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## CONSTITUTIONAL LAW — THE 1966 OBSCENITY CASES

That obscenity is not within the ambit of constitutionally protected free speech and press was decided by the United States Supreme Court in *Roth v. United States*.<sup>1</sup> American courts rejected the early English rule that material was to be judged by the effect of isolated passages on particularly susceptible persons,<sup>2</sup> and *Roth* merely reiterated what lower courts had been saying for years,<sup>3</sup> that the test for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."<sup>4</sup> This standard provides little guidance in predicting what materials may be declared obscene.<sup>5</sup> Realizing it is essential to distinguish between actual obscenity and materials which merely delve into areas not traditionally within society's norms of acceptability,<sup>6</sup> members of the Court began to consider the many practical problems left unsettled by *Roth*. What is the "average person"? What are "contemporary community standards"? What is "prurient interest"? In groups of twos and threes, the Justices sought to clarify the basic standard; the results have created substantial difficulty in determining the legal definition of obscenity. Justices Brennan, Harlan, and Stewart are of the opinion that the contemporary community standards to be applied must be national rather than local.<sup>7</sup> Justice Brennan introduced the belief that a work may be declared obscene only if "utterly without redeeming social importance."<sup>8</sup> Justice Harlan put forth the idea that material must

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1. 354 U.S. 476 (1957).

2. The test was first applied in *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868). It had been adopted in some of the early American cases. See *United States v. Kennerley*, 209 Fed. 119 (S.D.N.Y. 1913); *United States v. Clarke*, 38 Fed. 500 (E.D. Mo. 1889); *Commonwealth v. Buckley*, 200 Mass. 346, 86 N.E. 910 (1909).

3. See, e.g., *Walker v. Pompenoe*, 149 F.2d 511 (D.C. Cir. 1945); *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940); *United States v. Levine*, 83 F.2d 156 (2d Cir. 1936); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933); *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N.E.2d 585 (1954); ALI MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6 1957).

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

5. See GERBER, SEX, PORNOGRAPHY, AND JUSTICE 129-31 (1965); Kalven, *The Metaphysics of the Law of Obscenity*, SUP. CT. REV. 1, 15 (1960).

6. See *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959).

7. *Jacobellis v. Ohio*, 378 U.S. 184, 193 (1964) (Brennan, J.); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488 (1962) (Harlan and Stewart, JJ.).

8. *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964): "Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance."

be "patently offensive" before it may be held obscene.<sup>9</sup> However, in no decision prior to 1966 had a majority of the Court been able to join in clarifying or expanding the elements of the *Roth* standard. As a consequence, the obscenity vel non of questionable material was far too frequently determined by ad hoc value judgments rather than by application of an abstract standard.<sup>10</sup> This Note examines the effect of three 1966 decisions.<sup>11</sup>

The result in *Mishkin v. State of New York*<sup>12</sup> was to be expected. Appellant was convicted of violating a state statute prohibiting publication or sale of obscene books.<sup>13</sup> The books in question depicted deviant sexual practices, such as flagellation, fetishism, and lesbianism.<sup>14</sup> The United States Supreme Court affirmed, holding the statute not unconstitutionally vague as written and not invalid as applied, since the standard of obscenity as applied by the state courts limited the statute's reach to "hard-core" pornography. Most of the Court have long agreed that "hard-core" pornography is not protected by the first amendment, and that states are free to devise reasonable standards for obscenity, provided they do not transgress the bounds set in *Roth*.

In *Mishkin* the appellant urged that an element of the *Roth*

9. *Manuel Enterprises v. Day*, 370 U.S. 478, 482 (1962). The concept was essentially a change of terminology. "These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness.'"

10. For a more detailed history of the obscenity standards and the laws regulating obscenity, see GERBER, SEX, PORNOGRAPHY, AND JUSTICE (1965); Alpert, *Juridical Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1937); Gerber, *A Suggested Solution for the Riddle of Obscenity*, 112 U. PA. L. REV. 834 (1964); Kalven, *The Metaphysics of the Law of Obscenity*, SUP. CT. REV. 1 (1960); Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

11. *Mishkin v. New York*, 383 U.S. 502 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966).

12. 383 U.S. 502 (1966).

13. N.Y. PENAL LAW § 1141 reads in pertinent part: "1. A person who . . . has in his possession with intent to sell, lend, distribute . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic, or disgusting book . . . or who . . . prints, utters, publishes, or in any manner manufactures, or prepares any such book . . . or who

"2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

"Is guilty of a misdemeanor . . . .

" . . . .

"4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section."

14. The information charged 159 counts of violating § 1141. Representative titles are: THE WHIPPING CHORUS GIRLS, CULT OF THE SPANKERS, SO FIRM SO FULLY PACKED, SORORITY GIRLS STRINGENT INITIATION, and STUD BROAD.

test was lacking because the books in question depicted such deviant sexual practices that they would hardly appeal to the prurient interest of the "average person." The Court rejected this argument, holding that when material is designed for a specifically defined deviant group the prurient-appeal element of the standard is satisfied if the material appeals to that group's prurient interest.

In *Ginzburg v. United States*,<sup>15</sup> the Supreme Court affirmed a conviction for knowingly distributing obscene literature through the mail in violation of the federal obscenity statute.<sup>16</sup> The materials mailed included the periodical "Eros" and the book "The Housewife's Handbook on Selective Promiscuity."<sup>17</sup> The majority held that even if material is not obscene in the abstract, evidence of the publisher's exploitation of its prurient appeal may justify finding the material obscene. The Court expressed this in unequivocal terms: "[W]here the purveyor's sole emphasis is on the sexually provocative aspects of his publication, that fact may be decisive in the determination of obscenity."<sup>18</sup> In so holding, the Court has applied an unexpected mutation of the concept of "variable obscenity,"<sup>19</sup> a theory which allows obscene material to be considered non-obscene on

15. 383 U.S. 463 (1966).

16. 18 U.S.C. § 1461 (1964), providing: "Every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance; and . . .

". . . Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters . . . may be obtained . . . Is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

17. EROS purported to be a magazine designed for sexual sophisticates, and featured articles and photo essays dealing with various aspects of love and sex. THE HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY depicted the sexual and psychological misadventures of an "average American housewife."

18. 383 U.S. at 470. And later, *id.* at 475-76: "Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."

After unsuccessful attempts to have the material postmarked from Inter-course and Blue Ball, Pennsylvania, mailing permits were obtained from Middlesex, New Jersey. A less subtle aspect of the advertising scheme was the unconditional money-back guarantee "if the book fails to reach you because of U.S. Post Office censorship interference."

19. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 68 (1960): "The issue, of course, is whether obscenity is an inherent characteristic of obscene material, so that material categorized as obscene is always obscene at all times and places and in all circumstances, or whether it is a chameleonic quality of material that changes with time, place, and circumstance."

a showing that the material is innocently and constructively employed. It appears the material here in controversy, judged in the abstract by the *Roth* standard, was not obscene, but was held obscene in light of the pandering element. Thus the Court has added, by majority opinion, a new element to the *Roth* rule, although they do not proclaim it as such. By virtue of *Ginzburg*, "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test."<sup>20</sup> "Close cases" apparently are those in which the material is questionable.

The concept of variable obscenity had always been used to treat obscene materials as if they were not obscene, and the crucial variable was the reader, hearer, or viewer of the obscene materials. For example, admittedly pornographic photographs were not treated as obscene when used by the Institute for Sex Research of Indiana University (the "Kinsey Institute") in scientific studies.<sup>21</sup> But this is in sharp contrast with the Court's application of the theory in *Ginzburg*, where it employs the concept to declare questionable materials obscene, the crucial variable being the reprehensible intention of the publisher, exhibited in advertising designed to appeal to the salaciously disposed.<sup>22</sup> The argument that material obscene on its face should not be proscribed if put to commendable uses seems far more rational than that by which material not obscene in the abstract will nevertheless become obscene if the publisher-distributor advertises it as such. It is suggested that a logical application of the theory of variable obscenity demands that materials subject to proscription be recognized as a species of obscene materials; thus, all material that is proscribed is necessarily obscene, but not all obscene material is to be banned. When obscene material is put to a legitimate, constructive use it does not thereby

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20. *Ginzburg v. United States*, 383 U.S. 474 (1966).

21. *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957).

22. The opinion in *Ginzburg* is reminiscent of the words of Chief Justice Warren in *Roth v. United States*, 354 U.S. 476, 495 (1957) (concurring opinion): "It is not the book that is on trial; it is the person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the material 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." It is submitted that when a defendant is charged with possessing or distributing obscene materials, a determination of the nature of the materials is not only relevant as an attribute of the defendant's conduct but is essential to support a conviction. For if the material is not in fact obscene, the defendant did not possess or distribute obscene materials, regardless of his intentions or motives. In this regard, see the part of Justice Douglas' opinion which is pertinent to this discussion, 383 U.S. 482-83 (1966) (dissenting opinion).

change its nature; it remains obscene but is no longer subject to proscription. The Kinsey Institute, for example, knew well that the photographs were obscene; had they not been obscene they would not have served the Institute's purposes. It is submitted, therefore, that the term "variable proscription" is more cogent than "variable obscenity," and that although proper use may render obscene material unsusceptible of proscription, it does not follow that blameworthy use should render non-obscene material subject to proscription.

Although all may not agree with *Mishkin* and *Ginzburg*, the manner in which they will be applied in the future seems quite clear. Not so with the *Fanny Hill* case.<sup>23</sup> The Massachusetts courts declared the novel commonly called *Fanny Hill* obscene.<sup>24</sup> The United States Supreme Court reversed, but the six members of the Court who voted for reversal were not united in their reasons. Justice Brennan, joined by Chief Justice Warren and Justice Fortas, based reversal on the belief that the lower courts misapplied the social-value criterion of the federal definition of obscenity by declaring the book obscene although it was found to possess at least some element of social worth.

It has long been disputed whether the utter lack of social value is a prerequisite for obscenity or merely the customary incident of an obscene work. To escape the mandate of the first amendment, the Court in *Roth* reasoned that the history of the amendment indicates that all obscenity is "utterly without redeeming social value."<sup>25</sup> Given this, the Court was able to justify the proscription of some materials, for the first amendment was meant to protect only speech and press that has some social worth, however slight.<sup>26</sup> The argument in *Fanny Hill* is that if no obscenity has redeeming social value, once a book is found to have redeeming social value, it cannot be declared obscene. Although the reasoning of Justices Brennan, Warren, and Fortas is structurally sound, it appears that they now choose to overlook the impact of the word "redeeming" in both their major and minor premises. The argument in *Roth* was not that

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23. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966). The case is hereinafter referred to in the text as the *Fanny Hill* case.

24. The book recounts the experiences of a young country girl who becomes a London prostitute. It was written by John Cleland about 1750.

25. *Roth v. United States*, 354 U.S. 476, 484 (1957).

26. *Id.* at 484: "All ideas having the slightest social value must fall within the protection offered by the First Amendment."

obscenity is utterly without social value; it was that obscenity is utterly without *redeeming* social value, indicating that the social worth of the material should be balanced against its obscene nature. "Indeed, obscenity was denoted in *Roth* as having 'such slight social value as a step to truth that any benefit that may be derived . . . is clearly *outweighed* by the social interest in order and morality. . . .'"<sup>27</sup> It seems that the plurality opinion has now read out "redeeming" by stressing "utterly without."<sup>28</sup>

Notwithstanding the lack of a majority rationale, it appears that the social-value aspect will be an element of the standard in future cases, for whenever Justices Brennan, Warren, and Fortas determine that a given work is not obscene because it possesses an element of social value, Justices Black and Douglas may be counted on to provide a majority by concurring in the result.

As mentioned, *Roth* provided a test of unpredictable applicability. In the ten years since that decision, the Supreme Court has produced few results substantially tending to solidify this area of the law, and these most recent cases do not lessen the confusion. The principles upon which a majority of the Court agree are: obscenity is not protected by the first amendment; the test for obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest; if the material is designed for dissemination to a clearly defined deviant group, the prurient-appeal element of the standard is satisfied if the material appeals to the prurient interest of that

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27. Justice Clark dissenting in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 442 (1966).

28. In his dissenting opinion, Justice White points out that if the prevailing opinion is followed, "obscene material, however far beyond customary limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way." 383 U.S. 413, 461 (1966).

An interesting dilemma would seem to arise when a work exploited by its publisher for its prurient appeal is found to possess a slight element of social worth. But the plurality opinion notes that "it does not necessarily follow from this reversal that a determination that MEMOIRS is obscene in the constitutional sense would be improper under all circumstances . . . . Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but rather that . . . where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value." 383 U.S. 413, 420 (1966).

group; and "in close cases" exploitation of the prurient appeal of material will be decisive in the determination.

The decisions and views are varied as to other aspects of the standard and its application. On one hand Justices Brennan, Fortas, and the Chief Justice are relatively united in the opinion that the *Roth* test should be applied to determine the obscenity of questionable material, and that no material may be declared obscene if it be found to possess an element of social value; they stand with the majority in the belief that evidence of exploitation of prurient appeal should be decisive in "close cases."<sup>29</sup> On the other hand Justices Black, Douglas, and Stewart fully accept none of these concepts. Justices Black and Douglas believe the first amendment does not allow proscription of any materials not inextricably bound up with illegal activity.<sup>30</sup> Justice Stewart feels that the first amendment will permit the proscription of "hard-core" pornography only.<sup>31</sup>

Justice Clark denies that the social value criterion constitutes a separate test,<sup>32</sup> but agrees that the exploitation factor should be afforded determinative weight.<sup>33</sup> Justice Harlan is of the opinion that the first amendment does not apply to the federal government and the states with equal vigor, and asserts that although the federal government may proscribe only hard-core pornography, the states may adopt any standard of proscription reasonably related to contemporary notions.<sup>34</sup> Justice White expressly rejects the notion that the social value element constitutes a separate test, and would apply a limited view of the *Roth* standard.<sup>35</sup>

Only one clear result emerges as the cumulative effect of the obscenity decisions, "that no stable approach to the obscenity problem has yet been devised by [the] Court."<sup>36</sup> Justice

29. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966).

30. *Ginzburg v. United States*, 383 U.S. 463, 476 (1966) (dissenting opinion of Black, J.); *id.* at 482 (dissenting opinion of Douglas, J.).

31. *Ginzburg v. United States*, 383 U.S. 463, 497 (1966) (dissenting opinion).

32. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 441 (1966) (dissenting opinion).

33. *Ginzburg v. United States*, 383 U.S. 463 (1966).

34. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 455 (1966) (dissenting opinion).

35. *Id.* at 460 (dissenting opinion).

36. *Id.* at 455 (dissenting opinion of Harlan, J.).

Black adds, "certainly after the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today."<sup>37</sup> That this should be so seems particularly incongruous in view of the marked tendency of the Court to expand the protection of the first amendment in the area of libel.<sup>38</sup> A comparison of the libel and obscenity cases reveals contradictory tendencies which considerations of public policy only partially reconcile.

It is submitted that confusion and contradiction reign today because the Court has never offered a fully acceptable rationale to support the conclusion that the first amendment permits the censorship of obscenity, and because it has yet to define obscenity in a consistent and rational manner.

The first point was settled by the majority of the Court in *Roth*.<sup>39</sup> It did not receive the affirmation of a united Court then, nor does it now. The language of the first amendment is absolute: "Congress shall make *no law* . . . abridging the freedom of speech, or of the press."<sup>40</sup> Two arguments have been presented as a reason to evade this absolute language. It is claimed that the existence of anti-obscenity statutes in many states at the time of the adoption of the amendment indicates that the drafters intended to except obscenity from its scope.<sup>41</sup> This argument rings false, for at that time the fourteenth amendment was not yet in effect, and the first amendment was a restraint on the federal power alone; thus, state statutes are not relevant to the problem. It is certainly not clear that the publication of obscenity was a crime at common law; as late as the beginning of the Eighteenth Century the publication of obscenity was exclusively within the jurisdiction of the ecclesiastical courts,<sup>42</sup> and the first recorded conviction was in 1727.<sup>43</sup> But

37. *Ginzburg v. United States*, 383 U.S. 463, 480-81 (1966) (dissenting opinion).

38. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

39. Note, however, that even at this early stage the confusion of the majority was evidenced by marked inconsistencies. Compare the language from *Roth* in note 26 *supra* with the language quoted from *Roth* by Justice Clark in the text accompanying note 27.

40. U.S. CONST. amend. I (emphasis added).

41. *Roth v. United States*, 354 U.S. 476, 482-83 (1957).

42. *The Queen v. Read*, 11 Mod. 142 (Q.B. 1707).

43. *Dominus Rex v. Curl*, 2 Strange 789 (K.B. 1727).

even assuming that the common-law doctrine was settled at the time, the absolute language of the first amendment does not warrant the assumption that the doctrine was meant to be incorporated intact into the laws of the republic.<sup>44</sup>

The second argument would rest on the "clear and present danger" concept, which is acceptable when applicable only because it is reasonable to hold that speech which presents a clear and present danger of illegal action is closely bound to that action.<sup>45</sup> Again, those who would challenge the absolute language of the first amendment must bear the burden of showing that there exists a significant positive correlation between pornography and sex-orientated criminal activity; this burden has never been met.<sup>46</sup> Notwithstanding, it is the settled opinion of the majority of the Court that obscenity is not within the scope of the first amendment's protection. This settled, the second point becomes the crucial one.

The reason the Court has been unable to formulate a definition of obscenity which admits of equitable application in any given case is that obscenity is essentially a subjective determination.<sup>47</sup> It is submitted that the essentials of due process are violated when publishers and distributors are made to rely on guesswork in determining whether their activities may give rise to criminal liability,<sup>48</sup> and that the federal standard for obscenity should properly be considered void because of its subjective nature.<sup>49</sup>

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44. See *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 424 (1966) (dissenting opinion of Douglas, J.) and authorities cited therein.

45. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919).

46. See Cairnes, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1034-41 (1962); Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 382-87 (1954). For the view that pornographic literature often deters and provides a substitute for anti-social conduct, see Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655 (1964).

47. The writer regards a declaration that a given book is obscene as distinctly analogous to a declaration that a certain woman is beautiful, and submits that most such declarations more accurately reflect the nature of the perceiver than that of the perceived.

48. *State v. Kraft*, 214 La. 351, 355, 37 So.2d 815, 817 (1948): "It is sufficient to say that a criminal statute, in order to be valid and enforceable, must define the offense so specifically or accurately that any reader having ordinary intelligence will know when or whether his conduct is on the one side or the other side of the border line between that which is and that which is not denounced as an offense against the law." For an excellent discussion in this regard see *In re Davis*, 51 Cal. Rptr. 702 (1966) and authorities cited therein.

49. See *Ginzburg v. United States*, 383 U.S. 463, 478 (1966) (dissenting opinion of Black, J.); *Id.* at 497 (dissenting opinion of Harlan, J.).

A particular problem is that the availability of obscene materials will have an unhealthy effect on the undisciplined and undiscriminating minds of young people. But adequate measures other than universal censorship exist for coping with this threat. The "clear and present danger" test is more tenable in this limited area, and would support legislation. The parental duty to provide for the health and welfare of the child provides added protection. It is submitted that a less strained interpretation of the first amendment would lead, not to moral chaos, but to a heretofore unknown spirit of sexual tolerance in the United States.

"I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field."<sup>50</sup>

*Gerard A. Rault*

#### INSURANCE — EXCLUSIONARY CLAUSES IN AUTOMOBILE LIABILITY POLICIES

Insured had driven his automobile to a service station to have it washed and serviced while he was at work. The service station manager sent an employe, Dronet, to accompany the insured to his place of employment then return the car to the station. While driving back, Dronet was involved in an inter-sectional collision with a car driven by plaintiff, who sued Dronet, the service station owner, and insured's liability carrier for personal injuries sustained in the collision. The insurance policy contained a clause excluding coverage with respect "to an owned automobile while used in the automobile business." The trial court sustained defendant insurer's motion for summary judgment denying coverage. The Third Circuit Court of Appeal reversed. *Held*, the exclusionary clause is susceptible of at least two meanings and is to be construed against the insurer; thus, the vehicle being driven with permission of the insured to the service station by an employe of the station to be washed and serviced was not being "used in the automobile business" within the exclusionary clause. *Wilks v. Allstate Ins. Co.*, 177 So.2d 790 (La. App. 3d Cir. 1965), *writs refused*, 248 La. 424, 179 So.2d 18 (1965).

<sup>50</sup>. *Roth v. United States*, 354 U.S. 476, 514 (1957) (dissenting opinion of Douglas, J.).