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moral character of the petitioner.²⁴ In addition, there was no evidence that he had in fact ever been a member of the Communist Party.²⁵ It is therefore submitted that the question of whether past membership in the party is a valid ground for denying one admission to a state bar was not in issue, and that the Court thus went beyond the bounds necessary to its decision and rendered what may be a dangerous precedent.

RICHARD C. CARMICHAEL, JR.

Constitutional Law—Regulation of Obscene Matter

Dissemination of obscene books, publications, and other materials has been punishable both under common law¹ and under modern statutory law.² All forty-eight American states currently exercise some form of regulation over obscene materials and extensive restrictions in this area are imposed by the federal government.³

Toward the end of its 1957 session, the North Carolina General Assembly enacted chapter 1227⁴ as a supplement to existing state laws.⁵ The new statute is designed to suppress commerce in the obscene and redefines "obscenity" by taking into account contemporary circumstances, scientific and sociological knowledge.

In all of its essential parts, the legislation is an enactment of section 207.10 of the American Law Institute's Model Penal Code,⁶ which was tentatively approved by the institute in May 1957.⁷ With the adoption of the statute, North Carolina became the first state in the union to accept this definition of obscenity.⁸

Fourteen days later the United States Supreme Court in *Roth v.*

²⁴ Forty-two witnesses attested to Konigsberg's good moral character. Among them were a Catholic priest, a Jewish rabbi, lawyers, doctors, professors, businessmen, and social workers. None testified that his moral character was bad or questionable in any way.

²⁵ The only evidence that Konigsberg might have been a member of the Communist Party was the testimony of one ex-communist. However, she did not testify that he had in fact been a member, but only that he had attended meetings of a party unit in 1941. This was the sole basis for her belief that he was a communist. She did not know him personally, nor was her identification of him convincing.

¹ See Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40-53 (1938).

² See Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

³ *E.g.*, 18 U.S.C. §§ 1461-64 (1952), concerning use of the mails for sending or receiving obscene materials, importation or sending obscene matter by common carrier or express company, displaying obscene matter on envelopes or postcards, and using obscene language in radio broadcasting.

⁴ N.C. Sess. Laws 1957, c. 1227.

⁵ N.C. GEN. STAT. §§ 14-189 to -194 (1953), as amended, § 14-189 (Supp. 1955).

⁶ ALI Model Penal Code § 207-10 (Tent. Draft No. 6, 1957).

⁷ Schwartz, *Criminal Obscenity Law*, 29 PA. B. ASS'N Q. 8 (1957).

⁸ Schwartz, *supra* note 7, at 13.

United States and Alberts v. California,⁹ combined for hearing, held for the first time¹⁰ that obscenity statutes are constitutional when they are "applied according to the proper standards for judging obscenity."¹¹

In indicating what these "proper standards" are, the Court drew many of its words directly from the North Carolina and American Law Institute definition. The Court said that "obscenity" is utterance "utterly without redeeming social importance."¹² "Obscene material is material which deals with sex in a manner appealing to prurient interest."¹³ The constitutionally valid test is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."¹⁴

But Mr. Justice Brennan, writing for five members of the Court, emphasized that materials are not obscene merely because they deal with sex. He said, "Sex and obscenity are not synonymous," and "the portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."¹⁵

⁹ 354 U.S. 476 (1957) *affirming* *Roth v. United States*, 237 F.2d 796 (2d Cir. 1956), and *Alberts v. California*, 138 Cal. App. 2d 909, 292 P.2d 90 (App. Dep't., 1955).

¹⁰ In an earlier test of the first amendment validity of such statutes, *Doubleday & Co. v. New York*, 335 U.S. 848 (1948), *affirming* 297 N.Y. 687, 77 N.E.2d 6 (1947), the Court had divided equally and in a per curiam opinion upheld the New York statute. Frequent dicta has also indicated that obscene utterance is not protected expression. *E.g.*, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Winters v. New York*, 333 U.S. 507, 510 (1948); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *Ex parte Jackson*, 96 U.S. 727, 736-37 (1877).

In affirming the *Roth* and *Alberts* convictions, the Court equated obscenity with libel and pointed to evidence "sufficiently contemporaneous" with the adoption of the first amendment "to show that obscenity, too, was outside the protection intended for speech and press." 354 U.S. at 483. For a different interpretation of some of this evidence see the concurring opinion of the late Judge Jerome N. Frank in *United States v. Roth*, 237 F.2d 796, 806-10 (2d Cir. 1956).

¹¹ 354 U.S. at 492.

¹² *Id.* at 484.

¹³ *Id.* at 487.

¹⁴ *Id.* at 489.

¹⁵ *Id.* at 487. The first amendment guarantees of freedom of speech and press are made applicable to the states by the due process clause of the fourteenth amendment. *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Included are motion pictures, writings, and other forms of expression designed merely for entertainment. *Burstyn v. Wilson*, 343 U.S. 495 (1952); *Winters v. New York*, 333 U.S. 507 (1948); *Hannegan v. Esquire*, 327 U.S. 146 (1946). Distribution as well as publication is included and the Court has struck down licensing or censorship systems which conditioned these rights upon obtaining prior approval. *Lovell v. Griffin*, 303 U.S. 444 (1938); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Near v. Minnesota*, 283 U.S. 697 (1931).

But in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), decided the same day as the *Roth* and *Alberts* cases, the Court upheld the validity of a state statute permitting the legal officer of municipalities to obtain an injunction pendente lite against the sale or distribution of allegedly obscene materials. The statute provided for a prompt hearing on the issue of obscenity and required that the materials be confiscated and destroyed upon the court's finding that they were obscene. Comparing the injunctive procedure with the criminal procedure sustained in the

He warned that any statute attempting to regulate obscenity must not impose such standards that might include material which is legitimately concerned with sex and which is constitutionally protected.¹⁶

While the decisions are not all that those who argue for absolute freedom of expression in this area might have hoped for, the Court could hardly have been expected to open the gates to an unrestrained flood of obscene and pornographic materials. The decisions appear to have left this field in a better condition than that in which the Court found it.

Courts have recognized that "the concept of obscenity remains

Alberts case, the Court concluded that the New York procedure does no more and goes no further than the criminal statutes. Both interfere with the publication's distribution at precisely the same stage and in neither case need the materials have passed into the hands of the public. Four members dissented; Chief Justice Warren because the procedure placed the book itself on trial, and the decision was based "on the quality of art or literature" without taking into consideration the manner of use, conditions of the sale, and the identity of the buyer and seller, *id.* at 445-46; Justice Brennan because jury trial on the issue of obscenity was not guaranteed, *id.* at 447-48; and Justices Douglas and Black because the procedure was "prior restraint and censorship at its worst" since an *ex parte* decree could be issued in secret. They also considered the statute's authorization of a state-wide injunction against distribution of the materials to be objectionable. The "nature of the group among whom the tracts are distributed" was felt to have an "important bearing on the issue of guilt in any obscenity prosecution." *Id.* at 446-47.

¹⁶*Id.* at 488. See also *Butler v. Michigan*, 352 U.S. 380 (1957), unanimously reversing a conviction under a state statute making it unlawful to sell a book "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." The Court invalidated the statute as not being reasonably restricted to the evil with which it attempted to deal. "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig." *Id.* at 383.

In *Winters v. New York*, 333 U.S. 507 (1948), the Court held invalid a statute, directed against "crime comic-books," which prohibited distribution of "collections of criminal deeds of bloodshed or lust." The Court stated that although it could see "nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature . . ." *Id.* at 510.

Censorship or "prior-restraint" problems are also sometimes raised by prosecutors and sheriffs who furnish distributors and dealers with lists of "objectionable" publications and order their removal with the warning that continued sales will result in prosecution. See, *New American Library of World Literature v. Allen*, 114 F. Supp. 823 (N.D. Ohio, 1953) (enjoining police chief who ordered removal of publications deemed offensive); *Bantam Books, Inc. v. Melko*, 25 N.J. Super. 292, 96 A.2d 47 (Ch. 1953), *aff'd and modified*, 14 N.J. 524, 103 A.2d 256 (1954) (enjoining county prosecutor who ordered removal of books from newsstands). *But cf. Sunshine Book Co. v. McCaffrey*, 112 N.Y.S. 2d 476 (Sup. Ct. 1952) (refusing injunction).

See also reports of sheriffs in at least three North Carolina counties ordering newsdealers to stop selling present, as well as future, unpublished issues of publications termed "objectionable." *Greenboro Daily News*, Nov. 27, 1957, § A, p. 6, col. 7-8; *id.*, Nov. 22, 1957, § A, p. 15, col. 1; *Durham Morning Herald*, Nov. 2, 1957, § B, p. 1, col. 4-8; *The Durham Sun*, Nov. 1, 1957, § C, p. 1, col. 8. The restrictions were also applied to one best-selling novel, the reprint edition of Grace Metalious's *Peyton Place*, *Durham Morning Herald*, Nov. 16, 1957, § A, p. 1, col. 1-4. For a discussion of similar activities elsewhere, see Note, 22 U. CHI. L. REV. 216 (1954); 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 226-28 (1947); CHAFEE, FREE SPEECH IN THE UNITED STATES 536-38 (1941).

elusive,¹⁷ that materials deemed to be obscene might vary from generation to generation,¹⁸ and that what was yesterday obscene may today be acceptable,¹⁹ or vice versa.²⁰ Nevertheless, the term "obscene" has generally been considered to be of sufficient definiteness to support a criminal prosecution.²¹

No legal definition of obscenity is likely to be entirely satisfactory.²² Too many factors are involved, ranging from indecent language—as offensive words written in public places²³—to ideological obscenity—as the advocacy of changes in accepted sexual standards or institutions contrary to the policy of the state,²⁴ and including materials which are thought to have a harmful effect on the reader's sexual thoughts, desires, and possibly activity.²⁵

Various standards for determining obscenity have been applied; but courts have generally followed one of two major tests. Earlier cases adopted a rule promulgated in the English case of *Regina v. Hicklin*,²⁶ which called for a determination of the material's effect upon children and sexually susceptible and perverted individuals. Under the *Hicklin*

¹⁷ *American Civil Liberties Union v. Chicago*, 3 Ill. 2d. 334, 343, 121 N.E.2d 585, 590 (1954).

¹⁸ See *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940); *People v. Miller*, 155 Misc. 446, 279 N.Y. Supp. 583 (N.Y.C. Magis. Ct. 1935).

¹⁹ See *United States v. Kennerley*, 209 Fed. 119 (S.D.N.Y. 1913).

²⁰ See *United States v. One Unbound Volume of a Portfolio*, 128 F. Supp. 280 (D.C. Md. 1955).

²¹ "Everyone who uses the mails . . . must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious." *Rosen v. United States*, 161 U.S. 29, 42 (1896).

²² See 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 200-18, for a discussion of the difficulties in giving "obscenity" a legal definition.

²³ See *Pascagoula v. Nolan*, 183 Miss. 164, 184 So. 165 (1938) (coarse words written on side of automobile held obscene).

²⁴ See *Commercial Pictures Corp. v. Regents of New York University*, 305 N.Y. 336, 113 N.E.2d 502 (1953), *rev'd on other grounds*, 346 U.S. 587 (1954) (fact that film "La Ronde," based on Schnitzler's *Reigen*, did not condemn the adultery it described was an important consideration in concluding that film was "immoral" and would "tend to corrupt morals"); *People v. Friede*, 133 Misc. 611, 233 N.Y. Supp. 565 (N.Y.C. Magis. Ct. 1929). (Radcliffe Hall's *The Well of Loneliness* held obscene because subject matter was "offensive to decency".)

²⁵ "[U]nder the statute . . . punishment is apparently inflicted for provoking . . . undesirable sexual thoughts, feelings, or desires." *United States v. Roth*, 237 F.2d 796, 802 (2d Cir. 1956) (concurring opinion); "The meaning of . . . 'obscene' . . . is: Tending to stir the sex impulses or to lead to sexually impure and lustful thoughts." *United States v. "Ulysses"*, 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

²⁶ L.R. 3 Q.B. 360, 371 (1868). The test was said to be "whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

The rule was followed in numerous American decisions, e.g., *United States v. Bennett*, 24 Fed. Cas. No. 14,571, at 1103 (C.C.S.D.N.Y. 1879); *Knowles v. United States*, 170 Fed. 409 (8th Cir. 1909); *United States v. Clarke*, 38 Fed. 732 (E.D. Mo. 1889); *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930); *Commonwealth v. Buckley*, 200 Mass. 346, 86 N.E. 910 (1909); *People v. Pesky*, 254 N.Y. 373, 173 N.E. 227 (1930), *affirming* 230 App. Div. 200, 243 N.Y. Supp. 193 (1st Dept. 1930).

rule, an entire book might be condemned because of selected excerpts or passages.²⁷ The test was criticized,²⁸ fell into disrepute, and was finally rejected by the Court in the *Roth* case as "unconstitutionally restrictive of the freedoms of speech and press."²⁹ Later cases have tended to follow rules which developed out of the litigation involving the importation of James Joyce's novel, *Ulysses*.³⁰ These more recent decisions have considered the book as a whole, tried to determine its predominant effect, and condemned the publication as obscene only upon finding that its tendency to arouse the sexual desires of the average, normal reader was so substantial as to outweigh whatever artistic, literary, scientific or other merits it might possess.³¹

However, central to both definitions was the idea that obscene publications were of a type that excited certain sexually stimulating *thoughts* in the minds of readers and that by doing so corrupted and depraved them.

Phrasing of the definition in these terms has caused courts and writers to advance various forceful arguments against governmental

²⁷ See *New York v. Doubleday & Co.*, 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd on other grounds*, 335 U.S. 848 (1948) (Edmund Wilson's *Memoirs of Hecate County* held obscene because of chapter, "The Princess with the Golden Hair"); *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930) (Theodore Dreiser's *An American Tragedy* held obscene because of selected portions); *United States v. Bennett*, 24 Fed. Cas. No. 14,571, at 1103 (C.C.S.D.N.Y. 1879) (jury told to convict if "any" of the "marked passages . . . are obscene").

²⁸ In *United States v. Kennerley*, 209 Fed. 119, 121 (S.D.N.Y. 1913), Judge Learned Hand, although he applied the *Hicklin* rule because of its earlier acceptance by the federal courts, protested, characterized it as "mid-Victorian," and stated that "it seems hardly likely that we are . . . so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few . . ."

Judge Curtis Bok in *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 125 (Q.S., 1949) *aff'd sub nom.* *Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A.2d 389 (1950), argued that "strictly applied, this rule renders any book unsafe, since a moron could pervert to some sexual fantasy to which his mind is open the listings in a seed catalogue."

²⁹ 354 U.S. at 489.

³⁰ *United States v. "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

³¹ "[T]he work must be taken as a whole, its merits weighed against its defects . . . ; if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach." *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936).

Examples of cases following this standard include *Walker v. Popenoe*, 149 F.2d 511 (D.C. Cir. 1945); *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940); *United States v. Levine, supra*; *Attorney General v. "Serenade,"* 326 Mass. 324, 94 N.E.2d 259 (1950); *Attorney General v. "God's Little Acre,"* 326 Mass. 281, 93 N.E.2d 819 (1950); *Attorney General v. "Forever Amber,"* 323 Mass. 302, 81 N.E.2d 663 (1948); *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E.2d 840 (1945); *Bantam Books Inc. v. Melko*, 25 N.J. Super. 292, 96 A.2d 47 (Ch. 1953) *modified and aff'd*, 14 N.J. 524, 103 A.2d 256 (1954).

But cf. *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953) *affirming* *United States v. Two Obscene Books*, 99 F. Supp. 760 (D.C. Cal. 1951); *Burstein v. United States*, 178 F.2d 665 (9th Cir. 1949); *State v. Becker*, 364 Mo. 1079, 272 S.W.2d 283 (1954).

regulation of obscene materials. They have argued (1) that for either a state or the United States lawfully to interfere with speech or press by suppressing an allegedly obscene publication it must first be shown that there is a "clear and probable"³² danger that overt criminal activity or serious antisocial conduct would result from the distribution of the publication,³³ (2) that actually there are no reliable scientific or sociological studies of the effects of obscenity on behavior although such legislation rests upon the assumption that reading these materials will induce misconduct. Available studies seem to indicate that the individual who is susceptible will be affected by whatever else is available. Present day society is one which accepts a great deal of erotic appeal, and, aside from books and other publications, innumerable other matters arouse normal sexual thoughts and desires with greater frequency. Hence, in the absence of data connecting obscenity with misbehavior, restrictions on publications appear to be neither reasonable nor appropriate; (3) that the function of criminal law is to punish behavior which falls below accepted community standards, not to regulate thoughts and desires. Immoral acts may be prohibited, not immoral thoughts and desires. The latter would appear to be the concern of the church or the home, but not of government; (4) that while admittedly a line must be drawn at some point between decency and indecency, artistry and pornography, judicial tests which condemn materials because of their tendencies to arouse sexual thoughts and desires are unduly restrictive of freedom of expression for serious literature dealing with sexual problems and behavior.³⁴

The American Law Institute took these arguments into consideration in adopting a definition for its Model Penal Code. A tentative decision not to make private illicit sexual relations criminal had been made earlier.³⁵ Accordingly the Institute felt that the gist of the obscenity

³² The phrase is borrowed from the sedition law where it is used to indicate the exigency upon which advocacy may be suppressed. See *Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919).

³³ See *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (Q.S., 1949), *aff'd sub nom.* *Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A.2d 389 (1950). This view was also advocated, with some modifications, by Judge Frank in his concurring opinion in *United States v. Roth*, 237 F.2d 796, 826 (2d Cir. 1956). See also, Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 363-68 (1954).

The argument was rejected by the Court's holding in the *Roth* case. As obscenity is not protected by the first amendment, no "clear and present danger" test applies. 354 U.S. at 485-87.

³⁴ Judge Frank's lengthy concurring opinion in *United States v. Roth*, 237 F.2d 796, 801-27 (2d Cir. 1949) presents the most recent detailed exposition of these arguments. See also his concurring opinion in *Roth v. Goldman*, 172 F.2d 788, 790-98 (2d Cir. 1949). And see Lockhart and McClure, *supra* note 33, at 358-87; Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 73-76, (1938); ALI MODEL PENAL CODE § 207.10, comments at 8, 20, 24-28 (Tent. Draft No. 6, 1957); Note, 6 BUFFALO L. REV. 305, 312-16 (1957); MCKEON, MERTON AND GELLHORN, *THE FREEDOM TO READ* 67, 71-76 (1957).

³⁵ ALI MODEL PENAL CODE § 207-10, comments, at 14 (Tent. Draft No. 6, 1957).

offense was "a kind of 'pandering'"³⁶ and drafted the model statute "to suppress commerce in the obscene."³⁷ Hence, the private possession, writing, or lending to friends of obscene materials is not punishable under the Model Code.³⁸ In addition, the Supreme Court had granted certiorari in the *Roth* case and the Institute felt that whatever the case's outcome might be obscenity laws would have to be restricted so that they would not include materials legitimately dealing with sex.³⁹ Hence the prevailing tests which defined obscenity in terms of its "tendency to excite lustful thoughts" and "corrupt and deprave" were rejected,⁴⁰ and the following definition was adopted instead:

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.⁴¹

The language was intended to recognize a "normal interest in sexual matters, for which it should be lawful to provide satisfaction."⁴² Further, since society tolerates much in literature, advertising, and art which individuals or particular groups might consider to be appeals to "prurient interest," the definition was restricted "to the prurient which is disapproved by generally observed custom."⁴³

"Appeal to prurient interest" was said to refer to "qualities of the material itself: the capacity to attract individuals eager for a forbidden

³⁶ *Ibid.*

³⁸ *Id.* at 10-11.

⁴⁰ *Id.* at 10.

³⁷ *Id.* at 13.

³⁹ *Id.* at 13.

⁴¹ *Id.* § 207-10 (2); N.C. Sess. Laws 1957, c. 1227, § 1 (b). In a further discussion of "prurient interest" it is said that this "is an exacerbated, morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and equally universal social controls of sexual activity. The wall of secrecy with which society has surrounded sexual behavior tends to build up in the individual strong feelings of the shameful of sexuality Literary or graphic material which disregards the social convention evokes 'repression-tensions'; i.e., mixed feelings of desire and pleasure on the one hand, and dirtiness, ugliness, revulsion on the other. This is especially likely if the material is presented in a sly, leering manner, or in vulgar terms manifestly chosen merely to shock or titillate the reader. Devices like these, serving to remind the reader that he is enjoying 'contraband,' make the very fact of social disapproval a source of added excitement and attraction. Society may legitimately seek to deter the deliberate stimulation and exploitation of emotional tensions arising from the conflict between social convention and the individual's sex drive." ALI MODEL PENAL CODE § 207.10, comments, at 29-30 (Tent. Draft No. 6, 1957).

⁴² *Id.* comments, at 29.

⁴³ *Id.* comments, at 10.

In order to determine whether the material exceeds these boundaries, the statute admits evidence of "public acceptance" of the material throughout the United States. *Id.* § 207.10 (2) (d); N.C. Sess. Laws 1957, c. 1227 § 1 (b) (4).

One purpose of this provision was to "achieve a general and predictable policy on obscenity, free of local or temporary distortions . . ." It was anticipated that a "book could hardly be held obscene in one county of a state if it appeared openly on public library shelves and in book stores throughout the state." ALI MODEL PENAL CODE § 207.10, comments, at 11, 44. (Tent. Draft No. 6, 1957).

look behind the curtain of privacy which our customs draw about sexual matters."⁴⁴

Obviously, books and other material which may have a tendency to excite lustful thoughts need not necessarily appeal primarily to prurient interest. The North Carolina and Model Penal Code definition looks to the *appeal* of the material, the type of appetite toward which the publication is directed. The prevailing definitions, as pointed out, have considered the supposed *effect* upon the reader's thoughts and behavior.

As a generalization, it might be said that the Code has drawn the line between the obscene and the permissible considerably closer to the pornographic⁴⁵ than the heretofore existing tests.

The Model Penal Code was not directly involved in either the *Roth* or *Alberts* cases. Both defendants had been convicted under conventional statutes which as interpreted defined obscenity in terms of the material's tendency to arouse lustful thoughts or deprave and corrupt the reader.⁴⁶ The primary issue in both cases was the constitutionality of these statutes⁴⁷ and the obscenity of the publications involved was not in issue.⁴⁸ Nevertheless, all of the Justices appear to have been influenced in their thinking by the Code and it is discussed in three of the four opinions.⁴⁹

Some confusion is created by the fact that Mr. Justice Brennan, in the majority opinion, after defining obscenity in language adapted from the Code, stated that the trial courts "sufficiently followed"⁵⁰ this standard. He further cites as examples of applications of the Court's definition cases which applied the prevailing test defining obscenity in terms of the thoughts it creates in the reader.⁵¹ Elsewhere,⁵² he

⁴⁴ *Id.* comments, at 10.

⁴⁵ "The term 'obscene' or one of its equivalents is 'often used to describe typical under-the-counter pornography, which is, of course, not entitled to constitutional protection.' Lockhart and McClure, *supra* note 33, at 356. See also Note, 6 BUFFALO L. REV. 305, 315-16 (1957), where pornography is said to be distinguishable from obscenity "because it is deliberately designed to stimulate sex feelings and to act as an aphrodisiac whereas an obscene book has no such immediate and dominant purpose, although incidentally this may be its effect."

⁴⁶ 354 U.S. at 486.

⁴⁷ CAL. PEN. CODE ANN. § 311 (1955); 18 U.S.C. § 1461 (1952).

⁴⁸ 354 U.S. at 481 & n. 8.

⁴⁹ Although Chief Justice Warren did not specifically mention the Penal Code in his separate concurring opinion, some of his language seems to have been at least influenced by its provisions and his argument appears to embody the philosophy behind the model legislation. He says: "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." He felt that the language of the majority opinion was too broad and noted that both defendants "were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect." He felt that both the state and federal governments could constitutionally punish such conduct. 354 U.S. at 494-96.

⁵⁰ *Id.* at 489.

⁵¹ *Id.* at 489 & n.26.

⁵² *Id.* at 487.

substitutes a dictionary definition of "prurient interest" ("i.e., material having a tendency to excite lustful thoughts")⁵³ for the American Law Institute definition, and states: "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the . . . Model Penal Code. . . ."⁵⁴ Yet at the same time he cites portions of the comments to the Code where the prevailing definitions were expressly rejected.⁵⁵

Despite these inconsistencies, there seem to be strong indications that the Penal Code definition is the standard toward which the Court is moving.⁵⁶ It has been suggested, also, that the Court "may have been trying to bring existing law up to the level of the Model Penal Code by the *tour de force* of declaring that it was already there."⁵⁷

Even if the Court be said to have only indicated a qualified acceptance of the Model Penal Code definition and approach, it has nevertheless made clear that obscenity statutes must be so restricted that they will not interfere with materials merely concerned with sex, that obscenity and sex are not the same; obscenity is something more—the appeal to "prurient interest" which goes beyond community standards and is "utterly without redeeming social importance." Further, the old restrictive *Hicklin* rule has been expressly rejected and allegedly obscene materials must now be evaluated as a whole and their "dominant theme" determined with reference to the average person, not the especially susceptible individual. How the Court's test will work out in ap-

⁵³ *Id.* at 487, n. 20.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, citing ALI MODEL PENAL CODE § 207-10, comments, at 10 (Tent. Draft No. 6, 1957).

⁵⁶ Mr. Justice Douglas, in his dissenting opinion concurred in by Mr. Justice Black, states that the Court's standard "in substance" seems to be the definition of the Model Penal Code. However, he did not consider it valid because it "does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit." Equally invalid to him were the standards applied by the lower courts in both cases because they "punish mere speech or publication that the judge or jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of unlawful action . . ." 354 U.S. at 508-14.

Mr. Justice Harlan charged that "the Court compounds confusion" by superimposing the Model Penal Code definition on the two statutory definitions involved in the cases. He did not feel that the definitions could be reconciled and believed that the convictions should have been reversed if the American Law Institute formula were the correct standard. He contended also that each particular suppression of a publication as obscene involved a sensitive question of constitutional judgment which in each case was the responsibility of an appellate court. Upon making his own examination of the material involved in *Alberts*, he concurred in affirming the conviction and concluded that suppression of this material would not "so interfere with the communication of 'ideas' in any proper sense of that term" that it would violate due process and the first amendment. In *Roth*, however, he dissented because of his view of the differences between state and federal power and the danger of a uniform national censorship imposed by the federal government. He felt that Congress could only regulate "hard-core" pornography" and that the materials involved in the case were not such. *Id.* at 496-508. See also note 49 *supra*.

⁵⁷ Schwartz, *Criminal Obscenity Law*, 29 PA. B. ASS'N. Q. 8, 11 (1957).

plication remains to be seen from future litigation,⁵⁸ but the present decision would seem to be conducive to greater freedom of expression in this area. In the meantime, North Carolina—a state which has apparently never had an obscenity case reach its highest court—stands in the unique position of having an obscenity statute which, properly applied,⁵⁹ ranks with the most modern and liberal in the nation and represents an acme toward which the law appears to be presently moving.

DAVID E. BUCKNER

Criminal Law—Assault on a Female—“Show of Violence” Rule in North Carolina

In *State v. Allen*,¹ the evidence tended to show that the defendant followed prosecutrix in his automobile on several occasions as she walked to a place on a public street where she customarily awaited her ride to work, that the defendant stopped within a few feet of prosecutrix but made no attempt to approach her or to communicate with her in any way, that defendant gazed constantly at her, making motions with the lower part of his body, and that because of fear of him, prosecutrix quit walking the usual way to the place for her ride. These acts, on the occasion before his arrest, caused prosecutrix to run to the steps of a public school. This evidence was held sufficient to go to the jury in a prosecution for assault on a female.²

The principal case is the latest of several recent borderline cases of assault on a female which have been brought before the North Carolina Supreme Court, and it serves well to illustrate the difficult problem confronting the court in determining whether or not the particular acts of a defendant are sufficient in law to constitute the criminal offense.³

⁵⁸ In three per curiam decisions since the preparation of this Note, the Court has struck down prohibitions on the mailing of magazines which lower courts had held to be obscene, as well as a similar ban on the showing of a motion picture. In all of these cases the Court relied upon its decision in the *Roth* case.

See *One, Inc. v. Olesen*, 26 U.S.L. WEEK 3204 (U.S. Jan. 14, 1958) reversing 241 F.2d 772 (9th Cir. 1957) (over-turning the lower court's affirmance of a post-office ban on "One," a magazine concerned with homosexuality, on grounds that it was obscene); *Sunshine Book Co. v. Summerfield*, 26 U.S.L. WEEK 3204 (U.S. Jan. 14, 1958), reversing 128 F. Supp. 564 (D.C. Cir. 1955) (nudist magazines, *Sunshine and Health and Sun Magazine*, not excludable from the mails as obscene); *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957), reversing 244 F.2d 432 (7th Cir. 1957) (reversing Chicago censorship of the French motion picture "Game of Love" on obscenity grounds). The Court's only explanation of these one-sentence decisions was in its citation of the *Roth* case. Their inference, however, would seem to be that the Court has imposed tight limits on permissible censorship for obscenity. See also, Lewis, *Censorship Limited in 'Obscenity' Cases*, *The New York Times*, January 19, 1958, § E, p. 9, col. 6-8.

⁵⁹ See note 16 *supra*.

¹ 245 N.C. 185, 95 S.E.2d 526 (1956).

² N.C. GEN. STAT. § 14-33 (1953).

³ Technically, assault on a female is not a specific type of assault, as the degrees of assault specified by statute relate to the extent of punishment and do not create