FROM ULYSSES TO PORTNOY:
A PORNOGRAPHY PRIMER

WILLIAM F. EICH

In the November, 1959, issue of Field and Stream magazine, one of America's great unsung humorists, Ed Zern, reviewed D. H. Lawrence's controversial work, Lady Chatterley's Lover, and summarized the novel with the following comment:

[This] fictional account of the day-by-day life of an English gamekeeper is still of considerable interest to outdoor minded readers, as it certainly contains many passages on pheasant raising, and apprehending of poachers, ways to control vermin and chores and duties of the professional gamekeeper. Unfortunately, one is obliged to wade through many pages of extraneous material in order to discover and savor these sidelights on the management of a midland shooting estate. In this reviewer's opinion this book cannot take the place of J. R. Miller's Practical Gamekeeper.

The problem was, of course, that any game manager or outdoor-minded reader living in the state of New York at that time who wanted to compare the pheasant-raising philosophies of Lawrence and Miller would have had great difficulty in doing so, for Lady Chatterley had been banned by the New York City Postmaster on grounds that it was pornographic. The ban was removed by a federal court decision declaring that the book was not obscene.

The varying opinions of the book reviewer, the government official and the judges set the tone for this discussion. Agreement is indeed rare in obscenity matters. What is obscene depends largely on locality and time. The first of these variables, locality, is exemplified in the readily observable fact that films and other entertainments playing to...
packed houses in New York would probably not be allowed even a single performance in Ashtabula or Des Moines. Courts, too, have reflected this variable by finding certain publications obscene in some areas and not obscene in others.³

The second factor, time, is illustrated by the dramatic change in public acceptance of sex materials in the past twenty years. During this period of time, we have moved from public outrage over Clark Gable's utterance of the word "damn" in Gone With The Wind, to apparent acceptance of total nudity in films like I Am Curious (Yellow). Our tastes for the printed word have undergone a similar change—from the secretive transfer of Forever Amber from hand to sweaty hand in the 1940's, to the mountainous drugstore paperback displays of Portnoy's Complaint in 1970.

It is not within the scope of this article to investigate the causes of these differing attitudes—or even whether general attitudes have truly changed, or truly differ, at all. The fact remains, however, that films are being freely shown, and books and magazines openly purchased and read, that would have been immediately suppressed twenty years ago. What follows is only a summary of where we are, how we got there, and one view of where we may be going in the area of obscenity regulation. It does little more than skim the surface and raise the problems; and it is primarily concerned with the development of a non-definition.

A. ROTH: THE BUILD-UP AND AFTERMATH

For all the present confusion, both in the law and in society itself, Americans have always felt a need to regulate obscenity. In simpler times, obscenity was merely an offshoot of the "crimes" of profanity and blasphemy.⁴ Indeed, the 1868 English case that influenced obscenity standards in this country for almost one hundred years involved a conviction for selling a pamphlet "showing the depravity of the Romish priesthood, and the iniquity of the Confessional, and the questions put to females in confession."⁵ The standard devised by the court to determine the obscenity of the work was stated as follows:

[Whether] the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.⁶

³ John Cleland's Memoirs of a Woman of Pleasure [Fanny Hill], for example, has been deemed obscene in Illinois, Massachusetts, New Jersey and Rhode Island, but was held not to be obscene in New York. See K. Kuh, FOOLISH FIGLEAVES: PORNOGRAPHY IN AND OUT OF COURT 138 (1967). A similar fate was to befall many books—Tropic of Cancer perhaps most of all. See note 25 infra.
⁵ Regina v. Hicklin, L.R. 3 Q.B. 360, 362 (1868).
⁶ Id. at 371. This standard permits the material to be judged by the effect of isolated passages upon the most susceptible person in society and was repudiated in Roth v. United States, 354 U.S. 476 (1957).
This rule, which came to be called the *Hicklin* test, crossed the Atlantic and was adopted by many courts in this country. As might be expected, it was rejected in as many others. The legal definition of obscenity truly varied from case to case and place to place.\(^7\)

Finally, in 1956, obscenity became a question of federal constitutional law. In *Butler v. Michigan*,\(^8\) the United States Supreme Court declared that a Michigan statute which prohibited the sale—even to an adult—of any publication containing items which might tend to corrupt the morals of minors, was unconstitutional under the First and Fourteenth Amendment, with Justice Frankfurter noting that the net effect of such a law is to "burn the house to roast the pig."\(^9\) Although the appellants' argument was characterized by the court as taking "a wide sweep," the conviction was reversed solely on grounds that the legislation was not reasonably restricted to the evil with which it was said to deal, for the reason that it reduced the adult population of Michigan to "reading only what is fit for children."\(^10\)

*Butler v. Michigan* was followed, four months later, by the landmark decision of the United States Supreme Court in *Roth v. United States*.\(^11\) No question was raised in *Roth* as to the obscenity of the materials involved, and the court stated the "dispositive question" presented as, simply, "whether obscenity is utterance within the area of protected speech and press."\(^12\) After holding quite specifically that "obscenity is not within the area of constitutionally protected speech or press,"\(^13\) Justice Brennan, speaking for the majority, proceeded to consider whether the statutes involved—a federal postal law and a California penal statute—violated First Amendment guarantees.\(^14\) Both laws were upheld on the basis of a test formulated in the opinion which has been stated and restated as follows in hundreds of subsequent cases:

\(^7\) See Annot., 5 A.L.R.3d 1158 (1966).
\(^8\) 352 U.S. 380 (1957).
\(^9\) Id. at 383. The statute prohibited the dissemination of material

[Containing] obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.

The conceptual similarity between the language of the Michigan statute and the *Hicklin* test is obvious—both are directed toward materials which "tend to corrupt" society's most susceptible members.

\(^10\) Id. at 382-84.
\(^12\) Id. at 382. The fundamental constitutional question actually had been raised several years before in a case involving Edmund Wilson's *Memoirs of Hecate County*, but the Court (in the absence of Justice Frankfurter) was evenly divided and the publisher's conviction was affirmed without opinion. Double-day & Co. v. New York, 335 U.S. 848 (1948), aff'd 297 N.Y. 687, 77 N.E.2d 6 (1947).
\(^13\) 354 U.S. at 485.
\(^14\) The federal law (18 U.S.C. 1461 (1964) ) declared "obscene, lewd, lascivious or filthy" materials to be non-mailable; the California statute (CAL. PENAL CODE § 311 ( ) ) made it a misdemeanor to disseminate "obscene or indecent" material.
[Whether] to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.\(^{15}\)

This was a direct and very specific negation of the *Hicklin* rule. No longer was that standard that of the most "susceptible person," but that of the average person in the community; and no longer could isolated passages, taken out of context, be judged.

The Court was far from unanimous, however. Chief Justice Warren concurred, expressing his concern that the decision was overbroad, and pointing to the conduct of the defendant, rather than the nature of the materials, as the central issue in such cases.\(^{16}\) Justice Harlan concurred in the affirmance of the state case and dissented in the federal case, expressing in great detail his view that the states have primary responsibility in the area of obscenity regulation—a responsibility with which federal courts "should be slow to interfere."\(^{17}\) Justices Black and Douglas, in a joint dissent, paved the road they would travel (with only slight deviation) through all of the obscenity cases:

The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.\(^{18}\)

The next major case to reach the Court was *Manual Enterprises, Inc. v. Day,*\(^{19}\) which involved a challenge to an administrative finding of the Post Office Department that certain magazines were obscene and thus non-mailable. Although the decision (reversing the administrative findings) is generally regarded as amplifying the *Roth* test, the Court was hopelessly divided. Justices Harlan and Stewart felt that the magazines were not obscene; Justices Brennan, Warren and Douglas concurred in the reversal on other grounds; Justice Black concurred

\(^{15}\) 354 U.S. at 489. The various elements of the test—community standards, the material-as-a-whole concept, etc.—had been separately enunciated in a wide variety of prior cases, some going back to the early days of the century. *Id.* at 489 n.26. The term "prurient" has never been defined in terms other than the dictionary definition which relates it to "itching," or "longing."

\(^{16}\) *Id.* at 495. In giving greater weight to the disseminator's conduct than to the type of materials being disseminated, the Chief Justice laid the groundwork for the later, and highly controversial, "pandering" rule of *Ginsburg v. United States,* 383 U.S. 463 (1966).

\(^{17}\) 354 U.S. at 502. Justice Harlan also questioned the propriety of deciding the constitutional questions without making a determination on the obscenity of the materials themselves. To Justice Harlan, the question of whether a particular work is obscene is not an issue of fact, but rather one of "constitutional judgment of the most sensitive and delicate kind." *Id.* at 498.

\(^{18}\) *Id.* at 514.

\(^{19}\) 370 U.S. 478 (1962).
in the result without opinion; Justice Clark dissented, and Justices White and Frankfurter did not participate.

The Harlan-Stewart opinion, which appears first in the reports, states that a determination that the materials are "so offensive on their face as to affront current community standards of decency" is essential to the determination of obscenity. Thus, "patent offensiveness" came to be regarded as a separate element of the Roth test.

The Roth test came before the Court again in 1964. Here, too, the members of the Court were unable to agree on an opinion, although six justices did vote to reverse the conviction of a Cleveland Heights, Ohio, motion picture exhibitor for violation of an Ohio statute prohibiting (among other things) the showing of "obscene, lewd or lascivious" films. Justice Brennan, joined by Justice Goldberg, restated the Roth test, and emphasized that the constitutional status of the questioned material cannot be made to turn on a "weighing" of its social importance against its prurient appeal, "for a work cannot be proscribed unless it is 'utterly' without social importance." The opinion found no such "utter void" in the film in question, noting that it had been favorably reviewed in a number of national publications (although disparaged in others), and was "rated by at least two critics of national stature among the best films of the year in which it was produced."

B. THE 1966 TRIO: MISHKIN, GINZBURG AND FANNY HILL

1966 was a banner year for obscenity cases. Roth and the melange of opinions that followed had, quite predictably, led to more and more

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20 Id. at 482. Even though it appeared in a "minority" opinion, later decisions have adopted "patent offensiveness" as part of the Roth formula. See Annot., 5 A.L.R.3d 1158, 1171 (1966, Supp. 1969).


23 378 U.S. at 191.

24 Id. at 196. Justices Black and Douglas concurred in the reversal on the basis of their now-familiar views: (1) the Supreme Court is "the most inappropriate . . . Board of Censors that could be found"; and (2) the First Amendment safeguards all citizens against conviction for exhibiting a motion picture. Id. Justice Stewart also concurred, expressing his view that, under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to "hard-core pornography." Id. at 197. Justice Stewart's own definition of hard-core pornography was, quite simply, "I know it when I see it." This is no mere tongue-in-cheek statement and may, in fact, be one of the more workable definitions of obscenity if people are to continue to legislate in this area. It is highly probable, for example, that most trial judges and juries use this very approach (albeit unconsciously), for the Roth test is sufficiently malleable to be easily adapted to any result in virtually any case. Justice Stewart amplified his definition of hard-core pornography in Ginzburg v. United States, 383 U.S. 463, 499 n.3 (1966).

Justice Harlan dissented on the basis that the state courts should have a greater say in the matter, and Justices Warren and Clark agreed in a separate opinion that expressed the view that a state court's application of Roth should carry great weight and that review should be limited to the consideration of whether there is sufficient supporting evidence in the record. 378 U.S. at 202. These nine men, whether they planned it or not, had become a national board of censors.
confusion, and the Court, on March 21, 1966, issued three opinions that had the effect of deepening the uncertainty and sending publisher Ralph Ginzburg to prison for a crime apparently created on the spot. The Court’s continuing failure to reach some common ground on the subject of obscenity is silently (but eloquently) reflected in the fact that, in these three cases, no less than fourteen separate opinions were filed.

One of the two cases in this trio containing an “opinion of the court” is Mishkin v. New York which held that the “average person” described in the Roth test really does not have to be “average” at all. Some of the books involved in the Mishkin prosecution depicted “various deviant sexual practices, such as flagellation, fetishism and lesbianism.” The argument was made that such materials did not satisfy the “prurient appeal” portion of the Roth test because they would only disgust or sicken the average person, and would neither stimulate him nor appeal to his prurient interests. The Court, noting that the materials were conceived and marketed for sexually deviant groups (for whom they apparently had some prurient appeal), rejected this argument and held that:

When the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to prurient interest of that group.

The second case, Ginzburg v. United States, is probably the best-known of the three, and certainly has caused the most comment. Ginzburg was convicted for using the mail to distribute obscene literature in connection with the publication and sale of the magazine “Eros” and a book entitled “The Housewives’ Handbook on Selective Promiscuity.” Justice Brennan’s opinion, representing the majority view (five justices) upheld the conviction on the basis that, even assuming the materials to be not obscene, where they are created or exploited on the basis of their prurient appeal, they are not constitutionally protected.

The Wisconsin Supreme Court noted in 1963, for example, that courts in California, Connecticut, Maryland and Pennsylvania had declared Henry Miller’s Tropic of Cancer obscene, while courts in Massachusetts and Illinois had taken an opposite position—all while using the Roth test. The Wisconsin court adopted the former view. See McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963).

27 Id. at 474-75. If not entitled to constitutional protection, it follows (under the Roth rationale) that they are obscene. While perhaps logically unsound, it
Whatever validity the criticisms of Ginzburg may possess, one thing is clear: "pandering" is now an element to be considered in determining obscenity. Pandering is defined in Ginzburg as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of . . . customers." The last of the 1966 cases, A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General (Fanny Hill), is probably the most significant of the three, even though the court, in reversing a Massachusetts decision adjudging the book obscene, could not agree on a single opinion. The opinion of Justice Brennan (joined by Justices Warren and Fortas), refines the Roth definition of obscenity into a three-pronged test:

Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description of sexual matters; and (c) the material is utterly without redeeming social value.

As if to amplify the confusion over "pandering," the opinion re-emphasizes the fact that material cannot be proscribed—even though it is patently offensive and possesses the requisite prurient appeal—unless seems that this conclusion must follow from (1) the Court's assumption that the materials are not obscene per se, and (2) the Court's resultant decision that they are nonetheless not constitutionally protected and that the publisher may be convicted for sending obscene matter through the mails. Thus, although not expressly so stating, Ginzburg must mean that non-obscene matter may be made obscene by the manner in which it is distributed.

Two of the dissenting justices leveled what is probably the most cogent criticism of the decision. Justice Black observed that:

Only one stark fact emerges with clarity out of the confusing welter of opinions and thousands of words written in this and two other cases today. That fact is that Ginzburg, petitioner here, is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal. 383 U.S. at 476.

Justice Stewart, in a separate opinion, echoed Justice Black's due process objections and went on to state:

For me, however, there is another aspect of the Court's opinion in this case that is even more regrettable. Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his "sordid business." That is a power the Court does not possess. For the First Amendment protects us all with an even hand. It applies to Ralph Ginzburg with no less completeness and force than to G. P. Putnam's Sons. In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way. For then we forsake a government of law and are left with government by Big Brother. Id. at 501.

This definition is taken, interestingly enough, from Chief Justice Warren's concurring opinion in Roth v. United States, 354 U.S. 476, 495 (1957).

383 U.S. 413 (1966) [hereinafter cited as Fanny Hill—the popular name of the book involved].

Id. at 418.
it is **utterly** without redeeming social value. Each of these three criteria must be applied independently: a book's social value cannot be balanced against (or cancelled by) its prurient appeal or patent offensiveness.  

But the opinion mentions the *Ginzburg* "pandering" test and states that, assuming "a minimum of social value,"

Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance.

Recalling the fact that, of the decisions in *Mishkin*, *Ginzburg* and *Fanny Hill*, only the first two involved clear majority opinions, one is rather limited in drawing legal conclusions.  

It is safe to say, however:

1. that the manner in which material is distributed or disseminated may bear heavily on the question of obscenity (*Ginzburg*) and,
2. that the obscenity or non-obscenity of a particular item depends not really on its effect on the "average person," but rather upon its effect on the "intended recipient group" (*Mishkin*).

The separate opinions filed in the three cases repeat and refine views expressed earlier by the individual members of the court. Justice Douglas remained firm in his view that the First Amendment does not permit censorship of expression without accompanying illegal action and that "Whatever may be the reach of the power to regulate conduct . . . the First Amendment leaves no power in government over expression of ideas."

Justice Clark voted with the majority in *Mishkin* and *Ginzburg*, and, in his separate dissent in *Fanny Hill*, disagreed with the notion that material must be **utterly** without redeeming social value in order to be proscribed, stating instead his adherence to the "original" *Roth* test.

Justice Harlan, true to the views expressed in his separate opinion in *Roth*, would give the states much wider latitude in the area of obscenity regulation than that allowed to the federal government (whose regulatory powers would be limited to "hard-core pornography"). Justice White would rule out the notion that social value is an independent

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35 Id. at 419.
36 Id. at 420.
37 Subsequent cases have, however, adopted the principles of the Brennan opinion without mentioning that he was not speaking for a majority. *See Annot.*, 5 A.L.R.3d 1158, 1169-72 (1966, Supp. 1969).
38 383 U.S. at 433 (concurring opinion; *see also* Ginzburg v. United States, 383 U.S. 463, 492-93 (1966) (dissenting opinion)).
39 383 U.S. at 441-43 (dissenting opinion). Justice Clark has, of course, been replaced on the Court by Justice Marshall, who wrote the opinion in the most recent and perhaps far-reaching of the post-*Roth* cases, *Stanley v. Georgia*, 394 U.S. 557 (1969), which held that private possession of obscene material cannot be made a crime.
criteria in the Roth test and feels instead that materials are to be judged by their predominant themes.\footnote{383 U.S. at 461-62 (dissenting opinion). Justice White voted with the majority in Mishkin and Ginzburg.} Justice Stewart filed separate opinions in Fanny Hill and Mishkin on the basis of his view that only "hard core" pornography may be suppressed\footnote{Id. at 421 (concurring opinion); Mishkin v. New York, 383 U.S. 502, 518 (1966) (dissenting opinion). See the discussion of Justice Stewart's views, supra note 24. Justice Stewart's Ginzburg opinion does, however, amplify his definition of "hard-core pornography" by quoting as follows from the brief of the Solicitor General in that case:

"... Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to affford portrayals of character or situation and with no pretense to literary value. All of this material ... cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. ..." 383 U.S. at 499 n.3.} and dissented in Ginzburg on due process and other grounds.\footnote{383 U.S. at 497-501 (dissenting opinion).} Justice Black held to his well-known absolutist view of the First Amendment and wrote that the federal government is without authority to censor speech, regardless of the subject matter.\footnote{Fanny Hill, 383 U.S. 413, 421 (1966) (concurring opinion); Ginzburg v. United States, 383 U.S. 463, 476-82 (1966) (dissenting opinion); Mishkin v. New York, 383 U.S. 502, 515-18 (1966) (dissenting opinion).}

Justice Brennan, of course, wrote the "lead" opinion in Fanny Hill, and the majority opinions in Ginzburg and Mishkin. He was joined in each by Justices Warren and Fortas—neither of whom is now on the Court.

C. STANLEY AND GINSBERG—A NEW DIRECTION

There have been two important obscenity cases since 1966. The first, Ginsberg v. New York,\footnote{390 U.S. 629 (1968).} has primary significance for legislators, for it upheld the validity of a New York statute setting separate obscenity standards for persons under 17 which are far more restrictive than those applicable to adults.\footnote{N.Y. PENAL LAW § 484-h (McKinney 1967) uses the term "harmful to minors," together with a lengthy and involved series of definitions which are graphic enough to have caused at least one wag to classify the law itself as obscene.} The language of the opinion, with its references to the parents' right to rear their own children and the state's power to regulate the well-being of children, makes it clear that the decision is not grounded solely on traditional First Amendment considerations.\footnote{See also the dissents of Justices Douglas and Fortas, 390 U.S. at 650 and 671.}

The second case, Stanley v. Georgia,\footnote{394 U.S. 557 (1969).} held that the First and Four-
teenth Amendments prohibit making the mere private possession of obscene material a crime. Like Ginsberg, this case did not turn solely on "freedom of speech" questions, but seems to be grounded largely on a person's right to privacy.49

D. The Sum Total—Confusion

As of this writing, then, we can assume the following: (1) Obscenity (other than that in private possession) is not within the protections afforded by the First Amendment;50 (2) The test for determining what is obscene is whether to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to the prurient interest;51 (3) The "community" against whose standards the material is judged may be a national community, a local community, or something in between;52 (4) There probably must be, in addition, a determination that the material is so patently offensive as to affront current community standards of decency;53 (5) There probably also must be a determination that the material

49 For example, "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library." 394 U.S. at 565.

Stanley leads to a rather strange result. Under it I am permitted to acquire, keep, and otherwise use as much pornography as I please; but even so, no one can legally sell me any.

50 As might be expected, at least one case has held to the contrary. A three-judge United States District Court in Massachusetts has held that Stanley protects a public showing of a concededly obscene film in a commercial theater—thus overruling Roth, despite Stanley's statement that Roth remains alive. Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969).


52 The opinion of Justices Harlan and Stewart in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962), states that the obscenity standard under the federal postal laws should be a national standard. In Jacobellis v. Ohio, 378 U.S. 184 (1964), which was, like Manual Enterprises, a "no-opinion" decision, the opinion of Justices Brennan and Goldberg discusses the problems of local versus national standards and states that the determinant must be a national standard, for "It is, after all, a national Constitution we are expounding." 378 U.S. at 195.

The problem is, of course, that state courts must also follow the same "national" document and they do not all agree on the geographical limits of the "community." Some feel that only a national standard is applicable. See State v. Locks, 97 Ariz. 148, 397 P.2d 949 (1964); State v. Vollmar, 389 S.W.2d 20 (Mo. 1965); State v. Childs, 447 P.2d 304 (Ore. 1968). Some say that the standard is statewide. See McAuley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963); In re Gianninni, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968). At least one state has held that a nationwide standard is applicable to printed and published material, while local standards govern local "events," like a burlesque show. See City of Newark v. Humphres, 94 N.J. Super. 384, 228 A.2d 550 (1967).

53 This entry is purposely ambivalent, for the element of "patent offensiveness" is found in the opinion of Justices Harlan and Stewart in Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), one of the cases in which the Court could not agree on an opinion. It has been stated, however, that this element is implicit in the Roth test. See State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963).
is utterly without social importance; 54 (6) Assuming that the elements described in (4) and (5) really do join prurient appeal to make up the three-point test mentioned earlier, 55 it may also be true that all three are cumulative, and must be applied independently of each other; 56 (7) The "average person" mentioned in (2), above, need not be very average after all, for, if material is designed for and primarily disseminated to a clearly-defined deviant group, its prurient appeal may be judged in terms of that group, rather than the general public; 57 and, (8) If the material is "openly advertised to appeal to the erotic interest," disregard all of the above—your search may be over. This type of "pandering" may make the material obscene even if it does not fail all of the other tests. 58

Finally, the most recent cases have established that: (1) the concept of obscenity is variable, and states may impose stricter standards upon children than they may upon the adult population; 59 and (2) mere private possession of obscene materials may not be made a crime. 60

So, we come full circle. Determining what is obscene today is virtually as uncertain a task as it was prior to Roth. In addition, a growing group of recent federal cases hints that the entire concept as we have known it may be on the wane.

E. THE NEW WAVE

The most intense activity in the area of obscenity law is taking place in federal district courts throughout the country, and the questions raised primarily procedural.

The Federal Civil Rights Act 61 provides (among other things) a civil action to restrain interference with activities protected by the First Amendment. Under it, a civil action will lie to enjoin prosecution under a state obscenity statute where the law operates—or state officials act—so as to impair the First Amendment right of the complainant. 62 The first challenge—to the constitutionality of the applicable state law—raises the "traditional" First Amendment and due process questions under Roth and similar cases, together with questions of scienter, 63 and, in

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54 The "social importance" element comes from the opinion of Justices Brennan and Goldberg in Jacobellis v. Ohio, 378 U.S. 184 (1964), another "no-opinion" case.
55 See note 34, supra.
56 See the opinion of Justices Brennan, Warren and Fortas in Fanny Hill, supra note 35.
63 This refers, in simplest terms, to the rule that, to be convicted, a disseminator must have some knowledge (or be held to some reasonable standard of knowledge) of the obscene nature of the material he is circulating. See Smith v. California, 361 U.S. 147 (1959). Courts will usually require proof of
some cases, prior restraint\textsuperscript{64} (both of which are beyond the scope of this article).

The second challenge—going to the manner in which the law is administered by state and local officials—has been making interesting inroads into traditional methods of obscenity law enforcement. Generally, the cases indicate that no one is immune from good-faith prosecution under a valid state law, and that such action does not amount to the type of impairment of constitutional rights necessary to justify enjoining the prosecution.\textsuperscript{65} The federal courts will, however, enjoin any “harrassment or intimidation” that goes beyond good faith prosecution.

The prime example of the type of conduct which federal courts have enjoined is mass or overboard seizure of films, books or other material—with or without a warrant—without a prior adversary determination that they are obscene.\textsuperscript{66}

Courts have also recognized that practices short of seizure may operate to impair protected rights—conduct such as public “blacklisting” of material by officers or prosecutors.\textsuperscript{67} A New York district court has similarly enjoined state officials where police officers were constantly present in a bookstore in full view of actual and potential customers.\textsuperscript{68} Other courts have held that mere threats to prosecute can amount to sufficient harassment to support an injunction.\textsuperscript{69}

In all of these cases, however, only the “extracurricular” conduct

\textsuperscript{64} The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon forms of expression \textit{in advance} of actual publication or exhibition. Prior restraint is thus distinguished from subsequent punishment (a penalty imposed after the communication has been made). Generally, a system of prior restraints prevents the communication or exhibition from being made at all, whereas a system of subsequent punishment permits the communication, but imposes a penalty after the fact. For a variety of reasons, the impact on freedom of expression may be quite different, depending on whether the control is designed to block exhibition in advance or to deter further exhibition by a later punishment.

In constitutional terms, the First Amendment forbids government to impose any restraint or pre-censorship in advance of communication (with certain limited exceptions) in any area of expression within the purview of that amendment. By incorporating the First Amendment in the Fourteenth, the same limitations are applicable to the states.


PORNOGRAPHY PRIMER

has been enjoined, and “good-faith” prosecutions have been permitted to continue.70

Some recent federal cases have gone further and have either enjoined prosecutions, or, by the sheer weight of the decisions, have made prosecutions impossible without a prior adversary determination that the materials are obscene. A district court in Louisiana, for example, held that a person may not be arrested for violation of a state obscenity law prior to a judicial determination that the materials involved are obscene.71 A district court in Florida has apparently enjoined a state prosecution on this basis alone.72 Other courts presented with similar questions, however, have gone the other way and have not required a prior determination of obscenity before a good-faith prosecution may be commenced.73 One case has held that there is no constitutional defect in the lack of a prior adversary hearing where the state seizes only a single copy of a film for use as evidence in an obscenity prosecution.74

The Federal District Court for the Western District of Wisconsin declined to follow those cases requiring an adversary hearing on the obscenity question in advance of arrest.75 The court relied instead on a seventh circuit case, Metzger v. Pearcy,76 in which the prosecution was permitted to continue using one copy of the subject film which was supplied by the exhibitor.77 The same question is pending in Wisconsin's Eastern District at the time of this writing.78

Similarly, in Pinkus v. Arnebaugh,79 the court found that a judicial determination of obscenity prior to “the institution in good faith of a complaint and/or arrest for violation of the state obscenity laws”, was not required by the First Amendment. In Milky Way Productions, Inc. v. Leary,80 the court, after a lengthy discussion, held that no adversary
hearing was required prior to initiation of a state obscenity prosecution. The United States Supreme Court affirmed, \textit{per curiam}, and without opinion.\footnote{New York Feed Co. v. Leary, 397 U.S. 98 (1970).

82 396 U.S. 767 (1967).

83 The cases—two criminal convictions from New York and Kentucky and an Arkansas civil obscenity judgment—involves questions of scienter, vagueness and prior restraint. When certiorari was granted, it was assumed that the materials involved were obscene. \textit{See} Redrup v. New York, Austin v. Kentucky, and Gent v. Arkansas, all at 384 U.S. 767 (1967).

84 386 U.S. at 518. The opinion drew a sharp rebuke from Justices Harlan and Clark, who dissented on the basis that the Court should have either decided the constitutional issues so clearly presented to it (and the sole issues on which certiorari was granted) or dismissed the writs. \textit{Id.} at 772.

Since its issuance, \textit{Redrup} has been the major tool used by the court for \textit{per curiam} reversals of obscenity convictions. \textit{See}, e.g., \textit{Henry v. Louisiana}, 392 U.S. 655 (1968). In its use of simple citations to \textit{Redrup} as authority for reversal in \textit{Henry} and several other state cases, the Court reaches the apex of its role as the nation's supreme board of censors—and thus realizes the very fear expressed by some of its members several years earlier. \textit{See} the discussion of \textit{Jacobellis v. Ohio} in note 24, \textit{supra}.

85 386 U.S. at 769.


87 Roth v. United States, 354 U.S. 476, 485 (1957).}
of that interest cannot, in every context, be insulated from all constitutional protections. Neither Roth nor any other decision of this Court reaches that far. As the Court said in Roth itself, 'caseless vigilance is the watchword to prevent... erosion [of First Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.'

These statements, taken in conjunction with the "protection-of-children" and "pandering" decisions in the Ginsberg and Ginzburg cases, give rise to the somewhat plausible theory that the Roth notion that obscenity is not a protected form of speech has gone by the boards. In its place is the proposition that obscenity, as that term is generally understood, is within the protections of the First Amendment except insofar as it: (1) amounts to an unsolicited intrusion into individual privacy by publication or distribution in a manner so obtrusive as would render it difficult for an unwilling individual to avoid exposure; or, (2) furthers a specific (and limited) state concern for juveniles.

It should not be long before this theory is fully tested. A three-judge federal court in Massachusetts recently held that, under Stanley, the First Amendment forbids prosecution for showing an obscene film in a public theater (where the adult viewers paid for admission and were forewarned of the nature of the film). The court's theory appears to be that the conviction in Stanley could never have been overturned if Roth were still intact. The decision has been appealed. A three-judge court in California has met the same argument and apparently adopted it, while another district court in Massachusetts has upheld a state obscenity law, declaring its belief that Stanley in no way impairs Roth.

Perhaps the forthcoming decision in Karalexis v. Byrne, supra, will settle these and the many other uncertainties; and again, perhaps not. This is, after all, what everyone expected from Roth; and we certainly expected a thorough clarification of the law from Mishkin, Ginzburg and Fanny Hill in 1966.

The "obtrusiveness/child-protection" theory advanced above does not seem at all unreasonable in the light of unmistakable social trends. Such a theory would, for the present at least, have its basis in two or

88 394 U.S. at 563.
90 Appeal docketed, Feb. 4, 1970, Docket No. 1149. The case was argued before the United States Supreme Court on April 30, 1970, but has since been restored to the Court's calendar for reargument. See 38 U.S.L.W. 3521 (June 30, 1970).
three of the clearest expressions to issue from the Supreme Court in many years—Ginsberg v. New York and Stanley v. Georgia. In Ginsberg, the court specifically declined to question the propriety of a legislative assumption that exposure to certain obscene materials is harmful to children, and it also provided clear constitutional guidelines for such regulation.93 As for adult population, the opposite appears to be true. By upholding the right to possess privately (and to use) obscene materials, the Court in Stanley seems to rule out any possible justification for “adult” laws regulating obscenity which are based upon its actual or potential harm—either to the individual himself or to society in general. Had the Court considered obscenity to be harmful as such, and that this factor justified its regulation, how could it, at the same time, sanction unlimited private possession (which, of course, implies the same sanction for acquisition) and use?

If we must, as we have always done, impose restrictions on morally offensive materials, and, further, if we do not wish to accomplish this end through a haphazard system which relegates the impossible task of rendering universal moral judgments to a small group of judges, perhaps we should turn to a system based solely on obtrusiveness and the protection of children. Such a system assumes, of course, that adults can handle exposure to obscene materials; and this is a question that has evoked the widest possible range or response.

Anti-smut groups have apparently taken the position that even the mini-skirt is a dangerous and proven cause of criminal behavior.94 At the other end of the spectrum is the view that exposure to obscenity can be beneficial in many instances—by providing an outlet for repressed, and potentially dangerous, sexual urges.95 Probably the clearest conclusion is that there is little empirical basis for any conclusion that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence.96

93 In the wake of Ginsberg, many states adopted legislation closely following the “approved” language of the New York statute. For the Wisconsin example, see Ch. 405, Laws of 1969.
94 See “Mini-Skirts and the Rise in Crime,” in The National Decency Reporter [published by Citizens for Decent Literature, Inc.] 13 (November-December 1969). The article concluded that “[The] mini-skirt is a serious cause of sex crimes, . . .” and is based upon a survey (apparently CDL’s own) of “the nation’s top law enforcement officials in 62 cities.”
96 See Stanley v. Georgia, 394 U.S. 557, 566 n.9 (1969). Presumably, this could be phrased in the opposite: that there is no evidence that it does not lead to such behavior. It is, however, usually phrased as above.

The thesis appears to be borne out in extremis on Madison Avenue. What could be more obscene than a huge, iron-encased fist bursting through the hole in the top of a washing machine; or a white-clothed knight bearing a long lance advancing on your dirty clothes; or a luscious blonde writhing on the hood of an automobile? The aim here must be to appeal to my prurient
In the end, we do have freedom of expression; we do have a right of privacy; and we do have an interest in the protection of our children. To date, Roth and subsequent tests have not been able to fully adjust these often conflicting rights—particularly the right of free expression—in the light of existing social attitudes and aims.

Perhaps it is time to shift our emphasis in obscenity regulation from moral considerations to considerations of privacy and child-protection. Perhaps not. In any event these questions have been raised, and the courts have the opportunity to either further refine—or further confuse—the traditional obscenity standards, or to develop an entirely new basis for regulation. In short, the future should be as interesting as the past.

There is a famous remark (frequently attributed to Bertrand Russell, but apparently made by Aldous Huxley) which should be repeated at the close of any discussion of obscenity. As the story goes, a top-level International Congress on the Suppression of Traffic in Obscene Publications was once held in Geneva, where, according to Mr. Huxley:

[It] was unanimously decided that no definition of the word 'obscene' 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.97

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97 Huxley is quoted in K. Kuh, Foolish Figleaves: Pornography In and Out of Court 249 (1967).