tion for exhibiting a motion picture.[1315] Chief Justice Warren's concurrence in *Roth* [1316] was adopted by a majority in *Ginzburg v. United States*,[1317] in which Justice Brennan for the Court held that in "close" cases borderline materials could be determined to be obscene if the seller "pandered" them in a way that indicated he was catering to prurient interests. The same five-Justice majority, with Justice Harlan concurring, the same day affirmed a state conviction of a distributor of books addressed to a sado-masochistic audience, applying the "pandering" test and concluding that material could be held legally obscene if it appealed to the prurient interests of the deviate group to which it was directed.[1318] Unanimity was shattered, however, when on the same day the Court held that *Fanny Hill*, a novel at that point 277 years old, was not legally obscene.[1319] The prevailing opinion again restated the *Roth* tests that, to be considered obscene, material must (1) have a dominant theme in the work considered as a whole that appeals to prurient interest, (2) be patently offensive because it goes beyond contemporary community standards, and (3) be utterly without redeeming social value.[1320]

After the divisions engendered by the disparate opinions in the three 1966 cases, the Court over the next several years submerged its differences by *per curiam* dispositions of nearly three dozen cases, in all but one of which it reversed convictions or civil determinations of obscenity. The initial case was *Redrup v. New York*,[1321] in which, after noting that the cases involved did not present special questions requiring other treatment, such as concern for juveniles,

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[1315] 378 U.S. 184 (1964). Without opinion, citing *Jacobellis*, the Court reversed a judgment that Henry Miller's *Tropic of Cancer* was obscene. Grove Press v. Gerstein, 378 U.S. 577 (1964). *Jacobellis* is best known for Justice Stewart's concurrence, contending that criminal prohibitions should be limited to "hard-core pornography." The category "may be indefinable," he added, but "I know it when I see it, and the motion picture involved in this case is not that." Id. at 197. The difficulty with this visceral test is that other members of the Court did not always "see it" the same way; two years later, for example, Justice Stewart was on opposite sides in two obscenity decisions decided on the same day. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Genera, 383 U.S. 413 (1966) (concurring on basis that book was not obscene); Mishkin v. New York, 383 U.S. 502, 518 (1966) (dissenting from finding that material was obscene).

[1316] Roth v. United States, 354 U.S. 476, 494 (1957).

[1317] 383 U.S. 463 (1966). Pandering remains relevant in pornography cases. Splawn v. California, 431 U.S. 595 (1977); Pinkus v. United States, 436 U.S. 293, 303–04 (1978).

[1318] Mishkin v. New York, 383 U.S. 502 (1966). *See* id. at 507–10 for discussion of the legal issue raised by the limited appeal of the material. The Court relied on *Mishkin* in Ward v. Illinois, 431 U.S. 767, 772 (1977).

[1319] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Genera, 383 U.S. 413 (1966).

[1320] 383 U.S. at 418. On the precedential effect of the *Memoirs* plurality opinion, *see* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[1321] 386 U.S. 767 (1967).