OBSCENITY AND THE LAW—AN APPRAISAL OF THE CONTEMPORARY CONCEPT OF OBSCENITY

> For decades the censors have fought to emasculate literature. They have tried to set up the sensibilities of the pruriency-ridden as a criterion for society, have sought to reduce the reading matter of adults to the level of adolescents and subnormal persons, and have nurtured evasions and sanctimonies.
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> The "Ulysses" case marks a turning point. It is a body blow for the censors. The necessity for hypocrisy and circumlocution in literature has been eliminated. Writers need no longer seek refuge in euphemisms. They may now describe basic human functions without fear of the law.[1]

As is most often the case with prophecy, this optimistic presage of the nineteen thirties still remains unfulfilled.[2] No doubt its author, and the rest of the literary world, has paused to reconsider and conclude that the anticipated rapprochement between the censor and the artist seems destined to be further delayed.

Yet in spite of this prolonged adversity, or perhaps because of it, pornographic "literature" has continued to thrive. In fact, it seems that the threat of governmental suppression of obscene material has invariably been the most effective lure to "borderline" publications. It might therefore be said that the obscenity laws regulating legitimate art forms frustrate their purpose to "protect" society from its prurient proclivities by indirectly enhancing the attractiveness of the most lewd and salacious "literature" available.

The purpose of this comment is to examine obscenity laws in light of their historical origin and current application with a view toward determining their prospective direction.

The first amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[3] The fourteenth amendment protects these rights from invasion by state action.[4] At first blush, complete freedom of speech and of the

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1 Ernst, *Foreword* to J. JOYCE, ULYSSES at v (cor. res. ed. 1961).

2 C. REMBAR, THE END OF OBSCENITY (1968). "The *Ulysses* decision impressed the literary world, but not the other courts." *Id.* at 3.

3 U.S. CONST. amend. I.

4 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 147 (1939).

press would appear to be guaranteed. This, however, is not so. Various limitations and exceptions do exist.

Thus, for example, any utterance, publication, or other means of expression (hereinafter referred to as publications) which would create a clear and present danger of generating substantial evils may be prevented by the legislature.[5] Accordingly, while one may agitate for the purpose of securing political and social reform,[6] one may not encourage the violation of current law.[7]

Furthermore, certain publications, not even initially protected, are viewed as exceptions in that they do not conform to the fundamental objective of the free speech or press clause of the first amendment—the unrestricted exchange of ideas which would ultimately benefit the American way of life.[8] Among these are obscene, libelous, and insulting words, which by their very utterance, inflict injury or tend to incite an immediate breach of the peace.[9] These have been adjudged to be devoid of social utility and to fall outside the contemplation of the first amendment. Consequently, courts have refused to intervene when legislative bodies have imposed restrictions on such matter.[10]

In *Roth v. United States*,[11] the Supreme Court for the first time considered the question of whether obscenity is protected by the first amendment. The case involved two appeals questioning the constitutionality of criminal obscenity statutes. In *Roth*, the defendant was convicted of mailing obscene circulars and advertising in violation of the federal obscenity statute.[12] He argued that the statute violated first amendment protections involving freedom of speech. In the companion

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5 Schenck v. United States, 249 U.S. 47 (1918), "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic." *Id.* at 52.

6 *See* Roth v. United States, 354 U.S. 476 (1957), where the Court states that the protection of free speech and press was designed to promote the interchange of ideas which would foster desired political and social changes. *Id.* at 484.

7 United States *ex rel.* Milwaukee Pub. Co. v. Burleson, 255 U.S. 407 (1921) (restriction of a publication which villified and falsely described American participation in W.W.I was held constitutional).

8 New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

9 Beauharnais v. Illinois, 343 U.S. 250 (1952); Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931).

10 *See* Ginsberg v. New York, 390 U.S. 629 (1968).

11 354 U.S. 476 (1957).

> Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate . . . that obscenity is not protected by the freedoms of speech and press.

Id. at 481.

12 18 U.S.C. § 1461 (1966) (originally enacted as Act of June 25, 1948, ch. 645, § 1461, 62 Stat. 768).

case of *Alberts v. California*,[13] the defendant, who was convicted of wilfully, unlawfully and lewdly disseminating obscene matter, argued that the obscenity provisions of the California Penal Code[14] violated the due process clause of the fourteenth amendment. The Court affirmed both convictions by holding that obscenity is not subject to first amendment protection. It also set down the test for determining whether material was obscene. The Court, by its decision, made obscenity a matter of federal constitutional law[15] and superseded all previous inconsistent decisional law on the subject.[16] The *Roth* test is whether, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interests of the average person.[17] Although it is clear that the matter must be evaluated in its entirety, using the average person as the standard,[18] two questions immediately arise: (1) what are prurient interests, and (2) what community is to be the standard?

As to the first question, the Court simply stated that material appealing to prurient interests is that which has a tendency to excite lustful thoughts.[19] A more precise definition is found in the Model Penal Code which defines prurient interest as "an exacerbated, morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and equally universal social controls of sexual activity."[20] This definition is particularly important since the Court's opinion in *Roth* stated:

> We perceive no significant difference between the meaning of ob-

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13 354 U.S. 476 (1957). This case was argued and decided at the same time as *Roth* and is reported under the same citation.

14 CAL. PEN. CODE ANN. § 311 (West 1955).

15 *See* Annot., 5 A.L.R.3d 1158 (1966).

> The significance of the Roth Case is not only that it furnishes a comprehensive definition of obscenity for modern use, but also that it makes this definition a matter of federal constitutional law.

Id. at 1163.

16 *See* Annot., 5 A.L.R.3d 1214 (1966).

> [N]o regulation of obscenity is valid unless it requires the application of the proper test of obscenity enunciated in the Roth Case.

Id. at 1216.

17 354 U.S. at 489.

18 *See* Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

> . . . [W]e can find in the *Roth-Alberts* majority opinion only two constitutional requirements. The material must be judged as a whole, not by its parts in isolation, and it must be judged by its impact upon average or normal persons, not the weak and susceptible.

Id. at 55.

19 354 U.S. at 487, n.20.

20 MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957).

> scenity developed in the case law and the definition of the A.L.I., Model Penal Code. . . .[21]

Prurient interest, therefore, is seemingly a mixed emotion of psychological and/or physiological sexual longing coupled with a socially imposed feeling of shame for desiring that which society has deemed morally wrong.

The Court in *Manual Enterprises v. Day*,[22] stated that the proper test under the federal mailing statute[23] is a national standard of decency. Generally, states have also adopted this view, at least when the subject is published material as opposed to a live performance.[24] For instance, in *State v. Hudson County News Co.*[25] the Appellate Division of the New Jersey Superior Court stated:

> It is to be presumed that the community standards of morality in Hudson County are the same as those in any other county in the State or Nation. A county is a recognized subdivision of a state. Unless it is demonstrated that the standards of morality in Hudson County are different from those in comparable political subdivisions, it cannot be said that improper standards [are] applied.[26]

On appeal,[27] the New Jersey Supreme Court rejected the above statement by holding "that the contemporary community standard to be applied . . . is not the standard of a particular individual, group of individuals, or locality, but it is the standard of the contemporary society of this country at large."[28]

There are jurisdictions that hold to the contrary.[29] The proponents for the statewide community point out that standards of decency vary from state to state. National standards make it possible to restrict publications in a state where the average person would not be offended, and allow publications where the average person would. On the other hand, those advocating the national norm insist that constitutional

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21 354 U.S. at 487 n.20.

22 370 U.S. 478 (1962).

23 18 U.S.C. § 1461 (1966) (originally enacted as Act of June 25, 1948, ch. 645, § 1461, 62 Stat. 768).

24 *See* Annot., 5 A.L.R.3d 1158, 1182-1185 (1966).

25 78 N.J. Super. 327, 188 A.2d 444 (App. Div. 1963).

26 *Id.* at 333, 188 A.2d at 447.

27 41 N.J. 247, 196 A.2d 225 (1963).

28 *Id.* at 266, 196 A.2d at 235.

29 *In re* Giannini, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1968), *cert. denied*, 395 U.S. 910 (1969) (live performance); State v. Miller, 145 W. Va. 59, 112 S.E.2d 472 (1960) (nude photographs); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963) (literary work).

rights cannot be afforded to citizens of one state while being denied to citizens of another.[30]

There is another aspect to the controversy. Political subdivisions bear a slight relationship to the degree of sophistication among the numbers of the political entity. Residents of rural upstate New York are no less likely to be offended by graphic descriptions of sexual activity than Iowa farmers; while Los Angeles citizens can mingle with the New York jet set as if the two cities were contiguous. If any relevance can be attached to the argument for a standard encompassing less than the entire nation, the local and not the state community must be the test. As of now, the law is still in a state of flux.[31] Until the United States Supreme Court makes a definitive statement regarding community standards pertaining to state anti-obscenity laws, state law would seem to be controlling.

While the national community is the standard for both state and federal anti-obscenity statutes, should the entire community or only the portion which is directly affected by the material be considered? More precisely, is something obscene per se or does it only become so under certain circumstances? *Roth* did not expressly provide the answer but implied that obscenity is constant by stating that the average person in the contemporary community would be the test.

If one purpose of anti-obscenity legislation is to protect society from being harmed by individuals who allow themselves to be exposed to obscene matter (since it is argued that degenerate activity is stimulated by exposure to obscenity), the *constant* obscenity concept may have merit despite contrary opinion.[32] If, however, it is the exposed

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30 C. REMBAR, *supra* note 2. The author recounts the oral argument for the appellant in *Memoirs v. Massachusetts*, stating:

> It is just not consonant with the realities of modern publishing to attempt a state-by-state censorship. We cannot have some states in which a book is published and others in which it is not. A publisher cannot gauge his ability to publish, which comes down to a matter of money, in that way. I say that this nation cannot exist half censored and half free.

Id. at 461.

31 *See* Jacobellis v. Ohio, 378 U.S. 184 (1964). Mr. Justice Brennan expressed the view that the national community should be controlling in all cases, while Mr. Chief Justice Warren in his dissenting opinion in the same case (at 190) stated that there are no provable national standards, and perhaps there should be none. Both opinions have been relied on by state courts.

32 *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 887 (1963).

> [T]he argument that obscene expression stimulates or induces subsequent illegal conduct, even if true, falls before the fundamental proposition that society must deal with the illegal action directly and may not use restriction of expression as a means of control.

Id. at 938.

who are to be isolated from the damaging effect of obscene matter, the *variable* obscenity standard is the proper test. The average man is not the norm of the community, but of the audience:

> Under variable obscenity the concept of the average or normal person has little place. Instead, variable obscenity requires first a determination of the audience to which the material is primarily directed, and then, as the standard for testing the material, the postulation of a hypothetical person typical of that audience.[33]

When material is directed at a particular audience, courts have accepted variable obscenity,[34] but when the distribution is to the general public, how can a court determine the primary audience? The failure to arrive at a satisfactory solution has kept the concept of variable obscenity from being completely recognized.

Manual Enterprises v. Day[35] expanded the obscenity standard and limited the scope of what could be judged to be obscene. The Court stated that proof of obscenity involves two elements: 1) patent offensiveness; and 2) prurient interest appeal. *Roth's* test was interpreted as embracing the same two elements.[36] Consequently, before matter can be adjudged obscene three elements must be present; (a) the material must have a tendency to excite lustful thoughts (prurient appeal), (b) it must be patently offensive because it affronts contemporary community standards as to the description of sexual matters, and (c) it must be devoid of redeeming social value (as is the case of all initially unprotected speech).

Although the opinion of the Court, written by Justice Harlan, was joined only by Justice Stewart, the requirement of patent offensiveness was adopted as constitutional precedent by state courts. In *State v. Hudson County News Co.*,[37] the highest court of New Jersey, discussing the importance of *Manual Enterprises,* stated:

> [W]e believe that the requirement of patent offensiveness articulated in that opinion was nevertheless inherent in the Roth opinion which approved the twofold concept expressed in the A.L.I. proposal. Indeed, it is the characteristic of indecency which is the basis of society's objection to obscene material, and if the

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33 *Supra* note 18, at 78-79.

34 *See,* e.g., Mishkin v. New York, 383 U.S. 502 (1966).

35 370 U.S. 478 (1962).

36 *Id.* at 486-87.

The Court of Appeals was mistaken in considering that *Roth* made "prurient interest" appeal the sole test of obscenity. Reading that case as dispensing with the requisite of patently offensive portrayal would be not only inconsistent with § 1461 and its common law background, but out of keeping with *Roth's* evident purpose to tighten obscenity standards.

37 41 N.J. 247, 196 A.2d 225 (1963).

> test did not include both elements, many worthwhile works in literature, science, or art would fall under the test of "prurient-interest" appeal.[38]

It must be emphasized that each of the three elements, prurient interest, patent offensiveness, and lack of redeeming social value, must be present before something can be designated as obscene. Consequently, even under constant obscenity, peripheral groups must be considered to determine whether they are devoid of social value.[39]

The necessity of ascertaining whether an allegedly obscene publication has social value resulted from the decision in *Memoirs v. Massachusetts*,[40] where the Supreme Court held that John Cleland's *Fanny Hill* was not obscene because it had literary merit. The result was that more freedom was given to writers than ever before.[41] Since obscenity must be "utterly" without redeeming social value, the question arises as to whether a bare minimum of merit would warrant constitutional protection for a publication. Though, by virtue of the Court's own definition, this should apparently be so, subsequent decisions indicate that it is not. *Fanny Hill* may arguably imply that, if one is going to be a pornographer, one had better be a talented pornographer.

Ginsberg v. New York,[42] passing on the validity of a state statute which made it a misdemeanor to sell minors harmful material, held that a different standard should apply in the case of minors.

In this case defendant, convicted of selling "girlie magazines" to a 16 year old boy, questioned the constitutionality of a New York anti-obscenity statute[43] which prohibited the sale to minors of material which would be obscene as to them, regardless of whether it would be obscene to adults. The defendant's main contention was that the denying to minors access to material which is not obscene for adults is a deprivation of protected liberty. The Court rejected the contention and held that a publication may be restricted when it (1) predominantly appeals to the prurient interest of minors, (2) is patently offensive to

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38 *Id.* at 256, 196 A.2d at 229.

39 Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964).

40 383 U.S. 413 (1966).

41 *See* C. REMBAR, *supra* note 2.

> Consider the author at his typewriter. . . . Assuming he can produce something not "utterly without" merit, which is equivalent to assuming that he is a writer at all, he and his book will be safe. . . . So far as writers are concerned, there is no longer a law of obscenity.

Id. at 490.

42 390 U.S. 629 (1968).

43 N.Y. PEN. LAW § 484-h as enacted by L. 1965, c. 327.

prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (3) is without redeeming social importance for minors.[44] Although *Ginsberg* is the law, similar statutes have been held void for vagueness.[45]

Application of the variable obscenity concept in the case of minors has naturally had an effect on booksellers and moving picture theater proprietors. The film industry has established a rating system by which minors are excluded from theatres showing certain movies, and dealers of printed matter exercise caution in the sale of sexy books and magazines. However, what effect did *Ginsberg* have on minors? Even if one accepts the proposition that youngsters can be morally harmed by exposure to lewdness, would anti-obscenity statutes effectively curb the exposure? A great deal of what children read or see is acquired secondarily, i.e. via parents or acquaintances. Thus, the only way to keep undesirable matter out of the hands of youth is to keep it out of the hands of adults. Unfortunately, this would reduce the adult population to reading only what is fit for children.[46] Furthermore, the "forbidden fruit" syndrome leads to increased interest and, perhaps, ultimately pruriency.

Freedom of speech is a personal right which is constitutionally protected from governmental invasion.[47] Consequently, the Supreme Court has jealously guarded this right against legislative restriction.[48] As a result procedures which a state adopts for regulating obscene materials are carefully scrutinized.[49]

Authorities are not in agreement as to whether the question of

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44 390 U.S. at 646.

45 *See, e.g.*, Rabesh v. New York, 391 U.S. 462 (1968), where the Court declared a New York criminal obscenity statute prohibiting the sale of any magazine to minors, which would appeal to the lust of persons under age 18, void for vagueness. Though this case is apparantly inconsistent with *Ginsberg*, two different sections of the NEW YORK PENAL LAW were involved.

46 Butler v. Michigan, 352 U.S. 380, 383 (1957).

47 Schneider v. State, 308 U.S. 147 (1939).

48 *See* Jacobellis v. Ohio, 378 U.S. 184 (1964).

> It has been suggested that this is a task in which our Court need not involve itself. We are told that the determination whether a particular motion picture, book, or other work of expression is obscene . . . can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. . . . Such an issue, we think, must ultimately be decided by this Court.

Id. at 187-88.

49 *See generally*, Annot., 5 A.L.R.3d 1215 (1966).

obscenity is one of fact, of law, or a mixed question of fact and constitutional law.[50] However, all authorities agree that, upon appeal, the appellate tribunal is to make an independent determination of whether the matter in question is obscene.[51] In view of the prevailing discrepancy (even in jurisdictions which treat obscenity as a question of fact, the appellate court judges the material *de novo* as if it were a question of law) the most logical procedure a court of first impression can adopt is to pass on the obscenity question before submitting it to a jury.[52]

Distributors of obscene material can be subject to criminal punishment[53] as long as they are assured the right to a jury trial and counsel.[54] Although the term "obscene" is generally not held to be unconstitutionally vague,[55] some jurisdictions require a more precise definition of the prohibited material.[56] Such a view is not inconsistent with *Roth* since in the construction of a statute statute, "a state may permit greater freedom of speech and press than the Fourteenth Amendment would require, although it may not permit less."[57] There are states which limit prohibited material only when it falls within the area of "hard core pornography."[58] Others adhere strictly to the *Roth* definition on the theory that "the label 'hard core' pornography is too vague to be helpful to a court or a jury in determining whether particular material is obscene."[59]

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50 *See* Annot. 5 A.L.R.3d 1158, 1190-91 (1966).

51 *Id.* at 1191-92.

52 *See* State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963).

> The trial judge must apply the constitutional standards to the specific material, in the light of any factual findings supported by the evidence, for if in his judgement the material cannot constitutionally be suppressed, then nothing remains for the jury's consideration. . . . Of course, if the trial judge determines that the material is not constitutionally protected and should be submitted to the jury, he should avoid expressing to them his opinion on the issue of obscenity.

Id. at 256-57, 196 A.2d at 230.

53 *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

54 *See* Jacobellis v. Ohio, 378 U.S. 184 (1964).

> If the proceeding involved is criminal, there must be a right to a jury trial, a right to counsel, and all the other safeguards necessary to assure due process of law.

Id. at 201 (Chief Justice Warren dissenting on other grounds).

55 Roth v. United States, 354 U.S. 476 (1957); Embassy Pictures Corp. v. Hudson, 242 F. Supp. 975 (W.D. Tenn. 1965).

56 Commonwealth v. Blumenstein, 396 Pa. 417, 153 A.2d 227 (1959).

57 McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 139, 121 N.W.2d 545, 548 (1963).

58 *See* Mishkin v. New York, 383 U.S. 502 (1966) (passing on the constitutionality of New York obscenity statutes which had been construed by state courts to apply only to hard core pornography); Attorney General v. Tropic of Cancer, 345 Mass. 11, 184 N.E.2d 328 (1962).

59 State v. Hudson County News Co., 41 N.J. 247, 254, 196 A.2d 225, 229 (1963).

A defense attorney in a criminal prosecution concerning distribution of obscene materials should scrutinize the state law to determine the extent to which the state courts have expanded on *Roth* in permitting greater freedom of speech and press. Since a criminal statute which does not require knowledge that the published matter is obscene is invalid as a matter of federal constitutional law,[60] a defense attorney "should carefully check the statute to ascertain whether, by its terms it requires scienter; if not, it should be argued not only that the statute is invalid but also that the Court should refuse to imply the element of scienter."[61] The latter argument is necessary because some state courts have construed legislation not specifically requiring scienter as impliedly doing so.[62]

Recognized constitutional safeguards unique to criminal proceedings do not come into play where the state's objective is prevention of dissemination of obscene matter by seizure,[63] restraint of publication by injunction,[64] or refusal to license the publication when such license is a prerequisite for public exhibition.[65] However, even in cases of this nature, the first amendment guarantees require strict adherence to constitutional procedures.[66] The rules governing the search and seizure of allegedly obscene matter are consequently not the same as those involving contraband.[67] A seizure of material alleged to be obscene is invalid "if it is the product of an arbitrary, unreasonable rule of thumb."[68] What is arbitrary depends on the circumstances. An arbitrary

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[60] *See* Smith v. California, 361 U.S. 147 (1959), which dealt with the constitutionality of a city ordinance that made the proprietor of a bookstore absolutely liable criminally if he had possession of a book in his store which was later judicially determined to be obscene. Mere possession was sufficient, he did not have to be aware of the contents. The Court held that the ordinance was unconstitutional in that it restricted the sale of books to those the proprietor had examined, thus placing an unlawful restriction on constitutionally protected matter.

[61] *Supra* note 16, at 1218.

[62] State v. Ramos, 260 Iowa 590, 149 N.W.2d 862 (1967); State v. Hudson County News Co., 35 N.J. 284, 173 A.2d 20 (1961); People v. Finkelstein, 9 N.Y. 2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470 (1961).

[63] A Quantity of Books v. Kansas, 378 U.S. 205 (1964).

[64] Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

[65] Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

[66] Marcus v. Search Warrant, 367 U.S. 717 (1961); Smith v. California, 361 U.S. 147 (1959).

[67] *See, e.g.*, A Quantity of Books v. Kansas, 378 U.S. 205 (1964).

> It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband.

Id. at 211-12.

[68] *In re* Louisiana News Co., 187 F. Supp. 241, 245 (E.D. La. 1960).

rule has been held to be one by which the law enforcement officers are empowered to seize publications before a judicial determination that the contents are obscene;[69] where the warrant authorizing the seizure only describes the subject matter as "obscene" or "pornographic," leaving the determination of obscenity to the police officer;[70] or where there is a wholesale suppression while the warrant only authorizes seizure of a few publications.[71] On the other hand, a seizure has been held not to be arbitrary in spite of the lack of a primary judicial determination of obscenity where there was opportunity for a judicial decision on the merits immediately after the seizure and where the restraint was not extensive.[72]

The state can also suppress the publications of obscene matter by injunction,[73] though this method of suppression has been vehemently attacked as an unconstitutional prior restraint.[74] As in the case of seizure, an immediate judicial determination of obscenity is a necessity.

The requirement that motion pictures be licensed before they can be publically exhibited is not unconstitutional per se[75] but licensing procedures must conform to constitutional standards as set down in *Freedman v. Maryland*.[76] The safeguards are that:

> First, the burden of proving that the film is unprotected expression must rest on the censor . . . Second . . . the exhibitor must be assured . . . that the censor will, within . . . a brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover . . . the procedure must also assure a prompt final judicial decision. . . .[77]

Ordinances and statutes have subsequently been held unconstitutional where they placed the burden on the exhibitor to show that the film

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69 Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968).

70 Marcus v. Search Warrant, 367 U.S. 717 (1961); People v. Rothenberg, 20 N.Y.2d 35, 281 N.Y.S.2d 316, 228 N.E.2d 379 (1967).

71 United States v. Brown, 274 F. Supp. 561 (S.D.N.Y. 1967); People v. Kimmel, 34 Ill. 2d 579, 217 N.E.2d 785 (1966).

72 Kingsley Books Inc. v. Brown, 354 U.S. 436 (1957).

73 *Id.* at 441.

> Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction . . . is a matter within the legislature's range of choice.

74 *Id.* at 446 (dissenting opinion of Justice Douglas).

75 *See* Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

76 380 U.S. 51 (1965).

77 *Id.* at 58-59.

was not obscene,[78] where they did not provide for prompt judicial review,[79] where the censor did not have to license a film or go to court to restrain such showing within a brief period,[80] or where there was no provision assuring final judicial decision.[81]

The *Roth* case has been characterized as a victory for censorship[82] and for that reason has been criticized by some legal writers[83] and judges.[84] On the other hand, those who regard obscenity as dangerous have welcomed it.[85] Both views appear to have sound reason supporting them. Although it is natural to turn to the state for protection when one is offended by a publication,[86] the basic principles underlying our

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78 State *ex rel.* Londerholm v. Columbia Pictures Corp., 197 Kan. 448, 417 P.2d 255 (1966).

79 Interstate Circuit Inc. v. Dallas, 247 F. Supp. 906 (N.D. Tex. 1965), *aff'd*, 366 F.2d 590 (5th Cir. 1966).

80 Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968).

81 Fine Arts Guild, Inc. v. Seattle, 74 Wash. 2d 503, 445 P.2d 602 (1968).

82 *See* C. REMBAR, *supra* note 2.

> The *Roth* case was hailed as a victory by those bent on suppression. . . . The favorite arguments of those who opposed censorship—that obscenity was impossible to define and that there was no demonstrable connection between exposure to it and antisocial behavior—had been explicitly rejected. . . . Obscenity was given an elaborate definition—the prurient interest formula—which the opinion said was only a summary of what most courts had already been saying. The two unpalatable elements of the *Hicklin* rule were no longer accepted. But otherwise the old law apparently remained intact. It might indeed be said that *Roth* had strengthened it. The intellectual minority was not going to have its way; the tastes of the avantgarde would not disrupt the restraints on publication that a majority morality required.

Id. at 51.

83 *See* Rogge, *The High Court of Obscenity I.*, 41 COLO. L. REV. 1 (1969).

> Despite the first amendment's unqualified prohibitions, the United States Supreme Court has recognized two exceptions—sedition and obscenity. . . . [t]here should, however, be none.

Id. at 1.

84 *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966) where Mr. Justice Douglas, while telling of the great pressures exacted by pro censorship groups states:

> Happily we do not bow to them. I mention them only to emphasize the lack of popular understanding of our constitutional system. Publications and utterances were made immune from majoritarian control by the First Amendment, applicable to the States by reason of the Fourteenth. No exceptions were made, not even for obscenity. The Court's contrary conclusion in *Roth*, where obscenity was found to be "outside" the First Amendment, is without justification.

Id. at 428 (concurring opinion).

85 *See, e.g.*, the opinion of the Court in Roth v. United States, 354 U.S. 476 (1957).

86 *See* Emerson, *supra* note 32.

> An attack upon cherished premises tends to create anxiety, especially in those who have a strong inner need for certainty. The deviant opinion is felt as a threat to personal security. And the response tends to be fear, hatred or a similar emotion, from which springs a compulsion to eliminate the source of the danger. In such circumstances it is natural to turn to the state for protection against the supposed evil.

Id. at 887.

system of government dictate that the will of the majority should not be used to silence the minority.[87] Conversely, it could be argued that exposure to obscenity is a form of brainwashing which erodes the very foundations of American morality. Corrupt moral practices become more prevalent when the public is induced to see them as acceptable modes of behaviour. Consequently, the majority should be able to protect the entire public from such inducements.

The problem with the latter argument is that it calls for a construction of the Constitution before the argument can be made legally valid. The majority in *Roth* was forced to look beyond the plain meaning of the first amendment in order to reach the conclusion that obscenity was not subject to its protection. The Court's reasons for deciding as it did, after making such a construction, have also been criticized.[88] It is interesting to note that even though the Court in *Roth* declared obscenity not to be initially protected speech, it has been very reluctant to declare that particular matter brought before it was, in fact, obscene.[89]

Although the obscenity test as set out in *Roth* is constant, matter which is obscene varies with the changing mores of society. The more tolerant a society becomes, the more difficult it is to satisfy the test of patent offensiveness. As a result, the sexually stimulated sixties swept sociological inhibitions and narrowed the scope of obscenity.

Roth has been modified[90] and expanded,[91] but continues to be the primary source of authority involving obscenity law, at least where

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87 Most men have a strong inclination to suppress opposition even where differences in viewpoint are comparatively slight. But a system of free expression must be framed to withstand far greater stress. The test of any such system is not whether it tolerates minor deviations but whether it permits criticism of the fundamental beliefs and practices of the society.

Id. at 887.

88 *See* C. REMBAR, *supra* note 2.

The reasons that the *Roth* majority stressed were not good. It was true that the Supreme Court "had always assumed that obscenity was not protected", but assumptions are not law; certain older courts had always assumed that heresy required burning. The statements on which Brennan relied came from opinions that had nothing to do with obscenity. They were offhand remarks, tossed out when obscenity was not in issue. *Dicta* so *obiter* cannot constitute precedent.

Id. at 53.

89 *See* Rogge, *supra* note 83.

However, after *Roth* and before *Ginzburg v. United States* there was at least one consolation in the existing arrangement for those who felt that there was no obscenity exception to the first amendment. . . . [T]he Court did not specifically find any material which came before it to be obscene, and, on non-obscenity or other grounds, lifted the ban on every film it viewed.

Id. at 17.

90 Manual Enterprises v. Day, 370 U.S. 478 (1962).

91 Ginsberg v. New York, 390 U.S. 629 (1968).

publication is concerned. The Court in *Stanley v. Georgia*,[92] recently held that the first and fourteenth amendments prohibit making mere private possession of obscene material a crime.[93] Perhaps the decision is the first step leading up to an eventual reversal of *Roth*.

In *Karolexis v. Byrne*,[94] a three judge court concluded that *Roth* cannot remain intact in view of the *Stanley* holding. The defendant in that case was the county district attorney who charged plaintiffs with violation of the Massachusetts anti-obscenity statute for showing the film "I Am Curious (Yellow)." Plaintiffs had warned the public of the film's possible offensiveness and barred minors. For purposes of the decision, the court assumed that the film was obscene. Plaintiffs contended that *Stanley* extended to the case where the possessors permitted paying adults to view a possibly obscene film in a public movie house and the court accepted the contention by holding:

> [W]e think it probable that Roth remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned.[95]

By declaring obscenity to be outside first amendment protection the Supreme Court seemingly collared itself with a constitutional albatross. The Court has to constantly guard against infringement of free speech by ever increasing anti-obscenity legislation.[96] This constant duty could be avoided, without sacrificing first amendment guarantees regarding freedom of expression by declaring obscenity subject to constitutional protection. This would *not* give obscenity complete immunity from restriction; it would place on the government the burden of proving clear and present danger of harm because of the publication. Perhaps a reassessment is warranted.[97]

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92 394 U.S. 557 (1969).

93 *Id.* at 568.

94 — F.Supp. —, 38 U.S.L.W. 2327 (D. Mass. Nov. 28, 1969).

95 *Id.* at —, 38 U.S.L.W. at 2328.

96 *See* Rogge, *supra* note 83.

> Not only did *Ginzburg* and *Mishkin* produce a new volume of obscenity litigation, but they also brought forth more obscenity legislation. Legislators . . . added to the mountains of useless obscenity legislation already on the books.

Id. at 41.

97 *See* Emerson, *supra* note 32.

> The only justifications for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth. But no individual or group can be infallible, particularly in a constantly changing world.

Id. at 882.