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Obscenity - Constitutional Obscenity: The Supreme Court's Interpretation

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arbitration are valid and binding; the inference from the *Kirouac* case is that the *Boughton* and *Levy* decisions may not stand up, or if at all, be applied with care and a certain reluctance. Most courts follow the doctrine of refusing to decide questions prematurely or not raised by the facts in the particular case. The New Hampshire court's reluctance to decide the questions of the effect of the "no action without consent" exclusion and whether the company is bound by the insured's suit against the tortfeasor certainly indicates the court will carefully scrutinize the cases before either invalidating the exclusion or invoking the *res judicata* concept discussed above.

Time alone will not provide the answers to the questions which have plagued plaintiff and insurance lawyers in this field. The adoption by the Illinois legislature of the Uniform Arbitration Act[36] indicates that future decisions interpreting its effect on the *Cocalis* case and on cases like *Levy* will be forthcoming; its adoption in other states will result in similar changes in the law of the forums.

[36] ILL. REV. STAT. ch. 10, §§ 101–123 (1961).

OBSCENITY—CONSTITUTIONAL OBSCENITY: THE SUPREME COURT'S INTERPRETATION

The architects of our constitution realized that freedom of speech and of press are indispensable to the informed citizenry required to make democratic self-government work. Justice Frankfurter concisely reiterated this belief when he observed that: "Freedom of expression is the wellspring of our civilization."[1]

The United States Supreme Court has consistently recognized that the free speech guarantee is not limited to the expression of ideas that are conventional or shared by a majority,[2] but that the "test of its substance is the right to differ as to things that touch the heart of the existing order."[3] Ideas, no matter how "odious their expression may be to the prevailing climate of opinion,"[4] are likewise most rigidly protected by the First Amendment. These free speech guarantees are also safeguarded from invasion by state action by the due process clause of the Fourteenth Amendment.[5]

[1] Dennis v. United States, 341 U.S. 494, 550 (1951) (concurring opinion).

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

[3] Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

[4] Bridges v. California, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting).

[5] Butler v. Michigan, 352 U.S. 380 (1957); Near v. Minnesota 283 U.S. 697 (1931).

Although unconventional and odious ideas are stringently protected by the First Amendment, it is well understood that liberty of speech, and of the press, are not absolute at all times and under all circumstances.[6] Justice Holmes, in *Frohwerk v. United States*, declared that:

> the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not intended to give immunity for every possible use of language.[7]

Justice Cardozo, speaking more generally, observed that: "Complete freedom—unfettered and undirected—there never is."[8]

The limitations placed on the freedom of speech doctrine stem undoubtedly from a recognition that the right of free speech may be employed in such a manner as to gravely and adversely affect the interests of society, while adding nothing to the exposition of new ideas and new truths. As a result, the courts have recognized that the panoply of the free speech guarantee does not apply absolutely to libelous utterances,[9] fighting or insulting words,[10] or seditious language.[11]

The Supreme Court has also recognized that the right of free speech does not protect all forms of lewd and obscene expressions. The problem here is the same as in the above mentioned cases, that is, "the formulation of constitutionally allowable safeguards which society may take against evil without impinging upon the necessary dependence of a free society upon the fullest scope of free expression."[12] In the case of lewd, immoral, or obscene expressions, the question is, how base, degrading or shocking must these expressions be, to be deprived of the protection of the First Amendment.[13]

The complexity of this problem is best illustrated by the many concurring and dissenting opinions expressed in each case concerning obscene expressions. To understand what types of obscene expressions are not constitutionally protected, a careful examination of the opinions of all the Supreme Court Justices is necessary in order to determine their areas of agreement. For in obscenity cases, it is rare indeed, when a majority of the Court joins in the opinion of one justice. Therefore, to better

[6] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Whitney v. California, 274 U.S. 357 (1927); Schenck v. United States, 249 U.S. 47 (1919).

[7] 249 U.S. 204, 206 (1919).

[8] CARDOZO, GROWTH OF THE LAW 61 (1924).

[9] Beauharnais v. Illinois, 343 U.S. 250 (1952).

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

[11] Yates v. United States, 354 U.S. 298 (1957).

[12] Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 694 (1959).

[13] Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?* 7 UTAH L. REV. 289 (1961).

understand the Supreme Court's position on obscene expressions, we look to these opinions for areas of agreement, but in the final analysis, we look "to what the Court has *done*, and not what it has *said*."[14]

The first case to contribute to the present constitutional status of obscenity was *Butler v. Michigan*.[15] In that case a Michigan statute[16] made it a misdemeanor to sell or make available to the general reading public any book containing obscene language "tending to the corruption of the morals of youth." The Supreme Court reversed such a conviction, and in a unanimous opinion written by Justice Frankfurter held that so far as distribution of materials to the general public is concerned, the impact on the young is irrelevant. The impact on the average adult was declared to be the constitutionally required test in determining the "obscenity" of materials distributed *generally*.

The Court, by so ruling, recognized that different standards exist as to what materials can constitutionally be withheld from the general public as opposed to those which can be withheld from children alone.[17] The Court did not attempt to define the standard for either class. All it said was that a standard, which is based on the sensitivity of children, is unconstitutional when used to censor publications generally distributed, as the breadth of allowable reading material for adults is much broader than for children.

Four months later the Supreme Court set out the standard to be used in determining whether a publication of general circulation is obscene. The decision disposed of two separate cases at one time. *Roth v. United States*,[18] the first of these two, involved a New York defendant who was convicted of violating the federal obscenity statute[19] which prohibited

[14] Lockhart & McClure, *supra* note 13, at 292.

[15] 352 U.S. 380 (1957).

[16] MICHIGAN PENAL CODE ch. 750, § 343 (1943).

[17] In Paramount Film Distributing Corp. v. City of Chicago, 172 F. Supp. 69, (N.D. Ill. 1959), Chief Judge Sullivan, citing *Butler*, held that an ordinance authorizing a limited exhibition of a motion picture to persons over 21 years of age was invalid.

[18] 354 U.S. 476 (1957).

[19] 18 U.S.C. § 1461 (1948). Its pertinent provisions provide: "Every obscene, lewd, lascivious, or filthy book, pamphlet, paper, letter, writing, print, or other publication of an indecent character; and— . . . .
Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . . whether sealed or unsealed . . .
Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

the mailing of obscene material. The other case, *Alberts v. California*,[20] involved a Los Angeles bookseller who was convicted of violating the obscenity provisions of the California Penal Code.[21] The Court[22] considered the dispositive question to be "whether obscenity is utterance within the area of protected speech and press."[23] The disposition of the question began by recognizing that the First Amendment was not intended to protect every utterance. Continuing, the Court stated that:

> All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . We hold that obscenity is not within the area of constitutionally protected speech or press.[24]

The Court concluded that since "obscenity" was not within the area of constitutionally protected speech, it was not necessary to consider if such utterances created a "clear and present danger."

The Court then set out the now famous test of obscenity:

> Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[25]

The Court concluded that since "obscenity" was not within the area of such a standard for judging obscenity, provided reasonable, ascertainable standards of guilt and, therefore, were not so vague as to violate the due process clause of the Constitution.

Chief Justice Warren, in a concurring opinion, would limit the decision to the facts before the Court. It is interesting to note two of his additional observations. First, that the present laws depend largely upon the effect that the material may have upon the audience who receives them.[26] This issue, *i.e.*, whether the test of obscenity varies with the nature of its primary audience, is one which the Court touches upon a number of times, recognizes a distinction, *but never attempts to define concretely*.[27] Secondly, he recognizes that the central issue is the conduct of the de-

[20] 354 U.S. 476 (1957).

[21] CAL. PENAL CODE ANN. § 311 (West 1955).

[22] Note: Mr. Justice Brennan wrote the majority opinion in which he was joined by four other justices.

[23] 354 U.S. 476, 481 (1957).

[24] *Id.* at 484–85.

[25] *Id.* at 489.

[26] Lockhart & McClure, *supra* note 13. These recognized authorities maintain that censorship of material should depend upon the manner in which it is marketed and the primary audience to which it is sold.

[27] Manual Enterprises v. Day, 370 U.S. 478 (1962); Butler v. Michigan, 352 U.S. 380 (1957).

fendant, not the obscenity of the book, thereby prophesying the importance of the personal element of *scienter* in such criminal prosecutions.

Justice Harlan, in a separate opinion, observes that the obscenity of a particular publication "involves not really an issue of fact but a question of *constitutional judgment* of the most sensitive and delicate kind."[28] Evidently, Justice Harlan considers the issue of "obscenity" as a mixed question of law and fact, a belief in which he has been later joined by a number of Justices.[29]

Justice Douglas, joined by Justice Black, dissents because he believes that "freedom of expression can be suppressed if . . . it is so clearly brigaded with illegal action as to be an inseparable part of it,"[30] and for the further reason that any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment.

Roth teaches us that a "clear and present danger" is not necessary where obscene publications have no social utility. Such publications, if distributed generally, may be constitutionally banned as "obscene," if they meet the following standards: 1) The dominant theme of the material considered as a whole must be obscene; it is not enough if it is obscene in parts. 2) Its obscenity must be judged by its prurient appeal to the average normal adult, and not by its prurient appeal to the susceptible or immature. 3) The obscenity of the material must be judged in light of contemporary community standards. 4) And lastly, to be obscene it must appeal to "prurient interests." This last standard tells us very little, as the words "obscene" and "prurient" are practically synonymous.

Knowing the qualities which make publications constitutionally obscene, we are still confronted with the question as to what in fact constitutes such obscenity. When it is recognized that the Court considered "obscenity" as material utterly without social utility, having no literary or expositive value, and when it is remembered that the Solicitor General's case in *Roth* was supported by a carton of blatantly shocking material, it becomes apparent that the Court's concept of "obscenity" is probably centered on hard-core pornography. This view is supported by three *per curiam* decisions in the term immediately following *Roth* wherein the Court unanimously reversed without opinion three United States Court of Appeals decisions,[31] that had upheld censorship of material found "ob-

[28] *Id.* at 498.

[29] Justices Whittaker and Frankfurter joined Justice Harlan in such an opinion in Kingsley Pictures Corp. v. Regents, 360 U.S. (1959), as did Justice Stewart in Manual Enterprises v. Day, 370 U.S. 478 (1962).

[30] 354 U.S. 476, 514 (1957).

[31] Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc. v. Olesen, 355 U.S. 371 (1958); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957).

scene" by the trial court. In reversing these cases, the Court cited *Roth* for authority, making it reasonably clear that the material censored was not "obscene" under the constitutional requirements.

A look at the record in these cases will shed some light on the kind of material the Court does *not* consider constitutionally obscene, and thereby helps us to understand what is "obscene."

The case of *Times Film Corp. v. City of Chicago*[32] involved a French motion picture, "The Game of Love," which depicts the illicit sexual relations of a sixteen-year-old boy, both with an older woman and a girl of his own age. In one scene in the movie the boy is shown completely nude on a bathing beach among a group of younger girls after a boating accident. The Supreme Court reversed the holding of the Court of Appeals,[33] which had concluded that the film was obscene and immoral.

The second decision, *One, Inc. v. Olesen*,[34] involved a monthly magazine written to appeal to the tastes and interests of homosexuals called *One—The Homosexual Magazine*. The Court of Appeals[35] found the magazine to be cheap pornography calculated to promote lesbianism, and therefore non-mailable. The Supreme Court reversed the decision.

The third decision, *Sunshine Book Co. v. Summerfield*,[36] concerned a nudist magazine, *Sunshine and Health*, that was found obscene because of photographs showing quite distinctly male and female genital organs. The holding of the Court of Appeals[37] that such material was non-mailable was reversed.

It appears evident from these decisions that constitutional obscenity is limited to the socially worthless, *i.e.*, something akin to hard-core pornography.

The New York Court of Appeals, evidently aware that constitutional obscenity required something akin to hard-core pornography, rejected any notion that the film "Lady Chatterley's Lover" was obscene, but upheld the Regent's denial of a license because the picture as a whole "alluringly portrays adultery as proper behavior."[38] The Supreme Court in a unanimous decision[39] reversed the New York decision. Six different opinions were written as to why the case should be reversed.

[32] 355 U.S. 35 (1957).

[33] Times Film Corp. v. City of Chicago, 244 F. 2d 432 (7th Cir. 1957).

[34] 355 U.S. 371 (1958).

[35] One, Inc. v. Olesen 477, 241 F. 2d 772 (9th Cir. 1957).

[36] 355 U.S. 372 (1957).

[37] Sunshine Book Co. v. Summerfield, 249 F. 2d 114 (D.C. Cir. 1957).

[38] Matter of Kingsley Corp. v. Regents, 4 N.Y. 2d 349, 151 N.E. 2d 197, 175 N.Y.S. 2d 39 (1958).

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

Justice Stewart delivered the opinion of the Court. The opinion stated that the First Amendment's "guarantee is not confined to the expresssion of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."[40] The Court continued that advocacy of conduct proscribed by law is not a justification for denying free speech where the advocacy falls short of incitement.

Although "obscenity" as defined in *Roth* is censorable because it has no social utility, the Court finds that "thematic obscenity," *i.e.*, the advocacy of improper sexual ethics is only censorable when it incites such improper conduct. Therefore, it appears that a film may advocate any theme and still be considered of some social value,[41] as long as the film itself is not pornographic. Lacking a pornographic character, a "clear and present danger" must exist before it is censorable.

Of interest in the concurring opinions is the side debate which takes place between Justices Black and Harlan. Justice Black maintains that the immorality of a picture should not be left to the subjective standards of the members of the Court. Justice Harlan, joined by Justices Whittaker and Frankfurter, meets the issue squarely:

> It is sometimes said that this Court should shun considering the particularities of individual cases in this difficult field lest the Court become a final "board of censorship." But I cannot understand why it should be thought that the process of constitutional judgment in this realm somehow stands apart from that involved in other fields, particularly those presenting questions of due process. Nor can I see, short of holding that all state "censorship" laws are constitutionally impermissible, a course from which the Court is carefully abstaining, how the Court can hope ultimately to spare itself the necessity for individualized adjudication. In the very nature of things the problems in this area are ones of individual cases . . . for a "censorship" statute can hardly be contrived that would in effect be self-executing.[42]

In *Smith v. California*[43] the appellant was convicted of violating a Los Angeles ordinance which was construed by the state courts as making him absolutely liable criminally for the mere possession in his store of a book later judicially determined to be "obscene"—even though he had no

[40] *Id.* at 689.

[41] Kalven, *The Metaphysics of Obscenity*, 1960 SUPREME COURT L. REV. 1. The author notes that Aristotle would disagree: "Not every action or feeling however admits of the observance of a due mean. Indeed the very names of some essentially denote evil. . . . All these and similar actions and feelings are blamed as being bad in themselves. . . . It is impossible therefore ever to go right in regard to them—one must always be wrong; nor does right or wrong in their case depend on the circumstances, for instance, whether one commits adultery with the right woman at the right time, and in the right manner. . . . [NICOMACHEAN ETHICS II, vi, 18–19 (Loeb Classic Library ed. 1926)].

[42] 360 U.S. 684, 708 (1959).

[43] 361 U.S. 147 (1959).

knowledge as to the contents of the book. The conviction was unanimously reversed, although five Justices found it necessary to write an opinion.

Justice Brennan, speaking for the Court, said that although it is competent for states to create strict criminal liability statutes, it is but a limited right.[44] Notwithstanding that "obscenity" is not constitutionally protected, it would be violative of the guarantees of free speech to hold a bookseller criminally liable, even though he had not the slightest notice of the character of the books he sold. For if such convictions were allowed, non-obscene books would also be censored as the bookseller would tend to restrict the books he sells to those he has inspected. The Court did not pass on what sort of mental element is required for a constitutionally permissible prosecution. All it said was that to require no element of *scienter* is to unconstitutionally restrict free speech.

It must be remembered that here the Court speaks of the requirement of *scienter* in a case involving a criminal prosecution and says nothing about cases which involve administrative censorship.

Justices Frankfurter and Harlan, in separate concurring opinions, would reverse the conviction because of the state court's refusal to admit expert testimony as to the prevailing literary and moral community standards. To do so, they continued, would be violative of due process because such evidence goes to the very essence of the defense, as the obscenity of any material is to be judged by contemporary community standards. The effect of such a holding is to reject the concept that contemporary community standards are to be determined solely from the personal experience of the jurors. The Justices insist that expert testimony is both relevant and important, and that the rejection of such evidence amounts to a violation of due process.

The need for such evidence is readily apparent when we recognize that: 1) contemporary community standards are one of the criteria used to determine if the material is obscene, and 2) in all the cases to date, the Court itself has made the constitutional judgment as to whether or not a particular matter was "obscene." Therefore, if the Court is to continue to use this criterion it should have some basis upon which to make its judgment.

In 1961, in *Times Film Corp. v. Chicago*,[45] the Supreme Court in a five to four decision held that a provision requiring the submission of motion pictures for examination or censorship prior to their public exhibition is not void on its face as violative of the First and Fourteenth Amendments.

[44] For an illuminating analysis of strict criminal liability statutes, see Note, 11 DE PAUL L. REV. 329 (1962).

[45] 365 U.S. 43 (1961).

The Court held that the constitutional protection of freedom of speech and press does not include the complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. The Court rejected the petitioner's argument that regardless of the capacity for, or extent of, such an evil, previous restraint cannot be justified.

This decision acts to restrict even further the First Amendment guarantee of expression. For not only does it reaffirm that "obscenity" is not entitled to free speech protection, but it declares that such expression may be suppressed prior to publication.

Accepting the Supreme Court's position that "obscenity" is beyond the pale of constitutional protection as it is patently injurious and without social utility, it, therefore, seems perfectly consistent that society should be able to prevent the dissemination of such patently injurious material from the very beginning. The truth of the above statement would not be subject to attack if it were possible to guarantee that censors are able to accurately distinguish between the "obscene" and the non-obscene. But this is not the case. From the nebulousness of the definition of "obscenity," it is obvious that many times the non-obscene will be censored along with the "obscene." The increased restriction on free speech becomes apparent when it is realized that the publisher of the non-obscene must prevail over the adverse decision of the censor, "who like any agency and its *expertise*, is given a presumption of being correct."[46] Such advantage of the censor is lost or at least diminished when the publication is generally distributed.

The problem resolves itself to choosing between: 1) restricting free expression by placing an additional burden on the non-obscene publisher, *i.e.*, the burden of overcoming the presumption in favor of the censor, or 2) allowing "obscene" literature to corrupt society, for at least a short time, before banning it. The Supreme Court chose the first alternative, at least in the case of motion pictures.

Shortly thereafter in *Marcus v. Search Warrant*[47] the Court appears to take a contradictory position. There, upon a complaint of a police officer, and after an *ex parte* hearing, police officers were granted search warrants authorizing them to seize all "obscene" material. Justice Brennan speaking for the Court said:

> [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedure it pleases for dealing with obscenity as here involved *without regard to the possible consequences for constitutionally protected speech.*
>
> We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled.[48]

[46] *Id.* at 83, (Douglas, J., dissenting).

[47] 367 U.S. 717 (1961).

[48] *Id.* at 731 (Emphasis added).

Therefore, the Court in the *Times* case sufficiently trusts the censor's ability to distinguish between the "obscene" and the non-obscene to allow a "prior restraint," but does not trust the police officer's judgment to likewise distinguish when the magazines are already on the newsstands.

In the most recent "obscenity" case, *Manual Enterprises v. Day*,[49] the Judicial Officer of the Post Office Department, after an administrative hearing, issued a ruling barring a shipment of petitioner's magazines from the mails under 18 U.S.C. § 1461, on the grounds that: 1) they were themselves "obscene," and 2) they gave information as to where "obscene" matter could be obtained. The Judicial Officer found that the magazines 1) were composed primarily, if not exclusively, for homosexuals and had no literary, scientific or other merit; 2) would appeal to the "prurient interests" of such sexual deviates but would not have to be of interest to sexually normal individuals; 3) are read almost exclusively by homosexuals and possibly a few adolescent males; and 4) would not ordinarily be bought by normal adult males.

Justice Harlan announced the judgment of the Court and, in an opinion in which Justice Stewart joined, he proceeded to "clarify" the *Roth* definition of obscenity to a point where it now corresponds almost identically with the definition proposed by the American Law Institute's Model Penal Code.[50] The opinion reads:

> The Court of Appeals was mistaken in considering that *Roth* made "prurient interest" appeal the sole test of obscenity. . . . Obscenity under the federal statute . . . requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal.[51]

Material is considered to be "patently offensive" when it goes substantially beyond the customary limits of candor in describing or representing material appealing to "prurient interests." It must affront the current community standards of decency. It seems that the "patent offensiveness" of any material is to be judged by the average adult, regardless of whom its primary audience may be. The opinion goes on to reverse the Court of Appeals[52] because it finds lacking in the magazines such an element of "patent offensiveness."

It appears that for material to be presently considered "obscene" it is not enough that it be socially worthless, but it must also shock the aver-

[49] 370 U.S. 478 (1962).

[50] A.L.I., MODEL PENAL CODE, Proposed Official Draft (May 4, 1962), § 251.4 (1): "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . and in addition it goes substantially beyond customary limits of candor in describing or representing such matters."

[51] 370 U.S. 478, 486 (1962).

[52] Manual Enterprises, Inc. v. Day, 289 F. 2d 455 (D.C. Cir. 1961).

age adult in the community. Again the definition indicates that "obscenity" is limited to hard-core pornography.

The Court, by dividing the definition of "obscenity" into two distinct elements, and then finding that the magazines lack the element of "patent offensiveness," avoids considering the question of the proper audience by which their prurient appeal should be judged. The Court of Appeals considered this question, and held that the proper test as to the magazines' prurient appeal was "the reaction of the average member of the class for which the magazines were intended, homosexuals."[53]

It is evident from this decision that no matter what the proper audience is, the social worthlessness of an expression, in and of itself, is not sufficient to ban such an expression. For although Justice Harlan does not consider publications catering to the "prurient interests" of homosexuals as "patently offensive" (one wonders what will constitute "patent offensiveness"), it cannot be doubted that such publications are of no social value. As homosexuality is contra to the interests of any society, magazines which devote themselves solely to promoting homosexuality must be socially worthless.

Continuing, Justice Harlan considered the question of the relevant community standard:

> 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*.[54]

The logic of this opinion may be subject to attack, but certainly not its practicality. To hold otherwise would require the Court to consider the contemporary community standard of each community in which the publication was distributed, creating the possibility that it might be "obscene" in state A, but not in state B.

And finally, Justice Harlan would reverse because he deems that *scienter* is necessary to hold a publisher *civilly* responsible.

Justice Brennan, joined by Justices Warren and Douglas, would reverse the judgment because legislative history indicates that § 1461 is exclusively penal,[55] and it does not authorize the Post Office to act administratively as a censor.

Justice Clark, as the lone dissenter, would affirm the judgment on the sole ground that the magazines contain information as to where "obscene" material can be obtained and thus are non-mailable.

He takes issue with the contention that §1461 is exclusively penal, citing contrary legislative history and pointing out that § 1461 explicitly pro-

[53] *Id.* at 456.

[54] 370 U.S. 478, 488 (1962) (Emphasis added).

[55] 18 U.S.C. § 1461 (1948).

vides that such material "is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."[56]

Justice Clark also maintains that the element of *scienter* on the part of the sender is irrelevant in determining the material's mailability.

> Congress could not have made it more clear that the sender's knowledge of the material to be mailed did not determine its mailability but only his responsibility for mailing it. Nor is there any reason why Congress—in a civil action—should have wanted it any other way. The sender's knowledge of the matter sought to be mailed is immaterial to the harm caused to the public by its dissemination.[57]

As was stated earlier, in "obscenity" cases the opinions are many and varied, but although the law is not clear, a certain number of principles have come forward to guide our future conduct.

As a general rule, publications in a community may be censored because they are "obscene" or because they present a "clear and present danger" of unlawful conduct.

If the publication is "obscene," nothing else need be shown, as the publication's very nature is sufficient to justify censorship. A criminal sanction however will not attach unless the publisher's criminal intent is proven. The Court has yet to establish the kind of mental element necessary.

It is also clear, from past practice and from the opinions of all but one Justice, that the question of "obscenity" is a matter for "constitutional judgment." To date, this "constitutional judgment" has set out the following requirements, before material will be considered "obscene": 1) The "obscenity" of publications distributed *generally* must be judged by its appeal to the average normal adult. The Court has avoided considering the applicable standard when the material is distributed to a special group. 2) The dominant theme of the material considered as a whole must be obscene; it is not enough if it is obscene in parts. 3) The "obscenity" of the material must be judged in the light of contemporary community standards. The size of the community will probably correspond to the jurisdiction within which the statute is effective, and expert testimony will probably be considered relevant and competent in determining this standard. 4) The material to be "obscene" must appeal to "prurient interests" and be "patently offensive," i.e., it must be socially worthless and grossly shocking to the average adult.

Considering the various standards and the Court's application of these standards, it appears that the limitation on the First Amendment applies

[56] 370 U.S. 478, 521 (1962).

[57] *Id.* at 525.