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The Roth Test and Its Corollaries

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INTRODUCTION

The apparently unconditional wording of the First Amendment of the Constitution securing freedom of expression[1] has been held to be subject to certain exceptions.[2] Whether this guarantee is so absolute as to bar censorship or that portion of expression designated as "obscenity", had been controversial until decided in the negative in the now legendary case of *Roth* v. *United States*.[3] Since that time, state and federal courts have applied the test therein defined in an attempt to delineate the limitations which can constitutionally be placed upon expression in all forms.

During the past term of the Supreme Court, three cases were decided in an attempt to clarify the doubtful aspects of the *Roth* test[4] concerning the nature of "obscenity". *Ginzburg* v. *United States* is significant as the court's initial treatment of the advertising provision of the federal statute making certain obscene materials nonmailable[5] while adding a new "pandering" test to the *Roth* criteria. *Mishkin* v. *New York* and *Memoirs of a Woman of Pleasure* v. *Massachusetts*, respectively, develop the "average person" and "redeeming social value" elements of the *Roth* approach.

Through these cases the law relating to "obscenity" has undergone sufficient expansion and renovation to warrant a review of the censorship decisions along with an examination of the new holdings. As the primary issue in each of these decisions was the proper application of the *Roth* criterion, no attempt will here be made to cover the history

1. "Congress shall make no law . . . abridging the freedom of speech or of the press." U.S. Const., amend. I.

2. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Beauharnais v. Illinois, 343 U.S. 250 (1952).

3. 354 U.S. 476 (1957).

4. Ginzburg v. United States, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966); Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966).

5. 18 U.S.C. § 1461 states in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and * * * Every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving information, where, or how, or from whom, by what means of such mentioned matter . . . may be obtained . . . * * * Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years or both for the first such offense.

of obscenity before *Roth* except as it may bear upon the recent decisions.

Roth AND THE NATURE OF OBSCENITY

In 1957, the Supreme Court squarely faced the "then unresolved problem of the constitutionality of official censorship of obscenity." [6] The Court, in *Butler* v. *Michigan*,[7] declared unconstitutional a Michigan statute making it a misdemeanor to sell or make available any book containing obscene language "tending to the corruption of the morals of youth." [8] Justice Frankfurter, speaking for the majority, stated that the statute was "not reasonably restricted to the evil with which it is said to deal" and that "the incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." [9]

The *Butler* case, was followed by the *Roth-Alberts* decision, wherein Justice Brennan spoke for the majority of the Court in affirming the convictions in both cases for violation of a federal and state offense.[10] *Roth* involved a conviction based upon the federal statute[11] making punishable the mailing of obscene material while Alberts was prosecuted under a California statute[12] making it a misdemeanor to keep or advertise obscene material for sale. Although measuring the rights of the respective defendants by the First and Fourteenth Amendments,[13] the test established was uniformly applied to both state and federal cases without distinction.

Holding that obscenity is not within the area of constitutionally protected speech or press, Justice Brennan qualified censorable obscenity to be those ideas which are "utterly without redeeming social importance." [14] Stating the standard for determining what is obscene as,

6. Roth v. United States, *supra* note 3, at 481; Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960) (Hereinafter cited as Lockhart & McClure).

7. 352 U.S. 380 (1957).

8. *Id.* at 382.

9. *Ibid.*

10. Roth v. United States, Alberts v. California, 354 U.S. 476 (1957).

11. *Supra* note 5.

12. CAL. PENAL CODE ANN. § 311 (1955).

13. "In Roth, the primary constitutional question is whether the federal obscenity statute violates the provision of the First Amendment . . . . In Alberts the primary constitutional question is whether the obscenity provision of the California Penal Code invade the freedom of speech and press as they may be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment." 354 U.S. at 479-480.

14. *Id.* at 484-5.

"whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest" [15] the Court rejected the English test announced in *Regina* v. *Hicklin*.[16] The majority described the English approach as unconstitutionally restrictive of the freedom of speech and press as it potentially included material legitimately dealing with sex.[17]

Consideration of appeal to the prurient interest of the "average person" in conjunction with the requirement of "redeeming social importance" permitted greater conformity with these constitutional mandates.

The leading cases have attempted to set out a standard of an hypothetical man applicable to obscenity as the "reasonable man" is to torts or the "man learned in the act" is to questions of invention in patent law.[18] Prior to the *Roth* decision, the *Butler* case struck down Michigan's statute thereby indirectly rejecting the *Hicklin* test,[19] but the Court later passed up the opportunity to develop a positive criterion of sexual maturity to which the "prurient interest" effect might be applied, in *Manual Enterprises, Inc.* v. *Day*.[20] The defendants in that case were convicted of attempting to send magazines, consisting largely of photographs of nude males bearing the names of the model and the photographer, through the mails in violation of the federal obscenity statute. Contending, in line with *Roth* that the standards of "prurient interest" appeal of the magazines should be judged in terms of their probable impact on the "average person," although not a likely recipient of the publications. The Court of Appeals held, "that the administrative findings respecting their impact on the 'average homo-

15. *Id.* at 489. The Court in footnote 20 of the opinion, cited at page 487, referred to the A.L.I. MODEL PENAL CODE, Sec. 207.10(2) (Tent. Draft No. 6, 1957) wherein it is stated, ". . . 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 matter. . . ."

16. L.R. 3 Q. B. 360, 369 (1868). ". . . And I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprive and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

17. See Roth, *supra* note 10, at 489.

18. United States v. One Book Called "Ulysses," 5 F.Supp. 182, 184 (S.D. N.Y. 1933). Woolsey's opinion made reference to this man as a "person with average sex instincts—what the French would call l'homme moyen sensuel."

19. Butler, *supra* note 7, at 383; Lockhart & McClure, at 70.

20. 370 U.S. 478 (1962).

sexual' sufficed to establish the Government's case." [21] In overruling the conviction, the Supreme Court found that the magazines were not so offensive "as to affront current community standards of decency." The Court found it unnecessary to consider the question of the proper audience by which the "prurient interest" appeal of the magazines should be judged.[22]

Mishkin: Composition of the Average Person

The issue was again presented to the Supreme Court in *Mishkin* v. *New York*,[23] one of the three cases being considered. In this instance, the Court dealt directly with the problem and reached a realistic result. Mishkin was convicted under the New York criminal obscenity statute[24] for hiring others to prepare obscene books and keeping them for sale. He contended, on appeal, that some of the books involved, depicting various deviant sexual practices, did not satisfy the prurient interest criterion laid out in *Roth* because they would not appeal to the prurient interest of the "average person" but to such a person they would be disgusting and sickening rather than erotic.[25] The Court rejected this contention holding that:

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group rather than the public at large, the prurient appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. . . . We adjust the prurient appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probably recipient group.[26]

Out of context the above-quoted statement appears to be a step backward to the *Regina* v. *Hicklin* "particularly susceptible person" test.[27] In an attempt to avoid this consequence, the Court made it clear that

21. *Id.* at 482.
22. *Ibid.*
23. Mishkin, *supra* note 4.
24. N. Y. Penal Code § 1141.
25. Mishkin, *supra* note 4, at 508.
26. *Ibid.*
27. See *supra* note 16, Regina v. Hicklin also recognized the concept of a type of exception to the Roth test still held to be voted that, "A medical treatise with illustrations necessary for the information of those whose education or information the work is intended may, in certain sense, be obscene, and yet not subject for indictment, but it can never be that these prints may be exhibited for anyone, boys and girls, to see so they pass." Hicklin, *supra* note 16, at 369. See text accompanying note 30 *infra.*

the recipient group was to be defined with more specificity than in terms of the sexually immature person.[28]

Most of the decisions dealing with the proper recipient audience, for determining censorable obscenity, have been concerned with a sexually deviant group as in *Mishkin*. Unlike *Mishkin*, they were largely negative holdings striking down adopted standards or lower court instructions as being too restrictive.[29] Cases approximating the interpretation of *Mishkin* on the "average person" criterion have been concerned with permitting admitted obscenity to be distributed lawfully "where in good faith it is to be used exclusively within a professional group pursuing legitimate professional purposes." [30] Thus, the present opinion attempts to employ a standard which customarily permits an exception to proscribable obscenity and apply that standard to proscribe, to a specifically defined group, otherwise protected material.

In finally dealing with the issue, the Court has taken the initial step in a realistic approach to obscenity. In so doing, it appears to have recognized what two writers have called a "variable obscenity." [31] This is not only in the sense of geographical or time variance, but in the sense of a "chameleonic quality of materials that changes with time, place, and circumstances." [32] This possibility was recognized by Chief Justice Warren in *Roth*[33] and by the drafters of the Model Penal Code in excepting from the offense of dissemination of obscene material, "dissemination to institutions or individuals having scientific or other special justification for such material." [34]

Unfortunately, the Court did not fully utilize the opportunity presented to it, for the result of the case is too indefinite. What was meant by defining the recipient group "with more specificity" is not explained.

28. Mishkin, *supra* note 4, at 509.

29. United States v. Kennerly, 209 F.Supp. 119 (S.D. N.Y. 1913). Although the Hicklin test was upheld it was severely criticized. See United States v. One Book Called "Ulysses," *supra* note 18; Roth, *supra* note 10; Butler, *supra* note 7. See also Lockhart & McClure, at 73.

30. People v. Maher, 18 Cal. 923, at 926 (1962); United States v. 31 Photographs, 156 F.Supp. 350 (S.D. N.Y. 1957); United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); Hicklin, *supra* note 27. Virginia has a statutory exception for such material. See VA. CODE ANN. § 18.1-263.3(10) (1960).

31. Lockhart & McClure at 70.

32. *Id.* at 68.

33. Roth, *supra* note 10 at 495 (concurring opinion).

34. MODEL PENAL CODE, op cit. *supra* note 15, at § 207.10(4)(c).

All other things being equal, would the fact that the recipient group is narrowed to one class of persons such as "homosexuals," "youths under 18," "doctors"; etc., remove the taint of the *Hicklin* test and adequately protect art from the warning of Judge Learned Hand that:

> To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.[35]

Under the *Mishkin* holding once the recipient group has been defined and prurient appeal of the material to that group has been established, the material can then be proscribed as being criminally obscene. Does it then become obscene for purposes of distribution to everyone or just to members of the group defined? If the former is the case, the dangers of *Hicklin's* "particularly susceptible person" test return, and if the latter situation is true, a deaf ear is turned to Justice Douglas' warning that censorship "substitutes majority rule where minority tastes or viewpoints were to be tolerated." [36]

Nevertheless, Justice Brennan is correct to recognize the "social realities" in determining the appeal to the intended and probable recipient group. When the realities are that the material is intended only for those to whom it has an abnormal appeal can they complain that for purposes of proscription the appeal to govern is their own and not that of the average person?

Memoirs AND REDEEMING SOCIAL VALUE

A second criterion enunciated in the *Roth* case was the utter absence of redeeming social value. Consideration of this prerequisite in the categorization of materials as obscene proved to be the key factor in the Court's decision that John Cleland's famous novel *Memoirs of a Woman of Pleasure* was entitled to the protection of the First and Fourteenth Amendments. Limiting review, in *Memoirs of a Woman of Pleasure* v. *Massachusetts*,[37] solely to whether the book could be labeled obscene in view of the standards established in *Roth* v. *United States*, the work was found to contain a modicum of social value. This position, that a publication although possessing the requisite prurient appeal and even being patently offensive may not be designated obscene

35. Kennerly, *supra* note 29 at 121.

36. Memoirs, *supra* note 4 at 427.

37. 383 U.S. 413, 419 (1966).

if of social value,[38] is entirely compatible with Mr. Justice Brennan's views in *Roth*, wherein he stated that:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [constitutional] guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importances.[39]

The "redeeming social value" criterion was referred to in *Jacobelli* v. *Ohio*[40] as having been part of the orignal *Roth* test, and by way of dictum in that decision Justice Brennan added, "Nor may the constitutional status of the material be made to turn on 'weighing' of its social importance against its prurient appeal for a work cannot be proscribed unless it is 'utterly' without social importance." [41] This placed a criterion, thought by some[42] not to be included in the original test, on a par with the two commonly recognized criteria. The wording of Justice Brennan's opinion in *Memoirs* now elevates that criterion to the point where it is the determinative factor. As a result of this decision, regardless of the offensiveness of the material and regardless of its prurient appeal, if it can be shown that the material contains some modicum of redeeming social value it will not be judged obscene. In this connection it is possible that the *Memoirs* decision may prevent consideration of *Mishkin's* "recipient group." Thus, if the Court had applied the *Memoirs* rationale to the books Mishkin was keeping for sale and found that by the standards of society as a whole they had some redeeming social value, the fact that these books actually appealed to the prurient interest of the average homosexual would be of no circumstances.

The viewpoint of the Court seems to be contradictory in these two cases. If the Court is going to look at the intended recipient group on one hand but then turn to society in general on the other hand, it

38. *Ibid.*

39. Roth, *supra* note 10 at 484.

40. 378 U.S. 184 (1964).

41. *Id.* at 191.

42. Lockhart & McClure, at 70. We conclude that the Court in the Roth-Alberts opinion laid down two constitutional requirements for determining what is obscene . . . that material must be judged as a whole, not by its parts, and that it must be judged by its impact on the average person, not the weak and susceptible. See also Memoirs, *supra* note 4 at 445 (Clark, J., dissenting); *Id.* at 462 (White, J., dissenting).

looks as though the obscenity criteria are becoming malleable and may be shaped to reach the result most appealing to the Court in each case.

Justices Harlan and Stewart have adhered to a test for obscenity which allows proscription of only that matter which can be classified as "hardcore pornography." [43] In his opinion in *Memoirs* Justice Harlan noted, "Given my view of the applicable constitutional standards, I find no occasion to consider the place of 'redeeming social importance' in the majority opinion in *Roth*, an issue which further divides the present Court." [44] Justice Black feels that the First Amendment prohibition that, "Congress shall make no law . . . abridging the freedom of speech," is an absolute,[45] and Justice Douglas has said that, "Freedom of expression can be suppressed if, and to the extent that, it is so clearly brigaded with illegal action as to be an inseparable part of it." [46] Justices Clark and White also opposing the redeeming social value test,[47] there remain only three Justices who have adhered to the Brennan concept to its present stage.

Considering the wide split within the Court on this point, it may be that in the future the place of redeeming social importance may be minimized and that the trend of the Court will be to focus on "hardcore pornography" as advocated by Justices Harlan and Stewart.[48] But, should redeeming social importance remain fixed within the framework of the censorship criteria, the Court will be greatly increasing its task of determining what is censorable and the bookselling merchants will become hopelessly confused as to what can safely be put on the shelves and be sold.

Ginzburg AND THE EFFECT OF PURVEYING

Having attempted to clarify the elements of the *Roth* criteria in *Mishkin* and *Memoirs*, the Court further developed the test in *Ginzburg* v. *United States*,[49] by examining the marketing techniques employed in advertising the publication. Ralph Ginzburg was charged with vio-

43. Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 457 (1966) (Harlan, J., dissenting); Jacobellis, *supra* note 40, at 197 (Stewart J., concurring).

44. Memoirs, *supra* note 43 at 456, Court's note 1. (Harlan, J., dissenting).

45. Smith v. California, 36 U.S. 147, 157 (1959) (Black, J., concurring).

46. Roth v. United States, 354 U.S. 476, 514 (1954) (Douglas, J., dissenting).

47. Memoirs, *supra* note 43 at 445 (Clark, J., dissenting); *Id.* at 463 (White, J., dissenting).

48. See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, at 58 (1960).

49. 383 U.S. 463 (1966).

lating the federal obscenity statute.[50] The matter mailed consisted of three publications and circulars describing the method by which the publications might be obtained. Each of the three publications was considered separately and adjudged obscene in the district court.[51] A stipulation was entered in that proceeding by the prosecution agreeing that the circulars were not obscene per se,[52] and the only reference in the decision to the method chosen by the defendants in mailing their publications and circulars appeared in the court's special findings. Consideration of the method was attributed to its evidentiary value in demonstrating the defendants' general scheme and purpose;[53] however, it was not deemed determinative of the obscenity of the publications.

On appeal to the Third Circuit Court of Appeals, the opinion noted the circulars were not obscene in and of themselves,[54] but nevertheless affirmed the convictions.[55] Characterizing each publication as directed to prurient interest and offensive to current national community standards, affirmance of the convictions on the advertising counts followed as a matter of course.[56]

The Supreme Court granted certiorari[57] and in affirming the convictions,[58] the Court stated that since there was no claim of misinterpretation of the *Roth* test, the sole issue was whether there was a misapplication of the criteria.[59] Noting that the evidence of technique and setting in which the publications were presented were properly considered in determining the question of obscenity, the opinion indicated that materials not obscene per se might be made such in this manner,[60] when viewed "against a background of commercial exploitation of erotica solely for the sake of their prurient appeal." [61]

Referring to Chief Justice Warren's concurring opinion in *Roth*,[62]

50. See statute cited *supra* note 5.
51. 224 F.Supp. 129 (E.D. Pa. 1963).
52. *Id.* at 132.
53. *Id.* at 131.
54. 338 F.2d 12, 13 (3rd Cir. 1964).
55. *Ibid.*
56. *Id.* at 16.
57. 380 U.S. 961 (1963).
58. Ginzburg v. United States, *supra* note 49 at 465.
59. "Since petitioners do not argue that the trial judge misconceived or failed to apply the standard we first enunciated in Roth v. United States [citation omitted], the only serious question is whether those standards were correctly applied." *Ibid.*
60. *Ibid.*
61. *Id.* at 466.
62. Roth, *supra* note 46 at 495.

Justice Brennan introduced the concept of pandering, "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers," as the motive for the origin of these publications.[63] An examination by the Court of the content of the advertising circulars showed that the defendants were taking advantage of recent Court decisions which, according to the circulars, "have given to this country a new breath of freedom of expression," and in doing so the publications were said to handle "Love and Sex with complete candor." [64] To consider this type of statement, "pandering" under the above definition would be to ignore the fact that ". . . sex and obscenity are not synonymous." [65]

The Court relied heavily on the very well-reasoned case of *United States* v. *Rebhuhn*[66] where publications assumed useful to scholars and learned professions were pandered to the general public. In that case, Judge Learned Hand stated that the publications:

> had a place, though a limited one, in anthropology and in psychotherapy. They might also have been lawfully sold to laymen who wished seriously to study the sexual practices of savage barbarous people of sexual aberrations; in other words most of them were not obscene per se.[67]

However, from the tenor of Judge Hand's words, the statement that they were not obscene per se could have meant no more than when sold for the purposes enumerated, these materials could not be held to be obscene and would have escaped proscription—they were not obscene under all conditions.

Justice Brennan turned the argument around to say that although matter is not otherwise censorable it becomes so if the manner of distribution tends to cheapen it and exploit its potential prurient appeal. Under this interpretation, material of substantial aesthetic value will be censored if "purveyed" by men such as Ginzburg with no more titillation than that it deals with, "Love and Sex with complete candor."

Under the federal statute and consistent with the history of the statute enunciated in *Manual Enterprises, Inc.*, v. *Day* that "its focus was seen to be solely in the character of the material in question," [68] a con-

63. Ginzburg v. United States, *supra* note 49 at 467.
64. *Id.* at 468, Court's note 9.
65. Roth v. United States, *supra* note 46 at 487.
66. 109 F.2d 512 (2d Cir. 1940).
67. *Id.* at 515.
68. 370 U.S. 478 at 483 (1962); Ginzburg, *supra* note 49 at 493 (Harlan, J., dissenting).

viction can only be had if the materials being mailed are obscene or if these mailed materials give information about where obscene materials may be obtained.[69] This Court assumed the obscenity of the publications was dependent upon the evidence of pandering and all three courts accepted the Government stipulation that the advertising circulars were not obscene. Thus, *Ginzburg* presents the anomalous situation of non-obscene circulars telling where, for purposes of the statute, obscene materials can be obtained and a conviction results for mailing nonobscene materials.

Justice Harlan's dissent, in keeping with his belief that only hardcore pornography can, in any case, be censored, asserted that the effect of the Court's opinion is to rewrite the federal obscenity statute, "without the sharply focused definitions and standards necessary in such a sensitive area." [70] He speculated that under the present decision, the decisions of the *United States* v. *One Book Entitled Ulysses* given by Judges Woolsey and A. N. Hand[71] "might be rendered nugatory if a mailer of *Ulysses* is found to be titillating senders with its 'course [sic], blasphemous, and obscene' portions, rather than piloting them through Joyce's stream of consciousness." [72]

Conclusion

The three cases when considered together pose the problems of overlapping and competing criteria. The *Memoirs* decision said that redeeming social value could not be weighed against prurient appeal, but went on to state that:

> On the premise, . . . that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of other values, might justify the conclusion that the book was utterly without redeeming social importance.[73]

69. The advertising provisions will not be violated if the mailed material merely "gives the promise of some obscene pictures." United States v. Hornick, 229 F.2d 120, 121 (3rd Cir. 1956). See also Grimm v. United States, 156 U.S. 604 (1895).

70. Ginzburg, *supra* note 49 at 494. Justice Black agreed, *Id.* at 477.

71. 5 F.Supp. 182 (D.C. N.Y. 1933); 72 F.2d 705 (2d Cir. 1934).

72. Ginzburg, *supra* note 49 at 497.

73. Memoirs, *supra* note 43 at 420.

The *Roth* test has become too clouded with collateral issues which destroy the possibility of establishing a uniform standard of obscenity. Recipient groups become important under the *Mishkin* decision for the determination of prurient appeal but not for the establishment of social value except as "pandering" to a particular group may serve to destroy the possible social value. Under the *Ginzburg* holding it now becomes possible to hold that materials previously ascertained as being of literary value, and not proscribable, may, if pandered, be characterized as obscene.

Further attempts to pinpoint the *Roth* standard will, in all likelihood, confuse it with more exceptions. Facing "social realities" [74] is causing the Court to reconsider the restrictive position prior to *Roth* as a possible means of effective censorship. Along with a reconsideration of the obscenity tests should also be a reevaluation of the aims of censorship. Under the present status of the law, it is unclear whether the evils of obscenity are that it criminally arouses the minds of men, or that it is without any redeeming value to society such as to warrant its distribution.

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74. See text accompanying note 26 *supra.*