OBSCENITY AND THE SUPREME COURT: 1957-1973

BY

DAVID WARREN STEWART

OBSCENITY AND THE SUPREME COURT: 1957-1973

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Master of Arts in Education

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by

David Warren Stewart

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To the Graduate Council:

I am submitting a Research Paper written by David Warren Stewart entitled "Obscenity and the Supreme Court 1957-1973." I recommend that it be accepted in partial fulfillment of the requirement for the degree of Master of Arts in Education, with a major in History.

Preston L. Hubbard
Major Professor

Accepted for the
Graduate Council:

William H. Ellis
Dean of the Graduate School

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Chapter 1

INTRODUCTION

The problem of obscenity,[1] which involves individual freedom of expression and the role of government in establishing public morality, has presented the United States Supreme Court one of its greatest challenges. Momentous legal, social, and cultural issues have been raised. For years, segments of society have sought to censor and suppress literature which offended the prevailing norms of the community or which offended the tastes of those engaged in censorship. Books have been burned and artists imprisoned. The emotions and anger of people have often resulted in the passage of laws designed to prevent the distribution of so-called obscene materials.

Other groups and individuals have sought to protect so-called obscene material from regulation by government,

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[1]The Supreme Court uses the terms "obscenity" and "pornography" as functional synonyms. While both terms refer to explicit descriptions of sex-related topics, there are no standard or unambiguous definitions in common usage. If we were to use dictionary definitions, obscenity would be the broader term, including references to excretory functions and profanity, while pornography would only deal with materials pertaining to sex.

claiming that the First and Fourteenth Amendments protected freedom of expression, including expression that might be judged obscene. Their efforts resulted in the protection of classics even those containing so-called obscene passages.

Pornography, however, changed and new battles started. Venturesome publishers and film directors began to produce materials that depicted sexual activities explicitly. The nature of obscenity changed. As it changed, the fight for control of obscenity intensified. The Supreme Court was forced to face the issue.

The contemporary attempt by the Supreme Court to delineate a constitutional test for obscenity began in 1957. Since 1957, the Court has struggled to develop an acceptable test of obscenity which all of the Justices could generally embrace. But its efforts have proved unsuccessful. Instead of agreeing on a single criterion by which to measure obscenity, the Justices have developed several different tests.

This paper will examine the efforts of the Supreme Court to define and regulate obscenity from 1957 to 1973. Representative cases will be cited.

Chapter 2

OBSCENITY REGULATION: HISTORICAL PERSPECTIVE

Attempts to regulate obscenity did not suddenly appear in 1957. The process was a long and arduous task for both groups, those who sought to control so-called obscene material and those who opposed the placing of restrictions on the First Amendment. Therefore, a brief review of obscenity regulation will provide some insight into the legal actions that began in 1957.

The earliest recorded censorship actions in the colonies were directed against printed matter considered blasphemous or seditious. In 1711, Massachusetts enacted a statute entitled "An Act Against Intemperance, Immorality, and Profaneness, and for Reformation of Manners."[2] It was directed against anyone guilty of "composing, writing, printing, or publishing of any filthy, obscene, or profane song, pamphlet,

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[2]Acts and Laws, Passed by the Great and General Court or Assembly of the Province of the Massachussets-Bay in New England, from 1692, to 1719 (London: Printed by John Baskett, 1724) cited by Felice Flanery Lewis, Literature, Obscenity, and Law (Carbondale: Southern Illinois University Press, 1976) p. 3.

libel, or mock sermon, in imitation or in mimicking of preaching, or any part of divine worship."[3]

In 1668 in Massachusetts, Marmaduke Johnson was fined five pounds for possession of a pamphlet, Henery Neville's The Isle of the Pines, which dealt with the activities of a shipwrecked man and four women. Johnson, however, was not fined for possessing obscene material; he was fined for having unlicensed material. During this period, the offense of obscenity was directly related to sacrilege. A person could more easily possess erotic material than blasphemous material.[4]

By the early part of the eighteenth century, the availability of erotic material had increased. Erotic classics and English novels such as Defoe's Moll Flanders and Roxana were circulated throughout the English colonies.[5]

The two earliest obscenity cases on record in the United States, Commonwealth of Pennsylvania v. Sharpless, (1815) and Commonwealth v. Holmes, (1821) were decided on the basis of

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[3]Ibid.

[4]Felice Flanery Lewis, Literature, Obscenity, and Law (Carbondale: Southern Illinois University Press, 1976), pp. 2-3.

[5]Ibid., p. 4.

English common law. These cases were the first in either country in which sexual content was the sole issue.[6]

The Sharpless case involved a painting; the Holmes case involved the book Memoirs of a Woman of Pleasure (Fanny Hill). In both cases, the defendants were accused of attempting to corrupt the youth by creating lustful desires in their minds. The judges in both cases assumed that obscenity was readily recognizable. Neither questioned the authority of common law to ban materials considered obscene.[7]

Between 1821 and 1870 only a few obscenity cases appeared. However, states such as Vermont, Connecticut, Massachusetts, Pennsylvania, and New York enacted statutes designed to control obscenity. In the Tariff Act of 1842, Congress outlawed, for the time, the importation of obscene material. This law was aimed at prints and paintings and made no reference to printed matter. Then in 1865, primarily because of complaints about the sort of reading matter in the Civil War barracks, Congress banned the mailing of obscene matter. The Post Office was not given the authority to enforce this statute.[8]

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[6]Commonwealth of Pa. v. Sharpless, 2 S and R 91 (Pa. Sup. Ct. 1815, and Commonwealth v. Holmes, 17 Mass. 336 (1821) cited by Felice Flanery Lewis, Literature, Obscenity, and Law (Carbondale: Southern Illinois University Press, 1976), pp. 5-6.

[7]Ibid.

[8]W. Barnett Pearce and Dwight L. Teeter, Jr., "Obscenity: Historical and Behavioral Perspectives," Intellect, November 1975, p. 167.

The anti-obscenity drive intensified during the 1870's under the leadership of Anthony Comstock. After leaving high school to join the Union Army, Comstock organized a society against smoking and drinking. He increased his decency campaigns after the Civil War, taking as his motto, "Morals, not Art or Literature."[9]

In 1873, pressure groups managed to get an obscenity bill through Congress that made unmailable "every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance...."[10] It prescribed criminal penalties including a fine and/or a prison term for violators. Many state statutes and local ordinances copied the 1873 statute. Gradually, cases involving these statutes began to appear before the American courts. Unable to find American precedents which would aid them in the interpretation of these statutes, the American courts turned to an 1868 British case, Regina v. Hicklin.

When a British magistrate seized copies of a pamphlet and branded it obscene, Benjamin Hicklin, the Recorder of London, ruled in favor of the author, Henry Scott. Hicklin declared the pamphlet was not obscene. Chief Justice Alexander Cockburn reversed Hicklin's decision, establishing this test for

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[9]Ibid.

[10]18 U.S.C.A. Sec. 1461. See Historical and Revision Notes.

obscenity: "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands, a publication of this sort may fall."[11]

The Cockburn definition became the standard used by many American judges well into the twentieth century. The broadness of this definition made it easier to obtain a conviction for obscenity.

As the sexual content of fiction increased during the 1890's, a sustained effort to censor fiction through legal action began. All works were suspect regardless of their literary quality. Many works recognized as classics for centuries were caught up in this censorship movement. Among these were Voltaire's Candide, Defoe's Moll Flanders and Roxana, and Boccaccio's Decameron. Several court cases followed, and in the Worthington case (1894) a new concept was stated.[12]

Judge Morgan J. O'Brien, the judge in the Worthington case, advocated the "whole book" concept - that a book could not be considered obscene because passages in it were judged obscene. This was a radical departure from the Hicklin test;

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[11]Pearce and Teeter, op. cit., citing L.R. 3 Q.B. 360, 370 (1868).

[12]Lewis, op. cit. pp. 25-45.

however, it did not stop legal attempts at censorship. Nevertheless, censorship forces greatly reduced their attempts to ban classic works of literature.[13]

The tension produced by the coexistence of pro-censorship groups and anti-censorship groups remains with us. It is enhanced by the proliferation of obscene materials and by new areas of obscenity - "peep" shows, adult movies, and live sex shows. All of these elements forced the Supreme Court of the United States to face the issue of obscenity directly for the first time in 1957.

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[13] Ibid.

Chapter 3

THE WARREN COURT AND THE NATIONAL STANDARD

The Supreme Court opened the modern era of obscenity law in 1957. Responding to increased public debate, the Warren Court began the process of creating a standard by which obscenity could be judged. The process was not easy; the Warren Court continually refined its standard. This chapter will review this process by examining the major obscenity cases of the Warren Court.

Roth v. United States and Albert v. California

Roth, a dealer in erotica in New York, specialized in the publication and sale of books, photographs, and magazines. He used circulars and advertising matter to solicit sales. A New York jury convicted him of sending books called Good Times, A Review of the World of Pleasure, and a quarterly called the American Aphrodite, through the mails in violation of section 1461 of Title 18 of the United States Code. This statute makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy... or other publication of an indecent

character."[14] Roth's conviction was affirmed by the Court of Appeals for the Second Circuit. The Supreme Court agreed to hear the Roth case on appeal.[15]

Alberts was convicted by a Beverly Hills, California judge under a misdemeanor complaint which charged him with lewdly keeping for sale obscene and indecent books. He was also charged with writing, composing, and publishing an obscene advertisement of the books, in violation of section 311 of the California Penal Code. A large part of the materials distributed by Alberts were sado-masochistic photographs, popularly known as bondage pictures, and had no literary pretentions whatsoever. His conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles, setting the stage for a Supreme Court Appeal.[16]

Both the Roth case and the Alberts case were argued and decided on the same dates. However, it was Roth's name that became identified with what would later become the Court's newly devised obscenity test. The decision in the Alberts case was contained in the Roth verdict.

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

[15]Ibid.

[16]Ibid., p. 481

The Supreme Court sustained Roth's conviction by ruling that section 1461 of Title 18 of the United States Code was constitutional. Alberts's conviction for violating section 311 of the California Penal Code was sustained also.[17] In reaching these decisions, the Supreme Court had to face several constitutional questions that had been raised by the attorneys for Roth and Alberts. The Supreme Court, in doing so, addressed itself - more than ever before - to the issue of obscenity.

Attorneys for Roth claimed that Roth's conviction violated the provision of the First Amendment that "Congress shall make no law... abridging the freedom of speech, or of the press...."[18] The attorneys also claimed that he had been wrongly convicted under a federal obscenity statute since the "power to punish speech and press offensive to decency and morality"[19] had been left to the states by the Ninth and Fifth Amendments.

Federal powers versus state power was also an issue in the Alberts case. Alberts argued that the federal obscenity statute had been enacted under the powers delegated by Article I, section 8, clause 7 of the United States Constitution. Since this section gave the Federal government the power to manage

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[17]Ibid., p. 476.

[18]Ibid., p. 179.

[19]Ibid.

the mail, the Federal power pre-empted the power of the State of California to manage the mail, including obscene mail.[20]

The defendants in both cases insisted that their right to due process had been violated because the statutes under which they were convicted were too vague to support conviction.[21] The Supreme Court answered all of these questions in the Roth decision.

In its Roth decision, the Court admitted that it was squarely facing the issue of obscenity for the first time. The Court then cited numerous cases supporting the idea that obscenity is not protected by the freedoms of speech and press. Reviewing the history of the First Amendment, the Court stated that it was "apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance."[22] The Court asserted that "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"[23] could be protected by the First Amendment; obscenity could not be protected. Citing an international agreement aimed at restraining obscenity, the obscenity laws of the various states,

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[20]Ibid., p. 480.

[21]Ibid.

[22]Ibid., p. 483.

[23]Ibid., p. 484.

and the obscenity laws enacted by Congress, the Court stated that the First Amendment rejected obscenity "as utterly without redeeming social importance."[24] The Court then held that "obscenity is not within the area of constitutionality protected speech or press."[25] The Court, thus, confirmed the opinions of many.

Because obscenity was not protected by the First Amendment, the Court dismissed Roth's arguments involving the Ninth and Tenth Amendments. Stating that California's obscenity statute did not conflict with federal postal functions, the court dismissed Alberts arguments. The constitutional questions had been answered, but the Court did not stop there.[26]

In the Roth case, the Court stated - for the first time - its test for obscenity. Realizing that it had increased the possibility of unwarranted censorship by placing limits on the First Amendment, the Supreme Court sought to ease this problem by devising a more precise definition of obscenity. It started by voting that "sex and obscenity are not synonyms."[27] Obscene material was material that dealt "with sex in a manner appealing

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[24]Ibid.

[25]Ibid., p. 485.

[26]Ibid., pp. 492-494.

[27]Ibid., p. 487.

to prurient interest."[28] Prurient interest occurred if the material had a tendency to excite lustful thoughts. Sex portrayed in art, literature, or scientific works was not automatically denied the protection of the First Amendment.

The Court expressed its concern over encroachment on the freedoms of speech and press. It insisted that it was:

> vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.[29]

The Court rejected the Hicklin standard and substituted the following test:

> whether the average person, applying contemporary community standards, thinks the dominate theme of the material taken as a whole appeals to the prurient interest.[30]

The task of formulating a less restrictive "national" standard had begun; it did not begin in unanimity. Justice Harlan believed the new formula was too generalized and would make the Court act as a board of censors. Justice Douglas, expressing his position, asserted:

> I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to

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[28] Ibid.

[29] Ibid., p. 488.

[30] Ibid., p. 489.

> sort out the truth from the false in theology, economics, politics, or any other field.[31]

Nevertheless, Roth became the landmark case, the progenitor of all the law produced in this era. Following the Roth case, the Court overturned lower-court decisions that had found obscene the motion picture The Game of Love,[32] a book called One - The Homosexual Magazine,[33] two nudist magazines entitled Sunshine and Health and Sun,[34] and an imported collection of art-student publications.[35] In each of these opinions, the Court merely cited the Roth decision.

In 1959, New York's assessment of the movie, Lady Chatterly's Lover, as obscene was revised by the Court. Again, Justice Harlan expressed his fear that the new standard would make the Court a censorship board - a task he felt the Court was not qualified to handle.[36] He proved to be foresighted; the Court would have to listen to appeals in several cases in the following years after Roth.

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[31]Ibid., p. 514.

[32]Times Film Corp. v. City of Chicago, 355 U.S. 35 (1958).

[33]One, Inc. v. Olesen, 355 U.S. 371 (1958).

[34]Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).

[35]Mounce v. United States, 355 U.S. 180 (1957).

[36]Kingsley Int'l. Picture Corp. v. Regents of the Univ. of New York, 360 U.S. 684 (1959).

Smith v. California

The Court continued to clarify its Roth decision with its decision in Smith v. California. Smith, a bookstore proprietor, was convicted of violating a Los Angeles ordinance which made it unlawful for any person to have obscene material "in any place of business where... magazines, books, pamphlets, papers, pictures, or postcards are sold or kept for sale."[37] Without considering whether the proprietor had been aware of the contents of the book, the state courts of California held Smith liable criminally for the possession in his store of a book later judged obscene.[38]

Smith's conviction was reversed by the Supreme Court. The Court stated that the Los Angeles ordinance violated freedom of the press which was safeguarded from invasion by state action by the Due Process clause of the Fourteenth Amendment. According to the Court, Los Angeles had the right to regulate obscene materials since the First Amendment did not protect obscene materials. But the Court stated that the Los Angeles ordinance interferred with free speech and press, arguing that bookstores were important in the distribution of constitutionally protected materials. Holding a bookstore operator

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[37]Smith v. California. 361 U.S. 148 (1959).

[38]Ibid., pp. 149-155.

responsible for a book that he did not know was obscene would force the operator to sell only those books he had inspected. Therefore, the result would be indirect - but real - limitations on freedom of speech and press in violation of the First and Fourteenth Amendments.[39]

To prevent this kind of indirect censorship, the Court, in Smith v. California, required proof of sciential-knowledge by the defendant of the contents of the book - as a constitutional predicate to any obscenity conviction. The Roth standard became broader, allowing for an easier distribution of so-called pornographic materials.[40]

Jacobellis v. Ohio

In 1964, the Supreme Court clarified the Roth standard again. Its decision in the Jacobellis v. Ohio case had far reaching implications.

Nico Jacobellis, a manager of an Ohio motion picture theater, was convicted of violation of the Ohio Revised Code by possessing and showing an obscene film, Les Amants (The Lovers). He was fined a total of $2,500 and was sentenced to the workhouse if the fines were not paid.[41]

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[39]Ibid.

[40]Ibid., pp. 148-168.

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

Once again, the Court had become involved in judging an obscenity case, a task many members wanted to avoid. However, the obscenity cases were not unanimous decisions. In dispelling the contention that it should not become involved in judging individual obscenity cases, the majority argued that the idea was:

> appealing since it would lift... a difficult, recurring, an unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees.[42]

The Court reaffirmed its committment to the Roth test by declaring:

> any substitute would raise equally difficult problems, and we therefore adhere to that standard.[43]

According to the Court, a work had to go substantially beyond customary limits of candor and description or representation before being judged obscene. Thus the whole book concept, or as in this case, the whole movie concept was affirmed.

Then the Court answered a new question. For the first time, the Court defined the term community as it pertained to the local community from which a case arose; it referred

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[42]Ibid., p. 187.

[43]Ibid., P. 191.

to the nation as a whole. The Court stated that it did not see how:

> any 'local' definition of the community could properly be employed in delineating the area of expression that is protected by the Federal Constitution.[44]

The "national" standard had bloomed.

The 1966 Trilogy

Since 1957, Roth had been used to strike down a number of obscenity convictions. Three obscenity cases appeared on the Court's docket in 1966; Roth played an important role again. The three cases were A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, Ginzburg v. United States, and Mishkin v. New York.

The Memoirs Case

The Memoirs case involved a book written by John Cleland in 1750, Memoirs of a Woman of Pleasure (commonly known as Fanny Hill). In a civil suit, the Attorney General of Massachusetts sought to have the book declared obscene. G. P. Putnam's Sons, the publisher of the book, intervened in the proceedings in behalf of the book. Expert testimony given by the chairman of the English department at Williams College, a

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[44]Ibid., p. 193.

Harvard English professor, a Massachusetts Institute of Technology professor, and a Brandeis University professor claimed that Fanny Hill had literary merit and historical value. Other experts asserted that the book was hard core pornography. The lower court and the Massachusetts Supreme Judicial Court decreed the book obscene, stating that it was not entitled to the protection of the First and Fourteenth amendments.[45]

Restating the test that had been elaborated in Roth and subsequent cases, the Supreme Court reversed these judgments. It then stated that each of three elements must independently be satisfied before a book could be held obscene:

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[46]

The Supreme Court considered only the last section of the test in overturning the Massachusetts verdicts. The Massachusetts Supreme Judicial Court had held that a book could be declared obscene even if it had some social value. The Supreme Court rejected this concept, but the Court admitted

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[45]A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

[46]Ibid., p. 418.

that, in a different setting, Fanny Hill might be declared obscene legally. The Court clarified this statement in the Ginzburg case.[47]

The Ginzburg Case

Ralph Ginzburg, who boasted of the sexual content of his publications, was convicted of sending through the mail Eros, a hard-cover magazine, Liaison, a biweekly newsletter, and The Housewife's Handbook on Selective Promiscuity in violation of a federal obscenity statute.[48]

After hearing evidence supporting the literary merit of the Ginzburg's materials, the Supreme Court sustained Ginzburg's conviction. His activities in advertising and selling his publications played a major role in his conviction. Ginzburg advertised his magazines and newsletters in circulars stressing unrestricted expression of sex. He sought mailing priviledges from places with suggestive names. Intercourse and Blue Balls, Pennsylvania were too small to handle the volume of his mail, so Ginzburg deposited his materials with the postmaster at Middlesex, New Jersey.[49]

The Court found Ginzburg guilty of pandering - the purveying of publications openly advertised to appeal to the

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[47]Ibid., p. 418.

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

[49]Ibid., pp. 466-470.

customers' erotic interest. Thus, the setting in which a book appeared became an important aid in determining the question of obscenity, at least for this case.[50]

The Mishkin Case

In the third case, Edward Mishkin was convicted of violating a New York law by preparing, publishing, and selling obscene books. Mishkin urged his writers to depict such deviations as sado-masochism, fetishism, and homosexuality. In Mishkin, the Court decided that the prurient appeal test was met when it could be shown that a work was designed for and disseminated to a well-defined sexual group.[51]

Redrup v. New York

The obscenity law continued in this state until 1967. The Supreme Court docket became clogged with a large number of obscenity cases involving a variety of materials found obscene by trial courts and juries. In 1967, the Court decided three companion cases, Redrup v. New York, Austin v. Kentucky, and Gent v. Arkansas. Most of the relevant data was cited in Redrup.

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[50]Ibid., pp. 474-476.

[51]Mishkin v. New York, 383 U.S. 502-518 (1966).

Redrup, a New York City newsstand clerk, was convicted of selling a plain-clothes patrolman two paperback books, Lust Pool and Shame Agent, in violation of the New York Penal Code. The patrolman had asked for the books by name.[52]

Austin owned and operated a retail bookstore and newsstand in Paducah, Kentucky. One of his salesgirls was arrested after selling two magazines, High Heels and Spree. A woman resident, like the patrolman in Redrup, had asked for the magazines by the name.[53]

In Gent, the prosecuting attorney of the Eleventh Judicial District of Arkansas sought to have certain issues of various magazines declared obscene and destroyed. The magazines proceeded against were Gent, Swank, Bachelor, Modern Man, Cavalcade, Gentlemen, Ace, and Sir. The magazines were declared obscene by various courts in Arkansas.[54]

In deciding these cases, the Court noted that none of the statutes in question reflected a specific and limited state concern for juveniles. None of the cases, according to the Court, suggested that individual privacy had been violated by the publication or distribution of the materials in question. In none of the cases was there evidence of the

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[52]Redrup v. New York, 386 U.S. 768 (1967).

[53]Ibid., pp. 768-769.

[54]Ibid., p. 769.

sort of pandering which was significant in the Ginzburg case. The Court concluded that the distribution of the publications in question was protected by the First and Fourteenth Amendments from governmental suppression.[55]

The Redrup decision broke a logjam of Supreme Court cases. It was used to overturn some fifteen obscenity convictions. As a result of the Redrup decision, a wide range of paperback novels, girlie magazines, and motion picture films received the protection of the Constitution. Redrup became the watchword in reversing thirty-five obscenity convictions following its appearance. This unconditional Supreme Court action led lawyers to conclude that any publication which was not sold to a minor or which did not interfere with the privacy of another enjoyed First Amendment protection.

Stanley v. Georgia

In 1969, the Court delivered one of its most important obscenity decisions. With this decision the Court concluded the clarification and expansion of the Roth doctrine. This case was Stanley v. Georgia.

During a search for bookmaking activities, federal agents and state officers found three reels of eight-millimeter film in a desk in Stanley's bedroom. After viewing the films with

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[55]Ibid., pp. 769-771.

Stanley's projector, the state officers declared them obscene and seized them. Stanley was arrested for possession of obscene matter in violation of Georgia law. The Supreme Court of Georgia affirmed Stanley's conviction, citing the Roth decision. Since both parties agreed that the material in question was obscene, the issue before the Supreme Court was whether the private possession of obscene matter was constitutional.[56]

The Supreme Court, agreeing with the Georgia Supreme Court, indicated that the Roth decision had declared, seemingly without qualification, that obscenity was not protected by the First Amendment. The Court argued the Stanley case could not be decided by citing Roth because Roth had involved the distribution of obscene matter - not the private possession of obscene matter. The Court also rejected Georgia's claim that it had the right to regulate the ideas to which a person could be exposed. The Court argued:

> 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.[57]

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[56] Stanley v. Georgia, 394 U.S. 557-562 (1969).

[57] Ibid., p. 565.

When the Warren Court reversed Stanley's conviction, it stated that mere possession of obscenity could not be made criminal. Stanley became the Warren Court's valedictory opinion in the obscenity field. Under Stanley's influence, it was thought that the Court was on the road to renovating and modernizing the law of obscenity by holding that sexually oriented material was protected speech, subject only to the limited control of safeguarding minors and those unwilling to receive it. But, as it developed, the authority of Roth had crested and was receding.

Chapter 4

RETURN TO THE LOCAL STANDARD

In the years following Roth and Redrup, the composition of the Supreme Court changed dramatically when Richard Nixon began making appointments to the Court in 1969. When the next battery of obscene cases was considered by the Court, Chief Justice Burger had assumed its leadership, with Justice Blackmun siding with him. In 1971, the Burger Court began to withdraw the frontiers established by the Warren Court, rejecting the claim that the distribution of obscenity could only be criminal if made to minors or an unwilling audience. In 1971, the Burger Court began the process of modifying the Roth standard. This process will be examined, using representative cases.

United States v. Reidel

In 1970, Norman Reidel was charged with sending through the mail three copies of an illustrated booklet entitled The True Facts About Imported Pornography. One of the copies had been sent to a postal inspector who had requested the booklet. A Federal District Court, stating that Reidel

had made a constitutionally protected delivery, dismissed the case. Citing Stanley, the judge stated that "if a person has the right to receive and possess this material, then someone must have the right to deliver it to him."[58]

The Supreme Court reversed the lower court's decision, arguing that the lower court had given Stanley too wide an interpretation. The Court declared that the Stanley decision had not questioned the validity of the Roth decision; therefore, Reidel could be convicted for distributing obscene materials. Only materials used privately could be protected. Justice Black, in dissent, pointed out that it would be hard to possess materials that could not be distributed legally.[59]

In Reidel, the Court made it apparent that there would be no further doctrinal expansion of Roth. Reidel sounded the requiem for Stanley; it also indicated that the Burger Court did not accept the concept that obscenity regulation should be limited to safeguarding minors and unwilling recipients.

The June Decisions: Background

By 1971, Justices Powell and Rehnquist had joined the Burger Court. A new majority on obscenity was formed, making

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[58]United States v. Reidel, 402 U.S. 355 (1971).

[59]Ibid., pp. 355-379.

possible a new attitude toward obscenity regulation. An integral part of future Court actions on obscenity was Chief Justice Burger's desire to reduce the Court's caseload. On June 21, 1973, the Court announced opinions in five major cases dealing with the substantive law of obscenity. Subsequently, the Court remanded some sixty additional cases, which were pending, for reconsideration in light of the June decisions. These June cases were Miller v. California, Paris Adult Theatre I v. Slaton, Kaplan v. California, United States v. Orito, and United States v. 12 200-Foot Reels of Super 8mm. Film. Since the decisions in these cases were interrelated, the background information for each case will be presented and then the decisions will be examined.

Miller v. California.

Marvin Miller had started one of the largest mail-order businesses in California dealing in sexually oriented materials. He was convicted under California's Roth test obscenity law of mailing unsolicited ads and sexually oriented magazines to the public, specifically a restaurant in Newport Beach, California. Using explicit photographs of sexual activities, the brochures advertised four books entitled Intercourse, Man - Woman, Sex Orgies Illustrated, and Illustrated History of Pornography, and a film entitled Marital Intercourse. The trial judge instructed the jury to assess the challenged publications in

light of California's contemporary community standards and not a national standard. The prosecutor produced no proof, expert or otherwise, bearing on the issue of obscenity.[60]

Paris Adult Theatre I.

In this case, the District Attorney for Atlanta, Georgia, and the state solicitor joined forces and filed civil complaints seeking to enjoin the exhibition of two allegedly obscene films entitled Magic Mirror and It All Comes Out in the End at the Paris Adult Theatre I. These actions were initiated under a Georgia civil statute based on the Roth test. Evidence presented at the trial showed the theatre had an inoffensive entrance. No offensive photographs were displayed and a sign at the theatre's entrance indicated that adult films were shown by the theatre. This sign advised anyone who would be offended by nude bodies not to enter; it also warned that a person had to prove he was twenty-one before he could enter. The Atlanta trial judge dismissed the complaint on Stanley grounds, holding that the exhibition of these films in a commercial theater to consenting adults, with the use of reasonable precautions preventing exposure to minors, was constitutionally protected. The Georgia Supreme Court reversed the trial court, finding the films obscene.[61]

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[60] Miller v. California, 413 U.S. 16-18 (1973).

[61] Paris Adult Theatre I v. Slaton, 413 U.S. 49-53 (1973).

Kaplan v. California.

In this case, Murray Kaplan, who owned the Peek-A-Boo Bookstore, one of more than two hundred and fifty bookstores in Los Angeles, was convicted of selling an unillustrated paperback novel entitled Suite 69. He sold the book to an undercover police officer who asked for a sexy book. Since the book contained no pictures, Kaplan argued that the written word could not, under any circumstances, be considered legally obscene. During the lower court trial, both sides presented expert testimony as to the nature of the book. But the State offered no evidence that the book had no redeeming social value. Those questions would confront the Supreme Court.[62]

United States v. 12 200-Ft. Reels.

The defendant, Paladini, sought to import movie films, color slides, photographs, and other printed materials into Los Angeles from Mexico. Customs officers seized these materials under the authority of a federal statute which prohibits the importation of any obscene or immoral materials. The District Court for the Southern District of California dismissed the government's complaint stating that the statute in question had been declared unconstitutional in a previous case. The Supreme Court, contending that a new issue was

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[62] Kaplan v. California, 413 U.S. 115-121 (1973).

involved, reviewed the case and came to terms with the Stanley decision.[63]

United States v. Orito.

George Joseph Orito was indicted for transporting numerous reels of allegedly obscene material from San Francisco to Milwaukee in violation of a federal statute. The District Court for the Eastern District of Wisconsin dismissed the indictment on the grounds that the federal statute in question was unconstitutionally broad because it failed to distinguish between public and nonpublic transportation. The Supreme Court agreed to review the case.[64]

With a snyopsis of the cases, we turn now to a discussion of the major rules of law which emerged from these cases.

The June Decisions: Substantive Law

In the previously cited cases of 1973, the Supreme Court drastically changed the formula for judging obscenity. It remanded the five cases back to lower courts to be reviewed in light of its new standards. Since the decisions in these cases were supportive of each other, they will be examined by looking at the major points involved.

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[63]United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123-125 (1973).

[64]United States v. Orito, 413 U.S. 139 (1973).

The Miller Manifesto.

In Miller and companion cases, the Burger Court radically changed the Roth formula for judging obscenity. In Miller, the Court formulated a new trier for judging obscenity by declaring:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary artistic, political or scientific value.[65]

The Court concluded that for an obscenity statute to be constitutional, it must specifically define the sexual conduct sought to be disallowed. The Roth test for evaluating obscenity was discarded because it was too vague for defendants to understand and impossible for prosecutors to implement. The Court, stating that its function did not include proposing regulatory schemes for the States, did suggest examples of what a state statute could define. The examples included:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[66]

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[65]Miller, op. cit., p. 24.

[66]Ibid., p. 25.

The Court also insisted that sex and nudity could not be exploited in films or pictures without limits.

In Paris Adult Theatre I, supported by statements in Miller, the Court attacked the right of consenting adults to view any material without regulation. The Court declared that it categorically disapproved of "the theory, ..., that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only."[67]

In United States v. Orito and United States v. 12 200-Ft. Reels of Super 8mm. Film, the Burger Court continued to place restrictions on the Stanley ruling. Both cases involved the importation of obscene materials for private use. The Court concluded that the zone of privacy that Stanley protected did not extend beyond the home:

> We are not disposed to extend the precise, carefully limited holding of Stanley to permit importation of admittedly obscene material simply because it is imported for private use only. To allow such a claim would be not unlike compelling the Government to permit importation of prohibited or controlled drugs for private consumption as long as such drugs are not for public distribution or sale. We have already indicated that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others.[68]

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[67] Paris Adult Theatre I, op. cit., p. 57.

[68] 12 200-Ft Reels of Film, op. cit., p. 128.

In an equally important area, the Court rejected the Roth contention that a work had to be utterly without redeeming social value before it could be declared obscene. The Burger Court argued that "that concept has never commanded the adherence of more than three Justices at one time."[69]

The Written Word

Since the Redrup decision, attorneys and publishers had believed that works containing only words would be constitutionally protected, no matter how frankly they depicted sexual experiences. The Court, in Kaplan v. California, rejected the claim that books were automatically protected, stating:

> Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures or flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be. But this generalization, like so many, is qualified by the book's content. As with pictures, paintings, drawings, and engravings, both oral utterances and the printed word, have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution.[70]

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[69] Miller, op. cit., p. 25.

[70] Kaplan, op. cit., pp. 119-120.

Proof of Obscenity.

Prior to the June obscenity decisions, it had become customary for expert testimony to be presented in obscenity trials as to the content and nature of the material in question. In the Paris Adult Theatre case and the Kaplan case, the Court asserted that expert testimony was not necessary to meet constitutional standards:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand.... No such assistance is needed by jurors in obscenity cases; indeed the expert witness practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.[71]

Community Standard.

In 1964, the Supreme Court decided that a national standard would be used in interpreting contemporary community standards. It argued that the First Amendment could not be geographically compartmentalized. However, in the Miller case and the Paris Adult Theatre case, the Burger Court negated the national standard.

In Miller, the Court decreed:

> We hold the requirement that the jury evaluate the materials with reference to 'contemporary' standards of the State of California serves this

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[71] Paris Adult Theatre I, op. cit., p. 56.

> protective purpose and is constitutionally adequate.[72]

The Burger Court did not indicate whether the new standard would pertain to the state as a whole or to a local community from which an obscenity case arose.

Thus, the June decisions negated most of the Roth standards. They did not, however, end the controversy over the regulation of obscenity.

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[72]Miller, op. cit., pp. 33-34.

Chapter 5

CONCLUSION

The importance of obscenity as a social, political, and legal issue during the period from 1957 to 1973 is beyond question. Whether it should have been an important issue is questionable. Nevertheless, people and events made it an issue which the Supreme Court could not avoid.

During this period, obscene materials, such as peep shows, X-rated films, and live sex shows, proliferated. The more traditional elements of society rebelled at this increase of obscenity. Blaming the increased availability of obscene materials for the moral decay in America and for a wide variety of sex crimes, these groups sought rigid censorship over so-called obscene materials. These censorship attempts often resulted in the banning of serious works of art.

Other groups, frightened by the banning of serious works of art, fought the attempts at censorship. Stating that adults should be allowed to read or view materials at their own discretion, these groups sought to invoke the guarantees of the First Amendment.

Elected officials, especially prosecutors, found obscenity control a safe issue. A minority opposed any regulation of obscene materials, but the majority responded favorable to attempts to control pornography. As a result, pornography prosecution was often pursued by many elected officials.

All of these elements forced the issue of obscenity before the Supreme Court, and the Supreme Court attempted to solve the problem. It was unsuccessful.

The Supreme Court, under the leadership of Chief Justice Warren, faced the issue squarely. In a series of decisions, the Warren Court formulated tests for obscenity that seemed to protect the right of consenting adults to read or view obscene materials. The formulation of these tests was not easy. Many of the cases were decided by a plurality indicating that a change in the make-up of the Court might result in a new test.

When Warren Burger became Chief Justice, the process of reversal began. The process intensified as President Nixon made new appointments to the Court. The Burger Court sought to remove the issue of obscenity from the Supreme Court's docket be devising a formula that would allow lower courts to interpret obscenity questions. Obscene materials lost some of the protection they had enjoyed under the Warren Court rulings.

The issue of obscenity was not solved by the rulings of the Warren Court or the Burger Court. The Supreme Court,

demonstrating that public pressure could influence it, swayed back and forth on the obscenity issue. The majority of the Court was consistent in only one respect, obscenity was not protected by the First Amendment.

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