Conflict in the Courts: Obscenity Control & First Amendment Freedoms

Father Edward J. Berbysse, S.J.

Follow this and additional works at: https://scholarship.law.stjohns.edu/tcl

Part of the Constitutional Law Commons, and the First Amendment Commons

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
Regulation of obscenity has long taxed the mind of man in his effort to enhance the welfare of the community while preserving freedom. The advent of Christianity brought a higher moral standard. The teachings of Christ and the reforms urged by St. Paul came into conflict with a world long in moral decay. Today the West, which has tenuously held the Christian tradition, is widely secularized; and the Church has been hard-pressed to hold the walls of society against moral collapse. To renew the Christian message, she has appealed to the legal tradition which is interwoven with Christian morality. While admitting the need for evolution in the law to meet ever-changing conditions, she has urged a return to laws which reflect the objective morality of the order in nature and do not conflict with Eternal Law.

The United States derived its legal tradition from England's common law. This heritage, built upon the Christian ethic and expressed in the basic principle of procedural due process, is vibrant in English constitutionalism and finds fundamental expression in the Constitution of the United States. Whether one reads the Magna Charta and its historical incorporation into the common law, or the history of American constitutionalism, the issues of freedom and authority have a substratum of morality derived from Christian teaching. Contemporary society is confronted with the necessity of maintaining a balance between protecting freedom of expression and preventing the erosion of society's morality. The general purpose of this writing is to analyze the common law tradition—both English and American—and to discover the basic principles which preserve freedom and the moral health of society. More specifically, obscenity is the particular concern of this paper. It will study the legal conflict between those who advance the argument for greater individual permissiveness and those determined to prevent the destruction of society's moral order.

* Associate Professor, Fordham University.
COURT INTERPRETATION OF OBSCENITY IN ENGLAND

In early England, obscenity was little interfered with by the lay courts. With the invention of printing in the 15th century, however, it soon became apparent that some regulation was needed. Initially, control over publication was chiefly concerned with political and doctrinal rather than moral issues. Even the Puritans, who disapproved of obscenity, were mainly concerned with the stage and the Marprelate controversy. In Sir Edward Coke's *De Libellis Famosis* (1606) there is no mention of obscene libel. The matter was handled by ecclesiastical courts whose remedial powers were limited to the imposition of such spiritual penalties as excommunication. In 1727, obscenity was defined by the British Attorney General as an "offense at common law" since "it tend[ed] to corrupt the morals of the King's subjects and [was] against the peace of the King." Even here, the Attorney General qualified his denunciation of obscenity by stating: "I do not insist that every immoral act is indictable . . . but if it is destructive of morality in general, if it does or may affect all the King's subjects, then it is an offence of a publick nature." Although the court adopted the Attorney General's view, Mr. Justice Fortescue maintained that obscenity was not indictable unless concomitant with "a breach of the peace or something tending to it. . . ." Therefore, during the 18th century, obscenity was an indictable offense only under appropriate circumstances.

During the 19th century in England, pornographic publications increased and diversified "from highly priced erotica designed for bibliophiles to the cheap trash intended for the general public." To counter the volume of pornography on the market, the Customs Consolidation Act (1853) authorized the customs officers to confiscate "indecent or obscene articles." Four years later Lord Campbell's Act gave judicial officers the authority to require the "destruction" of pornographic publications which they deemed equivalent to a "'misdemeanor proper to be prosecuted as such.'" These enactments were designed to protect society from publications which tended "to shock the common feelings of decency in a well regulated mind."

Late in the 19th century, the scope of the developing obscenity law expanded its focus to the message conveyed by the publication rather than the terminology used. In *Regina v. Bradlaugh*, the defendants, Charles

---

3 *Id.*
4 *St. John-Stevas* at 39.
7 146 PARL. DEB. (3d ser.) 327 (1857).
8 2 Q.B.D. 569 (1877), rev'd on other grounds, 3 Q.B.D. 607 (1878).
Bradlaugh and Annie Besant were prosecuted for publishing Charles Knowlton's *Fruits of Philosophy* which urged the public to practice birth control. The jury deliberated and ultimately reached an ambiguous verdict: "We find that the book is calculated to corrupt public morals, but we entirely exonerate the defendants from any corrupt motives in publishing it." The jury apparently based its verdict on the legal distinction between intent and motive. Motive has been defined "as the desire prompting an act, a state of mind which the law cannot take into account." Therefore, motive constitutes the underlying basis giving rise to the formation of an intent. The question of motive is peculiarly within the purview of the moralist. In contrast, the law, in order to establish criminal liability, concentrates on the intent or purpose of the author or publisher. Apparently as a consequence of this distinction, Chief Justice Cockburn interpreted the jury's verdict to be consistent with guilt.

Earlier, in *Regina v. Hicklin*, Chief Justice Cockburn established the standard for determining whether a publication is obscene: "The test of obscenity is whether the tendency of the matter . . . [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." The Chief Justice reestablished the notion of public nature and emphasized the "tendency" as the essence of the common law offense. Moreover, the intent to "deprave and corrupt" could be equated with publications which evoke lewd thoughts, stimulate licentious acts, or threaten the stability of society's moral order. He acknowledged that the indiscriminate sale of an obscene pamphlet could inflict evil on the public; but he remained conscious, as in *Bradlaugh*, of the difficulty "in determining whether the publication is calculated to corrupt public morals or is allowable in the discussion of a public question." Chief Justice Cockburn emphasized the urgency of providing special protection to young minds which were more vulnerable to the contaminating tendencies of obscenity.

The court will allow the accused to present evidence of his good character provided it is pertinent to the alleged offense. Experts on matters

---

*Id.; see discussion in St. John-Stevas at 70-74. St. John-Stevas distinguishes pornography from obscenity: "A pornographic book, although obscene, is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac. An obscene book has no such immediate and dominant purposes, although incidentally this may be its effect." It is to be noted that the word pornography is of Greek origin, and means "the writing of harlots." In the *Bradlaugh* case, the Chief Justice Cockburn of the Queen's Bench had his decision overruled by the High Court which admitted a writ of error "on the grounds that the indictment was bad for setting out only the title and not the whole book." Id. at 73.

10 St. John-Stevas at 139.
11 L.R. 3 Q.B. 360 [1868].
13 St. John-Stevas at 127.
14 *Id.* at 153.
of science or art may give testimony. Furthermore, when the facts are uncontested, it is the court’s prerogative to draw the conclusions of law.\textsuperscript{15} Finally, the court must determine the intent of a bookseller or librarian in making available an obscene book. Libel is not a crime of negligence, but always requires a mental culpability (\textit{mens rea}). It is presumed that booksellers can read only a fraction of the books which they sell. Therefore it is often difficult to prove the criminal intent necessary to convict for selling an obscene book.

In reviewing the problems that faced English legislation regulating obscenity, St. John-Stevas observed that “[t]he obscenity problem involves a conflict of rights, and thus no perfect solution is possible . . . .”\textsuperscript{16} The court must consider the circumstances of publication, the relevance of sanctions against criminal libel under statutory and common law, and the publication as an entity to determine its dominant effect. Moreover, intent must be determined in order to draw the distinction between ordering the removal of pornographic publications from the market and an unfettered control over all literary works.\textsuperscript{17} Intent may be established by direct or circumstantial evidence or inferred from the publication itself. St. John-Stevas contends that the weakness of English law on obscene libel was its failure to demarcate the boundary beyond which a publication would be criminal and the excessive discretionary authority residing in the judges. St. John-Stevas concluded: first, a balance must be struck between the right to freedom of expression and the necessity of protecting society against rampant sexual misconduct; second, the “reasonable man” test should be used in determining whether a publication is obscene, except that a different standard should apply to children’s books; and third, common law courts should be the forum for resolving obscenity issues.\textsuperscript{18}

**UNITED STATES CONTROLS OBSCENITY UNDER COMMON LAW INFLUENCE**

While English courts were attempting to balance freedom of press against the government’s obligation to protect the public from pornography, the United States also focused on the problem. In 1821, the court, in \textit{Commonwealth v. Holmes},\textsuperscript{19} held that the book \textit{Memoirs of a Woman of Pleasure} (Fanny Hill) was obscene and punishable under common law. By 1873, Congress had enacted legislation designed to eliminate the influx of obscenity from abroad and prohibit use of the mail as a means of transporting “obscene goods.”\textsuperscript{20} Six years later, a district court adopted the test

\textsuperscript{15} Id. at 154.
\textsuperscript{16} Id. at 203.
\textsuperscript{17} Id. at 137.
\textsuperscript{18} Id. at 202-03.
\textsuperscript{19} 17 Mass. 336 (1821).
developed in the aforementioned Hicklin case. Nevertheless, Judge Hand's observation indicates that some jurists were dissatisfied with the Hicklin test.

'The rule as laid down, however consonant it may be with the mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time . . . . 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.

Although the American courts were convinced that obscenity was not protected under the first amendment, uncertainty existed as to whether a particular publication was obscene. Consequently, to achieve some degree of harmony, the courts considered the intent of the book as a primary factor. For instance, the district court, in United States v. One Book Called Ulysses, held that a book with a pornographic intent had to be removed from the public; a contrary intent, however, required the court to analyze the entire book before deeming it obscene. Judge Woolsey defined obscenity as "tending to stir the sex impulses or to lead to sexually impure and lustful thoughts." This "stirring" was to be judged by its effect on "a person with average sex instincts. . . . It is only with the normal person that the law is concerned." Judge Woolsey concluded that Ulysses was not pornographic because he did "not detect anywhere the leer of the sensualist." A year later, the Second Circuit affirmed by noting that

[t]he book as a whole is not pornographic, and, while in not a few spots it is coarse, blasphemous, and obscene, it does not, in our opinion, tend to promote lust. The erotic passages are submerged in the book as a whole and have little resultant effect.

In effect, the opinion strengthened freedom of literary expression by tolerating obscenities interspersed throughout the publication. Judge Manton dissented stating that "[n]o matter what may be said on the side of the letters, the effect on the community can and must be the sole determining factor . . . . [A] work must be condemned if it has a depraving influence." As a consequence of Ulysses, four principles were developed to facilitate the determination of obscenity: first, the author's intent, although not determinative, must be considered; second, the publication's

(1970) (prohibiting importation of "immoral articles").

24 Id. at 184.
25 Id. at 184-85.
26 Id. at 183.
27 United States v. One Book Entitled Ulysses, 72 F.2d 705, 707 (2d Cir. 1934).
28 Id. at 711 (Manton, J., dissenting).
“dominant effect,” rather than infrequent obscenities, is the operative test; third, the court must apply the “reasonable man” standard; and finally, the publication’s social value must be balanced against the prevalence of obscenities.29

In the 1940’s, parties charged with publishing or authoring obscene works looked to the state and federal constitutions for vindication. In Doubleday & Co. v. New York,30 the publishing house maintained, in defense of publishing Edmund Wilson’s Memoirs of Hecate County, that the freedom of the press protections found in the New York Constitution and the first amendment of the United States Constitution, as applied to the states by the fourteenth amendment, were being encroached. Since the Supreme Court’s vote was split, four-to-four, thereby upholding the conviction, no definitive rule can be derived from the case. In 1949, Judge Bok, in Commonwealth v. Gordon,31 established a stringent test to be used in determining whether a publisher could be convicted pursuant to an obscenity statute. He ruled that a provision of the criminal code

may not constitutionally be applied to any writing unless it is sexually impure and pornographic. It may then be applied as an exercise of the police power, only where there is reasonable and demonstratable cause to believe that a crime or misdemeanor has been committed or is about to be committed, as the perceptible result of the publication and distribution of the writing. . . .32

The imminent danger of criminal behavior was the basis for the state court’s exertion of its police powers in confiscating these pornographic writings. The Supreme Court moved slowly toward adopting rigorous restrictions on a state’s police powers, and then only by certain justices whose emphasis on individual liberty often rendered the public unprotected against the sexual excesses of the libertarians.

The Supreme Court has held that freedom from prior restraints is not an absolute right. In Chaplinsky v. New Hampshire,33 Justice Murphy stated:

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, the profane, the libelous, and insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . 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

29 St. John-Stevas at 165.
32 66 Pa. D. & C. at 156.
33 315 U.S. 568 (1942).
may be derived from them is clearly outweighed by the social interest in order and morality.\textsuperscript{34}

Although the defendant was convicted for using “fighting words,” the Court nevertheless made it clear that obscene speech was not protected by the Constitution. Therefore, it can be inferred that so long as there is protection of the “essential . . . exposition of ideas,”\textsuperscript{35} prior restraint against obscene matter may be imposed. In \textit{Near v. Minnesota},\textsuperscript{36} Chief Justice Hughes, in analyzing a statute which authorized an injunction against a publisher of “an obscene, lewd and lascivious newspaper, magazine, or other periodical or a malicious, scandalous and defamatory newspaper, magazine or other periodical,”\textsuperscript{37} held that as applied to an allegedly defamatory article in a local newspaper the statute unconstitutionally infringed upon freedom of the press. Nevertheless, he agreed by way of dictum that “immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. . . . [T]he primary requirements of decency may be enforced against obscene publications.”\textsuperscript{38} In a dissenting opinion which denied the presence of any previous restraint, Justice Butler pointed to the indistinguishable nature of defamatory and obscene publications, the latter having been held by the majority, in dictum, as subject to injunction.\textsuperscript{39}

\textbf{Supreme Court Restrains State Use of Police Powers}

In the late 1940’s, the Supreme Court, having adopted the “clear and present danger” test, had to define the legitimate use of the state’s police powers. A New York statute made it a misdemeanor if one “print[ed] . . . publish[ed] . . . distribut[ed] . . . or possess[ed] with intent to sell . . . any book . . . or stories of deeds of bloodshed, lust or crime.”\textsuperscript{40} In upholding the constitutionality of the enactment, the New York Court of Appeals viewed the intent of the statute as prohibiting the “[c]ollections of pictures or stories of criminal deeds of bloodshed or lust . . . as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene . . . .”\textsuperscript{41} On appeal, the Supreme Court, in \textit{Winters v. New York},\textsuperscript{42} set the conviction aside on the ground that, as construed, the statute failed to define the prohibited acts in such a way as to exclude those which are a legitimate

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 571-72 (citations omitted).
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} 283 U.S. 697 (1931).
\item \textsuperscript{37} \textit{Id.} at 702.
\item \textsuperscript{38} \textit{Id.} at 715-16.
\item \textsuperscript{39} \textit{Id.} at 737 (Butler, J., dissenting).
\item \textsuperscript{40} N.Y. \textsc{Penal} \textsc{Law} § 1141(2) (McKinney 1941) (repealed 1950).
\item \textsuperscript{41} People v. Winters, 294 N.Y. 545, 550, 63 N.E.2d 98, 100 (1945).
\item \textsuperscript{42} 333 U.S. 507 (1948).
\end{itemize}
exercise of the constitutionally guaranteed freedom of the press. It failed, moreover, to provide an ascertainable standard for the determination of guilt. Less than two months later, the Court, in *Musser v. Utah,* vacated a judgment of the Utah Supreme Court which affirmed convictions on a charge of conspiring to “commit . . . acts injurious to the public health, to public morals . . .” by encouraging and engaging in polygamy. Although the Court remanded the case to the state court for an interpretation of the statute, the dissent went further and maintained that the conviction should be reversed because, in construing the statute, “the line must be drawn between advocacy and incitement, and even the state’s power to punish incitement may vary with the nature of the speech . . . .” The dissenting justices reached the zenith in the expression of the “clear and present danger” doctrine. They would have narrowly interpreted the police power limitation on free speech, looking carefully to “the degree of probability that the substantive evil actually will result.”

In *Butler v. Michigan,* the Court studied the question of standards for determining police power regulation of traffic in obscene printed matter. It declared unconstitutional a Michigan statute prohibiting the distribution to the general reading public of books containing obscene language tending to corrupt the morals of youth. The Court reasoned that the constitutional liberties of adults were arbitrarily curtailed by restrictions applicable to children.

In the same year, the Court, in *Alberts v. California,* sustained a state court conviction for obscenity on the grounds that obscenity, as distinguished from ideas having the slightest social importance, is not constitutionally protected free speech. The Court said in part:

>[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. . . . We hold that obscenity is not within the area of constitutionally protected speech or press.

The Court made clear the distinction between sex and obscenity, the latter defined as “material which deals with sex in a manner appealing to prurient interest.” The California statute was deemed not to have violated

---

333 U.S. 95 (1948).
Utah Code Ann. § 76-12-1 (1953).
333 U.S. at 101 (Rutledge, J., dissenting).
Id.
Id. at 484-85.
Id. at 487 (footnote omitted).
OBSCENITY CONTROL

the freedom of speech and press protected by the due process clause of the fourteenth amendment. In a companion case, Roth v. United States, a federal obscenity statute was found not to violate the first amendment. The statute read in part: "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture . . . or other publication of an indecent character; and—every written or printed card, letter, circular . . . giving information, directly or indirectly, where, or how, or from whom . . . any of such mentioned matters . . . may be obtained . . . is declared to be nonmailable matter." 

To the constitutional question whether the two statutes (state and federal) violated the "clear and present danger" test in that their proscription was not limited to material that would probably induce the recipients to antisocial conduct, the Court forthrightly stated that "obscenity is not protected speech." While rejecting the Hicklin test which judged obscenity by the effect of isolated passages upon the most susceptible persons, the Court set the standard for identification of obscene material: "whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest," that is "having a tendency to excite lustful thoughts." The Court believed that this test provided "reasonably ascertainable standards of guilt," and so was not in violation of the constitutional requirements of due process. It also remarked that lack of precision "is not itself offensive to the requirements of due process," since the Constitution "does not require impossible standards." Here the Supreme Court wisely refused to be led down the road of mathematical calculations, where free human actions were involved. While strongly protecting free speech and press, it reiterated the constant constitutional rule that obscenity, like libelous utterances, is not protected speech and left the determination of obscene material to mature judgment based on contemporary community standards.

In a separate opinion, Justice Harlan dissented from the Roth decision and concurred in Alberts. In sustaining California's statute he reasoned:

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. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Justice Harlan believed that under the Constitution, the protection of the

---

354 U.S. at 485.
Id. at 489 (footnote omitted).
354 U.S. at 491 (citation omitted).
354 U.S. at 501 (Harlan, J., concurring in Alberts).
public from obscenity was "primarily entrusted to the care . . . of the States." He feared "a deadening uniformity which can result from nationwide federal censorship" and rejected the contention that any book which tends to stir sexual impulses is "utterly without redeeming social importance." He would leave the regulation of obscenity to the "police powers" of the states, and so permit that difference of statute and conviction which would arise from the diversity of state communities.

In another dissenting opinion Justice Douglas, with the concurrence of Justice Black, expressed the idea that the first amendment's protection of free speech was absolute. This is consistent with the belief that speech enjoys a "preferred position" in the Constitution. Such dogmatic insistence on unlimited free speech, apart from the "clear and present danger" of violent or antisocial action, has not become a majority opinion of the Court. Such a view leaves little room for reasonable restraint upon pornographic elements that affront and corrosively attack the moral fabric of society. It would leave the public open to abuse from grossly immoral individuals and force the public to try to isolate itself from the broadcast of filth by all the media of communication. It is needless to remark that if such "freedom" were realized, neither adults nor children could escape the bad effects; the peace and decency of the community would be destroyed.

The Roth-Alberts cases manifest the diverse reasonings of the Justices and consequently are of problematical precedential value. They nevertheless incorporate the major principles of the Court's obscenity reasoning. In post-Roth cases the attempts to determine what constitutes "obscenity" have produced much confusion; but the narrowing of the category of obscenity seems clear. In a 1957 case, Kingsley Books v. Brown, Justice Frankfurter, speaking for the majority, sustained a special procedure under New York law by which the legal officer of a municipality could invoke a limited injunctive remedy against the sale and distribution of written and printed matter found after due trial to be obscene. To the publisher's contention that the injunction was prior restraint, Justice Frankfurter maintained that the civil procedure subjected him to no criminal prosecution without prior warning. He was subjected to no dread of the law and was free to keep the book for sale and sell it, until a court order specifically directed him to desist "for a prompt and carefully circumscribed determination of the issue of obscenity." The only criminal action that he should fear would arise from contempt of the court order. The New

57 Id. at 506 (Harlan, J., dissenting in Roth).
58 Id. at 507 (Harlan, J., dissenting in Roth).
59 Id. at 508-14 (Douglas and Black, JJ., dissenting).
60 354 U.S. 436 (1957).
61 N.Y. CODE OF CRIM. PROC. § 22-a(2) (McKinney 1958). This section required a trial within one day after joinder of issue and a decision within two days of the end of the trial.
62 354 U.S. at 442.
York statute was not prior restraint in the strict sense of the word. Though this seems a reasonable restraint upon obscene materials in conflict with the public moral health, and the procedures in accord with due process, nevertheless it was a thin victory: Justices Warren, Black, Douglas and Brennan all dissented.

The confusion was further compounded in *Kingsley International Pictures Corp. v. Regents,* wherein a New York motion picture licensing law was vacated. The law banned films that were "obscene, indecent, immoral, inhuman, sacrilegious, or . . . of such a character that . . . exhibition would tend to corrupt morals or to incite to crime . . . ." By amendment the law became applicable to a film that "expressly or impliedly presents . . . acts [of sexual immorality] as desirable, acceptable or proper patterns of behavior." In application to "Lady Chatterley's Lover," wherein adultery was presented as "right and desirable for certain people under certain circumstances," Justice Stewart made a distinction between "sexual immorality" and "obscenity" or "pornography". They are, he said, "entirely different." The basis of this entire difference is far from clear. Obscenity and pornography gradually corrode the moral fiber of society by publicly striving to seduce the public conscience into acceptance of a degenerate distortion of sexual integrity and by seriously tending to produce action in conformity with idea. A novel that makes adultery desirable, whatever the circumstances in which it may be fashioned, is also a corrosive of public morality. Moreover, it partakes of an additional evil in that it seductively counsels a violation of the justice of the committed bond between spouses.

It also comes into conflict with the legal code of the state which protects the accepted morality of a people. Justice Stewart's insistence is that the first amendment's guarantee protects the freedom to advocate ideas. That the first amendment ever intended to allow freedom to incite to adultery, while prohibiting freedom for the expression of obscenity, pornography or polygamy, seems to be in clear contradiction to the Christian ethic that formed the basis of our Constitution. The proposition that the first amendment has come to allow such a distinction, through legislation or court interpretation, is without proof. Though Justices Douglas and Black concurred with the Stewart decision and consistently held their thesis that all "censorship of movies is unconstitutional," a majority of the Justices cannot be said to have assented to the Stewart opinion. No rule, therefore, was clearly established. Justice Frankfurter was in favor of

---

46 360 U.S. at 685.
47 Id. at 688.
48 Id. at 690, 697 (concurring opinions).
reversal because the statute did not apply to the particular film in issue.\textsuperscript{9} Justice Harlan interpreted the New York statute as requiring "incitement" and not "mere abstract expression of opinion" and believed that the film lacked "anything that could properly be deemed obscene or corruptive of the public morals by inciting to the commission of adultery."\textsuperscript{10} In this opinion he was joined by Justices Frankfurter and Whittaker. It is interesting to note that these Justices identified "inciting to the commission of adultery," as \textit{obscenity}, with a "corruption of public morals" against which the state may legislate.\textsuperscript{71}

In 1966 the Supreme Court handled three cases—two involving state obscenity statutes, and one dealing with a federal obscenity statute. In \textit{Ginzburg v. United States},\textsuperscript{12} the Court affirmed a conviction under federal law. It viewed "the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal" and argued that "[w]here the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity."\textsuperscript{73} Justice Brennan considered that the "materials involved" were "used as a subject of pandering"\textsuperscript{74} and concluded that the \textit{Roth} test was applicable. It was noted that the advertising and selling of a work "on the basis of its prurient appeal" is behavior "central to the objectives of criminal obscenity laws"\textsuperscript{75} and therefore not within the protection of the first amendment. Justices Black and Douglas dissented on the basis of

\textsuperscript{9} Id. at 695 (concurring opinion).
\textsuperscript{10} Id. at 705-06 (concurring opinion).
\textsuperscript{71} Id. at 708. In this case the Court quoted the opinion by Judge Conway of the New York Court of Appeals, who said:

[I]t is curious indeed to say in one breath, as some do, that obscene motion pictures which alluringly portray adultery as proper and desirable may not be censored. As stated above 'The Law is concerned with effect, not merely with but one means of producing it.' 360 U.S. 686 n.7, quoting, 4 N.Y.2d 349, 364, 151 N.E.2d 197, 205, 175 N.Y.S.2d 51, 55 (1958) (emphasis added). It is my belief that Judge Conway is much more on the side of the true interpretation of the first amendment meaning than is Justice Stewart. Justice Harlan believed that "the Court has moved too swiftly in striking down a statute which is the product of a deliberate and conscientious effort on the part of New York to meet constitutional objections." Id. at 702. Though Justice Harlan believed that the application of parts of the film in question to the statute exceeded constitutional limits, he was convinced that it cannot be claimed that adultery is not a form of "sexual immorality." Id. at 705. He agreed that "it is the corruption of public morals, occasioned by the inciting effect of a particular portrayal or by what New York has deemed the necessary effect of obscenity, at which the statute is aimed." Id. at 706. Justice Harlan adds with telling effect: "It is difficult to understand why the Court should strain to read those opinions as it has. Our usual course in constitutional adjudication is precisely the opposite." Id. at 707.

\textsuperscript{12} 383 U.S. 463 (1966).
\textsuperscript{71} Id. at 466, 470.
\textsuperscript{11} Id. at 471.
\textsuperscript{75} Id. at 475 n.19.
their interpretation of the first amendment.\textsuperscript{6} Justice Harlan dissented, in the belief that such control of obscenity must be left to the "police powers" of the state or a federal enactment under the postal or commerce powers. He believed that the Court had written "a dubious gloss over a straightforward 101-year-old statute" and that the first amendment in matters of obscenity must be interpreted "in the light of the defendant's conduct."\textsuperscript{77} Justice Stewart dissented because he found no federal statute which made "commercial exploitation" or "pandering" or "titillation" a criminal offense. He believed that the Court had no power to deny Ginzburg the protection of the first amendment because it disapproved of his "sordid business."\textsuperscript{77}

In \textit{Mishkin v. New York},\textsuperscript{79} the Court sustained a conviction under a New York obscenity statute. The books involved depicted such deviations as sadomasochism, fetishism and homosexuality. The Court found the prurient-appeal standard easily satisfied: 
{\"[n]ot only was there proof of the books' prurient appeal . . . but the proof was compelling; in addition appellant's own evaluation of his material confirms such a finding.\textsuperscript{78}\} Though Justices Black, Douglas and Stewart dissented, the majority opinion was consistent with the Roth rule which held that obscenity (which deals with sex in a manner appealing to prurient interest) is without redeeming social importance and is not constitutionally protected speech.

\textbf{Plurality Opinion of Memoirs Brings Confusion in Law & Precedent}

The third case, \textit{Memoirs v. Massachusetts},\textsuperscript{81} which was decided in 1966, but before both \textit{Ginzburg} and \textit{Mishkin}, merely exacerbated the confusion that characterizes this area of the law. Justice Brennan, whose opinion was concurred in by Justices Warren and Fortas, expressed an interpretation of the Roth rule which required the coalescence of three elements: 1) a "dominant theme of material taken as a whole which appeals to prurient interest in sex;" 2) material which is "patently offensive because it affronts contemporary community standards;" and 3) material which is "utterly without redeeming social value."

\textsuperscript{82} Justice Brennan reasoned:

\begin{quote}
The Supreme Judicial Court (Mass.) 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 \textit{utterly} without redeeming social value. This is so even though the book is found to possess the requisite prurient
\end{quote}

\textsuperscript{76} \textit{Id.} at 476, 482 (dissenting opinions).
\textsuperscript{77} \textit{Id.} at 494-95 (dissenting opinion).
\textsuperscript{78} \textit{Id.} at 500 (dissenting opinion).
\textsuperscript{79} 383 U.S. 413 (1966).
\textsuperscript{80} \textit{Id.} at 510.
\textsuperscript{81} 383 U.S. 502 (1966).
\textsuperscript{82} \textit{Id.} at 418.
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. Justices Black and Stewart concurred in the decision of the Court but on
the basis of their reasoning in their dissents in Ginzburg and Mishkin. Justice Douglas found the Court's reasoning "disingenuous." Dissenting
opinions were expressed by Justices Clark and White. The former asserted
that "social importance does not constitute a separate and distinct constitut-
tional test . . . So-called 'literary obscenity', i.e., the use of erotic fantasies of the hard-core type clothed in an engaging literary style, has no
constitutional protection." Justice White reasoned forcefully:

To say that material within the Roth definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the Roth case—that such material is not protected because it is inherently and utterly without social value.

. . . [S]ocial importance is not an independent test of obscenity but is relevant only to determining the predominant prurient interest of the material, a determination which the court or the jury will make, based on the material itself and all the evidence in the case, expert or otherwise.

Because only three Justices explicitly endorsed the "coalescence" interpre-
tation of the Roth rule, we may not conclude a change in the original meaning of Roth was intended. Nevertheless, in some haste various legislatures have changed their criminal code on obscenity to conform to the Brennan reading of Roth, and have required for prosecution the coalescence of the "three elements". Clearly such revisions make prosecution for obscenity almost impossible. Under such a test, the most obscene matter, as long as it is clothed in literary or social garments, becomes constitutionally protected speech. Refinement of literary phrase or the agonizing of the sociologist, though only given the slightest expression, can protect the most pornographic of writings from indictment.

In Redrup v. New York, three cases, all involving state criminal and
civil proceedings against books and magazines, were decided simultane-
ously. The Court's majority concluded that all of the publications were constitutionally protected "from governmental suppression, whether crim-
inal or civil, in personam or in rem." The Court further noted that in
these cases there was lacking any question of:

---

83 Id. at 419.
84 Id. at 421.
85 Id. at 426.
86 Id. at 445, 450.
87 Id. at 461-62.
88 386 U.S. 767 (1967).
89 Id. at 770.
Reflecting on this reasoning of the Court, it can be argued that the "coalescence" requirement of the three Justices in the Memoirs case would not be applicable to legislation involving juveniles, an inescapable assault upon individual privacy, or pandering. Such materials cannot be regarded as constitutionally protected publication, whether or not they contain "redeeming social value." In apparent emphasis on the point of special state legislation for the protection of juveniles, in Ginsberg v. New York, the Court upheld section 484-h of the New York Penal Law which prohibits the sale to minors under seventeen years of age of material defined to be obscene. The Supreme Court sustained the New York trial court's conviction of Ginsberg for the sale of materials depicting female "nudity." The trial court had convicted under the law that prohibited material which:

1) "predominantly appeals to the prurient, shameful or morbid interest of minors"; and
2) "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors"; and
3) "is utterly without redeeming social importance for minors." 

The lower court, in sustaining the state statute, held the first two conditions sufficient for conviction, apart from the matter of "social importance." Upon review the Supreme Court cited Roth in a restatement of the proposition that "obscenity is not within the area of protected speech or press." Though the case primarily brought out the Court's belief that a minor's judgment in selecting sex material is more restricted than that of an adult, it also reiterated the constitutionally unprotected character of obscenity. With his usual individuality of approach, Justice Harlan in a concurring opinion repeated his conviction that "this whole problem is primarily one of State concern, and that the Constitution tolerates much wider authority and discretion in the States to control the dissemination of obscene materials than it does in the Federal Government." Moreover, in reflecting on the diversity of opinion of the Justices, he remarked, "Anyone who undertakes to examine the Court's decisions since Roth which have held particular material obscene or not obscene would find himself in utter bewilderment."
The great error was committed by three Justices who enunciated the “coalescence” requirement in Memoirs and by lower courts and legislators who have incorporated this requirement into their decisions and legislation. A return to the verbal clarity of meaning of Roth was needed. Instead, we were subjected to a new confusion, expressed in Stanley v. Georgia. In that case, though Justice Marshall made clear that Roth was not concerned with the private possession of obscene matter, and so “cannot foreclose an examination of the constitutional implications of a statute forbidding [it],” yet he spoke with some hesitation. “Roth,” he said, “does declare, seemingly without qualification, that obscenity is not protected by the first amendment.” While Justice Marshall found, realistically enough, no grounds in the Constitution for “controlling a person’s private thoughts,” he went too far in contending that “there appears to be little empirical basis for . . . [the assertion] that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence.” Secondly, his citing of Justice Brandeis in Whitney v. California wherein it was stated that “the deterrents ordinarily to be applied to prevent crime are education, and punishment for violations of the law,” is not applicable. Obscenity, under the Constitution, is not protected speech, and thus the “clear and present danger” is not pertinent here, as it was in the Whitney case. Finally, Justices Stewart, Brennan and White, while concurring in the decision, understandably expressed their belief that the case should have been solved on the basis of the fourth and fourteenth amendments, and that the Court should not have disregarded “this preliminary issue in its hurry to move on to newer constitutional frontiers.”

While confusion in the courts and legislatures was coalescing and while public criticism grew, the Supreme Court determined that a federal statute prohibiting the knowing use of the mails for the delivery of obscene matter was unconstitutional. It was the opinion of Justice White, in United States v. Reidel, that “Reidel was wrong in assuming that he had a ‘first amendment right to do business in obscenity and use the mails in the process.’” He asserted that the Roth case had not been overruled—that “it remains the law in this Court and governs this case.” He added that Stanley v. Georgia did not impair the validity of Roth.

---

88 Id. at 564.
89 Id. at 560.
90 Id. at 566.
91 Id. at 566-67.
92 274 U.S. 357 (1927).
93 Id. at 378.
94 394 U.S. at 569 (concurring opinion).
97 Id. at 356.
98 Id. at 354.
insofar as the distribution of obscene material was concerned. Whatever the scope of the 'right to receive' referred to in Stanley, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings that Roth held unprotected by the First Amendment. Although Justice White consistently stands firm on the proposition that the first amendment gives no shelter to obscenity, he introduces a disquieting note in his "postscript." He notes a "developing sentiment that adults should have complete freedom to produce, deal in, possess and consume whatever communicative materials may appeal to them" and that the law's involvement be limited to the protection of children. He believes that "reassessment" of the law "may prove to be the desirable and eventual legislative course." Justice White's position seems to assert that the legislature may, without hindrance from Roth, "restructure the obscenity laws," even to the extent of allowing commerce in obscenity. Such judicial restraint might have the effect of opening the Constitutional doors to a wide commerce in obscenity by legislative permissiveness—under pressure of such concerned groups as the ACLU, the motion picture industry and the book publishers. To permit such legislative action would be to amend the Constitution, making obscene expression allowable under the first amendment. Is Justice White correct in asserting that the first amendment "neither proscribes dealings in obscenity nor directs or suggests legislative oversight in this area?" Whatever may be the historico-juridical resolution of this query, it is my impression that the majority of the American people prefer the restriction of obscenity.

In a companion case to Reidel, United States v. Thirty-seven Photographs, the Court upheld the federal law prohibiting importation of obscene material and providing for its seizure by customs officials. The plurality opinion of Justice White (joined by Justices Burger, Brennan and Blackmun) found an essential distinction between the private possession of obscenity in one's home and the importation of obscene materials from abroad "whether for private use or public distribution." The private user, as in Stanley, may not be prosecuted; but this "does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce." Again Justice White appealed

109 Id. at 354-55.
110 Id. at 357.
111 Id.
112 Id.
113 Id. at 356.
116 402 U. S. at 376.
117 Id.
to *Roth* and cited *Reidel* in his assertion that "obscenity is not within the scope of First Amendment protection. Hence Congress may declare it contraband and prohibit its importation." In the *Thirty-seven Photographs* case, Justice Harlan concurred in the decision, but on the ground that the petitioner "lacked standing to raise the overbreadth claim." Justice Stewart also concurred in the judgment, but denied that "the Government may lawfully seize literary material intended for the purely private use of the importer." Justices Black and Douglas dissented, by denying any first amendment right for Congress to act as censor. Justice Marshall believed that obscene materials distributed through the mails allowed regulatory action for the protection of children and unwilling adults. Consequently, he concurred in *Reidel* but dissented in *Thirty-seven Photographs* on the ground that "the seized items were then in his purely private possession and threatened neither children nor anyone else." He believed that "the Government has ample opportunity to protect its valid interests if and when commercial distribution should take place."  

**THE COURT REITERATES AND CLARIFIES ROTH**

In the spring session of 1973, the Supreme Court handed down a series of decisions on obscenity, most of which dealt with state statutes. In *Miller v. California*, the Court upheld the ruling of the Superior Court of Cali-

---

118 Id. at 376-77.
119 Id. at 378 (concurring opinion).
120 Id. at 379 (concurring opinion).
121 Id. at 379 (dissenting opinion).
122 402 U.S. at 360 (concurring opinion).
123 Id. at 361. It is interesting to note that Justice Marshall was most willing to restrict distribution through the mails of obscene materials, as decided in *Reidel*, but would not assent to the Government’s right to remove obscene materials from the baggage of the appellee at the customs office. In *Reidel*, he feared that obscenity would be sent to children, even though the appellee "indicated his intent to sell to only adults who requested his wares." Id. Justice Marshall could have envisioned, with a customs house open to obscenity, a flood of foreign obscenity that would ultimately become a threat to the morality of children. He is convinced that "the Government has ample opportunity to protect its valid interests if and when commercial distribution should take place." Id.

I submit that it would be much more effective for the Federal government to "protect its valid interests" at the port of entry of the sordid stuff. Our Constitution has always protected the national government’s right to protect the public from the importation of plant diseases and human (physical) diseases; it would be a great inconsistency to open the door to moral evils if we still accept the Government’s role of protecting both the bodily and moral health of its people. If Justice Marshall really believes in the *Roth* rule that obscenity has no protection under the first amendment, then it is difficult to understand why he would permit the public authority to cooperate in the public act of bringing obscene material into the country, with a high possibility that it will have a significant impact upon the public. Is the prurient interest or the financial success of such an importer of greater weight than the public health?

fornia that the trial court had constitutionally convicted Marvin Miller of a misdemeanor in mailing unsolicited advertising brochures containing pictures and drawings explicitly depicting sexual activities. Chief Justice Burger, speaking for the majority, reiterated the Roth rule that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance," and repeated the Court's judgment enunciated in Chaplinsky v. New Hampshire that obscene utterances "are no essential part of any exposition of ideas." The Court also put to rest the so-called "test" of Memoirs v. Massachusetts in which a plurality opinion demanded, as an independent criterion, that matter must be "utterly without redeeming social value." The Chief Justice found this "test" to be "a burden virtually impossible to discharge under our criminal standards of proof;" he rejected it as inconsistent with Roth, and not held by any member of the Court today.

The Court then said that "[s]tate statutes designed to regulate obscene materials must be carefully limited." While emphasizing that it was not the Court's function "to propose regulatory schemes for the States," it set basic guidelines:

1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest.
2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.
3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Court further attempted to give a "few plain examples of what a state statute could define for regulation." It also accepted the place for the jury system in determining questions of fact, while safeguarding the law by judges, rules of evidence, presumption of innocence and other elements in due process. In addressing itself to the minority opinion of Justice Brennan who feared "institutional tension," the Chief Justice reasoned that there would be no remedy of tension between state and federal courts "by arbitrarily depriving the States of a power reserved to them under the Constitution." Here the Court made clear that, though "fundamental

125 315 U.S. 568 (1942).
126 Id. at 572.
128 413 U.S. at 22.
129 Id. at 23-24.
130 Id. at 25.
131 Id. at 24 (emphasis added).
132 Id. at 25.
133 Id. at 29. In the majority opinion, the Court specifically notes that Mr. Justice Brennan "has abandoned his former positions and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the
First Amendment limitations on the powers of the States do not vary from community to community," questions of fact cannot be determined by uniform national standards. With such diversity characterizing the country, the state community may devise its own norms. By way of parallel the Court argued:

The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of their community, guided always by limiting instructions on the law. The Chief Justice noted that during the trial, "both the prosecution and the defense assumed that the relevant 'community standards' in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America." The appellant, said Mr. Chief Justice Burger, raised for the first time, in an appeal to the Appellate Department of the Superior Court of California, the objection that application of state, rather than national, standards violated the first and fourteenth amendments. In noting this objection Chief Justice Burger cited former Chief Justice Warren's statement in Jacobellis v. Ohio:

It is my belief that when the Court said in Roth that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard. . . . I believe that there is no provable 'national standard' . . . . Finally, he vigorously asserted, "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." The Court concluded by reaffirming Roth

First Amendment from protected expression." Id. at 27. The majority criticizes this position, saying: "Paradoxically, Mr. Justice Brennan indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults . . . and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only." Id. at 27. The majority further adds that "if the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hardcore' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Mr. Justice Douglas contends." Id. at 27-28. Finally the majority, in response to Mr. Justice Brennan's plea of "institutional stress," states: "Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power reserved to them under the Constitution." Id. at 29.

134 413 U.S. at 30.
135 Id.
136 Id. at 31.
138 Id. at 200 (Warren, C.J., dissenting).
139 413 U.S. at 33.
in its ruling that obscenity is not protected by the first amendment by asserting that obscene matter can be regulated by the states, subject to specific safeguards and by application of contemporary community standards.\textsuperscript{140}

Another aspect of the regulation of obscenity by the states was raised in \textit{Paris Adult Theatre I v. Slaton},\textsuperscript{141} wherein the operators of “adult” theatres raised a plea of certiorari to the Supreme Court from a decision of the Supreme Court of Georgia. The state’s supreme court found that the films, exhibiting “scenes of simulated fellatio, cunnilingus, and group sex intercourse,”\textsuperscript{142} were not protected by the first amendment; and that exhibition of obscene material in public places is not protected by any constitutional doctrine of privacy. Chief Justice Burger noted that Georgia’s action of employing a civil injunction against the exhibition of obscene materials was constitutional—that it was not error to fail to require “expert” affirmative evidence that the materials were obscene “when the materials themselves were actually placed in evidence.”\textsuperscript{143} The Chief Justice then reached the heart of the matter when he said:

\begin{quote}
We categorically disapprove the theory, apparently adopted by the trial judge, that obscene pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only.\textsuperscript{144}
\end{quote}

The Court noted that, whereas the ruling of \textit{Stanley v. Georgia}\textsuperscript{145} allowed “the right of Stanley to possess, in the privacy of his home, pornographic films,”\textsuperscript{146} the present case had a decidedly public character:

\begin{quote}
We have declined to equate the privacy of the home relied on in \textit{Stanley} with a “zone” of “privacy” that follows a distributor or a consumer of obscene materials wherever he goes.\textsuperscript{147}
\end{quote}

The Court then considered the question whether there is at least an arguable correlation between obscene material and crime, and here cited the \textit{Hill-Link Minority Report of the Commission on Obscenity and Pornography}. Besides, there is a “right of the Nation and of the States to maintain a decent society . . . .”\textsuperscript{148} The Court also rejected the contention that, in the absence of conclusive scientific data demonstrating that exposure to obscene materials adversely affects men and women, there should be no state regulation. “It is not for us,” said the Court, “to resolve empiri-
cal uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself." In support of this the Court quoted extensively from its decisions, especially in review of state and national regulation of commerce and business, which had been based on assumptions that might be unprovable. The Court criticized those who, holding an absolutist view of the first amendment, allowed for a severe restraint in the marketplace of goods and money, but not in the marketplace of pornography. And so:

Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "the social interest in order and morality." Turning to the question of an assumption that people have the capacity for free choice, the Court admitted that most exercises of individual free choice are explicitly protected by the Constitution but that "totally unlimited play for free will . . . is not allowed in ours or any other society."

Finally, the Court admitted the state's rights argument that, in the exertion of its police powers, it might adopt a laissez-faire policy and "drop all controls on commercialized obscenity"; that the Supreme Court does "not sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems business affairs or social conditions." The Court was decidedly convinced, as in Miller, that such regulation by the states is within their scope of powers reserved under the Constitution, and only reviewable when the true freedoms of the first amendment are involved. Chief Justice Burger rejected the claim that the State of Georgia was attempting to control the minds or thoughts of those who patronize theatres. To prevent the display of obscene material "is distinct from a control of reason and the intellect." The state has the right "to maintain a decent society . . . ."

Another case was brought to the Supreme Court on certiorari from the Superior Court of California. In Kaplan v. California, Kaplan, the proprietor of the Peek-A-Boo Bookstore, was charged with selling to a police officer a book "made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being

---

144 413 U.S. at 60.
145 Id. at 60-61, citing Roth v. United States, 354 U.S. at 485, quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (emphasis added in Roth).
146 413 U.S. at 64.
147 Id.
149 413 U.S. at 67.
The book was received in evidence as read, in its entirety, to the jury in the trial hearing. Petitioner's conviction was affirmed on appeal to the Superior Court of California. The petitioner's contention that "all books were constitutionally protected in an absolute sense" was rejected by the California Court. The Supreme Court agreed. It observed that obscenity, whether in conduct, or in written and oral description, or in photographs and moving pictures, is not protected by the first amendment. The Court, in noting the continuing life of a book, remarked that "widely circulated books of this category" have a tendency "to reach the impressionable young and have a continuing impact." The Court stated that states need not wait until behavioral experts provide empirical data before enacting controls of commerce in obscene materials. Here it adverted to the reasoning in Paris Adult Theatre I, repeating that it was not arguable that "sale of sexually oriented material to consenting adults is constitutionally protected"; and insisting that "the prosecution's evidence was sufficient, as a matter of federal constitutional law, to support petitioner's conviction;" and that the book, "taken as a whole, predominantly appealed to the prurient interest of the average person in the State of California, applying contemporary standards."

On the same date the above decisions were handed down, the Supreme Court decided United States v. 12 200-ft. Reels of Super 8mm Film, which tested the constitutionality of a section of the United States Code. The statute provided in part:

All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper . . . print, picture, drawing . . . or other article which is obscene or immoral.

The claimant Paladini sought to carry movie films, etc., into the United States from Mexico. The materials were seized as being obscene by customs officers at Los Angeles Airport. The narrow issue in this case was whether the United States may constitutionally prohibit importation of obscene material which "the importer claims is for private, personal use and possession only." Claimant was denied any first amendment protection, first because Roth allows no such protection, and secondly because Stanley gives a precise and narrow protection to privacy, based on the

---

157 Id. at 116-17.
158 Id. at 118.
159 Id. at 120.
160 Id.
161 Id. at 122.
162 Id. at 121.
165 Id.
166 413 U.S. at 125.
law's "'solicitude to protect the privacies of the life within [the home].'" As Justice White said in *United States v. Thirty-seven Photographs*, "Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home." The Court also noted that "it is extremely difficult to control the uses to which obscene material is put once it enters this country."

Chief Justice Berger again delivered the majority opinion of the Court in *Heller v. New York*, which found the defendant guilty of violating the state obscenity laws. On request of a state law enforcement official, a New York State Criminal Court judge viewed a motion picture, found it obscene, and issued warrants under which the manager of the theatre was arrested and the film seized. In a non-jury trial the New York Criminal Court rejected the defendant's contention that the seizure of the film without a prior adversary hearing violated his constitutional rights. On appeal to the Court of Appeals the conviction was affirmed. On certiorari, the United States Supreme Court held that the seizure was constitutionally permissible if such seizure was pursuant to a warrant issued after a determination of probable cause by a neutral magistrate, and if following the seizure, a prompt judicial determination of the obscenity issue was available at the request of any interested party, with copying of the seized film being permitted if necessary for continued exhibition of the film pending judicial determination of the obscenity issue. In the Court's ruling Chief Justice Burger said:

> This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. . . . In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution.

It is "an open question whether a judge need 'have viewed the motion picture before issuing the warrant.'" It was determined that it was not required that an adversary proceeding must take place prior to initial seizure. It was held, rather, that a judicial determination must occur "promptly so that administrative delay does not in itself become a form of censorship." In the *Heller* case there was no final restraint in the sense

---

163 Id. at 376.
164 413 U.S. at 129.
166 Id. at 484-94.
167 Id. at 488.
169 413 U.S. at 489.
of being enjoined from exhibition or threatened with destruction. The Court noted that in this case "the barrier to a prompt judicial determination of the obscenity issue in an adversary proceeding was not the State, but petitioner's decision to waive pretrial motions and reserve the obscenity issue for trial." It remarked that the seizure of a copy of the film did not prevent the continuing exhibition of the film and took judicial notice of the statement of the counsel for New York that movie films tend to "disappear" if adversary hearings are afforded prior to seizure.

Another case, Roaden v. Kentucky,

served as a check on overzealous police officers who, without warrant, seized an obscene film exhibited at a drive-in theatre. On certiorari the Supreme Court reversed the lower courts of Kentucky, arguing that the seizure, without the authority of a constitutionally sufficient warrant, was a prior restraint on expression and an unreasonable action under the fourth amendment, and that the admission in evidence of an unconstitutionally seized film required reversal of conviction. In this case the petitioner did not contest the obscenity of the film at trial. The law enforcement agency did not contest the assertion that: first, the sheriff had no warrant when he made the arrest and seizure; second, there had been no prior determination by a judicial officer on the question of obscenity; and third, the arrest was based solely on the sheriff's observing the exhibition of the film. The Supreme Court quoted the fourth amendment's proscription against "unreasonable seizures," and noted that "seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves' . . . are to be distinguished from quantities of books and movie films . . . ." In this case, the Court said:

The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness.

The Court remarked that since "there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." In the matter of seizure of books or films, however, there are presented "no such 'now or never' circumstances." The effect of this case is to show that the Court will not tolerate what the ACLU would label "witch-hunting" or censorship. It insists upon constitutionally correct procedures in preventing obscenity.

177 413 U.S. at 490-91.
178 413 U.S. 496.
180 413 U.S. at 504.
181 Id. at 505.
On October 23, 1973, the Court handed down 11 obscenity decisions which reiterated local standards as the measure of obscenity, as long as the standards are held within the restraining limits of the new “guidelines” enunciated by the Court in its decisions of June 21, 1973. The majority did not file opinions in any of the cases. The minority of the Justices, under the leadership of Justice Douglas, found the producers and sellers “at the mercy of the local police force’s conception of what appeals to ‘prurient interest’ or is ‘patently offensive.’”

It seems not to have occurred to the minority that the people wish their government, through its legally constituted officers, to remove from public display obscenity which is not protected by the first amendment. The people are not opposed to an exchange of ideas. They reject a degenerate flooding of pornography into the public marketplace, just as they refuse a place for worthless securities and communicative diseases. They find that their elective government is better qualified to protect the common good than those who opt for flooding the market with profit-bearing obscenity at a cost to public morality, and more conscientious of the commonweal than those who imagine that the rights of the first and fourteenth amendments are absolute, and checked by no other purposes of government.

**Author’s Conclusions and Observations**

The Court, consistent with a long tradition, holds that the freedoms of the first amendment are basic and may not be restrained. Yet such freedoms are not absolutes. Speech, press, literature, movies and conduct which explicitly and significantly are obscene are subject to the “police powers” of government. The Court is well aware that civil society is not in existence merely for the protection of individual expression, but also in order to maintain the public order. Preservation of moral decency is essential to the latter. The state must legislate both for the individual freedom and for the healthy order of society. The Supreme Court will be called on to review the legislative act and judicial reasoning of lower courts, both national and local. In so doing it will strive both to restrain the government’s unreasonable use of the “police powers” and a permissive licensing of an individual’s abuse of speech, writing and action.

In holding that obscenity is not protected free speech, the Court is consistent with the tradition of the English common law. This heritage incorporates a moral tradition which is based on Christian revelation and a philosophical ethic that is concretized in positive law.

Once a law has been enacted by a state or by the Congress, it is challenged for constitutionality by those affected. The Court asks: Is the law violative of the basic freedoms of the first and fourteenth amendments? Does it harbor a potential repression of legitimate freedom? A

---

OBSCENITY CONTROL

statute, therefore, must have a high degree of clarity, even though — since it deals with free human acts — it cannot be drawn with the precision found in mathematics. While the Court must be a concerned custodian of the individual's freedom, it also must practice restraint in overturning law. The legislature is the body most immediately representative of the people who are the sovereign source of government. The Court looks to the law, constitutional and statutory, for light, and only with reluctance does it overturn the legislative statute. As a judicial tribunal it should not prefer the freedom of an individual to the law which is enacted for the protection of, and presumably with the consent of the people who are individuals constituting the commonwealth. It is neither legal nor prudential for the Court to hold a doctrinaire thesis in the face of the people's determination to retain its moral tradition in matters so oppressive of the common good as obscenity. To do so is to force the people to such emergency and difficult measures as constitutional amendment. Reasonable law-making should be presumed to represent the reasoned will of the people, and so should not lightly be overturned.

Admitting that restraint must be observed both in legislative enactment and judicial decision, the law must also evaluate the nature of obscenity. Legislation, both state and national, has consistently held that obscenity is that which appeals to prurient interest. Whether it is highly "literary" erotica or cheap trash, it has no human value. Rather it has the effect of shocking the feelings of decency in a balanced mind, and a tendency to disgust adults while corrupting the morals of youth. The matter of obscenity is not determined by observing its effect upon a person's moral activity. It is not protected from indictment by a need of proof that it will cause a "clear and present danger" of immoral action. It is enough that it manifest a tendency to corrupt public morality. The law cannot be defused from action by the sociologist's statistics on whether or not obscenity leads to immoral action. The law must protect society from being publicly and shamelessly affronted by matter that is degenerate. Because of its degeneracy such matter cannot be said to have literary or social value. The United States Supreme Court has frequently used the "clear and present danger" test in respect to inciting speech which is allowable in times of peace, but which is limited in times of national emergency. Obscenity is different, since it is never legitimate speech under the Constitution.

The law looks to the intention that becomes apparent in the matter that is written or filmed. To the reasonable man it soon becomes evident that certain matter does not reflect sociological concern, medical science, psychological insight, artistic integrity or true literary expression. It intends the corruption of public morality by pandering to prurient interest. A light covering of literary phrase, artistic style, medical terminology or psychological theorizing cannot redeem what is patently an obscene intention. As the law is written to preserve society from the corruptive influence of indecency, so the Court must look to the evidence of intention which the material before it reveals. Here the practical question is raised
as to what degree of obscenity may be present in a publication or film. The "dominant effect" of the work seems to be, with the exception of some justices, the Court's norm of liability before the law. This norm apparently is in use as a prevention against confining speech and publication to narrow areas of expression, while restricting the writer and publisher who fears falling afoul of the law. I submit that the permission of any obscenity becomes an opening wedge to the admission of unlimited obscenity. It must, in the light of such permissiveness, be asked: When is the culpable degree of obscenity reached? What norm should be employed in the determination of "dominant effect"? Since the Constitution has been consistently interpreted as not including obscenity under free speech, it must have been with the realization that the expression of all ideas can be successful without drawing into use the worthless and degenerate.

In the recent decisions of the Supreme Court on obscenity, I find a healthy trend in the Court's ruling and reasoning. It defines obscenity and places it outside the protection of the law. Yet it seems to tolerate obscenity, so long as a work, "taken as a whole," does not predominantly appeal to the prurient interest of the average person in the locality nor violate contemporary standards. It seems contradictory to me to assert that obscenity is not under first amendment protection and simultaneously to allow it, as long as the general character of the book is not obscene. Could not some parts be obscene, while the general intention is wholesome? Is this justified by some credence that the law is not concerned de minimis? Is the "taken as a whole" test a return, in modified form, to the "utterly without redeeming social value" as enunciated by a plurality in Memoirs? It should be remembered that the Court specifically rejected this separate test.

The Court, in my view, has wisely given over the determination of obscenity to the state's "police powers," since no national norm of obscenity could be realizable. The control of public morality has always been understood to be part of the powers reserved by the Constitution to the states. Simultaneously the Court, in consideration of the important protections of the first amendment, has required of the states a respect for certain "basic guidelines." Some of these protections have appeared in the cases that have been summarized in this article, under the decisions of June, 1973.

A last question concerns the individual who fears innocently falling into the thickets of the law, and so is restrained in his freedom of speech, composition, filmmaking or action. The presumption of innocence in the writer, speaker, publisher or actor, who conspire to capture the obscenity market, is a bit naive. But, even if innocent, their protections are many. First, their motives are not subject to the scrutiny of the law, but only the intention which is revealed in the production. Second, they have the guidance of laws and court decisions which offer enlightenment to the innocent. Third, the creation of advisory groups of citizens can help them in knowing
the moral standards of the community. Fourth, the Court has been more than tolerant in its reading of the evidences that border on and often encompass the obscene.

It is my conviction that there is no present danger of writers and publishers having their freedom restricted. Rather, in the widespread pestilence of obscenity, where the law has become ineffective and the courts permissive to a dangerous degree, it is the public that has been left unprotected from the virulent and aggressive proliferation of obscenity in speech, writings, films and action.