not involuntarily exposed to the contents of a book and should not complain or have to be protected from being offended by that which he seeks out. There is no obligation to continue reading that which is offensive. If protection from the offensive is a valid factor, is the current (?) definition of obscenity—that which *appeals* to the prurient interest—in step with this aim?<sup>143</sup>

(2) Obscene literature and pornography produce a stimulation of sexual impulses and thoughts that lead to conduct contrary to the laws of accepted moral conduct. The customary reply given to this is that there is no empirical or other reliable data which demonstrates that there is any cause-effect relationship between reading pornography and anti-social or criminal conduct.<sup>144</sup> The argument is that it has not been shown that such material leads to conduct, and in fact may *prevent* anti-social conduct.<sup>145</sup> The concern of criminal law has always been with

143. Lockhart & McClure, *supra* note 8, at 378, n. 495, suggest that the objection of the censors "is not that these books offend readers but that they delight them." They later said, "For hard core pornography appeals to the sexually immature because it feeds their craving for erotic fantasy; to the normal, sexually mature person it is repulsive, not attractive." *Supra* note 53, at 72.

144. For an excellent survey of the empirical and scientific data on the cause-effect problem see Cairns, Paul and Wishner, *supra* note 27; Rogers, *supra* note 1, at 431-438, discusses studies subsequent to those in Cairn, *et al.* See also Judge Frank's concurring opinion in *United States v. Roth*, 237 F.2d 796, 811-816 (2d Cir. 1956).

145. Douglas suggests that pornography may provide a "release valve" preventing unlawful conduct. See *supra*, pages 325-326. Clark, dissenting in *Fanny Hill*, 383 U.S. at 451-2, concludes that the evidence is not as clear as Douglas presents it, and that there is reliable information indicating such material does contribute to anti-social conduct. Harlan takes the view that a state legislature could rationally believe there is a cause-effect relation and legislate on that basis. *Supra*, page 309.

conduct, and mere thoughts without action have generally not been considered a proper area for imposing penal sanctions. If the aim is to prevent "evil thoughts," what thoughts are "evil"? Lockhart and McClure have pointed out that the creation of normal sexual thoughts and desire is neither immoral nor contrary to accepted sex standards, but is perfectly normal, natural and an absence of them would be abnormal.<sup>146</sup> If this be admitted as to "normal" thoughts, is there a valid interest in protecting against stimulation of abnormal, deviant sex thoughts? Should we tolerate material which encourages such thoughts, even if there is no link to conduct? As Rogers<sup>147</sup> has pointed out, much of the obscene material today deals with aberrant behavior. Many today would say that we should not encourage thoughts concerning the abnormal, but is this a valid basis for censorship? If obscenity legislation is aimed at sex thoughts, why should such thoughts be treated any differently than other thoughts or other "bad thoughts"? The causes of "evil" thoughts are complex; why proscribe only the obscene stimuli for such thoughts? Is legislating against "sinful thoughts" a valid governmental concern or one that under our constitutional system should be left to other means of controlling and influencing behavior and establishing moral and spiritual concepts, such as the family, the church and education? Another comment which is often made here is that, if preventing thoughts and conduct is the aim, the present approach of censorship has been a miserable failure.

(3) Ideological element. The reasoning given here is that by controlling obscenity the state seeks to protect the current moral standards from criticism or from being questioned. Under this view, widespread circulation of ob-

146. *Supra* note 8, at 379-382. They also suggest that a stimulation of normal sex thoughts may often be in the public interest.

147. *Supra* note 1.

scenity and material dealing with deviant sexual behavior may lead to a belief that one's morals are out of date, and to a questioning of whether they are out of step with the accepted mores. The fear is that the result will be a change in accepted standards. Certainly society has and should be interested in maintaining acceptable standards of conduct and certainly conduct is affected by what is thought to be "acceptable." However, can the espousal of ideas—however unpopular and non-acceptable to the majority—constitutionally be suppressed? The Court has been quite clear in its opposition to any type of "ideological or thematic" censorship as shown by *Kingsley Pictures*.<sup>148</sup> Should ideas regarding sex and sex behavior be treated differently from other ideas? Or are there certain basic standards which should not be open to challenge?<sup>149</sup>

(4) Prevention of extra-legal censorship. Every state and many foreign countries have some type of control of obscene publications. This is certainly some expression of the feeling of need for such control, whatever may be the unarticulated or poorly expressed reason. Without legal redress or a means to control what to many is a very basic problem, the argument is made that "vigil-

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148. *Supra* note 82.

149. Lockhart and McClure, *supra* note 8, at 375 suggest, "The remedy against those who attack currently accepted standards is spirited and intelligent defense of those standards, not censorship. This is the remedy guaranteed and required by the Constitution. Only through unlimited examination and re-examination, attack and defense, can come the ultimate perfection of these standards, and the understanding and grasp of the reasons that alone will insure their preservation, if sound." Is this too much fine theory, with its underlying assumption that such decisions as to standards will be made rationally, not emotionally, and that those making the choice are mature and qualified to make such decisions? Should "freedom of choice" be extended to all in the area of obscene publications or limited to those mature enough to make a more rational choice? Does youth seek out pornography for its saving ideological content or merely for its erotic value? Should there be a limited "Big Brother approach" here for youth? All censorship has a Big Brother quality.

ante" action would produce far greater harmful results than would any legal system supervised by the courts. Legal means of censorship reduce the pressure for "vigilante" or citizens' groups which might otherwise exercise almost unlimited censorship powers and fail to consider other basic values in their zeal to wipe out obscenity. To the writer, "vigilante" action does not present an attractive alternative to a legal approach to censorship.<sup>150</sup> Certainly those fearful of the harm which may result from obscenity cannot be denied the right to propagandize against dissemination of such materials as long as they do not use unlawful methods. Perhaps the liberal opponents of any type of censorship might well

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150. One needs only look at the history of such vigilante action to respect and fear the results. Lockhart and McClure, *supra* note 8, at 302-320, give an excellent account of how extra-legal organizations and groups operate. They describe the activities of groups such as the National Organization for Decent Literature, NODL, their standards or codes for censorship and their effectiveness through such means as blacklists of books, boycotts, direct contact with bookdealers and publishers and pressing for enforcement of obscenity laws. Such groups in many areas have been quite effective. *Id.* at 305, n. 71. In some areas they have succeeded in suppressing the sale of 300-750 paperback books. *Id.* at 310-311. However admirable the intent of such groups, one needs only to look at the impressive list of books, cited by Lockhart and McClure, which have been "banned," to become quite concerned with the result of secret blacklists based on clearly unconstitutional standards of obscenity. A partial list of blacklisted books shows the insidious nature of such unbridled censorship: Ernest Hemingway's *A Farewell to Arms*; James A. Michener's *Tales of the South Pacific*; Irwin Shaw's *The Young Lions*; Boccaccio's *Decameron* and Flaubert's *Madam Bovary*. Lockhart and McClure, *supra* note 53, at 6 continue their account of the methods and targets of the proponents of censorship and point out that beginning around 1957 there was an increase in the practice of using "blacklists" by police and prosecutors with threats of prosecution to dealers selling listed books. In some instances this practice was restrained by injunction. *Id.* at 7-8. Following this there was a rise in new organizations such as Citizens for Decent Literature, CDL, which have confined their activities more to arousing public opinion and encouraging and assisting law enforcement officials. Rogers, *supra* note 1, at 438-442, describes the recent activities of some of these citizen groups.

consider the alternatives: the very narrowly limited censorship by legal means as opposed to an effective vigilante form of censorship which could result in censorship of material having greater value than the borderline material presently suppressed under legal methods of censorship.

### *A Suggested Approach*

From all of the foregoing it is quite apparent that any sane approach to dealing with obscene publications is faced with complex problems without many clear guidelines as to the legal, political, social and religious factors which are involved. But in one area in the control of obscenity, the goal or aims may be clearer and more acceptable, infringe less on liberties and offer an alternative to "vigilante" action. Unfortunately, law enforcement officials have not used their strongest point to fight the smut peddlers nor in many cases have legislatures provided the machinery to do so. Brennan, in *Jacobellis*, suggested the approach: "State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination."<sup>151</sup>

At this point, it is questionable whether it would be politically expedient or feasible to abandon statutes dealing with distribution of obscenity generally. In the future their utility may be of little value, depending upon the development of the concept of pandering, if nothing is to be obscene in the abstract. Publishers and dealers may learn to avoid "labelling" as obscene, yet the content will still be recognizable to those interested. Or Douglas and Black's view of the first amendment and

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151. *Supra* note 88, at 195.

obscenity may yet prevail. Overzealous application of general statutes totally banning dissemination may produce such a result. In any event a law aimed specifically at preventing distribution of obscenity to children would be a helpful supplement or an alternative which might survive.

Admittedly, even in this area there can be no complete reconciliation of freedom of expression and censorship nor can there be a justification by empirical proof. Yet such an approach would allow for the saving content of any idea or other value such material may have for adults who could exercise their freedom of choice, but would deny such material to the immature who seek it, not primarily for its thematic content, but for its erotic value. Society does have a valid interest in protecting its standards from erosion by those not mature enough to make a qualified choice. As has been suggested by many judges what might not be obscene when disseminated to adults might well be obscene in the hands of children.

Professor Dibble<sup>152</sup> has suggested an approach, along with a draft of a statute, which deserves serious consideration by those interested in the problem of obscenity. That there are serious problems and questions about the approach is readily conceded. Dibble's proposal is similar to the Model Penal Code. Criminal sanctions are placed on the dissemination of obscene material to children. Obscene material is defined as that which "considered as a whole, has a predominant appeal to the prurient interest of children and which goes substantially beyond customary limits of candor in describing or representing such matters to children."<sup>153</sup> This definition is basically the

152. Dibble, *Obscenity: A State Quarantine to Protect Children*, 39 So. CALIF. L. REV. 345 (1966). See also Rice, *supra* note 14. For a discussion of formulation of a constitutional statute, see Luchsinger, *A Blueprint for Censorship of Obscene Material: Standards for Procedural Due Process*, 11 VILL. L. REV. 125 (1965).

153. Dibble, *supra* note 152, at 374, Section 1 (c) of draft of statute.

definition of the Model Penal Code which appears to have been accepted by some members of the Supreme Court,<sup>154</sup> but is modified and cast in terms of prurient appeal to children. The predominant appeal of material is judged in terms of "the effect of such material upon a class of children of the same general age group as the child to whom such material was disseminated, such children having average intelligence, average mental health, and average moral standards of children of such age group."<sup>155</sup> The circumstances of dissemination are also to be considered in determining the prurient appeal. The draft statute also has other provisions dealing with the problems of knowledge and scienter and proof of obscenity, but the heart of Dibble's solution is dealing with obscenity where society has the greatest concern—dissemination and pandering to children.

Certainly there would be administrative and enforcement problems with such a quarantine, but would these be greater than those under present statutes dealing with general bans against distribution of obscenity? Does *Mishkin* help—with its suggestion that pandering to the prurient interests of a well-defined group with material not appealing to the average person may make such material obscene? Some commentators, prior to *Mishkin* and *Ginzburg*, have suggested that a banning of material obscene for children would not be constitutional because of the indirect inhibiting effect on dissemination of such materials to adults.<sup>156</sup> Dibble suggests such an approach may be constitutional. In his opinion it is at least worth a try.

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154. *Supra*, page 307.

155. Dibble, *supra* note 152, at 375, Section 3(a) of draft of statute.

156. Lockhart and McClure, *supra* note 53, at 86. Would *Fanny Hill* lend support for this view? *Ginzburg*? The latter seemed to disregard the indirect consequence of labelling as obscene by pandering in pointing out that under different circumstances it might not be obscene. See *supra*, page 322.

*Conclusion*

Are there discernable trends in the law of obscenity today? Discerning trends from the numerous opinions handed down in each case, often with no real majority opinion, is almost pure speculation. The unresolved questions far outnumber the answered. Perhaps the Court is wise in moving slowly to resolve such basic questions and conflicting interests and values. Perhaps this is due to expediency or a lack of suitable alternatives which the Court might adopt. Perhaps the solution is not within grasp or the problem should be dealt with by other than legal processes. To step into the realm of speculation, some commentators suggest the Court will ultimately move to strike down all censorship of obscenity. This may well come about with changes in the members of the Court. For the present, the Court has undoubtedly been influenced by the American Law Institute's approach to obscenity in the Model Penal Code. Significantly, there appears to have been a shift in emphasis by some members of the Court from the material itself to the conduct of the purveyor, so that the probable result is that obscenity is not an absolute but a variable, depending on the context. If this is the trend, it may be a welcome development—banning nothing in its proper context, but proscribing some material when pandered or purveyed solely for its erotic value. If this is the result, legislation aimed at those who disseminate to children material obscene because of its prurient appeal to children, may fare better than legislation proscribing dissemination of obscenity in general. Such legislation may also come nearer to preserving the values of free expression and at the same time attaining some of the legitimate aims of censorship. The very real problem of obscene publications is one that cannot be solved solely by legal means.