The 1973 Obscenity-Pornography Decisions: Analysis, Impact, and Legislative Alternatives

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On June 21, 1973, the United States Supreme Court announced a series of decisions which inevitably will have far reaching consequences.[1] The purpose of this article is to examine critically the rationale of those decisions and to assess their actual and potential impact. An exhaustive review of the history of obscenity in the courts is not contemplated nor necessary. Abler attempts at comprehensive treatment have, on occasion, been performed by members of the Court, as well as by scholars in the field.[2] Constitu-

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1. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973).

2. *See* for example, the dissenting opinions of Brennan and Douglas, JJ., in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 70 (1973), and the

tional history will be employed only insofar as it has a direct bearing upon the new guidelines announced by the Court and what one can expect from their subsequent application.

Marvin Miller, the Defendant-Appellant in the first case, was arrested, tried and convicted under California Penal Code § 311.2(a) for "knowingly distributing obscene matter."[3] The conviction was based upon Miller's having sent unsolicited advertising brochures through the mail to a restaurant in Newport Beach, California. The manager of the restaurant complained to the police.

The brochures advertised four books and a film. The Court's characterization of the brochures was:

> While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.[4]

The Court vacated Miller's conviction and remanded the case to the Appellate Department, Superior Court, Orange County, in light of its decision to reformulate the guidelines on what may be regarded as obscene.

ANALYSIS OF DECISIONS

Miller was used by the Court as the major vehicle to announce the adoption of the new standards:

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exhaustive historical analysis compiled by Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standard*, 45 MINN. L. REV. 5 (1960) [hereinafter cited as Lockhart & McClure].

3. CAL. PEN. CODE § 311.2(a) (West Supp. 1973) reads in part:

> Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, any obscene matter, is guilty of a misdemeanor. . . .

CAL. PEN. CODE § 311(a) (West Supp. 1973) defined as "obscene" material,

> . . . that to the average person applying contemporary standards the predominant appeal of the matter, taken as a whole, is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

CAL. PEN. CODE § 311(e) (West Supp. 1973) defined "knowingly" as "having knowledge that the matter is obscene." This subsection was amended after Miller's arrest to read: "(e) "knowingly" means being aware of the character of the matter of live conduct."

4. Miller v. California, 413 U.S. 15, 18 (1973). Further disposition of issues pertaining to Miller's case were confined to brief footnotes. See notes 1, 12, 13 and 14 of the majority opinion. *Id.* at 16, 31, 32, 34.

> The basic guidelines for the trier of fact must be: (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.[5]

In the decisions which follow *Miller*, the Court went on to clarify the application of the new standards in several ways: (1) obscenity may be proscribed by the State even where it is offered only to consenting adults;[6] (2) the Constitution does not require that expert affirmative evidence be presented by the prosecution to show that the materials are obscene when the materials themselves are actually placed into evidence;[7] (3) words alone, without any pictorial depictions of sexual conduct may constitute obscene material which the State has the right to proscribe;[8] and (4) the rule announced in *Stanley v. Georgia*[9] is specifically limited to possession of obscene materials in the home, and does not afford protection to the consumer who imports such material for his private use[10] or who transports such material in interstate commerce for private use.[11]

The State's Interest in Controlling Obscenity

In reaffirming the holding in *Roth v. United States*[12] that "obscenity is not within the area of constitutionally protected speech or press,"[13] the Court concluded:

> The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society." [Citation omitted][14]

The Court's justification for such a conclusion apparently lies in the existence of evidence of a direct harm produced by obscenity, either in specific criminal conduct, or in a deleterious effect on the "tone" or "mode" of society.[15] The Court cites the Hill-Link

5. *Id.* at 24.
6. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973).
7. *Id.* at 56. *See also* Kaplan v. California, 413 U.S. 115, 121 (1973).
8. Kaplan v. California, 413 U.S. 115, 118-120 (1973).
9. 394 U.S. 557 (1969).
10. United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 127-128 (1973).
11. United States v. Orito, 413 U.S. 139, 141-143 (1973).
12. 354 U.S. 476 (1957).
13. Roth v. United States, 354 U.S. 476, 485 (1957).
14. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973).
15. *See* Bickel, *On Pornography II: Dissenting and Concurring Opin-*

Minority Report of the Commission on Obscenity and Pornography[16] as indicating that "there is at least an arguable correlation between obscene material and crime."[17]

Most of the evidence cited by the Minority Report, however, suggests a correlation between obscenity and anti-social conduct only insofar as juveniles are concerned. The Majority Report denies even the significance of this correlation:

> [E]mpirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials play a significant role in the causation of delinquent or criminal behavior among youth or adults.[18]

Despite the conflicting evidence and inconclusive findings, the Court took the position that a legislature "could quite reasonably determine that such a connection does or might exist."[19] This language seems to suggest that the Court had adopted a "reasonable legislature test"[20] with respect to obscenity. Indeed, the examples cited by the Court[21] in justifying this proposition all harken to the post New Deal decisions where the "substantial due process" theory was discredited.[22]

Regardless of whether or not one subscribes to the "Preferred Position Doctrine" articulated by Justice Stone in *United States*

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ions, 22 THE PUBLIC INTEREST 25-26 (1971) quoted with approval by the Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973).

16. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 456-505 (New York Times ed. 1970) [hereinafter cited as COMMISSION REPORT].

17. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973).

18. COMMISSION REPORT, *supra* note 16, at 32.

19. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

20. *See* Nebbia v. New York, 291 U.S. 502 (1934).

21. On the basis of these ["unprovable"] assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers and dealers in securities, profit sharing "coupons," and "trading stamps," commanding what they must and must not publish and announce. [Citations omitted] Understandably, those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61-62 (1973).

22. "Substantive due process" is the doctrine that the "Due Process" clauses of the Fifth and Fourteenth Amendments impose limitations on the *substance* of governmental regulation, independent of *procedural* limitations derived from the due process concept. *See* CORWIN, LIBERTY AGAINST GOVERNMENT (1948).

v. Carolene Products Co.,[23] State regulation of economic activity and regulation of material deemed to be obscene are clearly distinguishable. In the former, the rights of association, speech and press affected by regulation are clearly incidental to the main purpose of the activity—marketing a product; in the latter, State reguation amounts to a prohibition of the product itself. The distinction is also one specifically drawn by the Court itself.[24]

In cases involving advocacy of violent overthrow of government, the Supreme Court, from 1919 on, has required the State to show that the utterance sought to be proscribed produced a "clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[25] Assuming that some correlation does exist between exposure to obscenity and anti-social behavior, and that such anti-social behavior amounts to a substantive evil which the State, exercising its legitimate police powers has a right to prevent, there is nothing to suggest that this evil is greater than that of violent overthrow of the government. No rational argument has ever been advanced to justify the different treatment by the Court of obscenity and criminal advocacy.[26] Yet from the *Roth* case onward, the Court has assumed a priori that speech dealing with matters of sexual conduct is deserving of less protection under the First Amendment than speech dealing with revolution or incitement to riot.

Presented with the opportunity in *Paris Adult Theatre I v. Slaton*, the Court refused to limit the power of the State in regulating obscenity to that of safeguarding juveniles and the interests of unconsenting adults.[27] Granting that an "adult" theatre can pre-

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23. 304 U.S. 144, 152-53 n.4 (1938). *See also* Herndon v. Lowry, 301 U.S. 242, 258 (1937); Schneider v. New Jersey, 308 U.S. 147, 161 (1939); Jones v. Opelika, 316 U.S. 584, 600, 608 (1942); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943); Kovacs v. Cooper, 336 U.S. 77, 90-96 (1949) (Frankfurter, J., concurring); McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1184, 1191-93 (1959).

24. *See* Shulman, *The Supreme Court's Attitude Toward Liberty of Contract and Freedom of Speech*, 41 YALE L.J. 262 (1931).

25. Schenck v. United States, 249 U.S. 47, 52 (1919). *See also* Terminello v. City of Chicago, 337 U.S. 1 (1949).

26. Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances: "the lewd and obscene, the profane, the libelous, and the insulting of 'fighting' words. . . ." [Citations ommitted] We have frequently indicated that the interest in protecting speech depends upon the circumstances of the occasion.

Dennis v. United States, 341 U.S. 494, 544 (1951) (Frankfurter, J., concurring).

27. In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against ex-

vent exposure to juveniles and unconsenting adults, the Court argued that an "adult" bookstore could not, for the reason that obscene books and pictures can and are distributed to juveniles off the premises by adult buyers.[28] In offering this rationale the Court apparently did not consider that it applies equally to other products denied juvenile consumption, such as alcohol, tobacco, and non-prescription birth control devices; nor did it consider the argument that alternative means of deterrence are available, such as prosecution for contributing to the delinquency of a minor.

Finally, in affirming that the State has a valid interest in suppressing obscenity, the Court effectively overruled its prior holding in *Stanley v. Georgia*[29] that a State may not constitutionally make knowing possession of obscene materials a crime. Given the reasoning in *Paris*, that the State has the right to suppress obscenity because of its potentially corrupting influence in society and its close connection with crime, the interest of the State in controlling obscenity would apply equally in or out of the home. The Court apparently has concluded that "depravity" in the privacy of the home is not likely to diffuse throughout society, but sufficient danger exists when a person attempts to import such materials from a foreign country[30] or transport it in interstate commerce[31] solely for private use.

The Court distinguishes *Stanley* on the grounds that it was not a First Amendment case. The evidence given for this conclusion is that three concurring Justices indicated that the case could have been disposed of on Fourth Amendment grounds.[32] This proposition is refuted by even a superficial reading of the case. In a footnote to the specific holding that "the First and Fourteenth Amend-

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posure to juveniles and to passersby.
Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 (1973).

28. *Id.* at 58 n.7.
29. 394 U.S. 557 (1969).
30. United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 129 (1973).
31. United States v. Orito, 413 U.S. 139 (1973).
Congress could reasonably determine such regulation to be necessary to effect permissible federal control of interstate commerce in obscene material, based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause.
Id. at 143-144.
32. Stanley v. Georgia, 394 U.S. 557, 569 (1969) (Stewart, J., joined by Brennan and White, JJ., concurring).

ments prohibit making mere private possession of obscene material a crime," the Majority opinion stated:

> What we have said in no way infringes upon the power of the State or Federal government to make possession of other items, such as narcotics, firearms, or stolen goods a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.[33]

If the Court has not overruled *Stanley*, then it has emasculated its operation in Constitutional law to practically zero. But more important, the attempt to distinguish rather than overrule *Stanley* significantly weakens the already tenuous argument by the Court that obscenity is a substantive evil which the State has the right to prevent.

The "Serious Value" Test

The Majority voted to abolish the constitutional standard announced in *Memoirs v. Massachusetts*[34] which required that matter, in order to be judged obscene, must be proved to be "utterly without redeeming social value."[35] At the same time, however, the *Roth* test was reaffirmed by the Court, which contained the statement,

> But implicit in the history of the First Amendment is the rejection of obscenity as *utterly without redeeming social importance*. . . .[36]

In explaining away this apparent contradiction, Chief Justice Burger argued that the "utterly without" phrase in *Roth* was never intended to be a test, nor an element of proof in a criminal trial, as was asserted by the plurality opinion in *Memoirs*.

> While *Roth* presumed "obscenity" to be "utterly without redeeming social value," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i.e.*, that the material was "*utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof.[37]

The Majority's reasoning is somewhat suspect. If the reason obscenity is not protected by the First Amendment is because, in the words of the *Roth* opinion, it is "utterly without redeeming

33. *Id.* at 568 n.11.
34. 383 U.S. 413 (1966).
35. *Id.* at 418.
36. 354 U.S. 476, 484 (1957) [emphasis supplied].
37. Miller v. California, 413 U.S. 15, 21-22 (1973) [emphasis in original].

social importance," then in any judicial proceeding held to determine whether or not material is obscene, it would appear logically necessary that the "social importance," or "social value" test as stated in *Memoirs*, be one of the standards employed. To argue otherwise, as the Court does, would amount to shifting the burden of proof to the defendant. What the Court may be saying at this point is that the first two tests in *Memoirs*, which are reformulations of *Roth*, "(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,"[38] if met, together produce the legal conclusion that the material is, "(c) utterly without redeeming social value." But it then goes on to substitute a third test for the one struck down:

> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[39]

The conclusion seems to be that the "utterly without" test was not a presumption or legal conclusion based upon proof of the first two tests of *Roth-Memoirs*, but a separate constitutional standard. The Court's argument that the "social value" test never commanded a majority of the Court therefore seems untenable.[40]

The second, and more appealing argument the Court gives for eliminating the "social value" test, and replacing it with a "serious literary, artistic, political or scientific [L.A.P.S.]" test is that it places a burden upon the prosecution "virtually impossible to discharge under our criminal standards of proof."[41] While appealing,

38. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).
39. Miller v. California, 413 U.S. 15, 24 (1973).
40. But the definition of "obscenity" as expression utterly lacking in social importance is the key to the conceptual basis of *Roth* and our subsequent opinions. In *Roth* we held that certain expression is obscene, and thus outside the protection of the First Amendment, precisely *because* it lacks even the slightest redeeming social value.
Paris Adult Theatre I v. Slaton, 413 U.S. 49, 97 (1973) (Brennan, J., dissenting).
41. Miller v. California, 413 U.S. 15, 22 (1973).
One should hardly need to point out that under the third component of the Court's test the prosecution is still required to "prove a negative"—*i.e.*, that the material lacks serious literary, artistic, political or scientific value.
Paris Adult Theatre I v. Slaton, 413 U.S. 49, 98 (1973) (Brennan, J., dissenting).

it is not convincing. Proving that material is obscene, and thus outside the protection of the First Amendment ought to be extremely difficult because of the danger of overreaching likely to occur on the part of jealous guardians of the public morality. The *Roth* opinion, reaffirmed by this Court, stated:

> All ideas having the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have full protection of the [First Amendment] guarantees, unless excludable because they encroach upon the limited area of more important interests.[42]

Presumably, the Majority believed that its "serious [L.A.P.S.] value" test will ease the burden on the prosecution, so that "hard core" pornography[43] may properly be proscribed. It is doubtful whether this will be the case. Proof of "seriousness" or the lack thereof is just as nebulous, if not more so, than the "social value" test discarded. The term, "serious" implies a judgment as to quality, a much more difficult determination than the one implied by the term, "utterly without," which is a judgment as to quantity or degree.

But the new test is subject to more severe criticism. First, the term, "serious" may be read in several different ways. It can be taken to mean the opposite of "light," which might allow the preclusion of all humorous works relating to sexual matters. Much of what comes under the broad definitions of "literature" and "art" has as its only purpose light entertainment. Nothing instructional, useful, or "serious" may be inherent in such works; but they do serve a redeeming social purpose: that of easing tensions and of providing means of periodic escape so necessary for adjustment to an urban, technological society, overwhelming in its complexity.[44]

"Serious" might also be taken to refer to the motive or intent of the author of the work. Any literary, artistic, political or sci-

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42. 354 U.S. 476, 484 (1957). The "more important interests" referred to involve for the most part considerations of national security. *See* Schenck v. United States, 249 U.S. 47 (1919); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Dennis v. United States, 341 U.S. 494 (1951); United States v. O'Brien, 391 U.S. 367 (1968).

43. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring):

> I shall not today attempt further to define the kinds of material I understand to be embraced within that short-hand description ["hard-core pornography"]; and perhaps I could never succeed in intelligently doing so. But I know it when I see it. . . .

Id.

44. Judge Leventhal (U.S. Court of Appeal, D.C. Cir.) is optimistic concerning the protection to be afforded humorous works:

> [T]he protection surely extends to movies offered for mere amusement, say, horseplay. Presumably, the Court's reference to "serious" L.A.P.S. values does not outlaw the comic side of literary

entific work produced and sold for commercial gain may become suspect as to its seriousness of purpose, and consequently proscribed.[45] This interpretation was adopted for some purposes in *Ginzburg v. United States*,[46] which held that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." While the Court in *Ginzburg* admonished that commercial activity *per se* was not the deciding factor, by its decision it clearly limited the extent to which publishers and disseminators may advertise, thus indrectly making commercial exploitation a new, and perhaps an independent test for obscenity.[47]

Apart from the interpretation of the term "serious," one may question whether the Court has exhausted the "legitimate" categories of expression by expressly delineating the four terms, "literary, artistic, political, or scientific." Judge Levanthal of the Washington, D.C., Circuit Court of Appeals, asks:

> What, for example, about a serious sex education book? Is its value literary, artistic, political, or scientific? If it is, these cate-

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> or artistic expression. Suppose some gifted comics evolve a hilarious movie on mishaps in a nudist camp, and it is challenged as including a lewd exhibition of the genitals. It seems likely that the courts will be called to pass on portrayals and descriptions of people in the nude and the claims of literary and artistic expression, and perhaps of social commentary, offered by the business concerned.

Leventhal, *The 1973 Round of Obscenity-Pornography Decisions*, 59 A.B.A.J. 1261, 1264-65 (1973) [hereinafter cited as Leventhal].

45. This interpretation, and the preceding one goes forth under the assumption that the first two tests of obscenity announced by the Court, (a) appeal to prurient interest, and (b) patently offensive description or depiction of sexual conduct, have been met.

46. 383 U.S. 463 (1966).

47. Testimony from numerous psychiatrists and marriage counselors at Ginzburg's trial that they found the work useful in their professional practice was not contested seriously by the Government.

> Petitioners, however, did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity; and we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence. . . .

Ginzburg v. United States, 383 U.S. 463, 472 (1966). The majority's opinion in *Ginzburg* led Justice Douglas in his dissent to conclude that anything could be an obscene object. *Cf.* Zimmerman, *Can Anything Be an Aesthetic Object?*, 25 J. AESTHETICS & ART CRITICISM 177 (1966).

gories are elastic.[48]

Similarly, it can be argued, as in *Ginzburg*, that material which might otherwise be obscene can have serious "therapeutic" value in psychiatric treatment or in marriage counseling.[49] It would be stretching the plain meaning of the four terms beyond the point of "elasticity" to find a therapeutic element within them.

Another major objection to the Court's new test is that it fails to provide a basis for determining the seriousness of the L.A.P.S. value of the material. Unlike the first test, the "serious value" test is not preceded by the phrase, "whether the average person, applying contemporary community standards . . . ." According to normal rules of construction this phrase would be applicable only to a determination of "(a) whether . . . the work . . . appeals to the prurient interest."[50] The question remains open, therefore, as to whom the value of the work must be serious.[51] Moreover, the nature of the prosecution's burden in proving, and the criteria to be employed by the jury in judging, whether the work lacks "serious [L.A.P.S.] value" is unresolved by the formulation. As held in *Kaplan*,[52] the State is not constitutionally required to proffer "expert" evidence on the question of obscenity, where the material in question is admitted into evidence.[53] This would necessarily ex-

48. Leventhal, *supra* note 43, at 1264.

49. *See* note 47, *supra*.

50. This construction of the tests is supported by the fact that the phrase, "taken as a whole," is repeated in the "serious value" test (clause (c)), whereas, the "average person" phrase is not.

51. As in the *Ginzburg* case, the possibility exists that the material may have serious value to a particular class of people and still be judged obscene.

52. 413 U.S. 115 (1973).

53. *Id.* at 121. In California, however, the State is required to produce affirmative expert testimony to establish community standards. *In re* Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968), *cert. denied*, 395 U.S. 910 (1969). The California Supreme Court, in asserting this requirement, stated,

> Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards.

69 Cal. 2d at 573, 446 P.2d at 543, 72 Cal. Rptr. at 663. The California State Legislature, however, amended its chapter on obscenity subsequent to *In re* Giannini to no longer require affirmative expert evidence. CAL. PEN. CODE § 312.1 (West Supp. 1973) provides:

> In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish contemporary community standards of appeal to prurient interest or of customary

clude the need to prove that the material lacks serious value, according to some expert evaluation. What standards of literary, artistic, political or scientific excellence may the jury apply? The formulation of the test, as noted above, precludes the jury from employing mere "community standards." Can jurors, who might be trusted to decide for themselves whether the work appeals to the prurient interest, also be expected to possess the requisite academic knowledge to judge the literary or artistic value of a work? It is quite arguable that the question of serious value is not an issue for the trier of fact at all. While the three tests announced in *Miller* are introduced by the phrase, "The basic guidelines for the trier of fact must be: . . ." the Court suggests at a later point in the opinion that only the first two guidelines involve issues of fact.[54] More sensible is the conclusion that the issue in clause (c) of the guidelines is not one of fact but one of aesthetic, academic, or scientific judgment, requiring knowledge and training beyond the capacity of the average juror. The holding of the Court that the State need not produce expert evidence on the question of obscenity ultimately may mean that the serious value test is not a separate guideline, but only a restatement of one or both of the first two, "prurient appeal" and "patently offensive." At best, the test will be reduced to a question of individual taste, rather than informed aesthetic, academic, or scientific judgment.

The "Patently Offensive" Test

The other change in the substantive tests to be applied was "(b) whether the work depicts or describes, in a patently offensive way,

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limits of candor in the description or representation of nudity, sex, or excretion, or which bears upon the question of redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense.

The question remains as to the effect of § 312.1 upon the holding of the Court in *In re* Giannini. If the holding is to be regarded as required by *State* constitutional law, then the legislation has no effect. *Kaplan*, however, clearly indicates that the production of expert testimony is not a requirement of the *federal* Constitution.

54. These [the issues of "prurient appeal" and "patent offensiveness"] are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.

Miller v. California, 413 U.S. 15, 30 (1973).

sexual conduct specifically defined by the applicable state law; . . ."[55] This language had not apppeared in *Roth* except where "obscenity" was limited to "material which deals with sex. . . ."[56] It first appeared in *Memoirs* in a different form:

> (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters . . . .[57]

Whereas *Memoirs* gives a definition of what is meant by "patently offensive," the new guideline does not; and because the entire *Memoirs* formulation (excepting paragraph (a), the *Roth* test) was rejected by the Court, one cannot rely, with any assurance, on the *Memoirs* definition of the term.

The new rule also requires that in order for a depiction or description of sexual conduct to be proscribed, it must be "specifically defined" by state statute. The Court gives two examples of what a State could define for regulation under the second test:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[58]

The Court suggests that the new requirements will provide adequate safeguards against vagueness or ambiguity of interpretation, thereby giving "fair notice to a dealer in such materials that his public and commercial activities may bring prosecution,"[59] and providing "positive guidance to the federal and state courts alike."[60] This assurance is somewhat self-serving, particularly in light of the dissenting opinions of Justices Douglas and Brennan.

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55. *Id.* at 24.

56. The language in CAL. PEN. CODE § 311(a) (West Supp. 1973) which defines "prurient," is derived, not from the *Roth* opinion, but from American Law Institute, MODEL PENAL CODE § 251.4(1) "Obscene Defined" (Official Draft, 1962). See discussion of § 207.10(2) (Tent. Draft No. 6, 1957), *infra*, pp ——.

57. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

58. Miller v. California, 413 U.S. 15, 25 (1973). It is understood that these are subjects *for* definition, rather than definitions themselves. The Court cites as examples of statutes containing specific definitions, OREGON LAWS 1971, ch. 743, Art. 29, §§ 255-262 (Supp. 1973), and HAWAII PENAL CODE, Tit. 37, §§ 1210-1216, 1972 HAWAII SESSIONS LAWS, Act 9, ch. 12, pt. II, at 126-29. The Court cautions that these references do not imply that all States other than Oregon and Hawaii are obliged to enact new obscenity statutes in order to meet the "patently offensive" test. *Id.* at 24 n.6. One should note that the Oregon law applies only to juveniles, and it is doubtful that the specific acts described (*e.g.*, "bare nipples of the postpubertant female breast") could withstand a constitutional challenge with respect to adults.

59. Miller v. California, 413 U.S. 15, 27 (1973).

60. *Id.* at 29.

Justice Douglas, citing *Coates v. City of Cincinnati*,[61] argued that the term, "offensive" was unconstitutionally vague,[62] because it subjects the exercise of free expression to an unascertainable standard:

> How we can deny Ohio the convenience of punishing people who "annoy" others and allow California power to punish people who publish materials "offensive" to some people is difficult to square with constitutional requirements.[63]

The defect is not remedied by the enumeration of specific sexual or excretory acts, since it is clear that not all representations or depictions of such acts may be proscribed—only those which are "patently offensive."

Justice Brennan argues that the vagueness inherent in the *Miller* tests is compounded by the fact that persons are compelled to guess

> not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes "[b]ookselling . . . a hazardous profession," [Citation omitted] but as well because it invites arbitrary and erratic enforcement of the law.[64]

He concludes that this uncertainty produces a "chill on protected expression" above and beyond the lack of fair notice. Just as the

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61. 402 U.S. 611 (1971).

62. 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 held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617 (1954). It was suggested in Smith v. California, 361 U.S. 147, 151 (1959), that,

> stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.

63. Miller v. California, 413 U.S. 15, 46 (1973) (Douglas, J., dissenting). The *Coates* case dealt with a city ordinance making it a crime for three or more persons to assemble on a street and conduct themselves "in a manner annoying to persons passing by." The Court, in striking down the ordinance, stated,

> Conduct that annoys some people does not annoy others. Thus the ordinance is vague, not in the sense that it requies a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all.

Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

64. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 87-8 (1973).

man on the street is unable to determine whether his conduct is punishable, so is the state or federal judge who is called upon to review the conviction on appeal. This, argues Justice Brennan, has created an undue stress on state and federal judicial machinery. Since, "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so,"[65] a continuing state of tension exists between the state and federal courts. This is so because the need for an independent determination by the Supreme Court of the United States,

> seems to render superfluous even the most conscientious analysis by state tribunals. And our inability to justify our decisions with a persuasive rationale—or indeed, any rationale at all—necessarily creates the impression that we are merely second-guessing state court judges.[66]

Two additional problems mar the workability of the "patently offensive" test. The first problem concerns the application of the test to the material being adjudicated. Nowhere in the clause concerning patent offensiveness is there a limitation on how the material is to be viewed in making such a judgment; whereas, in the "prurient interest" and "serious value" guidelines the instruction is included that the matter must be "taken as a whole."[67] As Judge Levanthal points out:

> [T]he words "taken as a whole" are omitted from the patent offensiveness test. Is the jury to be instructed that it is enough if one page of a 300-page book is patently offensive, even though the book as a whole is not? I do not see the reason for the difference in treatment, which is not explained.[68]

Further, noted also with respect to the "serious value" test, the Court gives no standard for the application of the "patently offensive" test. The "community standards" application pertains only to the question of prurient appeal. Thus, it is unclear whether the Court, in adopting the "patently offensive test" means to suggest a national or local standard. At one point the Court argues that the First Amendment does not require that,

> there are, or should or can be fixed, uniform national standards of precisely what appeals to the "prurient interest" *or is "patently offensive."* [Emphasis supplied] These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated in a single formulation, even assuming the prerequisite consesus exists.[69]

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65. *Id.* at 92.
66. *Id.* at 93.
67. Miller v. California, 413 U.S. 15, 24 (1973).
68. Leventhal, *supra* note 44, at 1263.
69. Miller v. California, 413 U.S. 15, 30 (1973).

Yet, in the very next sentence, the Court implies that the community standards provision applies only to the "prurient interest" test:

> When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation.[70]

Since, as noted above, the question of offensiveness is a subjective one, the Court must clarify whether the term, "patently" is to be read as an absolute limitation, applying throughout the nation, or as varying from community to community.

Beyond the question of vagueness a further problem besets the new test: how can a depiction of sexual conduct be both appealing to the prurient interest and patently offensive at the same time?[71] This paradox has been with us since the *Memoirs* decision, and the Supreme Court in *Miller*, rather than resolving it, has reenacted it. If the average person applying contemporary community standards finds the work sexually arousing, it comes close to being an absolute contradiction to suggest that he will find it patently offensive as well. As noted above, the "average person" formulation does not precede the "patently offensive" test. Thus, it may be that two different classes of individuals are being described: the average man, who will be sexually aroused, and the Victorian "prude" who will be revolted, sickened or disgusted at the depiction.

Two attempts at resolution of the paradox other than the one suggested above have been made. In *Mishkin v. New York*,[72] the appellant's major contention was that the material in question was not obscene under the *Roth* standard because to the average person, "instead of stimulating the erotic, they disgust and sicken."[73] Justice Brennan writing for the majority replied that the argument was based on an "unrealistic interpretation" of the prurient appeal test:

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70. *Id.*

71. It should be recalled that the standards announced in *Miller* are cumulative: all three must be met in order for the work to be found obscene. Miller v. California, 413 U.S. 15, 24, 26 (1973).

72. 383 U.S. 502 (1966).

73. *Id.* at 508. Most of the materials in the case dealt with such sexual deviations as sadomasochism, fetishism, and homosexuality.

> Where the material is designed for, and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.[74]

A similar argument was made by defendants in *State v. J-R Distributors, Inc.*,[75] decided after the announcement of the *Miller* standards. After citing *Mishkin v. New York*, the Washington Supreme Court stated:

> Logically, defendants' argument is a virtual concession that the materials are *worse* than obscene. . . . If this [their argument] is true, the obscenity displayed in the two questioned exhibits amounts to "hard core pornography" in its strongest sense.[76]

Neither *Mishkin* nor the Washington case confront the real paradox contained in both the *Memoirs* and *Miller* formulations cited above. In essence the trier of fact is required to apply two sets of standards: (1) those of the average sexual deviant, to determine if the material appeals to his or her prurient sexual interst;[77] and (2) those of the average normal person in determining whether the material is "patently offensive" to that person. Where the material is aimed at the average person, however, the trier of fact must resort to an even more obscure application in order to find the material both erotic and offensive. It seems clear that at no time may the same "average person" standard be used and retain the logical distinction which the Court wishes to draw between prurient appeal and patent offensiveness. Thus the juxtaposition of the two tests within the same formulation renders it worse than vague: it becomes a logical impossibility to apply.

The Application of "Contemporary Community Standards"

The first reference to the use of community standards as a means of judgment whether material is obscene appeared in *Roth v. United States*.[78] There is ample evidence to suggest the reference was drawn from two sources, *United States v. Kennerley*[79] and

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74. *Id. See also* Miller v. California, 413 U.S. 15, 33 (1973) which reaffirms the *Mishkin* decision.

75. 82 Wash. 2d 584, 512 P.2d 1049 (1973). "They assert that the material is so sexually abhorrent that it would repulse the average man rather than create an appeal to his 'prurient interest'." *Id.*, 512 P.2d at 1076.

76. *Id.*, 512 P.2d at 1077 [emphasis in original].

77. Such a task the trier of fact may be clearly unqualified to perform in the absence of, or even with, "expert testimony on the community standards" of the deviant sexual group.

78. 354 U.S. 476, 489 (1957).

79. 209 F. 119 (S.D.N.Y. 1913).

the American Law Institute's Model Penal Code. In *Kennerley,* Judge Learned Hand, attacking the "most susceptible" test established in *Regina v. Hicklin,*[80] argued for a standard unrelated to particular sensibilities:

> If there be no abstract definition, such as I have suggested, 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? . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by necessities of the lowest and least capable seems a fatal policy.[81]

The *Roth* Court also cited with approval[82] the definition of obscenity contained in the American Law Institute's Model Penal Code.[83] The Code defines as "obscene," material that taken as a whole appeals predominantly to the prurient interest "if it goes substantially beyond customary limits of candor in description or representation of such matters as nudity, sex, or excretion."

The A.L.I. drafters apparently favored a national perspective in the application of its test, and provided for the admission of evidence of "the degree of public acceptance of the material in this country."[84] In justifying the inclusion of this provision, the draftsmen noted:

> Customs do indeed vary among our states, but it would be unfortunate to have no evidence on "public acceptance," in a case where material is challenged so promptly in a particular jurisdiction that the only opportunity to test public acceptance has been in other states. Also the divergence of custom between one state and another is probably far less than the differences between various social and religious groups within any one state. Furthermore, since a large part of the responsibility in this area has been assumed by the national government enforcing federal obscenity legislation, a country-wide approach is almost unavoidable. That which does not offend the sensibilities of most Americans is likely to be in the area of controversial morals or aesthetics, inappropriate for penal control.[85]

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80. [1868] L.R. 3 Q.B. 360.

81. 209 F. 119, 121. Lockhart & McClure argue that Judge Hand was contemplating a national community standard. Lockhart & McClure, *supra* note 2, at 110. This argument was relied upon by Justice Brennan in Jacobellis v. Ohio, 378 U.S. 184, 193 (1964):

> It seems clear that . . . Judge Hand was referring not to state and local "communities," but rather to "the community . . . at large . . . the public, or people in general."

82. Roth v. United States, 354 U.S. 476, 487 (1957).

83. MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957).

84. MODEL PENAL CODE § 207.10(2) (d) (Tent. Draft No. 6, 1957).

85. MODEL PENAL CODE § 207.10(2) Comment (Tent. Draft No. 6, 1957).

Regardless of the intent of the *Roth* Court in adopting the community standards test, subsequent application of the test was far from uniform. The Post Office and Justice Department treated the test as implying local standards, and secured federal legislation allowing "forum shopping" for the most easily obtained convictions.[86] A number of courts also came to this conclusion and applied a local standard under the apparent authority of *Roth*.[87]

In 1964, the Supreme Court reversed the conviction of a theatre manager for possessing and exhibiting an obscene film in violation of Ohio law.[88] The opinion announcing the judgment of the Court was written by Justice Brennan, but concurred in only by Justice Goldberg. Justice Brennan rejected that interpretation of *Roth* which allowed the application of standards of a particular local community from which the case arises.

> [T]he constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.[89]

Justice Brennan's argument was based upon the theory that the application of local community standards would create a chilling effect[90] on the dissemination of constitutionally protected materials in some places because sellers and distributors would be unwilling to risk conviction by testing variations in standards from place to place.

Chief Justice Warren dissented from the plurality opinion as well as the judgment.

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86. 72 Stat. 940 (1958), 39 U.S.C. § 259(c) (1958). Justice Frankfurter had previously criticized the effect of such a provision in United States v. Johnson, 323 U.S. 273, 275 (1944):

> Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.

87. *See* United States v. Frew, 187 F. Supp. 500, 506 (E.D. Mich. 1960); Four Star Publications, Inc., v. Erbe, 181 F. Supp. 483, 484-85 (D. Ia. 1960); People v. Smith, 161 Cal. App. 2d 860, 862, 327 P.2d 636, 638, *rev'd sub nom.* Smith v. California, 361 U.S. 147 (1959); People v. Brooklyn News Co., 12 Misc. 2d 768, 771-72, 174 N.Y.S.2d 813, 817-18 (County Ct. 1958). For a summary of the various approaches to "community standards" taken by the States during the period between the *Roth* and *Miller* decisions, *see* Shugrue, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157, 166-173 (1974).

88. Jacobellis v. Ohio, 378 U.S. 184 (1964).

89. *Id.* at 195.

90. The term is used to designate "spillover deterrence," *i.e.*, persons would be deterred not only from engaging in conduct prohibited by statute, but from engaging in lawful conduct under the Constitution as well, due to uncertainty as to the dividing line drawn by the statute between lawful and unlawful conduct. *See* Near v. Minnesota, 283 U.S. 697 (1931). *Cf.* United States v. Harriss, 347 U.S. 147 (1959).

> It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable "national standard" . . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.[91]

The inability of a majority of members of the Court to agree on the interpretation of the *Roth* phrase perpetuated the confusion and mixed application of the rule. In *People v. Adler*,[92] for example, a California appellate court ruled that the appropriate standards to be applied were those of the State of California. Noting the split in *Jacobellis*, the court concluded that the correct interpretation of *Roth* was that State or local community standards were to be applied in determining prurient appeal. This holding was reaffirmed by the appellate court in *Miller*, and was a basis for appealing the State decision to the United States Supreme Court.

Despite the persuasive evidence that *Roth* implied a national standard, the Supreme Court, in *Miller*, held that the Constitution does not require that the determination of whether or not material appeals to the prurient interest be made by resorting to national "community" standards.[93] In upholding California's use of statewide standards, the Court argued,

> 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 . . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[94]

Two arguments against doing away with a national standard announced in *Jacobellis* by Justice Brennan were summarily dismissed by the Court. The first was the so-called chilling effect which a pluralistic standard would have on sellers and distributors. Faced with the prospect of multiple standards perhaps yet to be

91. Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting).
92. 25 Cal. App. 3d Supp. 24, 101 Cal. Rptr. 726. *Adler* was cited by the California Appellate Department, Orange County Superior Court as authority for its holding in *Miller* that the State of California was the appropriate community.
93. Miller v. California, 413 U.S. 15, 31-34 (1973).
94. *Id.* at 32-33.

articulated in any precise way, sellers and disseminators of materials dealing with some form of sexual conduct would be unwilling to risk criminal conviction by testing variations in standards from community to community.[95] As a consequence, the use of local standards would have the effect of preventing the publication and dissemination of constitutionally protected material, by virtue of self-imposed censorship. The Court responded to the argument by saying:

> The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes, . . .[96]

The Court's argument is fallacious, for it proceeds from two premises, one of which is not necessarily true and one which is definitely untrue. It is not necessarily true that national criteria must be some sort of average, striking a balance between the most conservative and the most liberal tastes. The national criteria might indeed be very permissive, representing a constitutional ceiling, or floor, depending on one's perspective, beyond which material would receive no protection from criminal sanctions. But secondly, it is definitely not true that the Constitution requires States to regulate and prosecute obscenity, a proposition which the Court itself has rejected.[97] Thus, even if the national standard were an average, "places" which had a greater tolerance for materials than the toleration level allowed by the national standard, would in no way be required to adhere to the lower level.

Related to the first argument in favor of retention of a national standard is appellant's assertion in *Miller* that retention is necessary in order to avoid unconscionable burdens on the free flow of interstate commerce. The Court rejected this assertion on the grounds that there was "no indication that appellant's materials were ever distributed interstate,"[98] but went on to suggest that even if there were interstate distribution,

> [o]bscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general wel-

95. *See* Jacobellis v. Ohio, 378 U.S. 184, 193-195 (1964).

96. Miller v. California, 413 U.S. 15, 32 n.13 (1973).

97. The States, of course, may follow such a "laissez faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, . . . but nothing in the Constitution *compels* the States to do so. . . .

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973) [emphasis in original].

98. Miller v. California, 413 U.S. 15, 32 n.13 (1973).

> fare of its population despite some possible incidental effect on the flow of such materials across state lines.[99]

It would appear that the effect of pluralistic standards on interstate commerce will be far from incidental. Assuming that the new standards will affect only pornography, as the Court warrants,[100] they will necessarily affect a billion dollar industry,[101] almost all of which flows in interstate commerce.[102]

Several examples may help illustrate the nature and extent of the burden imposed by multiple standards of what appeals to the prurient interest. Granting the assumption made by the Court that "[p]eople in different States vary in their tastes and attitudes,"[103] national producers of films and books dealing with matters of sexual conduct would be required to produce and disseminate multiple editions of such materials. The number of such editions is not easily estimated, but potentially could number in the hundreds or thousands if local community standards are found to be permissible by the Court.[104] The cost of doing business in such a context may be prohibitive.

It has been contended that such a task may be less burdensome for the motion picture industry, since films can be cut and spliced for particular localities,[105] apparently with little difficulty. This

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99. *Id.* at 32-3 n.13.

100. Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed.

Id. at 27.

101. COMMISSION REPORT, *supra* note 16, at 83-142.

102. The practical application of Miller, however, may not be limited simply to pornography, as defined by the Court. *See* note 92 *supra.* The Georgia Supreme Court has upheld a theatre owner's conviction under Georgia's obscenity statutes for exhibiting the R-rated motion picture, "Carnal Knowledge." Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183, *rev'd sub nom.* Jenkins v. Georgia, — U.S. — [No. 73557] (1973). (After this article went to press, the Supreme Court reversed the conviction in the *Jenkins* case, holding that the film "Carnal Knowledge" did not meet the "patent offensiveness" test announced in *Miller.* Jenkins v. Georgia, — U.S. — (1974), 42 U.S.L.W. 5055, decided June 24, 1974. *See* discussion of the *Jenkins* decision in the postscript to this article, *infra* at 950.

103. Miller v. California, 413 U.S. 15, 33 (1973).

104. *See* discussion of state vs. local standards p. 931 *infra.*

105. Leventhal, *supra* note 44, at 1263. He suggests, however, that books are not as easily adapted to various community requirements. *Id.*

has been denied by at least one film company.[106] It has also been argued that the burden of multiple editions is one of the costs of doing business, and no concern to the courts.[107] Perhaps the most unconscionable burden is not that producers and distributors will have to adjust to pluralistic standards, but will be the extreme difficulty in determining, with impunity, the specific tastes of a local community. In the area of obscenity an otherwise feasible "marketing study" may be impossible without incurring burdensome costs of litigation[108] and possible criminal penalties. In most cases, this burden will be upon the local seller rather than the national producer.

Assuming the burden on interstate commerce to be more than incidental, what are the constitutional limitations upon state regulation of such commerce? Where there is a conflict between State regulation and the national concern for the free flow of interstate

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106. In response to a survey of motion picture companies conducted by the author, one major company stated:

> Major studio theatrical films are a national product. It is not economically feasible to market them in a segmented manner. This is precisely the reason why it is essential to our industry that the [Miller and Paris] decisions be modified as to identify with adequate specificity the type of product intended to be regulated.

The Motion Picture Association of America also shares this position

107. What is true is that under this ruling, producers and publishers will no longer have a single, uniform national market for selling their products. What they can sell in one town they cannot sell in another. But that has always been true in the sales of goods and services involving questions of taste. . . .

> Producers of "X" movies and pornographic books and magazines can hardly expect the courts to do their marketing for them.

David Brinkley's Journal, NBC News, June 21, 1973, reproduced in Joseph, *How TV Covered the Obscenity Decision: A Revealing Case Study*, 3 JURIS DOCTOR 14, 15 (1973). Ample evidence exists for Brinkley's argument that media are equipped to decentralize production and marketing, and indeed must be, in order to respond to diversification of tastes quite unrelated to questions of obscenity:

> [I]n almost every other communications medium [except television] we can trace a decreasing reliance on mass audiences. Everywhere the "market segmentation" process is at work. . . .
>
> "The old-style mass cinema audience . . . is gone for good." Instead, multiple small audiences turn out for particular kinds of films, and the economics of the industry are up-ended. . . .
>
> Between 1959 and 1969, the number of American magazines offering specialized editions jumped from 126 to 235. Thus every large circulation magazine in the United States today prints slightly different editions for different regions of the country—some publishers offering as many as one hundred variations.

TOFFLER, FUTURE SHOCK 276-278 (Bantam ed. 1970).

108. It cost $250,000 to defend "Deep Throat" in a Los Angeles obscenity prosecution, and the first trial ended in a hung jury. VARIETY, Oct. 26, 1973. Mr. Brinkley's comment to the contrary notwithstanding, producers and sellers are forced to do their marketing in the courts, a significantly more hazardous operation than the "market segmentation" process discussed by Toffler.

commerce the test most often applied is the so-called "balancing" test.[109] The balancing test requires that the benefit derived from local regulation outweigh the implicit burden on interstate commerce before the regulation will be upheld. If we are to accept the Court's rationale for excluding obscenity from the protection of the First Amendment, *i.e.*, that the State has a legitimate interest in safeguarding its citizens from anti-social behavior caused by the dissemination of obscenity, then we must establish also that there exists in fact a difference among the States in the degree of anti-social behavior likely to be caused by the same obscene material. This would be the only legitimate basis for finding a benefit innuring to the State which would outweigh the burden on interstate commerce of non-uniform regulation. Such a finding would be exceedingly difficult to prove. A policy based on such a proposition would, in effect, be resurrecting the now discredited *Hicklin* test.

Nevertheless, the Court has ruled that the regulation of obscenity, even though that regulation may be substantially different in application from the practice of another State, is a valid exercise of the State's police powers, despite its effect on interstate commerce.[110] This justification appears to be somewhat simplistic in light of previous decisions. In *Southern Pacific Co. v. Arizona*,[111] an authority cited by *Miller*, the Court stated:

> The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by "simply invoking the convenient apologetics of the police power . . . ."[112]

Uniformity in commercial regulations has been an integral part of this nation's economic system since the discarding of the Articles of the Confederation.[113] The theory of a national economy has often been used to invalidate State regulations despite the State's claim of police powers. Where the national interest is supported by the First Amendment right of free expression the benefits inherent in the free dissemination of ideas ought to outweigh any

109. *See, e.g.*, Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Bibb v. Navaho Freight Lines, 359 U.S. 520 (1959).
110. Miller v. California, 413 U.S. 15, 32 n.13 (1973).
111. 325 U.S. 761 (1945).
112. *Id.* at 779-780.
113. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

peculiar local interest in a specific regulation which would have the effect of isolating that community from interstate commerce.[114] The argument is even more persuasive where reasonable alternatives are available to the State or community, in promoting that interest.[115] Alternatives may indeed be available which would not involve unreasonable burdens on interstate commerce,[116] which the Court has neglected to consider.

One further problem concerning the application of State versus national standards was left unresolved by the Court; namely the standard to be used by federal courts in applying federal statutes. In *United States v. 12 200-Ft. Reels of Film*, decided the same day as *Miller*, the Court held that the standards enunciated in *Miller* "are applicable to federal legislation,"[117] but the interpretation of this language, insofar as it bears on the question of community standards is uncertain. Judge Levanthal correctly asks:

> What community is to be used in making this application to federal legislation? Does not the principle that federal legislation is to be given a uniform construction throughout the land require that the federal judge or jury determine a federal obscenity case by reference to a national standard on what appeals to prurient interest or what is patently offensive?[118]

United States v. One Reel of Film,[119] decided after *Miller*, answered in the affirmative.[120] Chief Judge Coffin in a concurring opinion provided a rationale:

> [I]f 19 U.S.C. § 1305(a), which permits customs seizures, be said to contemplate the application of state or local standards of prurient appeal or patent offensiveness, the few commercial ports of entry for foreign films or literature would be able to preclude such

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114. Dean Milk Co. v. Madison, 340 U.S. 349 (1951). *See also* Baldwin v. GAF Seelig Inc., 294 U.S. 511 (1935); H.P. Hood and Sons v. Dumond, 336 U.S. 525 (1949); Cantwell v. Connecticut, 310 U.S. 296, 304 (1939).

115. Dean Milk Co. v. Madison, 340 U.S. 349 (1951). *Cf.* Schneider v. New Jersey, 308 U.S. 147, 162 (1939); Shelton v. Tuckwell, 364 U.S. 479 (1960); Lovell v. City of Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1939).

116. *See* SUGGESTED ALTERNATIVES, p. 938 *infra*.

117. 413 U.S. 123, 130 (1973).

118. Leventhal, *supra* note 44, at 1262. *See also* Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962) where Justice Harlan, joined by Justice Stewart, argued:

> We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency.

119. 481 F.2d 206 (1st Cir. 1973).

120. *Id.* at 208 n. 2: "[S]ince we do not read the Supreme Court as requiring a local standard in proceedings under [19 U.S.C.] § 1305(a), we find no error in the district court's assumption in this case." The film, "Deep Throat," was confiscated by federal customs officials at Logan Airport, Boston, and was adjudged obscene and forfeit by the district court.

> material from ever reaching other parts of this country where it might not be considered obscene or where regulation, rather than outright prohibition, might be in effect.[121]

In applying a national standard to the film the circuit court did not pause to articulate what that standard was, or how it might have differed either from the community standards of Boston or the State of Massachusetts. One is left with the contradiction between the statement in *Miller* that a national standard is "unascertainable"[122] and "an exercise in futility"[123] and the apparent facility with which the First Circuit could and did apply such a standard.[124]

Despite the Court's intention to resolve the question of what constitutes "community standards," confusion remains over what kind of forum community is permissible. In *Miller* the Court approved a statewide standard, but did not address itself to the question of whether the State was the only appropriate community which could be used, or whether governmental units within the State are permissible. Decisions in State courts following *Miller* have been mixed on the issue of which community may be employed.[125]

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121. *Id.* at 210-11. *But see* pp. 950-52, *infra.*

122. Miller v. California, 413 U.S. 15, 31 (1973).

123. *Id.* at 30. Leventhal resolves this dilemma by suggesting that,

> [T]he proper construction of federal laws is to prohibit only those items as obscene that could not be vindicated in *any* substantial community market. That materials would pass muster in, say, New York and California, if established by evidence of persons knowledgeable as to their standards, would be enough to avoid federal interdiction, without prejudice to prohibition by other states.

Leventhal, *supra* note 44, at 1262.

124. In a federal prosecution of Miller under 18 U.S.C. § 1461, the 9th Circuit, on remand from the Supreme Court, did not reach the question of which standards were applicable, but merely held, in a memorandum decision, that the material was clearly obscene under either local or a national standard. United States v. Miller, 482 F.2d 1379 (1973). One may also inquire how the United States Supreme Court will now make independent reviews of cases involving obscenity. Given the application of "local" community standards to the "prurient interest" test, and most likely, the "patently offensive" test, the Court will be limited to making an independent review of whether the material lacks "serious literary, artistic, political, or scientific value." Since expert evidence of community standards is no longer required, there will be no basis in the record for the Court to disturb a jury determination that the material was appealing to the prurient interest and was patently offensive.

125. Some post-*Miller* decisions hold that the applicable community standards may be "local." Rhodes v. State, 283 So. 2d 351, 358 (Supreme

At least one case has been accepted by the Supreme Court for the current Term which presents this question squarely.[126] The appellant in that case was convicted by an Albany, Georgia jury for exhibiting the film, "Carnal Knowledge." The Georgia Supreme Court affirmed on the basis that *Miller* allowed the use of a "local" community standard.[127] If the Burger Majority votes to affirm this case it will necessarily take on the additional burden of having to define, either in *Jenkins*, or in subsequent cases, the permissible parameters of the local community.[128] Standards of taste are likely to differ appreciably even within cities and towns.[129] Are we likely to have neighborhood block associations asserting the right to exercise community control over the dissemination of books, magazines, and films? If the Court permits local standards, the answer is most likely to be "Yes."[130] It is clear that in practice the effect of the ruling will be that jurors will apply the standards of their own communities and more likely, their own personal tastes. The fact that materials may be declared obscene in Orange County, and not obscene in Los Angeles County does not appear to concern the Court.[131]

Ct. Fla. 1973); Brazelton v. State, 282 So. 2d 342, 343 (Ala. Crim. App. 1973); Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183 (1973). Others hold that the applicable community standards must be statewide in scope. State v. J-R Distributors, Inc., 512 P.2d 1049, 1065 (Supreme Ct. Wash. 1973), *cert. granted*, — U.S. — [No. 73-937]; People v. Heller, — N.Y.2d —, — N.Y.S.2d — (1973). One court has held that *both* statewide and local standards should be applied. Richards v. State, 497 S.W.2d 770, 777 (Tex. Ct. Civ. App. 1973). The State of Georgia has made inconsistent and contradictory rulings. Jenkins v. State, *supra* (local), and Slaton v. Paris Adult Theatre I, — Ga. —, —, 201 S.E.2d 456, 460 (1973) (on remand from the U.S. Supreme Court).

126. Jenkins v. Georgia, — U.S. — [No. 73-557] (1973).

127. *Id.*

128. Even within a forum or local community there may be pertinent, more localized, communities. Is a college bookstore governed by the standards of the college community or of the town or county in which the college is located?
Leventhal, *supra* note 44, at 1263.

129. It can well be argued that the State of California, in terms of varying tastes and attitudes, contains as much diversity as the nation as a whole. To require juries to formulate in their minds a California standard encompassing tastes and attitudes as diverse as those represented in the Counties of Orange, San Francisco, Los Angeles, Imperial, Inyo and Humboldt, or the cities within those counties is, under the Court's reasoning, equally "an exercise in futility."

130. For an example of the effect of carrying the local standards test to its logical extreme, see Gillers, *People v. Lotsmore, 504 U.S. 718 (1998)*, 3 JURIS DOCTOR 18 (1973).

131. This was actually the case with respect to Miller. A Los Angeles County trial judge dismissed, before trial, a prior prosecution based upon the same brochures. The Majority rejected Miller's "double jeopardy" claim as improperly pleaded, and a matter of state law. Miller v. California, 413 U.S. 15, 34 n.14 (1973).

Perhaps the best conclusion to be drawn is that the *Roth* test of "contemporary community standards," whether interpreted as national, state, or local ought simply to be discarded. Materials dealing with sexual conduct do not forego the protection of the First Amendment solely on that basis; only such materials as present a potential harm to the community are treated as unprotected speech. The tests of "prurient appeal," "patently offensive," and lack of "serious literary, artistic, political or scientific value," are justified only insofar as they relate to the State's legitimate interests in protecting its citizens from aberant, anti-social behavior, or minimally from unwanted and unconsented to exposure to material which the individual citizen finds offensive.[132] If such is the harm, then the State should be required to prove that a clear and present danger exists that the harm will come about.[133] Surely the publisher of pornography may be afforded the same protection as the anarchist who preaches violent revolution; and his conduct should be judged by a Constitutional standard, not one of community tastes.

IMPACT AND RESPONSE

Legislation

In announcing the new standards the Court emphasized that "it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts."[134] Nor did it hold that all States (excepting Oregon and Hawaii[135]) must enact new obscenity statutes. Instead, the Court merely required that prosecutions under obscenity laws be limited to depictions or representations of sexual conduct as defined specifically under State (or federal) law "as written *or construed.*"[136] The decision thus invited state courts to continue the practice of authoritative construction of state obscenity laws.

A survey of remanded and original cases in the wake of *Miller* finds almost all of the lower state and federal courts upholding the validity of current legislation by the process of construing the

132. *But see* Cantwell v. Connecticut, 310 U.S. 296 (1940); Coates v. City of Cincinnati, 402 U.S. 611 (1971).
133. Schenck v. United States, 249 U.S. 47 (1919).
134. Miller v. California, 413 U.S. 15, 25 (1973).
135. *Id.* at 24 n.6.
136. *Id.* at 27.

statutes as requiring the use of *Miller* guidelines. States which have taken this approach thus far include Alabama,[137] California,[138] Florida,[139] Georgia,[140] Massachusetts,[141] Missouri,[142] New York,[143] Ohio,[144] Texas,[145] and Washington.[146] In addition various federal statutes dealing with obscenity have been authoritatively construed as incorporating the *Miller* tests.[147]

Two state supreme courts, however, have ruled that the obscenity statutes in their respective States were unconstitutionally vague in light of the *Miller* standards. The convictions in two Indiana cases[148] were vacated and remanded by the United States Supreme Court[149] "for further consideration in light of *Miller v. California* . . . ."[150] On remand, the Indiana Supreme Court reversed the convictions on the grounds that the two statutory provisions[151] were unconstitutional.[152]

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137. Brazelton v. State, 50 Ala. App. 723, 282 So.2d 342 (1973).

138. People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973). After this article went to press a federal district court declared California's obscenity statute to be unconstitutional. Miranda, et al. v. Hicks, et al., F. Supp. — (C.D. Cal. 1974).

139. Papp v. State, 281 So. 2d 600 (Fla. App. 1973) (prospective application); Rhodes v. State, 283 So. 2d 351 (Fla. 1973).

140. Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183 (1973); Slaton v. Paris Adult Theatre I, — Ga. —, 201 S.E.2d 456 (1973).

141. Commonwealth v. Claflin, 73 Adv. Mass. App. 475, 298 N.E.2d 888 (1973).

142. State v. Bird, 499 S.W.2d 780 (Mo. 1973).

143. Lynbrook v. United Artists Corp., 75 Misc. 2d 124, 347 N.Y.S.2d 856 (Sup. Ct. Sp. Term 1973); Redlich v. Capri Cinema, 43 App. Div. 2d 27, 349 N.Y.S.2d 697, 42 U.S.L.W. 2297 (1974), *rev'd*, 75 Misc. 2d 117, 347 N.Y.S.2d 811 (Sup. Ct. 1973).

144. State *ex rel.* Keating v. "Vixen," 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).

145. Richards v. State, 497 S.W.2d 770 (Tex. 1973).

146. State v. J-R Distributors, Inc., 82 Wash. 2d 584, 512 P.2d 1049 (1973).

147. United States v. Hamling, 481 F.2d 307 (9th Cir. 1973), *aff'd*, Hamling v. United States, — U.S. —, 42 U.S.L.W. 5035 [No. 73-507] (1974) (18 U.S.C. §§ 2, 371, 1461); United States v. Miller, 482 F.2d 1379 (9th Cir. 1973) (18 U.S.C. § 1461); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973) (18 U.S.C. § 1462); United States v. One Reel of Film, 481 F.2d 206 (1st Cir. 1973) (19 U.S.C. § 1305(a)).

148. Stroud v. State, — Ind. —, 273 N.E.2d 842 (1971); Mohney v. State, — Ind. —, 276 N.E.2d 517 (1971).

149. Stroud v. Indiana, 413 U.S. 911 (1973); Mohney v. Indiana, 413 U.S. 911 (1973).

150. *Id.*

151. IC 1971, 35-30-10-1 [IND. STAT. ANN. § 10-2803 (Burns Repl. 1956)], "Obscene literature and devices"; IC 1971, 35-30-10-3 [IND. STAT. ANN. § 10-2803a (Burns Repl. 1956)].

152. Stroud v. State, — Ind. —, 300 N.E.2d 100 (1973); Mohney v. State, — Ind. —, 300 N.E.2d 66 (1973). Chief Justice Afterburn's opinion was

The Louisiana Supreme Court also struck down that state's anti-obscenity statute.[153] A related "common nuisance" statute[154] which allowed the State to close a theatre for one year for the showing of obscene films was also struck down as an unlawful prior restrain and a denial of due process.[155]

In *Hamar Theatres, Inc. v. Cryan*[156] a Three Judge District Court struck down New Jersey's anti-obscenity statute[157] on the grounds that it was not susceptible to any saving judicial construction under *Miller*, in light of prior legislative history.[158] In holding the statute unconstitutional, the Court stated:

> A construction of N.J.S. 2A:115-1.1 (Supp. 1973) embodying the *Miller* standard would have to stand upon the premise that a state can enact a statute which, although specifically intending to proscribe certain sexually-oriented material, would "intend" to proscribe something less if the standard it had intended to create turned out to be unconstitutional. To permit this kind of statutory construction, however, is equivalent to condoning a criminal statute that would prohibit "all expression not permitted by the First Amendment." The offense to due process inherent in such a vague legislative enactment is apparent.[159]

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the same in each case:

> The main thrust of those [the 1973 U.S. Supreme Court obscenity-pornography] opinions, so far as applicable to this case, is that the statute under which the appellant was convinced is unconstitutional for the reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.

Stroud v. State, — Ind. —, 300 N.E.2d 100, 101 (1973); Mohney v. State, — Ind. —, 300 N.E.2d 66, 67 (1973).

153. Louisiana v. Shreveport News Agency Inc., — La. —, 287 So. 2d 464 (1973). *See* LA. REV. STAT. § 14:106(2) (——).

154. LA. REV. STAT. § 13:4711-13:4717 (——).

155. Gulf State Theatres of Louisiana, Inc. v. Richardson, — La. —, 288 So. 2d 649 (1973), *review granted*, Cryan v. Hamar Theatres, Inc., — U.S. —, 42 U.S.L.W. 3591 [No. 73-711] (1974).

156. 365 F. Supp. 1312 (D.N.J. 1973).

157. N.J.S. 2A:115-1.1 (Supp. 1973). *See also* Cine-Com Theatres Eastern States, Inc. v. Lorde, 351 F. Supp. 42 (D.N.J. 1972).

158. *See* N.J.S. 2A:115-1.1a (Supp. 1973) ("Legislative findings," L. 1971, ch. 449, § 2, eff. Feb. 16, 1972).

159. Hamar Theatres, Inc. v. Cryan, 365 F. Supp. 1312, 1327 (D.N.J. 1973) [footnotes omitted]. The Court concluded that the statute was unconstitutional because:

> (1) it would proscribe material that possessed serious literary, artistic, political or scientific value; (2) it would proscribe material that did not depict or describe sexual conduct in a patently offensive manner; and (3) it cannot be construed as *specifying* the kind

No State has yet acted to revise its law concerning obscenity in light of the *Miller* standards. No action is contemplated in California, the State wherein Miller was convicted.[160] The New York Senate and Assembly Codes Committees, however, held hearings in October of 1973 to consider amendments to the New York obscenity laws in light of *Miller*.[161] One may expect that unless the Supreme Court overturns the decisions noted above, Indiana, Louisiana and New Jersey, at least will be forced to adopt new legislation.

Reactions from the Industry

In an effort to make a realistic assessment of the impact of the 1973 obscenity-pornography decisions on the communications industry, motion picture producers, theatre owners and publishing houses were sent a questionnaire concerning that issue. The questionnaire asked the respondents to comment on (1) the extent to which *Miller v. California* had affected their policies concerning the production of materials which potentially could be subjected to an obscentity prosecution; and (2) whether they had modified or were contemplating the modification of policies relating to national marketing and/or distribution of such materials, in light of the local community standards test announced in *Miller*.

The number of returns was too few to constitute a valid sample. However, of the companies responding to the survey only one, a motion picture company, replied that *Miller* had affected its production policies, and that the decision had merely "accelerated" its movement toward more family entertainment films (G and PG rated). Three respondents reported some impact on distribution of materials. One publisher stated, "We do avoid inflammatory covers and we help our wholesalers keep adult reading out of communities and areas that are violently offended by this type of

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of sexual conduct the depiction of which can be proscribed under *Miller*.

Id. at 1328-29. *Compare*, United Artists Corp. v. Harris, 363 F. Supp. 857 (W.D. Okla. 1973); Speight v. Slaton, 356 F. Supp. 1101 (S.D. Ga. 1973) *vacated and remanded*, — U.S. —, 42 U.S.L.W. 4300 (1974) (in light of Sanders v. State, [No. 28352, Jan. 28, 1974] — Ga. —, — S.E.2d — (1974) which struck down the application of § 26-2101 of the Criminal Code of Georgia in a case involving similar facts. The Court considered that Speight could no longer show irreparable injury in light of the *Sanders* decision.).

160. Telephone interview with Assemblyman Bob Wilson's Office, Feb. 15, 1974. Presumably, this means that the "redeeming social importance" test found in CAL. PEN. CODE § 311(a) (West 1970) will continue to be the standard in California. *See* People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973). *But see* note 138, *supra*.

161. 204 PUBLISHERS WEEKLY 30 (Nov. 5, 1973).

material." Several of the respondents concluded that in light of the pending review of *Jenkins v. Georgia*[162] by the Supreme Court, it would be precipitous to attempt to formulate new policies concerning either production or distribution. Many respondents simply referred the author to the positions taken by their respective trade associations.

Trade associations have been much more vocal in their evaluation and response to the 1973 decisions. The Association of American Publishers in its September 19, 1973, meeting called for the repeal of all federal, state, and local legislation that prohibits the sale, exhibition, or distribution of sexually explicit materials to consenting adults.[163] Almost all the media trade associations filed *amici* briefs in the *Jenkins case*.[164] They all have taken the position that statewide, rather than local community standards should be constitutionally required. The Directors Guild of America, for example, took the position that:

> A rule permitting judges and jurors to apply the singular standards of a town, county or rural area in deciding whether material is obscene would impose an intolerable burden on the distribution and dissemination of communication. It is not feasible to prepare different versions of books, magazines and films for distribution in different parts of each of the states.[165]

A final means of assessing the impact of *Miller* on the communications industries is to examine the nature of materials currently being prosecuted, where such information is available. A partial

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162. — U.S. — [No. 73-557] (1973).

163. 102 INTELLECT 140 (1973):

> Kenneth D. McCormick, Senior Editorial Consultant, Doubleday & Co., and Chairman of the [AAP] Freedom to Read Committee, said that, because of the Supreme Court's decisions on June 21, 1973, establishing new guidelines for obscenity prosecutions, it was "now more important than ever that our lawmakers, jurists and every concerned citizen read the [Obscenity and Pornography] commission's report and give serious and rational consideration to its recommendations."

Id.

164. Trade associations filing *amici* briefs included the Authors League of America, the National Association of Theatre Owners, Adult Film Association of America, Inc., the Directors Guild of America, and the American Library Association.

165. Brief for Directors Guild of America at 7, Jenkins v. Georgia, — U.S. — [No. 73-557]. The *amicus* went on to state the opinion of the DGA "that *all* communication to adults who wish to receive it, is protected against regulation by the First and Fourteenth Amendments." *Id.* at 8.

listing of materials which have gained national prominence follows:

Motion Pictures: "Carnal Knowledge,"[166] "Last Tango in Paris,"[167] "Deep Throat,"[168] "Vixen,"[169] "Behind the Green Door."[170]

Books: *The Illustrated Presidential Report of the Commission on Obscenity and Pornography*,[171] *A Clockwork Orange*.[172]

Magazines: *Playgirl*,[173] *Playboy, Oui,* and *Penthouse*.[174]

These prosecutions would suggest that national motion picture producers, distributors and publishers which heretofore could rely on non-interference with their products by state and federal authorities, can no longer continue to do so without risking seizures and prosecutions, some of which may be successful.

Suggested Alternatives

Given the continuing problems of First Amendment encroachment,[175] vagueness of standards,[176] and their application[177] implicit in the Supreme Court's new constitutional guidelines on obscenity, state legislatures would do well to ponder the options now available to them. Presented below are three sets of alternatives which may be feasible for legislative enactment. It should be noted that no attempt has been made to present precise legislative language but only the basic approach with specific illustration in some cases. These proposals are offered in view of the conclusion drawn above,

166. Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183, rev'd, — U.S. — [No. 73-557] (1974) (Albany, Ga.).

167. Oklahoma City threatened prosecution. United Artists Corp. v. Harris, 363 F. Supp. 857 (W.D. Okla. 1973).

168. Monmouth County, N.J. *See* Hamar Theatres Inc. v. Cryan, 365 F. Supp. 1312 (D.N.J. 1973); *see also* United States v. One Reel of Film, 481 F.2d 206 (1st Cir. 1973) ("Deep Throat" seized at Port of Entry).

169. Hamilton, County, Ohio: State ex rel. Keating v. A Motion Picture Entitled "Vixen", 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).

170. Redlich v. Capri Cinema, Inc., 43 App. Div. 2d 27, 349 N.Y.S.2d 697 (1974) (New York City).

171. United States v. Hamling, 481 F.2d 307 (9th Cir. 1973), *aff'd sub nom.*, Hamling v. United States, — U.S. — [No. 73-507] (1974) (San Diego, Calif.).

172. Oram, Utah. Letter from Publisher to author, Jan. 28, 1974.

173. Letter from distributor to author, Feb. 4, 1974.

174. These three publications have been seized in Macon, Georgia, Hopewell, Virginia, Prattville, Alabama, Gulfport, Mississippi, and Ashland, Ohio, noted in Gartner, *If You Think I Look Silly . . .*, 3 Juris Doctor 11 (Aug./Sept. 1973).

175. *See* discussion p. 919 *supra*.

176. *See* discussion p. 920 *supra*.

177. *See* discussion pp. 921-26 *supra*.

that mere authoritative construction of current state statutes by judicial agencies within the State are inefficacious and undesirable means of solving "the intractable obscenity problem."[178]

"Adults Only" Model

Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton*, concluded that:

> [A]fter 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials . . . . Although we have assumed that obscenity does exist and that we "know it when [we] see it," . . . we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.[179]

He therefore called for an end to any absolute state suppression of sexually-related material insofar as consenting adults are concerned:

> I would hold, therefore, that 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.[180]

The Court criticized Justice Brennan for this approach because he offered no guidelines on how to distinguish between protected and unprotected materials which may be disseminated to juveniles and unconsenting adults.[181] What is presented below is an attempt

178. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

179. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973).

180. *Id.* at 113. Justice Brennan admitted that "[d]ifficult questions must still be faced, notably in the areas of distribution to juveniles and offensive exposure to unconsenting adults." *Id.* at 114.

181. Paradoxically Mr. Justice Brennan indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one

to delineate the way in which a State may safeguard juveniles and unconsenting adults from unwanted or undesirable exposure.

§ 101. All laws in the State prohibiting the manufacture, sale, dissemination or exhibition of obscene materials to consenting adults are hereby repealed.[182]

§ 102. Safeguards Against Undesirable Exposure to Juveniles and Unconsenting Adults.

a. *It shall be unlawful for any person to display publicly any material which depicts by photograph or drawing explicit sexual conduct.*[183]

1) "Public display" means any presentation on a building, billboard, sign, or in a newspaper or magazine cover which is visible to the passerby on a public thoroughfare.

2) "Explicit sexual conduct" means any of the following acts:

a) sexual intercourse between two or more persons;

b) oral-genital contact between two or more persons;

c) oral-anal contact between two or more persons;

d) anal-genital contact between two or more persons;

e) any of the above acts between one or more persons and an animal or the dead body of a human being;

f) acts of human torture or sadomasochistic abuse when performed within a sexual context;

g) acts of masturbation, self or other induced, manually, or with the aid of an artificial device;

h) exposure of the human genitals.[184]

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month past the state law age of majority and a willing "juvenile" one month younger.

If one were to adopt a "liquor" analogy to the obscenity problem, rather than Chief Justice Burger's totally unjustified "heroin" analogy, the difficulty in adopting Justice Brennan's proposal would be far less severe than that intimated by the Court. *See* Justice Brennan's reply to the above criticism, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 114 n.29.

182. This would allow the consenting adult to patronize and consume whatever "obscene" material he wished. The only limitation would be on the viewing of "live" sexual conduct. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968); California v. LaRue, 409 U.S. 109, 117-18 (1972).

183. *Cf.* Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 MICH. L. REV. 1296 (1973); *See also* Rabe v. Washington, 405 U.S. 313, 316-17 (1972) (Burger, C.J., concurring). Adequate justification has been presented for protecting the unconsenting adult from unwilling exposure. *See* Rowan v. Post Office Department, 397 U.S. 728, 736, 738 (1970); KUH, *Censorship With Freedom of Expression*, in CENSORSHIP AND FREEDOM OF EXPRESSION 131, 135 (H. Clor ed. 1971); Gellhorn, *Dirty Books, Disgusting Pictures, and Dreadful Laws*, 8 GA. L. REV. 291, 307-09 (1974). A special exception may be required in the case of textbooks dealing with sex education adopted by a duly authorized Board of Education of Trustees. The State can prevent the abuse of this exception by private "schools" through the use of its certification requirements for educational institutions.

184. *See* OREGON LAWS 1971, ch. 743, Art. 29, §§ 255-262 for alternative examples of sexual conduct and exposure of the genitals which may be prohibited. The Oregon statute would proscribe a greater array of sexual acts and sexual exposure than what is proposed here. *See also* N.Y. PENAL LAW §§ 235.20-.21 (McKinney 1967), which prohibits commercial

b. *It shall be unlawful for any person to mail or send any unsolicited material depicting explicit sexual conduct as described in 2a(2) above, or to send such materials in response to a specific order or request without requiring proof that the intended recipient is over the age of 18 years.*[185]

c. *It shall be unlawful for any person to sell, disseminate or exhibit any material which depicts explicit sexual conduct as described in 2a(2) above to any person under the age of 18 years.*[186]

§ 103. Locations of businesses dealing in sexually explicit materials.

Each municipal corporation chartered under the laws of this state and each county which has jurisdiction over unincorporated areas may prohibit, under its zoning regulations, the operation of any business which sells, disseminates, or exhibits material which depicts explicit sexual conduct as defined in 2a(2) above within a certain distance of a school, child care center, church, park, public playground, or residentially zoned property.[187]

The advantage to this proposal is that it avoids completely the necessity of making value judgments on what "appeals to the prurient interest" or what is "patently offensive." It also avoids the difficulty inherent in determining the literary, artistic, political or scientific value of material alleged to be obscene. While there are some restrictions on the seller and disseminator who wish to engage in a lawful business, these restrictions are no greater than those placed on other persons who market products potentially harmful to juveniles.[188] While the interest of the State in protect-

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distribution of materials to minors which stress nudity, sexual acts, or sadomasochistic abuse that is found to be harmful to minors, upheld by the Supreme Court in Ginsberg v. New York, 390 U.S. 629 (1968). *Compare* Butler v. Michigan, 352 U.S. 380 (1957) which struck down MICH. PENAL CODE § 343 which made a juvenile standard applicable to adults as well.

185. This provision would apply to Miller, since the brochures in question depicted explicit sexual conduct, and were sent to unconsenting adults. Brochures which linguistically, rather than pictorially describe such material are unaffected by this provision.

186. In light of recent legislation conferring adult status on persons aged 18 years or over, this age limit is recommended as being more consistent with such provisions.

187. *Cf.* Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973). *But see* Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363, 369-70 (E.D. Mich. 1974).

188. Businesses under such regulation include liquor stores, bars, and tabocconists. Sale or dissemination of alcoholic beverages to a minor may not only cost the proprietor his license, but may make him criminally liable for contributing to the delinquency of a minor. *See, e.g.*, CAL. PEN. CODE, § 272 (West 1970). *Cf.* Vachon v. New Hampshire, — N.H. —, 306 A.2d 781, *rev'd*, — U.S. —, 42 U.S.L.W. 3403 (1973).

ing juveniles and unconsenting adults from unwarranted exposure to such materials, the consenting adult is left free to consume or not to consume as he or she sees fit.[189]

"Sexual Conduct" Model

Throughout the *Miller* majority opinion the Court admonishes that it is concerned only with the regulation of graphic portrayal of explicit sexual conduct, also referred to as "hard core pornography."[190] This would seem to suggest that the Court is much more concerned with exhibition, *i.e.*, presentations which are "live" or on film, than of literary representations, as in the case of books,[191] or artists' renditions. Assuming that the State has a greater interest in prohibiting graphic displays, it might be advantageous for the State to abandon the concept of obscenity altogether and simply prosecute on the basis of actual sex acts committed in public or on film. It is clear that "obscenity" cases can be prosecuted under sex act statutes when actual sexual conduct is involved.[192]

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189. [T]here is developing sentiment that adults should have complete freedom to produce, deal in, possess and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age.

United States v. Reidel, 402 U.S. 351, 357 (1971). Chief Justice Burger rejects the argument by saying,

> [S]tate regulation of hard core pornography so as to make it unavailable to nonadults, a regulation which Mr. Justice Brennan finds constitutionally permissible, has all the elements of "censorship" for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation.

Miller v. California, 413 U.S. 15, 36 (1973). To be sure, the above model places some restrictions on access to such materials by consenting adults, but hardly in a manner which would justify the appelation of "censorship." No censorship of content is made except with respect to the time, place and manner in which the material may be exhibited. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

190. Miller v. California, 413 U.S. 15, 18 n.2, 27, 29, 35, 36 (1973).

191. *But see* Kaplan v. California, 413 U.S. 115 (1973) decided the same day as *Miller* which held that an unillustrated book with plain cover could be found to be obscene. See also Judge Leventhal's criticism of the *Kaplan* decision. Leventhal, *supra* note 44, at 1263. The Court has recognized that motion pictures are not "necessarily subject to the precise rules governing any other particular method of expression," Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 503 (1952), and has held that they are subject to prior censorship under carefully drawn statutes. Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Freedman v. Maryland, 380 U.S. 51 (1965).

192. *See*, for example, CAL. PEN. CODE §§ 288a, 286, 314 (West 1970). Under these statutes live theatrical performances and motion picture productions have been subject to prosecution. *See* People v. Drolet, 30 Cal. App. 3d 207, 105 Cal. Rptr. 824 (1st Dist. 1973); People v. Schwartz, No. A-282165 (Super. Ct. 1972) (appeal pending —Cal. App. 3d —, — Cal.

Such an approach has been urged for the State of California.[193] As an example, Cal. Pen. Code § 288a would be amended so as to exclude theatrical or film productions from its scope and a new statute drafted:

> **New Statute**
>
> (a) *Any person participating in an act of copulating the mouth of one person with the sexual organ of another, when said act is recorded on film and said person has knowledge that said act is being filmed, or in a theater, if part of a theatrical production presented for an admission fee, is guilty of a misdemeanor.*
>
> (b) *Any person who displays for an admission fee a film or theatrical presentation depicting the acts described in (a) or records such an act on motion picture film shall be guilty of a misdemeanor.*[194]

The approach suggested above could easily be extended to other specific acts of actual sexual conduct performed in a theatre or recorded on film. The following statutory outline illustrates the second model for state legislation:

> § 101. **Public presentations of actual sexual conduct; punishment**
>
> (a) *Any person participating in an act of sexual conduct as defined in subsection (b), when said act is recorded on film and said person has knowledge that said act is being recorded on still or motion picture film, or in a theatre, if part of a theatrical production presented for an admission fee, is guilty of a misdemeanor.*
>
> (b) *For purposes of this section, "sexual conduct" includes any or all of the following acts:*
>
> *(1) sexual intercourse between two or more persons;*
> *(2) oral-genital contact between two or more persons;*
> *(3) oral-anal contact between two or more persons;*
> *(4) anal-genital contact between two or more persons;*

Rptr. — (1974); People v. Parker, 33 Cal. App. 3d 842, 109 Cal. Rptr. 354 (2d Dist. 1973). *See also* California v. LaRue, 409 U.S. 109 (1972), *reh. denied*, 410 U.S. 948 (1973).

193. Comment, *New Prosecutorial Techniques and Continued Judicial Vagueness: An Argument for Abandoning Obscenity as a Legal Concept*, 21 U.C.L.A. L. REV. 181 (1973).

194. *Id.* at 237-38. The author of the comment argues:

> The specific legislation articulates social goals. Rather than placing nebulous concepts in the hands of the courts, they are a direct reflection of popular will and, in a sense, of the community standard. Legislators who draft unpopular sex act statutes for the theatre can be turned out of office; conversely candidates who propose popular regulation can be elected. As always, judicial review will be essential, but the obscenity laws will be just like the myriad other regulations with which courts must deal: specific prohibitions, not specific modes of conduct within vague boundaries, will be evaluated.

Id. at 239.

(5) any of the above acts between one or more persons and an animal, or the dead body of a human being.[195]

(6) acts of masturbation, self or other induced, manually, or with the aid of an artificial device.

(c) *Any person who displays for an admission fee a theatrical production depicting any of the acts described in subsection (b) or who records such acts on film, or who sells or displays for an admission fee such acts recorded on film is guilty of a misdemeanor.*[196]

(d) *Every person who, with knowledge that a person is a minor under the age of 18 years, employs such minor to commit any of the acts described in subsection (b) is punishable by imprisonment in the state prison for one to five years or a fine of no more than $10,000, or both.*

Every person who otherwise employs any other person to commit the acts described in subsection (b) is guilty of a misdemeanor.[197]

Assuming that a State has a legitimate interest in controlling the production and dissemination of "obscene" materials even with respect to consenting adults, the proposed model offers a superior vehicle for pursuing that interest. It avoids most, if not all of the problems of vagueness inherent in the *Miller* standards for obscenity, and establishes a precise standard under which prosecutors may operate.[198]

This greater degree of certainty is achieved at some expense of coverage. Literary, or linguistic descriptions are not subject to prosecution under this model, nor are sexual "acts" which are merely simulated, either by actual models, or by artists' renditions. The model does, however, stand for the principle that:

> Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or "live" theatre stage, any more than a "live" performance of a man and woman locked in sexual embrace at high noon in Times

195. *Cf.* N.Y. PEN. LAW § 130.20 (McKinney 1967).

196. *Cf.* People v. Massey, 137 Cal. App. 2d 623, 290 P.2d 906 (2d Dist. 1955) (conspiracy to violate CAL. PEN. CODE § 311 upheld).

197. The State's interest in protecting minors from engaging in actual sexual conduct where such acts are commercially exploited for public exhibition is clearly a valid one. *See* note 193 and accompanying text *supra*. "Parental consent" for such modeling would not remove such an act from criminal sanction under the proposed statutory model. *Cf.* THE ILLUSTRATED PRESIDENTIAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 90-93 (1970).

198. In Los Angeles County only about 44% of the persons against whom obscenity charges were brought were convicted in 1970-71. This compares with an 80% to 90% conviction rate for most categories of crimes. Comment, *New Prosecutorial Techniques, supra* note 193, at 185 n.16. *See also* Teeter & Pember, *The Retreat From Obscenity: Redrup v. New York*, 21 HAST. L.J. 175, 176 (1969).

> Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.[199]

One difficulty faced by the prosecution under the "Sexual Conduct" model is proving that actual, as opposed to simulated sexual conduct took place. Similar problems of proof exist in other areas of the criminal law, and are far less insurmountable than the requirements of proof for the *Miller* guidelines. Given the uncertainty still present in the Supreme Court's tests for obscenity a State may well choose to avoid the problem altogether and rely on a modified version of its sex act statutes.

Miller "Obscenity" Model

The least desirable alternative for the States from an economic[200] as well as administrative point of view, is to continue to deal with the problems inherent in prohibiting obscenity. At the very least, States should redraft their statutes in order to bring them into line with the *Miller* standards, rather than relying on their courts to construe present statutes on a slow, case by case basis. The third alternative attempts to present a statutory model closest to the line drawn by *Miller* as dividing constitutional and unconstituional means of suppressing materials dealing with sexual conduct.

> § 101. **Obscenity.**
>
> *It shall be unlawful for any person to sell, disseminate, or exhibit any material found to be obscene in a civil proceeding described below.*
>
> § 101.1 **Civil Proceedings.**
>
> *No criminal prosecution may be instituted against any person for selling, disseminating or exhibiting obscene material without a prior adjudication in civil court on the question of obscenity. In order to secure a judicial determination on the question of obscenity, the Prosecution must bring a civil quasi-in-rem proceeding against the material itself.*[201]

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199. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973).

200. The Commission estimated the aggregate cost of enforcing state obscenity statutes at $5 to $10 million per year, and federal enforcement to be at least $3 to $5 million per year. COMMISSION REPORT, *supra* note 16, at 42-43.

201. *See* Miller v. California, 413 U.S. 15, 41-44 (Douglas, J., dissenting). *See also* Pilpel, *Obscenity and the Constitution*, 204 PUBLISHERS WEEKLY 24, 26 (1973).

a. *Under the civil action there shall be a full adversary proceeding on the question of obscenity, utilizing standards hereinafter set forth.*

b. *Relief under the civil proceeding is limited to forfeiture of the seized material and a permanent injunction against sale, dissemination or exhibition of that material or copies thereof, once a final adjudication of the question has been made. Criminal penalties may be imposed for selling, disseminating or exhibiting such material after it has been found to be obscene, or for violation of a permanent injunction issued under the civil proceedings against such sale, dissemination or exhibition.*

§ 101.2. Standards to be applied in civil proceeding.

a. *Any proceedings brought pursuant to this section is limited to the following kinds of materials:*

(1) actual or simulated acts of sexual conduct when performed in a theatre for which an admission fee is charged;

(2) actual or simulated acts of sexual conduct recorded on film which is offered for sale or exhibition;

(3) graphic or animated depictions of sexual conduct which are offered for sale or exhibition.

b. *For purposes of this section "sexual conduct" is defined as*

(1) sexual intercourse between two or more persons;

(2) oral-genital conduct between two or more persons;

(3) oral-anal contact between two or more persons;

(4) anal-genital contact between two or more persons;

(5) any of the above acts between one or more persons and an animal or the dead body of a human being;

(6) acts of human torture or sadomasochistic abuse when performed within a sexual context;

(7) acts of masturbation, self or other induced, manually or with the aid of an artificial device.

c. *The standard which the trier of fact shall apply to materials subject to proceedings brought under this section shall be: whether the dominant theme of the material, taken as a whole appeals to the prurient interst of either*

(1) the average adult applying contemporary statewide community standards; or

(2) a discrete and insular deviant sexual group; or

(3) minors under the age of 18 years,
where such appeal presents a clear and present danger of antisocial conduct prohibited by state law.

§ 101.3. Requirements of proof.

a. *In any action commenced under the proceedings described in this section, the prosecution shall be required to offer affirmative expert evidence of statewide community standards of prurient appeal under § 101.2c(1) above, or the statewide standards of the special groups referred to in § 101.2c(2)-(3) above. Such evidence shall include but not be limited to:*

(1) the degree to which the material in question or comparable material[202] *has caused anti-social conduct proscribed by state law;*

(2) the degree to which the material possesses or lacks redeeming social value to the specific group for which the material was designed.

b. *In the absence of affirmative evidence that the material was intentionally aimed primarily at one of the groups described in § 101.2c(2)-(3) above, the determination of prurient appeal shall be presumptively based on the average adult as described in § 101.2c(1).*

c. *For purposes of this section, "redeeming social value" means that where the material in question is found to be otherwise obscene under § 101.2a-c, the social value of the material is such that it outweighs the interest of the State in suppressing it. Redeeming social value may be established by the production of affirmative expert evidence of the literary, artistic, educational, scientific, therapeutic, or political value of such material or comparable material.*[203]

§ 101.4. **Certain institutions exempted.**

a. *The foregoing provisions shall not apply to the following institutions:*[204]

(1) scientific and educational institutions engaged in experimental or academic research requiring the use of such materials;

(2) libraries, museums and other depositories where the collection of such materials has historical value;

(3) federal, state and local governmental agencies.

b. *The above exemptions shall apply only where the institutions described in § 101.4a above*

(1) provide adequate safeguards against exposure to minors under the age of 18 years and unconsenting adults;

(2) do not advertise, or otherwise hold out such materials for exhibition or sale to the general public.

The alterations of *Miller* in the above model are fairly clear: (1) a civil *in rem* proceeding is made mandatory; (2) the "patently

202. A judicial determination of what constitutes "comparable material" is required before such material may be admitted into evidence. *Cf.* Petition for Writ of Certiorari, at 18, Hamling v. United States, — U.S. — [No. 73-507].

203. *Id.*

204. *See* REV. CODE WASH. § 9.68.015. *Cf.* State v. J-R Distributors, Inc., 82 Wash. 2d 584, —, 512 P.2d 1049, 1061 (1973).

offensive" test is removed;[205] (3) the burden of proof established for the State is the clear and present danger test which is required in other First Amendment cases;[206] (4) "seriousness" as a measure of value is deleted and the *Roth-Memoirs* formulation of "redeeming social value" is reinstated, with reference to the *Miller* refinements; and (5) the requirement of affirmative expert evidence is reinstated for the purposes of showing the statewide community standards, the clear and present danger of anti-social conduct, and the lack of any redeeming social value.[207]

Conclusions

After *Miller v. California* we are no nearer to a resolution of the question of what makes something obscene. At best, the decision maintains the status quo, by reaffirming *Roth*. At worst, the decision regresses us to a pluralistic concept of the meaning of obscenity, with as many different community standards as there are juries applying them, and a concept, which, due to the increasing pervasiveness of the mass media, and the increasing mobility of the population, is even less tenable than a decade ago when *Jacobellis* was decided. Constitutional doctrine involving the First Amendment is hardly an appropriate area to experiment with modes of "New Federalism."

Nor do we see any serious attempt to justify and explain the

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205. *See* notes 70-76 and accompanying text *supra*.

206. Schenck v. United States, 249 U.S. 47 (1919); Terminello v. City of Chicago, 337 U.S. 1 (1949); Dennis v. United States, 341 U.S. 494 (1951).

207. While a work may be the best evidence of its obscenity, it can shed no light on the prevailing statewide standards of what appeals to the prurient interest, nor can it describe for the jury the standards to be applied in measuring its social value. *See* note 53 *supra*, and accompanying text. *See also* Shugrue, *supra* note 87, at 179-181. A related argument is that where the prosecution is permitted but not required to produce expert affirmative evidence on community standards significant injustices will result by virtue of prosecutorial discretion:

> For example, in a liberal community, a prosecutor may elect to offer expert testimony, hoping to convince the jurors that the state-wide standard is less permissive than the standard existing in the community where the jurors reside. A different result may be reached in a conservative community, where the prosecutor may avoid expert testimony hoping that the conservative jurors will apply their more restrictive personal interpretation of community standards. With such a choice, the prosecutor virtually selects the community through use of expert testimony or lack of it.

Comment, *Miller v. California: A Search for a New Community*, 5 U.W.L.A.L. Rev. 63, 67 n.30 (1973). This argument assumes, of course, that statewide, rather than local community standards are in effect, and that expert testimony offered by the defense is ruled inadmissible or not believed by the jury if admitted.

policy of excluding obscene materials from the protection of the First and Fourteenth Amendments, a policy which owes its constitutional existence to a dictum in *Chaplinski v. New Hampshire.*[208] As Justice Douglas points out,[209] there is little historical evidence on which to base a conclusion that the Framers intended obscenity to be outside the protection of the First Amendment. Nor does the Court come to grips with the empirical evidence currently available on the supposed harm caused by dissemination of obscenity, but decides instead that it is up to the legislatures to evaluate conflicting data.[210]

Finally, the Court does nothing to resolve the potential injustices which may arise from the application of vague standards in criminal cases. The new requirement that states must specifically define what depictions or representations of sexual conduct are forbidden has yet to materialize in any state statutes, and may never do so, given the "authoritative construction" option given by the Court to the states.[211] Nor would such statutes, if adopted, necessarily have the effect of providing adequate safeguards against injustices, when the specific definitions of sexual conduct are to be judged by pluralistic "contemporary community standards" of what is "prurient" and at the same "patently offensive."

The alternative models for legislation proposed in this article are attempts to provide workable and just standards for state regulation of obscene materials. By no means do these models solve all of the problems inherent in such regulation, and in many cases, they may create new problems. In the long run, as is the case with many other social problems, education, not legislation may be the only effective solution.[212]

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208. 315 U.S. 568, 571-572 (1942).

209. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 70-71 (Douglas, J., dissenting). *See also* United States v. Roth, 237 F.2d 796, 806-09 (1956) (Frank, J., concurring).

210. The Court in the past has utilized empirical findings in support of conclusions of Constiutional law. *See* Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954). *See also* Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases,* 52 N.C.L. REV. 223, 237 (1973).

211. *See* discussion pp. 933-34 *supra.*

212. *See* COMMISSION REPORT, *supra* note 16, at 32-41.

POSTCRIPT: THE LESSONS OF *HAMLING* AND *JENKINS*

After this article went to press the Supreme Court handed down two decisions[213] which purportedly clarified some of the issues left unresolved by the 1973 cases. Discussion of these two cases is, by necessity of space, limited to the issues raised in the body of this article.[214]

In the first case, Hamling and others were convicted of mailing and conspiring to mail an obscene brochure advertising an "illustrated" version of the Report of the Commission on Obscenity and Pornography under 18 U.S.C. §§ 2, 371 and 1461, in United States District Court (S.D. Cal.). The jury was unable to agree on whether the book itself, published by Greenleaf Classics, Inc.,[215] was obscene, and the District Court declared a mistrial. The Court of Appeals for the Ninth Circuit affirmed.[216] The Supreme Court granted certiorari[217] and subsequently affirmed the convictions.

Community Standards.

The Court used the *Hamling* case to answer some of the questions concerning the meaning of community standards which had been raised after *Miller* was decided a year ago. These clarifications may be summarized as follows:

1. A "national" community standard is not required in federal obscenity prosecutions. Laying to rest any doubt as to the application of the *Miller* local community doctrine to federal prosecutions,[218] Justice Rehnquist, writing for the five man majority, concluded,

> The result of the *Miller* cases, therefore, as a matter of constitutional law and *federal statutory construction,* is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion "the

213. Hamling v. United States, — U.S. — (1974); Jenkins v. Georgia, — U.S. — (1974), both decided June 24, 1974.

214. The author expresses his appreciation to the San Diego Law Review for making the space available for this addendum.

215. The jury returned a verdict of Not Guilty as to Greenleaf on the counts of mailing and conspiracy to mail.

216. Hamling v. United States, 481 F.2d 307 (1973).

217. — U.S. — [No. 73-507] (1974).

218. In United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 129-130 (1973) the Court stated:

> We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. . . . These standards are applicable to federal legislation.

> average person, applying contemporary community standards" would reach in a given case.[219]

The majority was unperturbed by Justice Brennan's dissent which pointed out that the legislative intent of 18 U.S.C. § 1461 prescribed a national, rather than a local standard,[220] dismissing it out of hand.[221]

2. Statewide community standards are not required for *any* obscenity prosecution. Anticipating the issue raised in *Jenkins*,[222] decided the same day, Justice Rehnquist dispelled any notion that the *Miller* tests *require*, as opposed to *permit*, the application of statewide community standards:

> Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law.[223]

In the *Jenkins* opinion Justice Rehnquist went on to imply that the notion of state-wide community standards is just as "hypothetical" as that of national standards, and that *Miller* was not intended to require state or federal courts to adhere to such a notion or to instruct juries to apply statewide community standards.[224]

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219. Hamling v. United States, — U.S. —, — (1974) [emphasis added].

220. *Id.* at —, n.1 (Brennan, J., dissenting):

> The legislative history of § 1461 gives not the slightest indication that the application of local standards was contemplated. Indeed, the remarks of an early sponsor of the provision indicate that application of a national standard was intended. . . .

See 4 Cong. Rec. 696 (1876) (remarks of Rep. Cannon). *See also* Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 & n.10.

221. Both of these arguments are foreclosed by our decision last Term in *United States v. 12 200-ft. Reels of Film, supra*, that the *Miller* standards, including the "contemporary community standards" formulation, applied to federal legislation. The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions.

Hamling v. United States, — U.S. —, — (1974).

222. In *Jenkins*, the Georgia Supreme Court sustained a conviction of an Albany, Ga. theatre owner on the grounds that *Miller* allowed standards of *local* communities to be used.

223. Hamling v. United States, — U.S. —, — (1974).

224. We agree with the Supreme Court of Georgia's implicit ruling

3. No precise geographic community need be specified at all. It was argued in this article as well as by others[225] that should the Court permit less than a statewide standard to be applied, it would take on the additional burden of specifying the acceptable parameters of a "local community." The majority of the Court refused to do so, and deferred to the States the choice of whether or not to specify the community.[226]

Presumably, the most limited community from which standards might be drawn is the vicinage from which the jury is selected.[227] Yet there is no constitutional requirement that it be so limited, and a trial court, in a particular case may well allow the admission of evidence of "community standards" which are derived from a statewide assessment, or even a national one, without violating the *Miller* test.[228] All that is required by the *Miller* test of "contemporary community standards" is,

> . . . to assure that the material is judged neither on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insensitive person or group.[229]

The ultimate effect of these glosses on the meaning of "contemporary community standards" is to render the constitutional safeguard of *Roth,* adopted by the Burger majority in *Miller*, totally without substance. Each State, each court, and indeed each ju-

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> that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use.

Jenkins v. Georgia, — U.S. —, — (1974).

225. *See* discussion of local community standards, *infra,* pp. —; *see also* Adams, *Dirty Stuff: The Redeeming Cultural Importance of the Obscene,* 2 COLUM. FORUM (no. 3) 2, 7 (1973); Gellhorn, *Dirty Books, Disgusting Pictures, and Dreadful Laws (John A. Sibley Lecture,* Feb. 8, 1974) 8 GA. L. REV. 291, 299 (1974); Levanthal, *supra,* note 44, at 1263.

226. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller without further specification,* as was done here, or it may choose to define the standard in more precise geographic terms, as was done by California in *Miller.*

Jenkins v. Georgia, — U.S. —, — [emphasis added].

227. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.

Hamling v. United States, — U.S. —, — (1974).

228. *Id.* at —:

> But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jury in the resolution of the issues which they were to decide.

229. *Id.* at —.

ror[230] is free to decide without apparent constitutional restraint, what, among materials dealing with sex, appeals to the prurient interest. Such a ruling is likely to have the most pernicious consequences, the most objectionable of which is the denial of equal protection under the Fourteenth Amendment. Absent a specific rule, such as in California, that a statewide standard is to be applied, the same work, under the same state statute may be found to be obscene and not obscene by various communities. It is even possible to have local, state and national standards applied *within* a single metropolitan area. The evils of forum shopping have already been discussed with respect to the 1958 amendments to 18 U.S.C. § 1461;[231] the community standards test adopted by the Court in *Hamling* and *Jenkins* compounds these evils into unimaginable horrors.[232]

Deviant Groups and Prurient Interest

Among the many assignments of error charged by the petitioners in the *Hamling* case was that the trial court judge gave instructions on the determination of prurient appeal based upon the sensibilities of deviant groups as well as those of the "average person." The Supreme Court sustained the use of such instructions, citing

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230. Without the requirement that the community be defined, each juror is free to substitute his personal opinion of the work for any conceived of aggregate opinion, Mr. Justice Rehnquist's assurances to the contrary notwithstanding.

231. *See* discussion *supra*, p. 924.

232. Justice Rehnquist replies that,

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.

Hamling v. United States, — U.S. —, —. The argument is premised on the theory that the "reasonable man" standard is defined exclusively in terms of a *local* community or vicinage. Prosser suggests that,

> [W]here common knowledge and ordinary judgment will recognize unreasonable danger, what everyone does may be found to be negligent, and there will be extreme cases where it is so clearly negligent in itself that it [evidence of community custom] may even be excluded from evidence.

Prosser, LAW OF TORTS, 4th ed., § 33, p. 168 [footnotes omitted]. Other differences suggest themselves: the reasonable man is not a constitutional doctrine, but one of common law; nor is it subject to the constraints of a direct fiat against inhibiting free expression.

Mishkin v. New York.[233] This holding is clearly a misapplication of the *Mishkin* rule, which stated,

> Where the material is *designed for* and *primarily disseminated to* a clearly defined deviant sexual group, *rather than* the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.[234]

No evidence was offered by the government in the *Hamling* case that the brochure in question was designed for and primarily disseminated to one or more deviant sexual groups, yet the government was permitted to offer, without such a foundation, expert evidence on the prurient appeal which the brochure most likely would have on various deviant groups.[235]

While the *Mishkin* rule was clearly an either/or test as to prurient appeal, the Court's affirmance in *Hamling* transforms it into a both/and test, with no requirement of specific intent to disseminate to sexually deviant groups.[236] This transformation also reincarnates "the inadequac[ies] of the most-susceptible-person facet of the [*Regina v.*] *Hicklin* [(1868) L. R. 3 Q.B. 360] test,"[237] which *Mishkin* sought to avoid. The adoption of the both/and rule for prurient appeal enmeshes the Court in a paradox more mind-boggling than that described above with respect to the joint applicability of prurient appeal and patent offensiveness.[238]

The Content of "Patent Offensiveness"

In *Jenkins v. Georgia* the Court reversed the conviction of a theatre owner who displayed the film, "Carnal Knowledge" in Albany,

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233. 383 U.S. 502 (1966).

234. *Id.* at 508-509 [emphasis added].

235. In response to the defendants' motion for a bill of particulars, the government alleged that the brochure appeals to the prurient interest of the *average* person. The Court of Appeals, while admitting that this variance of proof was error, considered it to be non-prejudicial because (1) the government expert's testimony was directed to the "Illustrated Report" rather than the brochure, and (2) defendants offered rebuttal expert testimony. This ruling overlooked that fact that all pictures contained in the brochure were from the "Illustrated Report," and that defendants offered rebuttal evidence only after its objection to the admission of the government's evidence was overruled. Hamling v. United States, Petition for Certiorari, pp. 50-51.

236. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its *intended* and *probable* recipient group. . . .

Mishkin v. New York, 383 U.S. 502, 509 (1966) [emphasis added].

237. *Id.*

238. *See* discussion *infra*, pp. 921-22.

Georgia. The Court predicated its reversal of the Georgia Supreme Court not on the grounds that local, as opposed to statewide standards were inappropriate, but on the basis that an independent viewing of the film by the members of the Court revealed that it did not contain patently offensive depictions of explicit sexual conduct.[239] Justice Rehnquist, again writing for the majority, argued that nothing in the film could be considered to come within the proscribed categories of patent offensiveness listed by the Court in *Miller*.[240]

> While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct, including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.[241]

The Court concluded that the film "is simply not the 'public portrayal of hard core sexual conduct for its own sake, and for ensuing commercial gain' which we said was punishable in *Miller*."[242] There is nothing to suggest in the opinion that, had there been a single scene in the film which a majority of the Court believed to be patently offensive that the conviction would be reversed.[243] Indeed, we are left with the implication that, had the camera focused on the bodies of the actors during the brief scenes depicting sexual intercourse, the conviction would have been sustained. The Court in fact provides us with no greater understanding of what, in its view, is patently offensive or how to apply such a test, except that a direct depiction of a woman's bare midriff would be protected expression.[244] The language of the *Jenkins* opinion

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239. Our own view of the film satisfies us that "Carnal Knowledge" could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way.
Jenkins v. Georgia, — U.S. —, — (1974).

240. (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.
Miller v. California, 413 U.S. 15, 25 (1973).

241. Jenkins v. Georgia, — U.S. —, — (1974).

242. *Id.*

243. *See* discussion of the patent offensiveness test *supra*, pp. 917-22.

244. It would be wholly at odds with this aspect of *Miller* to uphold an obscenity conviction based upon a defendant's depiction of a

ultimately harkens to Justice Stewart's notorious statement concerning "hard core pornography."[245]

The lessons of *Hamling* and *Jenkins* do nothing to alter the conclusions contained in this article, and, if anything, make them more telling. The Congress, as well as the state legislatures should consider carefully whether it is feasible or desirable to follow the circuitous path mapped out by the five-member majority of the United States Supreme Court.

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woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty.

Jenkins v. Georgia, — U.S. —, — (1974).

245. *See* note 43, *supra.* Justice Brennan in a concurring opinion joined in by Justices Stewart and Marshall criticized the Court's failure to enunciate a standard which would give jurors and judges a clear basis for determining the alleged obscenity of a work:

> In order to make the review mandated by *Miller*, the Court was required to screen the film Carnal Knowledge and make an independent determination of obscenity *vel non.* * * *
>
> Thus, it is clear that as long as the *Miller* test remains in effect "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." [Citation omitted].

Jenkins v. Georgia, — U.S. —, — (1974).