Justice Michael A. Musmanno and Obscenity (1956-1967)

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There was a time when juries and trial judges conscientiously performing their duty in ascertaining the facts were allowed to use their common sense and appreciation of what is fair and just in deciding what is obscene and what is not obscene. That day is vanishing like the American Indian because recently courts have been fighting windmills over the definition of the simplest words. Any urchin on the street, any illiterate immigrant only in America a few months, any uneducated laborer will tell you the meaning of the word obscene, but there are courts which still cannot define or describe obscenity without employing polysyllabic words enmeshed in complicated verbiage of unending modifications and nuances which finally leave the reader or hearer as confused as one listening to an aboriginal incantation in an equatorial jungle.

From 1957 to 1973, the United States Supreme Court was engaged in revising what was the contemporary view of obscenity. The Court's opinion in Roth v. United States (1957) provided that the test to determine obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." It took another sixteen years, until Miller v. California (1973), for the Court to articulate its three-prong test for obscenity: "(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole,

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appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.”

The Pennsylvania Supreme Court followed the United States Supreme Court in a “lockstep” approach, supporting the expansion of obscenity decisions dealing with both films and books. Before the Miller decision, Roth was considered the “standard” view of how obscenity should be defined through court cases. In these decisions, however, Associate Justice Michael A. Musmanno consistently opposed the majority decisions and viewed obscenity or pornography as a major problem for society. His quotation, cited in the opening paragraph, reflects his views, as well as those of others, on the subject. His decisions represent Supreme Court Justice William Brennan’s view of a single justice who votes his conscience regardless of opinions of his brethren. This article will review Justice Musmanno’s decisions in film and book censorship during the decade from 1956 to 1967.

I. FILM CENSORSHIP

Film censorship began in the early twentieth century when numerous states created censorship boards to review films. In 1915, Pennsylvania enacted the Movie Picture Censorship Act. Under the act the formation of the Production Code Administration stopped any further state action concerning censorship laws. In 1948, the United States Supreme Court decided in United States v. Paramount Pictures, Inc. that motion pictures are entitled to first-amendment protection. Four years later, the Court decided Joseph Burstyn Inc. v. Wilson (1952) and determined that a New

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5. Robert F. Williams uses this term, “Lockstep,” to describe how state courts follow policies based on federal, usually U.S. Supreme Court decisions, in deciding state opinions, although state constitutional law may actually lead to other decisions. See Robert F. Williams, In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result, 35 S. CAL. L. REV. 353 (1984); Robert F. Williams, Methodology Problems in Enforcing State Constitutional Rights, 3 GA. ST. U. L. REV. 143 (1987).
7. 1915 PA. LAWS 534.
8. 72 S. Ct. 777 (1948).
York film, Roberto Rossellini’s *The Miracle*, could not be censored under New York statutes, and that the word “sacrilegious” was too vague.\(^9\) It is with this short background that the Pennsylvania Supreme Court heard its first censorship case in 1956, *Hallmark Productions v. Carroll* (1956).\(^{10}\)

In this case, Hallmark Productions showed the film *Wild Weed*, later renamed twice as *Devil’s Weed* and then *She Should’a Said No!*, in which the theme was a dope peddler selling marijuana cigarettes to minors.\(^{11}\) In Pennsylvania, a Board of Censors found the film “indecent and immoral and, in the judgment of the Board, tended to debase and corrupt morals,’ and therefore disapproved it.”\(^{12}\) The sole question for the court was whether the Censorship Act

is unconstitutional, either because it is so vague and indefinite in its terms as to offend the due process clause of the Fourteenth Amendment, or because it abridges freedom of speech in contravention of the First and Fourteenth Amendments to the Constitution of the United States and the free communication of thoughts and opinions in violation of Article I, Section 7,\(^{13}\) of the Constitut-

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12. *Hallmark*, 121 A.2d at 585.
13. 1874 PA. CONST. art. I, § 7 provided:

   Freedom of the Press.

   Section 7. The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever by made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Id. The provision was carried over in the article and section under the current 1968 Pennsylvania Constitution, at http://www.paconstitution.duq.edu/con68.html.
Citing first the U.S. Supreme Court opinion in *Joseph Burstyn, Inc. v. Wilson*, and other state cases that followed the *Burstyn* case in their own jurisdictions, the Pennsylvania Supreme Court held that the Censorship Statute, calling for "sacrilegious, obscene, indecent, or immoral, or such as tend, in the judgment of the board, to debase or corrupt morals," was unconstitutional.

Chief Justice Bell provided a concurring opinion "reluctantly" agreeing with the majority opinion based on the U.S. Supreme Court opinions. A footnote observed:

If that standard is too vague and indefinite before the motion picture is shown, it is difficult to understand how a Court, can, after an exhibition, bar a picture or punish its participants on the ground that it is obscene, indecent, immoral or sacrilegious and hence a violation of Sections 527, 528 et seq. of the Criminal Code of June 24, 1939, P.L. 872, 18 Pa.S. §§ 4527, 4528 et seq.

This concurrence was followed by Justice Musmanno's dissent.

Associate Justice Musmanno opened his dissenting opinion with an observation: "The Majority Opinion is an interesting legal travelogue but it does not decide the issue in this case. It takes the reader on a learned tour of various appellate courts but it does not resolve the appeal before us." Rejecting the majority opinion, he criticized the court for passing "sentence of execution on an honorable institution which for forty-one years has protected the good people of Pennsylvania from sacrilegious, obscene, indecent and immoral pictures and those tending to debase or corrupt morals." The Board was a "dike" against indecency. He cited five instances in the movie that were found unacceptable by the Censorship Board, that found no approval of the Federal Bureau of

17. *Id.* at 589 (Bell, C.J., concurring).
18. *Id.* at 590 (Musmanno, J., dissenting).
19. *Id.*
20. *Id.* at 591. Five of the 22 charges against the film listed by Justice Musmanno were:
Narcotics for the film as an educational film, and that found no support from the Censorship board and local police. Musmanno criticized the majority for not discussing the film, while declaring an act of the legislature unconstitutional:

But it is impossible to decide the constitutionality of the Motion Picture Censorship Act without considering the motion picture which brought the Act into the forum of discussion. Statutes are not interpreted in a vacuum, they are not weighed abstractly, they are not appraised like a garment in a window – they must be draped over the living figure of the controversy. This Court cannot simply proclaim that a solemn Act of the sovereign body of this Commonwealth, the General Assembly, is unconstitutional. It must specify why. This it has not done.

Although finding the U.S. Supreme Court’s reasoning in Burstyn acceptable when it came to the question of a sacrilegious film in New York, Justice Musmanno believed that the Court’s application should not apply to an obscenity film in Pennsylvania:

While conflicting currents of religious views might make difficult the formation of a legal standard as to what constitutes sacrilege in a motion picture, there can be no con-

\[\text{8. The scene of two teenage couples, an open roadster on a hill overlooking Hollywood and being under the influence of the drug; each boy having a girl in his arms and smoking a marijuana cigarette depicts depravity and indecency and is indecent and immoral and, in the judgment of the Board, tends to debase and corrupt morals and teaches a method of crime.}
\[\text{10. The scene showing the party in Ann's home with Rita and the two men as they smoke marijuana cigarettes and under its influence deport themselves in an obscene manner is indecent and immoral and, in the judgment of the Board, tends to debase and corrupt morals.}
\[\text{13. The scene showing Rita dancing in an indecent fashion under the influence of the drug after smoking a marijuana cigarette is indecent and immoral and, in the judgment of the Board, tends to debase and corrupt morals.}
\[\text{14. The statement made by the dope peddler (Markey) is indecent and immoral and, in the judgment of the Board, tends to debase and corrupt morals, when he says to the girl Ann "All that energy, beautiful—Let's not waste it in dancing."}
\[\text{15. The scene where the dope peddler (Markey) and Ann leave the room where the party has taken place and where Ann has already smoked her first marijuana cigarette and goes into another room with Markey is indecent and immoral and, in the judgment of the Board, tends to debase and corrupt morals.}

Id.

21. Hallmark, 121 A.2d at 592 (Musmanno, J., dissenting).
22. Id.
23. Id. at 592-93.
lict, in civilized society, as to what is indecent and immoral and what tends to debase and corrupt morals. The code of decency and morality is one that God laid down in the morning of creation and has been written on the tablets of conscience of every race since the mists of Genesis lifted, and man began to walk alone.24

Justice Musmanno went on to point out that the U.S. Supreme Court stated that the opinion only dealt with the censorship of a movie that was sacrilegious,25 as did Justice Reed's dissent claiming the limited nature of the opinion.26 The Supreme Court's own recognition that all motion pictures were open to the same criticism of other forms of expression also drew his criticism that the court would continue to strike down all films no matter how obscene.27 He questioned the movement of lewd films from private clubs to the public movie house: "How will the punishment of the exhibitor heal the lacerating wounds made in the delicate sensations of children and sensitive adults who witness a picture of lewdness, depravity and immorality? Damage is done at the very first exhibition of the film."28 With upward of 4,000 people being able to attend a movie theater in Pittsburgh or Philadelphia, the opportunity to prevent showing had to be done before the movie was shown not afterwards. "That is why reason dictates that control over immoral films must be found in prevention and not in subsequent punishment."29

Furthermore, it was not enough to tell people that if they do not like a film they should stay away:

How are people to know if a certain production is immoral and indecent? And why should anyone be required to be offended in a theatre with scenes that sting decent eyes and with language that shocks respectable ears? If

24. Id. at 593.
25. Id.
26. Hallmark, 121 A.2d at 593-94. Justice Reed noted:

Assuming that a state may establish a system for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored. This film does not seem to me to be of a character that the First Amendment permits a state to exclude from public view.

Id. (citing Joseph Burstyn, Inc., 343 U.S. at 506-07 (Reed, J., concurring)).
27. Id. at 594 (Musmanno, J., dissenting).
28. Id.
29. Id.
one is to learn of impurities in water only after he has drunk it, the municipal authorities have done very little to protect the citizens who make up and maintain the municipality.\(^\text{30}\)

The government's police power to protect its citizens made it possible to provide for the screening of movies: "Why should the avenues of the mind and the soul be polluted with the parading of indecencies and obscenities which can and do sometimes appear in films?"\(^\text{31}\) In addition, the movie producers have their own code, recognizing their own responsibility to the public in making films.\(^\text{32}\) The Censorship Board, in 1953, "passed on 1144 subjects. It rejected 10 pictures outrightly and in 34 others eliminated 84 scenes. Who can say that he has lost any of his freedom because he was not given the opportunity to see the 10 bad pictures and the 84 outlawed scenes?"\(^\text{33}\)

Musmanno complained that the U.S. Supreme Court found the word "sacrilegious" vague, but he saw nothing vague or uncertain about the words "obscene," "indecent," and "immoral:"

There is nothing ambiguous about "debasement and corruption of morals." Any citizen with a fairly good education, excellent character, good religious upbringing, social consciousness and devotion to the ideals of democracy, can pass with satisfactory results on whether certain motion pictures are moral and proper.\(^\text{34}\)

He believed that the Censorship Board could only help people and that the finding of a sacrilegious film did not take away from the Board the capability of declaring something obscene. Citing the Statutory Construction Act of 1937, he felt it provided for the board "to pass upon pictures under the criteria of decency and morality."\(^\text{35}\) He asked, "Why then does the Majority outlaw the provi-

\(^{30}\) Id.

\(^{31}\) Id. at 595.

\(^{32}\) This is a reference to the Movie Picture Producers and Distributors of America created in 1922 and created the Motion Picture Code in 1934 under William Hays. See supra note 9, at Film Censorship in the 21st Century.

\(^{33}\) Hallmark, 121 A.2d at 595 (Musmanno, J., dissenting).

\(^{34}\) Id. at 596.

\(^{35}\) Id. Musmanno cited 46 P.S. § 555:

The provisions of every law shall be severable. If any provision of a law is found by a court of record to be unconstitutional and void, the remaining provisions of the law shall, nevertheless, remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with,
sions of the Act which are constitutional? By removing the word "sacrilege" from the act, the pertinent sentence would stand on its own and could be enforced: "[The Board] shall disapprove such [films] as are obscene, indecent, or immoral, or such as tend, in the judgment of the board, to debase or corrupt morals." Musmanno concluded that:

The Pennsylvania Motion Picture Censorship Act is a fortress, armed originally with five cannon to protect the welfare of the people from the forces of immorality and intemperate greed. One of the cannon has been ruled out of action. The other four remain whole and strong and are in excellent firing condition. History has never shown in America a surrender, while artillery of this formidableness was fighting on the side of the right.

Three years later, Justice Musmanno again was faced with an obscene movie, but this time it was being shown at a drive-in theater. A defendant owner of a drive-in theater showed a film, Undercover Girls, which was considered lewd and indecent and was tried in Lackawanna Common Pleas Court under the Crimes Code of 1939, section 528, which states:

Whoever gives or participates in, or being the owner of any premises, or having control thereof, permits within or on said premises, any dramatic, theatrical, operatic, or vaudeville exhibition, or the exhibition of fixed or moving pictures, of a lascivious, sacrilegious, obscene, indecent, or immoral nature or character, or such as might tend to corrupt morals, is guilty of a misdemeanor *

and so depend upon, the void provision that it cannot be presumed that the Legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete or incapable of being executed in accordance with the legislative intent.

36. Hallmark, 121 A.2d at 595 (citing Rutenberg v. City of Philadelphia, 196 A. 73, 79 (Pa. 1938), to defend the constitutionality of the provision: "It is elementary that a statute may be in part constitutional and in part unconstitutional, and in the event that the various parts of the statute are independent of each other, that which is constitutional will prevail and that which is unconstitutional will be rejected.").

37. Hallmark, 121 A.2d at 596-97 (Musmanno, J., dissenting).

38. Id. at 597.


40. Id. at 228 (citing 18 P.S. § 4528). The judge hearing the case determined:
The majority opinion held that the United States Supreme Court had found the word “sacrilegious” too vague in Burstyn v. Wilson, while the terms “lascivious, sacrilegious, obscene, and immoral,” and “tending to corrupt morals” were found unconstitutional in Superior Films v. Department of Education of Ohio (1954). Justice Musmanno opened his dissent in Blumenstein with a comment on the Hallmark case:

[T]his Court dismantled the siege guns of the Motion Picture Censorship Act of 1915 which for 41 years had stopped those invading forces at Pennsylvania’s borders. Now, there is nothing left with which to save clean-minded, clean-thinking men, women and children of this State from the vulgarities, obscenities and indecencies which some moving picture producers are determined to inflict on the public for the sake of a greed-soaked dollar.

In reference to the court’s earlier statements that the criminal code would protect society against obscene films, Justice Musmanno stated:

[I]t proclaimed has no reality at all. The signals which were flown from the high masts turn out to be beguiling, the lifesavers which were thrown to the public in 1956 turn out to be weighted with lead, the lifeline which was lowered over the deck’s rail has turned out to be only a thread which the decision of this Court today severs.

He felt that the court should have defended the criminal law possibility in the 1956 Hallmark case so that the General Assembly could have passed further legislation to protect society. Instead, “the Court threw to the public a weighted lifesaver, it lowered the parting strand of a lifeline, it hung out a chimerical rain-

The pictures depicted a series of dancing acts, which were definitely cheap, lewd, obscene and indecent. By their very nature they would corrupt the morals of the immature and the weak, appealing only to those of depraved taste and the lowest of human instincts. To seek and entice dollars through the promotion of lust and immorality manifests the worst kind of greed of money.  

Blumenstein, 153 A.2d at 228.  
41. 343 U.S. 495 (1952).  
42. 346 U.S. 587 (1954).  
43. Blumenstein, 153 A.2d at 230 (Musmanno, J., dissenting).  
44. Id. at 231.
bow, it flashed an unreliable weather report, it removed the warning signs from the rocky shores.\textsuperscript{45} The safeguards that the state had against obscenity were now being dismantled and were "as useless as a stick against a striking jackal."\textsuperscript{46} Musmanno was critical of the majority who claimed the statute was unconstitutional without stating a rationale therefore.\textsuperscript{47} He went on to complain:

I believe that the people of Pennsylvania who expect protection from obscene exhibitions, and who had every reason to assume that it had that protection in the Criminal Code, are entitled to be told why this Court strikes down a law, whose prostrate form now leaves the district attorneys of the Commonwealth helpless to fight the purveyors of cinematic filth.\textsuperscript{48}

In questioning the majority's opinion, he wondered how the majority could declare something unconstitutional based on it being "obscene." Reproducing the \textit{per curiam} opinion of \textit{Holmby Productions v. Vaughan},\textsuperscript{49} which cited to the \textit{Burstyn} case to declare the movie obscene, Justice Musmanno questioned how this comes to define obscenity as unconstitutional in the Pennsylvania statute?\textsuperscript{50}

He continued to criticize his own court for ignoring previous cases that held that "all legislation must be construed as intending to favor the public interest."\textsuperscript{51}

May this Court not presume that it is the intention of the Legislature to favor the public which certainly wishes to see young girls of 16, 15, and 12 protected from the degradation of visual and auditory contact with an immoral picture such as "Undercover Girls" has been proven to be? Who can doubt that many juvenile delinquents have been consciously or unconsciously urged into lurid crime because of being repeatedly exposed to lurid and immoral motion pictures? Children are by nature imitative and when they see immorality being practiced on so extensive

\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 232.
\textsuperscript{47} \textit{Id.} at 234.
\textsuperscript{48} \textit{Blumenstein}, 153 A.2d at 234 (Musmanno, J., dissenting).
\textsuperscript{49} 350 U.S. 870 (1955).
\textsuperscript{50} \textit{Blumenstein}, 153 A.2d at 234-35 (Musmanno, J., dissenting).
\textsuperscript{51} \textit{Id.} at 236.
and expansive a medium of expression as the motion picture screen, is it strange if they conclude that there is nothing wrong about what is being publicly glorified? 52.

Movies such as Baby Doll were obscene to Justice Musmanno. The lewdness of the film, the failure of the censorship board to continue, and the court’s decision resulted in “destroy[ing] the only remaining protection we have had from cinema monstrosities, there can be no doubt that there will come along other film depravities which will make ‘Baby Doll’ seem like a Sunday School travelogue in comparison.” 53

Justice Musmanno contended that “[e]ven without statutes on the subject, the exhibition of a picture which outrages public decency is a crime.” 54 Judge Ervin of the Pennsylvania Superior Court “spoke wisely, courageously, and eloquently on this subject in the case of Commonwealth of Pennsylvania v. Randall.” 55

Our Federal and State Constitutions assume that the moral code which is part of God’s order in this world, exists as the substance of society. The people of this State have acted through their legislature on that assumption. We have not so cast ourselves adrift from that code nor are we so far gone in cynicism that the word “immoral” has no meaning for us. Our duty, as a court, is to uphold and enforce the laws, not seek reasons for destroying them. 56

Justice Musmanno also defended his position on historical grounds citing to the common-law case of Commonwealth v. Sharpless, 57 in which Justice Yeates found a person guilty for possessing an obscene painting that might corrupt peoples’ morals. 58

Current newspapers and periodicals – Time Magazine, Pittsburgh Post-Gazette, Philadelphia Inquirer – were quoted for their various views against obscenity in the movies or the sale of porno-

52. Id. at 237.
53. Id.
54. He cited to 2 WM. L. CLARK AND WM. L. MARSHALL, LAW OF CRIME § 8 (1900), which was quoted in Commonwealth v. Schoen, 25 Pa. Super. 211, 217 (1904).
56. Blumenstein, 153 A.2d at 238 (Musmanno, J., dissenting).
57. 2 S. & R. 91 (1815).
graphic movies through the mail. Whether looking at books or movies, the result, according to Musmanno, is the same:

Moreover, motion pictures today are in effect talking pictorial books. In fact, most of the successful motion pictures are based on books. Thus, whether youth is corrupted by reading salacious books or by looking at salacious motion pictures, the deleterious effect on the fibre of the nation is the same.  

Musmanno concluded his dissent with an addendum, requesting that the legislature read his opinion and future opinions in order that the members would the necessary legislation to protect society against obscenity. He believed the court had a responsibility to the public to show why the unconstitutionality of the act affected the prosecuting district attorneys "helpless to fight these purveyors of cinematic filth."

In the third movie-related case, Kingsley International Pictures Corp. v. Blanc, the Corporation filed suit against Victor Blanc, District Attorney of Philadelphia, who opposed the showing of the movie And God Created Woman. Blanc previewed the film and then informed the owners of the theaters that they would be arrested under criminal law, 18 P.S. § 4528. In turn the theater owners refused to show the movie, which was a breach of their contract with the movie distributor. "[T]he sole question on this appeal is whether, under the facts averred in the complaint, a court of equity has jurisdiction to enjoin the District Attorney from interfering with the exhibition of the motion picture films with consequent irreparable harm to the property rights of the plaintiff." The court held that equity has jurisdiction because it is the only way in which the plaintiff can gain relief.

Under Pennsylvania law, section 4528 of title 18 made it a misdemeanor "to show . . . moving pictures, of a lascivious, sacrile-
gious, obscene, indecent, or immoral nature and character, or such as might tend to corrupt morals.\textsuperscript{65}

The Corporation filed its complaint on February 4, 1958, the day before the film was to be shown, and the district attorney asked for a preliminary injunction. The court held a hearing the next day in which the "court suggested that the defendant agreed to the film's being shown without interruption pending a determination by the court with respect to the request for a preliminary injunction."\textsuperscript{66} The film was shown on February 5, and a hearing took place in which evidence of the harm suffered by the plaintiff was introduced. A second hearing occurred five days later, and a deputy city solicitor filed preliminary objections "which assigned, inter alia, as ground for the dismissal of the bill, that equity is without jurisdiction to entertain the subject matter of the complaint."\textsuperscript{67} Between February 11 and March 5, 1958, the plaintiff obtained orders restraining the district attorney from seizing the films, which were then reversed on March 5. The district attorney again seized the films. Thereafter the opinion summarizes cases from Pennsylvania and other jurisdictions in which equity is granted when irreparable injury or harm will affect the plaintiff. The court therefore reversed the lower court.\textsuperscript{68}

Musmanno opened his dissenting opinion by reflecting on the opinion declared in \textit{Commonwealth v. Blumenstein}, issued on the same day, that found section 528 of the act of 1939 unconstitutional. "If the defendants, who were indicted under the Act of 1939, cannot be prosecuted, why enjoin the District Attorney from prosecuting them? The proposed injunction, as the law now stands, is like enjoining a person from swimming in a river which is empty of water."\textsuperscript{69} Justice Musmano further explained that, if the injunction were granted against the district attorney, that

\begin{quote}
The costs should under no circumstances be placed on the District Attorney. To do so, would be not only inequitable but, as I view the case, contrary to the most elementary rules of justice. To impose costs on a district attorney because of an injunction action begun by someone else—an injunction which sought to impede the District Attorney
\end{quote}

\begin{footnotes}
\item[65.] 18 P.S. § 4528.
\item[66.] \textit{Kingsley Corp.}, 153 A.2d at 245.
\item[67.] \textit{Id.}
\item[68.] \textit{Id.} at 248.
\item[69.] \textit{Id.} at 249 (Musmanno, J., dissenting).
\end{footnotes}
in the discharge of his sworn duty—would represent to me
the ultimate in legal paradox and the apogee of jurispru-
dential outrage.\textsuperscript{70}

Justice Musmanno was harsh with his colleagues: “The Majority
completely ignores the rights of the public in this matter. The
public has the right to be protected from lewd, lascivious and im-
moral exhibitions.”\textsuperscript{71} By telling the district attorney not to inter-
fere with the movie for over a year, he was restrained from per-
forming his duties as the law required of him. “And it is utterly
shocking that he should be restrained from protecting the rights of
the citizens of Philadelphia who elected him to do that very
thing.”\textsuperscript{72} Furthermore, the court’s sustaining of the lower court’s
decision, Musmanno claimed, was “an extraordinary and, to me,
alarming doctrine, that a District Attorney may be enjoined from
proceeding in a criminal case.”\textsuperscript{73} Citing \textit{Meadville Park Theatre
Corp. v. Mook}\textsuperscript{74} for the position that it was the first time that such
a procedure had occurred, the court had transferred the violator
into the complainant and the district attorney into a defendant in
a civil action.\textsuperscript{75} Citing two U.S. Supreme Court cases in support of
his position that it was wrong to use equity to stop a criminal pro-
ceeding,\textsuperscript{76} Justice Musmanno further criticized the majority for
ignoring the rights of the public. “This Court makes not one refer-
ence to the public in its Opinion.”\textsuperscript{77} The court’s failure to issue an
opinion in more than a year “allowed the public to be subjected to
the film’s obnoxiousness for all that time, so that whatever rights
the public possessed to be guarded from obscenity and indecent
exhibitions have been completely dissipated, through no fault of
its own.”\textsuperscript{78} In fact, he feared the movie could have been more than
obscene, it could have been pornographic, open to children and
women “left absolutely defenseless before its vulgar assaults on
public morals.”\textsuperscript{79}

\textsuperscript{70} Id.
\textsuperscript{71} Id. at 252.
\textsuperscript{72} Id. at 250.
\textsuperscript{73} Kingsley Corp., 153 A.2d at 250 (Musmanno, J., dissenting).
\textsuperscript{74} 10 A.2d 437, 439 (Pa. 1940).
\textsuperscript{75} Kingsley Corp., 153 A.2d at 251 (Musmanno, J., dissenting).
\textsuperscript{76} Id. (citing Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925), and In re Sawyer, 124 U.S. 200, 210 (1888)).
\textsuperscript{77} Kingsley Corp., 153 A.2d at 252 (Musmanno, J., dissenting).
\textsuperscript{78} Id.
\textsuperscript{79} Id.
Justice Musmanno reiterated his position that "[t]he rights of property in a film certainly do not rise and should not rise higher than the rights of the people to be protected from public corruption." The defendant's request on April 8, 1958 to present an appeal first gave the corporation the ability to show the film over a period of time and earn all of the money it could. There was no complication that needed to be tried in a court of equity, but instead it could have been solved in the court of quarter sessions. By analogy, Justice Musmanno questioned if someone possessed a gambling device, could he stop prosecution because property rights were involved? Since most criminal cases involve property rights, equity proceedings "can then be protracted until witnesses in the criminal case move away or die, documents are lost or disappear and interest in the prosecution wanes, or disappears." Musmanno concluded his argument that the Hallmark, Bluemenstein, and now Kingsley cases had devastatingly completed . . . the prosecution machinery of the State in obscene films cases has been reduced to a shambles. It is inevitable that the district attorneys and the police departments throughout Pennsylvania will be demoralized and bewildered as to what they can or should do to keep out of the State the carpetbaggers of filth, prevent the importation or (sic) pornography, and restrain the merchants of obscenity.

He hoped the General Assembly would provide legislation to correct the situation, otherwise, the Commonwealth "may well be on the way to a cinematic Gomorrah." Justice Musmanno's legislative request resulted in the General Assembly, by a vote of 163 to 1 in the house, and 47 to 3 in the senate, creating the Motion Picture Control Act of 1959. This act was in place for two years before two cases came before the Penn-

80. Id. at 252.
81. Id. at 253.
82. Kingsley Corp., 153 A.2d at 253 (Musmanno, J., dissenting).
83. Id. at 254.
84. Id. at 255.
85. 1959 PA. LAWS 902, 4 P.S. § 70.1 et seq.
sylvania Supreme Court: William Goldman Theatres Inc. v. Dana \(^{86}\) and Twentieth Century-Fox Film Corp. v. Boehm. \(^{87}\)

In Goldman Theatres, under the Motion Picture Control Act of 1959, \(^{88}\) Goldman Theatres sued to stop the Motion Picture Control Board from enforcing the act, while in Twentieth Century, the Corporation sued to stop the spending of money to enforce section 16 of the Act. \(^{89}\) The new Act followed the Roth prescription: a film was obscene "if to the average person applying contemporary community standards its dominant theme, taken as a whole, appeals to prurient interest." \(^{90}\) The court held that the Act was invalid under Article I, § 7 of the Pennsylvania Constitution, as "a precensorship of the exercise of the individual's right freely to communicate thoughts and opinions." \(^{91}\) Under Article I, §§6 and 9, the theatres faced a panel appointed by the governor to determine if the film was obscene, contrary to the "guarantee that a person can be found guilty of a crime of the indicated description only if an impartial jury of the vicinage is of the opinion that his utterance was obscene. . . ." \(^{92}\) Another complaint by the court was that the Board did not have to consider the film "as a whole," but could "view" an individual frame separately. \(^{93}\) The court also questioned if community standards were the same for people residing in both city and rural area. \(^{94}\) Furthermore, the decision questioned whether the members of the Board were capable of determining standards when there were no qualifications, except residency, to be appointed to the Board. \(^{95}\) The court's decision also questioned if placing fees upon distributors was actually an impermissible tax upon free speech. \(^{96}\) The act further limited importation of out-of-state televisions and newspapers, as they were required to cut out the proscribed films from their advertisements. \(^{97}\)

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86. 173 A.2d 59 (Pa. 1961). The Pennsylvania Supreme Court consolidated the separate appeals from the cases of William Goldman Theaters Inc. v. Dana and Twentieth Century Fox Film Corp. v. Boehm and disposed of them both in this opinion. Id.
87. Id.
88. 1959 PA. LAWS 902, 4 P.S. § 70.1 et seq.
90. 1959 PA. LAWS 902.
91. Goldman Theatres, 173 A.2d at 64.
92. Id. at 64 (emphasis added).
93. Id. at 66.
94. Id.
95. Id.
96. Goldman Theatres, 173 A.2d at 67.
97. Id. at 69.
Justice Musmanno opened his dissent citing the *Hallmark* case, which dissolved the Motion Picture Censorship Board, the *Blumenstein* case, which struck down the section of the criminal code under which exhibitors of immoral pictures could be prosecuted, and the *Kingsley* case, which ruled that a district attorney could be enjoined from seizing a film which he regarded as violating the laws of Pennsylvania because of obscenity.\(^{98}\) The ruling, he stated, “reduces another statute of the sovereign body of the Commonwealth to shreds of paper by declaring it unconstitutional.”\(^{99}\) He criticized the court’s three decisions making “itself a super-chief executive or a super-Senate.”\(^{100}\) Musmanno faulted the court’s rejection of the new act, for “freedom of speech is not involved in the Act; much less freedom of the press.”\(^{101}\)

Musmanno doubted that motion picture regulation would lead to press censorship:

> The American people would never stand for press censorship because the freedom of the press is one of the strongest bulwarks of our independence and well-being and has been so recognized by statutes and decisions of the nation’s highest court. Here we stand unanimously as at Armageddon.\(^{102}\)

He denied that the issues of freedom of speech and freedom of press were really before the court. Performance of speech involves only one person, while in motion pictures, many persons participate. Motion pictures go beyond communication and opinion, since they “may appeal to the senses, to the passions. Further comparison between mere words and the panorama, parade, and performance of motion pictures is not only bizarre but might even

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98. Id. at 79 (Musmanno, J., dissenting).

99. Id.

100. Id. at 80.

101. *Goldman Theatres*, 173 A.2d at 80 (Musmanno, J., dissenting). He quoted the paragraph from *Blumenstein* supporting the need of the state to protect children from the examination of visual and auditory contact with immoral exhibitions:

Who can doubt that many juvenile delinquents have been consciously or unconsciously urged into lurid crime because of being repeatedly exposed to lurid and immoral motion pictures? Children are by nature imitative and when they see immorality being practiced on so extensive and expansive a medium of expression as the motion picture screen, is it strange if they conclude that there is nothing wrong about what is being publicly glorified?

*Blumenstein*, 153 A.2d at 27.

become unseemly.”\textsuperscript{103} The majority’s discussion of the historical nature of article I, section 7 of free press drew his question: “But what does printing in 1790 to do with the malignance of filthy motion pictures?”\textsuperscript{104} Citing J. Edgar Hoover, columnist Bob Considine, Cardinal Cushing of Boston, John Wayne and others in support of his view of immoral and obscene movies, Justice Musmanno applauded the creation of the act by the legislature “when it decided that it had to do something to protect the children of Pennsylvania from their corrosive influences.”\textsuperscript{105} Musmanno praised the state for its attempt to protect its citizens:

Pennsylvania has the right to pride itself on the solicitude it has always exerted in behalf of the welfare of children. The statute books glow with special laws shielding tender minds and bodies from inhuman treatment and cruelty, injurious labor conditions, and deleterious environments. Pennsylvania has enacted statutes to keep children off the streets after certain hours, is prohibits the sale of firearms to them. . . . The State budget each year bulges with expenditures running into millions and millions of dollars, all designed to educate and protect children, to promote their health — physical, mental, moral and spiritual; to guide back to the path of moral and legal behavior those who have strayed into the woods and mire of delinquency.\textsuperscript{106}

Musmanno further stated that it would take a book to describe only briefly what Pennsylvania does to educate, train, and equip the children of today to become the citizens of tomorrow to perpetuate the ideals on which this Commonwealth was founded and to which it has adhered in its entire glorious history.\textsuperscript{107} He complained that the legislature had provided instructions in a book on how to protect children, but the court “tor[e] it [the instructions] out, on the theory that it encroached on the rights of those engaged in the business of this medium of entertainment, a medium which unquestionably possesses the potentialities of pernicious persuasion.”\textsuperscript{108}

\textsuperscript{103} Id. at 81.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 82.
\textsuperscript{106} Id.
\textsuperscript{107} Goldman Theatres, 173 A.2d at 82 (Musmanno, J., dissenting).
\textsuperscript{108} Id. at 82-83.
The Act protects children, Musmanno claimed, while not interfering with adult citizenry participating in a "perfectly legitimate and in fact laudable business enterprise."¹⁰⁹ He went on to claim that the Act works in favor of the legitimate distributor "because it is obvious that the vast majority of films submitted for registration will be approved for showing, and dealers will thus be saved from a constant concern as to whether they may or may not be violating the law of the State and the law of morals."¹¹⁰ Following the Supreme Court's definition, a person who is found to have an obscene movie, would "only be paying what all citizens are required to pay in the maintenance of an organized, wholesome, and decent society."¹¹¹ Recognizing that free speech is limited if it interferes with someone else's freedoms, Justice Musmanno observed: "No one who is engaged in the business of motion pictures has the right, under the Constitution, to contaminate the mind of youth, just as no one, under the Constitutional guarantee of free speech, has the right to slander or libel his neighbor."¹¹²

Justice Musmanno further disagreed with the majority's holding that prosecuting the defendant would result in a violation of the constitutional provision of trial by jury under article I, section 6. Other industries face the same problem when state inspections that show tainted milk or meat or unhygienic barber shops that violate statutory/administrative regulations, the offender has a right to a jury trial after the government inspection, just as the exhibitor of a motion picture.¹¹³

The majority opinion argued that if a picture was disapproved, the exhibitor could not advertise its showing, and that would infringe on right of free press and would keep national magazines out of Pennsylvania. Justice Musmanno argued that it did not follow because the Interstate Commerce clause of the Constitution could not impede the introduction of papers into Pennsylvania.¹¹⁴

Nor did Justice Musmanno agree with the majority that the members of the Control Board needed academic education or sociological training. Rather, "[t]he reaction to a motion picture, in so far as the reaction appertains to morality and decency, should be that of normal, average persons and not that of technicians

¹⁰⁹. Id.
¹¹⁰. Id.
¹¹¹. Id.
¹¹². Goldman Theatres, 173 A.2d at 82-83 (Musmanno, J., dissenting).
¹¹³. Id. at 84.
¹¹⁴. Id.
trained in technical fields. 115 He did not think that the governor would appoint an illiterate person to the board for "it is to ascribe to the chief executive of the State an ignorance and sheer perversity, which even the most partisan minded opponent would hardly ever suggest." 116 He agreed that the 1959 Act may need some improvements, but should not be considered unconstitutional.

In conclusion, Justice Musmanno praised the movie industry:

I regard motion picture entertainment as the best form of relaxation extant. Color photography, the wide screen, and the miraculous equipment which reproduces music with such fidelity, volume and tone, that one can hardly believe that the orchestra is not actually in the theatre—all these magnificent features have made the motion picture theatre the rendezvous of relaxful diversion which even kings could not have dreamed of having fifty years ago. Classics in literature are being reproduced, educational subjects are attractively handled, history is made to live again before one's entranced vision. Faraway places, which the unwealthy person would never have the money to visit, are being brought to us in all their original charm, quaintness, and dramatic picturesqueness. 117

He concluded by indicating his hope that the legislature would "in the spirit of William Penn, try and try again" to supply movie picture control. 118 The effects of the case were, however, contrary to Justice Musmanno's wishes. The General Assembly never passed another act for movie picture control.

II. BOOK CENSORSHIP

Turning to book censorship, at the end of the decade, Justice Musmanno observed:

The contemporary United States Supreme Court has drifted far from the wisdom and fundamental democratic philosophy inherent in the above quotation. The Majority Opinion in the case at bar seeks to justify its conclusions citing from recent decisions of the Court on Capitol Hill

115. Id.
116. Id. at 85.
117. Goldman Theatres, 173 A.2d at 85 (Musmanno, J., dissenting).
118. Id.
in Washington. Those decisions are a lighthouse with broken beams. The majority opinions of the present U.S. Supreme Court, on the subject of obscenity, constitute a never-never land of confusion and self-contradiction. Taken in the aggregate, those opinions suggest a region hazy with drifting fogs, beset with contrary wind currents, criss-crossed with labyrinthian, tortuous foot trails, perforated with pitfalls and tortured with quicksands, which no legal travelers could hope to traverse and emerge therefrom with a precise knowledge as to where he had been, what he had seen, and where he was now going. It is with regret that I say this, but it is with conviction, based on intensive study of late Supreme Court decisions, that I say that Court itself does not seem to know where it is going on this subject which affects the homes, the welfare, and the moral standards of the nation.\textsuperscript{119}

Musmanno's most extensive, vituperative complaints against pornography were reserved for the case dealing with Henry Miller's \textit{Tropic of Cancer}, a joint opinion issued for the cases of \textit{Commonwealth v. Robin} and \textit{Commonwealth v. Grove Press, Inc.}\textsuperscript{120} Henry Miller authored the book in 1934, and it was banned in the United States and Great Britain.\textsuperscript{121} In 1961, Grove Press published \textit{Cancer} in the United States. A succession of cases followed. Prior to the Pennsylvania case, the United States Supreme Court held in \textit{Grove Press, Inc. v. Gerstein},\textsuperscript{122} that the attempt to limit publication of \textit{Tropic of Cancer} amounted to an unconstitutional abridgement of the First and Fourteenth Amendments. Justice Cohen gave a short two paragraph opinion, citing four other states (Connecticut, New York, Arizona, and Illinois) cases upholding the federal decision against their own statutory law.\textsuperscript{123} Following its earlier holding in \textit{Commonwealth v. Blumenstein}, the Pennsylvania Supreme Court held that federal courts decisions were con-

\textsuperscript{120} 218 A.2d 546 (Pa. 1966).
\textsuperscript{122} 378 U.S. 577 (1964).
clusive over state obscenity laws and therefore reversed the lower court’s decree.\textsuperscript{124}

Chief Justice Bell found \textit{Tropic} a lewd, obscene book, but “reluctantly concurs” that federal law mandated his accord. Both Jones and O’Brien agreed with Bell.\textsuperscript{125} Justice Roberts, however, thought governmental action could take place in drawing restrictions on the sale or distribution of pornographic materials to juveniles similar to limiting the sale of intoxicating beverages, cigarettes, firearms, etc.\textsuperscript{126}

Justice Musmanno’s dissent was fourteen pages long.\textsuperscript{127} One paragraph is usually cited to display his total opposition to this work:

“Cancer” is not a book. It is a cesspool, an open sewer, a pit of putrefaction, a slimy gathering of all that is rotten in the debris of human depravity. And in the center of all this waste and stench, besmearing himself with its foulest defilement, splashes, leaps, cavorts and swallows a bifurcated specimen that responds to the name of Henry Miller. One wonders how the human species could have produced so lecherous, blasphemous, disgusting and amoral a human being as Henry Miller. One wonders why he is received in polite society.\textsuperscript{128}

Musmanno called Henry Miller, “Moral Public Enemy No. 1,”\textsuperscript{129} “a foul-minded pornographic writer,”\textsuperscript{130} a man “who shuns a bath of clean words, as the devil avoids holy water, who reduces human beings to animals, home standards to the pigsty, and dwells in a land of his own fit only for lice, bedbugs, cockroaches and tape-worms.”\textsuperscript{131}

In regards to the U.S. Supreme Court holding that the “slightest redeeming social importance” justified the publication, Justice

\begin{footnotes}
\item[124] Robin, 218 A.2d at 546.
\item[125] Id. (Bell, C.J., concurring; Justices Jones and O’Brien, joined in this concurring opinion).
\item[126] Id.
\item[127] Id. at 547-61 (Musmanno, J., dissenting).
\item[128] Id. at 556. This paragraph is cited in the \textit{American National Biography} article on him. Musmanno used the shortened form “Cancer” in referring to the book in his opinion, and I will follow him.
\item[129] Robin, 218 A.2d at 556 (Musmanno, J., dissenting).
\item[130] Id. at 557 (Musmanno, J., dissenting). Later, in \textit{Commonwealth v. Dell Publications, Inc.}, 233 A.2d 840, 862 (Pa. 1967), Musmanno called Miller “the arch pornographer of America.”
\item[131] Robin, 218 A.2d at 556 (Musmanno, J., dissenting).
\end{footnotes}
Musmanno, opposed to the *Roth* holding, stated that if only hard-core pornography fell within the obscenity, and left *Cancer* out, than *Cancer* was "rotten-core pornography." Musmanno cited Joseph T. Kirkland of Union Baptist Church of Philadelphia and Dr. Nicholas Fignitomedical director and chief psychiatrist of the County Court of Philadelphia, as experts who called the book obscene. He went on to complain about "a tide of printed filth is driving across the land" spreading everywhere. Again, he posited that "[s]o far as youth and immature minds are concerned, pornographic literature can do as much harm as narcotics. Of course, no one dares to defend illicit traffic in narcotics but a thousand tongues will wag to protect filthy books and magazines."

Harsh words were also applied to the book, *Mein Kamp*:

World War II which filled the universe with graves, cripples, devastation and ruin, began with a *book!* Hitler's *Mein Kamp* fired Germany with a bellicose spirit, a hatred for minority and helpless peoples, and whipped the nation into a global conflict which almost drove civilization to the very brink of destruction, where indeed it even teeters today.

Musmanno complained "[t]here can be no more false notion than the one that the First Amendment protects everything that may be utterly orally or in print." Citing laws which prohibit false advertising of food and drugs, he questioned,

why may law not protect children from poison which may enter their minds, and do far more harm than any extra grain of aspirin. The constant fare of dirty books, to the exclusion of good literature, will eventually produce a

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132. *Id.* at 552. He continued: "No decomposed apple falling apart because of its rotten core could be more nauseating as an edible than 'Cancer' is sickening as food for the ordinary mind. 'Cancer' is dirt for dirt's sake, or, more appropriately, as Justice Frankfurter put it, dirt for money's sake." *Id.*

133. *Id.* at 550-51. Others cited included Dr. Benjamin Karpman, Chief Psychotherapist at St. Elizabeth's Hospital, J. Edgar Hoover as head of the FBI, Ralph McGill, E. Preston, Executive Director of Youth Study Center of Philadelphia. *Id.*

134. *Id.*

135. *Id.* at 555-56.


137. *Id.* at 555.
sick mind. The mind governs the body and if the mind becomes sick, the body will become sick. 138

The claim under the First Amendment clothed Cancer “with invincibility,” Justice Musmanno called it “arrant nuisance:”

It is the most bizarre notion imaginable that a printing press constitutionalizes every paper that passes between and beneath its rollers. Filth does not lose its stench or its bubonic characteristics because it is formed into letters of the alphabet. If everything that is printed or written is presumed to be good and incapable of evil, then correspondence on conspiracy to overthrow the government, ransom notes or even counterfeit money could not become the basis for prosecution of those who engage in its dissemination or use. 139

Of Grove Press, Justice Musmanno observed critically, “the printing presses must now be corroded with the festering mildew emanating from the accounts of human depravity.” 140 What Grove Press calls “censorship of the erotic impulse” is the desire of the American people to be liberated from the bubonic plague of morbid unnatural emphasis on sex.

Musmanno felt pornography would undermine the social mores of our society. Pornographic writing, “unless curbed by the law, may eventually undermine the moral foundations of our nation because they are aimed at the youths of today who eventually will be the citizens of tomorrow.” 141 It would react negatively upon our youth:

Abnormal sex and immorality are being hammered into the minds of the youth of America with such shattering influences and incessant repetition that it is displacing from the thoughts of myriads of minors the concentration due other vital facets of life. Devotion to country, ambition for wholesome careers, desire for approval in the eyes of the community are being violently shouldered aside for this artificially-stimulated craving until that

138. Id.
139. Id.
140. Id.
141. Robin, 218 A.2d at 556 (Musmanno, J., dissenting).
craving may well persuade youth into illicit behavior and moral shipwreck.\textsuperscript{142}

Justice Musmanno’s opposition to the majority opinion posited against the U.S. Supreme Court precedents for this case. He cited the U.S. Supreme Court justices who cited \textit{Jacobellis v. State of Ohio}\textsuperscript{143} as precedent for the \textit{Grove Press}. He complained that the \textit{Jacobellis} case said absolutely nothing about \textit{Cancer}, nor was it about books but had to do with motion pictures.\textsuperscript{144} After reviewing the statements of the Justices, he did not understand his colleagues’ decision, stating “based on so varied a precedent is a mystery to me.”\textsuperscript{145}

Justice Musmanno claimed that the \textit{Gerstein} case only reversed the Florida Supreme Court. With no opinion filed by the court, he found that “\textit{Gerstein} is no authority for what may or may not be done with “Cancer” in Pennsylvania.”\textsuperscript{146} He cited from Professor Eugene Wambaugh’s \textit{The Study of Cases} and Henry Campbell Black’s \textit{Law of Judicial Precedents} to support his view that the “Supreme Court of the United States, in the Gerstein case, left the door open as wide as the horizon for the State courts to determine for themselves whether so loathsome a beast as ‘Cancer’ should enter into the ark of the First Amendment protection.”\textsuperscript{147}

He also found his colleagues’ reliance upon \textit{Gerstein} as “all controlling, all powerful and all omniscient” was wrongly decided because they did not analyze \textit{Gerstein} and \textit{Jacobellis} cases but depended on the four related state opinions.\textsuperscript{148} None of the four cases dealt with \textit{Cancer}. The \textit{Huntingdon} case dealt with an unnamed publication; Chicago case dealt with two books; Arizona with magazines; and New York dealt with \textit{Memoirs of a Woman of Pleasure}.\textsuperscript{149}

Various cases supported his view that freedom of speech is not absolute. He cited Chief Judge Desmond and Judge Scileppi’s dissenting opinions in \textit{Putnam’s Case},\textsuperscript{150} as well as other U.S. Su-

\begin{thebibliography}{99}
\bibitem{142} Id. at 557.
\bibitem{143} 378 U.S. 184 (1964).
\bibitem{144} Robin, 218 A.2d at 557-58 (Musmanno, J., dissenting).
\bibitem{145} Id.
\bibitem{146} Id.
\bibitem{147} Id. at 558.
\bibitem{148} Id.
\bibitem{149} Robin, 218 A.2d at 559 (Musmanno, J., dissenting).
\bibitem{150} Id. at 559-60.
\end{thebibliography}
preme Court cases supporting his position.\(^{151}\) "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places."\(^{152}\) In his concluding paragraphs, he appealed to the long-honored standards of American decency as part of our national heritage to the colonial statesmen "who labored just as earnestly and valiantly, for moral cleanliness as they did to destroy political tyranny."\(^{153}\) Rather than "Cancer’s being consigned to the garbage can malodorously yawning to receive it," it will go to the Public Library of Philadelphia "within ringing distance of Independence Hall where the Liberty Bell rang out joyously the proclamation of the freedom, independence and dignity of man."\(^{154}\) His concluding paragraph read "From Pittsburgh to Philadelphia, from Dan to Beersheba, and from the ramparts of the Bible to Samuel Eliot Morison’s Oxford History of the American People, I dissent!"\(^{155}\)

Justice Musmanno’s opposition to Cancer carried over in his dissent in Commonwealth v. Dell Publications,\(^{156}\) which upheld the publication of the book Candy. The Pennsylvania Supreme Court conformed to Justice Brennan’s position in the Roth case in analyzing the Candy decision.\(^{157}\) The Court then reviewed Redrup v. State of New York,\(^{158}\) which involved two books and ten "girlie" magazines, to show that the Court was divided.\(^{159}\) Following the opinions of the U.S. Supreme Court, the Pennsylvania Supreme Court reversed the lower court’s finding that Candy was obscene.\(^{160}\)

Justice Musmanno began his dissent castigating the Supreme Court decision in favor of Candy,\(^{161}\) for which he "disassociate[d]"

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152. Robin, 218 A.2d at 559-60 (Musmanno, J., dissenting).
153. Id.
154. Id.
155. Id. at 561.
160. Id. at 854.
161. Id. at 858 (Musmanno, J., dissenting):

The Supreme Court of Pennsylvania had an opportunity in this case to unlimber some heavy artillery in fighting for American morality; it had unlimited freedom to pour devastating fire into the forces that would destroy the very foundations of decency, purity and wholesome conduct upon which our American society is founded; it had the clearest chance to draw from the armory of...
from the case, "intellectually, jurisprudentially, and philosophically from the decision of this Court in this case."\textsuperscript{162} To the majority opinion claiming its opinion should not be construed as approval of Candy, Musmanno questioned "How else can it be construed? The Majority's statement is like saying the Court does not approve of a snake entering a nursery but forbids anyone to build a fence around the nursery to keep the snake out."\textsuperscript{163} He denied the "healthy" aspects of the book which would "make the beasts of Sodom and Gomorrah ashamed\textsuperscript{164}" or that it was a satire upon our contemporary society that represents the "reprehensible conduct, the bestial practices described in Candy."\textsuperscript{165}

Justice Musmanno's condemnation of the U.S. Supreme Court, as stated above,\textsuperscript{166} was shown by his quoting the majority opinion concerning the divisions of the justices.\textsuperscript{167} "The decisions are a conglomeration of personal views, individual tangents and private predilections, without much thought apparently being given to the

\begin{quote}
the law the weapons which would beat back those who, for greed and lucre, would poison the minds of the youth of our Commonwealth. The Supreme Court, however, did none of these things. The Majority of this Court retired from the field of battle without firing a shot. It did more. It encouraged the foul foe to smash more effectively at the bastions of American decency; it unfurled a flag of impecability and authority over the invading filthy battalions; it supplied to each hoodlum in the putrid expeditionary force a bar of Ivory Soap which made him, according to the Majority's reasoning, 99 1/2\% Pure!
\end{quote}

\textit{Id.}
\textsuperscript{162}
\textit{Id.}
\textsuperscript{163}
\textit{Id.}
\textsuperscript{164} Dell Publications Inc., 233 A.2d at 859 (Musmanno, J., dissenting).
\textsuperscript{165} Id. (italics added).
\textsuperscript{166} Id. See supra note 119.
\textsuperscript{167} Dell Publications, Inc., 233 A.2d at 861-62 (Musmanno, J., dissenting). Justice Musmanno wrote:

Because of the wide difference of opinion on the Supreme Court, perhaps the only way to obtain a sense for the Court's attitude qua Court is to consider the views of each individual Justice. A breakdown of the individual votes in the eleven Redrup related cases reveals the following: Justices Black, Douglas and Stewart predictably voted to reverse in each instance, but so did Justices White and Fortas. Justice Brennan voted to reverse the conviction in seven cases, to affirm two cases (both involving movies) Without giving any reason, and to affirm one case on the authority of Ginzburg and to vacate and remand one case on the authority of Memoirs. Chief Justice Warren voted to reverse in two cases, to affirm in two cases (both involving movies) Without giving any reason, to affirm two cases on the authority of Mishkin and one on the authority of Ginzburg, to vacate and remand one case in light of Memoirs, and to set down three cases for oral argument. Justice Clark voted to reverse in two cases, to affirm in five cases Without giving his reasons, to affirm two cases on the authority of Mishkin and one on the authority of Ginzburg and to set down one case for oral argument . . .

\textit{Id.}
effect those decisions will have on the nation as a whole.” Musmanno further opined that the fourteen opinions handed down in three cases could be overlooked if they “resulted only in verbal confusion, one could overlook shall study, nebulous syntax, vocabular circulocution and indifference to stare decisis, but the tragedy is that, with confusion at the sentinel gate, the pornographic thieves steal into the citadel of our moral security.” The actions of the U.S. Supreme Court are “in effect, to offer in one form or another, a free passport to every book which comes before it, no matter how degraded or vile it may be.” Quoting from the early case of *Mugler v. State of Kansas*, he posited that the Supreme Court acknowledged it was the legislative function in its police power to guard public morality; however, he criticized the Supreme Court for its assumption of jurisdiction over “millions of books, pamphlets, magazines and newspapers in the land, a jurisdiction it cannot possibly cope with.” The court’s “seizure of jurisdiction,” from the local state’s judge’s point of view, has worked, and continues to work, havoc in the individual states which are frequently compelled to wait for decisions from Washington as to whether a book may or may not be sold at a newsstand in a village in North Dakota. And more often than not, the expected decision turns out to be so cloudy in exposition and disposition that the pornographic culprit escapes under cover of rhetorical smoke.

His own court’s failure to contradict the federal court “sawed away the rights of the people of Pennsylvania to be saved from the inundation of filth gushing from the pages of a book which the Majority finds possesses a minimum of social importance but never explains why. But, of course, it cannot!”

168. *Id.* at 862.


171. 123 U.S. 623 (1887).


173. *Id.* at 864.

174. *Id.* at 865.
III. OTHER RELATED CASES

Two other opinions were handed down by the Pennsylvania Supreme Court that tangentially dealt with obscenity issues, but were decided on other rationales. Justice Musmanno participated in the decisions, but did not write the majority opinion nor did he offer concurring or dissenting opinions. In In re Tahiti Bar, the Pennsylvania Supreme Court upheld a criminal statute against two bars (Casino Bar and Tahiti Bar) for liquor code violations rather than First and Fourteenth Amendment rights dealing with freedom of expression and due process. The emphasis upon the police power of the state to regulate alcoholic beverages completely interfere with freedom of expression or speech. Musmanno's approval of this act probably falls under two categories. For decades he hated drunk driving and consistently opposed excessive drinking. Furthermore, since the court did not argue that it was an infringement on a constitutional freedom or upholding an obscene or immoral act, there was no need for a concurrence or dissent.

In Cooper v. McDermott the Pennsylvania Supreme Court held that the plaintiffs had violated Pennsylvania criminal statutes in the distribution and printing of obscene literature. The Philadelphia district attorney asked the Governor to request extradition of the individuals from California to be held on trial. The suit was brought by six individuals involved with the criminal charges and three taxpayers who objected to the district attorney's use of extradition warrants as a waste of tax funds if further prosecution occurred. The lower court denied injunctive relief.

175. 150 A.2d 112 (Pa. 1959).
176. In re Tahiti Bar, 150 A.2d at 115. Section 493 (47 P.S. § 4-493) provides in material part that it shall be unlawful for any licensee, under any circumstances, to permit in any licensed premises any lewd, immoral or improper entertainment, regardless of whether a permit to provide entertainment [required by this section] has been obtained or not. Any violation of this clause shall subject the licensee to suspension or revocation of his permit and his license.
47 P.S. § 4-493 (emphasis added to original).
178. As a judge of the court of common pleas of Allegheny County, Musmanno found people guilty of drunk driving and sentenced them to the workhouse or jail depending on the severity of their conduct.
179. 159 A.2d 486 (Pa. 1960)
180. 1939 PA. LAWS 872, section 524 as amended by 1957 PA. LAWS 972, 18 P.S. § 4524.
181. McDermott, 159 A.2d at 487.
182. Id.
183. Id. at 488.
and dismissed the request for a preliminary injunction. The Pennsylvania Supreme Court upheld the lower court. It rejected the criminal charges finding it possible for the accused to question the constitutionality of the criminal law procedures in a regular trial. The court also rejected the argument that equity has no jurisdiction in the matter of these crimes by creating irreparable damage done to property. Furthermore, the court found it possible to uphold the lower court decision that the Uniform Criminal Extradition Act, 19 P.S. § 191.1 et seq., “provide[d] for the extradition of persons whose acts in the asylum state result in the commission of crimes in the demanding state.” Both Justices Bell and Bok dissented, though only the former offered a lengthy dissent. Justice Musmanno’s decision to support the majority opinion reflects his noncombative approach in this matter that would bring violators of the law to court. Since Chief Justice Bell’s dissent found that equity did apply in determining a legal right and was against bringing the violators back to Pennsylvania for trial, he thought the offenders could be tried in California either on state laws or in the federal courts if they violated the federal postal laws.

IV. CONCLUSION

Justice Michael A. Musmanno’s dissents in these major cases dealing with film and book obscenity were consistent throughout the decade. Beginning with Hallmark and finishing with Dell Publications, he struggled against U.S. Supreme Court opinions that widened the definition of obscenity, lewdness, and immorality that opened the door for expanding growth of all types of materials throughout society. His approach to protect society, especially younger adults and children, reflect his views on American democracy. He had no problem in criticizing the justices on the U.S. Supreme Court and his own judicial colleagues for their opinions. In his early opinions he urged the legislature, as a coordinate branch of government, to do more in limiting the spread of pornography. Yet, the court overruled the two attempts by the legislature to

184. Id.
185. Id.
186. McDermott, 159 A.2d at 489.
187. Id.
188. Id.
189. Id. at 494-95.
limit the spread of obscene materials. As the one, sometimes two, dissenting judges in these opinions, Justice Musmanno's views never wavered. The growth of pornography through books, movies, and even television today would probably have Justice Musmanno turning over in his grave when viewing how widespread pornography is with little restrictions offered by the courts.  
