OBSCENITY: THE LINGERING UNCERTAINTY

I. INTRODUCTION

> The task [of detecting obscenity] is difficult because to us, as to most judges, the test which must be applied here, like the Peace of God, passeth all understanding.[1]

While Anglo-American law sports a variety of unwieldy concepts and doctrinal formulations, few have emerged with greater ambiguity, both in theory and application, than obscenity.[2] This comes, however, as no shock; the nature of the problem may be such that its ultimate resolution is for the sociologist and not for the judge.[3] Courts traditionally have realized, at least subliminally, the difficulty of identifying obscenity.[4] However, they have almost categorically felt constrained to pass judgment on the issue.[5]

Because obscenity is an issue for which no amount of judicial expertise will serve the courts well, they have yet to crystallize a uniform legal standard.[6] To this end,

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[1] United States v. 127, 295 Copies of Magazines, Etc., 295 F. Supp. 1186, 1188-89 (D. Md. 1968).

[2] In 1968, Justice Harlan, dissenting in two obscenity cases then before the Supreme Court (Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) and Ginsberg v. New York, 390 U.S. 629 (1968)), said: "The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." Interstate Circuit, Inc. v. Dallas, supra at 704-05. Justice Harlan observed further that "[i] n the . . . thirteen obscenity cases from the date *Roth* [Roth v. United States, 354 U.S. 476 (1957)] was decided, in which signed opinions were written for a decision or judgment of the Court, there has been a total of 55 separate opinions among the Justices." Interstate Circuit, Inc. v. Dallas, supra at 705 n.l. See generally Z. Chafee, Government and Mass Communications 210-12 (1947).

[3] The studies of the behavioral sciences in this area, by their failure to reveal a direct causal relationship between mere exposure to "obscene" material and overt anti-social conduct, appear to suggest that the affirmative role assumed by the courts is capable of question. For analysis of sociological studies on this point, see United States v. Roth, 237 F.2d 796, 811-16 (2d Cir. 1956) (appendix to concurring opinion of Frank, J.), aff'd 354 U.S. 476 (1957). See also M. Jahoda and Staff of Research Center for Human Relations, New York University, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954) (results of this study reported in the appendix to Judge Frank's concurring opinion in United States v. Roth, supra); Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 387 (1954); Lockhart & McClure, Obscenity and the Courts, 20 Law & Contemp. Prob. 587, 595 (1955).

[4] Voicing the only truly indisputable conclusion on the matter, Justice Black observed that "[a] s the Court's many decisions in this area demonstrate, it is extremely difficult for judges or any other citizens to agree on what is 'obscene'." United States v. Thirty-Seven Photographs, 402 U.S. 363, 379-80 (1971) (dissenting opinion).

[5] The literature on obscenity and the law is formidable. Still the most enlightening article, albeit dated, is Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295 (1954). The authors updated their observations six years later in Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960).

Development of the concept of obscenity in England is discussed in N. St. John-Stevas, Obscenity and the Law (1956) and Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40 (1937).

For a helpful overview of the evolution of obscenity in America, see generally both Lockhart and McClure articles, supra; see also Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1; Katz, Privacy and Pornography: Stanley v. Georgia, 1969 Sup. Ct. Rev. 203; Krislow, From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation, 1968 Sup. Ct. Rev. 153; Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Rev. 7.

[6] An Ohio state court has remarked:

> "Obscenity" is not a legal term. It cannot be defined so that it will mean the same to all people, all the time, everywhere. "Obscenity" is very much a figment of the imagination, – an

courts have proposed various tests to demonstrate that obscenity either does or does not exist in a given instance. Unhappily, from this melange of tests no single statement of obscenity can be gleaned.[7] As a result, the defendant ultimately falls prey to the emotional anxiety and moral indignation experienced by the finder of fact.[8]

The purpose of this Note is to analyze the constitutional tests employed in obscenity litigation since *Roth v. United States*,[9] examine the rationale behind their use, and evaluate the current relevance of the *Roth* doctrine.

II. BIRTH OF THE MODERN CONCEPT

The early common law did not view as an offense the publication of a book or magazine containing sexual pictures or literature.[10] In 1727, the English courts declared for the first time that obscenity was a temporal offense, reasoning that it was

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undefinable something in the minds of some and not in the minds of others; and it is not the same in the minds of the people of every clime and country, nor the same today that it was yesterday or will be tomorrow.

State v. Lerner, 81 N.E.2d 282, 286 (C.P., Hamilton County, Ohio, 1948).

Forty years ago, the late Aldous Huxley recognized the difficulty when, reporting on a Geneva conference on the suppression of international traffic in obscene publications, he wrote:

> The Greek delegate (too Socratic by half) suggested that it might be a good thing to establish a preliminary definition of the word "obscene." Sir Archibald Bodkin sprang to his feet with a protest. "There is no definition of indecent or obscene in English Statute Law." The law of other countries being, apparently, no more explicit, it was unanimously decided that no definition was possible. After which, having triumphantly asserted that they did not know what they were talking about, the members of the Congress settled down to their discussion.

A. Huxley, Vulgarity in Literature 1 (1930).

Others, however, have maintained, in effect, that the search for a single obscenity standard is unnecessary, as the concept is obvious to everyone. Pennsylvania Supreme Court Justice Michael Musmanno noted:

> What is indefinite about the work "obscene"? It is as indefinite as the word "cat." I doubt that there is a newspaper reader, radio listener, or television watcher, no matter how meager his education or how much a stranger to books, who does not know the meaning of the word "obscene."

Hearings on Obscene Matter Sent through the Mail Before the Subcomm. on Postal Operations of the House Comm. on Post Office and Civil Service, 86th Cong., 1st Sess., pt. 2, at 143 (1959).

[7] See note 2 supra.

[8] See Jacobellis v. Ohio, 378 U.S. 184 (1963), where Justice Stewart's oft-cited statement in his concurrence epitomizes the judicial reaction:

> I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* . . ., that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it* . . ..

Id. at 197 (emphasis added.)

Justice Harlan, dissenting in *Jacobellis*, noted:

> I experience no greater ease than do other members of the Court in attempting to verbalize generally the respective constitutional tests, for in truth the matter in the last analysis depends on how particular challenged material happens to strike the minds of jurors or judges and ultimately those of a majority of members of this Court.

Id. at 204.

[9] 354 U.S. 476 (1957).

[10] The etymology of the word "obscene" is of interest, as one sees that the modern connection with matters sexual needed time to evolve:

> The word "obscene" comes from the Latin *obscinus* which meant inauspicious in the sense that, after taking the various tests for omens and asking the oracles, the conclusion was negative. From this comes the meaning *adverse*, and subsequently *obscene* began to be used as a synonym for not decent, then filthy, disgusting and the like.

A. Gerber, Sex, Pornography and Justice 17 (1965).

In 1708, an English court upheld a conviction for the publication of a book entitled *Fifteen Plagues of a Maidenhead*, a satire "exposing the folly of young people, and expos[ing] fornication." Regina v. Read, 92 Eng. Rep. 777 (K.B. 1708). The court held that the publication of such a book was no offense at common law, but punishable only in the Ecclesiastical Courts.

an offense against religion and that religion was part of the common law.[11] However, it was not until 1868 that an English court, in *Regina v. Hicklin*,[12] announced the first modern obscenity guidelines.[13]

The appellant in *Hicklin* had published a pamphlet entitled "The Confessional Unmasked; Shewing the Depravity of the Roman Priesthood, the Iniquity of the Confessional, and the Questions Put to Females in Confession." A number of these pamphlets were seized in the appellant's home and ordered to be destroyed as obscene.[14] The pamphlet contained excerpts of the works of certain theologians who had written critically on the doctrines of the Church. The court found about one-half of the material in the pamphlet not obscene, the other half filthy and "obscene in fact."[15] It also found that Hicklin's intent in selling the pamphlets was the dissemination of a sincere theological critique.[16] Nevertheless, the court adjudged the entire pamphlet obscene, declaring that its ultimate effect was the corruption of good morals.[17]

The test announced by the court in *Hicklin* was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[18] Under this test the relevant questions are: "(1) will the matter tend to corrupt the most corruptible; and (2) is there a possibility (not a probability) that this most corruptible reader may come in contact with the questionable matter."[19] One commentator has observed that "[u]nder such a procedure the Bible itself could be adjudged obscene."[20]

For over sixty years after *Hicklin*, American courts acted in harmony with its construction.[21] By 1913 its roots were so deeply set that Judge Learned Hand, in *United States v. Kennerley*,[22] reluctantly acquiesced to its influence. In so doing, however, he voiced the hope, ultimately vindicated, that the *Hicklin* rule would not long remain a bellwether. He wrote:

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[11] Rex v. Curl, 93 Eng. Rep. 849 (K.B. 1727). Curl was arrested for publishing a book entitled *Venus in the Cloister, or The Nun in her Smock*. In ruling that obscenity had become an offense that common law courts could proscribe, the court said:

> [Obscenity] is an offence at common law, as it tends to corrupt the morals of the King's subjects, and is against the peace of the King. Peace includes good order and government, and that peace may be broken in many instances without an actual force . . ..
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> It is a libel if it reflects upon religion, that great basis of civil Government and society; and it may be both a spiritual and temporal offense.

Id. at 850. For detail, see R. Straus, The Unspeakable Curll (1927).

For the incorporation of obscenity prohibition into American law, see, e.g., Commonwealth v. Holmes, 17 Mass. 336 (1821) (sale of book); Commonwealth v. Sharpless, 2 S.&R. 91 (Pa. 1815) (exhibition of an indecent picture held punishable in absence of statute on authority of Rex v. Curl, supra).

A fuller background into the seeds of the obscenity concept in the early common law is beyond the design of this Note. See note 5 supra; Model Penal Code § 207.10, Comments (Tent. Draft No. 6, 1957); Ringel, Obscenity: Thought Control and Morality, 166 N.Y.L.J., No. 61, p.l., col. 4.

[12] L.R. 3 Q.B. 360 (1868).

[13] See C. Rembar, The End of Obscenity 17-21 (1968).

[14] The action was taken pursuant to The Obscene Publications Act of 1857, 20 & 21 Vict., c. 83, § 1. The statute provided that where there is reason to believe books, etc., of obscene nature are kept by anyone for sale or distribution and if, in fact, any are sold or distributed (Hicklin had himself sold two or three thousand copies of his pamphlet), they may be ordered destroyed.

[15] L.R. 3 Q.B. at 363.

[16] Id. at 363, 368.

[17] Id. at 371, 373.

[18] Id. at 371.

[19] See Model Penal Code § 207.10, Comment 9 at 36 (Tent. Draft No. 6, 1957).

[20] Ringel, supra note 11, at 4, col. 1.

[21] See, e.g., United States v. Bennett, 24 F. Cas. 1093 (No. 14,571) (S.D.N.Y. 1879) (use of the mails for alleged non-mailable, obscene pamphlet); People v. Muller, 96 N.Y. 408 (1884) (sale of alleged obscene photographs); cf. United States v. Rosen, 161 U.S. 29 (1896) (use of the mails for alleged obscene paper; sole issue was sufficiency of indictment under obscenity statute).

[22] 209 F. 119 (S.D.N.Y. 1913).

> [T] he [*Hicklin*] rule . . ., however consonant with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, "obscene, lewd, or lascivious." I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses . . .. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?[23]

It was not until the early 1930's that the influence of *Hicklin* waned,[24] with *United States v. One Book Called "Ulysses"*[25] marking one of the "high cultural moments."[26] Declaring the Joyce work not to be obscene, the court suggested that a work is obscene only if its dominant effect, when considered as a whole, would be sexually corrupting to a person of average sex instincts.[27]

The *Ulysses* formulation was doubly significant. First, it emasculated the *Hicklin* doctrine by requiring examination of the work as a unit rather than as a disjointed collection of its parts, and by declaring that the standard is the average person, not the "most corruptible."[28] Secondly, it presaged the formula espoused twenty-four years later in *Roth v. United States,*[29] which test remains the bedrock of contemporary obscenity litigation.

In 1957 the Supreme Court unanimously sounded this country's final death knell for *Hicklin*. The Court, in *Butler v. Michigan,*[30] invalidated a state statute making it an offense to offer the general reading public a book "manifestly tending to the corruption of the morals of youth."[31] The Court noted that the effect of the statute

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[23] Id. at 120-21.

[24] Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 56-65 (1938) (and cases cited); Grant & Angoff, Massachusetts and Censorship, 10 Boston U. L. Rev. 147, 173-76 (1930).

Some decisions, however, notably in New York, did stray from the *Hicklin* statement. See St. Hubert Guild v. Quinn, 64 Misc. 336, 118 N.Y.S. 582 (Sup. Ct. 1909) (contract for sale of works of Voltaire not obscene, by virtue of their merit as literary classics; the court applied a test of "ordinary intelligence"); In re Worthington Co., 30 N.Y.S. 361 (Sup. Ct. 1894) (rare editions of the Arabian Nights, the works of Rabelais, Ovid's *Art of Love*, the *Decameron* of Boccaccio, the *Heptameron* of Queen Margaret of Navarre, the confessions of Jean Jacques Rousseau, and *Alladin* judged not to be obscene). Neither case made reference to the *Hicklin* decision, a possible distinction being that both dealt with standard works of high literary quality.

In People v. Eastman, 188 N.Y. 478, 81 N.E. 459 (1907), the Court of Appeals held that a violent newspaper attack on the confessional was not "indecent" under the statute.

[25] 5 F. Supp. 182 (S.D.N.Y. 1933), aff'd 72 F.2d 705 (2d Cir. 1934).

[26] H. Kalven, The Right to Publish, in The Rights of Americans 253, 254 (N. Dorsen ed. 1970).

[27] Judge Woolsey, in the district court opinion in *Ulysses*, wrote:

> Whether a particular book would tend to excite such [sex] impulses and thoughts must be tested by the court's opinion as to its effect on *a person with average sex instincts* — what the French would call *l'homme moyen sensuel* – who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law.

5 F. Supp. at 184 (emphasis added).

[28] See text accompanying note 19 supra.

[29] 354 U.S. 476 (1957). See text accompanying notes 35 - 68 infra.

[30] 352 U.S. 380 (1957).

[31] Id. at 383. The statute struck down by the *Butler* Court was Mich. Comp. Laws § 750.343 (1948). Earlier statutes with similar wording were ruled unconstitutional by the Court on a "void for vagueness" basis. After the decision in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), the Court, in a number of per curiam decisions citing *Burstyn* and/or Winters v. New York, 333 U.S. 507 (1948), found various restrictions unconstitutional because of the vagueness of the standards. Superior Films, Inc. v. Dept. of Educ., 346 U.S. 587 (1954) ("moral, educational or amusing and harmless character" and "immoral" or "tend to corrupt morals"); Gelling v. Texas, 343 U.S. 960 (1952) ("prejudicial to the best interest of the people of [the] City"). For a full opinion, see Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) ("not suitable for young persons").

was to reduce the level of reading material permissible for the entire adult population to that level suited only for children.[32]

Butler and *Hicklin* clearly could not co-exist. In striking down the Michigan obscenity statute, *Butler* avoided the *Hicklin*-based anomaly of including adults (a group presumably of "average sex instincts"[33]) within a regulatory scheme designed to protect young people, who, it is assumed, are more adversely affected by erotic inputs. Moreover, at the same time *Butler* virtually stripped *Hicklin* of all effect, it implicitly endorsed the standard of the average person announced in 1933 by Judge Woolsey in *Ulysses*.[34]

III. THE MODERN CONCEPT - *Roth v. United States*

The leading case around which all modern obscenity litigation ultimately revolves is *Roth v. United States*.[35] In *Roth*, the defendant was engaged in the publication and sale of books, photographs and magazines in New York, employing circulars and advertising matter to solicit sales. He was convicted of mailing an obscene book and obscene circulars and advertising in violation of the federal obscenity statute.[36]

The Court ruled that obscenity as a form of expression is not within the area of constitutionally protected speech or press.[37] To determine what is obscene, the Court advanced a special test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[38]

Although present Michigan obscenity statutes still contain the phrase "tending to the corruption of the morals of youth," the statutes themselves are directed toward the child's welfare and not that of an adult. See Mich. Comp. Laws Ann. §750.142 (1968) (furnishing obscene books to children); Mich. Comp. Laws Ann. § 750.143 (1968) (exhibition of obscene matter within view of children).

[32] 352 U.S. at 383.

[33] See note 27 supra and accompanying text.

[34] See text accompanying notes 27 - 28 supra.

[35] 354 U.S. 476 (1957) [hereinafter *Roth*]. Decided with *Roth*, which dealt with a violation of the federal obscenity statute (18 U.S.C. § 1461 (1948)), was Alberts v. California, which dealt with violation of a state obscenity statute (Cal. Penal Code Ann. § 311 (West 1955)). The Court in *Roth* indicated that a 1955 revision to the federal obscenity statute was inapplicable and proceeded to ignore it.

[36] The statute, in pertinent part, provides:

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and –
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> . . . .
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> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .
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> . . . .
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> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
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> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1461 (1948).

[37] *Roth* at 485.

[38] Id. at 489. The Court stated that obscenity was "material having a tendency to excite lustful thoughts [ostensibly those of the "average man"] ." Id. at 487 n.20.

It is worth noting that the Model Penal Code, which was drafted in April 1957 when the *Roth* case was before the Supreme Court, is clearly at odds with much of the formula announced in *Roth:*

> 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.

Model Penal Code § 207.10, Comment 2A at 10 (Tent. Draft No. 6, 1957) (emphasis added).

By excluding that which is obscene from the protection of the first amendment, *Roth* foreclosed resort to two tests traditionally applied to constitutionally sanctioned speech. The first test, employed by Judge Curtis Bok eight years before *Roth* in *Commonwealth v. Gordon*,[39] adapted the "clear and present danger" doctrine to the law of obscenity. Judge Bok would have found obscenity only in those cases

> [W]here there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the preceptible [sic] result of the publication and distribution of the writing in question . . .. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt.[40]

The second test, proposing a balancing of interests, was similarly rejected although advocated by the Government in *Roth*. In its brief, the Government introduced a lengthy list of different means of communication, purportedly in descending order of importance and public interest. The brief suggested that a balancing test be applied to the list to weight the priorities of various brands of speech. The list ran from "political speech" as the highest priority to "commercial pornography" as the lowest.[41]

Hence, in the eyes of the *Roth* majority, obscenity did not deserve the dignity of first amendment analysis. Whatever material passed the special obscenity test formulated in *Roth* was protected, clear and present danger or overriding state interest notwithstanding; that which failed the test could be proscribed no matter how innocuous its effect or minimal the government's interest in its suppression. However, the special obscenity test is actually a composite of several elements. These elements raise serious definitional problems and require separate analysis.

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[39] 66 Pa. D. & C. 101 (Philadelphia County Ct. 1949), aff'd sub nom. Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A.2d 389 (1950).

[40] 66 Pa. D. & C. at 156.

This test was received favorably as representing "the thoughtful and balanced approach of a philosophical mind to a restatement that will meet the challenge of changing times and morals." Bantam Books, Inc. v. Melko, 25 N.J. Super. 292, 315, 96 A.2d 47, 59 (1953), modified, 14 N.J. 524, 103 A.2d 256 (1954). Judge Jerome Frank, concurring in the Second Circuit opinion in the *Roth* case, followed Judge Bok's lead in *Gordon*, indicating, however, that he would be satisfied if the prosecution showed a clear danger that material of the type involved in the case *probably* would induce serious anti-social conduct. United States v. Roth, 237 F.2d 796, 806, 826 (2d Cir. 1956), aff'd 354 U.S. 476 (1957).

Justice Brennan's *Roth* opinion, in reasoning that the states were not in favor of an all-inclusive first amendment (by virtue of obscenity statutes in every one), rejected the clear and present danger approach by invoking Beauharnais v. Illinois, 343 U.S. 250 (1952) and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The *Beauharnais* opinion, exemplifying the position, supported in *Roth*, that libel lies without first amendment protection, stated that "it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon showing of such circumstances." 343 U.S. at 266 (dictum). *Chaplinsky* included the lewd and the obscene in "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems." 315 U.S. at 571-72.

[41] The scale of values was as follows:

1. Political speech	7. Literature	14. Comic books
2. Religious	8. Art	15. Epithets
3. Economic	9. Entertainment	16. Libel
4. Scientific	10. Music	17. Obscenity
5. General news and information	11. Humor	18. Profanity
6. Social and historical commentary	12. Commercial advertisements	19. Commercial Pornography
	13. Gossip	

Brief for Respondent at 29, Roth v. United States, 354 U.S. 476 (1957).

IV. THE *ROTH* TEST

A. "Redeeming Social Importance"

Justice Brennan, speaking for the *Roth* majority,[42] announced that a work was not obscene if it contained material of "redeeming social importance."[43] While this was a revolutionary judicial approach,[44] it gave rise to several questions; at the same time, it answered practically none.

The immediate question left unanswered by *Roth* is whether material found socially worthless is ipso facto worthless to society and subject per se to proscription, absent proof of social harm.[45] Unless we assume the very character we are testing for, viz. obscenity, there appears no reason why an allegedly obscene piece should be proven socially important any more than non-obscene, albeit vacuous, material.[46]

By raising such issues, *Roth* departed from the philosophy expressed by the Court nine years earlier in *Winters v. New York*.[47] In ruling upon the nature of several lewd magazines, the Court in *Winters* observed that even material without any apparent value to society is protected by the first amendment.[48] Absent a concrete showing of harm, there was no more reason in *Roth* to distinguish between socially redeeming material and worthless material than existed in *Winters*.

Furthermore, Justice Brennan's own attempt to define "redeeming social importance" was only partly successful. He explained that his approach clearly safeguards serious expositions of ideas, be they "unorthodox . . . controversial . . . even . . . hateful to the prevailing climate of opinion.[49] Obviously, Justice Brennan felt obscenity to fall beyond that which is hateful or controversial, but he failed to

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[42] In the oral argument before the Supreme Court in *Roth*, it was not Justice Brennan but Justice Frankfurther who was the most vigorous participant. It was Justice Brennan, however, who had posed no inquiries of either counsel, who authored the majority opinion, in which Justice Frankfurter and three others (Justices Burton, Clark and Whittaker) concurred without opinion. C. Rembar, Introduction to Obscenity. xx-xxi (L. Friedman ed. 1970) [hereinafter Obscenity].

[43] *Roth*. at 484.

[44] Only nine years prior to *Roth*, in Winters v. New York, 333 U.S. 507 (1948), the Court refused to deny first amendment protection to material adjudged to be socially worthless. See text accompanying notes 47-48 infra.

[45] See notes 38 and 40 supra; Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295 *passim* (1954).

[46] Justice Douglas' dissent in *Roth* launches an attack upon the preferred position of non-obscene expression in his opposition to the "contemporary community standards" branch of the *Roth* formula:

> That standard is, in my view, . . . inimical . . . to freedom of expression.
> . . . Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

Roth at 511-12.

Judge Frank, in whose concurrence in the Second Circuit opinion in *Roth* Justice Douglas may have found guidance, was similarly bothered by the *carte blanche* afforded Congress constituitionally to provide punishment for the mailing of books evoking mere thoughts or feelings about sex, with no requirement that a nexus be provided with punishable action. He wrote:

> If that be correct, it is hard to understand why, similarly, Congress may not constitutionally provide punishment for such distribution of books evoking mere thoughts or feelings, about religion or politics, which Congress considers socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially dangerous deeds.

United States v. Roth, 237 F.2d 796, 819 (1956) (appendix to concurring opinion), aff'd 354 U.S. 476 (1957).

[47] 333 U.S. 507 (1948).

[48] Id. at 510.

[49] *Roth* at 484.

establish concrete boundaries of tolerance[50] and none of the concurring opinions in *Roth* provides guidance.[51]

B. "Dominant Theme"

Perhaps the most significant departure from the *Hicklin* rule[52] in *Roth* is the principle that the dominant theme of the entire work in question, rather than the character of scattered portions, must be found obscene. Here again, the Court does not elaborate. In theory, "dominant theme" may require a determination of the author's creative intent, call for a quantitative weighing of obscene themes against non-obscene themes, or beg a qualitative analysis of the general impact of the material. A court might consider these three elements cumulatively, or it may rely on any one or combination of these elements in evaluating the piece.

In *Jacobellis v. Ohio*,[53] which involved the alleged obscenity of a French film entitled "Les Amants" ("The Lovers"), the Supreme Court, although reversing simply on the general authority of *Roth*, was asked to rule that the Ohio state court had erred in judging "Les Amants" by the effect of an isolated portion, contrary to the "dominant theme" rule in *Roth*.[54] A conclusion that may be drawn from *Jacobellis* is that a small percentage of obscenity will not condemn the entire work.[55]

C. "Prurient Interest"

Justice Brennan's majority opinion in *Roth* defines obscene material as "material which deals with sex in a manner appealing to prurient interest,"[56] that is, "material having a tendency to excite lustful thoughts."[57] At the same time, the Court cites approvingly the Model Penal Code formulation, which requires of prurience "a shameful or morbid interest in sex, nudity or excretion, [that] goes substantially beyond customary limits of candor in description or representation of such matter."[58]

Yet, the *Roth* characterization of prurience clearly conflicts with that of the Model Penal Code. What the Model Penal Code might consider a normal interest in

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[50] The Court's citation to Thornhill v. Alabama, 310 U.S. 88 (1940), sheds little light on the matter. The *Thornhill* Court advanced the notion that freedom of expression "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern," id. at 101, and "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Id. at 102. Here, as in *Roth*, the degree to which the Court wished to extend its mantle of protection is hazy. The question confronted by neither Court is whether their posture is akin to a public-private distinction or whether a more libertarian view may be assumed.

For an authoritative discussion of the public-private speech theory of first amendment protection, see generally A. Meiklejohn, Political Freedom (1960). Professor Meiklejohn maintains that speech relating to issues of general public concern enjoys absolute protection from censorship, whereas speech conveying a message more personal in nature may remain susceptible to proscription. See also Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965).

[51] Justices Burton, Clark and Whittaker concurred without opinion. Chief Justice Warren, issuing a separate opinion, concurred only in the result.

[52] See text accompanying notes 18-20 supra.

[53] 378 U.S. 184 (1964).

[54] Id. at 196.

The Ohio Supreme Court had styled the film as "87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity." State v. Jacobellis, 173 Ohio St. 22, 28, 179 N.E.2d 777, 781 (1962), rev'd, Jacobellis v. Ohio, 378 U.S. 184 (1964). Ephraim London, counsel for the appellant Jacobellis, advanced before the Supreme Court the argument that "[i] f more than 96% of the film was deadly dull, as the Ohio Supreme Court indicated, then its 'dominant effect' cannot be described as 'having a tendency to excite lustful thoughts. . . .' " Jurisdictional Statement for Petitioner at 15, Jacobellis v. Ohio, 378 U.S. 184 (1964).

[55] Note, however, that the *Jacobellis* holding was not a majority mandate. See note 71 infra.

[56] *Roth* at 487.

[57] Id. n.20.

[58] Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957).

sexual matters, despite its tendency to arouse lustful thoughts, Justice Brennan would brand "prurient" precisely because of this selfsame tendency. One way to eradicate the discrepancy might be to read Justice Brennan's concept of "lustful thoughts" to mean, rather than "normal" prurience, something more closely akin to the Model Penal Code's concept of the "exacerbated, morbid or perverted interest."[59] Alternatively, Justice Brennan's concept might be intentionally vague, so as to apply with greater elasticity, as courts see fit, to a variety of circumstances. In either case, the resolution of the issue of prurient appeal is left to subsequent decisions.[60]

D. "Contemporary Community Standards"

In *Roth*, the Court stated that the standard of obscenity of any given piece of material must be related to "contemporary community standards."[61] Naturally, before this branch of the *Roth* test can be implemented, the proper community and the proper standard for that community must be announced.

The difficulties of the "contemporary community standards" concept in application are deeply convoluted, perhaps sufficiently so as to render the formula unworkable on its face. Ideally, no two communities could have identical community standards if it may be taken as a premise that no two communities are alike. Further, we must know which person or group of persons, other than a court of law, is to be the spokesman for enunciating each community's standards.[62]

The realist recognizes that customs change from time to time and prevent the law of obscenity from freezing the society to the customs of a particular era.[63] Unfortunately, once a court recognizes a particular standard, it is often hesitant to revise that standard though the customs which spawned it may have changed.[64] Thus, it may be improper to invoke the law to protect prevailing moral standards, for, as one commentator observed, "this assumes a finality which such standards do not possess, since much of what passes for morality is mere convention, and . . . there is no common agreement on ultimate moral attitudes."[65]

Moreover, the question of the size of the community – whether the community should be local, statewide, or national – is left for discussion and elaboration in a later opinion.[66] Had the Court been referring to a local community, it might have been sanctioning application of highly provincial, localized conventions and prohibitions. If *Roth* intended a national community, it ignored the diversity of

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[59] Id. § 207.10, Comment 6(c) at 29.

[60] See Jacobellis v. Ohio, 378 U.S. 184 (1964); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).

[61] *Roth* at 489. See also Annot., 5 A.L.R. 3d 1158, 1182 (1966).

[62] One commentator has illustrated the problem:

> Assuming . . . that a community, of whatever dimensions, can be described, how are its standards to be made known? Are juries, or are judges sitting without juries, sufficiently attuned to the necessary pulses to perceive unaided what such a community's standards are? If not, who are the experts to whom the standards are most likely to be revealed? Are they the community's clergymen (in well-balanced and politically aware fashion, one of each faith), or its sociologists or psychologists? Or are they its standard-makers: its magazine, newspaper, and television columnists and critics?

R. Kuh, Foolish Figleaves? 37(1967).

[63] See text accompanying note 23 supra and especially Judge Learned Hand's formulation of contemporary community standards.

[64] Id.

[65] N. St. John-Stevas, Obscenity and the Law 196 (1956). The author concludes that the only legitimate aim of censorship is control of that literature having an adverse and proximate effect on sexual behavior.

[66] See discussion of Jacobellis v. Ohio, 378 U.S. 184 (1964), in text accompanying notes 69-80 infra.

regional opinion which no national standard could adequately reflect.[67] In any event, *Roth* may well have encouraged "a regime where in the battle between the literati and the Philistines, the Philistines are certain to win."[68]

V. BEYOND *ROTH*: THE NEW TESTS

In *Jacobellis v. Ohio*,[69] the Supreme Court elaborated the "community standards" branch of the *Roth* test.[70] Although Justice Brennan spoke for the Court, no majority could agree on the reasons he advanced.[71] Hence, it might be argued the *Jacobellis* affects only the facts as presented in that case and wields no constitutional force. However, this position is untenable for two reasons. First, Justice Brennan authored the *Roth* opinion, which remains the touchstone for the Court's position on obscenity.[72] Secondly, the role played by Brennan's *Jacobellis* opinion in the development of the Court's obscenity doctrine was later emphasized in *Memoirs v. Massachusetts*.[73] There, a majority of the Court incorporated the *Jacobellis* elaboration into its most recent formulation of the obscenity test.[74]

Because the issue of obscenity involves the Federal Constitution insofar as the material might be protected by the first amendment, Justice Brennan ruled in *Jacobellis* that national contemporary community standards must be applied.[75]

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[67] Justice Black, having long asserted that all obscenity statutes are void under the first amendment (and thus no advocate of standards of any kind), anticipated the problem of moral diversity created by the national standards test. In Smith v. California, 361 U.S. 147 (1959), he wrote:

> If, as it seems, we are on the way to national censorship, I think it timely to suggest again that there are grave doubts in my mind as to the desirability or constitutionality of this Court's becoming a Supreme Board of Censors – reading books and viewing television performances to determine whether, if permitted, they might adversely affect the morals of the people throughout the many diversified local communities in this vast country.

Id. at 159-60 (concurring opinion).

[68] *Roth* at 512 (Douglas, J., dissenting).

[69] 378 U.S. 184 (1964).

[70] Id. at 192-95.

[71] The Court split six ways, with only Justice Goldberg joining in the Brennan opinion. Four other Justices concurred merely in the judgment of reversal, Justice White doing so without opinion. Three Justices dissented, with Chief Justice Warren, joined by Justice Clark, maintaining that the decisions since *Roth* had given inadequate guidance for a finding of obscenity. Justice Harlan's dissent would have had the *Roth* test apply to the national government, with a standard of rationality for the states. See also note 97 infra.

[72] United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971); United States v. Reidel, 402 U.S. 351, 354 (1971). See text accompanying notes 120 - 31 infra.

[73] 383 U.S. 413 (1966).

[74] See text accompanying note 99 infra.

[75] 378 U.S. at 193-95. The Court made reference to Judge Learned Hand's *Kennerley* opinion (209 F. 119, 120-21 (S.D.N.Y. 1913)) and his mention of "society at large," thereby indicating that the obscenity concept would vary from time to time but not from place to place. Contra, In re Giannini, 69 Cal.2d 563, 446 P.2d 535, 72 Cal Rptr. 655 (1968), cert. denied, 395 U.S. 910 (1969), where the court, as in *Jacobellis*, took language from Judge Hand's *Kennerley* opinion ("candor and shame") but reached the opposite result:

> Different areas of the country, both in attitude and practice, undoubtedly do reach different compromises between "candor and shame," and we can conjure no reason for ignoring so obvious a reality. Certainly, all would agree that standards of obscenity are not immutable; they change with the character of whatever community we use for a testing ground. . . . We should not be disturbed by different standards based upon the place of the test; *geography should assume a no more troublesome role than chronology.*

In re Giannini, supra at 579, 446 P.2d at 546, 72 Cal. Rptr. at 666 (emphasis added).

The *Giannini* court thus advanced the notion that, in some instances, it is the very nature of the obscene act or piece of material that will determine whether national community standards or those more localized will offer the proper breadth.

Note also Chief Justice Warren's dissent in *Jacobellis*, which rejected the national standards formulation. Jacobellis v. Ohio, 378 U.S. 184, 200 (1964).

The difficulty in applying a national community standard lies in the application of that standard to a diverse set of local communities.[76] With the imposition of national community standards, a national moral conscience is not at once created; no court can do away with deep-set feelings of moral regionalism. A bawdy play or erotic work of literature might, with proper deference to realism, be accepted and, indeed, be commercially desirable in New York or Los Angeles and, at the same time, be run out of town on a rail in Lancaster, Pennsylvania. The national standard would permit or reject these materials in both areas. As a consequence, neither locality may be totally satisfied with the resultant compromise.[77]

It should also be noted that the imposition of a national standard strips from the individual communities and states their role in dealing with their own local problems. Such a standard may tend to centralize in the federal government the authority to control criminal prosecutions in the respective states.[78]

Such a result would not only frustrate the substance of local public policy,[79] but might also complicate the administration of local obscenity statutes. If a national standard must be applied at the trial stage, that standard will have to be explained to the local veniremen. It may not be practical to expect those jurors to relinquish emotional attitudes grounded in local customs and mores. Admittedly, Justice Brennan's analysis in *Jacobellis* may require only that local standards applied by different communities be tested, on appeal to the federal courts, by the national standard. In either case, the federal judiciary will have to make itself available for review of every local case or else permit Justice Brennan's mandate to be undermined.[80]

The argument above presumes that, in many cases, the local community might prohibit material which the national community would allow. In *Manual Enterprises, Inc. v. Day*,[81] Justice Harlan protested that the federal courts should not adopt the standards of a particular local community, imposing a national restriction on materials acceptable in some areas or permitting materials unacceptable in others.[82] Alternatively, *Jacobellis* implied that tolerance of conflicting local standards might interfere with a publisher's ability to disseminate generally materials permissible where published but prohibited where received.[83]

While it may be necessary to apply a national standard in cases arising under a federal statute, such as *Manual Enterprises*, there is no equivalent necessity in cases

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The national standards rationale in *Jacobellis* was followed in Hudson v. United States, 234 A.2d 903 (D.C. Cir. 1967), a case involving an allegedly obscene burlesque show. The court held that the term "community" used in *Jacobellis* refers to the nation as a whole and not to the local community. The national gauge must be applied, the court reasoned, because the meaning of the term "obscenity" is not intended to vary from place to place, and thus variable community standards for a uniform concept should not attach. Id. at 905-06. The *Hudson* court further reasoned that, in order to avoid the danger of basing a finding of obscenity on the mores and morals of a local community as against those of the nation as a whole, it is incumbent on the Government, as an essential element of its case, to establish just what those national standards are. Id. at 906. See also United States v. Klaw, 350 F.2d 155 (2d Cir. 1965).

[76] See note 67 supra; Obscenity 149-50 (oral argument by Ephraim London before the Supreme Court in *Jacobellis* on the question of community standards and a proper construction of the "community").

[77] The national standards test has been adopted in New Jersey. See State v. Hudson County News, 41 N.J. 247, 266, 196 A.2d 225, 235 (1963) (discussed in Obscenity 149). The First Circuit also has adopted the national standards test. See Excellect Publications, Inc. v. United States, 309 F.2d 362, 365 (1st Cir. 1962).

[78] Cf. Senn v. Tile Layers Union, 301 U.S. 468 (1937); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

[79] See In re Giannini, 69 Cal.2d 563, 580, 446 P.2d 535, 547, 72 Cal. Rptr. 655, 667 (1968), cert. denied, 395 U.S. 910 (1969).

[80] See Jacobellis v. Ohio, 378 U.S. 184, 187-88 (1964).

[81] 370 U.S. 478 (1962). See also R. Kuh, Foolish Figleaves? 53-59 (1967).

[82] 370 U.S. at 488.

[83] 378 U.S. at 194.

arising in state prosecutions. Moreover, the courts, while decrying the effects of local diversity, have failed to focus on the major reason for conflict: obscenity is a vague concept and its definition is inherently subjective.

The same quandary of subjectivity which would plague a local court will confront the national judiciary. Furthermore, the common "national" conscience is, because of the breadth of areas affected, even more elusive than a local community standard. Random surveys would be fragmentary and inconclusive because of national geographical diversity. Expert testimony would only mirror the divergent postures within the same community.[84] The end result will be that either the judgment of a particular community will be most appealing to the federal courts, or the opinion of a particular group of persons would be most persuasive. Moreover, the local trial judge is likely to construe the national standard in terms of his own regional biases.

In sum, the result in any event is bound to be the imposition of some personal ethic by the federal or local judge or jury upon the rest of their community. Were the "contemporary community standards" test really that beacon by which the judiciary was guided, their function simply would be to apply a pre-determined, precisely defined standard to the facts of each case.[85] Hence, the Supreme Court could never truly act as a "Supreme Board of Censors,"[86] nor could federal and state courts act in a similar fashion. Perhaps realizing that a community standard, by its very nature, cannot be accurately voiced, the judge creates an artificial unanimity by proclaiming himself, in effect, a "community of one," and, as such, the only community through which the *Roth* standards may concretely be applied.

Even if a national standard were justifiable, it could not relieve the burden of defining obscenity in a just and uniform manner. The concern professed by Justice Brennan in *Jacobellis* for the rights of sellers and exhibitors[87] is not served by the vague notions which the community standard is to employ in determining how the obscenity issue is to be resolved. The post-*Roth* cases, having inherited a constitutional test poorly defined and hard to manage, added new dimensions to that test without developing a concrete test for obscenity. In the process, the Supreme Court proposed new words of art to illustrate that which makes a work obscene. In future opinions, those words may become springboards for that subjective, emotional judgment which *Roth* sought to minimize, albeit with questionable success.

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[84] Expert testimony is not, of itself, conclusive on the issue of obscenity, as conflicting testimony from expert witnesses as to the nature of a given community's standards will serve only to show that that community has no uniform standards. Obscenity 245-46.

[85] The Supreme Court recognizes that this must be its function before it can properly apply any of the *Roth* tests, and it has tried desperately to avoid the conclusion that it is, in fact, operating in a vacuum. Note the following exchange on oral argument in Memoirs v. Massachusetts, 383 U.S. 413 (1966), involving Justice Brennan, author of the Court's opinion, and Charles Rembar, appellant's counsel:

> JUSTICE BRENNAN: . . . I gather you are saying that the *Roth* test is a constitutional test?
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> MR. REMBAR: Yes, sir.
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> JUSTICE BRENNAN: And because it is a constitutional test, its application necessarily is a constitutional judgment?
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> MR. REMBAR: Yes, sir.
>
> . . . .
>
> JUSTICE BRENNAN: And that it is not a matter of experts in this field but ours is the ultimate constitutional responsibility, whether you call us experts or anything else. We have to make the ultimate judgment, is that it?
>
> MR. REMBAR: You have the responsibility, Your Honor. You are experts on law. In making that judgment, what I suggested yesterday -
>
> JUSTICE BRENNAN: In other words, we are not making a judgment as experts of literature or prurient interest or anything else, but experts in the application of the constitutional test.
>
> MR. REMBAR: That's right, Your Honor . . ..

Obscenity 266-67.

[86] See note 67 supra.

[87] 378 U.S. at 194.

In *Manual Enterprises,* the Court began the process of trying to make concrete sense out of the *Roth* case. In that 1962 case, the District of Columbia Circuit had found magazines designed ostensibly for a homosexual audience to be obscene. Applying its reading of *Roth,* the Court of Appeals had reasoned that the magazines appealed to the prurient interest of a particular audience, viz. homosexuals.[88]

Justice Harlan, writing for the Supreme Court in *Manual Enterprises* (which, like *Jacobellis,* could not command a majority), imposed what he considered a refinement implicit in the *Roth* standard. To be obscene, material would have to be "deemed so offensive on [its] face as to affront current community standards of decency;"[89] in other words, it must be found "patently offensive."[90]

The Court claimed that its "patently offensive" standard required an independent inquiry "only in the unusual instance where . . . the 'prurient interest' appeal of the material is found limited to a particular class of persons."[91] At the same time, it refused to consider whether any particular group smaller than that of average persons was the relevant audience in whose terms "prurient interest" was to be judged.[92]

The "redeeming social value" branch of the *Roth* test received treatment in *Jacobellis.*[93] There, the defendant had been convicted of possessing and exhibiting an obscene film. The conviction was affirmed by the Ohio Supreme Court.[94] Concluding that the material was not obscene, Justice Brennan declared that, despite the prurient appeal of a work, it could not be proscribed unless it was " 'utterly' without redeeming social importance."[95]

Undoubtedly, *Jacobellis* created a more effective restraint on censorship by requiring that prurient material be utterly worthless. Nowhere in *Roth* was there a prohibition against censorship based upon the outweighing of "slight" social importance by a high degree of prurience. *Jacobellis* maintained that the slightest finding of literary merit or aesthetic value would, despite prurient content, place a work under the mantle of first amendment protection.[96] As Justice Stewart vividly observed, the only type of material left subject to censorship after *Jacobellis* was "hard-core pornography."[97]

After *Jacobellis,* it was apparent that a tripartite test of obscenity was emerging. The "prurient interest" and "patently offensive" tests declared in *Roth* and *Manual Enterprises* were joined by the requirement of utter absence of worth in *Jacobellis* as the cumulative refinement of the *Roth* standard.

The newly elaborated *Roth* test was presented in *Memoirs v. Massachusetts:*[98]

> Under this [the *Roth*] definition, . . . three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole

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88 Manual Enterprises, Inc. v. Day, 289 F.2d 455, 456 (D.C. Cir.), rev'd, 370 U.S. 478 (1962).

89 370 U.S. at 482.

90 Id. at 486.

91 Id.

92 Id. at 482.

93 378 U.S. 184 (1964).

94 State v. Jacobellis, 173 Ohio St. 22, 179 N.E.2d 777 (1962), rev'd, 378 U.S. 184 (1964).

95 378 U.S. at 191.

96 Id. at 192.

97 378 U.S. 184, 197 (1964) (concurring opinion); see note 8 supra.

Chief Justice Warren, in his dissent in *Jacobellis,* argued that it is no easier task to define "hard-core pornography" than it is to define "obscenity," maintaining (as he did in *Roth*) that the use to which various materials are put, and not simply their content, must be considered in determining whether or not the materials are obscene. 378 U.S. at 201. Justice Harlan's dissent similarly voiced no desire to approach the "hard-core pornography" standard espoused by Justice Stewart, advocating instead an attenuated federal interest in censorship, while allowing the states broader control, limited only by a test of "rationality." 378 U.S. at 203. See also Teeter and Pember, Obscenity, 1971: The Rejuvenation of State Power and the Return to *Roth,* 17 Vill. L. Rev. 211 (1971). What remains uncertain here is whether obscenity control can be adequately managed by state and local authorities. See J. Paul and M. Schwartz, Federal Censorship: Obscenity in the Mail 222-23 (1961).

98 383 U.S. 413 (1966).

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.[99]

On the same day it decided *Memoirs*, the Supreme Court handed down its decision in *Ginzburg v. United States*.[100] There, the Court upheld the conviction of Ralph Ginzburg for publishing the magazine "Eros," the newsletter "Liaison," and a book entitled *The Housewife's Handbook on Selective Promiscuity*. The Court seemed unprepared to rule the materials before it obscene on their own merit.[101] However, it found that Ginzburg had engaged in "pandering," as he had deliberately exploited the "sexually provocative aspects of the work, in order to catch the salaciously disposed."[102] The Court noted that "in close cases evidence of pandering may be probative with respect to the nature of the material in question."[103]

The road traveled by the Court from *Manual Enterprises* through *Ginzburg* saw it strengthen *Roth* only to prepare for an eventual erosion of the reinforced *Roth* test. Although *Manual Enterprises* claimed and *Memoirs* assumed that "prurient interest" and "patently offensive" require separate inquiries, "prurient interest" may become subsumed under "patently offensive." By not declaring the audience to which a prurient appeal is necessary, *Manual Enterprises* permits material to be judged by the interests of the most corruptible group. Both *Butler v. Michigan*[104] and *Roth* negated that aspect of *Hicklin*.[105] Moreover, since for almost any significantly salacious material a deviant group may be found whose prurient interest will be aroused, the time of and rationale for *Roth*'s average man will be wasted in gauging some other, less average person's reaction. Of course, the Court in *Manual Enterprises* sensed that *Roth* intended to proscribe only material which affronts the average man and his entire community. However, if most "dirty" or "lewd" works are prurient in terms of someone's taste, the only test emerging from *Manual Enterprises* is that of "patent offensiveness." It should be noted that, when *Memoirs* summarized the tripartite *Roth* test, it did not explain how the "prurient interest" and "patently offensive" branches function independently of each other. Hence, despite its protestations to the contrary, *Manual Enterprises* emasculated the "prurient interest" inquiry, if it did not replace it.[106]

Ginzburg weakened the entire *Roth* test by asserting that the conduct of the seller, publisher or distributor may render a work obscene in close cases. Had it not done so, the forceful language in *Jacobellis* may have outweighed the ambiguity of *Manual Enterprises* in the former's attempt to buttress the *Roth* statement. " 'Utterly' without redeeming social value" is an iron prophylaxis on the hands of the censor. Even in *Memoirs* the Court observed that, after *Jacobellis*, "the social value of the book can neither be weighed against *nor cancelled by* its prurient appeal or patent offensiveness."[107] After *Ginzburg*, and in light of it, the endorsement of Justice Brennan's *Jacobellis* rationale by the *Memoirs* Court may only be qualified and hence far less effective. No longer will a high degree of prurience be ignored because of minimal social value.

Since the *Memoirs* and *Ginzburg* opinions in 1966, the Supreme Court has displayed no desire to engage in either formulation of a new obscenity standard or further sophistication of what was then available. Rather, it has chosen to reverse a

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[99] Id. at 418.
[100] 383 U.S. 463 (1966).
[101] Id. at 470-71.
[102] Id. at 472.
[103] Id. at 474.
[104] 352 U.S. 380 (1957).
[105] See text accompanying notes 12-20 supra.
[106] See 370 U.S. at 486.
[107] 383 U.S. at 419 (emphasis added).

larger number of state obscenity convictions without opinion,[108] citing *Redrup v. New York*.[109] In *Redrup* the Court, in a brief *per curiam* opinion, held that two paperbacks, *Lustpool* and *Shame Agent*, and a series of girlie magazines were not obscene. The only apparent distinction from *Ginzburg* the Court felt prepared to offer was the absence from *Redrup* of any evidence of pandering.[110] Notably, the Court framed *Redrup* to bring it within the *Ginzburg* holding, which, not having since been weakened, retains constitutional force.

In 1969, with *Stanley v. Georgia*,[111] the Supreme Court ventured onto a new plane of discussion, ruling that mere private possession of obscene material cannot constitutionally be made a crime.[112] The Court noted that the *Roth* statement (that obscenity enjoys no first amendment protection) was not meant to apply to a situation as that presented in *Stanley*, where mere private possession of obscene material was at issue.[113] The Court further observed that it had decided no obscenity prosecutions subsequent to *Roth* involving private possession.[114] Moreover, the Court advocated the constitutional right freely to receive information and ideas,[115] regardless of their social worth.[116] Reflecting on *Roth*, the *Stanley* Court concluded that the force of *Roth* and its progeny were not emasculated by its holding.[117]

The split following the *Stanley* decision ran deep. Some lower courts limited the case to its very narrow holding;[118] others advocated the extension of the doctrine to include the protection not only of private possession of obscenity within the home, but also private possession outside the home, private distribution, and other activities

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108 See, e.g., Bloss v. Michigan, 402 U.S. 938 (1971); Hoyt v. Minnesota, 399 U.S. 524 (1970); Walker v. Ohio, 398 U.S. 434 (1970); Bloss v. Dykema, 398 U.S. 278 (1970); Cain v. Kentucky, 397 U.S. 319 (1970); Carlos v. New York, 396 U.S. 119 (1969). Note also the dissent from the denial of certiorari by Chief Justice Burger, Justice Harlan and Justice Blackmun in Keriakos v. Hunt, 400 U.S. 929 (1970).

Most recently, the Supreme Court, in Hartstein v. Missouri, 92 Sup. Ct. 531 rev'g mem. 469 S.W.2d 329 (1971) and Wiener v. California, 92 Sup. Ct. 534, has continued the trend. Both cases involved allegedly obscene films. The Supreme Court granted certiorari and ordered in both cases that lower court findings of obscenity be reversed. The decisions in both *Hartstein* and *Wiener* were 4-3, with dissents entered in each by Chief Justice Burger and Justices White and Blackmun. Justice White's dissent is particularly noteworthy. His switch to a conservative stand on the obscenity issue (see also text accompanying notes 120-31 infra) presages what may well be the majority view of the new nine-member Court. See N.Y. Times, Dec. 15, 1971, at 23, col. 6.

109 386 U.S. 767 (1967) (a consolidation of three cases, one each from New York, Kentucky and Arkansas).

110 Id. at 769.

111 394 U.S. 557 (1969). A helpful treatment of the case may be found in Katz, Privacy and Pornography: Stanley v. Georgia, 1969 Sup. Ct. Rev. 203. See also Comment, 83 Harv. L. Rev. 147 (1969); Comment, 31 Ohio St. L. J. 364 (1970); Comment, 48 Tex. L. Rev. 646 (1970).

112 394 U.S. at 559. The prosectuion involved the discovery by police of three "stag movies" in the defendant's bedroom during a search for evidence of bookmaking. Stanley was convicted for knowing possession of obscene matter in violation of Georgia law. The Supreme Court of Georgia affirmed Stanley's conviction, holding that an indictment for possession of obscene matter need not allege intent to sell or distribute. Stanley v. State, 224 Ga. 259, 261, 161 S.E.2d 309, 311 (1968). On appeal, the Supreme Court, through Justice Marshall, reversed and held that making the mere private possession of obscene matter a crime is prohibited by the first and fourteenth amendments. Justice Black concurred on his theory that all obscenity, public or private, is constitutionally protected. Justices Stewart, Brennan and White would have reversed withou reaching the issue decided by the majority, as they felt the films were illegally seized. Chief Justice Burger and Justices Douglas, Harlan and Blackmun did not participate in the opinion.

113 394 U.S. at 560-61.

114 Id. at 561.

115 Id. at 564, citing Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

116 Citing Winters v. New York, 333 U.S. 507 (1948). See text accompanying note 48 supra.

117 394 U.S. at 568.

118 Cases opposing any extension of *Stanley* include: United States v. Fragus, 422 F.2d 1244 (5th Cir. 1970); United States v. Melvin, 419 F.2d 136 (5th Cir. 1969); Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969), aff'd, 397 U.S. 98 (1970); Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1968), aff'd, 397 U.S. 592 (1970).

falling short of outright, unrestricted public distribution.[119] Thus, some lower courts believed that *Stanley*, in freeing the private sphere from obscenity regulation, was not merely expressing an opinion on the right of privacy as an independent issue, but was exhibiting an impatience with rigid enforcement of obscenity laws. These courts felt that *Stanley* presaged a liberal approach to the regulation of obscenity on the commercial market.

Two years after *Stanley*, however, the Supreme Court declared that *Stanley* was not to be construed as a liberalization of the Court's position on obscenity, clarifying its position in *United States v. Reidel*[120] and *United States v. Thirty-Seven Photographs*.[121] The issue before the Court in *Reidel* was the constitutionality of the federal statute prohibiting the knowing use of the mails for the delivery of obscene material.[122] The Supreme Court reversed the district court and ruled that the statute was constitutional. Speaking for the Court, Justice White likened the case to *Roth* (which also involved use of the mails for the distribution of obscene material) and held the latter case controlling.[123] The Court believed that "[t]he District Court ignored both *Roth* and the express limitations on the reach of the *Stanley* decision."[124] *Reidel* did not claim that a right to receive does not exist in any case; it did, however, state that "[w]hatever 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."[125] The Court indicated that the "right to receive" (and the right to deliver) in a *Stanley* situation (i.e., for private use) would be acceptable but that that right does not extend to "do[ing] business in obscenity and us[ing] the mails in the process."[126]

In *Thirty-Seven Photographs* the substantive issue involved the applicability of a section of the federal customs statute[127] to a seizure by United States customs agents of photographs which the agents had adjudged obscene. The defendant denied that the photographs were obscene and alleged that section 1305(a) of the federal statute was unconstitutional on its face and as applied to him. The trial court had construed *Stanley* as protecting at least the right to read obscene material in the privacy of one's own home and to receive it for that purpose, holding that section 1305(a), which prohibits importation of obscenity for private use as well as for commercial distribution, was overbroad and hence unconstitutional.[128] The Supreme Court, again speaking through Justice White, held incorrect the trial court's reading of *Stanley* in interpreting it as protecting from seizure obscene materials possessed at a port of entry for the purpose of importation for private use. The Court placed *Stanley*'s emphasis on "freedom of thought and mind in the privacy of the home,"[129] and not at a port of entry. Further, the Court felt that the authority of customs officials routinely to

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[119] Cases favoring extension of *Stanley* include: United States v. Dellapia, 433 F.2d 1252 (2d Cir. 1970); United States v. Langford, 315 F. Supp. 472 (D. Minn. 1970); United States v. Articles of Obscene Merchandise, 315 F. Supp. 191 (S.D.N.Y. 1970); United States v. Lethe, 312 F. Supp. 421 (E.D. Cal. 1970); Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), vacated on procedural grounds, 401 U.S. 216 (1971); Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), vacated on procedural grounds, sub nom. Dyson v. Stein, 401 U.S. 200 (1971).

[120] 402 U.S. 351 (1971).

[121] 402 U.S. 363 (1971).

[122] 18 U.S.C. § 1461 (1970). See also United States v. Orito, appeal docketed, No. 70-69, 40 U.S.L.W. 3016 (U.S. July 13, 1971), which was argued before a full Court on Jan. 19, 1972 and currently awaits decision. The case involves 18 U.S.C. § 1462 (1970), which prohibits interstate transportation by common carrier of obscene material, and asks whether it may constitutionally be applied when transportation is for personal use. The decision will be an indication of the role the newly reconstituted Court feels it must play in obscenity regulation.

[123] 402 U.S. at 354.

[124] 402 U.S. at 355.

[125] Id.

[126] Id. at 356.

[127] 19 U.S.C. § 1305(a) (1970).

[128] United States v. Thirty-Seven Photographs, 309 F. Supp. 36, 37-38 (C.D. Cal. 1970), rev'd, 402 U.S. 363 (1971).

[129] 402 U.S. at 376.

inspect all luggage at ports of entry is part of their function and should stand unfettered.[130] The right to receive in *Stanley* will not protect one seeking publicly to distribute obscene materials, nor will it protect one seeking to import obscene material, whether for public distribution or private use.[131]

The *Stanley* rationale fared better in *Reidel* than in *Thirty-Seven Photographs*, if only for the fact that *Reidel* contained a positive showing of intent to use the obscene material commercially, whereas in *Thirty-Seven Photographs* that showing could only be demonstrated by conjecture. The larger picture, however, will reveal that *Reidel* and *Thirty-Seven Photographs* have placed *Stanley* into a tight fitting cubicle where all possibility of expansion has been uncompromisingly snuffed out.

This clearly conservative trend now enjoys particularly strong support, with Justices Powell and Rehnquist arguably adding to a conservative majority. The implications of this recomposition on the Court's present practices in obscenity litigation are enormous. It is foreseeable that the Court's technique of granting certiorari and summarily reversing obscenity convictions by citing *Redrup v. New York* is nearing an end. *Hartstein v. Missouri* and *Wiener v. California* were reversed in this manner by only a four to three vote.[132] It is possible that the Court, as presently constituted, would ignore *Redrup* and vote five to four to affirm a lower conviction. Further, if the *Redrup* approach is abandoned, the newly reconstituted Court may be eager to place its own imprint on the continuing obscenity struggle. In so doing, the Court may choose to revise the obscenity tests in a new mold. The possibility exists that the Court may return to its precedent in *Ginzburg* and consider evidence of pandering determinative on the question of obscenity. Most cases involve close questions on the obscenity issue; in the eyes of contemporary judges or juries with Victorian tastes, all cases do. In cases where prurient material is even a minimally significant part of the work, a conclusion of "pandering" may become automatic. Indeed, the "pandering" ground upon which the *Ginzburg* case was decided has not since been applied. Needless to say, "patently offensive" is equally subject to manipulation by a court. In the hands of a conservative judiciary,[133] these new words of art, "pandering" and "patently offensive," may draw new breath and become new tests, far broader than even *Roth* would permit. Whether the contemporary standard is national or local, the average man may become a ruthless censor.

CONCLUSION

The greatest and most obvious danger in the obscenity area has been the repeated formulation of public policy in a factual vacuum. With the roots of obscenity regulation in the religious and moral doctrines of Victorian times, precise factual boundaries for a finding of obscenity will almost certainly never be announced. Furthermore, present case law and legislation seriously weaken the requirement of an evidentiary finding of guilt beyond a reasonable doubt. By their creation of standards, and in the belief that the obscenity problem is theirs to solve, the courts have transformed themselves into sophists of the lowest order. In an attempt to limit the play of subjective judgment, the *Roth* Court advanced a standard designed to

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130 Id.

131 See United States v. 12 200-Ft. Reels, appeal docketed, No. 70-2, 40 U.S.L.W. 3021 (U.S. July 13, 1971), which was argued before a full Court on Jan. 19, 1972 and, along with United States v. Orito (see note 122 supra), currently awaits decision. The issue in *12 200-Ft. Reels* is whether the Government may validly prohibit importation of obscene matter which the importer claims is intended solely for personal use and possession. *Thirty-Seven Photographs* is in point and, with the Court at its most conservative in years, almost certainly will be used to affirm the conviction.

132 See note 108 supra.

133 The conservative approach would have the states bear the major burden of regulating censorship and voicing the applicable standards. See note 97 supra.

distinguish between obscene and meritorious literature by ruling obscenity present whenever the applicable contemporary community would view the dominant effect of the work as a whole to appeal to the prurient interest.

Between *Roth* and the *Memoirs* case in 1966, it must be remembered that no opinions were joined by a majority of the Court, thus stifling the flow of fully developed constitutional doctrine. What refinements did take place, however, in preparation for the *Memoirs* statement began in earnest in 1962, where *Manual Enterprises* interpreted *Roth* to mean that a work must be "patently offensive" before it may be declared obscene. *Jacobellis* added that obscene material must be found to be "utterly without redeeming social importance." Finally, in *Memoirs*, a majority of the justices issued a revamped *Roth* test of constitutional force. That same day, *Ginzburg* appeared to circumvent that test with its introduction of the "pandering" element, thus adding to content the new dimension of conduct. The year after, however, in *Redrup*, the Court refused to make a finding of pandering and the Court has yet to dispose of a case on *Ginzburg* grounds. *Stanley's* permission of obscenity in the private sector was given precise and narrow boundaries by the combined influence of *Reidel* and *Thirty-Seven Photographs*.

The present constitutional tests remain in a fog, and it remains nearly impossible to know when the law has been broken. The tests as presently framed fail also to reveal a nexus with society's interests in controlling public distribution of obscene materials. In addition, judicial administration is rendered less effective while the prosecutor enjoys wide discretion due to the elusive essence of his prey. The burden falls then on the courts to consider questionable materials on a case-by-case basis.

When one thus reaches the question of the areas in which the law should remain empowered to reach and control obscenity, the answer must reveal a concrete societal interest which the regulation is designed purposefully to protect.[134] Such materials as are foisted upon the public in such a manner that a sense of shock and disgust is at once produced, coupled with an inability of such audience to escape exposure to this manner of expression, should remain susceptible of regulation.[135] Moreover, a studied analysis of the potential effect of erotic materials on the juvenile audience also compels separate treatment.[136] It is a far simpler task to envision damaging social and behavioral effects befalling a child than an adult when obscenity is transmitted through the visual media. Casting the problem in yet another light, the use of the mails to send obscene materials to an adult without his express consent to their shipment would work an unwarranted invasion of privacy.[137] Clearly, uniform statutory implementation of the above regulatory measures would leave unresolved the basic definitional problems posed by the obscenity concept, but this approach to obscenity prosecutions would almost certainly be conducted in a significantly more selective fashion.

Stubborn adherence to the *stare decisis* doctrine in the obscenity field and the shifting, elusive nature of the obscenity concept simply do not mesh. While laws and precedents stagnate, public morality, with the inputs of the visual media, change each day. Moreover, obscenity is elusive only to the extent to which it is moving in a known direction. Perhaps remedial legislation, riding the wave of an unsteady concept, is itself doomed to a brief useful life, for legislation, while designed to restrict conduct, must ultimately conform to conduct.

Mindful of the force of ideas and the guarantees of the first amendment, a prudent judge views only two alternatives: halt obscenity prosecutions or make the

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134 See T. Emerson, The System of Freedom of Expression 497-99 (1970).

135 See Ginzburg v. United States, 383 U.S. 463, 498 n.l (1966) (Stewart, J., dissenting).

136 Id.; Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring).

137 Cf. Rowan v. Post Office Dept., 397 U.S. 728 (1970), where the Court sustained the validity of 30 U.S.C. § 4009 (1967), which generally prohibits "pandering advertisements in the mail," whereby the addressee is given unreviewable discretion to decide whether he wishes to receive any further material from a particular sender.

prosecutor prove that a work has not even the slightest redeeming value. English and American legal history will not permit the first alternative and the departure from *Jacobellis* makes the second unlikely.

Hence, we are left not only with a situation where the effect of the first amendment will depend upon emotional reaction, but "patently offensive" and "pandering" remain as symbols through which ideas may be suppressed merely because they revolve around sexual themes. A system of rational jurisprudence would shudder to witness its principles so compromised.

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