Miller v. California: A Cold Shower for the First Amendment

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MILLER V. CALIFORNIA:  
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FIRST AMENDMENT  

The first amendment of the Constitution provides that "Congress shall make no Law . . . abridging the Freedom of Speech, or of the Press. . . ."1 Judicial construction of this provision, however, has allowed governmental regulation of the content of some speech as a proper exercise of authority. Libelous speech,2 or speech which advocates the violent overthrow of the government or interference with its operations3 has been found to be without first amendment protection. Relying upon social and legal history, the Supreme Court has concluded that "obscene" speech or writing is not protected by the constitutional umbrella of first amendment guarantees.4 The Court concluded that because obscenity is bereft of any value or importance it should not be considered speech at all, and thus need not be afforded constitutional protection.5

HISTORICAL BACKGROUND

Prior to the mid-nineteenth century influence of Victorian philosophy, pornographic literature flourished in England and the United States.6 Obscenity prosecutions were extremely rare. The first reported

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1 U.S. Const. amend. I. The first amendment's prohibition against the passage of any law which abridges the freedom of expression is made applicable to the states by the fourteenth amendment. Gitlow v. New York, 268 U.S. 652 (1925).

2 Beauharnais v. Illinois, 343 U.S. 250 (1952). As libel is outside the area of protected speech, any attempt to redeem it through a balancing of evils or a clear and present danger test is inappropriate. The Court analogized libelous utterances to obscene speech, and found both totally unprotected from government regulation and without any possibility of redemption. Id. at 266.

3 Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919). Under the "clear and present danger" test, the Government may suppress this type of advocacy since such speech is likely to create serious evils which Congress has the power to prevent. Or, employing a balancing test which weighs the right of free speech against the evil created by it, the Court may find that the presence of the created evil clearly outweighs the danger of limiting free speech. Dennis v. United States, 341 U.S. 494, 510 (1951). Political speech is afforded greater safeguards than libelous or obscene utterances, unless it can be shown that the former has created a fervor which will likely result in "imminent lawless action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

4 Roth v. United States, 354 U.S. 476, 485 (1957). The Court relied heavily upon the existence of numerous state and federal statutes and international agreements which prohibited obscenity. Id. at 485. Although this was the first case which squarely presented the question of whether or not obscene speech is protected by the Constitution, the Court was influenced by earlier decisions which had assumed that obscenity was not constitutionally protected. Id. at 481. See Miller v. California, 413 U.S. 15, 23 (1973); United States v. Reidel, 402 U.S. 351, 354 (1971).

5 See notes 32-33 and accompanying text supra.

6 United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 191-35 (1973)
case involving obscenity was decided in 1663. In Sir Charles Sydlyes' Case, the defendant, charged with obscene conduct, was fined for "shewing himself naked in a balconcy." In colonial America, obscenity laws were generally restricted to punishing the crimes of blasphemy and profanity. Under the common law crime of obscene-libel, Connecticut, in the early nineteenth century, punished the depiction of a "monster." Vermont, in 1821, enacted the first state law which prohibited the publication or sale of "lewd or obscene" materials. At the federal level,

(Douglas, J., dissenting). In England, under the Stuarts and Tudors, censorship by the government was limited to blasphemous or treasonous utterances. Obscenity was a moral question to be resolved by the ecclesiastical courts and not the common law courts. Books such as John Cleland's Memoirs of a Woman of Pleasure, William King's The Toast, and Harris' List of Covent Garden Ladies (an advertising catalogue for prostitutes) were openly circulated for common reading. During this period in America, Benjamin Franklin wrote his Advice to a Young Man on Choosing a Mistress. D. Loth, The Erotic in Literature (1961); N. Sr. John-Stevas, Obscenity and the Law 25 (1956).


8 United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 134 n.4 (1973); Roth v. United States, 354 U.S. 476, 482-83 (1954). E.g., the Massachusetts Bay Colony prohibited the "composing, writing, printing or publishing of any filthy, obscene, or profane song, pamphlet, libel or mock-sermon, in imitation or in mimicking of preaching, or any other part of Divine Worship." Acts & Laws of the Province of Massachusetts Bay, c. CV, § 8 (1712), Massachusetts Bay Colony Charter & Laws 399 (1814). In 1821, in Commonwealth v. Holmes, 17 Mass. 336 (1821), the defendant was convicted of publishing obscene literature, viz., John Cleland's Memoirs of a Woman of Pleasure, based upon this colonial statute and the common law. This was one of the earliest decisions which deviated from the blasphemy standard and attempted to describe obscenity in a sexual context.

9 Knowles v. State, 3 Day 103 (Conn. 1808). The defendant exhibited a sign deemed indecent for showing a "horrid and unnatural monster" which had no eyes, whose ears were misplaced and whose skin was copper-colored. What is "obscene" varies with the philosophical and cultural development of society. In colonial times, "obscene" generally referred to blasphemous utterances. See, e.g., Acts & Laws of the Province of Massachusetts Bay, c. CV, § 8 (1712), Massachusetts Bay Colony Charter & Laws 399 (1814). In the nineteenth century it described something which depicted violence or the supernatural. See, e.g., Knowles v. State, 3 Day 103 (Conn. 1808). In the twentieth century, obscenity centers around matters with sexually erotic themes. See, e.g., Roth v. United States, 354 U.S. 476 (1957).

10 [1824] Laws of Vt., 1 c. XXXII, no. I, § 23. Subsequently, in 1834, Connecticut enacted an obscenity statute, Stats. of Conn. 182-84, and, in 1835, Massachusetts amended and departed from its religious definition of obscenity. Mass. Rev. Stat., ch. 130, § 10 (1835). The first American prosecution for obscenity involving sexually explicit material occurred prior to any state legislative enactment. In Commonwealth v. Sharpless, 2 S. & R. 91, 92 (Pa. 1815), a defendant was convicted under the common law of Pennsylvania for exhibiting obscene pictures. There, "obscene" was described under the more modern approach as "lewd, wicked, scandalous, infamous, . . . and indecent posture with a woman." By the end of the nineteenth century, at least 50 states had some general type of
although the Tariff Act of 1842\footnote{Customs Law of 1842, c. 270, \S 28, 5 Stat. 566, \textit{amended}, Act of March 2, 1857, ch. 63, 11 Stat. 168, \textit{repealed}, Act of March 3, 1933, ch. 202, 47 Stat. 1430. Section 28 of the 1842 act prohibited the "importation of all indecent and obscene prints, printings, lithographs, engravings, and transparencies." The power of the Federal Government to regulate the importation of "indecent prints" was recognized in \textit{Thurlow v. Massachusetts}, 46 U.S. (5 How.) 608, 628 (1847).} was the earliest prohibition against lewd-obscene materials, it was not until the enactment of the Comstock Act\footnote{Act of March 2, 1872, ch. 395, \S 148, 17 Stat. 283, \textit{amended}, Act of March 3, 1873, ch. 258, \S 2, 17 Stat. 598. This law placed internal limitations on obscene materials by making their mailing a criminal act. In \textit{Ex parte Jackson}, 96 U.S. 727 (1878), the Supreme Court upheld the validity of this obscenity statute under the power of the Government to regulate the mails and to prohibit the transportation of "corrupting publications," which "have a demoralizing influence upon the people." \textit{Id.} at 736. \textit{See Rosen v. United States}, 161 U.S. 29 (1896). In \textit{United States v. Bennett}, 24 F. Cas. 1093, 1100 (No. 14,571) (S.D.N.Y. 1891), the Act of 1876, \S 1, 19 Stat. 90, which prohibited the mailing of any obscene or indecent publication, was found not to be repugnant to the Constitution. Justice Blatchford reflected upon the relationship of free speech and press to the publication and distribution of obscene literature, and concluded that: \textit{Freelovers and freethinkers have a right to their views, and they may express them, and they may publish them; but they cannot publish them in connection with obscene matter, and then send them through the mails ... without violating the law.} \textit{Id.} at 1101. The relationship between freedom of expression and governmental restrictions on the mailing of obscene materials was again seriously considered in \textit{United States v. Harmon}, 45 F. 414 (D. Kan. 1891). There the court recognized the need for protecting the right to express private opinions. The court found that although there is a necessary privilege, it is not without limits. There is a boundary line which the government may, in its proper authority, establish between the permissible and the prohibited. The boundary line, although stated to be where what is published "outrages the common sense of decency, or endangers the public safety," was not specifically defined. \textit{Id.} at 416.} in 1870 that the Government took an activist role in suppressing obscenity. Today, both federal and state governments regulate pornographic material under the theory that it is necessary to protect their citizens from the harmful effects attending the dissemination or ex-

obscenity statute and by the time of the \textit{Roth} decision every state had one. \textit{Paris Adult Theatre I v. Slaton}, 413 U.S. 49, 104-05 (1973).

\footnote{351 (N.Y. Times ed. 1970). Four years later, under Lord Cambell's Act of 1857, 20 & 21 Vict., ch. 83, the Government outrightly banned obscene literature. 413 U.S. 123, 133 n.3 (1973).} In England, it was not until 1853 that Parliament enacted anti-obscenity legislation. The Customs Consolidation Act of 1853, 16 & 17 Vict., ch. 107, was passed to prevent the importation of obscene French postcards. The \textit{REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY} 351 (N.Y. Times ed. 1970). In \textit{Ex parte Jackson}, 96 U.S. 727 (1878), the Supreme Court upheld the validity of this obscenity statute under the power of the Government to regulate the mails and to prohibit the transportation of "corrupting publications," which "have a demoralizing influence upon the people." \textit{Id.} at 736. \textit{See Rosen v. United States}, 161 U.S. 29 (1896). In \textit{United States v. Bennett}, 24 F. Cas. 1093, 1100 (No. 14,571) (S.D.N.Y. 1879), the Act of 1876, \S 1, 19 Stat. 90, which prohibited the mailing of any obscene or indecent publication, was found not to be repugnant to the Constitution. Justice Blatchford reflected upon the relationship of free speech and press to the publication and distribution of obscene literature, and concluded that: \textit{Freelovers and freethinkers have a right to their views, and they may express them, and they may publish them; but they cannot publish them in connection with obscene matter, and then send them through the mails ... without violating the law.} \textit{Id.} at 1101. The relationship between freedom of expression and governmental restrictions on the mailing of obscene materials was again seriously considered in \textit{United States v. Harmon}, 45 F. 414 (D. Kan. 1891). There the court recognized the need for protecting the right to express private opinions. The court found that although there is a necessary privilege, it is not without limits. There is a boundary line which the government may, in its proper authority, establish between the permissible and the prohibited. The boundary line, although stated to be where what is published "outrages the common sense of decency, or endangers the public safety," was not specifically defined. \textit{Id.} at 416.}


hibition of such material — notwithstanding that the "adverse effects" of exposure to such matter remains an unsettled question. 1

**Defining Obscenity**

What is obscene and what is not? "Obscene" is derived from the Latin word *obscaenus*; *ob* meaning "to," and *caenum* meaning "filth." The dictionary defines obscene to be that which is "disgusting to the senses . . . grossly repugnant to the generally accepted notions of what is appropriate . . . [or] offensive or revolting as countering or violating some idea or principle." 1

Pornography is of Greek derivation from the words *pornè* meaning "harlot," and *graphos* meaning "writing." 13 Pornography is defined as a "description of prostitutes or prostitution . . . [or] a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." 17

When does a literary or artistic work extend beyond the boundaries of social acceptability and edge into the sphere of pornography? 14 A precise standard or formula has never been developed to make this determination. This imprecision has allowed the definition of obscenity

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**Psychological and physiological studies have indicated that people do become sexually aroused from reading obscene materials. F. Wertham, Seduction of the Innocent 164 (1954). But the relationships among obscenity, sexual arousal, and anti-social behavior are constantly debated. It is typically claimed that obscene materials do induce anti-social conduct in the average person and thus should be prohibited. See, e.g., J. Kilpatrick, The Smut Peddler (1960). Another author suggests that pornographic material is a potentially disruptive force in the community due to its deleterious effect upon mental health. P. Sorokin, The American Sex Revolution (1956). The Federal Bureau of Investigation has found a direct correlation between pornography and the increase in the number of violent sex crimes. Hoover, Combating Merchants of Filth: The Role of the FBI, 25 U. Pitt. L. Rev. 469 (1964). The harmful effects of obscenity have been the subject of numerous works. See R. Kyle-Keith, The High Price of Pornography (1961); C. Rolph, Does Pornography Matter? (1961); Blount, Pornography and its Effect on Society, 44 Fla. B.J. 518 (1970).


16 *Webster’s Third New International Dictionary* 1557 (1969). The *Oxford English Dictionary* defines obscene as "[o]ffensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome."

17 *Webster’s Third New International Dictionary* 1767 (1969). In this note, obscene (obscenity) and pornographic (pornography) are used synonymously. It is, however, more precise to treat pornography as a subcategory of the larger class of obscenity. Miller v. California, 413 U.S. 15, 18-19 (1973).

to evolve gradually, the effort generally being made to base it upon prevailing notions of decency, i.e., the consideration being whether the subject matter is offensive to modesty or decency.

Recently, in Miller v. California, the Supreme Court attempted to formulate "concrete guidelines to isolate 'hardcore' pornography from expression protected by the First Amendment." In delivering the Court's opinion, Chief Justice Burger described obscene works to be ones which

[when] "applying contemporary community standards," . . . appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The Court determined that the term "contemporary community standards" referred not to a national standard, but to one based upon the local community.

Developing a Standard

The earliest definitive standard of obscenity was enunciated in Regina v. Hicklin. Under the Hicklin test, a publication was judged to be obscene based upon the effect of individual, isolated excerpts upon particularly susceptible persons. Hicklin has led a checkered

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22 Id. at 24.

23 Id. at 30-34. Contra, Jacobellis v. Ohio, 378 U.S. 184, 192-95 (1964) (standard based upon the community at large—a national standard).

24 [1868] 3 Q.B. 360. A pamphlet entitled "The Confessional Unmasked" which showed "the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession," was seized as obscene. Id. at 362.

25 Id. at 371. The test was 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. In rejecting the defendant's contention that a book cannot be obscene unless the motive of the publisher was to make it so, the court found that it is immaterial whether or not the book was intended to provide an educational experience. "Obscenity is to be judged by the objective tendency of the material . . . and not by the motives or intentions of the author." H. CLORE, OBSCENITY AND THE PUBLIC MORALITY 16-17 (1969).
existence in American courts, being affirmed by some and, in more recent times, disregarded by others. Criticism of the rule is based on two grounds. First, emphasis on those most susceptible to the undesirable effects of questionable excerpts instead of on the average adult population tends to restrict available reading material to that fit for children. Second, it tends to proscribe matters legitimately dealing with sex and, thus, infringes upon the constitutional guarantees of free speech and press.

In 1957, the Supreme Court, aware of the flaws and unworkability of the Hicklin test, attempted to formulate a "better" definition of obscenity. In Roth v. United States, and its companion case, Alberts v. California, the Court acknowledged that all ideas, be they controversial or unorthodox, are afforded complete constitutional protection as long as they possess even the slightest degree of "redeeming social importance," and are subject to censorship only when they infringe upon

26 See, e.g., Rosen v. United States, 161 U.S. 29, 43 (1896); United States v. Bennett, 24 Cas. 1093, 1103-05 (No. 14,571) (S.D.N.Y. 1879); Commonwealth v. Buckley, 200 Mass. 346, 86 N.E. 910 (1909). Although the above mentioned cases are somewhat dated, the test has been employed as late as 1953. See, e.g., Besig v. United States, 208 F.2d 142, 145 (9th Cir. 1953) (a written work which is of high literary merit is objectionable if obscenity is a part of such work).

27 See, e.g., Roth v. United States, 354 U.S. 476, 489 (1957); United States v. One Book Entitled Ulysses, 72 F.2d 705, 707-08 (2d Cir. 1934); American Civil Liberties Union v. Chicago, 3 Ill. 2d 334, 121 N.E.2d 585, 591-92 (1954). Infrequent instances or episodes of obscenity will not result in condemnation unless the context of the entire book is based upon sexual adventures or mis-adventures. There must be a weighing of the affirmative value of the literary work against its objectionable aspects to determine if in the aggregate the work is intended purely to excite sexual desires. Id.

28 Butler v. Michigan, 352 U.S. 380, 383-84 (1957). Although the object of the state's action was to protect juveniles from books which were potentially injurious to their innocence, the impact of the law was to ban all books available to the general public unless suitable to youths. Id. This is not to say, however, that all laws which establish different standards of obscenity for children and adults should be void. In Ginsberg v. New York, 390 U.S. 629 (1968), the Court found it constitutionally permissible for a state to modify its obscenity statutes to restrict minors' rights to access to sexually explicit materials more severely than the rights of adults. But a state's right to adjust obscenity standards where minors are involved is limited by the requirement that the applicable state law be definite and carefully limit any discretion on the part of the statute's administrator. The fact that children are involved does not alter the requirement of specificity in laws. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 688-90 (1968); United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913); Zeitlin v. Arnebergh, 59 Cal. 2d 901, 912-13, 383 P.2d 152, 159-60, 31 Cal. Rptr. 800, 807-08 (1965); People v. Richmond County News, Inc., 9 N.Y.2d 278, 285, 175 N.E.2d 621, 684, 216 N.Y.S.2d 369, 374 (1961).

29 Roth v. United States, 354 U.S. 476, 489 (1957). The coarseness and harshness of certain passages aid in the depiction of matter by giving fuller expression and meaning to the artist's words. These isolated passages, important as tools of the artist, should not be used to condemn the entire work as obscene. Zeitlin v. Arneberg, 59 Cal. 2d 901, 912-13, 383 P.2d 152, 159-60, 31 Cal. Rptr. 800, 807-08 (1965).

30 Roth, who was prosecuted for mailing obscene circulars and advertisements in violation of 18 U.S.C. § 1461 (1970), contested the constitutionality of the statute. Alberts attacked the validity of a state penal statute, CAL. PENAL CODE ANN. § 311 (West 1955), which prohibited the sale or advertising of obscene or indecent material.
areas of "more important interests." But, Mr. Justice Brennan, delivering the Court's opinion, emphasized that obscenity is "utterly without redeeming social importance" and is thus outside the area of constitutionally protected freedoms.

The Roth Court then proceeded to attack the definitional problem. Sex and obscenity were found not to be interchangeable, as the mere appearance of sex in a literary, artistic, or scientific work did not perforce result in condemnation of the material as obscene. Material is obscene, and denied constitutional safeguard, when "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." In succeeding sessions, the Court attempted to clarify its obscenity guidelines. Customarily, the Roth decision was reiterated and then refined.

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31 354 U.S. 476, 484 (1957). See, e.g., Kingsley Int'l Picture Corp. v. Regents, 360 U.S. 684, 687-88 (1959) (New York's refusal to issue a license to show the motion picture Lady Chatterley's Lover because of its favorable depiction of adultery resulted in the striking down of the license requirement statute as unconstitutional); Near v. Minnesota, 283 U.S. 697 (1931) (existence of strong notions of liberty and freedom of the press recognized by the Court, and only in exceptional situations will courts be allowed to infringe upon these ideas). In Near, the Court refused to enjoin publication of a "possibly" defamatory periodical. There, the need for freedom of expression outweighed the injurious effects of the subject speech. There are, however, limited times, e.g., during wartime where the proposed speech pertains to the movement of troops or war materials, when speech can be limited prior to its publication. In these cases, the danger caused by the speech clearly outweighs the right of the individual to speak. Id.


There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene..... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.....

Id. at 485, quoting Chaplin v. New Hampshire, 315 U.S. 568, 571-72 (1942) (emphasis added). Chaplin also represents another class of speech which because of its contents is, like libelous utterances, without constitutional protection. "Fighting-words" which cause "immediate breach of the peace," cannot be considered communication and are thus not safeguarded from state regulation. Id. at 572.


34 Id. at 487.

35 Id. at 489. The "average person" and "dominant theme" criteria judicially buried the Hicklin test. Justice Brennan realized the imprecision and generality of such a standard, but concluded that it was not in violation of due process as it provided sufficient warning of the proscribed conduct. Id. at 491. Soon afterward, the Court demonstrated that it would take a narrow view in applying this potentially broad definition to determine what should be considered obscene. See, e.g., One, Inc. v. Olesen, 355 U.S. 371 (1958), rev'g 241 F.2d 772 (9th Cir. 1957); Times Film Corp. v. Chicago, 355 U.S. 35 (1957), rev'g per curiam 244 F.2d 432 (7th Cir.); Mounce v. United States, 355 U.S. 180 (1957), rev'g per curiam 247 F.2d 148 (9th Cir.); Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 MINN. L. REV. 5, 35 (1960). Much has been written about the Roth decision and its impact. See, e.g., Kalven, The Metaphysics of the Law of Obscenity, 1960 SUP. CT. REV. 1 (1960); 7 AM. U.L. REV. 39 (1959).
In *Manual Enterprises, Inc. v. Day*,\(^{36}\) decided in 1962, "patent offensiveness" became an additional requirement. Mr. Justice Harlan concluded that in order for materials to be considered obscene they must not only appeal to the "prurient interest" but also must be "deemed so offensive on their face as to affront current community standards."\(^{37}\) The Court first noted that *Roth* failed to delineate the term "contemporary community standards" and then proceeded briefly to determine the relevant community. It found that because a violation of a federal statute was involved, a national standard of decency should govern.\(^{38}\)

Two years later, the Court, in *Jacobellis v. Ohio*, directly confronted the problem of the "contemporary community standard" as articulated by the *Roth* Court.\(^{39}\) First, the Court reaffirmed the *Roth* standard.\(^{40}\) It then determined that the phrase referred not to the standards of the particular local community from which the case arose, but to the standards of the community at large, *i.e.*, a national community standard.\(^{41}\) Obscenity could have a "varying meaning from time to

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\(^{36}\) 370 U.S. 478, 482 (1962).

\(^{37}\) Id.

\(^{38}\) Id. at 488. The statute in question was 18 U.S.C. § 1461 (1970).


\(^{40}\) If there be no abstract definition... should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If the letters must... be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable... 209 F. at 121 (emphasis added). The significance of the *Kennerley* decision lies in its observation that obscenity may be determined according to a standard, but in so doing, it is necessary that the framework be flexible. The legal standard to be used by the courts must be sufficiently flexible to accommodate the evolution in morality and community mores. H. CLOR, *OBSCENITY AND PUBLIC MORALITY* 20 (1969). Later decisions employed Judge Hand's suggestion that when attempting to locate the point between "candor and shame" obscenity could be flexibly standardized, with its meaning varying from period to period. *See* Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940). Whether this refers solely to time, scope or encompassed geographical limitations as well as has been the subject of much debate. Although *Redd v. State*, 7 Ga. App. 575, 67 S.E. 709, 711 (1910), was decided prior to *Kennerley*, the *Redd* court suggested that time, place, and other surrounding circumstances are factors necessary to the determination of the point of indecency. Justice Brennan firmly believes that variance from period to period refers only to time and not geography. *Jacobellis v. Ohio*, 378 U.S. 184, 193 (1964), *discussed in notes 41-42 and accompanying text infra*.

\(^{41}\) Id. at 192-96. The Court reasoned that anything less would be intolerable and
time,” but “not from county to county, or town to town,” even though local communities throughout the country are diverse in nature. To uphold a standard based upon a particular local community would, in effect, deny materials to some parts of the country which would be readily obtainable in sections with a more “open” notion of decency. Suppression in one locality would inhibit dissemination in another and unconstitutionally restrict public access to printed matter.

The Court, however, was not yet satisfied with its obscenity standards. Shortly after Jacobellis, an attempt was made to crystallize the essences of Roth and subsequent decisions. In A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts, a tripartite guideline was established:

[T]hree 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.

To sustain a determination as obscene, each element must be independently established. It was stressed by the Court that the third element is met only if the matter in question is “utterly without redeeming value.” If there is some social importance, be it artistic, literary, or scientific value, no matter how slight, the material should not be condemned as obscene. Evidence that the material was “utterly without redeeming value” could be established by a showing that it was “commercially exploited for the sake of prurient appeal” only and any other value was disregarded in its publication or distribution. an affront to rights protected by the Federal Constitution. “It is, after all, a national Constitution we are expounding.”

42 Id. at 193-94.
43 Id. at 193-94. See generally Smith v. California, 361 U.S. 147, 153 (1959) (city ordinance which imposed strict criminal liability, by eliminating the element of scienter for the possession of obscene material, was held unconstitutional as imposing a “severe limitation on the public’s access to constitutionally protected matter”).
46 Id. at 419 (emphasis in original).
48 383 U.S. 413, 420 (1966). In his concurring opinion, Justice Douglas rejected the majority’s rationale that the social value of the book could be negated if there was proof
On the same day *Memoirs* was decided, the Supreme Court, in *Ginzburg v. United States*, employed the pandering doctrine alluded to in *Memoirs*, and branded as obscene publications which it conceded were inherently not obscene. The commercial exploitation of the materials, including circumstances of presentation and dissemination with sole emphasis upon their sexually provocative and erotic aspects, was found to taint the accused work as "utterly without redeeming value" within the meaning of the obscenity test.

In *Mishkin v. New York*, decided at the same time as *Memoirs* and *Ginzburg*, a further refinement and expansion of the obscenity definition was made. The Court found that the accused material was designed for and distributed primarily to deviant sexual groups. In determining whether a work, directed to a deviant group as opposed to the general public, appeals to the prurient interest, it is the prurient interest of the former that governs. Therefore, the "average person" concept of *Roth* did not strictly mean just "normal" person, but was meant to include the average person of a sexually deviant group where the matter in question was directed to that group.

After 1966, and until recently, the Supreme Court had taken a less active role in refining obscenity guidelines. In *Redrup v. New York*, the manner of its advertising should not determine the nature and literary, scientific, or artistic value of the material. *Id.* at 427.

Scrutiny of the circumstances of publication or promotion in determining obscenity is not without precedent in the federal courts. In *United States v. One Book Called Ulysses*, 5 F. Supp. 182 (S.D.N.Y. 1933), the district court felt it necessary to determine whether or not the book in question was written with "pornographic intent." District Judge Woolsey concluded that although *Ulysses* was unusually explicit, there was absent the "leer of the sensualist," and thus, the book was not obscene. *Id.* at 183. It has been stated that although there is precedent for the pandering rationale, there was nothing mentioned in the *Roth* majority opinion which would make pandering another criterion for judging obscenity. H. CROON, OBSCENITY AND PUBLIC MORALITY 80 (1969). *But see* Roth v. United States, 354 U.S. 476, 495 (1957), wherein Mr. Chief Justice Warren, in his concurring opinion, stated: "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture."

50 *Id.* at 465-66, 470. The purveyor's methods of advertising the erotically arousing aspects of the work only succeeds in increasing the offensiveness of the work to those already offended. *Id.* at 470.
52 The Court defined a deviant group as one whose members become "sexually stimulated" by viewing deviant sexual practices. *Id.* at 509. Defendant had contended that because the books appealed to those interested in deviant sexual practices it automatically precluded these materials from coming within the "average person-prurient interest" concept of *Roth*. *Id.* at 508.
53 *Id.* at 508-09. The recipient group could not be defined merely as those persons who were sexually immature. The Court concluded that its determination as to the material "[being] assessed in terms of the sexual interests of its intended and probable recipient group" would avoid the pitfalls of vagueness and the restrictiveness of the *Hicklin* rule.
54 This is not to say that development came to a complete halt. *See,* e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968), *discussed in note 28 supra.* The Court adopted the concept
York, the Court, in a brief per curiam opinion, abruptly reversed several obscenity convictions without mentioning any of its previously established tests. There were, however, very important post-1966 decisions in the area of obscenity and censorship which did not directly affect the definition of obscenity.

In the years succeeding the Supreme Court's determinations and elaborations, lower courts, both federal and state, have labored arduously to apply them. An incorporated Roth-Memoirs test has generally been used to judge obscenity. Some courts have considered, in addition to the Roth-Memoirs test, such factors as specific state concern for the protection of children, pandering, invasion of individual privacy through unwilling receipt of sexually explicit matter, and assessment of prurient elements of the sexual interest of intended or probable recipient groups.

The lower courts have challenged exact application of Supreme Court guidelines in two areas. First, courts have questioned the validity of the "utterly without redeeming social value" test enunciated in Memoirs as an independent criterion for judging obscenity. It has

of variable obscenity. When the audience involved is children, less stringent requirements need be satisfied and obscenity will be more readily found. Therefore, it is possible that a magazine, though not obscene if the viewing audience is adult, may be found obscene if its readers are minors. The Court justified its action on its special authority, which does not extend to adults, to control the conduct of children. The Court recognized that parents have primary responsibility for their children's conduct and the obscenity law was merely an aid to parents in promoting their children's well-being. Id. at 638-39. Cf. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), where the Court struck down an unconstitutionally vague law seeking to employ the variable obscenity concept. See Note, Constitutional Problems in Obscenity Legislation — Protecting Children, 54 Geo. L.J. 1379 (1966).

See, e.g., Stanley v. Georgia, 394 U.S. 557, 568 (1969), wherein the Court refused to allow state regulation of obscenity to extend to and proscribe possession of obscene matter by an individual in the privacy of his own home. See notes 179-80 and accompanying text infra; cf. United States v. Reidel, 402 U.S. 351, 355-56 (1971) (constitutional right to possess obscenity in one's home does not protect defendant's distribution of obscene materials to willing adult recipients). Stanley was an exception to the Roth-Memoirs holdings and did not overrule them. See notes 182-86 and accompanying text infra.


See, e.g., United States v. Pelegrino, 467 F.2d 41 (9th Cir. 1972) (no pandering since advertising brochure, although presenting explicit illustrations, stated that its purpose was to provide general information as to sexual functions); United States v. Manarite, 448 F.2d 589 (2d Cir.), cert. denied, 404 U.S. 947 (1971); United States v. Carlson, 294 Minn. 433, 202 N.W.2d 640 (1972), vacated in light of Miller, 94 S. Ct. 263 (1973); Stroud v. State, — Ind. —, 273 N.E.2d 842, 846-48 (1971), rev'd in light of Miller, — Ind. —, 300 N.E.2d 100 (1973).

See, e.g., NGC Theatre Corp. v. Munnert, 107 Ariz. 484, 489-90, 489 P.2d 823, 829 (1967) (en banc), wherein the court refused to accept social value as a third and separate element.
been said that this factor results from something being obscene and is not an independent component of the obscenity definition.\textsuperscript{60} Second, courts have questioned the determination in \textit{Jacobellis} that the phrase "contemporary community standards" refers to a national community and a national standard of decency. Many courts have adopted the Supreme Court's national standard\textsuperscript{61} but others have used a different rule when deemed more appropriate to specific situations. "Local" standards, be they based on state-wide,\textsuperscript{62} community-wide,\textsuperscript{63} or even school district-wide\textsuperscript{64} notions of decency, have been employed as alternatives. Rejection of the national standard rationale was based on the lack of a majority opinion in \textit{Jacobellis}. The opinion of the Court was written by only two Justices, both of whom believed in the national standard.\textsuperscript{65} It was also reasoned that "community" meant only local community and not national standards.\textsuperscript{66}

\textsuperscript{60} State v. Shapiro, 122 N.J. Super. 409, 425, 300 A.2d 595, 604 (1972). "[O]bscenity is something without redeeming social importance" (emphasis in original).


\textsuperscript{64} See, e.g., \textit{Jacobs v. Board of School Comm'rs}, 349 F. Supp. 605, 610 (S.D. Ind. 1972). An injunction was sought to enjoin the suppression by the school board of allegedly obscene literature. The court held that to be obscene the banned subject matter had to offend the notions of decency of an entire school district, disapproval by just one school in the district was held to be insufficient.

\textsuperscript{65} See, e.g., \textit{People v. Kaplan}, 23 Cal. App. 3d 9, 12, 100 Cal. Rptr. 372, 373 (L.A. Super. Ct. App. Dep't 1972), \textit{vacated sub nom}. Kaplan v. California, 413 U.S. 115 (1973). In \textit{Jacobellis}, Justices Brennan and Goldberg delivered the opinion of the Court. 378 U.S. 184, 187-96 (1964). Justice White concurred without opinion. \textit{Id}. at 198. Justice Stewart concurred but emphasized that only hard-core pornography could be limited. \textit{Id}. at 197. Justices Black and Douglas concurred in reversing the lower court judgment, but did so on the ground that any limitation of freedom of speech was repugnant to the Constitution. \textit{Id}. at 196-97. Chief Justice Warren and Justice Clark, in their joint dissenting opinion, agreed that obscenity may be regulated by the government, provided that local contemporary standards prevail. \textit{Id}. at 199-203. Justice Harlan dissented, advocating the separation of federal and state obscenity regulation. State regulation, he said, should be based upon a rationality test, while federal regulation should be premised upon the Roth rationale and subsequent amplifications. \textit{Id}. at 204.

**Miller v. California — A New Test**

In June, 1973, the Supreme Court, in *Miller v. California*, seized an opportunity to settle the contentious obscenity problem. Rather than attempt to bury the *Roth* concepts of obscenity because of all the surrounding confusion, the Court, on the contrary, has made an effort to revitalize them. *Miller* follows the basic premise of *Roth*, that obscenity may be defined, and once this has been accomplished, it may be excluded from the umbrella of constitutional protection.

Appellant was convicted in the Municipal Court of Orange County under a California criminal statute prohibiting advertising and mailing of unsolicited, sexually explicit, obscene material. The statute was basically a *Roth-Memoirs* incorporation. The materials in question consisted of five brochures which advertised four books, entitled *Intercourse*, *Man-Woman*, *Sex Orgies Illustrated* and *An Illustrated History of Pornography*, and a film entitled *Marital Intercourse*. The brochures contained explicit descriptive words, drawings, and pictures of men and women engaging in a multitude of sexual activities with a prominent showing of their sexual organs. Recipients of the unsolicited advertisements complained to the police and the criminal prosecution ensued. The Superior Court of California, Orange County, affirmed the conviction, and an appeal to the United States Supreme Court followed a denial of rehearing by the state Court of Appeals.

The *Miller* Court approached the problem from a historical perspective. A review was made of prior obscenity holdings commencing with *Roth* as well as a consideration of subsequent amplifications thereto. The Court noted its failure to achieve majority agreement in any of the post-*Roth* decisions. It also cited the distinction between

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70 CAL. PENAL CODE ANN. § 311 (West Supp. 1973). The state penal code defined "obscene" as follows:
> [T]he 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.

Following the definition in the Code is a list of specific incidents and descriptions exemplifying that which should be considered obscene. Section 311.2 imposes criminal sanctions for those who knowingly distribute obscene matter.
71 All lower court decisions were unreported.
72 413 U.S. 15, 20-23 (1973). The Court quoted the proposition that obscene utterances do not constitute the communication of ideas and, therefore, are not constitutionally protected. See Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364 (1966), which provides a score card of how the Court’s justices voted on the major cases and the theory upon which they based their decision.
the conclusory presumption of Roth that obscenity is "utterly without redeeming value" and the Memoirs evidentiary requirement that material be affirmatively shown to be "utterly without redeeming social value" before it can be labelled obscene. The Court recognized a need for an approach alternative to that of Memoirs since the negative burden of proof placed upon the prosecutor thereby made criminal convictions almost impossible to secure. 73

As it had been "categorically settled" that obscene materials lack constitutional protection, the Court acknowledged the "inherent dangers" attending state regulation of expression. 74 It also recognized the requirement that courts remain sensitive to any encroachment upon all areas of free speech and the press that are of "serious literary, artistic, political or scientific value," and therefore deserving of protection. Accordingly, it found that while states may control such materials within their own boundaries, such regulation must be limited. 75 States

74 Id., at 23. Although the Court found it "categorically settled" that obscene materials are without the protections of the Constitution, there are some who strongly disagree. Justice Douglas emphasizes that the Constitution emphatically prohibits governmental interference in the exercise of free speech or press. The Constitution does not make exception for obscene utterances, oral or written. The notion that courts may not implicitly read such an exception into the Constitution permeates all of Justice Douglas' opinions. See, e.g., Miller v. California, 413 U.S. 15, 40 (1973) (dissenting opinion); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 70-71 (1973) (dissenting opinion); Byrne v. Karalexis, 396 U.S. 976, 979 (1969) (dissenting opinion); Memoirs v. Massachusetts, 383 U.S. 413, 426 (1973) (concurring opinion); Roth v. United States, 354 U.S. 476, 513-14 (1957) (dissenting opinion).

75 Limitations by states on expression have always come under close scrutiny by the courts. Unless justified by immediate exigencies, prior restraints on freedom of expression have been viewed with much disfavor. See Near v. Minnesota, 283 U.S. 697 (1931), wherein the Court refused to enjoin publication of a "potentially" libelous periodical. Disfavor of prior restraint on expression also extends to obscenity. Although freedom of speech is not an absolute right, it does not follow that states have a blanket license for prior restraint. Such restraint must "be closely confined so as to preclude what may fairly be deemed licensing or censorship." Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957). In Kingsley, the Court sustained the validity of a state statute which empowered a state official to seek an injunction against the sale or distribution of any written or printed matter indecent in nature. The statute was found to provide sufficient constitutional safeguards since the seller or distributor had a right to trial within one day of joinder of issue and a decision within two days after the conclusion of the trial. These speedy procedures avoided prior censorship of constitutionally protected freedoms. This was not the case in Freedman v. Maryland, 380 U.S. 51 (1965). Under the Maryland statute, a motion picture had to be submitted to state board of censors prior to exhibition. The procedure, as established, did not provide for prompt judicial determination of the ob-
can regulate the depiction or description of sexual conduct, but such prohibitions must be "specifically defined by the applicable state law, as written" by the legislature or as "authoritatively construed" by the judiciary.\(^7\)

The Court proceeded to promulgate a three-pronged mandate which states seeking to regulate obscenity must follow. The state court must consider:

(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.\(^7\)

Unworkability of the "social importance" and "utterly without redeeming social value" tests was acknowledged, and these were rejected as constitutional guidelines.\(^7\) The Court felt that the basic framework outlined above, coupled with provision for independent appellate review, was adequate to protect constitutional rights from state infringement.\(^7\)

State regulation illegal as a prior restraint on freedom of expression need not be formal action taken pursuant to statute. In Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), practices of an administrative commission established by state legislation were held to be a system of informal censorship and violative of first amendment freedoms. If a majority of the commission found the materials objectionable the distributor was notified and asked to cooperate with the commission's decision. This administrative system, the Court found, was successful in suppressing publication without the safeguards of notice or hearing. \(Id.\) at 68-72.

\(^7\) 413 U.S. 15, 24 (1973). See United Artists Corp. v. Harris, 363 F. Supp. 857, 861 (W.D. Okla. 1973). Where suit was brought in federal district court for injunctive and declaratory relief against both the seizure of the movie \textit{Last Tango in Paris} and criminal prosecution for its exhibition. Oklahoma defined obscenity under a Roth-like standard. \textit{Okla. Stat. Ann.} § 1040.12 (Supp. 1973). The district court, in refusing to grant the request for a preliminary injunction, stated that on its face the statute was not in conformity with \textit{Miller} and was thus invalid. The case was remanded to the state court to allow the state to construe the statute in accordance with \textit{Miller}, and thereby possibly salvage it.

\(^7\) 413 U.S. 15, 24 (1973) (footnotes omitted). Subsection (a) reflects the reaffirmance of the \textit{Roth} concepts. The Court talks in terms of average person, prurient interest, dominant theme, and contemporary community standards. The "patent offensiveness" concept of \textit{Manual Enterprises} is reflected in subsection (b). But in subsection (c) the Court attempted a new treatment of the value element, disregarding the \textit{Roth} and \textit{Memoirs} approaches. \textit{Cf.} People v. Heller, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1973). The New York Court of Appeals found subsection (c) comparable to the former approaches.

\(^7\) 413 U.S. 15, 24-25, 25 n.7 (1973). The Court cited the divergence of opinions among the Justices and the lack of majority approval of any of these concepts.

\(^7\) \textit{Id.} at 25.
To aid states in formulating statutes sufficiently specific, the Court suggested types of subject matter which could constitutionally be prohibited. Included were patently offensive depictions of normal or perverted, actual or simulated, sexual acts and descriptions of masturbation, excretion, or depiction of the sexual organs in a lewd manner. This sample specification also provided "fair notice" to commercial distributors as to what materials shall be proscribed.

Recognizing its duty of "judicial supervision" to uphold first amendment rights, the Court next tackled the definitional problem raised by the phrase "contemporary community standards." Appellant had argued that a nation-wide community standard was the only appropriate one because freedom of expression is a high priority right which must be protected from infringement. State regulation, therefore, must be restricted to that least detrimental to such freedom. The "national community standard" of Jacobellis, which appellant urged, was rejected by the Miller Court in favor of a "local notion of decency." It was reasoned that a uniform national standard as a single, abstract formulation would hinder a jury in its determinations. It would be an "exercise in futility" to require a national standard because the country is just too large and too diverse in its tastes and attitudes. As additional authority for this proposition, the Court relied upon former Chief Justice Warren's succinct statement in his dissenting opinion in Jacobellis that "there is no provable 'national standard.'"

The argument that application of a local standard of decency would prevent the dissemination of materials acceptable to some areas of the nation merely because such materials transgressed the boundaries of decency established by others was disposed of by an interesting application of reverse reasoning. It rationalized that even under a national standard materials that would have been otherwise acceptable in some

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80 Id. The Court merely suggested a functional regulatory scheme for the state; it did not require them to specifically adhere to its suggestions, nor, for that matter, require them to regulate obscenity at all. See People v. Heller, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1973).


82 Brief for Petitioner at 16-17, Miller v. California, 413 U.S. 15 (1973). Appellant's argument presupposes that a nation-wide standard is more liberal than a local one. As local standards must vary among communities, this argument is tenuous at best.


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.

Id. at 32.

84 Id. at 32, quoting Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting).

85 In Jacobellis v. Ohio, 378 U.S. 184, 193-95 (1964), Justices Brennan and Goldberg based their rejection of the local standard on this theory.
"open-minded" places still may be banned. The Court then concluded that a national standard would be equally as dangerous to the freedom of expression as a standard based upon local attitudes. 86

Appellant's contention that application of a local standard would necessarily place "unconscionable burdens on the free flow of interstate commerce" was similarly dismissed. State regulation of obscene material has long been recognized as a valid exercise of police power despite its incidental effects on interstate commerce. 87

The Court next replied to the fears and charges of repression by the dissenting Justices. Borrowing from Roth, the Court rejected Justice Brennan's challenge that Miller is just the beginning of "state-ordered regimentation of our minds." 88 Hardcore pornography exploited for commercial gain, said the Court, may be strictly censored, with first amendment protections afforded to those works which do have "serious literary, artistic, political or scientific value," thus protecting the free exchange of thoughts. To Justice Brennan's anticipation of repression, Chief Justice Burger answered that the courts are competent to distinguish the constitutionally protected exchange of ideas from the commercial exploitation of hard-core pornography. 89

Summarily, the Supreme Court established its guidelines. It reserved to the state courts, based upon local concepts of decency, the power of obscenity regulation and the power to test the constitutionality of their state's statutes. 90

86 413 U.S. 15, 32 n.13 (1973). See Roth v. United States, 354 U.S. 476, 505-06 (1957) (Harlan, J.). Justice Harlan believed that the Federal Government's interest in regulation of obscenity, like its interest in the regulation of libel, is only of an incidental nature, the primary responsibility resting with the states. This is the better situation as state legislatures are less threatening to first amendment rights due to their capacity to adopt new modes of "social control" to meet their individual needs. "The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of the States to experiment will be stunted [if a national standard is adopted]." Id. at 506.

87 413 U.S. 15, 32 n.13 (1973). Additionally, the Miller Court noted that in this particular case there was no showing that the accused materials were ever distributed across state boundaries.

In Kidd v. Pearson, 128 U.S. 1 (1888), the Court noted that state regulation is not unlimited. The incidental effects of such regulation of interstate commerce must be scrutinized because the state cannot unjustly infringe upon such commerce. Id. at 23. See also Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).


90 People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973). Following this policy, the Supreme Court remanded Miller and several other pending obscenity cases to state and lower federal courts for further proceedings consistent with the new obscenity definition. See Miller v. United States, 413 U.S. 913 (1973) (mem.), vacating 431 F.2d 655 (9th Cir. 1970); Ewing v. United States, 413 U.S. 913 (1973) (mem.), vacating 445 F.2d 945 (10th Cir. 1971); Kaplan v. United States, 413 U.S. 913 (1973) (mem.), vacating 277 A.2d 477 (D.C. Cir. 1971); Court v. Wisconsin, 413 U.S. 911 (1973) (mem.), vacating 51 Wis. 2d 683, 188 N.W.2d 475
Miller's Impact

In the wake of this landmark decision has grown a plethora of commentary, both legal and social. Some commentators have applauded the decision as a method of stemming the flood of pornography which has saturated the American cultural market. Others have viewed the decision with much disdain. Their disapproval is primarily based upon fear and resentment of any threat of repression of ideas and thoughts. Some will concede the necessity for a curb on the sexual permissiveness of society but such stern control as this, they believe, threatens its entire cultural, intellectual, and educational development.

The full impact of Miller on obscenity law has yet to be realized. Judicial application of the Miller guidelines is now taking place. Early indications tend to dissipate all hope that the Supreme Court has finally established "concrete guidelines." What has so far occurred and what appears to be continuing in the state and lower federal courts is much litigation with varying results more often than not characterized by confusion as to what is obscene and what is the determining standard.91

The Miller guidelines require that the types of descriptions and representations of sexual conduct to be proscribed be specifically delineated in the applicable statute. The required specificity may be accomplished through judicial construction or by the language of the legislative enactment itself.92 In response to this requisite element, lower state and federal courts have begun, at their earliest opportunity, a close examination of their jurisdiction's obscenity and decency statutes. Interesting interpretations of the Miller specifications, with often contrasting and conflicting decisions as to the validity of obscenity statutes, even though their language be identical, have been the result of these individual inquiries.

A survey of obscenity statutes from the many jurisdictions reveals a great variance in their scope. A small number are extremely detailed,93 more are quite general in their language,94 but most are in-between.

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91 See notes 104-10, 142-48 and accompanying text infra.
The middle group primarily consists of statutes which embody either a sole Roth standard, or an incorporated Roth-Memoirs test.

In the case of the very detailed statutes, the requisite specificity has been easily recognized. Arizona imposes criminal sanctions for the exhibition of "explicit sexual material" defined as the depiction of "human sexual intercourse, masturbation, bestiality, oral intercourse, [or] anal intercourse." In a suit which challenged the decency of the movie The Last Picture Show, the federal district court found that Arizona's statute closely resembled the examples of obscenity articulated by the Miller Court.

The validity of a broad, general statute presents courts with a more difficult determination. This type of statute usually provides no definition other than the word obscene itself, or the use of synonyms such as lewd, filthy, lascivious, impure, or indecent.

In the federal arena, the Fifth Circuit, in United States v. Thevis, upheld the validity of section 1462, title 18, United States Code, which prohibits obscenity from flowing in interstate commerce. The court took the position that the prohibited depictions of sexual conduct could be, under Miller, authoritatively construed by the judiciary. Relying on the action of the Supreme Court in United States i., 12 200-Ft. Reels of Super 8mm Film, a case decided at the same time as Miller, the

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98 BBS Productions, Inc. v. Purcell, 13 CRIM. L. REP. 2388 (D.C. Ariz. Aug. 1, 1973). Miller gives as examples these patently offensive depictions: "ultimate sexual acts," "masturbation, excretory functions, and lewd exhibition of the genitals." 418 U.S. 15, 25 (1978). While the BBS court seized the opportunity to construe the state obscenity statute, other federal courts have deferred decision until a state, either by judicial construction or statute, decides if its statute comports with Miller. See, e.g., Detco, Inc. v. McCann, 14 CRIM. L. REP. 2145 (E.D. Wis. Nov. 21, 1973), wherein the court abstained from deciding the constitutionality of Wis. STAT. ANN. § 944.21 (1958); United Artists Corp. v. Harris, 363 F. Supp. 837 (W.D. Okla. 1973), discussed in note 76 supra.

99 See note 94 supra.


101 413 U.S. 128, 130 n.7 (1973). Here, 19 U.S.C. § 1305(a) (1970), which prohibits the importation and provides for the seizure of articles which are "obscene and immoral," was attacked as unconstitutional on its face because of its general terms. In sustaining the validity of the section Chief Justice Burger noted that if vagueness and questionable validity were created by the use of the words "obscene, lewd, lascivious, indecent, filthy," the Court would interpret these terms as proscribing only hardcore, patently offensive depictions of sexual conduct as described in Miller. See United States v. 87 Photographs, 402 U.S. 369,
court applied judicial gloss to turn a general prohibition statute into the more specific type demanded by Miller. Although the statute appeared to encompass a broad scope of regulation, its sweep was judicially narrowed to prohibition of patently offensive hard-core pornography. On the state level, Massachusetts and Washington affirmed the validity of their general obscenity statutes, while Indiana rejected its own as unconstitutionally vague. The Washington court recognized that, by itself, “obscene” without further clarification in the statute was unconstitutionally vague, and that obscenity should not be described in terms of itself. The court then proceeded to limit the statute in light of the Miller dictates, and their application by the Supreme Court in 12 200-Ft. Reels, so as to regulate only those works which are patently offensive or contain descriptions of hard-core sexual conduct. The Massachusetts appellate court also concluded that the statute need not specifically set out an obscenity standard in order to be constitutional but could be limited by the process of judicial construction, and thereby retain its vitality.

Indiana, whose statute was worded similarly to its Washington and Massachusetts counterparts, reached a different result. In light of Miller, the Indiana court ruled that the Indiana statute was too general and failed to set out specifically the sexual acts which, when depicted, would constitute a violation. Unlike Washington and Massachusetts, Indiana did not take the judicial construction route to validate an otherwise general and vague statute. The choice made by the Indiana court, although different from other states’ decisions, is permissible and con-

369-71 (1971), wherein Justice White discusses an attempt by the courts to judicially construe a statute so as to uphold its constitutionality and affirm its vitality. 102


104 State v. J-R Distributors, Inc., 82 Wash. 2d 584, 512 P.2d 1049 (1973) (en banc). The validity of Wash. Rev. Code Ann. § 9.68.010(1) (1961), which prohibits the exhibition, sale or distribution of obscene articles, was challenged as overly broad.


sonant with the Supreme Court's policy to let individual localities make their own determinations concerning obscenity.

While there may be no serious difficulty when individual states make conflicting decisions as to the validity of similar statutes, a problem does arise when two lower courts of the same state make contradictory determinations as to the validity of a single state-wide statute. For several months New York was caught in this paradox. There, two irreconcilable decisions as to the validity of a single obscenity statute emanated from different divisions of the same court.109

Court interpretations of the third type of statute, those of the in-between group, have also resulted in conflicting decisions. Under their

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109 In New York, under section 6330 of the Civil Practice Law and Rules (CPLR), a county district attorney or prosecutor may seek an injunction to halt the distribution or display of any "obscene, lewd, lascivious, filthy, indecent or disgusting" written matter, photograph, motion picture or any other type of material which could be categorized under section 235 of the Penal Law as obscene. The state Penal Law defines "obscene" in terms of the Roth-Memoirs coalescence standard. N.Y. PENAL LAW § 235.00 (McKinney 1967).

Two months after Miller, the New York County Supreme Court, in Redlich v. Capri Cinema, Inc., 347 N.Y.S.2d 811 (Sup. Ct. New York County 1973), refused to issue an injunction under CPLR § 6330 because it found this statute to be unconstitutionally overbroad. There was no limitation built into the statute which would limit its regulatory force to those works lacking serious literary, artistic, political or scientific value. As written, it could encompass works which, although dealing with sex, also legitimately possessed the requisite serious value. The statute, Justice Gellinoff found, lacked any built-in limitation and none could be judicially construed from its language. The court also indicated that section 235 of the Penal Law possibly exceeded the permissible scope of regulation, as it failed to confine itself to specifically described sexual conduct, nor could any such limitation be construed. 347 N.Y.S.2d at 816-17. This decision brought a temporary halt in New York County to further attempts by the district attorney and police to enjoin such exhibitions and displays.

Soon after Redlich, the Nassau County Supreme Court refused to dismiss a request for an injunction to stop the showing of the movie Last Tango in Paris under CPLR § 6330, notwithstanding defendant's allegations that the underlying penal provision was vague and overbroad. In Lynbrook v. United Artists Corp., 347 N.Y.S.2d 856 (Sup. Ct. Nassau County 1973), the presumption of constitutionality of section 6330 was held not overcome. The court also noted that the predecessor to section 6330, N.Y. CODE PRO. § 22-a (McKinney 1970), had been upheld by the United States Supreme Court. See Kingsley Books v. Brown, 354 U.S. 436 (1957); Milkyway Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969), aff'd sub nom. New York Feed Co. v. Leary, 397 U.S. 98 (1970) (per curiam) (affirming the validity of N.Y. PENAL LAW § 235.00 (McKinney 1967)). Although "obscene" was not defined in section 6330, the court judicially construed it to encompass the Miller requirements. 347 N.Y.S.2d at 860.

The court's reliance upon previous Supreme Court decisions validating the New York statutes is questionable as they were based on a Roth-Memoirs standard of obscenity. The decision as to definiteness through the vehicle of judicial construction actually was, under the Miller guideline, within the prerogative of the court.

On appeal, the Appellate Division, First Department, tentatively settled the conflict by reversing Redlich. Redlich v. Capri Cinema, 43 App. Div. 2d 27, 349 N.Y.S.2d 697 (1st Dep't 1973). The court, following the Miller suggestion of judicial construction, found the civil statute well within the guideline. Any other determination, it was rationalized, would frustrate the clear legislative intent to control obscenity. Id. at 30, 349 N.Y.S.2d at 701. As in Lynbrook, the court relied on pre-Miller United States Supreme Court decisions upholding the constitutionality of the New York statutes. Id. at 30, 349 N.Y.S.2d at 701. The
respective criminal codes, Florida\textsuperscript{110} and New Jersey\textsuperscript{111} define obscenity by the Roth standard. After examining their statutes for definiteness, Florida found its own valid, while a federal district court voided the New Jersey statute for vagueness. Florida relied on judicially imposed limitations to save its acknowledgedly broad statute.\textsuperscript{112} After examining the legislative history of the New Jersey statute, a three-judge federal court found it purposefully broad in nature and not embodying the Miller concepts. It was the legislative intent that the Roth test be the only standard in the prosecution of obscenity offenses.\textsuperscript{113} As the statute did not include a "patently offensive" test, nor specifically define the sexual descriptions which would be prohibited, it would unconstitutionally proscribe material that possessed the requisite serious value and did not depict sexual conduct in a patently offensive manner.\textsuperscript{114} Again, two states employ the same statutory language, but the courts reach different results as to their respective statutes' validity. This paradox is attributable to the Supreme Court's new policy of local determination.

Other states have readily concluded that their statutes incorporate:

court found that the movies in question were hard-core pornography and were exploited for their sexual aspects and perversions only. Instead of discussing the relevant New York community standards, the court found that the movies would violate the community standards of Sodom and Gomorrah, and, thus, a fortiori, would violate any conceivable New York community standard. \textit{Id.} at 28, 349 N.Y.S.2d at 699. It is open to serious question whether the standards of a narrowly circumscribed New York community, e.g., Times Square, would proscribe whatever would violate the standards of Sodom and Gomorrah. In any event, this approach plainly violates the "local community" concept of Miller.


\textsuperscript{110} FLA. STAT. ANN. § 847.011(10) (1965), as amended, § 847.011(11) (Supp. 1972); "[T]he test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."


\textsuperscript{112} Rhodes v. State, 283 So. 2d 351, 355-58 (Fla. Sup. Ct. 1973); Papp v. State, 281 So. 2d 600 (Fla. Dist. Ct. App. 1973). In State \textit{ex rel. Sensenbrenner v. Adult Book Store}, 35 Ohio St. 2d 220, 301 N.E.2d 695 (1973), the Supreme Court of Ohio, in a per curiam opinion, upheld the validity of the Ohio obscenity statute, OHIO REV. CODE ANN. § 2905.34 (1971). This statute is unique in that it defines obscenity in several ways. First, material may be obscene under the Roth test. The Roth quality comes through although the contemporary community standard element is lacking. Second, material may be obscene if it arouses lust because of its sexual depictions of nudity, bestiality, bizarre violence or the like. Or, in the alternative, if the depictions of this bizarre sexual conduct are included for the sake of commercial exploitation rather than any valuable scientific, artistic, or moral purpose, then they may also be found obscene. Although the court did not substantiate its reasoning, it appears that the statute was read conjunctively and not as an enumeration of separate and independent tests, each alone sufficient to satisfy the requisite definiteness.


ing the Roth-Memoirs definition meet the Miller dictates.\textsuperscript{115} Even though Miller deleted the Memoirs element of “utterly without redeeming social value,” its presence in the Texas\textsuperscript{116} and California\textsuperscript{117} statutes did not affect their validity.

California, in \textit{People v. Enskat},\textsuperscript{118} held that the intent of Miller was to strengthen the prohibition against obscenity, and that to declare its own statute unconstitutional would violate this mandate.\textsuperscript{119} Inasmuch as the Supreme Court did not expressly declare the Memoirs “utterly” element unconstitutional, but simply deleted it, the Enskat court, in keeping with the tenor of Miller, simply ignored that element in the California statute until legislative changes could be made. It found the statute sufficiently definitive in that it forbids only hard-core pornography, and therefore sustained its validity.\textsuperscript{120}

Judicial construction is one means of achieving the specificity requisite to a valid obscenity statute. The Miller Court also suggested a more direct approach, \textit{viz.}, legislative enactment. Several state legislatures have recently appointed special committees which have begun hearings and proceedings to aid in the formulation of new laws consonant with the standard of Miller.\textsuperscript{121} Such legislation incorporating the tri-partite Miller test has already been proposed in the General Assemblies of Illinois,\textsuperscript{122} Pennsylvania,\textsuperscript{123} and Kansas.\textsuperscript{124}


\textsuperscript{116} Richards v. State, 497 S.W.2d 770, 777 n.11 (Tex. Civ. App. 1973), upholding TEx. PENAL CODE ANN. art. 527, § 1(A) (Supp. 1972). There the court found that the "social value" element placed an additional burden on the prosecutor.


\textsuperscript{118} 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973).

\textsuperscript{119} The court acknowledged that the test of “merely lacks serious value” as opposed to “is utterly without redeeming social value” relaxes the burden of the prosecutor and makes it much easier for the people to succeed. \textit{See} Miller v. California, 413 U.S. 15, 22 (1973). The “utterly” element places upon the prosecutor the burden of proving a negative which is almost impossible. 33 Cal. App. 3d 900, 910-11, 109 Cal. Rptr. 433, 440-41 (1973).

\textsuperscript{120} 33 Cal. App. 3d 900, 908-12, 109 Cal. Rptr. 433, 438-41 (1973).

\textsuperscript{121} See, e.g., S.C. H.R. Con. Res. 1128 (Sept. 20, 1973) which established a nine-man committee to study pornography and obscenity laws. The purpose of these hearings was to obtain information from the public, elected governmental officials, and other interested parties in order to determine if alterations to the existing statutes were necessary. Arizona Public Hearing on Pornography, Committee on Judiciary, Subcommittee on Pornography Investigation, Sept. 24, 1973.


\textsuperscript{123} Senate Bill 1236 which, as of October 22, 1973, was still in the Judiciary Committee of the General Assembly.

\textsuperscript{124} Proposed amendments to the Kansas obscenity statutes follow the basic Miller test with some mild variations. As to the value requirements, a fifth one is added, \textit{viz.}, educational. The proposed value element also deletes “serious” as a value requirement. The committee report accompanying this proposed bill explained that the lessening of the
Vagueness

The states, either by judicial construction or legislation, are attempting to emulate the teachings of Miller and embody within their law a specific standard. This has been the subject of severe criticism in that the Miller pronouncements are themselves not sufficiently definite. Charges of vagueness have resulted in their condemnation by several of the dissenting Justices as just another set of unworkable guidelines.\textsuperscript{125}

For a statute to be sustained, the Constitution mandates that it "provide adequate notice to persons who are engaged in the type of conduct that the statute" seeks to prohibit. Failure to give adequate notice is especially distasteful in the area of free speech.\textsuperscript{126}

The Miller solution to the obscenity problem is tenuous because, in its attempt to define a perhaps undefinable concept, the Court employs subjective criteria such as "'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like."\textsuperscript{127} The problem inherent

\textsuperscript{125} Miller v. California, 413 U.S. 15, 41-42 (1973) (Douglas and Brennan, J.J., dissenting); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83-89 (1973) (Brennan, J., dissenting). The majority of the Miller Court believed the standard to be definitive and held that if a state incorporated within its statutes specific depictions of what is to be proscribed adequate and fair notice would be given to those who, because of their dealings in such materials, would be subject to criminal prosecutions. 413 U.S. 15, 27-28 (1973).

\textsuperscript{126} Paris Adult Theatre I v. Slaton, 413 U.S. 49, 87-88 (1973) (Brennan, J., dissenting). The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be criminally responsible for conduct which he could not reasonably understand to be proscribed.

\textsuperscript{127} Id. at 87, quoting United States v. Harris, 347 U.S. 612, 617 (1954). See Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); cf. Bouie v. Columbia, 378 U.S. 347, 350-54 (1964). In Bouie, a criminal trespass statute was on its face precise. Retroactive judicial construction broadened the law so as to bring the defendants within its prohibitions. This situation, the Supreme Court felt, was even more damaging than when a statute is vague or overbroad on its face. At least the latter type of statute suggests to the future defendant that his contemplated conduct may come within its ill-defined prohibitions. The retroactively broadened statute gives no warning at all. Id. See also Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

\textsuperscript{128} Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973). Justice Stewart has conceded that obscenity cannot be defined, but that he "know[s] it when he see[s] it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion). This viewpoint was adopted by the Court when it eliminated the requirement that a prosecutor produce expert testimony when obscene material was placed in evidence. The Court concluded that its content speaks for itself. Kaplan v. California, 413 U.S. 115 (1973). The Second Circuit, employing the "I know it when I see it" rationale, found the film Sinderella obscene. United States v. One Reel of 35mm Color Motion Picture Film Entitled "Sinderella," Sherpix, Inc., — F.2d — (2d Cir. 1974). See People v. Heller, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1973).
under the Roth-Memoirs criteria with regard to who is the "average" citizen reappears. The problem is further aggravated when meanings are attributed by police, prosecutors, and the courts to these indefinite concepts on the basis of personal life experiences, philosophies, and idiosyncrasies.128 What is especially feared by some, when standards vary according to each person's own predispositions, is the creation of an open invitation to erratic and arbitrary exercise of police power.129 It is feared that every writer and dealer of literature, motion pictures, or any type of media will be subjected to local police interpretations of these indefinite subjective concepts.130

When high priority rights are affected, e.g., freedom of expression, laws based upon subjectivity and community considerations are especially undesirable. But this is not to say that all laws based upon these considerations are invalid. For even where constitutional rights are involved, e.g., protection of land from government confiscation,131 the law recognizes that subjectivity, aesthetics, and community objectives are valid considerations when formulating new law. Zoning ordinances have been upheld even though their restrictions were based

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130 Trinkler v. Alabama, 94 S. Ct. 265 (1978). This apprehension appears to be well founded. In New York, the Albany County district attorney not only subpoenaed all "X-rated" movies that were appearing in the county movie theaters for grand jury review, but requested that all theater operators remove, at least temporarily, any "X-rated" movies from their programs. The mayor of Albany issued orders to the police department that it was to monitor city movie theaters and, in its discretion, remove those materials of questionable acceptability. 170 N.Y.L.J. 22, Aug. 1, 1973, at 1, cols. 5-6.

Hauntingly reminiscent of the fifteenth century counter-reformation burnings and the Salem witchhunts were recent events in Drake, North Dakota. The local school board ordered the burning of Kurt Vonnegut's novel, Slaughterhouse Five, James Dickey's Deliverance, and several anthologies of Faulkner, Hemingway, and Steinbeck. The books were deemed unsuitable for classroom study because of their references to sexual conduct and profanity, and were symbolically disposed of. N.Y. Times, Nov. 16, 1973, at 27, col. 1.

How "dirty" does a "dirty" word have to be before it is censored? In Cohen v. California, 403 U.S. 15 (1971), the Supreme Court rejected the state's attempt to impose criminal sanctions upon the defendant because he openly wore his jacket which bore the words "Fuck the Draft." The crudeness and distasteful method of expression was noted by the Court, but first amendment considerations of free dialogue outweighed its offensiveness Id. at 21. The State could not as "guardians of [the] public morality" remove this offensive utterance from the vocabulary of its citizens. Id. at 23-26. "[T]he State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." Id. at 25.
131 U.S. CONST. amends. V, XIV.
primarily or even exclusively upon aesthetics-subjectivity. Why it should be permissible to have zoning laws based upon these considerations and impermissible to base obscenity regulation on the subjective considerations of a community may best be explained by the fact that the former restriction is of truly local nature. Zoning regulation affects real property permanently affixed within the community; it affects only the community. Obscenity regulation affects personal property and even under the guise of community control has nationwide implications. A decision labelling a literary work obscene in one locality with perhaps criminal penalties imposed upon the distributor may deter him from disseminating the work anywhere in the nation for fear of further prosecution.

The Supreme Court intended the Miller formula to be concrete. The vagueness and uncertainty of its final formulation, however, results not only in confusion, but in infringement upon several important values as well. First, by failing to give adequate notice, obscenity laws threaten to trap the unsuspecting and innocent. Second, first amendment freedoms are placed in jeopardy. It is a matter of great concern when this chilling effect pervades the area of freedom of expression. Third, the vague law leaves its enforcement to the subjective discretion of police or local courts. Open discretion invites arbitrary, erratic, and discriminatory application. Finally, and partially as a result of the invitation to discretion, such vagueness inevitably results in "institutional stress." Courts will be overrun with marginal cases of borderline obscenity. With each case a court will have to decide whether or not to grant first amendment protection. This ad hoc approach will clog the judicial machinery by transforming every case into a constitutional question.

Whether or not this vagueness defect can be corrected is as yet an unanswered question. Justice Stewart has implied that obscenity is inherently vague and will thus always remain an indefinable concept.

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132 Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967). The Court of Appeals recognized that although aesthetic objectives alone may support a zoning ordinance, these objectives may not be manipulated by the state to enforce unreasonable and discriminatory decisions. As a safeguard, the aesthetic considerations must relate to the community's economic, social, and cultural policies. Cf. Sun Oil Co. v. Madison Heights, 41 Mich. App. 47, 199 N.W.2d 525 (1972) (aesthetics can be an incidental consideration when enacting zoning laws).


134 When statutory vagueness potentially inhibits speech, courts generally will scrutinize the statute more closely and apply a stricter standard as to the limit of permissible vagueness. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 88 (1973) (Brennan, J., dissenting); Smith v. California, 361 U.S. 147, 151 (1959).


136 Id. at 91.

137 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The Court,
Ex Post Facto Application

Closely related to the requirement of fair notice is the due process consideration of ex post facto application of laws. When Miller distributed his brochures neither he nor his prosecutor could have anticipated with any degree of certainty that they would be found obscene under a yet unarticulated, but stricter standard.\(^\text{138}\) Miller was placed in the same position as Ralph Ginzburg.\(^\text{138}\) Both had their convictions affirmed under law set forth by the Court subsequent to their alleged criminal acts.

To prevent further impingement upon due process guarantees, lower courts have attempted to limit, time-wise, the Miller yardstick of obscenity. Some say they will apply Miller prospectively, i.e., to offenses committed after the decision.\(^\text{140}\) It has also been suggested that in a case in the trial or appeal stage when Miller was announced, the accused must receive the benefit of both the Miller and Roth-Memoirs tests. For a conviction, therefore, the material in question must be adjudged obscene under both tests.\(^\text{141}\)

How Large Is the Relevant Community?

In response to the vagueness problem, lower courts are now attempting to attach specific meaning to the words employed by the Court in its “concrete guideline.” The majority claimed in Miller that it had finally settled the problem of what are proper community standards. But whether or not they have finally settled the question of optimal community size remains to be seen. True, the Court explicitly stated that the Jacobellis nation-wide standards are not to be used. It failed, however, to articulate exactly what was to be used in their place. It was stated that in an obscenity prosecution it would be un-

138 413 U.S. at 38 (Douglas, J., dissenting); see Trinkler v. Alabama, 94 S. Ct. 265 (1973) (Douglas, J., dissenting) (on remand, the state court will employ in its determination standards which no one knew existed at the time the alleged offense was committed); Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183, 186-87 (Gunter, J., dissenting), prob. juris. noted, 94 S. Ct. 719 (1973).
139 See Ginzburg v. United States, 383 U.S. 463 (1966) (pandering rationale introduced). Justice Black, in his dissenting opinion, expressed outrage at this decision. Id. at 476.
140 See, e.g., Rhodes v. State, 283 So. 2d 351, 354-55 (Fla. Sup. Ct. 1973). The court found that the statute, on its face, sufficiently comported with the first two elements of the Miller test, but found the new literary value test not embodied within the statute absent additive judicial construction. As the offense was committed prior to the Supreme Court ruling, the state court refrained from applying a new construction of the statute in order to protect defendant's due process rights. Id.; Papp v. State, 281 So. 2d 600 (Fla. Dist. Ct. App. 1973); see also United States v. Lang, 361 F. Supp. 380 (C.D. Cal. 1973).
141 United States v. Thevis, 484 F.2d 1149, 1154-55 (5th Cir. 1973).
workable to have a jury apply an "abstract formulation" based upon uniform national standards since in any prosecution jurors are instructed to draw their conclusions based upon their own community standards. After intimating that community standards were based upon local notions of decency, the Miller Court proceeded to adopt the California approach which applies state-wide community standards. Thus, it is now established that proper standards shall be gauged in a "local sense," but within the confines of state-wide standards. This is one of the concrete guidelines with which the Miller Court has left us.

Through Miller, the Supreme Court intended to return to the individual states plenary power to determine questions on obscenity with the aim that they would mold their answers according to their unit needs. Reflecting the lack of clarity of the Supreme Court's rejection of nation-wide community standards, lower courts have come up with a variety of substitute boundaries. Alabama and Texas seem to take the county approach. The Supreme Court of Washington indi-

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Prior to Miller, the movie Deep Throat, which was described as the "nadir of decadence," was found obscene by a New York City Criminal Court sitting without a jury. People v. Mature Enterprises, Inc., 73 Misc. 2d 744, 764, 343 N.Y.S.2d 911, 925 (N.Y.C. Crim. Ct. N.Y. County 1973). On the other hand, a jury sitting in the Binghamton, New York, City Court found the movie not obscene. People v. Binghamton Theatres, Inc., cited in People v. Mature Enterprises, Inc., id. at 763, 343 N.Y.S.2d at 924. These opposite determinations are interesting in that they tend to refute the Court's reference to forcing the people of smaller, less open-minded areas to accept what is deemed acceptable in the more open-minded places when substantiating its local community rationale. See note 83 and accompanying text supra.

The thrust of Miller's local community standards was that obscenity determinations should be reflective of community mores. These community notions of decency are determined by the jury. It is ironic that the Binghamton jury, composed of members of the community, found the movie not obscene while the judge in New York City found it obscene. The judge in Mature Enterprises attempted to circumvent the Binghamton jury's determination by suggesting that failure to convict was based on their confusion over the state's obscenity laws. 73 Misc. 2d at 763, n.13, 343 N.Y.S.2d at 924, n.13. Thus, the court rationalized away the fact that a small city jury refused to condemn as obscene a movie characterized by it as the "nadir of decadence."


The implementation of a county-wide notion of decency raises several unanswered questions in the area of venue. For example, if a party to an action moves for a change of venue and the motion is granted, what local community standard of decency should apply? Texas will direct a change in venue if the moving party can show that there is great prejudice which precludes a fair and impartial trial in the county where trial was commenced. Tex. R. Civ. Pr. 257 & 259 (1970). If the Richards notion of the community, based upon the location from which the jury was drawn, is used, as opposed to that where the offense was committed, then the "localness" concept as described in Miller is defeated. The Supreme Court employed the local standard rational because of the divergence of community tastes and the necessity for satisfying individual community needs. See notes 83-84 and accompanying text supra. Under the Richards approach, one community will
cated in a recent case that the standard was to be measured by the mores of a city, *viz.*, the metropolitan area of Seattle. The community from which a standard is to be determined in New York is state-wide. In Georgia, a town's standard of decency was implemented to condemn the movie *Carnal Knowledge* as obscene. Soon after the Supreme Court ruled that no nation-wide standard exists, the First Circuit employed a national standard in a federal forfeiture proceeding to find that obscenity permeated the entire movie *Deep Throat*. As this proceeding was brought under a federal statute, and its effects would reach all parts of a country well diversified in its attitudes, the court decided a national standard of decency was required.

The courts are now caught in a quagmire of uncertainty. For state courts the standard is limited to a state-wide basis, but may be "local" and vary with respect to the chosen locality. As for federal courts, at least when a federal statute is involved, a national standard is to be used. If the practical results of the decisions be considered in deter-

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144 State v. J-R Distributors, Inc., 82 Wash. 2d 584, 512 P.2d 1049 (1973) (en banc). National community standards were rejected as too "hypothetical and unascertainable." *Id.* at 1064. The local standard was deemed the most rational as it allowed the greatest flexibility in meeting the diverse tastes and cultures of the different localities. *Id.* at 1065. The court found, however, that the standard should not be based upon a "microscopic portion" of the community, and rejected plaintiff's claim that such demonstrations would be quite acceptable in the "red-light district" of the city. *Id.* at 1083. The court believed that such a limited boundary would not be indicative of "community acceptance." *Id.*

145 People v. Heller, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1973). The state-wide standard is to be determined by the appellate courts and applied uniformly throughout the state.


147 United States v. One Reel of Film, 481 F.2d 206, 208 n.2 (1st Cir. 1973). The forfeiture proceeding was instituted under 19 U.S.C. § 1305(a) (1970).

The Fifth Circuit, even prior to *Miller*, had held that in obscenity cases brought under federal statutes the standards would be that of the local community and not a country-wide standard. The court relied heavily upon the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (Supp. 1972), to support its decision. The Act used the word community to mean the area from which the jury should be selected. The jury should be a diverse cross-section of the district. Hence, the court found it to be unreasonable to have a jury assess matters of the conscience of a boundless community if they are purposefully drawn from a restricted area. United States v. Groner, 479 F.2d 577, 582-83 (9th Cir. 1973). *Accord*, United States v. One Reel of 35mm Color Motion Picture Film Entitled "Sinderella," Sherpix, Inc., — F.2d — (2d Cir. 1974).

148 See note 147 supra.
mining optimal community size, it appears that a national standard of decency is to be preferred. For example, in a highly publicized case where a local community controlled the standard of decency, the film *Carnal Knowledge*, which received wide critical acclaim both in the movie industry and nation-wide, was condemned as obscene. Recently, the Supreme Court consented to review this decision and reevaluate its obscenity guidelines. Even though a national standard appears least offensive to constitutional freedoms, it is most probable that the Court will specifically locate the boundary of the community according to state lines. This location will be consonant with the court's concept of "localness" as the proper community standard.

Day to day mass communication functions on a nation-wide level. Condemnation of films such as *Carnal Knowledge* has clearly endangered national communication of ideas. A greater apprehension has been expressed, however, of a more subtle interference that might result from the local community concept. A chilling effect on freedom of expression could touch virtually every nation-wide distributor of books, magazines, or movies as well as local dealers, booksellers, and librarians. There could result a tendency not to produce, distribute or exhibit material where there could be even the slightest question as to its acceptability, rather than risk criminal prosecution.

Doctrinal principles as to the importance of freedom of communication in a traditionally democratic atmosphere also indicate that a national community standard is preferable. Anything less than a "society at large" determination of obscenity, if such determination is necessary at all, could lead to an extremely intolerable situation whereby the cultural, intellectual, and educational achievements and advancements of society depend upon an isolated sector of the community.

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150 The dicta in *Jacobellis* to the effect that a local community standard will result in denial of access to some parts of the country of materials found acceptable in other sections is no longer prophesy. See 378 U.S. 184, 193 (1964).

151 See *Trinkler v. Alabama*, 94 S. Ct. 265, 266 (1973) (Douglas, J., dissenting). In Westchester County, New York, the distributors and producers of the film *The Devil in Miss Jones* have instituted a civil rights suit against the district attorney of the county for seizing the film. Such suits may became a viable method by which dealers, producers, and sellers may protect their interests in the face of either civil or criminal prosecution. N.Y. Times, Oct. 30, 1973, at 49, col. 5.

Gauging the Mores of the Community

Once the relevant boundaries of the community are determined, the community standard must be assessed. The Supreme Court failed to suggest any suitable method by which lower courts may make this determination. On a large scale basis, where many people would be involved, e.g., in Manhattan, New York, it would be extremely difficult to make this determination.\(^{153}\) When the relevant community is extremely small, it may be appropriate to have the townspeople visit the local adult book store or movie theater and report to the magistrate their impressions of its contents.\(^{154}\) The Supreme Court's guideline, therefore, merits criticism not only for vagueness as to its substantive description of obscenity, but also due to the vagueness of its procedure for application.

The Value Element

The third requirement of the Miller test for obscenity is that the work lack "serious literary, artistic, political or scientific value."\(^{155}\) The

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\(^{153}\) See Redlich v. Capri Cinema, Inc., 347 N.Y.S.2d 811, 815-18, rev'd, 43 App. Div. 2d 27, 349 N.Y.S.2d 697 (1973). Policemen can visit the corner candy store and view the books and magazines displayed, but will be unable, by this small scale effort, to get the full flavor of the community's notion of decency. The great number of people in this geographic area, with varying tastes and attitudes, also makes questionable the efficacy of the Miller Court's reasoning in geographically limiting the boundary of the relevant community. Diversity of attitudes and tastes throughout the country was the majority's justification for requiring a less than national standard.

\(^{154}\) Phila. Inquirer, Oct. 26, 1973, at 1, col. 5. In Upper Merion, Pennsylvania, a suburb of Philadelphia, the local justice, before he would close down the local adult book store, invited the local residents to visit the store and report back to him with their impressions.

In Rockland County, New York, the Clarkstown town council formed an anti-obscenity committee to investigate public displays and motion pictures in the area. The committee mailed out more than 20,000 questionnaires to the local residents requesting their views on pornography and censorship. Suit has been instituted in federal district court challenging the role and powers of this committee. N.Y. Times, Oct. 30, 1973, at 49, col. 3. If other local committees begin to appear throughout the country, each sending out its own questionnaires, cries of invasion of privacy and infringement of free speech are certain to be heard. Another question as to the validity of these committees focuses around the consideration of whether or not they are truly representative of community ideals. If a committee is publically elected perhaps it can be said that it represents majority opinion, but, in Clarkstown, the committee was appointed by other town officials.

\(^{155}\) An immediate impression would be that the Court again created a "marginal" problem. According to all court decisions, hard-core pornography is definitely proscribed. A problem arises because some works of the soft-core variety may conceivably have some value element. Prosecutors may attack the latter to avoid creating a sub-category of exceptions. The possibility of encroachment upon first amendment guarantees is apparent. If, however, a strict interpretation of the majority's value test is made, then this problem should not arise. One type of necessary value used in Miller was the value of sexual conduct depictions for physicians or other related professionals. 413 U.S. at 16.
Court omitted a fifth category of serious value, *viz.*, educational value. This value is an important one and its inclusion within the guideline has been strongly recommended.\(^{156}\)

Even under the value categories actually promulgated, there remains the problem of determining what exactly is meant by "serious value." It has been suggested that this does not mean simply any value, but implies a test of quality. The question must then be asked: Is it a "good" book or a "good" picture? If so, then the work has the requisite value and is acceptable. If not, the material is obscene and prohibited. The result of this quality test would improperly place upon the artist the burden of establishing his innocence by proving the value of his work.\(^{157}\)

The degree of value necessary to pass muster under *Miller* was left unanswered by the Court. In an attempt to establish some direction in this area, it has been suggested that lack of value is indicated by the presence of pandering in its distribution.\(^{158}\) Under this approach, the unanswered question posed by *Memoirs* reappears. Can pandering be a determinative factor as to the social value of disseminated material? Strong criticism has been levelled at the pandering rationale because of its failure to alleviate the problem of vagueness of the value element.\(^{159}\)

The value element is also subject to criticism in that it calls upon

\(^{156}\) 96th Meeting of the American Bar Ass'n, 13 CRIM. L. REP. 2415-16 (Aug. 8, 1973).

\(^{157}\) AMERICAN, Aug. 18, 1973, at 83-84. One of the avowed purposes of the *Miller* revision of standards was to enable the prosecutor to succeed more easily in his prosecution. People v. Enskat, 33 Cal. App. 3d 900, 904, 109 Cal. Rptr. 435, 436 (1973). It is doubtful, however, that the Court intended that the prosecutor be relieved of his burden of proof and that it instead be placed upon the defendant. But see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 98 (1973) (Brennan, J., dissenting). Justice Brennan does not believe that the prosecutor has in fact been seriously relieved of his burden. The *Miller* majority stressed that under the *Memoirs* test the prosecutor had to "prove a negative," *viz.*, that the work be "utterly without redeeming social value," an almost impossible task. 413 U.S. 15, 22 (1973). Under the *Miller* test, the prosecutor still must "prove a negative," he must show that the material lacks serious value. Thus, it is not unlikely that the prosecutor's task remains as burdensome as it was before *Miller*.

\(^{158}\) State v. J-R Distributors, Inc., 82 Wash. 2d 584, 512 P.2d 1049, 1061, 1066 (1973) (en banc). The pandering rationale proceeds from the assumption that a book or movie "commercially exploited for the sake of prurient interest" in disregard of any other interest or value it might possess, establishes that the material is "utterly without redeeming value." *Memoirs* v. Massachusetts, 383 U.S. 413, 420 (1966). See note 48 and accompanying text supra.

The fact that certain materials were used in therapy treatment of sexually disoriented persons, or that they were kept on file in supervised state depositories as examples of what is obscene to aid police and the courts in their prosecutions, was held to be insufficient to show even some "modicum of social value," let alone the required serious value. State v. J-R Distributors, Inc., 82 Wash. 2d 584, 512 P.2d 1049, 1061, 1066 (1973) (en banc).

\(^{159}\) See *Memoirs* v. Massachusetts, 383 U.S. 413, 427 (1966) (Douglas, J., concurring) (there is no correlation between the social value of the book and the way in which it is distributed); note 48 supra.
the triers of the facts to make their own subjective determination. This is so, even though the standard is clothed with such phrases as the “average person.” This is not an area of black-white differentiation, of right versus wrong, but is one where ideas and thoughts bound up with much emotion confront and conflict with one another. The undesirability of allowing subjectivity to determine the permissible scope of expression has been discussed earlier in this note.

Reviewing the Results

The Supreme Court’s attempt to clarify the definition of obscenity has fallen short of its goal. The vagueness of the Miller standard, accompanied by all the attendant evils of a loosely defined guideline, has caused much confusion in the lower courts. These courts have side-stepped the requirement of specificity, resulting in arbitrary action by local police, prosecutors, and courts, e.g., book burnings in North Dakota. The undefined community, although limited in that it is not national, has led to both explicit and implicit censorship. The mass communication industry continues to work under this chilling atmosphere, knowing that its products may not only be banned in some of the less “open-minded” parts of the country, but that its executives may be subject to criminal sanctions as well.

The Supreme Court applied a balancing test, weighing the evil of censorship against the evil of pornography, and concluded that obscenity is the greater evil and must be controlled. The Court “presumed” that pornography detrimentally affects the “quality of life and the total community environment” even though conclusive scientific data is unavailable. Considering the prevailing fundamental notions and tra-

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160 Grigsby v. State, 14 CRIM. L. REP. 2134 (Tenn. Crim. App. Nov. 14, 1973) (dissenting opinion). One reason why obscenity cannot properly be dealt with by the Court, Justice Douglas believes, is that it involves personal tastes in literature. “What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others,” Miller v. California, 413 U.S. 15, 40-41 (1973), for “one man’s vulgarity is another’s lyric.” Cohen v. California, 403 U.S. 15, 25 (1971).

The public display of the four-letter expletive of sexual intercourse in Cohen could not be banned. Fundamental rights of free speech did not allow the condemnation of this word as there is no way, the Court believed, that it could be distinguished from any other offensive yet permissible word. Id. at 25. See Hess v. Indiana, 94 S. Ct. 326 (1973); note 141 supra.

161 See note 141 and accompanying text supra.

162 See notes 148-151 and accompanying text supra.

163 See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973). The Court, operating under the assumption that there is an inherent evil in obscene material which undermines societal life and morality, recognized the existence of a legitimate state interest to regulate obscenity, including the exhibition of such materials to consenting adult viewers. The state has a right to maintain a decent society. Id. at 59-60 (citations omitted). “States need
ditions of freedom of expression in America, it is necessary to reconsider whether or not obscenity is the greater evil. Even accepting the Court's conclusion that pornography is undesirable, alternative approaches to the Miller doctrine are available.

A BROADER PROSPECTIVE

Pornography May Be Acceptable — The Brennan Approach

One possible alternative has been suggested by Justice Brennan: Because of the failure of all earlier formulas and possibly any future definitions of obscenity, and the great risk of encroachment upon constitutional freedoms, censorship of obscenity is unacceptable except in limited circumstances. Governmental suppression of pornographic materials cannot be upheld unless there is a substantial state interest. When juveniles or unconsenting adults are involved, a legitimate state concern is recognizable and state regulation is allowed and warranted.164

The utility of Justice Brennan's approach is questionable. If formulations of obscenity are impossible because of the indefiniteness of the concept itself,165 the task becomes no less difficult when juveniles or unconsenting adults are involved. Pragmatic considerations also tend to brand Justice Brennan's suggestion infeasible. How can willing adults avail themselves of sexually oriented materials and still prevent

not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials." Kaplan v. California, 413 U.S. 115, 120 (1973). The Court, in its assumption, totally ignores the findings of the Commission on Pornography and Obscenity. See note 164 infra.


At least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, 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. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 113 (1973).

This view is supported by the Commission on Obscenity and Pornography's recommendations that governmental restraint on the distribution or exhibition of pornography be limited to juveniles and unconsenting adults. REPORT OF THE COMM’N ON OBSCENITY AND PORNOGRAPHY 57 (N.Y. Times ed. 1970). Justification for such restrictions when juveniles are involved is based upon the lack of conclusive evidence as to the effect such exposure to sexually explicit materials will have, and ethical difficulties in exposing this group to the materials in order to make a conclusive determination. Id. at 63. As to the regulation of materials in the case of unwilling adult recipients, this is allowable because of findings that these materials are offensive to these people's sensibilities. Id. at 67. See 39 U.S.C. §§ 3010-11; 18 U.S.C. §§ 1735-37 (1970). These acts allow recipients of sexually explicit materials to authorize postal authorities to prevent delivery of such mail to them.

such materials from falling into the hands of juveniles or unsoliciting adults? In Paris Adult Theatre I it was noted by the Court that conceivably it is possible to have “adult” movie theaters whereby close screening of patrons would prevent juveniles from being admitted. The Court, however, further recognized that in the case of “adult” book stores the screening method would not prevent juvenile exposure to restricted materials as, although juveniles may be denied entrance to the stores, the forbidden materials are still readily obtainable on the outside.166

Pornography Cannot Be Censored — The Douglas Approach

A. The First Amendment Prohibits Censorship. The second alternative, which is completely opposite to the majority proposition that obscenity is definable and must be censored by the state is that suggested by Justice Douglas. It is his belief that the first and fourteenth amendment guarantees of freedom of expression prohibit all obscenity regulation. The first amendment provision that “Congress shall make no Law . . . abridging the Freedom of Speech, or of the Press . . .”167 is interpreted as an absolute blanket of protection. There is no mention in the Constitution that in the case of obscene utterances, either oral or written, such protection should not apply. Mr. Justice Douglas strongly criticizes the courts’ implicit reading into the Constitution of an exception to this rule of law for obscenity.168

The primary purpose of the first and fourteenth amendments is to permit the free flow of discussion and debate.169 They protect the people’s right to receive information and ideas, without regard to their

166 Id. at 58 n.7, relying on the Hill-Link Minority Report of the Commission on Obscenity and Pornography which reported that the elderly and the young adolescent, both female and male, were the best “customers” of pornography. REPORT OF THE COMM’N ON OBSCENITY AND PORNOGRAPHY 401 (N.Y. Times ed. 1970).

167 U.S. CONST. amend. 1.


social value; this right touches upon the very foundations of a free society. Justice Douglas argues that suppression of these rights is censorship and if there is to be censorship of pornography, traditional notions of democratic ideals dictate that there be full public debate climaxed by constitutional amendment. The judiciary is not as responsive an organ of government as is the legislature. It is a very inappropriate branch of government to be entrusted with the responsibility of determining what people can read or see, as obscenity is a subjective determination.

B. Censorship Is Thought Control. Suppression of obscenity has been attacked as an attempt by the state to control the moral thoughts of an individual. This society's prevailing notions of freedom do not permit the state to "premise legislation on the desirability of controlling a person's private thoughts." The state has no interest in controlling the moral thoughts of an individual, nor the right to impose the Court's set of values as to "good" literature upon others. This is,

170 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 107-08 (1973) (Brennan, J. dissenting); Stanley v. Georgia, 394 U.S. 557, 564 (1969). "The First Amendment was designed to 'invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with conditions as they are,' and even to stir 'people to anger.'" Miller v. California, 413 U.S. 15, 44 (1973), quoting Terminiello v. Chicago, 337 U.S. 1 (1949). See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), where the people's right to receive information was recognized by the Supreme Court as one of high priority. In sustaining the validity of the FCC's "fairness doctrine," which requires that public issues be presented and that each side be given fair coverage, the public's right to receive information was found superior to a broadcaster's right to broadcast. Id.


Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. . . . [The authors of the Constitution] believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith . . . in the enlightened choice of the people. . . . [I]t is . . . the Constitution [that] protects coarse expression as well as refined, and vulgarity no less than elegance.


172 Smith v. California, 361 U.S. 147, 159-60 (1959) (Black, J., concurring). But cf. Jacobellis v. Ohio, 378 U.S. 184, 187-90 (1964). The Supreme Court rejected the allegations that it was acting as a "super-censor." It concluded that it was merely performing its proper task of examining and delineating the scope of constitutionally protected freedom of expression. Id.


however, not to say that all forms of control over morality through legislation are bad. Legislating morality at times is a necessary and acceptable function of government. The subjective and personal nature of obscenity, however, does not make it amenable to this type of control. That human thoughts are affected by governmental censorship should not be lightly dismissed as has been the Court's policy in the past.

C. Censorship Invades the Right of Privacy. Closely related to the argument that censorship controls the minds and thoughts of individuals is the argument that such repression invades an individual's right of privacy. The right of privacy, although not specifically mentioned in the Constitution, emanates from the protected rights as a whole, because it is one of the "personal rights that can be deemed fundamental . . . in the concept of ordered liberty."

Under the influence of the right of privacy concept, the Supreme Court, in Stanley v. Georgia, held unconstitutional a state statute which made mere possession of obscene material in one's private home a crime. To hold otherwise, it was recognized, would permit a drastic and dangerous invasion of personal freedoms, especially the right to be free from unwarranted state interference in one's private life. It has been argued by some that the Stanley right to possession of obscenity, in the privacy of one's home, gives rise to an ancillary right to buy, by claiming it is not trying to control the intellectual or rational mind of an individual. It alleges that control here involves the prohibition of matters which inherently lack any serious, recognizable value such as legitimate communication.


The government, through its judiciary arm, is attempting to censor pornography in much the same way the government, through its legislative branch, attempted to prohibit alcohol during the prohibition era. The results of the prohibition efforts to legislate morality were, inter alia, that people suddenly developed a greater thirst. Similar results are likely to follow censorship legislation. Those who would have chosen to see or read obscene materials will continue to do so but, in addition, those who would not ordinarily be attracted to such works will out of curiosity patronize its dealers, even if it means travelling to a more permissive community to do so. See id.

177 See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973). Governmental suppression has been justified because censorship only incidentally affects human thoughts. These indirect results do not obstruct the right of the state to protect its legitimate interests.


180 Id. at 564-65.
mail, transport, or import such materials.\textsuperscript{181} In rebuttal, the Supreme Court has narrowly construed the \textit{Stanley} right of privacy. The acceptable boundary for permissible possession of obscene materials has not been extended beyond one's home. Repeatedly, the Court has refused to give rise to a correlative right to mail such materials,\textsuperscript{182} to transport them in interstate commerce,\textsuperscript{183} or to import such materials from a foreign country for commercial or personal use.\textsuperscript{184} The Court has justified these refusals by adopting the attitude that the first amendment does not give a protected right to do business in obscenity nor is there a "'fundamental' privacy right 'implicit in the concept of ordered liberty'" to watch, purchase, or otherwise disseminate it in a public place.\textsuperscript{185} Here, the suggestion to allow unpublicized dissemination may be a satisfactory compromise.

Those who advocate the desirability of extending \textit{Stanley} protection to the procurement of obscene matter for personal use in the home argue that without such extension \textit{Stanley} is void of any meaning. If \textit{Stanley} rights are to be preserved these ancillary rights must be granted; otherwise, all the Stanleys will be relegated to enjoy their right of privacy in their homes only with materials they, themselves, produce.\textsuperscript{186}

\textbf{D. Pornography — A Matter of Individual Choice.} Mr. Justice Douglas, a strong opponent of censorship and first amendment infringement, views pornography as a matter of choice. Freedom of choice, to purchase or not to purchase, to read or not to read such materials, is thought to be a fundamental right exercisable by members of a free society. This is not a "captive audience" situation wherein one is forced

\begin{itemize}
\item \textsuperscript{182} United States v. \textit{Reidel}, 402 U.S. 351 (1971).
\item \textsuperscript{183} United States v. \textit{Orito}, 413 U.S. 139 (1972).
\item \textsuperscript{184} United States v. \textit{12 200-Ft. Reels of Super 8mm Film}, 413 U.S. 123, 128-29 (1973). There are pragmatic considerations to forbid the importation for private use. Through modern technology, a single copy imported under the guise of private use could quickly be reproduced for sale on the open market. \textit{Id. See United States v. 37 Photographs}, 402 U.S. 363 (1971).
\end{itemize}

\begin{itemize}
\item Unless there is that ancillary right, one's \textit{Stanley} rights could be realized, . . . only if one wrote or designed a tract in his attic and printed or processed it in his basement so as to be able to read it in his study.
\item \textit{United States v. 12 200-Ft. Reels of Super 8mm Film}, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting).
\end{itemize}
to look at or listen to that which he finds offensive. Those who patronize places which disseminate sexually explicit materials do so under their own compulsion.\textsuperscript{187} If materials were truly offensive to the community, there would be no need to prohibit their dissemination by governmental restrictions because these works would be banned at the market place—no consumer would purchase them. The market place constantly stocks such materials because it knows buyers exist which find them not only not patently offensive, but of sufficient worthiness for purchase.\textsuperscript{188}

Under . . . [a] free enterprise system, an individual's choices in the


\textsuperscript{188} Trinkler v. Alabama, 94 S. Ct. 265 (1973) (Douglas, J., dissenting). Each week the entertainment newspaper \textit{Variety} publishes a listing of the top fifty money grossing films. These movies are voluntarily given ratings by the Motion Picture Association of America to forewarn prospective audiences of the movies' themes and contents. Film classification depends upon the prominence of sex, violence, profanity, and crime, but heavy emphasis is placed upon its sexual aspects, if any. A motion picture that receives a "G" rating will have no vulgar language and no sexual matters other than a slight embrace or kiss, and all ages are admitted. A "PG" movie will have some sexual implications, \textit{e.g.}, flashes of nudity, vulgar language, and may have an anti-social theme; all ages are admitted but parental guidance is suggested. If it is too anti-social, \textit{i.e.}, depicts adultery, a more severe rating may be given. An "R" rated movie will contain partial nudity shots, sexual foreplay, and an erotic theme, and persons under 17, unless accompanied by an adult guardian, are not admitted. A film which concentrates exclusively on the erotic nature of the topic is given an "X" rating and no one under 17 is admitted. \textit{Report of the Commission on Obscenity and Pornography} 8-9 (N.Y. Times ed. 1970).

A breakdown of the top fifty money grossing films according to film classification appears in Table I. A similar breakdown for the top ten grossing films is in Table II.

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<th>TABLE I</th>
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<tr>
<td>Top 50 Grossing Films</td>
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<tr>
<td>Week</td>
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<tr>
<td>Oct. 17, 1973</td>
</tr>
<tr>
<td>X: 20%</td>
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<tr>
<td>R: 36%</td>
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<tr>
<td>PG: 28%</td>
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<td>G: 16%</td>
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<tr>
<td>Oct. 24, 1973</td>
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<tr>
<td>X: 18%</td>
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<tr>
<td>R: 30%</td>
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<tr>
<td>PG: 38%</td>
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<td>G: 14%</td>
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<tr>
<td>Oct. 31, 1973</td>
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<tr>
<td>X: 16%</td>
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<td>R: 28%</td>
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<td>PG: 44%</td>
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<td>G: 12%</td>
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<td>Nov. 1, 1973</td>
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<td>X: 12%</td>
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<td>R: 36%</td>
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<td>PG: 42%</td>
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<td>G: 10%</td>
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<th>TABLE II</th>
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<tr>
<td>Top 10 Grossing Films</td>
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<tr>
<td>Week</td>
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<tr>
<td>Oct. 17, 1973</td>
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<tr>
<td>X: 20%</td>
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<tr>
<td>R: 40%</td>
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<tr>
<td>PG: 30%</td>
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<td>G: 10%</td>
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<tr>
<td>Oct. 24, 1973</td>
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<td>X: 20%</td>
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<td>R: 20%</td>
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<td>PG: 60%</td>
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<td>G: 0%</td>
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<td>Oct. 31, 1973</td>
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<td>X: 20%</td>
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<td>R: 10%</td>
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<td>PG: 60%</td>
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<td>G: 10%</td>
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<td>Nov. 1, 1973</td>
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<td>X: 30%</td>
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<td>R: 20%</td>
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<td>PG: 50%</td>
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<td>G: 10%</td>
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Although this survey is based upon a one month period it is indicative of the general tastes and desires of the movie-going community. A spokesman for the Motion Picture Association of America suggests that the "X" and "R" rating percentages for the above time period are lower than usual because of the proximity of holidays—a time when film-makers market more "family-type" movies.
market place are respected, however unwise they may seem to someone else. It is not the business of a court... to make its own critical evaluation of those choices and protect only the ones that... [it deems] are “necessary.”

If people want to see pornographic films or read pornographic literature why is it necessary to suppress these desires? The government has adjudged sexually explicit material bad for society. It has felt it necessary to supersede the market in determining the accessibility of pornography. If pornography is bad for society, then the government should act to suppress it within the constraints of the Constitution. However, the effects of pornography on society are debatable. Furthermore, there may be other areas of public expression that are more harmful than pornography and require more governmental concern than does pornography. If governmental suppression of pornography is based on its recognition of one group’s wishes as opposed to another’s, then this weighing of importance must be explained and its constitutionality taken into account. The courts, however, have not followed this prescription. State regulation is permitted because it is presumed that obscenity is harmful to society in that it will cause a general breakdown in its morality and eventually of society itself.

Fuentes v. Shevin, 407 U.S. 67, 91 (1972). The enactment of the Federal Anti-Pandering Act, 39 U.S.C. §§ 3010-11 (1970), in 1968, and the subsequent enactment of the Postal Reorganization Act, 18 U.S.C. §§ 1735-37 (1970), in 1970, demonstrate the Government’s cognizance of the fact that individual choice can be effectively employed to control the dissemination of obscenity. Under these Acts, a recipient of an unwanted sexually explicit mail advertisement can refuse to accept it. The recipient can also request postal authorities to maintain his name on a list of those who choose not to be subjected to such offensive materials. In Rowan v. Post Office Dept., 397 U.S. 728 (1970), the Court rejected the claim by the mailers of erotic advertisements that the Anti-Pandering Act infringed upon their freedom of speech and sustained its validity. The recipient is allowed to reject the material which he “in his sole discretion believes to be erotically arousing or sexually provocative.” Id. at 730. In this instance, the Court recognized the inherent subjective nature of obscenity and left the determination of suppression to the individual, rather than the community. The mailer’s constitutional guarantees of freedom of expression were found subordinate to the individual’s choice to be left alone. Id. at 736.

The Supreme Court has recognized that freedom of choice extends into other areas of freedom of expression. In Martin v. Struthers, 319 U.S. 141 (1943), a town’s anti-bellringing ordinance was held unconstitutional not only because it effectively prohibited the dissemination of religious views, but also because it substituted the choice of the community as to what should be heard in place of the individual’s own.

Kaplan v. United States, 413 U.S. 115, 120 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973). Conclusive empirical evidence is not necessary, and states, based upon this presumption, can proceed with their prohibitions. The lawmakers rely upon “common sense” knowledge.

The sum of experience... affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

413 U.S. 49, 63 (1973). The Court relies upon the tradition of civilized nations wherein law-makers’ passage of laws is sometimes based upon unprovable assumptions. See Citizens.
Is Pornography Harmful?

It is necessary for the Supreme Court to reevaluate the accuracy of its presumption that obscenity is harmful to society before allowing states to control expression. Although the findings are not conclusive, there is evidence available which tends to refute the "common sense" value judgment made by the courts and legislatures that pornography is harmful. The Report of the Commission on Obscenity and Pornography acknowledged that exposure to erotic materials does cause sexual arousal, but it concluded that an individual's behavior was not substantially altered as a result of such exposure. 191 The Commission reported that there is no evidence which shows that exposure to sexually oriented materials plays a substantial part in the causation of criminal behavior, including sex crimes and delinquency, among youths and adults. 192

On the other hand, there are those who believe that exposure to erotic material is detrimental to society. The Minority Report of the Commission on Obscenity and Pornography found that pornography does have "an eroding effect on society, on public morality, on respect for human worth, on attitude toward family love, on culture." 193 The Minority Report also cites evidence showing that exposure to pornography does influence potential sex offenders. 194

In its approach, the Supreme Court has relied on the latter theory which holds obscenity to be harmful, notwithstanding that there is at least equally ample evidence to substantiate the opposite viewpoint. Instead of employing all its energy to eradicate the alleged evil, the Court would best call for legislative efforts in the nature of definitive and conclusive studies to determine the true effects of pornography before approving statutes which endanger first amendment rights. A law concerning obscenity cannot be based purely on an assumption that

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192 Id. at 27. The Commission recommended that the government cease further interference with the freedom of consenting adults to obtain the materials they wished. Id. at 51. The erotic materials were found to be a source of entertainment and information to many adults, i.e., their appeal to the prurient interest supplied their socially redeeming value. Such materials also served as a beneficial aid to "facilitate constructive communication" between marriage partners. See M. GOLDSTEIN & H. KANT, PORNOGRAPHY AND SEXUAL DEVIANCE 150-53 (1973); Murphy, The Value of Pornography, 10 WAYNE L. REV. 655 (1964).
194 Id. at 47.
it is bad. There must be a greater assimilation of science, sociology, and psychology into the law.

It is difficult to explain why law-makers focus so strongly upon obscenity and why they insist upon imposing their moral value judgments on the many who do not agree with them. It is ironic that the government finds sexual obscenity glaringly in need of suppression, while at the same time the problem of violence in the media is seldom confronted.

Violence

There is an increasing recognition of the adverse effects of mass media portrayals of violence on the values, attitudes, and behavior of society. The studies of the National Commission on the Causes and Prevention of Violence reported a link between the glorification of violence in the media and the American preoccupation with violence. Violence on television, for instance, does have ill effects upon its audiences, especially the young. The impact is upon the learning process in that it teaches children a set of moral and social values about violence which is not consistent with the values of a civilized society. The Violence Commission recommended that a new approach be taken whereby media programming redirect its efforts away from the dramatic emphasis upon violence and aim toward the development of cultural, educational, and non-violent dramatic programming.

Violence seems more acceptable to law-makers than erotica, despite the conclusions reached by both governmental commissions. This disorientation of priorities may prove untenable in the future, especially if violent sublimation is one of its consequences.

Conclusion

The essence of the Miller decision is the allocation to the local community of the power to determine obscenity. Prior to the Miller decision, concepts such as the "average person" were used; however, the Miller Court recognized that the average citizen may differ among varying communities. This left a question as to the optimal size of the community which was to be the foundation of the relevant obscenity standard. The Supreme Court ruled that if states so desire they may regulate obscenity within their boundaries. Problems of local autonomy of communities within a state have not yet been resolved.


196 Id. at 172-74.
There is still a great deal of vagueness in the new legal definition of obscenity. The components of the definition are now left to the interpretation of "local" communities. Which person or group of people should be entrusted with this determination is problematic. If the views of a community are relatively homogeneous, an otherwise difficult task may be alleviated. However, it has not yet been determined what size community might, in fact, be regarded as homogeneous in outlook, or what would be the implications of a great diversity of obscenity laws on an issue touching all of American society. In general, the Supreme Court decision is intended to give prosecutors and the police more power to deter the dissemination of pornography.\(^{197}\)

If there are, in fact, no socially detrimental effects of pornography, then there is no reason why the free marketplace should not determine the extent of its dissemination, under the constraint that those uninterested should not be forced to experience it.\(^{198}\) However, if socially detrimental effects of pornography do exist and they are not eliminated in the market, then some sort of extra-market regulation would be desirable. This extrinsic regulation may also be desirable if there exists a distinguishable group in the community whose desires are deemed by society superior to all others, and which looks unfavorably on the dissemination of pornography. While this nation has experienced the influence of dominating groups in its history (with or without social approval), e.g., during Prohibition, their dominating influence would appear contradictory to the stated goals of American society as expressed in the Constitution. However, proceeding upon an assumption that some forms of obscenity are harmful, the Court has felt justified in retaining power to define and allow extra-market control over pornography.\(^{199}\)

The question then remains—what are the true effects of pornography on American society? Further efforts must be made to arrive at a definitive answer. It may very well be that the detrimental effects of pornography are not nearly as severe as the Supreme Court presumes them to be. Growing realization of this, as well as increasing difficulty in defining appropriate communities, threatens to undermine the Miller Court's decision concerning the regulation of pornography in the United States.

Beverly G. Miller

\(^{197}\) See notes 122, 175 and accompanying text supra.

\(^{198}\) See notes 187-91 and accompanying text supra.

\(^{199}\) See notes 190, 193-94 and accompanying text supra.