Sex Publications and Moral Corruption: The Supreme Court Dilemma

Erwin A. Elias
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THE SUPREME COURT DILEMMA

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The danger of influencing a change in the current moral standards of the community, or of shocking or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom.¹

INTRODUCTION

This proposition has not been expressly disavowed by any member of the United States Supreme Court. On the contrary it has, ostensibly at least, constituted one of the basic assumptions upon which the law has been predicated, and its validity has been assumed by many of the numerous commentators who have written on the highly controversial and confused area.

The purpose of this article is to examine this proposition and its ramifications. If, in fact, the state does not have a legitimate interest in protecting its citizens from being shocked and offended, or sexually aroused, or morally corrupted, what conceivable purpose can the state have in attempting to regulate and suppress publications because of the manner in which they deal with sex? The relationship between publications and overt conduct has not been and probably can never be established, at least not in any clear and present danger sense. On the other hand if the state does have an interest in, for example, maintaining the moral standards of the community, how has this interest been accommodated by the Court with the First Amendment values involved? Has this accommodation been realistic?

A full decade has gone by since the United States Supreme Court first dealt with the validity of governmental attempts to regulate obscenity in the companion cases of Roth v. United States and Alberts v. State of California.² During this period there have been twelve major

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² 354 U.S. 476 (1957). An even split on the Court resulted in no opinions being
"obscenity" decisions rendered by the Court. There have also been a considerable number of per curiam reversals of state and lower federal court decisions wherein obscenity was an issue, including seventeen such reversals in the 1966-1967 term alone. Despite all this effort on the part of the Court it appears that the Court has not yet devised a definitive and satisfactory solution to the problems involved in this area.

The Court itself remains deeply divided. After struggling for ten years...
to perfect a test for distinguishing the obscene, the justices today cannot agree even on what the original test means. The decisions in *Ginzburg* and *Mishkin* have thoroughly unsettled those areas of the law which appeared reasonably well settled a few years ago.

The Court has been castigated by some for permitting and indeed encouraging the increasing emphasis on sex in contemporary publications and at the same time severely criticized by others for its failure to give adequate protection to First Amendment values. Even if one has no strong feelings in regard to either of these positions it must be conceded that the governing principles are vague and ambiguous and, in some respects, wholly inconsistent and illogical.

The issues confronting the Court in this area defy easy solution, involving as they do a conflict between cherished free speech values and equally cherished moral convictions. The most vehement critics of the Court are inclined to ignore either one or the other. Nevertheless the Court's rationale in *Roth* and subsequent cases leave one, I believe, with the distinct impression that a vital ingredient is lacking. The rationale obfuscates rather than clarifies. The critical underlying issues have been only tacitly resolved or have been avoided entirely by the two-level speech approach. It is readily apparent that in obscenity cases, as in all cases involving First Amendment contentions, the Court was and is faced with the necessity of accommodating competing interests—the right of free speech and the right of government to regulate speech when a valid subordinating governmental interest is asserted. That governmental interest must obviously be first ascertained and

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7. See text accompanying note 26, *infra*.
12. Very generally the two-level approach is based upon the thesis that First Amendment protection applies only to speech which has some social value. See Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1. This approach has also been utilized in the area of libel, see Note, *Dirty Words and Dirty Politics: Cognitive Dissonance in the First Amendment*, 34 U. Chi. L. Rev. 367 (1966).
evaluated before any meaningful accommodation can be made. In the case of obscenity regulations a conventional approach would have required an inquiry into the primary objectives of state and federal laws directed at publications dealing with sex. What evil or evils is government attempting to control, whom or what is it endeavoring to protect and from what?

Although individual justices have directed their attention to these questions from time to time, the Court as a whole has dealt with them only obliquely. Rather the entire emphasis has been focused on free speech values and the abortive effort to formulate a verbal test to differentiate protected speech from unprotected speech and conduct. There has been a conspicuous failure to define and articulate the governmental interest that was and is being either subordinated to or accorded priority over First Amendment values. The balancing process has been concealed by a manipulation of such relatively meaningless concepts as "redeeming social importance" and "prurient interest appeal" while still paying lip service to the proposition quoted at the beginning of this article.

The definitional approach taken in Roth has proven to be barely workable with respect to "hard-core pornography." It has become

13. In Roth v. United States, 354 U.S. 476, 502 (1957) Mr. Justice Harlan noted that "... The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards" (dissenting opinion). In Jacobellis v. Ohio, 378 U.S. 184, 199, 202 (1964), Chief Justice Warren refers to "... the right of the nation and of the states to maintain a decent society..."; and to "... society's right to maintain its moral fiber..." (dissenting opinion). Mr. Justice Douglas has devoted the bulk of his opinions to the question of harm to society and the purposes of obscenity legislation. See in particular his opinions in Roth v. United States, supra at 508 (dissenting opinion); Ginzburg v. United States, 383 U.S. 463, 482 (1966) (dissenting opinion) and Memoirs, 383 U.S. 413, 424 (1966) (concurring opinion).

Various commentators have explored the primary purpose or purposes of legislation directed at sex publications. See in particular Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963); Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877 (1963); Kalvin, supra note 12 at 41-42; Slough and McAnany, Obscenity and Constitutional Freedom Part II, 8 St. Louis U. L. Rev. 449 (1964).

14. The terms "obscenity," "pornography" and "hard-core pornography" are used interchangeably throughout this paper. Legally the terms are synonymous although individual justices from time to time refer to hard-core pornography as best describing the type of material the Roth test is designed to isolate. See Lockhart and McClure, Censorship of Obscenity, The Developing Constitutional Standard, 45 Minn. L. Rev. 5, 63-64 (1961); Ginzburg v. United States, 383 U.S. 463, 499 n.3 (1966); Note, More Ado About Dirty Books, supra note 11 at 1376 n. 48. In Lockhart and McClure,
apparent, however, that society is not concerned only or primarily with suppressing this type of publication. A considerable number of the cases reaching the Court do not involve material which is even arguably obscene within the definition worked out in *Roth* and subsequent cases. The controversy over the definition and suppression of hard-core pornography is in fact probably now over.\textsuperscript{16} I believe, however, that this controversy has been only a preliminary skirmish. The really basic and far-reaching issues are still to be resolved, and these issues cannot be dealt with by verbal formulas. Specifically, the Court will be confronted again and again with the question of what right the state has to maintain contemporary standards of morality and decency and with the problem of reconciling that interest with the constitutional guarantee of free speech. It is in this context, of course, that an examination of the assumption contained in the proposition quoted above is so very relevant. If these assumptions are substantially valid no further accommodation will be necessary, and the decisions have probably already gone too far in permitting speech to be curbed without apparent justification. If they are not valid the Court's present definitional approach is simply not realistic and its continued use can only result in more confusion and contradiction.

The basic thesis of this article is that the crucial issue in this area is not one of differentiating between different classes of sex publications but is rather one of determining and evaluating the state interest involved in regulating such publications, and, further, that the state interest referred to has always related primarily to the prevention of moral corruption, not of overt acts and conduct. I shall attempt to show that the confused state of the law is attributable in large part to the Court's circumvention of this crucial issue, avoiding thereby the necessity of expressly affirming or denying that this state interest may be paramount to free speech values, while in actuality the Court has been continuously engaged in accommodating this interest and these values.

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*Obscenity Censorship: The Constitutional Issue-What is Obscene*, 7 Utah L. Rev. 289 (1961) pornography is defined at 297 as follows:

Pornography is daydream material, divorced from reality, whose main function is to nourish erotic fantasies of the sexually immature, or as the psychiatrists say, to nourish auto-eroticism.

\textsuperscript{15} The decision in *Memoirs*, 383 U.S. 413 (1966), and the per curiam reversals in the 1966-1967 term, *supra* note 4, make it clear that a publication must be clearly pornographic before it may be judged obscene on its face and thus be subject to suppression. The decision in *Memoirs* is discussed in Semonche, *supra* note 10, at 1194-1196.
Roth—The Initial Accommodation

Roth involved an appeal from a conviction under a Federal statute prohibiting the mailing of obscene matter. In Alberts the defendant had been found guilty of violating a provision of the California Penal Code prohibiting the lewdly keeping for sale of obscene and indecent books and writing, composing and publishing an obscene advertisement of them. In both cases the Court proceeded on the assumption that the publications involved were obscene. The majority could thus limit itself to the "dispositive question [of] whether obscenity is utterance within the area of protected speech and press." The question was answered in the negative. Obscene publications were not within the protected area because they were "utterly without social importance." In reaching this conclusion the majority relied upon historical material and language appearing in prior cases such as the following quotation from Chaplinsky v. New Hampshire.

... There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality ...

16. 18 U.S.C. § 1461 (1964) which provides, in part:
Every obscene, lewd, lascivious, indecent, filthy, or vile matter, thing, device, or substances: ... is declared to be nonmailable matter ... whoever knowingly uses the mails for mailing ... of anything declared by this section to be nonmailable ... shall be fined not more than $5,000.00 or imprisoned not more than five years, or both, for the first such offense ...

17. The majority opinion was written by Mr. Justice Brennan. Mr. Chief Justice Warren concurred but would stress the conduct of the purveyor, "It is not the book that is on trial; it is a person." 354 U.S. 476, 495. Mr. Justice Harlan dissented in Roth and concurred in Alberts. He would distinguish between the authority of the State and Federal governments to regulate sex literature and allow considerably more discretion to the State. Mr. Justice Douglas dissented in an opinion concurred in by Mr. Justice Black. See text accompanying note 44, infra.

19. Id. at 484.
20. 315 U.S. 568 (1942). The historical material referred to shows that 13 of the original States had laws on their books proscribing blasphemy or profanity, that over 50 nations have joined in the "universal judgment that obscenity should be restrained" 354 U.S. at 485, that all 48 states have laws against obscenity and that the U.S. Congress has enacted 20 obscenity laws between 1842 and 1956.
The defendants' contention that their constitutional rights were violated "because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, or will probably induce its recipients to such conduct" was easily avoided by the majority. Since obscenity is not protected speech there is no need on the part of the state to show a clear and present danger of anything. Nor is there any need to determine whether the regulations are too vague or overbroad, considerations which would be important only where it is necessary to balance protected speech against the right of the state to regulate it. No express weighing of competing interests was deemed necessary in the case of obscene utterances. Such utterances are not only outside the protection afforded by the First Amendment but they are subject to complete suppression by the state because of the danger they represent to society.

Of equal and probably greater significance was the Court's determination that sex and obscenity were not synonymous. Non-obscene publications dealing with sex were entitled to protection because they involve the conveying of ideas on a "subject of absorbing interest to mankind through the ages . . . one of the vital problems of human interest and public concern." Whatever dangers to society such publications may result in they are protected because of this redeeming social importance.

Having established these principles all that remained was to formulate a satisfactory test to isolate the obscene from the non-obscene. A publication is obscene, according to the Court, when "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Subsequent decisions have elaborated upon the definition, and the views of the justices with respect to its proper interpretation is succinctly summed up in the following quotation from one of the 1966-1967 term per curiam opinions:

Two members of the Court have consistently adhered to the view that a State is utterly without power to suppress, control or

22. 354 U.S. at 486.
24. Id. at 487.
25. Id. at 489.
punish the distribution of any writings or pictures upon the ground of their "obscenity". A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others have subscribed to a not dissimilar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value," emphasizing that the "three elements must coalesce," and that no such material can be proscribed unless it is found to be utterly without redeeming social value" . . . . Another Justice has not viewed the "social value" element as an independent factor in the judgment of obscenity.26

It is conceded by everyone, including the members of the Court,27 that the test for distinguishing obscenity is anything but clear, either intrinsically or in relation to the subject matter to which it is to be applied, regardless of which variation of the test is adopted. Who is the "average person" and by whom and how is he to be determined? Who is to determine whether material is patently offensive and by what standard? Is the contemporary community referred to local, statewide, or national? What relationship is there between "dominant theme" and isolated portions of the publication, that is, will a theme of redeeming social importance protect the entire publication from governmental suppression? What is meant by "prurient interest" appeal, and how can material be patently offensive and appealing to the prurient interest at the same time? Presumably repulsion is as inimicable to sexual arousal as humor is purported to be,28 and if we confine our inquiry to the effect of the publication on the average man we are met with what appears to be patent contradiction. Is it even necessary to consider the

26. Redrup v. New York, Austin v. Kentucky, Gent v. Arkansas, 87 S. Ct. 1414, 1416 (1967). The writs of certiorari in Redrup and Austin were granted to review the application of scienter requirement to convictions of booksellers. In Gent the validity of a comprehensive state law was attacked on vagueness grounds. The majority reversed on the basis that the publications involved were not obscene.


effect of the material or is the court to judge the material on its face alone? 

I leave these questions however, as I am here concerned not with the ambiguity and vagueness of the definition, but rather with the attempted accommodation of competing interests it represents. In essence the Court held that the only enforceable state interest in this area is to proscribe and suppress the dissemination of patently offensive material, the dominant theme of which appealed to the prurient interest of the average person. The justices apparently had in mind only what one justice refers to as "hard-core pornography . . . I know it when I see it . . ." When hard-core pornography is not involved the state's interest is subordinated to free speech values. It is totally irrelevant whether the state's regulations were intended to apply only to pornography or whether the language of the specific statute involved even lends itself to this limited construction. It can be used against pornography or not at all.

The Court evidently recognized in Roth that sex publications, whether obscene or not within the definition formulated by the Court, involve some danger to society. The qualifying term "redeeming" was employed with reference to both the obscene and non-obscene. In the case of the former the vices outweigh the virtues but in the case of non-obscene its social importance made amends for whatever evils it caused. This is where the Court stopped. Other than the cryptic reference to "social interest in order and morality" the majority opinion contains no hint of what these vices and evils might be that justify the limitation on speech sanctioned by the decision.

29. There are numerous articles exploring these questions and attempting to provide answers or at least guidance. Probably the most prominent and influential treatments are those by Professors Lockhart & McClure, Literature, the Law of Obscenity and the Constitution, 38 MINN. L. REV. 295 (1954); Censorship of Obscenity: The Developing Constitutional Standards, 45 MINN. L. REV. 5 (1960); Obscenity Censorship: The Core Constitutional Issue—What Is Obscene? 7 UTAH L. REV. 289 (1961).


31. Note the contrasting language of the two statutes involved in Roth, "tendency to deprave or corrupt its readers" in the state statute and tendency "to stir sexual impulses and lead to sexually impure thoughts" in the federal statute. Mr. Justice Harlan points out that "the Court merely assimilates the various tests into one indiscriminate pot pourri." 354 U.S. at 500. State statutes typically employ various adjectives in the obscenity laws. See Note, More Ado About Dirty Books, supra note 11, Appendix III.

There is obviously no objective criterion for evaluating either social importance or redeeming social importance. A determination in this area has to be a value judgment which one can accept or reject but hardly prove or disprove. Many people clearly derive at least some measure of satisfaction, perhaps considerably more, from reading and viewing hard-core pornography. This fact alone would tend to show that such publications have as much social value as any form of entertainment and whether treated as free speech or not, should be left unregulated in the absence of some evidence of overriding state interest.

But the fact of the matter is that such publications are speech, and speech is or should be protected by the First Amendment whether it be socially important or not. This much would appear to be implicit in the guarantee of free speech; that speech needs no social importance to be entitled to freedom from suppression and penal sanctions. The majority in Roth may have sidestepped this basic principle but the critics certainly haven't overlooked it.

On the other hand, if pornography has no social importance it is not at all clear what distinguishes it from many of the publications thus far held to be non-obscene. If social importance is equated to discussions of "matters of public concern" and the supplying of "the public need for information and education with respect to the significant issues of the times", it is not readily apparent that "girlie" magazines or movies depicting sexual promiscuity contain much in the way of social value.

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33. In Memoirs, 383 U.S. 413 (1966). Mr. Justice Douglas suggests that pornography may provide an outlet for drives which might otherwise lead to anti-social conduct. Id. at 432 (concurring opinion). See also Murphy, The Value of Pornography, 10 Wayne L. Rev. 655 (1964).


37. I have in mind such motion pictures as "The Game of Love" described by the Circuit Court of Appeals as follows:

(A) 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls (as a result of a boating accident). On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age. The erotic thread of the story is carried, without deviation toward any wholesome idea, through scene after scene. The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly
that is lacking in hard-core pornography. The primary object of the publishers is to commercially exploit sex and the educational and informative function is at best incidental to this primary goal. This is perhaps painting with too broad a brush, but I must confess that I am not at all impressed with the position of those commentators who characterize the writers, publishers and producers of sexually-laced publications as modern day Thomas Paines.\textsuperscript{38}

In any event little is to be gained in terms of understanding the competing interests the Court was reconciling from examining the concept of social importance. The determination of whether it exists or not with respect to a particular publication or class of publications can only be subjective conclusion based upon unarticulated personal predilection. One need only compare the views of Justices Douglas and Clark in \textit{Memoirs}\textsuperscript{39} to corroborate this point. Moreover, the state has no conceivable interest in suppressing speech merely because it lacks social importance. The factor of social importance acquires a meaning only within the context of a balancing process and here one of the prerequisites is missing. The Court has not explained what it was balancing, why the state should be permitted to suppress pornography or why it should be limited to pornography in exercising its regulatory powers.

The concept of prurient interest appeal is not particularly helpful either. In the first place it is not at all clear what precisely is meant by prurient interest appeal and the Court in \textit{Roth} was willing to accept any number of definitions.\textsuperscript{40} Quoted with apparent approval was the

\textsuperscript{38} See, e.g., Hugh Heffner's \textit{Playboy Philosophy} which appears regularly in \textit{PLAYBOY MAGAZINE}, a publication to which few need introduction. Conversely the Court's decisions and views which do not accord with an absolutist approach to First Amendment issues are characterized as misguided, insensitive, undemocratic, intolerant, prudish, hypocritical, outdated, and with terms of similar import.

\textsuperscript{39} \textsuperscript{383 U.S. 413 (1966).} Mr. Justice Douglas attached an address by a clergyman to his concurring opinion. The address favorably compares Fanny Hill with the work of Norman Vincent Peale and in fact suggested that Fanny Hill "represents a more significant view of morality than is represented by Dr. Peale's book, \textit{Sin, Sex and Self-Control." Id. at 436.} Mr. Justice Clark found the book more than he could stomach and concluded that it was clearly hard-core pornography. \textit{Id.} at 441 (dissenting opinion).

\textsuperscript{40} \textsuperscript{354 U.S. 476, 487 n. 20.} See Lockhart and McClure, \textit{supra} note 29, 45 MINN. L. REV. 5, 56-58. (1960).
following test for ascertaining whether such appeal was present in a publication:

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e.: a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.41

It is questionable whether the terms “shameful” and “morbid” have any independent significance and it appears that we are speaking here simply of material the predominant purpose of which is to sexually arouse.42 Assuming this is correct one must ask what interest the state has in preventing its citizens from being sexually aroused. Particularly if the danger of stimulating sex thoughts or desires does not justify state interference, what purpose does the prurient appeal requirement have? Moveover, non-obscene publications also stimulate thoughts or desires and probably do so to a greater degree than the obscene insofar as the average person is concerned.43 Finally, what difference can it make to the state whether the material which arouses does or does not go substantially beyond customary limits of candor?

These inquiries have a dual significance. If the primary objective of state legislation is to maintain existing moral standards, the prurient interest appeal-redeeming social importance tests have only limited relevancy to that objective. The corruption of morals can presumably be accomplished without any immediate sexual arousal at all by publications which are clearly non-obscene under the Roth test. A film which alluringly portrays promiscuous conduct as desirable behavior will, I believe, have a far greater impact on the moral standards of the average man than hard-core pornography can ever have.


42. It appears reasonably clear that sexual arousal is not what the draftsmen of the Model Penal Code provision, supra note 41, had in mind. The emphasis was to be on the nature of the appeal; not the effect of a publication upon the readers. See Lockhart & McClure, supra note 40.

43. This proposition has been stressed by Mr. Justice Douglas primarily for the purpose of showing that obscene utterances did not have any perceptible effect different from non-obscene publications or everyday events. See his opinion in Roth v. United States, 354 U.S. 476 (1967). See also Cairns, Paul and Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962).
On the other hand, if maintaining a desired moral standard is not a legitimate and recognized object of governmental legislation there would appear to be no justification at all for singling out pornography and permitting the state to suppress it. What harm does it do? As noted above, the fact that it may cause sexual arousal has no independent overall significance. Very little concern has been manifested over the danger of shocking or offending readers. The latter can ordinarily avoid such impact on his emotions by simply putting aside the book or magazine, assuming the cover or other promotional material has not adequately forewarned him.44

A few words need be said concerning the frequently asserted belief that obscene utterances incite anti-social conduct and the contention that the validity of regulations in this area should be judged by a clear and present danger test. Mr. Justice Douglas initially sounded this theme in his dissent in Roth,45 and it has been reiterated in subsequent opinions and law review comments. Speech must be related to conduct or action before it may be constitutionally penalized or suppressed. There is no evidence that obscene publications have any effect on conduct beyond perhaps arousing impure thoughts.46 The burden of proof should be on the state to show that such publications present a clear and present danger of overt acts and anti-social conduct.

If the majority of the Court had taken this approach it is obvious that it could only have arrived at a result wherein all utterances dealing with sex would be wholly immune from state regulation. Proving a cause and effect relationship between a magazine or movie and a non-consensual criminal act, such as rape, would be indeed difficult.47 When one thinks of such penal code violations as fornication or

44. Semonche, supra note 10, at 1207-1208.
46. "By these standards punishment is inflicted for thoughts provoked, not for overt acts nor anti-social conducts. This test cannot be squared with the First Amendment. Even the ill starred Dennis case conceded that speech must have some relation to action which could be penalized by government . . . . Freedom of expression can be suppressed if, and to the extent that, it is so clearly brigaded with illegal action as to be an indispensable part of it." Id. at 509 and 514.
adultery the causal connection between the actors and their reading habits would be impossible to establish, particularly in advance of the conduct itself. This is, of course, not to say that no relationship exists. We are after all dealing with one of man's strongest animal instincts. Common sense dictates that if one tempts a hungry man with forbidden food or an alcoholic with forbidden beverage there is a strong probability that a relationship exists between the temptation and the consumption. Who can gainsay that a reader will not be persuaded by what he reads that he is justified in indulging his sexual appetite with an illegal act should the occasion arise, and that the misgivings he might have otherwise had were rationalized away by the publication. The point need not be belabored. The relationship either in a specific case or in an overall sense simply cannot be proven. Furthermore the anti-social conduct may also be inspired by non-obscene publications, and for the average man the likelihood of being so inspired is probably greater from "ideological obscenity" than from hard-core pornography, the effect of which is probably only superficial and transitory.

If it be conceded that no convincing proof exists or is possible that obscene publications result in a clear and present danger of overt anti-social conduct then the only justification for permitting suppression of such publications is their assumed pernicious effect on moral character. We have thus come full circle. If the state has a recognized interest in the moral character of its citizens it is because the state has a legitimate interest in preserving and maintaining certain standards of morality. That interest is threatened at least as much by non-obscene sex publications as by the rankest pornography. The fact that material may be shocking, offensive and primarily aimed at arousing prurient interest has considerable bearing on its social value perhaps, but is really only incidental when the primary consideration relates to the long range effect on individual character and community standards. Here the governmental interest is actually greater in the case of non-obscene publications. Yet the law as promulgated in Roth goes in a diametrically opposite direction. The Court has continued to maintain, at least by implication, that the tendency of material and the ideas contained therein to corrupt morals does not constitute justification for governmental regulation when the only tenable basis for permitting state regulation

at all is the state interest in preserving individual morality, in protecting against "sin," as one commentator sees it.\textsuperscript{49}

With this fundamental contradiction as the basic predicate it is hardly surprising that the end result would be a thoroughly confused area of the law. A brief perusal of several of the decisions subsequent to \textit{Roth} will demonstrate that this basic contradiction has led the Court into its present dilemma, and that an intelligible accommodation is impossible as long as the Court continues to at least try and ride two horses pointed in opposite directions.

\textbf{Subsequent Accommodations-Continued Contradiction}

\textbf{Kingsley International Pictures Corp. v. Regents}\textsuperscript{50}

Two years after the decision in \textit{Roth} the Court was squarely faced with the issue of what subordinating interest the state has in regulating publications which adversely affect community moral standards. The state of New York's motion picture licensing law prohibited the licensing of a film "... of such a character that its exhibition would tend to corrupt morals or incite to crime." \textsuperscript{51} A motion picture would fall into this category if it "portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior." \textsuperscript{52} The administra-

\textsuperscript{49} Henkin, \textit{supra} note 34:

To me it seems that the unusual confusion—more prevalent than in discussions of other attempts of government to regulate forms of expression—is due in large measure to misapprehension of the concern and the interest that inspire government to regulate obscenity. Specifically, I believe, despite common assumptions and occasional rationalizations, that obscenity laws are not principally motivated by a conviction that obscene materials inspire sexual offenses. Obscenity laws, rather, are based on traditional notions, rooted in this country's religious antecedents, of governmental responsibility for communal and individual "decency" and "morality."

Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual and has no place in a decent society. They believe too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the "consumer." Obscenity, at bottom, is not crime. Obscenity is sin. \textit{Id.} at 391 and 395.

This brief quotation hardly does justice to Professor Henkin's excellent treatment. It might be noted that Professor Henkin concludes that suppression of obscenity is not justified.

\textsuperscript{50} 360 U.S. 684 (1959).

\textsuperscript{51} N.Y. Educ. Law § 122 (McKinney 1953).

\textsuperscript{52} N.Y. Educ. Law § 122-a (McKinney 1958).
tive agency involved denied a license to the film "Lady Chatterly's Lover" on the ground that "the whole theme of this motion picture is immoral under said law, for that theme is the presentation of adultery as a desirable, acceptable and proper pattern of behavior." The New York Court of Appeals upheld this action on the same basis, that the film "alluringly portrays adultery as proper behavior . . . because its subject matter is adultery presented as being right and desirable for certain people under certain circumstances." The state court did not find the film to be obscene within the meaning of the Roth test and did not find that it would itself incite the viewer to illegal action.

The U.S. Supreme Court reversed in a short opinion written by Mr. Justice Stewart. The opinion acknowledged that the state court's characterization of the film was correct but nevertheless denied the state the power to regulate or suppress "ideological obscenity." The statutory scheme was held invalid on its face.

What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.

It is submitted here that the Court's decision struck at the very heart of the state's primary objective in regulating sex publications. The decision is significant of course in that it represents an express affirmation of the thesis that a state may exercise control only over hard-core pornography. Since this type of publication was not involved there was no reason to consider why a state should be permitted to suppress pornography and at the same time be totally forbidden from regulating a publication which concededly has a tendency to corrupt. The emphasis

53. Quoted, 360 U.S. at 685.
55. Quoted, 360 U.S. at 687.
56. Separate concurring opinions were written by Justices Black, Frankfurter, Douglas, Clark and Harlan but ironically this is one of the few decisions rendered in the obscenity area without dissenters. Professor Henkin, supra note 34, takes the position that Kingsley is not really an obscenity case at all, but rather a "moral" case. Id. at 400.
57. See note 48, supra.
58. 360 U.S. at 688.
as always was on free speech values, the advocacy of ideas. It might
be noted in passing that obscene utterances also convey ideas and,
somewhat ironically, it is probably because of that very fact that the
state seeks to suppress such utterances. The reference to incitement to
overt conduct is of course meaningless. It was undisputed that the
state could not and did not prove that as a result of the exhibition of the
film the incidence of adultery in New York would increase by a given
percentage or that a substantial number of New Yorkers would im-
mediately take up with their neighbor's wives. One can only refer to a
clear and present danger test in this context with tongue in cheek.

The Kingsley decision is significant today in another respect. Now
pending before the U.S. Supreme Court is a movie censorship case
involving very similar issues. A Dallas, Texas, ordinance provides for
the classification of motion pictures by an administrative board and
prohibits the exhibition of a film to minors if it is found to be "not
suitable for young persons." The standards to be applied in making
this determination are as follows: (emphasis supplied)

(1) Describing or portraying brutality, criminal violence or
depravity in such a manner as to be, in the judgment of the Board,
likely to incite or encourage crime or delinquency on the part of
young persons; or

(2) Describing or portraying nudity beyond the customary
limits of candor in the community, or sexual promiscuity or
extramarital or abnormal sexual relations in such a manner as to
be, in the judgment of the Board, likely to incite or encourage
delinquency or sexual promiscuity on the part of young persons
or to appeal to their prurient interest.

A film shall be considered "likely to incite or encourage" crime,
delinquency or sexual promiscuity on the part of young persons,
if, in the judgment of the Board, there is a substantial probability
that it will create the impression on young persons that such con-
duct is profitable, desirable, acceptable, respectable, praiseworthy
or commonly accepted. A film shall be considered as appealing to
"prurient interest" of young persons, if in the judgment of the
Board, its calculated or dominant effect on young persons is sub-
stantially to arouse sexual desire. In determining whether a film
is "not suitable for young persons," the Board shall consider the

59. Interstate Circuit Inc. v. City of Dallas, 402 S.W.2d 770, Tex. Civ App. 1966,
probable jurisdiction noted 87 S. Ct. 1685 (1967). See also Interstate Circuit, Inc. v.
Dallas, 366 F.2d 590 (5th Cir. 1966), involving the same ordinance.
60. § 46 A-4, Dallas, Tex., Ordinance 11284 (1965).
film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.\textsuperscript{61}

The Texas Court of Civil Appeals upheld the ordinance and its application to the film in question. The U.S. Supreme Court holdings were distinguished on the basis that they all involved complete suppression rather than merely a regulation of publications.\textsuperscript{62} The Court further held that the requirements of the Roth test were met if "judged by the average young person" were substituted for "judged by the average person" although the Court indicated it would hold the same way were this not the case. The following quotation from a concurring opinion best expresses the basis of the decision:

It is my firm opinion that the constitutional guaranties of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as "not suitable for young persons" is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States Supreme Court intended, in \textit{Near v. State of Minnesota}, 283 U.S. 697, 716, 51 S. Ct. 625, 75 L. Ed. 1357, 1367, or in other cases to make such a stringent limitation on the powers of a state or city in this field.

The ordinance under examination, in defining the phrase "not suitable for young persons," does not employ the words "obscene" or "obscenity." The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted. Conveying to young persons the idea that to be able to enjoy the pleasures of sexual gratification

\begin{footnotesize}
61. \textit{Id.} § 46 A-1.

62. We bow to the pronouncements of the Supreme Court. But we do not believe that the holdings above set out are applicable here. In all of the cited cases the Court was considering enactments which sought to impose total censorship. Their effect would have been to ban completely the sale, distribution or exhibition of the matter involved either to adults or children. The Ordinance we have before us for consideration in this case does no such thing. As we have already pointed out it does not call for total censorship in any instance. It simply applies limited regulations of the conditions under which certain classified pictures may be exhibited to children under the age of sixteen years. 402 S.W.2d 775-776.
\end{footnotesize}
without being burdened with any accompanying responsibility or commitment, and with no retributive consequences, or even the slightest remorse, is acceptable behavior according to accepted standards of the American community, would in my opinion have a much more pernicious effect on the morals of the community than mere obscenities. To say that a community is powerless to protect itself and its youth from such damage because of the constitutional safeguards of free speech is to my mind unconscionable and unacceptable.63

This is not the first time the Court has been met with these contentions, and they have in the past been rejected out of hand.64 Although there are some distinguishing features between this case and the issues in Kingsley, the rationale of the latter decision would appear to require a reversal. The ordinance does not refer only to obscene utterances and expressly requires that the Board balance the pernicious effect on morals against the artistic and educational value the film may have. This is the very balancing process the U.S. Supreme Court totally rejected in Kingsley.

Yet there are now strong indications that the Court will uphold state laws aimed at protecting the moral character of minors, either by a manipulation of the Roth test or perhaps even by permitting an outright balancing approach. For example, in one of the 1966-1967 term per curiam opinions the Court referred to the fact that: "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles."65 Moreover the members of the Court are certainly aware of the strong public concern over the reading and viewing habits of minors.66 It may be, as Mr. Justice Douglas suggests, that children would be better off if they were permitted to

63. 402 S.W.2d at 778.
64. See Gelling v. Texas, 343 U.S. 960 (1952).
66. In Jacobellis v. Ohio, 378 U.S. 184 (1964), the following statement appears at 195:

We recognize the legitimate and indeed exigent interest of States and localities . . . in preventing the dissemination of material deemed harmful to children . . . State and local authorities might as well consider whether their objectives in this area would be better served by laws armed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.

"meet the facts of life and the literature of the world" 67 without restriction, but it is doubtful that this view is or will be accepted by the majority of parents.

Should the Court acknowledge this overriding state interest in protecting moral character of minors it would obviously be on a basis other than incitement of overt anti-social conduct. Such a holding could only mean that under certain circumstances the interest of the state in maintaining moral standards outweighs the free speech values involved in non-obscene sex publications, quite apart from whether the publications have prurient interest appeal, are patently offensive or present a clear and present danger of overt acts. The state would be permitted to meet the "danger of influencing a change in the current moral standards of the community" 68 by restricting access to publications having such a tendency by members of that class which are most easily influenced and most likely to readily adopt new moral standards. It is apparent that the Court could hardly continue to maintain the position that publications are either obscene or non-obscene and that those falling in the latter category are absolutely protected by the guarantee of free speech. In fact, as is pointed out below, the Court has already abandoned this position.

Ginzburg 69 AND Mishkin 70

Ginzburg involved an appeal from a conviction and five-year prison sentence based upon violations of a federal statute. 71 The defendant had been found guilty of mailing three separate publications, Eros, Liaison and the Housewife's Handbook on Selective Promiscuity. The conviction was upheld in a five-man majority opinion, 72 not on the basis

68. Supra note 1.
71. 18 U.S.C. § 1461 (1964). The statute is the same one that was involved in Roth v. United States. See note 16 supra.
72. The majority opinion was written by Mr. Justice Brennan. Mr. Justice Black dissented in an opinion in which he stressed that the Roth test was overly vague and meaningless and that the defendant was jailed for distributing matter that neither he nor anyone else could know was obscene and would subject him to imprisonment. He reiterated his position that all censorship was illegal. Mr. Justice Douglas dissented in a combined opinion in both Ginzburg and Mishkin. His opinion stressed the prurient interest appeal and social value elements of the Roth test and concluded that the materials involved clearly had social value. Mr. Justice Stewart also dissented.
that the publications involved were obscene in the Roth sense, but because of the methods employed by the defendant in disseminating the publications. Ginzburg was found to have been engaged in "pandering . . . the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." 73 This exploitation of "the widespread weakness for titillation by pornography" 74 is not protected by the First Amendment. Even when the material itself is not pornographic the disseminator may be prosecuted (one writer has suggested the basis is analogous to traditional estoppel75) if he himself emphasizes "the sexually provocative interests of the work, in order to catch the salaciously disposed." 76

The Ginzburg decision has been rather severely criticized on a number of grounds. 77 Whether one agrees with the outcome or not it can hardly be denied that the rationale is inherently contradictory. If the material itself is not obscene by what logic can one justify imprisoning the publisher under an obscenity statute for truthfully advertising his product? If candid discussions of sex are constitutionally protected, it is difficult to perceive why the individual who publishes these protected discussions can be criminally prosecuted simply because he advises prospective purchasers that his publications contain candid discussions of sex. By shifting the focus of attention from the material itself and emphasizing the conduct of the purveyor, an approach initially suggested by Chief Justice Warren in Roth, 78 the majority obviously sought to avoid the First Amendment issue but this maneuver is too obvious. The decision reflects the consequences of the Court's failure to deal candidly with the underlying issues. Even assuming that the case can be treated as one involving only the regulation of conduct,

in both cases on the basis that none of the material involved in either Ginzburg or Mishkin was hard-core pornography. Mr. Justice Harlan dissented only in Ginzburg. He found that the statute involved was not a pandering statute and the defendant's rights were violated by a conviction under a statute that did not by its terms apply to the conduct of the defendant. He also reiterated a position he had taken in Roth, that state convictions should be treated differently in this area and should be reviewed by the Court only in extreme cases.

73. 383 U.S. at 467.
74. Id. at 471, quoting from Schwartz, supra note 41, at 677.
75. Dyson, supra note 11, at 11.
76. 383 U.S. at 473.
77. See articles cited, supra note 11.
78. See note 17, supra. It took almost ten years but the Chief Justice did succeed in converting four other justices to his point of view. The influence of the Chief Justice is discussed briefly in Semonche, supra note 10, at 1181.
the rationale still fails to elucidate the state interest which is paramount to a publisher's liberty to cater to the desires of a substantial segment of the public. There is certainly no showing that the defendant's activities caused harm to society or incited anyone to commit anti-social acts. There is not even here a showing of sexual arousal resulting from the illegal conduct. What legitimate and overriding interest did the state assert which in the eyes of the Court justified this deprivation of liberty?

I submit that what the majority did in *Ginzburg* was to recognize that the state's interest in maintaining certain standards of morality outweigh the free speech values involved where the publisher brazenly assails those standards. The Court has in effect admonished the publisher that while he may advocate ideas that are morally corrupting and disseminate material that is appealing to prurient interest or patently offensive, his First Amendment rights from this point on are subject to and limited by the governmental interest in protecting community moral standards. He can publish the material but he cannot flaunt it in the face of this state interest. Free speech values are adequately protected by the right to place the publication on the market—anything beyond this constitutes an unprotected encroachment upon a legitimate state concern.

I believe this is the only reasonable explanation of this rather extraordinary decision. It is certainly difficult to accept the proposition that *Ginzburg* represents only an application of the *Roth* principles. A person's conduct, as such, is relevant to the validity of a police power exercise only when that conduct in some way endangers a legitimate objective of the police power. The only apparent objective affected by the defendant's activity is the maintenance of a "healthy" moral climate, and it is this objective that the majority must have had in mind.

I express no opinion over whether this accommodation is either desirable or workable or whether it would have met with greater approval had the Court expressly rationalized the decision in terms of a balancing test. Perhaps the majority wisely declined to plunge into the controversy over the right of the state to regulate private consensual conduct and individual morality. 79 The Court would then be confronted with the problem of how to ascertain and evaluate the effect of publications on moral standards. Such an approach would also re-

quire the outright repudiation of the rationale of Roth and subsequent decisions such as Kingsley.

In Mishkin the majority\(^{80}\) made further inroads on the Roth doctrine by adopting a "variable obscenity"\(^{81}\) test to be applied where the publications are directed at a specific class of readers or viewers.

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than to the public at large, the prurient appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.\(^{82}\)

This shifting person test again removes the primary emphasis from the publication itself, and for the first time requires an inquiry into the characteristics of the intended recipients. The majority opinion speaks only in terms of prurient appeal and does not even allude to the possible harm such publications may cause. In this respect the decision differs little from Roth and is subject to the same observations, although it is noteworthy that in neither Mishkin nor Ginzburg did the Court elaborate upon the redeeming social importance factor, the keystone of the Roth rationale. Nevertheless, I believe it is apparent that Mishkin represents another accommodation, a recognition of the state's special concern with the character of those members of society deemed to be more susceptible to moral corruption than the average man. One can only

\(^{80}\) The opinion was again written by Mr. Justice Brennan and was this time joined also by Mr. Justice Harlan. The position of the three dissenting justices is essentially the same as in Ginzburg. See note 72, supra.

\(^{81}\) The theory of variable obscenity developed by Professors Lockhart & McClure, supra note 29, 45 MINN. L. REV. 5 (1960) at 69-86.

Under variable obscenity, material is judged by its appeal to and effect upon the audience to which the material is primarily directed. In this view, material is never inherently obscene; instead, its obscenity varies with the circumstances of its dissemination. Id. at 77. The "effect" referred to is presumably prurient interest arousal.

Note that some lower federal courts had prior to the Mishkin decision made an effort to apply a variable obscenity approach. See, in particular, United States v. Klaw, 350 F.2d 155 (2nd Cir. 1965); United States v. One Carton Positive Motion Picture Film Entitled "491," 247 F. Supp. 450 (S.D.N.Y. 1965). However in Manual Enterprises v. Day, 370 U.S. 478 (1967), the U.S. Supreme Court refused to adopt the test although it did not expressly reject it. See Elias, Obscenity, the Law, a Dissenting Voice, 51 KY. L. J. 611, 619-624 (1963).

\(^{82}\) 383 U.S. at 508. The Court points out that the use of an "average person" standard in Roth was for the negative purpose of rejecting the old "most susceptible person" test of Regina v. Hicklin, L.R. 3 Q.B. 360 (1868) and that the Court was now simply adjusting to social realities by adopting the variable obscenity standard.
speculate with respect to the eventual application of the principle of variable obscenity, but it appears that the person who deals in publications catering to the interests of sexual deviates will find his free speech rights rather severely limited.

It has not been my purpose to analyze these two decisions other than in the context of demonstrating the reconciliation of competing interests effected by the Court. What the Court said in these cases is obviously not as important as what the Court did. While continuing to maintain the position that free speech could not be regulated or suppressed by the state to prevent corruption of morals, the holdings themselves belie this position and reflect a new balance struck in favor of the state's regulatory power. It would appear, moreover, that these new accommodations have compounded the confusion which already existed, a certainly undesirable side effect. It was not really very difficult to identify hard-core pornography once it was established that it was only this class of publications that the Court had in mind in Roth, quite apart from the inherent vagueness of the verbal formula provided for that purpose. It is going to be considerably more difficult to apply the Ginsburg and Mishkin principles using only the enigmatic concept of prurient interest appeal as a working tool.

**Conclusion**

The Court's dilemma is a very real one. It is charged with the responsibility of accommodating the governmental interest in maintaining moral standards with the guarantees of the First Amendment. It has attempted to accomplish this objective without expressly acknowledging the validity of such governmental interest, and by the use of a verbal formula which bears little relationship to that interest. To compound this delicate and complex problem of balancing rival values, there are vaguely worded laws, a dearth of adequate knowledge concerning the effect of sex publications on overt conduct or moral standards, a brewing controversy over the right of the state to regulate even conduct for the sole purpose of preventing immorality, publishers all too eager to take full advantage of an opportunity to exploit the public's desire for sex and more sex and, finally, censors, all too ready to censor if given the authority.

To many the issues could be quite simply resolved by wholly denying the validity of the state concern. This I submit is an extreme position which if adopted would only engender extreme reactions and
undesirable "vigilante" activity. Nor is it feasible to permit unrestrained censorship. The task has been to find a middle ground, to formulate principles which will preserve the essential values of the First Amendment, and also recognize the right of the state to protect its interests by authorizing it to draw lines beyond which the publisher may not legally venture. This may not be the result desired by many, indeed the limited restrictions on speech permitted by the Roth decision were considered unjustified particularly by those who espouse an absolutist approach to First Amendment guarantees. Nevertheless, I believe the only tenable position the Court can take in fulfilling its responsibility is one which takes account of both sets of values involved.

I have, therefore, no criticism of the accommodation at which the Court has arrived, but unfortunately thus far the justices have been unable to translate that accommodation into governing principles that accurately reflect the basis of the Court's holdings, an inability that I maintain is due in large part to the inadequacy of the prurient interest concept either as an intelligible explanation of the Court's decisions or as a guide for applying these holdings to concrete cases. I submit that in the long run the law will be better served by an express adoption and application of a balancing test in this area, even though this would require that the Court undertake the truly formidable task of candidly evaluating on a case to case basis the extent and nature of the state's interest in avoiding moral corruption and under what circumstances that interest will be paramount to free speech values.