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The Obscenity Terms of the Court

O. John Rogge

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At its October 1970–June 1971 Term, the Supreme Court of the United States had the incredible number of 61 obscenity cases on its docket, if one includes two cases which involved the use of the four-letter word for the sexual act, in the one case by itself, and in the other instance with the further social message that this is what one should do with the draft. These are more such cases than at any previous term, or number of terms for that matter. No less than five of the 61 cases involved the film, I Am Curious (Yellow). Other cases involved such varied forms of expression and entertainment as the following: Language of Love, a Swedish sex education film which contains explicit scenes of sexual intercourse; Hair, a rock musical with some fullfront mass nudity; sculptor Mark Morell's representation of the American flag as a phallus; Candy, A Woman's Urge, and Man and Wife, films; Whiplash Lovers, a magazine; Eros, a quarterly; Liaison, a newsletter; Housewife's Handbook on Selective Promiscuity, a book; stag movies; photographs for use in a book describing sexual positions; nudes displaying female genitalia; and the disrobing at a public meeting in a lounge of one of the student resident halls of Grinnell College, Iowa, by eight young women as a protest against Playboy magazine's use of nude females for commercial purposes.

In the first six of the 61 cases the Supreme Court listened to over six hours of argument during November 1970. In three of those cases,
the Court had heard argument at its 1969–1970 term, but instead of deciding the cases, restored them to the calendar for reargument at its 1970–1971 term. Thus, these six cases alone consumed more than two full days of arguments.

In three of the first six obscenity cases, Dyson v. Stein, Perez v. Ledesma, and Byrne v. Karalexis, as well as three sedition cases, Younger v. Harris, Samuels v. Mackell, and Fernandez v. Mackell, and a case involving an Illinois intimidation statute, Boyle v. Landry, the Court invoked the doctrine of abstention, ordering counsel to raise their federal constitutional points in state court trials, unless there were "extraordinary circumstances," or the threat of "irreparable injury," or the danger of suffering "irreparable damages." In these cases, relief from state prosecutions had been sought in three-judge federal district courts. Later in the term, the Court gave similar advice in six more of the 61 obscenity cases on its 1970–1971 docket.

Two of the first six obscenity cases involved the film I Am Curious (Yellow). One of these cases was Byrne v. Karalexis. The other was Grove Press v. Maryland State Board of Censors, where the Court,

11. For an excellent discussion of the effects of these cases and the rejuvenation of the abstention doctrine, see Teeter & Pember, Obscenity, 1971: The Rejuvenation of State Power and the Return to Roth, 17 Vill. L. Rev. 211 (1971).
evenly divided, affirmed an obscenity holding of a state court, Justice Douglas not participating.

The three-judge federal district court in Karalexis v. Byrne applied Stanley v. Georgia, where the Court held that an individual had a right to the private possession of pornography, and ruled by a two to one vote that a theatre owner had a right to show the film I Am Curious (Yellow) to paying adults. Circuit Judge Bailey Aldrich wrote for the court: "If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone." The Supreme Court, however, vacated the judgment.

In the remaining two of the first six obscenity cases, Blount v. Rizzi and United States v. Book Bin, the Court held that sections 4006 and 4007 of title 39 of the United States Code, now sections 3006 and 3007 of the Postal Reorganization Act, providing for a mail block, constituted prior restraints contrary to Freedman v. Maryland, and were therefore unconstitutional.

In addition to Grove Press v. Maryland State Board of Censors, the Court, evenly divided, Justice Douglas not participating, sustained opposing holdings of the lower courts in two other instances. In Radich v. New York, the Court sustained an art dealer’s conviction for displaying sculptor Mark Morell’s representation of the American flag as a phallus, while in California v. Pinkus, it let stand the Ninth Circuit’s ruling that a stag movie of a woman who disrobed and feigned some sort of sexual satisfaction from self-induced acts was not obscene.

The Court continued to reverse obscenity convictions simply by citing Redrup v. New York, a case which became the password, as it were, for such reversals. To date, if one includes the two cases decided with Redrup, there have been a total of 32 cases in which the Court in per curiam decisions reversed obscenity holdings simply on the basis of that case. There were two Redrup rulings at the 1970–
1971 term: Childs v. Oregon and Bloss v. Michigan. In the first case, Lesbian Roommate, a paperback, and in the second, A Woman's Urge, a film, were both held not to be obscene. There are two obscenity cases entitled Childs v. Oregon. Both involved the same individual and the same item, but the results were different. More than in any other constitutional area, the results in obscenity contests are a toss-up.

The results in the two cases involving the use of the four-letter word for the sexual act also point in opposite directions. In the case where the word was used by itself, Hoffman v. Illinois, involving Abbie Hoffman, the Yippie leader, the Court denied review and let stand a judgment of conviction for resisting arrest. However, in the other, Cohen v. California, the Court held that the language used was protected speech under the first and fourteenth amendments. The Court added that this was not "an obscenity case," for the challenged language "must be, in some significant way, erotic." In Byrne v. P.B.I.C., Inc., which involved Hair, a rock musical with some fullfront mass nudity, the Court vacated a judgment in the musical's favor, and remanded the case for a consideration of the question of mootness.

By denying certiorari in Keriakos v. Hunt, the Court let stand a First Circuit ruling that magazines emphasizing female genitalia are not obscene. However, the Court has also taken the opposite tack in refusing to review several lower court obscenity convictions.

Ralph Ginzburg, publisher of the quarterly Eros and, later, of the magazine Fact, was before the Court for a second time on a petition for certiorari. The offenses and the items were the same: an issue of Eros, a newsletter called Liaison and a book, Housewife's Hand-
book on Selective Promiscuity. Ginzburg got five years, and he and his three corporate co-defendants drew fines aggregating $28,000.00. On his first petition, the Court granted review, but affirmed. In that opinion, delivered in March 1966, the Court through Justice Brennan added to its prurient interest test and requirement of patent offensiveness the ingredient of pandering. The Court denied Ginzburg's petition for rehearing. He then asked District Judge Body, the trial judge, for a reduction or suspension of his five-year prison sentence. Judge Body refused and ordered him to begin his prison term. Ginzburg also contended before Judge Body that he had no knowledge that the mailing company he had hired had tried to send his publications from such places as Intercourse and Blue Ball, Pennsylvania, and Middlesex, New Jersey. Still Judge Body granted him no relief. However, the United States Court of Appeals for the Third Circuit, by a two-to-one decision, granted a stay pending the outcome of his new appeal. Subsequently, that court heard the new appeal en banc and, by a four-to-three vote, vacated the order of the district court and sent the case back for an evidentiary hearing. Thereafter, Ginzburg managed to get his sentence reduced from five to three years, which the Third Circuit affirmed. This time the Court denied his petition for a writ of certiorari.

In two cases, on the request of the federal government, the Court granted review, but subsequently the Government made dismissal motions under Rule 60, which the Court also granted. One of these cases involved the film Language of Love. After granting the Government's petition for a writ of certiorari, the Court also granted an

43. Ginzburg v. United States, 398 F.2d 52 (3d Cir. 1968).
44. Id.
45. Id.
46. Ginzburg v. United States, 398 F.2d 52 (3d Cir. 1968).
47. Id.
49. Ginzburg v. United States, 403 U.S. 931, denying cert. to 436 F.2d 1386 (3d Cir. 1971). Ginzburg was finally scheduled to begin serving his sentence on January 17, 1972, N.Y. Times, Jan. 27, 1972, at 14, col. 3.
application for a suspension of the Second Circuit's stay of mandate, thus permitting the film to be shown.\textsuperscript{53}

The other case, \textit{United States v. Various Articles of "Obscene" Merchandise},\textsuperscript{54} involved the question whether the Government may constitutionally prohibit the importation of obscene material that is intended for private use only. The Court on the Government's appeal noted probable jurisdiction; but then on the Government's motion, dismissed the appeal.\textsuperscript{55} That case and four others, \textit{United States v. Thirty-Seven Photographs},\textsuperscript{56} \textit{United States v. 119 Cartons Containing 30,000 Obscene Magazines},\textsuperscript{57} \textit{United States v. Reidel}\textsuperscript{58} and \textit{United States v. B & H Distributing Corp.},\textsuperscript{59} presented questions of the extension of \textit{Stanley v. Georgia}.\textsuperscript{60} In the first three of these five cases, counsel argued that if an adult had the right to possess pornography, he had the right to bring it into this country from abroad. In \textit{Various Articles of Obscene Merchandise}, the items sought to be imported were for private use; in \textit{Thirty-Seven Photographs}, the items consisted of 37 photographs for use in a book describing sexual positions that was for commercial distribution. In \textit{Reidel}, counsel argued that if an adult had the right to possess pornography, he had the right to use the mails to send it to other adults who wanted it; and in the final case, counsel argued similarly for the transportation of obscene materials in interstate commerce by means of a common carrier.

The Court ruled against these contentions in \textit{Thirty-Seven Photographs} and \textit{Reidel}; in the remaining two cases it vacated the judgments and remanded for reconsideration in the light of one or both of the foregoing two cases.\textsuperscript{62}

The Court's rulings in \textit{Thirty-Seven Photographs} and \textit{Reidel} caused Justice Black to complain in a dissent in which Justice Douglas joined:

\begin{quote}
Since the plurality opinion offers no plausible reason to distinguish private possession of "obscenity" from importation for pri-
\end{quote}

\begin{footnotes}
\item\textsuperscript{53} United States v. Unicorn Enterprises, Inc., 402 U.S. 970 (1971).
\item\textsuperscript{54} 403 U.S. 942 (1971).
\item\textsuperscript{55} \textit{Id.}
\item\textsuperscript{57} 402 U.S. 969 (1971), \textit{vacating and remanding to 324 F. Supp. 1112 (C.D. Cal. 1970).}
\item\textsuperscript{58} 402 U.S. 351 (1970), rev'g C.D. Cal. (unreported).
\item\textsuperscript{59} 402 U.S. 927 (1971), \textit{vacating and remanding to 319 F. Supp. 1231 (W.D. Wis. 1970).}
\item\textsuperscript{60} 394 U.S. 557 (1969).
\end{footnotes}
vate use, I can only conclude that at least four members of the Court would overrule Stanley. Or perhaps in the future that case will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.63

The Second Circuit in United States v. Dellapia64 took the same approach as Justices Black and Douglas. Circuit Judge Irving R. Kaufman wrote ably for the Court:

The most fundamental premise of our constitutional scheme may be that every adult bears the freedom to nurture or neglect his own moral and intellectual growth. In a democracy one is free to work out one's own salvation in one's own way. If there is a justification for this premise, it is the faith — or the calculation — that to relinquish freedom of self-development would be to abandon most that is valuable about living. Government censorship of an adult's private thoughts would, as Stanley recognized, raise havoc with the individual's personality. The danger to freedom would hardly be less if private correspondents should need to fear that the government will monitor their private mail and mark the emotions and ideas privately revealed therein with a criminal stigma. If the only reason for a prosecution is to protect an adult against his own moral standards which do harm to no one else, it cannot be tolerated. Private communication seems no less part of freedom than privacy to read one's own books. If not, then the privacy that Stanley held inviolable is less robust than we would have thought.65


Despite all of the Court's activity in the obscenity area last term, it still had 22 obscenity cases on its docket when the term ended on June 30, 1971. More obscenity cases were docketed after that time and still more were on the way. When the Court convened for its 1971–1972 term, it had 42 obscenity cases on its docket — more than two-thirds the number of cases docketed during the entire 1970–1971 term — and new cases were being docketed at the rate of about one a week. If this rate continues, the Court will have one-third again as many cases on its 1971–1972 docket as it had on its burdened 1970–1971 docket.66

Four of the cases on this term's docket involve the film, I Am Curious (Yellow). Hair, the rock musical, is back. Other cases in-

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64. 433 F.2d 1252 (2d Cir. 1970).
65. Id. at 1258–59 (footnotes omitted).
66. The cases docketed to date this term are listed in Appendix V infra.
The Libertine, Man and Wife, and Carmen Baby, films; 69 Potion, a book; "girlie" magazines; peep shows; and stag movies. The Court at its 1970–1971 term granted review in four of these cases, more than it used to hear in any average term.

Counsel will argue at the 1971–1972 term, as they did at the preceding one, for extensions of Stanley v. Georgia.8 The Court will also consider the question whether the contemporary community standards to be applied in judging obscenity are national or local ones. At least three cases, Miller v. United States, Miller v. California and Wall v. California, present this issue, among others, despite the fact that the question had been considered by many to be settled.

After Roth v. United States, there was ample reason to believe that the contemporary community standards which the Court had in mind were national ones. Justice Harlan, who announced the judgment of the Court in Manual Enterprises, Inc. v. Day, a case involving publications beamed at homosexuals, said so in his opinion in that case, and Justice Brennan voiced the same opinion when he announced the judgment of the Court in Jacobellis v. Ohio, where the Court lifted an Ohio ban on the French film The Lovers (Les Amants).

The New Jersey supreme court so held in State v. Hudson County News Co. However, further investigation shows that the question


74. Id. at 488. Justice Harlan stated:

There must first be decided the relevant "community" in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency.


76. Justice Brennan stated:

We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding.

77. 41 N.J. 247, 196 A.2d 225 (1963). The court in that case stated:

Accordingly, we hold that the contemporary community standard to be applied under our statute is not the standard of a particular individual, group of in-
of national versus local standards does not appear to be resolved in the opinion of all members of the Court. Chief Justice Warren, in his dissenting opinion in *Jacobellis*, expressed the view that community standards meant exactly that, and not a single national standard:

But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.\(^\text{78}\)

The October 1971 term of the Court promises to be another of its obscenity terms.

The Supreme Court has indeed become, in the prophetically apprehensive phrase of Justice Robert H. Jackson in 1948 during the course of the argument on Edmund Wilson's *Memoirs of Hecate County*, the "High Court of Obscenity."\(^\text{79}\) There the Court, evenly divided, Justice Frankfurter not sitting, affirmed an obscenity holding. Justice Jackson in colloquy said:

Does your argument mean that we would have to take every obscenity case and decide the constitutional issues on the merits of the literary work? It seems to me that would mean that we would become the High Court of Obscenity.\(^\text{80}\)

The Court has more than borne out the fears which Justice Hugo Black expressed in December 1965, during the course of the argument on *Fanny Hill* and other items. Justice Black observed: "The problem still arises whether this Court can do all this censorship and do anything else and whether it is the one who should do the censoring — if anyone should."\(^\text{81}\)

It has also more than earned the reproach of Justice John M. Harlan in his dissenting opinion in 1968, in *Interstate Circuit, Inc. v. Dallas*,\(^\text{82}\) where the Court invalidated a Dallas censorship ordinance for motion pictures:

From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd

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\(^\text{79.}^\) The case was *Doubleday & Co. v. New York*, 335 U.S. 848 (1948), aff'g by an evenly divided *Court* 297 N.Y. 687, 77 N.E.2d 6 (1947).


\(^\text{81.}^\) *N.Y. Times, Dec. 9, 1965*, at 28, cols. 1-3.

\(^\text{82.}^\) *390 U.S. 676* (1968).
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. 83

Not only has the Court become the High Court of Obscenity, but also the last and the current terms of the Court, and the coming term — with the same load of obscenity cases as the other two — may appropriately be called, without too much exaggeration, the obscenity terms.

Three years ago the writer, usually of an optimistic frame of mind, saw a ray of hope in Redrup 84 and the Court's repeated use of it as a basis for per curiam reversals of obscenity judgments. From this development he inferred that a majority of the Court had gathered behind Justice Stewart's concept equating obscenity with hard-core pornography. 85 It then appeared that the Court, to paraphrase Justice Stewart, thought it knew obscenity when it saw it, even though it could not intelligibly describe it in the abstract. Perhaps the Court had not quite "turned the law of obscenity into a constitutional disaster area," 86 as many of us once feared it had. Perhaps after all the law of obscenity would settle down to something bearable. In this respect it was encouraging that, on the Court's docket for its 1968-1969 term, the number of applications for review in obscenity contests was far fewer than at any preceding term. A comparable occurrence took place in the commerce clause litigation over a century ago. As in the obscenity cases, the Passenger Cases 87 in 1849 had resulted in eight separate opinions and "a seemingly hopeless inability to agree on a general interpretation of the commerce power." 88 But two years later in Cooley v. Board of Wardens, 89 the Taney Court handed down a decision defining the respective roles of federal and state governments under the commerce clause which has remained viable ever since. From this historical perspective, it appeared possible that if we continued our course as "a maturing society" 90 and the rest of the world

83. Id. at 707.
[1]If only four, or even three, justices agree on one method by which immunity is reached, this agreement is as significant as if five joined, so long as there are enough other justices who can be counted on to concur in the result. If we may be pardoned the analogy, if deuces are wild, an inside straight flush and a deuce takes the pot.
Id. at 1365 n.4.
87. 48 U.S. (7 How.) 282 (1849).
89. 53 U.S. (12 How.) 298 (1851).
with us, it might be that we could live with Redrup until such time as obscenity contests, along with wars, prisons and capital punishment, became obsolete.

The writer’s optimism turned out to be short-lived. There were more obscenity cases on the Court’s 1969–1970 docket, the first year of the Burger Court, than there were on the 1968–1969 docket, the last year of the Warren Court. With the 1970–1971 docket came the flood that continues to date.

Of course, there was also an increase of obscenity prosecutions across the country. This may be due in part to a reaction to what some regard as undue permissiveness in the obscenity area under recent Supreme Court decisions. It may also be due in part to the fact that the result of these decisions has led to a vast increase in the number of incidences of what traditionally may have been termed obscenity. Three years ago, the writer pointed out that nudity had been entering on the center stage in the movies, in the theater and elsewhere. It has now arrived. One of his then illustrations was Tom O’Horgan’s production of the rock musical Hair, which in one scene showed mass fullfront nudity of four or five young men and several girls. Nudity spread to the news when a photograph of that scene appeared as part of an article in The New York Times Magazine.

To nudity has been added the depiction of sexual acts. Two films involved in the cases on the Court’s 1970–1971 docket are illustrative: I Am Curious (Yellow) and Language of Love. Two circuit court judges in pending cases described I Am Curious (Yellow). Circuit Judge Hays, in the opinion for the Second Circuit, which held the film to be not obscene by a vote of two to one, wrote:

There are a number of scenes which show the young girl and her lover nude. Several scenes depict sexual intercourse under varying circumstances, some of them quite unusual. There are scenes of oral genital activity.

It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing.

Circuit Judge Celebrezze, who wrote the opinion for a three-judge court in Grove Press, Inc. v. Flask, which is on the Court’s 1971–1972 docket, was even more graphic:

91. Rogge, supra note 84.
93. United States v. "I Am Curious (Yellow).", 404 F.2d 196, 198 (2d Cir. 1968).
The film tract, "I Am Curious (Yellow)" depicts the curious searchings of a young woman attempting to personally relate her existence to the political, social and sexual currents of Swedish democracy. In relating to the complex of real and imagined forces which composed her life in a democracy, the heroine of the film engaged in numerous normal and abnormal sexual episodes, each of which was graphically portrayed to the viewer.

Our heroine's search for equality of women's rights in a democracy was ironically portrayed by her helpless submission to the advances of a young man who had "loaned" her father $90 to gain entrance to her home. Thereafter, the director chose to express his contempt for established institutions by having his lead actors engage in coitus on the balastrade of the National Palace in front of a guard as the Swedish national anthem played, and then to acrobatically engage in coitus in the oldest tree in Europe while a religious ceremony was portrayed in the background. Subsequent acts of coitus, fellatio, cunnilingus and suggested acts of sodomy were depicted between the couple, including some rather violent moments at a "religious" retreat, and an array of explicit sexual acts in a variety of settings after our heroine realized how tragically self-defeating her relationship was with her lover, as well as how incongruous were her political and sexual philosophies.\(^95\)

As for *Language of Love*, Circuit Judge Moore for the Second Circuit, which held the film to be not obscene, wrote:

"Language of Love," a Swedish–made film, is a movie version of the "marriage manual" — that ubiquitous panacea (in the view of some) for all that ails modern man–woman relations. Assuming the Masters and Johnson premise that the path to marital euphoria and social utopia lies in the perfection and practice of clinically correct and complete sexual technology, this film offers to light that path in a way the masses can understand. It purports to be a veritable primer of marital relations, or perhaps the *Kama Sutra* of electronic media, although the film is nowhere nearly as rich in the variety of its smorgasbord of delights as comparison with that ancient Hindu classic might suggest. . . . Towards the end of the film, a gynecological examination and the emplacement by a doctor of contraceptive devices in two young women are portrayed.\(^96\)

The increase in obscenity cases may also be due, in part, to the fact that prosecutors may anticipate a more conservative approach to be forthcoming from the four new members of the Court, Chief Justice

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95. *Id.* at 585.
Burger and Justices Blackmun, Powell and Rhenquist. Whatever the reasons, there are clearly more obscenity prosecutions than in the recent past.

III. AVAILABLE ALTERNATIVES: TAKING OBSCENITY OUT OF THE HIGH COURT

A. Alternative 1 — Abandoning Legislation and Regulation of Morals

Now it may be that the members of the Court find the study of obscenity cases a way of relaxing their minds. The Justices probably engage in more hard thinking than any other body in the world. Just as others find relaxation from their business duties in bridge, or golf, or chess, or music, or the theatre, so it may be that the members of the Court find relaxation from the hard thinking which many of the issues before them require by turning to the records in some of the obscenity contests.

However, if we wish to get the Supreme Court, and other courts as well, out of the obscenity muddle in which they have mired themselves and to let the judges apply their minds to more urgent, as well as more challenging problems, there are four possible ways of doing so. One way is to accept the recommendations of the 18-member federal Commission on Obscenity and Pornography, headed by Dean William B. Lockhart of the University of Minnesota Law School, and repeal all federal, state and local legislation prohibiting the sale, exhibition or distribution of sexual material to consenting adults.

After Redrup, Congress established the Commission on Obscenity and Pornography.97 The two chief sponsors of the legislation, Senator Karl E. Mundt, Republican from South Dakota, and Representative Dominick V. Daniels, Democrat from New Jersey, said the Commission's emphasis would probably be on hard-core pornography.98 The Commission was:

(1) ... to evaluate and recommend definitions of obscenity and pornography;

(2) to study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other antisocial behavior; and

(4) to recommend such legislative, administrative or other advisable and appropriate action as the Commission deems neces-

sary to regulate effectively the flow of such traffic, without in any way interfering with constitutional rights. 99

The Commission was to report its findings and recommendations to the President and Congress as soon as practicable and in any event not later than January 31, 1970. 100 The Commission transmitted its final report on September 30, 1970. Its legislative recommendations, with reference to statutes relating to adults, begins with this paragraph:

_The Commission recommends that federal, state and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed._ Twelve of the 17 participating members of the Commission join in this recommendation. Two additional Commissioners subscribe to the bulk of the Commission's Report, but do not believe that the evidence presented at this time is sufficient to warrant the repeal of all prohibitions upon what adults may obtain. Three Commissioners dissent from the recommendation to repeal adult legislation and would retain existing laws prohibiting the dissemination of obscene materials to adults. 101

This recommendation is not only constitutionally sound, but also legislatively wise. As to consenting adults, there should be no obscenity legislation or litigation as such. If there is conduct which amounts to a breach of the peace, or disorderly conduct, or trespass, or indecent exposure, or contributing to the delinquency of a minor, or the like, prosecute such conduct. But let individuals read, see or hear whatever they like; in the long run we shall be better off; the pornographers will have their day and that will be that. A not atypical illustration of this point is this writer's experience with two nudist periodicals. Within three years after he obtained second-class mail rates for Sun-shine & Health and Sun Magazine, his nudist clients went into bankruptcy, corporately and individually. Their explanation to him was that they now had so much competition that they could not make a living.

The writer takes the position that constitutionally, obscenity laws are beyond the power of Congress under the absolute prohibition of the first amendment; and that, in any event, legislatively they are un-

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100. _Id._ § 1461(5) (b).
wise. Although he concedes that under the tenth amendment the states have some power over obscenity, whereas under the first amendment the federal government has none, he is of the further view that the states are unwise to use their power. Suppression is not the solution for the obscenity problem. This does not mean that nudists, for instance, may stage a parade unclad on Fifth Avenue in New York City, or on any street of that or any other city. They may not. Or as Justice John D. Voelker (author, under the pen name of Robert Traver, of Anatomy of a Murder), put it in People v. Hildabridle,\textsuperscript{102} where the Michigan supreme court reversed the convictions of some nudists on the ground that there had been an illegal search and seizure, nudists may not “boldly” stage a “nude missionary expedition on the main street of Battle Creek.”\textsuperscript{103} If individuals engage in conduct, other than speech, which violates applicable provisions of statute or common law, prosecute them for such conduct. But do not prosecute them under obscenity laws. This was the approach of Justice Fortescue in Rex v. Curl\textsuperscript{104} more than two centuries ago in what was really the first reported decision in England sustaining a conviction for obscenity. There the defendant, Edmund Curl, bookseller, printer and pirate of literature, was convicted at the king’s bench for publishing an “obscene libel.” However, Justice Fortescue expressed a doubt about proscribing obscenity as such which represents the writer’s view: “To make it indictable there should be a breach of the peace, or something tending to it, of which there is nothing in this case.”\textsuperscript{105}

Moreover, the causes of deviant behavior are too many, too subtle, too intangible and too deeply rooted in an individual’s past for the material he reads or the pictures he sees to be among them. There is simply no evidence which directly connects the material which individuals read or the pictures they see with subsequent deviant behavior.

The Commission on Obscenity and Pornography wrote:

Extensive empirical investigation, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or nonsexual deviancy or severe emotional disturbances.

\dots

In sum empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual ma-

\textsuperscript{102} 353 Mich. 562, 92 N.W.2d 6 (1958).
\textsuperscript{103} Id. at 584, 590, 92 N.W.2d at 15, 18.
\textsuperscript{105} Id. at 851.
Materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults.\textsuperscript{106}

Additional support for this contention may be found in \textit{Sex Offenders}, a 923-page report published in 1965 by four of the late Dr. Alfred C. Kinsey's associates at the Institute for Sex Research.\textsuperscript{107} That report shows that although many sexual offenders committed their offenses while drunk, few were influenced by seeing or reading objectionable material. The report contains a statistical analysis of interviews with 1,356 white men in the United States who were convicted of rape, homosexuality, offenses against children and a variety of other sexual crimes. Comparing their records with those of 888 white men jailed for nonsexual crimes and 477 non-criminals, the authors found "that rather large proportions of the men reported little or no sexual arousal from pornography."\textsuperscript{108} Deviants responded more to the sight of a woman than to a picture of one. Furthermore, a survey by the Bureau of Social Hygiene of New York City indicates that neither publications nor pictures have any appreciable relationship to sexual deviation or juvenile delinquency. The Bureau sent questionnaires to 10,000 female graduates of colleges and normal schools. In the 1,200 answers received, not one of the women specified a "dirty" book as the source of sex information. Of the 409 replies in answer to the question concerning what things were most stimulating sexually, the majority noted very simply, "Man."\textsuperscript{109}

Indeed, there are experts who not only disagree with those who assert a causal connection between obscenity and delinquency, but take exactly the opposite position: they suggest that publications, rather than causing delinquency, may act as an emotional catharsis. These experts contend, in the words of the commentary of \textit{Tentative Draft No. 6} of the \textit{Model Penal Code}, that "for an undetermined number of individuals the writing or reading of obscenity may be a substitute for rather than a stimulus to physical sexuality."\textsuperscript{110} In his book \textit{The Sexual Offender and His Offenses}, Dr. Benjamin Karpman, chief psychologist of Saint Elizabeth's Hospital in Washington, D.C., discussed the relation between reading and sexual activity in the following terms:

Contrary to popular misconception, people who read salacious literature are less likely to become sexual offenders than those

\begin{itemize}
\item \textsuperscript{106} \textit{Report of the Commission on Obscenity and Pornography} 52-53 (1970).
\item \textsuperscript{107} C. Christenson, J. Gagnon, P. Gebhard & W. Pomeroy, \textit{Sex Offenders} (1965).
\item \textsuperscript{108} \textit{Id.} at 670.
\item \textsuperscript{109} Alpert, \textit{Judicial Censorship of Obscene Literature}, 52 \textit{Harv. L. Rev.} 40, 73 (1938).
\item \textsuperscript{110} \textit{Model Penal Code} § 207.10, at 24 (Tent. Draft No. 6, 1957).
\end{itemize}
who do not, for the reason that such reading often neutralizes what aberrant sexual interests they may have.  

Professor Walter Gelhorn also shares this view. After describing censorship as a nostrum rather than a remedy and observing that reliance on it would simply delay the therapeutic and preventive steps that must be taken if youthful anti-social conduct is to be lessened, he continued:

The offsetting possibility derives from the Aristotelian concept of emotional catharsis, shared now by many psychiatrists who believe that aggressions and frustrations that might otherwise flare into overt conduct are not fanned to flame but, instead, are more often dissipated, or at least made temporarily quiescent, by reading.  

In his concurring opinion in Memoirs v. Massachusetts, Justice Douglas pointed out that a connection between erotica and deviant conduct had not been established; contrariwise, he indicated that pornographic literature might act as a substitute rather than a stimulant for such conduct. In his dissent in Ginsburg v. United States, he made this observation even more pointedly:

Man was not made in a fixed mould. If a publication caters to the idiosyncrasies of a minority, why does it not have some "social importance"? Each of us is a very temporary transient with likes and dislikes that cover the spectrum. However plebian my tastes may be, who am I to say that others' tastes must be so limited and that other tastes have no "social importance"? How can we know enough to probe the mysteries of the subconscious of our people and say that this is good for them and that is not? Catering to the most eccentric taste may have "social importance" in giving that minority an opportunity to express itself rather than to repress its inner desires, as I suggest in my separate opinion in Memoirs v. Massachusetts. . . . How can we know that this expression may not prevent anti-social conduct?

Moreover, the studies by Dr. Kinsey and his associates demonstrated that erotic responses, whether normal or abnormal, were as frequently evoked by objects and literature which were not sexual in the conventional sense as they were by the more usual sexual

112. W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENT RESTRAINT 64 (1956).  
114. 383 U.S. at 431-32.  
stimuli. Justice Douglas expressed the same thought in his opinion in \textit{Fanny Hill}: "It would be a futile effort even for a censor to attempt to remove all that might possibly stimulate antisocial sexual conduct." An old faded bridal crown hanging framed on a wall might prove sexually stimulating to a modern Oedipus. Judge Bok wrote comparably nearly two decades ago in \textit{Commonwealth v. Gordon}.

I can find no universally valid restriction on free expression to be drawn from the behavior of "l'homme moyen sensuel," who is the average modern reader. It is impossible to say just what his reactions to a book actually are. Moyen means, generally, average, and average means a median between extremes. If he reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book or another?

In \textit{Ginsberg v. New York}, Justices Brennan and Douglas (the former writing for the majority, the latter in dissent) returned again to the controversy regarding the effect of allegedly obscene material on deviant conduct. Justice Brennan quoted the legislative finding of section 484(e) of the New York Penal Code to the effect that the material condemned by section 484(h) was "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." He then commented: "It is very doubtful that this finding expresses an accepted scientific fact." At the end of the paragraph, however, he quoted Magrath's summary and agreed that, while studies on the relationship between what one reads and what one does not "all agree that a causal link has not been demonstrated, they are all equally agreed that a causal link has not been disproved either."

The Court concluded that since we do not know what impact this type of material has on con-

\begin{thebibliography}{99}
  \bibitem{118} 383 U.S. at 432 n.11.
  \bibitem{120} \textit{Id.} at 137-38.
  \bibitem{121} 390 U.S. 692 (1968).
  \bibitem{122} N.Y. \textit{Penal Code} § 484(e) (McKinney 1967).
  \bibitem{123} \textit{Id.} § 484(h).
  \bibitem{124} 390 U.S. at 641.
  \bibitem{125} \textit{Id.} at 642, quoting Magrath, \textit{supra} note 86, at 52.
\end{thebibliography}
duct, New York's obscenity legislation for the protection of youth was constitutional.

The writer would argue that the lack of understanding of the effect of literature on conduct is as good a reason for overturning as for upholding obscenity legislation. Justice Douglas' dissent in *Ginsberg* supports this contention:

> Today this Court sits as the Nation's board of censors. With all respect, I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may have on minds either young or old.128

The nonsense in the obscenity area exists on both sides, on the side of those who defy the censors as well as on the side of the censors themselves. Those who fill their writings with four-letter words and those who disseminate nude pictures are neurotically motivated, but so are the censors. The Henry Millers, the D. H. Lawrences, the James Joyce's, and the nudists are psychologically sick; but so are the Comstocks and the Bowdlers, the leaders of the National Office for Decent Literature and the Citizens for Decent Literature, and the heads of the societies for the suppression of vice. In this category, the writer includes his nudist clients, the oldest among whom was an octogenarian Baptist minister — a Master of Sacred Theology who looked the part, for he had a rather heavy fringe of white hair which framed a cherubic face. He was a great grandfather, whose children, grandchildren and great grandchildren, so the old nudist said, were all nudists. The writer as counsel helped the old man state his thesis: that the practice of nudism would satisfy the healthy curiosity of children and eliminate the unhealthy curiosity of adults about the human body. This was better phrased than the old nudist's formulation, but it was what he wanted to say. With this thesis, we went through several major proceedings with the Post Office Department, as well as various proceedings with state officials. The old man vigorously adhered to the principle that the human body should be shown as it actually was. The opposition of the Post Office Department focused on the showing of pubic hair. After nearly a decade of struggle with the federal government, the Supreme Court ruled summarily in *Sunshine Book Company v. Summerfield*,127 that his two nudist publi-

126. 390 U.S. at 656 (Douglas, J., dissenting).
cations *Sunshine & Health* and *Sun Magazine* were not obscene. After another contest, Judge Luther W. Youngdahl ruled that these publications were entitled to second-class mail rates, saying:

The precepts of nudism presented by "Sunshine & Health" and 'Sun Magazine' do not have the public acceptance given the ideas and way of life presented by *Ladies' Home Journal* and *House and Garden*, but they are not, for that reason, undeserving of equal treatment by the Postal Service.\(^{128}\)

Yet, in the view of counsel, the thesis of his nudist clients was nonsense, all nonsense. Nevertheless, the writer's nudist clients told him that one day, and before too long, there would be nude bathing at our public beaches. Inwardly, the writer scoffed at the idea. But with the topless era knocking at the door, who knows but that the nudists, at least on this point, may turn out to be right.

As for the critics of the old nudist, those who would censor his publications were even more full of nonsense than he was. The Supreme Court was right in summarily holding his publications to be not obscene, and Judge Youngdahl was right in ruling that they were entitled to second-class mail rates.

The censors would be well advised to take a respite from their lugubriations to examine their own minds. They are full of sound and fury, but their words do not signify what the censors think they do. When they voice fears for the rest of us and for the young, perhaps what they are really doing is revealing their own fear about themselves. Henry Miller, the author of *Tropic of Cancer*, quotes Dr. Ernest Jones, the biographer of Sigmund Freud, as saying:

> It is the people with secret attractions to various temptations who busy themselves with removing these temptations from other people; really they are defending themselves under the pretext of defending others, because at heart they fear their own weakness.\(^{129}\)

The author is not interested in what Henry Miller writes, but in what Dr. Jones says. Or as Justice Douglas put it in his dissenting opinion in which Justice Black joined, in *Ginsberg v. New York*,\(^{130}\) where the Court sustained the validity of obscenity legislation for the protection of youth: "Censors are, of course, propelled by their own neuroses."\(^{131}\)

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130. 390 U.S. 629 (1968).
131. *Id.* at 655.
Let each one take care of his own neurosis, and not try to give unsolicited directions, legislative, judicial or otherwise, to the rest of us on how to handle ours.

However, with President Richard M. Nixon and Vice President Spiro T. Agnew condemning the Report of the Commission of Obscenity and Pornography, with the United States Senate, by a 60 to 5 roll call vote overwhelmingly passing a resolution denouncing the Report,\textsuperscript{132} and with the current climate of public opinion, there is no possibility of achieving the legislative recommendations of the Commission as to adults. Senator John L. McClellan, Democrat from Arkansas, who was one of the sponsors of the resolution, asserted that:

\begin{quote}
[T]he Congress might just as well have asked the pornographers to write this report, although I doubt that even they would have had the temerity and effrontery to make the ludicrous recommendations that were made by the Commission.\textsuperscript{138}
\end{quote}

While the writer feels that the censors’ time might better be spent healing themselves instead of infecting others, he also takes a puritanical approach to those who fill their writings with four-letter words, as well as those who distribute nude or near-nude pictures. He sees neither the need nor the use for such activities. Those who insist on using an abundance of four-letter words should, like the censors, examine their own minds. Are they going back to the rebellion and defiance of their battles with their parents in their infant years? Indeed, in one respect, the writer will go the censors one better and then some; he will adumbrate that if human beings continue to mature, they will one day give up fiction for fact as more suitable fare for thinking minds.

As for the nudists and those especially interested in pictures of nudes or near-nudes, whether of male or female figures, or near-nudes in chains, or being tormented, or otherwise encumbered, the problem would appear to be primarily a male one. The record in \textit{Manual Enterprises, Inc. v. Day}\textsuperscript{134} shows that the pictures of the male models in the three publications there involved, \textit{Manual}, \textit{Trim} and \textit{Grecian Guild Pictorial}, were for homosexuals. But the ones who are interested in pictures of female nudes are also primarily males; and, among the nudists, males would appear to be somewhat more interested in nudism than are females.

\begin{footnotes}
\item[134.] 370 U.S. 478 (1962).
\end{footnotes}
If the male is more interested than the female in the nude figure, whether of male or female, one can ask whether this interest involves, in part, the same fear. If so, one can speak not unsympathetically of one approach as the bold one, and the other as the timid one. One can say that the nudist approach is the bold one, for the nudists compel themselves to look continuously at the nude female. Contrariwise, one can characterize the homosexual approach as the timid one, for they, like Perseus slaying the Gorgon Medusa, cannot bear to look upon the female figure at all. Despite such characterizations, or perhaps because of them, the conclusion must remain the same: "deviant" or otherwise unusual sexual tastes and proclivities are the consequences of individual mental processes; for this reason, they cannot be regulated. Likewise, until such behavior manifests itself in some clear, concrete deleterious effect on society or other individuals, it should not be regulated.

B. Alternative 2 — Approaching the First Amendment as an Absolute

Another way to get our courts out of the obscenity muddle is to adopt the view of Justices Black and Douglas that there are no exceptions to the first amendment, for obscenity or anything else. These two Justices draw the distinction recognized by Jefferson and Madison between words and deeds, between utterances and criminal conduct other than utterances. Jefferson, for instance, in his draft of *A Bill for Establishing Religious Freedom*, which he introduced into the Virginia Assembly in 1779 and which passed that body in 1785, stated:

[T]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.\(^{135}\)

He expressed the same thought more than two decades later in a letter of July 3, 1801 to Elijah Boardman:

But we have nothing to fear from the demoralizing reasonings of some, if others are left to demonstrate their errors. And

\(^{135}\) 2 THE PAPERS OF THOMAS JEFFERSON 546 (Boyd ed. 1950).
especially when the law stands ready to punish the first criminal act produced by the false reasoning. These are safer correctives than the conscience of a judge.\footnote{136}

Even before Jefferson presented the draft of his bill to the Virginia Assembly, the Rev. Philip Furneaux, a dissenting divine, in one of a series of famous letters to Blackstone, eloquently urged the same approach:

[T]he tendency of principles, though it be unfavourable, is not prejudicial to society, till it issues in some overt acts against the public peace and order; and when it does, then the magistrate’s authority to punish commences; that it, he may punish the overt acts, but not the tendency, which is not actually hurtful; and, therefore, his penal laws should be directed against overt acts only. . . . [Principles] cannot be restrained by penal laws, except with the total destruction of civil liberty.\footnote{137}

Moreover, Jefferson and Madison carried their distinction between utterance and conduct other than utterance into the first amendment. Thus, Justices Black and Douglas are historically correct in their insistence that the first amendment has no obscenity exception. However, the rest of the Court does not agree. Justices Black and Douglas stand alone, and Justice Black has gone from the Court.

C. Alternative 3 — Repudiation of the Incorporation Theory

1. Foundation of the Theory

A third way for our courts to get out of the obscenity muddle, at least in large part, is to take the position of Justice Harlan, which was also that of Justice Frankfurter, that the due process clause of the fourteenth amendment does not incorporate the first eight amendments. Just as Justices Black and Douglas are historically correct that there are no exceptions to the first amendment, so Justices Frankfurter and Harlan are historically correct that the due process clause of the fourteenth amendment as such does not make the federal Bill of Rights applicable to the states. The result would be that whatever power there would be over obscenity would rest in the states, as limited by the due process clause of the fourteenth amendment, and not in the federal government because of the sweeping prohibition of the first amendment. This result will also accord with our federal governmental structure, for under it the prosecution of offenses, as the

\footnote{136} Id. at 550.

\footnote{137} Letters to the Honourable Mr. Justice Blackstone 53-55 (1770).
Court has more than once pointed out, is primarily the concern of the states.\footnote{138} Just as the Court has not followed Justices Black and Douglas in their historically correct view that there are no exceptions to the first amendment, so the Court has not followed Justices Frankfurter and Harlan in their historically correct view that the due process clause of the fourteenth amendment does not incorporate the first eight amendments. Although the Court never fully accepted the incorporation theory, propounded by Justice Black in his dissent in \textit{Adamson v. California},\footnote{139} it nevertheless travelled so far in the direction of the result he sought to obtain in \textit{Adamson} that it seemed substantially to have arrived there, with but the single exception of the fifth amendment provision for indictment by a grand jury. This was the only exception that it seemed safe to say would not be made applicable to the states.\footnote{140} The Court accomplished this result by the

\footnote{138. For example, in the Court's opinion in \textit{Knapp v. Schweitzer}, 357 U.S. 371 (1958), Justice Frankfurter wrote:  

Except insofar as penal remedies may be provided by Congress under the explicit authority to "make all Laws which shall be necessary and proper for carrying into Execution" the other powers granted by Art. I, § 8, the bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States.  

\textit{Id.} at 375. Or again in the Court's opinion in \textit{Rochin v. California}, 342 U.S. 165 (1952), this same Justice said:  

In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers.  

\textit{Id.} at 168. Or yet again, in the Court's opinion in \textit{Jerome v. United States}, 318 U.S. 101 (1943), Justice Douglas stated:  

Since there is no common law offense against the United States . . . the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress.  

\textit{Id.} at 104-05.  

Justice Frankfurter, in his concurring opinion in \textit{Malinski v. New York}, 324 U.S. 401 (1945), commented:  

Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice to the States.  

\textit{Id.} at 412-13. Justice Stanley Reed, in his dissenting opinion in \textit{Pennsylvania v. Nelson}, 350 U.S. 497, 519 (1956), in which Justices Harold H. Burton and Sherman Minton joined, relied upon this fact. He quoted a section of the federal criminal code which provides: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." Then he observed: "That declaration springs from the federal character of our Nation. It recognizes the fact that maintenance of order and fairness rests primarily with the States."  


The Court of Appeals for the Fifth Circuit, in sustaining a claim of the privilege against self-incrimination before a subcommittee of the Kefauver Committee despite the fact that the claim was really based upon a fear of state rather than federal prosecution, adverted to this point in \textit{Marcello v. United States}, 196 F.2d 437 (5th Cir. 1952): "It must be remembered also that, in our federal system, the administration of criminal justice rests preponderantly with the States."  

\textit{Id.} at 443.  

\footnote{139} 332 U.S. 46, 68 (1947) (Black, J., dissenting). Justice Douglas joined in the dissent, and Justices Murphy and Rutledge agreed on this particular point.  

\footnote{140} For a fuller discussion, see Rogge, \textit{Williams v. Florida: End of a Theory} (pts. 1 & 2), 16 \textit{VILL. L. Rv.} 411, 607 (1971).}
use of the incorporation theory's makeshift double selective incorporation.

Instead of following history, the Court took three wrong turns under the first amendment. The first two of these were the creation of the sedition and obscenity exceptions. The framers of the first amendment had no such exceptions in mind; rather they "sought," in the words of Professor Zechariah Chafee, "to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing sedition prosecutions."\(^{141}\) There were no exceptions to this amendment.\(^{142}\)

Despite the first amendment's unqualified prohibitions, the United States Supreme Court imported two exceptions into it: one for sedition; and another for obscenity. The Court sanctioned the sedition exception in *Schenck v. United States*,\(^{143}\) where Justice Holmes announced his clear and present danger test. The Court established the obscenity exception in *Roth v. United States* and *Alberts v. California*,\(^{144}\) decided together, where Justice Brennan determined that material was obscene when it dealt with sex in a manner appealing to "prurient interest," whatever that may mean. Thus there are currently two exceptions to the first amendment, while the writer feels that historically there should be none. On the Court only Justices Black and Douglas have been of the view that there are no exceptions to the first amendment, and now Justice Douglas is the sole remaining proponent of this theory.

The third wrong turn taken by the Court was the use of the due process clause of the fourteenth amendment to make the first amendment as fully applicable to the states as to the federal government. Justice Brennan elucidated the end product of this selective incorporation theory in *Malloy v. Hogan*,\(^{145}\) a fifth amendment case:

*Gitlow v. New York* \ldots initiated a series of decisions which today hold immune from state invasion every First Amendment protection for the cherished rights of mind and spirit — the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.

\ldots

\[T\]he guarantees of the First Amendment, \ldots the prohibition of unreasonable searches and seizures of the Fourth Amend-
ment . . . and the right to counsel guaranteed by the Sixth Amendment . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. 146

Justice Brennan's statement in Malloy was the result of a long line of cases 147 which developed from a misreading of a dictum of the Court in Gitlow v. New York. 148 The Court in that case never said that the due process clause of the fourteenth amendment made the first amendment applicable to the states. Justice Holmes, in a dissenting opinion in Gitlow in which Justice Brandeis joined, emphasized this fact:

The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the

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146. Id. at 5, 10 (footnote omitted). In Abington School Dist. v. Schempp, 374 U.S. 203, 215 (1963), Justice Clark wrote for the Court: First, this Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment.

147. E.g., Poulos v. New Hampshire, 345 U.S. 395, 396-97 (1953) ("[t]he conclusion depends upon consideration of the principles of the First Amendment secured against state abridgment by the Fourteenth"); Zorach v. Clauson, 343 U.S. 306, 309 (1952) ("the First Amendment which [by reason of the Fourteenth Amendment] prohibits the states from establishing religion or prohibiting its free exercise"); McCollum v. Board of Educ., 333 U.S. 203, 210 (1948) ("the First Amendment [made applicable to the States by the Fourteenth]"); Everson v. Board of Educ., 330 U.S. 71, 8 (1947) ("[t]he First Amendment, as made applicable to the states by the Fourteenth"); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) ("the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment"); State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("[i]n weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake . . . . [I]t is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case"); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) ("[t]he First Amendment, which the Fourteenth makes applicable to the states"); School Dist. v. Gobitis, 310 U.S. 586, 593 (1940) ("[t]he First Amendment, and the Fourteenth through its absorption of the First"), overruled in Board of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("[t]he fundamental concept of liberty embodied in that Amendment [fourteenth] embraces the liberties guaranteed by the First Amendment"); Schneider v. Irvington, 308 U.S. 147, 160 (1939) ("[t]he freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state"); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth"). See also Kunz v. New York, 340 U.S. 290, 293 (1951) ("the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights").

sweeping language that governs or ought to govern the laws of the United States. 149

In like manner in other cases, Chief Justice Hughes was consistently careful not to say that the due process clause of the fourteenth amendment made the first amendment applicable to the states. 150 So were Justices Cardozo and Sutherland. 151 Instead, they maintained that the constitutional strictures placed upon the states emanated from the due process clause of the fourteenth amendment alone; the fact that due process considerations may, in some instances, overlap first amendment provisions did not mean that the entire first amendment was incorporated in the due process clause of the fourteenth. However, their discriminating language apparently went generally unnoticed.

Unfortunately the language in the Gitlow case lent itself to being misunderstood. Persons could read into it whatever they wanted to see there. A similar misreading occurred with respect to Justice Holmes' language about shouting "fire" in a crowded theatre in Schenck v. United States, 152 although with more justification than in the instance of the language in the Gitlow case. Just as those who wanted restrictions on speech cited Holmes' hypothetical case as a prime illustration for their argument, 153 so those who wanted the

149. Id. at 672 (Holmes & Brandeis, JJ., dissenting).
150. See, e.g., De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Near v. Minnesota, 283 U.S. 697, 707 (1931); Stromberg v. California, 283 U.S. 359, 368 (1931). In De Jonge, the Chief Justice stated:
   Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. . . . The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, principles which the Fourteenth Amendment embodies in the general terms of its due process clause.
299 U.S. at 364.
151. Justice Cardozo, in the Court's opinion in Palko v. Connecticut, 302 U.S. 319, 324 (1937), stated:
   [T]he due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . . (Emphasis added.)
   In the Court's opinion in Grosjean v. American Press Co., 297 U.S. 233, 243 (1936), Justice Sutherland wrote:
   While . . . [the first amendment] is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.
152. 249 U.S. 47 (1919).
153. What Justice Holmes actually said in the Schenck case was this: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Id. at 52. This is not speech. Shouting "fire" under such circumstances is as much an act as firing a gun or lighting a fire. It is the same as if by a shout one intentionally detonated an infernal machine. This is criminal conduct; not speech.
first amendment applicable to the states cited the *Gitlow* case as so saying.

Before *Gitlow*, the Court in *Patterson v. Colorado* let stand a contempt conviction for the publication of a cartoon and certain articles which dealt with the Supreme Court of Colorado. In that case, Justice Holmes speaking for the Court said: "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First." Still later he and Justice Brandeis joined in the Court's opinion in *Prudential Insurance Co. v. Cheek*, which stated:

[N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about "freedom of speech" or the "liberty of silence" . . .

With reference to the change in views of Justices Holmes and Brandeis in the three years between the *Prudential Insurance Co.* decision and their dissent in the *Gitlow* case, Justice Jackson, in his dissenting opinion in *Beauharnais v. Illinois*, commented:

However, these two Justices, who made the only original contribution to legal thought on the difficult problems bound up in these Amendments, soon reversed and took the view that the Fourteenth Amendment did impose some restrictions upon the States. But it was not premised upon the First Amendment nor upon any theory that it was incorporated in the Fourteenth.

In *Beauharnais*, the Court sustained the validity of an Illinois group libel law. Justice Jackson, although dissenting, vigorously rejected the incorporation theory:

The history of criminal libel in America convinces me that the Fourteenth Amendment did not "incorporate" the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.

He set forth with some emphasis the quoted language from the Holmes and Brandeis dissent in *Gitlow*, and prefaced it with this comment:

154. 205 U.S. 454 (1907).
155. Id. at 462.
156. 259 U.S. 530 (1922).
157. Id. at 543.
158. 343 U.S. 250 (1952).
159. Id. at 291 (Jackson, J., dissenting).
160. Id. at 288.
"What they wrote, with care and circumspection, I accept as the wise and historically correct view of the Fourteenth Amendment."\textsuperscript{161}

2. \textit{Post Incorporation: Application of the First Amendment to the Law of Obscenity}

Despite the vigorous arguments of these Justices, the incorporation theory prevailed and in \textit{Roth v. United States},\textsuperscript{162} the Court not only sustained the validity of federal as well as state obscenity legislation, but also used the same yardstick for state as well as federal action. Within a decade and a half after this decision, the Supreme Court became the "High Court of Obscenity," with 61 obscenity cases on its 1970–1971 docket. The federal government and the Court, as well as the states and their political subdivisions, were now all in the business of protecting us from obscenity.

In \textit{Manual Enterprises, Inc. v. Day},\textsuperscript{163} a federal case involving three periodicals admittedly published for, and sexually arousing to, homosexuals, Justice Harlan added to the prurient interest test the requirement of patent offensiveness:

\begin{quote}
Obscenity under the federal statute thus requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under §1461.\textsuperscript{164}
\end{quote}

Justice Stewart in his concurring opinion in \textit{Jacobellis v. Ohio},\textsuperscript{165} where the Court lifted an Ohio ban on the French film \textit{The Lovers (Les Amants)}, expressed the view that the obscenity exception to the first amendment was limited to hard-core pornography. He confessed to an inability to describe hard-core pornography, but added that he knew it when he saw it. Other judges, however, have not been certain of knowing hard-core pornography when they see it.\textsuperscript{166}

\begin{itemize}
\item \textsuperscript{161} Id. at 291.
\item \textsuperscript{163} 370 U.S. 478 (1962), rev'g 289 F.2d 455 (D.C. Cir. 1961).
\item \textsuperscript{164} Id. at 486.
\item \textsuperscript{165} 378 U.S. 184, 197 (1964), rev'g 173 Ohio St. 22, 179 N.E.2d 777 (1962), aff'g 115 Ohio App. 226, 175 N.E.2d 123 (1961).
\item \textsuperscript{166} In Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965), where the Tenth Circuit reversed a conviction for sending allegedly obscene booklets through the mail, Circuit Judge John C. Pickett in a footnote to the court's opinion, after quoting Justice Stewart's statement, continued:
\end{itemize}

The writer of this opinion has also felt that he would "know it when he saw it" but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters.

\textit{Id.} at 62 n.6.
In *Memoirs v. Massachusetts*, involving a book popularly known as *Fanny Hill*, Justice Brennan, in an opinion in which Chief Justice Warren and Justice Fortas joined, described three elements that had to coalesce in order to make an item obscene. In one paragraph he wrote:

We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.168

Then in *Redrup v. New York*, decided with *Gent v. Arkansas* and *Austin v. Kentucky*, the Court in a per curiam opinion seemed to tie together the various loose ends of its obscenity decisions. The Court first pointed out that none of the state statutes involved was designed specifically for the protection of youth; and that in none of the cases was there evidence of pandering:

In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Massachusetts*, 321 U.S. 158 [(1943)]; cf. *Butler v. Michigan*, 352 U.S. 380 [(1957)]. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. Alexandria*, 341 U.S. 622 [(1951)]; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 [(1952)]. And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463 [(1966)].170

Thereafter the Court made the significant observation that the three ingredients for obscenity spelled out in Justice Brennan's opinion in *Fanny Hill*, in which Chief Justice Warren and Justice Fortas joined, added up to a concept which was "not dissimilar" from Justice Stewart's concept of hard-core pornography:

168. Id. at 418.
170. Id. at 769.
Two members of the Court [Justices Black and Douglas] adhered to the view that a State is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their "obscenity." A third [Justice Stewart] has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others [Chief Justice Warren and Justices Brennan and Fortas] have subscribed to a not dissimilar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value," emphasizing that the "three elements must coalesce," and that no such material can "be proscribed unless it is found to be utterly without redeeming social value." *Memoirs v. Massachusetts*, 383 U.S. 413, 418-19 [(1966)]. Another Justice [White] has not viewed the "social value" element as an independent factor in the judgment of obscenity. *Id.* at 460-62 (dissenting opinion).  

*Redrup*, however, did not have an immediate effect; defendants in cases decided shortly thereafter found little solace in that opinion and as the Court mired itself deeper and deeper in the obscenity mess, the complaints became harsher that it did not know what it was doing. Justice Harlan in his concurring opinion in *Interstate Circuit, Inc. v. Dallas*, 1 the one of the three obscenity cases 2 in which the Court heard argument at its 1967-68 term, commented:

As the Court enters this new area of obscenity law it is well to take stock of where we are at present in this constitutional field. The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication. . . .

. . . .

The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment.  

Judge Leo Weinrott of the Philadelphia Common Pleas Court, who, after three days of hearings, had to decide the question whether

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171. *Id.* at 770-71 (footnotes omitted).
172. 390 U.S. 676, 704 (1968) (concurring opinion).
173. The other two were *Interstate Cir., Inc. v. Dallas*, 390 U.S. 676 (1968) (separate case); and *Ginsberg v. New York*, 390 U.S. 629 (1968).
Candy was obscene, and who delayed his decision until after he had the help of the Supreme Court’s rulings in Ginzburg, Fanny Hill and Mishkin v. New York, found Candy to be obscene but specifically declared that this was without any help from the Court, or, for that matter, from the three days of hearings. Concerning the Court’s efforts he commented: “The nine justices have yielded 14 separate opinions pointing in various directions. Instead of intelligible guidelines we have confusion worse confounded.” The Pennsylvania supreme court reversed Judge Weinrott’s ruling on the ground that Candy, although appealing to prurient interest, was not patently offensive. However, Chief Justice Bell and Justice Musmanno, in separate dissenting opinions, were even more caustic in their criticisms of the Supreme Court than was Judge Weinrott. Chief Justice Bell wrote:

The Supreme Court cannot define obscenity in language which a majority of Judges, or of lawyers or of laymen understand. However, notwithstanding the fact that it is high on the “best sellers list” and its wide popularity, “Candy” is a very obscene, dirty “sex” book without a single redeeming feature or the slightest social value, and no matter what legal test is applied it should be banned.

Justice Musmanno was even more harsh in his comments:

The reason so many Justices gave no reason for their decisions is that there is no reason to the decisions. The decisions are a conglomeration of personal views, individual tangents and private predilections, without much thought apparently being given to the effect those decisions will have on the nation as a whole. I state, again with disinclination, that the Supreme Court of the United States has failed to live up to its solemn responsibility of protecting, through a serious interpretation and firm enforcement, of the laws of the land, the ramparts of moral standards, the crumbling of which will bring disaster to our country. The Supreme Court has simply refused to meet its obligations in considering a grave situation which affects American youth, into whose hands the destiny of our nation will one day be committed.


178. Id. at 223, 233 A.2d at 858 (footnotes omitted).

179. Id. at 231, 233 A.2d at 862.
Senator John McClellan, in his argument in support of the Senate resolution which condemned *The Report on Obscenity and Pornography*, declared that "during the past decade, the Supreme Court, through a series of decisions, has emasculated, obfuscated and thrown into a complete state of confusion, laws relating to obscene and pornographic material."180

These criticisms are all true. The Court's obscenity opinions do leave one in utter bewilderment; they do result in confusion worse confounded. However, the criticisms are all unmerited, for it is impossible to describe obscenity.

Although *Redrup* itself did not immediately afford much stability to the law of obscenity, the writer hoped that, as the Court's *Redrup* per curiam reversals mounted, there would be provided a solution of some sort for the mess.181 This turned out not to be so.

3. *Intimations of Forthcoming Clarity: Retreat from the Incorporation Doctrine?*

Subsequently, with the changes in the Court and with Justice Stewart agreeing with Justice Harlan that Justice Black's incorporation theory was historically incorrect, it seemed that the Court might retreat from its selective incorporation doctrines, at least in the area of obscenity, and turn obscenity contests over to the states, subject of course to the due process clause of the fourteenth amendment.

Justice Stewart, in his concurring opinion in *Williams v. Florida*182 and dissenting opinion in *Baldwin v. New York*,183 expressed himself as being in substantial agreement with Justice Harlan, characterizing Justice Black's incorporation theory as "that erroneous constitutional doctrine."184 He also thought that Justice Harlan was surely right when he said that "it is time for the Court to face up to reality."185 In addition, he wrote:

The "incorporation" theory postulates the Bill of Rights as the substantive metes and bounds of the Fourteenth Amendment. I think this theory is incorrect as a matter of constitutional history, and that as a matter of constitutional law it is both stultifying and unsound. It is, at best, a theory that can lead the Court only to a Fourteenth Amendment dead end. And, at worst, the spell of the theory's logic compels the Court either

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181. See Rogge, *supra* note 84.
184. Id. at 144.
185. Id. at 145.
to impose intolerable restrictions upon the constitutional sovereignty of the individual States in the administration of their own criminal law, or else intolerably to relax the explicit restrictions that the Framers actually did put upon the Federal Government in the administration of criminal justice. 186

Thus, two Justices regarded Justice Black's incorporation theory as historically incorrect. In addition, the two new members of the Court, Chief Justice Burger and Justice Blackmun, accepted Justice Harlan's approach to federal-state relations, at least in part. For instance, in California v. Green, 187 where the Court held that the confrontation clause in the sixth amendment does not preclude the introduction of an out-of-court declaration to prove the truth of the matters asserted therein when that declaration was made under oath and subject to cross-examination and when the declarant is available to testify at trial, Chief Justice Burger stated in his concurring opinion:

I add this comment only to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice. If new standards and procedure are tried in one State their success or failure will be a guide to others and to the Congress.

. . . The circumstances of this case demonstrate again that neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States. Federal authority was never intended to be a "ramrod" to compel conformity to nonconstitutional standards. 188

In his dissenting opinion in Baldwin v. New York, 189 he complained:

I find it somewhat disconcerting that with the constant urging to adjust ourselves to being a "pluralistic society" — and I accept this in its broad sense — we find constant pressure to conform to some uniform pattern on the theory that the Constitution commands it. 190

In Hoyt v. Minnesota, 191 a state obscenity case, Justice Blackmun, in a dissenting opinion in which Chief Justice Burger and Justice Harlan joined, wrote that he was in general agreement with Justice Harlan's views in this area:

186. Id. at 143 (emphasis supplied by the Court).
188. Id. at 171-72.
190. Id. at 77.
I am not persuaded that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure — rather than one capable of some flexibility and resting on concepts of reasonableness — of what each of our several States constitutionally may do to regulate obscene products within its borders.

At this still, for me, unsettled stage in the development of state law of obscenity in the federal constitutional context I find myself generally in accord with the views expressed by Mr. Justice Harlan in Roth v. United States, 354 U.S. 476, 496, 500–03 (1957); Jacobellis v. Ohio, 378 U.S. 184, 203–04 (1964); and Memoirs v. Massachusetts, 383 U.S. 413, 455, 458–60 (1966), and with those enunciated by The Chief Justice in Cain v. Kentucky, 397 U.S. 319 (1970), and in Walker v. Ohio, supra.192

To these circumstances must be added one other. Chief Justice Burger, taking a position which makes a retreat from the incorporation doctrine all the more possible, is not so firmly committed to stare decisis as is Justice Harlan. The Chief Justice, in his dissenting opinion in Coleman v. Alabama,193 where the Court held that the sixth and fourteenth amendments required counsel at an Alabama preliminary hearing, announced:

With deference, then, I am bound to reject categorically Mr. Justice Harlan's and Mr. Justice White's thesis that what the Court said lately controls over the Constitution. While our holdings are entitled to deference I will not join in employing recent cases rather than the Constitution, to bootstrap ourselves into a result, even though I agree with the objective of having counsel at preliminary hearings. By placing a premium on "recent cases" rather than the language of the Constitution, the Court makes it dangerously simple for future

192. Id. at 524–25. In Walker v. Ohio, 398 U.S. 434 (1970), Chief Justice Burger in dissent wrote:
I dissent from such a summary disposition, not only for the reasons expressed in my separate opinion in Cain v. Kentucky, 397 U.S. 319 (1970), but also because I find no justification, constitutional or otherwise, for this Court's assuming the role of a supreme and unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before it without regard to the findings or conclusions of other courts, state or federal. That is not one of the purposes for which this Court was established.

Id. at 524.

In my view we should not inflexibly deny to each of the States, the power to adopt and enforce its own standards as to obscenity and pornographic materials; States ought to be free to deal with varying conditions and problems in this area. I am unwilling to say that Kentucky is without power to bar public showing of this film; therefore, I would affirm the judgment from which the appeal is taken.

Courts, using the technique of interpretation, to operate as a “continuing Constitutional convention.”

Indeed, even Justice Harlan himself has weakened on stare decisis insofar as the constitutional pronouncements on the form of jury trials of *Duncan v. Louisiana* is concerned. In his opinion dissenting in *Baldwin v. New York* and concurring in *Williams v. Florida*, he wrote:

In taking that course in *Baldwin*, I cannot, in a matter that goes to the very pulse of sound constitutional adjudication, consider myself constricted by *stare decisis*.

The principle of *stare decisis* is multifaceted. It is a solid foundation for our legal system; yet care must be taken not to use it to create an unmovable structure. It provides the stability and predictability required for the ordering of human affairs over the course of time and a basis of “public faith in the judiciary as a source of impersonal and reasoned judgments.” Woodenly applied, however, it builds a stockade of precedent that confines the law by rules, ill-conceived when promulgated, or if sound in origin, unadaptable to present circumstances. No precedent is sacrosanct and one should not hesitate to vote to overturn this Court’s previous holdings — old or recent — or reconsider settled dicta where the principles announced prove either practically . . . unworkable, or no longer suited to contemporary life . . . . Indeed, it is these considerations that move me to depart today from the framework of *Duncan*. It is, in part, the disregard of *stare decisis* in circumstances where it should apply, to which the Court is, of necessity, driven in *Williams* by the “incorporation” doctrine, that leads me to decline to follow *Duncan*. Surely if the principle of *stare decisis* means anything in the law, it means that precedent should not be jettisoned when the rule of yesterday remains viable, creates no injustice, and can reasonably be said to be no less sound than the rule sponsored by those who seek change, let alone incapable of being demonstrated wrong. The decision in *Williams*, however, casts aside workability and relevance and substitutes uncertainty. The only reason I can discern for today’s decision that discards numerous judicial pronouncements and historical precedent that sound constitutional interpretation would look to as controlling, is the Court’s disquietude with the tension between the jurisprudential consequences wrought by “incorporation” in *Duncan* and *Baldwin*.

194. Id. at 22-23.
and the counter-pulls of the situation in *Williams* which presents the prospect of invalidating the common practice in the States of providing less than a 12-member jury for the trial of misdemeanor cases.\(^{198}\)

As one amassed these circumstances — the historical incorrectness of the incorporation theory; two Justices, Harlan and Stewart, who recognized the historical incorrectness of the incorporation theory; a Chief Justice, Burger, who shares Justice Harlan's approach to federal–state relations; two Justices, Burger and Blackmun, who are in general agreement with Justice Harlan's views in state obscenity cases; a Chief Justice, Burger, who is not so firmly committed to stare decisis as is Justice Harlan; and Justice Harlan himself weakening in his views on stare decisis on the issue of jury trials in state criminal cases — one began to have hope that the Court would abandon selective incorporation along with the incorporation theory and return to a case–by–case application of the due process clause of the fourteenth amendment.\(^{199}\)

However, at the 1970 term, even Justice Harlan began to write like an incorporationist in the first amendment area. He did so, for instance, in his dissenting opinion in *Rosenbloom v. Metromedia, Inc.*,\(^{200}\) a diversity action under Pennsylvania libel law; he explained in a footnote:

> Of course, for me, this case presents a Fourteenth, not a purely First Amendment issue, for the question is one of the constitutionality of the applicable Pennsylvania libel laws. However, I have found it convenient, in the course of this opinion, occasionally to speak directly of the First Amendment as a shorthand phrase for identifying those constitutional values of freedom of expression guaranteed to individuals by the Due Process Clause of the Fourteenth Amendment.\(^{201}\)

Furthermore, the question of whether Justice Harlan would have maintained his anti–incorporationist position and exerted an influence in redirecting the Court has become moot with his departure.

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\(^{198}\) *Id.* at 118, 127–29 (footnote omitted). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), where the Court held that the provisions of the Voting Rights Acts Amendments of 1970 fixing the voting age at 18 are constitutional in national elections but not in state and local elections, Justice Harlan, who felt that these provisions were unconstitutional even as to national elections, stated with reference to the Court's one-man one-vote course which began with *Baker v. Carr*, 369 U.S. 186 (1962):

> Concluding, as I have, that such decisions cannot withstand constitutional scrutiny, I think it my duty to depart from them, rather than to lend my support to perpetuating their constitutional error in the name of *stare decisis*.

400 U.S. at 218 (Harlan, J., concurring and dissenting).


\(^{200}\) 403 U.S. 29 (1971).

\(^{201}\) *Id.* at 63 n.1 (dissenting opinion).
D. Alternative 4 — Invoking Due Process

Further reflection suggested that perhaps the best way for the courts to get out of their obscenity muddle lay in the due process clauses of the fifth amendment as to federal action and of the fourteenth amendment as to state action. The courts should simply hold that consenting adults have the due process right to read, see, or hear whatever they like. Such a course would bypass the necessity of taking a position on the Court’s incorporation doctrines. Such a course would also mean that the Court could use the same yardstick for state as for federal action, for the benefit of those who regard that fact as an advantage.

The Court went part way in this direction in its many *Redrup* and comparable rulings. Justice Stewart’s concept of hard-core pornography, behind which the Court seemed to have united in its *Redrup* rulings, is not a big step from the position that consenting adults have the due process right to read, see, hear or obtain pornography. The Court went further in this direction when it held in *Stanley v. Georgia* that an adult had the right to the private possession of pornography. The Second Circuit applied *Stanley* in *United States v. Dellapia* to reach the conclusion that consenting adults had the right to use the mail for the transmission of pornography. A federal three-judge district court in Massachusetts in *Karalexis v. Byrne* applied *Stanley* in order to hold that paying adults had a right to see pornography. However, the Court itself did not go this far, vacating the decision and remanding the case to the state court for reconsideration.

To hold that consenting adults have a due process right to read, see, hear or obtain pornography still leaves ample room for the protection of privacy as well as the protection of youth. As the Commission on Obscenity and Pornography wrote in one paragraph of its *Report*:

> In general outline, the Commission recommends that federal, state, and local legislation should not seek to interfere with the right of adults who wish to do so to read, obtain, or view explicit sexual materials. On the other hand, we recommend legislative regulations upon the sale of sexual materials to young persons who do not have the consent of their parents, and we also recommend legislation to protect persons from having sexual...

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202. See Appendices II & III infra.
204. 433 F.2d 1252 (2d Cir. 1970).
OBSCENITY TERMS

materials thrust upon them without their consent through the mails or through open public display.\textsuperscript{206}

The Postal Reorganization Act,\textsuperscript{207} enacted in 1970, is in conformity with these recommendations, with a section prohibiting pandering advertisements, and two sections dealing with the mailing of sexually oriented advertisements.\textsuperscript{208} The predecessor of the section prohibiting pandering advertisements was adopted in December 1967, the year the Court decided \textit{Redrup}. Its constitutionality was sustained in \textit{Rowan v. Post Office Dep't}.\textsuperscript{209} A federal three-judge court in Brooklyn, in \textit{Pent-R-Books, Inc. v. United States Postal Service},\textsuperscript{210} sustained the validity of the two sections dealing with the mailing of sexually oriented advertisements.

On the state level, New York, following a recommendation of the federal Commission on Obscenity and Pornography, passed an act which went into effect September 1, 1971, that made the public display of offensive sexual material an offense.\textsuperscript{211}

As for the protection of youth, here we can go overboard. Those who favor obscenity legislation for children can piously point to a line of authorities going back more than 2000 years. They can begin their case with Socrates and Plato, who were for the expurgation of Homer and the other poets as well, and for the protection of youth.\textsuperscript{212} They can proceed, chronologically, to the words of Jesus, as related in three of the four Gospels, those of Matthew, Mark, and Luke.\textsuperscript{213} According to St. Matthew, Jesus called a little child to him, set him in the midst of his disciples, and said: "But whoso shall offend one of these little ones that believe in me, it were better for him that a millstone were hanged about his neck, and he were drowned in the depth of the sea."\textsuperscript{214}

From Jesus, they can go to that champion of liberty, John Stuart Mill, who specifically excluded children from the freedom which he advocated for adults. In 1859, Mill, in his \textit{On Liberty}, wrote:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties.

\begin{itemize}
\item \textsuperscript{206} Report of the Commission on Obscenity and Pornography 51 (1970).
\item \textsuperscript{207} 39 U.S.C. §§ 3001 et seq. (Supp. 1971).
\item \textsuperscript{210} 328 F. Supp. 297 (E.D.N.Y. 1971).
\item \textsuperscript{211} N.Y. Penal Law §§ 245.10, 245.11 (McKinney's Sess. Laws 1971). However, this act may be invalid for overbreadth. \textit{See, e.g.}, Winters v. New York, 333 U.S. 507 (1948), rev'd 294 N.Y. 545, 63 N.E.2d 98 (1945). \textit{But see} People v. Lou Bern Broadway, Inc., N.Y. L.J., Nov. 10, 1971, at 17, col. 8 (N.Y. City Crim. Ct.), There, Judge Irving Lang held the statute to be constitutional. The case is on appeal to the Appellate Term.
\item \textsuperscript{212} \textit{Republic}, bks. II & III (Rouse transl. 1906).
\item \textsuperscript{213} \textit{Matthew} 18:6; \textit{Mark} 9:42; \textit{Luke} 17:2 (King James).
\item \textsuperscript{214} \textit{Matthew} 18:6 (King James).
\end{itemize}
We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.\footnote{215. J.S. MILL, ON LIBERTY 15 (Oxford Univ. Press ed. 1868), quoted in People v. Bookcase, Inc., 14 N.Y.2d 409, 422–23, 201 N.E.2d 14, 22, 252 N.Y.S.2d 433, 444 (1964) (Burke, J., dissenting). There, the court invalidated a New York statutory provision which prohibited the sale to a minor of “any book . . . the cover or contents of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality.” N.Y. PENAL LAW § 484(h) (McKinney Supp. 1963). The book was John Cleland’s \textit{Fanny Hill}.}

Then they can come to some of the many modern experts, such as FBI Director J. Edgar Hoover, Dr. Frederic Wertham, Cardinal Spellman, and various congressional and legislative committees, subcommittees, and commissions.

One of the first intimations that the Court might adhere to these historical precedents occurred in \textit{Jacobellis v. Ohio},\footnote{216. 378 U.S. 184 (1964), rev’g 173 Ohio St. 22, 179 N.E.2d 777 (1962), aff’g 115 Ohio App. 226, 175 N.E.2d 123 (1961).} where Justice Brennan suggested legislative protection for children and Chief Justice Warren manifested an attitude consistent with such legislation. Justice Brennan wrote:

\begin{quote}
State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.\footnote{217. Id. at 195.}
\end{quote}

In his dissenting opinion, the Chief Justice wrote:

\begin{quote}
In my opinion, the use to which various materials are put — not just the words and pictures themselves — must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, “obscene” in the extreme when sold or displayed to children.\footnote{218. Id. at 201 (footnote omitted).}
\end{quote}

Earlier the Chief Justice had expressed this same idea in a different form in his concurring opinion in the companion cases of \textit{Roth v. United States} and \textit{Alberts v. California}.\footnote{219. 354 U.S. 476, 494 (1957), aff’g Roth v. United States, 237 F.2d 796 (2d Cir. 1956), and People v. Alberts, 138 Cal. App. 2d 909, 292 P.2d 90 (Super. Ct. App. 1955).}

\begin{quote}
It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant’s conduct, but the materials are thus
\end{quote}
placed in context from which they draw color and character. A wholly different result might be reached in a different setting.\(^220\)

This point was also raised in Chief Justice Warren's dissenting opinion in *Kingsley Books, Inc. v. Brown*,\(^221\) decided the same day as *Roth* and *Alberts*, where the Court upheld by a five-to-four vote a New York statute providing for civil non-jury injunctive proceedings against obscene publications:

> It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature. To do otherwise is to impose a prior restraint and hence to violate the Constitution.\(^222\)

Other courts have also recognized the special position of legislation aimed at protecting youth. For example, in *State v. Settle*,\(^223\) the Rhode Island supreme court upheld a statute which prohibited the sale of pornographic material to any person under eighteen years of age. The statute contained the words "or is principally made up of descriptions of illicit sex or sexual immorality," followed by the phrase "or which is obscene." The Rhode Island court, by construction, confined the statute before it to obscenity. It characterized the words preceding the phrase as "nothing more than examples of what is obscene,"\(^224\) and quoted the statute's preamble that the materials prescribed by it "are a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state."\(^225\)

The New York court of appeals, however, demonstrated once again that contradictory results are to be expected in the area of obscenity, where the blind appear to lead the blind. In *People v. Bookcase, Inc.*,\(^226\) that court had before it the question of validity of a statute which was substantially similar to Rhode Island's and con-

\(^{220}\) *Id.* at 495.


\(^{222}\) *Id.* at 446.

\(^{223}\) 90 R.I. 195, 156 A.2d 921 (1959). See also Matthews v. State, 99 So. 2d 568 (Fla. 1957), *cert. denied*, 356 U.S. 918 (1958), where the state of Florida, relying on a statute similar to the one struck down by the Supreme Court in *Butler v. Michigan*, 352 U.S. 380 (1957), when applied to adults, convicted a defendant of showing obscene pictures to a 12 year-old girl.

In *Attorney Gen. v. Memoirs*, 349 Mass. 69, 206 N.E.2d 403 (1965), *rev'd*, 383 U.S. 413 (1966), in which the Supreme Judicial Court of Massachusetts by a four-to-three vote held *Fanny Hill* to be obscene, Justice Cutter, although dissenting, nevertheless felt that "it could reasonably be found that distribution of the book to persons under the age of eighteen would be [a] violation of G.L. c.272, § 28, as tending to corrupt the morals of youth." *Id.* at 76, 206 N.E.2d at 408 (footnote omitted).

\(^{224}\) 90 R.I. at 199, 156 A.2d at 924.

\(^{225}\) *Id.* at 198, 156 A.2d at 924.

tained those portions quoted above. Nevertheless, the court did not construe the statute so as to limit its operation to obscenity; consequently, it was held void for vagueness.

The Model Penal Code, which the Justices of the Supreme Court have repeatedly cited and quoted with approval, has a comparable child protection provision. Section 251.4(1) of the 1962 Proposed Official Draft contains this sentence in its definition of obscenity:

Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.227

Section 251.4(4) adds that:

[E]vidence shall be admissible to show:

. . .

(b) what the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people.228

However, this general acceptance of the states' power to prohibit the distribution of obscene materials to minors does not mean the states are free to enact whatever legislation they deem proper. As shown by the Bookcase decision, obscenity legislation, even if applicable only to children, must be reasonably definite. This results from the general due process requirement imposed by the fifth and fourteenth amendments on all legislation, whether federal or state, civil or criminal. And, of course, the standards of certainty are more exacting for statutes with criminal sanctions than for those with civil ones only. As the Supreme Court announced through Chief Justice Waite many years ago in United States v. Reese:229 "Every man should be able to know with certainty when he is committing a crime."230 Or, as the Court ruled more recently in an opinion by Justice Reed in Winters v. New York:231 "The crime ‘must be defined with appropriate definiteness.’ . . . There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.’232

In addition, a criminal statute applicable to utterances must be particularly clear and precise. If it might encompass a protected form

228. Id. § 251.4(4).
229. 92 U.S. 214 (1875).
230. Id. at 220.
232. Id. at 515.
of expression as well as unprotected ones, it must fall. As Justice Reed stated further:

It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment.\(^2\)

In view of these strict requirements, it is not surprising that the Court has invalidated or cast doubt on much state and local legislation dealing with obscenity and related matters.\(^3\)

Adjudications involving the New York statutory provisions for the protection of youth furnish an interesting illustration. In *People v. Bookcase, Inc.*, involving the sale of a copy of *Fanny Hill* to a 16-year-old girl, the New York court of appeals by a four-to-three

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In an earlier decision, *Mutual Film Corp. v. Industrial Comm’n*, 236 U.S. 230 (1915), the Court in approving the same language which it later invalidated in *Superior Films, Inc. v. Department of Educ.*, expressed the view that motion pictures were not entitled to the same measure of protection as other forms of utterance. In the *Burstyn* case, the Court overruled its earlier position. This result was forecast in United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), where the Court said: “We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”


vote struck down section 484(h) of the New York Penal Law,\textsuperscript{236} which prohibited the sale to a minor under eighteen years of age of "any book . . . the cover or contents of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality," on the ground that the language was too vague for a criminal statute and thus violated the fourteenth amendment.\textsuperscript{237}

Subsequently, in \textit{People v. Kahan},\textsuperscript{238} the prosecution argued that there remained enough in old section 484(h) to support another test: that of "exploitation for commercial gain." Despite the fact that the court was unpersuaded by this argument and, by a four-to-three vote, abided by its decision in \textit{Bookcase}, it was pointed out in the per curiam opinion that:

The decision in \textit{People v. Bookcase, Inc.} implied that a constitutionally valid statute defining obscenity in its impact on the young, as distinguished from obscenity in respect of adults, might emerge under careful draftsmanship. We find defects in draftsmanship of section 484-h of the Penal Law which seem to be remediable both in respect of its substantive definitions and in respect of \textit{scienter} as to contents and the age of the customer.\textsuperscript{239}

In a concurring opinion Judge Fuld added:

While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults. And I have no doubt that such a law, punishing the sale or distribution to children of matter deemed objectionable, under criteria that would not be permissible if applied to adults, may be drafted so as not to violate the constitutional guarantees of freedom of expression.\textsuperscript{240}

\textsuperscript{236} N.Y. \textit{Penal Code} § 484(h) (McKinney 1965).
\textsuperscript{237} 14 \textit{N.Y.2d} at 411–12, 201 N.E.2d at 15, 252 N.Y.S.2d at 434–35; \textit{accord}, \textit{People v. Kaplan}, 252 N.Y.S.2d 927 (N.Y. County Crim. Ct. 1964). In \textit{State v. Pocras}, 166 Neb. 642, 90 N.W.2d 263 (1958), the Nebraska supreme court upset an obscenity ordinance of the city of Lincoln on the ground that the words "or dispose of in any manner" in the ordinance made it void for uncertainty. In \textit{State v. Christine}, 239 La. 259, 118 So. 2d 403 (1960), involving Lilly Christine, also know as the Cat Girl, the Louisiana supreme court invalidated as unconstitutionally indefinite a statute which proscribed as obscene the performance "in any public place or in any public manner, of any act of lewdness or indecency, grossly scandalous and tending to debauch the morals and manners of the people." In \textit{State v. Locks}, 97 Ariz. 148, 397 P.2d 949 (1964), the words "obscene or indecent" were held impermissibly vague in the absence of any statutory definition.
\textsuperscript{238} 15 \textit{N.Y.2d} 311, 206 N.E.2d 333, 258 N.Y.S.2d 391 (1965).
\textsuperscript{239} \textit{Id.} at 311–12, 206 N.E.2d at 334, 258 N.Y.S.2d at 392 (citations omitted).
\textsuperscript{240} \textit{Id.} at 312, 206 N.E.2d at 334–35, 258 N.Y.S.2d at 392.
OBSCENITY TERMS

The result was the passage in 1965 of two new statutes — sections 484(h) and 484(i). Section 484(h), drafted with the aid of the district attorney's office of New York County, made it an offense knowingly to sell to a minor under seventeen years of age material showing a "visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors," or containing "explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors." Material "harmful to minors" was defined to mean that material which:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.241

In approving the measure, Governor Nelson A. Rockefeller stated:

Recently, the courts have indicated that society's transcendent interest in protecting the welfare of children leaves some room for sustaining carefully drawn legislation. This bill, which appears to meet every constitutional test imposed by the courts, will be an invaluable weapon in the hands of parents and law enforcement officers alike in the fight for decency.242

Section 484(i) made it illegal to sell to a minor under eighteen years of age material which would appeal "to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes."243 Apparently for good measure, the Governor also signed this bill.

In Bookcase, Inc. v. Broderick,244 the New York court of appeals sustained the constitutionality of both new sections against a challenge that the "distinction on the basis of age is an unconstitutional infringement upon freedom of the press." Judge Keating wrote for the court:

The decisions of the Supreme Court of the United States and of this court have indicated that a concept of variable obscenity for the protection of children, in a properly drawn statute, is not

241. N.Y. PENAL CODE § 484(h) (McKinney 1965).
only within the power of our Legislature but is a desirable and even necessary provision. The statutes in question embody that concept and we uphold the validity of such a concept.\textsuperscript{245}

To substantiate the existence of this concept, Judge Keating quoted from the opinions of Chief Justice Warren and Justice Brennan in \textit{Jacobellis}. He further noted the legislative finding in section 484(e) of the New York Penal Law that obscene literature is "a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state."\textsuperscript{246}

In \textit{People v. Tannenbaum},\textsuperscript{247} the New York court, by a four-to-three vote, sustained a conviction under section 484(i) for the sale of an issue of the magazine \textit{Candid} to a 17-year-old youth. The dissenters — Judges Fuld, Van Voorhis, and Bergan — took the position that section 484(i) was unconstitutionally broad.\textsuperscript{248}

In both \textit{Broderick} and \textit{Tannenbaum}, the Supreme Court denied review. As usual in obscenity cases, the Justices expressed widely divergent views. In \textit{Broderick}, the Court dismissed the appeal for want of a properly presented federal question.\textsuperscript{249} Justices Harlan and Brennan were of the opinion that the appeal should be dismissed for want of a substantial federal question, while Justices Black and White felt that probable jurisdiction should be noted. In \textit{Tannenbaum}, the Court dismissed the appeal as moot,\textsuperscript{250} Chief Justice Warren and Justice Douglas dissenting separately, and Justice Brennan voting for reversal.

The New York statutes, and also a Dallas ordinance, came before the Supreme Court in three of the obscenity cases it decided at its 1967–1968 term. The cases were \textit{Ginsberg v. New York},\textsuperscript{251} \textit{Interstate Circuit, Inc. v. Dallas}, decided with \textit{United Artists Corp. v. Dallas},\textsuperscript{252} The appellant in the first case was Sam Ginsberg, to be


\textsuperscript{246} 18 N.Y.2d at 73, 218 N.E.2d at 670, 271 N.Y.S.2d at 950.


\textsuperscript{248} Id. at 275, 220 N.E.2d at 788, 274 N.Y.S.2d at 138.


\textsuperscript{250} People v. Tannebaum, 388 U.S. 439 (1967).

\textsuperscript{251} 390 U.S. 629 (1968); \textit{accord}, Universal Film Exchange, Inc. v. Chicago, 288 F. Supp. 286 (N.D. Ill. 1968) (upholding Chicago's new motion picture censorship ordinance requiring a permit if the audience was to include persons under 18 years of age).

distinguished from Allen Ginsberg, the American poet, and Ralph Ginzburg, the defendant in *Ginsburg v. United States*. Sam Ginsberg and his wife operated a luncheonette which offered magazines for sale. In order to make possible Ginsberg's prosecution, a mother had her 16-year-old son enter the luncheonette and buy two girlie magazines. One of them was *Sir*, which was held not obscene in a previous action, *Gent v. Arkansas*. Nevertheless, Ginsberg was prosecuted and convicted under section 484(h). The latter two cases were appeals from the same Texas state court, challenged the same Dallas ordinance, and concerned the same motion picture (*Viva Maria*).

In the words of Justice Harlan's concurring opinion in *Ginsberg* and his dissenting opinion in the other two cases, the issue before the Court was: """"[M]ay a State prevent the dissemination of obscene or other obnoxious material to juveniles upon standards less stringent than those which would govern its distribution to adults?""

The Court answered the question in the affirmative, but imposed the requirement that the legislation be sufficiently specific in scope. Using this criterion, the Court sustained the statute in *Ginsberg* and at the same time held the Dallas ordinance unconstitutionally vague.

In upholding the constitutionality of section 484(h), the Court adopted the concept of variable obscenity. To emphasize the widespread acceptance of this idea, Justice Brennan listed the youth-protective provisions contained in the obscenity laws of 35 other states. Justices Harlan and Stewart concurred separately in the decision, while Justice Douglas was joined by Justice Black in dissent. After indicating a willingness to reverse the judgment on the basis of *Redrup*, Justice Douglas restated his belief that there is no obscenity exception to the first amendment. Justice Fortas wrote a dissenting opinion which urged reversal on the basis of *Redrup* and *Ginsburg v. United States*.

Later in the 1967-1968 term, in *Rabeck v. New York*, the Court held that the standard in section 484(i) was unconstitutionally vague, even though the section had been repealed a short time before. Justice Douglas, with whom Justice Black concurred, would

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255. 390 U.S. at 704.
256. See note 245 and accompanying text supra.
261. On September 1, 1967, New York put into effect a revision of its Penal Law whereby section 484(h) became sections 235.20 to 235.22; section 484(i) was repealed. Ch. 791, § 33 (McKinney 1967).
have reversed for the reasons stated in his dissenting opinion in *Ginsberg*. Justice Harlan would have affirmed, relying on his dissenting opinion in *Interstate Circuit*. In addition, he considered it "a particularly fruitless judicial act to strike down on the score of vagueness a state statute which has already been repealed."

The other youth-protective provision considered by the Court, the Dallas movie censorship ordinance, required the classification of films as either "suitable" or "not suitable" for "young persons." In *Interstate Circuit*, the Supreme Court, while reiterating its position that a "State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults," nevertheless held the ordinance invalid because the standards governing the classification of unsuitability were too vague.

At the same time that *Interstate Circuit* was making its way from the Texas state courts to the Supreme Court, the same Dallas ordinance was the subject of litigation in the federal courts. In the first federal action, District Judge Hughes invalidated the ordinance on the ground that it failed to provide for prompt judicial review as required by *Freedman v. Maryland*. However, she harbored no doubts about the validity of such legislation, provided it was carefully drawn:

> The States' authority over children's activities is broader than over like activities of adults, and the fact that certain films are not obscene under the Supreme Court definition in *Roth* and affirmed in *Jacobellis* does not necessarily render them not obscene when viewed by an audience of young persons, as defined in . . . the Ordinance, so as to protect them under the First Amendment to the Federal Constitution.

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263. 391 U.S. at 463.
264. 390 U.S. at 690.
265. *Id.* at 689-90. In *Paramount Film Distrib. Corp. v. Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959), involving the motion picture *Desire Under the Elms*, the court held that a Chicago ordinance was hopelessly indefinite in its reference to any film that "tends to create a harmful impression on the minds of children," and unreasonably high in its age limit of 21. As to the latter provision, the court said:

> Under it, a twenty year old, married service man would be prevented from seeing a film that might not be suitable for a girl of twelve. As Justice Frankfurter remarked in a similar situation, "Surely, this is to burn the house to roast the pig." *172 F. Supp.* at 72.


268. 247 F. Supp. at 910 (footnotes omitted).
Acting on this judicial encouragement, Dallas passed a new movie censorship ordinance which Judge Hughes promptly sustained. She ruled that the provision, in conjunction with Texas procedure, was "sufficient to insure the exhibitor's right to a speedy determination of the issue and to guarantee due process of law."269 The Fifth Circuit affirmed; but the Supreme Court, in a per curiam decision, vacated and remanded for the Fifth Circuit's further consideration in the light of the Interstate Circuit decision.270

If the Court takes the course of sustaining legislation which, as construed, is limited to the protection of privacy or of youth, or both, but of holding that consenting adults have a due process right to read, see, hear or obtain pornography, there are still two cases that stand in the way: United States v. Thirty-Seven Photographs,271 where the Court held that an individual could not import pornography for use in a book for commercial distribution; and United States v. Reidel,272 where the Court held that an adult did not have the right to use the mail to send pornography to other adults who wanted it. The first of these two cases can be confined to its facts. As for the second, perhaps Justice Marshall's concurring opinion suggests a way out:

While the record does not reveal that any children actually received appellee's materials, I believe that distributors of purportedly obscene merchandise may be required to take more stringent steps to guard against possible receipt by minors.273

CONCLUSION

The courts should get out of the obscenity mess by holding that consenting adults have a due process right to read, see, hear or obtain whatever they like under the due process clauses of the fifth and fourteenth amendments. Obscenity legislation should be restricted in the manner that the Commission on Obscenity and Pornography recommended: to "regulations upon the sale of sexual materials to young persons who do not have the consent of their parents;" and "to protect persons from having sexual materials thrust upon them without their consent through the mails or through open public display."274

273. Id. at 361-62.
### APPENDIX I

#### Obscenity Cases on the Court's 1970-1971 Docket

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<tr>
<th>Item</th>
<th>Docket No.</th>
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* See p. 394 supra.
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<tr>
<td>41. The Name is Bonnie, a pictorial.</td>
<td>1014</td>
<td>Miller v. United States, petition for cert. filed to review 431 F.2d 655 (9th Cir. 1970).</td>
<td>Nov. 27, 1970 39 U.S.L.W. 3247</td>
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* See p. 394 supra.
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<td>56. Motion pictures.</td>
<td>1599</td>
<td>Pleasure House, Inc. v. Hicks, appeal docketed to review M.D. Cal. (Feb. 17, 1971) (unreported).</td>
<td>Apr. 19, 1971</td>
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*See p. 394 supra.*
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The Second Circuit in United States v. A Motion Picture Film Entitled "I Am Curious (Yellow)," 404 F.2d 196 (2d Cir. 1968), by a two to one vote held the named film (which was on the Court's 1970-1971 docket in no less than five cases) to be constitutionally protected.
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<td>6. Honey Bee, a motion picture which shows a young woman disrobing until she is wholly nude.</td>
<td>Ratner v. California, 388 U.S. 442 (1967) (per curiam) (granting certiorari and reversing Appellate Department of Supreme Court of California, County of San Mateo).</td>
<td>June 12, 1967</td>
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## APPENDIX II — (Continued)

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<td>Motion picture film which in the words of the trial court showed “two women, at least nude to the waist, going through actions that could lead to no conclusion in my opinion except that they were behaving like lesbians.”</td>
<td>I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968), rev'd per curiam 10 Ohio App. 2d 153, 226 N.E.2d 567 (1966).</td>
<td>Jan. 15, 1968</td>
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There the two different obscenity cases entitled Ratner v. California, one of which appears in Appendix II, the other in Appendix IV. Similarly, there are two different cases entitled Quantity of Copies of Books v. Kansas. One appears in Appendix II, the other is reported at 378 U.S. 205 (1964), rev’d 191 Kan. 13, 379 P.2d 254 (1963). Also note that there are two different obscenity cases entitled Childs v. Oregon, the first of which appears in Appendix II and the second in Appendix IV.

As is their wont in such cases, the Justices, even in the Court’s per curiam rulings, went every which way. Justice Harlan, who has accepted Justice Stewart’s view that the obscenity exception to the first amendment is confined to hard core pornography, nevertheless would have given the states somewhat more leeway in obscenity contests under the due process clause of the fourteenth amendment than he would have given the federal government under the first amendment. For example, in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), one of the three obscenity cases in which the Court heard argument during its 1967-68 term, Justice Harlan stated in his concurring opinion:

Reiterating the viewpoint that I have expressed in earlier opinions, I would limit federal control of obscene materials to those which all would recognize as what has been called “hard core pornography,” and would withhold the federal judicial hand from interfering with state determinations except in instances where the state action clearly appears to be but the product of prudish overzealousness.

Id. at 708. Because of this view, Justice Harlan dissented in 25 of the 29 cases — all but the four federal proceedings: Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); and Aday v. United States, 388 U.S. 447 (1967). In nearly all of the state cases, after Redrup, Gent and Austin, and in two of the four federal cases, Justice Harlan based his dissents, as well as his concurrences, on his separate opinion in Roth v. United States, 354 U.S. 476, 496 (1957), and his dissenting opinion in Memoirs v. Massachusetts, 383 U.S. 413, 455 (1966).


In two of the four federal cases, Justice Clark voted for affirmance; Justice Harlan for reversal. Books, Inc. v. United States, 388 U.S. 449 (1967); and \textit{Aday v. United States,} 388 U.S. 447 (1967). In \textit{Books,} Chief Justice Warren wanted to set the case for oral argument, and in \textit{Aday} he voted with Justice Brennan to vacate the judgment and remand the case in light of \textit{Fanny Hill.} In the other two, Potomac News Co. v. United States, 389 U.S. 47 (1967), and Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967), Justices Clark and Harlan both voted for reversal. Chief Justice Warren voted for affirmance in both cases, relying on \textit{Roth} to reach his conclusion in \textit{Central Magazine.}


It was in one of the four federal cases, that there was as wide a divergence of views between trial and reviewing courts as has probably ever occurred: a federal district judge imposed sentences aggregating 40 years in prison, and fines aggregating $69,000; the federal Supreme Court, without briefs and without argument, reversed per curiam. Aday v. United States, 388 U.S. 447 (1967). The Justices themselves voted four different ways. Five Justices — Black, Douglas, Stewart, White and Fortas — joined in the per curiam reversal, citing \textit{Redrup.} Justice Harlan concurred in the reversal on the basis of the reasoning in his opinions in \textit{Roth and Manual Enterprises, Inc. v. Day.} Chief Justice Warren and Justice Brennan voted to vacate the judgment and remand in the light of \textit{Fanny Hill.} Justice Clark voted to affirm.

In \textit{Childs v. Oregon,} 401 U.S. 1006 (1971), Chief Justice Burger and Justices Blackmun and Harlan were of the opinion that certiorari should be denied. In \textit{Bloss v. Michigan,} 402 U.S. 938 (1971), they would have "set [the] case for oral argument on [the] issue of [whether [the]] seizure of the film without a warrant violated applicable constitutional standards."

Although the Burger Court has continued to make \textit{Redrup} reversals, as evidenced by two recent rulings, Justice White dissented along with Chief Justice Burger and Justice Blackmun. Hartstein v. Missouri, 40 U.S.L.W. 3278 (U.S. Dec. 14, 1971); and Wiener v. California, 40 U.S.L.W. 3278 (U.S. Dec. 14, 1971). If the two new Justices, Powell and Rehnquist, share their view, perhaps the Court will adopt Justice Harlan's course and give to the states power over obscenity, limited only by the due process amendment, in contrast to the power of the federal government, which is severely limited by the sweeping prohibition of the first amendment.
### APPENDIX III

**OTHER RULINGS COMPARABLE TO REDRUP**

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APPENDIX IV
ITEMS HELD OBSCENE AT RECENT TERMS

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Anyone who tries to make rhyme or reason out of the Court's obscenity rulings can begin with this comment by Justice Harlan in his dissent in *Bloss v. Dykema*, 398 U.S. 278 (1970): "I am at a loss to understand how these materials can be deemed to qualify for Redrup treatment when only a short time ago the Court declined to accord that treatment to the materials involved in Spicer . . . ."

In most of the cases in this Appendix, Justice Douglas would have granted review. In many of them he would have gone further and reversed. In the case of the film *Un Chant d'Amour*, Justices Black, Stewart and Fortas voted with him for reversal. In the case of sculptor Marcel Fort, Justices Douglas and Black joined in Justice Stewart's dissenting opinion.

In four cases, Justice Douglas would have reversed on the basis of Redrup. Bray v. California, 390 U.S. 987 (1968); Ratner v. California, 390 U.S. 924 (1968); G.I. Distribs., Inc. v. New York, 389 U.S. 905 (1967); and Wenzler v. Pitchess, 388 U.S. 912 (1967). In the last case, Justices Black and Stewart joined him, and in two of the others, *Ratner v. Bray*, Justice Black alone joined. In addition, in two cases, where the Court granted review in a per curiam ruling, thereafter reversing and remanding the cases to the lower courts, Justices Black and Douglas joined in the decision for reversal on the basis of Redrup. Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968). In one of the three obscenity cases at which the Court heard argument at its 1967-1968 term, Justices Douglas and Black indicated a willingness to reverse on the basis of Redrup. Ginsberg v. New York, 390 U.S. 629 (1968). Thus, if one includes Redrup and the two cases decided with it, Justice Douglas at recent terms would have used Redrup to reverse a total of three dozen obscenity judgments; and Justice Black only one less. When one adds to this startling fact the consideration that these two Justices have consistently taken the position that there was no obscenity exception to the first amendment, one realizes the extent to which Redrup became the password for reversing findings of obscenity. Along with Redrup becoming the password for reversals in obscenity contests, the concept of hard core pornography became the test for judging obscenity.
## Appendix V

### Obscenity Cases on the Court’s Docket, October 1971

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<tr>
<th>Item</th>
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<th>1970-71 Term</th>
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APPENDIX V — (Continued)

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<td>27. Use of the term “sexual interest of such deviant groups” instead of “prurient interest” in jury instructions.</td>
<td>71-182</td>
<td>Ewing v. United States, 40 U.S.-L.W. 3079, petition for cert. filed to review 10th Cir. (July 15, 1971) (unreported).</td>
<td>Nov. 9, 1971</td>
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<td>54. No item mentioned.</td>
<td>71-984</td>
<td>Wasserman v. Municipal Court, 40 U.S.L.W. 3369, petition for cert. filed to review 9th Cir. (unreported).</td>
<td>Feb. 3, 1972</td>
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