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OBSCENITY: A NEW DIRECTION IN REGULATION

In 1957 the Supreme Court announced that "obscenity is not within the area of protected speech or press."[1] While the Court refused to extend constitutional protection to obscenity, it failed to provide a necessary standard which would separate protected from unprotected speech. The litigation which ensued created a virtual arena of dilemma for the lower courts which were forced to apply incomprehensible definitions of obscenity and rigid procedural requirements mandated by the Supreme Court. In an era of increasing social awareness, with a clamoring for the preservation of individual freedom, *Stanley v. Georgia*[2] re-examined for the first time the constitutional prohibition and extended First Amendment protection to obscene materials in the privacy of an individual's home.

This comment examines the development of obscenity regulation in the United States in light of the First Amendment and the *Stanley* doctrine.[3] In addition this comment reviews recent decisions in order to propose a multi-step method of judicial decision-making which would avoid the pitfalls of today's inadequate system of censorship.

FIRST AMENDMENT PROTECTION

That "Congress shall make no law . . . abridging the freedom of speech or of the press" is established by the First Amendment.[4] Although this choice of words gives every appearance that the framers of this mandate sought to protect the expression of all the beliefs, thoughts, and ideas of the American citizenry,[5] the majority of the Supreme Court in *Roth v. United*

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[1] Roth v. United States, 354 U.S. 476, 485 (1957).

[2] 394 U.S. 557 (1969).

[3] See text accompanying notes 178 through 238 *infra*.

[4] U.S. CONST. amend. I.

[5] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). James Madison, in exploring the sweep of the First Amendment's limitation on the Federal Government, when he offered the Bill of Rights to Congress in 1789, is reported as having said, "[t]he right of freedom of speech is secured; the liberty of the press is expressly declared to be *beyond the reach of this Government. . . .*" (Emphasis added.) 1 Annals of Cong. 738. For reports of other discussions by Mr. Madison see pp. 424-49, 660, 704-56. Eleven years later he wrote: "[w]ithout tracing farther the evidence on this subject, it would seem scarcely possible to doubt that no power whatever over the press was supposed to be delegated by the Constitution, as it originally stood, and that the amendment was intended as a positive and absolute reservation of it." 6 J. MADISON, WRITINGS 341, 391 (Hunt ed. 1906), and *see generally* 385-93, 399.

Thomas Jefferson's views of the breadth of the First Amendment's prohibition against abridgment of speech and press by the Federal Government are illustrated by the following statement he made in 1798:

> [The First Amendment] thereby guard[s] in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation,

States,[6] held obscenity not to be speech entitled to this constitutional protection. The majority, *per* Justice Brennan, found that although this phraseology is unconditional, the First Amendment was not intended to protect every utterance.[7] Although it is settled constitutional doctrine that the dissemination of protected "speech" may ordinarily be prohibited only where there is a "clear and present danger" of resulting anti-social behavior,[8] the majority in *Roth* did not find it necessary to apply this standard. They, instead, found that there was sufficient contemporary evidence to show that obscenity, at the time of the enactment of the First Amendment, was outside the protection intended for speech and press,[9] since it is utterly without redeeming social importance.[10] This the Court noted, was "reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 States, and in the 20 obscenity laws enacted by Congress from 1842 to 1956."[11]

The Justices of the Supreme Court, in addition to legal scholars, have repeatedly remained divided as to the breadth of the First Amendment. Rarely has a majority of the Court agreed in the reasoning used to arrive at a decision.[12] Instead they have expressed their own views in separate concurring or dissenting opinions.[13]

Two Justices, Douglas and Black, have consistently adhered to the view that the First Amendment is absolute; that any expression of ideas, even if not in accord with contemporary com-

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equally with heresy and false religion, are withheld from the cognizance of federal tribunals.

8 T. JEFFERSON, WRITINGS 464-65 (Ford ed. 1904). For another early discussion of the scope of the First Amendment as a complete bar to all federal abridgment of speech and press see St. George Tucker's comments on the adequacy of state forums and state laws to grant all the protection needed against defamation and libel. 1 BLACKSTONE, COMMENTARIES 299 (Tucker ed. 1803).

[6] 354 U.S. 476 (1957). *See also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941), expressing the same interpretation.

[7] 354 U.S. at 483.

[8] *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919).

[9] 354 U.S. at 483.

[10] *Id.* at 484.

[11] *Id.* at 485-86.

[12] Mishkin v. New York, 383 U.S. 502 (1968) is the sole case since *Roth* in which a majority of the Court has agreed in one opinion. See note 51 *infra*.

[13] *See* Hoyt v. Minnesota, 399 U.S. 524 (1970) for opinions of Justices Blackmun, Burger and Harlan; Walker v. Ohio, 398 U.S. 434 (1970) for an opinion by Chief Justice Burger; Stanley v. Georgia, 384 U.S. 557 (1969) in which Justice Marshall wrote the opinion of the Court; Memoirs v. Massachusetts, 383 U.S. 413 (1966) for opinions by Justices Brennan, Warren and Fortas, a separate opinion by Justice Harlan, and another by Justice Clark and one by Justice White; Jacobellis v. Ohio, 378 U.S. 184 (1964) for opinions by Justices Brennan and Goldberg, one by Justice Stewart, one by Justices Warren and Clark, and another by Justice Harlan. See text accompanying notes 14 through 22 *infra*.

munity standards, is within the ambit of constitutional protection.[14] Therefore, they hold that a state is constitutionally without power to supress, control or punish the distributor of any writing upon the grounds that it is obscene.[15] Justice Stewart has held that no constitutional protection is extended to obscenity

[14] Roth v. United States, 354 U.S. 476 (1957) (Douglas and Black, JJ., dissenting):

> When speech alone is involved, I do not think that government, consistently with the First Amendment, can become the sponsor of any . . . movements [liberal or Victorian]. I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be concerned with antisocial conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.

Id. at 512-13.

[15] Smith v. California, 361 U.S. 147 (1959) (Black, J., concurring):

> Certainly the First Amendment's language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' I read 'no law . . . abridging' to mean *no law abridging*. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly 'beyond the reach' of *federal* power to abridge. No other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal agencies, including Congress and this Court, have power or authority to subordinate speech and press to what they think are 'more important interests.' The contrary notion is, in my judgment, court-made, not Constitution-made.

Id. at 157-59.

Justice Douglas, a foe of all obscenity regulations, stated his position most ferociously in Ginzburg v. United States, 383 U.S. 463 (1966) (Douglas, J., dissenting):

> [T]he First Amendment allows all ideas to be expressed — whether orthodox, popular, offbeat, or repulsive. I do not think it permissible to draw lines between the 'good' and the 'bad' and be true to the constitutional mandate to let all ideas alone. If our Constitution permitted 'reasonable' regulation of freedom of expression, . . . we would be in a field where the legislative and the judiciary would have much leeway. But under our charter all regulation or control of expression is barred. Government does not sit to reveal where the 'truth' is. People are left to pick and choose between competing offerings. There is no compulsion to take and read what is repulsive any more than there is to spend one's time poring over government bulletins, political tracts, or theological treatises. The theory is that people are mature enough to pick and choose, to recognize trash when they see it, to be attracted to the literature that satisfies their deepest need, and, hopefully, to move from plateau to plateau and finally reach the world of enduring ideas.
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> I think this is the ideal of the Free Society written into our Constitution. We have no business acting as censors or endowing any group with censorship powers. It is shocking to me for us to send to prison anyone for publishing anything, especially tracts so distant from any incitement to action as the ones before us.

Id. at 491-92. *See also* Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (Black, and Douglas, JJ., concurring). For other cases in which Justices Douglas and Black have concurred that the First Amendment is absolute, *see* Ginsberg v. New York, 390 U.S. (1968); Cox v. Louisiana, 379 U.S. 559 (1965); Wilkinson v. United States, 365 U.S. 399 (1960); Beauharnais v. Illinois, 343 U.S. 250 (1952); Rochine v. California, 342 U.S. 165 (1952); Adamson v. California, 332 U.S. 46 (1947).

because it is a "distinct and easily identifiable class of material" not embodying a "communication of ideas or artistic values."[16] Reasoning similarly, Justice Brennan has stated that the purpose of the First Amendment is to protect unfettered exchange of political and social ideas, intended to bring about desired social change.[17] But obscenity, he maintains, is worthless and, as such, cannot be an essential part of an exposition of such ideas.[18] However, a majority of the Court in other areas of speech, has stated that constitutional protection does not depend upon the social utility of the ideas expressed.[19] Justice Harlan, in his own opinion in *Roth,* rejected Justice Brennan's view by stating that every communication has a " 'value of its own."[20] Justice Black has also opposed the majority supposition in *Roth:* "[w]hat is one man's amusement teaches another doctrine."[21] The two recent appointees, Justices Burger and Blackmun, have not spoken directly to this issue.[22]

Although the Justices have failed to reach agreement on the breadth of the First Amendment, it is clear that under *Roth,* obscenity is outside its scope. However, 12 years after *Roth,* in *Stanley v. Georgia,*[23] the Court altered its interpretation of the First Amendment, when it announced that "mere private possession of obscene matter cannot constitutionally be made a crime."[24] The Court found that the First Amendment did pro-

[16] Ginzburg v. United States, 383 U.S. 463 (1966):

> . . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment . . . .

Id. at 499 n.3.

[17] Roth v. United States, 354 U.S. 476, 484 (1957).

[18] *Id.*

[19] N.A.A.C.P. v. Button, 371 U.S. 415, 445 (1963).

[20] Roth v. United States, 354 U.S. 476, 497 (1957) (Harlan, J., dissenting).

[21] Mishkin v. New York, 383 U.S. 502, 510 (1966).

[22] Neither Chief Justice Burger nor Justice Blackmun have spoken directly, however they have spoken concerning obscenity regulation, *see* Walker v. Ohio, 398 U.S. 434 (1970) (Burger, Chief Justice, dissenting). *See also* Cain v. Kentucky, 397 U.S. 319 (1970) (Burger, Chief Justice dissenting):

> In my view we should not inflexibly deny to each of the States the power to adopt and enforce its own standards as to obscenity and pornographic materials; States ought to be free to deal with varying conditions and problems in this area.

Id. at 319. Hoyt v. Minnesota, 399 U.S. 524 (1970) (Blackmun, J., dissenting).

[23] 394 U.S. 557 (1969).

[24] *Id.* at 559.

tect obscene materials in a limited sense in the privacy of an individual's home:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.[25]

However, this pronouncement was not based solely upon the guarantees of the First Amendment, for it is the Fourth Amendment which extends the right of privacy, not the First.[26] Therefore, the Court found it necessary to combine the force of both Amendments so that Constitutional protection could be extended to obscenity. Sole reliance by the Court upon the First Amendment would have required overruling *Roth,* which the Court was expressly not willing to do.[27] But the plurality in *Stanley* was willing to reject Justice Brennan's view that the First Amendment only protects an exchange of ideas. They held that although the material in Stanley's possession was devoid of any ideological content, it was still entitled to Constitutional protection.[28]

Although the Court in *Stanley* was concerned with the applicability of the First Amendment to obscenity regulation, the equally grave problem of determining the meaning and the application of the standard for determining what is obscene was not considered. The Court assumed, *arguendo,* that the films found in Stanley's possession were obscene.[29] However, it should be noted that in order for an exception to a constitutional mandate to be upheld (such as obscenity is to the First Amendment), the standard determining this exception must be defined in a narrow manner so as to provide predictability.[30] The standard in obscenity regulation should provide the author or publisher with a means to predict the legality of his work by an objective test. However, an individual's determination of what is obscene must necessarily be a subjective judgment. It is the result of a personal, emotional reaction, propounded by the fact that a clear line

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[25] *Id.* at 565.

[26] *See* Mancusi v. DeForte, 392 U.S. 364 (1968), *aff'g* 379 F.2d 897 (2d Cir. 1967); Mapp v. Ohio, 367 U.S. 643, 655 (1961); Jones v. United States, 357 U.S. 493 (1958), where the Court stated that "[t]he decisions of this court have . . . underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Id.* at 498. This right of privacy is in contrast to the protection of property also guaranteed by the Fourth Amendment. The fact that a large quantity of allegedly obscene material has been seized before an adversary hearing has been held and has caused the owner great property losses has not influenced many courts. *See, e.g.,* Outdoor Am. Corp. v. Philadelphia, 333 F.2d 963 (3d Cir.), *cert. denied,* 379 U.S. 903 (1964); Dale Book Co. v. Leary, 233 F. Supp. 754 (E.D. Pa. 1964), *aff'd,* 389 F.2d 40 (3d Cir. 1968).

[27] 394 U.S. at 568.

[28] *Id.* at 565.

[29] *Id.*

[30] *E.g.,* Dennis v. United States, 341 U.S. 494 (1951).

[31] Stanley v. Georgia, 394 U.S. 557, 566 (1969); Roth v. United States,

between obscenity and artistic expression does not exist.[31] Thus, the subjective nature of an obscenity determination has resulted in an inadequate standard for predicting, with any degree of certainty, when a matter will be held to be obscene.

In 1896, the Court said, "[t]he words, 'obscene, lewd and lascivious,' as used [in the federal obscenity statute] signify that form of immorality which has relation to sexual impurity."[32] But the first modern standard for determining if a matter will be considered obscene was stated by Justice Brennan for the majority of the Court in *Roth v. United States*,[33] as "[w]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[34] Justice Brennan argued that historically the First Amendment rejects obscenity as utterly devoid of redeeming social importance. Thus, he implied that for a matter to be considered obscene it must, in addition to violating the stated standard, be devoid of any idea or social value.[35]

Four Judges did not join in the majority opinion. Justices Douglas and Black argued against all censorship except where it could be shown that "the particular publication has an impact on action the government can control."[36] Justice Harlan wanted to limit federal obscenity regulation to "hardcore pornography" only[37] and to grant to the states broader censorship powers, which he did not spell out.[38] He further argued that the Court's decision in *Roth* would result in the fact-finder determining whether the material was obscene, rather than the reviewing courts. He stated that the Supreme Court should make the determination as a matter of Constitutional law.[39] Chief Justice

354 U.S. 476, 488 (1957); *Id.* at 497-98 (Harlan, J., dissenting).

[32] Swearingen v. United States, 161 U.S. 446, 451 (1896).

[33] 354 U.S. 476 (1957).

[34] *Id.* at 489 (footnote omitted).

[35] *Id.* at 484.

[36] *Id.* at 511.

[37] *Id.* at 507. Justice Harlan relied on the government's examples of hardcore pornography and never defined it himself.

[38] *Id.* at 500-08.

> The danger is perhaps not great if the people of one State, through their legislature, decide that 'Lady Chatterley's Lover' goes so far beyond the acceptable standards of candor that it will be deemed offensive and nonsellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.

Id. at 506.

[39] *Id.* at 497-98. Justice Harlan illustrating that the determination of censorable obscenity is "not really an issue of fact but a constitutional *judgment* of the most sensitive and delicate kind," stated:

> Many juries might find that Joyce's 'Ulysses' or Bocaccio's 'DeCameron' was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no

Warren, in his concurring opinions, stated that the central issue in obscenity cases is not the obscenity of the book or picture, but the conduct of the defendant.[40] While he held that the nature of the materials was relevant as an attribute of the defendant's conduct, a "different result might be reached in a different setting."[41]

This disagreement among the Justices coupled with the failure of the Court to apply the *Roth* standard, except in four cases,[42] led to considerable confusion in the local and lower federal courts in their attempts to conform to the Supreme Court's dictates.[43] In an attempt to refine the definition of obscenity as expressed in *Roth*, Justice Brennan nine years later in *Memoirs v. Massachusetts*,[44] enunciated a tri-parté test, which provides that three elements must coalesce before an item can be determined obscene:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[45]

But, this definition, even though more easily applied than the *Roth* standard, is laden with ambiguities.

The first element requires an examination of the work as a whole rather than a selection of isolated passages or excerpts in judging the obscenity of an entire work.[46] Upon examination, the "dominant theme" of the "whole" work must appeal to the prurient interest, which was defined in *Roth* as "having a tendency to excite lustful thoughts,"[47] in the "average person." Al-

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such verdict could convince me, without more, that these books are 'utterly without redeeming social importance.'

Id. at 498.

[40] *Id.* at 495. By this statement the Chief Justice hinted at what was to become a determining factor in obscenity decisions: pandering. *See* Ginzburg v. United States, 383 U.S. 463 (1966); see notes 72 through 75 *infra* and text accompanying.

[41] *Id.* at 495.

[42] Mishkin v. New York, 383 U.S. 502 (1966); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).

[43] *See e.g.*, Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex., 1969); United States v. A Motion Picture Entitled "I Am Curious — Yellow," 404 F.2d 196 (2d Cir., 1968); Hudson v. United States, 234 A.2d 903 (D.C., 1967); Cain v. Kentucky, 997 U.S. 319 (1970), *rev'd per curiam.*

[44] 383 U.S. 413 (1966). The book concerned, commonly known as *Fanny Hill*, was J. CLELAND, MEMOIRS OF A WOMAN OF PLEASURE (1750).

[45] *Id.* at 418.

[46] 354 U.S. at 488-89. Justice Brennan explicitly overruled the *Hicklin* test which allowed the courts to judge obscenity by isolated passages. Regina v. Hicklin, L.R. 3 Q.B. 360 (1868). The Court subsequently overruled the Postmaster General who sought to ban the unexpurgated edition of *Lady Chatterley's Lover* in Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 501 (S.D.N.Y. 1959), *aff'd* 276 F.2d 433, 437-39 (2d Cir. 1960).

[47] 354 U.S. 487 n.20. The Court noted that the definition in the

though, as originally stated, an "average person" was thought to be an adult member of the general public,[48] in a companion case to *Memoirs, Mishkin v. New York*,[49] the Court modified this concept. The majority held that if the material is designed for and primarily disseminated to a deviant sexual group, such as homosexuals, rather than to the general public, the material will be considered obscene if it appeals to the prurient interest in sex in members of that group, even if the material would not stir a similar emotion reaction in the average person in the general public.[50] The *Mishkin* opinion is the singular instance since *Roth* in which a majority of the Court agreed in one opinion.[51]

While a majority of the Court agreed as to the group in whom the prurient interest might be aroused, no such agreement has been reached as to the "contemporary community" whose standards should be used in judging the offensiveness of the material. Justices Brennan and Goldberg have stated that the community should be the "national" community when dealing with both federal and state legislation.[52] Justice Stewart has held that the national standard should be applicable to federal obscenity statutes only.[53] Justice Harlan, however, feels that although a national standard should be applied when dealing with a federal statute, the real decision should rest with each state.[54] He argues that there would be a great danger of federal censorship if one nationwide standard would be applied. But, this danger to the freedom to gratify different tastes in literature would

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American Law Institute's Draft Penal Code and the definition prescribed in the decision were similar. However, the Court has never explained its assertion of equivalency between material tending to "excite lust" and material appealing to "shameful" or "morbid" interests in sex. In practice, the Court seems to look to sexual arousal as the principal element of prurient interest.

[48] 354 U.S. at 490. Justice Brennan quoted the trial court's instruction to the jury:

> The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved . . . .
>
> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community.

Id. at 490.

[49] 383 U.S. 502 (1966).

[50] *Id.* at 508.

[51] However, in a similar case, materials similar to those involved in *Mishkin* were held not obscene by the Court. Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967).

[52] Jacobellis v. Ohio, 378 U.S. 184, 193-96 (1964).

[53] Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962).

[54] 370 U.S. 378, 488 where Justice Harlan said that a standard based on local communities would have "the intolerable consequence" of denying the material to some parts of the country and permitting other sections access to it. But see note 55 *infra*.

not be present if the States were free to experiment with the same or bolder books.[55] In a similar vein, Justices Clark and Warren have urged the use of local community standards when dealing with State regulation.[56] But, the use of local or state standards would result in several inconsistencies. A disseminator of literature which has been adjudicated in one state not to be obscene, may rely upon that State's decision. However, he may still be convicted of selling obscene material if another state of dissemination determines the material to be obscene by its own "contemporary community standards." Use of local or state standards could also result in prior restraint of literature. A purveyor of material, found to be obscene in one state, might not distribute the material in another state for fear of conviction, when, in fact, the material would not have been held obscene by that state's "contemporary community standards." Therefore, while the use of a "national" standard does inherently contain a danger of suppressing the freedom to gratify a particular taste in literature, as suggested by Justice Harlan,[57] it does insure a consistency, which the use of state or local standards cannot.

The application of the third element of the *Memoirs* coalesence, that the material be "utterly without redeeming social value," has resulted in a serious disagreement between the Justices. In the plurality opinion of *Memoirs,* Justices Brennan, Fortas and Warren stated their view that this third element was to be applied independently of the other two.[58] Therefore, they hold that even if the material is found to be patently offensive and to appeal to the prurient interest in sex, it should be afforded First Amendment protection if any social value can be found.[59] This application seems inconsistent with the plurality's choice of the modifier, "redeeming."[60] When read literally, the use of the phrase, "redeeming social value," would seem to indicate a balancing of social value against the other two factors in the test. But, only Justice Clark has read this to be the proper interpretation.[61] Justice White, however, holds that social value is relevant

[55] Memoirs v. Massachusettes, 383 U.S. 413, 457-58 (1966) (Harlan, J., dissenting). The Justice seems to have partially changed his position, *see* Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962). See note 54 *supra.*

[56] Jacobellis v. Ohio, 378 U.S. 184, 200 (1964).

[57] See note 55 *supra.*

[58] Memoirs v. Massachusettes, 383 U.S. 413 (1966).

[59] *Id.* at 419.

[60] *Id.* at 418.

[61] *Id.* at 441-43 (Clark, J., dissenting). Justice Clark pointed out that the Majority in *Roth* never held "social value" to be a test. He noted that it was in Jacobellis v. Ohio, 378 U.S. 184, 191 (1964), seven years after *Roth,* where Justice Brennan mentioned the "social value" test and that Justice Brennan's opinion in *Jacobellis* was the only one to mention such a test.

"only to determine the predominant prurient interest of the material."[62]

In addition to the diversity of opinion in the application of the social value test, the Court has not been explicit as to what is meant by the use of the term. Presumably, artistic, literary, philosophical and scientific ideas are included in this definition, while mere entertainment is not.[63] However, the exact quality or quantity of social value needed to "redeem" the material has not been even remotely discussed by the Court.

This lack of clarity in the standards to be applied when using the *Memoirs* test has been increased by the failure of the Justices themselves to agree. While Justice Brennan was joined in his opinion in *Roth* by four other Justices,[64] only two agreed with him in his *Memoirs* restatement.[65] The state of disagreement was such that *Memoirs* inspired a total of seven opinions.

Justices Black[66] and Douglas[67] in concurring opinions in *Memoirs* restated that there is no federal power of censorship. Justice Stewart, also concurring in *Memoirs* on the basis of his dissent in a companion case, *Ginzburg v. United States*,[68] stated that there was power to censor "hardcore pornography," but that the novel in *Memoirs*, in his opinion, was not within this classification.[69] He did not, however, add any clarity to this problem of definition:

> I shall not today attempt further to define the kinds of materials I understand to be [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.[70]

Justice Black, dissenting in *Ginzburg*, summed up the effect of *Memoirs*, *Ginzburg*, and *Mishkin*, all handed down the same day:

> My conclusion is that certainly after the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge, much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today.[71]

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[62] 383 U.S. at 462.

[63] *E.g.*, Stanley v. Georgia, 394 U.S. 557, 566 (1969).

[64] Justices Frankfurter, Burton, Clark and Whittaker.

[65] Chief Justice Warren and Justice Fortas.

[66] Memoirs v. Massachusettes, 383 U.S. 413, 424 (1966) (concurring, on basis of his dissenting opinion in Ginzburg v. United States, 383 U.S. 463, 476 (1966)).

[67] 383 U.S. at 424.

[68] 383 U.S. 463 (1966).

[69] *Id.* at 499.

[70] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[71] 383 U.S. 463, 480-81 (1966). Such uncertainty may be a danger. Justice Douglas, believes *any* test may impinge upon the freedom of expression:

> As a people, we cannot afford to relax that standard of freedom of expression. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is incite a lascivious thought or

In addition to an application of the *Memoirs* tri-parté test, *Ginzburg v. United States*,[72] allows the courts to consider how the material was advertised and distributed.[73] If the Court finds that the material was pandered, *i.e.*, openly advertised so as to appeal to the customer's erotic interests,[74] this factor may be considered in determining the obscenity of the publication.[75] However, close examination of this approach reveals that pandering has no actual affect on the intrinsic quality of the publication itself. That is, pandering reflects only upon the manner of dissemination but does not change the actual social value, literary attributes or patent offensiveness of the material itself. This approach signifies that the Court is looking to the conduct of the defendant rather than making a determination as to the character of the material.[76] However, if the central issue in an obscenity case is the nature of the material itself, which is the underlying consideration of *Roth* and *Memoirs*, the manner in which the defendant purveys the material in question should make no difference in the outcome. However, the Court has failed to see this distinction and has found that when pandering is present in the case, the material will be found obscene, even though had the Court used the *Memoirs* test alone, such a finding would not have resulted.[77]

The *Memoirs* standard, as applied to minors, was modified in *Ginzburg v. New York*.[78] The Court realized the necessity of statutes dealing expressly with minors and found a definite state interest in protecting youth.[79] The Court indicated that minors

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arouse a lustful desire. The list of books that judges or juries can place in that category is endless.

Roth v. United States, 354 U.S. 476, 495 (1957).

[72] 383 U.S. 463 (1966). Petitioner Ginzburg and three corporations were convicted of violating the federal obscenity statute, 18 U.S.C. §1461, for mailing three publications, including a popular magazine, *Eros*.

[73] *Id.* at 475-76. The evidence was sufficient to show that each of the three publications involved were openly advertised in a manner intended as a ". . . deliberate representation . . ." of what is "erotically arousing." *Id.* at 470. *Eros* sought mailing privileges from two Pennsylvania hamlets (Blue Ball and Intercourse), and it was obvious to the Court that this choice was made for the purpose of selling "their publications on the basis of salacious appeal." *Id.* at 467.

[74] *Id.* at 467. Justice Brennan relied on the concurring opinion of Chief Justice Warren in Roth v. United States, 354 U.S. 476, 495-96 (1957).

[75] 383 U.S. at 463, where the Court claimed that the defendant "deliberately emphasized the sexually provocative aspects of the work in order to catch the salaciously disposed." *Id.* at 472.

[76] This determination was forecast by Chief Justice Warren in his concurring opinion in *Roth*. See note 40 *supra*.

[77] *See* Stanley v. Georgia, 394 U.S. 557 (1969).

[78] 390 U.S. 629 (1968).

[79] The Court relied on and quoted Chief Judge Fuld in his opinion in People v. Kahan, 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S.2d 391, where he stated:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare

are not entitled to the same constitutional protection to read or view material of their own choice as are adults.[80] The *Ginzburg* standard is complex, for material must fall within one or more objectively defined categories of explicit sexual material and must also be "harmful to minors."[81] This standard incorporates a modification of the *Memoirs* elements: a) an appeal to the prurient interest in minors; b) patent offensiveness as determined by prevailing standards in the adult community with respect to what is suitable for minors; and c) utter lack of redeeming social value

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of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

Id. at 312, 206 N.E.2d at 334-35, 258 N.Y.S.2d at 392.

[80] 390 U.S. at 639-40.

[81] Ginsberg v. New York, 390 U.S. 629 (1966).

The definitional and prohibitory section of the *Ginsberg* statute are as follows:

1. Definitions. As used in this section:

(a) 'Minor' means any person under the age of seventeen years.

(b) 'Nudity' means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) 'Sexual conduct means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) 'Sado-masochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to pervailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) 'Knowingly means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual

for minors.[82] However, the *Ginzburg* decision does not require that statutes conform to this standard. Rather, the Court states that categories defined in a state statute may be constitutionally applied so long as it is "not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."[83]

Obscenity statutes, other than those directed only to minors, must incorporate the *Memoirs* tri-parté test, even though this test was set out in a plurality rather than a majority opinion. As long as Justices Douglas and Black continue to take the view that no general obscenity prohibition is constitutionally permissible, and three other Justices employ the *Memoirs* test as the constitutional standard for determining what is obscene, any statute failing to incorporate this test will be held unconstitutional upon appeal.

Although the Supreme Court requires the states and federal government to incorporate the *Memoirs* test in their statutes, the Court has not aided the lower courts in its application. It now seems apparent that the Court itself has not completely adopted *Memoirs*. In *Redrup v. New York*,[84] the Court reversed three obscenity convictions that had been affirmed in the state courts of New York, Kentucky and Arkansas.[85] Rather than applying the *Memoirs* standards to reach its determination, the Court summarized the views of the different Justices, as expressed in previous opinions, and stated that whichever of these constitutional views is applied to the materials in question, the judgments cannot stand.[86] Therefore, the Court avoided an application of *Memoirs* to the facts of the case, and it was apparent from the *per curiam* opinion that such a decision could either not have been reached by an application of the *Memoirs* test alone, or would not have been reached by *Memoirs* alone because of the divergent views of the Justices.[87]

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conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises wherein there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-maschistic abuse and which is harmful to minors.

Id. at 645-47.

[82] *Id.* at 645.

[83] *Id.* at 639.

[84] 386 U.S. 767 (1967), *per curiam, rehearing denied sub nom.* Austin v. Kentucky, 388 U.S. 924 (1967).

[85] Austin v. Kentucky, 386 S.W.2d 270 (Ky. 1965); Gent v. Arkansas, 239 Ark. 747, 343 S.W.2d 219 (1965).

[86] Redrup v. New York, 386 U.S. 767, 770-71 (1966). See notes 44 through 71 *supra* and text accompanying.

[87] *Id.* at 771.

The refusal by the Court to apply *Memoirs* is evidenced by their decisions since *Redrup*, which have been rendered *per curiam*. They reverse the convictions and cite almost invariably to *Redrup*.[88] Thus, the Court appears to be relying on no standard at all, and instead is rendering *ad hoc* decisions.[89]

PROCEDURAL REQUIREMENTS

Although obscenity in most circumstances falls outside the safeguards of the First Amendment, publications determined not to be obscene must be afforded full constitutional protection.[90] In order to insure complete freedom of dissemination of protected material, the Court has developed a system of "procedural safeguards designed to obviate the dangers of a censorship system."[91] Rather than attempting to apply the traditional due process requirements of the Fifth and Fourteenth Amendments to obscenity determinations, the Court has developed a different standard which inquires as to whether the procedure shows "the necessary sensitivity to freedom of expression."[92] By application of this test, states must regard the possible consequences to constitutionally protected free speech when adopting procedures for dealing with obscenity.[93]

Essential to due process in adjudicating First Amendment rights is the requirement that a judicial, rather than an adminis-

[88] *See* Henry v. Louisiana, 392 U.S. 655 (1968); Felton v. City of Pensacola, 390 U.S. 340 (1968); Robert-Arthur Management Corp. v. Tennessee *ex rel.* Canale, 389 U.S. 578 (1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Chance v. California, 389 U.S. 89 (1967); Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967); Conner v. Hammond, 389 U.S. 48 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967); Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Aday v. United States, 388 U.S. 447 (1967); Avansino v. New York, 388 U.S. 446 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Covert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Kenney v. New York, 388 U.S. 440 (1967).

[89] *See, e.g.*, Hunt v. Keriakos, 428 F.2d 606 (1970), *cert. denied*, 38 U.S.L.W. 3477 (April 13, 1971). Justice Douglas in reference to the material in question merely stated that no picture of the female anatomy if not engaged in sexual activity could be considered obscene.

[90] Like the substantive rules themselves, insensitive procedures can "chill" the right of free expression. *See* Monighan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970) for a complete discussion of procedural problems.

[91] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[92] *Id. See also* Speiser v. Randall, 357 U.S. 513 (1958) where it was recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Id.* at 525.

[93] Marcus v. Search Warrant, 367 U.S. 717 (1961) where the Court stated that "a state is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Id.* at 731. In Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), the Court held, ". . . that the freedoms of expression must be ringed about with adequate bulwarks." *Id.* at 66.

trative, determination of obscenity is necessary.[94] In *Manual Enterprises v. Day*,[95] the petitioner was charged with violating 18 U.S.C. §1461 (1964), which excluded from the mails allegedly obscene material.[96] He first appeared before a "judicial officer" of the Post Office and then appealed the finding of obscenity to an administrative board of the Post Office before the case was litigated in the federal district court. While no majority opinion was reached by the Court, Justice Harlan, joined by Justice Stewart, found the material lacking the essential *Roth* element of patent offensiveness and reversed in favor of the petitioner.[97] In an elaborate concurring opinion, Justice Brennan, joined by Chief Justice Warren and Justice Douglas, raised the question of whether Congress could provide that the issue of obscenity be determined by any forum other than a court, without violating the "procedural safeguards" necessary to prevent "erosion of First Amendment liberties."[98] In his opinion, Justice Brennan

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[94] The hearing need not be a "fully matured action at law." Fontaine v. Dial, 303 F. Supp. 436, 440 n.7 (W.D. Tex. 1969), *appeal dismissed*, 399 U.S. 521 (1970). A good description of a hearing is found in the Brief for Appellee at 15, Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970):

> No precedent contemplates that such a hearing be a plenary trial. At best it would be similar to the preliminary hearings afforded defendants in felony . . . cases. Its purpose could be to determine whether prima facia a crime had been committed. Such a hearing would in effect be the sole protection that an exhibitor would have against harassment and disruption of business activities. It would be conducted in a courtroom with due process procedures including the . . . right of cross-examination. It would have a salutary effect in that some exhibitors upon being apprised of such a hearing may voluntarily discontinue exhibition without having to run the gamut of sudden seizure and arrest. It removes the onus on judges of having to ride circuit to various theatres. . . .

Id. at 15.

[95] 370 U.S. 478 (1962) (Brennan, J., concurring):

> I imply no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts.

Id. at 518-19.

In Freedman v. Maryland, 380 U.S. 51 (1965), Mr. Justice Brennan made the Court's position quite clear:

> [B]ecause only a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.

Id. at 58. See discussion *infra* of Blount v. Rizzi. For a history of the administrative proceeding and court determination conflicts, *see* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

[96] 18 U.S.C. §1461 (1964) declared that obscene materials were "nonmailable matter [which] shall not be conveyed in the mails or delivered from any post office or by any letter carrier." For a collection of cases dealing with the power of the Post Office to bar obscene materials from the mails, *see* Annot., 76 L. Ed. 845 (1932); Annot., 8 L. Ed. 2d 1045 (1963). *See* Paul & Schwartz, *Obscenity in the Mails; A Comment on Some Problems of Federal Censorship*, 106 U. PA. L. REV. 214 (1957).

[97] 370 U.S. at 495.

[98] *Id.* at 497-98. In dissent, Justice Clark apparently disagreed, *id.* at 523-24, yet he purported to reserve judgment on the point. Id. at 521 n.2.

seemed to suggest that the First Amendment, itself, rather than the due process clause demanded a judicial determination of obscenity.[99] The use of the First Amendment as the basis for due process in obscenity determinations would mean that the procedural rules flowing therefrom would be directly responsive to the First Amendment interests which the rules are designed to protect.

The following year in *Bantam Books v. Sullivan*,[100] the Court condemned a procedure where a state obscene literature committee pressured local retailers into removing objectionable materials from their shelves by rendering "advice" in the form of threatened criminal prosecution. The Court held that the actions of the commission resulted in an unconstitutional prior restraint on expression.[101] In condemning the procedure the Court relied on two deficiencies; that there was no "judicial superintendence" of the commission and no guarantee of an *immediate judicial determination* of the validity of the commission's decision.[102]

In *Freedman v. Maryland*,[103] which followed *Bantam Books*, the Court invalidated the Maryland motion picture censorship statute. Crucial to the decision was the Court's statement:

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.[104]

The Court's preference for a judicial determination, rather than a decision by an administrative agency is a result of the belief that judges will be more likely to be sensitive to the guarantees of the First Amendment.[105] In addition, judges usually serve

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Justice Harlan intimated that previous decisions of the Court would permit such a procedure, but reversed an express statement until a "full-dress argument and briefing" was presented. *Id.* at 480 n.2.

[99] Similarly it was suggested that judicial review of administrative agency decision would be required by use of Article III of the Constitution in addition to the due process clause. *See* Crowell v. Benson, 285 U.S. 22 (1932).

[100] 372 U.S. 58 (1963).

[101] *Id.* at 72. The operation of the committee "was in fact a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress." In State Cinema, Inc. v. Ryan, 303 F. Supp. 579 (D. Mass. 1969), the court found *Bantam Books* applicable only to public threats by local officials not private citizen groups.

[102] *Id.* at 70-72.

[103] 380 U.S. 51 (1965). *See also* Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968).

[104] 380 U.S. at 58.

[105] Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. A. BICKEL, THE LEAST DANGEROUS BRANCH 25-62 (1962).

for long periods and are less likely to be influenced by political considerations, so frequent in administrative decisions.[106]

While it is clear that it is necessary to have a judicial adjudication rather than an administrative proceeding, the exact role of the jury in such a determination is not so clear. Since *Duncan v. Louisiana*[107] established that a defendant in a proceeding for a serious crime is entitled to a trial by jury,[108] the question of whether the First Amendment requires the existence of a jury for an obscenity determination has been raised. Although Justice Brennan in *Kingsley Books v. Brown*[109] urged that the absence of a jury in obscenity proceedings was a "fatal defect,"[110] he seems to have abandoned this position. In *Jacobellis v. Ohio*,[111] Justice Brennan again considered the role of the jury and he concluded that the question of obscenity is an issue of constitutional law, which must be ultimately decided by the Supreme Court.[112] Therefore, the jury's participation in a criminal obscenity trial would seem to be limited to a factual determination of the defendant's conduct, such as determining the issue of pan-

[106] The relative insulation of the judges, means, as Professor Hart observed, that the "structure of American institutions" predestined courts "to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles. . . ." Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

[107] 391 U.S. 145 (1968). The critical question, however, is whether the judge, if he finds that the speech is unprotected, must submit the issue to the jury. Dennis v. United States, 341 U.S. 494 (1951), indicates that the defendant has no constitutional right to insist that the jury pass on the protected character of the speech. There a divided Court held that the trial judge had not erred in refusing to submit to the jury the issue of whether the speech constituted a "clear and present danger." But whatever the extent of constitutional compulsion, surely no error is committed if the trial judge does permit the jury to consider whether the speech is protected — so long as the judge himself has made a determination that it is not.

[108] *Id.* at 147-58.

[109] 354 U.S. 436 (1957).

[110] *Id.*

> The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, *i.e.*, that reasonable men may differ whether the material is obscene.

Id. at 448.

[111] 378 U.S. 184 (1964).

[112] *Id.* at 188. Shortly after *Jacobellis* the Supreme Court reversed, *per curiam* two Florida appellate decisions where the opinion had stated, "It is for the trier of fact to determine . . . whether or not a given publication is in fact obscene." *See* Grove Press v. Gerstein, 156 So. 2d 537 (Fla. Dist. Ct. App. 1963) and Tralins v. Gerstein, 151 So. 2d 19 (Fla. Dist. Ct. App. 1963).

dering. The actual decision as to the nature of the materials, therefore, should be decided by the trial judge as a question of law. Justice Black, however, has disagreed and has stated that judges "possess no special expertise" qualifying them "to supervise the morals of the Nation" or to decide what is "good or bad for local communities."[113] Despite Justice Black's position, authorities have urged that this is the correct role of the judge, for he has a far keener understanding of the freedom of expression than most jurors.[114]

The constitution requires the use of "sensitive tools"[115] for the determination of First Amendment claims which cannot be satisfied simply by a judicial proceeding. The determination of obscenity must either precede governmental action or immediately follow it. The Court has recognized that there are limited situations where prior restraint may be permissible. In *Kingsley Books, Inc. v. Brown*,[116] the Court upheld a statute permitting an ex parte injunction to prevent sale and distribution of printed obscene material, prior to an adversary hearing. However, the Court was quick to point out that the duration of the order was brief, for an adversary proceeding was to follow within twenty-four hours and a decision was guaranteed within two days after the conclusion of the hearing. Only after a final determination of the obscenity was a seizure of the material permitted.[117] The Court has recognized that motion picture exhibitors may be subject to the same type of restraint prior to a public showing.[118] In *Times Film Corp. v. Chicago*,[119] the majority, *per* Justice Clark, stated that a requirement to submit a motion picture to an examination for obscenity prior to a public exhibition is not, in itself, unconstitutional on its face.[120] However, the opinion made it clear that the decision did not rule on the "statutory standards employed by the censor or the procedural requirements as to submission of the films," but only on the challenge to

[113] Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 690 (Black, J., concurring 1959).

[114] Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 119 (1960). For a complete discussion of the requirement of adversary hearings in obscenity regulation and other areas of speech, see Note, *Prior Adversary Hearings*, 46 N.Y.U.L. REV. 80 (1971).

[115] Speiser v. Randall, 357 U.S. 513, 525 (1958).

[116] 354 U.S. 436 (1957).

[117] *Id.* at 439.

[118] Some courts believe live theatre productions must be treated differently from either films or books. "The immediacy of the live theatre, its easy access to the audience. . . distinguish it from a film production where the possibilities of sexual exhortation and of giving offense are fixed in celluloid." P.B.I.C., Inc. v. Byrne, 313 F. Supp. 757, 762 (D. Mass.), *appeal filed*, 39 U.S.L.W. 3067 (U.S. Aug. 1, 1970). *Accord*, People v. Bercowitz, 61 Misc. 2d 974, 981-82, 308 N.Y.S.2d. 1, 9 (Crim. Ct. 1970).

[119] 365 U.S. 43 (1969).

[120] *Id.* at 49.

the authority of a censor to require such a submission.[121] There followed a vigorous dissent by Chief Justice Warren, in which he argued that the Chicago licensing statute in question was "censorship in its purest" form.[122] The Chief Justice recognized that this decision relied on *Kingsley,* but distinguished that case because there the Court upheld a statute which insured prompt judicial review. The Chicago statute, he contended, did not incorporate such an assurance.[123]

The failure of the Court in *Times Film* to discuss the standards necessary to permit a limited restraint prior to a judicial determination necessitated the decision of the Court in *Freedman v. Maryland.*[124] There the Court invalidated the Maryland picture censorship statute which required an exhibitor to submit the film to an administrative censorship board prior to public exhibition. If the film was disapproved by the Board, the exhibitor had the burden of instituting judicial review of the censor's decision. The Court, in a decision by Justice Brennan, held that in this situation "judicial review may be too little and too late."[125] While the Court was unwilling to hold that a motion picture exhibitor had an absolute right to show a film without a prior submission to a censor, they stated that such a procedure would only be constitutional if the exhibitor was assured that the censor would either issue a license or "go to court to restrain showing the film [within] . . . a specified brief period."[126] Further, they held that "the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."[127] Then the Court in a very unusual move delineated exactly what a statute must contain so that it will be constitutional in light of the First Amendment:

> First, the burden of proving that the film is unprotected expression must rest on the censor . . . . Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. 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. . . . Third, the procedure must also assure a prompt final judicial decision, to minimize the deterrent

[121] *Id.* at 50.
[122] *Id.* at 54.
[123] *Id.* at 65-66.
[124] 380 U.S. 51 (1965).
[125] *Id.* at 57.
[126] *Id.* at 58-59.
[127] *Id.* at 59.

effect of an interim and possibly erroneous denial of a license.[128] In light of *Freedman,* the Chicago motion picture ordinance, upheld in *Times Film,* was subsequently struck down in *Teitel Film Corp. v. Cusak.*[129] The ordinance had allowed 50 to 57 days to complete the administrative process and also, failed to provide for a prompt decision by a court of the nature of the film, if found obscene by the censor.[130]

Although *Kingsley* and *Freedman* do permit prior restraint in a limited sense, the Court has consistently refused to permit wholesale seizures of materials prior to an adversary proceeding before a court. Two decisions dealing with wholesale seizures of printed materials were primarily responsible for this development. In *Marcus v. A Search Warrant of Property,*[131] police officers, acting under a vague, ex parte search warrant, seized over 1,000 copies of 280 publications before a judicial determination of the unprotected nature of the materials was made.[132] The hearing after the seizure resulted in a finding that 180 of the publications were not obscene. The majority, per Justice Brennan, stated that the states were not free to adopt any procedure they saw fit regarding obscenity. The Court held that before speech can be regulated or suppressed, the Constitution requires a procedure "designed to focus searchingly on the question of obscenity."[133] Here the Court felt the warrants left far too much discretion in the arresting officer.[134]

In *A Quantity of Books v. Kansas,*[135] the Court condemned a more restrictive procedure than the one found in *Marcus.* Here, a judge examined seven books which appeared under the label

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[128] *Id.* at 58-59.

[129] 390 U.S. 139 (1967).

[130] *Id.* at 141. An expedited appeal process is also required if restraint is sought during the appeal. *See* Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690 n.22 (1968). However, it has been suggested that a publisher who wins in a lower court should not be subjected to restraint pending appeal. Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969).

[131] 367 U.S. 717 (1961).

[132] 15 MO. SUP. CT. R. CRIM. P. 33.01 (1970) and MO. REV. STAT. §542.380 (1967), provided that a warrant could issue if the judge was satisfied there was probable cause to believe that obscene materials were in the place to be searched.

> The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each . . . [officer] involved the selection of such magazines as in his view constituted 'obscene . . . publication'.

367 U.S. 717, 732 (1961).

[133] *Id.* at 731.

[134] *Marcus* has been interpreted by some lower courts to invalidate seizures when the choice of items seized was with the officers' discretion. *See* United States v. Marti, 421 F.2d 1263 (2d Cir. 1970); Entertainment Ventures, Inc. v. Brewer, 306 F. Supp. 802 (M.D. Ala. 1969); Gregory v. DiFlorio, 298 F. Supp. 1360 (W.D.N.Y. 1969); Evergreen Review, Inc. v. Cahn, 230 F. Supp. 498 (E.D.N.Y. 1964).

[135] 378 U.S. 205 (1964).

Night Stand. He concluded that they were obscene and were representative of all books appearing under that label. Upon this conclusion, he issued a warrant for the seizure of all the copies of the seven books and all other books which appeared under the same label. In holding that the procedure was constitutionally deficient with respect to all the books, Justice Brennan in a plurality opinion, stated that any seizure of books prior to an adversary hearing on their unprotected character was an impermissable intrusion upon First Amendment rights.[136] He stated that if any "seizure of books preceded an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books."[137]

The reasons underlying the Court's decision in *Books,* and the reliance by the Court upon that decision in *Freedman,*[138] strongly suggest that the propriety of any interim restraint of a film, as well as a book, must be conditioned upon the availability of a prior adversary proceeding. The justification for this requirement is apparent in the exhibition of films, where an ex parte injunction can have a devastating effect.[139] If the theater is showing a film, and an ex parte injunction is issued, the theater's business will be interrupted, which could result in a serious financial loss. An adversary hearing prior to the issuance of an injunction will clearly reduce the chances of an erroneous decision, for the presence of both parties will insure a more accurate description of the relevant factual considerations, as well as direct the judge's attention to the relevant legal principles.[140] A prior adversary hearing will also satisfy the constitutional re-

[136] *Id.* at 211. *See also* Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Metzger v. Pearcy, 393 F.2d 202, 204 (7th Cir. 1968); Cambist Films, Inc. v. Illinois, 292 F. Supp. 185 (N.D. Ill. 1968); United States v. Brown, 274 F. Supp. 561 (S.D.N.Y. 1967).

[137] 378 U.S. at 213.

[138] See text accompanying notes 124 through 128 *supra.*

[139] The cost of producing "adults only" paperback books is relatively expensive because press runs are normally small, yet they still usually cost only between $0.10 and $0.20 per copy to produce. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 114-15 (Bantam Books ed. 1970). Major film productions can cost as much as $2 million. "Exploitation" film budgets range from $3,000 to $100,000, with the average cost being $40,000 to produce the negative and $60,000 to release it. *Id.* at 95. The argument may not be valid when "skinflicks" are involved since it will only cost a producer between $900 and $1500 to produce 100 copies each of four stag films. *Id.* at 140.

[140] *See* P.B.I.C., Inc. v. Byrne, 313 F. Supp. 757, 761 (D. Mass. 1970), *appeal filed,* 39 U.S.L.W. 3067 (U.S. Apr. 1, 1970) where the Boston production of "Hair" had $600,000 in advance ticket sales at the time of filing suit. An "exploitation" film, such as "He and She," has a gross earning potential of $100,000 per week from showing in eight theatres. VARIETY, Sept. 2, 1970, at 9.

quirement that a person may not be deprived of property, here, box office receipts, without due process of law.[141]

While Freedman seemed to make clear by its reference to *Kingsley,* and its reliance upon *Books,* that "any restraint . . . until a judicial determination of obscenity following notice and an adversary hearing,"[142] would not be permitted, a subsequent decision by the Court has caused considerable confusion in the state and lower federal courts. In *Lee Art Theatre, Inc. v. Virginia,*[143] the Court voided the seizure of a film, stating that the warrant which authorized the seizure was based upon conclusory evidence, not upon facts. The warrant was issued upon a police officer's affidavit giving the film's title and stating that he had determined from personal observation of the film and observation of the theater's billboard that the film was obscene. The Court held in a brief, *per curiam* opinion that based upon the officer's assertions, "without any scrutiny by the judge of any materials considered" that the seizure of the film was unconstitutional in light of *Marcus.*[144] But, the Court expressly reserved the issue of "whether the justice of the peace should have viewed the motion picture before issuing the warrant,"[145] and recognized the difficulty of a judge doing so. By this language the Court intimated that it was not necessary to have an adversary proceeding prior to the issuance of a warrant, provided that the judge "scrutinize" the materials. And, indeed, this is exactly what some state and lower federal courts took these words to mean.[146]

One district court has interpreted the dictum in *Lee Art* to mean that if the judge views the film himself, and in his own judgment finds it obscene, or if he inquires into the factual basis for the officer's conclusion that it is obscene, he may issue a warrant to have it seized, and there need be no prior adversary hear-

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[141] U.S. CONST. *amend.* V.

[142] Freedman v. Maryland, 380 U.S. 51, 60 (1965).

[143] 392 U.S. 636 (1968).

[144] *Id.* at 636-37.

[145] *Id.* at 637.

[146] *See, e.g.,* United States v. Wild, 422 F.2d 34 (2d Cir. 1969), *rehearing denied,* 422 F.2d 38 (1970), *petition for cert. filed,* 38 U.S.L.W. 3348 (U.S. Mar. 4, 1970); United States v. Pryba, 312 F. Supp. 466 (D.D.C. 1970); Hosey v. City of Jackson, 309 F. Supp, 527 (S.D. Miss. 1970), *appeal filed,* 38 U.S.L.W. 3433 (U.S. Apr. 25, 1970); Rage Books, Inc. v. Leary, 301 F. Supp. 546 (S.D.N.Y. 1969). *See also* United States v. One Carton Positive Motion Picture Film Entitled "491," 367 F.2d 889 (2d Cir. 1966). In Bazzell v. Gibbens, 306 F. Supp. 1057 (E.D. La. 1969) the court reasoned that whether or not a prior adversary hearing was necessary depended upon the nature and purpose of the seizure; if made for the purpose of destroying the thing seized and for the purpose of preventing the dissemination of the articles seized then such a hearing is mandated by the First Amendment. However, the court concluded that where a single copy of a film is seized for the sole purpose of preserving it for evidence in a criminal action, such a seizure does not violate the First Amendment.

ing.[147] The court did caution, however, that based upon *Kingsley*, a statute permitting seizures prior to an adversary hearing must insure that such a hearing will follow within a brief specified period.[148] However, this reasoning should be closely examined for *Kingsley* did not involve a seizure at all but rather an injunction against sale. And *Kingsley* expressly forbid a seizure until a judicial determination was made.[149]

Another district court has held that under *Lee Art*, not only is there no requirement for a hearing prior to the issuance of a warrant for the seizure of a film, but that the only purpose for the presence of the exhibitor and counsel at a required post-seizure hearing is "to insure that the film viewed is the same as that described in the affidavit and seized pursuant to the warrant."[150]

However, these lower court interpretations and reliance upon *Lee Art* are wholly inconsistent with the Supreme Court's holdings in *Marcus* and *Books*. While both of these cases dealt with seizures of books rather than motion pictures, the Court stressed in both opinions the importance of an adversary proceeding to insure preservation of First Amendment rights.[151] *Books* and *Marcus*, read conjunctively, state that these rights can not be adequately preserved unless the required adversary hearing takes place before any restraint is imposed.[152] And *Books* expressly stated that a subsequent hearing would not cure the procedural defect of failing to hold an adversary proceeding before the warrant authorizing the seizure was issued.[153] The great majority of courts have chosen to follow the rationale of *Books*, and have applied its dictates to films as well as printed publications.[154] These cases support the proposition that before a warrant can issue authorizing the wholesale seizure of allegedly obscene films, an adversary hearing on the question of obscenity

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[147] Merritt v. Lewis, 309 F. Supp. 1249 (E.D. Cal. 1970).

[148] *Id.* at 1255.

[149] 354 U.S. 436, 445 (1957).

[150] 309 F. Supp. at 1255.

[151] "The requirement of an adversary hearing prior to seizing allegedly obscene material is completely derived from the First Amendment's right of free speech. United States v. Manarite, 314 F. Supp. 607, 610 (S.D.N.Y. 1970). *But see* Gregory v. DiFlorio, 298 F. Supp. 1360, 1363 (W.D.N.Y. 1969), which seems to rely on the Fourth Amendment as the basis for a prior adversary hearing.

[152] Many courts cite *Marcus* as authority for the proposition that a prior adversary hearing is a requirement of procedural due process. Cambist Films, Inc. v. Duggan, 420 F.2d 687, 689 (3d Cir. 1969); HMH Publishing Co. v. Oldham, 306 F. Supp. 495, 496 (M.D. Fla. 1969); Gregory v. DiFlorio, 298 F. Supp. 1360, 1363 (W.D.N.Y. 1969).

[153] 378 U.S. at 210.

[154] Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir.), *cert. denied*, 396 U.S. 985, (1969); Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968); Morrison v. Wilson, 307 F. Supp. 196 (N.D. Fla. 1969); Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969); Sokolic v. Ryan, 304 F.

must be held. The very purpose of the hearing is to provide the sensitive tools to determine the protected nature of the material before imposition of substantial restraints.[155] It has been held that the judge's viewing of the film, without holding a prior adversary hearing, cannot provide these sensitive tools and satisfy the requirement of the First Amendment for an adversary hearing.[156] Despite the government's persistent argument that *Books* should be limited to the seizures of printed publications, and not films, all three Courts of Appeals which have considered *Books*' application to films have held that a prior adversary hearing is required.[157]

While the courts, for the most part, have refused to give any importance to the dictum in *Lee Art*, several have recognized the validity of the government's contention that if a film is not seized, the exhibitor may delete sections of it which are crucial to the government's case.[158] Therefore, most decisions requiring an adversary hearing prior to seizure have added the requirement suggested in the Seventh Circuit's holding in *Metzger v. Pearcy*.[159] In that case the Circuit Court of Appeals ordered that the seized film be returned to the exhibitor for there was not an adversary hearing prior to the issuance of the warrant. However, the court stated that the exhibitor would be required to furnish the court with a copy of the film, uncut, for the purpose of preserving it for criminal prosecution.[160] Other courts have held similarly that the exhibitor must make the film, or prints of

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Supp. 213 (S.D. Ga. 1969); Central Agency, Inc. v. Brown, 306 F. Supp. 502 (N.D. Ga. 1969); Fontaine v. Dial, 303 F. Supp. 436 (W.D. Tex. 1969); Cambist Films, Inc. v. Illinois, 292 F. Supp. 185 (N.D. Ill. 1968); United States v. Brown, 274 F. Supp. 561 (S.D.N.Y. 1967); Carter v. Gautier, 305 F. Supp. 1098 (M.D. Ga. 1969); Carroll v. City of Orlando, 311 F. Supp. 967 (M.D. Fla. 1970); Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967) (dictum); Gregory v. DiFlorio, 298 F. Supp. 1360 (W.D.N.Y. 1969); Miske v. Spicola, 314 F. Supp. 962 (M.D. Fla. 1969).

[155] United States v. Alexander, 428 F.2d 1169, 1174 (1970).

[156] Bethview Amusement Corp. v. Cahn, 416 F.2d 410, 412 (2d Cir. 1969).

[157] Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir.), *cert. denied*, 396 U.S. 985 (1969); Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968).

[158] It seems ludicrous to suggest that apprehension of suspected criminals and their unsavory wares requires adversary court proceedings to stamp the contents as probably obscene. . . . While this sort of scene is being enacted . . . the evidence could be consumed . . . or destroyed . . . or . . . the itinerant hucksters will . . . have flown the coop.

Rage Books, Inc. v. Leary, 301 F. Supp. 546, 549 (S.D.N.Y. 1969). And other courts have held that since the material is needed for criminal prosecution; a hearing need not be held. United States v. Wild, 422 F.2d 34 (2d Cir. 1969), *rehearing denied*, 422 F.2d 34 (1970), *petition for cert. filed*, 38 U.S.L.W. 3348 (U.S. Mar. 4, 1970); Merritt v. Lewis, 309 F. Supp. 1249 (E.D. Cal. 1970); Hosey v. City of Jackson, 309 F. Supp. 527 (S.D. Miss. 1970), *appeal filed*, 38 U.S.L.W. 3433 (U.S. Apr. 25, 1970); Bazzell v. Gibbens, 306 F. Supp. 1057 (E.D. La. 1969); Rage Books, Inc. v. Leary, 301 F. Supp. 546 (S.D.N.Y. 1969).

[159] 393 F.2d 202 (7th Cir. 1968).

[160] *Id.* at 204.

it, available upon the government's request, so that the prosecutor may prepare his case.[161]

Incidental to seizures of allegedly obscene material is the arrest of the disseminator. It has been urged successfully in some lower federal courts that the First Amendment forbids arrest of a purveyor of allegedly obscene material until there has been a judicial determination of the nature of the materials.[162] It has been pointed out that the material may be purchased by an officer acting as an ordinary customer, who can present the material to the court in an adversary proceeding.[163] If the court finds the material to be obscene, then, and only then, should the person who sold the officer the material be arrested.[164] Other courts have rejected this notion entirely and have held that the arrest of an exhibitor of an allegedly obscene film, be it the theater's owner, manager, or projectionist, prior to a final judicial determination does not violate the First Amendment.[165] These courts simply rely on a showing of "probable cause," which does not seem to be consistent with the other strict requirements the

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[161] United States v. Alexander, 428 F.2d 1169 (8th Cir. 1970); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir.), *cert. denied*, 396 U.S. 985 (1969).

[162] *See* New Orleans Book Mart, Inc. v. Garrison, No. 69-2521 (E.D. La., Dec. 31, 1969) (enjoining police from further arrests before a prior adversary hearing had been held); Sokolic v. Ryan, 304 F. Supp. 213 (S.D. Ga. 1969) (ordering restoration of petitioner's business license which had been revoked without a prior adversary hearing); City News Center, Inc. v. Carson, 298 F. Supp. 706 (M.D. Fla. 1969) (the court issued an order restraining defendants from making arrests without first holding, with due notice, a judicially supervised adversary hearing on the issue of obscenity). In Bee See Books, Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968), the court enjoined the defendant police commissioner from continually stationing a uniformed policeman in the plaintiff's bookstore as an unconstitutional restraint under the first and fourteenth amendments. The court interpreted *Books* as requiring an adversary hearing prior to the application of any restraints upon dissemination. *Id.* at 625. However all the above cases precede Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969) *aff'd sub nom.* New York Feed Co. v. Leary, 397 U.S. 98 (1970), where the court held that the arrest of a purveyor of obscene material prior to a determination of obscenity does not violate the First Amendment. *Id.* at 295-97.

[163] Purchase may prove useful in obtaining evidence in cases involving stag films since most producers do not invest enough to make it worth their while to obey an order prohibiting destruction of the material. However, the court in Rage Books, Inc. v. Leary, 301 F. Supp. 546 (S.D.N.Y. 1969), rejected this method feeling that there was no need to "fill the coffers of smut peddlers." *Id.* at 549. This method is not practical in those cases involving major film productions, where the cost of purchase is prohibitive.

[164] Delta Book Distributors v. Cronvich, 304 F. Supp. 662, 667 (E.D. La. 1969), where Justice Boyle stated that it was irresistible in logic and law that prior restraint through seizure of the allegedly obscene material or arrest of the alleged offender may be constitutionally undertaken prior to an adversary adjudication.

[165] *See* Pinkus v. Arnebergh, 258 F. Supp. 996 (C.D. Cal. 1966) (arrest of exhibitor does not violate first amendment); *cf.* Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288, 295-97 (S.D.N.Y. 1969), *aff'd sub nom.* New York Feed Co. v. Leary, 397 U.S. 98 (1970); Rage Books, Inc. v. Leary, 301 F. Supp. 546, 549 (S.D.N.Y. 1969).

Court has laid down to prevent an inhibition of First Amendment rights.

In order to establish criminal liability, the government has the burden of proving that the defendant had knowledge of the contents of the allegedly obscene material,[166] to the extent that such knowledge constitutes scienter. It must, therefore, be shown that the defendant knew, to some degree, the illegal character of the material. In *Smith v. California*,[167] the Court found that a statute making the sale of obscene material a crime without requiring scienter, was inharmonious with the guarantees of the First Amendment:

> If the bookseller is criminally liable without knowledge of the contents he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.[168]

In *Mishkin v. New York*,[169] a state statute was upheld which required that the defendant be "in some manner aware of the character of the material" so that only a "calculated purveyance of filth" was prohibited.[170]

Although, the Supreme Court has stated that a conviction for the sale of obscene material must require knowledge of the contents, in *Smith* it expressly refused to determine what amount of knowledge must be shown.[171] Several state and lower federal courts, however, have ruled that there are circumstances which make it incumbent upon the defendant to inquire further into the contents of the material, and that proof of the existence of these circumstances may be substituted for proof of actual knowledge of the contents. Among these circumstances are: 1) the "erotic," "lurid," or "vile" titles of the books;[172] 2) "obscene," "smutty" or "blatant" pictures on the covers of the books;[173] 3) the advertising and other material promoting the book;[174] 4) complaints received by the defendant that the material he was selling was "filthy";[175] 5) the fact that the supplier from whom the material was obtained was a dealer in erotic

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[166] Smith v. California, 361 U.S. 147 (1959).
[167] *Id.*
[168] *Id.* at 153.
[169] 383 U.S. 502 (1966).
[170] *Id.* at 503. *See also* Ginsberg v. New York, 390 U.S. 629, 443-45 (1967); Winters v. New York, 333 U.S. 507, 520 (1947).
[171] 361 U.S. at 154.
[172] United States v. Hochman 277 F.2d 631 (7th Cir. 1960); City of Cincinnati v. Coy, 115 Ohio App. 478, 182 N.E.2d 628 (1962).
[173] People v. Harris, 192 Cal. App. 2d 887, 13 Cal. Rptr. 642 (Super. Ct. App. Dept. 1961); People v. Sikora, 32 Ill. 2d 260, 204 N.E.2d 768 (1965).
[174] State v. Jungelaus, 176 Neb. 641, 126 N.W.2d 858 (1964).
[175] People v. Williamson, 207 Cal. App. 2d 839, 24 Cal. Rptr. 734 (Dist. Ct. App. 1962), *cert. denied*, 377 U.S. 994 (1964).

books.[176] One state court has even held that the fact that the defendant knew that other booksellers in the area had been arrested for selling the same book placed him on notice of the character of the book, and he assumed the risk that the court would find it obscene.[177]

LEGISLATIVE CONTROL

Operating on the premise that *Roth* and its progeny mean that the First and Fourteenth Amendments recognize a valid governmental interest in regulating obscenity, every state has enacted legislation to control dissemination of obscene material.[178] All the states, with the exception of New Mexico,[179] have sought state-wide control of obscenity through criminal statutes designed to suppress commerce in obscene materials. Consequently, transporting obscene material *into* a state for commercial distribution is unlawful,[180] as well as possessing obscene literature with the intent to distribute it commercially.[181] Many states pro-

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[176] State v. Cercone, 2 Conn. Cir. 144, 196 A.2d 439 (App. Div. 1963); State v. Onorato, 2 Conn. Cir. 428, 199 A.2d 715 (App. Div. 1963).

[177] Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962). The Supreme Court of Maryland reversed the conviction of a bookdealer on the ground that the trial court had erred in refusing to admit expert testimony on the issue of obscenity. While considering that issue, however, the court noted that booksellers in the same area had been arrested for selling the same book and that defendant had actual knowledge of such arrests. As a result, the court concluded that "the defendant, though he had some doubt as to whether the book could be banned, chose to take the risk that a court would not declare it to be obscene," and that his conviction could not, therefore, be reversed on the ground of belief in the nonobscenity of the material. *See also* United States v. Oakley, 290 F.2d 517 (6th Cir.), *cert. denied*, 368 U.S. 888 (1961) in which the Sixth Circuit sustained a federal conviction for sending photographs of nude women through the mails. The defense of belief in the nonobscenity of the materials was rejected by the Court in the following words:

> From his experience with these matters, [defendant] was persuaded, he says, that his enterprise was not illegal, and criminal intent was absent . . . [but it] was for the jury here, under proper instructions and applying 'contemporary community standards' in the context of defendant's conduct, to determine his guilt.

Id. at 519.

[178] Notes 2 through 6 *supra*. *See generally* McCarty, *Obscenity from Stanley to Karlexis: A Back Door Approach to First Amendment Protection*, 23 VAND. L. REV. 369 (1970).

[179] New Mexico has failed to enact state statutes, but vests control in local municipalities. N.M. STAT. ANN. §14-17-14 (1953). Several states, in addition to state laws, give local governments regulatory powers: *e.g.* ILL. REV. STAT. ch. 24, §11-5-1 (1969); N.D. CENT. CODE §40-05-01 (1968); S.D. COMPILED LAWS ANN. §22-24-25 (Supp. 1970).

[180] ALA. CODE tit. 14, §374(4)(1) (Supp. 1967); ARIZ. REV. STAT. ANN. §13-532(2) (Supp. 1969); GA. CODE ANN. §26-6301 (Supp. 1968); HAWAII REV. STAT. §727-8 (1959); KAN. STAT. ANN. §21-1102 (1964); MASS. ANN. LAWS ch. 272, §§28A, 28B (1968); MD. ANN. CODE art. 27, §418 (Supp. 1968); MISS. CODE ANN. §2674-03 (Supp. 1970); N.D. CENT. CODE §12-21-09 (1960); OKLA. STAT. ANN. tit. 21, §1040.13 (Supp. 1970-71); R.I. GEN. LAWS ANN. §11-31-1 (Supp. 1969); S.C. CODE ANN. §16-414.1 (Supp. 1970); S.D. COMPILED LAWS ANN. §22-24-24 (Supp. 1970); TEX. PEN. CODE ANN. art. 527, §3 (Supp. 1970-71); W. VA. CODE ANN. §61-8-11 (1966); WIS. STAT. ANN. §944.21(1)(a) (1958).

[181] ALA. CODE tit. 14, §374(4)(1) (Supp. 1967); ARIZ. REV. STAT. ANN. §13-532(3) (Supp. 1969-70); CONN. GEN. STAT. REV. §53-243 (1968); DEL.

hibit the buying of obscene materials with the intent to sell,[182] while others prohibit preparation, display, sale, offer for sale, or any other distribution.[183] Most jurisdictions have statutory provisions prohibiting sale or distribution of erotica to young persons.[184] Many of these youth statutes are closely patterned after the New York statute upheld in *Ginsburg v. New York*.[185] These statutes usually adopt the tri-parté *Memoirs* test, adapted for

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CODE ANN. tit. 11, §711 (1953); D.C. CODE ANN. §22-2001(a)(1)(E) (Supp. 1, 1968); HAWAII REV. LAWS §727-8 (1959); IOWA CODE ANN. §725.5 (1950); KAN. STAT. ANN. §21-1102 (1964); LA. REV. STAT. ANN. §14:106 (West Supp. 1969); MD. ANN. CODE art. 27, §418 (Supp. 1969); MASS. ANN. LAWS ch. 272, §§28A, 28B (1968); MICH. STAT. ANN. §28.575(1) (Supp. 1969); MISS. CODE ANN. §2674-03 (Supp. 1968); NEB. REV. STAT. §28-921 (1964); NEV. REV. STAT. §201.250(2) (1967); N.H. REV. STAT. ANN. §571-A:2 (Supp. 1969); N.J. STAT. ANN. §2A:115-2 (1969); N.Y. PENAL LAW §235.05 (McKinney Supp. 1969-70); N.D. CENT. CODE §12-21-09 (1960); OKLA. STAT. ANN. tit. 21, §1040.13 (Supp. 1969-70); PA. STAT. ANN. tit. 18, §4524(a) (Supp. 1969); R.I. GEN. LAWS ANN. §11-31-1 (Supp. 1967); S.C. CODE ANN. §16-414.2 (Supp. 1968); TEX. PEN. CODE ANN. art. 527, §3 (Supp. 1969-70); UTAH CODE ANN. §76-39-5-(3) (Supp. 1969); VA. CODE ANN. §18.1-228(4) (Supp. 1968); W. VA. CODE ANN. §61-8-11 (1966); WYO. STAT. ANN. §6-103 (Supp. 1969).

[182] *E.g.*, CONN. GEN. STAT. REV. §53-243 (1968); MASS. ANN. LAWS ch. 272, §§28A, 28B (1968); R.I. GEN. LAWS ANN. §11-31-10 (Supp. 1969); UTAH CODE ANN. §76-39-5 (Supp. 1969); W. VA. CODE ANN. §61-8-11 (1966).

[183] ALA. CODE tit. 14, §374(4)(1) (Supp. 1967); ALASKA STAT. §§11.40.160, 11.40.170 (1962); ARIZ. REV. STAT. ANN. §13352(1) (2) (Supp. 1969); ARK. STAT. ANN. §§41-2729, 41-2731 (Supp. 1967); DEL. CODE ANN. tit. 11, §711 (1953); D.C. CODE ANN. §22-2001(a)(1)(A) (Supp. 1, 1968); FLA. STAT. ANN. §847.011(1)(a) (1965); GA. CODE ANN. §26-6301 (Supp. 1968); HAWAII REV. STAT. §727-8 (1959); ILL. ANN. STAT. ch. 39, §11-20 (Smith-Hurd Supp. 1969); IND. ANN. STAT. §10-2803 (Supp. 1968); IOWA CODE ANN. §725.5 (1950); KAN. STAT. ANN. §21-1102 (1964); MASS. ANN. LAWS ch. 272, §§28A, 28B (1968); ME. REV. STAT. ANN. tit. 17, §2901 (1964); MD. ANN. CODE art. 27, §418 (Supp. 1968); MICH. STAT. ANN. §28.575(1) (Supp. 1969); MINN. STAT. ANN. §617.241 (1964); MISS. CODE ANN. §2674-03 (Supp. 1968); MO. ANN. STAT. §563.280 (Supp. 1968-69); MONT. REV. CODES ANN. §94-3603 (1947); NEB. REV. STAT. §21 (1964); N.Y. PENAL LAW §§235.00(4) (1967) (Definition of promotion), 235.05 (Supp. 1969-70); N.D. CENT. CODE §12-21-09 (1960); OHIO REV. CODE ANN. §2905.34 (Baldwin 1964); OKLA. STAT. ANN. tit. 21, §§1040.13, 1040.51 (Supp. 1969-70); ORE. REV. STAT. §167.151(1) (1967); PA. STAT. ANN. tit. 18, §4524(a) (Supp. 1969); R.I. GEN. LAWS ANN. §11-31-1 (Supp. 1967); S.D. COMPILED LAWS ANN. §22-24-12 (Supp. 1969); TENN. CODE ANN. §39-3004 (Supp. 1968); TEX. PEN. CODE ANN. art. 527 §3 (Supp. 1969-70); UTAH CODE ANN. §76-39-5(3) (Supp. 1969); VA. CODE ANN. §18.1-228(1), (2), (3) (1968); W. VA. CODE ANN. §61-8-11 (1966); WIS. STAT. ANN. §944.21(1)(a) (1958); WYO. STAT. ANN. §6-103 (Supp. 1969).

[184] *E.g.*, S.C. CODE ANN. §16-414.3 (Supp. 1968); S.D. COMPILED LAWS ANN. §22-24-13 (Supp. 1969); UTAH CODE ANN. §76-39-5(6), (8) (Supp. 1969); VT. STAT. ANN. tit. 13, §2802 (Supp. 1969).

[185] 390 U.S. 629 (1968), The statute provides:

> A person is guilty of disseminating indecent material to minors when:
> 1. With knowledge of its character and content, he sells or loans to a minor for monetary considerations:
>
> (a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or
>
> (b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors; or

youth, as a test of what is "harmful to minors."[186] Utah, in a recent enactment, has made it illegal to sell or offer for sale, "hard-core pornography," which is defined as material "that shows people, or people and animals in actual genital contact of any kind."[187] In the state of Washington, it is illegal to sell material which is labelled "Adults Only" to minors.[188] In addition, many states make unlawful the hiring or employing of minors to sell or assist in selling or distributing obscene materials.[189]

Although since Stanley, "mere possession [of obscenity] cannot constitutionally be a crime,"[190] possession can lead to prosecution for related offenses. Prosecution may result from possession with intent to show or introduce obscene material into any family.[191] In many states possession of a statutory number of obscene items creates a rebuttable presumption of possession with intent to sell, lend, give away or show,[192] thereby subjecting

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2. Knowing the character and content of a motion picture, show or other presentation which in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he:

(a) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or

(b) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or

(c) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation.

Disseminating indecent material to minors is a class A misdemeanor. Added L. 1965, C. 327, eff. Sept. 1, 1965.

[186] N.Y. PENAL LAW §235-20 (McKinney 1967):

'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(a) Predominantly appeals to the prurient, shameful or morbid interest of minors; and

(b) Is patently offensive to prevailing standards in the community as a whole with respect to what is suitable material for minors; and

(c) Is utterly without redeeming social importance for minors. Added L. 1967, (c) 791, §34, eff. Sept. 1, 1967.

[187] UTAH PENAL CODE ch. 242, §76-39-5 (1950) *as amended* ch. 264, §76-39-5(8) (1967).

[188] Ch. 256, §14(3a), 2 (1969) WASH. SESS. LAWS.

[189] *E.g.* ALA. CODE tit. 14 §374 (16a-16i) (Supp. 1969), where a minor is under eighteen; N.Y. PENAL LAW §235.21 (McKinney Supp. 1970), where a minor is under 17; PA. STAT. ANN. tit. 18, §4524(b), (c) (Supp. 1970), where a minor is under 17.

[190] Stanley v. Georgia, 394 U.S. 557 (1969).

[191] ALA. CODE tit. 14, §374(4)(1) (Supp. 1967); ARIZ. REV. STAT. ANN. §13-532(2) (Supp. 1969); COLO. REV. STAT. ANN. §40-9-17(1) (1963); CONN. GEN. STAT. REV. §53-243 (1968); DEL. CODE ANN. tit. 11, §711 (1953); FLA. STAT. ANN. §847.011(1)(a) (1965); GA. CODE ANN. §26.2101 (Supp. 1969); HAWAII REV. STAT. §727-8 (1959); IND. ANN. STAT. §10-2803 (Supp. 1969); IOWA CODE ANN. §725.5 (1950); KAN. STAT. ANN. §21-1102 (1964); ME. REV. STAT. ANN. tit. 17, §2901 (1964); MICH. STAT. ANN. §28.575(1) (Supp. 1969); MINN. STAT. ANN. §617.241 (1964); MO. ANN. STAT. §563.280 (Supp. 1969-70); NEB. REV. STAT. §28-921 (1964); N.J. STAT. ANN. §2A:115-2 (1969); N.D. CENT. CODE §12-21-09 (1960); OHIO REV. CODE ANN. §2905.34 (Baldwin 1964); PA. STAT. ANN. tit. 18, §4524(a) (Supp. 1969); WYO. STAT. ANN. §6-103 (Supp. 1969).

[192] *E.g.*, ALA. CODE. tit. 14, §374(15) (Supp. 1967); ARK. STAT. ANN. §41-2727 (1964); FLA. STAT. ANN. §847.011(1)(b) (1965); MICH. STAT.

the defendant to a more severe penalty.[193] Some states make it a misdemeanor to deposit, or cause to be deposited, any obscene material in the mail, or with a common carrier.[194] Some states even make it illegal to furnish information as to where, when, how, or from whom, obscene materials can be obtained.[195]

Although the states seem to have a disposition toward criminal prosecution as a vehicle for a determination of obscenity,[196] an *in rem* procedure, such as developed by Massachusetts, may be more advantageous. The Massachusetts statute permits the Commonwealth to bring an *in rem* proceeding against any book to determine its status.[197] The distributor or publisher may appear and defend the book,[198] thereby obtaining a penalty-free determination of the protected nature of the book. This procedure is more desirable than criminal prosecution, although there is one significant drawback. The statute expressly provides that in any criminal prosecution for a sale after the *in rem* proceeding, the defendant is "conclusively presumed" to have knowledge that the book is obscene.[199] This would seem to foreclose the bookseller from selling any book he believed protected, as he could not raise the question of the protected nature of the material, once the *in rem* proceeding was concluded. This seems to be in direct conflict with the reasoning in *Smith v. California*,[200] for there the Court held that in order for a criminal statute to be constitutional, the statute had to include a requirement of scienter, so that a bookseller would not be discouraged from selling controversial books.[201]

ANN. §28.575(1) (Supp. 1969); MISS. CODE ANN. §2764-15 (Supp. 1968); N.Y. PENAL LAW §235.10(2) (McKinney 1967); OKLA. STAT. ANN. tit. 21, §1040.24 (Supp. 1969-70).

[193] *Compare* ALA. CODE tit. 14, §374(4)(1) (Supp. 1967) (maximum fine of $2,000 or 1 year in prison, or both), *with* ALA. CODE tit. 14 §374(4)(2) (Supp. 1967) (maximum fine of $500 or 6 months in jail, or both). *Compare* ARK. STAT. ANN. §41-2731(1) (Supp. 1969) (a felony offense) *with* ARK. STAT. ANN. §41-2731 (Supp. 1969) (a misdemeanor, a maximum fine of $1,000 or maximum 1 year in county jail, or both).

[194] *E.g.*, MINN. STAT. ANN. §617.26 (1964); MO. ANN. STAT. §563.29 (1953); NEB. REV. STAT. §28-922 (1964); WYO. STAT. ANN. §6-104 (Supp. 1969).

[195] *E.g.*, MO. ANN. STAT. §563.280 (Supp. 1969-70); N.J. STAT. ANN. §2A:115-2 (1969); OHIO REV. CODE ANN. §2905.34 (Baldwin 1964); PA. STAT. ANN. tit. 18, §4524(a) (Supp. 1969); WYO. STAT. ANN. §6-103 (Supp. 1969).

[196] *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69-70 (1963).

[197] MASS. GEN. LAWS ANN. ch. 272, §28H (1959).

[198] §28D provides that "Any person interested in the sale, loan or distribution of said book may appear and file an answer. . . ."

[199] MASS. GEN. LAWS ANN. ch. 272, §28H (1959). *See* Smith v. California, 361 U.S. 147 (1959) for a discussion of the constitutionality of liability of retailers without knowledge of the contents of the material.

[200] 361 U.S. 147 (1959).

[201] See text accompanying notes 167 through 177 *supra* for a complete discussion of Smith v. California.

Other jurisdictions have adopted declaratory judgment actions providing for a statutory notice of the pending litigation to all known, interested persons. In a recent enactment, the Georgia legislature included a written notice requirement from the district attorney, stating that he had determined the matter obscene and any person receiving such notice had thirty days to file for declaratory relief.[202]

Some states provide for injunctions, *in rem,* against the particular material,[203] requiring that the complaint designate all persons known to have a commercial interest in the matter. Other states provide for *in personam* injunctions against individuals connected with the matter.[204] While most injunction statutes empower only the State's Attorney to institute injunctive proceedings, in Kentucky any citizen may commence the action.[205] In Colorado, private citizens may compel the District Attorney to act with a mandamus proceeding.[206]

In addition to this extensive state control, the federal government has imposed several restraints, where its interest appears marginal at best.[207] Although the power of censorship has never been explicitly given to the Postmaster General, and it is doubtful whether any such power was intended except as an incident to an arrest,[208] a system of administrative censorship has developed.[209] Prior to 1971, 39 U.S.C. §4006[210] permitted the Postmaster General, or his agents, to make a finding on "evidence satisfactory to [him]," that a person was obtaining or seeking money through the mails for "an obscene . . . matter" or was using the mails to distribute information about where such articles might be obtained. The statute permitted him, upon this finding, to stamp "unlawful" upon the letters addressed to that person and return them to the mailer, as well as prohibit the payment of money orders for the material. Under department regulations, a judicial officer held a hearing and rendered an opinion with "all due speed," from which there was an adminis-

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[202] GA. CODE ANN. §40-3107(a) (1970).

[203] *E.g.*, MASS. GEN. LAWS ANN. ch. 272, §28H (1969). See text accompanying notes 197 through 200 *supra* for a discussion of the statute's operation.

[204] *E.g.*, N.Y. PENAL LAW §235.05 (McKinney 1967).

[205] KEN. REV. STAT. §436.101 (1966).

[206] COLO. REV. STAT. §40-9-21 (1963).

[207] *See* Roth v. United States, 354 U.S. 476, 503-05 (1957) (Harlan, J., dissenting). For a detailed survey of the Postal System see Note, *Project: Post Office,* 41 S. CAL. L. REV. 643 (1968).

[208] CONG. GLOBE, 42 Cong., 3d Sess., App. 168 (1873).

[209] This development is due largely to legislative silence after an 1890 Attorney General's opinion, 19 Op. Att'y Gen. 667 (1890). And the courts assumed such a power was possessed. *See, e.g.*, American Mercury v. Keely, 19 F.2d 295, 297 (2d Cir. 1927); Anderson v. Patten, 247 F. 382, 384 (2d Cir. 1917).

[210] 9 U.S.C. §4006 (1964), now 39 U.S.C. §3006, Postal Reorganization Act, 84 Stat. 719, 747-48.

trative appeal.[211] 39 U.S.C. §4007[212] permitted the district courts to order the defendant's incoming mail detained pending completion of the §4006 proceedings, merely upon showing of "probable cause" that §4006 was being violated.[213] Both statutes were held unconstitutional recently in a combined decision in *Blount v. The Mail Box,* and *United States v. Book Bin.*[214] In *Mail Box,* the appellee, a retail magazine distributor, against whom the Postmaster General had instituted §4006 proceedings,[215] sought declaratory and injunctive relief in the federal district court.[216] In *Book Bin,* the Postmaster General applied for a §4007 order, to which the appellee counterclaimed successfully.[217] The Court held in a unanimous decision that §4006, and §4007 were unconstitutional because they violated the First Amendment by failing to provide procedures which include "built-in safeguards against curtailment of constitutionally protected expression . . . ."[218] Using *Freedman v. Maryland*[219] and the procedural requirements

[211] Proceedings under §4006 are governed by departmental regulations. A proceeding is begun in the General Counsel of the Post Office Department by written complaint and notice of hearing. A Judicial Officer holds a hearing and renders an opinion which includes findings of fact and reasons upon which the decision was based. 39 C.F.R. §§952.5-952.25. Under the Administrative Procedure Act, 5 U.S.C. §§551-59 (1966), the accused is guaranteed certain procedural safeguards:

> (1) a complaint stating facts sufficient to enable him to answer, 39 C.F.R. §952.5 (1967); (2) representation by counsel, 39 C.F.R. §952.16 (1967); (3) opportunity for continuances and extensions 'for good cause shown,' 39 C.F.R. §952.13 (1967); (4) opportunity to file depositions, 39 C.F.R. 952.21 (1967); (5) hearing in front of an examiner independent of the agency involved, 39 C.F.R. §952.17 (1967); (6) application of the rules of evidence, 39 C.F.R. §952.18 (1967); (7) opportunity to obtain an official transcript of the record, 39 C.F.R. §952.22 (1967); (8) opportunity to present proposed findings of fact, 39 C.F.R. §952.23 (1967); (9) opportunity to move for a reconsideration, 39 C.F.R. §952.27 (1967).

[212] 39 U.S.C. §4007 (1964), now 39 U.S.C. §3007, Postal Reorganization Act, 84 Stat. 719, 747-48.

[213] Prior to 1956, interim impounding orders were issued without statutory authority. In partial response to judicial unfriendliness to such interim detention of mail, Standard v. Oleson, 74 S.Ct. 768 (1954), the Postmaster General sought and obtained the power to impose a twenty-day interim mail lock, subject to extension by the district court. Act of July 27, 1956, ch. 755, 70 Stat. 699. Postmaster General Summerfield in 1959 sought to broaden Post Office power to seize mail. *See* H.R. 7379, 86th Cong., 1st and 2d Sess. (1959-1960). Instead, Congress stripped the Postmaster General of his power to issue an interim mail block for any period, by enactment of §4007 which required him to seek relief in a federal district court.

[214] 400 U.S. 410 (1971).

[215] *Id.* The Postmaster General began administrative proceedings under §4006 on November 1, 1968, and the hearing was concluded on December 5, 1968. The Judicial Officer filed his opinion on December 31, 1968, with a finding that the magazines were obscene and entered a §4006 order 61 days after the complaint was filed. *Id.* at 415.

[216] 306 F. Supp. 634 (1969). A three judge district court was convened pursuant to 22 U.S.C. §2284 in the District Court in the City of Los Angeles, California.

[217] 306 F. Supp. 634 (1969). *Cf.* Lamont v. Postmaster General, 381 U.S. 301 (1965).

[218] 400 U.S. at 422.

[219] 380 U.S. 51 (1965). The Court stated that its decision in *Freedman*

set forth therein, the Court found: a) that the administrative censorship scheme created by §4006 and §4007 did not require governmentally initiated judicial participation, or assure prompt judicial review;[220] b) that the power given the Postmaster General under §4007 to apply for a court order to impound the mail did not cure the defects in §4006 since it is only a discretionary procedure and the requirement for prompt judicial review was not satisfied by a "probable cause" finding,[221] and c) that §4007 failed to provide for a preservation of "the status quo for the shortest period compatible with sound judicial discretion."[222]

Although, §§4006 and 4007 are no longer available to the Post Office, §1461 of 18 UNITED STATES CODE, popularly known as the Comstock Act[223] provides criminal penalties for those who knowingly use the mails for mailing or delivery of obscene ma-

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compels the conclusion which the three-judge court reached that the administrative procedures "omit those 'sensitive tools' essential to satisfy the requirements of the First Amendment." *Id.* at 418.

[220] *Id.* The Court noted that this administrative scheme did differ from the Maryland procedure involved in *Freedman* in that under the Maryland scheme, the picture could not be exhibited until the conclusion of the pending hearing, while under §4006 the order to return the mail or not pay the postal money order is not made until the hearing is completed with a determination that the magazines are obscene. *Id.* at 418-19. But, this distinction did not "redress the fatal flaw" of the procedure requiring the distributor to assume the burden of initiating judicial proceedings. *Id.* at 416.

[221] *Id.* at 419-21.

[222] *Id.* at 421, relying on Freedman v. Maryland, 380 U.S. 51, 58 (1965). It is interesting to note that in note 8 of the decision the Court included the following:

> This provision was added at the request of Postmaster General Summerfield who desired it expressly to forestall judicial review pending completion of the administrative proceeding. 'This would guarantee that counsel for a mailer will not be able to raise successfully a bar to all further administrative proceedings in a case in which the Government failed to prevail on its motion for a preliminary injunction.' Letter from Arthur E. Summerfield, Postmaster General, to Senator Olin D. Johnston, Chairman, Senate Committee on Post Office and Civil Service, U.S. Code Cong. and Ad. News, 86th Cong. 2d Sess. 3249 (1960). In 1959, Postmaster General Summerfield had testified:
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> 'In spite of the frustrations and legal complications and even the court decisions [which the Postmaster General had described as handing down "very broad definitions of obscenity"] I feel a responsibility to the public to attempt to prevent the use of the mails for indecent material, and to seek indictments and prosecutions for such offenses, even though it may be argued that it falls in the category of material concerning which there have been previous rulings favorable to promoters.' Hearings on Obscene Matter Sent Through the Mail before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess. 6-7 (1959).

Id. at 420 n.8.

[223] Making the obscenity statute his personal endeavor, Anthony Comstock brought the first radical change to the postal laws in 1873, while Attorney General.

See Act of March 3, 1873, ch. 257, §148, 17 Stat. 598. For a history of the colorful life of this champion of Victorian ideas *see generally:* W. TRUMBULL, ANTHONY COMSTOCK, FIGHTER (1913); A. BROWN & J. LEECH, ANTHONY COMSTOCK, ROUNDSMAN OF THE LORD (1927). The result of his efforts was a substantial expansion of proscribed material.

The present statute is even more expansive:

> Every obscene, lewd, lascivious, indecent, filthy or vile article,

terial.[224] The power of this statute has been diluted by various judicial decisions, which require that the materials not only meet the statutory standards of "lewd, obscene, [etc.]", but that they also satisfy the three elements of *Memoirs*,[225] and are not considered a "classic."[226] Also, it has been held that the statute is not applicable to obscene literature used for scientific or professional purposes.[227] In addition, the Justice Department has stated that it intends to limit prosecutions to "those cases involving repeated offenders or other circumstances which may fairly be described as aggravated."[228] The most far-reaching decision, however, is the case of *United States v. Dellapia*,[229] which found that in light of *Stanley v. Georgia*,[230] which permits private possession of obscene materials in the home, §1461 could no longer apply to private correspondence between consenting adults.[231]

In addition to punishment for interstate traffic in obscene material,[232] §1305 of the Tariff Act prohibits importation of ob-

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matter, thing, device, or substance; and —

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine or thing —. 18 U.S.C. §1461 (1948).

[224] 18 U.S.C. §1461 prescribes a fine of $5,000 and/or five years imprisonment for the first offense, with $10,000 and /or 10 years imprisonment for each subsequent offense.

[225] Manual Enterprises, Inc. v. Day, 370 U.S. 478, 483-86 (1962) (opinion of Harlan, J.); *see also* United States v. Klaw, 350 F.2d 155, 164 (2d Cir. 1965).

[226] *E.g.*, Roth v. Goldman, 172 F.2d 788 (2d Cir.), *cert. denied*, 337 U.S. 938 (1949).

[227] *E.g.*, Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945).

[228] *See* Redmond v. United States, 384 U.S. 264, 265 (1966).

[229] 433 F.2d 1252 (2d Cir. 1970).

[230] 394 U.S. 557 (1969).

[231] See note 240, *infra*. *See also* in direct agreement, United States v. Lethe, 312 F. Supp. 421 (E.D. Cal. 1970).

[232] 18 U.S.C. §1462 (1948) which prohibits the use of common carriers for the importation or interstate transportation of obscene materials.

18 U.S.C. §1465 (1948) which prohibits interstate transportation of obscene materials for sale or distribution. There is a rebuttable presumption that transporting two or more copies of any publication or a combined total of five such publications is intended for sale or distribution.

scene material into the United States.[233] Packages are inspected at random and if the material found is deemed obscene by the inspector, the United States' Attorney is notified. He, in turn, files for an *in rem* determination of the protected nature of the materials in the appropriate federal district court. Movies are handled in a similar fashion, and with rare exceptions, all are screened prior to entry. Section 1305 has recently been challenged successfully in *United States v. Thirty-Seven (37) Photographs.*[234] The court found §1305 unconstitutional in light of *Stanley,* for it prohibited importation of obscene material for all purposes, including private viewing, which *Stanley* holds the Constitution protects.[235]

More consistent with the philosophy underlying *Stanley* and other recent decisions[236] dealing with private possession of pornography is the Anti-Pandering Act.[237] It permits postal patrons receiving unsolicited erotic material to request the Postmaster General to issue an order, commanding that the patron's name be deleted from the mailing list of the person sending the material. The only basis for determining what is considered "erotically arousing or sexually provocative," the standard incorporated in the statute, is the patron's "sole discretion." Therefore, the government can exercise a legitimate interest in protecting an individual from having material, which he finds is offensive, thrust upon him.[238]

STANLEY EXTENDED

Although the government can claim a legitimate interest in obscenity regulation, it does not extend to all situations. This was the basis for the Court's holding in *Stanley v. Georgia*[239]

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[233] 19 U.S.C. §1305 (1948).

[234] 309 F. Supp. 36 (D.C. Cal. 1970); *probable jurisdiction noted,* 39 U.S.L.W. 3146, oral arguments made, 39 U.S.L.W. 3317 (1971).

[235] 309 F. Supp. at 37-38.

[236] In *Stanley,* Justice Marshall stated that the First Amendment guaranteed the right of an individual "to receive information and ideas" regardless of their social worth. Stanley v. Georgia, 394 U.S. 557, 564 (1969). "The most fundamental premise of our constitutional scheme may be that every adult bears the freedom to nurture or neglect his own moral and intellectual growth." United States v. Dellapia, 432 F.2d 1252 (2d Cir. 1970).

[237] 39 U.S.C. §4009 (1967), which also provides that the addressee may request the Postmaster General to include in the order the names of any of his minor children, not yet nineteen, and who reside with the addressee, 39 U.S.C. §4009(g) (1967). The constitutionality of this statute was upheld in Rowan v. Post Office Department, 397 U.S. 728 (1970). Balancing the right to communicate against the right of privacy the Court stated, "[a] mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37.

[238] *See* Ginsberg v. New York, 390 U.S. 629 (1968), where the court refused to permit pandering as an intrusion on the public sensibilities; Redrup v. New York, 386 U.S. 767, 769 (1967), where the Court stated a special concern for protection against "obtrusive" publication of obscenity and for regulation of "pandering."

[239] 394 U.S. 557 (1969).

that mere possession of obscene material cannot constitutionally be made a crime.[240]

Under authority of a federal warrant to search Stanley's home for alleged bookmaking evidence, officers found three reels of eight millimeter film in an upstair's bedroom desk drawer.[241] Using a projector and screen the officers found on the premises, they viewed the films, determined them to be obscene, and arrested Stanley for knowingly having possession of obscene material in violation of Georgia law.[242] The Georgia Supreme Court affirmed Stanley's conviction,[243] holding it "was not essential to an indictment charging one with possession of obscene material that it be alleged that such possession was 'with intent to sell, expose or circulate the same'."[244]

On appeal to the United States Supreme Court, the applicant contended that the Georgia statute violated the First and Fourteenth Amendments because it punished mere private possession of obscene material.[245] The State argued that obscenity is not within the area of protected speech or press, relying on *Roth*.[246] The Court answered that although *Roth* seemed to declare without qualification, that obscenity is not within the First Amendment protection, it did not deal with mere private posses-

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[240] *Id.* at 559.

[241] In a concurring opinion, Mr. Justice Stewart acknowledged the legality of the officers' presence in Stanley's house and that they acted within the scope of the warrant when they searched the desk drawer. But he stated that what they found were cans of film, not gambling material, and under the warrant there was no authority to seize the films. He concluded that since the contents of the films could not be determined from mere inspection, this was an exploratory search, which violated the Constitution. He reasoned that to condone this action was equal to permitting the government to use a legal warrant "as a ticket to get into a man's home, and once inside, to launch forth upon unconfined searches and indiscriminate seizures . . . ." *Id.* at 571-72.

[242] GA. CODE ANN. §26-6301 (Supp. 1968), which states in part:

> Any person who shall knowingly . . . have possession of . . . any obscene matter . . . shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony . . . .

[243] Stanley v. State, 224 Ga. 259, 260, 161 S.E.2d 309, 310 (1968).

[244] *Id.* at 261, 161 S.E.2d at 311.

[245] In Mapp v. Ohio, 367 U.S. 643 (1961), the issue was before the Court, but that case was decided on other grounds. Justice Stewart noted that he would reverse on the ground that the Ohio statute punishing mere possession of obscene material was "not 'consistent with the right of free thought and expression assured against state action by the Fourteenth Amendment.'" *Id.* at 672.

In State v. Ohio, 170 Ohio St. 427, 166 N.E.2d 387 (1960), four of the seven judges felt that criminal prosecution for mere private possession of obscene materials was prohibited by the Constitution. However, Ohio law required concurrence of all but one of the judges to declare a law unconstitutional.

[246] Stanley v. Georgia, 394 U.S. 557, 560 (1969). The Court noted that the cases sighted in *Roth* for support of the assertion that obscenity has always been considered outside of the sphere of the First Amendment have dealt primarily with public distribution or use of the mail. *Id.* at 560-61. *See* Roth v. United States, 354 U.S. 476, 481 (1957).

sion of obscene materials.[247] Most prior cases, the Court stated, dealt with prosecutions for sale or distribution,[248] or prosecutions for sale of obscene material to children.[249]

The Court recognized a valid governmental interest in dealing with obscenity, but held that mere assertion of such an interest cannot in all situations outweigh all constitutional protections.[250] The Court reasoned that it is well established that the Constitution protects the right to receive information and ideas, regardless of their social worth.[251] Also, the right to be free from unwarranted governmental intrusions into one's privacy, except in very limited circumstances, is fundamental.[252] These, the Court stated, are the rights that the appellant, Stanley, is asserting — the right to read or observe what he pleases in the privacy of his own home.[253] Whatever, the justification for other statutes regulating obscenity such reasons do not apply to the privacy of one's own home.[254]

The Court found Georgia's assertion of the right to protect an individual's mind from the effects of obscenity noble, but wholly inconsistent with the philosophy of the First Amendment: "Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority . . . ."[255] The Court also asserted that it is of no relevance that the materials are utterly devoid of any ideological content, as the line between transmission of ideas and mere entertainment is too elusive to be drawn by the Court, if such a delineation can be made at all.[256]

In addressing itself to the effects of obscenity, the Court held that the State may no more prohibit the mere private pos-

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[247] 394 U.S. at 660-61 (1969).

[248] *See* Redrup v. New York, 386 U.S. 767 (1967); Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Smith v. California, 361 U.S. 147 (1959).

[249] Ginsberg v. New York, 390 U.S. 629 (1968); *cf.* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968).

[250] 394 U.S. at 563, citing *Roth*:

> Ceaseless 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. 354 U.S. at 488.

[251] Martin v. City of Struthers, 319 U.S. 141, 143 (1943); *see* Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster General, 381 U.S. 301, 308-09 (1965) (Brennan, J., concurring); *cf.* Pierce v. Society of Sisters, 268 U.S. 510 (1925). *See also* Winters v. New York, 333 U.S. 507, 510 (1948).

[252] *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *cf.* NAACP v. Alabama, 357 U.S. 449, 462 (1958).

[253] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[254] *Id.* at 565.

[255] *See* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959); *cf.* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1962).

[256] 394 U.S. at 565.

> If the First Amendment means anything, it means that a State has

session of obscenity on the ground that it may lead to antisocial behavior than it may ban possession of chemistry books in that they may lead to homemade manufacture of spirits.[257] The Court further found no clear and present danger from mere private possession of obscenity.[258]

The Court concluded by stating that the decision did not impair the holding in *Roth*, but that *Roth* did not extend to mere possession of obscenity in one's own home.[259] Rather, they indicated that its application is limited to situations of commercial distribution or public dissemination, where there is the danger that the obscene materials might fall into the hands of children[260] or where it might intrude upon the sensibilities or privacy of the general public.[261]

Although the *Stanley* Court purported to work no fundamental changes in the rationale that supported the decision in *Roth* and post-*Roth* cases, the basis of *Stanley* necessarily modifies *Roth's* broad declaration that obscenity is not protected by the First Amendment. Therefore, where courts would once have applied the *Roth* standard and simply dismissed the material as unprotected, it is now necessary to consider the impact of *Stanley* to determine whether its mandate can be extended to the particular situation under consideration.[262]

In 1969, the United States District Court for the District of Massachusetts extended *Stanley* beyond the privacy of the living room and into the quasi-public atmosphere of a movie theater, restricted to adult patrons in the far-reaching decision of *Karalexis v. Byrne*.[263] The defendants were indicted, and subsequently con-

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no business telling a man, sitting alone in his house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id.

[257] *Id.* at 567.

[258] *Id.* at 566.

[259] *Id.* at 568.

[260] Ginsberg v. New York, 390 U.S. 629 (1968).

[261] Redrup v. New York, 386 U.S. 767, 769 (1967).

[262] After *Stanley* it is necessary to look at each case and accommodate legitimate, competing interests. United States v. Dellapia, 433 F.2d 1252, 1255 (2d Cir. 1970), challenging the right to mail in private correspondence obscene material:

> It is no longer accurate to state categorically that the First Amendment does not protect obscenity. It is now necessary to inquire beyond the mere nature of the published matter, and to look into the government's interest in suppressing it.

Hayes v. Van Hoomissen, 321 F. Supp. 642 (D. Ore. 1970):

> "The clear implication [of *Stanley*] is that orthodox First Amendment considerations are once again of paramount importance, *Roth* notwithstanding, even where the publications in issue are concededly 'obscene.'" United States v. Various Articles of "Obscene Merchandise", 315 F. Supp. 191, 195 (S.D.N.Y. 1970). *See* Katz, *Privacy and Pornography*, 1969 SUP. CT. REV. 203; Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 MICH. L. REV. 185, 198-201 (1969).

[263] 306 F. Supp. 1363 (D. Mass. 1969).

victed in violation of the Massachusetts' obscenity law in the State court for showing the Swedish film, "I Am Curious Yellow," distributed and owned by Grove Press.[264] The District Court refused to abstain[265] and issued a preliminary injunction against further interference with the showing of the film. It further forbid initiation of any future prosecutions or execution of any sentences already imposed by the State Court, pending a decision on the merits.[266] The court noted that in the State proceeding, the lower court applied the *Roth* standards and found the picture obscene.[267] But it found that even if the picture was obscene within the meaning of *Roth,* it was advertised so that anyone purchasing a ticket would be aware of its contents. They further found that no pandering in the *Ginzburg* sense was involved.

The court then approached the problem directly: "how far does *Stanley* go?"[268] First, the court held that *Roth* cannot stand in light of *Stanley.* While *Roth* held that "implicit in the history

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[264] MASS. ANN. LAWS ch. 272, §28A (1968). The history of the litigation is not clear from the district court decision 306 F. Supp. 1363 (D. Mass. 1969). *See* Byrne v. Karalexis, 396 U.S. 976 (1969), where the Court detailed a chronological account of the case and stayed the temporary injunction issued by the appellate court.

[265] 306 F. Supp. 1363 (D. Mass. 1969). The district court refused to abstain on the ground that the statute was challenged on its face as a violation of the right of free speech. *Id.* at 1367. Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965), held that abstention would be inappropriate where a statute is justifiably so challenged. A state statute is "justifiably" attacked on its face if not susceptible to a state court construction that would avoid or modify the constitutional question. Zwickler v. Koota, 389 U.S. 241, 248-49 (1967).

The *Karalexis* court found abstention improper because the Massachusetts statute directly concerned free expression and it was "difficult to think the Massachusetts statute susceptible to a construction which would save it from over-broadness." 306 F. Supp. at 1367.

[266] The propriety of injunctive relief was governed by Dombrowski v. Pfister, 380 U.S. 479, 486-89 (1965), where special circumstances existed which raised a question concerning the good faith of the state officials invoking the criminal process. *Dombrowski* also stated that it was necessary to show "irreparable injury" in order to justify the issuance of an injunction against state proceedings. The *Karalexis* court found such irreparable injury:

> We do not agree with defendant's contention that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset. It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered.

306 F. Supp. at 1367.

The correctness of this decision was held to be improper. See note 276 *infra.*

[267] 306 F. Supp. at 1365. The court noted that in Commonwealth v. Karalexis it was found that: "the dominant theme of the film . . . is its appeal to prurient interest in sex . . . . [The film] is patently offensive to the average person and an affront to community standards . . . . [It] is utterly without redeeming social value." *Id.* at 1365.

[268] 306 F. Supp. at 1366.

of the First Amendment is the rejection of obscenity as utterly without redeeming social importance,"[269] *Stanley* found that it was irrelevant that the film was "devoid of any ideological content."[270] Of more importance, the *Karalexis* court relied on the statement of the *Stanley* Court that obscenity presented no clear and present danger to the adult or society as a result of exposure to it.[271] Limiting *Roth* to full public disclosures, the court found as in *Stanley*, that the dangers of public distribution, that is, exposure to children and an intrusion upon public sensibilities, were not present here.[272] The court held that "restricted distribution, adequately controlled, is no longer to be condemned."[273] They further found that "[a] constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it."[274] The court stated that the only logical source to view the films protected by *Stanley* was the local exhibitor, who would not act at the expense of criminal prosecution.[275]

Although the Supreme Court later stayed the District Court's order and subsequently remanded on grounds of abstention,[276] the opinion laid the ground work for subsequent decisions.

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[269] *Id.* at 1366. *See* Roth v. United States, 354 U.S. 476, 484 (1957).

[270] Stanley v. Georgia, 394 U.S. 557, 566 (1969).

[271] Karalexis v. Byrne, 306 F. Supp. 1363, 1366 (D. Mass. 1969). The test as originally stated required that in order to regulate First Amendment rights the regulation had to be directly related to a "clear and present danger that [the expression] will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919). The rule was later liberalized to permit a balancing of the danger against the right to free speech. Dennis v. United States, 341 U.S. 494, 510 (1951). For a discussion of the demise of the test *see* Strong, *Fifty Years of "Clear and Present Danger,"* 1969 SUP. CT. REV. 41, and for a critique of the doctrine *see* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 910-12 (1963). *Roth* rejected the use of the doctrine for distribution of obscenity was outside protection of the First Amendment. Therefore, if some obscenity is protected as in *Stanley*, then this test can control distribution.

[272] 306 F. Supp. at 1365. *See* Ginsberg v. New York, 390 U.S. 629 (1968). *See generally* Krislov, *From Ginzburg to Ginsberg*, 1968 SUP. CT. REV. 153.

[273] 306 F. Supp. at 1366.

[274] 306 F. Supp. at 1366-67. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold* a Connecticut statute forbade the use of birth control devises and convictions were sough against the physician prescribing the devises to married couples. In reversing the conviction, the Court noted that law prohibiting them from utilizing birth control devices was an unconstitutional invasion of privacy. *Id.* at 485-86. Since their right to the use of such devices would be practically meaningless, without the counseling of a competent physician in its use, the Court held that the advising physician had standing to challenge the constitutionality of the statute:

> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . . Without those peripheral rights the specific rights would be less secure.

Id. at 482-83.

[275] 306 F. Supp. at 1367.

[276] Byrne v. Karalexis, 396 U.S. 976 (1969). In concurring opinions,

In *Stanley* the Court stated unequivocally that individuals enjoy a constitutional "right to receive information and ideas, regardless of their social worth."[277] If an individual has a right to possess "obscene" materials, as an expression of an idea, then it would seem to follow logically that he has a right to exchange such ideas.[278]

One method of exchange is the mails. However, it is a criminal violation of 18 UNITED STATES CODE §1461 to use the Postal System to transport obscene material for any purpose. In reliance upon *Stanley,* the Court of Appeals for the Second Circuit in the recent decision of *United States v. Dellapia*[279] placed a new interpretation upon the statute. The defendant had responded to an ad in a newspaper with a letter offering "real stag films . . . definitely not to be shown to minors."[280] After placing the films in the mail, he was arrested and subsequently convicted for sending obscene material through the mails, in violation of §1461.[281] However, the entire transaction was by private correspondence and the money the defendant received was to cover out-of-pocket expenses.[282] The court, after viewing the films sent by the defendant, found that they were "obscene in the constitutional sense,"[283] but that since *Stanley v. Georgia,*[284] "mere private possession of obscene matter cannot constitutionally be made a crime."[285] The court then noted that if the Supreme Court intended to protect Stanley's right to receive any impulses his films yielded, it must have intended to extend some protection to methods for conveying the films to him. By relying upon the right of privacy that *Stanley* protects, the court stated: "[i]t would be anomalous to prevent consenting adults from freely passing among themselves obscene material which

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Justices Black and Stewart criticize the district court for interfering with a state criminal prosecution. *Id.* at 982-83. Subsequently, the Court vacated the judgment of the district court in light of a decision handed down the same day finding that the district court failed to find a threat to Karalexis' federally protected rights that cannot be eliminated by " 'his defense against a single criminal prosecution,' *Younger v. Harris.*" Byrne v. Karalexis, 39 U.S.L.W. 4236, 4237 (Feb. 23, 1971).

[277] 394 U.S. at 564.

[278] *See, e.g.,* United States v. Sidelko, 248 F. Supp. 813 (M.D. Pa. 1965).

[279] 433 F.2d 1252 (2d Cir. 1970).

[280] *Id.* at 1253. Earl Gerard, in early 1967, and his financee, placed an ad in *Swinger's Life,* asking to hear from "other photo-collectors and liberal-minded couples."

[281] *Id.* at 1254.

[282] *Id.* The defendant sent a list of movies that he had available, after a response from Gerard, and then sent him films for $150.00 (which appears to the court to be payment for out of pocket expenses).

[283] *Id.* The court relied upon Jacobellis v. Ohio, 378 U.S. 184, 190 (1964), Roth v. United States, 354 U.S. 476, 485 (1957), and the *Roth* restatement in Memoirs v. Massachusetts, 383 U.S. 413 (1966) in reaching its decision on the obscene nature of the material.

[284] 394 U.S. 557 (1969).

[285] 433 F.2d 1252, 1255 (2d Cir. 1970).

Stanley tells us . . . [they are] . . . entitled to possess and view or read."[286] Although the court refused to hold the Act unconstitutional,[287] it added the requirement that there must be present a "valid governmental interest which constitutionally justifies invasion of a private consensual relationship such as . . . [present here]."[288]

While *United States v. Dellapia*,[289] held §1461 inapplicable to private correspondence, it has been held applicable to commercial distributions of "adult" literature. In *United States v. Reidel*,[290] the defendant offered for sale in an underground newspaper "imported pornography" to adults only. He was indicted under §1461 after a postal inspector obtained a $1.00 booklet from him.[291] The United States District Court for the Central District of California quashed the indictment relying on *Stanley*.[292] The court found that *Stanley* meant that individuals cannot be prevented from such commercial distribution to soliciting adults, and that §1461 has been erroneously applied.[293] *Stanley*, it was argued successfully, protects the right to possess, and such a right necessarily incorporates the right to send such material to an adult who desires it, even by a commercial distributor.[294]

However, the Supreme Court did not agree with the district court's findings and reversed.[295] In the second of two ob-

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[286] *Id.* at 1258. *Cf.* Martin v. Struthers, 319 U.S. 141 (1943). The Court in a footnote expanded this thought:

> We cannot believe that the Supreme Court intended to protect Stanley's right to receive whatever messages or impulses his films yielded, while not protecting at least some methods for conveying the films to him. In a variety of other contexts, the Supreme Court has treated the first amendment rights to transmit and to receive as cognate. E.g., Lamont v. Postmaster General, 381 U.S. 301 (1965) (right to receive implies right to unimpeded delivery by mail); Marsh v. Alabama, 326 U.S. 501, 508-09 (1946) (right to receive implies right to distribute literature on sidewalk). Cf. Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) myriad and complementary facets of first amendment protection).

433 F.2d 1252, 1258 and n.25 (2d Cir. 1970).

[287] 433 F.2d at 1259-60.

[288] *Id.* at 1260. The court relied upon the previous decisions weakening the strength of the Act. See notes 225 through 228 *supra*.

[289] 433 F.2d 1252 (2d Cir. 1970).

[290] 39 U.S.L.W. 4523 (May 3, 1971).

[291] *Id.* at 4523.

[292] *Id.* at 4524.

[293] *Id.*

[294] *Id.*

[295] Arguing for the appellee, Reidel, Sam Rosenwein of California in response to a question by Mr. Justice Marshall concerning *Roth* stated:

> If you have a right to possess the material, you have a right to receive it. There is a right to communicate and the right to communicate to me means the right to use the mails to communicate, since they are an accepted form or method of communication.

Id. at 39 U.S.L.W. 3318 (1971).

39 U.S.L.W. at 4525. The Court stated that the district court "ignored both *Roth* and the express limitations on the *Stanley* decision." *Id.* at 4524. The lower court had concluded that §1461 was inapplicable when the material was not directed to children or unwilling adults.

scenity decisions rendered the same day,[296] Justice White, speaking for the majority, found Reidel in the precise circumstances as those under which Roth was convicted in *Roth v. United States.*[297] The Court held that *Roth* was still the law and that *Stanley* was inapplicable to commercial distribution. To extend the reasoning of *Stanley* to commercial distributions the Court found would "effectively scuttle *Roth,* the precise result that the *Stanley* opinion abjured."[298]

Reidel was argued before the Supreme Court together with *United States v. Thirty-Seven (37) Photographs,*[299] which challenged the constitutionality of §1305 of the Tariff Act,[300] which prohibits importation of obscene material. The claimant was carrying 37 photographs in his luggage from Europe, which were seized by customs officials upon inspection at the airport.[301] In seeking to enjoin the government from enforcing the statute, he admitted that some of the photographs were intended for private use in a commercial sense. They were to be offered for sale to adults soliciting them in response to an ad.[302] Even though the defendant intended to distribute the materials commercially, the District Court found the statute unconstitutional in light of *Stanley,* for it prohibited importation for all purposes, including private viewing.[303] The court further found the statute constitutionally invalid for failing to meet the procedural requirements set forth in *Freedman v. Maryland,*[304] because it failed to insure that any restraint prior to a final judicial determination would only be for a brief, specified period.[305]

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[296] *Reidel* was handed down with a companion case United States v. Thirty-Seven Photographs, 39 U.S.L.W. 4518 (May 3, 1971). See text accompanying notes 299 through 311 *infra.*

[297] 354 U.S. 483 (1957). *Roth* dealt with a disseminator of obscene material. *Stanley,* however, dealt with a possessor, and the Court, here, was unwilling to apply the reasoning of *Stanley* to the *Roth* situation. 39 U.S.L.W. at 4524.

[298] *Id.* The Court stated that the focus of *Stanley* was on freedom of mind and thought. These rights, the Court held, are "independently saved by the Constitution." *Stanley,* they said, did not seek to protect the disseminator of the material but the recipient.

[299] 39 U.S.L.W. 4518 (May 3, 1971).

[300] 19 U.S.C. §1305 (1948).

[301] 309 F. Supp. 36 (C.D. Cal. 1970).

[302] *Id.* at 37. The claimant in seeking to enjoin the government from enforcing the statute admitted that some of the photographs were to be incorporated into a book. In oral argument before the Supreme Court the claimant's attorney stated that the photographs would be distributed under "controled circumstances," *i.e.,* when ". . . the book was completed it would be offered, probably through advertising to adults and will probably not be sold without proof of age." 39 U.S.L.W. 3317, 3318 (Jan. 26, 1971). The lower court held that *Stanley* protects "the right to receive if it protects the right to read." 309 F. Supp. at 37. *Cf.* Lamont v. Postmaster General, 381 U.S. 301 (1965).

[303] 309 F. Supp. at 38.

[304] 380 U.S. 51 (1965).

[305] 309 F. Supp. at 38. The Court found that under the present statutory scheme in §1305, long delays prior to judicial determination could result.

On appeal the Supreme Court agreed with the lower court that the statute failed to conform to the mandate of *Freedman* and as such realized that §1305(a) was unconstitutional in its entirety.[306] Then, in order to save the statute, the Court made a unique maneuver by writing in the required time limitations: fourteen days to commence the judicial proceedings with a sixty day limitation from commencement to conclusion.[307] The Court stated that Congress had expressed such an intent,[308] and that the Court, itself, possessed "as much expertise as Congress in determining" the speed with which "prosecutorial and judicial institutions can, as a practical matter, be expected to function . . . ."[309] The Court, as in *Reidel,* refused to extend *Stanley* beyond its facts.[310] The majority held that importation of pornography was prohibited under §1305(a) for commercial or private purposes.[311]

Justice Stewart concurred in the result of the Court but disagreed with the *dicta* that the government can "seize literary material intended for the purely private use of the importer."[312] He then stated:

> If the Government can constitutionally take the book away from . . . [the private importer] . . . as he passes through customs, then I do not understand the meaning of *Stanley v. Georgia*. . . .[313]

The first amendment they held, does not permit such discretion vested in customs agents.

[306] 39 U.S.L.W. at 4521. Justice Black in his dissent to *Reidel* stated that the Court should have affirmed the court's decision upon finding §1305(a) invalid according to *Freedman.* 39 U.S.L.W. at 4527.

[307] 39 U.S.L.W. at 4521. The Court determined the length of these limitations based on lower court cases in which the government had brought the action within 14 days and concluded within 60 days. The Court then stated that such time limitations would not impose an undue burden upon the government. The majority also found that these limitations were not unduly harsh on importers "engaged in the lengthy process of bringing goods into this country. . . ." The Court seemed to ignore the private importer who, travelling abroad, purchases a book for private consumption and spends merely minutes packing the book in his luggage. See Justice Black's dissent in *Reidel,* note 316 *infra.*

[308] 39 U.S.L.W. at 4520. The Court relied on statements in the Congressional Record made while the statute was being considered by Congress. Justice Black noted that these remarks referred to the first draft of the bill and not the draft finally enacted into law. 39 U.S.L.W. at 4528.

[309] 39 U.S.L.W. at 4521. The basis for this usurpation of Congressional power was the alleged intent discussed in note 308 *supra.*

[310] *Id.* at 4522. "That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxius articles from commerce."

[311] *Id.* Justice Harlan agreed with the majority that the Court could rewrite the statute but dissented as to the Court's *dicta* prohibiting importation for private use. Such a discussion should not be reached as the facts concern importation for commercial use and "constitutional questions should be avoided when not necessary to the decision of the case at hand."

[312] *Id.* at 4523. Justice Marshall in his dissent in *Reidel* stated that the government had ample time to protect its valid interest in protecting children, *etc.* when the private importer commercially distributes the material. 39 U.S.L.W. at 4526.

[313] 39 U.S.L.W. at 4523. Justice Marshall was particularly disturbed

Justice Black, with whom Justice Douglas joined, vehemently dissented in both cases.[314] He found the Court's rewriting of the statute in *Thirty-Seven Photographs* "a seizure of legislative power that . . . [the Court] . . . simply . . . [does] . . . not possess under the Constitution."[315] He felt that by permitting such lengthy delays as occurred in *Thirty-seven Photographs* the importer would be at the mercy of the customs agent and coerced into giving up his First Amendment rights.[316] He further stated that based upon these two decisions, *Stanley* would only be good law "when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room."[317]

While the majority refused to extend *Stanley*, it was apparent that to do so would require overruling *Roth*.[318] They chose instead to usurp legislative power and rewrite the statute so that it would conform with prior holdings by the Court. However, in a postscript to *Reidel*, Justice White made it quite apparent that the Court was aware of the "developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may

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at the Court's suggestion that there was no need to scrutinize the government's behavior since this was a border search. He realized that such a situation might necessitate some diminution of constitutional protection but any such reduction must be jealously guarded. 39 U.S.L.W. at 4526.

[314] *Id.* at 4526. At the outset Justice Black stated his disappointment at seeing *Roth* revived. The failure of the Court to adequately act with obscenity determinations caused *Roth's* demise, as evidenced by *Stanley* and *Redrup*, he stated. He closed his dissent with the following remarks which not only expressed his displeasure with the Court's decision, but the Court itself and particularly its new members, Chief Justice Burger and Justice Blackmun:

> I do not understand why the Court feels so free to abandon previous precedents protecting the cherished freedoms of press and speech. I cannot of course believe it is bowing to popular passions and what it perceives to be the temper of the times. As I have said before, 'Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind that brings new political administrations into temporary power.' *Turner v. United States*, 396 U.S. 398, 426 (1970) (BLACK, J., dissenting). In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten. I hope, however, 'that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.' *Dennis v. United States*, 341 U.S. 494, 581 (1951) (BLACK, J., dissenting).

Id. at 4529.

[315] *Id.* at 4527. Justice Black noted how conveniently the government stayed within the limitations set forth by the Majority. Also, he refused to agree with the Majority's statement that they could not re-write a similar statute in Blount v. Rizzi, 400 U.S. 410 (1971), as that was the job of Congress. *Id.* at 419. The Majority stated that in *Blount* there was lacking the necessary intent of Congress which was present in this case.

[316] *Id.* at 4529. The Justice stated that a citizen faced with lengthy delays, high expenses and the need to hire a lawyer would leave the material at his port of entry and return home.

[317] *Id.* at 4527. Justice Black concluded that by barring importation for private use at least four members of the Court would overrule *Stanley*.

[318] 39 U.S.L.W. at 4524.

appeal to them. . . ."[319] Restructuring the obscenity laws, he stated lies with the legislature, and "*Roth* and like cases pose no obstacle to such developments."[320] He recognized the validity of decisions which indicated that it is essential to consider valid governmental interests, which at times may outweigh the individual's rights.[321] The courts have consistently recognized a valid governmental interest in protecting the public against unwarranted attacks upon its sensibilities. However, such a legitimate governmental interest need not be affectuated by extending the protection of the First Amendment to some obscene publications, and at the same time, denying it to others. Complete constitutional protection for obscene materials, need not result in a flood of pornography. In *Redrup v. New York*,[322] the Supreme Court set forth guidelines which protect both the purchaser's right to possess obscene materials, and the non-purchaser's right to freedom from uninvited confrontations. The decision noted three factual settings in which otherwise protected materials might become objectionable: circumstances involving juveniles; evidence of pandering; and publication of material so as to make it impossible for an unwilling person to avoid exposure to it.[323] Therefore, the Court found three circumstances in which the valid governmental interests outweighed the individual's rights under the First Amendment. This use of the "balancing test" would place obscenity under the same factual considerations used in other areas of "protected" speech.[324] The courts would no longer be forced to apply the *Memoirs* test, which the Supreme Court in *Redrup* refused to accept as the only standard by which obscenity could constitutionally be judged. Instead, the courts could simply look to the factual circumstances of the case and determine: a) the persons to whom the materials were made available and b) the methods by which they were offered.[325]

CONCLUSION

It may be concluded with some assurance that out of a sea of legal confusion a pattern appears to be emerging. *Roth v.*

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[319] *Id.* at 4524-25.

[320] *Id.* at 4525. The Court shifted the blame for obscenity regulation onto Congress. Justice White seemed to ignore the fact that this Court was more than willing to help the legislature, even where it was doubtful as to the desired result of the legislation. See note 308 *supra*.

[321] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 567 (1969); Redrup v. New York, 386 U.S. 767 (1967); United States v. Dellapia, 433 F.2d 1252 (2d Cir. 1970).

[322] 386 U.S. 767 (1967), *rehearing denied sub nom.* Austin v. Kentucky, 388 U.S. 924 (1967).

[323] 386 U.S. at 768.

[324] *E.g.*, Tinker v. Des Moines, 393 U.S. 503 (1969); Schenck v. United States, 294 U.S. 47 (1919).

[325] United States v. 127,295 Copies of Magazines, 295 F. Supp. 1186, 1189 (D. Md. 1968).

United States[326] was once thought to foreclose all constitutional protection to obscenity. However, *Stanley v. Georgia*[327] mitigated its effect by extending First Amendment protection to private possession of obscene material and *Freedman v. Maryland*[328] regulated its effect by requiring adherence to strict procedural requirements in its application. While the Court in *Memoirs* tried to reformulate a standard to prevent infringement upon sensitive First Amendment rights,[329] the Justices soon came to realize that any one standard would be too subjective and too ambiguous to be unequivocably accepted and uniformly applied.[330] Thus, a new concept of obscenity regulation and First Amendment protection emerged, which recognized the right of an individual to privately select his source of intellectual growth, regardless of its nature.

Recent decisions by the Court will now allow a rule to emerge which will free the courts of the seemingly impossible task of determining whether an idea which appeals to an interest in sex is so valueless as to be outside the protection of the Constitution. *Stanley v. Georgia*[331] allows the Court to balance the interest of the individual's right to receive any ideas, regardless of their social worth, against state interests of protecting its youth and adults from unwarranted intrusions upon their sensibilities.[332] *Redrup v. New York*[333] clarifies the situations in which this state interest will take precedence over the individual's interest: circumstances involving juveniles, situations burdened with pandering, and publication designed so that an unwilling person cannot avoid exposure to it.[334]

To secure its legitimate interests, state and federal legislation need only incorporate two factors: 1) a classification of persons to whom publications may and may not be distributed, such as minors; and 2) methods of advertising and dissemination which will not infringe upon the sensitivities of unwilling persons. To insure that the individual's First Amendment rights will be secure against competing state interests, statutes should also incorporate an alteration of the *Freedman* procedural standards:[335] a) the burden of proving an encroachment of one or more of the three *Redrup* circumstances should rest with the govern-

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[326] 354 U.S. 476 (1957).
[327] 394 U.S. 557 (1969).
[328] 380 U.S. 51 (1965).
[329] Memoirs v. Massachusetts, 383 U.S. 413 (1966).
[330] *See, e.g.*, United States v. Reidel, 39 U.S.L.W. 4523 (May 3, 1971); Redrup v. New York, 386 U.S. 767 (1967).
[331] 394 U.S. 557 (1969).
[332] *Id.*
[333] 386 U.S. 767 (1967).
[334] *Id.*
[335] See text accompanying note 128 *supra*.

ment; b) any administrative restraint, prior to a final judicial determination must be limited to a preservation of the status quo; and c) any administrative regulation must assure a prompt judicial determination, in an adversary setting, similar to the New York statute upheld in *Kingsley Books,* requiring a hearing within 24 hours and a finding within two days after the conclusion of the hearing.

The basis for determining the type of material to be regulated by these legislative enactments can be similar to the standard presently found in the Anti-Pandering Act.[336] If the complaining witness, in his "sole discretion" finds the material "erotically arousing or sexually offensive" and his conclusions are considered by the judge to be "reasonable," then the jury may consider the factual setting in which the material appeared. If they conclude that the defendant distributed the material in one of the three *Redrup* situations, the court can punish the defendant appropriately.

By use of such limited regulation, governmental interests will be secure, and the individual's First Amendment rights will be maintained at a maximum, assuring that the mandates of the Constitution will be satisfied. More importantly, the injustice resulting from the dilemma started by *Roth* will be foreclosed.

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[336] 39 U.S.C. §4009 (1967). See note 237 *supra.*