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The Supreme Court and Obscenity

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NOTE

THE SUPREME COURT AND OBSCENITY

The Supreme Court of the United States has now made binding law of its oft-repeated dictum that obscenity is beyond the pale of constitutionally protected free expression. After being spared—or avoiding—the necessity of ruling squarely on the constitutional status of obscene matter for 169 years, the Court addressed itself to virtually every aspect of the whole slippery problem in a single year. The Court disposed of seven obscene publication cases[1] in the twelve months through January, 1958. These included three reversals this term in memorandum decisions[2] merely citing the major opinion of the series, which was handed down in the combined cases of *Roth v. United States* and *Alberts v. California*.[3] The net result appears to be that the controlling constitutional issue in obscenity cases hereafter will be the proper application of the definition of obscenity laid down by the five-man majority in *Roth:*

> Obscene material is material which deals with sex in a manner appealing to prurient interest.[4]

The proper application will be difficult, as two appellate courts discovered after they endeavored to follow the *Roth* precedent to uphold findings of obscenity and were reversed in memorandum decisions by the Supreme Court.[5]

BACKGROUND

The Common Law of Obscenity

The publication of obscene prints and books was a misdemeanor indictable at common law in England before and at the time of the American Revolution.[6] The indication is strong that this was accepted

1. Sunshine Book Co. v. Summerfield, 78 Sup. Ct. 365 (1958); One, Inc. v. Oleson, 78 Sup. Ct. 364 (1958); Mounce v. United States, 78 Sup. Ct. 267 (1957); Roth v. United States, 354 U.S. 476 (1957) (two cases); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Butler v. Michigan, 352 U.S. 380 (1957).
2. Sunshine Book Co. v. Summerfield, *supra* note 1; One, Inc. v. Oleson, *supra* note 1; Mounce v. United States, *supra* note 1. See 26 U.S.L. WEEK 1107 (1958).
3. 354 U.S. 476 (1957).
4. *Id.* at 487.
5. Sunshine Book Co. v. Summerfield, 249 F.2d 114 (D.C. Cir. 1957), *rev'd per curiam*, 78 Sup. Ct. 365 (1958); Mounce v. United States, 247 F.2d 148 (9th Cir. 1957), *rev'd per curiam*, 78 Sup. Ct. 267 (1957). For a history of obscenity law from earliest times, see ST. JOHN-STEVAS, OBSCENITY AND THE LAW (1956).
6. Rex v. Wilkes, 4 Burr. 2527, 98 Eng. Rep. 327 (K.B. 1770) (*Essay on*

as the law in America at the time of the adoption of the first amendment,[7] but it presented few problems for the courts so far as the early reported cases show.[8] The scattered reports available were concerned with common-law questions, and no issues appear to have been raised either on the definition or the constitutional status of obscenity. This remained true until after the Civil War, although obscenity cases began to appear with increasing frequency after the beginning of the Victorian era.[9]

Federal Statutes

Obscenity cases seem to have made their first appearance in the federal courts after Congress inserted a ban on importation of indecent matter in the Customs Act of 1842.[10] The federal judges seemed to be as unaware as the state courts of any difficulty about the definition or the constitutional status of obscenity,[11] and these issues remained dormant for another thirty years.

The landmark case upholding the power of the federal government to censor the mail under the postal clause[12] of the Constitution arose more than ten years after the Civil War under an 1872 statute.[13] This case, *Ex Parte Jackson*,[14] concerned censorship of lottery advertising, but it included the first in a long line of dicta tending to establish that obscenity enjoyed none of the constitutional protection accorded to free expression.[15] The theory of the case was that Congress was not required to provide mail service, and therefore no deprivation of constitutional rights could result if the privilege of using the service

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Woman); Rex. v. Curl, 2 Str. 788, 93 Eng. Rep. 849 (K.B. 1727) (*Venus in the Cloister*, or *The Nun in Her Smock*); 29 CYC. 1318 (1908).

7. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

8. Commonwealth v. Holmes, 17 Mass. 336 (1821) (*Memoirs of a Woman of Pleasure*); Commonwealth v. Sharpless, 2 S.&R. 91 (Pa. 1815) ("a lewd and obscene painting representing a man in an obscene, impudent and indecent posture with a woman.")

9. Commonwealth v. Tarbox, 55 Mass. (1 Cush.) 66 (1848); People v. Girardin, 1 Mich. 90 (1848); State v. Appling, 25 Mo. 315 (1857); Bell v. State, 31 Tenn. 42 (1851); State v. Hanson, 23 Tex. 233 (1859); State v. Brown, 27 Vt. 619 (1855). An argument that the Constitution invalidated the common law on blasphemy was rejected in People v. Ruggles, 8 Johns. 290 (N.Y. Sup. Ct. 1811).

10. 5 STAT. 1848, c. 270 § 28 (1842), 19 U.S.C. § 1305 (1952). The federal courts had not been concerned with state cases on obscenity under the view that the first amendment inhibited only Congress. Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833).

11. Anonymous, 1 Fed. Cas. 1024, No. 470 (D.N.Y. 1865); United States v. One Case Stereoscopic Slides, 27 Fed. Cas. 255, No. 15,927 (D. Mass. 1859); United States v. Three Cases of Toys, 28 Fed. Cas. 112, No. 16,499 (S.D.N.Y. 1843).

12. "The Congress shall have Power . . . [T]o Establish Post Offices and post Roads." U.S. CONST. art. I, § 8, cl. 7.

13. 17 STAT. 302 (1872), 18 U.S.C. § 1461 (1952).

14. 96 U.S. 727 (1878).

15. *Id.* at 737.

is withheld. Another dictum clarifying this theory has proved less durable than the one concerning obscenity. This dictum was that if "printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."[16] Nevertheless, within twenty years Congress forbade the interstate transportation of obscene matter by common carrier,[17] and this statute has stood on the books alongside the obscene mail statute for sixty years without a Supreme Court ruling on the applicability of the dictum. Still another statute was added in 1955 extending the ban to *any* interstate transportation,[18] and this, too, has failed thus far to bring a decision on the point from the Court.

The Definition Problem

Meanwhile, the problem of defining obscenity grew in importance. The words "obscene" and "obscenity" are usually defined in terms of other words equally as difficult to define, all ultimately involving a subjective judgment. Thus obscene has been defined as offensive to taste; foul; loathsome; disgusting; offensive to chastity of mind or to modesty; expressing or presenting to the mind or view something that delicacy, purity, and decency forbid to be exposed; lewd; indecent; . . . inauspicious and ill-omened.[19] A legal definition of long standing is "such indecency as is calculated to promote the violation of the law and the general corruption of morals."[20]

Regardless of how the words may be defined, courts must invoke somebody's sense of moral values to determine the legal consequences of the definition. Whose sense of decency, or good taste, or delicacy is controlling? Whose morals must the matter tend to corrupt—the most easily corruptible members of society? Those most incorruptible?[21] One of the most influential tests evolved was the so-called *Hicklin* rule: "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."[22] This English rule was adopted by many American courts, including

16. *Id.* at 733.
17. 29 STAT. 512 (1897), 18 U.S.C. § 1462 (1952).
18. 69 STAT. 183 (1955), 18 U.S.C. § 1465 (Supp. IV 1957).
19. MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY 1681 (2d ed. 1955). For exhaustive discussions of various approaches to the definition of obscenity see Abse, *Psychodynamic Aspects of the Problem of Definition of Obscenity*, 20 LAW & CONTEMPORARY PROB. 572 (1955); Gardiner, *Moral Principles Towards a Definition of the Obscene, id.* at 560; Kaplan, *Obscenity as an Esthetic Category, id.* at 544; La Barre, *Obscenity: An Anthropological Appraisal, id.* at 533. See also ST. JOHN-STEVAS, OBSCENITY AND THE LAW (1956).
20. 29 CYC. 1315 (1908).
21. See Lockhart and McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587 (1955); Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).
22. The Queen v. Hicklin, L.R. 3 Q.B. 360 (1868).

the federal courts,[23] despite judicial complaints that it allowed judgment of a book by isolated passages in relation to their effect on the most susceptible class of readers.[24] The test has been rejected with increasing frequency in recent years in favor of tests based on the work as a whole as it affects an average member of the community.[25]

Freedom of Expression Since World War I

The obscenity problem was only one aspect of the overall conflict between free expression and the growing power of government. A new ferment of judicial thought on the meaning of the constitutional guaranties of freedom of speech and press was created by the cases arising out of the security measures of World War I.[26] These cases developed three tests by which a line might be drawn between permitted and forbidden speech when it was alleged to threaten the national security. The "direct incitement" test was proposed by Learned Hand, then a district judge, in 1917:[27]

> To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. . . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me that one should not be held to have attempted to cause its violation.

This was reversed on appeal and the "natural consequences" test laid down to replace it:[28]

> If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested.

Two years later, Mr. Justice Holmes, speaking for the United States Supreme Court, announced the "clear and present danger" test:[29]

> The question in every case is whether the words used are used in such

23. *E.g.*, Rosen v. United States, 161 U.S. 29 (1896); McFadden v. United States, 165 Fed. 51 (3d Cir. 1908), *writ of error denied*, 213 U.S. 288 (1909), *cert. denied*, 214 U.S. 511 (1909); State v. Clein, 93 So. 2d 876 (Fla. 1957); Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930); People v. Pesky, 230 App. Div. 200, 243 N.Y. Supp. 193 (1st Dep't 1930), *aff'd*, 254 N.Y. 373, 173 N.E. 227 (1930), *reargument denied*, 255 N.Y. 576, 175 N.E. 320 (1930).

24. *E.g.*, United States v. Kennerley, 209 Fed. 119 (S.D.N.Y. 1913).

25. *E.g.*, Roth v. Goldman, 172 F.2d 788 (2d Cir. 1949), *cert. denied*, 337 U.S. 938 (1949); United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

26. Writers, too, contributed to the controversy. See, *e.g.*, Carroll, *Freedom of Speech and of the Press in War Time: The Espionage Act*, 17 MICH. L. REV. 621 (1919); Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919); Corwin, *Freedom of Speech and Press under the First Amendment: A Résumé*, 30 YALE L.J. 48 (1920).

27. Masses Publishing Co. v. Patten, 244 Fed. 535, 540 (S.D.N.Y. 1917). See, Lancaster, *Judge Hand's Views on the Free Speech Problem*, 10 VAND. L. REV. 301 (1957).

28. Masses Publishing Co. v. Patten, 246 Fed. 24, 38 (2d Cir. 1917).

29. Schenck v. United States, 249 U.S. 47, 52 (1919).

> circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

This last test has been hailed as a milestone in the history of free expression but it has had a somewhat uneven career in the courts from the start. Its present status is in question.[30]

The modern law of freedom of expression, however, may really be said to date from *Gitlow v. New York*,[31] decided in 1925, when the Court made the historic "assumption" that the fourteenth amendment applied to the state governments the prohibitions which the first amendment decreed against Congress.[32] Thus not only was the scope of the Court's review of cases in the area of free expression greatly broadened, but the impact of its decisions was tremendously increased. Although Gitlow's conviction was upheld, the principle was soon affirmed in cases striking down state convictions under criminal syndicalism laws.[33]

In 1931 this new principle allowed the court, in *Near v. Minnesota*,[34] to breathe constitutional life into Blackstone's principle[35] that a free man's right to speak his mind was immune from previous restraints, although exercise of the right might subject him to later punishment. On this principle the decision struck down a Minnesota injunction statute. The Court found hard questions presented in this area by the handbill,[36] sound truck[37] and public assembly cases,[38] and has so far managed to leave open the question of whether prior censorship

30. See Yates v. United States, 354 U.S. 298, 312 (1957); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); Antieau, *Dennis v. United States—Precedent, Principle or Perversion?* 5 VAND. L. REV. 141 (1952); Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952); Mendelson, *Clear and Present Danger—from Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952). For controversy on the merits, see Meiklejohn, *The First Amendment and Evils that Congress Has a Right to Prevent*, 26 IND. L.J. 477 (1951); Mendelson, *The Clear and Present Danger Test—A Reply to Mr. Meiklejohn*, 5 VAND. L. REV. 792 (1952).

31. 268 U.S. 652 (1925).

32. *Id.* at 666. Mr. Justice Harlan (the elder) proposed the principle in his dissent in Patterson v. Colorado, 205 U.S. 454 (1907), but Mr. Justice Holmes, speaking for the majority, said that even if accepted, the principle would not have given the court jurisdiction in that case.

33. Stromberg v. California, 283 U.S. 359 (1931); Fiske v. Kansas, 274 U.S. 380 (1927); Whitney v. California, 274 U.S. 357 (1927). The full force of the first amendment has now been virtually written into the fourteenth. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). *But see* dissenting opinions of Harlan, J., in Roth v. United States, 354 U.S. 476, 496 (1957); Jackson, J., in Beauharnais v. Illinois, 343 U.S. 250, 287 (1952); and Holmes, J., in Gitlow v. New York, 268 U.S. 652, 672 (1925).

34. 283 U.S. 697 (1931).

35. 4 BLACKSTONE, COMMENTARIES *151.

36. *E.g.*, Jones v. Opelika, 316 U.S. 584 (1942), *judgment vacated*, 319 U.S. 103 (1943).

37. *E.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948). See 2 VAND. L. REV. 113 (1948).

38. *E.g.*, Kunz v. New York, 340 U.S. 290 (1951); Cox v. New Hampshire, 312 U.S. 569 (1941).

of movies is in itself an unconstitutional exercise of state power.[39] It has made it abundantly clear in these cases, however, that prior licensing of any kind will be closely scrutinized, and must be administered under clearly and narrowly drawn statutes which leave censors little room for arbitrary action.[40]

It is difficult to assess the net effect of the Court's decisions since it undertook the role of final arbiter in both state and federal freedom of expression cases. Two important generalizations may be drawn, however, from what the cases had shown of the Court's attitude by the time it turned its attention to the full implications of the obscenity problem: (1) The Court assigned a high priority to freedom of expression under its concept of "balancing of interests";[41] (2) It was willing to commit itself to a great deal of case-by-case drudgery rather than establish boundaries too sharply.[42]

THE NEW LAW OF OBSCENITY

Virtually every proposition of constitutional law which had any possible application to the facts involved was presented to the court by one or another of the numerous parties and amici curiae in the four obscenity cases heard in the 1956-57 term.[43] The Court, sharply split on three of the cases, gave direct consideration to most of the contentions in the three majority opinions.

The primary principles laid down were these:

1. Obscenity is not included in the area of constitutionally protected free expression.[44]

2. The test of obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[45]

3. A state may enjoin sale of an obscene book, under a properly drawn statute, without exercising an unconstitutional prior restraint or violating the right of trial by jury.[46]

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39. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
40. *Ibid.;* Holmby Productions v. Vaughn, 350 U.S. 870 (1955); Superior Films v. Department of Educ., 346 U.S. 587 (1954); Gelling v. Texas, 343 U.S. 960 (1952). See 5 VAND. L. REV. 819 (1952).
41. See notes 36-40, *supra.*
42. "Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." Beauharnais v. Illinois, 343 U.S. 250, 263 (1952). See also 6 VAND. L. REV. 393 (1953).
43. See Briefs of Counsel filed in *Butler, Kingsley,* and *Roth* cases, abstracted at 1 L. Ed. 2d 1889, 2192, 2198.
44. Roth v. United States, 354 U.S. 476, 485 (1957).
45. *Id.* at 489.
46. Kingsley Books v. Brown, 354 U.S. 436 (1957).

4. A state may not limit its adult readers to literature fit for children.[47]

Constitutional Status

In the combined *Roth* and *Alberts* cases, the Court addressed itself to almost all of the principal issues involved in criminal convictions under both federal and state laws. It upheld both convictions—by a vote of seven to two in the California case and six to three in the federal case. The sweeping holding that obscenity is not within the area of constitutionally protected speech or press, however, was supported only in the opinion of a five-man majority. These five, speaking through Mr. Justice Brennan, reached this holding, first, by relying on the Court's own consistent assumptions in a long line of previous cases;[48] second, by showing that all state governments involved in adopting the Bill of Rights considered obscenity a proper subject of legislation both before and after the adoption;[49] and, third, by asserting the view that first amendment history implied a rejection of obscenity as "utterly without redeeming social importance."[50]

The holding that obscenity is unprotected was given great force in the majority opinion as the basis for summarily disposing of appellants' arguments based on the "clear and present danger" test, on the ninth and tenth amendments and on the asserted differences in scope of the first and fourteenth amendments.

Definition

The holding that obscenity was beyond the constitutional pale apparently could have settled both cases since there was no contention that the publications involved were not obscene. However, this holding served only to narrow the real constitutional question to the problem of defining a single elusive word. Therefore the majority took up this problem at some length, with somewhat confusing results.

The first brief statement of the definition was footnoted with a more

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

48. Beauharnais v. Illinois, 343 U.S. 250 (1952); Winters v. New York, 333 U.S. 507, 510 (1948); Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942); United States v. Limehouse, 285 U.S. 424 (1932); Near v. Minnesota, 283 U.S. 697, 716 (1931); Bartell v. United States, 227 U.S. 427 (1913); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904); Dunlop v. United States, 165 U.S. 486 (1897); Price v. United States, 165 U.S. 311 (1897); Robertson v. Baldwin, 165 U.S. 275, 281 (1897); Andrews v. United States, 162 U.S. 420 (1896); Swearingen v. United States, 161 U.S. 446 (1896); Rosen v. United States, 161 U.S. 29 (1896); Grimm v. United States, 156 U.S. 604 (1895); United States v. Chase, 135 U.S. 255, 261 (1890); *Ex Parte* Jackson, 96 U.S. 727, 737 (1877).

49. 354 U.S. at 482.

50. *Id.* at 484. The court also said, "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." *Ibid.*

extensive discussion which equated "appealing to prurient interest" with "a tendency to excite lustful thoughts." This, in turn, was identified with the general definition developed in the case law, and this with the definition in the American Law Institute's Model Penal Code, Tentative Draft No. 6. Yet, as the dissenting justices pointed out,[51] the drafters of the Code had explained that their selection of the words "prurient interest" was a rejection of "the prevailing tests of tendency to arouse lustful thoughts or desires. . . ." The majority finally expressed the definition in the form of a legal test in these words:

> [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[52]

Further complicating the job of determining the precise meaning of the majority's definition was its holding that the trial courts in the two cases used the proper definition. Mr. Justice Douglas indicated that there were three different definitions, all of them bad because they did not require "any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit."[53]

"The Court," said Mr. Justice Harlan, "merely assimilates the various tests into one indiscriminate potpourri."[54]

Prior Restraint and Trial by Jury

In *Kingsley Books v. Brown*,[55] decided the same day as *Roth*, the Court split differently, deciding five to four, with no concurring opinions, that a New York statute[56] providing injunctive procedures for dealing with obscene matter was valid. The statute provided that a municipal officer could sue for an injunction against sale of obscene matter, that the defendant had a right to trial within a day of joinder of issue and to a decision in two days after the end of the trial, that after a final order against the defendant the obscene matter could be seized and destroyed, and that the defendant would be chargeable

51. *Id.* at 499, 513.

52. *Id.* at 489. This test is presented, not as the court's own test, but as an approved statement of the test already substituted for the *Hicklin* rule by many lower courts. This assertion is footnoted with citations to cases, including United States v. Dennett, 39 F.2d 564 (2d Cir. 1930), in which the *Hicklin* rule was accepted, the court of appeals finding the material not obscene even by that test.

53. 354 U.S. at 513. Douglas said that under the *Roth* test, "the material 'must be calculated to corrupt and debauch the minds and morals' of 'the average person in the community,' " and in *Alberts* it must have " 'a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.' " *Id.* at 508, 509. The *Roth* jury also was charged, "You may ask yourselves does it offend the common conscience of the community by present-day standards." *Ibid.*

54. *Id.* at 500.

55. 354 U.S. 436 (1957).

56. N.Y. CODE CRIM. PROC. § 22-a.

with knowledge of the contents of the matter in question from the day of the first summons. Although the statute by its terms appears to provide only for an injunction upon final judgment, an injunction *pendente lite* was issued with the defendant's consent. The appeal challenged only the statute, but the Court refers to the injunction *pendente lite* as part of the statutory scheme and said that this device was merely "a safeguard against frustration of the public interest in effectuating judicial condemnation of obscene matter."[57] The Court took no notice of the Chief Justice's assertion in his dissenting opinion that in this case police already had seized the books under another statute before the court order was obtained.[58] The majority's holding on the statute was that "as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive."[59] Although the opinion is not entirely clear on the point, it seems to leave open the possibility that the issues raised in dissent concerning the injunction *pendente lite* and the police seizure might be attacked in a future proceeding less narrowly confined to the validity of the statute.

The jury trial issue was considered briefly, apparently in answer to Mr. Justice Brennan's dissent. The appellant does not appear to have raised the issue. The Court observed that the consequences of a judicial condemnation under the statute in question were no more restrictive of freedom of expression than a misdemeanor conviction would be. The Constitution, the Court said, does not require jury trials in state misdemeanor cases.[60]

Children's Obscenity Standard

Of the four cases decided in the 1956-57 term, only *Butler v. Michigan*[61] rescued the defendant from the censorial power of the state, and it was the only unanimous decision. The case struck down a Michigan statute which prohibited sale to the general public of obscene material "tending to incite minors to violent or depraved or immoral acts."[62] The sale which was the basis of prosecution was to a policeman. The Court, speaking through Mr. Justice Frankfurter, disposed of it thus:

> We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment.

57. 354 U.S. at 440.
58. *Id.* at 445.
59. *Ibid.*
60. *Id.* at 443.
61. 352 U.S. 380 (1957).
62. MICH. STAT. ANN. § 28.575 (1954).

> . . . We are constrained to reverse this conviction.[63]

Beginnings of Refinement

The first case to be summarily reversed on the authority of *Roth* was originally heard in 1955 by the District Court for the District of Columbia under the title *United States v. 4200 Copies Int'l Journal.*[64] The district court approved destruction of a large quantity of imported nudist magazines under the obscene import statute,[65] after holding them obscene in relation to the standard of the "average, normal, reasonable, prudent person of the community." The test was worded this way:

> If, at the time of circulation, considered as a whole it offends the sense of propriety, morality, and decency of such average person, it is within the bar of the statute.[66]

The court of appeals affirmed in a brief per curiam opinion which cited the *Roth* case.[67] The Supreme Court granted certiorari, reversed, and remanded to the district court for consideration in the light of *Roth.*[68]

In January of this year two more cases were summarily reversed. In *Sunshine Book Co. v. Summerfield,*[69] the trial court quoted a potpourri of passages from various cases, one of which was worded in terms of the *Hicklin* rule, calling them "the beacons by which the channel is lighted." It judged the nudist magazine in question "obscene and indecent when judged by the ordinary standards of the vast majority of the citizens of our country." The court of appeals affirmed, five to three, citing *Roth.* Three dissenting judges asserted that the decision exceeded the prior restraint limits set in the *Kingsley* case and failed to satisfy those portions of the *Roth* test requiring that the "dominant theme" be ascertained from the book "taken as a whole."[70] In *One, Inc. v. Oleson,*[71] the Ninth Circuit described particular articles in a magazine on the "dangers of homosexuality" as "cheap pornography" and added that "the articles mentioned are sufficient to label the magazine as a whole obscene and filthy." It also quoted words similar to those of the *Hicklin* rule with apparent favor. The Supreme Court reversed both, citing *Roth.*[72]

A common factor in two of the cases is the mention of the *Hicklin*

63. 342 U.S. at 383.
64. 134 F. Supp. 490 (D.D.C. 1955).
65. 46 STAT. 688 (1930), as amended 19 U.S.C. 1305 (1952).
66. 134 F. Supp. at 493.
67. Mounce v. United States, 247 F.2d 149 (9th Cir. 1957).
68. Mounce v. United States, 78 Sup. Ct. 267 (1957).
69. 128 F. Supp. 564 (D.D.C. 1955).
70. Sunshine Book Co. v. Summerfield, 249 F.2d 114, 120 (D.C. Cir. 1957).
71. 241 F.2d 772, 778 (9th Cir. 1957).
72. 78 Sup. Ct. at 364, 365.

rule, which was rejected in *Roth,* but it is difficult to tell what shades of wording in the lower court opinions might be found to be in fatal conflict with *Roth,* especially in view of the lower court definitions approved in that case. Thus the process of refining definitions may be slow if the court relies on memorandum reversals.

The Dissenters

The three reversals this year turned the numerical score against the censors in the seven cases here considered. Although they won in *Roth, Alberts* and *Kingsley,* they were set back by the whole court in *Butler, Sunshine Books, Mounce* and *One, Inc.* Furthermore, the judges who voted against the defendants in all three of the cases which upheld censorship are less than a majority. In *Kingsley* the bare five-man majority did not include all of the five who went along with the majority opinion in the *Roth-Alberts* decision. Furthermore, the *Kingsley* majority included Mr. Justice Harlan, who concurred only in the *Alberts* result and dissented in the *Roth* result. Thus the major principles announced in the *Roth* case did not have sufficient strength for specific application in the *Kingsley* case where issues of prior restraint and trial by jury were added. Only the *Alberts* case could be cited in the *Kingsley* opinion, and that only for its result.

Thus a careful reading of the dissenting and concurring opinions is necessary to any assessment of what the Court has done in the obscenity field. Here is a brief summary of the positions taken by the five dissenting justices:

Douglas and Black. With Douglas writing most of the opinions, these two have formed the hard core of resistance to any invasions of freedom of expression through the years. In *Roth,*[73] Douglas wrote a convincing argument showing the futility of obscenity laws and the desirability of a constitutional policy based on "confidence in the ability of our people to reject noxious literature." Whether he is as convincing in arguing that such a policy has already been constitutionally adopted is another question. In *Kingsley,* with Black again joining him, he denounces the New York injunction procedure as "prior restraint and censorship at its worst."[74]

Harlan. Rejecting the contention that the first amendment prohibitions apply to the state governments through the fourteenth amendment with the same force that it applies to Congress by its terms, Mr. Justice Harlan would have preferred to take the Post Office Department out of the censorship business while leaving the states leeway to prohibit obscene matter. He contends, in concurring in

73. 354 U.S. at 508.
74. *Id.* at 446.

the *Alberts*[75] result, that the Court's function is narrow in reviewing state policy and that the very division of expert opinion on the effects of obscene literature on society counsels respect for the state's choice of methods of dealing with the evil. In his *Roth* dissent, he contends that the interests obscenity statutes purportedly protect are primarily entrusted to the states and that Congress has no substantive power over sexual morality. He joined the majority in *Kingsley,* again supporting state action.

Warren. The Chief Justice proposed an interesting shift of emphasis in his concurring opinion in *Roth-Alberts.* He suggested that it be remembered that the conduct of a person is the central issue and the obscenity of the publication is merely a relevant attribute of that conduct. He would have rested affirmance on the finding that the defendants were "plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect,"[76] which is constitutionally punishable conduct. In *Kingsley* he strongly condemned the New York procedure as prior restraint.

Brennan. The author of the majority opinion in *Roth* dissented in *Kingsley*[77] on the ground that the New York law deprived the defendant of the constitutional right of jury trial. The definition of obscenity laid down in *Roth,* he said, was one which should be applied to the facts by a jury.

CONCLUSION

Mr. Justice Harlan, with admirable restraint and colorfully mixed metaphor, suggested in his separate opinion in *Roth* that the majority "paints with such a broad brush that I fear it may result in a loosening of the tight reins which state and federal courts should hold upon enforcement of obscenity statutes."[78] A single passage of dictum from the majority opinion will illustrate:

> 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.[79]

The conflicting metaphor may be amusing, but the unnecessary use of phrases like "more important interests" is not. Used in this broad context in opposition to the general concept of free expression, as differentiated from the specific context of the case at hand, this may well be interpreted by censorial minds as justification for activities

75. *Id.* at 496.
76. *Id.* at 496.
77. *Id.* at 447.
78. *Id.* at 496.
79. *Id.* at 488.

which the Court very likely would disapprove, but which are not likely to come before it for review.[80]

The language used in the actual holdings falls short of solving the problem at hand, which is to set understandable limits on governmental interference with individual freedom in this area without depriving it of power to protect legitimate community and individual interests in combating evils associated with commercialized pornography. The Court swept aside balancing formulas and standards set up in the past for solving similar problems, and, in effect, reduced the whole argument to the definition of the single word "obscenity." Yet the definition laid down, taken in the context of the opinion, is as subjective as the word itself in some respects, and a great deal of case-by-case litigation may be necessary to give it understandable meaning.

Fortunately, the net effect of the entire group of cases appears to be much more restrictive of censorship than the language of the prevailing opinions would indicate, and a good deal of constructive thinking was displayed in the separate opinions. The Chief Justice suggested a shift in emphasis in the cases from the obscene matter itself to the conduct of the defendants. This merits further judicial and legislative exploration. It might be that the emphasis could be shifted even further to focus on the damage done in terms of the rights of other individuals which may have been invaded against their will.[81] Mr. Justice Harlan's proposal would retire the federal censors permanently, leave the obscenity problem to the several states and limit the federal courts' role to a narrow compass. This, too, merits study since it offers forty-eight opportunities for free men to battle the censors for possible victory or acceptable compromise, without the weight of federal authority and precedent to be argued against them. Perhaps a few might become havens for individualism by adopting, under constitutional procedure, the views of Mr. Justice Douglas.

There seems to be little doubt that the opinions of Mr. Justice Douglas on the obscenity question are at variance with the intent of those who drafted and adopted the amendments under which he would impose them on state and federal governments alike. In addition, he is apparently at odds with the consistent interpretation placed on those amendments by the courts and the public. The weakness of his

80. For a convincing argument that the post office censors operate in defiance of court rulings and give in when court action is threatened, see de Grazia, *Obscenity and the Mail: a Study of Administrative Restraint,* 20 LAW & CONTEMP. PROB. 608 (1955). For a study of censorship which is ordinarily outside the scope of judicial review, see Twomey, *The Citizens' Committee and Comic-Book Control: a Study of Extragovernmental Restraint, id.* at 621.

81. For a vivid description of the plight of a defendant in an obscene publication case as compared with defendents in more serious cases, see introduction by A. P. Herbert in ST. JOHN-STEVAS, OBSCENITY AND THE LAW, at p. XIV.

proposals as principles of federal constitutional law, however, detracts nothing from the worth of his views on the substantive value of free expression. Constitutional draftsmen, legislators, judges, and administrators of the future, both state and federal, might well heed the article of faith he expressed in these words:

> I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.[82]

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82. 354 U.S. at 514.