1960

The Metaphysics of the Law of Obscenity

Harry Kalven Jr.

HARRY KALVEN, JR.

THE METAPHYSICS OF THE LAW OF OBSCENITY

I. The Problem

The United States Supreme Court had no occasion to pass on the constitutionality of legislation making obscenity a crime for more than one hundred and fifty years after the adoption of the First Amendment. Within the last five years, however, the Court has been confronted with and decided most of the principal questions relating to the problem. It has thus defined a body of law which has rich interest for lawyer and layman alike, and has developed constitutional doctrine with major implications transcending the immediate problem. The purpose of this article is to examine some of the Court's recent opinions[1] in order to see how it has resolved the perplexities inherent in the problem of the validity of such legislation and to see what issues, if any, remain to be decided.[2]

Harry Kalven, Jr., is Professor of Law, The University of Chicago.

[1] Butler v. Michigan, 352 U.S. 380 (1957); Roth v. United States, 354 U.S. 476 (1957); Kingsley Pictures Inc. v. Regents, 360 U.S. 684 (1959); and Smith v. California, 361 U.S. 147 (1959). One other major decision, Kingsley Books v. Brown, 354 U.S. 436 (1957), dealing primarily with the constitutionality of prior restraints, falls outside the scope of this article.

[2] For general discussions of obscenity and the law, see Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1937); Lockhart & McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954); *Symposium: Obscenity and the Arts*, 20 LAW & CONTEMP. PROB. 531 (1955); ST. JOHN-STEVAS, OBSCENITY AND THE LAW (1956); Kalven, Book Review, 24 U. CHI. L. REV. 769 (1957), 27 LIBRARY Q. 201 (1957).

Although it has been argued that the utterance of obscenity was a common-law crime,[3] early instances are infrequent and, at best, ambiguous. The publication of obscene matter does not clearly emerge as a crime in England until the passage of Lord Campbell's Act in 1857.[4] American legislation comes a few years later under the crusading impetus of Anthony Comstock.[5] During the early part of the twentieth century there were judicial decisions, principally from Massachusetts, which laconically assumed the constitutionality of such legislation;[6] but most of these decisions antedate the constitutional doctrines of free speech developed by the Supreme Court in the period from *Schenck*[7] to *Yates*.[8] Thus, the law of obscenity regulation seems to have had a kind of "sleeper" development, outside the main stream of decisions dealing with the problems of freedom of speech, until recently two distinguished lower court judges were met with the dilemma of reconciling the theories underlying the free-speech cases with the decisions sustaining obscenity regulation. Judge Curtis Bok, in *Commonwealth v. Gordon*,[9] and Judge Jerome Frank, in *United States v. Roth*[10] both found the problem perplexing, and Judge Frank's opinion reads like a personal plea to the Supreme Court to resolve the constitutional difficulties.[11]

The constitutional problems are primarily of two kinds. The first revolves around the ambiguity of the term "obscenity." The lack of

---

[3] The English history is reviewed in Alpert, *supra* note 2, at 40–53, and in ST. JOHN-STEVAS, *op. cit. supra* note 2, at 18–29.

[4] 20 & 21 Vict., c. 83 (1857).

[5] There were scattered American cases, however, prior to the Civil War. See Lockhart & McClure, *supra* note 2, at 324 and n. 200.

[6] See, *e.g.*, Commonwealth v. Allison, 227 Mass. 57 (1917); see also Grant & Angoff, *Massachusetts and Censorship* III, 10 B. U. L. REV. 147 (1930).

[7] 294 U.S. 47 (1919).

[8] 354 U.S. 298 (1958).

[9] 66 Pa. D. & C. 101 (1949).

[10] 237 F. 2d 796 (2d Cir. 1956). Judge Frank, after entering a concurring opinion (*id.* at 801–6), added an appendix of twenty pages in which he detailed his difficulties (*id.* at 806–27). He had anticipated some of the problems in his opinion in Roth v. Goldman, 172 F. 2d 788, 790 (2d Cir. 1948). Mention should be made also of the opinion of Judge Arnold, in Esquire v. Walker, 151 F. 2d 49 (D.C. Cir. 1945), *aff'd sub. nom.* Hannegan v. Esquire, 327 U.S. 146 (1946).

[11] The Frank opinion is a remarkable judicial performance and deserves wide reading. I have attempted to indicate my respect—and gratitude—for it in Kalven, Book Review, *supra* note 2.

precision had in no way been abated by the slow evolution of the test for obscenity, from the measure of the impact of isolated passages on the susceptible—the formula provided by the leading English case of *Queen v. Hicklin*[12] in 1868—to the standard of the impact of the whole upon the average member of the audience, a doctrine worked out by Judges Woolsey and Learned Hand in *Kennerley*,[13] *Levine*,[14] and "*Ulysses*."[15] At the time the problem came to the Supreme Court it could still be argued with some force that the term was irreducibly vague and that all definitions were circular—a poor predicate for a law inhibiting free speech. It may be possible to distinguish between degrees of explicitness in discussions of sex, but among explicit discussions of sex it is heroic to attempt to distinguish the good from the bad. Nor were the contemporary decisions of the state courts reassuring: Massachusetts, in 1945, held that the fine, compassionate novel by Lillian Smith, *Strange Fruit*, was obscene;[16] at about the same time, it held that *Forever Amber* was not.[17] And the New York and Massachusetts courts had reached opposite conclusions about Erskine Caldwell's *God's Little Acre*.[18]

The second group of constitutional doubts derived from the clear-and-present-danger test. Toward what dangers was obscenity legislation directed? Analysis reveals four possible evils: (1) the incitement to antisocial sexual conduct; (2) psychological excitement resulting

---

[12] L. R. 3 Q. B. 360 (1868). The famous test appears in the opinion of Lord Cockburn, at 371.

[13] United States v. Kennerley, 209 Fed. 119 (S.D.N.Y. 1913).

[14] United States v. Levine, 83 F. 2d 156 (2d Cir. 1936).

[15] United States v. One Book "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1934), *aff'd*, 72 F. 2d 705 (2d Cir. 1934). Judge Woolsey's opinion is probably the most widely known of all judicial decisions on obscenity, but its concern is with the evaluation of Joyce's work and not with constitutional issues. Judge Woolsey handled the literary critic aspect of his assignment with wit, compassion, and charm, observing: "The words which are criticized as dirty are old Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe. In respect to the recurrent emergence of the theme of sex in the minds of his characters, it must always be remembered that his locale was Celtic and his season spring." 5 F. Supp. at 183–84.

[16] Commonwealth v. Isenstadt, 318 Mass. 543 (1945).

[17] Attorney General v. "Forever Amber," 323 Mass. 302 (1948).

[18] People v. Viking Press, 147 Misc. 813 (Mag. Ct. N.Y. Co. 1933) (not obscene); Attorney General v. "God's Little Acre," 326 Mass. 281 (1950) (obscene).

from sexual imagery; (3) the arousing of feelings of disgust and revulsion; and (4) the advocacy of improper sexual values.[19] All present difficulties. It is hard to see why the advocacy of improper sexual values should fare differently, as a constitutional matter, from any other exposition in the realm of ideas. Arousing disgust and revulsion in a voluntary audience seems an impossibly trivial base for making speech a crime. The incitement of antisocial conduct, the point at which Judges Bok and Frank directed most of their fire, evaporates in light of the absence of any evidence to show a counection between the written word and overt sexual behavior.[20] There remains the evil of arousing sexual thoughts short of action. There is no doubt that the written word can excite the imagination. What puzzled Judge Bok and amused Judge Frank was the idea that the law could be so solemnly concerned with the sexual fantasies of the adult population.[21]

The movement of obscenity cases to the Court took an ironic turn in 1947. The New York Court of Appeals held that Edmund Wilson's *Memoirs of Hecate County* was obscene.[22] Here was an ideal test case, involving a serious book by the country's most distinguished literary critic. The New York Court of Appeals had disposed of the case without opinion and without dissent, stating "that the conviction

---

[19] It is possible to assert a fifth evil: the impact of obscenity on character and hence, slowly and remotely, on conduct. Mr. Justice Harlan recognizes this possibility in his opinion in *Roth*, 354 U.S. at 502.

[20] The evidence is summarized in Lockhart & McClure, *supra* note 2; Sr. JOHN-STEVAS, *op. cit. supra* note 2, at 196–202; and in the Frank opinion in *Roth*, 237 F. 2d at 812–17. See also MCKEON, MERTON, & GELLHORN, THE FREEDOM TO READ 71–78 (1957). While there is no persuasive evidence that exposure to obscenity triggers action, there is also, it must be admitted, no persuasive evidence that it does not. One view on the point has been captured in two well-known bon mots. The first is the remark attributed to Mayor James J. Walker of New York, that no nice girl was ever ruined by a book. The second is the comment by Macaulay: "We find it difficult to believe that in a world so full of temptations as this, any gentleman whose life would have been virtuous if he had not read Aristophanes or Juvenal, will be vicious by reading them." Both are quoted at 237 F. 2d 812.

[21] It is one of the ironies of discussion of obscenity that it has been too polite to put the point that must be involved. The talk is of "arousing sexual thoughts." Presumably what is meant is a physiological (sexual) response to a picture or the written word. And one suspects that the real fear is one that everyone, except Anthony Comstock, has been too reticent to mention, the fear of masturbation. See Kalven, Book Review, *supra* note 2; see also BROUN & LEECH, ANTHONY COMSTOCK—ROUNDSMAN OF THE LORD (1927).

[22] The details of the litigation are fully set forth in Lockhart & McClure, *supra* note 2, at 295–301.

aforesaid did not violate the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States."[23] It was an arresting commentary on the vitality of the constitutional issue that at that late date the New York high court did not think it serious enough to warrant an opinion. The hope that the Supreme Court would make both law and history in reviewing this case was dissipated when its judgment came down. The Court had divided evenly, thus affirming the conviction.[24] Following tradition in evenly divided decisions, there was no opinion.[25] The possibility of such division had resulted from Mr. Justice Frankfurter's recusation because he was a personal friend of Wilson's. If it revealed nothing else, however, the judgment served notice on the legal world that the constitutional issue was an open question.

II. Butler v. Michigan

In 1956 the Court's first important decision in the obscenity area, *Butler v. Michigan*,[26] appeared to dig deeper the hole in which the Court would find itself when it faced the constitutional issue directly. *Butler* involved a conviction under a Michigan statute which made it a crime to "publish materials tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. . . ."[27] Mr. Justice Frankfurter, speaking for a unanimous Court, held the statute unconstitutional. He read the statute as making it an offense to sell to the general public a book that might have a deleterious influence on the young.

> The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. Indeed, the Solicitor General of Michigan has, with characteristic candor, advised the Court that Michigan has a statute specifically designed to protect its children against obscene

---

[23] People v. Doubleday & Co., 297 N.Y. 687 (1947).

[24] Doubleday & Co. v. New York, 335 U.S. 848 (1948).

[25] The tradition was recently shattered in Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960).

[26] 352 U.S. 380 (1957).

[27] *Id.* at 381.

matter "tending to the corruption of the morals of youth." But the appellant was not convicted for violating this statute.

We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. . . .[28]

The *Butler* case thus appeared to do little more than underwrite the shift in the test audience, from the young and vulnerable to the average adult, when the item in question is distributed to the general public. The point had been brilliantly made by Judge Learned Hand more than forty years earlier in *United States v. Kennerley*[29] when, although following the *Hicklin* rule, he added the following dissenting dictum:

I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, "obscene, lewd, or lascivious." I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. That such latitude gives opportunity for its abuse is true enough; there will be, as there are, plenty who will misuse the privilege as a cover for lewdness and a stalking horse from which to strike at purity, but that is true today and only involves us in the same question of fact which we hope that we have the power to answer.

Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be

---

[28] *Id.* at 383–84.

[29] 209 Fed. 119 (S.D.N.Y. 1913).

> necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.[30]

In fact, however, the *Butler* case cuts deeper. The Court was saying that the average adult is not merely the preferred test audience for materials distributed generally; it is the constitutionally required test audience. Moreover, if the state cannot bar materials generally distributed by using their impact on youth as a criterion of obscenity, it cannot use the young at all as a justification for regulation. That is, the state cannot justify regulation on the ground that the regulated materials might move the young to antisocial conduct, or might excite the sexual imagination of the young, or might make premature disclosure of the "facts of life" to the young in a vulgar and debased form. Admittedly these are serious problems, particularly the last. They may well justify intervention of the state keyed specifically to distributions to children. But so far as distribution of materials to the general public is concerned the impact on the young has now become irrelevant. If general publications not specifically aimed at children are to be banned as obscene, it can only be because of their effect on the adult audience, because of their impact on the average adult who is sexually experienced and mature. The *Butler* decision thus served to sharpen the constitutional debate that would attend a decision on the constitutionality of general obscenity statutes.

III. Alberts and Roth

The Court finally reached the constitutional issue in 1956 in two cases which were heard and decided together: *People v. Alberts* and *United States v. Roth.*[31] In the *Alberts* case, a conviction was based on a California statute which made the distribution of obscene mate-

---

[30] *Id.* at 120–21.

[31] 354 U.S. 476 (1956).

rials a crime. The *Roth* case involved a federal statute making criminal the transmission of obscene materials through the mails. The Court, agreeing that this was the first time the constitutional issue had been "squarely presented" to it under either the First or the Fourteenth Amendment, sustained the validity of both the federal and the state regulation. The opinion of the majority was by Mr. Justice Brennan; Mr. Chief Justice Warren filed a separate concurring opinion; Justices Black and Douglas dissented; and Mr. Justice Harlan concurred in *Alberts* and dissented in *Roth*.

The majority opinion, although it decisively and unequivocally disposed of doubts as to constitutionality, did so by a route which neatly bypassed all the perplexities raised by Judges Bok and Frank and the commentators. Mr. Justice Brennan began by stating the question in a fashion that clearly foreshadowed the answer: "The dispositive question is whether obscenity is utterance within the area of protected speech and press."[32] The question could be put differently.[33] Mr. Justice Harlan asked whether the particular materials before the Court could constitutionally be subjected to regulation. For Justices Black and Douglas the question was whether the state could use the criminal law to regulate speech and letters to prevent the alleged evils of obscenity. The Court's beginning was thus reminiscent of its strategy in *Dennis*,[34] where it limited certiorari to the question whether advocating the violent overthrow of government could be constitutionally punished. The difficulty with this approach, as both Mr. Chief Justice Warren and Mr. Justice Harlan were quick to point out, is that the Court was thereby deciding an abstract question cut off from the color and context of particular circumstances. One can only assume that the referents for "obscenity" in the minds of the majority of justices as they dealt with the question were certain well-known four-letter Anglo-Saxon words, or images of "French postcards." Yet the last time the Court had had the question, the referent was Edmund Wilson's *Memoirs of Hecate County*.

Having thus stated the issue, Mr. Justice Brennan proceeded

[32] *Id.* at 481.

[33] The grant of certiorari in *Roth* was limited to the questions whether the federal obscenity statute was constitutional under the First, Ninth, and Tenth amendments. 352 U.S. 964 (1957). *Alberts* came up by way of appeal from a state court. 352 U.S. 962 (1957). The issues there, too, were limited to federal constitutional questions.

[34] Dennis v. United States, 341 U.S. 494 (1951).

quickly to its disposition. He first noted that, although it had never passed on the question, the Court had several times previously appeared to assume its constitutionality in dicta. The First Amendment, in light of colonial history, cannot be read as intended to "protect every utterance."[35] This argument is curious. Because thirteen of the fourteen states which ratified the Constitution had laws prohibiting libel, profanity, and blasphemy, he concluded that obscenity is without constitutional protection. There are at least two difficulties here. The Court seems to have assumed that the only argument against the constitutionality of obscenity regulation rests on the broad premise that under the First Amendment no utterances can be prohibited and that if this broad premise were destroyed the argument must collapse. Further, the Court's use of history was so casual as to be alarming in terms of what other propositions might be proved by the same technique. Is it clear, for example, that blasphemy can constitutionally be made a crime today? And what would the Court say to an argument along the same lines appealing to the Sedition Act of 1798 as justification for the truly liberty-defeating crime of seditious libel?

The opinion then proceeded to the crux of the matter. "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" are protected against governmental restraint. Obscenity on the other hand is "utterly without redeeming social importance."[36] This is clear from the fact that over fifty nations have entered into international agreements for its regulation, and twenty obscenity laws have been enacted by Congress in the last century. The Court then quoted *Chaplinsky*[37] to the effect that "such utterances are no essential part of any exposition of ideas . . ." and concluded: "We hold that obscenity is not within the area of constitutionally protected speech or press."[38]

The opinion, however, was not yet finished. The most interesting part was to come. Mr. Justice Brennan turned to meet the challenge that there must be a clear and present danger of something to justify

---

[35] 354 U.S. at 483.

[36] *Id.* at 484.

[37] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[38] 354 U.S. at 485.

regulation of speech. He is thus on the very threshold of the perplexities which so entranced Judge Frank. He disposed of them with one quick thrust: since obscenity is not in the area of constitutionally protected speech, it is, quoting *Beauharnais v. Illinois*,[39] "unnecessary either for us or for the state courts to consider the issues behind the phrase 'clear and present danger.' " The Court thus found further use for the two-level free-speech theory which made its first appearance in *Chaplinsky* and was given status as doctrine in *Beauharnais*. The spectacular dilemma predicted for the Court when it confronted the perplexities of obscenity regulation turned out to have no horns at all. The perplexities may be puzzling but, the Court said, they are simply not relevant.

After putting obscenity so securely beyond the pale of constitutional concern, Mr. Justice Brennan hastened to add a good word on behalf of sex: "Sex and obscenity are not synonymous."[40] Then followed what must be the least controversial utterance in the Court's history: "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages."[41] But obscene discussions of sex are not entitled to the protection afforded fundamental freedoms. "It is therefore 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 interests."[42]

The Brennan opinion invites three lines of consideration. First, is the two-level theory of free speech tolerable as doctrine? Second, is there disclosed a weakness in the preoccupation of free-speech theory with competition in the market place of ideas when we turn to art and belles-lettres, which deal primarily with the imagination and not with ideas in any strict sense? Finally, will the tendency of the Court's decision be to relax or to make more restrictive the enforcement of the obscenity laws?

The two-level speech theory, although it afforded the Court a statesmanlike way around a dilemma, seems difficult to accept as doctrine. It is perhaps understandable in the context of *Chaplinsky*, where

---

[39] 343 U.S. 250 (1952).

[40] 354 U.S. at 487.

[41] *Ibid.*

[42] *Id.* at 488.

the speech in question is nothing more complex than the utterance "son of a bitch," said rapidly. In connection with libel, as in *Beauharnais*, or obscenity, as in *Roth*, however, it seems a strained effort to trap a problem. At one level there are communications which, even though odious to the majority opinion of the day, even though expressive of the thought we hate, are entitled to be measured against the clear-and-present-danger criterion. At another level are communications apparently so worthless as not to require any extensive judicial effort to determine whether they can be prohibited. There is to be freedom for the thought we hate, but not for the candor we deplore. The doctrinal apparatus is thus quite intricate. In determining the constitutionality of any ban on a communication, the first question is whether it belongs to a category that has any social utility. If it does not, it may be banned. If it does, there is a further question of measuring the clarity and proximity and gravity of any danger from it. It is thus apparent that the issue of social utility of a communication has become as crucial a part of our theory as the issue of its danger. Although the Court has not yet made this clear it must be assumed that the Court's concern is with the utility of a category of communication rather than with a particular instance. Thus, to go back to the pamphlet in *Gitlow*,[43] presumably the question, were the case to arise today, would be about the social utility of revolutionary speech and not the utility of the particular pamphlet which so bored Mr. Justice Holmes.[44] There is, to be sure, no quarrel with the premise that even odious revolutionary speech has value. If a man is seriously enough at odds with society to advocate violent revolution, his speech has utility not because advocating revolution is useful but because such serious criticism should be heard. No one advocates violent overthrow of government without advancing some premises in favor of his conclusion. It is the premises and not the conclusion that are worth protecting. This is in effect what Judge Hand meant in the *Dennis* case when he spoke of utterances which have a "double aspect: *i.e.*, when persuasion and instigation were inseparably confused."[45] There is thus no contradiction in the concept of speech

[43] Gitlow v. New York, 268 U.S. 652 (1925).

[44] "But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration." *Id.* at 673.

[45] United States v. Dennis, 183 F. 2d 201, 207 (2d Cir. 1959).

which presents a clear and present danger but which nevertheless has sufficient social utility to require close constitutional scrutiny. The difficulties are with the other half of the theory, with the categories of speech that have no social utility. Neither in *Beauharnais* nor in *Roth* has the Court spoken at any length about the concept of social utility. It has confined itself on each occasion to the historical point that these categories—libel and obscenity—have long been regarded as worthless speech subject to prohibition. But, if history alone is to be the guide, the same inference might better be drawn about the utility of revolutionary speech.

It is at this point that Mr. Justice Brennan's phrasing of "the dispositive question" bears strange fruit. It seems hardly fair to ask: what is the social utility of obscenity? Rather the question is: what is the social utility of excessively candid and explicit discussions of sex? Here too there is the problem of the mixed utterance. The well-known sexual passages in *Lady Chatterley's Lover* are integral to the possibly strange but indubitably serious view of English postwar life that Lawrence wished to portray. And even if they were not a part of a complex whole—which will be destroyed with them if the novel is held obscene, just as the critical premises of the revolutionary would disappear—they would appear to have some value in their own right as a lyrical view[46] of the potential for warmth, tenderness, and vitality

[46] As antidote to this assessment of Lawrence's achievement in writing about physical love, reference should be made to a deadly and delightful critique by Katherine Anne Porter, *A Wreath for the Gamekeeper*, 14 ENCOUNTER 69 (Feb. 1960), in which she speaks of "his blood-chilling anatomy of the activities of the rutting season between two rather dull persons. . . ." Generous quotation is irresistible: "When I first read *Lady Chatterley's Lover*, thirty years ago, I thought it a dreary, sad performance with some passages of unintentional hilarious low comedy, one scene at least simply beyond belief in a book written with such inflamed apostolic solemnity. . . . I wish only to say that I think . . . he was about as wrong as can be on the whole subject of sex, and that he wrote a very laboriously bad book to prove it. . . . We cannot and should not try to hallow these words because they are not hallowed and were never meant to be. The attempt to make pure, tender, sensitive, washed-in-the-blood-of-the-lamb words out of words whose whole intention, function, place in our language is meant to be exactly the opposite is sentimentality, and of a very low order. . . . Sex shouldn't be that kind of hard work, nor should it, as this book promises, lead to such a dull future. For nowhere in this sad history can you see anything but a long, dull grey, monotonous chain of days, lightened now and then by a sexual bout. I can't hear any music, or poetry, or the voices of friends, or children. There is no wine, no food, no sleep nor refreshment, no laughter, no rest nor quiet—no love. . . . If a novelist is going to be so opinionated and obstinate and crazed on so many subjects he will need to be a Tolstoy, not a Lawrence. . . . Lawrence constantly describes what the man *did*, but tells us with great authority what the woman *felt*. . . . The inepti-

of a fully satisfactory sexual experience. The Court's formula thus seems to have oversimplified the problem. The Court may understand obscenity, but it does not seem to understand sex.

The oversimplification is irritating because the Court appeared unaware, as it could not have been, of the distinguished items that have been held obscene. A legal term gets its meaning from the construction put on it by the courts, and the Court's logic thus appears to lead to the conclusion that, in its view, such books as *Lady Chatterley's Lover*, *Memoirs of Hecate County*, and *Strange Fruit*, all of which have been held obscene by distinguished courts, are in the category of speech which is "utterly without redeeming social importance."

I do not think the Court meant to say this—to say, for example, that *Memoirs of Hecate County* is worthless. There is an obvious way to avoid the apparent *reductio ad absurdum*. Presumably, in the future, the Court will take it. For everything now depends on what is meant by obscene. If the Court's formula is to make any sense, it must place a heavy burden on the definition of obscenity. Obscenity must be so defined as to save any serious, complex piece of writing or art, regardless of the unconventionality of its candor. If the obscene is constitutionally subject to ban because it is worthless, it must follow that the obscene can include only that which is worthless. This approach makes sense. So-called hard-core pornography involves discussions of sex which are not integral parts of anything else. In themselves, they are, at best, fantasies of sexual prowess and response unrelated to the serious human concern that moved Lawrence and, at worst, a degrading, hostile, alien view of the sexual experience. If the socially worthless criterion is taken seriously, the *Roth* opinion may have made a major advance in liberating literature and art from the shadow of the censor.

The Court's approach touches another long-standing puzzle in the law of obscenity. Is there a category of privileged obscenity, using privilege in its technical legal sense? It has long been clear that certain classics—Aristophanes, Rabelais, Boccaccio, Shakespeare, Montaigne, Voltaire, Balzac, and, some would add, the Bible itself—have been immune from obscenity regulation. The Court has never ex-

---

tudes of these awful little love-scenes seem heart-breaking—that a man of such gifts should have lived so long and learned no more about love than that!"

plicitly held that the other values of a work make privileged its obscene parts; but the pattern of decision and prosecution has been clear. The abortive effort of the Postmaster a few years back to bar *Lysistrata* was greeted with, and defeated by, laughter. Judge Frank argued that the judges had written such a privilege into the law and had thereby given the game away:

> To the argument that such books (and such reproductions of famous paintings and works of sculpture) fall within the statutory ban, the courts have answered that they are "classics"—books of "literary distinction" or works which have "an accepted place in the arts," including, so this court has held, Ovid's Art of Love and Boccaccio's Decameron. There is a "curious dilemma" involved in this answer that the statute condemns "only books which are dull and without merit," that in no event will the statute be applied to the "classics," i.e., books "of literary distinction." The courts have not explained how they escape that dilemma, but instead seem to have gone to sleep (although rather uncomfortably) on its horns.
>
> This dilemma would seem to show up the basic constitutional flaw in the statute: No one can reconcile the currently accepted test of obscenity with the immunity of such "classics" as e.g., Aristophanes' Lysistrata, Chaucer's Canterbury Tales, Rabelais' Gargantua and Pantagruel, Shakespeare's Venus and Adonis, Fielding's Tom Jones, or Balzac's Droll Stories. For such "obscene" writings, just because of their greater artistry and charm, will presumably have far greater influence on readers than dull inartistic writings.
>
> . . . . . .
>
> The truth is that the courts have excepted the "classics" from the federal obscenity statute, since otherwise most Americans would be deprived of access to many masterpieces of literature and the pictorial arts, and a statute yielding such deprivation would not only be laughably absurd but would squarely oppose the intention of the cultivated men who framed and adopted the First Amendment.
>
> This exception—nowhere to be found in the statute—is a judge-made device invented to avoid that absurdity. The fact that the judges have felt the necessity of seeking that avoidance, serves to suggest forcibly that the statute, in its attempt to control what our citizens may read and see, violates the First Amendment. For no one can rationally justify the judge-made exception. . . .[47]

While the unperplexed blandness of the Court's majority opinion in *Roth* is disconcerting in the teeth of so vigorous and engaging a

[47] 237 F. 2d 796, 819–20 (2d Cir. 1956).

commentary in the court below, it is probably true that the Court has solved Judge Frank's dilemma. On the two-level theory, the classics do not need a special privilege; they fall automatically into speech on the first level, and hence automatically outside the realm of the constitutionally obscene. To put this another way, the Court is giving a constitutional privilege to all communication that has some social value. And Judge Frank's pointed query as to why obscenity embedded in a classic was less dangerous than obscenity in a book without literary distinction is not so pointed now, since the latter is banned not because it is dangerous but because it is worthless.

The Brennan opinion, however, remains curious on two grounds. The Court did not make its own best point but defined obscenity substantially in the words of the American Law Institute's model penal code: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[48] This definition has certain advantages over its predecessors. It insists on the *average* person, on the material considered *as a whole*, and on the *dominant* theme. But it shares the central weakness of all prior legal definitions of obscenity: the word is still defined in terms of itself. The key word "prurient" is defined by one dictionary in terms of "lascivious longings" and "lewd." The obscene, then, is that which appeals to an interest in the obscene. In the process of defining obscenity the Court said nothing about social worthlessness. The opinion thus failed to break sharply enough with prior definitions of obscenity, to narrow them sufficiently, to make plausible its assumption that the obscene cannot include materials of some social utility.

Moreover, it is unclear how the formula will help a future court faced with the question whether a particular item can be banned constitutionally. Everything now depends on the classification. If the item is obscene it can be banned without regard to its danger. But in any close case a court, in order to determine whether the item is "obscene enough," will have to decide first whether it can be banned. The Court's formula offers no guidance on the constitutional issue.

I suggest that the difficulties in working out the implications of the new free-speech doctrine also reflect a difficulty with the older forms of that doctrine. The classic defense of John Stuart Mill and the mod-

---

[48] 354 U.S. at 489; *cf. id.* at 487 and n. 20, citing A.L.I., MODEL PENAL CODE § 207.10 (2) (Tent. Draft No. 6 1957).

ern defense of Alexander Meiklejohn[49] do not help much when the question is why the novel, the poem, the painting, the drama, or the piece of sculpture falls within the protection of the First Amendment. Nor do the famous opinions of Hand, Holmes, and Brandeis. The emphasis is all on truth winning out in a fair fight between competing ideas. The emphasis is clearest in Meiklejohn's argument that free speech is indispensable to the informed citizenry required to make democratic self-government work. The people need free speech because they vote. As a result his argument distinguishes sharply between public and private speech. Not all communications are relevant to the political process. The people do not need novels or dramas or paintings or poems because they will be called upon to vote.[50] Art and belles-lettres do not deal in such ideas—at least not good art or belles-lettres—and it makes little sense here to talk, as Mr. Justice Brandeis did in his great opinion in *Whitney*,[51] of whether there is still time for counter-speech. Thus there seems to be a hiatus in our basic free-speech theory.

I am not suggesting that the Court will have any hesitation in recognizing, not, as Keats would have it, that truth and beauty are one, but that beauty has constitutional status too, and that the life of the imagination is as important to the human adult as the life of the intellect. I do not think that the Court would find it difficult to protect Shakespeare, even though it is hard to enumerate the important ideas in the plays and poems. I am only suggesting that Mr. Justice Brennan might not have found it so easy to dismiss obscenity because it lacked socially useful ideas if he had recognized that as to this point, at least, obscenity is in the same position as all art and literature.

So much for the Court's response to the clear-and-present-danger dilemma. What did it do with the objection about vagueness? The Court was either disingenuous about, or indifferent to, the prior record of difficulties with the term, its own recent experience with *Hecate County*, and the difficulties which become apparent upon any introspective examination. Admittedly, Mr. Justice Brennan argued, the terms of obscenity statutes "are not precise." But, citing and

---

[49] MEIKLEJOHN, POLITICAL FREEDOM (1960), a republication in expanded form of his FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[50] *Cf.* Professor Chafee's review, affectionate but critical, of the Meiklejohn book, 62 HARV. L. REV. 891, 897 (1949), which makes much the same criticism.

[51] Whitney v. California, 274 U.S. 357 (1927).

quoting the *Petrillo*[52] case, he asserted: "All that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' "[53] And the obscenity standards meet this test. The *Roth* case involved a felony for which a five-year sentence could be imposed along with a $5,000 fine. Yet, even for so serious a crime, the Court saw no difficulty.

Once again it was the Court's failure to break more sharply with prior definitions of obscenity that makes its opinion unsatisfactory. Although the whole approach seems to rest on a notion of hard-core pornography, as Mr. Justice Harlan suggested, the Court chose not to make a fresh start by attempting a definition of pornography. Perhaps most troublesome is the fact that the Court, despite Mr. Justice Harlan's dissent, could see no connection between the workability of its two-level theory and the objections about vagueness.

In the end, although the majority opinion in *Roth* has made several major contributions to the law and should replace *Queen v. Hicklin* as the key case in the field, it is unsatisfactory because in the teeth of Judge Frank's stimulating opinion below and of Mr. Justice Harlan's stimulating dissent in the Court, it appeared to find no difficulties. It is unsatisfactory, too, because in an effort to solve the small problem of obscenity, it gave a major endorsement to the two-level theory that may have unhappy repercussions on the protection of free speech generally.

The other opinions in the *Roth* case deserve comment as an index to the unpersuasive quality of the majority opinion and to the full complexity of the issue as it is presented to the Court. The Chief Justice filed a brief concurrence, full of caution as to the scope of what had been decided. "I agree," he said, "with the result reached by the Court in these cases, but, because we are operating in a field of expression and because broad language used here may eventually be applied to the arts and sciences and freedom of communication generally, I would limit our decision to the facts before us and to the validity of the statutes in question as applied."[54] He thought that both defendants were "plainly engaged in the commercial exploitation of

---

[52] United States v. Petrillo, 323 U.S. 1 (1947).

[53] 354 U.S. at 491.

[54] *Id.* at 494.

the morbid and shameful craving for materials with prurient effect."[55] He concluded: "I believe the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all that we need to decide."[56] Mr. Chief Justice Warren thus concurs in only two points: there is some material within the category of the obscene which can be prohibited constitutionally both at the state and federal level, and whatever it was that Roth and Alberts were distributing, it was bad enough to fall within this category. Presumably Mr. Chief Justice Warren was not indorsing the two-level theory or the revised definition of obscenity. In some future case he could decide consistently with his opinion that some material, although obscene within the new definition, could not be barred constitutionally. It is clear that the majority opinion had not put to rest for him the perplexities of the theme.

As might have been anticipated, the First Amendment difficulties which Mr. Justice Brennan so carefully muted exploded in the dissent of Mr. Justice Douglas, with whom Mr. Justice Black concurred. First, Mr. Justice Douglas noted that the tests used by the trial judges and the revised test announced by the Court require only the arousing of sexual thoughts; this he vigorously rejected as a sufficient predicate for government regulation. Second, he regarded the fact that the trial judge in *Roth* used offensiveness to "the common conscience of the community" as a test, as "more inimical still to freedom of expression."[57] He argued that such a standard would surely be unconstitutional "if religion, economics, politics, or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?"[58]

It is thus apparent that the effectiveness of Mr. Justice Douglas' dissent turned on his rejection of the two-level theory. He argued for a single unified doctrine of free speech that would cover both ob-

---

[55] *Id.* at 496.

[56] *Ibid.*

[57] *Id.* at 511.

[58] *Id.* at 512. Some years ago I participated in a seminar on obscenity to which scholars from various disciplines were invited. I particularly remember the point made by the representative from Philosophy, Professor Charner M. Perry of the University of Chicago. He wondered how we would feel about restrictions on literature describing other vices such as greed, cowardice, or gluttony in the same way that obscenity may be said to be related to sexual intemperance.

scenity and political speech. On that interpretation his argument is irresistible, since the regulation of speech in other areas on the ground that it aroused improper thoughts, or that it offended the common conscience of the community, would surely fall.

Mr. Justice Douglas met the two-level theory squarely. The issue, he said, cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, "What is the constitutional test of obscenity?" With the exception of *Beauharnais*, none of the Court's prior cases have resolved free-speech issues by placing "any form of expression beyond the pale" of the First Amendment. And, unlike *Beauharnais*, there is "no special historical evidence"[59] that literature dealing with sex was intended to be treated in a special manner. The first American obscenity decision did not come until 1821.[60] More important, he challenged the basic idea of weighing the social utility of speech: "The First Amendment . . . was designed to preclude courts as well as legislatures from weighing the values of speech against silence."[61] I think he put his finger firmly on the fundamental difficulty of the two-level theory. It is to be hoped that the force of his dissent will prevent the Court from adding any new categories of speech that are "without redeeming social importance." It is thus clear that Justices Douglas and Black, like Judges Frank and Bok, would favor unifying free-speech theory by requiring that there be evidence of clear danger of action resulting from material dealing with sex before they would permit it to be banned. As between the competing embarrassments of invalidating obscenity legislation or complicating free-speech theory, their choice is clear.

The most complex and interesting of the separate opinions is that of Mr. Justice Harlan. It is apparent from his opening sentence that the Court's opinion had not dispelled his doubts: "I find lurking beneath its disarming generalizations a number of problems which . . . leave me with serious misgivings as to the future effect of today's decisions."[62]

Mr. Justice Harlan's first point went to the abstract way in which

---

[59] Mr. Justice Douglas thought the history of the law of libel was, however, "wrongfully relied on" in *Beauharnais*. *Id.* at 514.

[60] Lockhart & McClure, *supra* note 2, at 324, n. 200, cite Commonwealth v. Holmes, 17 Mass. 336 (1821), as the "first reported" American case.

[61] 354 U.S. at 514.

[62] *Id.* at 496.

the Court put the "dispositive question." "This sweeping formula appears to me to beg the very question before us. The Court seems to assume that 'obscenity' is a peculiar genus of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether 'obscenity,' as an abstraction, is protected by the First and Fourteenth Amendments, and the question whether a *particular* beok may be suppressed becomes a mere matter of classification, of 'fact,' to be entrusted to a fact finder and insulated from independent constitutional judgment."[63] Mr. Justice Harlan thus exposed the central weakness of the majority opinion: the difficulty in using the two-level theory where classification at the first or second level depends on a key term as vague as obscenity. The thrust of his objection, however, went to the implications for judicial review of obscenity judgments. He objected that the classification as obscene, which under the Court's formula is decisive of the constitutional question, will be made by the original trier of fact and deferred to, thus encouraging the state and federal reviewing courts "to rely on easy labelling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case."[64] He asserted that no matter how a jury labelled *Ulysses* or the *Decameron*, a conviction for selling those beoks would raise "the gravest constitutional doubts."[65]

Mr. Justice Harlan thus pointed up an important issue about judicial review in free-speech cases. Is not the issue of clear and present danger, or the issue of obscenity, a constitutional fact which the reviewing court must decide for itself? This has been a troublesome and clouded point in the clear-and-present-danger cases,[66] but the case for

---

[63] *Id.* at 497. [64] *Id.* at 498. [65] *Ibid.*

[66] In the *Schenck* case, and in his dissents in *Abrams* and *Gitlow*, Mr. Justice Holmes, although never explicit about the point, seemed to be making up his own mind as to whether, under the circumstances, there was a clear and present danger in the speech. Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616, 624 (1919); Gitlow v. New York, 268 U.S. 652, 672 (1925). In *Gitlow* the majority opinion appeared to hold that the judgment of the danger can be made conclusively by the legislature. In *Dennis* the confusion on the point is further confounded: the majority accepted the trial judge's finding that there was a sufficient danger; Mr. Justice Douglas argued that the danger must be found by the jury; Mr. Justice Frankfurter deferred to the legislative judgment; Mr. Justice Jackson argued that the test is unworkable when the Communist conspiracy is involved since no one would be in a

such an independent reviewing judgment is stronger with issues of obscenity. It seems to me clear, although the Court did not say so, that obscenity is a constitutional fact. The majority opinion makes sense only so long as the Court will be scrupulous and serious in scrutinizing lower-court judgments as to what is obscene. Otherwise the Court may be trapped into the absurdity of asserting that a work like *Ulysses* is "utterly without social importance" because some lower court has held that it was obscene.

Roth and *Alberts* are unfortunate cases from the point of view of clarification of this issue, since the majority of justices appear to have regarded the particular items as obscene beyond doubt.[67] Hence, although Mr. Justice Brennan did not make an independent judgment as to the obscenity of the items in this case, it does not necessarily follow that he would not do so in a more troublesome case. I would predict, therefore, that Mr. Justice Harlan's point as to independent review will triumph as soon as the occasion arises, and that the *Roth* case will liberalize the enforcement of obscenity statutes because lower courts as well as the Supreme Court will feel the pressure of the requirement that the item be "utterly without social importance," that it be "constitutionally obscene."

As one reads Mr. Justice Harlan's complaint about the abstract way in which the Court put the question, the thought occurs that *Roth*, too, is perhaps destined, like *Dennis*, to have its *Yates* aftermath, with Mr. Justice Harlan writing the majority opinion.

Mr. Justice Harlan's second point is of major interest. It will be

---

position to evaluate rationally when so complex a danger became "clear and present." Dennis v. United States, 341 U.S. 494 (1951).

[67] The defendants in *Roth* had submitted the question: "Were the publications, when considered in their entirety, obscene?" Petition for Certiorari, p. 3. By its limited grant of certiorari, see note 33 *supra*, the Court excluded this question. Mr. Justice Brennan's opinion carried a footnote to the effect that "no issue is presented in either case concerning the obscenity of the material involved." 354 U.S. at 481 n. 8. Mr. Justice Harlan did not dissent from the limitation on the grant of certiorari in *Roth* and did not discuss the limitation in his opinion in *Roth*. He could, nonetheless, argue that the Court could not pass on the constitutional issue it had accepted for review without making a judgment as to the obscenity of the particular items involved. It might be noted that the material in *Alberts*, as disclosed by the transcript, included exhibits with such titles as "Petting as an Erotic Exercise," "Bestiality and the Law," "The Pleasures of the Torture Chamber." Record, p. 13.

recalled that it was not until *Gitlow*[68] that the Court held that the First Amendment was a restriction on the states. In his dissent in *Gitlow*, Mr. Justice Holmes noted the possibility that the First Amendment might apply less stringently to the states than to the federal government.[69] Holmes, however, was content merely to note the possibility. The point remained unnoticed until Mr. Justice Jackson took it up vigorously in *Beauharnais*.[70] He marshaled several arguments for his conclusion that the power of the states to regulate speech is subject to different and lesser constitutional restrictions than the power of the federal government. First, he argued from the important differences in wording in the First and Fourteenth amendments that "liberty" in the Fourteenth incorporates only the general notion of such restraints as are essential to the concept of the "ordered liberty" of *Palko*.[71] Second, he was properly concerned lest the Court in *Beauharnais* be taken to imply that federal seditious libel laws would be constitutional—a result which, he felt, has long been rejected by the Court and by American political practice. Third, he was impressed with the number of states which had criminal libel laws on their books then and at the time the Fourteenth Amendment was adopted. Fourth, he thought the functions of the state and federal governments are sufficiently different to warrant the use of different

---

[68] Gitlow v. New York, 268 U.S. 652 (1925). Mr. Justice Sanford disposed of the point as follows: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendmeut from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666.

[69] The Holmes caveat was as follows: "The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States." *Id.* at 672.

Judge Hand quoted the caveat in his review of precedents in *Dennis*. Speaking of the *Gitlow* case, Judge Hand said: "This case arose under state law, but all the judges agreed that the First Amendment applied to it, though possibly without so strong a grip as though it had been a federal law." 183 F. 2d 201, 208 (2d Cir. 1950). Chafee, however, heads his chapter on *Gitlow*, "Victory out of Defeat." FREE SPEECH IN THE UNITED STATES 318–25 (1948).

[70] 343 U.S. at 287, 288–95. Although Mr. Justice Jackson would have given broader power to the state, he nevertheless found the state statute in question unconstitutioual because it failed to preserve certain defenses in libel.

[71] Palko v. Connecticut, 302 U.S. 319 (1937).

standards. The states should be allowed to experiment; libel is primarily a local concern; the interest of the federal government is highly attenuated. Hence he saw a dilemma if we must either limit the states to what is permissible for the federal government in the regulation of speech or permit the federal government what is permissible to the states. He would eliminate the dilemma by applying differential constitutional standards.

It is extraordinary that the distinction between the First and Fourteenth should have been stressed only in the two cases, *Beauharnais* and *Roth*, in which the Court seriously employed the two-level theory. Is this just coincidence or is there a relationship?[72] Mr. Justice Jackson seemed concerned to avoid the need for a two-level theory by distinguishing between state and federal power. Since he could accommodate the prevalence of state criminal libel laws by allowing more constitutional leeway at the state level, he had no need for a two-level theory to achieve the same purpose.

Mr. Justice Harlan, however, faced certain difficulties that did not confront his predecessor. He did not reject outright the two-level theory—and therefore left open the problem of what the two levels are at the state tier and what they are at the federal tier. Doctrinal niceties thus appear to be proliferating at a dizzy rate. Mr. Justice Harlan made a determined effort to apply his separate state and federal criteria to the materials before the Court. He concurred in *Alberts* because, constitutionally, the state should be permitted to regulate obscenity on the ground that such material might influence action either immediately or over a long period of time. This is especially true since the point is one of scientific controversy. "Nothing in the Constitution requires California to accept as truth the most ad-

---

[72] The tendency to dichotomize speech in order to accommodate the categories of speech which are admittedly subject to control is an interesting one. Those who do so appear to reject the thesis that all the speech which is subject to regulation can be determined solely by reliance on the clear-and-present-danger test. Thus, Mr. Justice Frankfurter, in *Beauharnais*, and Mr. Justice Brennan, in *Roth*, advanced the two-level First Amendment theory for the purpose of leaving the states at least free to regulate certain non-dangerous categories of speech. Mr. Alexander Meiklejohn distinguishes between public and private speech for much the same purpose: private speech is more vulnerable to regulation. Like so many aspects of the *Roth* case and its successors, this is again a reminder of how incomplete is our basic free-speech theory. For a not very successful effort to explore the reasons why the tort law of defamation is constitutional, see Kalven, *The Law of Defamation and the First Amendment*, UNIVERSITY OF CHICAGO LAW SCHOOL CONFERENCE ON THE ARTS, PUBLISHING, AND THE LAW 3 (1952).

vanced and sophisticated psychiatric opinion. It seems to me clear *that it is not irrational*, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a state may deem obnoxious to the moral fabric of society."[73] There are two implications in this passage. First, in Mr. Justice Harlan's view the state can regulate obscenity, not because it falls within a lower category of speech, but because the state has broader powers. Second, the limit of the state's power is the familiar one, that the legislative judgment not be "irrational." In the *Roth* case, the problem is quite different. If a state bans a book, the ban holds only for that state, whereas if the federal government does it, the ban holds for the entire country. Then, too, the federal government has only an attentuated interest in obscenity.[74] Mr. Justice Harlan then made an interesting switch in premises: the trial judge's charge would allow conviction for stirring up sexual thoughts; the limited federal interest is not a basis for the regulation of mere thoughts. Therefore, the conviction of Roth was unconstitutional. He did not tell us whether the state can reach mere thoughts, since he read the federal statute as turning on the stirring up of sexual impulse and the state statute as turning on influencing conduct.

In dealing with the federal half of the question, Mr. Justice Harlan did seem to reject the application of the two-level theory of the majority. He would not agree that a book which stirs sexual impulses is necessarily "without redeeming social importance." "It is no answer to say, as the Court does, that obscenity is not protected speech. The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has

[73] 354 U.S. at 501–2. (Emphasis added.)

[74] Counsel for Roth and for Alberts advanced arguments derived from federalism which were amusingly contradictory. Roth's counsel argued that the federal obscenity statute encroached upon powers reserved to the states under the Ninth and Tenth Amendments. Brief for Petitioner, pp. 8–24. Albert's counsel, however, argued that since his was a mail-order business the federal statute pre-empted the regulatory field as to people in his category. Brief for the Appellant, pp. 108–19. The Court summarily rejected both contentions and, in passing, affirmed the use of the postal power as the basis for federal power over obscenity. 354 U.S. at 492–94. Mr. Justice Harlan's discussions of the attenuated federal interest, however, may foreshadow a critical re-examination of the basis for postal censorship when and if that question reaches the Court again. See Comment, *Obscenity and the Post Office: Removal from the Mail under Section 1461*, 27 U. CHI. L. REV. 354 (1960).

termed as 'hard-core' pornography."[75] It is regrettable that Mr. Justice Harlan was unable to persuade the Court to shift to the new and apparently narrower—if still undefined—concept of hard-core pornography.

The Harlan opinion, despite its elegance and apparent subtlety, is full of unresolved difficulties. If he did not reject the two-level theory, he applied it at neither the state nor the federal level. The test of state power over speech is apparently that of ordinary substantive due process. The test of federal power is obscure, since there is no discussion of clear and present danger. If the federal government cannot regulate mere thoughts in this area, it may, nevertheless, reach hard-core pornography, which arguably does no more than stir sexual fantasy. Apparently the federal government cannot reach action, as can the states, on the doubtful ground of a connection between speech and action.

The combination of the Brennan and Harlan opinions has thus created more free-speech doctrine than can be used sensibly. It would seem to me monstrously complex to have a four-level speech theory. And it would seem to me "burning the house to roast the pig" to solve the obscenity problem at the price of reducing the constitutional control over the states to mere substantive due process, although Mr. Justice Frankfurter, to be sure, has long and ably argued for this result in the political speech cases.[76] Further, if Mr. Justice Harlan meant to reject the two-level theory, there is still the puzzle of balancing the government's interest against the freedom involved. That balance would be quite different for political speech than for obscenity. Moreover, it is difficult, and I would add unwise, to read *Palko* as meaning that only some of the basic notion of free speech is integral to "ordered liberty." It has been difficult enough for the Court to decide which of the Bill of Rights are incorporated in the Fourteenth Amendment; it should not assume the further burden of deciding how much of each is incorporated.[77] In any event, it is abun-

---

[75] 354 U.S. at 507.

[76] See especially Mr. Justice Frankfurter's lengthy concurring opinion with appendix, in Dennis v. United States, 341 U.S. 494, 517–61 (1950).

[77] This does not seem to be the same as the celebrated issue of whether the entire Bill of Rights is incorporated in the Fourteenth Amendment. See Adamson v. California, 332 U.S. 46 (1947). Presumably, those who argue for a total incorporation would reject the Harlan-Jackson position on the First Amendment, but those who would hold with the

dantly clear that the effort of the Court to deal with obscenity within its commitment to free speech has opened issues about free speech which transcend in importance the limited problem of obscenity. Even more than the two-level theory of the Brennan opinion, the split-level First Amendment theory of the Harlan opinion advances a doctrine which could have the most profound impact on freedom of speech. It is unfortunate that the collision of complex analyses in the Brennan and Harlan opinions could not have been carried to more explicit resolution.

The third of Mr. Justice Harlan's basic objections to the majority opinion was that the Court had ignored differences between the two statutes involved and, moreover, differences between the statutory standards and the Court's definition of obscenity. It is partly these differences which permitted him to reach different conclusions in the state and in the federal cases. Yet the distinction drawn here, like those in his opinions in *Yates*,[78] *Barenblatt*,[79] and *Lerner*,[80] reveal a capacity to find satisfying distinctions that seem too fine for the ordinary mind. His proposition that the state statute defines obscenity in terms of affecting conduct and the federal statute in terms of affecting thoughts is based on no significant difference in the wording of the two statutes. Both statutes are confined to flat prohibitions of "the obscene." Nor can reliance be placed on the constructions given by the California court and by the trial judge's charge in *Roth*. The California test is whether the material has a tendency to corrupt by exciting

---

Palko "ordered liberty" criterion might still argue that all of the First Amendment is incorporated in the Fourteenth.

[78] Yates v. United States, 354 U.S. 298, 312–27 (1958), where Mr. Justice Harlan distinguished between "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, but where such advocacy or teaching is *engaged in with evil intent*" from "advocacy directed at promoting unlawful action." (Emphasis added.) The decision turned on the distinction.

[79] Barenblatt v. United States, 360 U.S. 109, 123–25 (1959). Mr. Justice Harlan distinguished the pertinency of the questions asked the witness, Barenblatt, from the nonpertinency of the questions asked the witness, Watkins, in Watkins v. United States, 354 U.S. 178 (1957). See Kalven, *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 U. CHI. L. REV. 315 (1960).

[80] Lerner v. Casey, 357 U.S. 468 (1958). See the distinctions made in the interpretation of employee's silence under a claim of the Fifth Amendment privilege in Mr. Justice Harlan's opinion in *Lerner*, and the Court's decision as to impermissible inferences from a claim of the Fifth Amendment in Slochower v. Board of Education, 350 U.S. 551 (1956). It must be admitted, however, that in *Yates*, *Barenblatt*, and *Lerner*, Mr. Justice Harlan did persuade a majority of the Court to accept his distinctions.

"lascivious thoughts or arousing lustful desires."[81] The charge to the jury in *Roth* spoke of whether the material would arouse sexual desires or impure sexual thoughts in the average person.[82] I frankly do not see the difference. Both definitions emphasize impact on thoughts, and the California court's reference to "the tendency to corrupt," I suggest, is tautological; the court meant that the arousing of lascivious thoughts necessarily corrupts. The elaborate structure of the Harlan opinion collapses at this point: the neat symmetry is illusory. He did not need the distinction between state and federal power to decide the issues actually before him. Yet he ducked the interesting issue, in his terms, of whether the state has the power to reach thoughts. He put a strained interpretation on the two cases in order to have occasion to sponsor a view of the constitutional inhibitions against regulation of speech generally which may have grave consequences at the state level.

His second distinction between the definitions in the two cases and the Court's "prurient test" seems more solid. The Court avowedly borrowed its definition from the American Law Institute's proposed model penal code. Mr. Justice Harlan pointed out that the draftsmen explicitly rejected "the prevailing test of tendency to arouse lustful thoughts or desires."[83] Unfortunately, he did not pursue this point—pursuit which might have led to an analysis of that curious term, "prurient interest." It is not easy to see any difference between "arousing lascivious thoughts" and having "an appeal to prurient, that is lascivious interests." Further, although the A.L.I. draftsmen rejected the traditional test because they thought it "unrealistically broad" for our society, Mr. Justice Harlan is silent on whether the "prevailing test" is constitutionally permissible as a test for the states.

The Harlan critique does, however, expose another difficulty with the majority opinion. Is the prurient test to be taken as the constitutional test of obscenity so that any substantial deviations from it must raise a constitutional doubt? If so—and it would appear to be so[84]—Mr. Justice Harlan's suggestion that the tests used in *Roth* and *Alberts* are not the same as the prurient test raised a serious issue for

---

[81] 354 U.S. at 501. [82] *Id.* at 490. [83] *Id.* at 499.

[84] The Court does state explicitly that the *Hicklin* test would be unconstitutionally "restrictive" but that the "prurient" test seems to provide adequate safeguards. *Id.* at 489,

the majority as to the validity, in their own terms, of the two convictions. For if the prevailing tests, which were employed in both cases, are different from the prurient-interest test, as the A.L.I. spokesmen argued, then both defendants were convicted under tests of obscenity that were broader and presumably more vague than the constitutional test. It is a serious weakness of the Brennan opinion that it is not more directly responsive to his point.

Whatever else might be said about *Roth* and *Alberts*, it is clear that they will have a major effect, not only on future obscenity regulation, but, for better or worse, on general free-speech doctrine as well.

IV. Kingsley Pictures Corp. v. Regents

In the 1958 Term, the Court added another major decision on obscenity.[85] It will be recalled that one possible evil was "thematic obscenity," that is, the advocacy of improper sexual ethics.[86] In *People v. Friede*[87] thirty years earlier, a New York court found Radclyffe Hall's *The Well of Loneliness* obscene. The court found the book well-written and compassionate, and in no sense vulgar or offensive in its imagery, but too favorable toward homosexuality. The notion that there could be obscene *ideas* as well as obscene images had seemed particularly hard to square with developing free-speech doctrine. In *Kingsley*, the issue came before the Court. Ironically, the *Kingsley* case involved that most celebrated of obscenity causes, *Lady Chatterley's Lover*, but in the form of a motion picture rather than a book.

The New York Board of Regents had refused to license the picture. The Supreme Court unanimously found this action unconstitutional. The unanimity, however, ended with the decision. There were six separate opinions. The proliferation of individual opinions in this case, indicative of the continued difficulties of regulation of obscenity after

---

[85] Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959).

[86] Recognition of this category of thematic obscenity is not inconsistent with my view that belles-lettres properly do not deal in ideas. Thematic obscenity refers primarily to novels in which sexually unconventional conduct does not meet with punishment. Thus, *Lady Chatterley's Lover* is not an argument in favor of adultery but a story in which the author is sympathetic to the illicit lovers and in which the plot does not show, as compared, for example, with *Madame Bovary* or *Anna Karenina*, that "adultery does not pay."

[87] 133 Misc. 611 (Mag. Ct. N.Y. Co. 1929).

Roth, is the kind of thing that the layman finds dismaying—not, it must ruefully be admitted, without cause.

Kingsley involved another major problem of obscenity: the validity of prior restraints. This is one of the major unresolved issues affecting not only motion picture censorship but postal censorship[88] and possibly censorship of books as well. It is clear that censorship in advance of publication labors both under a bad name historically as well as some special constitutional inhibition. It is clear also that the Court is not prepared to say that all prior restraints are invalid. For several years, the Court has studiously avoided deciding whether such restraints are bad when related to obscenity. *Kingsley* afforded one more opportunity to pass on this issue; but only Justices Black and Douglas accepted the invitation. In separate concurring opinions each argued that the action of the Regents was bad because the entire New York movie censorship scheme was an unconstitutional prior restraint.[89]

The other opinions invalidated the Regents' action on the narrower grounds which will be considered here. The opinion of the Court was delivered by Mr. Justice Stewart. The New York statute under which the Regents had acted permitted the refusal of a license if the picture was "immoral." A recent amendment had amplified the definition of immoral to include the presentation of "acts of sexual immorality . . . expressly or impliedly . . . as desirable, acceptable or proper patterns of behavior."[90] Mr. Justice Stewart read the Regents' action as based on the ground that the picture presented "adultery as proper behavior . . . under certain circumstances."[91] Accepting this as the definitive construction of the statute, he was faced squarely with the issue of thematic obscenity and held squarely that the statute was unconstitutional. He said:

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of

[88] See Comment, *supra* note 74.

[89] On the prior restraint issue generally, see Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 537–45 (1951); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955). The leading case has been Near v. Minnesota, 283 U.S. 697 (1931), which is importantly construed in Kingsley Books v. Brown, 354 U.S. 436, 445 (1957). See also the thoughtful opinion of Mr. Justice Shaefer, in American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334 (1954).

[90] 360 U.S. at 685.

[91] *Id.* at 687–88.

> its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper,[92] no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.[93]

This ranks as one of the Court's clearest and most impressive utterances about free speech in general. Specifically, it means that one of the possible target evils of obscenity regulation, the obscene theme, has now been declared an unconstitutional predicate for government intervention.

The Stewart opinion is also notably courageous in its apparent willingness to allow those who would do so to put in a good word for adultery. It is not without interest that the Court is willing to expose itself to public criticism and embarrassment on this point but is unwilling to do so on behalf of obscenity. The other justices, who felt compelled to concur separately, do not appear to disagree with this view or with the result.

Mr. Justice Clark agreed with the majority reading of the New York statute but chose to put his decision on the ground he had advanced in the *Burstyn*[94] case, that the criterion of "immorality" as defined by the amendment was "too vague."

> The only limits [*sic*] on the censor's discretion is his understanding of what is included within the term "desirable, acceptable or proper." This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law.[95]

---

[92] Mr. Justice Stewart did not note that Aristotle would disagree: "Not every action or feeling however admits of the observance of a due mean. Indeed the very names of some essentially denote evil. . . . All these and similar actions and feelings are blamed as being bad in themselves. . . . It is impossible therefore ever to go right in regard to them—one must always be wrong; nor does right or wrong in their case depend on the circumstances, for instance, whether one commits adultery with the right woman, at the right time, and in the right manner. . . ." NICOMACHEAN ETHICS II, vi, 18–19 (Loeb Classical Library ed. 1926).

[93] 360 U.S. at 688–89.

[94] Burstyn v. Wilson, 343 U.S. 495 (1952).

[95] 360 U.S. at 701.

Thus Mr. Justice Clark, like Mr. Justice Stewart, found the statute unconstitutional on its face.

Justices Frankfurter and Harlan each filed opinions with different points of departure. They had in common two objections. First, that the Court should not have found the statute bad on its face but only in this particular application. Second, that the Court misread the construction of the statute by the New York Court of Appeals. Mr. Justice Frankfurter's opinion has familiar echoes of his earlier opinions on free speech. After references to D. H. Lawrence's views on obscenity and to a recent debate in Parliament, he proceeded to his main point:

> Unless I misread the opinion of the Court, it strikes down the New York legislation in order to escape the task of deciding whether a particular picture is entitled to the protection of expression under the Fourteenth Amendment. Such an exercise of the judicial function, however onerous or ungrateful, inheres in the very nature of the judicial enforcement of the Due Process Clause. We cannot escape such instance-by-instance, case-by-case application of the clause in all varieties of situations that come before this Court.[96]

He then analogized the task at hand to that found in the confession cases, the right-to-counsel cases, and the church-and-state cases. Such careful balancing is inherent in the concept of due process. "The task is onerous and exacting, demanding as it does the utmost discipline in objectivity, the severest control of personal predilections. But it cannot be escaped, not even by disavowing that such is the nature of our task."[97]

However one may feel about the evils of doctrinaire liberalism against which Mr. Justice Frankfurter has so valiantly fought, one cannot, I think, be happy with this opinion. Justices Stewart and Clark and Black and Douglas made valid general points about which Mr. Justice Frankfurter chose to remain silent. Is thematic obscenity constitutionally subject to state control? Is the two-level theory of *Roth* operative here, where ideas about sexual morality are involved? Is the New York statute too vague? Moreover, is Mr. Justice Frankfurter adopting Mr. Justice Harlan's view in *Roth*, that the First Amendment has a different impact on the states, or is he arguing, as his *Dennis* opinion suggested, that the problem reduces to the idea of substantive due process at both the state and federal levels? Are

[96] *Id.* at 696.

[97] *Id.* at 697.

prior restraints keyed to obscenity valid? With so many important and pressing general questions in view, it is difficult to accept the ideal of judicial self-restraint which would avoid passing on any of them in order to praise the difficult process of marginal inclusion and exclusion under the Due Process Clause. In his desire to avoid broad libertarian generalizations, Mr. Justice Frankfurter generalized too little. He is clear that the motion picture cannot be banned constitutionally, but he tells us almost nothing about the criteria that dictate his judgment about this particular. The preoccupation with balancing values in free-speech cases, although it steers clear of the doctrinaire, comes precariously close to the opposite evil of the intuitive, particularized judgment which offers no guidance for the future.

Certainly Mr. Justice Frankfurter's colleagues were not happy about his opinion. It struck angry sparks in the opinions of Justices Douglas, Black, and Clark. The first commented on the irrelevance of the references to England, which has no written Constitution and has different assumptions about the roles of court and legislature. The second (who, nnlike his colleagues, refused to see the picture) spoke wryly of the Court's becoming the Supreme Board of Censors, adding: "My belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found."[98] He added an animadversion to the reference to D. H. Lawrence's view on obscenity. And Mr. Justice Clark noted that fifteen times in a fourteen-page opinion Chief Judge Conway had said that the picture was proscribed because of its espousal of sexual immorality—a remark aimed directly at Mr. Justice Frankfurter's complaint about "culling a phrase here and there" in misconstruing the decisions of the New York Court of Appeals.

The sixth and last opinion in *Kingsley* is that of Mr. Justice Harlan, in which Justices Frankfurter and Whittaker joined. It followed closely the argument of the Frankfurter opinion but made more evident what it was that they found embarrassing in the holding that the New York statute was unconstitutional on its face. A few years earlier the Court had dealt with another case involving *La Ronde*, to which the Regents had denied a license on the ground that it was "immoral."[99] The Court, in a one-line *per curiam* decision, had held

---

[98] *Id.* at 690.

[99] Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954).

the Regents' action unconstitutional, citing the *Burstyn* case. New York had then tried to remedy the vagueness of the term "immorality" by the amendment defining it more fully. Mr. Justice Frankfurter in his opinion had made the familiar point that it is not the province of the Supreme Court to meet the "recalcitrant problems of legislative drafting. Ours is the vital but very limited task of scrutinizing the work of the draftsmen in order to determine whether they have kept within the narrow limits of the kind of censorship which even D. H. Lawrence deemed necessary."[100] Yet it is clear that both he and Mr. Justice Harlan were embarrassed at the idea of the Court's once more sending the statute back to New York for redrafting. The point is not so well taken in this instance, however, since the Court was not rejecting the statute, as Mr. Justice Clark would have done, because it was too vague. It rejected it on grounds that give ample advice to the draftsmen. Mr. Justice Harlan agreed that the "abstract" advocacy of adultery (which is certainly an interesting concept) may not be constitutionally prohibited but insisted that the Court was misconstruing the New York interpretation of its statute. He understood the New York Court of Appeals to have sustained a ban on the espousal of adultery, either by "obscene portrayal or by actual incitement," and found the statute, so construed, not unconstitutional on its face.[101]

Turning to the question of this application of the statute, Mr. Justice Harlan then affirmed his position in *Roth*, that the states have wider latitude than the federal government. But even that latitude did not permit them to bar this picture. *Lady Chatterley's Lover* was nothing more than a "somewhat unusual, and rather pathetic 'love tri-

[100] 360 U.S. at 694.

[101] On the question whether Mr. Justice Harlan is correctly reading the statute as interpreted by the New York Court of Appeals, 4 N.Y. 2d 349 (1958), or whether Justices Stewart and Clark are correct, it must be admitted that the majority opinion of Chief Judge Conway lends support to both views. In his description of the motion picture of *Lady Chatterley's Lover* he highlights particular scenes he found offensive. See, especially, *id.* at 353. In what appears to be a summary of the issues, however, he states: "Essentially, then, the question amounts to this: What can society do about protecting itself from motion pictures which are corruptive of the public morals? *We hold that it may refuse to license a motion picture which alluringly portrays adultery as proper behavior.*" *Id.* at 358. (Emphasis added.) After a close reading of the opinion, I would vote with the Stewart-Clark interpretation, especially in view of the wording of the statute itself. I would suggest that the difficulty arose because the Court did not recognize that the issue was thematic obscenity and not literal advocacy. See note 86 *supra*.

angle,' lacking in anything that could properly be termed obscene or corruptive of the public morals by inciting the commission of adultery."[102] Presumably, then, even the states cannot regulate ideas about sexual behavior unless they are imbedded in obscene imagery or unless they amount to direct incitement. In short, ideas about sexual behavior have the same constitutional status as ideas about anything else—which was precisely Mr. Justice Stewart's point.

Mr. Justice Harlan, however, added a remarkable sentence, perhaps in an effort to dissociate himself from the self-righteous tone of Mr. Justice Frankfurter on the question of making difficult individual judgments. "Giving descriptive expression to what in matters of this kind are in the last analysis bound to be but individual subjective impressions, objectively as one may try to discharge his duty as a judge, is not apt to be repaying."[103] The candor is commendable, but the remark plays directly into the hands of Mr. Justice Black, who complained that Justices Harlan and Frankfurter were substituting personal subjective judgment for constitutional rule.

The *Kingsley* case, then, if it added to the law on obscenity, also disclosed even more explicitly than did *Roth* a major tension in free-speech doctrine between those judges who favor a clear statement of ruling principle and those who favor a particularized balancing that is inevitably personal. Once again an obscenity case opened up basic issues transcending the problems of obscenity.[104]

---

[102] 360 U.S. at 708.

[103] *Id.* at 707.

[104] On the other hand, three other important decisions suggest that despite the vagueness of the standard, obscenity presents a constitutionally unique problem. The fact that the Court sustained regulation of obscenity does not imply that it will easily sustain regulation under apparently kindred rubrics. The three cases are Burstyn v. Wilson, *supra* note 94, Winters v. New York, 333 U.S. 507 (1948), and Haunegan v. Esquire, *supra* note 10. They demonstrate that "sacrilege," "massed" descriptions of violence, and "vulgarity" are not key words to avoidance of First Amendment limitatious. And the rejection of "immorality" in Commercial Pictures Corp. v. Regents, *supra* note 99, as reinforced in *Kingsley*, is further evidence of a pronounced judicial hostility to legislation by analogy to "obscenity." In brief, it would appear that the ratification of the power to regulate obscenity will not open wide the door to other regulation, however similar. The Court may feel obliged to close its eyes to the vagueness of "obscenity" and to the incompatibility of its sanction of obscenity regulation with free-speech doctrine, but it remains very sensitive to the vagueness of comparable terms and their incompatability with the Court's commitments to its announced freedom of speech rationales.

V. SMITH v. CALIFORNIA

The most recent important decision on obscenity is *Smith v. California*,[105] decided in the 1959 Term. It provides a fitting conclusion to the Court's recent work and may prove to be the most important decision on the subject yet rendered. The case was concerned with a Los Angeles ordinance making it a crime for anyone to have in his possession for sale any obscene or indecent writing or book. The Court was unanimous in holding the ordinance unconstitutional, but once again there was a proliferation of separate opinions—this time five. The defendant urged a series of arguments which had varied appeal for the different justices. He asserted that the ordinance was bad because it did not require *scienter*. He complained that the trial judge had excluded the testimony of experts as well as other evidence on the contemporary literary and moral standards of the community. And he urged that the material in question was not obscene. None of the justices reached the third point. They reacted differently to the other two. The *Smith* case highlights two further important issues in the regulation of obscenity: (1) The problem of the disseminator or bookseller who, as a practical matter, is far more likely than the author or publisher to be the target of prosecution; (2) the relevance of external evidence of community standards to the delicate judgments of obscenity and constitutionality.

The majority opinion by Mr. Justice Brennan effectuated his promise in *Roth* to be vigilant in the scrutiny of obscenity prosecutions. For him the fatal flaw in the ordinance was the absence of a requirement of *scienter*. As Mr. Justice Breunan read the ordinance, a bookseller could be convicted although legitimately unaware of the contents of the book. Because the Court had already upheld drug legislation imposing absolute criminal liability without *scienter*,[106] Mr. Justice Brennan did not find the ordinance bad because it was unfair to the bookseller. Rather, he argued that if the seller were absolutely liable there would be a serious clog in the free flow of communications, for the seller would deal only in material with which he was acquainted and which he regarded as safe. The result would be "a censorship by booksellers" of non-obscene items. Thus the ordinance would effect

---

[105] 361 U.S. 147 (1959).

[106] United States v. Balint, 258 U.S. 250 (1922).

an unconstitutional interference with free speech and press. The case thus posed a dilemma. If the state must prove that the seller knows that the book is obscene, the state will have an impossible burden to meet and the practical enforcement of obscenity laws will collapse. On the other hand, if the presence of the book in the store is sufficient, the seller will, as Mr. Justice Breunan reasoned, censor the books he offers for sale.

Mr. Justice Brennan relented enough to suggest, in passing, that something less than full *scienter* might suffice. But, following the tradition of Mr. Justice Frankfurter, he carefully noted: "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock."[107] It is sufficient that today the Court is considering a statute "which goes to the extent of eliminating all mental elements from the crime."[108]

Two points in the majority opinion clamor for attention. First, it is striking that the Court found a First Amendment violation because of the indirect consequences of the ordinance. Normally restraints have been direct, in the form of criminal penalty or refusal to license; no conjecture has been necessary as to whether the free flow of communication will be affected. The very purpose of such regulation is avowedly to ban circulation of the item. But the purpose of the Los Angeles ordinance was not to turn booksellers into censors of non-obscene items. To find that it would have this effect, the Court must have speculated as to a chain of human behavior. In the attacks on congressional investigating committees and the federal loyalty program, a principal point has been that they would have the effect of discouraging free speech and free association by making people unduly cautious of what they said and what organizations they joined, *i.e.*, by turning them into censors of their own speech and choice of associates. Although this argument of restraint by consequence won some minority judicial support, the courts have steadfastly rejected it as a basis for finding a First Amendment flaw in the procedures of the congressional investigating committee[109] or the loyalty program.[110]

---

[107] 361 U.S. at 154.

[108] *Id.* at 155.

[109] See, *e.g.*, United States v. Josephson, 165 F. 2d. 82 (2d Cir. 1947); Barskey v. United States, 167 F. 2d 241 (D.C. Cir. 1948). See also United States v. Rumley, 345 U.S. 41 (1953); Watkins v. United States, 354 U.S. 178 (1957); Barenblatt v. United

It is, therefore, of no small interest that the Court accepted such reasoning here,[111] though admittedly the bookseller is a more strategic link in the flow of public communication than the ordinary witness before a committee or the ordinary government employee.

Second, the dilemma about *scienter* sharpens on reflection. The Court was concerned primarily with the bookseller's knowledge of the contents of the book, but Mr. Justice Brennan noted explicitly the possibility "of honest mistake as to whether its contents in fact constituted obscenity."[112] If the Court were to require knowledge that the book is obscene, it would indeed be difficult for the prosecution ever to succeed: the defendant can always, with some plausibility, argue that he did not think the item was obscene and is astonished that others so view it. The objection as to the vagueness of "obscenity" which Mr. Justice Brennan dismissed so cavalierly in *Roth* had risen again to hannt the Court. The vagueness argument may have lost the battle but won the war, since the vagueness of obscenity may so bedevil the efforts to prove *scienter* that the effective enforcement of regulation against the dissemination of obscene matter will collapse at the prosecution of the bookseller, the key link in the chain of distribution. It is difficult, however, to see why the seller should receive more protection than the author or publisher. The latter have to take the risk that the Court's judgment of what is obscene will not agree with their own. This is precisely what the constitutional objection to vagueness means—that the law is so unclear that one cannot tell whether he is committing a crime or not. Having once rejected this point in *Roth*, the Court is not likely to accept it in the guise of the *scienter* requirement in future prosecutions of booksellers.

The separate concurrences of Justices Black and Douglas were hardly a surprise. They continued to advance their dissenting view in *Roth*, that the regulation of obscenity by criminal sanction is uncon-

---

States, 360 U.S. 109 (1959); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Uphaus v. Wyman, 360 U.S. 72 (1959).

[110] Bailey v. Richardson, 182 F. 2d 46 (D.C. Cir. 1950); Adler v. Board of Education, 342 U.S. 485 (1952); Jahoda & Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 YALE L. J. 295 (1952).

[111] It may be that the Court is moving in the direction of accepting this "consequential analysis" in First Amendment cases. See Speiser v. Randall, 357 U.S. 513 (1958); Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v Alabama, 357 U.S. 449 (1958).

[112] 361 U.S. at 154.

stitutional. Hence the bookseller could not be validly prosecuted for the dissemination of the obscene material because this is an unconstitutional predicate for a crime. In their view, the ordinance would be equally unconstitutional however it handled the *scienter* requirement.

As in the *Kingsley* case, Justices Harlan and Frankfurter concurred in the result only. Mr. Justice Frankfurter hesitated either to accept or to reject the Court's concern with *scienter*. He recognized that the food and drug cases were no precedent for the issue here: "There is an important difference in the scope of the power of a State to regnlate what feeds the belly and what feeds the brain."[113] But he also felt that the consequential impact of such ordinances on the non-obscene "cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity."[114] Having thus posed for himself the dilemma that the *Smith* case raises, he neatly avoided it by finding the critical flaw not in the wording of the ordinance but in the exclusion by the trial judge of expert testimony on community standards.

In the course of his discussion Mr. Justice Frankfurter made two interesting points. First, in an unusual turnabout, he complained that the majority opinion had not given sufficient guidance to the state as to how to draft a valid *scienter* requirement. "[I]nvalidating a statute because a State dispenses altogether with the requirement of scienter does require some indication of the scope and quality of scienter that is required."[115] Although he could be quoted against himself at length on the narrow but vital function of the Court in scrutinizing the work of legislative draftsmen, he scored a good point against the Brennan opinion. It would indeed be difficult to draft an ordinance which would be practically useful and yet would comply with the *scienter* requirement. The moral I draw is that there are serious weaknesses in Mr. Justice Frankfurter's favorite doctrine of judicial economy.

Second, in his emphasis on the utility of expert testimony he was directly responsive to the criticism that Mr. Justice Black made of his views in the *Kingsley* case. Unless the testimony of such experts can come in, the judicial judgment of obscenity, and hence of constitu-

---

[113] *Id.* at 162.

[114] *Id.* at 164.

[115] *Id.* at 162. Mr. Justice Frankfurter is of course aware of the tension. He begins this part of his opinion: "I am no friend of deciding a case beyond what the immediate controversy requires, particularly when the limits of constitutional power are at stake." *Id.* at 161.

tionality, will be "merely a subjective reflection of the taste or moral outlook of individual jurors or individual judges." Thus it is the ascertainment of community standards that is to give the obscenity judgment an objective referent. Mr. Justice Frankfurter would thus add an important gloss to the constitutional definition of obscenity in *Roth:* whether the dominant appeal is to prurient interest measured by prevailing community standards is to be determined in part by expert testimony. It is, therefore, unconstitutional to bar such testimony. This view is strongly indorsed by Mr. Justice Harlan, and the English have recently adopted it.[116] There is nothing in the other opinions inconsistent with it. Although I am inclined to applaud this development, I cannot refrain from suggesting a few doubts. The experts apparently are to testify to literary standards and to community moral standards rather than to psychological connections between words and actions, or to psychiatric views of the harm that may be caused by exposure to the obscene. Presumably, there are people who know enough about literature to inform the Court of the status of *Ulysses* or *Hecate County* or *Lady Chatterley*. But this the Court already knows. When it comes to the prevailing moral standards, to the community view of what is obscene, it is not at all clear what expertise is available. The Court appears to be inviting the well-publicized difficulty of the Court of Appeals for the Second Circuit in the *Repouille* case,[117] when it puzzled over the meaning of the "good moral character" requirement in the naturalization law in a most sympathetic case of euthanasia.

I suggest that heavy reliance on expert testimony to objectivize the obscenity judgment indicates once again how powerful the argument is that obscenity is a fatally ambiguous concept. And I would echo Mr. Justice Douglas' dismay in *Roth* that shock to the community conscience is the test of permissible speech. Finally, I wonder whether the only experts on the issue at hand are not the jury, as Judge Learned Hand suggested years ago,[118] and whether the logic of Mr. Justice

---

[116] Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66.

[117] Repouille v. United States, 165 F. 2d 152 (2d Cir. 1947). See Note, *Judicial Determination of Moral Conduct in Citizenship Hearings*, 16 U. CHI. L. REV. 138 (1948).

[118] United States v. Levine, 83 F. 2d 156, 157 (2d Cir. 1936): "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a

Frankfurter does not lead to the conclusion that the jury is the proper constitutional arbiter of obscenity.

Mr. Justice Harlan's opinion is not on all fours with that of Mr. Justice Frankfurter. He found a broader error in the trial. He objected not only to the refusal to permit expert testimony but also to the refusal to permit more amateurish efforts by the defendant to "compare the contents of the work with that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance."[119] The admission of this evidence, like that of the experts, is a constitutional requirement in the Harlan view.

The implications of the Harlan and Frankfurter opinions in *Smith* for the conduct of obscenity defenses should not be minimized. Until now an obscenity trial has been a rather pedestrian affair, with not much more than the material itself as the evidence. Defense counsel have been champing at the bit to introduce other evidence. If the Frankfurter-Harlan position is given effect, the trial of an obscenity case will not only be enlivened by a battle of experts but also by content analysis of lingerie advertisements, of bathing-suit photographs, of the hidden and not so hidden sexual symbolism of all advertising, and perhaps even of the content of ordinary speech and off-color jokes. In brief, *Life* and the *Saturday Evening Post* will be called upon to rescue *Playboy* and *Esquire*.

One final detail of the Harlan opinion remains to be noted. Once again the Justice repeated his thesis of *Roth*, that the First Amendment applies less stringently to the states. Once again, none of the other justices paid any attention to the point. And once again, as in *Kingsley*, the distinction did not seem to guide Mr. Justice Harlan's own opinion, since he found that the state had exceeded its constitutional power.

VI. Conclusion

This article began by noting four possible target evils of obscenity regulation. What has the Court said of them in the cases we

---

duty upon a jury because the standard they fix is likely to be an acceptable mesne, because in such matters a mesne most nearly satisfies the moral demands of the community."

[119] 361 U.S. at 172.

have examined? The majority in *Roth* used the two-level theory to avoid saying anything. Mr. Justice Douglas dissented on the ground that government could not control speech in an effort to control thoughts, sexual or otherwise. Mr. Justice Harlan, on the other hand, held that the state could regulate obscenity only on theory that it affected conduct, but that the federal government could not regulate it on the theory that it affected thoughts. Hence the twin evils of arousing sexual behavior and of arousing sexual thoughts receive an interesting pattern of rejection in the opinions. In the *Kingsley* case, the third possible evil, thematic obscenity, was held by the majority to be an unconstitutional basis for regulation in the name of obscenity.

There is left then only the fourth possible evil, the arousing of revulsion and disgust in a non-captive adult audience.[120] Thus far the Court has had no occasion to speak to this point. The issue appears to have been available in *Roth* since the federal statute uses the word "filthy" along with "obscene, lewd, lascivious," and the trial judge had defined "filthy" in his charge to the jury. The defendant had suggested the point in the Court of Appeals, resting his argument on vagueness. Chief Judge Clark, quoting Learned Hand, found, however, that the trial judge's definition was adequate: " 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion."[121] In any event, the defendant had waived objections to the trial judge's charge.

The point, however, is not that "filthy" is vague but that it points to an evil of obscenity which is the exact opposite of that usually recognized: the obscene is bad because it is revolting, not because it is alluring.[122] Since it cannot be both at the same time for the same audience, it would be well to have more explicit gnidance as to which

---

[120] It perhaps makes the point too easy to assume the audience is non-captive. Materials may be sent unsolicited through the mails, and it is difficult to avoid the covers of magazines, paperbound books, and motion picture advertisements. But the famous controversies over censorship all involve items where the community had to seek out voluntarily the "shock" to its conscience.

[121] United States v. Roth, 237 F. 2d 796, 799 (2d Cir. 1956).

[122] Judge Frank did not ignore this difficulty: "If the argument be sound that the legislature may constitutionally provide punishment for the obscene because, anti-socially, it arouses sexual desires by making sex attractive, then it follows that whatever makes sex disgusting is socially beneficial—and thus not the subject of valid legislation which punishes the mailing of 'filthy' matter." *Id.* at 801, n. 2.

objection controls. I suggest that the evil of arousing revulsion in adults who are a non-captive audience is simply too trivial a predicate for constitutional regulation. It is probable, especially since "filthy" is still in the federal statute, that a case will arise when "arousing revulsion" is part of the court's charge to a jury and the Court will yet be faced with the issue and invited to fill this hiatus in its coverage of the obscenity issues.

This account of the Court's encounter with obscenity would not be complete without some reference to a series of three *per curiam* decisions that followed *Roth*. Ordinarily a *per curiam* decision makes thin reading, but these three cases serve to mark, more distinctly than the facts in either *Kingsley* or *Smith* permitted, how the Court will interpret the definition of obscenity advanced in *Roth*. They serve, too, as the basis for a hypothesis which Thurman Arnold has voiced in a recent brief to the Supreme Court of Vermont as to what the Court's strategy will be in future obscenity cases.

The three *per curiam* cases are *One, Inc. v. Olesen*,[123] *Sunshine Book Co. v. Summerfield*,[124] and *Times Film Corp. v. Chicago*.[125] The first two cases involved magazines and the third a motion picture. In *One, Inc.*, the Court of Appeals for the Ninth Circuit held a magazine with a homosexual slant to be clearly obscene, saying that it was "offensive to the moral senses, morally depraving and debasing, and that it is designed for persons having lecherous and salacious proclivities."[126] In the *Sunshine Book* case, the Court of Appeals for the District of Columbia affirmed, not without dissent, the trial judge's finding, based on a meticulous examination of each photograph,[127] that the

---

[123] 355 U.S. 371 (1958), *reversing* 241 F. 2d 772 (9th Cir. 1957).

[124] 355 U.S. 372 (1958), *reversing* 249 F. 2d 114 (D.C. Cir. 1957).

[125] 355 U.S. 35 (1958), *reversing* 244 F. 2d 432 (7th Cir. 1957).

[126] 241 F. 2d at 778.

[127] The trial judge discussed each photo in detail. The following is a fair example of the process: "On page 11 there is a picture of three females . . . the mother is obese, short, stocky, has large flat breasts; the pubic area is somewhat shaded by shadow; the pubic hair is matted; the over-all picture is one of vulgarity, filth, obscenity and dirt. But the photographer in taking this picture has caused the two girls to turn to a side view and the sunshine clearly shows the fine, soft texture of pubic hair of the adolescent girls, and accordingly the Court finds the picture is obscene, lewd, and lascivious." 128 F. Supp. at 572. Mr. Arnold says of the judge's efforts: "Here the judge, feeling compelled to apply the majority standards in the *Roth* case, did analyze the magazine picture by picture. The language he had to use describing the pictures is more repellent than the pictures them-

pictures in a nudist magazine were obscene. And in the *Times Film* case the Court of Appeals for the Seventh Circuit, after seeing the motion picture, found "that, from beginning to end, the thread of the story is supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts. . . . The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized."[128] It held that the motion picture was clearly obscene. The Supreme Court granted certiorari in all three cases. In each case it reversed *per curiam*, citing only the *Roth* case. These three decisions, coupled with the citation of *Roth*, point unmistakably in one direction: the Court is feeling the pressure generated by the two-level theory to restrict obscenity to the worthless and hence to something akin to hard-core pornography. Thus the three decisions appear to add an important gloss to the *Roth* definition. And the prophecy that *Roth* would serve to narrow the range of obscenity regulation appears fulfilled.

It is at this point that Mr. Arnold enters with the appropriate last word. Having been engaged as counsel for the defense in a prosecution in Vermont for the sale of an allegedly obscene magazine, he submitted a brief to the Vermont Supreme Court which must rank as one of the more extraordinary briefs ever filed. The main point is advice to the Vermont court on how to handle the issue before it sensibly and diplomatically. Mr. Arnold purports to get his rule of judicial prudence from the United States Supreme Court. The rule is simple: the court should hold the items before it not obscene unless they amount to hard-core pornography, and should, after rendering a decision, shut up. In Mr. Arnold's view, any fool can quickly recognize hard-core pornography,[129] but it is a fatal trap for judicial decorum and judicial sanity to attempt thereafter to write an opinion explaining why:

---

selves." Brief for Respondent-Appellant in Vermont v. Verham News Corporation (Windsor County Court, Docket #2779, Supreme Court, Docket #1305 [1959]), p. 22.

[128] 244 F. 2d at 436.

[129] Although, as indicated, I would have preferred the Court explicitly to narrow the legal definition of obscenity to hard-core pornography, I think Mr. Arnold is exaggerating the ease of identifying the latter. One suspects that the touchstone is more likely to be the social status of the publisher than the content of the item.

> Ordinarily when the Supreme Court grants certiorari and reverses *per curiam* without argument or submission of briefs it means that the law was clear without argument. But it cannot be said of these three cases that previous decisions compelled their results. There must be a different reason for the Court's silence. We think that reason becomes apparent from a reading of the hundreds of cases where the courts have tried to analyze the concepts of obscenity and which we have refrained from citing because no more unedifying section of judicial literature exists. Vermont has indeed been fortunate in escaping it. The spectacle of a judge poring over the picture of some nude, trying to ascertain the extent to which she arouses prurient interests, and then attempting to write an opinion which explains the difference between that nude and some other nude has elements of low comedy. Justice is supposed to be a blind Goddess. The task of explaining why the words "sexual relations" are decent and some other word with the same meaning is indecent is not one for which judicial techniques are adapted.
>
> It is our belief, therefore, that the Supreme Court's refusal to write opinions in these three cases was exceedingly wise. No one can reason why anything is or is not obscene. . . . What the Supreme Court is saying to the lower court judges is that . . . if the material is bad enough they can leave the case to a jury. If it isn't the indictment should be dismissed or a verdict directed. This decision may be made at a glance. Studying the material for hours doesn't tell a judge any more about its obscene character than he knew when he first looked at it.
>
> While it is apparent that the Supreme Court has adopted the "hard core" pornography as a Constitutional test its use of the *per curiam* opinion neatly avoided the trap of defining what "hard core" pornography is. Such an attempt would have started the futile and desperate game of definition all over again. As William James, the great psychologist, said: "Such discussions are tedious —not as hard subjects like physics or mathematics are tedious, but as throwing feathers endlessly hour after hour is tedious."[130]

Mr. Arnold may well be right as to the Court's strategy. Like Judge Frank and Judge Hand, he has a rich appreciation of the comic aspects of judicial review of obscenity; and the Court, although it has been notably solemn in its dealing with the theme, may have come to see his point. "The Court evidently concluded that its actions must speak for themselves in this field. This may be an unconventional way of making law, but in the field of pornography it is certainly sound

---

[130] *Op. cit. supra* note 127, at pp. 21–22.

judicial common sense."[131] The Arnold advice has a familiar ring—all the Court can do in these cases is to make the difficult individual judgment; it can add little by way of generalization as to why. This is very close indeed to the position of Justices Frankfurter and Harlan. Obscenity, too, makes strange bedfellows.

I cannot leave the Court's efforts in this field without a word about the extraordinary difficulty of its task. The difficulties have, I think, three main strands. First, there is the specific topic of obscenity itself, a topic freighted with all the anxieties and hypocrisies of society's attitude toward sex. I think it not unlikely that none of the justices takes the evils of obscenity very seriously. Yet, as responsibly placed men, understandably they cannot follow Judge Frank and say so.[132] There are few topics on which the public and the private views of a person are so likely to diverge. And the justices are compelled by their roles to express a sober public view of the matter. Second, when they pass on the constitutionality of obscenity they come close to major doctrine about free speech and free press. They cannot handle obscenity issues, which they may not care much about, insulated from the implications their decisions may have for free-speech issues about which they do care. Finally, they perform their roles in an institutional context that necessarily raises issues about federalism, about judicial review, about holding statutes unconstitutional on their face or only in their application, about *de novo* review of constitutional fact, about whether they should ever decide any more issues than they are compelled to, and about whether they are obliged to give legislative draftsmen advice on how to cure the defects the Court may find in their work. In brief, the most impressive aspect of their task is that any decision must treat so many variables. The rest of us are fortunate indeed that our job is so much easier and less responsible.

---

[131] *Ibid.*

[132] It is tempting to attempt an inventory of possible judicial roles in dealing with so awkward a question as obscenity. Four such roles are visible. There is first the role of urbane resignation which is best exemplified in the decisions of Learned Hand; next there is the role of irreverent amusement which is best found in the opinions of Judge Frank and in the opinions of Judge (and now defense counsel) Thurman Arnold; third there is the stance of uncompromising concern with free speech which is shown in the responses of Justices Black and Douglas; and finally there is the role of the responsible man of affairs who feels that there are limits to what the public will tolerate a court's saying on so delicate a topic—a role which, I think, is exemplified by most members of the Court.