An Unhurried Look at Obscenity

John M. Regan, C.M.
AN UNHURRIED LOOK
AT OBSCENITY

JOHN J. REGAN, C.M. *

A DECADE HAS PASSED since the Supreme Court handed down its first major decision on obscenity. Scarcely a year has gone by in that period without at least one significant decision, and each has caused in varying degrees outbursts of criticism of the Court. The decisions have appeared against the background of the so-called “sexual revolution” in the country. They are likewise part of an era of expanding individual liberties guaranteed by the Court.

This article will attempt to summarize the evolution in the Supreme Court's handling of obscenity over the past decade and its significance as seen by some of the major commentators.

I. The Roth-Alberts Cases

For all practical purposes the decade began on June 24, 1957, with the decision in the Roth-Alberts cases. Earlier in 1957 the Court had held that a Michigan obscenity statute violated the first and fourteenth amendments to the Constitution because it prohibited the sale to an adult of a book unsuitable for minors, but the Court left for the Roth decision a full exposition of the constitutional aspects of obscenity legislation.

The Roth decision contains in embryo practically all of the major issues which would emerge in subsequent cases through the decade, and therefore a somewhat detailed exposition of the decision is desirable.

* B.A., Mary Immaculate College; M.A., St. John's University; LL.B., Columbia University; Member of the New York Bar.
Samuel Roth had been convicted in a jury trial for violating the federal criminal obscenity statute\(^3\) on charges of mailing obscene circulars and advertising, and an obscene book. David Alberts had been convicted under a complaint that he lewdly kept for sale obscene and indecent books, and for writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code.\(^4\)

---


Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and... Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made,... whether sealed or unsealed;... is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier.

Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

The Court noted that the 1955 revision of this statute, 69 Stat. 183, was not applicable to the case.

\(^4\) CAL. PEN. CODE § 311.

Every person who wilfully and lewdly, either:

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or

molds, cuts, casts, or otherwise makes any obscene or indecent figure: or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure;...

6. ... is guilty of a misdemeanor.

Mr. Justice Brennan, in the majority opinion, took up the constitutional issue first.\(^5\) He stated that the dispositive question was whether obscenity was utterance within the area of protected speech and press. He marshalled an impressive list of cases to support his contention that the Court had always assumed that obscenity was not protected by the freedoms of speech and press. He found that the guarantees of freedom of expression in most of the states which by 1792 had ratified the Constitution gave no absolute protection for every utterance. A number of these states made certain types of speech statutory crimes. The distinguishing mark of protected speech was its social importance:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.\(^6\)

Justice Brennan concluded by holding that obscenity was not within the area of constitutionally protected speech or press.\(^7\)

---

obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure;...

6. ... is guilty of a misdemeanor.

\(^5\) Roth v. United States, 354 U.S. 476, 481 (1957). Justice Brennan was joined by Justices Frankfurter, Burton, Clark, and Whittaker.

\(^6\) Roth v. United States, 354 U.S. 476, 484 (1957) (citations omitted).

\(^7\) Roth v. United States, 354 U.S. 476, 485 (1957).
A LOOK AT OBSCenity

The majority then disposed of potential constitutional objections to its holding. It rejected contentions that obscene speech should be judged by the clear and present danger test of Schenck\(^8\) or its variation in Dennis\(^9\) by declaring the test irrelevant in view of the holding that obscenity was not protected speech.

The Court then took up the standards for judging obscenity. It noted that sex and obscenity were not synonymous, but rather that obscenity was material which dealt with sex in a manner appealing to prurient interest. It defined prurient interest as material having a tendency to excite lustful thoughts. It perceived no significant difference between the meaning of obscenity developed in the case law and the definition of the American Law Institute's Model Penal Code, 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.\(^{10}\)

The Court found that the following test had evolved in the American courts:

[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.\(^{11}\)

This test implied a rejection of the English standard known as the Hicklin test, which allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons.\(^{12}\) The latter test might well encompass material legitimately treating sex, and therefore was unconstitutionally restrictive of the freedoms of speech and press.

Having disposed of the main issues, Justice Brennan turned to some of the other arguments put forth by the defendants. He found that the federal obscenity statute and the California statute gave adequate notice in their language of what was prohibited, even though different juries might reach different conclusions about the same material, and therefore did not offend due process requirements. He also rejected Roth's contention that the first amendment removes obscenity from the range of Congressional power when it states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." and that as a result jurisdiction over obscenity is reserved by the ninth and tenth amendments to the states and to the people. This argument fell in the light of the Court's previous holding that obscenity was not expression protected by the first amendment, and, instead, Justice Brennan held that the postal power delegated to Congress by Article I of the Constitution gave Congress the right to regulate the use of the mails. He then rejected Alberts' attempt to turn the last

\(^8\) Schenck v. United States, 249 U.S. 47 (1919).
\(^{10}\) Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957).
argument to Alberts' own favor by alleging that Congress had pre-empted the regulatory field by enacting the federal obscenity statute. The federal statute dealt only with actual mailing; it did not eliminate state power to punish keeping for sale or advertising obscene material.

Chief Justice Warren, in his concurring opinion, took an entirely different approach to the Roth-Alberts cases. He did not agree completely with the majority's emphasis on the nature of the material and its effect on its potential audience. A person, not a book, was on trial. The conduct of the defendant was the central issue, not the obscenity of a book or picture. There was relevance, however, in the nature of the material insofar as it was an attribute of the defendant's conduct. The context in which such material was presented was also of great importance, and might affect the result of a particular case.

In the instant cases, the Chief Justice found that both defendants were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. This was conduct which the state and federal governments could constitutionally punish.

Justice Harlan concurred with the result in Alberts but dissented in Roth.

He saw three basic difficulties in the majority opinion. First, he was apprehensive that the Court's framing of the constitutional issue in abstract terms and its holding that obscenity was not protected because it was utterly without redeeming social importance might make the question of whether a particular book was obscene merely a matter of fact to be entrusted to a fact-finder whose judgment would not be reviewed by appellate courts. He emphasized that the suppression of any form of expression was an individual constitutional problem, and therefore a reviewing court had to determine for itself whether the attacked expression is suppressible within constitutional standards.

His second difficulty was also of a constitutional nature and turned on the scope of the Court's review of state and federal court decisions. He sustained Alberts' conviction in the California courts on the grounds that the state legislature, in making it a misdemeanor to keep for sale or advertise obscene material, had used its power rationally and in harmony with the concept of "ordered liberty" required by the fourteenth amendment. But he would not sustain Roth's conviction under the federal obscenity statute because he could not find a direct substantive interest of the federal government in the control of obscenity. The dangers of federal censorship, with the possibility of a nation-wide ban on particular material, were too great. He could not agree, moreover, that a book which tended to stir sexual impulses and lead to sexually impure thoughts was necessarily "utterly without redeeming social

---

A LOOK AT OBSCENITY

importance," nor that there was a federal interest in restricting material which led to any kind of "thoughts." He would limit the extent of the federal statute to "hard-core pornography," but not necessarily only to persons engaged in the business of catering to the prurient mind-ed, even though their wares fell short of hard-core pornography. The material distributed by Roth was not hard-core pornography in his judgment.

Justice Harlan's final difficulty was with the Court's easy blending of the two statutes and the Model Penal Code's definition into one official definition of obscenity. The California statute said the book must have a "tendency to deprave or corrupt its readers." The federal statute stated it must tend "to stir sexual impulses and lead to sexually impure thoughts." The Model Penal Code considered a thing to be obscene "if, considered as a whole, its predominant appeal is to prurient interest," but explicitly rejected the current tests of tendency to arouse lustful thoughts or desires and tendency to corrupt or debase.

Justice Douglas dissented in both cases, and was joined by Justice Black. He saw no reason why obscene expression should be treated any differently from any other type of expression. Under first amendment prohibitions, freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. There was no dependable information on the effect of obscene literature on human conduct, and therefore freedom of expression was to be preferred. Mere arousal of thoughts or offense to the community conscience or appeal to prurient interest had no intrinsic or demonstrable connection with anti-social conduct. The test that suppressed a cheap tract today could suppress a literary gem tomorrow.

II. The Basic Issues

This long exposition of the Roth-Alberts opinions sets the stage for a discussion of the substantive issues involved in the control of obscenity. Some of these have been treated in detail in these opinions, while others were hinted at vaguely, but all have come to the surface at one time or another in the decade following Roth.

A listing of these issues will be helpful:

1) The relation of obscenity legislation to the free speech guarantees of the first amendment.
2) The purpose of legislation controlling obscenity.
3) The range of applicability of the "dominant theme" criterion.
4) The extent of the relevant community whose standards are to be applied.
5) The nature and uses of the concept of social importance as a requirement for constitutionally protected speech.
7) Obscenity as a reality in itself or as determined by circumstances.

---

A. The Constitutional Issue

One of the key issues of the last decade has been the constitutional one: to what extent is legislation controlling obscenity limited by the free speech and press guarantees of the first amendment?

1. Three Views

Three general constitutional approaches have emerged in the Court's discussion of obscenity. The first and the most consistent has been that of Justices Douglas and Black which they first stated in Roth and have repeated in virtually every subsequent opinion. It holds that obscene speech is to be treated no differently from any other type of speech, and may be controlled only by application of the clear and present danger test. Practically speaking, under this position, all legislation prohibiting obscenity has a fatal weakness in that there has never been clear and definite evidence that obscene material is linked causally with anti-social conduct.

The usefulness of this test depends on the opportunity for counter-persuasion afforded after the speech has been uttered. But the test is not appropriate in the cases of obscenity, where the harm is such that a corrective cannot be sought through countervailing speech. The Black-Douglas position, moreover, is legally insignificant and politically unrealistic, in Professor Magrath's opinion.

It has not attracted a single Justice to it of the thirteen who have served on the Court since Butler v. Michigan, and the lower federal and state judiciary have little sympathy for it. More important, there is in this country a governmental and popular consensus in favor of anti-obscenity control.

In contrast to the absolutist Black-Douglas position, Mr. Justice Harlan insisted in Roth on a "balancing of interests" approach. As noted above, each case involves an individual constitutional judgment. It is also important whether the interests are state or federal.

The third approach among members of the Court, and the prevailing one, is set forth by Mr. Justice Brennan in Roth. It finds in the history of the first amend-
ment certain types of speech which the amendment was not intended to protect. According to Mr. Justice Brennan, "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."22 Obscenity, like libel, lacked social importance and therefore was not within the area of constitutionally protected speech or press.

Support for this conclusion was found in Chaplinsky v. New Hampshire:23

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.24

Kalven describes this approach as a two-level speech theory:

At one level there are communications which, even though odious to the majority opinion of the day, even though expressive of the thought we hate, are entitled to be measured against the clear-and-present danger criterion. At another level are communications apparently so worthless as not to require any extensive judicial effort to determine whether they can be prohibited. . . . In determining the constitutionality of any ban on a communication, the first question is whether it belongs to a category that has any social utility. If it does not, it may be banned. If it does, there is a further question of measuring the clarity and proximity and gravity of any danger from it. It is thus apparent that the issue of social utility of a communication has become as crucial a part of our theory as the issue of its danger.25

The Brennan rationale has provoked much criticism. Kauper questions his use of history as justification for excluding obscenity from the category of constitutionally prohibited speech.26 On the same reasoning profanity and sacrilege could still be treated as crimes.27

Reliance on the Chaplinsky dictum is also questionable. Mr. Justice Murphy's unprotected classes of speech—the lewd and obscene, the profane, the libelous, and the insulting or "fighting words"—have a common element: by their very utterance they inflict injury or tend to incite an immediate breach of the peace. Justice Murphy apparently relied heavily on Chafee28 who held that these classes of speech fell outside the protection of the first amendment, not because they existed at common law before the Constitution nor on the historical fact that the framers of the Constitution wanted to safeguard political discussion, but because they in-

[Notes]

23 315 U.S. 568 (1942).
24 Id. at 571-72 (emphasis by the Court).
27 Kalven, supra note 25, at 9.
28 Z. CHAFEES, FREE SPEECH IN THE UNITED STATES 149-50 (1941).
 inflicted present injury upon listeners, readers, or those defamed. In this sense words are similar to acts. But this rationale poses difficulties. If one grants the distinction of Mr. Justice Murphy and Professor Chafee between words involving the exposition of ideas and those inflicting immediate injury or inviting immediate reaction, is the distinction one which guarantees full protection to the former class? What is the injury inflicted by obscenity? If it is to the social interest in order and morality, do we not have an "establishment of religion" problem? Is there really a close similarity between the impact of obscenity and that of "fighting words" or libel?

The linking of protected speech with the interchange of ideas for the bringing about of political and social change seems to limit too much the purposes of the first amendment. There is no denying the fact that the free speech and press guarantees are closely related to the political process. But this is not the same as saying that only communications relevant to the political process are protected. As Kalven notes, "[t]he people do not need novels or dramas or paintings or poems because they will be called upon to vote." The Brennan position is reminiscent of the Meiklejohn interpretation of the first amendment, which holds that speech unrelated to religious or political freedom, such as obscene speech, occupies a less favored position with regard to first amendment protection.

One writer finds another difficulty in the dictum of the Court in a recent libel case:

Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of illegal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

From this statement he concludes that "the Supreme Court has declared that all speech must be measured by the same standards." Arguably, however, all the Court is saying is that there are constitutional standards which must be met to justify a limitation on expression, not that these standards are the same for all classes of expression. Thus the clear and present danger test may be used for certain types of speech, while the social utility criterion is equally applicable to another type such as obscenity.

2. The Purposes of Obscenity Legislation

If we accept for the moment the Roth majority's adoption of social utility as the
acceptable criterion for constitutionally protected speech, we may rightly ask the rationale for the conclusion that obscenity, however defined, is socially worthless. Or to put the question a different way, what is there about obscenity which makes it socially worthless? The Court never discusses this point, but various theories have been proposed to explain this lack of social worth and thus to justify the legislative regulation of obscenity. But before going into them, we must put to one side one impermissible ground for declaring obscenity socially worthless. This ground is that obscenity advocates improper sexual values. The Supreme Court disposed of this point in *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, when it held that the denial of a license to a motion picture, *Lady Chatterly's Lover*, advocating that adultery under certain circumstances may be proper behavior, violated the freedom to advocate ideas guaranteed by the first amendment.

The first of the possible grounds justifying legislation directed against obscenity is the popular impression that obscenity leads to anti-social sexual behavior and crime. The difficulty with this position is that it is supported only with opinion evidence, but has never been proven on the basis of empirical evidence. In his dissent in *Roth*, Mr. Justice Douglas takes up the issue for the first time. In his judgment it was “by no means clear that obscene literature . . . is a significant factor in influencing substantial devia-

---

39. A summary of this study is reprinted in *United States v. Roth*, 237 F.2d 796, 815-16 (2d Cir. 1956) (concurring opinion).
of psychologists, sociologists, criminologists, public officials, and the clergy as well as the fact that Congress and every state legislature has passed anti-obscenity laws, justifying these controls by reference to evidence that anti-social behavior may result in part from reading obscenity.

The end result of this controversy is to leave it equally established that the causal link has been neither demonstrated nor disproven. Whether this places the burden of proof on those who favor obscenity laws or those who disapprove of them is equally up in the air. Someone has observed that the only way in which the controversy will be resolved will be to take groups of children, expose half of them to obscenity, control all other conditions, and wait for the results. Parents dedicated so wholeheartedly to empirical research in human conduct are not, however, expected to rush to enlist their children.

Another ground for obscenity legislation is the offense which it offers to the sensibilities of the community. This is analogous to laws against "nuisances." This analysis would support state action against obscenity in the same way as the state may forbid nudity, indecent exposure, graffiti, public fornication and public excretions. The trouble with the nuisance theory, however, is that it assumes that a person has been involuntarily exposed to the obscene material. It does not support legislation prohibiting the distribution of obscene material to those who voluntarily seek it out. Nor does it square completely with the Roth approach which is concerned chiefly with the material itself nor with the Ginzburg doctrine concerning commercial exploitation of material toward a willing audience.

A final argument supporting obscenity legislation is one rarely discussed by the Supreme Court. Justice Harlan alluded to it in his opinion in Alberts:

The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards.

This argument may be interpreted in two ways. Some see obscenity as a threat to personal integrity:

We submit that there is a social effect resulting from the individual's personal sexual reaction to the object, which could (not out of necessity) be revealed in the guise of triggered aggression or

---

45 Cairns, Paul & Wishner, supra note 39, which apparently can be cited for either side of the argument; Wertham, Seduction of the Innocent 164 (1954); Henry, Testimony before the Subcommittee of the Judiciary Committee to Investigate Juvenile Delinquency, S. Rep. No. 2381, 84th Cong., 2d Sess. 8-12 (1956).
50 Magrath, supra note 18, at 55.
other form of anti-social conduct; yet we are prepared to admit that this specific response is less likely than inducements to regressive social behavior which will eventually debilitate personal integrity. Assuming that the natural sexual structure necessarily involves two persons—an interpersonal relationship—we perceive the fact that inherent danger lurks in any substitution of the obscene object for the other person. Media which induce a congeries of fantasies and frustrations of their very nature threaten a reinforcement of personal weakness, which may in turn have the unsalutory effect of turning a person's sexual response back toward self. In summing up we see in obscenity a threat to the personal and the social structure.  

What these authors seem to be saying is that obscenity leads to auto-erotic stimulation, a type of sexual activity which is undesirable, and therefore government should control the distribution of obscene material. This analysis raises many problems. Is it just another form of the "obscenity-behavior" connection which has never been adopted by the Court? Is there any more proof for the connection between obscenity and auto-erotic stimulation than there is for the link between obscenity and sex crimes? Or if not, need there be? What is the governmental interest in controlling auto-erotic stimulation, good sexual health or good morals?  

The last point leads us to the second interpretation of the Harlan dictum. Professor Louis Henkin argues that obscenity is suppressed primarily because it corrupts morals and character, "for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin." He then suggests that some of the assumptions for the enactment of morals legislation by the state be re-examined. His inquiry began with three hypotheses which are at the same time his conclusions:  

First: even if the freedom of speech protected by the first and fourteenth amendments does not include a freedom to communicate obscene speech, suppression of obscenity is still a deprivation of liberty or property—of the person who would indulge in it, at least—which requires due process of law. Due process of law demands that legislation have a proper public purpose; only an apparent, rational, utilitarian social purpose satisfies due process. A state may not legislate merely to preserve some traditional or prevailing view of private morality.  

Second: due process requires, as well, that means be reasonably related to proper public ends. Legislation cannot be based on unfounded hypotheses and assumptions about character and its corruption.  

Third: moral legislation is a relic in the law of our religious heritage; the Constitution forbids such establishment of religion.  

This analysis has not been found completely persuasive. Henkin himself admits that some utilitarian ends can be found for morals legislation, even though they be rationalizations. Such rational-
zations, however, might well meet the “minimum rationality” standards of due process cases. Moreover, the state is not limited to passing legislation interfering with individual liberty only to restrain conduct threatening others; there is nothing to prohibit it from promoting virtue among its citizens.

The draftsmen of the Model Penal Code have attempted to meet the objections that Henkin raises by shifting the legislative target from the “sin of obscenity” to a disapproved form of economic activity—commercial exploitation of the widespread weakness for titillation by pornography. This approach will be discussed later, but regardless of its merits and its actual use by the Court in Ginzburg, the Supreme Court’s support for obscenity legislation on constitutional grounds goes far beyond prohibitions against behavior of a commercial nature.

This discussion of the purposes of obscenity legislation and the speculation which it necessarily involves points up, if nothing else, the need for the Supreme Court to elaborate on its reasons for considering obscenity “socially worthless.”

B. Definitional Issues

No matter which of the three constitutional positions one takes on obscenity legislation, one still must determine the nature of the obscene and this leads inevitably to the problem of defining it.

The English courts formulated the first obscenity test in 1868 in The Queen v. Hicklin:

The test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

This test, despite its inadequacies, gained acceptance in the American courts until the Ulysses case in 1934. In denying a motion of the United States for a decree declaring the book not importable into the country on the ground that it was obscene matter under the Tariff Act of 1930 and for the seizure and destruction of the book under the Act, Judge Woolsey defined obscenity as material “tending to stir the sex impulses or to lead to sexually impure and lustful thoughts.” He declared that the author’s motive in writing the book was relevant in deciding whether the book was written for the purpose of exploiting obscenity, even though this intent was not the test of obscenity. The court should also consider the book’s effect on the person with average sex instincts, just as it would use the “reasonable man” test in a tort action. The trier of fact was also required to read the entire work rather than isolated passages.

---

59 See Note, supra note 29, at 1403.
60 [1868] 3 Q.B. 360, 371.
61 United States v. One Book Called “Ulysses,” 5 F. Supp. 182 (S.D.N.Y. 1933), aff’d, 72 F.2d 705 (2d Cir. 1934).
In affirming this decision, Judge Augustus N. Hand formulated this test:

[W]e 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.

The definitional problem first reached the Supreme Court in 1957 in *Roth*. To be obscene, according to Justice Brennan, material had to be “utterly without redeeming social importance” and measured against the norm: “Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest.”

Justice Harlan grafted another element on the *Roth* definition in 1962 in *Manual Enterprises v. Day*. In addition to possessing the requisite prurient appeal, material to be obscene must be “patently offensive,” that is, on its face it must affront current community standards of decency. Justice Brennan stated this element of the test in a different way in *Jacobellis v. Ohio*. Material must go “substantially beyond customary limits of candor in description or representation of such matters.”

The emphasis at this point in the evolution of the test is on the material itself. Material is obscene when it takes on certain characteristics. Context and setting at this stage are not relevant. Before passing on to a discussion of whether material may be judged obscene because of extrinsic factors, it is necessary to examine more closely some of the elements in the definition.

1. Dominant Theme

Since the *Roth* decision, the only appearance of the “dominant theme of the material taken as a whole” requirement occurs in the Court's opinion in *Ginzburg v. United States*. The appellant had argued that the trial judge had improperly found the magazine *Eros* to be obscene as a whole, because he had concluded that only four of the fifteen articles were obscene. What made *Eros* as a whole obscene for the trial judge was its deliberate and studied arrangement, editorialized for the purpose of appealing to prurient interest but including non-offensive material to insulate it from attack. Justice Brennan's response to the trial judge's opinion is curious: “However erroneous such a conclusion might be if supported by the evidence of pandering, the record here supports it. . . . By animating sensual detail to give the publication a salacious cast, petitioners reinforced what is conceded by the Government to be an otherwise

---

65 Id. at 482.
debatable conclusion." This answer does not meet the issue head on; the Court seems determined to get on with its "commercialization" theme.

What if there had been no evidence of pandering? The dominant theme test is clear enough when applied to a unified work, but is vague when applied to works of a disparate nature joined together for extrinsic purposes. It is easy to deal with the mailing of an obscene picture packaged with non-obscene pictures, because the objects are separable and capable of independent publication. But the ordinary magazine dealing with diverse subjects is the hard case. To permit publication of the magazine containing one obscene article or picture mingled with non-obscene material would provide an open market to the purveyor of obscenity. An article-by-article approach seems more reasonable in contrast to the above procedure, but it does result, practically speaking, in the suppression of a certain amount of non-obscene material.

2. Contemporary Community Standards

In Roth the Supreme Court did not elaborate on the requirement that obscenity be determined according to "contemporary community standards."

Justice Harlan took up the question in Manual Enterprises and, joined by Justice Stewart, he argued that the proper test under a federal statute was a national standard of decency. A local standard would have

the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.

The Jacobellis case provides an interesting debate on the national versus local standard issue. Chief Justice Warren, joined by Mr. Justice Clark, opted for the local one:

I believe that there is no provable 'national standard,' and perhaps there should be none. . . . (T)his Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.

But Justices Brennan and Goldberg held out for the national standard. Developing Justice Harlan's reasoning, they argued:

To sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might not be held obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places . . .

It is true that local communities throughout the land are in fact diverse. . . . Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard of application of the Federal Constitution. . . . It is, after all, a national Constitution we are expounding.

73 Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (dissenting opinion).
74 Jacobellis v. Ohio, 378 U.S. 184, 194-95 (1964) (dissenting opinion).
No further references to the question occur in later cases, and thus far, of the Justices presently on the Supreme Court, only three have spoken on the issue, with Justice Brennan favoring the national standard, Justice Harlan allowing it when federal statutes are involved, and the Chief Justice adopting local standards. It seems likely that the national standard will be followed by state and lower federal courts because of a tendency to adopt the dicta in first opinions in obscenity decisions even though not supported by the majority of the Court. But one writer believes that the community standards requirement no longer has any vitality since the Ginzburg decision. "[A] national standard which varies from setting to setting depending on the ‘manner of sale’ will be no standard at all." |

3. Social Importance

In Roth, Justice Brennan had stated that in order to be obscene, material had to be “utterly without redeeming social importance.” In Jacobellis he had pointed out that the “social importance” test was independent of the “prurient appeal” element, and therefore one could not be weighed against the other. Finally, in Memoirs, a full-blown discussion of the “social importance” requirement developed.

This case presented the issue whether the book “Fanny Hill” was obscene under the Roth definition of obscenity. At the hearing in the trial court, the court had received the book in evidence and had heard the testimony of experts and accepted other evidence such as book reviews to assess the literary, cultural and educational character of the book. Some of these experts testified that the book was, in their opinion, a minor “work of art” having “literary merit,” “historical value,” and a good deal of “deliberate, calculated comedy,” and was a piece of “social history of interest to anyone who is interested in fiction as a way of understanding society in the past.” The court was unimpressed and found the book obscene, and the Massachusetts Supreme Judicial Court affirmed the decree.

The Supreme Court reversed this judgment by a 6-3 majority, but the Justices were unable to agree on an opinion of the Court and the majority needed four opinions to say why they disagreed with the Massachusetts court. The discussion centered around the “social importance” requirement.

Justice Brennan, joined by the Chief Justice and Justice Fortas, insisted that Roth and subsequent decisions had laid down a threefold test for obscenity:

[I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual
matters; and (c) the material is utterly without redeeming social value.\textsuperscript{78}

The mistake of the Massachusetts court was to discover in “Fanny Hill” a modicum of social value but still to declare it obscene. Brennan countered that a book cannot be obscene unless it is found to be \textit{utterly} without redeeming social importance even though it had the requisite prurient appeal and patent offensiveness. Moreover, each of the three federal constitutional criteria was to be applied independently. Social value could not be balanced against prurient appeal or patent offensiveness. Of course, he added, if “Fanny Hill” were found to have only a minimum of social value and was being commercially exploited, it might be found obscene, but the production, sale and publicity of the book were not at issue in this case.

In his dissenting opinion, Justice Clark strongly disagreed with the “social value” test used in the Brennan opinion.\textsuperscript{79} He described it as a “new test” imported into the \textit{Roth} test by Justice Brennan for the first time in the \textit{Jacobellis} case where he was joined only by Justice Goldberg, and now in the instant case. According to Justice Clark, the \textit{Roth} test includes only two constitutional requirements: (1) the book must be judged as a whole, not by its parts; and (2) it must be judged in terms of its appeal to the prurient interest of the average person, applying contemporary community standards.\textsuperscript{80}

Even assuming that the “social value” test has some merit, he argued further that the Brennan opinion erred in using as the basis for reversal the statement of the Supreme Judicial Court that this test does not require “that a book which appeals to prurient interest and is patentedly offensive must be unqualifiedly worthless before it can be deemed obscene.”\textsuperscript{81} He noted that the trial court specifically found that the book has “no value because of ideas, news or artistic, literary or scientific attributes.” He also took issue with Justice Douglas’ assertion that there is no proof that obscenity produces anti-social conduct. He argued that if social value may “redeem” an otherwise worthless book, then the courts may balance esthetic merit against the harmful consequences that may flow from pornography. In one final thrust, he believed that “Fanny Hill” could be found to be obscene under the “commercial exploitation” test of \textit{Ginzburg} and \textit{Mishkin}.

Justice White’s dissent also severely criticized the “social value” test used in Justice Brennan’s opinion.\textsuperscript{82} Once the predominant theme of a publication appeals to the prurient interest in a manner exceeding customary limits of candor, the material is \textit{ipso facto} without redeeming social importance. Minor elements in the publication, such as literary style, historical references or language characteristic of a bygone day, cannot overcome the character of a book as fixed by its predominant theme. Social value is there-

\textsuperscript{78} Id. at 418.
\textsuperscript{79} Id. at 441 (dissenting opinion).
\textsuperscript{80} Id. at 442 (dissenting opinion).
\textsuperscript{81} Id. at 445 (dissenting opinion).
\textsuperscript{82} Id. at 460 (dissenting opinion).
fore not an independent test, but relevant only to determining the predominant prurient interest of the material.

Thus we have three Justices who look on social value as an independent criterion, a fourth, Justice Harlan, who will accept it as such in federal cases, and a fifth, Justice Stewart, who considers it relevant only when "hard-core pornography" is involved. Two Justices, Clark and White, fail to see its independence, and two others, Justices Black and Douglas, continue to adhere through the storm to the "Black-Douglas" position.

What is social value? In Jacobellis, Justice Brennan defined it partially as material that has "literary or scientific or artistic value." Some find such a broad definition, particularly in an age of form-centered esthetics, as in fact limiting the Roth definition of obscenity to "hard-core pornography." Justice White seemed even more pessimistic:

If 'social importance' is to be used as the prevailing opinion uses it today, obscene material, however far beyond customary limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way. Well written, especially effective obscenity is protected; the poorly written is vulnerable. And why shouldn't the fact that some people buy and read such material prove its 'social value'?

The Brennan opinion also raises a semantic question about social value. The Massachusetts courts had found a "modicum" of social value in "Fanny Hill," and this was enough to save it from being banned. But if the trial record had shown that the book had only a "minimum" of social value and if there had then been evidence that the book was being commercially exploited for the sake of prurient appeal to the exclusion of all other values, then the Court might have been justified in concluding that the book was utterly without redeeming social importance. Do "modicum" and "minimum" mean the same thing? Justice Brennan does not indicate one way or the other, and it would seem logical that they are identical. One author, however, develops an interesting theory based on the premise that they mean different things:

The crucial quantum in the social value calculus is the 'minimum': the implication of Mr. Justice Brennan's thesis is that once a work is found to possess more than a minimum of social value, it cannot be suppressed, even with evidence of pandering. But we are never told how much a minimum is. Knowing where Fanny Hill lies on the social value scale with reference to the minimum point might help to determine what 'minimum' means, but that is impossible for several reasons. First, we cannot be sure that Mr. Justice Brennan agrees with the Massachusetts Supreme Judicial Court that Memoirs does have a modicum of value, because his disposition of the case made it unnecessary for him to consider that question. See Harlan, J., dissenting, 383 U.S. at 459 & n.4. Second, even if Mr. Justice Brennan had adopted the Massachusetts findings, we still would be unable to say where a

83 Supra note 69.
84 Supra note 75, at 768.
modicum stood in relation to the minimum—whether it was more, or less, or the same. If a modicum is greater than a minimum, then the entire first half of the Brennan opinion was unnecessary because, according to the second half, the Massachusetts holding could not stand even with evidence of pandering. If a modicum is less than a minimum, the matter becomes even more confusing: since it is impossible to draw from the modicum passage, which appears in the context of the 'utterly' language, the inference that any work can be suppressed so long as it contains less than a modicum but more than none at all and is not affected with pandering, it is impossible to say that pandering evidence is relevant only where the social value is less than a minimum but more than a modicum (because above the minimum pandering would be useless, and below a modicum it would be unnecessary). If pandering is relevant all the way from a minimum down to the point where the challenged work has 'utterly' no redeeming value,—as seems to be the case,—then one suspects that as the social quality of the work approaches zero (supposing that no work can be totally devoid of value of some sort), evidence of pandering will become unnecessary to achieve suppression of the work. Thus a fourth level, different from zero, modicum, and minimum, becomes important, and perhaps as crucial as the minimum level. The answer to the last problem depends, perhaps, on whether social value comes in individual streams or discrete quanta.86

4. What Kind of Material?

When one sorts out the various kinds of material which the Court has held not to be obscene, some new questions arise. The Roth-Alberts decision never came to grips with the obscenity of the material involved. In subsequent cases the following items were held not to be obscene: (1) motion pictures containing explicit love scenes;87 (2) nudist magazines and nude photographs;88 (3) magazines containing male nudes designed to appeal to homosexuals;89 (4) a book with graphic descriptions of sexual details.90 On the contrary, the only materials the Court has found obscene were (1) the publications in Ginzburg which admittedly presented only a “close case” and were considered obscene only because of the publisher's pandering91 (2) the deviant materials in Mishkin.92

The paucity of obscene material according to Court standards led Lockhart and McClure to suggest in 1960 that the Court really was not talking about the ordinary garden variety of obscenity but about “hard-core pornography.”93 They defined the latter as “daydream

material, divorced from reality, whose main or sole purpose is to nourish erotic fantasies or ... psychic autoeroticism ... [and which] must be grossly shocking as well." In the same year Kalven cited with approval Thurman Arnold's advice to the Supreme Court: "The Court should hold the items before it not obscene unless they amount to hard-core pornography, and should, after rendering a decision, shut up. In Mr. Arnold's view, any fool can quickly recognize hard-core pornography, but it is a fatal trap for judicial decorum and judicial sanity to attempt thereafter to write an opinion explaining why." 94

The New York Court of Appeals reached the conclusion a year later that obscenity meant "hard-core pornography" and defined it thusly:

It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. ... [T]he obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents ... 'a debauchery of the sexual faculty.' 96

Justice Harlan acknowledged this line of thought in Manual Enterprises but refused to decide whether obscenity was the same thing as "hard-core pornography." 97

Justice Stewart, however, in his concurring opinion in Jacobellis, took Mr. Arnold's advice, said the two were the same, and "defined" it masterfully: "I know it when I see it." 98 The Chief Justice and Justice Clark acknowledged their lack of such perception and asked who could define hard-core pornography with any greater clarity than obscenity. 99 And thus the dispute stood until Redrup v. New York, 100 which is discussed later.

5. Average Person

Basic to the Roth test is the rejection of the Hicklin standard which allowed material to be judged by its effect upon particularly susceptible persons. 101 The Court had already given constitutional sanction to the rejection in Butler v. Michigan. 102 In Roth the Court spoke instead of the average man norm.

a. The Deviant Audience

Two questions arise: 1) does this test preclude prohibitions against the dissemination of material appealing to the prurient interest of deviant persons; 2) is legislation designed to protect only children constitutionally valid?

Lockhart and McClure had suggested that "the reference to the average or normal person was simply a slip of the tongue, an expression of disapproval of the Hicklin rule's reference to particularly

94 Id. at 65-66.
99 Jacobellis v. Ohio, 378 U.S. 184, 201 (1964) (dissenting opinion).
100 386 U.S. 767 (1967).
susceptible persons." They proposed that the Supreme Court really meant a concept of variable obscenity:

Under variable obscenity, material is judged by its appeal to and effect upon the audience to which the material is primarily directed. In this view, material is never inherently obscene; instead, its obscenity varies with the circumstances of its dissemination. Material may be obscene when directed to one class of persons but not when directed to another. . . . Variable obscenity also makes it possible to reach, under obscenity statutes, the panderer who advertises and pushes non-pornographic material as if it were hard-core pornography, seeking out an audience of the sexually immature who bring their 'pornographic intent to something which is not itself pornographic.'

Material appealing primarily to homosexuals came before the Court in *Manual Enterprises* but the Court did not reach the issue of applying the average man norm to it. The issue returned again, however, in *Mishkin v. New York*. Here the appellant had been found guilty of violating Section 1141 of the New York Penal Law by hiring others to prepare obscene books, by publishing them himself, and by possessing them with intent to sell them. The books portrayed sexuality in many guises, some depicting relatively normal heterosexual relations, but more dealt with such deviations as sado-masochism, fetishism, and homosexuality. The convictions had been affirmed by the appellate divi-

sion and the New York Court of Appeals. The Supreme Court affirmed the decision.

Five Justices joined in the opinion of the Court which was written by Justice Brennan, the first such majority since the *Roth* case dealing with a substantive obscenity question. After rejecting the argument that the term "obscene" was impossibly vague, the Court held:

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. The reference to the 'average' or 'normal' person in *Roth* . . . does not foreclose this holding.

Citing the Lockhart-McClure interpretation of *Roth* given above, Brennan continued:

[T]he concept of the 'average' or 'normal' person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test . . . that made the impact on the most susceptible person determinative. 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 prob-

---

103 Lockhart & McClure, supra note 93, at 73.
104 Id. at 77.
109 Lockhart & McClure, supra note 93, at 77.
ably recipient group; and since our holding requires that the 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.\textsuperscript{110}

In an interesting footnote comment, Brennan noted that “[o]ur discussion of definition [in Roth] was not intended to develop all the nuances of a definition required by the constitutional guarantees.”\textsuperscript{111} Such clear acknowledgment of the development of the obscenity doctrine through subsequent cases would do much, if applied in other areas, to eliminate much of the Court's painful exegesis of the gospel according to Roth.

The Mishkin case marked an important change in the Court's approach to obscenity by shifting the emphasis from the material itself to the intent of the publisher. The Court looked at conduct instead of a book by itself. Brennan developed this point at some length:

Appellant instructed his authors and artists to prepare the books expressly to induce their purchase by persons who would probably be sexually stimulated by them. It was for this reason that appellant 'wanted an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong.' And to be certain that authors fulfilled his purpose, appellant furnished them with such source materials as Caprio, Varia-


Much of the importance of Mishkin lies in what it does not say. The question of the material's "patent offensiveness" never arises. Likewise the majority opinion never discusses the "social value" issue which had been so prominent in Memoirs. Justice Douglas, however, dissenting in Mishkin, asks why material of "social value" to a non-conformist minority is not tolerable, or is only the social value of the majority important?\textsuperscript{113}

Not only does the majority avoid a close examination of the fifty titles published by Mishkin, but it shows greater deference to the New York Court of Appeals' findings of obscenity once it is sure that that Court's understanding of Roth is proper. "Since that definition (the New York Court's) is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of §1141 below.”\textsuperscript{114}

\textbf{b. Protection of Minors}

Another aspect of the "average person" test concerns legislation directed against material appealing only to children. Justice Brennan stirred renewed interest in this problem with his decision in Jacobellis:

We recognize the legitimate and indeed exigent interest of States and localities
throughout the Nation in preventing the dissemination of material deemed harmful to children. . . . 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.\(^{115}\)

The Chief Justice made much the same point, although in a different context, in his dissenting opinion in *Jacobellis*:

[T]he use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children.\(^{116}\)

What modifications would be required in the constitutional standards for obscenity which is offered for sale or distribution to minors? One approach is to rephrase the three-fold requirement along these lines: 1) the dominant theme of the material taken as a whole must appeal to the prurient interest of minors; 2) the material is patently offensive because it affronts contemporary community standards relating to the representation of sexual matters to minors; 3) the material is utterly without redeeming social importance to minors. The *Mishkin* decision would justify the adjustment of the prurient interest test, but it did not discuss the other two parts of the test. Thus it might be asked whether the material must be patently offensive to minors themselves or to adult views of what is proper for minors. The debates about national versus local community standards and social importance seem less significant when minors are involved. Age, however, is an important factor and might be handled by a test based on the predominant appeal to a class of children of the same general age group as the child to whom the particular material has been disseminated.\(^{117}\)

A second approach, adopted by New York, skirts the definitional problem by specifying in minute and graphic detail the type of material which may not be disseminated to children; the term "obscenity" is avoided completely.\(^{118}\)

A separate problem is the need for a requirement that the distributor know the age of the intended recipient of the material.

### 6. Commercial Exploitation

Whatever else *Roth* accomplished, it focused attention on the material itself as being the essential component of obscenity. Yet, hidden in Chief Justice Warren's concurring opinion in *Roth* was a seminal idea which was to blossom almost a decade later in *Ginzburg*.

In *Roth* the Chief Justice had stated:

> It is not the book that is on trial; it is the person. The conduct of the defendant is the central issue, not the obscenity

\(^{116}\) Jacobellis v. Ohio, 378 U.S. 184, 201 (1964) (dissenting opinion).

\(^{118}\) N.Y. Rev. Pen. Law § 235.21, formerly N.Y. Pen. Law §§ 484-h, 484-i.
of a book or picture. The nature of the material is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting. . . . The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitations of the morbid and shameful craving for materials with prurient effect.\(^{119}\)

The Model Penal Code had adopted a similar approach in describing the criminal offense in terms of "pandering to an interest in obscenity,"\(^{120}\) although this phrase was later rejected by members of the American Law Institute.\(^{121}\) In its place were substituted provisions which still possessed overtones of the commercialization rationale. Advertising or commercial appeals to sell material "whether or not obscene, by representing or suggesting that it is obscene" were outlawed.\(^{122}\) Likewise, evidence of an "appeal to prurient interest, or absence thereof, in advertising or other promotion of the material" was admissible.\(^{123}\)

The Supreme Court paid no attention to the commercialization theory until \textit{Ginzburg v. United States}, but then it adopted it with vengeance. Ralph Ginzburg and three corporations controlled by him had been convicted for violations of the federal obscenity statute based on the use of the mails. They had mailed three publications: \textit{Eros}, a hard-cover quarterly magazine of expensive format; \textit{Liaison}, a bi-weekly newsletter on sexual matters; and \textit{The Housewife's Handbook on Selective Promiscuity}; and circulars advertising these publications.

Mr. Justice Brennan delivered the opinion of the Court, in which he was joined by the Chief Justice and Justices Clark, Fortas and White. He found Ginzburg engaged in "the sordid business of pandering," which he defined in the words of the Chief Justice's concurring opinion in \textit{Roth} as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."\(^{124}\) He found the "leer of the sensualist" and abundant evidence for his conclusion in the mailing addresses Ginzburg had sought for these publications and in his advertising statements and methods. Such evidence was relevant in determining the ultimate question of obscenity, and in this case it was decisive.

---


\(^{120}\) \textit{Model Penal Code} § 207.10, Alternative (1) (Tent. Draft No. 6, 1957).


ing whether the social importance claimed for them was pretense or reality. Thus, Justice Brennan saw "no threat to First Amendment guarantees in . . . 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." This analysis was simply an "elaboration" of the test.

The Court was quick to add a caveat to its conclusion:

No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.

The majority opinion, despite the lip-service it pays to the Roth test, represented a major new element to be considered in obscenity cases. What had been hinted at in Memoirs became in Mishkin and then dramatically in Ginzburg an emphasis on contextual obscenity instead of definitional obscenity.

Justice Harlan was disturbed by the implications of this new supplement to the obscenity test. He criticized the majority for elaborating a theory of obscenity entirely unrelated to the language, purpose, or history of the federal statute applied in the case and different from the test used by the trial court to correct the defendants. The Court had in effect written a new "pandering" statute without the sharply focused definitions and standards necessary in the first amendment area. Thus the Court had in the last analysis sustained the convictions "on the express assumption that the items held to be obscene are not, viewing them strictly, obscene at all."

The Douglas dissent also shows difficulty with the majority's departure from the concept of obscenity per se:

This new exception [to the first amendment] condemns an advertising technique as old as history. . . . The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. . . . A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it.

This comment is true to a point, but it does not reach the Court's theory. This seems to be that the advertising, rather than affecting the material itself, assists a court in reaching a judgment about the material as obscene or not. It provides the court with an insight into the distributor's own opinion of the material and with indication as to whether the intended audience is likely to look upon the material as obscene.

---

126 Ibid.
130 Ginzburg v. United States, 383 U.S. 463, 482 (1966) (dissenting opinion).
A Look at Obscenity

The “close case” qualification of the majority has also come in for its share of criticism. According to the Brennan opinion, it is argued, evidence of pandering is relevant only when a case is close. But a case can be close only when the usual Memoirs criteria are applied. This was not done in Ginzburg, and in fact the prosecution assumed that, standing alone, the publications themselves might not be obscene and the Court assumed without deciding that the prosecution could not have succeeded otherwise.

"Therefore it was the evidence of pandering which made Ginzburg a close case," and that meant that consideration of commercial exploitation had preceded rather than followed the Court’s determination that Ginzburg was close, in violation of the very rule the Court was announcing as the holding of the case. In other words, the Court first introduced evidence of pandering to give the impression of a close case, and then it invoked the finding of a close case to justify introducing the evidence of pandering.

The long-range implications of the Ginzburg decision are not clear at this time. The case may mark the beginning of the end for the Roth-Memoirs test and a concentration on the conduct of the defendant. If this be so, then conceivably the Ginzburg decision may result paradoxically in greater freedom of expression as long as the accompanying advertising material does not emphasize its prurient appeal. Even if both the Roth-Memoirs test and the Ginzburg approach are applied with equal force, the end result could be greater freedom, but this will be dependent on a showing of sufficient social value in the material to remove it from the “close case” category.

III. The 1967 Decisions

In an excellent review of the recent obscenity decisions, Magrath thus summarized the five tests developed by the Justices of the Supreme Court:

1. All material is constitutionally protected, except where it can be shown to be so brigaded with illegal action that it constitutes a clear and present danger to significant social interests. Justices Black and Douglas.

2. All material is constitutionally protected at both the federal and state level except hard-core pornography. Mr. Justice Stewart.

3. All material is constitutionally protected at the federal level except hard-core pornography. Material may be suppressed at the state level if reasonable evidence supports a finding that it is salacious and prurient. Mr. Justice Harlan.

4. Material may be suppressed both by the federal and state governments when prurient appeal, patent offensiveness, and an utter lack of social value coalesce; in addition, in close cases evidence that the producer or distributor commercially exploited the material so as to emphasize its prurience withdraws constitutional protection from otherwise protected material. Chief Justice Warren and Justices Brennan and Fortas.

5. Material may be suppressed if its dominant appeal taken as a whole is

---

133 Supra note 131.
to prurient interest. Justices Clark and White.\textsuperscript{134}

Dr. Magrath described the law of obscenity as a "constitutional disaster area," but apparently the Supreme Court was not offended by his description when Redrup,\textsuperscript{135} together with two other state cases, was decided in May 1967. Not only did the Court cite the Magrath article,\textsuperscript{136} but it drew up its own version of the various obscenity tests, deciding that the materials in question were not obscene by any of them:

Two members [Justices Black and Douglas] of the Court have consistently adhered to the view that a State is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their 'obscenity.' A third [Justice Stewart] has held to the opinion that a state's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others [Chief Justice Warren, Justices Brennan and Fortas] have subscribed to a not dissimilar standard, holding that a state may not constitutionally inhibit the distribution of literary material as obscene unless 'a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value,' emphasizing that the 'three elements must coalesce,' and that no such material can 'be prescribed unless it is found to be utterly

without redeeming social value.' Another Justice [White] has not viewed the 'social value' element as an independent factor in the judgment of obscenity.\textsuperscript{137}

The technique employed by the Court in Redrup is interesting. It suggests that the Court has decided to pause for breath after the fourteen opinions needed to decide Memoirs, Mishkin and Ginzburg. Instead of attempting to define obscenity further or to refute one another's positions, the Justices appear to be seeking a consensus, even if it be nothing more than a statement that particular material is not obscene by any of the established standards.

Equally interesting was the Court's enumeration of the claims and evidence which were not present in Redrup:

In none of the cases was there a claim that the statute reflected a specific and limited state concern for juveniles. See Prince v. Massachusetts, 321 U.S. 158; cf. Butler v. Michigan, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. Alexandria, 341 U.S. 622; Public Utilities Commission v. Pollak, 343 U.S. 451. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463.\textsuperscript{138}

The raising of these three issues may be significant. The question of special legislation for children had been mentioned only once before in the decisions since Roth. In Jacobellis, Justice Brennan

\textsuperscript{134} Magrath, The Obscenity Cases: Grapes of Roth, THE SUP. CT. REV. 7, 56-57 (P. Kurland ed. 1966).


\textsuperscript{136} Id. at 770 n.8.

\textsuperscript{137} Id. at 770-71.

\textsuperscript{138} Id. at 769.
and the Chief Justice had pointed out the possibility that legislation aimed at protecting children would run into fewer constitutional difficulties.\textsuperscript{130} The concept of "assault on privacy" is a new one for an obscenity decision. It is probably related to the "patent offensiveness" requirement, but the assault concept shifts the emphasis from the material to the purveyor's conduct. This is the same emphasis which the Chief Justice had proposed in \textit{Roth} and finally persuaded the Court to adopt in \textit{Ginzburg}. Finally, the reference to \textit{Ginzburg} suggests that the "pandering" doctrine has lost none of its vitality.

The Court thus seems to have listed three types of social interest which it considers to be legitimate objects of state concern: children, privacy and commercial exploitation of sex. Perhaps the Court is now beginning to indicate the rationale for obscenity legislation. Instead of justifying such legislation as a protector of public morality, it is finding specific "secular" goals and interest which help make up public morality but do not have undesirable religious overtones about them. One might ask now whether in the future the Court will find material obscene only when it fits into one of these categories or offends one of these three social interests.

A final point of interest about \textit{Redrup} is its comparison of the hard-core pornography standard of Justice Stewart with the \textit{Roth-Memoirs} test, the latter being "not dissimilar" from the former.\textsuperscript{140} The \textit{Court} cites the Magrath article in connection with its description of the Stewart position. Magrath argues, as a possible resolution of the impasse in which the Supreme Court presently finds itself, that "there exists a definable, reasonably precise, concept of hard-core pornography which, at least theoretically, could unite a strong majority of the Court."\textsuperscript{141} The materials for such a constitutional compromise are present in the agreement of all the Justices except Black and Douglas that something called obscenity is not entitled to first amendment protection and that it includes at least hard-core pornography. All seem to agree that there should be high standards of procedural fairness in obscenity cases and that children are entitled to special protection. Magrath calls on the Court to redefine obscenity as hard-core pornography in some forthcoming decision. The "not dissimilar" language of \textit{Redrup} and, indeed, the entire opinion, suggest the early stages of the proposed constitutional compromise.

The new restraint of the Court showed itself one month after \textit{Redrup} when the Court reversed per curiam thirteen federal and state court judgments finding material obscene.\textsuperscript{142} Without waiting for

\textsuperscript{130} Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).
\textsuperscript{140} Redrup v. New York, 386 U.S. 767, 770 (1967).
\textsuperscript{141} Magrath, \textit{The Obscenity Cases: Grapes of Roth}, \textit{THE SUP. CT. REV.} 7, 69 (P. Kurland ed. 1966).
full briefs and arguments, it simply granted certiorari and reversed, citing Redrup in eleven cases, Sunshine Book Company v. Summerfield in a twelfth, and nothing in the thirteenth. Justices Black, Douglas, Stewart, Fortas and White constituted the majority in all thirteen cases. Justice Brennan joined them in nine of the cases, while the Chief Justice and Justice Clark also agreed in three of these nine. In all of the state cases Justice Harlan would affirm on the bases of his Roth and Memoirs or Manual Enterprises opinions.

The apparent rationale for the majority’s action is the same as that in Redrup, that is, that special legislation protecting children, assault on privacy and pandering were not involved, and that the materials were not obscene under any of the tests currently used by the various Justices.

The significance of the use of the per curiam decision is difficult to assess. Once before, in 1957, the Court had reversed per curiam four lower court decisions, citing only Roth or Alberts.\(^4\) The Court apparently made an independent examination of the materials and found that censorship of the materials violated constitutional requirements.\(^{144}\) It is likely that the Court followed the same procedure in the thirteen 1967 cases and felt no need for further enlightenment from counsel about the law or the obscenity vel non of the materials in question. It hardly seems likely that the technique represents a victory for Justice Black’s position that the Court should not become involved in the review of materials found obscene.

The appearance in two of the cases of Thurgood Marshall’s name, then Solicitor General and now Supreme Court Justice, raises speculation about the course of future obscenity decisions, particularly since one vote is so crucial in this area. Justice Clark, formerly Attorney General, represented a strong conservative force. It will be interesting to see how the background elements of civil rights champion and Solicitor General influence Justice Marshall’s position on obscenity.

