CONGRESSIONAL, POSTAL, AND JUDICIAL ATTEMPTS AT CONTROLLING PORNOGRAPHY FROM 1965-1970

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CONGRESSIONAL, POSTAL, AND JUDICIAL ATTEMPTS AT CONTROLLING PORNOGRAPHY FROM 1965-1970

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by

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ABSTRACT

Society's battle against pornography has assumed a new ferocity in the past five years. Municipal authorities began to enforce strictly local obscenity laws, and present their cases before the courts of the nation. Hoping the courts would punish the alleged offenders of the local morality, the plaintiff was often disappointed. The courts took a very vague stand on what constituted obscenity, and, since obscenity had not been definitely defined, there were few convictions. The vagueness of the laws seemed to give rise to increased display and sale of pornography on the public market.

The clamor arising from the populace caused the Federal government to begin to seek an effective means of controlling the traffic in obscenity. Since the majority of the smut peddler's business was done by mail-order, the national legislature worked closely with the Post Office Department to eradicate obscenity from the mails. The primary target of these two national organizations was the unsolicited advertisement for sexually oriented material. Thousands of complaints were received by the Post Master General each year in regard to these ads, and the Congress felt this area should receive priority.

While working on controlling unrequested advertisements, the Congress created a Presidential Commission to study every facet of the pornography industry. Feeling

that it had to know the industry before it could be controlled, the Presidential Commission on Obscenity and Pornography was given two years and two million dollars to complete the study. Meanwhile, the national legislature passed the Pandering Advertising Act in 1967 to allow the recipient of erotically offensive ads to have his name removed from the advertiser's mailing list. This act also gave the receiver the sole authority to determine which ads were erotically offensive to him, and to order his name removed from the respective mailing lists.

Although many other controlling bills were introduced, the Congress seemed to be waiting for the findings and recommendations of the Presidential Commission before taking any direct action against the pornographers. When the report of the Commission was released in September of 1970, it caused a storm of protest among the conservatives in American society. The report denounced long-held beliefs about the industry and recommended doing away with existing censorship laws for adults, while maintaining censorship laws that protect minors. The report was a decided victory for the anti-censorship forces in America, but it had little constructive effect on the political position of the issue. Washington denounced the report even before it was publicized, and declared its findings invalid, following the policy of ignoring that which is distasteful. And so, with the report published and

discarded, the Federal Congress and the Post Office Department returned to the job of trying to find a constitutional method of controlling the "flood of filth" in the mails.

Quite often during the period from 1965 to 1970, the Congress or Post Office Department felt that they had found a constitutional, regulatory method of dealing with obscenity, only to have the method declared unconstitutional by the United States Supreme Court. As the final authority on constitutional matters, the Court often seemed to be opposing the Congress and the postal authorities. Basing their decisions on the standards of obscenity as set forth in the case of Roth v. United States in 1957, the Court often ruled for the defendent in obscenity cases.

In 1965 the liberal trend of the high Court seemed to be reversing itself when the Court declared a publication, Ralph Ginsburg's Eros as one example, obscene. In the cases of Ginzburg v. United States and Mishkin v. New York the Supreme Court, for the first time in its history, found a publication to be obscene. In so doing, the scope of the Roth standards was broadened so as to lead the pro-censorship advocates to believe that the days of pornography were numbered. Subsequent decisions by the Court proved these people wrong. Instead of shortening the life of the pornography industry, decisions such as Ginsberg v. New

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and Stanley v. Georgia seemed to lengthen its life. As a result of conflicting vague decisions and definitions about obscenity, the lower courts of the land were in doubt as to how to enforce local obscenity laws. Since these lower court cases were constitutional cases, they invariably appeared before the nation's highest court. So, instead of being clear and explicit in their definition of what constituted obscenity, and thus allowing the lower courts to handle effectively these cases, the high Court had made its own job much more difficult by being vague.

CONGRESSIONAL, POSTAL, AND JUDICIAL ATTEMPTS AT CONTROLLING PORNOGRAPHY FROM 1965-1970

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To the Graduate Council:

I am submitting herewith a Thesis written by John Rodgers Jennings entitled "Congressional, Postal and Judicial Attempts at Controlling Pornography from 1965 to 1970." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts, with a major in history.

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During the past decade there has been a revolutionary change in American morality. Some newsmen and public spokesmen have called this change a "sexual revolution," a "new morality," or a "permissive society," but all of them agree that a change has taken place, and that it is evident in all areas of American life. Perhaps the most important factor in the changing attitudes towards sex has been the technological evolution of the contraceptive. This has taken much of the fear out of sex, and has allowed more experimentation by men and women. Commonly referred to as "the pill," the new contraceptive has permitted women to feel free to participate in pre-marital love making without the fear of becoming pregnant. Hence, one of the Victorian's strongest arguments against pre-marital sex is no longer a valid one.

The new contraceptive, and the attitude that accompanies it, is only one indication of a newer freedom in the area of sex. Other indicators include the miniskirt, communal living, topless female clothing, erotic advertising, sexually permissive entertainment, and an ever increasing business in sexually oriented products, commonly called obscenity or pornographic material.

This last indicator of the "new morality" has caused a great deal of controversy. Of all areas influenced by the new sexual freedom, the area of obscenity or

pornography is the area objected to most strongly by the average person. Pornography (or obscenity, since the two words are almost synonymous today,)[1] is any type of material that describes or depicts any form of sexual activity. Of course, this covers a wide range of material, from comic books to motion pictures, but generally, any description of a sexual encounter between two people can be labeled obscene, depending upon the audience viewing the material. In this inherent vagueness of the definition of pornography lies the big problem for people who feel that this form of entertainment, for want of a better expression, must be censored or controlled. How does one determine what is or is not obscene, and after the determination is made, how does one control the production and distribution of matter deemed obscene?

Although it may appear that this problem is a new one, a product of twentieth-century America's permissive society, this is not the case. In some form or other society has always tried to control obscenity and pornography.[2] Usually, this has been accomplished by an

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[1]The word "pornography" is taken from the Greek words porno, for prostitute, and graphas, for writing, and literally means writings of a prostitute. Today, the words are used interchangeably.

[2]Albert B. Gerber, Sex, Pornography, and Justice (New York: Lyle Stewart, Inc., 1965), p. 15. See also Morris L. Ernst and Alan U. Schwartz, Censorship: The Search for the Obscene (New York: The Macmillan Company, 1964), Chapter 1.

edict from the ruler, as in De Gaullist France,[3] or by a general agreement of the public together with vague court decisions and ambiguous legislation, as in modern America. Although modern America has not found an absolute solution to its problem of obscenity, most people agree that it serves no worthwhile purpose, and in our pragmatic, technological society, that which does not fulfill a socially useful purpose is cast aside or suppressed. Many public opinion polls have been taken to determine how the public feels about pornography, and governmental control of the traffic in pornography. Each of these polls show that a majority of those responding to the questions favor stronger regulations to control the production and distribution of pornography. According to the Supreme Court Review of 1966

> A Gallup poll on October 15, 1965, reported that 58 per cent of the respondents in a national sample felt that their state laws are 'not strict enough' in regulating the sale of 'dirty books'; 15 per cent felt the laws were 'about right'; 23 per cent had 'no opinion'; and only 4 per cent felt the laws were 'too strict.' Even college-educated persons in the sample, who tend to be the most tolerant in such matters, favored stricter censorship by a 4-to-1 margin.[4]

Besides the public opinion polls, polls of special interest groups also have been taken in order to exhibit

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[3]Peter Coutros, "Blame Courts for Flood of Filth," New York Daily News, April 12, 1965, as cited in the Congressional Record, 89th Congress, 1st Session, p. 8421.

[4]C. Peter Magrath, "The Obscenity Cases: Grapes of Roth," The Supreme Court Review: 1966 (Chicago: University of Chicago Press, 1966), p. 57-58, n. 228.

that group's feelings. In a poll taken by the Christian Herald magazine over 7,000 readers responded:

> Ninety-five percent of them felt there should be additional legislation to restrict pornography; 3 percent felt there should not be additional legislation; 2 percent wanted no legislation at all on the subject.[5]

Thus, even in a religious publication poll, a small but significant minority opposed rigorous use of police power to deal with the problem.

The main basis for the division of the public's attitude is the protection offered to the freedoms of speech and press in the Constitution, and the protection of the Fourteenth Amendment that guarantees any citizen the right to "due process of law." Many of America's most prominent legal minds agree that censorship in any form is unconstitutional. Their reasoning is that given the powers of censorship, the government will expand its powers, as it has done in other areas in the past, to include control of other areas of personal freedom. Because of this fear, many prominent civic and literary groups have come to oppose any form of restriction on any type of writing or artistic expression. The American Civil Liberties Union and the American Library Association are two of the leading opponents of any form of restriction, while civic and church groups, such as Citizens for Decent

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[5]United States Government Congressional Record (Washington, D. C.: United States Government Printing Office) 89th Congress, 1st Session, Appendix, p. 5334.

Literature and Operation Yorkville, provide leadership in supporting the drive for more stringent censorship laws.

The division of opinion among Americans has resulted in very little effective control of the spread of the pornography business. Although exact figures on the size of the industry cannot be obtained, the often quoted figure of two billion dollars a year has been refuted by many people, but especially by the opponents of censorship.

> However, for comparison, the whole book business--trade books, textbooks, book clubs, encyclopedias, paperbounds, Bibles, cookbooks, and all--isn't a $2 billion business. Neither, measured by the sale of their products, is the magazine business or the newspaper business or the movie business. . . . If the $2 billion figure were true, every family in America, as an average, would have to spend $50 a year buying pornography.[6]

The two billion dollar figure is probably a propaganda move by the pro-censorship forces to shock the public into an awareness of the size and scope of the industry.[7] A recent in depth study of the industry made by the President's Commission on Obscenity and Pornography shows

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[6]Dan Lacey, "Censorship and Obscenity," Wilson Library Bulletin, June, 1965, p. 472.

[7]Ibid. Mr. Lacey goes into the background of the two-billion dollar figure, and shows how an estimate of 500 million dollars annually snowballed into the two-billion dollar figure.

that the industry is nowhere near that size.[8]

However large the pornography business is or is not, many Americans feel that there is still a need for its control. The people of the United States, at least the advocates of censorship, view this issue as a battle to save the morals of America's young people. By placing restrictions upon the industry, the young will not be exposed to obscenity and pornography until they are old enough to judge the material logically and reasonably. Hopefully, they also will be able to understand that love is more than sex, and that the type of sex displayed in pornographic publications is not the usual sexual relationship that exists between a man and a woman. The basic premise behind legislation against obscenity is that "obscenity incites sexually deviant behavior and is, in particular, a significant factor in stimulating adolescents toward premature sexual activity and juvenile delinquency."[9] Most all citizens who favor censorship feel it is a problem at all levels of society.[10] Since its nature is so controversial, its

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[8]United States Government, The Report of the Commission on Obscenity and Pornography (New York: Bantam Books, Inc., 1970), pp. 7-8. Hereinafter referred to as the Report on Obscenity and Pornography.

[9]Magrath, p. 48.

[10]Congressional Record, 89th Congress, 1st Session, Appendix, p. 5334.

operations involve interstate commerce, and since control of the industry involves questions of constitutional rights, the Federal government seems to have inherited the responsibility for making all of the major decisions. The Post Office Department and the Congress have been united in their efforts to control the pornography industry, especially its use of the mails, while the United States Supreme Court has been hearing all types of obscenity cases. Often attempts by one of these Federal agencies have been thwarted by the other, such as when the Supreme Court reverses a postal decision about what is obscene. But all three agencies have the same ultimate goal in mind: constitutional control of that which is erotically offensive.

The Post Office Department is relatively limited in the action that it can take against smut peddlers, since its actions are always under the critical eye of the public and the Federal Courts. The Post Office can only hold up mail "at the place of mailing or at the place of receipt,"[11] and then only after the questionable mail has been inspected. First-class mail is not subject to inspection, but the other classes of mail may be inspected.[12] This is especially true of second-class mail

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[11]Ernst, p. 227.

[12]Ibid.

that is used almost exclusively by magazine and book companies.

Before 1967, obscene material discovered in the mail opened three avenues of action for the postal authorities. They could refuse to deliver the mail from the destination post office on the grounds that it was classified as non-mailable matter according to the law. Federal law prohibits the mailing of "every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device or substance . . . and [it] shall not be conveyed in the mails or delivered from any post office or by any letter carrier."[13] Once mail is held up as non-mailable material, the addressee cannot receive it until a court order ordering the release of the mail in question is obtained.

The second avenue open to the Post Office is to refuse to deliver mail to persons suspected of dealing in obscene or pornographic materials. By impounding or returning to the sender incoming orders for pornography, the postal authorities can quickly force the dealer out of business. The basis for impounding or returning this mail is the same as for refusing to deliver non-mailable material.

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[13]Title 18, "Crimes and Criminal Procedure," Section 1461, United States Code Annotated (St. Paul, Minnesota: West Publishing Company, 1966). Hereinafter referred to as--U.S.C.A.

[14]Ernst, p. 227.

These first two avenues of postal control are administrative or civil, but there is a third avenue open. That is the criminal procedure. Faced with what they believe to be obscene material, the postal authorities, after an investigation into the matter, may request the aid of the Department of Justice in stopping the smut peddler's use of the mails. The Post Office must present sufficient evidence to the Attorney General's office to prove that the suspected party is violating the non-mailability law before the Attorney General can take any action. In most cases, the Department of Justice is hesitant to act on this type of complaint unless it involves what is known as "hard-core" pornography. "Hard-core" pornography has been described as "material depicting sexual acts in a way that can appeal only to the most prurient minded . . . and is usually devoid of any artistic merit or idea content."[15] Usually when a pornographer is faced with a court order involving "hard-core" pornography, the guilty plea is entered by his attorney, since the material itself is prima facie evidence against him.

Through the years the Post Office has had a problem in determining what constitutes "hard-core" pornography. Due to the vagueness of the definition,[16]

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[15]Terrance J. Murphy, Censorship: Government and Obscenity (Baltimore: Helicon Press, Inc., 1963), p. 191.

[16]Mr. Justice Stewart cites an extended definition of "hard-core" pornography from the Solicitor General's Office in Ginzburg v. U. S., 383 U.S. 499.

there is little possibility that a judge and jury will agree with the claims of a postal inspector. In order to try to curb the flow of pornography through the mails, Timothy J. May, top legal counselor for the Post Office, recommended in February of 1967 that the recipient of obscene advertising should have the final determination as to whether an advertisement was erotically offensive to him or not. Once the addressee deemed the advertisement offensive to him or his family, he could notify the Post Office to order the sender to remove his name from the sender's mailing list. Although May did not say that this would be absolutely constitutional, he did feel that this offered a solution to the obscenity problem.[17]

The mailing lists mentioned by May are one of the Post Office's sore spots. The names and addresses that appear on these lists are not collected by any central agency, but, rather, come from many varied sources. Anyone who subscribes to a magazine, book club, mail-order catalogue, or who has answered an advertisement in order to make a purchase has his name on someone's mailing list. Nearly everyone in America is on a mailing list of some kind, and they are candidates for receiving ads for pornography.

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[17]Roy Reed, "Erotic Material in Mail Defended," New York Times, February 10, 1967, p. 23.

Once these lists are compiled, they can be bought, rented, or leased by any firm wanting to advertise its wares by direct mail. Usually the ads are harmless as far as obscenity is concerned, but quite often these lists are obtained and used by smut peddlers. Since the people named on the lists have no idea who has the list or what line of merchandise they are selling, many people are shocked each day when they open an envelope and see advertisements for films, pictures, slides, magazines and books that feature any and all forms of sexual activity.[18] Many of these advertisements are sent by first-class mail so the post office personnel cannot inspect them. The firms that sell border-line pornography often use the bulk-rate postage system, thus they have to be more careful of their advertisements.

The fact that there is relatively little control over who obtains these lists, and what is done with them, is a matter of great concern to the Post Office Department and to Congress. The feeling is that if some type of control can be enforced on the users of the mailing lists, then the controllers could ferret out the smut merchants who obtain them to use on the unsuspecting public. In August of 1965, Rep. Clement J. Zablocki, (D.-Wisc.),

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[18]"Dodd Would Ban Pandering By Mail," New York Times, April 7, 1967, p. 24. In 1966 alone, the Post-master General received over 197,000 complaints about these advertisements.

introduced a bill that would regulate the buying and selling of the lists.[19] Like many other bills of its kind, it did not come up before the current sesession ended, and was not voted on by the House. In 1965 alone there were twenty-two separate, but similar, pieces of legislation introduced that would have provided for some measure of control over the mail-list business, but none of them passed the Congress.

Realizing that there was a great need for some form of action to protect the postal patron from the sexually-oriented advertising, Congress finally decided to act on a measure that had been before it for some time. In order to be able to control obscenity more effectively, in the mails and otherwise, there needed to be a thorough study made of the whole industry. By studying the industry, Congress hoped to answer questions such as what effects obscenity has on the morals of its audience, who is the audience, how large is the industry, and what can be done constitutionally to control the industry. Previously, many sub-committees in both houses of Congress had touched on the area of obscenity during their investigation into other subjects, but none of them had been created expressly for determining the answers to these questions. Once this investigation was complete, Congress

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[19]"Mail-order Rules Sought," New York Times, August 10, 1965, p. 14.

would be in a better position to take more positive steps toward controlling pornography.

On October 4, 1967 President Johnson signed a bill sponsored by Rep. Dominick J. Daniels, (D.-N.J.), and Sen. Karl E. Mundt, (R.-S.D.), that provided for the appointment of an eighteen-member commission which would be required to study the pornography industry, and make a report of that study by January of 1970.[20] Specifically, the Mundt-Daniels Commission was to try to answer all of the perplexing questions that had arisen with the Federal government's efforts to control obscenity,

> (1) with the aid of leading constitutional law authorities, to analyze the laws pertaining to the control of obscenity and pornography; and to evaluate and recommend definitions of obscenity and pornography;
> (2) to ascertain the methods employed in the distribution of obscene and pornographic materials and to explore the nature and volume of traffic in such materials;
> (3) to study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other associated behavior; and
> (4) to recommend such legislative, administrative, or other advisable and appropriate action as the Commission deems necessary to regulate effectively the flow of such traffic without in any way interfering with constitutional rights.[21]

President Johnson appointed William B. Lockhart, Dean of the University of Minnesota Law School, as chairman of the Commission, and named the rest of the members in January

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[20]"Johnson to Set Up Pornography Study Under New Law," New York Times, October 15, 1967, p. 25.

[21]United States Statutes At Large: 1967. Vol. 81. Washington, D. C.: United States Printing Office, 1968, p. 254-255.

of 1968.[22] At the first meeting of the Commission on Obscenity and Pornography, held in July, 1968,[23] a plan of action for the investigation was developed. The members of the Commission divided into four panels; legal, traffic and distribution, effects, and positive (non-regulatory) approaches to control. The Commission agreed to do their research in secret in order to keep down publicity, and went about their separate tasks. Interim reports made before the final reporting date offer no clues as to the progress that was being made in any of the four areas, nor were any recommendations made by the Commission before its final report.

In the mean time, Congress was still trying to find ways to control the unsolicited advertisements for sexually oriented materials that were entering American homes. In October of 1967, a solution presented itself to Congress in the form of The Postal Revenue and Salary Act. When this bill came up for discussion in the House, two representatives offered an amendment to the bill. The amendment would allow the addressee to have some determination over the type of advertising that entered his home. The amendment was attached to the Salary bill at the suggestion

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[22] "Obscenity Group Set Up," New York Times, January 3, 1968, p. 30.

[23] The time difference between appointment of the members and the first meeting was caused by a delay in appropriation of funds. Funds were granted in July of 1968 and the final reporting date changed to July 31, 1970.

of Rep. Jerome R. Waldie, (D. -Calif.), and enthusiastically promoted by his collegue, Rep. Glenn Cunningham, a Republican from Nebraska.[24] The amenders were fairly sure of the passage of the salary bill, so their amendment, called the Pandering Advertisements Amendment, would also pass.

The Pandering Advertisement Amendment, as adopted by the Congress and signed into law by the President on October 11, 1967, allowed the recipient of an advertisement to judge for himself whether the ad was offensive to him. If the recipient deemed the ad offensive, the amendment provided that the Post Office would be required, upon notification by the addressee, to order the sender of the ad to remove the recipient's name from the mailing list employed by the sender. The removal order would also apply to any other mailing list in the mailer's possession upon which the same customer's name appeared. The act became effective December 16, 1967.

This act placed a great deal of responsibility upon the Post Office Department. After receiving a complaint from an individual, the postal authorities issued an order to the sender to stop mailing ads to the complainant, and to remove his name from any mailing list in the sender's possession, regardless of whether the lists were purchased, leased, or rented. Upon initial notification of the complaint, the sender had thirty days in

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24"Mail Sex Behavior," The Reporter, November 16, 1967, p. 12.

which to comply with the order. If the complainant continues to receive offensive mail from the same party, the Postmaster General notifies the sender a second time, but now by certified mail, advising him of the addressee's complaint, and giving the sender fifteen days in which to reply. In reply, the sender can discontinue the mailings, or request a hearing to determine if he has actually violated the initial order. If no response is forthcoming from the sender, then the Postmaster General may ask the Attorney General to obtain a court order for compliance. If the complainant continues to receive erotic ads from the same mailer after the court order has been issued, then the sender is in contempt of court, and can be prosecuted.[25]

The enactment of this law caused an uproar among the members of the Direct Mail Advertising Association. They, along with the American Bar Association and the American Civil Liberties Union, protested that under the new law any type of advertising could be stopped by the individual. All the individual would have to do is claim that the ads were erotically offensive to him, whether they were meant to be so or not, and the mailing firm would have to remove that person's name from the mailing list. This act was seen by the protestors as a violation

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[25] 39 U.S.C.A. Sec. 4009. See Appendix for copies of the forms used by the Post Office Department to carry out the postal patron's request to have his name removed from a mailing list.

of their freedom of speech, hence, the act was unconstitutional. Although bemoaning the enactment of the law, they did very little towards having it repealed. One measure taken by the Direct Mail Advertising Association to control the use of mailing lists was announced in February of 1970 by Robert F. De Lay, the association's president. According to De Lay, there were only about twenty-six companies that were major offenders. This small number of firms used the mails and mailing lists to mail ninety percent of the mailed pornography. Under De Lay's supervision, the association formed a committee to try to prevent the mailing lists from being used by these twenty-six companies.[26] It was possible for the pornography merchants to obtain mailing lists from other sources, but internal control of the lists by the organization itself was much preferred to external control by the Federal government.

A final showdown on the constitutionality of the Pandering Act came on May 4, 1970 when the United States Supreme Court ruled that the law was constitutional. A group of publishers and mail-order firms from the west coast contested the law on the grounds that it infringed upon freedoms guaranteed by the First Amendment, denied them due process of the law, and unlawfully allowed the

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[26]Philip H. Dougherty, "De Lay is an Important Name in Direct Mail," New York Times, April 5, 1970 III, p. 16.

Post Office Department to become a national censor.[27] In delivering the majority opinion of the Court, Chief Justice Burger stated that the mailer's right under the First Amendment ended at the individual's front door.[28] Since the law allowed the recipient to make the only decision about what is offensive to him as an individual, the argument that the law made the Post Office a national censor did not hold up. Since the whole idea of freedom in America is based upon respect for the freedoms of others, the contention that the mailers had the First Amendment right to distribute their advertisements to all people did not hold up either.

The ruling of the Court upon the legality of the law resulted in its inclusion into the Postal Reorganization Act passed by Congress in November of 1970. This act, becoming effective in February of 1971, would allow the individual the same authority as the Pandering Act, but the recipient would be forewarned of the type of ads contained in the envelope. Under the 1970 law, each envelope that contains advertisements for potentially stimulating material would have to be clearly marked on the outside of the envelope. This would allow the

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27"Supreme Court Upholds Bar on Erotic Mail," Publisher's Weekly, May 18, 1970, p. 18.

28"Justices' Support Erotic Mail Curb," New York Times, May 4, 1970, p. 40. The majority opinion was concurred on by Chief Justice Burger, and Justices Douglas and Brennan.

addressee to return the advertisement to the Post Office unopened, and have his name removed from the mailing list of the sending business.[29] This external identification label resulted from legislation introduced by the Senate Democratic leader, Mike Mansfield of Montana, so that the recipient of the ad would know that the contents of the envelope "may violate his standards of decency and those he wishes to impress upon his children."[30]

Congress was still seeking some way to combat the industry itself, and not just the advertising part of the business. Since the real determining point of the constitutionality of laws controlling the industry would be with the Supreme Court, in some quarters there was the feeling that this power should be removed from the Court's jurisdiction. As the last appellate court in cases involving constitutional questions, the high court had reversed a majority of the obscenity appeals that had come before it.[31] Action on a bill to remove the Supreme Court's influence in future obscenity cases began in both houses of Congress at the same time.

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[29]Richard Halloran, "New Postal Law to Allow Public to Bar Mailing of Obscene Ads," New York Times, November 16, 1970, p. 26.

[30]"Mansfield Bill Seeks Label for Lewd Mail," New York Times, December 10, 1969, p. 43.

[31]The following section records the actions of the Supreme Court on its more important decisions. All of the high Courts' decisions in the area of obscenity are too numerous to list in this paper.

Rep. John Ashbrook of Ohio and Sen. Everett Dirksen of Illinois introduced identical bills in their respective houses at the same time. The bill, if adopted by Congress, would allow the local jury to have the final voice in deciding what was or was not pornographic. According to Sen. Dirksen, the answer to the control problem has always been in the Constitution of the United States, specifically Article III. This Article "specifically empowers Congress to make 'exceptions and regulations' to the Supreme Court's appellate jurisdiction."[32] Thus, the local juries would be able to determine what was obscene according to their community standards, and convict violators of these standards. Since each locality in the nation has a different view about some areas of morality, each area, represented by the jury, would be able to set the boundaries beyond which a sexy book or a "girlie" magazine may not legally proceed. This bill was introduced into Congress just a few weeks before Sen. Dirksen died, so he did not get to see it through, but it is still being advocated by many of his former collegues.

Of all of the solutions for controlling obscenity, many people felt that the Dirksen bill offered the best, most rational solution. If the courts were going to base the definition of obscenity upon that which "exceeds

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[32]Everett M. Dirksen, "A New Plan to Fight Pornography," Reader's Digest, November, 1969, pp. 115-116.

> The Legal panel has been reviewing recent case law to develop guidelines for legislative action which will not interfere with constitutional rights; Traffic and Distribution is looking into just who uses a wide variety of erotically stimulating materials and how they are distributed.... The Effects panel has been developing plans for a major research effort that would find out, what relationship, if any, exists between availability of pornography and sex crimes; the variations in intensity of different kinds of erotic stimuli; and other topics. The Positive Approaches panel is looking into methods, besides legislative controls, which might be used to get people to avoid pornography.[34]

What the progress report did indicate was a developing split among the members of the Commission about its procedure. After the Commission filed its report with Congress, there was a separate, dissenting report filed by Rev. Morton A. Hill, a member of the Commission. Hill attacked almost every phase of the Commission's operations. He attacked the research techniques, the qualifications of the other members, and claimed that the Commission was placing far too much emphasis upon the "effects" portion of its investigation and neglecting the rest of its duties.[35]

As the date of the final report drew nearer, the split in the Commission grew wider. Breaking an agreement of the Commission, two of the Commissioners began to hold public hearings to determine how the public felt about the

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[34]"Commission on Obscenity Files Progress Report," Library Journal, October 15, 1969, p. 3592.

[35]Congressional Record, 91st Congress, 1st Session, pp. 23985-23986.

contemporary community standards," then the community in which the material was marketed should be the one to say what their "standards" are, whether they agree with the rest of the country or not.[33] The Dirksen bill would have placed publishers at a disadvantage, however. A publication may not exceed the limits of candor at its place of publication, and yet, when it reaches its market destination, the moral standards of that community may be greatly offended by the product. The primary question posed by the Dirksen bill was whose level of morality would have precedence? The bill offered by Dirksen and Ashbrook would give the local courts the power to control local obscenity by striking at the seller of allegedly obscene materials. The major offender, however, seems to be the producer of pornography, and this proposal made no provision for prosecuting him, the real culprit of the smut racket.

While the members of Congress were busy trying to find a constitutional way to control pornography, the Commission on Obscenity and Pornography was busy with its investigation of the industry. In October of 1969, the Commission filed a progress report with the Congress, but it gave no indication of what its findings would be in the final report.

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[33]Former New York State Supreme Court Justice Samuel H. Hofsteader made the same observation, calling for the United States Supreme Court to "desist from acting as a national censor." "Hearing Assails the Flood of Smut," New York Times, February 19, 1970, p. 44.

issue of pornography and obscenity. The two Commissioners, Rev. Hill and Rev. W. C. Link, heard twenty-seven witnesses testify in one day as to the harm that would result if the industry were allowed to continue unrestrained.[36] These two men gave the nation a preview of the nature of the final report. The very fact that the members of the Commission could not agree on the text of the final report was unusual, since most congressional commissions usually reach a concensus easily about the thoroughness of their work and its conclusions. Another indication of the Commissioner's dissatisfaction with the forthcoming report was the organization of a House subcommittee that used a rough draft of the report to help line up witnesses to challenge the findings of the Commission. These witnesses were recruited and the hearings started before the final report was made public.[37] The report was being sabotaged before the Commission had a chance to present its side to the public. As a result of the sabotage, the public mind was led to believe that the Commission had not been objective in any approach to its research, and that its report was a conglomeration of fact and fancy, science and science

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[36]"Hearing Assails Flood of Smut," New York Times, February 19, 1970. p. 44.

[37]"Concern on Smut Held Unfounded," New York Times, August 12, 1970, p. 22.

fiction.[38] By the time the final report was ready for publication, the Nixon administration had publicly denounced the Commission and its findings, and later used the findings of the Commission as a minor political issue against the Democrats in the 1970 congressional elections.[39]

Commissioner Charles H. Keating, the only Commissioner to be appointed by President Nixon,[40] obtained a court order to stop publication of the final report until he had been given enough time to prepare a dissenting report.[41] On September 15, 1970, just over two weeks before the Commission was to terminate, Keating and Chairman Lockhart worked out an arrangement allowing Keating access to all of the panel reports, in return for having the court order withdrawn.[42] Had the prohibitory order remained in effect until September 30, when the Commission expired, the unpopularity of the report's contents probably would have prevented its publication

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[38] "Psychologists Disputes Report on Smut," New York Times, August 12, 1970, p. 22.

[39] James M. Naughton, "Epithets Greet Agnew at Salt Lake City," New York Times, October 1, 1970, p. 22.

[40] Replacing Commissioner Kenneth B. Keating who resigned to become ambassador to India. The two men are not related.

[41] Richard Halloran, "Report on Smut Held Up By Court," New York Times, September 10, 1970, p. 23.

[42] "Panelists Agree on Smut Report," New York Times, September 15, 1970, p. 23.

forever. Fortunately, the agreement was reached, and the taxpayer's two million dollars spent in compiling the report was not a total loss.

Publication of the report on September 30 created a storm of protest from all areas of America. The controversy caused by the dissenting Commissioners had alerted the public and the press to look for the sensational aspects of the report. And, since the report was a great deal different from what was anticipated at the Commission's creation in 1967, the sensational aspects were not hard to find. Basically, the report attacked many long-held beliefs about the effects of pornography, users of pornography, size of the industry, and ways of controlling the industry. In capsule form, the findings of the Commission, which fill ten very large volumes, were

1. The sexual behavior of most people is not altered substantially by exposure to erotica--nor are attitudes toward sexual morality substantially affected.
2. Adult sex offenders had had less adolescent experience with erotica than have other adults, and there is no evidence that exposure to pornography leads significantly to sex crimes.
3. Patrons of 'adults-only' bookstores and movies are generally not lonely misfits but 'predominantly white, middle-class, middle-aged, married males...in business suits or neat casual attire.'
4. The majority of Americans believe that adults should be allowed to read or see pornography if they wish to.
5. Contrary to previous estimates, traffic in smut is not a multibillion-dollar business, but an activity that brings purveyors an annual income

of about $574 million.[43]

Although this was enough to shock many conservative Americans, many more were stunned when they learned that the Commission recommended sex education in the public schools as a means of alleviating the youngster's "natural curiosity and the desire to know more about sex."[44] Since sex education would take place in an open, controlled atmosphere, the adolescent's desire for pornography would decrease.

Perhaps the one recommendation of the Commission that was not expected by even the most liberal of the anti-censorship forces was their position on the laws regulating the sale of obscenity and pornography. "The Commission recommends that federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed."[45] Although this was the same position taken by many states in drafting their obscenity-control laws, many people were outraged that a national congressional committee would make such a recommendation. Very few people bothered to read the rest of the recommendation

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[43]"The Oldest Debate," Newsweek, October 12, 1970, p. 37.

[44]Report on Obscenity and Pornography, p. 36.

[45]Ibid., p. 57.

offered by the Commission in the area of control. Had they bothered to read on, they would have discovered that the Commission also recommended that the Federal, state, and local governments enact legislation that would protect the adolescent from "commercial distribution or display for sale of certain sexual materials...public display...[and]...unsolicited advertisements," and was in complete agreement with the attempts of Congress to control the dissemination of pornography to the young people of America.[46]

Needless to say, rejection of the report became much more emphatic after it was published. One day prior to its release, Postmaster General Winton M. Blount, speaking before the Nashville, Tennessee Chamber of Commerce, soundly denounced the report, and called upon the people of America to force the pornographer out of business by refusing to purchase his merchandise.[47] Dissenting Commissioners urged Congress to throw the report into the"Congressional wastebasket," so that it would not "lead to an ultimate breakdown of all that we have held sacred through the years."[48] Rep. Roman C. Pucinski of

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[46]Ibid., pp. 62-70. The Commission's suggested legislation appears on pages 75-81 of this edition.

[47]Hugh LaFollette, "Pornography Up to Public, Blount says," Nashville Tennessean, September 29, 1970, p. 8.

[48]"Congress is Advised to Junk Smut Study," New York Times, September 24, 1970, p. 8.

Illinois introduced legislation that would require the Government Accounting Office to determine exactly how much money the Commission spent during the course of its investigation, and then "demand a refund to the treasury."[49]

But, the most damning denouncement of the report came from the Senate. Sen. John McClellan, (D.-Ark.), introduced Senate Resolution 477 denouncing the Commission's report because

> (1) generally the findings and recommendations are not supported by the evidence considered by or available to the Commission; and
> (2) The Commission has not properly performed its statutory duties nor has it complied with the mandates of Congress.[50]

The Senate voted 60-to-5 to approve the measure, denouncing almost everything that the Commission had done since its formation in 1967. Thus, two years of research passed, two million dollars was spent, and the nation was no closer to exerting a control or regulation over the smut industry than it was in 1966, before the Commission was created. Possibly the Commission was doomed to failure before it began its task, and obscenity really does defy definition.[51]

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[49] Congressional Record, 91st Congress, 2nd Session, p. E8775.

[50] Congressional Record, 91st Congress, 2nd Session, p. S17904.

[51] John M. Carter, "The Fructification Fulguration," Library Journal, March 15, 1970, p. 1001.

In the past, the final authority on whether material is obscene has been the United States Supreme Court. Many of the people accused of producing and distributing obscenity have claimed that their right to do so is guaranteed by the First Amendment, and that censorship in any form is a violation of the "due process of law" clause of the Constitution of the United States. Whatever the defendent's excuse is, if he is seriously trying to win his case, he will carry his appeal all the way to the United States Supreme Court before he gives up his fight. This determination of many smut peddlers has resulted in making the Supreme Court the final authority in deciding whether or not the material is obscene. The majority of cases decided by the Supreme Court in the past five years has resulted in only a few convictions and many reversals of a lower court's opinion.

Perhaps the greatest court case in the history of American obscenity litigation was presented before the United States Supreme Court in the summer of 1957. Samuel Roth had been accused of violating the federal law that prohibits the mailing of obscene matter. The courts of New York found him guilty, and he appealed to the Supreme Court on the basis that the First Amendment guaranteed him the right to freedom of speech, and that he was exercising that right when he used the mail to

transmit allegedly obscene advertisement circulars and a book called American Aphrodite. At the same time, the Court delivered its opinion on another case involving obscenity, the appeal of David Alberts. Alberts had been convicted by the California courts for violating that state's penal code which makes it a crime to "keep for sale, or to advertise, material that is 'obscene or indecent.'"[52] Alberts' defense before the Court was that the California law was violating his rights to "life, liberty, and property without due process of law,"[53] as guaranteed by the Fourteenth Amendment.

The Court combined both decisions, and delivered them as one. Justice William J. Brennan, writing the majority opinion[54] for the Court made some historic points about obscenity. Giving the historical background of the First Amendment, Brennan noted that not every utterance, especially liable, had been given protection. In the light of the subsequent events since the First Amendment was added to the Constitution, the Court ruled that "obscenity is not within the area of constitutionally

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[52]Roth v. U.S., 354 U.S. 476.

[53]"The Supreme Court: On Sex and Obscenity," Time, July 8, 1957. p. 10.

[54]The other consenting Justices were Justices Frankfurter, Barton, Clark, and Whittaker. "The Supreme Court: On Sex and Obscenity," p. 10.

protected speech or press."[55] Thus, for the first time, the nation's highest Court had cleared the air of one of the pornographer's biggest defenses. Now the Court had to define what constituted obscenity so that law enforcement officers would know exactly what to look for in future obscenity cases.

Beginning its definition of obscenity by separating simple sex from obscenity, the Court held that obscenity "is material which deals with sex in a manner appealing to prurient interests,"[56] and gave Webster's definition of the word "prurient." In the course of defining the word "prurient," Webster confounds the issue by stating the "pruriency" is that "'[q]uality of being prurient; lascivious desire or thought. . .'"[57] Of course, using a word to define itself does nothing to clarify the original word, so the definition of obscenity was close to worthless. Failing clearly to define "obscenity" the Court moved on to enunciate a standard for determining if questionable material was actually "obscene." The standard was to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[58]

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[55] 354 U.S. at 485.

[56] 354 U.S. 487.

[57] 354 U.S. 487, n. 20.

[58] 354 U.S. 489.

At first glance the Court seems to have solved the age-old problem of determining what is or is not obscene, but close examination reveals a few flaws. Some of these flaws are: who is the "average person?;" what are "contemporary community standards?;" how does the trier of fact determine the "dominant theme" of material presented for adjudication?; and who is going to interpret these standards for the courts of the land? Another question that arose to the fore in legal minds was who was to determine if allegedly obscene material was or was not "utterly without redeeming social importance?"[59] However dubious the definition of obscenity was, and however ambiguous the standard for determining obscenity, this ruling stood as the Supreme Court's guideline in obscenity cases until 1966.[60] During this period of eight years, reinterpretation of the Roth decision led to a narrowing of the standards so that by 1965 the only questionable material was the material which could be defined as "hard-core" pornography.[61] Nearly two hundred items, ranging from Henry Miller's Tropic of Cancer to "potboilers" like Trailer Trollop and The Wife-Swappers, were declared not

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[59]The Court ruled that material with "redeeming social value" was protected by the First Amendment and could not be suppressed. 354 U.S. 484.

[60]Magrath, p. 24.

[61]For a definition of "hard-core" pornography see above, page 9.

to be obscene by the Supreme Court.[62] The lower courts followed their lead, and little advancement was made in controlling obscenity through legal channels.[63]

On December 7, 1965, the Supreme Court heard arguments in three separate obscenity cases in which the Court declared that material can be deemed obscene even if it meets all of the Roth tests. By deviating from its guideline, the Supreme Court gave new hope to the pro-censorship forces who saw a new legal machine to control obscenity in the making.

The first of these three cases was A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts.[64] This book had been brought before the lower Massachusetts' court in order to prevent its release for sale in that state. The publisher of the book, G. P. Putnam's Sons, sought court action to have the book released. The Massachusetts Supreme Court ruled the book obscene since "a patently offensive book which appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene."[65] This ruling indicates that the lower court had applied the Roth test

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[62]Magrath, p. 24.

[63]Paul L. Montgomery, "Pulp Sex Novels Thrive as Trade Comes into Open," New York Times, September 5, 1965, p. 26.

[64]Throughout the text of the case the claimant is referred to as simply Memoirs, or as "Fanny Hill." 383 U.S. at 413.

[65]383 U.S. 413.

of obscenity, and had tried to implement it. During the course of the hearing, the publisher of Fanny Hill produced a great number of witnesses that testified for the defense on the grounds that the book did contain social, literary, and historical information about life in 18th century England.[66] Written in 1748, the book describes in very explicit terms the amorous adventures of a young girl from the age of fifteen until she realizes, some years and many adventures later, that sex apart from love is not a goal worth seeking.[67] The high Court reversed the decision of the Massachusetts Court because the lower court "misinterpreted the social value criterion"[68] of the Roth standard. Accordingly, the Court ruled that only material that is completely devoid of any kind of social value can be declared obscene, and the three parts of the Roth test must all agree that material is obscene before it can be declared as such.[69]

In the second of the three decisions, the Court made its pronouncement on Edward Mishkin.[70] Mishkin, a New York publisher, was convicted by a lower New York court of violating section 1141 of the New York Penal Law.

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[66] 383 U. S. 415, n. 2.

[67] 383 U. S. 425, concurring opinion of Mr. Justice Douglas.

[68] 383 U. S. 413.

[69] 383 U. S. 418. For an analysis of Roth Test, see pp. 32-33.

[70] Mishkin v. U. S. 383 U. S. at 502.

This law forbids "publishing, hiring others to prepare, and processing with intent to sell obscene books."[71] Almost all of Mishkin's publications dealt with some form of deviant sexual behavior. Such titles as Terror at the Bizarre Museum, Screaming Flesh, Columns of Agony, and Ways of Discipline were full of fetishism, sadism, masochism, and homosexuality. Mishkin's attorneys did not question the obscenity of the books, but based their defense upon the "prurient interest" test of the Roth case. The attorneys argued that the material was not designed for the "average" or "normal" audience, but expressly intended for people interested in deviant sexual practices. Since the "prurient interest" part of the Roth test did not apply to Mishkin's publications, and since all three parts of the Roth standard had to apply individually, the material could not be judged obscene.

Delivering the majority opinion of the Court, Justice Brennan rejected the defense attorneys' claim as "an unrealistic interpretation of the prurient-appeal requirement,"[72] and ruled

> [w]here the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the cominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of the group....[73]

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[71] 383 U. S. 502.

[72] 383 U. S. 508.

[73] 383 U. S. 508-509.

based upon the testimony of several of Mishkin's writers and artists, these publications were deliberately spiced up so that they would appeal to individuals who enjoyed this type of reading. Mishkin's defense that his intended audience was not the average person in the street did not stand up in Court.

The last of the three 1966 decisions, and the one that sparked the most controversy was the decision on the case of Ginzburg versus United States.[74] Ralph Ginzburg was found guilty of violating the Federal non-mailability law, 18 U.S.C. 1461, by mailing three obscene publications and advertisements for other obscene publications. After the Philadelphia and Pennsylvania courts found him guilty of the charges, he appealed to the Supreme Court of the United States, contesting the alleged obscenity of the publications that he had mailed.

The publications were Eros, "a hard cover $25-a-year quarterly magazine modeled, stylistically, after the highly successful American Heritage magazine;"[75] The Housewife's Handbook on Selective Promiscuity, which recounted the sexual experiences of a woman from her childhood until age thirty-six; and a bimonthly newsletter devoted to sex called Liaison. While trying to establish himself, Ginzburg had sought mailing privileges at several

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[74] 383 U.S. at 463.

[75] Magrath, p. 26.

small-town post offices. He tried to get mailing privileges at Blue Ball and Intercourse, Pennsylvania, but these post offices could not handle the expected volume of mail. Ginzburg finally settled on Middlesex, New Jersey as his mailing address. From the post office in Middlesex, Ginzburg mailed advertisements that described Eros as "the magazine of sexual candor," which had been made possible as a "result of recent court decisions that have realistically interpreted America's obscenity laws and that have given to this country a new breath of freedom of expression."[76]

This desire to find the appropriate mailing address, and the explicitedness of the advertisements caused the Supreme Court to rule against the publication. The Court held that advertising methods that were designed specifically to appeal to a person's erotic sense could be used as a factor in determining the obscenity of material. In close or borderline cases, "the circumstances in which material is advertised and marketed [is] a relevant aid in determining whether or not challenged material is obscene."[77] By examining the manner in which the product was advertised and sold, the Courts ruled the product obscene, and not protected by the provisions of the First Amendment.[78]

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[76]Advertisement brochure for Eros as cited by Magrath, p. 25.

[77]Magrath, p. 31.

[78]"End of the Boom in Smut?" U.S. News and World Report, April 4, 1966, p. 69.

Through these three decisions, the Supreme Court helped to clarify and, at the same time, confuse the definition of obscenity. There certainly was no clear-cut opinion by the Justices as to what constituted obscenity. In these three decisions there were thirteen different opinions offered by the Justices, none of which agreed with any other point for point.[79] A synopsis of the position of the Justices appeared in the Supreme Court Review of 1966:

1. All material is constitutionally protected except where it can be shown to be so brigaded with illegal action that it constitutes a clear and present danger to significant social interests. Justices Black and Douglas.
2. All material is constitutionally protected at both the federal and state level except hard-core pornography. Mr. Justice Stewart.
3. All material is constitutionally protected at the federal level except hard-core pornography; material may be suppressed at the state level if reasonable evidence supports a finding that it is salacious and prurient. Mr. Justice Harlan.
4. Material may be suppressed both by federal and state governments when prurient appeal, patient offensiveness, and an utter lack of social value coalesce; in addition, in close cases evidence that the producer or distributor commercially exploited the material so as to emphasize its pruriency withdraws constitutional protection from otherwise protected material. Chief Justice Warren and Justices Brennan and Fortas.
5. Material may be suppressed if its dominant appeal taken as a whole is to prurient interest. Justices Clark and White.[80]

Thus, nine years after the Roth obscenity standards were

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[79]Edward De Grazia, Censorship Landmarks (New York: R. R. Bowker Company, 1969), pp. 485-493, 521-535, 560-565.

[80]Magrath, pp. 56-57.

handed down, the nation's final authority on obscenity and pornography was far from unanimity on what obscenity was or how to define it.

For the writing and publishing world, the three decisions received a mixed reaction. Many people in these professions felt that the Memoirs decision opened up new horizons for their profession, and limited the scope of censorship in the United States.[81] It seemed that almost anything could be printed and published if it had even a tiny particle of "redeeming social value." One pro-censorship magazine prophesied that this phrase, "redeeming social value," "will prove to be of critical importance in future litigation."[82]

Those groups that were supporting the move for more restrictions on obscenity and pornography chose to ignore the Memoirs' decision, and concentrate on the Ginzburg ruling. Many of the pro-censorship forces felt that this ruling would be a way to end the obscenity problem once and for all.[83] By adding the pandering advertisement concept to the Roth tests, the smut peddler would be more

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[81] "Obscenity Test--A Legal Poser," Newsweek, April 4, 1966, p. 21.

[82] "Ginzburg and Pornography," National Review, April 19, 1966, p. 346.

[83] "End of Boom in Smut?" p. 69.

limited in his ability to make the public aware of his product. Once his power to advertise was removed, so the argument went, he would quickly go out of business. From now on, everyone in the entertainment field would have to be especially careful about the way their books, magazines, live performances, and movies were advertised. The editor of Publisher's Weekly, an anti-censorship publication, stated the results of the Ginsburg decision in the following manner:

> [T]he publishing community is now on notice that in censorship adjudications, a book is no longer a book, to be judged as a whole; it is a package of advertising, promotion and publisher's intentions.[84]

Regardless of the impact the triple rulings had on the writers, publishers, and advertisers, the effect was more confusing to the officers of the lower courts. When four dancers were brought before General Sessions Court Judge Harold H. Greene in Washington, D.C., for exposing their breasts during one of their acts, Judge Greene dismissed the charge of indecent exposure. He said that "he could not weigh the defendant's conduct without knowing the standards by which he was to measure it."[85] If a jurist had trouble understanding the rulings of the Supreme Court, how did the law enforcement officer in the field

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[84]Roger H. Smith, Editorial, April 4, 1966, p. 41.

[85]"What's Obscene for the Country," Time, July 29, 1966, p. 39.

feel when he went to arrest a suspected pornographer? Russell Baker of the New York Times offered a simple test to determine what books were obscene just a few days after the Court's decision.

> 1. If a buyer is not willing to walk into a neighborhood bookstore and, in a loud voice, demand a copy of the book, from the little gray-haired lady who knows him, then the book is probably obscene.
> 2. If he orders it by mail, under an assumed name, and has it sent not to his home but to a post office box rented only to receive this particular book, it is almost certainly pure smut.
> 3. If the buyer burns the book after reading it to insure that his daughter will never see it, then the case is airtight.[86]

As Mr. Baker pointed out, the test is relatively easy to administer for the average American, but in order to be able to prosecute and convict the root of obscenity, the producer, one must do more than observe those who buy books.

Since the convictions of Ginzburg and Mishkin were the first rulings in which the Court judged publications to be obscene, there was a flurry of activity on the state level to enforce the ruling.[87] The states of New York, Kentucky, and Arkansas tried the first cases that ultimately reached the Supreme Court.[88] The New York courts had

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[86]Russell Baker, "Observer: Some Advice to the Supreme Court," New York Times, March 24, 1966, p. 38.

[87]Fred P. Graham, "High Court Voids Obscenity Charge in 3 Test Cases," New York Times, May 9, 1967, p. 1.

[88]386 U.S. at 767.

found Robert Redrup guilty of selling obscene books, namely Lust Pool and Shame Agent, and he appealed to the Supreme Court. The Kentucky courts found William Austin guilty of selling obscene magazines entitled High Heels and Spree, and ordered that he stop selling such magazines. The Arkansas courts ruled for the state when the District Attorney of the Eleventh Judicial district sought to have such magazines as Gent, Swank, Bachelor, Modern Man and Sir declared obscene. He also wanted their distribution stopped and the copies in hand destroyed.[89]

Again, following the tendency to rule on similar cases at the same time, the three opinions were handed down together on May 8, 1967. The opinion of the Court was not signed by any single Justice, but handed down as the opinion of the Court. At the outset the Court defined the appeal as a case arising "from a recurring conflict--the conflict between asserted state power to suppress the distribution of books and magazines through criminal or civil proceedings, and the guarantees of the First and Fourteenth Amendments of the United States Constitution."[90] In delivering the unsigned opinion, the Court "concluded, in short, that the distribution of the publications in each of these cases is protected by the First and Fourteenth

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[89]De Grazia, pp. 596-597.

[90]386 U.S. 768.

Amendments from governmental suppression. . . ."[91] Thus, unless the material is sold to juveniles, promoted with pandering methods, or advertised through "junk" mail, the states are limited in the amount of censorship that they can exercise.[92] The Court was still undecided about what constituted obscenity.

On June 12, 1967 the Supreme Court decided to hear an appeal that would establish or reject the concept of variable obscenity. Under this concept there was one standard of acceptability for adults, and another for children. Material that was classified as obscene for children would be perfectly acceptable for adults under the idea of variable obscenity. The state of New York had included in its Penal Law, enacted by the New York legislature in 1965, section 484 h. Under this section it is unlawful knowingly to sell to a person under 17 "any picture . . . which depicts nudity . . . and which is harmful to minors' and '(b) any . . . magazine . . . which contains [such pictures] and which, taken as a whole, is harmful to minors.'"[93] The full text of the law goes

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[91] 386 U.S. 770.

[92] Fred P. Graham, "Still No Clear Rule on Obscenity," New York Times, May 14, 1967, IV, p. 6.

[93] Section 484-h, New York Penal Law as enacted by legislature in 1965, as cited 390 U.S. at 629.

into great detail to clarify many moot points in the wording of the law.[94]

Sam Ginsberg a Bellmore, New York stationary-store-luncheonette owner, was convicted by the New York courts of violating section 484-h of the New York Penal Law, in that he sold copies of Sir, Man to Man, and Escapade to a sixteen-year-old child. From all indications Ginsberg knew the boy, and had even been warned by the boy's mother not to sell this type of magazine to the boy since he was under age.[95] Under these circumstances this case offered an ideal opportunity to test the legal theory of variable obscenity, since Ginsberg had general knowledge of the nature of the magazines, did not dispute which magazines were involved, and knew that they were not obscene for adults under the Redrup decision of 1966.

The majority opinion of the Court was delivered by Justice Brennan,[96] and it indicated that the Court was following the Roth tests, making allowances for "youthful immaturity."[97] Mr. Justice Brennan declared

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[94]Section 484-h, New York Penal Law as enacted by legislature in 1965, as cited by De Grazier, p. 614.

[95]Samuel Krislov, "From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation," The Supreme Court Review: 1968 (Chicago:University of Chicago Press, 1968), p. 169.

[96]Justices Douglas, Black and Fortas dissenting, De Grazier, pp. 615-622.

[97]Krislow, p. 176.

that since obscenity is not constitutionally protected as free speech or freedom of the press, then a state has the authority to regulate the sale of obscenity with respect to minors.[98] The contention of New York that obscenity, as defined in section 484-h, is "'a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state,'"[99] seemed to justify state control of obscenity to minors. Apparently, one of the basic reasons for legislation against pornography was not constitutional,[100] and the young people of America would be protected while the adult population was free to determine for itself on the issue of obscenity and pornography.

Evidently, the state of Georgia did not interpret the Courts' ruling in this manner, because the state courts of Georgia convicted Robert Eli Stanley on a charge of possessing obscene material, which is against Georgia's state law. The background of the case is that Stanley, an Atlanta bachelor, was suspected of operating an illegal gambling business, and of keeping gambling equipment in his apartment. Stanley's apartment was raided by state officers, who had a warrant authorizing them to seize

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[98] 390 U.S. 641.

[99] 390 U.S. 641.

[100] Magrath, p. 48.

"certain items related to alleged bookmaking activities."[101] There were no gambling devices found in the apartment, but, during the course of the search, the officers did find some rolls of eight-millimeter film. The film was projected on Stanley's projector, and labeled obscene by the officers. The film was seized and Stanley arrested. Convicted under the Georgia law, Stanley appealed to the Supreme Court, claiming that he had no intention of selling the film nor of showing it to minors.[102]

Stanley could have contested the state court's ruling on any or all of several grounds, such as the question of privacy, illegal seizure, or as an issue of who the audience for the film was when the film was screened. He appealed on the basis that the Constitution protected his rights to possession of the material, and that the Georgia statute violated this right. The Court held that the state could not regulate mere possession of obscene materials,[103] nor could it violate the privacy of an individual's library in order to control pornographic materials.[104] The Court stated that

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[101] Al Katz, "Privacy and Pornography: Stanley v. Georgia," The Supreme Court Review: 1969 (Chicago: University of Chicago Press, 1969), p. 203

[102] Katz, pp. 203-204.

[103] 394 U.S. 566.

[104] 394 U.S. 564.

> [W]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own 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. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[105]

The result of the Court's decision was summed up very nicely by Lewis Slaton, District Attorney for Atlanta's Fulton County, when he complained that "'It says a person has a right to possess obscene material which is illegal to sell.'"[106]

This statement is indicative of the controversy that followed in the wake of the Stanley decision. Homing in on the section of Mr. Justice Marshall's majority opinion that states "[i]t is now well established that the Constitution protects the right to receive information and ideas,"[107] one libertine felt that "[t]hat which we have a right to have and possess and which is protected by the Constitution, has the subsidiary protection of the right to be received without undue burden."[108] Under this assumption, the laws prohibiting the sale of pornography are unconstitutional.

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[105] 394 U.S. 565.

[106] "Home Movies," Time, April 18, 1969, p. 78.

[107] 394 U.S. 564.

[108] Albert B. Gerber, "The Right to Receive and Possess Pornography: An Attorney Foresees the End of Legal Restrictions," Wilson Library Bulletin, February, 1970, p. 644.

The effects of the Stanley decision were also felt in the lower court systems of the states. In Massachusetts a U. S. District Court ruled, in Karalexis v. Byrne, that "'if a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theater or library.'" The subject of the hearing was the film I Am Curious (Yellow), which the plaintiffs admitted was obscene. But, since the Stanley ruling, the state obscenity law could not constitutionally be invoked against them. The state's highest court upheld this contention.[109]

As the first year of the new decade passed, there was still no clear-cut definition of pornography. The Supreme Court had utilized the Constitution and the Roth standards in deciding appeals, but often these had clashed with each other, and with the law of the land. As a result of this clash, there were variations on the rulings handed down from the high Court. Variations were often far afield from the original intended meaning, and the subjects of the cases appealed to the Supreme Court for further clarification of the original decision.[110] So, the decision originally voiced to keep similar cases out of

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[109]Harriet F. Pilpel and Kenneth P. Norwick, "But Can You Do That?" Publisher's Weekly, February 2, 1970. p. 65.

[110]See De Grazia, pp. V-XV for a listing of the more important obscenity cases.

the Court, resulted in their return. Since the courts of the land have been unable to determine exactly what constituted obscenity, they have often failed to convict the producers of obscenity. The nucleus of the obscenity control problem is a workable, constitutional definition of what elements make up obscene material. Before this is done, the censors are looking for something without having any idea of the appearance of the object of their search.

APPENDIX

COPY

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, _____ (*Print*), addressee [parent of minor addressee] of the enclosed mailing from _____ (*Print*), _____, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

_____ Signature _____ Date

_____ Street

_____ City _____ State _____ ZIP Code

NAMES OF CHILDREN	BIRTH DATE

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form
May 1968 2150

COPY

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No._____
Issued Against

_____

_____

_____

and agents or assigns.

On behalf of:

_____
Complaining Addressee

P. O. Docket No._____

On the_____day of_____, 19_____, you received Prohibitory Order No._____, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.
4. Other (specify):

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department,_____ (Address),

_____, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK]

_____
Postmaster

Dated:_____

_____ _____ _____
City State ZIP Code

POD Form
May 1968 2153

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

COPY

In the Matter of

_____
Mailer

_____

_____
and agents or assigns

PROHIBITORY ORDER

NO. _____

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

_____
(Name of Addressee)

_____;
(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

_____ _____

_____ _____

_____ _____

ADDRESS: _____
(Street)

_____ _____ _____
(City) *(State)* *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

_____
Postmaster

[POSTMARK]

_____
City State ZIP Code

Dated: _____

POD Form
May 1968 2152

COPY

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of
Prohibitory Order No._____
Issued Against

_____

_____

_____

and agents or assigns, pursuant to authority of Title 39, U. S. Code, §4009.

P. O. Docket No._____

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

_____
Postmaster

_____ _____
City State ZIP Code

[POSTMARK]

Dated:_____

POD Form
May 1968 2154