NOTES

NON-CRIMINAL OBSCENITY REGULATION AND FREEDOM OF EXPRESSION

INTRODUCTION

The dissemination of "obscene" matter and attempts by public and non-public bodies to restrict its circulation constitute a serious social problem.[1] Substantial effort has been expended in attempts to mobilize public opinion,[2] secure legislation[3] and enforce various regulatory schemes. Litigation volume alone indicates considerable social concern. During the fourteen years since the United States Supreme Court split four to four affirming[4] the censorship of Edmund Wilson's *Memoirs of Hecate County*,[5] cases involving obscenity issues have entertained the attention of state and lower federal courts on countless occasions. In the Supreme Court itself, after a history of relative inattention, full review has been granted in at least seven instances.[6] This volume of legislative and judicial concern indicates the existence of intense and successful public pressure. It is also indicative of strict enforcement of constitutional standards by a court sensitive to assaults on free speech guarantees.

Any extensive consideration of the historical context of the problem is beyond the scope of this note.[7] Also not treated in detail is that extensive body of lower federal and state court decisions which reflect

1. See, *e.g.*, SUBCOMM. ON POSTAL OPERATIONS OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 86TH CONG., 2d SESS., REPORT ON OBSCENE MATTER SENT THROUGH THE MAIL (Comm. Print 1960) [hereinafter cited as 1960 SUBCOMMITTEE REPORT]; *Hearings on H.R. 11454 Before a Subcommittee on Special Education of the House Committee on Education and Labor*, 86th Cong., 2d Sess. (1960) [hereinafter cited as *H.R. 11454 Hearings*]; *Obscenity and the Arts*, 20 LAW & CONTEMP. PROB. 533, 621 (1955); JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND THE AMERICAN BAR ASS'N, DRAFTING AN OBSCENITY STATUTE (1961).

2. *E.g.*, *Obscenity and the Arts*, *supra* note 1.

3. 1960 SUBCOMMITTEE REPORT; *H.R. 11454 Hearings*.

4. Doubleday & Co., Inc. v. New York, 335 U.S. 848 (1948).

A specific example of legislative activity is that of Florida where the obscenity law has been amended or rewritten in 1955, 1957, 1959, 1961.

5. Doubleday & Co. Inc., v. New York, 272 App. Div. 799, 71 N.Y.S.2d 736, aff'd, 297 N.Y. 687, 77 N.E.2d 6 (1947).

6. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Marcus v. Search Warrant, 367 U.S. 717 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Smith v. California, 361 U.S. 147 (1959); Roth v. United States, 354 U.S. 476 (1957); Kingsley Books v. Brown, 354 U.S. 436 (1957); Butler v. Michigan, 352 U.S. 380 (1957).

7. There are several illuminating treatments of the problem in its historical context. The symposium presented in *Obscenity and the Arts*, *supra* note 1, provides brief treatment in connection with the various topics. PAUL & SCHWARTZ, FEDERAL CENSORSHIP, OBSCENITY IN THE MAIL (1961) is quite detailed and discusses the history of postal censorship. See also, CHAFFEE, FREE SPEECH IN THE UNITED STATES (1941) for a broader treatment, discussing obscenity as one of many subjects of speech restriction.

the momentary flux of particular Supreme Court pronouncements and which treat the determination of what is and what is not obscene. Rather, attention is focused on non-criminal techniques of obscenity regulation, particularly the search for and seizure of suspected material. Accordingly, the Supreme Court's extensive consideration of this problem in *Marcus v. Search Warrant*[8] is emphasized. Proper perspective dictates that this issue be introduced and considered with the pressures for obscenity regulation, the test for obscenity and the various alternative enforcement techniques. Assumptions embodied in arguments advanced for regulation have not been without effect on the legislative tests for obscenity. In turn, the conceptual vitality of these tests has been determinative of the constitutional acceptability of enforcement schemes.

I. THE OBSCENITY DEBATE, CIRCA 1962

The most important element in the polemics favoring regulation is the assertion of a causal relation between obscene material and social misbehavior.[9] Characterization of pornography as a large lucrative business[10] serves but to gloss this assertion with a sense of urgency.

The existence of this causal relation has received largely uncritical acceptance.[11] Rising juvenile crime rates have brought efforts at explanation which in many instances have turned to the alleged effects of "obscene" literature.[12] A large number of police officials, juvenile court officers, religious leaders and representatives of groups working

8. 367 U.S. 717 (1961).

9. *E.g.*, SUBCOMM. ON POSTAL OPERATIONS OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 86TH CONG., 1ST SESS., REPORT ON OBSCENE MATTER SENT THROUGH THE MAIL 15-19 (Comm. Print 1959) [hereinafter cited as 1959 SUBCOMMITTEE REPORT]. This contention is subject to the qualification that its base is surely highly speculative, particularly since the classification of much material within the category would excite dispute.

10. *E.g.*, 1960 SUBCOMMITTEE REPORT 2, 5, 6, 8, 24, 25, 39, 44. Any classification of material on which such contentions are based will normally reflect only value predilections which might not receive very wide acceptance except in the instance of the rankest material. Indeed, at least some advocates of censorship profess greater fear of the dehabilitating effect of "borderline" material (often not susceptible to any constitutional regulation under present standards). *Hearing on Circulation of Obscene and Pornographic Material Before a Subcommittee of the House Committee on Post Office and Civil Service*, 86th Cong., 2d Sess., 10, 12 (1960) [hereinafter cited as *1960 Hearings*.]

11. Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 6-13 (1960); Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 304-18 (1954); *1960 Hearings* 1-27.

12. *E.g.*, *1960 Hearings* 16; *H.R. 11454 Hearings* 30-31.

with various child welfare agencies believe that the relationship between juvenile crime, particularly sex crime, and salacious material is not only correlative but causal.[13] One result has been the formation of pressure groups which have achieved a large measure of success in popularizing arguments for obscenity regulation.[14]

Anti-censorship interests,[15] while unable to affect significantly the popularization of their opponents' assumptions, have introduced material which seriously questions the scientific bases for their acceptance. A notable study done for the American Book Publisher's Council in 1953 by Marie Jahoda and the staff of the Research Center for Human Relations of New York University, reached an admittedly tentative conclusion that any causal role obscene literature might play is at least limited.[16] Moreover, the report noted the lack of direct research of the problem[17] and suggested the efficacy of a broad empirical study.[18]

A more empirical project, conducted by Sheldon and Elenore Glueck of Harvard, studied over 90 factors in juvenile delinquency. It failed even to include the reading habits of the subjects among the factors considered.[19] The Gluecks found that the delinquents' reading achievement was low and, indeed, that non-active pursuits, including reading, were preferred by a low percentage of the control group (7.8%) and an even lower percentage of the delinquent sample (2.7%). Their conclusion was that the evidence suggested, if anything, that the

13. See generally *ibid.*; *Obscenity and the Arts, supra* note 1, at 533, 621.

14. Authorities cited note 11 *supra.*

15. The well published fear of the opponent of censorship is often couched in terms of his apprehension that regulation of material without "redeeming social value" (definitional criterion applied to obscenity in Roth v. United States, 354 U.S. 476, 484 (1957)) may indeed lead to regulation of all literature for a variety of purposes. In addition, he fears that the classification system itself will reflect the norms of those who favor massive restriction.

16. *H.R. 11454 Hearings* 96, 143. The report was entitled "The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate," by Marie Jahoda and the staff of the Research Center for Human Relations, New York University [hereinafter cited as Jahoda]. The report fails to treat the literature and picture problems differently.

17. *Id.* at 92.

18. *Id.* at 141. A research program was suggested, which, it was thought might bear fruit. *Id.* at 145-53:

> A. Research proposals relevant to clarifying the assumptions made by different individuals and groups as to what constitutes obscene or harmful literature. . . .
>
> B. Research proposals relevant to establishing the place of literature among the antecedents of undesirable human conduct. . . .
>
> C. Research proposals relevant to establishing the impact of literature on the formation of values, attitudes, expectations and opinions . . . .

19. *Obscenity and the Arts, supra* note 1, at 596.

delinquent tends to reject reading, as he does all passive activity, preferring more active pursuits.[20] The Jahoda group reached a similar conclusion: "The enjoyment of literature and of other vicarious experiences presupposes a well-developed capacity for the delay of gratification . . . the very quality that is lacking in most character neuroses."[21]

Professor of Psychology at Washington University, Dr. Saul Rosenzweig, when interviewed by the writer, segregated those who maintain that salacious material has an effect on social behavior into two camps. Some argue that exposure to repeated literary invitations to vicarious anti-social or deviant sexual expression triggers acts paralleling those which the characters perform in the particular material. The other group argues in Freudian terms that man has certain libidinal instincts, and that social restrictions serve as a dam behind which they lie subject to violent eruption. Vicarious experience through reading is seen as a possible release mechanism, channeling hostililties away from avenues of anti-social behavior.[22]

In contrast to the doubt expressed by social scientists, law enforcement and church groups have often asserted the causal relationship with firmness.[23] J. Edgar Hoover said, for example, before the House Postal Committee:

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20. Jahoda 117-18.

21. *Id.* at 120.

22. Interview with Dr. Saul Rosenzweig, Professor of Psychology, Washington University, in St. Louis, Feb., 1962.

23. *E.g.*, 1960 SUBCOMMITTEE REPORT 15-19; Note, 34 MARQ. L. REV. 301 (1951); *1960* Hearings.

Mr. Charles H. Keating, Jr., Chief Counsel for the Citizens for Decent Literature said:

> These persons will help "censorship," "art," "borderline," and other undefined words and phrases to disguise their wares of sadism, masochism, narcissism, cannibalism, cunnilingualism, sodomy, necrophilia, and all the other rot they peddle which among other things, causes premarital intercourse, perversion, masturbation in boys, wantonness in girls and weakens the morality of all it contacts.

H.R. 11454 Hearings 30-31:

Judges Chamber,
39th Judicial District of Pennsylvania, Franklin County,
Chambersburg, Pa., May 11, 1960
Hon. James C. Oliver
House of Representatives, Washington, D.C.

> For a long time I have been familiar with this problem and with the work of Dr. Frederick Wertham, and the testimony received by the congressional committees. I know we must face the ill-conceived efforts of the libertarian group in the United States through the American Civil Liberties Union and writings such as you quoted from the *Washington Post* to confuse the issue and to consecrate somehow the purveying of this filth. After someone

I say that we can no longer afford to wait for the answer. What

near and dear to these professional liberals has been the victim of some revolting sex crime, perhaps each will come to his senses and realize that freedom of the press in this area of pornographic publications has no utilitarian advantage, actual or potential, to the people of the county. . . .

There is no such advantage or need of free expression for the body politic in the area of sex emphasis or perversion. In using this terminology, I intend to embrace both abnormal sexual relations and the normal sex relation unduly emphasized. Consider the product of excessive sex promotion in the press (including radio, TV, and cinema), its potentialities in producing illegitimate children, thoughtless marriages, broken marriages, neglected children, delinquency, and criminality. These are the direct outcome of conceiving infants without forethought or any social fabric likely to guarantee their future rearing. Such results of too much sex are just as harmful to the body politic, morally and financially, as is the indiscriminate encouragement and promotion through pornographic literature or otherwise of sex experience of nonconventional type. . . .

Personally I doubt if the subject is one that lends itself to the gathering of scientific data as to cause and effect, from juvenile exposure to this mass of sex literature. Even if we could obtain such evidence, I doubt if we have a mechanism loud and forceful enough to impress it upon the American people. We would have to overcome the tremendous power which the pornographers allied to the libertarians and apostles of freedom of the press á outrance are able to muster. I have practically come to the conclusion that what we need rather than scientific evidence is to find a larger sounding board so that we can outshout these people.

Id. at 32.

Judges Chambers
Thirty-ninth Judicial District of Pennsylvania,
Chambersburg, Pa., May 19, 1960
Hon. James C. Oliver
House Office Building
Washington, D.C.

I would like to offer this additional thought, which relates to the continuous drumfire that we as opponents of pornographic publications continuously meet from the left wing, the misguided apostles of the Civil Liberties Union and other groups afflicted with an obsession concerning "constitutional rights." If the latter small minority of citizens continues to press their desire for absolute rights for themselves, it looks like the majority of us are going to have to get out of the country and find a haven somewhere in some other island or continent, in order to maintain a reasonably decent and peaceful life. . . .

If, under the common law, the community is not obliged to tolerate the filth, stench and other unattractive features of junkyards, animal rendering plants, fertilizer production and so forth, by virtue of what the courts have constructed as the police power, why in the world should the community be hampered in eliminating filth of other varieties by a sacred cow erected out of the freedom of speech section of the Bill of Rights? This sacred cow is freedom of speech and press under the cloak of which exposes children and the weakminded part of our citizenry to pornographic literature. The police power ought to be coextensive with the need of the whole

we do know is that in an overwhelmingly large number of cases, sex crime is associated with pornography. We know that sex criminals read it, are clearly influenced by it.

I believe pornography is a major cause of sex violence, I believe that if we can eliminate the distribution of such items among impressionable school children, we shall greatly reduce our frightening sex crime rate.[24]

Against such a background of often personal vituperation,[25] the

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people for peaceful and decent repose for themselves and families free from fear of sexual perverts engendered and promoted by the libertarian left wing. It seems to me our effort to recapture lost legal ground could proceed from that point. . . .

For materials indicating the confused state of the evidence, see JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND THE AMERICAN BAR ASS'N, DRAFTING AN OBSCENITY STATUTE (1961).

24. 1960 SUBCOMMITTEE REPORT 16.

25. *1960 Hearings* 3, 5-7, 9-10, hearing testimony of Mr. Charles Keating, Jr., Chief Counsel of the Citizens for Decent Literature:

We have had enough in the way of hearings, talk and inaction. What we want from our legislative, administrative, and judicial branches of government is freedom—freedom from filth—now! . . . This material came to us in response to a relatively few letters mailed from CDL requesting information and evidence from those citizens who somehow or other seldom seem to be heard by their Government—and who are never heard by or represented in any of the mass media of communication, with the exception of a few important spokesmen such as George Sokolsky, Inez Robb, Loretta Young, Bishop Sheen, Howard Whitman, Jack Mabley and several others. . . .

On the contrary, attention is given to sensationalists, such as Kinsey, who draw sweeping conclusions from a handful of selected subjects and defraud the public by calling their meanderings a scientific study—and Eberhard and Phyllis Kronhausen, who, finding fellow travelers in erstwhile respectable media manage to disseminate, directly and indirectly, their absurd and dirty bleatings and pagan ideas. If these people and their surveys are able to be called scientific, then certainly this collection of opinion and comment which I have given you, coming from all corners of America, has a quality much more significant, and cannot be ignored. . . .

It seems strange to me that we credit (I should say our mass media credit) the unestablished generalities of a few so-called experts but ignore the overwhelming testimony of the true experts . . . like Pitirim Sorokin, J. Edgar Hoover, juvenile court judges, clergymen, psychologists, court workers, and innumerable others. . . . There has been the usual opposition by extremists such as the persistent, illogical, comical and theatrical (but legalistically skilled) activities of certain "civil liberties" groups. . . . However, these elements and those foul producers and salesmen of this depravity—as they use gullible courts and the judiciary apparatus of Government to thwart the will and desire of the people for decency, can be, I suppose, excused. The former groups have their ideologies and the latter their profit motives. Certainly many others are driven by philosophies which are diametrically opposed to, and advocate the overthrow of either, or both, our Judeo-Christian standards of morality and our Government.

These, for the reasons suggested, can perhaps be excused, or at least

Jahoda study provides one of the more balanced assessments of the positions of the various protagonists, and indicates the effect of the debate on the normative standards society has developed:

> It should be emphasized from the outset that while a psychological discussion of the impact of books on their readers obviously bears on the problem of censorship, it is not in itself an approach which can decide the censorship question. Most of the demands for censorship are, to be sure, couched in psychological terms; that is, they maintain that a particular book should be banned because it may influence the thoughts and actions of its readers in an undesirable way. And, similarly, some of the arguments against censorship rest on the assertion that no bad consequences occur. But this is certainly only part of the matter. Even if we could present irrefutable evidence for the assertion that bad books are a major cause of delinquency or of the counter assertion . . . , other arguments for or against censorship . . . arguments of social, political, philosophical or religious nature—may still be advanced. The "means-end" question that is involved, for instance; or the question of whether reading certain materials is in itself sinful, regardless of further consequences; the problem of anticipated and unanticipated consequences of censorship (or the absence of censorship) for religious, political and other spheres of life—these problems will not be decided by what psychology has to say on the nature of the effects of certain literature. The function of psychology in this debate is to clarify the *assumptions about human conduct* which underlie much of what is said pro and con, to present whatever evidence there is for the acceptance or rejection of these assumptions and to show how more critical evidence with respect to these psychological assumptions

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understood. But, what of our courts? Here is the crux of the problem. Here is where the floodgates have been opened. Willing but inexperienced prosecutors work too little and quit too soon. . . . Unwilling and inattentive, easily misled judges seem to be everywhere. . . . "The experience of the founder of Christianity having perhaps left in us a vague doubt of the infallibility of courts of law. . . ."

We need not delay, or be sidetracked by, high-sounding arguments about censorship," about "obscenity being the price of freedom," or about the so-called therapeutic values claimed for illicit sexual activities, writings or pictures, by treatises themselves prurient, which try to justify these things in a quasiscientific fashion. . . .

Take these "slick" magazines with their emphasis on seductively posed nude females. To those who say "But whom do they effect and how?" I reply. "Why disbelieve the countless clergymen who, from their flocks, know these magazines cause masturbation and other immoral behavior among boys. . . ."

As any lawyer can tell you, it is not a difficult matter to procrastinate in the courts so when your case comes up for trial or hearing, it will come up before a judge favorably disposed to your position. This, I would say, is the major problem. . . .

may be gathered. . . ."[26] The . . . test "of obscenity . . . is made identical with its assumed effect."[27]

As the Jahoda group intimated, the acceptance of notions as to the effects of obscenity has left an indelible mark on the law. The premise has received both tacit and explicit approval in the statutory and judicial definitions of the material for which regulation is sought.[28] Obscenity regulation has often been seen solely as a prophylactic against suspected invitations of social misbehavior, an analysis which often obscures other, more demonstrable reasons for some restriction.[29]

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26. Jahoda 102-03, 106.

27. The test discussed in Judge Goodman's opinion in United Staes v. Two Obscene Books, 99 F. Supp. 760 (N.D. Cal. 1951), a book libel proceeding relating to the obscenity of Henry Miller's TROPIC OF CANCER and TROPIC OF CAPRICORN.

28. See Roth v. United States, 354 U.S. 476 (1957), *e.g.*, Postal Obscenity Act, 18 U.S.C. § 1461 (1958): "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance. . . ." The word prurient is defined: "1. [P]ersons having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ." WEBSTER, NEW INTERNATIONAL DICTIONARY 1996 (2d ed. 1953). Lascivious is defined: "1. Wanton; lewd; lustful. 2. Tending to produce voluptuous or lewd emotions. Syn. Licentious, lecherous, libidinous, salacious. Ant. See Chaste." *Id.* at 1395.

29. The question need not be asked how many parents would trust their children with a steady diet of "hard core" or even "borderline" material. The Jahoda group found that there was a possibility of loss of sensitivity, particularly on the part of children, as a result of over-exposure to literature of violence and brutality: "Even in the more secure person excessive and exclusive familiarity with literature depicting violence, hate and brutality, may influence his view of the world." Jahoda 140. However, the fact remains that reading with the object which the Kronhausens attributed as the intent which the author of pornography seeks to inspire is a function of psychic illness and a symptom thereof. [KRONHAUSEN, PORNOGRAPHY AND THE LAW (1959). The authors define pornography largely in terms of the intent with which the material is produced: "In pornography the main purpose is to stimulate erotic response in the reader and that is all." *Id.* at 18.] It is not the activity of the normal and the well adjusted:

> These may present a particular danger with regard to those youngsters who are insecure or otherwise maladjusted, and who find in the reading of comic books an escape from reality which they do not dare to face. The psychological function which reading fulfils in their emotional economy [and note the inference as to all or most reading; at another place the researchers noted that a "bad" mind with a "good" book may be a worse combination than a "good" mind with a "bad" book. Jahoda 139-40] is the gratification of needs which are not being met in the real world. It is likely, though not yet fully demonstrated, that excessive reading of this kind will intensify in children the factors which drove them into reading to begin with: an inability to face the world, apathy with regard to events, a belief that the individual is hopelessly impotent and driven by uncontrollable forces and, hence, an acceptance of violence and brutality in the real world. Jahoda 144.

All are reasons for specific types of regulation. See text accompanying note 27 *supra* for recognition of various reasons for obscenity regulation. Then there is

II. THE CONSTITUTIONAL SETTING

The first amendment states in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." As the language on its face authorizes, the amendment has been applied to suspected restrictions on free speech by federal authorities.[30] But, since *Barron v. Baltimore*[31] in 1833, the Court has refused to apply the first eight amendments directly to the states. Rather, the modern vehicle for protection of Bill of Rights guarantees from state encroachment has been the due process clause of the fourteenth amendment.[32]

A definitive mode of analysis has yet to emerge as different members of the court have charted divergent courses. One of several schools of thought, often represented by Mr. Justice Black, has viewed the first amendment as applied to the states by the due process clause in the fourteenth; another view, articulated by Mr. Justice Frankfurter and now Mr. Justice Harlan, has pursued the "scheme of ordered liberty" analysis expressed in *Palko v. Connecticut*[33] and *Wolf v. Colorado*.[34]

The flux of disagreement over the source of the standards to be applied in Bill of Rights cases has been evident in almost every court pronouncement. The majority opinion in *Times Film Corp. v. City of Chicago*[35] accepted the notion that the first amendment is declaratory of free speech rights guaranteed under the fourteenth amendment.[36] In the same case the Chief Justice also considered the two amendments together in a dissenting opinion in which three Justices joined.[37]

Mr. Justice Harlan, in his separate opinion in *Roth v. United States*[38] in 1957, found a different and less rigorous standard under the

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the reason implicit in the fact that some material is simply patently offensive to dominant community mores.

30. U.S. CONST. amend. I. *E.g.*, Watkins v. United States, 354 U.S. 178 (1957); Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919).

31. 7 Pet. 243 (1833), which held that the first eight amendments apply only to the federal government and are not applicable to the states.

32. U.S. CONST. amend. XIV, § 1.

33. 302 U.S. 319 (1937).

34. 338 U.S. 25 (1949). Mr. Justice Frankfurter, speaking for the majority of the court:

> The security of one's privacy against arbitrary intrusion by the police—*which is at the core* of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. *Id.* at 27-28. (Emphasis added.)

35. 365 U.S. 43 (1961).

36. *Id.* at 46.

37. Times Film Corp. v. City of Chicago, 365 U.S. 43, 50 (1961).

38. 354 U.S. 476, 496 (1957). Alberts v. California was the state case con-

fourteenth amendment: "We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power."[39] Applying the distinction, he would have held the state statute valid,[40] while voting to strike down a similar federal law considered as part of the consolidated case. This view of the fourteenth amendment has received the *imprimatur* of the court in cases such as *Palko* and *Wolf*.

The practice of the majority in several recent cases is evidenced in the approach of Mr. Justice Brennan who has frequently authored obscenity opinions. Ostensibly he remains a neutral in the controversy, though he joined in Mr. Chief Justice Warren's dissent in *Times Film Corp.* In *Roth*[41] Mr. Justice Brennan stated the test to be applied to state obscenity regulation as "whether the obscenity provisions of the California Penal Code invade the freedoms of speech and press as they may be incorporated in the liberty protected from state action by the Due Process Clause . . . ."[42] Yet he found that both the California and the Federal obscenity statutes met his constitutional test. The result of the Brennan approach is to avoid mention of the first amendment as a source of due process standards, bowing in the direction of the Frankfurter-Harlan view, while at the same time robbing the controversy of any substantive vitality by applying identical standards to state and federal procedures. This approach would undoubtedly result in one body of case law in free speech questions, as it did in *Marcus*, the most recent consideration of a state statute.[43] There Mr. Justice Brennan found authority for his position in cases involving both state and federal regulation, failing to differentiate between the precedents.[44]

III. The Form and Effect of the Test

A. Short History

Much of the law on which present doctrines are based has arisen in criminal cases, as this method of regulation has been the most

solidated with *Roth*. Mr. Justice Harlan concurred as to the result in *Alberts*, dissented as to the result in *Roth*.

39. *Id.* at 501.

40. *Id.* at 500.

41. Roth v. United States, 354 U.S. 476 (1957).

42. *Id.* at 479-80.

43. Marcus v. Search Warrant, 367 U.S. 717 (1961).

44. It is apparent that concepts implicit in several of the first eight amendments are read into the "due process" clause of the fourteenth amendment by at least some Justices. Specifically, portions of the first, fourth and fifth as discussed in the cases of present concern. See Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting). See also Boyd v. United States, 116 U.S. 616 (1886).

widely employed.[45] The two issues to which the Court has devoted primary attention have been the test for obscenity,[46] and, more recently, scienter as a requisite for criminal prosecution.[47] While the primary concern of this note is with the application of the test in civil enforcement schemes, the sophisticated nature of the test[48] compels its consideration in conjunction with regulation techniques.

The development of the present standard for obscenity began with *The Queen v. Hicklin*[49] in 1868, which announced a test turning on two elements—prurience and offensiveness. However, the prurient effect was to be measured in terms of the impact of selected passages on the most susceptible members of the society, whether the corruptible would be corrupted.[50] In 1913, despite Judge Learned Hand's protest that mid-victorian morality was thereby institutionalized as a literary norm, that test was formally accepted in this country.[51]

45. Postal Obscenity Act, 18 U.S.C. § 1461 (1958): "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . is declared to be nonmailable matter .... Whoever knowingly uses the mails .... LA. REV. STAT. § 14: 106 (Supp. 1961):

> Obscenity is the intentional . . . production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image .... Whoever commits the crime of obscenity shall be ....

Brown v. Kingsley Books, 354 U.S. 436, 437, 441-42 (1957).

46. *E.g.*, Roth v. United States, 354 U.S. 476 (1957); Butler v. Michigan, 352 U.S. 380 (1957); Winters v. New York, 333 U.S. 507 (1948).

47. Smith v. California, 361 U.S. 147 (1959). The court struck down a Los Angeles city ordinance which did away with the element of scienter and imposed what amounted to strict liability for the contents of any publication in the hands of the defendant, who in this case operated a retail book and magazine store in Los Angeles. He had at least several thousand new and used books in stock, most of which were purchased from dealers and publishers in New York on reliance of book trade advertising. Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 43 & n.229 (1960).

48. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUPREME COURT REV. 3.

49. [1868] 3 Q.B. 360.

50. "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this may fall." *Id.* at 371.

51. United States v. Kennerley, 209 Fed. 119, 120-21 (S.D.N.Y. 1913):

> I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time .... To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.

Hand's expression of reluctant acceptance was followed by a line of decisions expressing ambivalence toward, if not rejection of, the *Hicklin* rule.[52] In 1957 *Butler v. Michigan*[53] disposed of the " 'most susceptible' and 'isolated passages' " factors in the *Hicklin* formula by striking down a statute in which the standard was the potential deleterious effect of selected passages on minors.[54]

The test in its present form asks two questions: "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest,"[55] and whether the material may "be deemed so offensive on . . . [its] face as to affront current community standards of decency . . . ."[56]

B. Roth v. United States and *Manual Enterprises, Inc. v. Day*

Shortly after the *Butler* decision, the Court in *Alberts v. California*[57] and *Roth v. United States*[58] formulated a standard to fill the void created by the supposed demise of *Hicklin* earlier in the term. Consolidating the cases and ignoring any possible question about whether obscenity was present,[59] the Court announced that obscene materials are beyond the protection of the first and fourteenth amendments.[60]

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52. *E.g.*, United States v. Levine, 83 F.2d 156 (2d Cir. 1936); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); *Obscenity and the Arts*, 20 LAW & CONTEMP. PROB. 533, 621 (1955).

53. 352 U.S. 380 (1957).

54. *Ibid.*

55. Roth v. United States, 354 U.S. 476, 489 (1957).

56. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482 (1962). Further, censorship may not be instituted to curtail the advocacy of ideas. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684, 688 (1959).

57. Roth v. United States, 354 U.S. 476 (1957).

58. *Ibid.*

59. Roth v. United States, 354 U.S. 476, 480-81 (1957). Alberts had been running a mail-order business from Los Angeles and was convicted by the Judge of the Municipal Court of the Beverly Hills Judicial District, upon waiver of a jury trial. Roth had conducted a business in New York in which he published, advertised and sold magazines, photographs and books. He was convicted by a jury on four of twenty-six counts of using the mail in violation of the federal obscenity statute.

60. *Ibid.* A tack reminiscent of Beauharnais v. Illinois, 343 U.S. 250 (1952) in which the petitioner presented a petition to the Chicago City Council in inflammatory terms calling for the maintenance of segregation. In upholding the conviction the Court based its decision on the fact that libel is outside the protection of the first amendment, calling the petition a "group libel." Indications that obscenity would similarly be found outside first amendment protection were found in at least two prior cases, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

The Court confounded at least some observers, since no use was made of the "clear and present danger" test, either in its original form, or as modified in *Dennis v. United States*.[61] Thereby, at the level of justification for not finding first amendment protection, the Court avoided any pitfall occasioned by assumptions as to the effect of obscenity. The test which the Court promulgated, however, was a different matter. Stress was laid on the effect on the average man,[62] consideration of the material as a whole,[63] and the fact that material "having even the slightest redeeming social importance . . ."[64] would receive protection.[65] The kernel of the definition was that obscenity is material which appeals to the prurient interest.[66] Applied as a gloss, which, however, seems to indicate the operative criterion on which the Court has based subsequent decisions, was the characterization of obscenity as "utterly without redeeming social importance."[67]

Five years later the Court found that the standard in *Roth* included an index of "offensiveness,"[68] a concept not directly articulated therein. *Manual Enterprises, Inc. v. Day*,[69] arose from an administrative hearing in which the Judicial Officer of the Postal Department barred a shipment of petitioner's magazines from the mails on the grounds that they were "obscene"[70] under the Comstock Act.[71] The magazines contained photographs of nude male models and were designed to appeal to homosexuals. The Judicial Officer had determined they had "prurient appeal," but the Court held they were not beyond

61. 341 U.S. 494 (1951). The court modified the original doctrine developed by Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919) which required a *clear* and *present* danger as interpreted in Whitney v. California, 274 U.S. 357, 372-80 (1927) (concurring opinion) by Mr. Justice Brandeis. *Id.* at 379. "Whether the evil apprehended was so substantial as to justify the stringent restriction interposed by the legislature."

In *Dennis* the Court upheld convictions under the Smith Act which were for conspiring to teach and advocate the overthrow of the United States Government by force and violence. In that opinion the Court subordinated the *present danger* factor in the analysis under the rubric of *probable*. Employment of such a test would automatically force the Court to find some degree of causal relation between the suppressed material and some substantive evil which the legislation seeks to regulate.

62. Roth v. United States, 354 U.S. 476, 489 (1957).

63. *Ibid.*

64. *Id.* at 484.

65. *Ibid.*

66. *Id.* at 487.

67. *Id.* at 484.

68. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482 (1962).

69. 370 U.S. 478 (1962).

70. *Ibid.*

71. Statute cited note 45 *supra*.

contemporary notions of rudimentary decency under any permissible constitutional standard.

Mr. Justice Harlan read the "prurient interest" formula of *Roth* as merely the element necessary to subject an "offensive" publication to prosecution.[72] He chose the formulation of an Australian jurist who had so analysed the *Hicklin* requirement of prurience:

> As soon as one reflects that the word "obscene," as an ordinary English word, has nothing to do with corrupting or depraving susceptible people, and that it is used to describe things which are offensive to current standards of decency and not things which may induce to sinful thoughts, it becomes plain, I think, that Cockburn, C.J. . . . was not propounding a logical definition of the word "obscene," but was merely explaining that particular characteristic which was necessary to bring an obscene publication within the law relating to obscene libel. The tendency to deprave is not the characteristic which makes a publication obscene but is the characteristic which makes an obscene publication criminal. It is at once an essential element in the crime and the justification for the intervention of the common law. But it is not the whole and sole test of what constitutes an obscene libel. There is no obscene libel unless what is published is *both* offensive according to current standards of decency *and* calculated or likely to have the effect described in *R.*[*egina*] *v. Hicklin* . . . .[73]

This formulation can be examined on two levels, both bearing directly on the enforcement problem. In the first place, it is necessary to ask what such a test means substantively, what kinds of materials will it affect? Secondly, what is its conceptual vitality for application by lower courts and law enforcement officers?

The meaning of *Roth* with respect to substantive application has proved somewhat obscure. The Court abstracted the issues and ignored the qualities of the material presented,[74] although there were efforts to make the regulation of *pornography* the dispositive question in the case. The Solicitor General argued that so-called "hard-core" material accounted for ninety per cent of the federal convictions. He also sent to the Court during its deliberations a considerable sample of material seized by the Post Office under the Comstock statute.[75] However, in the eyes of Justice Harlan, some of the material could not be classified as pornography.[76]

One researcher has concluded that by the inclusion of the question

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72. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 484-85 (1962).

73. *Ibid.*

74. Roth v. United States, 354 U.S. 476, 481 n.8 (1957).

75. Lockhart and McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289, 295 (1961).

76. Roth v. United States, 354 U.S. 476, 507-08 (1957). Mr. Justice Harlan indicates that he believes that the only federal regulation consonant with the Constitution would be that of "hard-core" pornography.

of redeeming social value, a majority of the Court has attempted to limit the definition of obscenity to hard-core pornography.[77] A commercial venture obviously dependent on such analysis has recently been launched.[78] Support for this view has developed as a result of three per curiam decisions during 1957 and 1958.[79] The Court found the publication of a magazine for homosexuals,[80] two for nudists,[81] and a movie in which there were repeated scenes of nudity and sexual intimacy,[82] not obscene under the *Roth* test. The *Manual* decision is perhaps the clearest evidence yet developed for that opinion. The Court characterized the quality which it established in equal dignity with prurience as "patent offensiveness or indecency,"[83] then found

77. Lockhart and McClure, *supra* note 75, at 295.

78. EROS is a new quarterly devoted to the subjects of Love and Sex. In the few short weeks since its birth, EROS has established itself as the rave of the American intellectual community—and the rage of prudes everywhere! And it's no wonder: EROS handles the subjects of Love and Sex with complete candor. The publication of this magazine—which is frankly and avowedly concerned with erotica—has been enabled by recent court decisions ruling that a literary piece or painting, though explicitly sexual in content, has a right to be published if it is a genuine work of art.

EROS is a genuine work of art. Its artists, writers and rewriters are the most talented in the world. EROS makes no concessions to subliteracy or bad taste. . . .

The publication buoys the confidence of its readers with some of its own, "EROS unconditionally guarantees full refund of the price of any issue of the magazine which fails to reach you because of U.S. Postal Office Censorship interference." EROS, advertising literature, EROS Magazine, Inc., 1962.

79. Sunshine Books Co. v. Summerfield, 355 U.S. 372 (1958), *reversing* 249 F.2d 114 (D.C. Cir. 1957) dealing with a nudist publication which the court of appeals noted was largely devoted to views of the genitals and other private parts of men, women and children normally covered in public by clothing; One, Inc. v. Olesen, 355 U.S. 371 (1958), *reversing* 241 F.2d 772 (9th Cir. 1957) which involved a magazine for homosexuals declared non-mailable by the post office. The court of appeals found that the magazine did not conform to its announced purpose of viewing the homosexual problem from a scientific, cultural and critical standpoint; Mounce v. United States, 355 U.S. 180 (1957), *reversing per curiam* 247 F.2d 148 (9th Cir. 1957) again concerned with a nudist publication in which the court of appeals adopted the district court determination on much the same grounds as did the district court in *Sunshine Books;* Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957), *reversing* 244 F.2d 432 (7th Cir. 1957) where the court of appeals had found the movie "Game of Love," "a series of illicit sexual intimacies and acts," *id.* at 436; Lockhart and McClure, *supra* note 75, at 293 (where conclusions are drawn on the basis of three of these four decisions). Significantly, the reversals in all four of these cases were based on a simple citation of *Roth* or its consolidated case *Alberts.*

80. *Ibid.*

81. *Ibid.*

82. *Ibid.*

83. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482 (1962).

a journal for homosexuals not obscene.[84] If indeed the Court is limiting its definition of obscenity to the clearly pornographic, its approach resembles that suggested by Thurman Arnold shortly after the *Roth* decision. Mr. Arnold posited that per curiam disposition constituted the wisest approach to the problem. He suggested that the Court not verbalize any standard, but permit an empirical basis to develop from its own *ad hoc* judgements. He hoped that criteria would emerge from the raw process of decision-making.[85]

The pitfalls of the other course are exposed by analysis of the conceptual vitality of the *Roth-Hicklin* standard. While *Roth* formulated a test which initially appeared to be a workable and viable tool, more problems were raised than solved.[86] The lexicon of the *Roth* test, as well as of the statutes which it applies, includes terms within a definitional circle.[87] Moreover, a sampling of this language confirms the tendency the Jahoda study noted: "[O]bscenity . . . [the test of] is made identical with the assumed effect."[88]

Great promise does not seem to lie in further semantic refinement of the test for obscenity. In their book *Pornography and the Law*,[89] the Kronhausens attempt to differentiate what they categorized as "erotic realism" from "pornography."[90] Early in the book their definitional criteria are summarized:

> In pornography the main purpose is to stimulate erotic response in the reader, and that is all. In erotic realism, truthful description of the basic realities of life, as the individual experiences it, is of the essence.[91]

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84. *Id.* at 478.

85. Kalven, *supra* note 48 at 43-44.

86. Kalven, *supra* note 48.

87. Authorities cited note 28 *supra.*

88. Jahoda 106; authorities cited note 28 *supra.*

89. KRONHAUSEN, PORNOGRAPHY AND THE LAW (1959). The Kronhausen work has held attraction for many in the field. Lockhart and McClure, *supra* note 75, at 297.

90. KRONHAUSEN, *op. cit. supra* note 89, at 18.

91. *Ibid.* Other reasearchers have made similar distinctions. Lockhart and McClure, *supra* note 75, at 296-97. Dr. Margaret Mead:

> The material of true pornography is compounded of daydreams themselves, composed without regard for any given reader or looker, to stimulate and titillate. It bears the signature of nonparticipation—of the dreaming adolescent, the frightened, the impotent, the bored and sated, the senile, desperately concentrating on unusualness, on drawing that which is not usually drawn, writing words on a plaster wall, shifting scenes and actors about, to evoke and feed an impulse that has no object: no object either because the adolescent is not yet old enough to seek sexual partners or because the recipient of pornography has lost the precious power of spontaneous sexual feeling.

Id. at 296. Note the emphasis on intent of the author as well as the intent of the reader.

The subjective element implicit here is sharpened by perusal of representative passages from both classifications. Obviously analysis of the purpose of the author requires the employment of criteria hardly subject to quantification, rationale or perhaps even empirical analysis.

IV. Criminal Enforcement Techniques, an Inadequate Response to Public Pressure

As the line between obscene and protected material has become less clear, an effort to impose strict criminal liability on purveyors of "obscene" materials has been condemned by the Supreme Court.[92] It has been observed that it might be impossible to draft a criminal ordinance which would be of practical use, yet comply with the requirements developed in *Smith v. California.*[93] This observation has particular application to "borderline" material. If the book seller actually read the volume but thought it not obscene, the slippery character of the test renders prosecution a marginal adventure. So, too, when prosecution is undertaken of a book wholesaler or large retailer who turns over hundreds of book titles and thousands of magazines every month; the problems of proof are insurmountable.[94] Contributing further to the general uncertainty, the Court has not articulated the strength of its scienter requirement, refusing to pass on any required quantum.[95]

Coupled with these considerations is the fact that most material circulated in a particular community is not manufactured there.[96] Hence law enforcement officials in distribution areas are armed with the least effective tools of enforcement.[97] As these barriers of court

92. Smith v. California, 361 U.S. 147 (1959).

93. *Ibid.*

94. People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961). There the lower court had been unable to find the requisite scienter for the conviction of a book, newspaper and magazine wholesale dealer.

95. Note that Mr. Justice Brennan does not state whether full scienter will be required, or that the Court will be satisfied with something less as he seems to imply. Smith v. California, 361 U.S. 147, 154 (1959):

> We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State consitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be.

96. 1959 Subcommittee Rfport 7-8.

97. *Ibid.*

interpretation and physical location have combined to render the historic pattern of criminal sanction inadequate to attain the level of enforcement demanded, development of novel obscenity control techniques has been spurred. Thus the problem which has assumed primacy is the sheer physical task of enforcement. Faced with the economics of modern law enforcement, officials have sought mechanisms which minimize man power commitments while producing long-term compliance by potential vendors.[98] Not unexpectedly, effectiveness has often proved the inverse correlative of constitutional acceptability.

V. PRIOR RESTRAINT

Writing for a Symposium, "Obscenity and the Arts," Thomas I. Emerson pointed out:

> We are witnessing today a tremendous and ominous expansion of preventive law in the area of civil liberties. More and more, our controls are being devised, not as a punishment for actual wrongful conduct, but with a view to preventing future evils by a series of restrictions and qualifications that seriously jeopardize freedom of expression.[99]

The trend which Emerson notes is apparent, and obscenity legislation is part of it. The Supreme Court has not sanctioned a "talismanic test" based on a finding of prior restraint,[100] but has hedged occasional approval of such schemes severely.[101]

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98. *E.g.*, State civil prior restraint statutes involving declaratory judgment or book libel: MASS. ANN. LAWS c. 272 § 28C (1956); WIS. STAT. ANN. § 269.565 (Supp. 1962); Fla. Laws 1959, ch. 59-360, § 1, at 1255. Statutes where injunctions are used: *e.g.*, FLA. STAT. ANN. § 847.011(7) Supp. 1961); GA. CODE ANN. § 26-6306(a) (Supp. 1961); IDAHO CODE ANN. § 18-1510 (Supp. 1961); N.Y. CODE CRIM. PROC. § 22(a) (Dennis Cum. Supp. 1959); OHIO REV. CODE ANN. § 2905.343 (Supp. 1960); PA. STAT. ANN. tit. 18 § 3832.1 (Supp. 1961); R.I. GEN. LAWS ANN. c. 11, § 31-13 (Supp. 1961). Statute authorizing civil seizure of suspected material: *e.g.*, MO. REV. STAT. §§ 542.380.410 (1959). Note that in the case of Florida the legislature amended the statute in 1955, 1957, 1959, 1961.

99. *Obscenity and the Arts*, 20 LAW & CONTEMP. PROB. 533, 649 (1955).

100. See Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) which upheld the validity of a city ordinance requiring the submission of all films to a review board as a condition for the issuance of an exhibition license. Mr. Justice Clark sustained the statute indicating that the shape of enforcement of local policy would not be dictated by the Court. Rather, that the procedure itself would be subject to review on the basis of its adherence to constitutional principles; Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) upheld an injunctive process *pendente lite*. Both these cases evoked strong dissents. In the case of *Times Film*, Mr. Justice Warren termed the procedure a prior restraint and therefore per se violative of constitutional guarantees as explicated in a list of prior decisions in which the Court had disapproved of prior restraints. See Times Film Corp. v. City of Chicago, *supra* at 50-65. The Chief Justice distinguished the prior *Kingsley Books* decision at 64-66.

101. Marcus v. Search Warrant, 367 U.S. 717 (1961) *Compare* Times

A. Near v. Minnesota (1931)

In the landmark case of *Near v. Minnesota ex rel. Olson,*[102] the Court found a Minnesota statute providing for abatement as a public nuisance of any "malicious, scandalous, and defamatory newspaper, magazine or other periodical," [103] repugnant to due process standards.[104] Publication of the *Saturday Press,* was enjoined upon a trial court finding that it was largely devoted to "scadalous" and "defamatory matter." The objectionable articles contained charges of corruption and dishonesty of particular civic officials, and an allegation that responsible public officials had not performed their duties with respect to a crime syndicate supposedly under the direction of a Jewish gangster.

The Minnesota Supreme Court affirmed the injunction. The Supreme Court observed:

> If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable by contempt. This is of the essence of censorship.[105]

B. Brown v. Kingsley Books, Inc. (1957)

In *Brown v. Kingsley Books, Inc.,*[106] the statutory scheme involved only obscenity. The statute[107] provided for preliminary restraint of the sale of particular issues at an *ex parte* proceeding, and entitled the owner to final determination of obscenity within two days.

Film Corp. v. City of Chicago, *supra* note 100, *with* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) which brought motion pictures within the ambit of protection of the first amendment and struck down a New York statute providing for licensing of movies by a board of review and authorizing the ban of "sacrilegious" movies; *and* Zenith International Film Corp. v. City of Chicago, 291 F.2d 785 (1961) which found invalid a procedure under the ordinance upheld in *Times Film* earlier that year because it denied to the petitioner a full and fair hearing.

102. 283 U.S. 697 (1931).

103. *Id.* at 702.

104. *Id.* at 716. Mr. Chief Justice Hughes perhaps anticipated *Roth* as he noted that obscenity is outside the ambit of first amendment protection.

105. *Id.* at 713.

106. 354 U.S. 436 (1957).

107. N.Y. CODE CRIM. PROC. § 22(a) (Dennis Cum. Supp. 1959):

The complaint charged the appellants with displaying obscene booklets for sale, fourteen of which were annexed. The court found the material obscene and ordered that it be destroyed. Any order pertaining to issues yet to be published was refused.[108]

After disposing of the objection to the statute on the basis of prior restraint per se, Mr. Justice Frankfurter applied a pragmatic test to the statute.[109] Following the lead of the New York Court of Appeals,[110] he maintained that the *"in terrorem"* effect of the procedure varied little from that of the criminal statutes of California[111] and New

The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The *district attorney of any county*, . . . in which a person, firm or corporation *publishes*, sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, . . . which is obscene . . . may maintain an action for an injunction against such person, . . . in the supreme court to prevent the sale or further sale or the distribution . . . of any book, . . . herein described or described in section eleven hundred forty-one of the penal law.

2. The person, . . . sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issues and a decision shall be rendered by the court within two days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of *such* officer . . . such final order or judgment shall contain a provision directing the person, . . . to surrender to *such peace officer as the court may direct* . . . any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

108. Brown v. Kingsley Books, 354 U.S. 436, 438-39 (1957).

109. *Id.* at 441: "The judicial angle of vision in testing the validity of a statute . . . is 'the operation and effect of the statute in substance.' "

110. Brown v. Kingsley Books, 1 N.Y.2d 177, 181, 134 N.E.2d 461, 463, 151 N.Y.S.2d 639, 641, (1956).

111. Brown v. Kingsley Books, 354 U.S. 436, 441-42 (1957). The California statute had been upheld in Roth v. United States, 354 U.S. 476 (1957): CAL. PEN. CODE ANN. § 311 (West 1955):

Every person who wilfully and lewdly, either: . . .

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; or,

5. . . . [M]aintains any recordings, transcriptions, or mechanical, chemical, or electrical reproductions . . . used or intended to be used in producing or reproducing any lewd or obscene song, ballad, or other words, whether spoken or sung; or,

6. Sings or speaks any lewd or obscene song, ballad, or other words, in any public place, or in any place where there are persons present to be annoyed thereby, is guilty of a misdemeanor.

York,[112] the constitutionality of which he treated as being established.[113] He pointed out that the operation of the schemes was at a similar point in time—post-publication, but that unlike the criminal provisions,[114] the civil statute authorized punishment only for violation of an injunction.[115] Justices Douglas, Black and Brennan, dissenting, objected to the use of the preliminary restraint and also the effective restraint of circulation throughout the state on the basis of the original determination of obscenity in a particular locale.[116]

C. Motion Pictures—A Case Study

The application of the first and fourteenth amendments to the cinema provides a capsule view of the Court's treatment of the *Near* problem. In 1952 the Court acted to extend constitutional protection to the movies in *Joseph Burstyn, Inc. v. Wilson,*[117] in which New York authorities censored the showing of *The Miracle.* The Court struck down a New York statute providing for the licensing of movies by a board of review, and authorizing censorship of *inter alia* "sacrilegious" productions.[118] Mr. Justice Clark did not base his decision on the fact that the statute authorized a system of prior restraint, rather:

> This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. . . . New York cannot vest such unlimited restraining control over motion pictures in a censor.[119]

In 1961 in *Times Film Corp. v. City of Chicago,*[120] the Court upheld the validity of a city ordinance requiring the submission of a film to a review board as a condition to issuance of an exhibition license.[121] Mr. Justice Clark, writing for a majority of five, character-

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> Upon the second . . . conviction . . . every person so convicted is guilty of a felony. . . .

112. The New York criminal statute, N.Y. PEN. LAW § 1141 (Supp. 1962), is very similar and both are to be compared with the New York civil procedure, *supra* note 107.

113. Brown v. Kingsley Books, 354 U.S. 436, 441-42 (1957).

114. Due to the meandering line which separates the obscene from the protected, criminal prosecution may come with little warning. For the effect of the scienter requirement on this proposition see text and notes 92-95 *supra.*

115. Brown v. Kingsley Books, 354 U.S. 436 (1957).

116. *Id.* at 446-47.

117. 343 U.S. 495 (1952). *Burstyn* disposed of Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915) in which Mr. Justice McKenna had categorized the movies as business and regulatable aside from any first or fourteenth amendment considerations.

118. *Id.* at 497.

119. *Id.* at 504-05.

120. 365 U.S. 43 (1961).

121. *Ibid.*

ized the dispositive issue as whether "the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."[122] Citing *Kingsley Books*,[123] the Court found the statute was not void on its face and failed to reach the question of standards which was characterized as controlling in *Burstyn*.[124] The Court emphasized its wish not to dictate the selection of particular procedures for the enforcement of local anti-obscenity policy.[125] However, Mr. Justice Clark intimated that the standards imposed and the procedure invoked would be subject to review.[126] The result evoked an emphatic dissent by Mr. Chief Justice Warren, who recalled a line of decisions striking down prior restraints.[127] The Chief Justice felt that such a statute was not

122. *Id.* at 46.

123. *Id.* at 48.

124. The standards in the Chicago ordinance, CHICAGO, ILL., MUNICIPAL CODE § 155-4 (1931), are analogous to those condemned in *Burstyn:*

> If a picture or series of pictures . . . is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of any human being. . . .

The Court has considered four other cases in which the standards problem has proved dispositive: Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684 (1959) ("sexual immorality"); Commercial Pictures Corp. v. Regents of Univ. of New York, 346 U.S. 587 (1954) ("immoral"); Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954) ("harmful"); Gelling v. Texas, 343 U.S. 960 (1952) ("prejudicial to the best interests of the people of said City"). All of these cases reverse decisions upholding censorship. Indeed, extensive searching has failed to reveal any instance since 1952 in which the Court has upheld an instance of actual movie censorship.

125. Times Film Corp. v. City of Chicago, 365 U.S. 43, 50 (1961).

126. *Ibid.*

127. *Id.* at 51. The Chief Justice found particular disfavor with the aspect of the license which allowed a censor to review the movie as a substitute for a court of law. *Id.* at 68. He detailed specific instances of censorship of particular portions of movies, particularly under the Chicago ordinance, in which lines and scenes were excised from a variety of films, some of which had distinguished reputations. *Id.* at 69-73. Instances of articulation of the standards of the censors are documented: "A police sergeant attached to the censor board explained, 'Coarse language or anything that would be derogatory to the government—propaganda' is ruled out of foreign films. 'Nothing pink or red is allowed,' he added. . . . A member of the Chicago censor board explained that she rejected a film because 'it was immoral, corrupt, indecent, against my . . . religious principles. . . . The police sergeant in charge of the censor unit has said: 'Children should be allowed to see any movie that plays in Chicago. If a picture is objectionable for a child, it is objectionable period.'" *Id.* at 72. It is also noted that between the decision in *Burstyn* and the filing of the petition of certiorari in this case, when the exhibitor has elected to appeal, not once has the court elected to uphold the application of the procedure. *Id.* at 72-73.

susceptible to constitutional administration. He feared that in the face of such potentially arbitrary authority, commercial interests would submit to the censor's editing rather than litigate.[128] As Mr. Justice Clark intimated, the federal courts reviewed a procedure under the same ordinance that very year, and as the Chief Justice feared, found it violative of the exhibitor's rights.[129]

The doctrine distilled from *Near* is that previous restraint does not per se invalidate a statutory scheme. However, any prior restraint must be placed within that "exceptional" category Mr. Chief Justice Hughes mentioned in *Near*.[130] Further, the emphasis has been placed on the limitations on the "exceptional" area and the subtleties involved in identifying that material which may be regulated.[131] In the *Times Film* case the Court summarized its attitude toward systems of prior restraint:

> [I]n *Kingsley Books*, . . . after characterizing *Near* . . . as "one of the landmark opinions" in its area, we took notice that *Near* "left no doubts that 'Liberty of speech, and of the press, is also not an absolute right . . . the protection even as to previous restraint is not absolutely unlimited.' . . . The judicial angle of vision," we said there, "in testing the validity of a statute . . . is 'the operation and effect of the statute in substance.' "[132]

It might have added that there is not a single instance since *Burstyn*[133] in which application of a movie censorship scheme has been sustained before the Supreme Court.[134]

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128. *Id.* at 74-75:

> His inclination may well be simply to capitulate rather than initiate a lengthy and costly litigation. . . . It is axiomatic that the stroke of a censor's pen or the cut of his scissors will be a less contemplated decision than will be the prosecutor's determination to prepare a criminal indictment.

129. Zenith Int'l Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir. 1961).

130. "Nor has it been suggested that all previous restraints on speech are invalid. On the contrary, In *Near v. Minnesota*. . . Chief Justice Hughes, in discussing the classic legal statements concerning the immunity of the press from censorship, observed that the principle forbidding previous re straint 'is stated too broadly, if every such restraint is deemed to be prohibited. . . . [T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' " Times Film Corp. v. City of Chicago, 365 U.S. 43, 47 (1961). "In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952). In fact, with regard to instances of movie censorship, since 1952 no state has been able to sustain an actual application of its statute before the Court.

131. Cases cited note 124 *supra*.

132. Times Film Corp. v. City of Chicago, 365 U.S. 43, 48-49 (1961).

133. 1952.

134. A search has not revealed any decision upholding the application of such a statute since that time either.

VI. Search and Seizure and Free Speech: The Constitutional and Statutory Setting

A. The Fourth Amendment

The fourth amendment[135] which, under *Mapp v. Ohio,* is applicable to all searches and seizures,[136] states: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[137] Assuming that *Mapp* envisions that at least the broad basis of federal search warrant standards theretofore developed will be applied to the states,[138] the constitutional requirements surrounding all search warrants are well stated in *Marron v. United States.*[139] The case holds that the Constitution requires search warrants to particularly describe the thing to be seized and therefore the property must be described with such certainty that it is identifiable.[140]

B. The Missouri Statutory Scheme

The Missouri legislature sought to attack the obscenity problem with a civil obscenity law[141] which provided for search and seizure

135. U.S. Const. amend. IV.

136. 367 U.S. 643 (1961). The Court held that the *Weeks* federal exclusionary rule would be applicable in the state courts under the right of privacy guaranteed in the fourth amendment as enforceable against the states by the due process clause of the fourteenth amendment.

137. U.S. Const. amend. IV.

138. Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 Calif. L. Rev. 474, 503 (1961): "It is difficult to believe that the many minor as well as major irrationalities in the law of search and seizure have suddenly achieved constitutional dimension. It is possible that in future cases the Supreme Court will more explicitly recognize the great virtue of federalism in approaching these problems and apply the exclusionary rules to the states only when a serious or intentional breach of the right of privacy occurs. It remains, however, for future litigation to resolve this point."

Obviously we are not here concerned with the exclusionary rule as in *Mapp* but with some undefined sanction, probably outright reversal, against proceedings resting on search and seizure violative of the right of privacy.

139. 275 U.S. 192 (1927).

140. *Ibid.*

141. Mo. Rev. Stat. § 542.380 (1959):

Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:

1. [list of gambling materials]

2. Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.,

of suspected materials. It authorized issuance of a search warrant on the complaint of a local law enforcement officer in an *ex parte* proceeding. The complaint had to be supported by the officer's oath of personal knowledge, or had to display "evidential facts" from which the judge or magistrate could determine probable cause.[142] There were provisions for a hearing within five to twenty days after the seizure,[143]

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obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any such things can be obtained. . . .

MO. REV. STAT. § 542.400 (1959):

The judge or magistrate issuing the warrant shall set a day, not less than five days nor more than twenty days after the date of such service and seizure, for determining whether such property is the kind of property mentioned in 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing. Written notice of the date and place of such hearing shall be given, at least five days before such a date, by posting a copy of such notice . . . upon the premises in which such property was seized, and by delivering a copy . . . to any person claiming an interest . . . , whose name may be known to the person making the complaint or to the officer issuing or serving such warrant. . . .

MO. REV. STAT. § 542.410 (1959):

The owner or owners of such property may appear at such hearing and defend against the charges as to the nature and use of the property so seized, and such judge or magistrate shall determine, from the evidence produced at such hearing, whether the property is the kind of property mentioned in section 542.380.

MO. SUP. CT. (CRIM.) R. 33.01:

(a) If a complaint in writing be filed with the judge or magistrate of any court having original jurisdiction to try criminal offenses stating that personal property. . . . [T]he seizure of which under search warrant is . . . authorized by . . . statute . . . is being held or kept in any place . . . within the territorial jurisdiction . . . and if such complaint be verified by oath or affirmation of the complainant and states such facts positively and not upon information or belief; or if the same be supported by written affidavits . . . stating evidential facts from which such judge or magistrate determines the existence of probable cause, then such judge or magistrate shall issue a search warrant directed to any peace officer commanding him to search the place . . . and to seize and bring before such judge or magistrate the personal property therein described.

(b) The complainant [sic] and the warrant issued thereon must contain a description of the personal property to be searched for and seized and a description of the place . . . in sufficient detail . . . to enable the officer serving the warrant to readily ascertain and identify the same.

142. *Ibid.*

143. Statutes cited note 141 *supra.*

but no statutory time limit was imposed within which the judge was required to render his decision.[144]

VII. MARCUS V. SEARCH WARRANT

Under the Missouri civil obscenity law, police made purchases of "girlie" magazines at several newsstands, and using their purchases as support for the complaint, procured a warrant which described the material to be seized in the generic terms of the statute (obscene, etc.). A search was instituted and 11,000 pieces of material, representing some 280 separate issues, were seized. The adjudication of the issue of obscenity, which resulted in return of 180 of the issues and destruction of the remainder,[145] was not completed until two months after the seizure.

The Missouri Supreme Court upheld the trial court ruling, comparing the Missouri procedure to that sustained by the United States Supreme Court in *Kingsley Books,* three years earlier.[146] However, on review, the United States Supreme Court found the procedure violative of the fourteenth amendment.[147] The Court called attention to the absence of a judicial determination of obscenity prior to the issuance of the warrant, the establishment by police officers of the operative criteria for seizure and the length of time which protected material was withheld from the public.[148] Mr. Justice Brennan reflected a unanimous Court's traditional concern with procedure in prior restraint cases, and differentiated the careful and speedy New York procedure in *Kingsley Books* from that in *Marcus.*[149] He pointed out that the Missouri statute classified obscene literature with gambling, contraband and other paraphernalia for the purposes of search and seizure,[150] thereby ignoring the requirement of "discriminating tools" in appreciation of the "finely drawn line" between the protected and the obscene.[151]

Initially, the New York procedure provided a preliminary judicial hearing on the issue of obscenity,[152] whereas in the Missouri procedure the warrant was issued on the basis of the belief of the police officer, buttressed by a general sample of the material for which the warrant was asked.[153] The preliminary suppression in *Kingsley* was

144. *Ibid.*
145. Marcus v. Search Warrant, 367 U.S. 717, 722-24 (1961).
146. Search Warrant v. Marcus, 334 S.W.2d 119 (Mo. 1960).
147. Marcus v. Search Warrant, 367 U.S. 717, 733 (1961).
148. *Id.* at 731-38.
149. *Id.* at 731-38.
150. *Id.* at 730-31.
151. *Id.* at 731.
152. Statutes cited note 107 *supra.*
153. See text accompanying note 145 *supra.*

under the control of a responsible judicial official; whereas in *Marcus,* substantive control was lodged in the hands of the police officer. In New York, the procedure offered prompt, final determination on the issue of obscenity, thereby minimizing suppression of material in the protected class.[154] In Missouri, the hearing and final determination were dragged out for two months, because the judge was under no statutory mandate to announce his decision promptly.[155]

Significantly, the Court did not rely on its extension of the protection of the fourth amendment to the states in *Mapp v. Ohio,*[156] as would concurring Justices Black and Douglas.[157] Rather, the procedure for differentiating the obscene from the protected—the application of the test announced in *Roth*—was found wanting under the fourteenth amendment because prompt protection was not afforded material which was not obscene.[158] Operative criteria which the court has applied in *Marcus* would seem to require prior judicial determination of obscenity of particular matter, seizure only of that matter, and final, prompt, judicial and adversary determination of obscenity. In the opinion, however, the Court refused either to indicate its assessment of the relationship of the first and fourteenth amendments[159] or to pass on the question of the validity of the Missouri statutory scheme on its face.[160]

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154. Statute cited note 107 *supra.*

155. See text accompanying note 145 *supra.*

156. 367 U.S. 643 (1961).

157. Marcus v. Search Warrant, 367 U.S. 717, 738-39 (1961).

158. *Id.* at 731. The court indicated its appreciation of the application of search and seizure as a prior restraint. *Id.* at 725-26:

> Governmental use of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of speech and press in England was bound up with the issue of search and seizure power. . . . [T]he Star Chamber . . . in 1586 . . . [decreed] "That it shall be lawful for the Wardens of the said Company [The Stationers' Company which was incorporated in 1557 to implement the Tudor licensing system] for the time being or any two of the said Company thereto deputed by the said Wardens, to make search in all workhouses, shops, warehouses of printers, book sellers, bookbinders, or where they shall have reasonable cause of suspicion, and all books [etc.] . . . contrary to . . . these present Ordinances to stay and take to her Majesty's use . . . ." Books thus seized were taken to Stationers' Hall where they were inspected by ecclesiastical officers, who decided whether they should be burnt.

159. *Id.* at 723. When Mr. Justice Brennan said "[I]n the context of the protections for free speech and press assured against state abridgement by the Fourteenth Amendment," as in *Roth* he did not articulate the due process clause as invoking the protection of the first amendment as to state action, but walked a tightrope.

160. *Id.* at 723 n.9.

VIII. The Problem in Louisiana and California

Two lower court cases preceding *Marcus* by a few months presented similar questions. *In re Louisiana News Co.*[161] involved a search similar to that in *Marcus*; however, local authorities based their action on a criminal obscenity statute which lacked explicit search and seizure powers.[162] A federal district court invalidated the action under the fourteenth amendment on the grounds that the procedure involved an improper application of the *Roth* test. The police officers, who again made an *ad hoc* determination of obscenity, testified that the criterion which they employed was the showing of "bare breasts" and "buttocks."[163] The use of such criteria illustrates the basis of the Supreme Court's condemnation in *Marcus* of police officer selection of suspected material.

In the other case, *Aday v. Superior Court*,[164] the California Supreme Court upheld procedure in which copies of two books[165] were seized under a warrant (granted in an *ex parte* hearing) naming them obscene. The statutes provided for an adversary hearing on probable cause on return of the warrant.[166] In a mandamus action[167] contesting

161. 187 F. Supp. 241 (1960).

162. This case involved mass seizures of materials with the criteria for obscenity as applied by the searching officers the showing of "bare breasts and buttocks." The court held the procedure was a violation of the due process clause of the fourteenth amendment on the grounds of the relevance of the test as applied by the officers. The constitutional issues posed by the entire procedure were not considered. A state action involving those questions was pending which the federal court was not asked to stay. (This must have been dropped or disposed of at the trial level as nowhere in the appropriate source material is such a case reported.) The officers acted under color of the Louisiana criminal obscenity law. La. Rev. Stat. Ann. § 14:106 (1951):

> Obscenity is the intentional: . . .
>
> (2) Production, sale, exhibition, possession with intention to display, exhibit, or sell, or the advertisement of, any obscene, lewd, lascivious, filthy, or sexually indecent print, picture, motion picture, written composition, model, instrument, contrivance or thing of whatsoever description:
>
> or . . .
>
> Whoever commits the crime of obscenity shall be . . . .

163. *In re* Louisiana News Co., 187 F. Supp. 241 (E.D. La. 1960).

164. 55 Cal. App. 2d 789, 362 P.2d 47 (1961).

165. *Id.* at 792, 362 P.2d at 49; Sex Life of a Cop; Joy Killer.

166. Cal. Penal Code Ann. §§ 1539, 1540 (West 1955).

167. Statute cited note 166 *supra*. Ordinarily mandamus is limited to the instance where there has been gross abuse of administrative discretion or to compel the performance of a ministerial duty. High, Extraordinary Legal Remedies § 24 (2d ed. 1884); Statson & Cooper, Cases and Other Materials on Administrative Tribunals 578-79 (3d ed. 1957); 55 C.J.S. *Mandamus* § 63 (1948). However, in California mandamus has undergone considerable expansion. See Kleps, *Certiorarified Mandamus: Court Review of California Administrative*

the seizure, the court answered constitutional objections by maintaining that prompt, final determination of obscenity might be obtained in a criminal trial or a mandamus proceeding.[168] While the promptness of the criminal trial would not satisfy the requirements developed in *Kingsley* and *Marcus*, the relief afforded under California's distinctive use of mandamus[169] would appear to meet Mr. Justice Brennan's criteria or prompt, final determination.[170]

IX. ANALYSIS: SEARCH AND SEIZURE AS PRIOR RESTRAINT

While search warrants must describe the object to be seized with particularity, this requirement does not obviate the use of a generic term such as "gambling devices."[171] If protected material were readily

Decisions 1939-40, 2 STAN. L. REV. 285 (1950). The CAL. CIV. PROC. ANN. §§ 1086-87, 1090, 1094.5 (Deering 1959); § 1086 provides that the writ issue in all cases where a plain, adequate, and speedy remedy is not available at law; § 1087 provides that the writ may be preemptory or alternative in form; § 1090 enables the court to order a jury trial in cases where essential questions of fact arise; § 1094.5 provides for extensive review of administrative decision making. In the *Aday* case the court cites three cases as support for the proposition that mandamus affords a remedy for the prompt final determination of obscenity: Stern v. Superior Court, 76 Cal. App. 2d 772, 780, 174 P.2d 34 (1946); Atlas Finance Corp. v. Kenny, 68 Cal. App. 2d 504, 157 P.2d 401 (1945); People v. Phillips, 163 Cal. App. 2d 541, 329 P.2d 621 (1958). These appear to deal with, or their dicta concern, the rights of the defendant to controvert the warrant under the same provisions as employed in *Aday* (defect in the warrant), or they do not refer to authority for a separate action of mandamus for final determination. However, the sense of the provisions of the California code seems to support the proposition which the supreme court of that state advanced in *Aday*. In addition, that court's announcement would appear to constitute considerable authority for the proposition.

168. Aday v. Superior Court, 55 Cal. App. 2d 789, 799, 362 P.2d 47, 53-54 (1961):

> The seizure of all copies of an allegedly obscene book is not invalid if made on probable cause and if the owner of the book has adequate remedies by which to litigate the issue of obscenity. Where, as here, the seizure occurs under a warrant, an *ex parte* determination of the issue of obscenity, so far as probable cause is concerned, has taken place before issuance of the warrant, and immediately after the seizure determination of the issue to that extent can be obtained in adversary proceedings by controverting the warrant under sections 1539 and 1540 of the Penal Code. In the event the owner is unsuccessful in that proceeding, a final determination as to obscenity will be had in the criminal action which will ordinarily follow within a reasonable time, or other remedies such as a mandamus will be available to secure the return of the property.

169. See discussion note 167 *supra*.

170. Marcus v. Search Warrant, 367 U.S. 717, 737-38 (1961).

171. Allen v. Holbrook, 103 Utah 319, 334, 135, P.2d 242, 249 (1943), *modified on other grounds*, 103 Utah 599, 139 P.2d 233 (1943). "If the goods are contraband or of such a character or nature as to be unlawful or illicit under the

identifiable under the Court's test, a generic term would suffice in the obscenity cases also, under the rule that contraband or unlawful or illicit goods require but a general description.[172] What is required is judicial control over the search. Varon, in his book *Searches and Seizures,* elucidates this in a manner particularly applicable here:

> The duty of the executing police officer is purely an administrative act and he is required to implicitly obey the command of the search warrant as to the place to be searched and the property seized. Were he to exercise any discretion in the execution and enforcement of the search warrant, such action may constitute a departure from the command of the warrant, which can render the same susceptible to attack . . . rigid observance of the description requirements of search warrants . . . divest the police officers of any discretion in the search.[173]

However, the *Marcus* Court did not discuss the subtleties of search and seizure requirements. Rather the requirements which were developed bore closer relation to those standards formulated in *Kingsley Books* and *Near.* The problem posed by the obscenity test caused the Missouri procedure, which the Court indicated would be acceptable if directed against anything but speech,[174] to fail the due process test. In the *Marcus* opinion Mr. Justice Brennan quoted *Speiser v. Randall*:[175] "The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ."[176] In itself, the position which the Court took respecting the sophistication required to make enforcement decisions indicates the shakiness of the *Roth-Manual* test as an effective tool for classification. It also indicates the Court's concept of search-seizure procedures as a form of prior restraint. Treatment of the *Marcus* situation in this manner permitted the Court to dictate an entire range of standards which flow naturally from the doctrines developed in the line of cases beginning with *Near.*

The answer may be couched in fourth-fourteenth amendment terms, "Since the state has used a general warrant in this case in violation of the prohibitions of the fourth and fourteenth amendments . . . ."[177] Such analysis, however, does not easily lend itself to development of the requirements of prompt judicial determination or of prior judicial determination, both of which are stronger than the

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circumstances surrounding it, a general description of the goods seems to be sufficient . . . [G]ambling devices. . . ."

172. *Ibid.*

173. 1 VARON, SEARCHES AND SEIZURES 338-39 (1961).

174. Marcus v. Search Warrant, 367 U.S. 717, 730-31 (1961).

175. 357 U.S. 513 (1958).

176. *Id.* at 525.

177. Marcus v. Search Warrant, 367 U.S. 717, 738-39 (1961).

"probable cause" required in search warrant cases. Another possible reason for the rejection of this approach is that by reviewing on the basis of search-seizure standards, the core issue of censorship would not be reached. The *Mapp* opinion did not specify the standards which would be applicable to state search-seizure cases,[178] a fact which might mean that a fourth amendment basis for these cases would prove a sandy foundation indeed.

However, the demise of the *Marcus* procedure is most clearly explained in terms of overly efficient realization of enforcement goals. In excusing the *Kingsley Books* incursion into the closely guarded realm of approved prior restraint, the Court found that the deterrent effect of the civil procedure, in terms of producing informal restraints on the circulation of protected material, was less than that of the typical criminal statute.[179] In *Times Film,* the particular objection which the dissent posed to the majority was this deterrent effect.[180] The Missouri procedure simply represented a devastatingly effective way to employ search and seizure as prior restraint. Extensive application of the statute would serve well the requirements of efficient police work; for what large distributor would carry even remotely questionable material in the face of the state's ability to withhold it from the market for two months? Further completing the analogy to prior restraint as evidenced in the movie cases is the fact that the Court refused to declare the Missouri statutory scheme beyond the constitutional pale[181] per se, contenting itself with the treatment of a particular application.

X. The Postal Department:[182] A Possible Field for the Application of the Marcus Standards

The United States Post Office Department, through the criminal provisions of the Postal Obscenity Law[183] and the recently amended civil statute authorizing the suspension of mail privileges of those

178. See authorities cited note 138 *supra.*

179. Brown v. Kingsley Books, 354 U.S. 436, 442 (1957).

180. Times Film Corp. v. City of Chicago, 365 U.S. 43, 74-75 (1961):

> His inclination may well be simply to capitulate rather than initiate a lengthy and costly litigation. . . . It is axiomatic that the stroke of a censor's pen or the cut of his scissors will be a less contemplated decision than will be the prosecutor's determination to prepare a criminal indictment.

181. Marcus v. Search Warrant, 367 U.S. 717, 723 n.9 (1961).

182. For a discussion in depth of the postal problem with emphasis on actual operational techniques and historical development, Paul & Schwartz, Federal Censorship: Obscenity in the Mail (1961).

183. Postal Obscenity Act, 18 U.S.C. §§ 1461-65 (1958):

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance. . . .

dealing in obscenity,[184] has made wide use of search and seizure to re-

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. . . .

Whoever knowingly uses the mails. . . .

§ 1462 prohibits the importation or transportation of obscene matters, § 1463 the mailing of indecent matter on wrappers or envelopes, § 1464 the broadcasting of obscene language and § 1465 the transportation of obscene matters for sale or distribution. Attached to these prohibitions is a penal provision. This is the successor of a penal statute which was enacted in 1873 at the behest of Anthony Comstock, noted advocate of the application of Victorian Standards of morality through legislation. Apparently the statute was passed with no consideration by the Congress of the possibilities of administrative censorship which postal authorities have since assumed under its provisions. This is not an implication that the present procedure is not sanctioned by congressional reinactment and silence over a long period of time. However, for such an opinion, Manual Enterprises, Inc. v. Day, 370 U.S. 478, 519 (1962); see Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. PA. L. REV. 214, 217-18 nn.9 & 12 (1957).

184. Postal Obscenity Law, 39 U.S.C. § 4006 (1962):

Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) Direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or his representative, to return the registered letters or other letters or mail to the sender marked "Unlawful"; and

(2) Forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes.

Postal Obscenity Law, 74 Stat. 655 (1960) (now Postal Obscenity Law, 39 U.S.C. § 4007 (1962)).

(a) When the Postmaster General determines during proceedings before him that in the administration of section 4006 of this title such action is necessary to the effective enforcement of the section, he may enter an interim order directing that mail addressed to any person be detained by the postmaster at the post office of delivery for twenty days from the effective date of the order. Notice of the order . . . together with a copy of this section and section 4006 . . . shall be sent forth with by registered or certified mail. . . . An order for the detention of mail addressed to a person expires at the end of twenty days . . . unless the Postmaster General files, prior to the expiration of the . . . period, a petition in the United States district court for the district in which the post office in which the mail is detained is situated, and obtains an order that mail . . . be detained for such further periods as the court determines. Notice of the filing . . . shall be given forthwith . . . to the person . . . and the person shall have five days . . . to appear and show cause why the order should not issue. . . . An appeal from the order of the court is allowable as in civil cases. An order

strict the circulation of obscene literature.[185] Departmental censorship has been studied by lower courts from time to time,[186] but prior to 1962 its procedures had escaped Supreme Court view.[187]

In a study of postal practices up to the early 1950's, Edward de Grazia, counsel for the American Civil Liberties Union in several

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of the Postmaster General or of the district court, under this section, may be dissolved by that court at any time for cause, including failure to conduct expiditously the proceedings instituted against the person before the Postmaster General with respect to section 4006 of this title. . . . Under an order herein authorized . . . a person's mail is detained . . . that person may examine the mail and receive such mail as clearly is not connected with the alleged unlawful activity.

(b) Action by the Postmaster General in issuing the interim order provided for herein and petitioning for a continuance of an order under this section, is not subject to chapter 19 of title 5.

(c) This section does not apply to mail addressed to publishers of publications which have entry as second-class matter, or to mail addressed to agents of those publishers.

Postal Obscenity Law, 39 U.S.C. § 4007 (1962):

(a) In preparation for or during the pendency of procedures under sections 4005 and 4006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postmaster General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction . . . directing the detention of the defendant's incoming mail . . . pending the conclusion of the statutory proceedings and any appeal therefrom. . . .

It is to be noted that Pub. L. 86-682 (74 Stat. 655) and Pub. L. 86-673 (73 Stat. 553) are in conflict and the latter has awaited its recent integration into title 39 in the perfecting bill. Although Pub. L. 86-673 was passed before the codification of title 39, it was passed after the cutoff date on the recodification so it is good law. Department regulations prior to the enactment of the perfecting bill have reflected the provisions in Pub. L. 86-673, 26 Fed. Reg. 12772 (1961) *amending* 39 C.F.R. § 201.1-.31 (Supp. 1961).

185. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). In *Manual* the Court refused to decide what law is in force. Paul & Schwartz, *Obscenity in the Mails: A comment on Some Problems of Federal Censorship*, 106 U. PA. L. REV. 214 (1957), provides a preliminary survey of the entire problem as an interim report on a broader study. *Obscenity and the Arts*, 20 LAW AND CONTEMP. PROB. 533, 608 (1955).

186. See, *e.g.*, Summerfield v. Sunshine Book Co., 221 F.2d 42 (D.C. Cir. 1954), *cert. denied* 349 U.S. 921 (1955); Stanard v. Olesen, 347 U.S. 609 (1954) (Douglas as Circuit Justice); Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945); Big Table, Inc. v. Schroeder, 186 F. Supp. 254 (N.D. Ill. 1960); see authorities cited note 185 *supra*.

187. Stanard v. Olesen, 347 U.S. 609 (1954) (Douglas as Circuit Justice); Big Table, Inc. v. Schroeder, 186 F. Supp. 254, 258 n.5 (1960). Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). The majority failed to reach the question of the validity of the procedure, however, Mr. Justice Brennan and three colleagues concurring separately viewed the Post Office procedure as unconstitutional.

censorship cases,[188] detailed the department's methods of obscenity control.[189] He found that under the criminal statute the department authorized any postal official to seize matter[190] and to submit it to the Solicitor of the Post Office, who determined its obscenity. Material found free from obscenity was placed back in the mail and nothing was said. If, however, the Solicitor determined that the material was non-mailable, the sender was notified that he had 15 days to show cause why it should not be destroyed.[191] The department has not regularly followed the restriction imposed in *Walker v. Popenoe*,[192] in which the Court held that the department must carry and deliver mail until it is determined to be obscene.[193]

In addition to the power which the department had exercised under that statute, Congress, in 1950, granted more authority for censorship.[194] As amended in 1960,[195] the Postal Obscenity Law authorized

188. *Obscenity and the Arts, supra* note 185.

189. *Ibid.*

190. Note that, except for first class mail, any letter carrier or mail clerk may open mail. *Id.* at 609.

191. *Ibid.*

192. 149 F.2d 511 (D.C. Cir. 1945); See Stanard v. Olesen, 347 U.S. 609 (1954) (Douglas as Circuit Justice) in which there was an interim order by the Postmaster General impounding the petitioner's mail pending administrative determination of obscenity; Big Table, Inc. v. Schroeder, 186 F. Supp. 254, 256 n.1 (N.D. Ill. 1960) where there was a seizure and a considerable lapse of time between notice, hearing and final adjudication. *Obscenity and the Arts, supra* note 185, at 610.

193. Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945). This action involved a pamphlet, "Preparing for Marriage," which the Postmaster excluded from the mails. The appellant was the author and publisher. The pamphlet contained certain information regarding the physical and emotional aspects of marriage. The court regarded the procedure of the Postmaster General in the following light:

> In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be excercised according to the ideas of due process implicit in the Fifth Amendment. . . . Appellees have been prevented for a long period of time from mailing a publication which we now find contains nothing offensive to current standards of public decency. A full hearing is the minimum protection required by due process to prevent that kind of injury.

Id. at 513-14. See discussion note 202, 204 *infra.*

194. *Obscenity and the Arts, supra* note 185, at 611.

195. Statute cited note 184 *supra.* The amendments added to the 1950 law the provisions for the department impounding order and departmental determination of obscenity in accordance with the provisions of the Federal Administrative Procedure Act, 39 U.S.C. § 259a, 259b (1950). See also Sunshine Book Co. v. Summerfield, 249 F.2d 114 (D.C. Cir. 1957), in which a post office procedure including an interim impounding order was upheld. However, this decision was summarily reversed, 355 U.S. 372 (1957) (per curiam), casting doubt on the

the department to issue a twenty day impounding order (subject to extension by a United States district court), pending an administrative determination concerning the suspect's dealing in obscenity. The statute provided for return of payment or orders to the sender stamped "unlawful" and prevented payment of postal money orders or notes where the Postmaster General had "satisfactory evidence" that the suspect was attempting to obtain payment for obscenity, or was sending information by mail concerning the procuring of the same.[196] Under this act the department set up rules to insure full and fair hearings,[197] but there have been efforts[198] which were successful in the 1960 amendments[199] to avoid the statutory requirements embodied in the Administrative Procedure Act of 1946.[200] A further example of the department's failure to follow court decisions is provided in the aftermath of *Summerfield v. Sunshine Book Co.*,[201] which condemned both blanket stop orders[202] and stop orders going to material yet unpublished.[203] The department contemplated the use of the blanket orders as late as 1955.[204]

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entire lower court opinion. The Court did not indicate the objection. The *Popenoe* case and the effect of *Summerfield* in the court of appeals, is extensively treated in PAUL & SCHWARTZ, *op. cit. supra* note 185, at 244-48.

196. Statute cited note 184 *supra*.

197. 26 Fed. Reg. 11654 (1961), amending 39 C.F.R. § 201.1-.31 (Supp. 1961).

198. *Obscenity and the Arts, supra* note 185, at 613.

199. Statute cited note 184 *supra*.

200. Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1958). "One of the really important events in the development of administrative law in the United States has been the enactment by Congress of the Administrative Procedure Act of 1946—an act designed to prescribe in statutory form certain basic essentials of fairness and equity in the administrative relations between government and its citizens." STATSON & COOPER, THE LAW OF ADMINISTRATIVE TRIBUNALS 81 (3d ed. 1957).

201. 221 F.2d 42 (D.C. Cir. 1954).

202. *Id.* at 47: "They [department stop orders] must be confined to materials already published, and duly found unlawful." Note that this language would seem to support the proposition in Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945).

203. *Ibid.*

204. *Obscenity and the Arts, supra* note 185, at 613-14:

> The Associate Solicitor for the Post Office Department already seems of a mind to ignore it [*Summerfield*] as it did Walker v. Popenoe. The Associate Solicitor for the Post Office Department recently was asked: "If you were to find that the Chevrolet Division of General Motors Corp. had posted an obscene book, could you, as you construe your existing powers, issue an order to stop *all mail* sent to the Chevrolet Division? Yes."

(Author's emphasis.) See PAUL & SCHWARTZ, *op. cit. supra* note 185, at 248-50 for a discussion of the practical difficulties of the use of the stop order within the dictates of the *Sunshine Book Co.* case. For recognition by commercial interests that the Post Office Department is operationally in disregard of court decisions, see authorities cited note 78 *supra*.

In 1959 the post office department secured passage of a bill in the House which would have authorized a forty-five day interim mail bloc on incoming mail and would have provided an altered appeal procedure from department obscenity determinations.[205] The Justice Department, however, interposed objections to the procedure, so the House bill was amended by the Senate[206] and was enacted into law in 1960.[207] The provisions of this act abandoned department-ordered twenty or forty-five day interim mail blocs, and substituted an indefinite bloc obtained by preliminary injunction issued in a federal district court on the Postmaster's application, supported by a showing of probable cause of violation of the statute. The statutory language does not indicate whether blanket blocs are envisioned.

Both of these administrative systems of restraint go further down the road of censorship than have any of the court-administered procedures heretofore examined. As a result of the broad nature of the statutes,[208] the inapplicability of the Administrative Procedure Act of 1946,[209] and the department's apparent disregard of restrictions imposed by the lower federal courts,[210] the practical exercise of the department's power has been limited only by the regulations the department itself has promulgated.[211]

Postal obscenity regulation, either in the form of the refusal to forward under Section 1461 or the mail bloc under the Postal Oscenity Law, provides an efficient weapon in the hands of the obscenity regulator. The sanctions are severe; there is no lag in their imposition; they are enforced without regard to state boundaries; and they may be imposed as a result of an administrative determination of obscenity which is not subject to review until long after the economic effects have taken place. The departures from established practice and the existence of potentially arbitrary power have brought increasing indications that a full-scale review of postal obscenity practice is not far off. Mr. Justice Douglas suggested, as early as 1954, that possibly the postal procedure would amount to a prior restraint and would be subject to limitations embodied in the first, fifth and sixth amendments.[212] Early in 1962, four members of the Court wished to turn

205. 2 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 86th Cong. 2d Sess. 3246 (1960) (legislative history).

206. *Id.* at 3246-47.

207. 74 Stat. 533 (1960), 39 U.S.C. § 4007 (1962).

208. Statutes cited notes 183-84 *supra.*

209. Statute cited note 192 *supra.*

210. Authorities cited notes 192, 193, 202, 204 *supra; Obscenity and the Arts, supra* note 185, at 608-14.

211. 26 Fed. Reg. 11654 (1961).

212. Stanard v. Olesen, 347 U.S. 609 (Douglas as Circuit Justice):

the consideration of the obscenity test in *Manual Enterprises, Inc. v. Day*[213] into a full scale review of the postal procedure. A separate concurring opinion written by Mr. Justice Brennan and signed by three of his colleagues, while attacking directly the authority assumed by the Postmaster under Section 1461,[214] indicated a need to measure the postal procedure against the constitutional standards announced in *Marcus*:[215]

> We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged.[216]

Mr. Justice Brennan called attention to several aspects of the current practice involved in the *Manual* fact situation, indicating his view of their questionable constitutional basis:

> Questions of procedural safeguards loom large in the wake of an order such as the one before us. Among them are: (a) whether Congress can close the mails to obscenity by any means other than prosecution of its sender; (b) whether Congress, if it can authorize exclusion of mail, can provide that obscenity be determined in the first instance in any forum except a court, and (c) whether, even if Congress could so authorize administrative censorship, it has in fact conferred upon postal authorities any power to exclude matter from the mails upon their determination of its obscene character.[217]

Thus, it may be germane to point to postal practice as a likely focal point for future Court attention, suggesting that the *Marcus-Kingsley Books* standards will provide the measure against which it will be considered. However, this rests on the assumption that the stoppage or destruction of mail would be regarded in the same light as the seizure in *Marcus*, or injunction of sale in *Kingsley Books*.

> It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee.
>
> Impounding one's mail is plainly a "sanction" for it may as effectively close down an establishment as the sheriff himself. The power to impound at the commencement of the administrative proceedings is not expressly delegated to the Post Office, as I have said. [Under the 1960 law this power has been expressly delegated. Statute cited, *supra* note 184.] It carries such a grave threat, it touches so close to First, Fifth and Sixth Amendment rights, it has such serious possibilities of abuse (unless carefully restricted) that I am reluctant to read it into the statute.

In the decision Mr. Justice Douglas refused to void the interim order after he was assured that it would be litigated in the courts as a result of the normal appeal process.

213. 370 U.S. 478 (1962).

214. *Id.* at 497.

215. *Ibid.*

216. *Ibid.*

217. *Id.* at 497-98.

Under Section 1461 there is no prior judicial determination of obscenity—no prompt, final, judicial determination. Under the Postal Obscenity Law formula, the order which the district court is to grant ostensibly provides for no prior judicial determination beyond a finding of "probable cause" of statutory violation. It bears remarkable similarity to the seizure condemned in *Marcus*. The statute envisions issuance of the injunction on "probable cause" of statutory violation, not on any determination of obscenity of particular items. The fact that there is no time limit imposed on the duration of the injunction is in clear violation of the standards in *Marcus*, as is the non-judicial character of the final determination.[218] The procedure under the regulations in force prior to the end of 1961 also revealed inconsistencies with the *Marcus* decision. The prior judicial determination requirement was ignored, and the twenty day duration of the order (extendible by court order) may well have been excessive in view of the facts of *Kingsley*, in which the Court reluctantly conceded the constitutionality of a statute where the maximum detention was three days. Also, the final determination of obscenity was not made in a judicial hearing.

CONCLUSION

The past few years have seen considerable examination of and change in the posture of legal institutions toward obscenity and its regulation. Although enforcement of criminal statutes still remains a tested device with a long and honorable history, the introduction of the scienter requirement and the tough attitude of appellate courts in this area[219] have proved limiting factors on their efficacy. That the period of 1956 to 1960 almost exclusively represented efforts of control by criminal enforcement is open to little question.[220] However, the

218. 26 Fed. Reg. 12772, amending 39 C.F.R. § 201.1-.31 (Supp. 1961).

219. *E.g.*, People v. Richmond County News, 9 N.Y.2d 578, 584, 175 N.E.2d 681, (App. Div. 1961):

> The broader the prohibitions we read into our statute, the more unlikely it is that these probitions are reasonably related to the legitimate ends which the legislation seeks to serve. Thus, the constitutional background of the legislation, the inherent nature of the subject of regulation and the available knowledge concerning the possible effects of such legal regulation all point to and necessitate a very limited definition of the statutory prohibition of obscenity.

220. One research project found but four civil proceedings against alleged obscenity. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 10-11 n.36 (1960). (1) In Ohio against the Mahoning Valley Distributing Agency to enjoin the distribution of 14 magazines and 4 books including *Playboy* and *Lady Chatterley's Lover*. (2) In Georgia, the state literature commission obtained an injunction against the sale of the paperback novel, *Turbulent Daughters*. (3) In Illinois the city of Chicago sought an injunction against a news wholesaler restraining the distribution of alleged obscene material, but the superior court voided the ordinance on the grounds that

effect of the late 1959 *Smith* decision, which has yet to receive specific interpretation, has hardly been felt. Recent restrictions on the operation of criminal regulation aside, state legislators have reflected dissatisfaction with enforcement by criminal prosecution during that four year period in at least nine instances,[221] as did Congress in the passage of the Postal Obscenity Acts of 1956 and 1960.[222] Several state statutes have involved a procedure similar to that upheld in *Kingsley Books*.[223] Others have followed the Massachusetts lead, determining obscenity by declaratory judgment, establishing a basis for imposition of later criminal penalties.[224] In the absence of specific

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there was no requirement of scienter. (What scienter has to do with a civil procedure remains to be seen.) (4) The Missouri procedure in *Marcus*. In New York a defendant in a criminal prosecution complained that he should not be prosecuted in the absence of a warning or notice of injunction proceeding, but his motion to dismiss the information was dismissed almost summarily. People v. Richmond County News, Inc., 8 Misc. 2d 162, 167 N.Y.S.2d 406 (Ct. Spec. Sess. 1957). The defendant was subsequently convicted of selling an obscene magazine. People v. Richmond County News, Inc., 13 Misc. 2d 1068, 179 N.Y.S.2d 76 (Ct. Spec. Sess. 1958). *rev'd* 9 N.Y.2d 578, 175 N.E.2d 681 (1961).

221. FLA. STAT. ANN. § 847.011 (7) (Supp. 1961); GA. CODE ANN. § 26-6306 (a) (Supp. 1961); IDAHO CODE ANN. § 18-1510 (Supp. 1961); MICH. STAT. ANN. § 27.1410 (1) (Supp. 1959); OHIO REV. CODE ANN. § 2905.343 (Supp. 1960); PA. STAT. ANN. tit. 18 § 3832.1 (Supp. 1961); R.I. GEN. LAWS ANN. ch. 11, § 31-13 (Supp. 1961); WIS. STAT. ANN. § 269.565 (Supp. 1962). Other states have procedures based on statutory schemes of longer duration: California, Massachusetts, Missouri and New York.

222. Statutes cited note 184 *supra*.

223. *E.g.*, GA. CODE ANN. § 26-6306 (a) (Supp. 1961); IDAHO CODE ANN. § 18-1510 (Supp. 1961); N.Y. CODE CRIM. PROC. § 22(a) (Dennis Cum. Supp. 1959); OHIO REV. CODE ANN. § 2905.343 (Supp. 1960); PA. STAT. ANN. tit. 18 § 3832.1 (Supp. 1961); R.I. GEN. LAWS ANN. ch. 11, § 31-13 (Supp. 1961).

224. MASS. ANN. LAWS ch. 272 § 28(c) (Supp. 1959):

> Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned, or distributed, or is in the possession of any person who intends to . . . is obscene, indecent, or impure, the attorney general or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. (Then follows material with respect to notice to interested persons such as the author.) After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, indecent, or impure. . . .

Section 28d provides for a jury trial if the same is requested and section 28f provides for a hearing and adjudication on the merits should an appearance be entered and an answer filed. This procedure evoked favorable comment in Lockhart and McClure, *Obscenity and the Arts*, 20 LAW AND CONTEMP. PROB. 587, 607 (1955). *E.g.*, State civil prior restraint statutes involving a declaratory judgement or book libel: FLA. STAT. ANN. § 847.011 (7) (Supp. 1961); MASS. ANN. LAWS c. 272 § 28c (1956); WIS. STAT. ANN. § 269.565 (Supp. 1962).

legislative schemes for prior restraint, capability for such regulation has been demonstrated in at least one state under existing law.[225] Without statutory authority, the state has the power and obligation to protect health, welfare and morals of the public. The doctrine of public nuisance is ancient authority for protecting these values under the powers of a court of equity.[226]

As is often the case, employment of new concepts has not occasioned the shedding of the old. The *Hicklin* "prurient interest" legacy yet survives, buttressed by the assumptions of those who form the constituency for severe obscenity regulation.

Aside from discussion concerning the ability to show prurient effect on an "average man," all the evidence there is on the subject suggests that obscenity regulation is not undertaken for the sole or even chief purpose of the prevention of directly induced social misbehavior. Rather there are a number of reasons for which regulation is sought. These aims have to do with the effect on those below community standards, and the assault on the mores and sensitivity of the community as a whole.[227] Recognition of that fact was implicit in the index of "patent offensiveness" introduced by Mr. Justice Harlan in *Manual.* Acceptance of such a standard of gross violation of community sensibilities without the appended "prurient appeal" might well be subject to the amassing of sufficient precedents so that such a high degree of judicial mystery would not be concomitant to its application. A possible result is that new schemes consonant with the procedural limitations envisioned in *Marcus* would be rendered more enforceable. These might entail considerable restriction on the circulation of rank pornography to the general populace, with freedom of circulation for the remainder, perhaps subject to audience limitation.[228] However, such an approach envisions rejection of full realization of the goals of those who appeal for obscenity regulation.[229]

225. Authorities cited note 168 *supra.*

226. See PROSSER, TORTS § 71 (2d ed. 1955).

227. Jahoda 102-103, 140.

228. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 83-88 (1960). The authors suggest the concept of variable obscenity. *Id.* at 77-78. This concept applies different standards to material by considering its audience. Explicit within this scheme is a category of material which would be sold for adults only.

229. *1960 Hearings* 10, 12.