1967

Obscenity Standards in Current Perspective

Teddy M. Jones Jr.

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
https://scholar.smu.edu/smulr/vol21/iss1/21

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
OBSCENITY STANDARDS IN CURRENT PERSPECTIVE
by Teddy M. Jones, Jr.

Is censorship necessary? Who is qualified to act as a censor? What is the constitutional scope of censorship control? These questions hit at the heart of a constitution which guarantees citizens a large degree of individual liberty. The Supreme Court cannot provide the answers which would satisfy voices on both sides of the issues. Perhaps no clear-cut answers are possible, for absolute standards pale before the confusing battery of factors to be weighed in coming to a decision. The Court's recent decisions in Mishkin v. New York, Ginzburg v. United States, and A Book, Etc. v. Attorney Gen. of Mass. do not set black and white limits to censorship control. Rather, they must be viewed as the latest chapter in an area of law which is whipped by changing constitutional philosophy and exposed to the turbulence of rapidly changing social mores. The first and fourteenth amendments to the United States Constitution prevent encroachment upon the freedoms of speech and press, but "obscenity" has been placed beyond this constitutional protection. Defining obscenity and applying the definition to specific materials has proved to be a difficult judicial task. When the United States Supreme Court once again came to grips with the problem in 1966, it decided three cases and amplified its 1957 ruling in Roth v. United States. Nevertheless, the Court left the waters almost as murky as it found them.

I. DEVELOPMENT OF OBSCENITY LAWS

Statutory Censorship of obscenity by statute came relatively late in this country's development. Literacy was uncommon in the early history of the United States as a nation, and presumably those who could read were sufficiently insulated against assault by lascivious printed matter. The first foray into the censorship area by the Congress, in fact, was a tariff statute designed to prevent importation of obscene "prints" and pictorial matter and later, representations created by the new process of photography.

5 U.S. Const. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."
7 Ibid.
9 ibid.

285
During the Civil War, Congress passed its first criminal obscenity law, ostensibly to prevent obscene mailings from being sent to its men under arms.\(^{10}\)

It was not until 1873, however, that the federal government fully entered the censorship business. Prodded by Mr. Anthony Comstock, the Congress of that year passed, with less than one hour of floor debate, the law which still serves as the basis of governmental regulation of obscenity in the mails.\(^{11}\) The Comstock Act proscribed not only pictorial matter but also printed material, mail-order advertisements of obscenity, abortifacients, contraceptives, and information as to how or where to obtain the forbidden materials.\(^{12}\) This statute forms the core of present legislative provisions authorizing the Post Office Department to take action against obscene material in the mail. Violations can be punished by fine, imprisonment, or both.

In addition to the federal statutes, all states except New Mexico have criminal laws designed to control or suppress obscene literature.\(^{13}\) Some enactments proscribe possession; others, possession with intent to sell; and still others, advertising of obscene literature or pictures. Most of the state regulatory statutes are directed, either primarily or secondarily, towards control of dissemination of obscene material to minors or persons under a certain age.\(^{14}\)

**Administrative Enforcement** Postal authorities are permitted to regulate obscenity in the mails through two primary methods, seizure and exclu-

---

\(^{10}\) Stat. 504 (1865).

\(^{11}\) Comstock Act of 1873, ch. 258, 17 Stat. 598. The current statute is 18 U.S.C. § 1461 (1964); see relevant text set out at note 12 infra.

\(^{12}\) For many years following passage of the act, the Society for the Suppression of Vice, which Mr. Comstock headed, received a portion of the fines collected in prosecutions initiated through the work of that great vice hound. By January 1, 1874, Comstock could boast of seizing, under authority of the act, 194,000 obscene pictures or photographs, 134,000 pounds of books, 14,200 stereo-view plates, 60,300 rubber articles (the nature of which is not disclosed), 5,100 sets of playing cards, and 31,150 boxes of substances purporting to be aphrodisiacs. ERNST & SCHWARTZ, CENSORSHIP ch. 4 (1964). Comstock's slogan during his lobbying campaign for the act of 1873 was, "Books are Feeders for Brothels." See generally ERNST & SCHWARTZ, op. cit. supra. See also Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 MINN. L. REV. 1009, 1010 n.2 (1962).

The main provisions of the present federal postal obscenity statute are:

- Every obscene . . . article, matter, thing . . . or notice of any kind giving information . . . where, or how, or from whom, or by what means any of such mentioned things may be obtained . . . is declared to be nonmailable matter and shall not be conveyed in the mails . . .
- Whoever knowingly uses the mails for the mailing . . . of anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both . . .

\(^{13}\) See id. at app. II for a listing of prohibited articles and action under the statutes.

\(^{14}\) See id. at apps. I and II.
sion of non-mailable material and exercise of mail stoppage procedures. All mail, except that carrying first-class postage, may be seized and inspected for obscenity by any mail clerk or mail carrier. In practice, however, most inspecting is done by Post Office Inspectors whose primary function is to ferret out and examine mail which may have an obscene content. If the inspector believes the seized material to be obscene, it will be refused mail service and forwarded, over the signature of the local postmaster, to the Post Office Department at Washington, D.C. There agents review the decision of the Postal Inspector, mark offending passages, and make recommendations which are reviewed finally by the Department’s General Counsel. If at any stage of this process the material is found to be not obscene, the mail is returned to the local postmaster with instructions to deliver the delayed mail to the addressee. Unless the addressee notices the delay evidenced by the postmark, neither he nor the sender may ever know of the seizure and inspection. If, however, the Department decides that impounded mail is obscene, the local postmaster is instructed to notify the sender that his mail has been intercepted. The notice demands that the sender show cause why the material should not be destroyed as non-mailable matter and states that unless such cause is shown within fifteen days, the material will be burned. This “show cause” notice may follow the interception of the mail by a long period of time and will often be the first indication to either the mailing or receiving party that a postal seizure has taken place.

No formal hearing or protection provided by notions of administrative or judicial due process may be afforded in the determination that mailed

15 See generally de Grazia, Obscenity and the Mail: A Study of Administrative Restraint, 20 Law & Contemp. Probs. 608 (1955); Paul & Schwartz, Obscenity in the Mails: A Comment on Some Problems of Federal Censorship, 106 U. Pa. L. Rev. 214 (1957); Comment, Obscenity in the Mails: Post Office Department Procedures and the First Amendment, 58 Nw. L. Rev. 664 (1963); Note, Obscenity in Private Communication, 23 Ohio St. L.J. 553 (1962). Some commentators point to the apparent schizophrenic enforcement attitude taken by the Post Office Department, i.e., the power to exclude obscenity from the mail comes from a criminal statute; but the Department uses primarily administrative enforcement procedures to regulate obscenity. For an exhaustive study of the legislative history of the postal obscenity statutes, see Paul, The Post Office and Non-Mailability of Obscenity: An Historical Note, 8 U.C.L.A. L. Rev. 44 (1961). Mr. Paul concludes that the basic congressional purpose was to provide criminal sanctions and that the postal independent censorship program may be wholly unauthorized.

16 de Grazia, supra note 15, at 608. This power is derived from § 1461; see relevant text of the statute at note 12 supra. A search warrant would be required to open and inspect first-class mail. 74 Stat. 657 (1960), 39 U.S.C. § 4017 (1964).

17 Id. at 609.


19 de Grazia, supra note 15, at 609.

20 Most instances of postal inspection arise not at the beginning of the mailing process, when an article is first deposited or offered for deposit in the mail, but rather arise after material has started its progress in the mail flow.
material is obscene. On occasion, when a party threatens to sue the Postmaster General or his agents, the Post Office Department has sent notice to the interested party that a "hearing" on the mailability of his mail will be held.\(^\text{21}\) Much doubt surrounds the value of such a "hearing," however, since the determination of obscenity and the seizure of mail has already taken place. The Department assumes the role of both prosecutor and judge in such a hearing, and no regulations promulgated by the Department or imposed upon it set out the procedure to be followed. An aggrieved party seems to have a greater chance of success through an independent court action than through the administrative remedy offered him by the Post Office.\(^\text{22}\)

The second, more drastic, method of postal administrative regulation is through a blanket stoppage of mail.\(^\text{23}\) This procedure not only denies use of the mail for the offending matter; it can be used to stop delivery of all mail to a sender under attack for violation of the obscenity provisions. In 1960 Congress amended the Postal Code to provide that upon showing of a probable violation, the Postmaster General could obtain an order from a federal district court stopping the defendant's incoming mail.\(^\text{24}\) The order remains in effect until the termination of proceedings before the Depart-

---

\(^{21}\) de Grazia, supra note 15, at 609-11. See generally Sigler, Freedom of the Mails: A Developing Right, 14 Geo. L.J. 30 (1965). The Postal Regulations provide machinery for a hearing which should be followed. See 39 C.F.R. § 203.3 (1966), providing that upon receipt of material of doubtful mailability, the General Counsel of the Post Office Department, after examination, must either (1) file a complaint with the Department's Docket Clerk or (2) forward the material to the local postmaster with instructions to accept the material for mailing. See 39 C.F.R. §§ 203.4-3 (1966) (requisites of complaint, service of notice of hearing); 39 C.F.R. §§ 203.6-17 (1966) (other provisions relative to hearings).

\(^{22}\) Under present Post Office Department procedures, the only supervision of mail withdrawal prior to a hearing is that undertaken by the General Counsel. The record of the Post Office shows that numerous items of constitutionally protected expression have been detained under the guise of suppressing obscenity, only to be vindicated ultimately. In addition, statements by some Post Office Department officials indicate that the Department, on occasion, may have little sympathy with the distribution of materials near the borderline of obscenity, and that it is often willing to withdraw the matter from the mails first and determine its precise character later. It may be seriously questioned, therefore, whether a truly impartial preliminary determination of obscenity is or can be made by the Post Office Department itself.

Sigler, supra note 21, at 671. (Emphasis added.) See generally id. at 667-77. See also Hearings Before the Select Committee on Current Pornographic Materials of the House of Representatives, 82d Cong., 2d Sess. 274 (1952). In Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) the Postmaster General unsuccessfully attempted to restrict reduced postal rates to magazines he thought to be of literary merit.

\(^{23}\) 74 Stat. 651 (1960), 39 U.S.C. § 4006 (1964). See de Grazia, supra note 15, at 612. Another lever for coercion used by the Post Office Department is the power to grant or revoke second-class mailing permits. This is especially effective with magazines depending on mail delivery to sustain their circulation. The Department formerly regarded second-class mailing privileges as a merit badge award for good character. See 1942 POSTMASTER GEN. ANN. REP. 12. This practice was ended by the Supreme Court's decision in Hannegan v. Esquire, 327 U.S. 146 (1946). Compare Public Clearing House v. Coyne, 194 U.S. 497 (1904) with Ex parte Jackson, 96 U.S. 727 (1878). See note 21 supra.

ment to determine the character of the material being challenged. Responding to judicial limitation of prior postal procedures, Congress provided that the court’s order may be restricted to stopping only such mail as is connected with the alleged unlawful activity. Another benefit to the defendant which may be incorporated in the court’s order is the privilege of opening and examining the mail detained by the Post Office. Though there is evidence indicating that the Department has exercised this mail-stoppage provision sparingly and that it has used hearings on occasion, its mere presence in a statutory scheme of postal obscenity control puts a potent weapon at the disposal of the Department.

Judicial Restriction of Administrative Control With the lack of procedural due process inherent in the above methods, there is little wonder that the wide-open powers given to the postal censors have been somewhat curbed by judicial decision. The seizing of mail believed by a postal inspector to be obscene without prior notice or hearing upon the obscenity issue was held to be beyond the scope of postal authority in Walker v. Popénoe. A restriction on the Department’s powers to exercise the blanket mail stoppage was incorporated in Summerfield v. Sunshine Book Co. Post Office authorities had determined, after a hearing, that nudist publications of the Sunshine Book Company were obscene. Subsequently the Department ordered that all mail addressed to the company be stopped, marked unlawful, and returned to the senders. Sunshine, faced with imminent business and financial disaster, made application for a temporary restraining order and an injunction staying the mail-stoppage order. The court of appeals upheld the lower court’s granting of these two remedies, holding that no blanket mail-stoppage order could issue. A mail-stoppage order could be directed only at the specific publications found at a previously conducted hearing to be obscene, not at the entirety of defendant’s mail volume.

The Post Office, however, has seemingly relegated Walker v. Popénoe and Summerfield v. Sunshine Book Co. to the dead-letter file. In practice prior notice and hearing is not always given before seizing or excluding mail thought to be obscene. Though provisions for fair and full hearings have been incorporated in some departmental rules, the Department still

\[\text{footnotes}^{25,26,27,28,29}\]

\[\text{footnotes}^{25,26,27,28,29}\]
seems to regard the use of hearings as discretionary, not as an obligatory procedural standard.30

Criminal Prosecutions  Violations of the basic postal obscenity provision, section 1461, are subject to criminal sanctions. A device most advantageous in prosecutions for mailing obscene material is the “forum-shopping” provision enacted in 1958 at the behest of the Post Office Department.31 The Department had encountered some difficulty obtaining convictions since juries drawn from metropolitan centers tended to be more liberal than the postal inspectors and often adopted a more sophisticated view toward material in question. An earlier Tenth Circuit case had held that a defendant in a case brought under the obscenity statute could be prosecuted only at the point of mailing.32 To withdraw this thorn in the side of the postal prosecutors, Congress enacted legislation allowing prosecution of a mailer at any point through which the material passed in the course of its journey through the mails. This made it possible for the Government to shift the scene of prosecution from New York or Los Angeles—the two primary mailing points from which mail-order purveyors operated—to more isolated rural hamlets where the level of literary sophistication did not run quite so high.

II. JUDICIAL EVOLUTION OF OBSCENITY STANDARDS

Armed with the statutory provisions and administrative procedures, postal control over the moral and literary content of the nation’s mails would seem almost complete.33 If the statutes were the only criteria, such

30 See discussion at notes 21-23 supra. There is some indication that the Department is moving closer to applying the procedural standards of the Administrative Procedure Act of 1946. See Cutler, The Post Office and the Administrative Procedure Act, 47 Nw. U.L. Rev. 72, 73 (1952). For provisions relative to hearings before the Department in obscenity determinations, see 39 C.F.R. §§ 203.3-17 (1966). See also Sigler, supra note 21.

31 72 Stat. 962 (1958), amending 18 U.S.C. § 1461 (1964). The amendment shifted the gravamen of the offense from depositing obscene material in the mail to using the mails for carriage of the material. Thus, a defendant could be prosecuted in the district of deposit, the district of delivery, or in any district through which the material passed. United States v. Luros, 243 F. Supp. 160 (N.D. Iowa 1965). In United States v. West Coast News Co., 357 F.2d 855 (6th Cir. 1966) defendants were convicted of mailing a book from California to Michigan in violation of §§ 1461 and 1462 (importation or transportation of obscene matters in interstate or foreign commerce). The court held that the defendants had no constitutional right to trial in their district of residence, California; neither did the court recognize their claim to a discretionary change of venue. See United States v. Sidelko, 248 F. Supp. 813 (M.D. Penn. 1965), explaining the intent of Congress in amending § 1461 to permit forum-shopping. See also Hearings on Control of Obscene Material Before Subcommittee on Constitutional Amendments and Subcommittee To Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 86th Cong., 1st & 2d Sess. 18 (1960). For cases decided under the old form of § 1461 and holding that a defendant could be prosecuted only at the point of mailing, see United States v. Ross, 205 F.2d 619 (10th Cir. 1953); cf., United States v. Comerford, 25 Fed. 902 (W.D. Tex. 1885).

32 United States v. Ross, 205 F.2d 619 (10th Cir. 1953). See note 31 supra.

33 The Post Office Department has made several recent requests to Congress asking for further congressional action on the postal obscenity laws. These proposals have centered mainly upon freeing the Department from the current scope of judicial review. The means of lifting the judicial review
would no doubt be the case.\textsuperscript{34} The proponents of vigorous censorship and advocates of more strict postal control, however, have had to temper their enthusiasm for the statutory and administrative framework in view of the judicial restraint placed upon the censor’s operation.\textsuperscript{35} Construing the permissible sphere of censorship activity and the standards by which allegedly obscene material must be judged, courts have drawn a constitutional out-of-bounds line, beyond which censorship activity may not be carried.\textsuperscript{36} The measurements of this line are not subject to exact calculation; indeed, it is often redrawn for each match. Though the first amendment limits are shifting and though relevant factors sometimes change, courts have always taken the view that speech and expression must be protected from arbitrary and unreasonable encroachment. Confusion at the bar and on the bench often results from the very nature of attempting to establish constitutional guidelines. A more subjective and personal task could hardly be imagined than determining what can be censored and what cannot. A tracing of the problem through the judicial annals of the United States illustrates the degree to which personal value judgments by individual judges have shaped the law.

The original judicial test for obscenity was established in the English case of Regina v. Hicklin.\textsuperscript{37} That case concerned the suppression and seizure of an anti-Catholic pamphlet. In deciding the case, Lord Chief Justice Cockburn formulated the standard by which literature would be judged for almost one hundred years: 

\begin{quote}
\textit{\[W\]hether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.}
\end{quote}

The Hicklin rule as announced and as applied thus would condemn any book or publication if the effect of any part thereof would tend to corrupt the weaker or more susceptible members of society.

\textsuperscript{34} See relevant text of § 1461 at note 12 supra; notes 21, 22, 24, and 33 supra.
\textsuperscript{35} See, e.g., statements of the Postmaster General and officers of citizens "decency" groups, collected in Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960).
\textsuperscript{37} L.R. 3 Q.B. 360 (1868).
\textsuperscript{38} Id. at 371.
Although disturbed by the results of the application of this *Hicklin* standard, American courts nevertheless felt constrained to follow it. Judge Learned Hand, for example, protested vigorously against continued use of the rule although applying it to the case before him:

I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time . . . . Indeed, it seems hardly likely that we are even to-day so luke-warm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature . . . .

Should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy. 29

Despite judicial criticism, the *Hicklin* rule was firmly entrenched as the legal standard for obscenity until the Second Circuit's decision in the *Ulysses* case. 40 James Joyce's novel had been published in Paris in 1922. At no time after its initial publication had it been legal to publish the book or to import a copy within the United States. The book was replete with four-letter words and contained accounts of the characters' thoughts which included rather explicit sexual fantasy. Critics believed the book to be an important literary experiment introducing the "stream of consciousness" technique. The publishers sought a ruling that the book was not obscene so that eventual publication within the United States would be possible. The district court held that the book was not obscene but that it was an honest attempt on the part of the author to utilize the "stream of consciousness" technique for the legitimate purpose of portraying fully the thoughts and desires of his characters. 41 The Second Circuit upheld the ruling of non-obscenity and attempted to establish new elements for a

---

40 United States v. One Book Called "Ulysses," 72 F.2d 703 (2d Cir. 1934), affirming 5 F. Supp. 182 (S.D.N.Y. 1933). Random House, the publishing firm, ordered a copy of the book, expecting it to be impounded while passing through customs inspection. In fact, the book slipped through customs without objection and had to be returned to the inspectors for a ruling. The case was tried under the Tariff Law of 1930 which allowed an in rem proceeding against the book rather than a criminal action against the person who ordered the copy. ERNST & SCHWARTZ, CENSORSHIP 94 (1964). See generally id. at ch. 14.

41 United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), aff'd, 72 F.2d 703 (2d Cir. 1934) (Judges L. Hand and A. Hand). Though most authorities cite the opinion of the circuit court in discussing the *Ulysses* case, an examination of Judge Woolsey's district court opinion can be enlightening in determining how an individual judge makes a ruling on obscenity. The opinion and the record show that Judge Woolsey made an honest attempt to understand Joyce's technique and writing style. The importance of this attempt to consider the literary value is underscored by remembering that the case was decided at a time when the *Hicklin* rule was virtually unchallenged.
finding of obscenity. The fact that the book might arouse lustful thoughts among some persons would not bring it within the scope of the obscenity statute. The court further stated, "We believe that the proper test of whether a given book is obscene is its dominant effect. . . . [I]t does not fall within the statute, even though it justly may offend many." Recognizing the need for an evaluation of social importance, the court opened the door to a consideration of literary worth:

In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.

Thus, the highly restrictive elements of the Hicklin rule—ignoring the social value of the work, judging an entire work by isolated passages often out of context, and giving determinative effect to the tendency to corrupt minds most open to such influence—were laid aside in favor of a test which gave consideration to the overall literary merit and social impact of questioned material. But the Ulysses holding impliedly retained the underlying assumption upon which the Hicklin rule was based: that exposure to certain types of literary expression could have such profound social consequences that a degree of control by the State upon public selection of reading material could be justified.

Although Ulysses was persuasive authority, it was not controlling. Therefore, many courts adopted the new standards; while others clung to the old Hicklin rule. Courts continued to determine obscenity without applying any uniform standard. Some deemed material obscene that "suggested" or "aroused" lustful thoughts; others approved suppression of works having a dominant purpose of erotic stimulation and a calculated

---

43 Ibid.
44 Id. at 709.
46 See Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); Murphy, The Value of Pornography, 10 Wayne L. Rev. 651 (1964). There is no clear-cut evidence that exposure to "obscene" material will cause a significant rise in anti-social sexual activity. Cairns, Paul, & Wishner, supra. Without delving too deeply into the realm of psychiatry, it may be noted that the extent to which a person could be affected by obscenity probably depends upon his susceptibility to sexual fantasy. Ibid. See also de Grazia, supra note 15, criticizing the Post Office Department for attempting to deal with social problems so inexorably tied to personal conduct and preference. There is some support for the proposition that exposure to pornography will decrease the amount of anti-social activity; the theory is that exposure to this sort of material acts as an "escape valve" for tendencies which would otherwise manifest themselves in overt acts. Murphy, supra.
47 Compare Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945) with State v. Becker, 364 Mo. 1097, 272 S.W.2d 283 (1954). As late as 1953 a United States court of appeals approved customs seizure of books because, inter alia, nothing in the writing had "the grace of purity or goodness." Besig v. United States, 208 F.2d 142, 145 (9th Cir. 1953).
incitement to sexual desire." Literary merit, an important factor in and contribution of the Ulysses decision, was not always considered. Generally, the suppression of material was based on the material's effect on thoughts, conduct, community moral standards, or its offensiveness. Courts divided as to how the audience should be determined in order to judge the potential effect or offensiveness. There were no guidelines laid down by the Supreme Court, and lower courts handed down a plethora of decisions characterized only by their inconsistency and confusion.

The Roth Standards The Supreme Court entered this area in 1957 with its decision of Roth v. United States. Roth and its companion case, Alberts v. California, presented only the issues of whether the federal and California obscenity statutes violated the freedom of expression and the definiteness requirements of the United States Constitution. There was no consideration of whether the materials actually vended were, in fact, obscene. The Court ruled that both statutes in question were constitutional and affirmed both convictions.

Mr. Justice Brennan, speaking for the majority of five, held that obscenity "is not within the area of constitutionally protected speech or press." But he carefully pointed out that not all material dealing with or related to sex was obscene:

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 [First Amendment] guaranties, unless excludable because they encroach upon the limited areas of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

Brennan further defined obscenity as "material which deals with sex in a manner appealing to prurient interest" and approved the following test...

---

50 354 U.S. 476 (1957). Samuel Roth had been indicted for violating the federal statute prohibiting the mailing of obscene material and advertising the sale of such matter for dissemination through the mails. In the trial court, the judge instructed the jury that obscenity was that "form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. . . . [I]t must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall." 354 U.S. at 508. The judge tempered this Hicklin-type instruction by advising the jury that they must consider the material as a whole and that its effect must be judged as that upon the average member of the community. But there was no mention of considering literary or social values in determining whether the material was obscene. Ibid. The companion case to Roth, Alberts v. California, 354 U.S. 476 (1954), was decided in the same opinion. Alberts was an appeal from a conviction for keeping obscene material for sale and for advertising obscene matter in violation of a California obscenity statute. WES'T'S CAL. PENAL CODE ANN. § 311 (1951).
52 Id. at 485. The majority was composed of Justices Brennan, Frankfurter, Burton, Clark, and Whittaker.
53 Id. at 484-85. (Emphasis added.)
54 Id. at 487. Brennan makes clear, however, that the mere portrayal of sex in art or literature is not sufficient to warrant a finding of obscenity. See quotation at text accompanying note 53 supra.
in determining whether material was obscene: "... whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 5 The Court expressly rejected the Hicklin standard as being in violation of constitutional freedoms of speech and press.

Brennan's use of the phrase "prurient interest" does very little to clarify the attempted definition of obscenity. The Roth opinion goes further in explaining prurient interest by stating that the element is present in material "having a tendency to excite lustful thoughts..." 6 The term prurient is defined by dictionaries as "marked by restless craving... itching with curiosity... having or easily susceptible to lasciviousness..." 7 None of these definitions seem particularly well suited for use in a constitutional test for obscenity. The Court borrowed the use of the term from the American Law Institute's Model Penal Code, 8 and Brennan states in the majority opinion in Roth that "we perceive no significant difference between the meaning of obscenity developed in case law and the definition of the A.L.I. Model Penal Code..." 9 But the draftsmen of the code expressly rejected the test of "tendency to arouse lustful thoughts" which Brennan incorporates into the definition of material appealing to prurient interest. 10 Thus, while the Court uses the terminology of the Model Penal Code approach, it rejects its underlying definitional basis.

One aspect of the old Hicklin rule, generally recognized as being unduly restrictive, was the use of the most susceptible members of society to determine the impact of the material in question. In Roth, however, the Court speaks of the "average" or "normal" person as the hypothetical in-

---

5 Id. at 489. This test has been applied by the Court in its obscenity cases following Roth. See, e.g., A Book, Etc. v. Attorney Gen. of Mass., 383 U.S. 413 (1966); One, Inc. v. Olesen, 355 U.S. 371 (1958), reversing 241 F.2d 772 (9th Cir. 1957); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), reversing 249 F.2d 114 (D.C. Cir. 1957); Mounce v. United States, 355 U.S. 180, reversing 247 F.2d 148 (9th Cir. 1957).
8 354 U.S. at 487 n.20; Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957).
9 354 U.S. at 487 n.20.
10 Mr. Justice Harlan points out the apparent inconsistency between the Court's accepted definition of "prurient" and that held by the draftsmen of the code.

We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debauch.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking.

354 U.S. at 499-500 (Harlan, J., concurring in Alberts and dissenting in Roth), quoting from Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957). Comments, at 10 (Emphasis added.). It seems as if the "most acute constitutional... difficulties" foreseen by the code draftsmen in using the test of "tendency to arouse lustful thoughts" were missed by the majority in Roth, for this test was accepted without question.
individual to whose prurient interest the material must appeal. Though the Court did away with the possibility of reversion to the old Hicklin standard, it did little in further defining the community from which this "average" person is to be chosen. Does the group include children and mentally imbalanced individuals? Is it a composite nation-wide community? Can the "community" be regarded as those persons living in one city, one state, one geographic area of the country? These questions may be particularly significant in prosecutions in which the Government has forced trial thousands of miles from the defendant's home or from the place where mailing was effected. The definition of community thus may have a marked effect on the standard by which literature or other material is judged. Another nagging question the Court passed over in Roth was whether a special "community" should be used in considering material of a particular nature, appealing to particular interests.

In addition to making the "normal" or "average" person part of a constitutional standard for judging the effect of material, the Court finally disposed of another lingering vestige of the Hicklin rule, the tendency to judge material on the basis of isolated passages or words. Rejecting such a limited scope, the Court made mandatory an appraisal based on the entire work. Whether passages which would be obscene in themselves are vitiated by being merely relevant to the author's dominant theme or whether their use had to be necessary to a conveying of the dominant theme or idea was left unanswered. Objective necessity to convey an idea or a theme probably would not be required; lower courts, in fact, have rejected such a necessity test in an obscenity determination. It would seem that a jury or a judge is most unsuitable to determine whether particular passages are necessary to an author's literary purpose.

Although it spoke of obscenity as "utterly without redeeming social importance," the Court did not absolutely require a weighing of redeeming social importance in its Roth standard. The opposite side of the coin, however, seems to indicate that material which has even slight social im-

---

62 See discussion at note 31 supra; text accompanying notes 31-32 supra.
64 The Court thus expressly rejected the Hicklin test as "unconstitutionally restrictive of the freedoms of speech and press." 354 U.S. at 489; see text accompanying notes 37-45 supra.
65 E.g., Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960).
portance is not obscene. This view was sustained in later cases in which the Court made non-obscenity determinations using the Roth rule. 67

Later application of the Roth standard made it clear that the decision could not be viewed as a victory for the censors. 68 The Court in 1959 added another chalk mark to its out-of-bounds line by putting an end to concepts of "ideological obscenity." In Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 69 the Court overturned a decision of the New York Court of Appeals which had censored the motion picture, Lady Chatterley's Lover, because it "alluringly portrays adultery as proper behavior." 70 The import of this decision was that no longer could communication which advocated unconventional ideas or "immoral" behavior by current standards be suppressed on that ground alone. Giving weight to the first amendment's protection of ideas, Mr. Justice Stewart stated:

[The constitutional guarantee] is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing. 71

The Court ruled in Smith v. California that a state must prove criminal intent as an element of a conviction under a state criminal obscenity statute. 72 The decision was based on the fear of the Court that state obscenity statutes operated as "self-executing" restrictions on dissemination of books, many of which would not be obscene. Strict criminal liability, with no element of scienter, might limit booksellers to sale of books which they had personally inspected. Mr. Justice Douglas, concurring, probably most accurately described the practical effect of Smith v. California when he stated, "What the Court does today may possibly provide some small degree of safeguard to booksellers by making those who patrol bookstalls proceed less highhandedly than has been their custom." 73

III. THE 1966 TRILOGY—GINZBURG, MISHKIN, AND FANNY HILL

The recent cases decided by the Supreme Court do not change the basic validity of the Roth tests. In applying Roth standards to the cases before

67 See the per curiam reversals by the Court in applying the Roth rule to lower court convictions or findings of obscenity, in Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), reversing 249 F.2d 114 (D.C. Cir. 1957); One, Inc. v. Olesen, 355 U.S. 371 (1958), reversing 241 F.2d 772 (9th Cir. 1957); Mounce v. United States, 355 U.S. 180, reversing 247 F.2d 148 (9th Cir. 1957). See also Note, Constitutional Law—Freedom of Speech—Tests of Obcenity, 15 Sw. L.J. 336 (1961).
68 Cases cited note 67 supra.
70 Id. at 686-87.
71 Id. at 689.
73 Id. at 169. (Douglas, J., concurring in separate opinion).
it, however, the Court refined and expanded the basic rules set out in 1957.\

A. Ginzburg v. United States

Ralph Ginzburg was convicted in the lower court for violating the federal obscenity statute by mailing obscene publications and advertisements relating how and where the obscene publications could be obtained. The Third Circuit affirmed, and the Supreme Court granted certiorari.

In considering and dismissing possible literary merit or redeeming social value of the material Ginzburg mailed, Mr. Justice Brennan, delivering the opinion of the majority, introduced a new element to the Roth test. The determination of obscenity of the publications was buttressed by the Court's finding that their sale was in the course of "the sordid business of pandering." Ginzburg's commercial exploitation of erotic material, his emphasis upon the prurient appeal of the publications, and the salacious nature of his promotional and merchandising techniques were cited in finding the pandering element present as a factor to be used in determining obscenity. Thus, the character of a defendant and the nature of his business activity should now be evaluated in an obscenity case. Though Mr. Justice Brennan stated that this element was relevant to application of the Roth test and seemingly implied that it had been incorporated into

---

76 See relevant text of the statute at note 12 infra.
78 383 U.S. at 467.
79 Ginzburg sought mailing privileges from the postmasters of Blue Ball and Intercourse, Pennsylvania. Being denied mailing permits from these two towns, he ultimately selected as his mailing point Middlesex, New Jersey. The trial court found that these permits were sought only for the value of their names in postmarking. The Supreme Court deemed this an "obvious" conclusion. 383 U.S. at 467-68.

The three questioned publications were Eros, a hard-cover magazine which was printed and bound in an expensive manner; Liason, a bi-weekly newsletter; and The Housewife's Handbook on Selective Promiscuity, a short book. Eros was devoted to treatment of sex and contained fifteen articles dealing with love, sex, and sexual relations. Some of the articles were photo-essays. The Handbook claimed to be a sexual autobiography relating in detail the author's sexual experiences and emotions from age three to age thirty-six. Liason, the newsletter, through a "Letter From the Editors," stated as its purpose, "keeping sex an art and preventing it from becoming a science." 383 U.S. at 466. The Court found that advertising for the material "openly boasted that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters." 383 U.S. at 468. Is the Court thus saying that attempting to take advantage of the license allowed by law can be a factor in affirming a criminal conviction if the wrong motives are present?

Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his 'sordid business.' That is a power the Court does not possess. For the First Amendment protects us all with an even hand. It applies to Ralph Ginzburg with no less completeness and force than to G. P. Putnam Sons.

383 U.S. at 101 (Stewart, J., dissenting in separate opinion).
the Roth standard for some time, it is clear that the new element might significantly alter possible results obtained under Roth. Brennan implied that this element of pandering may even be determinative:

"The circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor’s sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity."

At another point he stated:

"It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the materials would escape such condemnation."

The conclusion is inescapable that Ginzburg has added pandering as an element of the Roth test, or at the least as an element in determining whether "redeeming social value" is present. At first reading, one is tempted to doubt the wisdom of the Court in introducing pandering into the constitutional criteria. The Court almost seems to be saying that a book can be judged by its cover.

This pandering element could have far-reaching effects. As two members of the Court state, the decision effectively rewrites the postal obscenity statute. When the Court states that a book, not otherwise obscene,
may be made obscene through the manner in which it is offered for sale, this seems to be opening the door to widespread abuse of the censorship power. The concept of pandering can mean so many different things in various contexts that its use in a constitutional standard for freedom of expression is inviting abuse on the enforcement level. As Mr. Justice Douglas pointed out in his dissent in Ginzburg, society is being exposed constantly to sex-oriented advertisements. "The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it." As subjective as the Roth test already was, the introduction of pandering as an element makes it even more so. In fairness to the Court, however, pandering probably was intended for use only in a very close case where there was almost no other way to determine social value. This implied limitation loses some of its force, however, in considering that enforcers of obscenity statutes have not always displayed a great degree of comprehension when applying such technical legal niceties to their proposed course of action under authorizing statutes.

B. Mishkin v. New York

Mishkin was convicted of violating the New York obscenity statute by producing and selling allegedly obscene books. The subject matter covered by the books depicted almost all types of normal and abnormal

---

84 At least this seems to be the way enforcement agencies regard Ginzburg. Memorandum of United States Department of Justice on Effect of Recent Supreme Court Obscenity Decisions (1966); Memorandum of Houston District Attorney's Office to Enforcement Officers (1966).
85 E.g., Butler v. Michigan, 352 U.S. 380 (1962). The assistant prosecutor in the case had used his customary constitutional test for obscenity—if he didn't want his thirteen-year-old daughter reading the material, it was obscene. See generally Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 MINN. L. REV. 5, 6-12 (1960). This example drawn from many cited by the authors is not an exception; other abuses can be found in coercion of booksellers by enforcement officers. Lockhart & McClure, supra, at 6-12. At times the Post Office Department has seemed to be carried away with enforcing the postal obscenity regulations; the Department's enforcement at other times may have been politically motivated. Day, Mailing Lists and Pornography, 52 A.B.A.J. 1103, 1104 (1966). Former Postmaster General J. Edward Day discussed the attitude of his predecessor: Incredible as it seems, my predecessor set up, in a large conference room across from his office, a 'museum' with samples of pornography divided among various perversions. Members of the press, of Congress, and of the public, both men and women, were given guided tours through this room, which came to be known as the Chamber of Horrors. The worst items were behind a black curtain equipped with a draw string for display as the climax of the tour.

Day, supra, at 1104.
sexual activity, including sado-machoism, fetishism, and homosexuality.\footnote{383 U.S. at 501. Among the literary gems being purveyed by Mishkin were the following titles, \textit{Dance With the Dominant Whip}, \textit{Cult of the Spankers}, \textit{Screaming Flesh}, \textit{So Firm So Fully Packed}, \textit{The Strap Returns}, \textit{Peggy's Distress on Planet Venus}, etc. For a complete listing of titles, see 383 U.S. at 314-15.} Mishkin contended that the New York court had misapplied the prurient appeal requirement of the \textit{Roth} test. He contended that since most of his material appealed to various classes of people with deviant sex preferences, this material could not possibly appeal to the prurient interest of the "average" or "normal" person. The Court rejected this position as being an unrealistic interpretation of the \textit{Roth} prurient interest requirement.\footnote{383 U.S. at 508.} In so holding, the Court filled one of the voids left by the \textit{Roth} decision:

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 \textit{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 \textit{Roth} ... does not foreclose this holding ... We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group ... \footnote{But cf., United States v. Klaw, 350 F.2d 155 (2d Cir. 1965). The Mishkin modification of \textit{Roth} standards also interjects concepts of variable and contextual obscenity. See Semonche, \textit{Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation}, 13 U.C.L.A. L. Rev. 1173, 1190-94 (1966).}

The delineation of a group or "community" according to deviate sexual preferences aids in determining the effect of certain material, but the requirement of intent to reach that group almost counterbalances the value of the clarification. Suppose an author wrote a book concerning sexually deviate activity and that material in the work would appeal to the prurient interest of a deviate group, considering the work as a whole. Suppose further that there is evidence indicating that the work was sold mainly to persons who constitute such deviate group but evidence of an intent to make that group the main target of dissemination is lacking. Taking the language of \textit{Mishkin} that the material must be "designed for and primarily disseminated to" the deviant group and that material is to be judged in terms of "its intended" recipient group, prosecution might not be possible in the situation presented.\footnote{See notes 83-87 \textit{supra} and accompanying text. United States v. One Carton Positive Motion Picture Film Entitled "491," 367 F.2d 889 (1966) takes the position that prurient interest to the average person should be discarded altogether as a test since \textit{Mishkin} restricted prurient interest to deviant groups.} Some types of material, mainly "hard-core pornography" having little or no possible social value, will be suppressed by this new test of the "community." When there is a question raised as to the intended audience or the intent of a publisher or purveyor, the in-
tent element necessary to a sub-division of the normal “community” into separate deviant groups may be difficult to ascertain and to prove.

C. A Book, Etc. v. Attorney Gen. of Mass. 94

This case was an appeal from a civil equity action brought under the Massachusetts obscenity statute against the book itself, as distinguished from a criminal action against its publisher or purveyor. John Cleland’s book, Memoirs of a Woman of Pleasure, deals with the life of an English prostitute, Fanny Hill. The book as a whole gives an insight into a period of English history, portraying the life, habits, customs, mores, and morals as they existed at that time. Although it contains explicit accounts of sexual relations, it does so without use of “vulgar” or “four-letter” words. The Massachusetts court stated that the test for obscenity did not have to be whether the book was unqualifiedly “worthless” in a consideration of social value. The Supreme Court reversed and remanded, stating:

A book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness. 5

The Court also set out the three necessary elements under the modified Roth test for a finding of obscenity:

Under [the test] . . . three elements must coalesce: it 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. 6

No evidence of how the book was advertised or distributed was entered in the trial court; so the only issue before the Supreme Court was the ob-

95 Id. at 418. Mr. Justice Clark, dissenting in Fanny Hill, suggests that the requirement of “patent offensiveness” was not a part of the original Roth test and was taken from the opinion of Mr. Justice Harlan in Manual Enterprises v. Day. 383 U.S. at 442. Compare Manual Enterprises v. Day, 370 U.S. 478, 483-88 (1961).
96 383 U.S. at 419-20. Mr. Justice Clark dissents upon the ground that to impose the requirement of lacking any social value is to impose upon the Roth standards a new element. 383 U.S. at 441-40 (Clark, J., dissenting in separate opinion). Clark perhaps ignores some language in Roth which lays the foundation for such a test. See quotation at text accompanying note 53 supra. See also language in Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). Mr. Justice White dissents for much the same reason. He would view social importance not as an independent element or test but only as a factor to consider in determining if predominant prurient interest is present. 383 U.S. at 460-62. (White, J., dissenting in separate opinion). Mr. Justice Harlan dissented separately; Douglas concurred separately; Black and Stewart concurred for reasons stated in their Ginsburg and Mishkin dissenting opinions. See note 79 supra and accompanying text.
scenity of the work. The Court did note, though, that the pandering element introduced into the *Roth* test by the *Ginzburg* case might have compelled a different result if facts raising the issue were present in the case. But the Court was also careful to point out in *Fanny Hill* that the mere fact of possible exploitation by pandering could not be used in a finding of obscenity.  

D. The Minority Views

Several members of the Supreme Court hold independent views of proper obscenity tests or of the constitutional scope of censorship review. Thus, a true "majority" opinion is often not possible, although a majority may concur in a result.

Mr. Justice Stewart and Mr. Justice Harlan are both of the opinion that the federal government, through its postal and tariff statutes, is empowered to suppress only that category of material known as "hard-core pornography." If this view were accepted, another definitional question would arise, i.e., what is hard-core pornography? Mr. Justice Stewart has never attempted to give a precise definition of this type of material, but he has stated, "I know hard-core pornography when I see it." Perhaps this is the only definition possible.

Although Mr. Justice Harlan concurs with Justice Stewart as to the power of the federal government to suppress only hard-core pornography, he would not apply this same restriction to the states. Rather, the states would be free to apply their own standards of obscenity, subject presum-

---


99 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring in separate opinion). The only attempt at definition Mr. Justice Stewart has made is found in a footnote. This listing of material probably would be neither comprehensive nor exclusionary. Ginzburg v. United States, 383 U.S. 464, 499 n.3 (1966) (Stewart, J., dissenting). His list follows: . . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value . . . .

Mr. Justice Harlan has never tried to define hard-core pornography. It can be safely said, though, that the standards would be much more stringent than the current *Roth* rule, as interpreted in the recent cases. See generally Lockhart & McClure, supra note 87, at 63-64.

100 If the "hard-core pornography" test of Harlan and Stewart were to be adopted, there would have to be some definition. During consideration of Roth v. United States, 354 U.S. 476 (1917), the Solicitor-General sent to the Court a carton of what his office termed "hard-core pornography." It would hardly do for the Court to compare only on a basis of looking at the material in the carton every time the question arose.
ably to judicial review when a decision is too far out of line. Justice Harlan would apply only the following test to a state obscenity ruling: "that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards." 101

Justices Black and Douglas have frequently stated their view that neither Congress nor the states is empowered to exercise any censorship control over the communication of ideas. 102 Mr. Justice Black argues quite persuasively, in collateral support of his main proposition, that for purposes of determining the validity of literary censorship, the federal judiciary is particularly ill-equipped. 103 Both Douglas and Black apparently feel that the first amendment language should be taken literally and that no law is constitutional which restricts freedoms of speech and press.

IV. CONCLUSION

Questions concerning the necessity of censorship cannot be answered satisfactorily to those on both sides of the basic issues. A reading of the Supreme Court opinions certainly conveys the impression that each decision is permeated by a collective concern of the Justices for preserving freedom of expression. If the inquiry ended at this point, most observers could be relatively unconcerned except upon theoretical grounds of constitutional law. Yet it is a harsh reality that an inquiry into the validity of current obscenity statutes and decisions cannot stop with a reading of the United States Reports. The careful weighing of constitutional niceties and balancing of competing interests simply is not carried out at the administrative enforcement level. Obviously, much of the enforcement is entered into from a biased and prejudiced point of view. It is this feeling of indignation at the abuse to which the obscenity statutes have been subjected and at the attitude taken by the postal, state, and local enforcing agencies which causes many commentators to take a critical view of the current state of the law. Regardless of the careful judicial review given to state or federal obscenity decisions, most cases of literary suppression will never be reviewed at all. The coercive force of threatening a bookseller, drug store, magazine stand, etc., with a criminal prosecution acts almost as self-executing censorship in many areas. 104 The cost of litigation and appeal leads one to believe that most censorship is sub-surface and is never reflected in reported cases. Too, where official censorship is condoned, the

door is opened to informal and extra-legal suppression by private groups whose methods entail no notions of due process or of freedom of speech. Operating through the use of fear and coercion and playing on ignorance, the damage they have done to the intellectual climate in this nation is incalculable. 106

Against these objections must be weighed the possible valid control of some forms of expression. Certainly “hard-core pornography,” as the term is generally understood, has no significant artistic, literary, or social value. Perhaps the most acceptable middle ground is that suggested by Mr. Justice Stewart in restricting the federal government and the states to censorship of hard-core pornography. 106 Even in using such a test, the definition of “hard-core” pornography would have to be carefully formulated to avoid abuse of the censorship power on a local or administrative level. Viewing the abuses to which censorship powers have given rise, the question of whether the game is worth the candle must be answered.

There is something disturbing and unsettling about the history of censorship, about the fact that private and public frenzy has been aroused over the issue of whether citizens should be free to choose what they will read and what they will see. Perhaps the strongest indictment of governmental censorship is carried in Mr. Justice Stewart’s statement, “Censorship reflects a society’s lack of confidence in itself.” 107


Every time an obscenity case is to be argued here, my office is flooded with letters and postal cards urging me to protect the community or the Nation by striking down the publication. The messages are often identical even down to commas and semicolons. The inference is irresistible that they were all copied from a school or church blackboard. Dozens of postal cards often are mailed from the same precinct. The drives are incessant and the pressures are great. I mention them only to emphasize the lack of understanding of our constitutional system.

107 See notes 98-100 supra and accompanying text. The key question in a “hard-core pornography” test of obscenity would be formulating a test which would screen only such material, leaving works with social value free even from the zealous efforts of local enforcement. In Philadelphia some 5,000 pieces of alleged pornography were burned in the presence of the chief of police, superintendent of schools, and a hymn-singing choir. This took place in 1963; unfortunately no record is available of the hymns selected to burn books by. See Murphy, The Value of Pornography, 10 Wayne L. Rev. 655, 657 (1964); Lockhart & McClure, supra note 87, at 6-12.