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D. Grier Stephenson Jr.

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STATE APPELLATE COURTS AND THE JUDICIAL PROCESS: WRITTEN OBSCENITY

D. GRIER STEPHENSON, JR.*

A great commandment of our Lady of the Common Law: Thou shalt not make unto thyself any graven image—of maxims or formulas to wit.

—Sir Frederick Pollock¹

This article will draw several hypotheses and conclusions concerning the operation of state appellate courts on the basis of a case examination in Florida. What can one learn about state judiciaries from the way in which appellate courts in Florida have treated the subject of written obscenity? The subject is a litigious one today both in state and federal courts.² Written obscenity centers on the morality of the community and the courts' relationship to that morality. A case of written obscenity presents the judges with the task of applying some external standard to matters before them, and directly involves them in the emotions and feelings of a particular community.

The territorial and early statehood history of Florida was virtually bare of obscenity legislation. Prior to the Civil War state statutes and published court reports made no reference to the subject, though this silence was not uncommon in many of the other states during this period.³

Explaining why legislators failed to pass certain laws or why particular types of litigation failed to materialize is often more difficult than explaining the origins of enacted statutes and decided cases. A statute presents the opportunity to focus on the web of forces and the pressures which interacted to produce the law. Similarly, a case draws together

*A.B., Davidson College, 1964; M.A., Princeton University, 1966; Ph.D., Princeton University, 1967. Member of the faculty of The National War College.

1. Pollock, *A Plea for Historical Interpretation*, 39 L.Q. REV. 163, 169 (1923).

2. For background on obscenity statutes and cases in the United States see M. ERNST & A. SCHWARTZ, *THE SEARCH FOR THE OBSCENE* (1964); TO DEPRAVE AND CORRUPT (J. Chandos ed. 1962); VERSIONS OF CENSORSHIP (J. McCormick & M. MacInnes eds. 1962); Balter, *Some Observations Concerning the Federal Obscenity Statutes*, 8 S. CAL. L. REV. 267 (1935); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960); Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954); Zuckman, *Obscenity in the Mails*, 33 S. CAL. L. REV. 171 (1960).

3. See generally Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

opposing sides with conflicting claims, and a court decision represents a choice of values and a preference for certain interests at stake in the litigation. The case and the statute, then, expose for examination interests, feelings, and tensions perhaps muted or nonexistent before. Without the expressed opinions found in statutory debates and judicial argument, however, the search for the causal continues amidst an abundance of uncertainty and speculation.

The passage of obscenity laws was probably dependent more on the state of the public mind than on the quantity of material available for sale and distribution. One would be unreasonable to suppose that obscenity legislation appeared when a certain absolute level of circulation was reached, like a light's flashing when the temperature reached a danger point. Instead, if one could say that legislation reflected the desires of some group in the body politic, the passage of obscenity laws indicated a crisis point in the minds of some who felt that the state should curb the evil. An increase in the quantity of available matter would not be necessary to spark the legislation, for what was needed was a change in attitude toward whatever amount of material was present.

The Florida legislature first adopted a statute against obscene material in 1868:

Whoever imports, prints, publishes, sells, or distributes any book, pamphlet, ballad, printed paper, or other thing, containing obscene language, or any obscene prints, figures, pictures, or descriptions, manifestly tending to the corruption of the morals of youth, or introduces into any family, school, or place of education, or buys, procures, receives, or has in his possession any such book, . . . shall be punished by imprisonment . . . and fine⁴

The focus was on youth, the home, and the school, and the statute explicitly forbade books containing any obscene passages. Presumably, some irreverent Floridian could have applied the statute to the Bible to rid most Florida families of their only printed possession, though no record remains of any such attempt.

The statute was part of the movement to erase what many felt to be a plaguing mark on the nation's character;⁵ it exhibited signs of distinctly

4. FLA. LAWS ch. 1637, sub. ch., 8, § 15 (1868).

5. Anthony Comstock led the efforts to purify the nation's morals. See H. BROWN & M. LEECH, ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD (1927); Foster, *The "Comstock Load"—Obscenity and the Law*, 48 J. CRIM. L.C. & P.S. 245 (1957).

English influence.⁶ Lord Campbell had sired his Obscene Publications Act in 1857, and in the debates in the House of Lords on the bill, its author explained that the law would apply to works written for the purpose of corrupting the morals of youth.⁷ In 1868, the year of the enactment of the Florida statute, Chief Justice Cockburn announced the test for obscenity in the *Hicklin* case.⁸ In this first interpretation of the British act, Cockburn broadened Lord Campbell's definition to include more than material written with the singular purpose of corrupting the morals of young people.⁹ Obscene matter now became that which tended to deprave and corrupt those whose minds were open to such immoral influences and into whose hands a publication of this sort may fall.¹⁰

The Florida statute reflected the concern of both Lord Campbell and Chief Justice Cockburn that the state protect the minds of youth from obscene literature. The crucial distinction, of course, between the respective views of Campbell and Cockburn was that under the former's view the scope of the act would be much more narrow than under the latter's. Campbell's net would trap only products intended for sexually immature adolescents, but Cockburn's would include Campbell's criteria plus much literature directed only to adults. This emphasis on protect-

6. For background on English obscenity law, see Lloyd, *Obscenity and the Law*, 9 CURRENT LEGAL PROB. 75 (1956); Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938).

7. LLOYD, *supra* note 6, at 79.

8. *Regina v. Hicklin*, [1868] 3 Q.B. 360.

9. The United States courts adopted the *Hicklin* test as early as 1879. *United States v. Bennett*, 24 F. Cas. 1093 (No. 14,571) (C.C.S.D. N.Y. 1879). The first major judicial attack on Cockburn's rule did not come until 1933. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D. N.Y. 1933).

In *Winters v. New York*, 333 U.S. 507 (1948), the United States Supreme Court held void for vagueness a state law making it a criminal offense to distribute publications containing stories of deeds of bloodshed and lust. In *Doubleday v. New York*, 335 U.S. 848 (1948), the Court, equally divided (Frankfurter not participating), affirmed the conviction of the publisher of Edmund Wilson's *Memoirs of Hecate County*. The issue before the Court was first amendment protection for obscene literature, the first time a case had squarely presented this question to the justices.

In *Butler v. Michigan*, 352 U.S. 388 (1957), the Supreme Court ruled that a state statute incorporating the *Hicklin* test for obscenity was unconstitutionally broad because it in effect reduced all reading matter to the level of children.

Roth v. United States, 354 U.S. 476 (1957), found the Court burying the *Hicklin* rule explicitly, and substituting a new test: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.

10. *Regina v. Hicklin*, [1868] 3 Q.B. 360, 371.

ing young minds remained a central part of Florida obscenity law through 1957.

One of the possible contributing factors, then, of the enactment of the Florida statute was the English debate over obscenity legislation. Whether or not the *Hicklin* test was known to the Florida legislators in 1868, they were probably familiar with the Act of 1857 and the accompanying debates. In fact, such an act as that passed by the legislature in 1868 seemed a reasonable consequence of the blending of the Victorian conscience, the religious and moral fervor of the postwar years, and the tensions resulting from the social, political, and economic revolutions then in progress in the South. The second half of the century thus witnessed an interplay of factors which had been latent or largely absent during the first half.

What did the sponsors of the legislation hope to accomplish? The record was not sufficiently substantial to support any of several possible primary motivations.¹¹ The effort, however, seemed to be one of leading the youth away from the immoral and the indecent and toward the good and the proper.¹² Hopefully, by hiding the evil, the elevation of the spiritual rather than the baseness of the flesh would entice the adolescent Floridian in 1868. Whether or not the legislation appreciably improved the moral fiber of the younger generation, enough of the older generation was sufficiently optimistic to have the statute enacted.

The several decades following passage of the 1868 statute witnessed

11. Debate has been rampant during recent years over the effects of obscene matter on behavior. The change in emphasis from impure thoughts to antisocial behavior has reflected the belief that government can regulate actions, but not thoughts. If impure thoughts cause antisocial actions, one then has a stronger case for regulating literature which produces those thoughts.

[W]hether obscene literature does in fact affect public morals is a highly debatable question, but the Court recognizes that the American community seems to think so. The fact that all American legislative bodies, state and federal, have enacted antiobscenity laws does suggest that the belief on which they are founded may not be so clearly unreasonable as to justify a judge's putting his own personal judgment or his understanding of modern psychiatry against them.

FELLMAN, *The Essential Nature of American Constitutional Law* in *ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER* 550 (M. Forkosch ed. 1966). See also M. ERNST & W. SEAGLE, *To the Pure . . .*, at 239 (1928); G. SCOTT, *Into Whose Hands* 5 (1961); Cairns, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962).

12. It is the effort to control personal morality to which many object today. See Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

occasional prosecutions for sale and distribution of obscene matter, the first conviction under the statute to reach the supreme court of Florida being *Reyes v. State*.¹³ The supreme court reversed the trial court, however, because the indictment did not give a description of the material *in haec verba*.¹⁴ While counsel for the defense argued that the matter was not in fact obscene, the justices chose to reverse on procedural grounds. A similar case came up for review in 1928 and the supreme court again reversed, this time on the authority of *Reyes*.¹⁵

Such was the extent of the high court's participation in the state's obscenity law until 1957. The statute gave rise to convictions from time to time, but very few found their way to the supreme bench. The justices over a period of about ninety years never once had to define obscenity or to interpret the scope of the 1868 statute.

The failure to find obscenity cases on the supreme court's docket was not necessarily a sign that officials were not enforcing the law or that Florida was open to obscene publications. Enforcement of the law, instead, varied from county to county, with the coastal and tourist centers generally tending to be more tolerant of the questionable material. Often enforcement of the statute would not involve a prosecution and conviction, but only a confiscation and a warning. Most censorship and suppression of obscenity was informal, focusing community pressure on one whose business habits were in derogation of majority opinion. Few wished to risk the wrath of their neighbors, and transient salesmen could expect at best a hostile reception or at worst the rail if community leaders found them peddling printed filth in the schoolyard.¹⁶ In short, pressure for official enforcement of the statute was low key, and most suppression of obscenity resulted from the conforming force of community opinion.¹⁷

At the conclusion of hostilities in 1945, much of Florida underwent a cultural shock. The appearance of a massive tide of paperback books

13. 34 Fla. 181, 15 So. 875 (1894).

14. "The indictment should give such description of the paper, figure or picture as decency permits." *Id.* at 183, 15 So. at 875 (Liddon, C. J.).

15. *Vannoy v. State*, 115 So. 510 (Fla. 1928).

16. Judge Bok has called community opinion "the real censor who controls our freedom to read, to be spoken to, and to be silent." Bok, *The Duty of Freedom*, SATURDAY REVIEW, July 11, 1953, at 27.

17. The reader should of course remember that obscenity, like gambling and vice, thrived in particular sections of the state where the wealthy tourist's demands were met. Often, such conditions existed regardless of vocal "community opinion" to the contrary.

and "girlie" magazines swept many civic and religious groups into action, and produced a reaction which confronted the onslaught of printed sordidness with a moral barrier.¹⁸ To combat the evil, Floridians begot numerous official and semiofficial vigilante groups which operated in most of the major towns and cities.¹⁹ The mayor of a community would appoint leading ladies of the town to a censorship board, or a progressive literature group would create its own reviewing panel. In either case, the results were very much the same. The board members would examine newsstands for salacious publications and would hear complaints from parents who had discovered an "art" magazine beneath junior's pillow. If the board decided certain matter was obscene—and such a finding was not infrequent—its members would suggest prosecution to the local solicitor who in turn would warn the accused dealers of impending punishment. Usually, the dealers were more than happy to remove objectionable literature from sale, and submission to the board's determination was normally sufficient to forestall actual prosecution.

While agencies and citizens' groups were occasionally on guard in most Florida communities, the search for obscenity in certain towns and cities went forward vigorously and relentlessly. In Miami, for example, the Censorship Board banned *Good Times* and *Vue* in 1953, though on the recommendation of Police Chief Headley, the Board took no action against a calendar featuring Marilyn Monroe in the nude. Mrs. Regina L. McLinden, chairman of the Board, explained that the calendar was simply "traditional American calendar art." At the same time, a magazine containing a photographic layout of the Broadway show "Can-Can" almost fell under the Board's censure. A local attorney, however, reported that he had seen the show in New York City and did not consider it obscene. Mrs. McLinden deferred to him.²⁰

In late 1954, the police chief in nearby Miami Beach sent a squad of police to all newsstands in the city, instructing the dealers to clear "nudist books and so-called art magazines" from the shelves. In the meantime,

18. See P. SOROKIN, *THE AMERICAN SEX REVOLUTION* (1956); Rorty, *The Harassed Pocket-Book Publishers*, 15 *ANTIOCH REV.* 411 (1956); Kerr, *A Pox on Shocks*, N. Y. Times, Jan. 15, 1967, § 2, at 1, col. 1.

19. Such groups blossomed forth throughout the country. See generally Note, *Entertainment: Public Pressures and the Law*, 71 *HARV. L. REV.* 326 (1957).

20. American Book Publishers Council, *Bulletin*, Nov. 27, 1953, at 8. [hereinafter cited as *Bulletin*].

a Miami group pushed for a statewide censorship board patterned after the Georgia Literature Commission.²¹

Both the municipal government and private groups waged war on obscene literature in West Palm Beach. During the spring of 1954, the city commission prepared an ordinance banning all obscene publications from sale. After protests by the American Book Publishers Council and the Comic Magazine Publishers, the city agreed to rewrite the ordinance, since little of the first draft would have stood up in court.²² The city commission decided in November of 1954 to pass the revised version, but gave the dealers until January 31, 1955, "to clean house."²³ Later in the new year the commission debated a tougher ordinance, but agreed not to adopt the new measure in order to give the local junior chamber of commerce opportunity to conduct its own anti-obscenity campaign.²⁴

Feeling in Jacksonville reached fever pitch in the fall of 1954 when the mayor signed ordinances creating a board to censor comic books and other publications.²⁵ The authorities in Jacksonville Beach adopted a similar program, and the commissions in thirteen other communities received recommendations at this time for such boards.²⁶ By February of 1955, members of the Jacksonville Board of Literary Review could report that "objectionable comic books have practically disappeared from the shelves of local book dealers." As usual, most of the censorship in Jacksonville and Jacksonville Beach was extralegal, for despite the mass removal of many publications from sale, the censorship boards only referred one magazine and one paperback to the city attorneys for possible prosecution. The Jacksonville Board ventured a remark on March 2, 1955, that "lewd covers on cheap books displayed to attract child customers" were often suspect.²⁷

21. *Bulletin*, July 14, 1955, at 6. The State of Georgia centralized anti-obscenity efforts in the Georgia Literature Commission, a quasi-judicial body. See Fleming, *The Georgia Literature Commission*, 18 *MERCER L. REV.* 325 (1967).

22. *Bulletin*, May 25, 1954, at 11.

23. *Id.*, Dec. 28, 1954, at 3.

24. *Id.*, July 14, 1955, at 6.

25. John Milton apparently had little regard for the state-appointed censor. If he be of such worth as behooves him, there cannot be a more tedious and unpleasing journeywork, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books and pamphlets [W]e may easily foresee what kind of licenser we are to expect hereafter, either ignorant, imperious, and remiss, or basely pecuniary.

J. MILTON, *AREOPAGITICA* 20-21 (Everyman ed. 1927).

26. *Bulletin*, Dec. 28, 1954, at 4.

27. *Id.*, July 14, 1955, at 6.

The censorious elements were also active in the capital city of Tallahassee, working within the shadow of the handsome supreme court building. Community pressure for municipal action mounted during 1954, but the city commission first rejected the notion that government should "tell people what they can read, and what they can't," and set aside a proposed ordinance.²⁸ Later in the year, however, demands grew for a municipal ban of some type, so the commission relented in December and forbade the sale of obscene literature generally and crime comics to persons under eighteen. Despite vigorous opposition by the Tallahassee *Democrat*, the commission established an advisory committee with authority to screen material which distributors planned to put on sale.²⁹ The Winter Haven and St. Petersburg commissions adopted review ordinances similar to Tallahassee's. Although the St. Petersburg *Independent* approved the move, the city's *Times* commented,

If this ordinance is passed and enforced, St. Petersburg will out-Boston Boston. . . . Perhaps the police will have to search our libraries (many copies of Snow White are available in the city library).³⁰

With the war against obscenity reaching its peak in 1955, the maze of prosecutions and official and unofficial threats was bound to result in an appeal to the Florida Supreme Court. In 1957, a racy newspaper article presented the court with its first chance for review, and the justices used the opportunity to offer a lengthy discourse on the nature, purpose, and destiny of obscenity law and morality in Florida.

28. *Id.*, Dec. 28, 1954, at 4.

29. *Id.*, July 14, 1955, at 6.

30. *Id.* Community campaigns can be humorous. Earl Finbar Murphy sees the "malerotic element which leaves the modern conventional moral reformers indifferent. They burn copies of *Sunshine and Health*, while on a billboard above them, unnoticed, a nearly naked woman with an enticing smile hands an open can of beer to a leering man in swim trunks." Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655, 671 (1964).

A survey of community action in Florida was proof enough for the contention that, [w]e should not be exclusively obsessed with formal legislation. Ambiguous as it often is, it is in the open: informal censorship, subtle and pervasive, is hiding all around us, permeating even the figures of everyday speech. In the exploration of informal censorship lie the greatest perplexities and the greatest potential rewards. Our questions must be addressed, not only to the learned Magistrate, but also to that busy if enigmatic individual, the Man in the Street.

C. & W. RUSSELL, *The Natural History of Censorship*, in *TO DEPRAVE AND CORRUPT*, *supra* note 2, at 174.

One Reuben J. Clein of *Miami Life* published on April 30, 1955, an article relating to possible sexual perversions between a black man and a white girl. Dade County prosecuted Clein for violating the obscene literature statute, dating with few modifications from 1868, but the circuit court quashed the charge because, in the judge's opinion, the evidence did not show the article to be obscene beyond reason. The state appealed.³¹

The seven justices of the state's supreme court were unanimous on the judgment to reverse the trial court, though two of them entered separate concurring opinions. Justice O'Connell spoke for five justices, stating that where reasonable men might differ as to the question of obscenity, the case was one for the jury. Therefore, the trial judge erred in granting the motion to quash.

Clein admitted that he published the article, but claimed that even if obscene, the article was not the kind of obscenity which would arouse the sexual passions of youth. Rather, "if it would do anything, it would arouse disgust."³² Since the statute allegedly applied only to the lustful kind of obscenity, he claimed he had committed no offense under the act.

The question before the court was whether the trial judge had committed reversible error in granting the motion to quash. Justice O'Connell admitted as much, and ruled on the point early in his opinion. The case presented, however, an opportunity to deliver the court's first definitive statement on obscenity in Florida. Seizing his pen, Justice O'Connell ventured beyond the line of necessity and crossed into the realm of judicial lawmaking.

As a matter of law, one could not say that the article was not obscene because it included more than just sexually stimulating material. Certainly the article was "offensive to chastity of mind or to modesty," and thus within a legitimate definition of obscenity.

Many of the reported cases dealing with the question of obscenity involve statutes wherein no test of obscenity is given. In such cases, the generally accepted rule is that matter is obscene if it would tend to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands such matter might fall by suggesting or inciting lewd or lascivious thoughts or desires.³³

31. *State v. Clein*, 93 So. 2d 876, 878 (Fla. 1957).

32. *Id.* at 879.

33. *Id.* at 881.

The Florida Court did not have to resort to the *Hicklin* rule, however, because the legislature had defined the obscene as that ". . . manifestly tending to the corruption of the morals of youth." For Justice O'Connell, the legislature had in mind something more than sexual standards:

As we understand the word morals it means the code of conduct adopted and used by a particular people at a particular time. Such code expresses in thought and action the consensus of opinion of a people as to what is or is not acceptable in the conduct of persons in that community at that time. This code of conduct is formulated and taught to a people by its churches, its schools, to children by parents, and is influenced by the actions and conduct of friends, neighbors, and associates. Parts of such code or standard are also frequently expressed by the people, through their elected representatives, in the enactment of statutes and ordinances. Such code of conduct determines and is morals. It must and does encompass more than sexual conduct. It relates as well to common decency, cleanliness of mind and body, honesty, truthfulness, and proper respect for established ideals and institutions, among other things.³⁴

Even the casual observer might have queried whether in any American state in the mid-twentieth century one could point to a comprehensive code of conduct to which almost all would agree. Even if one begrudged Mr. Justice O'Connell's extension of fact, the implications of his statement were astounding. The obscenity statute, at least in the eyes of five justices, protected the minds of youth against any sort of nonconformist thought, on topics ranging from table manners to clothing styles.³⁵

The purpose of O'Connell's discourse was to broaden the meaning of

34. *Id.* at 882.

35. "So long as a man howl with the wolves, he may say whatever monstrous thing occurs to him; if he howls against the wolves, it may cost him his job, his social position, and perhaps his liberty." Bok, *supra* note 16, at 27.

If the appointed censors question the motives of those who write about sex, others have questioned the motives of the censors.

Censorship has an inevitable attraction for the least enlightened and most intolerant and regressive elements in society, those who throughout history are forever trying to put not only themselves into uniforms, but everyone else too. It is for this reason that the issue of pornography is an important one; it has been used, as blasphemy once was, to justify censorship.

CHANDOS, *Unicorns at Play*, in *TO DEPRAVE AND CORRUPT*, *supra* note 2, at 206.

obscurity to encompass more than the sexually arousing.³⁶ The justice agreed with Alexander Pope that, "Vice is a Monster of so frightful mien as to be hated needs but to be seen. Yet seen too oft, familiar with her face, we first endure, then pity, then embrace."³⁷ That is, O'Connell feared that even coarse and crude references to sex would dissolve the moral fiber of Florida's youth.

When familiarity is said to breed contempt, we have no doubt that familiarity with obscenity will lessen aversion to it and make it more acceptable. To the extent that obscenity becomes more acceptable morals are lessened and corrupted.³⁸

The justice's attempt to broaden the definition of obscenity was perhaps shrewd—at least he would help assure Clein's conviction. But in his efforts to enlarge sufficiently, he cast the statutory net so wide that the law now encompassed, by judicial fiat, almost all thought and opinion which could in any way relate to community standards, even of the meanest sort.³⁹

While O'Connell disclaimed the *Hicklin* rule as the Florida test, the statute did require that questioned matter, in order to constitute obscenity, must tend to corrupt the morals of youth. With his powerful grasp of interpretative techniques, O'Connell proceeded to incorporate the *Hicklin* test into the Florida act. This specification that the matter tend to corrupt youth actually gave the law a sweeping effect.

. . . [I]t would appear to us that obscenity which would not affect the morals of the average normal person, could nevertheless affect the morals of youth, with its generally recognized lack of experi-

36. Howard Moody has proposed perhaps the broadest definition of the obscene. "What is obscene is that material, whether sexual or not, that has as its basic motivation and purpose the degradation, debasement and dehumanizing of persons." Moody, *Toward a New Definition of Obscenity*, 24 CHRISTIANITY & CRISIS 284, 286 (1965).

37. 93 So. 2d 876, 882 (Fla. 1957).

38. *Id.*

39. O'Connell viewed society as a stagnant entity.

Literature . . . should not be asked to embody the values of the time. Literature should disseminate ideas, not moralities. If the author's ideas jar the prevailing mores, it is not the ideas which must be suppressed; both can exist cotaneously [*sic*], and both must so exist if society is not to stagnate, decay, and die. Moralities change; ideas develop; and the change in morals springs from the development of ideas. In this sense, to limn with a broad brush, poets are the unacknowledged legislators of the world.

Alpert, *supra* note 6, at 75.

ence, its venturesome spirit, its sponge-like mind, and its willingness to experiment with something new.⁴⁰

The legislature, then, "intended to measure by its effects on the morals of youth and thereby to give youth and its morals additional, not less, protection, than would have been given under a statute merely declaring against obscenity."⁴¹ What test was this, in effect, if not the *Hicklin* test, which measured obscenity by the probable effect on minds which might review the material, including children? True, the *Hicklin* rule could refer to any group in society, but the most common reference group in its legal history was youth.

Regardless of the rule to be applied, however, the community as represented on the jury was rightly the body to decide whether conduct violated public standards.

There is good reason for requiring the question of obscenity and effect on morals to be submitted to a jury for it is the people of a community who have the right to establish their standard of morals and it should be the people who apply the standard to specific conduct and who determine whether such conduct is offensive and harmful or not. This can best be done through a jury.⁴²

Justice O'Connell evidently presumed that the jurors did in fact represent community opinion in some way. By "community" he probably meant geographical community—the area from which the jurors came. The justice also presumed that one group of jurors would rule similarly to another group of twelve coming from the same geographical district, or so it appeared when the justice presumed a community standard and a jury to divine its contents. That on one occasion the jurors could reflect agrarian or blue collar values and on another occasion sophisticated white collar and professional values did not appear to trouble Justice O'Connell. Clearly, while two juries might be drawn from the same county, they might easily represent two entirely distinct intellectual communities.

His discourse on the preeminent place of the jury reminded the justice that his own opinion might reflect a judgment that Clein's article was obscene. Appearances to the contrary notwithstanding,

40. 93 So. 2d 875, 883 (Fla. 1957).

41. *Id.*

42. *Id.*

O'Connell claimed only to declare the law, leaving application to the jury.

We do not hold by this opinion that the article in question was obscene or that it manifestly tends to corrupt the morals of youth. We carefully refrain from doing so for if we did we would be going beyond our province which is to declare the law. If we went further we would not only be invading the province of the jury but would be imposing upon the people by judicial fiat our view of what the morals of the community should be. This is a matter for the people to decide for themselves.⁴³

What O'Connell no doubt knew and Clein painfully saw was that the court had written the obscenity law of Florida to encompass Clein's article. The chances were good that a jury would find the article distasteful, and thus obscene.

Despite Justice O'Connell's sweeping phrases, Justice Crosly perhaps echoed voices from the judicial conference when he emphasized that the statute was not as broad as O'Connell's opinion indicated.

For those who might regard this decision as a license to inaugurate a "witch hunt," it should be emphasized that in the trial of such a charge the burden remains upon the state at all times to prove every essential allegation of the information beyond and to the exclusion of every reasonable doubt.⁴⁴

Crosly's reminder was worth noting, but most likely the ears of the soldiers in the obscenity campaign throughout the state did not make the most fertile ground for his seeds of wisdom and restraint.

The astonishing fact about the *Clein* decision was its date—1957, the year of *Butler v. Michigan*⁴⁵ and *Roth v. United States*.⁴⁶ One could have expected O'Connell's opinion in 1900, and indeed his thoughts suggested those of jurists from an earlier day.⁴⁷ Even more astonishing was Justice Roberts' note in a concurring opinion, directing his col-

43. *Id.* at 884.

44. *Id.*

45. 352 U.S. 380 (1957).

46. 354 U.S. 476 (1957).

47. See, for example, several early Georgia cases: *Holcombe v. State*, 5 Ga. App. 47, 62 S.E. 647 (1908); *Montross v. State*, 72 Ga. 261 (1884); *Dillard v. State*, 41 Ga. 270 (1870).

leagues' attention to the *Butler* decision by the United States Supreme Court. In *Clein*, the Florida Supreme Court applied, reinforced, and broadened a statute almost identical to the Michigan act which had fallen beneath the judgment of the supreme federal bench.⁴⁸

The *Butler* decision, however, did provoke a change in Florida's obscenity statute, the first major alteration and renovation of the act since its passage in 1868. The response by the legislature to the United States Supreme Court's ruling was the first move in what one could describe as a federal-state checker game. The United States Supreme Court comprised one side, and the Florida legislature and supreme court the other. A play by the high federal bench produced a corresponding reaction in Florida, with state agencies and institutions making their moves against obscenity within the limits set by the supreme bench. The Florida Supreme Court reluctantly blended the new federal rules with local law, tradition, and custom, to fashion the state's approximation of the national standards.

Convinced that the heart of the 1868 statute, with the primary test being effects on youth, would not survive a test in the federal courts, the legislators agreed in 1957 to remove this stark feature of the law. While desiring to stay within the scope of constitutional interpretation offered by the United States Supreme Court, the legislators were alarmed over the prospects of mass publication of ribald literature. In a preamble to the new law of 1957, the legislature confessed that obscene literature was "easily obtainable by anyone in this state regardless of age. . . ." Moreover, minors under seventeen "are often greatly influenced by such articles because of their inability to place them in their proper perspective as outward manifestations of the sadistic and depraved nature of those who produce and distribute them. . . ." The circulation of the literature contributed to juvenile crime and constituted "a clear and present danger to the people of this state" because the material impaired "the ethical and moral development of the youth. . . ." By eliminating "this source of contamination," the legislature hoped that the purer atmosphere could "thereby strengthen the moral fibre of the people of Florida. . . ." ⁴⁹

The revised statute itself dropped the reference to corrupting the morals of youth, but prohibited the selling and displaying of "any obscene, lewd, lascivious, filthy, indecent, immoral, degrading, sadistic,

48. 93 So. 2d 875, 884 (Fla. 1957).

49. FLA. LAWS ch. 57-779, Preamble (1957).

masochistic or disgusting" matter. Within these adjectives, the state hoped to continue the war against obscenity and at the same time not derogate from the latest federal directives.⁵⁰

Curiously, the statute contained no definition of the obscene, unless the legislators intended the adjectives following the word "obscene" to be synonymous with obscenity. The writing of the statute apparently occurred before the *Roth* decision where the justices identified the obscene with matter, which, when taken as a whole and judged by contemporary community standards, appealed to the prurient interest of the average man. It was unfortunate that the new statute included no definition, for the *Clein* decision of the Florida Supreme Court related to the 1868 statute, and for all practical purposes the new law made Justice O'Connell's opinion obsolete.

If the 1957 act met the requirements of the *Butler* decision, its provisions fell short of the demands of the *Roth* test. The only real change in the statute was the removal of the youth corruption clause dissolved by *Butler*. Therefore, even on the surface the Florida obscenity law seemed out of line with federal rulings at the end of 1957.

The Florida Supreme Court reviewed an obscenity conviction in 1958, but delays in appealing *Matthews v. State*⁵¹ created complications. A long-time resident of Duval County, Matthews operated a small neighborhood jewelry store in Jacksonville. In September of 1955, he showed some pictures displaying sexual intercourse to Linda Raulerson, who was twelve years old at the time. During the trial, counsel for Matthews relied on no constitutional arguments, but instead attempted, unsuccessfully, to impeach young Raulerson's testimony. By the time the case reached the docket of the Florida Supreme Court, the United States Supreme Court had delivered the *Butler* decision and the Florida legislature had replaced the statute under which Matthews stood convicted.

At the trial, the judge charged the jury in such a way that one could not be certain of the basis of the conviction.

Now, the word obscene as used in the Statutes making the exhibition of obscene pictures a felony means not only pictures or prints

50. *Id.* § 1. Judges spoke of obscenity, immorality, and the debauching of public morals, "language that can close and open like an umbrella, depending on whether the particular individuals involved choose to make it do so." Landis, *A Lawyer Looks at Censorship*, in *PROTECTION OF PUBLIC MORALS THROUGH CENSORSHIP* 2 (1953).

51. 99 So. 2d 568 (Fla. 1957).

suggestive of sexual intercourse or tending to exercise lewdness, excite lewdness, or to debauch public morals of youth, but means offensive to the senses, repulsive, disgusting, foul, filthy, offensive to modesty or decency, impure, unchaste, indecent, and lewd.

Now, whether or not the pictures in this case are obscene pictures tending to the corruption of the morals of youth is largely a question of your own conscience and your own opinions. Before it can be said of such pictures, it must be calculated with the ordinary viewer to deprave him or her, deprave his or her morals or lead to impure purposes.

It is your duty to ascertain in the first place, if the said pictures are calculated or intended to lower that standard which we regard as essential to civilization if they are calculated or intended to excite those feelings which in their proper field are all right, but which transcending the limits of that proper field play most of the mischief in the world.⁵²

The Duval judge wove an obscenity test from a curious blend of the *Hicklin* rule, average person test, prurient interest, and personal opinion. The jury found Matthews guilty, though one could only guess which test or tests the jurors applied in their deliberations.

Before the supreme court, Matthews' counsel had the *Butler* decision in his arsenal of argument. The old statute violated freedom of speech because the law prohibited exhibition of pictures to the general public on the basis of the undesirable influences on youth, and because the statute failed to provide a sufficiently definite standard of guilt. The appellant relied heavily on *Butler* and quoted extensively from Frankfurter's opinion in that case.⁵³

The state tried to distinguish *Butler* by reminding the court that Michigan had another statute which forbade selling or showing obscene matter to youth.

Unlike the State of Michigan, the Florida statute . . . is the only legislative protection from such acts that this little girl has, together with all the other little girls in the State of Florida.⁵⁴

The state assured the court that,

by no stretch of the imagination can the Florida Statute be construed to forbid any adult person to have in good faith . . . for his

52. *Id.* Record, at 144-45.

53. *Id.* Brief for Appellant at 3.

54. *Id.* Brief for Appellee at 10.

own personal use any type of literature or other articles recited in the Statute.⁵⁵

The legislature designed the act to protect the youth of Florida. "It is aimed directly at the heart of the evil which is sought to be cured."⁵⁶

The state's self-restricting construction swayed all but two justices to affirm the conviction. The court announced the result in a per curiam opinion. Observers felt, however, that the majority saw the question as one of Matthews' detention in jail. The old statute was no more, and given the state's restricted interpretation, the justices could see no harm in affirming. If tried again, they thought the jury would simply convict under the 1957 statute. Besides, Matthews had not raised the constitutional arguments in the trial court.

But the state's rationale did not persuade the entire bench. Justice Drew joined Justice Roberts in a powerful dissent. Roberts himself had noted the *Butler* decision in his *Clein* concurrence of the previous year, and he objected to his colleagues' failure to read the signs of the times.

[T]his court will review and will correct on appeal an error of a "fundamental nature" even though timely objection was not made in the lower court. . . . [C]learly, a person who is subjected to a punishment not authorized by any law has suffered an invasion of a fundamental right; and if the statute under which he is convicted is wholly invalid, it is though it had never been enacted. . . .⁵⁷

But the protest of Justice Roberts was to no avail. Matthews remained in jail, and the United States Supreme Court denied review.⁵⁸

The legislature amended the obscenity statute in 1959,⁵⁹ but in 1960,

55. *Id.* at 12.

56. *Id.* at 10.

57. 99 So. 2d 568, 569 (Fla. 1957).

58. 356 U.S. 918 (1958). Matthews sued for a writ of habeas corpus in 1959 and obtained release from the Florida Supreme Court because his conviction rested on an unconstitutional statute. Curiously, Justice Roberts dissented. *State ex rel. Matthews v. Culver*, 114 So. 2d 796 (Fla. 1959). But the first positive recognition which the Florida Court gave to the *Butler* decision was *State v. Tracey*, 102 So. 2d 386 (Fla. 1958). The trial judge threw out obscenity charges on the 1868 statute, and the supreme court affirmed. The court in *Tracey* accepted the constitutional arguments even though they had not been raised in the trial court. The alternative was review of the obscene matter itself to determine the sufficiency of evidence.

59. The 1959 amendments were procedural and the consequences for appellate cases were slight. See FLA. LAWS ch. 59-360 (1959).

the Florida Supreme Court had occasion to review the conviction under the 1957 act of one Cohen for selling an issue of the magazine *Cocktail*. Cohen's trial was in the Dade County Circuit Court, and Judge George Schulz practically assured a guilty verdict by his charge to the jury.

The word "obscene" has been defined in a general sense as meaning offensive to morality or chastity, indecent or nasty. The test ordinarily followed by the courts in determining whether a particular thing is obscene within the meaning of the statutes is whether its tendency to corrupt those whose minds are open to such immoral influences, and into whose hands it may fall.

Another test of obscenity is whether it shocks the ordinary in common sense of men as indecent, or whether under the circumstances it appears to common sense and reason that the subject matter would tend to deprave the morals of those who might come into contact with the material, by suggesting lewd thoughts and exciting sexual desire.

I further charge you, gentlemen of the jury, that in determining whether the magazine is obscene, lewd, lascivious, filthy, indecent, immoral or disgusting, it is not enough that the said magazines might be offensive to propriety, refinement or good taste, but whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient or lewd and lascivious interest.⁶⁰

Judge Schulz had done his homework, but had failed to reach a synthesis in his thinking or to decide on the proper test for obscenity. Receiving a charge compounded with *Hicklin* and *Roth*, the jurors were probably thrown to their own opinions as tests for obscenity. In one moment Judge Schulz reminded them of the youthful minds which might read the magazine, and in the next he cautioned the jurors to apply the average person standard. And who was the average person? The jurors had only themselves for guides.

The problems for the accused had only begun with Judge Schulz's multitest rule for obscenity. Once deciding that the magazine was obscene, the jurors had to answer a second question: whether Cohen pub-

60. Record at 83, 85, *Cohen v. State*, 125 So. 2d 560 (Fla. 1960). The *Roth* test came largely from the Model Penal Code. See Schwartz, *Criminal Obscenity Law: Portents from Recent Supreme Court Decisions and Proposals of the American Law Institute in the Model Penal Code*, 29 PA. B.A.Q. 8 (1957).

lished or sold or committed "any other act in reference to the obscene article which the statute prohibits, irrespective of whether the defendant had knowledge of the contents of the alleged obscene article, and had only the highest and best purposes, which will not amount to a defense if the article is obscene within the meaning of the statute."⁶¹

On appeal to the supreme court of Florida, a unanimous bench reversed Cohen's conviction for the trial judge's failure to require scienter. The question of scienter arose from the United States Supreme Court's ruling in *Smith v. California*,⁶² where the Court reversed a judgment convicting a bookseller because the state had not shown that the dealer knew the item sold was obscene.

The appeal presented a real challenge to the attorney general's office, for the significance of scienter would almost insure a reversal of Cohen's conviction. As one state attorney who participated in the case said, "This was a loser right from the start. Our problem was to decide how best to lose it." The state could save the statute and free Cohen, or it could lose both. Little possibility existed that the state could both punish Cohen and save the statute except by some sort of legal miracle. No such miracle was in the offing, so the state sketched the plan to free Cohen and save the statute. To accomplish this goal, the state would have to persuade a majority of the justices to read the scienter requirement into the 1957 act.

The strategy worked. Justice O'Connell held that "scienter is not prescribed in the statute." As written, the statute "makes it a crime to sell or distribute any . . . article of the character described herein irrespective of whether the person selling or distributing has or does not have knowledge of the obscene . . . contents of the . . . article."⁶³ The state admitted the trial judge's fundamental error in excluding scienter and the supreme bench of the state agreed with this conclusion. While the court commended the state for the candor displayed, O'Connell reprimanded the state for so tardy an admission. "[H]ad it made the admission earlier in the proceedings the time involved in the ultimate disposition of this cause could have been shortened materially."⁶⁴

Responding to the state's request to bring the statute in line with the *Smith* decision, the court read scienter into the 1957 act.

61. *Cohen v. State*, 125 So. 2d 560, 562 (Fla. 1960).

62. 361 U.S. 147 (1959).

63. *Cohen v. State*, 125 So. 2d 560, 561 (Fla. 1960).

64. *Id.* at 563.

[S]cienter or knowledge of the obscene, lewd, etc. character of the books and other articles described in the statute is impliedly included in the statute. This means that one prosecuted under the statute must be charged with having committed the acts prohibited with knowledge of the obscene character of the documents or articles involved, and further that the state must prove such knowledge of the accused at the trial.⁶⁵

Because the United States Supreme Court failed to clarify the point, the Florida Supreme Court would not specify how the prosecution must prove scienter. "We do state that it is not necessarily required that the state prove that one charged has in fact read the obscene matter referred to in the charge."⁶⁶

The Florida justices were generally willing to let their brethren in Washington carry the ball of smut and obscenity. Few Florida appellate judges expressed admiration for the United States Supreme Court's leadership in obscenity law since *Butler* and *Roth* in 1957. At the same time, most admitted privately their awareness of the seemingly impossible task the federal justices had assumed in trying to find a workable and constitutionally acceptable test. Obscenity was a topic they would almost prefer to leave to the federal courts, but they flinched at the thought of having to apply someone else's unworkable test. Sifting through a basket of nudist magazines did not strike the appellate judges as a profitable way to spend one's time. The sifting and reading should occur at the trial, and the reviewing court's role should be minimal. This attitude possibly rested upon a revulsion at the sordid nature of much of the literature arrested by the government and involved in prosecutions. Perhaps, too, the attitude came from a lack of concern for free expression when one's freedom to distribute questioned literature was at stake. For most of the Florida appellate judiciary, much of

65. *Id.*

66. *Id.* at 564. Justice Roberts suggested in a concurring opinion that scienter "does not set up any insurmountable barrier against providing proof of conviction. Indeed, it would appear that the continued sale of the offensive publication after any person had called the obscene contents to the attention of the vendor would be sufficient." *Id.*

In 1961, the supreme court unanimously affirmed an obscenity conviction in *Tracey v. State*, 130 So. 2d 605 (Fla. 1961). The trial court had found Tracey guilty of selling obscene books but counsel delayed the scienter argument until oral argument before the supreme state bench. Unlike the *Cohen* decision, the Florida justices did not view the lack of scienter as fundamental error. Tracey sold the book upon a customer's request for a "dirty book," and the supreme court perhaps felt that this sale itself implied scienter.

the matter was filth and as such was neither socially redeeming nor socially important.⁶⁷

Shortly after the *Cohen* decision, the First District Court of Appeal affirmed a declaratory judgment by the Duval County Circuit Court in *Rachleff v. Mahon*,⁶⁸ a case involving twenty-six magazines. Neither side in the trial requested a jury, and the county solicitor offered no witnesses to prove contemporary community standards by which the court could judge the obscenity of the magazines. Applying the *Roth* test, the trial judge found twenty publications obscene and six not obscene.

On appeal, *Rachleff v. Mahon* presented Judge Mason of the district court of appeal with two key questions which had plagued the United States Supreme Court since *Roth*: (1) Did the state have to prove the contemporary community standards; and (2) Was the obscene limited to "hard-core" pornography?⁶⁹

Judge Mason failed to find merit in the contention that the state had to prove community standards. For the judge to rule without the benefit of outside testimony and only on the basis of the questioned matter before him was like

the jury in a criminal case where one is charged with an aggravated assault to conclude that the weapon involved is a deadly weapon solely from an examination of the weapon itself. Yet no one would argue that it would be necessary in such case for the prosecution to offer oral testimony as to its deadly character.⁷⁰

But Judge Mason failed to reach the heart of the issue. If the statute required that for matter to be obscene, it must be, among other things,

67. Research for this article included interviews with attorneys and appellate judges in Florida. Anonymity was usually a condition for frank discussion.

68. 124 So. 2d 878 (Fla. App. 1960). Under the 1959 amendments to the obscenity statute, the trial judge thought the declaratory judgment was required, since the magazines enjoyed second class mail privileges. The amended statute prescribed that punishment for possession of such second class matter could come only after a court finding of obscenity.

69. Mr. Justice Stewart of the United States Supreme Court has indicated the difficulty of defining "hard-core" as opposed to any other kind of obscenity. In what will doubtless live as a much-quoted statement in the developing law of obscenity, he said: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligently doing so. But I know it when I see it. . . ." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion).

70. *Rachleff v. Mahon*, 124 So.2d 878, 880 (Fla. App. 1960).

contrary to contemporary community standards. Mason's ruling presumed that the trial judge could divine those standards. Indeed, from his example, Judge Mason suggested that one could determine obscenity as easily as he could predict the deadly character of a weapon. By saying that the trial judge somehow, perhaps intuitively, had knowledge of community standards, Mason avoided the whole problem of the technique for discovering those standards.⁷¹

Perhaps one would be too critical of Judge Mason to mark his refusal to walk where the United States Supreme Court had feared to tread. There was much talk about community, but certainly no consensus among judges had coalesced to designate the community whose standards the courts were to apply. Perhaps in upholding the trial judge's refusal to require state proof of community standards, Judge Mason was recognizing the probable truth that "community standards" referred to the standards of those making the determination on obscenity. Even a parade of literary and social experts through the courtroom would not necessarily prove community standards, for both the prosecution and the defense would likely recruit spokesmen to uphold their respective positions. Even demonstration that certain so-called obscene books were on sale in a locale would not prove that a local community knowingly tolerated them. Such a newsstand demonstration might serve only to awaken the public to available obscenity and to bring community sanctions against the very items used in court to prove tolerant community attitudes.⁷² Judge Mason, along with his colleagues, was apparently willing to leave leadership and new departures in obscenity law to the United States Supreme Court.

The *Rachleff* case also brought to the surface the inclusiveness of the word "obscene." Judge Mason held that the term prohibited more than "hard-core" pornography, reaching "any material which is devoted not only to the presentation and exploitation of illicit sex, but also passion, depravity or immorality."⁷³ The district judge did not bother to distinguish between "illicit sex" and "passion," "depravity" or "immorality," and in effect left unanswered the breadth of the word "obscene." While not as sweeping as the trial judge's charges in *Cohen*,

71. For a helpful study of the problem of community attitudes and standards see Seaton, *Obscenity: The Search for a Standard*, 13 KAN. L. REV. 117 (1964). See also M. ERNST & A. LINDEY, *THE CENSOR MARCHES ON* 140-41 (1940).

72. A judge's choice of community, whether "local" or "nationwide," probably was related in some way to his interest in suppressing obscene literature. In Florida, at least, the "local" standard would be more restrictive than a "national" one.

73. *Rachleff v. Mahon*, 124 So. 2d 878, 882 (Fla. App. 1960).

Judge Mason refused to confine the meaning of obscenity to a specific test such as stated in *Roth*.⁷⁴

By failing to apply the *Roth* test, Mason confused obscenity law for the trial judges in his district. The *Roth* test was no novelty by 1960, and regardless of the possible variations in the scope of its application, the rule pointed to a command that a court was to think twice before judging matter obscene. By using such words as passion, depravity, and immorality, Judge Mason was in effect coupling them with the *Roth* test with which the trial judges were familiar. The combination could serve only to broaden the scope of *Roth* or to render the test a complete anomaly.⁷⁵

Judge Mason's apparent lack of enthusiasm for a specifically stated and consistently applied test perhaps had its origins in the judge's understanding of the appellate function. "[A]s a reviewing forum we could not substitute what may be our opinions as to their obscene character for that of the trial judge, the trier of the facts."⁷⁶ Having accepted a narrow role for the appellate court, Mason could not consistently claim authority to propound a test for the trial courts of his district to follow. Any test which he found sufficiently adequate and generally within the bounds of the statute would suffice. The trial courts were free to apply the *Roth* test, but Judge Mason apparently did not think that he should require them to do so.

While other Florida appellate judges later exhibited more concern over the uniformity of the test applied and usually adhered to the *Roth* test, Judge Mason's attitude regarding the appellate function was not unique. As one judge said, "We are a court of law and not of justice." What he meant, he added, was that Justice should be done at the trial level.

We cannot right all wrongs, even if we were certain of what was right and what was wrong. In reviewing a case, we look to see whether the trial judge applied the proper law in the case and

74. Most likely, even the justices who assented to the *Roth* test in 1957 are not certain of what it means. Despite the refusal of the Supreme Court justices to restrict obscenity explicitly to Stewart's hard-core variety, the pattern of reversals since *Roth* has pointed to a judicial standard which is permissive of all but the hard-core. *Ginzberg v. United States*, 383 U.S. 463 (1966), seems to have been a temporary tangent, rather than a real departure from this trend. By injecting "pandering" into borderline cases, the justices potentially broadened the scope of the *Roth* test.

75. For comment on *Rachleff*, see Alloway & Knight, *Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685 (1962).

76. *Rachleff v. Mahon*, 124 So. 2d 878, 882 (Fla. App. 1960).

whether or not a reasonable man could rule as he did on the basis of the evidence before him. Quite often, we will disagree personally with the trial judge, but we still give him the benefit of the doubt. After all, few things are certain, and appellate review sometimes boils down to a matter of tolerance. Again, I say, however, that the justice of a judicial system depends mainly on your trial judges. It is at the trial level that most of the harm or good is done.⁷⁷

Especially in obscenity cases, this attitude produced local variations in application of the law. Of course, some judges were willing to admit that when their personal opinions differed sharply with those of the trial judge, the appellate judge found reversal easier. In such cases, the trial judge simply did not appear to be a "reasonable man."⁷⁸

This attitude also rested upon a greater concern for orderly procedure than with the policy implications of every individual case. That is, for the sake of maintaining what they felt to be the ideal appellate role, many Florida appellate judges were willing to forsake the opportunity to direct policy, at least in the field of obscenity law. They preferred to accept the directions from the United States Supreme Court, and apply them to their jurisdictions, rather than cut their own path of policy. Without Supreme Court review on obscenity, the Florida appellate judges would probably have continued to leave the larger share of statutory interpretation to the trial courts, interfering only in the absence of due process or of sufficient evidence.⁷⁹

The Florida appellate courts did not give explicit recognition to the *Roth* test until 1963. In 1961 the legislature amended the obscenity statute for a second time and included the *Roth* definition of obscenity. The appellate courts, however, did not openly abandon the old for the new until presented with review of two books from Miami: *Pleasure*

77. See *supra* note 67.

78. One appellate judge was critical of the reviewing procedure used by the United States Supreme Court.

[The Court] can take liberties which we do not feel are open to us. Why, they will plow through a trial record just like the trial judge, and they do not hesitate to substitute their judgment for his. I like to think we have the better way. So many legal questions turn on one's opinions, and I feel that I should not displace the trial judge's with my own.

79. To the Florida judges, "sufficient evidence" meant reasonable grounds for a decision. To a justice of the United States Supreme Court, "sufficient evidence" in an obscenity case meant evidence clear enough to meet the *Roth* test.

Was My Business and *Tropic of Cancer*.⁸⁰ In March of 1961 he filed a request for a declaratory judgment against the first book, under the then applicable statute, last amended in 1959. While the matter was pending, the legislature amended a portion of the 1959 act, eliminating the provision authorizing declaratory judgments on the obscenity of a work. The circuit court allowed the state to alter its request to take account of the amended statute, and the court issued a declaratory judgment against *Pleasure Was My Business* despite the statutory repeal.

Applying the test laid down by our Appellate Courts and by the Florida Statutes, whether to the average person applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest, it is the opinion and finding of this Court that the defendant-book is offensive to the common conscience of this community measured by present day moral standards of this community and is an obscene book condemned by the . . . Statutes.⁸¹

The author of the book was a retired madam of Miami who had operated a plush house of prostitution in the city during the years before the Second World War. The language of the book was moderate, and she made no attempt to describe the intimate business relations her employees had with the customers. She reserved choice and kind remarks for the city and county officials who tolerated her establishment over the years, and who were occasional, and always welcome, visitors. One might well consider the book an indictment of the political, as well as the sexual, morality of the Florida Gold Coast—and perhaps the politically scandalous subject matter of the book explained in part at least the state's eagerness to rid Florida of the work.⁸²

Judge Horton of the Third District Court of Appeal affirmed the state's successful challenge against the book in the circuit court. Despite repeal of the section of the 1959 act authorizing declaratory judgments, the state's declaratory judgment act contained ample breadth to include determination of obscenity.⁸³

80. R. BARNES, *PLEASURE WAS MY BUSINESS* (1961). H. MILLER, *TROPIC OF CANCER* (1961).

81. *Tralins v. Gerstein*, 151 So. 2d 19, 20 (Fla. App. 1963).

82. The state had made an earlier attempt against *Pleasure Was My Business*, but failed. The circuit court refused to declare the book obscene, and the Court of Appeal for the Third District affirmed. See *Gerstein v. "Pleasure Was My Business,"* 136 So. 2d 8 (Fla. App. 1961).

83. "The circuit courts of the state are hereby invested with authority and original

Of greatest concern to Judge Horton was that the sale of obscene literature should not go unpunished.

Since obscenity has never enjoyed the protection of either the Federal or State Constitutions, no person has the right, under the guise of freedom of speech or press, to possess, sell or distribute obscene material.⁸⁴

And to judge obscenity, the *Roth* decision provided the rule. "[T]he test of obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest, that is to say, arouses lascivious or lustful thoughts."⁸⁵ But as in *Rachleff*, the application of this test was primarily the responsibility of the trier of facts, for "an appellate court will not substitute its judgment on these questions for that of the trier of fact absent a compelling reason to do so apparent in the record."⁸⁶ Judge Horton found declaratory judgments a useful weapon against obscenity, and he was not about to permit mere legislative repeal to remove such a formidable power from the courts. In the eyes of many observers, the declaratory judgment was the most convenient way to meet the requirement of scienter. Once a court had judged a book obscene, the police or prosecutor could wave the judgment in the faces of the retailers and distributors, giving fair warning and free advice so they could clean the objectionable matter from the shelves.

In addition, the declaratory judgment procedure did not have the limited effect of an injunctive proceeding. While the court might enjoin a dealer from selling a particular book or magazine, the injunction would not prevent his competition three doors down the street from peddling the publication and reaping sales gains resulting from the publicity surrounding the hearing. With the declaratory judgment, the antiobscenity squad could use the finding at any bookshop or newsstand.⁸⁷

jurisdiction and shall have the power upon a filed complaint, to declare rights, status and other equitable or legal relations whether or not further relief is or could be claimed or prayed." FLA. STAT. ANN. § 87.01 (1964).

84. *Tralins v. Gerstein*, 151 So. 2d 19, 20 (Fla. App. 1963).

85. *Id.*

86. *Id.*

87. Of course, a court could rule that a dealer's knowledge of the injunction was sufficient to prove scienter. If so, the injunction could reach far beyond the confines of the enjoined.

The state was not adverse to the injunction, however, when it was found useful. After all, a shop willing to pay a fine and to continue selling a book declared obscene might think twice before trying the patience of a circuit judge by disobeying a court order to halt sales.⁸⁸ Sales of Henry Miller's *Tropic of Cancer* were so profitable in Miami that the state secured an injunction against the publisher and a dealer to bring the mushrooming circulation of the book to a smashing stop. On appeal, while first challenging the validity of Florida's 1961 obscenity statute, Grove Press, the publisher, dropped that approach and concentrated on a proof that *Tropic of Cancer* was not obscene.⁸⁹ Since the obscenity of the book rather than the validity of the statute was at stake, the Florida Supreme Court transferred the case to the Third District Court of Appeal.⁹⁰

Judge Carroll in his opinion for the court was aware of the litigation which Miller's novels had produced in other states.

Generally, those courts have discussed at some length the filth which is packed into the work and in its narration of a procession of sexual episodes. We see no need to elaborate.⁹¹

The circuit court had applied the *Roth* test, and Carroll and his colleagues were willing to accept the trial court's ruling. "The finding of obscenity has not been shown by the appellant to be contrary to the

88. The declaratory judgment proceeding would attract support for the book from the publisher and others who felt valuable interests at stake. While the court might declare the book obscene, these interests possessed the necessary resources for appeal, and on appeal the original finding might fall. Thus, the declaratory judgment was not always so advantageous for the state. Prosecutors still preferred to arrest the retailers, for resources and hence the chances for vigorous appeal, were less here. But the insurmountable problem that remained was scienter, which for many persons has destroyed the utility of arrest without prior judicial determination of obscenity.

89. Often the "liberal" argument, as a way of touching base with respectability, has allowed that "smut for smut's sake" must be rigorously dealt with—forgetting that this is the only concession the would-be censor has ever needed to ask. As long as an exception is made for the indefensible or even the detestable—"Freedom for everybody, except Communists and pornographers"—then there will be people perfectly prepared to state that you or I are Communists or pornographers, or their dupes, until we prove to the contrary. It is at such times that one remembers why freedom has been said to be indivisible.

Larrabee, *The Cultural Context of Sex Censorship*, 20 LAW & CONTEMP. PROB. 672, 681 (1955).

90. *Grove Press, Inc. v. State ex rel. Gerstein*, 152 So. 2d 117 (Fla. 1963).

91. *Grove Press, Inc. v. State ex rel. Gerstein*, 156 So. 2d 537, 539 (Fla. App. 1963).

law or to the manifest weight and preponderance of the evidence.”⁹²

In neither of the two cases, then, was the appellate court willing to substitute its own judgment on obscenity for that of the trial court. Once the trial was concluded, the publisher's only hope was to convince the reviewing court that the trial court either had applied the wrong test, or had decided against the weight of the evidence. Most likely, an obscenity ruling against a classic would meet objection from the appellate courts, and the judges would not hesitate to substitute their own views on obscenity when the trial court's ruling appeared unreasonable.⁹³ In neither instance was a classic at stake, however, and the volumes doubtless received a rather cool personal reception from the reviewing bench. The Florida appellate courts by 1963 used the *Roth* test, to be sure, but permitted great discretion in the interpretation and application of that test.

The United States Supreme Court, however, was more inclined to examine the books on their merits, and in 1964 the Court reversed both cases⁹⁴ in the wake of *Jacobellis v. Ohio*.⁹⁵ By resorting to per curiam judgments in both cases and by listing the maze of judicial opinions in *Jacobellis* as authority for the reversals, the Supreme Court puzzled the Florida judiciary. What was certain, however, was that in Florida as well as in many other states, the failure of the United States Supreme Court to adequately define the test of obscenity in *Roth* resulted in varying interpretations of obscenity. That is, the Florida trial courts thought the two books obscene, but the United States Supreme Court did not. In fact, one could not say that the disagreement on obscenity lay between the Supreme Court and the Florida Court of Ap-

92. *Id.*

93. But by exempting classics and good literature, the censor may be doing more harm than good to his goal.

[I]f pornography is a menace, it must be worse when written skillfully than if perpetrated clumsily. Enemies of censorship never tire of pointing out how foolish it is to let susceptible people (if such there be) be swayed by masters who know exactly how to rouse and stir readers while condemning the bungling craftsmen who produce *American Aphrodite* or *Sodom in Union Square*.

D. LOTH, *THE EROTIC IN LITERATURE* 31 (1961).

94. *Grove Press v. Gerstein*, 378 U.S. 577 (1964); *Tralins v. Gerstein*, 378 U.S. 576 (1964).

95. 378 U.S. 184 (1964). Here, the United States Supreme Court reversed a conviction for exhibiting an obscene motion picture, but the justices could not agree on their reasons for doing so. For comment, see O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAW. 1 (1964).

peal, for the latter applied a "sufficient evidence" test and did not reach an independent determination that the books were obscene. The dispute between the Supreme Court and the Third District Court of Appeal in these cases turned on the strictness and exactness with which the appellate court was to examine the application of the *Roth* test in the trial court. While Judge Horton was not anxious to substitute his opinion regarding *Pleasure Was My Business*, a majority of the justices on the supreme federal bench were willing and able to declare that the trial judge's interpretation of *Roth* was too restrictive.

The dispute highlighted the difficulty with the *Roth* test. What amounted to prurient interest, community standards, and the average man in the minds of the Florida judge or jury would perhaps fall far short of an evaluation of the same material by the justices in Washington. If the terms "lewd" and "lascivious" created barriers of interpretation through space and time, the terms "prurient" and "community" presented a similar problem. The *Roth* test placed a tighter rein on the filth-hunting prosecutors, but the problem of interpretation seemed insoluble. When applying the *Roth* test, one could presume that the Florida courts would snare some material which would escape on appeal to Washington.

If the reversals of the Florida cases contained no insight for the Florida courts on the meaning of *Roth*, the reversals did reduce the momentum of the antiobscenity drive in Miami, and to a lesser extent in other parts of the state and the nation. The declaratory judgments and injunctions did not now appear quite as formidable to the retailers and distributors, and the public's interest in the campaign against obscenity was beginning to wane.

Informal and extralegal censorship continued in Florida after 1963, though not at the frantic pace of the previous decade. A recent perusal of newsstand literature in several Florida cities indicated that most of the ground that the censorious elements won from the libertarians before 1960 was gradually recaptured by attrition and sneak attack. Lost territory, however, could often serve as the basis for future conflict, so the libertarians have had no reason to be optimistic about the prospect for years of peace to come.⁹⁶

96. Observers are skeptical of the effect of the *Ginzburg* decision. Few, however, feel that the Court really means to unleash the state prosecutors. See *Redrup v. New York*, 386 U.S. 767 (1967).

If anything, the test of obscenity is much more limited with the emphasis on "redeeming social value" in *A Book Named "John Cleland's Memoirs of a Woman of*

CONCLUSIONS

The story of the state appellate courts and written obscenity in Florida leads one to several conclusions and hypotheses. What can be learned from this experience? First, a conclusion perhaps almost too obvious to mention, but an important one nonetheless, is that state courts influence public policy, positively or negatively, with the degree to which such courts exercise a positive influence on policy questions varying with the subject matter.

The second conclusion requires more elaboration than the first. Vagueness in a judicial test increases the probability of varying and unequal applications of that test. A judicial test is a standard for deciding a particular type of litigation, and often an appellate judge determines the test for the trial judge to follow. If the standard is unclear, the trial judge may be uncertain of the appellate judge's intent and may be left with his own interpretation of the words and meaning of the test. When the United States Supreme Court introduced the *Roth* test in 1957, Justice Brennan used such terms as "prurient interest," "dominant appeal," "community standards," and "social importance." The Supreme Court failed to define these terms in the *Roth* opinion and in subsequent cases, leaving state courts with the task of applying the test to specific pieces of allegedly obscene matter.⁹⁷

Pleasure" v. Attorney General, 385 U.S. 413 (1966). At the same time, *Mishkin v. New York*, 383 U.S. 502 (1966), permits courts to focus on the effect of obscene matter on a particular audience, such as homosexuals or youths.

Avoiding what otherwise might become a judicial impasse, the Court seems inclined to approve statutes restricting the sale of obscene matter to minors. See *Ginsberg v. New York*, 390 U.S. 629 (1968); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968). See also Comment, *Exclusion of Children from Violent Movies*, 67 COLUM. L. REV. 1149 (1967).

97. Two recent Florida cases highlight the difficulties of applying *Roth*. Judge Carroll of the First District Court of Appeal authored both opinions, affirming the obscenity rulings from the trial courts.

In the first, *Felton v. City of Pensacola*, 200 So. 2d 842 (Fla. App. 1967), Carroll admitted that the "question of what constitutes obscenity falls into one of the most difficult and mercurial areas of the law today." *Id.* at 846. He admitted frankly that any judgment on obscenity was a highly subjective act.

We fully realize the great difficulty faced by a judge or some other person, who may be charged with the duty of determining whether a certain material is obscene or not. Such a determination is largely a subjective thing, for what is obscene to one person may seem perfectly proper to another. To paraphrase a poet's words: Obscenity "lies in the mind of the beholder." Another apt expression might be: "Obscenity to him who obscenity thinks."

Id. at 848.

Given the subjective nature of an obscenity ruling, the appellate bench was obliged

The fact that the *Rotb* test found little application in the Florida courts, however, does not prove that vagueness of the standard was the sole reason. Vagueness permits varied application if a trial judge dislikes a test and desires to dilute the doctrine. Vagueness almost assures varied application because even sincere and dedicated trial judges may interpret the standard in several different ways in their efforts to divine the intent of the appellate bench. In other words, there is a high probability that a vague test weakens as the words pass through the corridors of judicial minds and through the sieves of local custom and morality.

A third point which study of the Florida cases demonstrates is that the presence of litigation is a *sine qua non* of a positive policy impact of a state court—i.e., before a court can act, there must be a case. Without cases a court does nothing, and its impact on public policy is therefore a negative one. Again, the point is an obvious one from the study, but yet a factor which one must consider if he wants to determine

to give great weight to the decision of the trial bench. Also, in this way the decision was more likely to reflect the prevailing standards in the local community.

[A]n appellate court may not substitute its judgment for that of the trier of the facts, where there is sufficient, competent evidence to support the trier's factual findings. . . . Certainly the judge . . . is in a much better position than the members of this court to know the "contemporary community standards" prevailing in the said city.

Id.

A year later, in *Nissinoff v. Harper*, 212 So. 2d 666 (Fla. App. 1968), Judge Carroll elaborated.

Our function in this appeal . . . is not to make our own judgment as to whether the film is obscene, but only to determine whether the evidence in record supports the finding of obscenity and to see that such finding accords with the applicable law. We approve the finding on both counts. The judge of the Court of Record was, under our law, the trier of the facts, and we have no authority to substitute our judgment for his on questions of fact, even if we wished to. Observation of this rule is particularly important here, because the test of obscenity depends upon community standards, and the judge and other citizens of the community are better equipped to know those standards than appellate judges living far away.

Id. at 668.

Judge Carroll, then, would leave for the trial court what Justice Harlan of the United States Supreme Court is willing to leave for the state courts.

From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court, mostly in state cases, all to no better end than second-guessing state judges.

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 707 (1968) (dissenting opinion).

the part which state courts play in the American political and legal system.

An hypothesis which research of the Florida experience indicates is that application by a state court of Supreme Court doctrine may be much less than enthusiastic when the state judges are apparently in strong disagreement with their brethren on the highest court. State judges may simply refuse to apply the higher doctrine, as did the Florida appellate judiciary for several years following the introduction of the *Roth* obscenity test. Or, even if the state judges recognize a relevant federal doctrine, including the correct words of a test, application may in fact reflect the spirit of an older and rejected rule.

A second hypothesis is that a judge's view of the appellate function is related in part to the issues which confront him. So, the Florida judges advocated a narrow function in obscenity cases. Did they do so out of a conscious feeling that the greatest amount of discretion should rest with the trial judge, or because a limited appellate role would, more often than not, affirm the convictions of the accused purveyors of pornography? The point is that a student of state courts should beware lest an advocate of a limited appellate function hide more basic policy aims. Perhaps a more thorough study of a single court might examine the actions of the judges with respect to all cases to see whether the concept of limited role applies in one field as it does in another. Though personal policy preferences undeniably play a part in judicial decision-making, one judge could conceivably subordinate policy choices in every area to one all-encompassing value preference regarding the role of his court. With respect to Florida, however, the evidence from cases and interviews indicated that the judges advocated a limited review function in part because a restricted appellate role tended to serve their policy choices.

This study of appellate court treatment of written obscenity in Florida represents an attempt to gain an insight into the operations of state courts as participants in the American political system. Only further investigation can reveal whether the tentative conclusions hold true for other state courts. In any event, the opportunities for research are vast, and given the influence which the appellate courts can have or fail to have on policy within a state, students of politics interested in the interpretation and application of legal rules within society have fifty fertile fields of study.