HB

133

Official Business

COMMITTEE: HOUSE JUDICIARY

DATE: 2/21/89

SIGN-IN

Subject of meeting:
HB 26 - FORFEITURE OF VEHICLE
HB 133 - CRIMES RELATING TO OBSCENITY

NAME	ADDRESS FULL ADDRESS PLEASE !	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY? WHICH BILL?
Paul Grant	217 2nd St 209, 99801	6 2701	ACLU	133
Kathy Grant	P.O. Box [illegible] State Library [illegible]	2910	Individual	133

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* DELIVER TO  LIOCGLE                        *
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* ORIGINAL                                   *
* SENT:          02/21/89  TIME: 13:10       *
* FROM:          LIOCINE                     *
* SUBJECT:       (H)JUD,HB133,2-21 ANC,PL$1  *
* PRINT DATE:    02/21/89  TIME: 13:18       *
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①

*** ANCHORAGE PARTICIPANT LIST ***

TO: ALL TELECONFERENCE SITES
FROM INEZ ---> ANCHORAGE

TC #: 89-02-299

SUBJECT:__HB 133 - CRIMES RELATING TO OBSCENITY__
DATE:_____

TO TESTIFY:

1.) DON JOHNSON HB 133

②

ARIZONA

Lynn Munsil

2.) IRA PERMAN HB 133
3.) DAVE ERLICH HB 133
4.)
5.)
6.)

TO OBSERVE:

1.) GARY CADD HB 133
2.) DAN AMOS HB133
3.) CHRISTINE DARCY HB133
4.)
5.)
6.)

EMAIL ADDRESS IS: LIOCINE
BACKUP NUMBER IS: 561-1199

EOM ..... JW

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 133
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to obscenity."

Agency Affected: Department of Law
BRU: Prosecution

Sponsor: Repr. Miller
Requestor: House Judiciary

Components: All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) The Department of Law believes that this bill is so broad that it has serious constitutional problems. In light of these problems, the department does not believe there will be any fiscal impact beyond the cost of an initial litigation that can be absorbed by existing resources.

Richard L. Pegues

Prepared by: Richard L. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division — Date: February 21, 1989

Richard L. Pegues /FOR/

Approved by Commissioner: Douglas B. Baily, Atty. General — Date: February 21, 1989
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA 1989 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: HB 133
Publish Date: 2/1/89

Revision Date:
Title: An act relating to obscenity

Agency Affected: Alaska Court System
BRU: Trial Courts

Sponsor: Miller, Martin, & Leman
Requestor: Judiciary

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel Phone: 261-0328
Division: Alaska Court System Date: 02/28/89

Approved by: Arthur H. Snowden, II, Administrative Director Date: 02/28/89
Agency: Alaska Court System

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)

MEMORANDUM

TO: Representative Mike Miller

FROM: Staff

RE: Plain English analysis for HB 133

DATE: 2/16/89

The language contained in House Bill 133 creates a number of new sections in state law dealing with the production, promotion and distribution of material that is obscene or harmful to minors.

BACKGROUND - U.S. SUPREME COURT TEST FOR OBSCENITY

There have been several significant decisions of the Untied States Supreme Court relating to the issue of obscenity. One of the earliest, Roth v. United States, declared that the First Amendment was not intended to "protect every utterance". This decision allows federal, state and local governments to regulate material that is determined to be "utterly without redeeming social importance." More recently, Miller v. California, reaffirmed that pornography is not protected by the First Amendment's guarantees. In the Miller decision, the Supreme Court added three criteria to the Roth standard by which the courts can determine whether material is "utterly without redeeming social importance". The criteria consists of the following:

1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

2) whether the work describes or depicts, in a patently offensible way, sexual conduct that is specifically prohibited by the applicable state law; and

3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The language proposed in HB 133 modifies this wording to read:

A) with respect to material or a performance, the average person, applying contemporary community standards, would find that the material or performance, taken as a whole, appeals to the prurient interest;

B) the material or performance depicts or describes sexually explicit nudity, sexual conduct, sadomasochistic sexual abuse, or lewd exhibition of the genitals in a way that is offensive to prevailing standards in the community; and

C) with respect to the material or a performance, that a reasonable person would find that the material or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

This test is modified once again, as allowed by Ginsberg v. New York, to determine what material should be restricted from minors. The modification adds the following language to sections A and B of the test to determine what material is "harmful to a minor":

A) .....as a whole, appeals to the prurient interest of a minor;

B) .....offensive to prevailing standards among adults in the community with respect to what is suitable for minors; and

PROMOTING OBSCENITY AND PROMOTING OBSCENITY FOR RESALE

Under the language of HB 133, and based on the above mentioned definition of "obscene", promoting obscene material or performances would become a class A misdemeanor and promoting obscene material for resale would become a class C felony. This language has been drafted to prohibit commercial exploitation or public dissemination of obscene material or performances.

PROMOTING A SEXUAL DEVICE

Promotion of a sexual device would be punishable as a class A misdemeanor. This offense is linked to a proposed statutory definition of a "sexual device" which covers artificial devices primarily designed to physically stimulate the genitals or anus. This definition would not ban the use of birth control devices.

The sections mentioned above are accompanied by an affirmative defense which recognizes that there are certain medical, psychological, legislative judicial, or law enforcement purposes allowable under the proposed law. An example of this affirmative defense would be, the distribution of material to members of a jury who are deciding the facts in case filed under this proposed law.

MAKING AN OBSCENE DRAWING

Making an obscene drawing in a public place, for the purpose of display in that place, would be a class B misdemeanor under the proposed language of HB 133.

DISSEMINATION MATTER HARMFUL TO A MINOR

Based on the definition of material that is "harmful to a minor", distributing such material to a person under the age of 18 would constitute the offense of disseminating matter harmful to a minor. Such an offense would be a class A misdemeanor. This section would prevent the sale or showing of certain material to individuals that are under the age of 18.

This section is accompanied by an affirmative defense that the minor used false identification, purporting to show that they were 18 years of age or older, to gain access to the material, and the person accepting the ID did not have reasonable cause to believe the minor was under 18 years of age. In addition, in cases where the material is harmful to a minor but not obscene, an affirmative defense exists if the minor was accompanied by their guardian or parent.

In cases involving obscene material, an affirmative defense exists if the person distributing the material is the parent, guardian or spouse of the minor. An affirmative defense also exists for bona fide medical, psychological, judicial or law enforcement purposes.

UNLAWFUL EXHIBITION OF MATERIAL HARMFUL TO A MINOR

The unlawful exhibition of material harmful to a minor would be a class A misdemeanor under HB 133. An individual would be guilty of this offense if they had responsibility for a place of business which displayed or exhibited matter harmful to a minor in portions of the business that could be entered or viewed by minors without parental supervision.

An affirmative defense exists for cases where a minor used false identification to gain access to the material, was accompanied by their parent or guardian or was given the material by their parent, guardian, or spouse.

DECEPTION TO OBTAIN MATTER HARMFUL TO A MINOR

Deception to obtain matter harmful to a minor would be a class A misdemeanor under the language of HB 133. This section covers individuals who falsely represent themselves as the parent, guardian or spouse of a minor in order to allow access to harmful material by a minor. This offense would also apply to individuals who supply minors with false identification.

Minors could also be charged with this offense if they falsely represent themselves to be 18 years of age or older, or use false identification showing that they are 18 years of age or older.

COMPELLING ACCEPTANCE OF OBJECTIONABLE MATERIAL

A person could be charged with with a class A misdemeanor for compelling acceptance of objectionable material. This section defines as a crime any efforts by a distributor to link sales to business retailers or pornographic materials to the provision for sale of nonsexual materials.

EVIDENCE OF KNOWLEDGE

This section collects and sets out certain technical legal requirements relevant to matters of proof in prosecutions brought under the preceding legal provisions.

DEFINITIONS

The final section of the bill consist of definitions of terms and phrases that are used through out the bill. These definitions are fairly self-explanatory.

STATE OF ALASKA
THE LEGISLATURE

ROOM [illegible] STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-[illegible]

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 8, 1989

SUBJECT: House Bill 133, relating to obscenity -- sectional analysis

TO: Representative Mike Miller

FROM: Jack Chenoweth
Legislative Counsel

This legislation is based on last year's House Bill 449. It adds to the body of state criminal law (AS 11) new sections in the chapter defining crimes relating to public health and decency. The sections proposed to be added are AS 11.66.300 - 11.66.499.

There have been several significant decisions of the United States Supreme Court relating to the issue of obscenity. One of the earliest, Roth v. United States, 354 U.S. 476 (1957), held that the First Amendment was not intended to "protect every utterance," leaving open to the federal government and to state and local governments opportunity to regulate material that is "utterly without redeeming social importance." More recently, Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), reaffirmed that pornography was not protected by the First Amendment's guarantees. The decision in Miller added to the Roth standard three criteria by which the courts might determine whether material was "utterly without redeeming social importance":

(1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest;

(2) whether the work describes or depicts, in a patently offensible way, sexual conduct that is specifically prohibited by the applicable state law; and

(3) whether the work, taken as a whole, lacks

serious literary, artistic, political, or scientific value.

Miller, supra., at 24, 25.

A number of the provisions incorporated into this bill are accompanied by a related affirmative defense. Under the criminal code, an affirmative defense means that some evidence must be introduced that places the issue in defense, and that the defendant has the burden of establishing the defense by a preponderance of the evidence. See, in this respect, AS 11.81.900(b)(1).

Promoting obscenity (AS 11.66.300) and promoting obscene material for resale (AS 11.66.310), and the related affirmative defense (AS 11.66.320):

The two sections that define the crime are grounded on the definition of "obscene" (proposed AS 11.66.499(5)), a definition that in turn draws on the Miller criteria. In describing the elements of the respective offenses, they take advantage of the rule announced in Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 (1966), holding that the exploitation of highly erotic material is itself evidence that the material is obscene. In essence, these sections prohibit commercial exploitation or public dissemination of obscene matter. Proof of either of those rests primarily on objective evidence of specific facts. Precise knowledge of the contents of the material is not made a requirement to satisfy scienter. Rather, having knowledge of the character or nature of the material may be an adequate indicator of scienter in order to sustain a conviction. The sections also set the penalties for their violation: violation of promoting obscenity is made a class A misdemeanor, but violation of promoting obscene materials for resale, deemed a more serious crime, is designated a class C felony.

An accompanying provision, AS 11.66.320, sets out an affirmative defense by recognizing that obscene matter can be legitimately sold or circulated in conjunction with a defined proper purpose. and allows use, research, or study of the material for these valid purposes.

Promoting a sexual device (AS 11.66.330) and the related affirmative defense (AS 11.66.340):

The section defining the crime generally bans advancing or furthering sale of a sexual device. The elements of this crime require that an offender know the illegal device is a "sexual device," an object of perversion or abuse, as that term has been defined in AS 11.66.499(9). Conviction would impose the penalty applicable to a class A misdemeanor.

An accompanying provision, AS 11.66.340, sets up an affirmative defense, recognizing that a sexual device can be legitimately promoted in conjunction with one of the defined purposes, and allowing the use of the sexual device for these valid purpose.

Making an obscene drawing (AS 11.66.350):

This section would criminalize the act of making an obscene drawing. The charge is applicable only as to acts involving defacing of public property with expressions that meet the Miller test of obscenity, with the additional requirements that the maker "intend to display" or that the drawing "[be] visible to the public" in that place that it is made. Violation of the provision is made a class B misdemeanor.

Disseminating matter harmful to a minor (AS 11.66.360) and the related affirmative defense (AS 11.66.370):

The definition of the offense covers the distribution of material to a person under the age of 18 that is either "obscene," as that term is defined with reference to the Miller test, or "harmful to a minor," a definition adapted from the New York state statute approved by the United States Supreme Court in Ginsberg v. New York, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968), as altered by the decision in Miller. The "harmful to a minor" standard applicable to review the suitability of material to a juvenile is a less stringent standard than the Miller standard defining obscenity with reference to adults. A violation of the provision would be made a class A misdemeanor.

The related affirmative defenses (AS 11.66.370) are intended to protect persons who disseminate material harmful to a minor based on exhibition of false identification or securing parental consent, and to protect persons who disseminate obscene material or material harmful to a minor if

the person is the minor's parent or in limited governmental or scientific instances in which the distribution may be necessarily required.

Unlawful exhibition of material harmful to a minor (AS 11.66.380) and the related affirmative defense (AS 11.66.390):

The "unlawful exhibition" provision, AS 11.66.380, would apply to the disclosure or showing of "material harmful to a minor" in a business or commercial setting. It initially distinguishes on the basis of whether a minor may be present in any portion of a business premises. The offense or "unlawful exhibition" occurs if the minor is permitted on the premises without parental supervision--that is, if access to the premises is not restricted to adults--and the person responsible for the business premises makes no effort to prevent the minor from being able to view harmful material. The "unlawful exhibition" provision also acts to prohibit display of material that is harmful if the display is viewable by a minor whether or not accessible by that minor, that is, where only the minor may act to prevent his or her own exposure to the material. Finally, the "unlawful exhibition" provision precludes employment or use of a minor when the harmful materials would be handled by or displayed to them. Violation of the provision constitutes a class A misdemeanor.

The related affirmative defense provision, AS 11.66.390, is included in order to protect business owners and employees who make reasonable precautionary efforts, and to preclude interference with the rights of a parent to the minor.

Deception to obtain matter harmful to a minor (AS 11.66.400):

The elements of the crime of "deception" are defined with reference to efforts to aid or assist a minor to obtain material that is harmful to a minor or to gain admission to a performance that is harmful to a minor. They address attempted misrepresentation by one claiming to be the parent, guardian, or spouse of the minor, the provision of phony identification to the minor, false representation by the minor, and use of false identification by the minor. Violation of any of these provisions is made a class A misdemeanor.

Compelling acceptance of objectionable materials (AS 11.66.-410):

This section defines as a crime any efforts by a distributor to link sales to business retailers of pornographic materials to the provision for sale of non-sexual materials. Violation of the section is defined as a class A misdemeanor.

Presumption and evidence of knowledge (AS 11.66.490):

This section collects and sets out certain technical legal requirements relevant to matters of proof in prosecutions brought under the preceding legal provisions.

Subsection (a) permits a prosecution based on evidence that the defendant has provided or supplied sexually explicit works. It makes a presumption that a dealer in materials or performances knows the character of that in which he or she deals if the dealer has actual or constructive notice, whether or not the dealer has precise knowledge of the specific content of those materials or that performance. Proof that the dealer is involved in providing or supplying sexually explicit works permits an inference that the dealer is aware that the material or performance contains the kind of concuct or exhibitions that are addressed in this legislation.

Subsection (b) defines the scienter requirements applicable to prosecutions. Since the thrust of this legislation is to proscribe calculated purveyance or distribution of obscene materials and materials harmful to minors, the provision is grounded on the requirement of Smith v. California, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1957), that, rather than requiring proof of specific knowledge of contents of materials, one's general awareness of the content of the materials is sufficient to meet the scienter test. The subsection permits a fact trier to presume knowledge of the character of materials or of a performance by the owner or manager of a commercial establishment, or by their agents or employees, if they have "actual or constructive notice of the nature of the materials or the performance," without requiring that the person have precise knowledge of its contents.

Subsection (c) speaks to prosecutions in which knowledge of the character of material or a performance, or that a device is a "sexual device," is at issue. The provision directs that it is evidence of that knowledge that the defendant had received actual notice of the character of the material, the performance, or the device, and specifies how that notice may be given by the attorney general or a prosecuting attorney.

A related provision, subsection (d), relates the nature of the evidence that may be accepted by a court relevant to the proof of a defendant's knowledge of the character of sexually explicit material or as to an obscene performance, or of knowledge as to whether or not a device is a sexual device.

Definitions (AS 11.66.499):

This section sets out the definitions specifically applicable to this legislation. Note, especially, the following definitions:

-- "harmful to a minor," drafted with an eye toward defining suitability of material for juveniles on the basis of the "variable obscenity" basis of Miller and Ginsberg;

-- "obscene," based on the standards for determining obscenity discussed in Miller, briefly summarized in the introductory paragraph of this memo; and

-- "prurient," defined in a manner that permits consideration of the nature of the appeal of the material or of a performance; the technical terms that compose the definition are themselves also defined in this section.

JC:gc
WKG6/113

State of Alaska

HB 133

Sorry in case of a Second Hearing

Committees

CO-CHAIR, HOUSE JUDICIARY
VICE CHAIR, HOUSE LABOR AND COMMERCE
HOUSE HEALTH, EDUCATION AND SOCIAL SERVICES

P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4712
465-4948/4986
(SESSION)

914 CLAY COURT
ANCHORAGE, ALASKA 995
(907) 276-6844

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

February 28, 1989

Don Johnson
1500 Russian Jack Drive
Anchorage, AK 99508

Dear Mr. Johnson:

Thank you for your public opinion message on HB 133, the ob cenity legislation. A copy is enclosed.

I'm sorry you were not able to testify at the teleconference. It has always been my policy to allow any and all public testimony. If you will send me your written testimony, I'll be glad to include it in the record. The House Judiciary Committee staff will let you know of any future hearings on the bill so you can testify further if you would like.

Thank you again for contacting me.

Cordially,

Max F. Gruenberg, Jr.

Enclosure

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1133 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10036

PHONE 212/840 6161
TELEX 236317 CANT MPAA
TELECOPIER 212/391 9239

Memorandum in Opposition to Alaska HB 133

This memorandum is respectfully submitted on behalf of the Motion Picture Association of America, In. (MPAA), a trade association representing many of the major producers and distributors of motion picture distributors in the United States[1] in opposition to Alaska HB 133. All MPAA members companies distribute motion pictures for theatrical exhibition.

The Bill

HB 133 would enact an omnibus obscenity statute referred to as the "Obscenity Act". Section 11.66.499 of the "Obscenity Act" provides that the definition of "community standards" is the municipality or village in which the crime occurred.

Statewide Community Standards Should Be Utilized

The MPAA respectfully submits that jurors in the State of Alaska should utilize statewide community standards in obscenity prosecutions. The application of statewide obscenity standards facilitates the uniform application of law within the State of Alaska. A patchwork of inconsistent local standards, from each of the judicial districts in Alaska would impose an impossible burden on the free flow of protected commerce.

Thus, if a national distributor of motion pictures, books, or magazines were forced to review hundreds of different local standards in each state, the distribution of materials protected by the First Amendment would be severely hampered. The cost of distribution would also increase substantially, limiting availability of motion pictures, books, and magazines to the public. Distributors of such protected materials may simply throw up their hands and cease distributing their works rather than face prosecution in hundreds of different jurisdictions.

In addition, if a "local community" obscenity standards were enacted, production costs and the risks associated with production would increase tremedously; thus, limiting the funds available for motion picture product. Producers of such constitutionally protected materials might simply be forced to cease exhibition of their work rather than face prosecutions in hundreds of different jurisdictions.

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[1] MPAA members include:
Buena Vista Pictures Distribution, Inc., Columbia Pictures Entertainment, Inc., MGM/UA Communications Co., Orion Pictures Corporation, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios, Inc., Warner Bros. Inc.

An Overview of State Obscenity Laws

A review of state obscenity law indicates that twenty-three states, after considering the merits of the issue, have adopted "statewide standards"[2] either by statutory enactment or judicial construction, fifteen states do not specify whether state or local standards should be used[3], five states do not regulate content[4] and only seven require local standards.[5] MPAA urges that the Alaska legislature continue to retain statewide standards.

Conclusion

We urge the State of Alaska to recognize the enormous burden imposed by a myriad of conflicting local standards, and to amend the proposed "Obscenity Act" to require statewide community standards. The MPAA believes that statewide standards facilitate the distribution of material protected by the First Amendment.

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[2] These states include Alabama, Arizona, Arkansas, California, Connecticut, Georgia, Hawaii, Illinois, Indiana, Michigan, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and West Virginia.

[3] These states include Colorado, Delaware, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Ohio, South Carolina, Washington, Wisconsin and Wyoming.

[4] These states include Alaska, Maine, New Mexico, South Dakota and Vermont.

[5] These states include Florida, Massachusetts, Minnesota, Nevada, New Hampshire, Utah and Virginia.

2/21/89

Policy #4

Censorship of Obscenity, Pornography and Indecency

(a) The ACLU opposes any restraint on the right to create, publish or distribute materials to adults, or the right of adults to choose the materials they read or view, on the basis of obscenity, pornography or indecency.[1] Freedom of speech and press and freedom to read can be safeguarded effectively only if the First Amendment is applied strictly -- to prohibit any restriction on these basic rights. In pursuing this policy, the ACLU emphasizes that it is neither urging the circulation nor evaluating the merit of such material.

* * *

(b) Laws which punish the distribution or exposure of such material to minors violate the First Amendment, and inevitably restrict the right to publish and distribute such materials to adults. The complex social problems which prompt such statutes cannot be solved by limiting freedom of speech and press and avoiding the real causes.

The ACLU is well aware of the concern of parents, clergy and community officials about the exposure of children to what many regard as hard-core pornography, whether through its availability at neighborhood stores and newsstands or by its unsolicited dissemination through the mails. However, the Union maintains that a causal relationship between exposure to sexually explicit material and juvenile delinquency has never been carried to the point of definitive proof. (See policy on Comic Books.) As a practical matter it would appear that there can be no substitute for parental responsibility. Inevitably, any legal sanctions would threaten the distribution of non-pornographic materials.

* * *

(c) The ACLU has long maintained that all definitions of obscenity are meaningless because this type of judgment is inevitably subjective and personal. Court and juries continue to differ over what constitutes obscenity, often including in that category materials that have won world-wide acclaim.

The standard that to be judged obscene a work must lack "serious literary, artistic, political or social value" is imprecise and uncertain. It is impossible to draw the exact line between "important" and "worthless" material because the informed, critical community is itself just as often divided on the issue of the social importance as on the "appeal to prurient

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[1] Since these terms are variously defined in different settings by different individuals, it is the intention of this policy to cover all meanings from merely sexually explicit material to constitutionally-defined obscenity to any group or individual's definition of pornography -- including violence.

interest" of any given work. Attempts to define "obscenity" frequently result in condemning most severely expression of a controversial nature -- the very kind of speech for whose protection the First Amendment was written.

* * *

(d) The ACLU believes that the constitutional guarantees of free speech and press apply to all expression and that all limitations of expression on the ground of obscenity, pornography or indecency are unconstitutional. But so long as courts sustain such limitations in any form, it will also work to minimize their restrictive effect.[1] Under the First Amendment and the due process clause of the Fifth Amendment, such statutes should be required to define precisely the forms of proscribed speech, provide strict procedural safeguards, and choose the least restrictive methods of regulation.

The following safeguards for freedom of expression should be required:

1) Any statutory definition of obscenity must be drawn precisely and narrowly.

2) Creators, publishers and producers, their distributors, exhibitors and retailers, should not be threatened with the sanctions of criminal statutes for distributing or being connected with a work before it has been determined obscene in an adversary civil proceeding with a standard of proof of clear and convincing evidence. The state should be required to select a civil proceeding, as the least restrictive method of censorship.

3) Obscenity statutes should provide for prompt trials, determination and appellate review within specified time periods; and to require proof of scienter under clearly defined and reasonable standards.

4) Obscenity statutes should assure defendants the right to counsel; and if a defendant is acquitted, the defendant should be entitled to recover the costs and reasonable attorneys' fees incurred in defending the person's First Amendment rights.

5) Creators, publishers and producers, their distributors, exhibitors and retailers, should not be submitted to harassment by a multiplicity of proceedings. The state should not be entitled to subject a work to more than one civil proceeding to determine its obscenity. This could be accomplished either by requiring that its Attorney General institute such proceeding (or designate a district or county attorney to do so), or by providing that once an obscenity proceeding has been commenced in

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[1] Legislators, courts, law enforcement personnel and citizens groups have over the decades tried to censor materials found to be distasteful or punish those who create or deal in it. Techniques and definitions have changed over the years and this policy reflects responses to the various law enforcement approaches although some may be out-dated and some are in their infancy.

a state against a work, no other proceeding may be instituted against the same work in other counties, cities or towns until and unless there has been a final judgment that the work is obscene. (For the due process aspects of obscenity hearings in the broadcast media, see policy on Diversity, Censorship, and FCC Regulation.)

6) Distributors, exhibitors and retailers should not be obliged to risk punishment by misjudging the age of a minor. Such persons should not be required to keep records of evidence submitted by minors; and should be entitled to rely reasonably on a minor's statement of age.

7) There should not be a variable standard of obscenity for minors. [Board Minutes, April 13-14, 1985.]

* * *

(e) The ACLU opposes all zoning plans restricting the availability of books, movies and other communications media because of their content. The ACLU has long opposed any restraint on the dissemination of materials on grounds of obscenity. It therefore believes that zoning plans designed to regulate so-called pornographic materials comprise another form of restraint that impinges on constitutionally protected speech. The breadth of zoning ordinances inevitably inhibits the full and free exchange of information and expression. [Board Minutes, June 18-19, 1977, April 13-14, 1985.]

* * *

(f) Statutes that restrict pornography on the ground that it contributes to the subordination of women violate the free press and free speech guarantees of the First Amendment. The ACLU opposes any form of sex discrimination against women or men, but censoring speech will in the end lead to more intolerance, not less.

Proponents of such statutes contend that pornography is a form of sex discrimination because it reinforces an inferior image of women and thus harms women's status. They argue that pornography also leads to physical abuse of women, by increasing male aggression towards them; also that actresses and models are often physically and psychologically abused in the actual production of pornographic movies and photographs, typically by being coerced into sex.

Pornography, however, is speech; it is not conduct. Certain pornographic materials may be offensive to some and perhaps most Americans. Yet many publications and films which broad segments of the public may wish to see or read, ranging from current cultural expression to renowned works of art, could be construed as pornography and face restriction under these statutes.

Some assert that there is "scientific proof" showing an actual causal relationship between viewing of pornography and anti-social behavior. The ACLU believes, however, that no different test of the effects of speech is applicable in this area as in any other area.

Much expression may offend the sensibilities of people and indeed have a harmful impact of some. But this is no reason to sacrifice the First Amendment. The First Amendment does not allow suppression of speech because of the potential harm.

Society, moreover, has ample means other than suppression for dealing with the types of harm that some contend are caused or aggravated by pornography. Enforcement of criminal laws regarding assault, coerced sex, kidnapping and trespassing; strengthening of rape laws including elimination of the "spousal rape" exception under which husbands may not be prosecuted for raping their wives; enforcement of Title VII (of the Civil Rights Act of 1964) and other sex discrimination laws are legitimate remedies. Victims of sexual offenses may also have grounds to sue for damages for torts or contract claims. [Board Minutes, April 13-14, 1985.]

* * *

(g) The ACLU believes that the First Amendment protects the dissemination of all forms of communication. The ACLU opposes on First Amendment grounds laws that restrict the production and distribution of any printed and visual materials even when some of the producers of those materials are punishable under criminal law.

The ACLU views the use of children in the production of visual depictions of sexually explicit conduct as a violation of childrens' rights when such use is highly likely to cause: a) substantial physical harm or, b) substantial and continuing emotional or psychological harm. Government quite properly has the means to protect the interests of children in these situations by the use of criminal prosecution of those persons who are likely to cause such harm to children.[1] [Board Minutes, June 12, 1985.]

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[1] Persons who cause such harm to children will usually be those who finance the sexually explicit depictions; those who procure the children; those who engage in sexual activity with the children; and those who otherwise actively contribute on the set to the production. Each situation, however, must be examined to determine a specific individual's participation in the activity.

Policy #5

Comic Books

The ACLU recognizes that comic books, like the other mass media, may play an important part in the development of children's mind and behavior. But in view of the divergent -- even contradictory -- opinions expressed by responsible and qualified persons, there is as yet no definitive basis for assuming that crime comics are a significant cause of juvenile delinquency. Until it is shown that the circulation of crime comic books constitutes a clear and present danger with respect to the occurence, or continuance, of juvenile delinquency, and until alternative means to combat this evil are shown to be inadequate, there is no justification for curtailing a basic right guaranteed by the Constitution -- a free press unhampered by governmental interference. To condone pre-censorship, even of a few selected subjects, is to invite a spreading of censorship to other reading material. Private groups which seek to inculcate their particular point of view are always eager to broaden the scope of banned material and seize on censorship as an ally. Self-imposed codes of propriety adopted by the comic book industry and supervision by volunteer citizen "watchdog committees" over the contents of newsstands and bookstores are likewise improper in their effects of inhibiting both the creative artist's free expression of ideas and the individual parent's freedom to choose what his and her children will read. (See also policy on Motion Picture and Book Codes.)

The Union is aware of parental concern over juvenile delinquency. As a practical matter, however, it would appear that there can be no legal substitute for parental responsibility and for the influence exerted by the home, schools, churches, and community organizations on the development of children's reading habits, and for the work of these institutions in removing the most basic cause of delinquency. The ACLU also endorses continuance of investigations into the causal relationship -- or lack of it -- between comic books and juvenile delinquency, investigations whose ramifications may well lead to knowledge of the effects of all mass media upon human behavior. [Board Minutes, June 7, 1954, May 23, 1955, February 14-15, 1970; Censorship of Comic Books, 1955.]

(See also policy on Censorship of Obscenity, Pornography and Indecency.)

MEMORANDUM State of Alaska

TO: Max Gruenberg/Peter Goll
House of Representatives

DATE: February 21, 1989

FILE NO:

TELEPHONE NO.

SUBJECT: HB 133 - An Act Relating to Obscenity

THRU:

FROM: John Salemi
Acting Public Defender

The attached memo is in response to your request for comment on the above-referenced proposed legislation. This attached memo was prepared last year in response to a request by Representative Mike Miller who at that time was sponsoring HB 449. HB 449 was very similar to the present HB 133, except that HB 133 eliminates the crime of "Commercial Nudity". Therefore, the section in the attached memo of the same name (which begins on page 11 of said memo) is no longer applicable to the obscenity bill under discussion this session.

Do not hesitate to contact my office if you need further information concerning this proposal.

JBS:sh

Attachment

cc: Representative Mike Miller

TO: Dana Fabe

DATE: April 11, 1988

FILE NO.:

THRU:

TELEPHONE NO.:

SUBJECT: Proposed Obscenity Statute

FROM: Sen Tan

Introduction

This is a quick review of the proposed act regulating obscenity. I have highlighted the potential legal and constitutional problems with the proposed act.

11.66.300 - Promoting Obscenity

This section makes it a crime to promote obscenity. The main problem in this section concern the relevant mental state. Under 11.66.300(a)(1) and (a)(2) a person commits the crime of promoting obscenity if the person "having knowledge" of the character of the material or performance does something to promote the sale of the material.

As defined in 11.66.440(a), a person "has knowledge of the character of the material or of a performance if the person knows, has reason to know, or has a belief or ground for belief that warrants further inquiry, that the material or performance contains, depicts [objectionable material] ... whether or not the

person has precise knowledge or the specific content of the material or performance". Such a broad definition of having knowledge would include intentional conduct, knowing conduct, reckless conduct, negligent conduct and a mental state which approaches strict liability. This section imposes a duty on a person to find out if the content of the material or performance could be deemed obscene.

In addition, Section 11.66.440(b) imposes strict liability on anyone who comes into contact with the material. Anyone who handles, distributes or promotes the material "may be presumed to have knowledge of the character of the material or the performance if the owner, manager, agent or employee has actual or constructive notice of the nature of the materials". This section imputes knowledge and liability on every person in the chain or custody of any offensive material. Needless to say, it would have an extremely chilling effect on persons who work in any bookstore, library, video store or cinema. Not only would the ultimate retailers be liable, but the distributing agencies including UPS, the postal service, or a messenger service would also be liable.

The mental state discussed above applies not only to this section but to other sections of the proposed act as well. There appears to be problems with the mens rea requirement. At least 11.66.440(b) would seem to say that anyone who comes in contact with any offensive material is presumed to have the requisite

mental state. However, the statute does not make this presumption rebuttable. As a result, I believe section 440(b) unconstitutionally shifts the burden of proof. Sandstrom v. Montana, 99 S.Ct. 2450 (1979); Koehler v. Engle, 104 S.Ct. 1673 (1984). Furthermore, 11.66.440(a) would allow conviction of a misdemeanor or class C felony on a minimal showing of negligence. Recently the Alaska courts have shown concern of allowing criminal convictions which carry jail time based on strict liability. See Beran v. State, 705 P.2d 1280 (Alaska App. 1985).

On a practical level, given the minimal mens rea requirement, any carrier, distributor and retailer (including employees such as store clerks) would have to find out what they were carrying or selling. This would be an impossible burden to meet, and would lead to unenforcibility or selective prosecution.

There are further problems with 11.66.300, as subsection (a)(1)(C) makes it a crime for "anyone to possess or control obscene material with the purpose of violating this section". Since the words "purpose or violating this section" are nowhere defined or restricted, it would make the mere possession of objectionable material a crime. In Stanley v. Georgia, 899 S.Ct. 1243 (1969), the United States Supreme Court ruled that states may not prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct. In so ruling, the court noted the right to privacy found in the United States Constitution. Since the Alaska Constitution has an even more

explicit privacy provision, this section which makes mere possession a crime (presumably even in the privacy of one's own home) would run afoul or Alaska's right to privacy. Ravin v. State, 537 P.2d 494 (Alaska 1975).

Generally, this section and other sections use the term "promote" rather liberally without defining it. As a result, the statute could be void for vagueness, as it does not give adequate notice of the prohibited conduct. See Marks v. City of Anchorage, 500 P.2d 644, 646 (Alaska 1972). This statute could make sharing a book with a friend a crime.

11.66.310 - Promoting Obscene Material for Resale

In a separate section, 11.66.310, the proposed statute makes promoting obscene material for resale a class C felony. If a person intentionally promoted obscene material for the specific purpose of resale, having knowledge of the character of the material, then a class C felony would result. The section is trying to make a distinction between wholesalers and mere retailers. Unfortunately, the statute does not define the term "resale" with any precision. It includes any act which promotes, offers, or an agreement to offer, or possession of the material for the purposes of resale. This section overlaps substantially with 11.66.300 and it would be difficult to tell if a class A misdemeanor or a class C felony resulted. Since Section 310 also uses the term "having knowledge", all the infirmities of a lack of mental state discussed earlier apply to this section.

11.66.320 - Affirmative Defenses

It is an affirmative defense that the obscene material or performance was "disseminated or promoted for a bona fide and medical, psychological, legislative, judicial, or law enforcement purpose, by or to a physician, psychologist, legislator, judge, prosecutor, or law enforcement officer, or to a person who is legitimately affiliated with one of these individuals in the performance of the person's duties". This seems to be an illogical defense under the Miller test, the obscenity test adopted by this statute.[1] Pursuant to Miller, material is obscene only if it has no serious socially redeeming value. Yet this affirmative defense allows doctors, judges, district attorneys and police officers to traffic in without socially redeeming value material. Furthermore, what constitutes a bona fide purpose is not addressed. As it stands, this section appears to allow judges, legislators and law enforcement officials a monopoly in promoting and disseminating obscene material.

In addition, by seeking to restrict the classes of persons who can disseminate and promote the material, this section is underinclusive. There are many persons who should be able to disseminate this information without any liability. For example, teachers and professors should be allowed to disseminate obscene

[1]Miller v. California, 93 S.Ct. 2607 (1973).

material for educational purposes. Similarly, public defenders and guardians ad litem, may need access to obscene material in the context of a case.

11.66.330 - Promoting a Sexual Device

This section makes it a crime for anyone to promote, offer, agree to promote, sell or agree to sell or possess it with the intent to promote a sexual device. A sexual device is defined as an artificial device primarily designed to physically stimulate or manipulate the genitals or anus. Section 11.66.499(a).

There are essentially two major problems with this section. On the one hand, this section really does not deal with obscenity, or the regulation of obscenity. It is directed against sale of a device which could be used for sexual purposes. In order to regulate such a sale, substantive due process would certainly demand that the device is harmful. LaFave and Scott, Substantive Criminal Law, Vol. I, § 2.12(b), p. 211 (1986). A more serious problem would be the vagueness of this section. Given the broad definition of "sexual device", it could include prophylactics.

In addition, this section makes it a crime to possess any device with the intent to promote. Making mere possession a crime, would again violate the privacy rights of citizens.

11.66.340 - Affirmative Defense

There is the standard affirmative defense that the device was

promoted by DAs, doctors and judges, with one exception, as it includes "other persons having a bona fide interest in that device". It is difficult to determine who is covered by this catch all provision.

11.66.450 - Making an Obscene Drawing

This section makes it a crime to make an obscene drawing in public or in a public place. It does not have to deface public property. Exhibiting obscene material would already appear to be a crime under 11.66.300(a)(1)(A) (creates an obscene material to be publicly promoted). If the drawing or graffitti was on public property, then the crime is adequately covered by the Criminal Mischief Sections of the Crimnal Code. See AS 11.46.480 - 11.46.486. Indeed the criminal mischief provisions are broader as it also covers private property. This section is redundant.

11.66.360 - Disseminating Matter Harmful to a Minor

This section makes it a crime to disseminate obscene or harmful material to a minor. This is distinguished from promoting obscenity, AS 11.66.300, to the extent that the definition of obscenity and material harmful to a minor is different. Material harmful to a minor is a lower standard than obscenity, because the standard is not whether the material appeals to the prurient interest of an adult, but whether the material appeals to the prurient interest of a minor. (The rest of the standard tracks the Miller standard.) Section 11.66.499(2). Although prevailing federal law would allow a statute to impose a stricter standard

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where minors are involved, this leads to a situation where the standard is constantly shifting. According to the proposed statute, a minor is defined as anyone under the age of 18. 11.66.499(4). Of course, what would be offensive and harmful to a seven year old is much different from what would be harmful to a 17 year old.

The lack of a precise standard becomes very troubling when it is coupled with the mental state "having knowledge". As already discussed, the term "having knowledge" imputes strict liability to some persons and mere negligence (or lower) to others. "Having knowledge" also imposes a duty on a person dealing with the material to investigate whether the material would be harmful to a minor and if so, below what age category. As it stands, the proposed statute puts a tremendous burden on the purveyors of information and entertainment.

This section uses the term promote (as yet undefined), and makes it a crime to possess a controlled material with the intent to present it or furnish it to a minor. Such an extremely broad provision would impose liability on libraries, bookstores, video stores, supermarkets and any agency disseminating information. An agency would have to know what material it has and who the suitable audience is. It would no longer be <u>caveat emptor</u>. Bear in mind that such material need not be obscene. As a practical result, retailers would be inclined to carry only material suitable for all ages, and this would in effect restrict the

availability of material suitable for adults.

11.66.370 - Affirmative Defense

This section applies only to material which is harmful to a minor but not obscene. It is essentially a mistake of fact defense, that there is no liability if there are reasonable grounds to believe that the minor was 18 years old or above. It also allows a parent, guardian or spouse of the minor to provide the minor with harmful material. Such material may also be disseminated for bona fide medical, psychological, judicial or law enforcement purposes. Again, by limiting the affirmative defense only to certain classes of persons would present due process and equal protection problems. There are other obvious examples, such as teachers and schools (not to mention the school board), which also have a legitimate purpose in disseminating information.

11.66.380 - Unlawful Exhibition or Material Harmful to a Minor

This section prohibits the public display of material harmful to a minor, or in places where a minor has access to. Again, there are problems with the mens rea, since anyone having responsibility for a business premise, and having knowledge of the character of the material, commits a crime if the material is exposed to the view of minors.

As already mentioned, a minor is defined as anyone under 18 years old, and any store, movie theater or video shop would have to watch out for the lowest common denominator. Failure to do so

results in a crime.

11.66.390 - Affirmative Defense

Again, if there are reasonable grounds to believe that the minor was 18 years or over, or was accompanied by a parent or guardian, there is a defense. The problems with this affirmative defense has been already discussed.

11.66.400 - Deception to Obtain Matter Harmful to a Minor

This section criminalizes conduct which helps a minor obtain harmful material. Subsection (b) provides that a person under 18 years or age commits the crime of deception to obtain matter harmful to a minor, if the person (1) falsely represents that the person is 18 years of age or older; (2) exhibits identification or document purporting to show that the person is 18 years or older. This crime is a class A misdemeanor. This section applies only to minors and criminalizes delinquent conduct, and moves juvenile misconduct from the civil sphere into the criminal sphere. This section would make it a crime for minors to try and see adult movies or read adult books, and presumably face jail time, while for other more serious offenses, only an adjudication or delinquency can result. Even for very serious crimes such as murder, a juvenile must be waived into adult court.

11.66.410 - Compelling Acceptance of Objectionable Material

This section makes it a crime to tie the sale of non-obscene material to the sale of obscene material and material harmful to

a minor. No mental state is provided. This section allows establishments and purchasers to reject non-obscene material harmful to a minor. This would surely constitute overreaching as it covers non-obscene First Amendment material, suitable for adult audience.

11.66.420 - Commercial Nudity

This section purports to make commercial nudity either a class A misdemeanor or a class C felony. Presumably, this section was based on California v. LaRue, 93 S.Ct. 390 (1972) which held that a city could regulate live entertainment in establishments where alcoholic beverages were served, although the acts were not obscene, under the state's broad authority to control intoxicating liquors under the 21st Amendment to the United States Constitution. However, the LaRue rationale was rejected in Mickens v. City of Kodiak, 640 P.2d 818 (Alaska 1982). In Mickens, Kodiak sought to prohibit waiters, waitresses and entertainers in establishments serving alcohol from exposing their genitals, buttocks, and in cases of females, their breasts. The Alaska Supreme Court found that dancing, including nude dancing, is a constitutionally protected form of expression under the First Amendment of the United States Constitution. Further, the court concluded that the Alaska Constitution draws no distinction between free speech in a bar and free speech on a stage, and therefore rejected the LaRue rationale on state constitutional grounds. The court was quite adamant that laws prohibiting free expression, based on content of the expression,

are sustainable only for the most compelling of reasons. The Alaska Supreme Court also explained that nudity does not equate to obscenity and such regulation was a direct contravention of First Amendment protections.

Given the premise that nudity falls within constitutionally protected speech, the affirmative defense set forth in Section 11.66.430 listing an affirmative defense that "the person's full or partial nudity has serious literary, artistic, political, or scientific value", really puts the cart before the horse. Under the Miller test, the state has the burden to prove that the work in question lacks serious literary, artistic, political, or scientific value, not the other way around. This entire section is constitutionally impermissible.

11.66.440 - Presumption and Evidence of Knowledge

Sections (a) and (b), the sections providing the definition of "having knowledge" have already been discussed at length. This leaves subsection (c). This section poses some procedural problems. Subsection (c) provides that it is evidence of knowledge that the performance or material is obscene when the attorney general or prosecuting attorney has given actual notice that such material, performance or device is obscene or prohibited. It allows the attorney general or the prosecuting attorney to determine what is obscene. The proper procedure to determine what the First Amendment protects was discussed at some length by the court in Hanby v. State, 479 P.2d 486 (Alaska

1970). In Hanby, the court was concerned that since First Amendment rights are involved, an adversary hearing should be held immediately before or after the seizure to determine if the material is obscene. If the material is not obscene then there would be no good reason to seize it. Although not squarely addressing the issue, Hanby seems to imply is that the question of obscenity should be one reserved to the courts (and ultimately to the jury), and the exercise of police powers in this area should be restricted. It would be incongrous to consider notice by the attorney general or prosecuting attorney as evidence of knowledge to the possessor that the material is obscene, as the courts are the final arbiters of that question.

11.66.499 - Definitions

(1) The term community is defined to mean the municipality or village in which the crime occurred. Although Miller expressly rejected a national standard of obscenity in favor of community standards, it is not clear whether the court anticipated a statute authorizing different interpretations of obscenity within an individual state. Having different community standards within Alaska, raises equal protection problems, especially in the context of Alaska's sliding scale equal protection analysis. The essence of an equal protection challenge is that the legislature has created unequal burdens and benefits, and has imposed greater restraints on first Amendment rights in different parts of the state. This is especially so when the concept of obscenity is fluid, and allows extremely broad prosecutorial discretion in

different areas of the state.

Problems with other definitional sections have already been discussed in the body of the text.

I hope that this is helpful and if you need any more work on it, please let me know. Statutes which attempt to regulate obscenity have to be limited in scope. The proposed statute is too broad, partially because it attempts to regulate protected speech, and partially because of its vague language. The present statute does not in many aspects satisfy Alaska's explicit constitutional guarantees of free speech and privacy.

MEDIA COALITION, INC.

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Michael A. Bamberger
General Counsel

Christopher M. Finan
Director

March 24, 1989

Rep. Peter Goll
Co-Chairman
House Judiciary Committee
State Capitol
Juneau, AK 99811

Re: House Bill 133

Dear Representative Goll,

The members of The Media Coalition believe that the provisions of House Bill 133, including bans on the sale of obscene material and the display of "harmful" works, will limit the circulation of non-obscene books and magazines with sexual content--works that are protected by the First Amendment. They have asked me to explain their concern.

The members of Media Coalition represent most of the publishers, booksellers and periodical wholesalers and distributors in Alaska and the rest of the United States. Their members neither publish nor sell obscene material. However, they do disseminate First Amendment-protected books and magazines with sexual content -- novels, art and photography books, health and sex education material -- that could be suppressed if H.B. 133 becomes law.

The members of Media Coalition recognize the right of the legislature to ban obscene material. However, even a constitutional obscenity statute has a chilling effect on the sale of non-obscene books and magazines with sexual content. The definition of obscenity set forth by the U.S. Supreme Court is vague. Different people find different things obscene. This vagueness leaves a bookseller or wholesaler unsure of what may be legally sold. Faced with the prospect of criminal prosecution if he or she makes a mistake, the bookseller or wholesaler will err on the side of caution, removing from sale legitimate works with sexual content. H.B. 133 is particularly frightening for wholesalers, who could be charged with a felony for mistakenly selling one work that a jury later determines to be obscene!

H.B. 133 also threatens the dissemination of constitutionally-protected materials by banning the display of material which is "harmful to minors" in any place to which minors have access. While they have some sexual content, books and magazines that are "harmful to minors" are not obscene under the guidelines set down by the U.S. Supreme Court: they contain serious literary, artistic, political or scientific value.

Restrictions on display inevitably force bookstore owners to get rid of non-obscene books and magazines with sexual content. It is impossible for a bookseller to review the thousands of new works that he or she receives every year to determine which ones are "harmful." Rather than run the risk of making a mistake that could lead to a criminal conviction or, at least, bad publicity, the bookseller will choose to discontinue the sale of all works with sexual content.

The constitutionality of display laws that affect non-obscene works is currently under review in Virginia, Georgia and New Mexico, where the members of The Media Coalition have challenged laws that are very similar to H.B. 133. The Supreme Court recently remanded the Virginia case, American Booksellers Assn. v. Commonwealth of Virginia, to the Fourth Circuit Court of Appeals for further consideration. In Georgia, the Eleventh Circuit Court of Appeals will soon hear an appeal by the State of a federal district court decision declaring the law unconstitutional.

Alaska is one of seven States that have chosen not to pass a general obscenity law. It has resisted the temptation to restrict the First Amendment rights of adults by enacting a "minors' access" law. The residents of your State enjoy their First Amendment rights in fullest measure, purchasing the books and magazines they want and need without hindrance by government. Let Alaska remain an example to the rest of the nation. Please defeat H.B. 133.

Yours very truly,

Christopher Finan

Christopher Finan
Director

1455Y

Alaska State Legislature

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House of Representatives

M E M O R A N D U M

TO: Representative Peter Goll
Co-Chairman, House Judiciary Committee

FROM: Representative Mike Miller

RE: House Bill 133, An Act relating to obscenity

DATE: February 21, 1989

There is a substantial line of case history, in the United States Court System, dealing with the regulation of obscenity. Although this history dates as far back as 1896, the two U.S. Supreme Court decisions of which all federal and most state obscenity laws are based are Roth v. United States (1957) and Miller v. California (1973).

The decision reached in Roth declared that the First Amendment was not intended to "protect every utterance." This finding allowed federal, state and local governments that opportunity to regulate material that was found to be "utterly without redeeming social importance." In making its determination, the Court rejected the English test that obscenity could be determined by the effect of isolated passages ob "particularly susceptible persons." The English test was replaced with the "Prurient appeal" test as judged by the average person applying contemporary community standards. This decision also established the "taken as a whole" requirement.

In 1973, Miller reaffirmed that obscene material was not protected by the First Amendment's guarantees. The decision added to the Roth standard the following three-part test for determining obscenity and whether material was "utterly without redeeming social importance":

> (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether the work describes or depicts, in a patently offensible way, sexual conduct that is specifically prohibited by the applicable state law; and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Concern has been expressed regarding the constitutionality of the "harmful to minors" provisions of House Bill 133. This definition is adapted from the New York statute which was approved by the U.S. Supreme Court in Ginsberg v. New York (1968), with revisions to comply with the modernized version of certain phrases as changed in Miller. The Court ruled that the "harmful to minors" provision of the New York statute was not vague, and upheld the state's power to adjust the test of legal obscenity according to the audience of the material.

Concern was also expressed that the proposed legislation "would provide a ready avenue for the would-be censor to purge those institutions of any material he did not find suitable for his and everyone else's children." However, the wording of the legislation establishes a system under which a regular jury would be the body charged with making a determination of whether material is obscene or harmful to minors. Hamling v. United States (1973) determined that the one constitutional requirement that must be met in making such a determination is that the material is judged by a juror not according to his own standards, but according to the standards of the community or vicinage from which he comes." Quite frankly, this is a very tough standard to meet.

The statutory language proposed by HB 133 is based on the same court precedents that all federal and most state obscenity laws are based on. In fact, the wording used in the sections of the bill dealing with dissemination of material harmful to minors is almost identical to Anchorage Municipal Ordinance 8.05.420; Minors--Disseminating indecent material to.

Although the topic of HB 133 is controversial, I believe it is a proper issue for this deliberative body to discuss.

G

8.05.420 M s—Disseminating indecent m. ial to.

A. In construing and applying this section, the following definitions shall apply:

1. A "minor" is a person less than 18 years old.

2. "Sexual conduct" is any sexual act, normal or perverted, or any act of masturbation, excretory functions or lewd exhibition of the genitals.

3. "Sexual excitement" is the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

4. "Sado-masochistic abuse" is flagellation or torture by or upon a person, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

5. "Harmful to minors" is that quality of any description or representation, in whatever form, of sexual conduct, sexual excitement or sado-masochistic abuse if, when taken as a whole, it:

a. according to contemporary community standards appeals to the prurient interest in sex; and

b. portrays sexual conduct, sexual excitement or sado-masochistic abuse; and

c. does not have serious literary, artistic, political or scientific value.

6. "Indecent material" is a picture, photograph, drawing, sculpture, motion picture film or similar visual representation or image of a person or portion of the human body which depicts sexual excitement, sexual conduct or sado-masochistic abuse which is harmful to minors; a book, pamphlet, magazine, printed matter, however produced, or sound recording which contains any matter enumerated above in this definition or explicit and detailed verbal description or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse, and which is harmful to minors; or an enactment of sexual conduct or sado-masochistic abuse, or exhibition of sexual excitement, by one or more persons.

B. Prohibited dissemination. It is unlawful for any person to knowingly:

1. disseminate, distribute, offer to distribute or exhibit indecent material to a minor; or

2. sell or give to a minor an admission ticket or pass to premises whereon indecent material is exhibited or to be exhibited; or

3. admit a minor to premises whereon indecent material is exhibited or to be exhibited.

C. Affirmative defenses in prosecution.

In a prosecution for disseminating indecent material to minors, it is an affirmative defense that:

1. the defendant had reasonable cause to believe that the person involved was 18 years old or more, and such person exhibited to the defendant a driver's license, birth certificate or other official or apparently official document purporting to establish that such person was 18 years old or more; or

2. the defendant is the parent of the minor, or has parental consent. (Adapted from CAC 8.48.010-.030 and new).

(e) As used in this section:

(1) "Place of prostitution" means any place where prostitution is practiced.

(2) "Prostitute" means a male or female person who engages in sexual conduct in return for a fee.

(3) "Prostitution enterprise" means an arrangement whereby two (2) or more prostitutes are organized to conduct prostitution activities.

(4) "Sexual conduct" means conduct between persons not married to each other consisting of contact between the sex organs of two (2) persons or between the sex organs of one person and the mouth or anus of another. (Ord. No. 3491, § 3, 9-13-76)

Sec. 6.403. Loitering for purposes of prostitution.

It is unlawful for any person to remain in a public place and repeatedly beckon to, or repeatedly stop, or repeatedly attempt to stop, passersby, or repeatedly attempt to engage passersby in conversation, or repeatedly stop or attempt to stop motor vehicles, or repeatedly interfere with the free passage of other persons, for the purpose of soliciting for prostitution or for assignation. (Ord. No. 3770, § 1, 3-12-79)

Sec. 6.404. Furnishing obscene materials; exhibiting obscene performance.

(a) A person commits the offense of furnishing obscene materials if, knowing or having good reason to know the character of the material furnished, he sells, rents or possesses for sale any obscene book, magazine, newspaper, picture, motion picture or other visual representation.

(b) A person commits the offense of exhibiting an obscene performance if he exhibits, performs or presents any obscene motion picture, play, lecture, dance, demonstration or other presentation.

(c) Something is "obscene" within the meaning of this section if:

(1) It depicts or describes, in a patently offensive manner, human masturbation, sexual intercourse, or any touching of the genitals, pubic areas, anus or buttocks of the human male or female, whether alone or between members of the same or opposite sex or between humans and animals, an act of apparent sexual stimulation or gratification, or flagellation or torture by or upon a person who is nude or clad in undergarments;

(2) The average person, applying contemporary community standards in the Fairbanks area, would find that, taken as a whole, it appeals to prurient interests; and

(3) Taken as a whole, it lacks serious literary, artistic, political or scientific merit.

(d) Before filing a complaint or making an arrest for an offense defined by this section, the city police shall first present their evidence to the city attorney. Based on the evidence presented, the city attorney shall determine whether there is probable cause to believe that an offense defined by this section has been committed. If the city attorney finds that there is such probable cause, he shall direct the city police to obtain an appropriate search warrant from the district court. (Ord. No. 3491, § 3, 9-13-76)

AS OF MAY 1986

STATUS OF GENERAL OBSCENITY LAWS

State	Follows Miller 3-Pronged Test	Statute or Decision	State or Local Standards	Remarks
Alabama	Yes	§ 13A-12-150 § 13A-12-151 § 13A-12-152		Performances are prohibited only if monetary consideration.
Alaska	-			No adult statute.
Arizona	Yes	§ 13-3501 § 13-3502	Statewide	But live performances are not prohibited by statute.
Arkansas	Yes*	§ 41-3585.1 through § 41-3585.4 § 41-3565	Statewide	*But statute on obscene material and live performances requires appeal to prurient interest of average person. Separate statute on films, § 41-3578.
California	Yes*	§ 311 § 311.2 § 311.6		*1st prong considers predominant appeal. 2nd prong reads: taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters. 3rd prong reads: taken as a whole lacks significant literary, artistic, political, educational, or scientific value.
Colorado	Yes	§ 18-7-101 § 18-7-102		But live performances and ... ns shown in theatres are not included. *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (1985).
Connecticut	Yes*	§ 53a-193 § 53a-194	Statewide	*1st prong considers predominant appeal with reference to ordinary adults. 3rd prong includes educational value.
Delaware	Yes	11 § 1364 11 § 1361		
District of Columbia	Yes	§ 22-2001 and *Lakin v. United States*, 363 A. 2d 990 (1976).		
Florida	Yes	§ 847.07 and §847.011 *Rhodes v. State*, 283 So. 2d 351 (1973)	Local, imposed by *Davison v. State*, 288 So. 2d 483 (1973).	Case law adopts *Miller* test.
Georgia	Yes*	16-12-80	Statewide, imposed by *Slaton v. Paris Adult Theatre I*, 201 S.E. 2d 456 (1973). *Cf. Jenkins v. Georgia*, 418 U.S. 153 (1974).	*But 1st prong considers predominant appeal. Obscene performances not prohibited.
Hawaii	Yes*	§ 712-1210 § 712-1214	Statewide	*3rd prong uses the phrase "serious merit" in place of "serious value." Monetary consideration required.
Idaho	Yes	§ 18-4101 § 18-4103 § 18-4104		
Illinois	Yes	38 § 11-20	Statewide, imposed by *People v. Ridens*, 321 N.E. 2d 264 (1974).	

AS OF MAY 1986

STATUS OF GENERAL OBSCENITY LAWS

Indiana	Yes	§ 35-49-2-1 § 35-49-3-1 § 35-49-3-2		But 1st prong considers appeal of "dominant" theme of the matter or performance. 2nd prong does not expressly include simulated conduct or excretory functions.
Iowa	Yes*	§ 728.4		*But statute *only* deals with *sale or offers for sale* of material depicting *sado-masochism, excretory functions, use of a child in sex act* or *bestiality*. "Average person" and "taken as a whole" improperly applies to 2nd prong. Lack of statute legalizes live sex acts, exhibiting obscenity, sale of obscene hardcore depictions or descriptions of sexual intercourse between humans, normal or perverted, actual or simulated, masturbation, lewd exhibition of genitals, fellatio, and cunnilingus. It also legalizes printing, advertising, importing, publishing and transferring of obscenity.
Kansas	Yes*	§ 21-4301(1) and (2) § 21-4301(5)		*But 2nd prong omits simulated conduct and excretory functions, and 3rd prong adds "educational" to value test.
Kentucky	Yes*	§ 531.010 § 531.020		*But 1st prong considers predominant appeal, and 2nd prong omits simulated conduct. Statute does not apply to live acts.
Louisiana	Yes*	14 § 106		*Commercial only. 14 § 106(F) requires prior adversary hearing before charges may be brought, and then punishment is restricted to activity thereafter (except for ultimate sexual acts, actual or simulated).
Maine	-			No adult statute at state level.
Maryland	Yes	27 § 417 and 41[illegible]		Case law indicates that state courts must apply the definition of obscenity put forth by the U.S. Supreme Court. *See B & A Co. v. State*, 330 A.2d 701 (1975). Live acts are not prohibited except in one county.
Massachusetts	Yes*	C.272 § 31 *C.272 § 29*	County-wide	*Where allegedly obscene matter is a book, an *in rem* proceeding must be held before criminal charges can be brought (C.272 § 28C). "Taken as a whole" unnecessarily applied to all three prongs.
Michigan	Yes	§ 752.362 § 752.364 § 752.365 § 752.366		But live performances are not included. ~~First degree offense declared unconstitutional in *511 Detroit St., Inc. v. Kelley*, No. 85-40006 (E.D. Mich.) (2-26-85).~~ (statute upheld by 6th Cir.)
Minnesota	Yes	§ 617.241		1st prong considers dominant theme of the matter. Live performances are not dealt with. Separate statute for drive-in theaters (§ 617.299).
Mississippi	Yes	§ 97-29-101 § 97-29-103		
Missouri	Yes*	§ 573.010 § 573.020 and § 573.030	Local, imposed by *McNary v. Carlton*, 527 S.W. 2d 343 (1975)	*Commercial only. 1st prong considers predominant appeal; 2nd prong omits simulated conduct and excretory functions. "Considered as a whole" and "contemporary community standards" apply to all three prongs.
Montana	Yes*	45-8-201		*"Taken as a whole" unnecessarily applied to all three prongs. Local option permits stricter laws at municipal and county level. 1st prong omits "average person" concept.

Nebraska	Yes*	§ 28-807 § 28-813		*1st prong considers predominant appeal. 2nd prong omits simulated conduct.
Nevada	Yes	§ 201.235 § 201.249 § 201.253	Local	Local laws expressly authorized.
New Hampshire	Yes*	§ 650:1 § 650:2	Countywide	*But 1st prong considers dominant theme. Schools, museums, public libraries and government agencies which violate law *after* adversary hearing on obscenity may be prosecuted. *State v. Manchester News Company, Inc.*, 387 A.2d 324 (N.H. Sup. Ct.), *appeal dism'd* 439 U.S. 949 (1978), excised that part of the definition of sexual conduct in 650:1(VI) which included touching of genitals, pubic areas, buttocks, or female breasts.
New Jersey	Yes*	2C:34-2		*But 1st prong utilizes the dominant theme concept. "Sale" of obscenity only thing prohibited. No prohibition on obscene performances or exhibition of obscene films.
New Mexico	-			No adult statute. 30-38-1 allows for an injunction using the *Miller* test against the showing of obscene films in outdoor motion picture theatres.
New York	Yes*	Penal Code, § 235.00 § 235.05 § 235.06 § 235.07	Statewide	*But 1st prong considers predominant appeal.
North Carolina	Yes*	§ 14-190.1		*But 3rd prong does not specifically include "taken as a whole" concept.
North Dakota	Yes*	§ 12.1-27.1-01	Statewide	*But 1st prong considers predominant appeal. Pecuniary gain required.
Ohio	Yes*	§ 2907.01 (*State v. Burgun*, 384 N.E. 2d 255 (1978))		*Simulated activity is not prohibited. 3rd prong uses genuine scientif , educational, sociological, moral, or artistic purpose. Statute "narrowed" by *Burgun* to "incorporate" *Miller* test.
Oklahoma	Yes*	21 § 1024.1 21 § 1024.2 21 § 1040.8 21 § 1040.12 21 § 1040.13 *state ex rel. Field v. Hess*, 540 P. 2d 1165 (1975).	Statewide, imposed by *McCrary v. State*, 533 P.2d 629 (1974).	*If mailable matter, criminal charges can be brought only after civil adjudication of obscenity. 21 § 1040.14 to 1040.22. Includes educational value in third prong.
Oregon	-	See remarks	~~Statewide~~	Statute declared void for vagueness in *State v. Henry*, No. A26439 (Ore. Ct. App.) (4-9-86). (Statute voided by Ore. Sup. Ct.)
Pennsylvania	Yes*	18 § 5903	Statewide	*Live performances are not dealt with. 3rd prong adds "educational" value to the test.
Puerto Rico	Yes*	33 § 4074 33 § 4075 33 § 4076		*1st prong substitutes "attracts lascivious interest" for appeal to prurient interest. 3rd prong includes religious or educational merit.
Rhode Island	Yes	§ 11-31-1	Statewide	Commercial only.

South Carolina	Yes*	§ 16-15-260 § 16-15-310 § 16-15-320	Statewide	*But 3rd prong adds "edu
South Dakota	-			No adult statute.
Tennessee	Yes	§ 39-6-1101 § 39-6-1104	Statewide	
Texas	Yes	§ 43.21 § 43.23		
Utah	Yes	§ 76-10-1203 § 76-10-1204	Local	Simulated conduct not spe
Vermont	-		Statewide	
Virginia	Yes*	§ 18.2-372 § 18.2-374 § 18.2-375	Local, see *Price v. Commonwealth*, 189 S.E. 2d 324 (1972)	*[illegible] 1st prong considers a[illegible] theme of the material.
Washington	Yes	7.48A.010 9.68.140	Statewide, imposed by *State v. J-R Distributors, Inc.*, 512 P. 2d 1049 (1973)	Only obscenity "for profit punishable criminally.
West Virginia	-	8-12-5b 7-1-4		Municipalities and counties enact statutory sections pe child pornography. Penal lief are available for muni under the statute.
Wisconsin	-	See remarks		Statute declared unconstitu *Cinema*, 292 N.W. 2d 807
Wyoming	Yes	§ 6-4-301 § 6-4-302		"Average person" applied

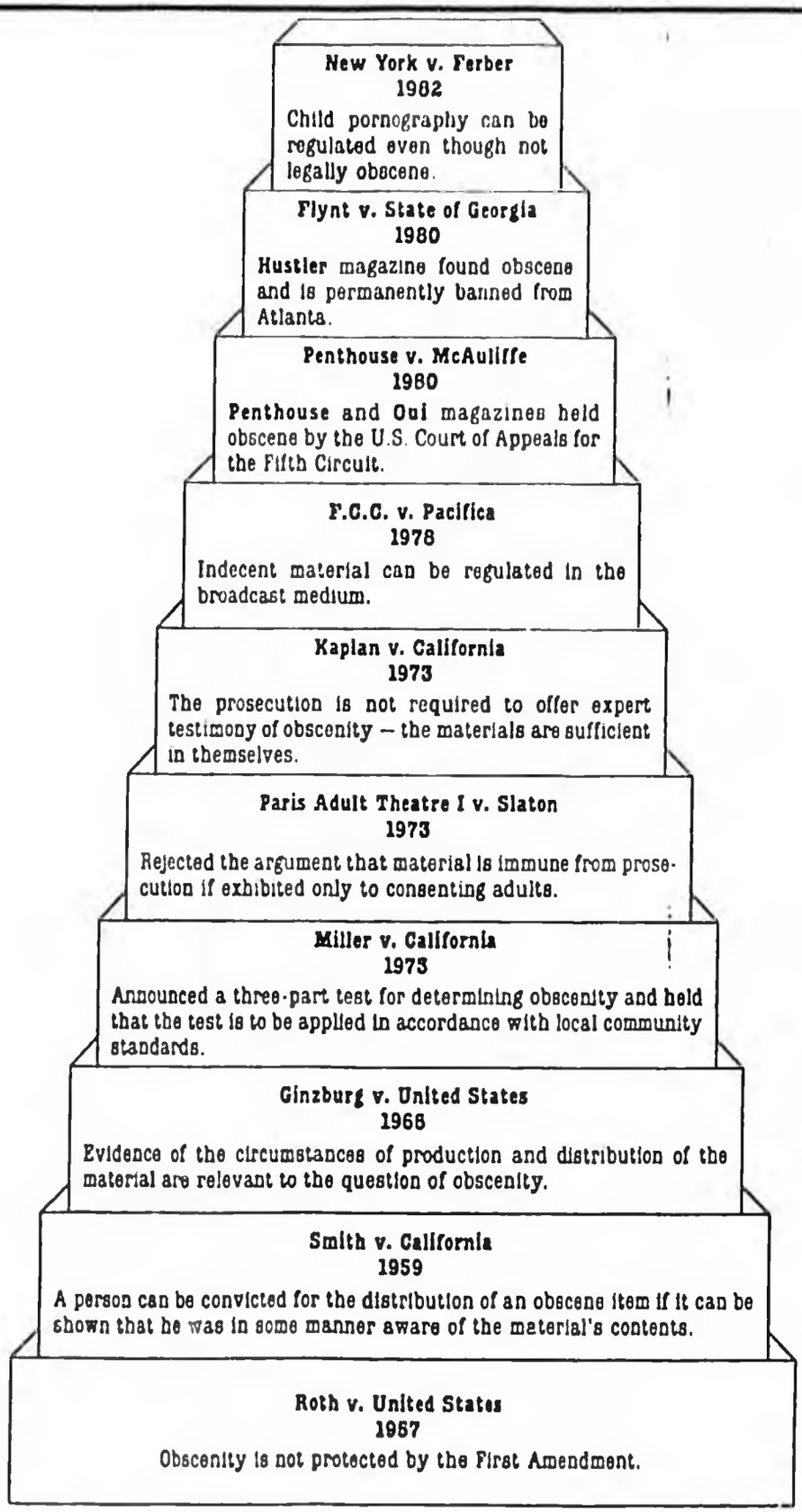
D
EXHIBIT

Landmark U.S. Supreme Court Decisions on Obscenity

CASE	DATE	BACKGROUND	CONTRIBUTION TO THE LAW ON OBSCENITY
Rosen v. United States 161 U.S. 29, 40 L.Ed. 606	1896	Rosen was convicted for mailing an obscene, lewd, and lascivious paper in violation of federal law	**Scienter.** Proper inquiry under the law was not whether the defendant knew or believed that the paper could be properly characterized as obscene, but whether it was of that character and deposited in the mail by one who knew or had notice, at the time, of its contents.
Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304	1957	Convictions under federal law (18 U.S.C. § 1461) for unlawfully mailing obscene material, and California law prohibiting the production of obscene material.	**First Amendment.** Obscenity is not protected. **Obscenity Test.** The Court rejected the English test that obscenity could be determined by the effect of isolated passages on "particularly susceptible persons," and established the "prurient appeal" test as judged by the average person applying contemporary community standards. The Court also established the "taken as a whole" requirement. **Prurient.** Defined as shameful, morbid, or "having a tendency to excite lustful thoughts."
Smith v. California, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215	1959	Smith was convicted of violating a Los Angeles obscenity ordinance, which had been construed to impose "strict" criminal liability with no evidence of scienter	**Scienter.** The complete absence of a scienter requirement is not constitutionally permissible, but the Court indicated that circumstantial evidence that the accused was aware of the book's contents will be sufficient proof of this element of the offense.
Manual Enterprises v. Day, 370 U.S. 478, 8 L.Ed.2d 639, 82 S.Ct. 1432	1962	Alleged violation of federal law prohibiting the mailing of obscene material (18 U.S.C. § 1461)	**Patent Offensiveness Test.** Establishes "patent offensiveness" as part of the obscenity test along with the "prurient appeal" test, and defines "patent offensiveness" as synonymous with "indecency" or affronting "current community standards of decency."
Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942	1966	Conviction for mailing obscene literature in violation of federal law (18 U.S.C. § 1461)	**Pandering.** Evidence of the circumstances of production and distribution of the material is relevant to the test of obscenity, especially "patent offensiveness" and "serious value," and where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.
Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958	1966	Conviction for violation of New York obscenity statute.	**Scienter.** The element of scienter is satisfied if it is shown that the accused was in "some manner aware of the character of the material" he attempted to distribute. **Prurient Appeal.** Court rejects the familiar defense argument that material cannot be determined "prurient" if it would disgust and sicken an average person, and holds that the material can be judged according to the prurient interest in sex of a clearly defined deviant sexual group if the material is designed for and primarily disseminated to that group.
Ginsberg v. New York, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274	1968	Defendant was convicted of violating a New York statute which prohibited selling material which is "harmful to minors" to children.	**Variable Obscenity.** The Court affirmed the statute as constitutional, ruled that the "harmful to minors" provision was not vague, and upheld the state's power to adjust the test of legal obscenity according to the audience of the material, thereby permitting the material to be judged in terms of the sexual interests of minors and not according to adult community standards.
Lee Art Theatre v. Virginia, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103	1968	Conviction for violation of state obscenity law	**Search and Seizure.** It is improper for a search warrant to be issued on the conclusory observation of the police officer, where the magistrate does not inquire into the factual basis for the officer's conclusions and thereby "focus searchingly on the question of obscenity."
Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243	1969	Conviction for possession of obscene matter.	**Private Possession.** The mere private possession of obscene matter cannot constitutionally be made a crime.
Roaden v. Kentucky, 413 U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796	1973	Arrest and seizure of film without a search warrant having been obtained.	**Search and Seizure.** The seizure of a motion picture film on the grounds that it violates the obscenity statute is unreasonable if not seized under the authority of a constitutionally sufficient warrant.

Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607	1973	Conviction for distribution of obscene matter in violation of California law.	**First Amendment.** Obscene material is not protected by the First Amendment. **Obscenity Test.** Court outlines a three-part test for determining obscenity which has been adopted under most state statutes and all federal laws. **Community Standards.** The three-part test is to be applied in accordance with contemporary local community standards – not national standards. Standards of the state of California were used and approved by the Court.
Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628	1973	Civil action to enjoin the exhibition of two obscene films. The complaints were dismissed in the trial court on the grounds that the films were exhibited to consenting adults only.	**Civil Actions.** Court approved the use of a civil common law action to enjoin the exhibition of obscene matter. **Expert Testimony.** The materials are sufficient in themselves for determining the question of obscenity. **Consenting Adults.** Obscene material does not acquire immunity from state regulation because it is exhibited for consenting adults only. There are numerous state interests supporting obscenity legislation other than the interest of protecting children.
Kaplan v. California, 413 U.S. 115, 37 L.Ed.2d 492, 93 S.Ct. 2680	1973	Conviction for violation of state obscenity statute.	**Written Material.** A book can be constitutionally obscene even though it contains no pictures.
United States v. 12 200-Ft. Reels, 413 U.S. 123, 37 L.Ed.2d 500, 93 S.Ct. 2665	1973	Federal action under 19 U.S.C. § 1305(a), which prohibits the importation of obscene articles.	**Right of Privacy.** The holding in **Stanley v. Georgia** is limited to private possession in the home, and does not prevent the control of obscene material in intrastate, interstate, or foreign commerce – there is no right to sell or give the material to others, and the material cannot be imported into this country even if it is for private use only and not for re-distribution.
United States v. Orito, 413 U.S. 139, 37 L.Ed.2d 513, 93 S.Ct. 2674	1973	Violation of federal law (18 U.S.C. § 1462) prohibiting the transporting of obscene material by means of a common carrier.	**Right of Privacy.** Court further limits the decision in **Stanley v. Georgia** by holding that the right to possess obscene material in the privacy of the home does not create a correlative right to receive it, transport it, or distribute it.
Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789	1973	Conviction for violation of state obscenity law.	**Search and Seizure.** There is no constitutional right to an adversary hearing prior to seizure of allegedly obscene material where the material is seized pursuant to a warrant for preservation as evidence in a criminal prosecution.
Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887	1973	Violation of federal law prohibiting the mailing of obscene materials (18 U.S.C. § 1461).	**Community Standards.** The decision in **Miller v. California** did not require that a "statewide" standard be used in determining community standards – a smaller geographical area could be used, and the only constitutional requirement is that the material be judged by a juror not according to his own standards but according to the standards of the "community or vicinage from which he comes." **Scienter.** It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. **Comparable Material.** The mere availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials at issue in the trial.
Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 94 S.Ct. 2750	1974	Conviction for violation of state obscenity law based upon showing of motion picture "Carnal Knowledge."	**Community Standards.** It is permissible to instruct jurors to apply "community standards" without specifying what "community." **Appellate Review.** Independent appellate review of constitutional claims is not precluded by a finding of obscenity in the trial court, even though the questions of what appeals to the "prurient interest" and what is "patently offensive" are essentially questions of fact.
Smith v. United States, 431 U.S. 291, 52 L.Ed.2d 324, 97 S.Ct. 1756	1977	Conviction for violation of federal law prohibiting the mailing of obscene material (18 U.S.C. § 1461).	**Community Standards.** Court approves a jury instruction which stated that "community standards" are set by what is in fact "accepted" in the community as a whole. Community standards cannot be legislated – this is a question of fact and jurors are entitled to draw on their own knowledge in determining community standards – but the size of the "community" and jury instructions can be legislated.
Splawn v. California, 431 U.S. 595, 52 L.Ed.2d 606, 97 S.Ct. 1987	1977	Conviction of violating state obscenity law.	**Pandering.** Evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant to determining whether the material is obscene.

Ward v. Illinois, 431 U.S. 767, 52 L.Ed.2d 738, 97 S.Ct. 2085	1977	Conviction of violating state obscenity law	**Patently Offensive Depictions of Sexual Conduct.** Sado-masochistic sexual materials may be proscribed, even though this type of sexual conduct was not expressly included in the **Miller v. California** case in the examples of sexually explicit representations that can be prohibited. The kinds of conduct listed in **Miller** to be utilized in determining patent offensiveness were only examples and were not intended to be exhaustive.
Pinkus v. United States, 436 U.S. 293, 56 L.Ed.2d 293, 98 S.Ct. 1808	1978	Conviction for mailing obscene materials in violation of federal law. (18 U.S.C. § 1461)	**Community Standards.** In determining obscenity, children are not to be included as part of the "community." The "community" does include all adults who constitute it, including the most sensitive or susceptible members.
F.C.C. v. Pacifica, 438 U.S. 726, 57 L.Ed.2d 1073, 98 S.Ct. 3026	1978	F.C.C. determination that federal law had been violated by the broadcast of indecent language by a radio station. (18 U.S.C. § 1464)	**Regulation of Indecent Material.** Because of the pervasiveness of the broadcast media, the F.C.C. has the power to regulate a radio broadcast that is indecent, but not obscene. The Court defines "indecent" as "nonconformance with accepted standards of morality." **First Amendment.** Content is important in determining constitutional protection, and each medium of expression presents special First Amendment problems. Of all forms of communication, broadcasting has received the most limited constitutional protection.
Cooper v. Mitchell Brothers, 454 U.S. 90, 70 L.Ed.2d 262, 102 S.Ct. 172	1981	Public nuisance abatement action against a motion picture theatre.	**Burden of Proof.** The Constitution does not require use of the "beyond a reasonable doubt" standard of proof in a civil nuisance abatement proceeding even though the obscenity of motion pictures is at issue.
New York v. Ferber, _____ U.S. _____, 73 L.Ed.2d 113, 102 S.Ct. _____	1982	Conviction for violation of state law prohibiting the distribution of material depicting sexual performances by children.	**Child Pornography.** States are entitled to greater leeway in the regulation of pornographic depictions of children, and it is not necessary that the materials be determined legally obscene before they can be prohibited.



A Summary of Key Court Cases

ANNOTATION

SUPREME COURT'S DEVELOPMENT, SINCE ROTH v UNITED STATES, OF STANDARDS AND PRINCIPLES DETERMINING CONCEPT OF OBSCENITY IN CONTEXT OF RIGHT OF FREE SPEECH AND PRESS

by

Ernest H. Schopler, S.J.D., J.U.D., LL.B.

I. PREFATORY MATTERS

II. SUBSTANTIVE ASPECTS OF CONCEPT

A. DEFINITIONS OF OBSCENITY

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

16 AM JUR 2d, Constitutional Law § 349; 50 AM JUR 2d, Lewdness, Indecency, and Obscenity §§ 3-28

7 AM JUR PL & PR FORMS (Rev ed), Constitutional Law, Forms 51 et seq.

10 AM JUR TRIALS 1, Obscenity Litigation

18 AM JUR PROOF OF FACTS 465, Obscenity—Motion Pictures

USCS, Constitution, 1st Amendment

US L ED DIGEST, Constitutional Law §§ 930, 930.1

ALR DIGESTS, Constitutional Law § 792(1)

L ED INDEX TO ANNOS, Indecency

ALR QUICK INDEX, Freedom of Speech and Press; Indecency, Lewdness, and Obscenity

FEDERAL QUICK INDEX, Freedom of Speech and Press; Lewdness, Indecency, and Obscenity

II. A.—Continued

B. Specific Elements of Concept

C. Other Relevant Factors

D. Illustrative Holdings as to Obscenity of Specific Matters

III. Procedural Aspects of Concept

INDEX

I. Prefatory matters

§ 1. Introduction

[a] Scope

This annotation collects and analyzes the United States Supreme Court cases which, beginning with Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, have developed the standards and principles determining the concept of obscenity

in the context of the free speech and press guaranties of the First Amendment, which is applicable to the states through the Fourteenth Amendment.[1] Cases dealing with situations in which it is presupposed that the materials involved are obscene are not within the scope of this annotation; illustrative of these situations are cases dealing with the question whether the First Amendment protects the possession of obscene material in the privacy of one's home, or the importation of obscene material. However, by way of illustration, the annotation includes cases in which the Supreme Court has held, specifically or by implication, that the involved materials are, or are not, obscene, irrespective of whether such cases include rules governing the tests and principles which are controlling in determining the concept of obscenity.

The annotation does not include cases insofar as they discuss the question whether an obscenity statute is unconstitutionally vague, since that question is primarily a question of due process.

The discussion herein of the procedural aspects of the concept of obscenity is limited to those procedural aspects which reflect or affect the substantive aspects of the concept.[2]

[b] Related matters

Applicability to advertisements of First Amendment's guaranty of free speech and press. 37 L Ed 2d 1124.

Constitutionality of regulation of obscene motion pictures. 22 L Ed 2d 949.

Constitutionality of federal and state regulation of obscene literature. 1 L Ed 2d 2211, 4 L Ed 2d 1821.

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976 (see especially § 7[b], dealing with obscene matters).

What matter is nonmailable under 18 USCS § 1461. 76 L Ed 846, 8 L Ed 2d 1045 (see especially § 3, dealing with the test of obscenity).

Validity, construction, and application of Federal Criminal Statute (18 USCS § 1464) punishing utterance of obscene, indecent, or profane language by means of radio communication. 17 ALR Fed 892.

Validity, under Federal Constitution, of public school or state college regulation of student newspapers, magazines, or other publications. 16 ALR Fed 182 (see especially § 11, dealing with obscenity, vulgarity, or indecency).

Validity, construction, and application of provisions of Postal Reorganization Act of 1970 (18 USCS §§ 1735–1737; 39 USCS §§ 3010, 3011) (so-called "Goldwater Amendment") prohibiting mailing of sexually oriented advertisements to persons who have notified postal service that they wish to receive no such materials. 15 ALR Fed 488.

Exhibition of obscene motion pictures as nuisance. 50 ALR3d 969.

Topless or bottomless dancing or similar conduct as offense. 49 ALR3d 1084.

Operation of nude-model photographic studio as offense. 48 ALR3d 1313.

Right of telephone or telegraph company to refuse, or discontinue, service because of use of improper language. 32 ALR3d 1041 (see especially § 3[b], dealing with what constitutes obscenity or profanity).

Modern concept of obscenity. 5 ALR3d 1158.

Validity of procedures designed to protect the public against obscenity. 5 ALR3d 1214.

What amounts to an obscene play or book within prohibition statute. 81 ALR 801.

Publications of a scientific, educational, or instructive character regard-

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1. Generally, as to what provisions of the Federal Constitution's Bill of Rights are applicable to the states, see the annotations at 18 L Ed 2d 1388 and 23 L Ed 2d 985, each of which, in § 4, deals with the First Amendment.

2. Generally, as to the validity of procedures designed to protect the public against obscenity, see the annotation at 5 ALR3d 1214.

ing sex relations as within statutes relating to obscene or immoral publications. 76 ALR 1099.

Note, Obscenity: A Step Forward by a Step Back? 38 Albany L Rev 764 (1974).

Note, Pornography, the Local Option. 26 Baylor L Rev 97 (1974).

Miller, Recent Developments in the Law of Obscenity. 1973 Crim L Rev 467 (1973).

Fahringer and Brown, The Rise and Fall of Roth — a Critique of the Recent Supreme Court Obscenity Decisions. 62 Ky LJ 731 (1974).

Engdahl, Requiem for Roth: Obscenity Doctrine is Changing. 68 Mich L Rev 185 (1969).

Note, Burger Court's Crunch on "Hard Core." 1 Ohio North L Rev 97 (1973).

Hunsaker, 1973 Obscenity-Pornography Decisions: Analysis, Impact, and Legislative Alternatives. 11 San Diego L Rev 906 (1974).

§ 2. Background

[a] Generally; the Roth Case

Prior to Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, infra, the concept of obscenity was defined by various courts and in various contexts, as illustrated by the two leading cases set out hereinafter.

The early leading standard of obscenity was defined in Reg. v Hicklin (1868, Eng) LR 3 QB 360, 8 ERC 60, in which a pamphlet purporting to expose the errors and practices of the Roman Catholic Church in the matter of confession was held obscene, and in which Cockburn, C.J., said: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." As pointed out by the United States Supreme Court in Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, infra, this standard allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons, and was adopted by some American courts, but was rejected by later decisions.

Illustrative of these later cases is United States v One Book Entitled Ulysses (1934, CA2 NY) 72 F2d 705, in which the court, in an opinion by Augustus Hand, Circuit Judge, holding that the book "Ulysses" by James Joyce was not obscene within the meaning of a federal statute prohibiting the importation of obscene books, stated that works of physiology, medicine, science, and sex instruction were not within the statute, although to some extent and among some persons they might tend to promote lustful thoughts, and that the same immunity should apply to literature as to science, "where the presentation, when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication," the question in each case being "whether a publication taken as a whole has a libidinous effect."

Not until the decision in 1957 of Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, did the United States Supreme Court establish, as a matter of federal constitutional law, a standard of obscenity, applicable in both federal and state courts, which rendered invalid any more stringent standards, whether statutory or judicial.

The constitutional concept of obscenity was first developed in the landmark case of Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8,[3] where the court affirmed (1) the conviction, after a jury trial, of a defendant in a federal court under a federal statute (18 USCS § 1461) prohibiting the mailing of obscene material, and (2) in the companion case (decided in the same opinion as Roth) of Alberts v California, the conviction, after a nonjury trial, of a defendant in a Cali-

3. For the sake of brevity the case will be hereinafter sometimes referred to as Roth.

fornia state court under a California statute prohibiting the keeping for sale of obscene books and the publishing of any advertisements of them. These statutes were challenged on the ground, among others, that they violated the constitutional rights of free speech and press. Insofar as pertinent, the court, in an opinion by Brennan, J., expressing the views of four other members of the court (Frankfurter, Burton, Clark, and Whittaker, JJ.), ruled: (1) Obscenity is not within the area of constitutionally protected speech and press; (2) considerations as to the "clear and present danger" rule are unnecessary; (3) sex and obscenity are not synonymous; (4) obscene material is material which deals with sex in a manner appealing to prurient interest; (5) the portrayal of sex in art, literature, and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press; (6) the proper test is whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest; and (7) judging obscenity by the effect of isolated passages upon the most susceptible person is inappropriate. The court observed that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." The court held that both trial courts below sufficiently followed the proper standard and used the proper definition of obscenity. In Roth, the trial judge's instructions to the jury were in substance as follows: The words "obscene, lewd and lascivious," as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts; the test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature, or the highly prudish, or would leave another segment, the scientific or highly educated, or the so-called "worldly-wise and sophisticated," indifferent and unmoved; the test in each case is the effect of the book, picture, or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach; in other words, the jury should determine its impact upon the average person in the community; the books, pictures, and circulars must be judged as a whole, in their entire context, and the jury should not consider detached or separate portions in reaching a conclusion; the jury should judge the circulars, pictures, and publications which have been put in evidence, by present-day standards of the community, and may ask themselves whether the material offends the common conscience of the community by present-day standards; and the jury alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience, the jury should consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women, and children. In the Alberts Case, the trial judge applied the test whether the material has "a substantial tendency to deprave or corrupt its reader by inciting lascivious thoughts or arousing lustful desires." In addition, in ruling on a motion to dismiss, the trial judge indicated that, as a trier of facts, he was judging each item as a whole as it would affect the normal person. In summary, the Supreme Court held that the statutes, applied according to the proper standard for judging obscenity, did not offend constitutional safeguards against convictions based upon protected material. It may also be noted that the court, although defining the concept of obscenity, stated that the dispositive question was whether obscenity is utterance within the area of protected speech and press, and, in footnote 8 of the opinion, observed that "[n]o issue is presented in either case concerning the obscenity of the material involved." Warren, Ch. J., concurred in the result, but expressed doubts as to the wisdom of the broad language used in the majority opinion. Harlan, J., concurred in the result in the Alberts Case, but dissented in the

Roth Case on the ground that the regulation of obscenity embodied in the federal statute was beyond federal power. Douglas, J., joined by Black, J., dissented in both cases, expressing the view that obscenity statutes violate the constitutional guaranties of free speech and press.

[b] Definition of obscenity in Model Penal Code

In the following cases the United States Supreme Court, in defining the term "obscenity," referred to the definition of the term in the American Law Institute's Model Penal Code.

In Roth (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), the court stated, in footnote 20 of the opinion, that it perceived no significant difference between the meaning of obscenity developed in the case law and the definition, quoted by the court, of the American Law Institute, Model Penal Code, § 207.10(2) of Tentative Draft No. 6, 1957. A reference to § 207.10(2) was also made by the court in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, in defining the specific judicial meaning of the words "obscene material."

The statement of § 207.10(2) of the Tentative Draft, quoted in Roth, is identical with the first sentence of § 251.4(1) of the American Law Institute's Model Penal Code (10 ULA pp 433 et seq. at p 591). This section of the Code, in its entirety, reads as follows:

"§ 251.4. Obscenity

"(1) Obscene Defined. Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience. Undeveloped photographs, molds, printing plates, and the like, shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it."

No opinion of the Supreme Court has adopted the provision in § 251.4 (1) that material is obscene if it "goes substantially beyond customary limits of candor in describing or representing such matters." However, in Jacobellis v Ohio (1964) 378 US 184, 12 L Ed 2d 793, 84 S Ct 1676, Brennan and Goldberg, JJ., in the plurality opinion, stated that the Roth standard (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) requires in the first instance a finding that the material "goes substantially beyond customary limits of candor in description or representation" of sex methods.

§ 3. Summary and comment

[a] Generally

Over the dissent of Black and Douglas, JJ., it has been categorically settled by the Supreme Court that obscene material is unprotected by the First Amendment[4] (Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8; Bantam Books, Inc. v Sullivan (1963) 372 US 58, 9 L Ed 2d 584, 83 S Ct 631; United

4. In Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, the court pointed out that although the providing of positive guidance to federal and state courts in obscenity cases may not be an easy road, nevertheless no amount of "fatigue" should lead the court to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the First Amendment—merely because it would lighten the court's burdens; that such an abnegation of traditional supervision would be inconsistent with the court's duty to uphold the constitutional guaranties; and that the court's duty admits of no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

States v Reidel (1971) 402 US 351, 28 L Ed 2d 813, 91 S Ct 1410, reh den 403 US 924, 29 L Ed 2d 703, 91 S Ct 2223; Kois v Wisconsin (1972) 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245; Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26 (stating that the question has been categorically settled); Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27; United States v 12 200-Ft. Reels of Super 8mm. Film (1973) 413 US 123, 37 L Ed 2d 500, 93 S Ct 2665; United States v Orito (1973) 413 US 139, 37 L Ed 2d 513, 93 S Ct 2674).

In view of the rule stated above, it has become necessary for the Supreme Court to define the concept of obscenity for the purpose of distinguishing material which is, and material which is not, protected by the First Amendment. However, the task of defining the term "obscenity" in general language presents extremely difficult and complex problems (§ 4, infra). Prior to the decision in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, infra § 7, the decision in Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, supra § 2[a], was the only one in which a majority of the United States Supreme Court was able to agree on the appropriate standards (see the statement to that effect in the Miller Case).

The Miller test (§ 7, infra) elaborates and refines, but does not repudiate, the Roth test (§ 5, infra). The Miller test states, as the most important criterion determining the constitutional concept of obscenity, the question whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest. The Roth test is whether to the average person, applying contemporary community standards, "the dominant theme of the material taken as a whole appeals to prurient interest." In the absence of a relevant decision of the United States Supreme Court, it cannot be determined whether the omission of the words "the dominant theme" signifies a substantive change in the concept of obscenity (§ 12, infra). The most significant feature of the Miller test is the rejection of the Memoirs test (§ 6, infra), insofar as this test requires, as an indispensable prerequisite of meeting the constitutional concept of obscenity, that the material involved be "utterly without redeeming social value." The Miller test replaces this criterion by the criterion whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The specific elements of the concept of obscenity as a matter of constitutional law also present some difficulties. The term "prurient interest" has been defined as relating to "material having a tendency to excite lustful thoughts" (§ 8, infra). The term "patently offensive" has now apparently been equated with "hard-core" sexual conduct (§ 9, infra). The term "average person" excludes a particularly susceptible or sensitive person or a totally insensitive person, but does not preclude the determination of obscenity by the prurient-interest appeal to specific groups such as sexual deviants or minors, as distinguished from adults (§ 10, infra). The phrase "contemporary community standards" signifies local or statewide community standards, but not national standards (§ 11, infra).

The "clear and present danger" rule has been held not applicable to obscene materials (§ 13, infra). A publication which, standing alone, might not be obscene, may nevertheless be so characterized in the context of the circumstances of production, sale, and publicity, and, in particular, of pandering (§ 14, infra). Although the Miller test is phrased in terms of its applicability to state obscenity laws, the rules stated in Miller, as well as those in Roth, are equally applicable to federal and to state legislation, and to federal and state courts alike (§ 15, infra).

The concept of obscenity may vary

where a state's power to regulate intoxicating liquor under the Twenty-First Amendment is involved, but does not seem to vary with the medium of expression, that is, with whether printed matter, motion pictures, or live performances are involved (§ 16, infra).

Obscenity, unprotected by the First Amendment, can manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct (see Kaplan v California (1973) 413 US 115, 37 L Ed 2d 492, 93 S Ct 2680, reh den 414 US 883, 38 L Ed 2d 131, 94 S Ct 28). Illustrative cases in which the Supreme Court held, specifically or by fair implication, that specific matters were, or were not, obscene, are set out in §§ 17-20, infra.

With regard to the procedural aspects of the concept of obscenity, it may be noted that while the elements of the concept ordinarily present a question of fact to be decided by the jury or the judge as the trier of facts, the Supreme Court will, nevertheless, make an independent determination of obscenity, irrespective of the findings below (§ 21, infra). Expert testimony has been held permissible, but not required, where the material itself has been introduced into evidence (§ 22, infra).

[b] Practice pointers

An attorney involved in obscenity litigation, whether civil or criminal and whether in a federal or in a state court, should make timely and specific allegations that the matter involved is, or is not, obscene. These allegations should be made at every stage of the proceeding, including petitions for review by the United States Supreme Court. The attorney should also file the allegedly obscene materials in the United States Supreme Court. In this context, see the opinion by White, J., written in support of the Supreme Court's denial of certiorari in J-R Distributors, Inc. v Washington (1974) 418 US 949, 41 L Ed 2d 1166, 94 S Ct 3217, where the Justice pointed out that (1) in five cases, cited in footnote 1 of the opinion, the issue whether the materials involved were obscene was not presented to the Supreme Court, and (2) the publications themselves were not lodged there. As to point (1), the opinion referred to Rule 23 (1)(c) of the Supreme Court Rules, which provides that only the questions set forth in the petition for certiorari or fairly comprised therein will be considered by the Supreme Court,[5] and stated that Rule 15(1)(c) with respect to appeals is to the identical effect. As to point (2), the opinion pointed out that in six cases, cited in footnote 2 of the opinion, the issue of obscenity vel non was among the questions presented, but the materials themselves had not been filed with the Supreme Court. The opinion went on to say that while the Supreme Court Rules permit parties to dispense with filing the entire record at the petition for certiorari stage, a petitioner is completely free at that time to file all or any part of the record he deems necessary or desirable to present clearly the issues he wants reviewed.

As stated in the dissenting opinion by Warren, Ch. J., joined by Clark J., in Jacobellis v Ohio (1964) 378 US 184, 12 L Ed 2d 793, 84 S Ct 1676, there has been some tendency on the part of enforcement agencies, in dealing with the law concerning obscenity, to do only that which is easy to do, for instance, to seize and destroy books with only a minimum of protection. The attention of attorneys employed in an obscenity case is called to the fact that procedural steps taken by officials should be carefully considered and any objection to their constitutional validity should be raised in the trial and appellate courts, including the United States Supreme Court. See the annotation on the validity of procedures designed to protect the public against obscenity, at

5. As to the construction and application of Rule 23 of the Rules of the Supreme Court prescribing the requirements of a petition for certiorari, see the annotation at 32 L Ed 2d 930.

5 ALR3d 1214 (particularly § 2[b], dealing with practice pointers).

As to the right of counsel to introduce the testimony of experts on the concept of obscenity, see § 22, infra.

Where appropriate, the substantive issues involved in the following cases should be seasonably and specifically raised by counsel.

Attention is called to Stanley v Georgia (1969) 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243, holding that a statute, insofar as it made mere "private" possession of obscene matter a crime, was unconstitutional under the First and Fourteenth Amendments.

Attention is also called to the holdings in Smith v California (1959) 361 US 147, 4 L Ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L Ed 2d 383, 80 S Ct 399, and Mishkin v New York (1966) 383 US 502, 16 L Ed 2d 56, 86 S Ct 958, reh den 384 US 934, 16 L Ed 2d 535, 86 S Ct 1440, that in criminal prosecutions for possessing obscene material, the relevant statute violates the Federal Constitution if it imposes criminal liability without requiring any element of scienter, that is, knowledge by the defendant of the obscene character of the material in his possession.

Generally, see 10 Am Jur Trials 1, Obscenity Litigation.

II. Substantive aspects of concept

A. Definitions of obscenity

§ 4. Generally

The following statements made by the Supreme Court or some of its members show the great difficulties presented in any attempt to define, in general language, the concept of obscenity.

As stated in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, the history of the Supreme Court's obscenity decisions is "somewhat tortured." The court pointed out that, apart from the initial formulation in Roth (345 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), and the reformulation in Miller, no majority of the court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the state's police power; instead there was "a variety of views among the members of the court unmatched in any other course of constitutional adjudication." The court went on to say that this uncertainty of the standards for determining obscenity creates a continuing source of tension between state and federal courts; that the problem is that one cannot say with certainty that material is obscene, until at least five members of the court, applying inevitably obscure standards, have pronounced it so; and that the absence, since Roth, of a single majority view of the court as to the proper standards, has placed a strain on both state and federal courts. The court also stated that for the first time since Roth was decided in 1957, a majority of the court in Miller agreed on concrete guidelines to isolate "hard-core" pornography from expression protected by the First Amendment.

The Supreme Court has recognized that constitutionally protected expression is often separated from obscenity only by a dim and uncertain line. Marcus v Search Warrant of Property (1961) 367 US 717, 6 L Ed 2d 1127, 81 S Ct 1708; Bantam Books, Inc. v Sullivan (1963) 372 US 58, 9 L Ed 2d 584, 83 S Ct 631; Blount v Rizzi (1971) 400 US 410, 27 L Ed 2d 498, 91 S Ct 423.

As stated in a dissenting opinion by Warren, Ch. J., joined by Clark, J., in Jacobellis v Ohio (1964) 378 US 184, 12 L Ed 2d 793, 84 S Ct 1676, neither courts nor legislatures have been able to evolve a truly satisfactory definition of obscenity in the context of the First Amendment. Harlan, J., in his dissenting opinion in the same case, observed that the test of obscenity, within the framework of the constitutional guaranties of freedom of speech and press, must necessarily be "pricked out on a case-by-case basis." The Justice also stated that he experienced no greater ease than do other members of the Supreme Court in attempting to verbalize generally the

respective constitutional tests, since in truth, the matter, in the last analysis, depends on how the particular material charged happens to strike the minds of jurors or judges and ultimately those of a majority of the members of the United States Supreme Court.

Harlan, J., concurring in part and dissenting in part in Interstate Circuit, Inc. v Dallas (1968) 390 US 676, 20 L Ed 2d 225, 88 S Ct 1298, described the obscenity problem as "intractable."

In a dissenting opinion in Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27, Brennan, J., joined by Stewart and Marshall, JJ., expressed the view that no formulation of the Supreme Court, the Congress, or the states can adequately distinguish obscene material unprotected by the First Amendment from protected expression.

On the other hand, no member of the court who shares the view that obscenity is not protected by the First Amendment's guaranty of free speech and press (§ 3[a], supra) has disagreed with any of the following statements made by the court.

In Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, the court, in footnote 2 of the opinion, observed that the Roth definition (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) of "obscene" does not reflect the precise meaning of the term as traditionally used in the English language, and that the words "obscene material," as used in Miller, have a specific judicial meaning which derives from Roth, that is, obscene material "which deals with sex."

And in Cohen v California (1971) 403 US 15, 29 L Ed 2d 284, 91 S Ct 1780, reh den 404 US 876, 30 L Ed 2d 124, 92 S Ct 26, the court noted that expression must be erotic in some significant way in order to fall within the state's power to prohibit obscene expression.

The court has also stated that sex and obscenity are not synonymous, and that the portrayal of sex, for instance, in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8; Kois v Wisconsin (1972) 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245.

In Kois v Wisconsin (1972) 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245, the court ruled that in determining whether a portrayal of sex is protected expression or obscenity unprotected by the constitutional guaranty of free speech and press, a reviewing court must, of necessity, look at the context of the material as well as its content.

It has also been noted that a quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. Kois v Wisconsin (1972) 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245; Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26.

And in Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750, the court said that nudity alone is not enough to make material legally obscene.

The constitutional standards of the concept of obscenity have been held equally applicable to federal and to state legislation and in federal and in state courts (§ 15, infra).

§ 5. The Roth test

The following cases show the Supreme Court's first formulation of the principal test of obscenity (Roth test), its application, and the difficulties in applying it.

The primary test of obscenity, first enunciated as a matter of federal constitutional law in Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 134, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

This test was applied in Times Film Corp. v Chicago (1957) 355 US 35, 2

L Ed 2d 72, 78 S Ct 115, infra § 18; One, Inc. v Olesen (1958) 355 US 371, 2 L Ed 2d 352, 78 S Ct 364, infra § 17; Sunshine Book Co. v Summerfield (1958) 355 US 372, 2 L Ed 2d 352, 78 S Ct 365, infra § 17; Mishkin v New York (1966) 383 US 502, 16 L Ed 2d 56, 86 S Ct 958, reh den 384 US 934, 16 L Ed 2d 535, 86 S Ct 1440, infra § 17; and Kois v Wisconsin (1972) 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245, infra § 17.

Noting that Roth (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) affirmed a conviction under 18 USCS § 1461 for mailing obscene circulars and advertising, and held that obscenity is not within the area of constitutionally protected speech or press and that the statute, "applied according to the proper standards for judging obscenity," did not offend constitutional safeguards, the court in United States v Reidel (1971) 402 US 351, 28 L Ed 2d 813, 91 S Ct 1410, reh den 403 US 924, 29 L Ed 2d 703, 91 S Ct 2223, observed that Roth has never been overruled, and declined to overrule Roth.

On the other hand, in a dissenting opinion in Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27, Brennan, J., joined by Stewart and Marshall, JJ., expressed the view that the court's approach to the obscenity problem initiated in Roth (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) should be abandoned, at least insofar as consenting adults were concerned.

The difficulties faced by the Supreme Court in applying the Roth test are illustrated by the following cases.

In Jacobellis v Ohio (1964) 378 US 184, 12 L Ed 2d 793, 84 S Ct 1676, the court reversed a state court judgment which upheld the conviction of a motion-picture theater manager for possessing and exhibiting, in violation of an Ohio obscenity statute, a French film, "The Lovers," which depicted an unhappy marriage and the wife's falling in love with a young archaeologist, and which included in the last reel an explicit, but fragmentary and fleeting, love scene. Six members of the court voted for reversal, but were unable to agree upon an opinion in support of the decision. Four of the members of the court applied the Roth test (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8). Under this test, two members (Brennan and Goldberg, JJ.), in the plurality opinion, reached the result that the film was not obscene, whereas two dissenting members (Warren, Ch. J., and Clark, J.) reached the result that there was sufficient evidence in the record upon which a finding of obscenity could be made. Another member of the court (Stewart, J.) held that obscenity laws are constitutionally limited to hard-core pornography, and that the film was not so classifiable. Black and Douglas, JJ., concurred in the reversal, on the basis of their broad view that a conviction for exhibiting a motion picture, even if it is obscene, abridges freedom of the press. White, J., concurred in the judgment without a written opinion. Harlan, J., dissented on the ground that the Constitution does not prohibit the states from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.

In Grove Press, Inc. v Gerstein (1964) 378 US 577, 12 L Ed 2d 1035, 84 S Ct 1909, the court reversed per curiam a state appellate court's judgment ((Fla App) 156 So 2d 537) which had upheld a lower court's judgment suppressing the book "Tropic of Cancer," by Henry Miller, and which had also concluded that a jury's finding that the book was obscene was not contrary to the law or to the manifest weight and preponderance of the evidence. The Supreme Court did not agree upon a reason for the reversal. Brennan and Goldberg, JJ., held that under the Roth test (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), the book was not obscene. Stewart, J.,

expressed the view that the book was not hard-core pornography. Black and Douglas, JJ., adhered to their view that even obscene materials are protected by the First Amendment. Warren, Ch. J., and Clark, Harlan, and White, JJ., thought that certiorari should have been denied.

§ 6. The Memoirs test

The following cases describe the so-called "Memoirs test" of obscenity, its application, and its subsequent rejection, at least in part, by later Supreme Court decisions.

As stated in Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 167, the definition of obscenity originally announced in Roth (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) was significantly refined by the plurality opinion in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v Atty. Gen. of Massachusetts (1966) 383 US 413, 16 L Ed 2d 1, 86 S Ct 975,[6] a case designated in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, as a "landmark" case, notwithstanding that a majority of the court in Memoirs could not agree upon an opinion. The plurality opinion in Memoirs, written by Brennan, J., and expressing the views also of Warren, Ch. J., and Fortas, J., held that under Roth, for material to be obscene, so as not to be protected by the First Amendment's guaranty of free speech and press, three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. The issue in Memoirs was whether a book commonly known as "Fanny Hill," relating to the adventures of a young girl who became a prostitute, was obscene, as held by the Massachusetts state courts below. The plurality opinion held that reversal of the judgment below was required because the state court below misinterpreted the "social value" criterion (element (c), supra) in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene," and that this was so even though the book was found to possess the requisite prurient appeal and to be patently offensive. The plurality opinion also pointed out that (1) it did not necessarily follow from the reversal of the judgment below that a determination that the book is obscene in the constitutional sense would be improper under all circumstances, such as the circumstances of production, sale, and publicity, which are relevant in determining whether or not the publication or distribution of a book is constitutionally protected; (2) evidence of commercial exploitation of the book 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; (3) in the instant proceeding the courts were asked to judge the obscenity of the book in the abstract; and (4) the lower courts' declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale, and publicity. Stewart, J., concurred in the reversal, on the ground that the book was not "hard-core pornography." Black, J., concurred on the ground that in his view the court was without constitutional power to censor speech or press, regardless of the particular subject discussed. Douglas, J., concurred on the ground that the Federal Constitution leaves no power in government over expression of ideas. On the other hand, Clark, J., dissented on the ground that in his view the book was obscene, having no conceivable social importance. Harlan, J., dissented on the grounds that the Fourteenth Amendment requires of a state only that it apply obscenity criteria rationally related to

6. In accordance with the practice of the Supreme Court, the case will be referred to hereinafter as Memoirs v Massachusetts, or Memoirs.

the accepted notion of obscenity, and that the judgment below conformed to this requirement. White, J., dissented on the ground that if a state insists on treating "Fanny Hill" as obscene and forbidding its sale, the First Amendment does not prevent it from doing so.

While the plurality opinion in Memoirs (383 US 413, 16 L Ed 2d 1, 86 S Ct 975) rested its definition of the elements of the test in determining the constitutional concept of obscenity on Roth (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), the court in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, infra § 7, rejecting the "social value" criterion (element (c)) of the Memoirs test, observed that this criterion represented a sharp break with Roth. The court in Miller pointed out that while Roth presumed "obscenity" to be "utterly without redeeming social importance," Memoirs required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value," and that even as the plurality in Memoirs repeated the words of Roth, the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, that is, that the material was "*utterly* without redeeming social value," a burden virtually impossible to discharge under the criminal standards of proof. The court observed that Brennan, J., the author of the opinion in Memoirs, abandoned the Memoirs test as unworkable in his dissenting opinion in Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27; and that "no Member of the Court today supports the Memoirs formulation."

As observed in Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157, the rejection in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, of the "social value" formulation in Memoirs (383 US 413, 16 L Ed 2d 1, 86 S Ct 975), permits the imposition of a lesser burden on the prosecution in the proof of obscenity than did Memoirs.

Noting that the court had originally limited review in three pending cases to certain particularized questions, upon the hypothesis that the material involved in each case was of a character described as obscene in the constitutional sense, in Memoirs (383 US 413, 16 L Ed 2d 1, 86 S Ct 975), the court in Redrup v New York (1967) 386 US 767, 18 L Ed 2d 515, 87 S Ct 1414, reh den 388 US 924, 18 L Ed 2d 1377, 87 S Ct 2091, concluded that this hypothesis was invalid and that accordingly the cases should be decided "upon a common and controlling fundamental constitutional basis." On this basis the court, per curiam,[7] reversed state court judgments convicting the defendants of distributing obscene material or declaring certain publications obscene. The distribution of the publications in each of these cases was held protected, by the First and Fourteenth Amendments, from governmental suppression, whether criminal or civil, in personam or in rem. The court pointed out that two members of the court (Black and Douglas, JJ.) consistently adhered to the view that a state is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their "obscenity"; that a third member (Stewart, J.) held to the opinion that a state's power in this area is narrowly limited to a distinct and clearly identifiable class of material; that other members (Warren, Ch. J., and Brennan and Fortas, JJ.) subscribed to the elements of obscenity as defined in Memoirs; and that another Justice (White, J.) did not view the "social value" element as an independent fac-

7. Fahringer and Brown, in their article, in 62 Ky LJ 731 (1974), entitled "The Rise and Fall of Roth—a Critique of the Recent Supreme Court Obscenity Decisions," suggest that Redrup is probably the most important per curiam opinion in the history of obscenity litigation.

tor in the judgment of obscenity. The court concluded that whichever of these constitutional views was brought to bear upon the instant cases, it was clear that the judgments below could not stand. Harlan and Clark, JJ., dissented on the ground that since the obscenity of the publications was deliberately excluded from review and was not discussed in the briefs and oral arguments, it was improper to decide the case on obscenity grounds and the writs of certiorari and the appeal should be dismissed.

With respect to the Redrup "policy" (386 US 767, 18 L Ed 2d 515, 87 S Ct 1414, reh den 388 US 924, 18 L Ed 2d 1377, 87 S Ct 2091), the court in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, observed, in footnote 3 of the opinion, that in the absence of a majority view as to appropriate standards for determining obscenity, the Supreme Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the court, applying their separate tests, found to be protected by the First Amendment; that 31 cases[8] had been decided in this manner; that beyond the necessity of circumstances, however, no justification had ever been offered in support of the Redrup "policy"; and that the Redrup procedure had cast the Supreme Court in the role of an unreviewable board of censorship for the states, subjectively judging each piece of material brought before the court. The opinion concluded that the court might now abandon the casual practices of Redrup, since Miller provided positive guidance as to obscenity standards. In Miller, Douglas, J., in his dissenting opinion, observed that even those members of the Supreme Court who had created the new and changing standards of "obscenity" could not agree on their application, and that consequently the court in Redrup had adopted a per curiam treatment of so-called "obscene" publications, which treatment seemed to pass constitutional muster under the several constitutional tests which had been formulated.

§ 7. The Miller test

The most recently stated standards of the concept of obscenity (the Miller test) and their application are discussed in the following cases.

In the landmark case of Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26,[9] a case involving a challenge to the validity of a California obscenity statute, the court, in an opinion expressing the view of five members thereof (Burger, Ch. J., the author of the opinion, and White, Blackmun, Powell, and Rehnquist, JJ.), reformulated the test for the determination of obscenity. Reviewing a defendant's conviction of violating a state statute making it a misdemeanor to knowingly distribute obscene matter, the court defined the standards concerning state statutes designed to regulate obscene materials as follows: (1) The permissible scope of state regulation must be confined to works which depict or describe sexual conduct; (2) that conduct must be specifically defined by the applicable state law, as written or authoritatively construed; and (3) a state offense must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not

8. These 31 cases are cited in footnote 8 of the dissenting opinion of Brennan, J., in Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27. In view of the Supreme Court's rejection of the Memoirs test in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, these cases are no longer useful in determining the constitutional standards of obscenity.

9. For the sake of brevity, the case will be sometimes referred to hereinafter as Miller.

The facts involved and the later history of Miller are stated in § 17, infra.

have serious literary, artistic, political, or scientific value. The court then laid down the basic guidelines for the trier of facts, applicable to federal and state courts alike, as follows: (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, 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. In support of the criterion described under (a), supra, the court cited Kois v Wisconsin (1972) 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245, quoting Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, supra § 5, and thus recognized the vitality of Roth insofar as the case defined the concept of obscenity in the terms stated in that section. As to the tests described under (c) of the court's guidelines, the court recognized that medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy and hence have scientific value. The court refused to adopt as a constitutional standard the "*utterly* without redeeming social value" test stated in the plurality opinion in Memoirs (383 US 413, 16 L Ed 2d 1, 86 S Ct 975, supra § 6). Douglas, J., dissented on the ground, among others, that the First Amendment makes no exception for obscenity. Brennan, Stewart, and Marshall, JJ., dissented on the ground that the California statute was unconstitutionally overbroad and therefore invalid on its face.

In connection with the Miller test (413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26), it should be noted that in Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27, infra, Brennan, Stewart, and Marshall, JJ., dissented, expressing, insofar as pertinent, the views that (1) the court's approach to the obscenity problem initiated in Roth should be abandoned, at least insofar as consenting adults were concerned, (2) "obscene" speech was incapable of definition with sufficient clarity to withstand attack on vagueness and overbreadth grounds, since no definition of obscenity, including that propounded in Miller, provided adequate notice of exactly what was prohibited from dissemination, and (3) absent distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments should be viewed as prohibiting the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents, although the government could perhaps regulate the manner of distribution of such material. Obviously, the relevant separate opinions of these dissenting Justices in obscenity cases antedating Paris Theatre should be read in the light of their new approach to the obscenity problem.

The Miller standards (413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 424 US 881, 38 L Ed 2d 128, 94 S Ct 26) were applied in Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, infra § 17, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157, and in Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750, infra § 18.

The First Amendment standards for determining obscenity set forth in Miller (413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 1298, 94 S Ct 26), were also held applicable in Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27, where the issue was whether the exhibition at the defendant's theaters of motion pictures found by the Georgia Supreme Court to be obscene, could be constitutionally prohibited, even though shown only to consenting adults. The two films in question, "Magic Mirror" and "It All Comes Out in the End," depicted sexual conduct characterized by the Georgia Supreme Court as

scenity (§ 7, supra), with "hard-core" sexual conduct. This inference seems to be justified by the statements of the court that (1) the Miller Case is one of a group of "obscenity-pornography" cases; (2) apart from the initial formulation in Roth (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), no majority of the court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the state's police power; (3) under the holdings announced in Miller and in its companion cases, no one will be subject to prosecution for the sale or exposure of obscene materials unless the materials depict or describe patently offensive "hard-core" sexual conduct; (4) if the inability to define regulated materials with ultimate, God-like precision altogether removes the power of the states or the Congress to regulate, then "hard-core pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike"; (5) a majority of the court has agreed on concrete guidelines to isolate "hard-core" pornography from expression protected by the First Amendment; (6) the prohibiting of public portrayal of "hard-core" sexual conduct, for its own sake and for the ensuing commercial gain, does not repress the free and robust exchange of ideas; and (7) regulation of patently offensive "hard-core" materials is permissible. Although recognizing that it is not the function of the Supreme Court to propose regulatory schemes for the states, the court gave a few examples of what a state statute could define for regulation under a standard which makes the concept of obscenity depend upon whether a work depicts or describes, "in a patently offensive way," sexual conduct, namely, (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. However, the court recognized that at a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.

In Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750, the court pointed out that, while not purporting to be an exhaustive catalog of what juries might find patently offensive, the examples given in Miller (413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26), as to what a state obscenity statute may define for regulation as being patently offensive, fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to a determination of obscenity; and that thus an obscenity conviction based on a defendant's depiction of a woman with a bare midriff could not be upheld, even though a properly charged jury unanimously agreed on a guilty verdict.

As to the particular description of the type of obscene materials noted in Miller (413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26), the court in Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157, pointed out that while such description was not intended to be exhaustive, it clearly indicates that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is "patently offensive" within the meaning of the obscenity test set forth in Miller and in its companion cases.

See United States v 12 200-Ft. Reels of Super 8mm. Film (1973) 413 US 123, 37 L Ed 2d 500, 93 S Ct 2665, where the court pointed out that if and when a serious doubt is raised as to the vagueness of words such as "obscene," as used to describe regulated material in 19 USCS § 1305(a), which prohibits importation of obscene material, and in 18 USCS § 1462, which prohibits interstate transportation of such material by a common carrier, the United States Supreme Court is pre-

pared to construe the statutory term "obscene" as limiting regulated material to patently offensive representations or descriptions of that specific "hard-core" sexual conduct given as examples in Miller (413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26), supra.

Stewart, J., in his concurring opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L Ed 2d 793, 84 S Ct 1676, expressed the view that under the First and Fourteenth Amendments, criminal laws in the areas of obscenity are constitutionally limited to hard-core pornography. However, he did not attempt further to define the kinds of material to be embraced within that shorthand description, and stated that perhaps he could never succeed in intelligibly doing so, but that he knew such material when he saw it. On the other hand, Warren, Ch. J. and Clark, J., dissenting, expressed the view that "hard-core pornography" cannot be defined with any greater clarity than "obscenity," and that even if the court should retreat to that position, it would soon be faced with a need to define the quoted phrase.

§ 10. Average person

As appears from the following cases, the term "average person," as used in the definition of obscenity insofar as that definition refers to the prurient-interest appeal to such person, excludes a particularly susceptible or sensitive person or a totally insensitive person, but does not preclude the determination of obscenity by the prurient-interest appeal to specific groups, such as sexual deviants or minors, as distinguished from adults.

The concept of the "average" person, within the meaning of the rule that to be classified as obscene, material must appeal to the prurient interest of such person, was discussed in Mishkin v New York (1966) 383 US 502, 16 L Ed 2d 56, 86 S Ct 958, reh den 384 US 934, 16 L Ed 2d 535, 86 S Ct 1440, where the court rejected the defendant's argument that some of the books involved in a state prosecution, namely, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, did not satisfy the prurient-appeal requirement because they did not appeal to the prurient sex interest of the "average person," but, "instead of stimulating the erotic, they disgust and sicken." The court pointed out that (1) where the material is designed for, and primarily disseminated to, a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) is satisfied if the dominant theme of the material taken as a whole appeals to the prurient sex interest of the members of that group; and (2) the reference to the "average person" in Roth did not foreclose this holding. In support of the latter position the court stated that the concept of the "average" person was employed in Roth to serve the essentially negative purpose of expressing the Supreme Court's rejection of that aspect of Reg. v Hicklin (1868, Eng) LR 3 QB 360, 8 ERC 60, supra § 2[a], that made determinative the impact on the most susceptible person. The court went on to state that it adjusts the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group. The Roth test was held satisfied where a state criminal obscenity statute had been interpreted by the state courts to cover only so-called "hard-core pornography," since the state definition of obscenity was more stringent than the definition required by Roth.

In Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, the court ruled that, as was made clear in Mishkin v New York (1966) 383 US 502, 16 L Ed 2d 56, 86 S Ct 958, reh den 384 US 934, 16 L Ed 2d 535, 86 S Ct 1440, supra, the primary concern of the federal constitutional requirement that a jury, in determining whether particular material is obscene, apply the standard of "the average person, applying contemporary community standards," is to be certain that so far as material is not aimed at a deviant group, it will

be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or a totally insensitive person. In support of this holding, the court cited Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8.

Rejecting the contention, made by the defendants in a federal obscenity prosecution, that the District Court's instruction was improper because it allowed the jury to measure the allegedly obscene brochure involved, by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant sexual group, the court in Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157, pointed out that its decision in Mishkin v New York (1966) 383 US 502, 16 L Ed 2d 56, 86 S Ct 958, reh den 384 US 934, 16 L Ed 2d 535, 86 S Ct 1440, supra, clearly indicated that in measuring the prurient appeal of allegedly obscene materials, that is, whether the "dominant theme of the material taken as a whole appeals to a prurient interest in sex," consideration may be given to the prurient appeal of the the material to clearly defined deviant sexual groups. Defendants' additional argument in the instant case was that if some of the material appeals to the prurient interest of sexual deviants, while other parts appeal to the prurient interest of the average person, a general finding that the material appeals to a prurient interest in sex is somehow precluded. This argument was also rejected by the court in reliance on Mishkin.

In this context see Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L Ed 2d 639, 82 S Ct 1432, where it appeared that a postmaster withheld delivery of copies of three magazines after a finding by the Post Office Judicial Officer that the magazines were obscene within the meaning of 18 USCS § 1461, which prohibits the mailing of obscene matter. This finding was based on the ground, among others, that the magazines appealed to the prurient interest of homosexuals, but had no interest for sexually normal individuals, the magazines consisting largely of photographs of nude, or near-nude, male models. The publishers of the magazines brought suit in a federal court for injunctive relief, but their complaint was dismissed by the courts below. The United States Supreme Court reversed, but could not agree on an opinion. The plurality opinion by Harlan and Stewart, JJ., rested the reversal on the grounds, among others, that the magazines could not be deemed legally obscene on the ground stated by the Post Office Judicial Officer, since they were not so offensive on their face as to affront current community standards of decency, and that, divorced from their "prurient interest" appeal to homosexuals, the portrayals of the male nude could not fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. The concurring opinions of three other Justices were based on grounds not relevant to the concept of obscenity. Black, J., concurred in the result, and one Justice dissented. Two Justices did not participate.

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Although not defining the term "average person," the following cases involve this element of the concept of obscenity in connection with minors or adults.

In Ginsberg v New York (1968) 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274, reh den 391 US 971, 20 L Ed 2d 887, 88 S Ct 2029, the court, upholding a New York statute which made it a misdemeanor knowingly to sell a minor material "harmful to minors," stated that its inquiry was limited to the question whether it was constitutionally impermissible for a state to accord minors under 17 years of age a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. The court held that the area of freedom of expression constitutionally secured to minors was not invaded by the statute, which defined the phrase "harmful to minors" as meaning the quality of any description or representation of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse where the material (1) pre-

dominantly appeals to the prurient interest of minors, (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (3) is utterly without redeeming social importance for minors.

In Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27, the court held that obscene, pornographic motion-picture films do not acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only, and that states have a legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, including so-called "adult" motion-picture theaters from which minors are excluded, as long as such regulations do not run afoul of specific constitutional prohibitions. The court pointed out that these legitimate state interests in stemming the tide of commercialized obscenity exist, even assuming that it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.

And see the dissenting opinion of Brennan, Stewart, and Marshall, JJ., in Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750, expressing the view that the proper rule should be that the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents, at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults.

§ 11. Contemporary community standards

Prior to the recent cases discussed hereinafter, various members of the Supreme Court disagreed as to whether under the Roth test (§ 5, supra), national or local community standards were meant by that part of the test which made the concept of obscenity, as a matter of federal constitutional law, depend upon whether to the average person, "applying contemporary community standards," the dominant theme of the material taken as a whole appeals to prurient interest. The following recent cases make it clear that under both the Roth test (§ 5, supra) and the substantially similar Miller test (§ 7, supra), "contemporary community standards" are local or statewide community standards, not national standards, and that this rule applies in federal as well as in state obscenity litigation.

The Supreme Court has held that in a prosecution under a state's obscenity laws, the contemporary community standards of the state, as opposed to national standards, are constitutionally adequate to establish whether a work is obscene. Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 123, 94 S Ct 26; Kaplan v California (1973) 413 US 115, 37 L Ed 2d 492, 93 S Ct 2680, reh den 414 US 883, 38 L Ed 2d 131, 94 S Ct 28.

In considering the phrase "community standards," as used in the court's guidelines under which one of the tests of obscenity is whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, the court in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 126, 94 S Ct 26, ruled that in a prosecution under a state's obscenity laws, neither the state's alleged failure to offer evidence of "national standards" of obscenity, nor the trial court's charge that the jury should consider state community standards, is a constitutional error, since nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. The court also pointed out that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."

In Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct

2887, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157, a federal obscenity prosecution, the court held that while a state may constitutionally proscribe obscenity in terms of a "statewide" standard any such precise geographic area is not required as a matter of constitutional law. Recognizing that in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, the court had rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, and describing such standards as "hypothetical and unascertainable," the Hamling court stated that in so ruling, Miller did not require as a constitutional matter the substitution of some smaller geographical area in the same sort of formula; and that the Miller test was stated in terms of the understanding of "the average person, applying contemporary community standards." The court went on to explain that when this approach is coupled with the reaffirmation in Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27, of the rule that the prosecution need not as a matter of constitutional law produce "expert" witnesses to testify as to the obscenity of the materials, the import of the quoted language from Miller is clearly to the effect that a juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes, for making the required determination, just as, in other areas of law, he is entitled to draw on his knowledge of the propensities of a "reasonable" person; and that the holding in Miller that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area was required as a matter of constitutional law. The court also pointed out that its analysis in Miller of the difficulty in formulating uniform national standards of obscenity, and the emphasis on the ability of the juror to ascertain the sense of the "average person, applying contemporary community standards," without the benefit of expert evidence, clearly indicated that the federal statute proscribing use of the mails for sending obscene materials or advertisements thereof (18 USCS § 1461) was not to be interpreted as requiring proof of the uniform national standards which were criticized in Miller. As stated by the Hamling court, the result of the Miller Case, as a matter of both constitutional law and federal statutory construction, has been to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes, in deciding what conclusion "the average person, applying contemporary community standards," would reach in a given case. The court went on to state that since the Hamling Case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried the defendants, it would be the standards of that "community" upon which the jurors would draw, but that this was not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside this particular district, if it felt that such evidence would assist the jury in the resolution of the issues which they were to decide. The court explained that the fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity; that those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the states for violations of state obscenity statutes; and that there is no constitutional impediment to a similar rule for federal prosecutions. The statement made by Warren, Ch. J., in his dissenting opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L Ed 2d 793, 84 S Ct 1676, to the effect that the reference in the federal obscenity case of Roth (354 US 476, 1

L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) to "community standards," meant community standards, and not a national standard, was quoted with approval by the Hamling court. The District Court's instruction, which contained occasional references to the community standards of the "country as a whole," and thereby delineated a wider geographic area than would be warranted by Miller, was held not to be prejudicial error, since there was no probability in the instant case that the excision of the references stated above would have materially affected the deliberations of the jury. Brennan, J., joined by Stewart and Marshall, JJ., dissented, expressing, insofar as relevant, the view that the use of local or community standards of obscenity under a federal statute would do violence both to congressional prerogatives and to the Federal Constitution.

The Federal Constitution was held to permit, but not to require, that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community, in Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750. The court pointed out that while Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, supra, approved the use of such instructions, Miller did not mandate their use. The court also ruled that state juries need not be instructed to apply "national standards," and may properly be instructed to apply "community standards," of obscenity, without specifying what "community." Noting that Miller held it constitutionally permissible for juries to rely on the understanding of the community from which they came as to contemporary community standards, the court in Jenkins ruled that states have considerable latitude in framing statutes under this geographic element, and that a state may choose to define an obscenity offense in terms of "contemporary community standards" or may choose to define it in more precise geographic terms.

As a matter of historical interest, it may be noted that in Jacobellis v Ohio (1964) 378 US 184, 12 L Ed 2d 793, 84 S Ct 1676, Brennan and Goldberg, JJ., in the plurality opinion, expressed the view that community standards are a national standard. On the other hand, Warren, Ch. J., and Clark, J., in their dissenting opinion, expressed the view that community standards are local standards, and that, in applying these standards the United States Supreme Court should avoid sitting as a "super censor" and should limit itself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made under the constitutional test.

§ 12. Other elements

Under the Roth test (§ 5, supra), the determination of obscenity as a matter of federal constitutional law depends upon whether to the average person, applying contemporary community standards, the "dominant theme" of the material taken as a whole appeals to prurient interest. The following cases deal with the phrase "dominant theme."[11]

In Kois v Wisconsin (1972) 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245, the court stated that while "contemporary community standards," under the Roth test (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) of obscenity, must leave room for some latitude of judgment, and while there is an undeniably subjective element in the test as a whole, the "dominance" of the theme is a question of constitutional fact. The opinion then stated that in determining whether the dominant theme of material is to "prurient interest," the court must consider whether the material has the earmarks of an attempt at serious art, even though such

11. The phrase "dominant theme" has been omitted in the reformulation of the constitutional obscenity test in Miller (§ 7, supra). Whether this omission is of legal significance is a question which presently cannot be determined, in the absence of a pertinent decision of the United States Supreme Court.

earmarks are not inevitably a guaranty against a finding of obscenity.

In Rabe v Washington (1972) 405 US 313, 31 L Ed 2d 258, 92 S Ct 993, reh den 406 US 911, 31 L Ed 2d 822, 92 S Ct 1604, a case otherwise not within the scope of this annotation, Burger, Ch. J. and Rehnquist, J., in their concurring opinion, observed that in a situation where the very method of display may thrust isolated scenes on the public, as where an allegedly obscene motion picture is shown in a drive-in theater, the requirement of Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, that the materials be "taken as a whole" has little relevance.

The United States Supreme Court has not yet defined, in general language, the meaning of the phrase "taken as a whole," as used in the Roth test (§ 5, supra) and in the substantially similar Miller test (§ 7, supra), which make the constitutional test of obscenity depend upon whether to the average person, applying contemporary community standards, the dominant theme of the material *taken as a whole* appeals to prurient interest. The following case deals with this element of the concept of obscenity.

In Ginzburg v United States (1966) 383 US 463, 16 L Ed 2d 31, 86 S Ct 942, reh den 384 US 934, 16 L Ed 2d 536, 86 S Ct 1440, the court ruled that even though a book such as "The Housewife's Handbook on Promiscuity" was, as testified to by witnesses, useful in the professional practice of members of medical and psychiatric associations, the trial court was not in error in "declaring the book as a whole obscene," where the defendants did not sell the book to such a limited audience, or focus their claim for it on its supposed therapeutic or educational value, but deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed.

C. Other relevant factors

§ 13. "Clear and present danger" rule

In the following cases the Supreme Court has rejected a test suggested in connection with the term "obscene," as used in criminal obscenity statutes, namely, whether obscene material creates a "clear and present danger" as to the commission, or the imminence of the commission, of criminal acts resulting from the reading of the material.[12]

The "clear and present danger" rule has been held inapplicable in determining the concept of obscenity as a matter of federal constitutional law, in Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, and in Ginsberg v New York (1968) 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274, reh den 391 US 971, 20 L Ed 2d 887, — S Ct 2029. In both these cases the court pointed out that obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase "clear and present danger" in its application to protected speech.

See the annotation on the Supreme Court's development of the "clear and present danger" rule at 38 L Ed 2d 835 (particularly § 4[b]).

§ 14. Pandering

As shown by the following cases, a publication which, standing alone, might not be obscene, may nevertheless be characterized as obscene in the context of the circumstances of production, sale, and publicity, and, in particular, of pandering.

In Ginzburg v United States (1966) 383 US 463, 16 L Ed 2d 31, 86 S Ct 942, reh den 384 US 934, 16 L Ed 2d 536, 86 S Ct 1440, the court upheld, in an opinion by Brennan, J., also expressing the views of Warren, Ch. J., and Douglas, Clark, and White, JJ., the defendants' conviction for violation of the federal obscenity statute (18 USCS § 1461) for using the mails to dis-

12. See the concurring opinion of Frank, Circuit Judge, in United States v Roth (1956, CA2 NY) 237 F2d 796, affd on other grounds 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8.

tribute the magazine "Eros," containing articles and photo essays on love and sex, a newsletter dedicated to the same subject, and a book entitled "The Housewife's Handbook on Promiscuity." The court held that even if the material involved was not obscene in the abstract and was assumed to have some degree of redeeming social value, the trial judge's conclusion that the mailing of these publications offended the statute was supported by evidence showing that the defendants engaged in the sordid business of pandering, that is, the business of purveying textual or graphic matter openly advertised to appeal to the erotic interests of the defendants' customers. The factual basis supporting the pandering aspect of the case was found in advertising boasting that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters, the solicitation being indiscriminate and not limited to those such as physicians or psychiatrists, who might independently find worth in the publications, and it was found also in the fact that the publishers attempted to have their material mailed from post offices having suggestive names, such as "Intercourse," and "Blue Ball," Pennsylvania. The court ruled: (1) The setting in which allegedly obscene publications were presented, such as a background of commercial exploitation of erotica solely for the sake of their prurient appeal, may be considered as an aid in determining the question of obscenity under federal constitutional standards; (2) in this context the circumstances of the presentation and dissemination of the materials are relevant to determining whether social importance, claimed for material in the courtroom, was, in the circumstances pretense or reality, and whether it was a basis upon which the material was traded in the marketplace or a spurious claim for litigation purposes; (3) where the purveyor's sole emphasis is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity; (4) the fact of pandering is relevant to the question of obscenity, apparently on the theory that if the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value; (5) at least a debatable conclusion that material is obscene under federal constitutional standards is reinforced by evidence of pandering, showing that the publisher animated sensual detail to give the publication a salacious cast; and (6) even though the Housewife's Handbook was, as testified to by witnesses, useful in the professional practice of members of medical and psychiatric associations, the trial court was not in error in declaring the book, as a whole, obscene, where the defendants did not sell the book to such a limited audience, or focus their claim for it on its supposed therapeutic or educational value, but deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. The fact that the Ginzburg Case may be of narrow scope is suggested by the court's statement that it perceived no threat to the First Amendment guaranties in holding that 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 (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8). Four of the Justices dissented. Only the dissent by Harlan, J., expressing the view that the federal government is constitutionally restricted to banning from the mails only "hard-core pornography," and that the material in question did not fall within that narrow class, is relevant.

In Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157, it was held that a Federal District Court, in a prosecution under 18 USCS § 1461 for using the mails to send obscene materials, had not erred in instructing the jury that if it found the question whether the materials involved were obscene to be a close one, it could also consider whether the materials had been pan-

dered, by looking to the manner of distribution, and the circumstances of production, sale, advertising, and editorial intent. Affirming a Court of Appeals' judgment upholding the defendants' convictions, the Supreme Court said that the jury instructions were consistent with the holding in Ginzburg v United States (1966) 383 US 463, 16 L Ed 2d 31, 86 S Ct 942, reh den 384 US 934, 16 L Ed 2d 536, 86 S Ct 1440, supra, that evidence of pandering may be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied.

And see A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v Atty. Gen. of Massachusetts (1966) 383 US 413, 16 L Ed 2d 1, 86 S Ct 975, supra § 6, where the plurality opinion noted that in the determination whether a particular publication is obscene, consideration may be given to the circumstances of production, sale, and publicity.

§ 15. Distinction between federal and state obscenity litigation

As appears from the following cases, the Roth test (§ 5, supra) and the Miller test (§ 7, supra) are applicable in both federal and state courts, and states may adopt definitions of obscenity other than those reflected in these tests only to the extent that such definitions stay within the bounds set by the constitutional criteria of the Roth and the Miller standards.

The Miller standards for testing the constitutionality of state obscenity laws have been held applicable to federal legislation—United States v 12 200-Ft. Reels of Super 8mm. Film (1973) 413 US 123, 37 L Ed 2d 500, 93 S Ct 2665—and to federal and state courts alike. Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26.

In Mishkin v New York (1966) 383 US 502, 16 L Ed 2d 56, 86 S Ct 958, reh den 384 US 934, 16 L Ed 2d 535, 86 S Ct 1440, the court ruled that the First Amendment prohibits criminal prosecution for the publication and dissemination of allegedly obscene books that do not satisfy the Roth definition (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) of obscenity; and that the states are free to adopt other definitions of obscenity "only to the extent that those adopted stay within the bounds set by the constitutional criteria of the Roth definition, which restrict the regulation of the publication and sale of books to that traditionally and universally tolerated in our society." The court also held that the federal constitutional criteria of "obscenity" are satisfied where a state criminal obscenity statute has been interpreted by the courts to cover only so-called "hard-core pornography," that definition being more stringent than the definition required by federal constitutional standards.

With regard to the scope of regulation of obscene material permissible under the First Amendment, the Supreme Court in Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27, ruled that the court does not undertake to tell the states what they must do, but rather undertakes to define the area in which they may chart their own course in dealing with obscene material. The court also stated that the states may elect to follow a "laissez-faire" policy as to the obscenity-pornography problem, dropping all controls on commercialized obscenity, but that nothing in the Constitution compels the states to do so with regard to matters falling within state jurisdiction.

As a matter of historic interest, it may be noted that Harlan, J., expressed the view, disputed by other members of the court, that a distinction should be made between federal and state obscenity litigation. Thus in Roth (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), the Justice, dissenting in part, pointed out that the opinion of the court failed to discriminate between the different factors which are involved in the constitutional adjudication of state and federal obscenity cases, and ignored relevant distinctions between the federal and state obscenity statutes involved in that

pictures is also supported by the cases set out in § 18, infra.

But see Freedman v Maryland (1965) 380 US 51, 13 L Ed 2d 649, 85 S Ct 734, where the Supreme Court, considering the validity of a state's motion-picture censorship statute, noted that motion pictures, though within the basic protection of the First and Fourteenth Amendments, are not necessarily subject to the precise rules governing any other particular method of expression.

D. Illustrative holdings as to obscenity of specific matters

§ 17. Printed materials

In the following cases the Supreme Court has held, specifically or by implication, that the books and other printed matter involved were obscene as a matter of federal constitutional law.[14]

A book entitled "The Housewife's Handbook on Promiscuity," even though, as testified to by witnesses, it was useful in the professional practice of members of medical and psychiatric associations, was held properly declared by the trial court to be obscene as a whole, in Ginzburg v United States (1966) 383 US 463, 16 L Ed 2d 31, 86 S Ct 942, reh den 384 US 934, 16 L Ed 2d 536, 86 S Ct 1440, where the defendants did not sell the book to such a limited audience, or focus their claim for it on its supposed therapeutic or educational value, but deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed.

Upholding a state conviction for violation of a state criminal obscenity statute on evidence that the defendant played a dominant role in several enterprises involving the producing and selling of books which depicted deviations such as sadomasochism, fetishism, and homosexuality, the court in Mishkin v New York (1966) 383 US 502, 16 L Ed 2d 56, 86 S Ct 958, reh den 384 US 934, 16 L Ed 2d 535, 86 S Ct 1440, noted that many of the books had covers with drawings of scantily clad women being whipped, beaten, or tortured, and contained photo offsets of typewritten books illustrated by many sex scenes, including lesbian scenes, involving largely deviant themes. The conviction was upheld on a finding that the material satisfied the Roth test (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) of obscenity, against an attack on the theory that the prurient-appeal requirement was not met since the material was designed for deviant sexual groups rather than the public at large. As stated by the court, the Roth requirement that the prurient-interest appeal be to the "average person" does not mean that such appeal could not be primarily to members of a special group. Harlan, J., concurred in the judgment on the issue of obscenity, reiterating his view that the Fourteenth Amendment requires of a state only that it apply criteria rationally related to the accepted notion of obscenity. Black, Douglas, and Stewart, JJ., dissented, the latter Justice on the ground that the books involved were not "hard-core pornography."

Although a plain-covered book contained no pictures, it was held obscene, and thus not protected by the First Amendment, in Kaplan v California (1973) 413 US 115, 37 L Ed 2d 492, 93 S Ct 2680, reh den 414 US 883, 38 L Ed 2d 131, 94 S Ct 28, where the book was made up entirely of repetitive descriptions of physical, sexual conduct, "clinically" explicit and offensive to the point of being nauseous, had only the most tenuous plot, and described almost every conceivable variety of sexual contact, homosexual and heterosexual, the content being unvarying whether one sampled every 5th, 10th, or 20th page, beginning at any point or page at random. The court pointed out that expression solely by words can be legally "obscene" in the sense of being unprotected by the First Amendment, and an obscene book is not protected by that Amend-

14. Generally as to the constitutionality of federal and state regulation of obscene literature, see the annotations at 1 L Ed 2d 2211 and 4 L Ed 2d 1821.

ment merely because it contains no pictures. Douglas, Brennan, Stewart, and Marshall, JJ., dissented, the last-mentioned three Justices on the ground, among others, that absent distribution to juveniles or obtrusive exposure to unconsenting adults, the Constitution prohibits the government from attempting to suppress sexually oriented material on the basis of its allegedly "obscene" contents.

A federal conviction under 18 USCS § 1461—which proscribes use of the mails for sending obscene materials or advertisements thereof—based on the defendants' use of the mails to carry their illustrated version of a government report on obscenity and pornography, such brochure containing a collage of photographs from the illustrated report portraying heterosexual and homosexual intercourse, sodomy, and a variety of deviant sexual acts, was affirmed in Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157, where the court held that the jury's finding that the brochure was obscene was supported by the evidence under the constitutional test applicable at the time of trial (the Memoirs test (§ 6, supra)). The court said that even though the defendants introduced expert testimony to show that the brochure did not appeal to a prurient interest in sex, that it was not patently offensive, and that it had social value, nevertheless the government also introduced expert testimony to the contrary, and, in any event, expert testimony was not necessary to the determination of obscenity, since the brochure itself had been placed into evidence. The court also pointed out that any constitutional principle enunciated in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, supra § 7, and in its companion cases, which would serve to benefit the defendants in the instant case, must be applied. Douglas, Brennan, Stewart, and Marshall, JJ., dissented, the last-named three Justices on the ground stated in their dissent in Kaplan v California (1973) 413 US 115, 37 L Ed 2d 492, 93 S Ct 2680, reh den 414 US 883, 38 L Ed 2d 131, 94 S Ct 28, supra.

As stated in § 7, supra, Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, the Supreme Court reformulated the test for the determination of obscenity as a matter of federal constitutional law. In Miller, it appears that the material involved included brochures advertising four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," respectively, and also a film entitled "Marital Intercourse." After stating that obscene material can be regulated by the states, subject to the specific safeguards enunciated in the opinion, and that obscenity is to be determined by applying contemporary community standards, not national standards, the court remanded the case to the Appellate Department of the California Superior Court for further proceedings not inconsistent with the First Amendment standards established by its opinion. On remand, the court below again affirmed the defendant's conviction of violating a California statute making it a misdemeanor to knowingly distribute obscene matter. On a second appeal, the United States Supreme Court, in Miller v California (1974) 418 US 915, 41 L Ed 2d 1158, 94 S Ct 3206, dismissed the appeal for want of a substantial federal question, four of the Justices dissenting. This dismissal seems to allow the inference that the court below did not violate the standards of obscenity formulated in Miller.

And see J-R Distributors, Inc. v Washington (1974) 418 US 949, 41 L Ed 2d 1166, 94 S Ct 3217, where White, J., wrote an opinion in support of the court's denial of a writ of certiorari. He classified as hard-core pornography unprotected by the First Amendment a publication entitled "Sex Between Humans and Animals," containing repeated photographs of men and women performing sex acts with a variety of animals.

On the other hand, in the following cases the Supreme Court has held, spe-

cifically or by implication, that the printed matter involved was not obscene as a matter of federal constitutional law.

"Girlie" picture magazines depicting female nudity were considered not obscene for adults, so as to be outside the area of constitutionally protected speech or press, in Ginsberg v New York (1968) 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274, reh den 391 US 971, 20 L Ed 2d 887, 88 S Ct 2029, where, however, the Supreme Court sustained the conviction of the defendant, who sold these magazines to a minor under the age of 17 years, thereby violating a New York statute which prohibited a person from knowingly selling to such minor material "harmful to minors."

In reliance upon the Roth test (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), the conviction of an underground newspaper publisher for violating a state obscenity statute by disseminating an issue with two relatively small pictures of a nude man and a nude woman embracing in a sitting position, published on an interior page of the newspaper as "similar" to photographs seized from the newspaper's photographer at the time of the photographer's arrest on an obscenity charge, and accompanied by an article about the arrest, was reversed in Kois v Wisconsin (1972) 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245. The court pointed out that (1) it could not fairly be said, considering either the article as it appeared or the record before the state court, that the article was a mere vehicle for the publication of the pictures; and (2) while a quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication, the pictures were relevant to the theme of the article and were rationally related to the article itself, and hence within the protection of the Fourteenth Amendment, so as to invalidate the state conviction of the publisher for disseminating obscene material. Likewise, the court reversed the publisher's conviction for the publication in its newspaper of a poem entitled "Sex Poem," which was an undisguisedly frank, play-by-play account of the author's recollection of sexual intercourse. The court pointed out that, considering the poem's content and its placement amid a selection of 11 poems in the interior of the newspaper, it bore some of the earmarks of an attempt at serious art; that while such earmarks are not inevitably a guaranty against a finding of obscenity, and while in the instant case many would conclude that "the author's reach exceeded his grasp," this element must be considered in assessing whether or not the "dominant" theme of the material appealed to prurient interest. The court concluded that the "dominance" of the theme was a question of constitutional fact, and that, notwithstanding the due weight and respect given to the contrary conclusions of the state courts, it could not be said that the dominant theme of the poem appealed to prurient interest.

Without defining tests for determining the constitutional concept of obscenity, the court in Papish v Board of Curators of University of Missouri (1973) 410 US 667, 35 L Ed 2d 618, 93 S Ct 1197, reh den 411 US 960, 36 L Ed 2d 419, 93 S Ct 1921, held that neither a political cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice, and bearing the caption "With Liberty and Justice for All," which appeared in a student newspaper, nor a newspaper article bearing the headline "Motherfucker Acquitted," and discussing the trial and acquittal of the leader of an organization called "Up Against the Wall, Motherfucker," also known simply as "The Motherfuckers," could properly be labeled as constitutionally obscene or otherwise unprotected. The court's holding was that a state university violated a student's First Amendment rights by expelling her because of her distribution on campus of newspapers containing the cartoon and article. Rehnquist, J., joined by Burger, Ch. J., and Blackmun, J., dissented on the ground, among others, that public use of the word "Motherfucker" was obscene.

The inference that an issue of the magazine "One," dealing in one article with the lesbian affairs of a girl, only 20 years old, and her roommate, and publishing a poem dealing with the homosexual activities of two English lords, was considered by the Supreme Court as not obscene under the Roth test (354 US 476, 1 L Ed 2d 149, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8) seems justified by the court's decision in One, Inc. v Olesen (1958) 355 US 371, 2 L Ed 2d 352, 78 S Ct 364, where the Supreme Court, citing Roth, reversed per curiam the judgment of the Court of Appeals for the Ninth Circuit (241 F2d 772), which had declared the magazine nonmailable, under 18 USCS § 1461, because the article and the poem described above were obscene.

Likewise, the inference that a nudist magazine is not obscene seems justified by the decision of the United States Supreme Court in Sunshine Book Co. v Summerfield (1958) 355 US 372, 2 L Ed 2d 352, 78 S Ct 365, where the Supreme Court, citing Roth (354 US 476, 1 L Ed 2d 149, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), reversed per curiam a judgment of the Court of Appeals for the District of Columbia Circuit (101 App DC 358, 249 F2d 114), which had affirmed the District Court's denial of the publisher's request for a declaratory judgment that the nudist magazines were not obscene, and had also denied an injunction against the Postmaster General.

§ 18. Motion pictures

In the following cases the motion pictures involved were held not obscene as a matter of federal constitutional law.[15]

In Kingsley International Pictures Corp. v Regents of University of N. Y. (1959) 360 US 684, 3 L Ed 2d 1512, 79 S Ct 1362, the Supreme Court accepted the conclusion of the New York Court of Appeals that the film "Lady Chatterley's Lover," which alluringly portrayed adultery as proper and desirable, was not obscene. In an opinion expressing the view of five members, the court held invalid New York statutory provisions barring exhibition of motion pictures which are immoral in that they portray acts of sexual immorality as desirable, acceptable, or proper patterns of behavior.

Under the constitutional standards for determining obscenity announced in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, supra § 7, the film "Carnal Knowledge" was held not obscene, in Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750, where the United States Supreme Court reversed the Georgia Supreme Court's affirmance of a theater manager's conviction, in a jury trial, of violating the state obscenity statute by showing the film. After viewing the film, the United States Supreme Court pointed out that even though the subject matter was, in a broad sense, sex, and there were occasional scenes of nudity and scenes in which sexual conduct including "ultimate sexual acts" took place, nevertheless the camera did not focus on the bodies of the actors during the latter scenes, and there was no exhibition whatever of the actors' genitals, lewd or otherwise, during such scenes. The court concluded that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and the defendant's showing of the film was not a public portrayal of hard-core sexual conduct for its own sake, and for ensuing commercial gain. Brennan, J., joined by Stewart and Marshall, JJ., concurred in the result, stating that (1) the instant case illustrated the uncertainty of the Miller test (413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26), whereby one could not say with certainty that material was obscene until at least five members of the United States Supreme Court, applying inevitably obscure standards, pronounced it so, and (2) the proper rule should be that the First and Fourteenth Amendments prohibit the

15. Generally, as to the constitutionality of regulation of obscene motion pictures, see the annotation at 22 L Ed 2d 949.

state and federal governments from attempting to suppress sexually oriented materials on the basis of their allegedly "obscene" contents, at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults. Douglas, J., also concurred in the result.

The motion picture "Viva Maria" was held not obscene for adults, and therefore not outside the protection of the First Amendment guaranty of freedom of expression, in Interstate Circuit, Inc. v Dallas (1968) 390 US 676, 20 L Ed 2d 225, 88 S Ct 1298, a case otherwise not within the scope of this annotation. However, neither the Supreme Court nor the court below described the details of this motion picture.

The view that the United States Supreme Court considered the French motion picture "Game of Love" not to be obscene is inferentially supported by its decision in Times Film Corp. v Chicago (1957) 355 US 35, 2 L Ed 2d 72, 78 S Ct 115, where the Supreme Court, citing Alberts v California (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8 (discussed in § 2 [a], supra), reversed per curiam a judgment of the Court of Appeals for the Seventh Circuit (244 F2d 432), which upheld, on obscenity grounds, a city's denial of a permit to exhibit this motion picture. The Court of Appeals, which had viewed the film, found it obscene on the following grounds: (1) From beginning to the end, the thread of the story was supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts; (2) in the introductory scenes a flying start was made when a 10-year-old boy was shown completely nude on a bathing beach in the presence of a group of younger girls; (3) on that plane the narrative proceeded to reveal the seduction of this boy by a physically attractive woman old enough to be his mother; (4) under the influence of this experience and an arrangement to repeat it, the boy engaged in sexual relations with a girl of his own age; (5) the erotic thread of the story was carried, without deviation toward any wholesome idea, through scene after scene; (6) the narrative was graphically pictured with nothing omitted except those sexual consummations which were plainly suggested but meaningfully omitted, and thus, by the very fact of omission, emphasized; (7) the words spoken in French were reproduced in printed English on the lower edge of the film; and (8) none of it palliated the effect of the scenes portrayed.

On the other hand, the facts stated hereinafter seem to support the conclusion that the motion picture "Anomalies," graphically depicting a variety of bizarre and anomalous acts of perverted sex behavior, was held obscene under the test announced in Miller (413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26). The defendant was convicted, in a South Carolina state court, on charges of feloniously exhibiting a motion picture as described above, in violation of the state's obscenity statute. His conviction was affirmed by the Supreme Court of South Carolina, in State v Watkins (1972) 259 SC 185, 191 SE2d 135. On appeal, the United States Supreme Court, in Watkins v South Carolina (1973) 413 US 905, 37 L Ed 2d 1016, 93 S Ct 3053, vacated the judgment and remanded the case to the South Carolina Supreme Court for further consideration in the light of Miller and its companion cases. On remand, the South Carolina Supreme Court again affirmed the conviction. A second appeal was dismissed by the United States Supreme Court for want of a substantial federal question, in Watkins v South Carolina (1974) 418 US 911, 41 L Ed 2d 1157, 94 S Ct 3204, four of the Justices dissenting.

To similar effect, see Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, supra § 17, involving a film entitled "Marital Intercourse."

§ 19. Live performances

The Supreme Court has not yet decided a case in which the test of ob-

scenity as applied to live performances was discussed.

However, in Adams Newark Theater Co. v Newark (1957) 354 US 931, 1 L Ed 2d 1533, 77 S Ct 1395, reh den 355 US 851, 2 L Ed 2d 61, 78 S Ct 8, the Supreme Court affirmed per curiam a judgment of the Supreme Court of New Jersey (22 NJ 472, 126 A2d 340) rendered in favor of the defendant municipality in an action brought against it by operators of a theater for a judicial determination of the legality of two ordinances which penalized a performer and a promoter of any performance which was obscene in any of the following particulars: The removal by a female performer, in the presence of an audience, of her clothing, so as to make nude, or give the illusion of nudeness, of the lower abdomen, genital organs, buttocks, or breasts; the exposure by a female performer in the presence of the audience, or the giving of the illusion of nudeness in the presence of the audience, of the lower abdomen, genital organs, buttocks, or breasts; the exposure by a male performer, in the presence of the audience, of the genital organs or buttocks; and the performance of any dance, episode, or musical entertainment the purpose of which is to direct the attention of the spectator to the breasts, buttocks, or genital organs of the performer. In affirming the judgment below, the court merely cited, among other decisions, Alberts v California, and Roth v United States (both 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, supra § 2 [a]). Warren, Ch. J., would have noted probable jurisdiction, Black and Douglas, JJ., dissented, and Brennan, J., did not participate.

And see California v La Rue (1972) 409 US 109, 34 L Ed 2d 342, 93 S Ct 390, reh den 410 US 948, 35 L Ed 2d 685, 93 S Ct 1351, supra § 16, which also involved live performances.

§ 20. Other matters

In the following cases, miscellaneous matters, such as wearing a jacket bearing certain words or making mere oral statements, were held not obscene as a matter of federal constitutional law.

A state court disturbing-the-peace conviction of the defendant, who, while in the corridor of a county courthouse, was wearing a jacket bearing the plainly visible words "Fuck the Draft," was reversed in Cohen v California (1971) 403 US 15, 29 L Ed 2d 284, 91 S Ct 1780, reh den 404 US 876, 30 L Ed 2d 124, 92 S Ct 26, on the ground, among others, that the quoted inscription was not obscene. The court pointed out that whatever else may be necessary to give rise to the states' power to prohibit obscene expression, such expression must be, in some significant way, erotic, as appears from Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, and that it could not plausibly be maintained that the defendant's vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with the defendant's crudely defaced jacket.

In Hess v Indiana (1973) 414 US 105, 38 L Ed 2d 303, 94 S Ct 326, it was held that a statement, made by a state court defendant during an antiwar demonstration on a university campus, "We'll take the fucking street later (or again)," could not be punished as obscene under Roth v United States (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8, and its progeny.

III. Procedural aspects of concept[16]

§ 21. Who determines question of obscenity

Notwithstanding earlier diversity of views expressed by individual members of the United States Supreme Court on the question, it is now settled that the Supreme Court will make an independent determination of ob-

16. The discussion of the procedural aspects of the concept of obscenity is limited to those procedural aspects which reflect or affect the substantive aspects of the concept.

scenity, irrespective of the findings below.

As stated by a majority of the court in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, in resolving the inevitably sensitive questions of fact and law in obscenity prosecutions, reliance must be placed on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide. The mere fact that juries may reach different conclusions as to the same material was held not to mean that constitutional rights are abridged. The court also pointed out that even though state law that regulates obscene material is limited by the standards of obscenity enunciated in its opinion, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional questions.

In Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750, the court held that based on the court's viewing of a particular film, the motion picture was not obscene, and thus the defendant's conviction for violating a state's obscenity statute could not be upheld, even though a state court jury had returned a guilty verdict. The court stated that (1) such a verdict does not preclude all further appellate review of the defendant's assertion that his exhibition of the motion picture involved was protected by the First and Fourteenth Amendments; (2) even though questions under the obscenity test, of appeal to the "prurient interest," or of patent offensiveness, are essentially questions of fact, juries do not have unbridled discretion in determining what is "patently offensive," and (3) appellate courts have the ultimate power to conduct an independent review of constitutional claims when necessary.

The decision in Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750, supra, settled a dispute between some members of the court, as shown by the separate opinions in Jacobellis v Ohio (1964) 378 US 184, 12 L Ed 2d 793, 84 S Ct 1676, where Brennan and Goldberg, JJ., in the plurality opinion, expressed the view that in applying the Roth test (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), the Supreme Court must make an independent constitutional judgment on the facts of each case, and cannot merely decide whether there is substantial evidence to support a finding that certain material is obscene, whereas Warren, Ch. J., joined by Clark, J., in a dissenting opinion, expressed the opposite view, that is, that in applying the Roth test, the Supreme Court should avoid sitting as a "super censor" and should limit itself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity can be made under the constitutional test.

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"Dominance" of the theme, within the meaning of the rule that as a matter of constitutional law, a test of obscenity depends upon determination whether to the average person "the dominant theme of the material taken as a whole appeals to prurient interest," was held, in Kois v Wisconsin (1972) 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245, a question of constitutional fact to be determined by the Supreme Court of the United States.

§ 22. Necessity and admissibility of expert testimony

The Supreme Court has held that there is no constitutional need for expert testimony on the question of obscenity of the material involved where that material itself has been placed in evidence, but that the defense is free to introduce evidence on the obscenity question by calling a qualified expert.[17]

17. As to the use of experts in obscenity cases, see 10 Am Jur Trials 1, Obscenity Litigation, which deals with expert testimony in §§ 56–62, and the article by G. K. Whyte, Jr., entitled "The Use of Expert Testimony in Obscenity Litigation," in Wis L Rev 113 (1966). Attention is also invited

The leading case on the use of expert testimony on the question of obscenity is Kaplan v California (1973) 413 US 115, 37 L Ed 2d 492, 93 S Ct 2680, reh den 414 US 883, 38 L Ed 2d 131, 94 S Ct 28, where the court, in a state criminal prosecution under the state's obscenity laws, ruled that there is no constitutional need for "expert" testimony on behalf of the prosecution or for any other ancillary evidence of obscenity, once the allegedly obscene materials themselves are placed in evidence. The court pointed out that although the defense should be free to introduce appropriate expert testimony, the prosecution's introduction of the material is sufficient for determination of the obscenity question. In support of its statement that the defense should be free to introduce appropriate expert testimony, the court referred to the concurring opinion of Frankfurter, J., in Smith v California (1959) 361 US 147, 4 L Ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L Ed 2d 383, 80 S Ct 399. For that reason it is of interest to state the grounds on which Mr. Justice Frankfurter rested his opinion. He pointed out that (1) the right of one charged with obscenity, a right implicit in the very nature of the legal concept of obscenity, is to enlighten the judgment of the tribunal, be it the jury or the judge, regarding the prevailing literary and moral community standards, and to do so through qualified experts; (2) community standards can as a matter of fact hardly be established except through experts; (3) therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process; (4) while the testimony of experts would not displace judge or jury in determining the ultimate question of obscenity, there is no external measuring rod for obscenity, nor is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges; (5) since, under Roth (354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L Ed 2d 60, 78 S Ct 8), the law, through its functionaries, is "applying contemporary community standards" in determining what constitutes obscenity, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are; (6) their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge; and (7) the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporary community standards." The Justice's opinion went on to state that it cannot be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859; that the difference derives from a shift in community feeling regarding what is to be deemed prurient, or not prurient, by reason of the effects attributable to a particular writing; that changes in the intellectual and moral climate of society afford shifting foundations for the attribution; and that what may well have been consonant with mid-Victorian morals does not seem to answer to the understanding and morality of the present time. The opinion concluded that it was violative of due process to exclude the constitutionally relevant evidence of duly qualified witnesses regarding the prevailing literary standards, and the literary and moral criteria, by which materials relevantly comparable to the material in issue are deemed not obscene. The views expressed in Mr. Justice Frankfurter's opinion have never been adopted by a majority of the Supreme Court. It may also be noted that Harlan, J., concurring in part and dissenting in part in Smith, expressed the view that a conviction for violation of an obscenity statute is fatally defective where the trial

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to the article by R. McGaffey entitled "Realistic Look at Expert Witnesses in Obscenity Cases," in 69 NW U L Rev 218 (1974).

judge turned aside every attempt by the defendant to introduce evidence bearing on community standards, but that the Constitution does not require that oral opinion testimony by experts be heard, even though expert testimony is the most convenient and practicable manner of proof.

Noting that defense counsel never objected to the testimony of the state's expert on community standards, the court in Miller v California (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 26, ruled that the state's expert witness was qualified to give evidence on the state's "community standards" as to obscenity, and that allowing such expert testimony was not constitutional error, where the witness was qualified as an expert, being a police officer with many years of specialization in obscenity offenses, had conducted an extensive statewide survey, and had given expert evidence on 26 occasions in the year prior to the trial.

In Paris Adult Theatre I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27, a civil action instituted in a state court by a local district attorney for a declaration that certain motion-picture films were obscene, and for an injunction against the defendants' exhibition of such films at their theaters, the Supreme Court ruled that it was not error to fail to require expert affirmative evidence that the materials were obscene, where the materials themselves were actually placed in evidence. The court pointed out that films are the best evidence of what they represent. As explained in Kaplan v California (1973) 413 US 115, 37 L Ed 2d 492, 93 S Ct 2680, reh den 414 US 883, 38 L Ed 2d 131, 94 S Ct 28, the Paris Theatre Case rejected any constitutional need for "expert" testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene material itself has been placed in evidence.

The most recent Supreme Court case dealing with the use of expert testimony on the question of obscenity is Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157, where the court again ruled that expert testimony is not necessary to enable a jury to judge the obscenity of material which has been placed into evidence. Noting that both the government and the defendants introduced such testimony, the court pointed out that the jury is not bound to accept the opinion of any expert in weighing the evidence of obscenity.

ANNOTATION

MODERN CONCEPT OF OBSCENITY

TOTAL CLIENT SERVICE LIBRARY REFERENCES

10 Am Jur Trials 1, Obscenity Litigation

ALR Quick Index, Indecency, Lewdness, and Obscenity

INDEX

TABLE OF JURISDICTIONS REPRESENTED

Consult Pocket Parts for later case service

US ——— §§ 1[a], 2–8, 9[a], 10, 12[a, b], 13[a, b], 15[a–c], 16[a, b]
Ariz ——— §§ 4[e], 9[a], 15[a]
Ark ——— §§ 3[a], 9[a, b]
Cal ——— §§ 3[a], 4[e], 6[a, b], 8[b], 15[a, b], 16[a]
Conn ——— § 4[e]
DC ——— § 4[e]
Fla ——— §§ 3[a], 6[a]
Ill ——— §§ 3[a, b], 4[e], 5, 15[a, b]
Md ——— §§ 3[a, b], 4[e], 7[a, b], 8[a], 15[a, b]
Mass ——— §§ 3[a], 4[a, e], 5, 6[a], 8[a], 15[a, b]
Minn ——— §§ 3[a], 4[e]
Miss ——— §§ 3[b], 15[a]
Mo ——— §§ 2, 4[e], 8[a], 9[a], 15[b], 16[a]
Neb ——— §§ 3[a], 4[e], 8[a], 10
NJ ——— §§ 3[a], 4[c, e], 6[a, b], 9[a], 15[a, b]
NY ——— §§ 2, 3[a], 4[e], 5, 6[a], 12[a], 15[a, b], 16[b]
Ohio ——— §§ 4[e], 8[a]
Or ——— §§ 4[b, d], 5
Pa ——— §§ 3[a], 7[a], 9[b], 13[a]
Tex ——— §§ 3[a], 4[e], 9[b]
Va ——— § 8[a]
W Va ——— §§ 4[e], 9[a]
Wis ——— §§ 1[a], 3[a], 4[a, c–e], 8[a], 9[b], 13[b], 15[b]
Eng ——— § 2

I. Preliminary matters

§ 1. Introduction

[a] Generally; scope

Questions concerning the concept of obscenity are of great importance in view of the fact that Congress has passed 20 obscenity laws between 1942 and 1956, and there are similar laws in force in practically all the states and supported by international agreements of over 50 nations.[1] All the authorities agree that obscene matters are not protected by constitutional guaranties of free speech and press.[2] However, it is very difficult to define what are obscene matters not so protected.

Without attempting to exhaust all cases in point, this annotation discusses the modern concept of obscenity as first developed as a matter of federal constitutional law by the United States Supreme Court in the landmark case of Roth v United States (1957) 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8,[3] and in federal and state cases decided

1. This statement was made in United States v Darnell (1963, CA2 Conn) 316 F 2d 813, cert den 375 US 916, 11 L ed 2d 155, 84 S Ct 265, reh den 375 US 982, 11 L ed 2d 429, 84 S Ct 493.

2. Roth v United States (1957) 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8, also stating that obscenity is excluded from the constitutional protection only because it is utterly without redeeming social importance.

In Kingsley Books, Inc. v Brown (1957) 354 US 436, 1 L ed 2d 1469, 77 S Ct 1325, the court pointed out that in an unbroken series of cases extending over a long stretch of the United States Supreme Court's history, it has been accepted as a postulate that "the primary requirements of decency may be enforced against obscene publications."

In Times Film Corp. v Chicago (1961) 365 US 43, 5 L ed 2d 403, 81 S Ct 391, reh den 365 US 856, 5 L ed 2d 820, 81 S Ct 798, it was held that the constitutional guaranty of freedom of speech does not preclude a municipality from protecting its people against the dangers of obscenity in the public exhibition of motion pictures, and that it is not true that regardless of the capacity for or extent of such an evil, previous restraint cannot be justified.

3. The standard of obscenity enunciated in the Roth Case has been often referred to as the Roth test (see McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR3d 1140), and will be so referred to in the present annotation.

thereafter.[4] Earlier cases are discussed as background material[5] only insofar as it is necessary to an understanding of the modern concept of obscenity.

The annotation is concerned only with legislative enactments which in terms deal with "obscene" matter; excluded from consideration are related terms, such as lewd, lascivious, filthy, indecent, or disgusting matter.

The present discussion deals only with the modern standards of obscenity and does not include the validity of the methods employed to protect the public against obscenity. In that respect see the annotation in 5 ALR3d 1214.

[b] Related matters

Constitutionality of federal and state regulation of obscene literature. 1 L ed 2d 2211, 4 L ed 2d 1821.

Validity of procedures designed to protect the public against obscenity. 5 ALR3d 1214.

What amounts to an obscene play or book within prohibition statute. 81 ALR 801.

Publications of a scientific, educational, or instructive character regarding sex relations as within statutes relating to obscene or immoral publications. 76 ALR 1099.

Entrapment to commit offense against obscenity laws. 77 ALR2d 792.

Constitutionality, construction, and effect of censorship laws. 64 ALR 505.

Power of municipality in respect of inspection and censorship of motion picture films. 126 ALR 1363.

What matter is nonmailable under 18 USC § 1461 and its predecessor statute (18 USC § 334). 76 L ed 845, 8 L ed 2d 1045.

§ 2. Background

The concept of obscenity has been defined by various courts and in various contexts prior to the Roth Case.[6]

The early leading standard of obscenity was defined in Reg. v Hicklin (Eng) (1868) LR 3 QB 360, 8 ERC 60, in which a pamphlet purporting to expose the errors and practices of the Roman Catholic Church in the matter of confession was held obscene, and in which Cockburn, C. J., said: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral

4. The necessity of focusing attention on the Roth Case and the cases decided thereafter clearly appears from statements made by the court in Capitol Enterprises, Inc. v Chicago (1958, CA7 Ill) 260 F2d 670, where it was pointed out that value changes that have occurred and are persistently occurring in this country gradually brought motion pictures to the status of the constitutionally protected medium, and consequently early censorship cases serve very little in this modern setting; that judges, no less than legislators, should observe, without prejudice, what is going on in our changing society, averting through such alertness the treating of law as a petrified body of shibboleths; that in the past "obscene" was hedged about with all the unreasoning of verbal taboos and the community imagined that that word was "invariant under transformation," and that only the recent United States Supreme Court decisions came to terms with the change.

In determining the concept of obscenity for the purposes of 18 USC § 1461, prohibiting the mailing of obscene matter, and its predecessor statute, 18 USC § 334, the lower federal courts, prior to the Roth Case, applied tests different from those enunciated therein, but since the decision in that case they have uniformly applied the Roth standard of obscenity. See annotation in 8 L ed 2d 1045 at page 1049.

5. § 2, infra.

6. See, for instance, Swearingen v United States (1896) 161 US 446, 40 L ed 765, 16 S Ct 562, where the words "obscene," "lewd," and "lascivious," as used in a federal statute respecting the wrongful use of the mails, were defined as signifying that form of immorality which has relation to sexual impurity, and as having the same meaning given these words at common law in prosecution for obscene libel.

influences, and into whose hands a publication of this sort may fall."[7]

As pointed out by the United States Supreme Court in the Roth Case, this standard allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons, and was adopted by some American courts.[8] For instance, the Hicklin test was the law of New York[9] and Missouri[9.1] until the decision in the Roth Case was handed down. It was also applied in some of the earlier federal cases.[10]

On the other hand, other pre-Roth American courts rejected the Hicklin test,[11] primarily on the grounds that (1) as applied, a book might be condemned on the basis of isolated passages in it rather than because of its "dominant effect," and (2) that it reduced treatment of sex to the standard of a child's library.[12]

Illustrative of these cases is United States v One Book Entitled Ulysses (1934, CA2 NY) 72 F2d 705, in which the court, in an opinion by Augustus Hand, Circuit Judge, in holding that the book "Ulysses" by James Joyce was not obscene within the meaning of a federal statute prohibiting the importation of obscene books, stated that works of physiology, medicine, science, and sex instruction were not within the statute, although to some extent and among some persons they may tend to promote lustful thoughts, and that the same immunity should apply to literature as to science, "where the presentation, when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication," the question in each case being "whether a publication taken as a whole has a libidinous effect."

Not until the decision in 1957, of Roth v United States, did the United States Supreme Court declare unconstitutional a standard of obscenity which did not conform to the standard and test laid down in that case. The significance of the Roth Case is not only that it furnishes a comprehensive definition of obscenity for modern use, but also that it makes this definition a matter of federal constitutional law.

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7. As to the modern concept of obscenity in English law see Reg. v Martin Secker Warburg, Ltd. [1954] 2 All Eng 683, where the court instructed the jury that in deciding the obscene nature of a novel, admittedly absorbed with the sex relationship of man and woman and purporting to describe contemporary life, it was necessary to take into account the changed approach to the question of sex since Reg. v Hicklin (Eng) (1868) LR 3 QB 360, 8 ERC 60, supra, was decided.

8. See the cases cited in footnote 25 of the court's opinion in the Roth Case.

9. See statement to that effect in People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681.

9.1. See State v Becker (1954) 364 Mo 1079, 272 SW2d 283, ovrld State v Vollmar (1965, Mo) 389 SW2d 20.

10. In United States v Kennerley (1913, DC NY) 209 F 119, a prosecution for sending an obscene book through the mails, Learned Hand, District Judge, felt obligated to follow the Hicklin test of obscenity but criticized the test, pointing out that however consonant it may be with mid-Victorian morals, the test did not seem to answer the understanding and morality of the present time, as conveyed by the words "obscene, lewd, or lascivious," used in the pertinent statute.

11. See the cases cited in footnote 26 of the opinion of the United States Supreme Court in the Roth Case.

A discussion of the standard of obscenity prevailing prior to the Roth Case will be found in Burgess, Obscenity Prosecution: Artistic Value and the Concept of Immunity, 39 NYU L Rev 1062 at pages 1065 et seq. See also the articles published prior to the Roth Case on "Obscenity and the Arts," in Law and Contemporary Problems pages 531 et seq. (1955).

12. People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681, citing United States v One Book Entitled Ulysses (1934, CA2 NY) 72 F2d 705, infra.

§ 3. Summary and comment

[a] Generally

The problem involved in laying down a standard of obscenity is to find the present critical point in the compromise between candor and shame at which the community has arrived.[13] Moreover, the right of freedom of speech and press seems to be in conflict with the right of the state to enact laws for the purpose of protecting society against obscene publications.[14]

As held as a matter of federal constitutional law by the United States Supreme Court in the leading case of Roth v United States (1957) 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8, infra § 4[a], the proper test in determining the obscene nature of material is whether to the average person,[15] applying contemporary community standards,[16] the dominant theme of the material taken as a whole[17] appeals to prurient interest.[18] However, as recognized in the Roth opinion itself,[19] the Roth Case did not present any issue concerning the obscenity of the material involved; hence it has been said that the Roth opinion discusses "obscenity on a highly theoretical basis,"[20] and that the court had no occasion to explore the application of a particular obscenity standard, being ultimately concern only with the question whether the co stitutional guaranties of free speech a press protect material admittedly o scene.[1] Moreover, most of the decisio of the United States Supreme Court i volving questions as to the obscene n ture of the material in issue, hand down since Roth v United States, ha been given without opinion and at fi failed to furnish appropriate guidan for lower courts and legislatures;[2] a up to the time the present annotati was prepared, no opinion of the cou that is, no opinion expressing the vie of a majority of the justices, has appli the Roth test to specific material.[3]

While the federal government ar virtually every state since the Unic was formed has had laws proscribir obscenity, and although obscenity is n within the protection of the Fir Amendment,[5] neither courts nor legi latures have been able to evolve a tru satisfactory definition of obscenity The United States Supreme Court itse has recognized the complexity of th test of obscenity fashioned in the Rot Case,[5] and the vital necessity in its ap plication of safeguards to prevent denu of the protection of freedom of speec and press for material which does no treat sex in a manner appealing t prurient interest.[6] The obscenity prot

13. People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681.

14. Scileppi, Obscenity and the Law, 10 NY L Forum 297 (1964).

15. § 8, infra.

16. §§ 8, 9, infra.

17. § 7, infra.

18. § 10, infra.

19. Footnote 8 in the court's opinion in the Roth Case.

20. Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328.

1. See separate opinion of Harlan and Stewart, JJ., in Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432.

2. See statement in separate opinion by Warren, Ch. J., and Clark, J., in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676.

3. § 1, and footnote 1, supra.

4. See statement to that effect in separa opinion by Warren, Ch. J., and Clark, in Jacobellis v Ohio (US) supra.

5. Marcus v Search Warrant of Proper (1961) 367 US 717, 6 L ed 2d 1127, 81 Ct 1708; Bantam Books, Inc. v Sulliva (1963) 372 US 58, 9 L ed 2d 584, 83 S 631.

See separate opinion by Brennan Goldberg, JJ., in Jacobellis v Ohio (1964 378 US 184, 12 L ed 2d 793, 84 S Ct 167

6. Marcus v Search Warrant of Proper (1961) 367 US 717, 6 L ed 2d 1127, 81 Ct 1708; Bantam Books, Inc. v Sulliv (1963) 372 US 58, 9 L ed 2d 584, 83 S 631.

lem is aggravated by the fact that it involves the area of public expression, an area in which a broad range of freedom is vital to our society and is constitutionally protected.[7] Constitutionally protected expression is often separated from obscenity only by a dim and uncertain line,[8] and under any definition of obscenity certain materials will lie in a gray area.[9] Notwithstanding the Roth test the concept of obscenity remains imprecise, its vague subject matter being largely left to the gradual development of general notions about what is decent.[10] Like the application of any general constitutional test, the test of obscenity, within the framework of the constitutional guaranties of freedom of speech and press, must necessarily be "pricked out on a case-by-case basis."[11]

The Roth test only indicates the broad boundaries of any permissible definition of obscenity under the United States Constitution.[12] A state may permit greater freedom of speech and press and hence a more liberal concept of obscenity than required by federal constitutional law, although it may not permit less.[13] The Roth test does not pretend to, and cannot, give specific content to the meaning of "obscene" as it appears in a specific statute.[14] Although the Federal Constitution does not stand as a barrier against legislation making obscenity criminal,[15] it does stand as a limitation on such legislation so as to compel its strict construction.[16]

The definition of the term "obscenity," as enunciated by the United States Supreme Court in the Roth Case, has generated much legal speculation[17] as well as further judicial interpretation by state and federal courts,[18] and has also

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7. Separate opinion by Warren, Ch. J., and Clark, J., in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676.

8. Marcus v Search Warrant of Property (1961) 367 US 717, 6 L ed 2d 1127, 81 S Ct 1708; Bantam Books, Inc. v Sullivan (1963) 372 US 58, 9 L ed 2d 584, 83 S Ct 631; State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225.

9. State v Hudson County News Co. (NJ) supra.

10. People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681.

11. Separate opinion by Harlan, J., in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, in which he also pointed out that he experienced no greater ease than do other members of the Supreme Court in attempting to verbalize generally the respective constitutional tests, since in truth the matter in the last analysis depends on how the particular material charged happens to strike the minds of jurors or judges and ultimately those of a majority of the members of the United States Supreme Court.

12. People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681.

13. McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR3d 1140.

14. People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681.

15. People v Richmond County News, Inc. (NY) supra.

16. People v Richmond County News, Inc. (NY) supra.

17. See statement in separate opinion by Warren, Ch. J., and Clark, J., in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676.

Among the many articles written on the subject are the following: Froessel, Law and Obscenity, 27 Albany L Rev 1 (1963); Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Columbia L Rev 391 (1963); Censorship and Obscenity: A Panel Discussion, 66 Dickinson L Rev 421 (1962); Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5 (1960); Scileppi, Obscenity and the Law, 10 NY L Forum 297 (1964); Burgess, Obscenity Prosecution: Artistic Value and the Concept of Immunity, 39 NYU L Rev 1063 (1964); Melott, Constitutional Law—Obscenity, 43 NC L Rev 172 (1964); O'Meara, Obscenity in the Supreme Court, a Note on Jacobellis v Ohio, 40 Notre Dame Lawyer 1 (1964); Lockhart and McClure, Obscenity Censorship: The Core Constitutional Issue—What is Obscene? 7 Utah L Rev 289 (1961).

18. See statement in separate opinion by Warren, Ch. J., and Clark, J., in Jacobellis v Ohio (US) supra.

been relied upon by legislatures.[19] The modern concept of obscenity has been discussed even in publications directed to the general public.[20]

It has been said that the Roth test "creates an illusory sense of certainty."[1] This is borne out by the fact that not only have the courts reached contrary results as to the obscene nature of the same material under the Roth test,[2] but also by the fact that there is a conflict of authority as to specific aspects of the test, for instance, as to whether the Roth test limits the constitutional meaning of obscenity to "hard-core pornography"[3] and whether this phrase is susceptible of more precise definition than the term "obscene,"[4] whether, in view of the requirement that material judged be as a whole, illustrations of a text may be judged apart from the text,[5] whether the geographical area determining "community standards" is nationwide, statewide, or local,[6] whether the concept of obscenity is immutable or should vary according to the circumstances of the

19. See statements in separate opinion by Warren, Ch. J., and Clark, J., in Jacobellis v Ohio (US) supra.

Various statutes and ordinances have incorporated the Roth test of obscenity.

For instance, the 1961 California statute construed in Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445, as not applying to the novel "Tropic of Cancer" defines the term "obscene" as meaning "that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

For other legislative enactments embodying the Roth test, see the following cases:

Ark—Gent v State (1965, Ark) 393 SW 2d 219 (Arkansas antiobscenity statute).

Ill—Chicago v Kimmel (1964) 31 Ill 2d 202, 201 NE2d 386 (Chicago ordinance); People v Sikora (1965) 32 Ill 2d 260, 204 NE2d 768 (Illinois antiobscenity statute).

Minn—State v Oman (1961) 261 Minn 10, 110 NW2d 514 (Minnesota criminal antiobscenity statute).

Neb—State v Jungclaus (1964) 176 Neb 641, 126 NW2d 858 (Nebraska criminal antiobscenity statute).

NJ—Hudson County News Co. v Sills (1963) 41 NJ 220, 195 A2d 626, app dismd 378 US 583, 12 L ed 2d 1036, 84 S Ct 1914 (New Jersey criminal obscenity statute).

Pa—William Goldman Theatres, Inc. v Dana (1961) 405 Pa 83, 173 A2d 59, cert den 368 US 897, 7 L ed 2d 93, 82 S Ct 174 (Roth test adopted in Pennsylvania Motion Picture Control Act of 1959; however, the act was declared unconstitutional for various reasons).

Tex—Carter v State (1965, Tex Crim) 388 SW2d 191 (Texas criminal antiobscenity statute).

20. See the essay on "The New Pornography," in Time Magazine, Vol 85, No. 16, issue of April 16, 1965, page 28.

1. Flying Eagle Publications, Inc. v United States (1960, CA1 NH) 273 F2d 799.

2. See the discussion concerning the novel "Tropic of Cancer," infra, this section.

3. § 6[a], infra.

Allegedly obscene materials have been divided into three rough categories: (1) novels of apparently serious literary intent, (2) borderline entertainment, such as magazines, cartoons, nudist publications, etc., (3) hard-core pornography, which no one would suggest held literary merit. Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328. Referring to these categories, the Supreme Judicial Court of Massachusetts pointed out that the most difficult area is that of works which some persons reasonably believe to have literary merit but which, equally reasonably, may be even more objectionable to others than "Lady Chatterley's Lover."

4. § 6[b], infra.

5. § 3[b], infra.

6. § 9, infra.

Whether a state community standard would be constitutional has not yet been determined by the United States Supreme Court. Making this observation, the court in People v Sikora (1965) 32 Ill 2d 260, 204 NE2d 768, pointed out that some of the justices would clearly favor a national standard, others would clearly favor a local standard, and still others adhere to an approach to First Amendment problems that has made it unnecessary for them to consider the question.

individual cases, for instance, according to the media of expression,[7] or the setting and the nature of the proceeding in which the question arises,[8] or the nature and content of the controlling legislation.[9] The "average person" test also raises questions as to whether the issue of obscenity should be determined by the judge or by the jury,[10] as to the extent and scope of appellate review of such determinations,[11] and as to the admissibility of evidence on the question of community standards.[12]

That the Roth test is difficult of application in individual cases and that under this test contrary results may be reached by different courts as regards the same material is best illustrated by decisions concerning Henry Miller's book "Tropic of Cancer" which have been handed down since the Roth Case was decided; the book was held not obscene in a number of cases,[13] but has been held obscene in other cases.[14] It has been observed that the legal status of the book "is largely tied into the geography of its sale or publication."[15] The question of the obscenity of the book was before the United States Supreme Court in Grove Press, Inc. v Gerstein (1964) 378 US 577, 12 L ed 1035, 84 S Ct 1909, on certiorari from a judgment of the District Court of Appeals of Florida (156 So 2d 537), which affirmed a decision of the trial court holding the book obscene. The United States Supreme Court reversed, but the justices were divided as to the grounds of reversal. Justices Brennan and Goldberg expressed the view that under the Roth test the book was not obscene; Justices Black and Douglas expressed the view that the suppression of any book, in injunctive proceedings, such as the present one, violated the constitutional guaranty of freedom of press; and Mr. Justice Stewart expressed the view that under this constitutional guaranty obscenity laws are constitutionally limited to hard-core pornography. On the other hand, Mr. Chief Justice Warren and Justices Clark, Harlan, and White dissented on the ground that certiorari should be denied.[16]

Similarly, the book commonly known as "Fanny Hill" has been held obscene by some of the courts,[16.1] and not ob-

7. § 12, infra.
8. § 13[a], infra.
9. § 13[b], infra.
10. § 14[a], infra.
11. § 15[b] and [c], infra.
12. § 16, infra.
13. See, for instance, the following:

Cal—Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445.

Mass—Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328.

Wis—McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR3d 1140.

14. See, for instance, People v Fritch (1963) 13 NY2d 119, 243 NYS2d 1, 192 NE2d 713. However, in Larkin v G. P. Putnam's Sons (1964) 14 NY2d 399, 252 NYS2d 71, 200 NE2d 760, the Court of Appeals recognized that its decision in the Fritch Case was overruled by the United States Supreme Court in Grove Press, Inc. v Gerstein (1964) 378 US 577, 12 L ed 2d 1035, 84 S Ct 1909, revg (Fla App) 156 So 2d 537, infra.

See also the trial court cases referred to in footnote 1 of the court's opinion in Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445.

In Yudkin v State (1962) 229 Md 223, 182 A2d 798, the court refused to hold as a matter of law that the book was not obscene.

15. Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445.

16. Pursuant to the mandate of the United States Supreme Court, the Florida District Court of Appeals directed the dismissal of the complaint. In view of the division of the members of the United States Supreme Court, the Florida Court did not state any reasons. (166 So 2d 690.)

16.1. Atty. Gen. v A Book Named "John Cleland's Memoirs of a Woman of Pleasure" (1965, Mass) 206 NE2d 403, probable

scene by others.[16.2] The question is now pending before the United States Supreme Court.

The difficulties presented in applying the Roth test to specific material challenged as obscene is also well illustrated by the fact that in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676 (in which a conviction of exhibiting an obscene film, namely, the French film "The Lovers," was reversed without the justices agreeing on an opinion) four of the members of the court applied the Roth test, two of them, Justices Brennan and Goldberg, reaching the result that the film was not obscene, and two other members of the court, Mr. Chief Justice Warren and Mr. Justice Clark, reaching the result that there was sufficient evidence in the record upon which a finding of obscenity could be made under the constitutional test. Another member of the court, Mr. Justice Stewart, held that obscenity laws are constitutionally limited to hard-core pornography, and that the film was not so classifiable.

[b] Practice pointers

Most authorities seem to agree that one whose material is challenged on the ground of obscenity is entitled to offer evidence relating to contemporary community standards.[17] Counsel for such a party should be careful to exercise this right, because where no such evidence is offered the triers of fact may be held the exclusive judges of what the common conscience of the community is.[18] Evidence of any local or statewide community standard should be offered by any party who wants to contest the application of a national community standard, because in the absence of such an offer of evidence the court will not decide the geographical area applicable to the concept of community standard.[18.1] Likewise, evidence of the artistic, literary,[19] scientific, educational, or other merits of the material, or absence thereof, should be offered, because where no such evidence is offered, the determination must be made from an examination of the material in question.[19.1] The evidence offered may be expert testimony,[20] the testimony of psychiatrists, if they can qualify as expert witnesses,[1] a study or critique of the challenged work,[2] prior determinations of nonobscenity in other cases,[3] or other books on sale in the community which are to be compared with the challenged book.[4]

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jurisdiction noted (US) 15 L ed 2d 154; G. P. Putnam's Sons v Calissi (1964) 86 NJ Super 82, 205 A2d 913.

16.2. Larkin v G. P. Putnam's Sons (1964) 14 NY2d 399, 402, 252 NYS2d 71, 73, 200 NE2d 760, 761 (decided by a closely divided court).

17. § 16, infra.

18. Such a ruling was made in Chicago v Kimmel (1964) 31 Ill 2d 202, 201 NE 2d 386.

In Yudkin v State (1962) 229 Md 223, 182 A2d 798, the court reaffirmed the holding, not clearly expressed in the opinion, in Monfred v State (1961) 226 Md 312, 173 A2d 173, cert den 368 US 953, 7 L ed 2d 386, 82 S Ct 395, that where there is a dearth of evidence other than the obscene material itself, exhibits of allegedly obscene material speak for themselves.

18.1. People v Sikora (1965) 32 Ill 2d 260, 204 NE2d 768.

Generally, as to the determinative geographical area of the community standard, see § 9, infra.

19. See Yudkin v State (1962) 229 Md 223, 182 A2d 798, infra § 16[a].

19.1. People v Sikora (1965) 32 Ill 2d 260, 204 NE2d 768.

20. See Yudkin v State (1962) 229 Md 223, 182 A2d 798, infra § 16[a].

See also 10 Am Jur Trials 1, Obscenity Litigation §§ 56–62.

1. See Yudkin v State (1962) 229 Md 223, 182 A2d 798, infra § 16[a].

2. See Yudkin v State (1962) 229 Md 223, 182 A2d 798, infra § 16[a].

3. See Yudkin v State (1962) 229 Md 223, 182 A2d 798, infra § 16[a].

4. Yudkin v State (1962) 229 Md 223, 182 A2d 798, infra § 16[a].

However, there is a conflict of authority as to the admissibility of such evidence. § 16 [b], infra.

Without incurring the risk of prejudicial error in case his motion is granted, either the prosecuting or defense attorney in a criminal prosecution involving obscene material may move the court to direct the jury to read the challenged material[5] silently, either in open court[5.1] at the close of the prosecution's case[6] or in the jury room,[7] the matter being largely in the discretion of the trial court[8] and a procedure permitting the silent reading of the material not depriving the accused of a public trial.[9]

If books challenged as obscene are addressed to a special audience,[9.1] this should be alleged and evidence in that respect should be offered.[9.2]

Where the attorney of one charged with violating obscenity regulations desires to complain, on appeal, that evidence as to the obscene nature of the material was unduly restricted by the trial court, he should not, for the purposes of appeal, admit that the material in question was obscene, because by so admitting he loses the right to complain about the exclusion of evidence, for instance, as to community standards of obscenity.[10]

Finally, prosecuting attorneys should be aware of the fact that it is not sufficient to allege in an indictment that the matter complained of is "obscene," it being necessary to state with specificity the language used upon which the charge is based.[10.1]

✦

Attention is called to the fact that the requirement of the Roth test that in determining the obscene nature of material the material must be judged "as a whole" invalidates the procedure prevailing in some of the courts prior to the decision in the Roth Case,[11] under which it was deemed proper to have the portions of an obscene character read to the jury by the prosecution, and the other portions essential to a proper understanding of what was meant by the prosecution to be read to the jury by the defense. This mode of procedure undoubtedly would be error today.[12]

II. Substantive aspects of concept

A. In general

§ 4. Definition of obscenity

[a] Generally; Roth test

As a matter of federal constitutional law, the proper modern test of 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."

This test was enunciated in the landmark case of Roth v United States (1957) 354 US 476, 1 L ed 2d 1498, 77

5. See 10 Am Jur Trials 1, Obscenity Litigation § 53.

5.1. United States v West Coast News Co. (1964, DC Mich) 228 F Supp 171.

6. United States v West Coast News Co. (F) supra.

7. Alexander v United States (1959, CA 8 Minn) 271 F2d 140; Chicago v Kimmel (1964) 31 Ill 2d 202, 201 NE2d 386 (holding it proper for the books, which were admitted into evidence, to be taken to the jury room without having been read to the jury in open court).

8. Alexander v United States (1959, CA8 Minn) 271 F2d 140.

9. United States v West Coast News Co. (1964, DC Mich) 228 F Supp 171.

9.1. § 8[b], infra.

9.2. See People v Sikora (1965) 32 Ill 2d 260, 204 NE2d 768.

10. See, for instance, United States v Hochman (1960, CA7 Wis) 277 F2d 631, cert den 364 US 837, 5 L ed 2d 61, 81 S Ct 70, reh den 364 US 906, 5 L ed 2d 199, 81 S Ct 231.

10.1. Spears v State (1965, Miss) 175 So 2d 158 (holding that an indictment charging defendant with use of obscene language over the telephone, without stating the language used, was fatally defective).

11. See, for instance, Burton v United States (1906, CA8 Minn) 142 F 57.

12. United States v West Coast News Co. (1964, DC Mich) 228 F Supp 171.

S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8, upholding the validity of a federal criminal statute (18 USC § 1461) concerning the mailing of obscene material, and in the companion case of Alberts v California, upholding a California criminal statute penalizing every person who wilfully produces obscene material or any notice or advertisement of such material. As regards the definition of obscenity, Mr. Chief Justice Warren concurred in the result, expressing doubts as to the wisdom of the broad language used in the majority opinion. Mr. Justice Harlan, concurring in the Alberts Case, but dissenting in the Roth Case, expressed the view that the definition of "obscenity," as used in different statutes should be controlling; Mr. Justice Douglas, joined by Mr. Justice Black, dissented in both cases, expressing the view that the test of obscenity indorsed by the court gives the censor free range over a vast domain and hence is inimical to freedom of expression.

In the Roth Case the United States Supreme Court quoted with approval the following instructions of the trial judge to the jury: "The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . . The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

Under the Roth test, the question of whether a literary work is obscene "is to be answered in the process of identifying the dominant theme and the degree of its appeal to the prurient interest." McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR3d 1140.

A balancing of factors is undoubtedly necessary in the application of the test, but where a work of apparent serious purpose is involved, the scales will not readily be tipped toward the determination of obscenity. McCauley v Tropic of Cancer (Wis) supra. The balancing concept was also expressed in other decisions. For instance, in Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328, the court said that "[w]hen the public risks of suppressing ideas are weighed against the risks of permitting their circulation, the guaranties of the First Amendment must be given controlling effect."

That literature is dismally unpleasant, uncouth, and tawdry is not enough to make it "obscene." Separate opinion by Justices Harlan and Stewart in Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432.

[b] Definition in draft of Model Penal Code

In the Roth Case the court stated (in footnote 20 of its opinion) that it perceived no significant difference between the meaning of obscenity developed in the case law and the definition of the American Law Institute, Model Penal Code § 207.10(2) of the Tentative Draft No. 6, 1957, stating that "[a] thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if

it goes substantially beyond customary limits of candor in description or representation of such matters."

And in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, Justices Brennan and Goldberg, in their separate opinions, went so far as to say that the Roth standard requires in the first instance a finding that the material "goes substantially beyond customary limits of candor in description or representation" of sex matters.

The Supreme Court of Oregon has adopted, as "apparently" approved by the United States Supreme Court in the Roth Case, the above definition of obscenity in the American Law Institute's Tentative Draft No. 6 of its Model Penal Code. Recognizing that the majority opinion in the Roth Case defines "prurient" as "having a tendency to excite lustful thoughts," the Supreme Court of Oregon, in State v Jackson (1960) 224 Or 337, 356 P2d 495, pointed out that in its view the United States Supreme Court had in mind the narrower meaning used by the Model Penal Code Tentative Draft No. 6, or at least meant to use the narrower meaning in cases following the Roth Case.

[c] Test of patent offensiveness

While not accepted by a majority of the United States Supreme Court, the view that the Roth test of obscenity embraces both the concept of a patent offensiveness and the element of the likely corrupt effect of the challenged material was taken by Justices Harlan and Stewart in Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432, wherein the United States Supreme Court, without a majority of the justices agreeing on an opinion, reversed the judgment below, in which injunctive relief had been denied to publishers of magazines consisting largely of photographs of nude male models, and which, according to the admissions of the publishers,[13] were published to appeal to the male homosexual group, against an order of the Postmaster General barring the magazines from the mail, as obscene, under 18 USC § 1461. The separate opinion of Justices Harlan and Stewart pointed out that Roth made "prurient interest" appeal not the sole test of obscenity; that reading that case as dispensing with the requisite of patently offensive portrayal would be out of keeping with Roth's evident purpose to tighten obscenity standards; and that to consider that the "obscenity" exception in the area of constitutionally protected speech or press does not require any determination as to the patent offensiveness vel non of the material itself might well put the American public in jeopardy of being denied access to many worthwhile works in literature, science, or art. The separate opinion further expressed the view that the magazines were not offensive on their face (Mr. Justice Clark apparently disagreeing with that view).

As to the statement by Mr. Justice Harlan in the Roth Case that obscenity requires proof of two distinct elements: (1) patent offensiveness, and (2) "prurient interest" appeal, it has been observed that although the opinion of Mr. Justice Harlan was joined only by Mr. Justice Stewart, the requirement of patent offensiveness articulated in the separate opinion was nevertheless inherent in the Roth opinion of the court, which approved the twofold concept expressed in the proposal of the American Law Institute. State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225. The court pointed out that the test expressed in the opinion of Mr. Justice Harlan expresses the characteristic of indecency which is the basis of society's objection to obscene material, and that if the test did not include both elements, many worthwhile works

13. See dissenting opinion of Clark, J., in 370 US at page 527, 8 L ed 2d at page 669, 82 S Ct at page 1457.

in literature, science, or art would fall under the sole test of "prurient interest" appeal. However, the court also said that the two elements will tend to coalesce, since that which is patently offensive will also usually carry the requisite "prurient interest" appeal.

The view has been expressed that before material can be held obscene it must be found both to appeal to prurient interests and to be patently offensive, these being not alternative tests. McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR 3d 1140 (footnote 19a of opinion).

The term "patent offensiveness" was held to describe material which can be deemed so offensive on its face as to affront current community standards of decency. State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225.

[d] "Clear and present danger" test

Another test suggested in connection with the term "obscene," as used in criminal antiobscenity statutes, is whether obscene material creates a "clear and present danger" as to the commission or the imminence of the commission of criminal behavior resulting from the reading of the material.[14]

This test has been discussed by some recent authorities,[15] but was rejected by the United States Supreme Court in the Roth Case, where the court pointed out that in the light of the holding that obscenity is not protected speech, it is unnecessary for the courts to consider the issues behind the phrase "clear and present danger," since certainly no one would contend that obscene speech may be punished only upon a showing of such circumstances.

The "clear and present danger" test was also rejected in State v Chobot (1960) 12 Wis 2d 110, 106 NW2d 286, app dismd 368 US 15, 7 L ed 2d 85, 82 S Ct 136, reh den 368 US 936, 7 L ed 2d 198, 82 S Ct 358.

[e] Application of Roth test

The Roth test has been consistently recognized in a number of cases.[16]

US—Glanzman v Schaffer (1958, CA2 NY) 252 F2d 333, vacated on other grounds 357 US 347, 2 L ed 2d 1368, 78 S Ct 1370 (denying relief from orders of the Post Office Department imposing sanctions upon obscene mail); United States v Keller (1958, CA3 Pa) 259 F 2d 54 (directing acquittal of defendant charged with having mailed obscene post cards); Capitol Enterprises, Inc. v Chicago (1958, CA7 Ill) 260 F2d 670 (holding not obscene a motion picture animating the theme of need for sex instructions and introducing in a second part, as a film within a film, straightforward instruction on sex); Flying Eagle Publications, Inc. v United States (1960, CA1 NH) 273 F2d 799 (reversing for new trial conviction of publisher of allegedly obscene crime-fiction magazine "Manhunt"); Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433 (holding the book "Lady Chatterley's Lover" not obscene so as to be nonmailable); Collier v United States (1960, CA4 Va) 283 F2d 780, cert den 365 US 833, 5 L ed 2d 744, 81 S Ct 746 (affirming conviction of mailing obscene pictures); United States v Oakley (1961, CA6 Tenn) 290 F2d 517, cert den 368 US 888, 7 L ed 2d 87, 82 S Ct 139, reh den 368 US 936, 7 L ed 2d 198, 82 S Ct 358 (affirming conviction of mailing obscene photographs); Ackerman v United States (1961, CA9 Cal) 293 F2d 449 (affirming conviction of mailing obscene matters); Womack v United States (1961) 111 App DC 8, 294 F2d 204, cert den 365 US 859, 5

14. Concurring opinion of Frank, Circuit Judge, in United States v Roth (1956, CA2 NY) 237 F2d 796, 825, 826, affd 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8.

15. See, for instance, State v Jackson (1960) 224 Or 317, 356 P2d 495.

16. No attempt has been made exhaustively to collect all cases applying the Roth test.

L ed 2d 822, 81 S Ct 826 (affirming conviction of mailing information as to where and how obscene matter could be obtained and of actually mailing obscene photographs); Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949 (sustaining conviction of mailing obscene matter, that is, the book "Peyton Place"); Excellent Publications, Inc. v United States (1962, CA1 NH) 309 F 2d 362 (magazines portraying nude women held not obscene in criminal prosecution for mailing obscene matter); United States v Peisner (1962, CA4 Md) 311 F2d 94, 5 ALR3d 1196 (holding that books transported in interstate commerce were obscene, but setting aside conviction because of admission of evidence unlawfully obtained); United States v Darnell (1963, CA2 Conn) 316 F2d 813, cert den 375 US 916, 11 L ed 2d 155, 84 S Ct 205, reh den 375 US 982, 11 L ed 2d 429, 84 S Ct 493 (affirming conviction of mailing obscene letter); Haldeman v United States (1965, CA10 Kan) 340 F2d 59 (reversing conviction of mailing obscene booklets and advertisements, these materials dealing with sex and various forms of sex deviation, without illustrations).

Big Table, Inc. v Schroeder (1960, DC Ill) 186 F Supp 254 (holding, upon judicial review of a post office order, that the magazine "Big Table I" was not obscene); Re Louisiana News Co. (1960, DC La) 187 F Supp 241 (holding that the Roth test was not met by state police officers in seizing "pin-up" or "girlie" magazines, such as Playboy); Dale Book Co. v Leary (1964, DC Pa) 233 F Supp 754 (holding obscene nudist magazines with color reproductions of nude females, giving prominence to the female external genital organs).

See Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676 (in which justices could not agree upon an opinion and, applying the Roth test, Justices Brennan and Goldberg held that the French film "The Lovers" was not obscene, and Mr. Chief Justice Warren and Mr. Justice Clark reached the opposite result).

Ariz—State v Locks (1964, 97 Ariz 148, 397 P2d 949 (reversing a conviction of exhibiting and keeping for sale obscene pictures and writings, and dismissing the case).

Cal—Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445 (holding that the novel "Tropic of Cancer" was not obscene).

Conn—State v Sul (1958) 146 Conn 78, 147 A2d 686 (affirming conviction under antiobscenity statute); State v Andrews (1962) 150 Conn 92, 186 A2d 546 (affirming conviction of possession of obscene literature and pictures).

State v Cercone (1963) 2 Conn Cir 144, 196 A2d 439 (sustaining conviction of violating antiobscenity statute by possession of obscene publication "Gang Girls").

Ill—Chicago v Kimmel (1964) 31 Ill 2d 202, 201 NE2d 386 (Roth test incorporated in municipal ordinance; books "Campus Mistress" and "Born to be Made" held not obscene); People v Sikora (1965) 32 Ill 2d 260, 204 NE 2d 768 (Roth test incorporated in state antiobscenity statute; book entitled "Lust Campus," a story of sexual adventures on a college campus, and book entitled "Passion Bride" describing curricular and extracurricular sexual episodes that took place during a honeymoon, held obscene).

Md—Monfred v State (1961) 226 Md 312, 173 A2d 173, cert den 368 US 953, 7 L ed 2d 386, 82 S Ct 395 (holding not obscene a set of photographs showing various poses of a woman in progressive stages of undress, though never quite naked, and a magazine "Black Garter," containing pictures of models who posed for "glamor" photography, and who were scantily dressed and depicted in coarsely offensive

postures, but holding obscene five other so-called "girlie" magazines).

Mass — Commonwealth v Moniz (1959) 338 Mass 442, 155 NE2d 762 (holding that the motion picture "Garden of Eden," depicting the experiences of nonnudists in a nudist colony, was not obscene); Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328 (holding that the book "Tropic of Cancer" was not obscene in the constitutional sense); Atty. Gen. v A Book Named "John Cleland's Memoirs of a Woman of Pleasure" (1965, Mass) 206 NE2d 403, probable jurisdiction noted (US) 15 L ed 2d 154 (holding that the book commonly known as "Fanny Hill" was obscene).

Minn — State v Oman (1961) 261 Minn 10, 110 NW2d 514 (applying Roth test in construing the term "obscene," as used in statute).

Mo — State v Vollmar (1965, Mo) 389 SW2d 20, 28 (holding obscene books replete with actual photographs of nude persons of both sexes, many of which clearly depicted both male and female genitalia).

Neb—State v Jungclaus (1964) 176 Neb 641, 126 NW2d 858 (applying statute embodying Roth test and holding that magazines containing photographs of nude males and females and certain records were obscene).

NJ—State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225 (reversing, on procedural grounds, convictions of obscenity, but holding that under the Roth test the "girlie" magazines involved were properly submitted by the trial court to the jury on the issue of their obscenity).

State v Hudson County News Co. (1962) 75 NJ Super 363, 183 A2d 161 (directing acquittal of distributor charged with violation of antiobscenity statute for sale of (1) magazines dealing with what might be termed "man's action" or "adventure" magazines, (2) magazines which might be referred to as the "for men only" type, and (3) "girlie" magazines).

NY — People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681 (holding that the magazine "Gent," notwithstanding its numerous pictures of nude women and descriptions of sexual arousal and satisfaction, was not obscene either within the meaning of the Roth test or the New York antiobscenity statute); People v Finkelstein (1962) 11 NY2d 300, 229 NYS2d 367, 183 NE2d 661, cert den 371 US 863, 9 L ed 2d 100, 83 S Ct 116 (holding obscene, in criminal prosecution, the books "Garden of Evil" and "Queen Bee"); Larkin v G. P. Putnam's Sons (1964) 14 NY2d 399, 402, 252 NYS2d 71, 73, 200 NE2d 760, 761 (holding that the book "Fanny Hill" was not obscene in the constitutional sense).

Ohio—Cincinnati v King (1958) 107 Ohio App 453, 8 Ohio Ops 2d 82, 159 NE2d 767, app dismd 169 Ohio St 107, 80 Ohio Ops 2d 67, 157 NE2d 431 (affirming conviction of violation of a municipal antiobscenity ordinance, upon finding the pamphlets involved obscene); State v Mazes (1965) 3 Ohio App 2d 90, 32 Ohio Ops 2d 166, 209 NE2d 496 (affirming conviction of knowingly possessing an obscene book entitled "Orgy Club").

State ex rel. Beil v Mahoning Valley Distributing Agency, Inc. (1960, CP) 84 Ohio L Abs 427, 169 NE2d 48, affd 116 Ohio App 57, 21 Ohio Ops 2d 299, 186 NE2d 631 (holding obscene a book "Sex Life of a Cop" in proceedings to enjoin its distribution).

Tex—Malone v State (1960) 170 Tex Crim 231, 339 SW2d 666 (reversing conviction of possession of obscene magazines on the ground that no instruction was given informing the jury of the Roth test); Janus Films, Inc. v Fort Worth (1962, Tex Civ App) 354 SW2d 597, error ref n r e 163 Tex 616, 358 SW2d 589 (sustaining, in exhibitor's suit for injunctive relief, the trial court's find-

ing that rape scene in film "The Virgin Spring" was obscene).

W Va—State v Miller (1960) 145 W Va 39, 112 SE2d 472 (holding that Roth test is for jury).

Wis—State v Chobot (1960) 12 Wis 2d 110, 106 NW2d 286, app dismd 368 US 15, 7 L ed 2d 85, 82 S Ct 136, reh den 368 US 936, 7 L ed 2d 198, 82 S Ct 358 (affirming conviction of possession of obscene magazine, not identified in opinion); McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR3d 1140 (holding, in declaratory judgment proceedings, that the book "Tropic of Cancer" is not obscene).

§ 5. Sex and obscenity

The view has been expressed that as a matter of federal constitutional law it is now clear that obscenity is restricted to sexual matters. State v Jackson (1960) 224 Or 337, 356 P2d 495 (the court relying on the Roth Case).

In the Roth Case it was pointed out that sex and obscenity are not synonymous, that obscene material is material which deals with sex in a manner appealing to prurient interest; that the portrayal of sex, in art, literature, and scientific works, for example, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press; and that sex, "a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages," and that it is one of the vital problems of human interest and public concern, the discussion of which is protected by the constitutional guaranties of freedom of speech and press.

Material dealing with sex is only obscene when it goes substantially beyond customary limits of candor in the description or representation of such matters; the guaranty of the Constitution is not confined to conventional material or to the expression of views shared by a majority of citizens. Haldeman v United States (1965, CA10 Kan) 340 F2d 59.

As stated by Justices Brennan and Goldberg in their separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, material dealing with sex in a manner that advocates ideas,[17] or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied constitutional protection; nor may the constitutional status of the material be made to turn on a "weighing" of its social importance against its prurient appeal, since a work cannot be proscribed unless it is "utterly" without social importance.

The mere undemonstrated possibility of harm to the community from realistic accounts of normal sexuality "is not of sufficient moment to warrant the exercise of the public force in their suppression." And this is true whether the narratives concerned may be said to have artistic or scientific justification or whether they lack anything of any possible value to society. People v Richmond County News, Inc. (1961) 9 NY 2d 578, 216 NYS2d 369, 175 NE2d 681.

The mere fact that a literary work depicting immoral conduct, such as adultery, expresses no adverse moral judgment does not render it obscene. Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433 (footnote 10 of opinion).

The mere fact that adultery or other sexually immoral relationships are portrayed approvingly cannot serve as a reason for declaring a work obscene without running afoul of the First Amendment. Kingsley International Pictures Corp. v Regents of University of State of N. Y. (1959) 360 US 684, 3 L ed 2d 1512, 79 S Ct 1362; People v Richmond County News, Inc. (1961)

17. See Kingsley International Pictures Corp. v Regents of University of State of N. Y. (1959) 360 US 684, 3 L ed 2d 1512, 79 S Ct 1362.

9 NY2d 578, 216 NYS2d 369, 175 NE 2d 681.

The same protection applies even if the material challenged as obscene is a form of entertainment, rather than an exposition of ideas, and even if it is lacking in all social value.[17.1] People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681 (the court citing from Winters v New York (1948) 333 US 507, 92 L ed 840, 68 S Ct 665, the statement that "[w]hat is one man's amusement, teaches another's doctrine").

Even though there was an explicit albeit fragmentary and fleeting love scene in the last reel of the film, which depicted an unhappy marriage and the wife's falling in love with a young archaeologist, a conviction of possessing and exhibiting an obscene film in violation of a state statute was held in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, to violate the constitutional guaranties of freedom of speech and press, Mr. Chief Justice Warren and Justices Clark and Harlan, dissenting. However, no majority of the justices could agree on an opinion.

As to Henry Miller's book "Tropic of Cancer," see § 3[a], supra.

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Nudity is not necessarily obscenity. Roth v United States (1957) 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8; Excellent Publications, Inc. v United States (1962, CA1 NH) 309 F2d 362.

Magazines aimed at a somewhat "sophisticated" male audience and containing, in the main, innocuous text, but also photographs of nude and partially nude women, usually portrayed in a seductive pose, but none of the photographs exposing the genitalia, were held in Excellent Publications, Inc. v United States (F) supra, not to be obscene so as to subject defendants to criminal prosecution under 18 USC § 1461, prohibiting the mailing of obscene matter. The court applied the Roth test, pointing out that nudity is not necessarily obscene and that while the pictures of the nude and the near nude are titillating and provocative, so are some of the greatest works of pictorial art. The court concluded that the pictures simply were not the kind of "hard-core pornography" within the reach of the statute construed in the light of the constitutional guaranty of freedom of press.

§ 6. — Hard-core pornography

[a] Generally

While there is no doubt that hard-core pornography is obscene in the constitutional sense,[18] the authorities are not in agreement as to whether the Roth test limits the constitutional meaning of obscenity to hard-core pornography, a question which has not yet been decided by the United States Supreme Court.

Some of the cases so limit the meaning of obscenity.

US — Excellent Publications, Inc. v United States (1962, CA1 NH) 309 F 2d 362 (by implication).

Cal—Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d

17.1. But see Atty. Gen. v A Book Named "John Cleland's Memoirs of a Woman of Pleasure" (1965, Mass) 206 NE2d 403, probable jurisdiction noted (US) 15 L ed 2d 154, in which the book commonly known as "Fanny Hill" was held obscene on the ground, among others, that it was "utterly without social importance."

The view that social importance of the material in question is significant in any obscenity case was expressed in People v Sikora (1965) 32 Ill 2d 260, 204 NE2d 768, the court relying upon Roth v United States (1957) 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8.

See also the definition of "hard-core" pornography in § 6[b], infra.

18. See, for instance, Ackerman v United States (1961, CA9 Cal) 293 F2d 449, sustaining conviction of mailing obscene matter on the ground that hard-core pornography was involved.

152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445.

Mass — Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328.

NY — People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681 (stating that the New York antiobscenity statute should apply only to what may properly be termed "hard-core pornography").

Mr. Justice Stewart, in his separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, expressed the view that under the First and Fourteenth Amendments criminal laws in the area of obscenity are constitutionally limited to hard-core pornography. However, he did not attempt further to define the kinds of material to be embraced within that shorthand description, and stated that perhaps he could never succeed in intelligibly doing so, but that he knew it when he saw it.

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On the other hand, the view has been taken that the Roth test does not limit the meaning of obscenity to hard-core pornography.

US—Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949.

Fla—Rachleff v Mahon (1960, Fla App) 124 So 2d 878.

NJ—State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225.

Under a Florida antiobscenity statute, the term "obscene" was held not limited to so-called "hard-core pornography," but to cover any material which is devoted not only to the presentation and exploitation of illicit sex, but also passion, depravity, or immorality. Rachleff v Mahon (1960, Fla App) 124 So 2d 878. It was pointed out, however, that the rule stated above may be subject to doubt under the federal constitutional standards enunciated by the United States Supreme Court, but that "be that as it may," the trier of the facts had found obscenity and there was nothing in the record that would cause the appellate court to disagree.

The view that the concept of obscenity is or may be constitutionally limited to hard-core pornography was rejected in State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225, the court pointing out that in the absence of any substantial concurrence as to the meaning of this term, its adoption at this time would not increase clarity or certainty in the law of obscenity, that the label "hard-core" pornography is too vague to be helpful to a court or jury in determining whether particular material is obscene, and that two states which have adopted the "hard-core" test reached opposite results in determining the constitutionality of the suppression of the same book.[19]

[b] Definition of phrase

Under the view that the Roth test limits the meaning of obscenity to "hard-core pornography," it becomes necessary to discuss the meaning of the latter phrase.

It has been said that hard-core pornography is easily recognized because of its repetitive emphasis (usually illustrated) upon purely physical action without character or plot development, and because even if its direct connection with crime or incitement to juvenile or other delinquency is not proved, it cannot arouse sympathy because of its essentially repulsive, as well as fraudulent, character. Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433.

19. The court's reference was to People v Fritch (1963) 13 NY2d 119, 243 NYS2d 1, 192 NE2d 713, and Larkin v G. P. Putnam's Sons (1964) 14 NY2d 399, 252 NYS2d 71, 200 NE2d 760, in which the book "Tropic of Cancer" was held "hard-core" pornography, as contrasted with Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328, in which the opposite result was reached.

Hard-core pornography has been defined as material which is commercial obscenity or salable pornography in the sense that it is utterly without redeeming social importance. Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445. The court went on to say, however, that if the material has literary value, if it is a serious work of literature or art, then it possesses redeeming social importance and obtains the benefit of the constitutional guaranties of freedom of speech and press.

On the other hand, in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, Mr. Chief Justice Warren and Mr. Justice Clark expressed the view that "hard-core pornography" cannot be defined with any greater clarity than "obscenity," and that even if the court should retreat to that position, it would soon be faced with the need to define "hard-core pornography," and meanwhile those who profit from the commercial exploitation of obscenity would continue to ply their trade unmolested.

The view that the term "hard-core pornography" is too vague to be helpful was also taken in State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225.

Even Mr. Justice Stewart, who, in his separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, expressed the view that the constitutional concept of obscenity is limited to hard-core pornography, admits that a definition of the latter phrase is difficult, if not impossible, but says, "I know it when I see it."

B. Specific elements and factors determining obscenity

§ 7. Judging material "as a whole"

[a] Generally

The earlier standard under which obscenity could be judged by the effect of an isolated excerpt taken from a book or other writing[20] was rejected in the Roth Case, which requires that material challenged as obscene must be judged "as a whole."

This rule, in varying language, is reflected in later cases decided by the lower federal courts. Zenith International Film Corp. v Chicago (1961, CA7 Ill) 291 F2d 785 (dealing primarily with proper procedures for licensing motion pictures, and stating that a publication must be judged as a whole, not merely by plucking isolated scenes or passages from it); Ackerman v United States (1961, CA9 Cal) 293 F2d 449 (stating that the writings of serious authors on subjects of public concern are not to be judged merely by selected words or phrases but as a whole); Haldeman v United States (1965, CA10 Kan) 340 F 2d 59 (stating that the constitutional status of published material dealing with sex is to be determined in the light of the effect it has when taken as a whole, and not by isolated excerpts, upon the average person and not the peculiarly susceptible); Re Louisiana News Co. (1960, DC La) 187 F Supp 241 (stating that it is not sufficient that an "isolated excerpt" is obscene).

An order of the Maryland State Board of Censors deleting from a motion picture showing the lives of the natives of the jungles of Brazil all scenes showing their bodies below the waist was held in Maryland State Board of Motion Picture Censors v Times Film Corp. (1957) 212 Md 454, 129 A2d 833, to have been properly reversed by the court below, since the board's order was predicated on the false legal premise that a scene could be eliminated because its possible obscenity outweighed any of its merits, considering that scene alone, whereas the proper statutory standard for the board was to weigh the scenes it found objectionable in relation to the picture as a whole to determine whether its

20. § 2, supra.

overall worth more than counterbalanced possibly obscene or pornographic bits or sequences.

Similarly, the requirement of considering allegedly obscene material "as a whole" was held violated where a motion-picture censorship statute authorized a censor to condemn a single "view," that is, one or more separate frames of a motion-picture film. William Goldman Theatres, Inc. v Dana (1961) 405 Pa 83, 173 A2d 59, cert den 368 US 897, 7 L ed 2d 93, 82 S Ct 174.

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On the other hand, even though a book such as "Peyton Place" may not be obscene so as to be barred from the mail, a passage lifted from the book, containing a vivid description of the accomplishment of sexual intercourse between a boy and a girl was held obscene in Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949, the court applying the Roth test and sustaining a conviction on a charge of using the mail for the delivery of information as to where obscene publications might be obtained and for mailing obscene matter.

[b] Where text is accompanied by illustrations

Whether illustrations challenged as obscene may be considered apart from the accompanying text seems a question which depends upon the circumstances of the individual case. In any event, at the present time there is not sufficient authority on the point to make it possible to state generalized rules.

In determining the nonobscene nature of a magazine containing pictures of models who posed for glamor photography and were portrayed scantily dressed in coarsely offensive postures, the court, in Monfred v State (1961) 226 Md 312, 173 A2d 173, cert den 368 US 953, 7 L ed 2d 386, 82 S Ct 395, gave weight to the fact that the textual matter accompanying the illustrations was in the main innocuous and purported to discuss in detail the technique of using shadows and lights in photographing the nude.

On the other hand, while stating that an instruction which directs that the jury must consider allegedly obscene material only as a whole is appropriate in the case of a single unit, such as a book or other writing, the court, in Flying Eagle Publications, Inc. v United States (1961, CA1 NH) 285 F2d 307 (a prosecution for mailing an obscene magazine), held that a jury is not compelled to regard illustrations as controlled by textual material. It was pointed out that an obscene picture of a Roman orgy would be no less so because accompanied by an account of a Sunday school picnic which omitted the offensive details, and that the principle is not different merely because these details might not be readily apparent to everyone upon a casual inspection.

§ 8. Contemporary community standard; meaning of phrase "average person"

[a] Generally; material distributed to public at large

Dealing with material distributed to the public at large,[1] the Roth test of obscenity refers to "the average person, applying contemporary community standards."[2]

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1. The "average person" test is applicable only to material distributed to the public at large. United States v 31 Photographs (1957, DC NY) 156 F Supp 350.

As to material designed for limited groups, such as scholars or scientists, see § 8[b], infra.

2. Notwithstanding the Roth test, the view has been expressed by at least one state court that community tolerance of obscenity does not establish community standards of morality or make obscenity less obscene. St. Louis v Mikes (1963, Mo App) 372 SW2d 508.

On the other hand, Mr. Justice Harlan, in his separate opinion in Smith v California

The words "average person," as used in a criminal statute embodying the Roth test, were held in State v Jungclaus (1964) 176 Neb 641, 126 NW2d 858, words of common meaning which need not be further defined in the court's instruction. The court pointed out that the opportunity of counsel to discuss the meaning of these words in his argument to the jury affords ample protection against any misuse of the term by the jury in considering the case.

It has also been said that the "average person" is comparable to the "reasonable man" often referred to in tort litigation. State v Nelson (1959) 168 Neb 394, 95 NW2d 678, where the court expressed doubt that the "average person," whether judge or juror, would be able to apply the phrase "appeals to prurient interest" without conjecture or resort to a dictionary.

The community standard of decency, like the standard of ordinary care, must be, in a sense, a rough average. Maryland State Board of Motion Picture Censors v Times Film Corp. (1957) 212 Md 454, 129 A2d 833.

Obscenity is not to be measured by the reactions of any particular class or group of the population, but by the standard of the community as a whole. Cincinnati v King (1958) 107 Ohio App 453, 8 Ohio Ops 2d 82, 159 NE2d 767, app dismd 169 Ohio St 107, 80 Ohio Ops 2d 67, 157 NE2d 431.

The determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporary community standards." Separate opinions by Justices Frankfurter and Harlan in Smith v California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399.

Mr. Justice Frankfurter, concurring in Smith v California (US) supra (invalidating, for failure to require scienter, a municipal criminal ordinance against possession of obscene books in any place where books are sold or kept for sale, pointed out that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859, and that the difference derives from a shift in community feeling regarding what is to be deemed prurient or not prurient by reason of the effects attributable to particular writings; that changes in the intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, affords shifting foundations for the attribution; and that what may well have been consonant with mid-Victorian morals does not answer the understanding and morality of the present time.

The early leading standard of obscenity, which allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons,[3] was rejected by the United States Supreme Court in the Roth Case, on the ground that this test "might well encompass material legitimately treating with sex."

A picture is not to be banned as obscene because of its possible effect, not upon the average citizen, but only upon the irresponsible, the immature, or the sensually minded. Maryland State Board of Motion Picture Censors v Times Film Corp. (1957) 212 Md 454, 129 A2d 833.

To condemn material as obscene it is not sufficient that a publication as a whole might have a deleterious effect upon youth or any group of particular susceptibility. Re Louisiana News Co. (1960, DC La) 187 F Supp 241.

If the appeal of allegedly obscene material, taken as a whole, to adults is not predominantly prurient, adults can-

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(1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399, pointed out that the community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates.

3. § 2, supra.

not be denied the material.[4] Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328.[4]

While recognizing the legitimate and existent interest of states and localities in preventing the dissemination of material deemed harmful to children, Justices Brennan and Goldberg, in a separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, pointed out that that interest does not justify a total suppression of such material, the effect of which would be to reduce the adult population to reading only what is fit for children.

In Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432, Justices Harlan and Stewart, discussing in a separate opinion the question of the obscene nature of magazines consisting largely of photographs of nude male models and published to appeal to the male homosexual group, pointed out that divorced from their "prurient interest" appeal to homosexuals the portrayals of the male nude could not fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates.

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It has been said that the resort to community standards seems more relevant to a determination of whether a book or other material is "patently offensive" than to a determination of whether it appeals to prurient interests. McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR 3d 1140.

[b] Material distributed to scholars and similarly qualified persons

The "average person" test has been held not applicable to material the use of which will be restricted to those in whose hands it will not have a prurient appeal. United States v 31 Photographs (1957, DC NY) 156 F Supp 350; People v Marler (1962) 199 Cal App 2d Supp 889, 18 Cal Rptr 923.

Thus, material sought to be imported by an institute for sex research at a state university for the sole purpose of furthering its study of human sexual behavior as manifested in varying forms of expression and activity and in different national cultures and historical periods, such material not to be available to the members of the general public but held under security conditions for the sole use of the institute staff members or of qualified scholars engaged in bona fide research, was held in United States v 31 Photographs (1957, DC NY) 156 F Supp 350, not obscene within the

4. Children may be denied access to offensive material, even though the material is not obscene insofar as the average adult is concerned. Thus, Warren, Ch. J., and Clark, J., in their separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, pointed out that a technical or legal treatise on pornography may well be inoffensive under most circumstances but at the same time "obscene" in the extreme when sold or displayed to children.

5. See Butler v Michigan (1957) 352 US 380, 1 L ed 2d 412, 77 S Ct 524, where the court, in support of its unanimous holding that a Michigan statute making it an offense to make available for the general reading public a book found to have a potentially deleterious influence upon youth was void as violating the due process clause of the Fourteenth Amendment, pointed out that the main vice of the statute was that it reduced the adult population of Michigan to reading only what is fit for children.

See also Bantam Books, Inc. v Sullivan (1963) 372 US 58, 9 L ed 2d 584, 83 S Ct 631, where the court, in invalidating the Rhode Island procedure concerning obscene material, pointed out that it entailed the complete suppression of publications, adult readers as well as juvenile readers being equally deprived of the opportunity to purchase the publications concerned.

And see Goldstein v Commonwealth (1958) 200 Va 25, 104 SE2d 66, where a statute making it a criminal offense to distribute material containing obscene language manifestly tending to corrupt the morals of youth was held invalid insofar as it undertook to provide a standard of judging obscenity dependent upon the undesirable effect the offensive material may have upon youth.

meaning of a federal statute prohibiting the importation of obscene material. The court recognized that material distributed to the public at large may not be judged by its appeal to the most sophisticated, nor by its appeal to the most susceptible, but distinguished situations in which use of material obscene under the "average person" test was restricted to those in whose hands it will not have a prurient appeal, stating that in the latter situation the material is not to be judged by its appeal to the populace at large.

Although the defendant in a criminal prosecution for "possession," "lending," and "giving" of obscene films admitted that the challenged films were obscene, his conviction was reversed and a new trial ordered in People v Marler (1962) 199 Cal App 2d Supp 889, 18 Cal Rptr 923, where the trial court had refused to instruct the jury to the effect that the giving or lending of obscene material directed to medical personnel for medical and scientific purposes was a justifiable and lawful use, and had given an instruction that if the film was obscene in itself, as admitted by the defendant, its giving or lending with the intent that it be used for experimentation on hospitalized perverts would not be made lawful merely by such intent. The appellate court pointed out that while it was not prepared to approve the actual instruction submitted by the defendant nor to disapprove of the instruction given by the court so far as it went, nevertheless, the jury was left without any proper instruction upon the issue raised by the defense, and under the instruction given might well have believed that if the material was found to be obscene and that the defendant "had given" it they should find the defendant guilty without regard to the purposes for which the films had been given. Noting that the California Penal Code, in provisions dealing with criminal prosecution for distribution of obscene matter, provided, in a section amended after the commission of the acts with which the defendant was charged, that it shall be a defense in any prosecution "that the act charged was committed in aid of legitimate scientific or educational purposes," the court pointed out that the true rule was that material, although admittedly obscene by the "average person" test, may be lawfully "given" when in good faith it is to be used exclusively within a professional group pursuing legitimate professional purposes where the material is germane to such purposes and is not likely to fall into the hands of others, and where it is not probable that the material will appeal to the prurient interests of the average person within the group.

§ 9. — Determinative geographical area

[a] Generally; national standard

The authorities are not in agreement as to the geographical area determining "community standards" of obscenity. The question has not yet been decided by the United States Supreme Court. The answer may depend upon the nature —federal or state—of the statute under which the issue of obscenity arises.

The view has been taken that the question of obscenity must be determined on the basis of a national standard.

In Excellent Publications, Inc. v United States (1962, CA1 NH) 309 F2d 362, the court stated that the "community" in terms of whose standards of decency the issue of obscenity must be decided is not any local community but the national community as a whole.

The view, at least insofar as used to suppress challenged material, that the "contemporary community standards" of obscenity must necessarily be uniform throughout the nation, and that under the New Jersey antiobscenity statute the contemporary community standard is not the standard of a particular individual, group of individuals, or locality, was taken in State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225, where, in support of this view, the

court said: "The First Amendment accepts for the nation as a whole the basic idea that freedom of expression is a necessary guarantee in a democratic society. In determining the constitutional limits of obscenity regulation, the issue in the particular case is whether the published material falls within or without that area of expression which it is the purpose of the First Amendment to protect. In resolving this issue, the court or jury must recognize that the balancing of freedom of expression against other social values has already been made in the adoption of the First Amendment and that this basic determination cannot be re-evaluated by a *de novo* balancing of local social interests against that area of constitutional protection which has been established. See Emerson, 'Toward a General Theory of the First Amendment,' 2 Yale L. J. 877 (1963). The First Amendment protects an area of free expression which cannot be diminished by obscenity regulation. Therefore, the standard to be applied under such regulations cannot operate in such a way as to alter the degree of protection from locality to locality. In short, the area of expression entitled to constitutional protection cannot be broad in some parts of the country and narrow in others. If a publication comes within the protected area, it cannot be suppressed any place where the First Amendment guarantee is in effect. If the United States Supreme Court were to hold that a particular publication was entitled to protection under the First Amendment, we doubt that any court, state or federal, could subsequently deny that publication protection on the ground that a higher community standard prevailed in its jurisdiction."

The court also said that the Model Penal Code, Official Draft 1962, which states in § 251.4(d) that in a criminal prosecution for obscenity evidence shall be admissible to show "the degree of public acceptance of the material in the United States," although not expressly discussing community standards, clearly leaves the impression that a national community standard should be applied rather than a state or local one. It was held reversible error for the trial judge to permit the jury in a criminal prosecution for obscenity to consider testimony of the local standards in the county in which the prosecution was had and to instruct them that they could use those standards in determining whether the magazines in question were obscene.

In Haldeman v United States (1965, CA 10 Kan) 340 F2d 59, reversing a conviction of mailing obscene matters, the court in footnote 5, stated that the community standard to be applied is that of the nation as a whole, and not that of a particular locality or area, citing Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, infra, without noting that the statement is supported only by the separate opinion of Justices Brennan and Goldberg.[5.1]

Likewise, the view that the phrase "contemporary community standards" refers to the entire nation and not the geographic boundaries of any state or subdivision thereof, and that to limit the concept to the standards of an area less than the entire nation would conflict with the First Amendment, was expressed in State v Locks (1964) 97 Ariz 148, 397 P2d 949, the court again relying upon Jacobellis v Ohio (US) infra, without stating that that view was not

5.1. In Gent v State (1965, Ark) 393 SW 2d 219, the contention that the Jacobellis Case determined conclusively that the "national community standard" must be applied was rejected by the court on the grounds that it did not appear in the Jacobellis Case that five judges, constituting a majority of the court, agreed upon the "national community" standard; that the case was decided by a six-to-three vote; and that there was no court opinion.

supported by a majority opinion of the United States Supreme Court.

In State v Vollmar (1965, Mo) 389 SW2d 20, the court concluded from later decisions of the Supreme Court of the United States (citing Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432, and Jacobellis v Ohio (US) infra) that the term "community," as used in determining the standard of decency, does not mean the local area involved, but relates to a national standard.

In their separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, Justices Brennan and Goldberg pointed out that while local communities are in fact diverse and that in determining obscenity the United States Supreme Court is confronted with the task of reconciling the rights of such communities with the rights of individuals, nevertheless communities vary in many respects other than in their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard or application of the Federal Constitution.

The view that under 18 USC § 1461, barring obscene matter from the mail, the test for determining the relevant "community" in terms of whose standards of decency the issue of obscenity must be judged is a national standard of decency, was expressed by Justices Harlan and Stewart in Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432 (wherein a majority of the justices could not agree on an opinion). It was pointed out that the federal statute reaches to all parts of the United States, whose population reflects many different ethnic and cultural backgrounds.

See Flying Eagle Publications, Inc. v United States (1960, CA1 NH) 273 F2d 799, wherein it was stated that in view of the fact that the federal statute making the mailing of obscene matter a criminal offense (18 USC § 1461) has national scope, and community standards reflected by a jury differ rather widely over the country at large, and to give the statute some uniformity in its application and to prevent abridgment of the freedom of the press, courts should very carefully scrutinize material alleged to be obscene before submitting it to a jury.

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On the other hand, the view has been taken that the reference in the Roth test to "community standards" means local community standards, and not a national standard.

Thus, it has been said that whether or not something is obscene depends upon the time and place of the alleged offense. State v Miller (1960) 145 W Va 59, 112 SE2d 472.

In Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, Mr. Chief Justice Warren, and Mr. Justice Clark, in a separate opinion pointed out that there are no provable "national standards," and perhaps there should be none; that in all events the United States Supreme Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one; and that while such a "community" approach may well result in material being proscribed as obscene in one community but not in another, communities throughout the nation are in fact diverse, and it is in such situations that the United States Supreme Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.

In Kingsley Books, Inc. v Brown (1957) 354 US 436, 1 L ed 2d 1469, 77 S Ct 1325 (in which the court upheld a New York statute dealing with obscene literature, and Mr. Justice Doug-

las, joined by Mr. Justice Black, dissented, expressing the view that the procedure for restraining by equity decree the distribution of all the condemned literature did violence to the First Amendment), the dissenters, in support of their view, pointed out that the judge or jury which finds the publisher guilty in New York City acts on evidence that might be quite different from evidence before the judge or jury that finds the publisher not guilty in Rochester; that in New York City the publisher may have been selling his tracts to juveniles, while in Rochester he may have sold to professional people; that the nature of the group among whom the tracts are distributed may have an important bearing on the issue of guilt in any obscenity proceeding; that every publication is a separate offense which entitles the accused to a separate trial; that "juries or judges may differ in their opinions, community by community, case by case"; and that the publisher is "entitled to that leeway under our constitutional system."

[b] Statewide or local community standard

The state courts seem not in agreement as to whether under state antiobscenity statutes the question of obscenity must be determined on the basis of a statewide or local community standard.

A statewide standard of obscenity was adopted in McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW 2d 545, 5 ALR3d 1140 (a declaratory judgment proceeding involving the question whether the book "Tropic of Cancer" was obscene), where the court pointed out that for the purposes of the Wisconsin statute no distinction ought to be made between the standards of different communities within the state. (However, the court expressed doubt whether standards relevant to the question of obscenity differ significantly from one locality to another in Wisconsin.) The court also pointed out that the Wisconsin statute permitted a judgment of obscenity to be used in a criminal trial of any person who was served with notice of it before the alleged violation, and that this should not be so if the particular matter could be obscene in one area and not in another.

On the other hand, affirming, under the Arkansas antiobscenity statute, an injunction against bringing "girlie" magazines into Jefferson County, the court in Gent v State (1965, Ark) 393 SW2d 219, declined to apply the "national community" standard and rested its decision on the ground that, as clearly established by the evidence, the contents of the magazines in question were not compatible with the contemporary community standards in Pine Bluff, Arkansas.

Similarly, noting that the definition of obscenity, as used in the 1959 Pennsylvania Motion Picture Control Act (declared invalid by the court), was obviously culled from the opinion of the United States Supreme Court in the Roth Case, the court, in William Goldman Theatres, Inc. v Dana (1961) 405 Pa 83, 173 A2d 59, cert den 368 US 897, 7 L ed 2d 93, 82 S Ct 174, pointed out that the word "community" as used in the act's definition of obscenity, meant a regional community, and not a political entity, such as the Commonwealth of Pennsylvania, it being obvious that the moral standards of the average resident of a metropolitan area were not the same as the moral standards of the average resident of a rural county.

Attention is called to the fact that, as stated in Carter v State (1965, Tex Crim) 388 SW2d 191, a Texas criminal antiobscenity statute sets the area for determination of contemporary community standards at an area not less than the state itself, the court holding that this provision of the statute was valid.

§ 10. What is "prurient interest"

The term "prurient interest," not being self-defining,[6] has been defined by the United States Supreme Court in the Roth Case[7] as relating to "material having a tendency to excite lustful thoughts," the court relying on the dictionary definition of "prurient," and the definition of the term "obscene" as contained in the American Law Institute, Model Penal Code § 207.10(2), tentative Draft No. 6, 1957.[8]

Defining the element of pruriency as tending to corrupt by inciting lascivious thoughts or arousing lustful thoughts, the court, in Eastman Kodak Co. v Hendricks (1958, CA9 Cal) 262 F2d 392, said: "It may be to oversimplify, but it looks (as indicated above) as if 'prurient' is to be the talisman. And out of 'prurient' it would seem that obscenity is shifting from the standard of distasteful to a majority of people to a standard of disgusting, really lewd, shameful, or excites morbid interest in sex. Perhaps, the shift is from 'bad' to 'awful.' . . . In short, there seems to emerge from the cases the proposition that obscenity in the standard of pruriency must really 'smell,' not just be of slight 'odor.'"

The use of obscene words (so-called "four-letter" words) in a literary work does not make the work obscene where such passages are subordinate but highly useful elements to the development of the author's central purpose, and hence are not "prurient." Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433.

It has been said[9] that even the Roth definition of "prurient interest" requires further specificity, because it does not answer the question "lust for what," but obviously the answer is lust for sex.

Similarly, in State v Nelson (1959) 168 Neb 394, 95 NW2d 678, the court expressed doubts that the "average person," whether judge or juror, would be able to apply the phrase "appeals to prurient interest" without conjecture or resort to a dictionary.

C. Variability of concept

§ 11. Introductory

This subdivision of the annotation discusses the question whether the concept of obscenity remains the same under all circumstances or may vary according to the media of expression[10] or other factors, such as the nature of the proceedings in which the issue of obscenity arises[11] or the nature and content of the controlling legislative enactments.[12]

The concept of obscenity may vary according to whether the challenged material is distributed to the public at large or only to a limited group of persons, such as scientists, to whom it is of no prurient interest.[13] The question whether the concept may vary according to geographical areas is discussed in § 9, supra.

§ 12. According to media of expression

[a] Generally; motion pictures and stage plays

The United States Supreme Court has held that motion pictures, though within the basic protection of the First

6. Separate opinion by Moore, Circuit Judge, in United States v Darnell (1963, CA2 Conn) 316 F2d 813, cert den 375 US 916, 11 L ed 2d 155, 84 S Ct 205, reh den 375 US 982, 11 L ed 2d 429, 84 S Ct 493.

7. Footnote 20 of opinion in the Roth Case.

8. The full text of § 207.10(2), mentioned above, is stated in § 4[b], supra.

9. Separate opinion by Moore, Circuit Judge in United States v Darnell (1963, CA2 Conn) 316 F2d 813, cert den 375 US 916, 11 L ed 2d 155, 84 S Ct 205, reh den 375 US 982, 11 L ed 2d 429, 84 S Ct 493.

10. § 12, infra.

11. § 13[a], infra.

12. § 13[b], infra.

13. § 8, supra.

and Fourteenth Amendments,[14] are not necessarily subject to the precise rules governing any other particular method of expression. Freedman v Maryland (1965) 380 US 51, 13 L ed 2d 649, 85 S Ct 734, Justices Black and Douglas dissenting on that point.

A distinction, as to the concept of obscenity, between motion pictures and stage plays on the one hand and other modes of expression on the other was made in Trans-Lux Distributing Corp. v Board of Regents (1964) 14 NY2d 88, 248 NYS2d 857, 198 NE2d 242, remittitur amd 14 NY2d 722, 250 NYS 2d 67, 199 NE2d 165, and revd on other grounds 380 US 259, 13 L ed 2d 959, 85 S Ct 952, wherein the New York Court of Appeals—three judges dissenting—upheld an administrative order directing the elimination, on the ground of obscenity because it depicted simulated sexual intercourse, of some scenes from a film "A Stranger Knocks," as a condition for granting a license for the exhibition of the film. Pointing out that films, by their nature, may lie on either side of the division between speech and conduct and that the nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen, Mr. Justice Burke writing the court's opinion, pointed out that the scenes to be eliminated from the film were obscene, and that the material so assigned was not speech, as opposed to conduct, and hence need not come within the Roth test. The court further pointed out that it makes no sense at all to say that the conduct—sexual intercourse in public—can be forbidden but not the play or film, holding that "this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art." As to all argument predicated on artistic merit as decisive of the constitutional question, the court held it sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays, and since no other profession is privileged to bend public morals, policy, and law to its internal craft standards, then neither should producers of films. In reversing, per curiam, the judgment of the New York Court of Appeals, the United States Supreme Court referred solely to Freedman v Maryland (1965) 380 US 51, 13 L ed 2d 649, 85 S Ct 734, wherein a Maryland motion-picture censorship statute was held invalid because of its failure to provide adequate procedural safeguards against undue inhibition of protected expression. Hence, the conclusion seems justified that the United States Supreme Court did not reach the substantive questions discussed above.

In this connection, attention is called to Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, in which a state conviction for possessing and exhibiting an obscene film was reversed, the film being the French motion picture "The Lovers," including in the last reel an explicit, but fragmentary and fleeting, love scene. While the court could not agree upon an opinion, five of the justices—Mr. Justice Brennan, joined by Justices Goldberg and Stewart, in their concurring opinion, and Mr. Chief Justice Warren, joined by Mr. Justice Clark, in their dissenting opinion—referred to the Roth test, and none of the justices expressed any doubt that, as regards motion pictures or plays, the same concept of obscenity is applicable as to other media of expression.

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In determining whether a work of literature is obscene, the courts have given

14. Kingsley International Pictures Corp. v Regents of University of State of N. Y. (1959) 360 US 684, 3 L ed 2d 1512, 79 S Ct 1362.

recognition to the literary setting in which the attacked expression is found, with references made to the intent of the author, the literary merit of the work, and the craft requirements of the style employed. Big Table, Inc. v Schroeder (1960, DC Ill) 186 F Supp 254.

[b] Private correspondence

Material may be obscene, although consisting of an exchange of private correspondence between adults. Ackerman v United States (1961, CA9 Cal) 293 F2d 449.

Defendant's mailing to a married woman of his acquaintance a letter wherein he discussed more frankly than fastidiously his entire personal relations with her husband, including homosexual practices described boldly in three-and-four-letter words, was held in United States v Darnell (1963, CA2 Conn) 316 F2d 813, cert den 375 US 916, 11 L ed 2d 155, 84 S Ct 205, reh den 375 US 982, 11 L ed 2d 429, 84 S Ct 493—Moore, Circuit Judge, dissenting—to support a conviction under 18 USC § 1461, prohibiting the mailing of obscene matter. A majority of the court felt compelled, by the definition of obscenity in the Roth Case, to find the letter obscene, but added that they could not view the result with satisfaction, since a private communication only brought to light by the addressee would hardly seem to merit criminal prosecution, particularly when it involves merely use of coarse language for which the writer could have substituted more refined phraseology.

§ 13. According to other factors

[a] Generally; nature of proceeding

Questions concerning the concept of obscenity may arise in various kinds of proceedings: (1) in criminal proceedings or in civil actions in personam, such as actions for injunctive or declaratory relief instituted either by a governmental agency against the possessor or distributor of allegedly obscene material or by the latter against the governmental agency, or (2) in proceedings in rem seeking the seizure and sometimes destruction of the material. Only a few authorities indicate that the concept may vary according to the kind of proceeding in which the question concerning the nature of material as obscene arises.

The view has been taken that the definition of obscenity enunciated in the Roth Case has never been approved by the United States Supreme Court other than in the context of a criminal proceeding, the reason being that a criminal proceeding ordinarily means a trial by jury of the vicinage, that the members of the jury represent a cross section of the community in which the allegedly obscene utterance was made, and that the jury naturally possesses a special aptitude for reflecting the view of the "average person" of the community. William Goldman Theatres, Inc. v Dana (1961) 405 Pa 83, 173 A2d 59, cert den 368 US 897, 7 L ed 2d 93, 82 S Ct 174.

Mr. Chief Justice Warren, dissenting in Kingsley Books, Inc. v Brown (1957) 354 US 436, 1 L ed 2d 1469, 77 S Ct 1325, in which the court sustained a New York statute dealing with obscene literature, stated that, as regards obscenity, the same object may have a wholly different impact depending upon the setting in which it is placed: that it is the manner of use that should determine obscenity; that it is the conduct of the individual that should be judged, not the quality of art or literature; and that to do otherwise is to impose a prior restraint and hence to violate the Federal Constitution.

Again, in the Roth Case, Mr. Chief Justice Warren, concurring in the result, pointed out that the line dividing the salacious or pornographic from literature or science is not straight and unwavering; that present laws depend largely upon the effect that the materials may have upon those who receive them; that

manifestly the same object may have a different impact, varying according to the part of the community it reaches; that it is not a book that is on trial, but a person; that the conduct of the defendant is the central issue, not the obscenity of a book or picture; that the nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but that the materials are "thus placed in context from which they draw color and character"; and that a wholly different result might be reached in a different setting.

And in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, a criminal prosecution for possessing and exhibiting an allegedly obscene film, Mr. Chief Justice Warren and Mr. Justice Clark, in their separate opinion, expressed the view that the use to which various materials are put, not just the words and pictures themselves, must be considered in determining whether or not the materials are obscene.

[b] Nature and content of controlling legislation

There is but little authority on the question whether the concept of obscenity may vary according to the nature and contents of the controlling legislative enactments.

While it is desirable that the definition of obscenity be the same for the purpose of determining the application of the federal constitutional guaranty of freedom of speech, and of a similar state constitutional guaranty, and for the purpose of construing a state statute, a state may permit greater freedom of speech and press than the Fourteenth Amendment would require, although it may not permit less. McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR3d 1140.

Mr. Justice Harlan, in his separate opinion in the Roth Case, pointed out that the opinion of the court failed to discriminate between the different factors which are involved in the constitutional adjudication of state and federal obscenity cases, and ignored relevant distinctions between the obscenity statutes involved in the case. The Justice went on to say that it did not seem to matter to the court that the Roth Case involved a question of balancing the power of the Federal Government against the limitations of the First Amendment, whereas in the companion Alberts Case the question of balancing the power of a state against the restrictions of the Fourteenth Amendment was involved; and that two different statutes were involved containing different definitions of obscenity, upon which the court superimposed its own definition. On this basis, Mr. Justice Harlan concurred in the result reached in the Alberts Case, upholding a state antiobscenity statute, but dissented from the result reached in the Roth Case, upholding a federal statute prohibiting the mailing of obscene matter.

Similarly, Mr. Justice Harlan, in his separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, expressed the view that the states should be permitted wide, but not federally unrestricted, scope in the field of obscenity, but that the Federal Government should be held with a tight rein. The contrary view was taken by Justices Brennan and Goldberg, in footnote 2 of their separate opinion, in which they stated that the line separating obscenity from constitutionally protected expression is no different where a state rather than a federal obscenity statute is involved.

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In view of the fact that the federal statute making the mailing of obscene matter a criminal offense (18 USC § 1461) has national scope, and community standards reflected by a jury differ rather widely over the country at large, the court, in Flying Eagle Publications, Inc. v United States (1960, CA1 NH) 273 F2d 799, ruled that to give the

statute some uniformity in its application and to prevent abridgment of the freedom of the press, courts should very carefully scrutinize material alleged to be obscene before submitting it to a jury.

III. Procedural aspects of concept

§ 14. Introductory

At this point the annotation discusses certain procedural aspects of the concept of obscenity. The discussion is limited to those procedural aspects which reflect the substantive aspects of the concept. In this sense the "average person" test of the Roth standard of obscenity raises the question whether and to what extent in cases requiring a jury trial the determination of obscenity is for the judge or for the jury[15] and, irrespective of whether the trial is with or without jury, whether and to what extent the determination of obscenity or nonobscenity is reviewable by an appellate court.[16] A due process question exists with respect to findings of administrative agencies.[17]

The "average person" test raises the additional question whether evidence, and in particular, expert evidence, as to community standards, is necessary or admissible in obscenity cases.[18]

§ 15. Who determines question of obscenity

[a] Generally; determination in trial court

Most authorities agree[19] that the question whether specific material involved in a case is obscene is not a simple question of fact but a mixed question of fact and constitutional law.[20]

The procedure described in State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225, is as follows: The judge is required to make an independent determination of the material in evidence, applying the proper constitutional standards, before submitting the issue of obscenity to the jury. The trial judge must apply the constitutional standards to the specific material in the light of any factual findings supported by the evidence, since if in his judgment the material cannot constitutionally be suppressed, then nothing remains for the jury's consideration.[1] In this connec-

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15. § 15[a], infra.
16. § 15[b], infra.
17. § 15[c], infra.
18. § 16, infra.
19. Some judicial statements deviate more or less from the rule stated in the text.

For instance, the question of obscenity has been characterized as "primarily one of fact." Ackerman v United States (1961, CA9 Cal) 293 F2d 449; People v Williamson (1962) 207 Cal App 2d 839, 24 Cal Rptr 734, cert den 377 US 994, 12 L ed 2d 1047, 84 S Ct 1902, reh den 379 US 871, 13 L ed 2d 77, 85 S Ct 13.

20. Cal—Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445 (stating that the determination of what is obscene in a statutory or a constitutional sense is not a question of fact, that is, a question of what happened, but rather a question of fact mixed with the determination of law).

NJ—State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225 (referring to the separate opinion of Harlan, J., in the Roth Case, and stating that the question of obscenity is not merely one of fact but a question of constitutional judgment of the most sensitive and delicate kind).

NY—People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681.

1. In Kingsley Books, Inc. v Brown (1957) 354 US 436, 1 L ed 2d 1469, 77 S Ct 1325, in which the court upheld a New York statute dealing with obscene literature, Brennan, J., dissented on the ground that the absence in the New York obscenity statute of the right to jury trial was a fatal defect. In support of this view, Brennan, J., pointed out that the jury represents a cross section of the community and has a special aptitude for reflecting the view of the average person; that jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards; and that, as with jury questions generally, the trial judge must initially determine that

tion the court referred to American Law Institute, Model Penal Code § 251.4(4) of the Official Draft 1962, providing that the court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene. The court further stated that if the trial judge determines that the material is not constitutionally protected and should be submitted to the jury, he should avoid expressing to them his opinion on the issue of obscenity.

Most authorities agree that the question of what is obscene under the Roth test is primarily for the trier of facts. Volanski v United States (1957, CA6 Ohio) 246 F2d 842 (stating that the question of obscenity is peculiarly one best left for nisi prius determination, preferably by a jury); Ackerman v United States (1961, CA9 Cal) 293 F2d 449; Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949 (rejecting defendant's contention that the question of obscenity "can only be adjudged as a matter of law").

A state is not debarred from regarding the trier of fact as the embodiment of community standards. Smith v California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399 (separate opinion by Mr. Justice Harlan).

However, while the question of obscenity may be properly submitted to the jury in a case in which a party has a right to a jury trial, it cannot properly be reposed in the jury for final disposition as a question of fact, and must ultimately be resolved by the court. Haldeman v United States (1965, CA10 Kan) 340 F2d 59; Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445.

But in the absence of evidence relating to contemporary community standards, the triers of fact have been held the exclusive judges of what the common conscience of the community is. Chicago v Kimmel (1964) 31 Ill 2d 202, 201 NE2d 386.

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On the other hand, the view has also been expressed that the question of obscenity must be determined by the judge rather than by the jury.

Whether the question of obscenity, in the context of the constitutional guaranties of freedom of speech and press, is deemed one of fact or of mixed fact and law, it is one for judicial determination on the relevant materials, these materials being available for visual inspection. Excellent Publications, Inc. v United States (1962, CA1 NH) 309 F2d 362.

Courts must themselves judge the pruriency of the material to determine the constitutional issue. Commonwealth v Maniz (1959) 338 Mass 442, 155 NE 2d 762 (criminal prosecution for showing allegedly obscene motion picture).

In a criminal prosecution for the sale of obscene writings or pictures, it was held in State v Locks (1964) 97 Ariz 148, 397 P2d 949, that it is incumbent upon the court to determine whether the material is obscene as a matter of law, the court pointing out that unless the material is obscene as a matter of law, the dissemination thereof is protected by the First Amendment to the Constitution of the United States.

Whether or not the language is obscene is a question of law primarily for the court to decide as a matter of law. Spears v State (1965, Miss) 175 So 2d 158 (a criminal prosecution for using obscene language over the telephone).

[b] Scope of appellate review

All authorities agree upon the proposition that an appellate court has the power to review determinations concerning obscenity, whether made by the jury

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there is a jury question, that is, that reasonable men may differ as to whether the material is obscene.

or the trial judge.[2] However, the authorities do not agree upon the extent and scope of appellate review.

Some authorities hold that the appellate court will make an independent determination of obscenity, irrespective of the findings below.

US—Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433 (stating that even factual matters must be reviewed on appeal against a claim of denial of a constitutional right).

Ill—Chicago v Kimmel (1964) 31 Ill 2d 202, 201 NE2d 386 (stating that an appellate court makes an independent constitutional judgment as to whether material is in fact obscene or constitutionally protected).

Mo—State v Vollmar (1965, Mo) 389 SW2d 20, 28.

NJ — State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225 (stating that on appeal each appellate court must make an independent examination of whether the attacked material is suppressible within constitutional standards).

Rejecting the contention that determination of obscenity of a particular motion picture, book, or other work of expression can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with the United States Supreme Court exercising only a limited review, such as that needed to determine whether the ruling below is supported by sufficient evidence, Mr. Justice Brennan, joined by Mr. Justice Goldberg, pointed out in their separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676 (a case in which no majority of the justices could agree on an opinion), that such an abnegation of judicial supervision in this field would be inconsistent with the court's duty to uphold the constitutional guaranties of freedom of speech and press, the question whether a particular work is obscene necessarily implicating an issue of constitutional law, since it is only "obscenity" that is excluded from the constitutional protection. It was further stated that such an issue must ultimately be decided by the United States Supreme Court. The conclusion was that the United States Supreme Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.

Where the trier of facts has determined the question of obscenity in the context of constitutional guaranties of freedom of speech and press, an appellate court is not bound by the conclusions of the lower courts or of juries but will re-examine the evidential basis on which those conclusions are founded. This rule applies to findings in the lower federal courts as well as to findings of state courts. Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949.

While recognizing that in cases in which fact questions are submitted to a jury, appellate review of the fact issues is ordinarily limited to a determination of whether there was substantial evidence from which the jury could reasonably have found the facts in question, the court in State v Vollmar (1965, Mo)

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2. A court of review retains responsibility for rendering the ultimate judgment upon constitutional infringement. Ackerman v United States (1961, CA9 Cal) 293 F2d 449.

The view that the question of obscenity of magazines, and in particular the question whether magazines were offensive on their face so as to be properly barred from the mail under 18 USC § 1461, was, as an issue involving factual matters entangled in a constitutional claim, ultimately one for the United States Supreme Court was expressed by Harlan and Stewart, JJ., in Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432, a case in which a majority of the justices could not agree upon an opinion.

389 SW2d 20, 28, accepted "the now prevailing view" that in obscenity cases the issue for determination is subject to constitutional limitations and the courts are faced with an obligation to make an independent determination of the constitutional issue, which cannot be avoided by considering "obscenity" as a fact question only.

The highest court of a state, no less than the United States Supreme Court, cannot escape its responsibility in defining the obscenity of material involved in a case by saying that the trier of the facts, whether a jury or a judge, has labeled the questioned matter as "obscene." People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681.

The rule that where the evidence is documentary the appellate court is not bound by the inferences drawn therefrom by the trier of facts has been applied in obscenity cases. Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328.

In McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR3d 1140 (a declaratory judgment proceeding in which the issue was whether the book "Tropic of Cancer" is obscene), the court said that although there was no greater conflict in the expert testimony in this case than there appears to have been in the Massachusetts case of Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328, supra, the court deemed the reading of the book to constitute the most weighty factor in the determination and did not consider itself bound by the decision of the trial court, based on the trial judge's reading of it.

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On the other hand, there are some authorities which would limit the scope of appellate review of findings as to obscenity according to the quantum of evidence supporting the finding made by the trier of facts.

Absent an erroneous definition of obscenity, an appellate court cannot upset the jury's determination unless, upon consideration of the material in its entirety, the jury could not reasonably reach such a conclusion. People v Williamson (1962) 207 Cal App 2d 839, 24 Cal Rptr 734, cert den 377 US 994, 12 L ed 2d 1047, 84 S Ct 1902, reh den 379 US 871, 13 L ed 2d 77, 85 S Ct 13.

Mr. Chief Justice Warren and Mr. Justice Clark, in a dissenting opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676 (a criminal prosecution under an antiobscenity statute), expressed the view that they would accept the judgments of the appropriate state and federal courts made pursuant to the Roth rule, limiting themselves to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made, or requiring something more than merely any evidence, but something less than substantial evidence, on the record as a whole.[3]

[c] Review of administrative findings

The courts are not in agreement as to the scope of appellate review of administrative findings of obscenity.[4]

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3. See, however, the concurring opinion of Warren, Ch. J., in the Roth Case, where he pointed out that the constitutional problem in defining obscenity, in the last analysis, becomes one of particularized judgments which appellate courts must make for themselves; and that reviewing courts cannot escape this responsibility by saying that the trier of the facts, whether a jury or a judge, has labeled the questioned matter as "obscene," since if "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind.

4. Apart from findings of the Post Office Department under federal statutes barring obscene matter from the mails, administrative findings of obscenity have been made in the past primarily under motion-picture censorship statutes. However, the United

On the one hand, it has been held that administrative findings of obscenity are not conclusive upon the reviewing court even though they are based upon substantial evidence. Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433 (dealing with an order of the Post Office Department excluding from the mail, as obscene, the novel "Lady Chatterley's Lover").

On the other hand, the view has been taken that a court must accept the conclusion reached by an administrative agency which has been properly granted the authority to ascertain the fact of obscenity, such as the Post Office Department, where that conclusion is supported by substantial evidence and not in disregard or violation of the other standards to be applied under a review; and that this rule applies even though a denial of constitutional rights is claimed.[5] Big Table, Inc. v Schroeder (1960, DC Ill) 186 F Supp 254 (where, however, the court, applying this standard, held, contrary to the finding of the Post Office, that the magazine involved was not obscene).

§ 16. Necessity and admissibility of evidence

[a] Generally

It is a denial of due process for the trial court not to allow defendant to prove contemporary community standards on the issue of obscenity. Re Harris (1961) 56 Cal 2d 879, 16 Cal Rptr 889, 366 P2d 305, vacated on other grounds 374 US 499, 10 L ed 1044, 83 S Ct 1876; People v Aday (1964) 226 Cal App 2d 520, 38 Cal Rptr 199, cert den 379 US 931, 13 L ed 2d 343, 85 S Ct 329 (recognizing rule and holding that a determination of obscenity may be made by a grand jury, insofar as the issue of probable cause is concerned, without the necessity of receiving evidence as to such standards). But see State v Vollmar (1965, Mo) 389 SW2d 20, holding that the trial court did not err in excluding defendant's proffered expert testimony to the effect that the allegedly obscene publications would conform to the general community standards and hence were not obscene.

Where the conviction or acquittal of the defendant of a charge of having sold an obscene book (Tropic of Cancer) depended on whether or not the book was in fact obscene, it was held in Yudkin v State (1962) 229 Md 223, 182 A2d 798, that the defendant was prejudiced by the refusal of the trial court to permit him to offer the testimony of expert witnesses, who, had they been allowed to do so, would have testified that the book had literary merit, that it fell within contemporary community standards, and that it would not stimulate lustful thoughts in the average reader. The court relied upon the American Law Institute, Model Penal Code, proposed official draft of May 4, 1962, which in § 251.4(4) stated that expert testimony relating to factors entering into the determination of the issue of obscenity, shall be admissible. It was further held error not to permit introduction of evidence showing that the Post Office Department had determined that "Tropic of Cancer" was mailable. Finally it was held that a "study" or critique of the book made by a novelist and critic was admissible

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States Supreme Court, in Freedman v Maryland (1965) 380 US 51, 13 L ed 2d 649, 85 S Ct 734, required, as a prerequisite to the validity of such a statute, that a censor who wants to disapprove a film on the ground of obscenity obtain a judicial determination of the issue within a specified brief period.

5. See, however, Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432, a proceeding for injunctive relief against an order of the Postmaster General barring, as obscene, magazines from the mail under 18 USC § 1461, where Brennan, J., joined by Warren, Ch. J., and Douglas, J., expressed the view that the statute does not authorize the Postmaster General to exclude matter from the mails on his own determination that it is obscene.

as evidence of the literary merit of the book, it being error on the part of the trial court to refuse to admit the critique as evidence.

Mr. Justice Frankfurter, in his separate opinion in Smith v California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399, expressed the view that the due process clause of the Fourteenth Amendment was violated by exclusion, at the state criminal trial of a bookseller for possession of obscene books in his shop, of evidence through duly qualified witnesses regarding the prevailing contemporary community standards in determining obscenity. It was pointed out that the exclusion of expert testimony regarding the prevailing literary and moral community standards or the psychological or physiological consequences of questioned literature went to the very essence of the defense and therefore to the constitutional safeguards of due process.

While in a criminal prosecution for unlawful possession of obscene books a state is not constitutionally compelled to admit expert testimony as to community standards of obscenity, the due process clause of the Fourteenth Amendment is violated where the trial judge turned aside every attempt by defendant to introduce evidence bearing on such standards. This was pointed out by Mr. Justice Harlan, dissenting in part and concurring in part in Smith v California (US) supra, where the majority of the court did not reach that question. (See footnote 4 of the court's opinion.)

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In a criminal prosecution for mailing obscene matter it is not necessary for the government to introduce expert testimony as to the obscene nature of the material mailed, particularly where the defendant was allowed to introduce witnesses on that point. Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949.

[b] Admissibility of other literary material

The courts are not in agreement as to whether material other than the material challenged as obscene is admissible to show the prevailing community standard.

On the one hand, it was held error in Yudkin v State (1962) 229 Md 223, 182 A2d 798, supra § 16[a], for the trial court to refuse to admit evidence of other books on sale in the community, since, as stated by Mr. Justice Harlan in his separate opinion in Smith v California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399, the community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates.

On the other hand, evidence of literary material other than that alleged to be obscene was held inadmissible to show contemporary community standards, in People v Finkelstein (1962) 11 NY2d 300, 229 NYS2d 367, 183 NE2d 661, cert den 371 US 863, 9 L ed 2d 100, 83 S Ct 116, a criminal prosecution for the sale of obscene books, where the court pointed out that the proffered evidence was irrelevant to the issue of whether or not the two books sold by defendants were obscene, since the fact that certain other and different publications were seen in bookstores and on magazine stands was no indication that they were sold or read, or that to the average person applying contemporary community standards they were not obscene.

E. H. SCHOPLER.