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Constitutional Law - Obscenity - 1977 Amendments to the Pennsylvania Obscenity Statute

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Recent Developments

CONSTITUTIONAL LAW — OBSCENITY — 1977 AMENDMENTS TO THE PENNSYLVANIA OBSCENITY STATUTE.

I. INTRODUCTION

Justice Stewart recognized the difficulties associated with the problem of defining obscenity in his concurrence in *Jacobellis v. Ohio*,[1] where he wrote:

> [U]nder the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand definition; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .[2]

Acknowledging the need for more precise standards, the United States Supreme Court in 1973 enunciated what purported to be "concrete guidelines"[3] for the identification of obscene materials in *Miller v. California*.[4] Pursuant thereto, the Pennsylvania Supreme Court held Pennsylvania's obscenity statute[5] unconstitutional in 1975,[6] and the legislature responded with a series of amendments to that statute in 1977.[7] The result is a wide-ranging prohibition on the exhibition and distribution of obscene materials to both minors and adults.[8] While a number of technical improvements have been made in the statute,[9] these amendments have failed to provide a precise definition which would foster predictable and evenhanded enforcement of the state's obscenity statute.[10]

This note will evaluate whether the amendments to the Pennsylvania obscenity law meet with the current constitutional standards governing the regulation of sexually explicit materials. The efficacy of the current standards will also be considered.

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1. 378 U.S. 184 (1964). For a further discussion of *Jacobellis*, *see* notes 22 & 60 *infra*.
2. 378 U.S. at 197 (Stewart, J., concurring) (footnotes omitted).
3. Miller v. California, 413 U.S. 15, 29 (1973).
4. 413 U.S. 15 (1973). For a further discussion of *Miller*, *see* notes 12-29 and accompanying text *infra*.
5. 18 PA. CONS. STAT. ANN. § 5903 (Purdon 1973). For a further discussion of this statute and the text of its major sections, *see* notes 30-32 & 38 and accompanying text *infra*.
6. Commonwealth v. McDonald, 464 Pa. 435, 347 A.2d 290 (1975), *cert. denied*, 429 U.S. 816 (1976). For a further discussion of *McDonald*, *see* notes 33-39 and accompanying text *infra*.
7. 18 PA. CONS. STAT. ANN. § 5903 (Purdon Cum. Supp. 1978-1979).
8. *See* note 44 *infra*.
9. *See* notes 64-75 & 95-96 and accompanying text *infra*.
10. *See* notes 79-83 and accompanying text *infra*.

II. OBSCENITY REGULATION: THE IMPACT OF *Miller v. California*

A. *Obscenity and the Supreme Court:* Miller *and its Heritage*

The standard for determining whether sexually explicit material is obscene has long been the subject of debate and confusion among the Justices of the United States Supreme Court.[11] In 1973, the Court decided *Miller v. California,*[12] and announced a new standard for determining whether speech is obscene or entitled to protection under the first and fourteenth amendments.[13] The standards established in *Miller* remain the Court's latest pronouncement on the "intractable obscenity problem."[14]

Chief Justice Burger, writing for the majority in *Miller,*[15] reaffirmed the position that obscene material is unprotected by the first amendment.[16] This

11. This comment will not attempt a full discussion of the history of the Supreme Court's struggle to define constitutionally suppressible obscenity, as others have already addressed this definitional problem. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 78-83 (1973) (Brennan, J., dissenting); F. SCHAUER, THE LAW OF OBSCENITY 30-48, 69-166 (1976); Lockhart, *Escape From the Chill of Uncertainty: Explicit Sex and the First Amendment,* 9 GA. L. REV. 533, 537-57 (1975).

12. 413 U.S. 15 (1973). Appellant Miller was convicted of knowingly distributing obscene matter, based on his unsolicited sending of five sexually explicit advertising brochures through the mail. *Id.* at 16-18. Chief Justice Burger, writing for the majority, characterized the case as involving "the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials." *Id.* at 18. *Miller* was thus factually distinguishable from the majority of obscenity cases in that it did not involve the sale or exhibition of sexually explicit materials to a "willing" buyer. SCHAUER, *supra* note 11, at 45-46. The Court, however, declined to deal with the facts in *Miller* on these narrow grounds. *Id.* at 46.

13. 413 U.S. at 23. *See* notes 15-27 and accompanying text *infra.*

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

15. 413 U.S. at 16. Joining Chief Justice Burger in the majority were Justices White, Blackmun, Powell and Rehnquist. *Id.* Majority opinions in obscenity cases are exceedingly rare. The *Miller* case was the first time that the Court has been able to muster a majority on the issue of defining obscenity since Roth v. United States, 354 U.S. 476 (1957). *See, e.g.,* Redrup v. New York, 386 U.S. 767, 770-71 (1967) (per curiam opinion noting the multiplicity of views); Memoirs v. Massachusetts, 383 U.S. 413 (1966) (five separate opinions); Jacobellis v. Ohio, 378 U.S. 184 (1964) (six separate opinions). *See also* Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-05 & n.1 (1967) (Harlan, J., concurring in part and dissenting in part).

The severity of the split of opinion among the Justices, and the resulting inability to agree on a uniform rationale for their decisions, was demonstrated in *Redrup* and its progeny. In *Redrup,* the Court reviewed three state cases dealing with obscene publications and, in a short per curiam opinion, noted the different views of its members regarding the proper test for determining obscenity and the scope of obscenity regulation. 386 U.S. at 771. The conclusion of the Court was merely an acknowledgement of their divergence: "Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand." *Id.* The Court then embarked upon a six year policy of issuing summary reversals, without opinion, of any conviction relating to materials which at least five Justices, each applying his own test, found to be protected by the first amendment. SCHAUER, *supra* note 11, at 44. The Court decided an additional 28 cases in this fashion between 1967 and 1973. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82 n.8 (1973) (Brennan, J., dissenting). The nature of the sexually explicit materials involved in these cases was summarized by Judge Leventhal in Huffman v. United States, 470 F.2d 386, 393-402 (D.C. Cir. 1971).

16. 413 U.S. at 23.

concept was first enunciated in *Roth v. United States*,[17] in which the Court applied an obscenity theory which divided speech into protected and unprotected categories, with regulation of only the former examined in the light of first amendment considerations.[18]

Denying obscene materials first amendment protection shifts the primary focus in this area to the definition of obscenity. The *Miller* Court reaffirmed the test first enunciated in *Roth*[19] for making this determination, holding that a work is obscene if "'the average person, applying

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17. 354 U.S. 476 (1957).

18. *Id.* at 484-85. The Court held that obscenity, although expression, falls outside the area of constitutionally protected speech under the first and fourteenth amendments. *Id.* at 485. Justice Brennan, writing for a majority of five of the Justices, stated that there was no incompatibility between antiobscenity laws and the constitutional guarantees of free speech and free press because obscenity was within a class of "utterances" which historically have not been considered as falling within the protection of the first amendment. *Id.* at 484-85. *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 9-12 (1960). Justice Brennan wrote:

> All ideas having even the slightest redeeming social importance . . . have the full protection of the [first amendment] guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

354 U.S. at 484 (footnote omitted). This bi-level theory of the first amendment, which entirely excludes certain utterances from first amendment protection, is derived from Beauharnais v. Illinois, 343 U.S. 250 (1952), and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), which excluded libel and "fighting words," respectively, from the scope of first amendment protection. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 486-95 (1970); Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127, 131 (1966).

A number of commentators have considered it noteworthy that the *Roth* Court employed this bi-level analysis rather than require the government to justify obscenity regulation in traditional first amendment terms. *See, e.g.*, Comment, Stanley v. Georgia: *New Directions in Obscenity Regulation?*, 48 TEXAS L. REV. 646, 647-48 (1970); Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364, 1365-66 (1966). Pursuant to traditional first amendment tests, regulation of speech is justified only because of the dangers posed by the consequences of the speech; speech itself is not considered to be the evil. *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 50-58 (1963). It has been suggested that the bi-level theory was used in *Roth* because of the improbability of the government establishing that the consequences of obscenity, in terms of antisocial conduct or more general injury to society, were so imminent or significant as to support proscription or regulation under any previous formula. *See* Kalven, *supra*, at 9-12; Monaghan, *supra*, at 130-31. *Cf.* REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (Sup. Doc. No. Y30B7:1/970) (1970) (finding little or no serious harm resulting from the availability of sexually explicit materials) [hereinafter cited as REPORT]. For a further discussion of the Commission, its findings, and its recommendations, *see* note 44 *infra*. A number of lower courts had expressed similar doubts prior to *Roth*. *See* United States v. Roth, 237 F.2d 796, 812-17 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957); Esquire v. Walker, 151 F.2d 49 (D.C. Cir. 1945), *aff'd sub nom.* Hannegan v. Esquire, 327 U.S. 146 (1946); Commonwealth v. Gordon, 66 D. & C. 101, *aff'd sub nom.* Commonwealth v. Feigenbaum, 166 Pa. Super. Ct. 120, 70 A.2d 389 (1949).

While the bi-level theory of speech survives in obscenity cases, it has been disregarded in other areas. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel); Gooding v. Wilson, 405 U.S. 518 (1972) (fighting words); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (libel); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (libel); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel).

19. 413 U.S. at 23. *See* notes 17 & 18 *supra*.

contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[20]

The *Miller* Court, however, supplemented the *Roth* formulation with two further requirements. First, material was to be considered obscene only if it "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[21] This element reflected the requirement first enunciated in *Manual Enterprises v. Day*[22] that the material be patently offensive, and added a due process safeguard that the controlling statute specifically state the type of depiction considered unlawful.[23] The second addition of the *Miller* Court, and the one that

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20. 413 U.S. at 24, *quoting* Roth v. United States, 354 U.S. 476, 489 (1957). This definition was far more important for what it rejected than for what it included. Its purpose was to reject the rule of Regina v. Hicklin, 3 Q.B. 360 (1868), which evaluated works on the basis of the likely effect of isolated sections of the work upon the most susceptible persons in the community. According to the *Roth* Court, the *Hicklin* rule had at one time achieved a significant degree of acceptance in the United States. 354 U.S. at 488-89 & n.25. *See generally* SCHAUER, *supra* note 11, at 7-8 & 15-29.

21. 413 U.S. at 24.

22. 370 U.S. 478 (1962). Justice Stewart, joined by Justice Harlan in a plurality opinion, held that although the *Roth* test required an appeal to prurient interest, such an appeal must be present in a patently offensive way for the material to be obscene. *Id.* at 486-88 (plurality opinion).

The permissible scope of regulation was narrowed toward a "hard core pornography only" test in Jacobellis v. Ohio, 378 U.S. 184 (1964). SCHAUER, *supra* note 11, at 42. Justice Brennan, joined by Justice Goldberg, noted that obscenity was outside of the range of first amendment protection because it was "utterly without redeeming social importance" but that "material dealing with sex in a manner that advocates ideas, or has literary or scientific value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection." 378 U.S. at 191 (plurality opinion) (citation omitted) (footnote omitted). The Court thus held that the material must go "substantially beyond customary limits of candor in description or representation of such matters." *Id.* at 191 (plurality opinion). For Justice Stewart's conclusion in *Jacobellis, see* text accompanying note 2 *supra*. For a comment on the value of the hard core pronography test, *see* Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655, 688 (1964).

23. 413 U.S. at 24-25. The *Miller* Court held that the permissible scope of obscenity regulation was confined to works which depict or describe sexual conduct, and that the "conduct must be specifically defined by the applicable state law, as written or authoritatively construed." *Id.* at 24 (footnote omitted). Chief Justice Burger then suggested some specific definitions:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under . . . the standard announced in this opinion, . . .:
>
> (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.

Id. at 25. *See also* United States v. Twelve 200-Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973). The practical effect of this portion of the standard is to exclude all but hard core pornography from the obscenity classification. 413 U.S. at 27.

represented the most significant departure from prior law, was that the material was to be considered obscene if "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[24] This test specifically replaced the "utterly without redeeming social value" test of *Memoirs v. Massachusetts,*[25] which Chief Justice Burger had criticized as "veer(ing) sharply away from the *Roth* concept"[26] and placing an almost insurmountable burden on the prosecutor in an obscenity action.[27] The *Miller* Court thus

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24. 413 U.S. at 24.

25. 383 U.S. 413 (1966). In *Memoirs,* a three Justice plurality, attempting to restate the *Roth* test as it had been interpreted by subsequent cases, expressed the view that federal or state governments could control the distribution of materials only where:

> three elements . . . coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the depiction or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id. at 418 (plurality opinion).

The *Memoirs* plurality consisted of Justices Brennan and Fortas, and Chief Justice Warren. 383 U.S. at 413. Justices Black and Douglas concurred on broader grounds in reversing the judgment. 383 U.S. at 421 (Black, J., concurring); 383 U.S. at 424 (Douglas, J., concurring). Justice Stewart also concurred in the judgment, based on his view that only "hard-core pronography" may be suppressed. 383 U.S. at 421 (Stewart, J., concurring). *See* Ginzburg v. United States, 383 U.S. 463, 499 (1966) (Stewart, J., concurring). Thus, "[t]he view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards." Marks v. United States, 430 U.S. 188, 193-94 (1977).

26. 413 U.S. at 21.

27. *Id.* at 21-22. The Chief Justice wrote:

> While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." 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.

Id. (emphasis supplied by the Court). The *Memoirs* test paved the way for six years of extremely minimal regulation of obscenity. SCHAUER, *supra* note 11, at 42. Opponents of censorship hailed the *Memoirs* decision as a conclusive victory. Oglesby, *Porno Non Est Pro Bono Publico: Obscenity as a Public Nuisance in California,* 4 HASTINGS CONST. L.Q. 385, 388 (1977). *See also* C. REMBAR, THE END OF OBSCENITY 484-89 (1968). In the years following *Memoirs* obscenity convictions were few, and many were reversed because the material had some slight degree of arguable social value. SCHAUER, *supra* note 11, at 43. *See, e.g.,* United States v. A Motion Picture Entitled "I Am Curious Yellow," 404 F.2d 196, 200 (2d Cir. 1968); United States v. One Carton Positive Motion Picture Film Entitled "491," 367 F.2d 889 (2d Cir. 1966); Attorney General v. A Book Named "Naked Lunch," 351 Mass. 298, 218 N.E.2d 571 (1966); Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 233 A.2d 840 (1967); Commonwealth v. Baer, 209 Pa. Super. Ct. 349, 227 A.2d 915 (1967).

clearly departed from the standards of previous decisions[28] in promulgating the tripartite test for the determination of obscenity.[29]

B. *The Pennsylvania Judiciary's Response to* Miller v. California

At the time *Miller* was decided obscenity regulation in Pennsylvania was governed by section 5903 of the Crimes Code.[30] Section 5903(a) prohibited the distribution of obscene materials to adults,[31] and section

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28. SCHAUER, *supra* note 11, at 47. The question of the extent to which the *Miller* standards were "new" generated a substantial amount of litigation to determine whether the decision would have retroactive application, or whether offenses committed prior to *Miller* could even be prosecuted in light of the *Miller* language arguably suggesting that prior standards were unduly vague. 413 U.S. at 22 & n.3. In Hamling v. United States, 418 U.S. 87 (1974), the Court held that the change was not so major as to provide a lack of notice defense for pre-*Miller* conduct. *Id.* at 115-17. The Court held that the due process clause of the fifth amendment precluded retroactive application of the *Miller* standards to the extent that those standards may impose criminal liability for conduct not punishable under the standards announced in *Memoirs*. Marks v. United States, 430 U.S. 188, 196 (1977). The *Marks* Court held that defendants are entitled to jury instructions requiring acquittal unless the jury finds the materials to be "utterly without redeeming social value." *Id.* The Court simultaneously held that any constitutional principle announced in *Miller* that would serve to benefit defendants must be applied in their case. *Id.* at 196-97.

29. 413 U.S. at 24. Chief Justice Burger summarized this tripartite test as follows:

> 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.

Id.

On the same day that *Miller* was decided, the Court handed down decisions in four other obscenity cases which expanded the applicability of the *Miller* standard. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (*Miller* standard applicable to dissemination to consenting adults); Kaplan v. California, 413 U.S. 115 (1973) (*Miller* standard applicable to printed verbal descriptions of sexual activity, even though devoid of any pictures); United States v. Twelve 200-Ft. Reels, 413 U.S. 123 (1973) (*Miller* standard applicable to importation for an importer's private use); United States v. Orito, 413 U.S. 139 (1973) (*Miller* standard applicable to private interstate transportation of films).

30. 18 PA. CONS. STAT. ANN. § 5903 (Purdon 1973).

31. *Id.* § 5903(a). Section 5903(a) provided:

> Whoever sells, lends, distributes, exhibits, gives away or shows to any person 17 years of age or older or offers to sell, lend, distribute, exhibit or give away or show, or has in his possession with intent to sell, lend, distribute or give away or to show to any person 17 years of age or older, or knowingly advertises in any manner any obscene literature, book, magazine, pamphlet, storypaper, paper, comic book, writing, drawing, photograph, figure or image, or any written or printed matter of an obscene nature, or any article or instrument of an obscene nature, or whoever designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, figure, image, matter, article or thing or whoever writes, prints, publishes or utters or causes to be printed, published or uttered, any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, or whom or by what means any obscene book, picture, writing, paper, comic book, figure, image, matter, article or thing named in this section

5903(b) defined "obscene" as "that which, to the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest."[32]

In *Commonwealth v. McDonald*,[33] the Pennsylvania Supreme Court examined section 5903 in light of the standards established in *Miller* and concluded that the definition of obscenity set forth in section 5903(b) was unconstitutionally vague and contrary to the definitional requirements of obscenity established by the United States Supreme Court.[34] The court held that section 5903(b) failed to define with requisite specificity the types of sexual conduct whose depiction or description the statute ought to regulate.[35] Rejecting the State's suggestion that the term "obscene" as used in section 5903(b) be construed to include the "examples" of obscene materials provided by the *Miller* Court,[36] the *McDonald* court concluded that section

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can be purchased, obtained or had, or whoever hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, is guilty of a misdemeanor of the second degree.

Id. Section 5903 contains separate provisions concerning the distribution of obscene materials to minors. *Id.* § 5903(c)-(e).

32. *Id.* § 5903(b). The definition of obscenity in section 5903(b) is taken directly from the test established by the United States Supreme Court in *Roth*. *See* notes 17-20 and accompanying text *supra*. This section was not subjected to judicial review until 1975. Commonwealth v. McDonald, 464 Pa. 435, 347 A.2d 290 (1975), *cert. denied*, 429 U.S. 816 (1976). For a further discussion of *McDonald*, *see* notes 33-39 and accompanying text *infra*. Language identical to that in section 5903(b) was construed by the Pennsylvania Supreme Court in two earlier cases. *See* Commonwealth v. LaLonde, 447 Pa. 364, 368 n.4, 288 A.2d 782, 784 n.4 (1972); Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 198-99, 233 A.2d 840, 846 (1967) (adopting the *Memoirs* test of "utterly without redeeming social value" as the controlling standard for obscenity regulation in Pennsylvania). For a discussion of the *Memoirs* test, *see* note 25 and accompanying text *supra*.

33. 464 Pa. 435, 347 A.2d 290 (1975), *cert. denied*, 429 U.S. 816 (1976).

34. 464 Pa. at 443, 347 A.2d at 295.

35. *Id.* at 452, 347 A.2d at 299. For a discussion of the specific definition requirement of *Miller*, *see* note 23 and accompanying text *supra*.

36. 464 Pa. at 449-50, 347 A.2d at 298-99. *See* note 23 *supra*. This approach has been adopted by a number of jurisdictions. *See, e.g.*, Pierce v. State, 292 Ala. 473, 296 So. 2d 218 (1974); Gibbs v. State, 255 Ark. 997, 504 S.W.2d 719 (1974); Rhodes v. State, 283 So. 2d 351 (Fla. 1973) (prospective application only); People v. Ridens, 59 Ill. 2d 362, 321 N.E.2d 264 (1974); Mangum v. Maryland State Bd. of Censors, 273 Md. 176, 328 A.2d 283 (1974); State v. Welke, 298 Minn. 402, 216 N.W.2d 641 (1974) (prospective application only); State v. DeSantis, 65 N.J. 462, 323 A.2d 489 (1974) (prospective application only); State v. Bryant, 285 N.C. 27, 203 S.E.2d 27, *cert. denied*, 491 U.S. 974 (1974); State v. Watkins, 262 S.C. 178, 203 S.E.2d 429 (1973), *cert. denied*, 418 U.S. 911 (1974); West v. State, 514 S.W.2d 433 (Tex. Ct. App. 1974); State v. J-R Distribs. Inc., 82 Wash. 2d 584, 512 P.2d 1049 (1973), *cert. denied*, 418 U.S. 949 (1974); State *ex rel.* Chobot v. Circuit Court, 61 Wis. 2d 354, 212 N.W.2d 690 (1973).

In rejecting this proposed construction the *McDonald* court noted:

> What the Commonwealth urges is not mere construction but wholesale rewriting. The proposed construction is not even *a* possible meaning of the words of the statute when used in their ordinary senses. It draws no support from either surrounding language in the same statute . . . or other statutes in pari materia . . . .
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> . . . In the present case . . . there are many possible specific definitions of sexual conduct which might be permissible under the First Amendment and we

5903(a) could not be constitutionally applied absent amendments to section 5903(b) specifically defining the proscribed activity.[37]

The court used the same vagueness rationale to invalidate the equity provision of section 5903.[38] Since section 5903(h) permits the enjoining of transactions in materials determined to be obscene only under the standards

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cannot choose among them, in the absence of guidance from the General Assembly, without intruding upon the legislative province.

464 Pa. at 450, 347 A.2d at 298-99 (emphasis supplied by the court).

The earlier adoption of the *Memoirs* test by the Pennsylvania courts prevented the *McDonald* court from holding that the language defining obscenity in section 5903(b), as construed prior to *Miller*, satisfied the *Miller* standard. *Id.* at 444-46, 347 A.2d at 296. *See* note 32 *supra*. This analysis, however, has been adopted in some other jurisdictions. *See, e.g.*, People v. Nissinoff, 43 Cal. App. 3d 1025, 118 Cal. Rptr. 457 (1974); People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), *cert. denied*, 418 U.S. 937 (1974); Slaton v. Paris Adult Theatre I, 231 Ga. 312, 201 S.E.2d 456 (1973), *cert. denied*, 418 U.S. 939 (1974); State v. Harding, 114 N.H. 335, 320 A.2d 646 (1974) (may have modified construction sub silentio); People v. Heller, 33 N.Y.2d 314, 307 N.E.2d 805, 352 N.Y.S.2d 601 (1973) (may have modified construction sub silentio); State *ex rel.* Keating v. A Motion Picture Film Entitled "Vixen," 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).

A number of these decisions are based on the premise that the requirement of specifically defined sexual conduct added nothing to the prior test in light of the requirement that a criminal statute give fair warning of the prohibited conduct. *See, e.g.*, Hall v. Commonwealth, 505 S.W.2d 166 (Ky. 1974); State *ex rel.* Wampler v. Bird, 499 S.W.2d 780 (Mo. 1973); State v. Little Art Corp., 191 Neb. 448, 215 N.W.2d 853 (1974); Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798, *cert. denied*, 419 U.S. 902 (1974). The Pennsylvania court noted in *McDonald* that, in light of the *Miller* Court's lengthy discussion concerning the requirement of a specific definition and the nature of its examples of definitions which would satisfy that requirement, it could not be assumed that this aspect of the *Miller* test was a nullity. 464 Pa. at 446 n.12, 347 A.2d at 296 n.12, *citing* Miller v. California, 413 U.S. 15, 25-26 (1973).

37. 464 Pa. at 452, 347 A.2d at 299. The vagueness rationale adopted by the *McDonald* court had been used by the Pennsylvania Superior Court in two earlier cases to invalidate related statutes. Commonwealth v. Burak, 232 Pa. Super. Ct. 499, 335 A.2d 820 (1975) (obscene exhibitions); Commonwealth v. Winkleman, 230 Pa. Super. Ct. 265, 326 A.2d 496 (1974) (obscene exhibitions). *See also* Commonwealth v. Krasner, 238 Pa. Super. Ct. 187, 357 A.2d 558 (1976); Commonwealth v. March, 238 Pa. Super. Ct. 8, 352 A.2d 65 (1975); Commonwealth v. Kasner, 238 Pa. Super. Ct. 1, 352 A.2d 558 (1975).

In holding the existing statute unconstitutional under *Miller*, Pennsylvania adopted an approach followed by a small number of jurisdictions. *See, e.g.*, People v. Tabron, 544 P.2d 372 (Colo. 1976); Mohney v. State, 261 Ind. 56, 300 N.E.2d 66 (1973); State v. Wedelstedt, 213 N.W.2d 652 (Iowa 1973); State v. Shreveport News Agency, 287 So. 2d 464 (La. 1973); Commonwealth v. Horton, 365 Mass. 164, 310 N.E.2d 316 (1974); ABC Interstate Theatres, Inc. v. State, 352 So. 2d 123 (Miss. 1976); Art Theatre Guild, Inc. v. State, 510 S.W.2d 258 (Tenn. 1974).

McDonald was subsequently reaffirmed. *See* Commonwealth v. Van Emburg, 467 Pa. 445, 359 A.2d 178 (1976); Commonwealth v. Evan, 467 Pa. 42, 354 A.2d 541 (1976).

38. 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973). Section 5903(h) provided:

> The district attorney of any county in which any person sells, lends, distributes, exhibits, gives away or shows, or is about to sell, lend, distribute, exhibit, give away or show, or has in his possession with intent to sell, resell, lend, distribute, exhibit, give away or show, any obscene literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, figure or image, or any written or pinted matter of an obscene nature, or any article or instrument of an obscene nature, may institute proceedings in equity in the court of common pleas of said county for the purpose of enjoining the sale, resale, lending, distribution, exhibit, gift or show of such

set forth in section 5903(b), the court held that no injunction could issue under the Pennsylvania law in the absence of a constitutionally valid definition of obscenity.[39]

III. PENNSYLVANIA'S LEGISLATIVE RESPONSE: THE 1977 AMENDMENTS

In response to the *McDonald* decision, the Pennsylvania General Assembly passed a series of amendments to section 5903.[40] Those amendments, which further defined the offense of obscenity,[41] redefined the term "obscene,"[42] and provided a new statutory scheme for injunctive relief,[43] represented the legislature's attempt to conform to the United States Supreme Court's mandates in the area of obscenity regulation.

A. *The Offense Defined*

Section 5903(a), which defines the offense of obscenity, prohibits anyone "knowing the obscene character of the materials involved" from displaying, distributing to adults, manufacturing, or advertising the availability of, obscene materials.[44] While the new version of section 5903(a) draws much of

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obscene literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, figure or image, or any written or printed matter of an obscene nature, or any article or instrument of an obscene nature, contrary to the provisions of this section, and for such purposes jurisdiction is hereby conferred upon such courts. A preliminary injunction may issue and a hearing thereafter be held thereon in conformity with the Rules of Civil Procedure upon the averment of the district attorney that the sale, resale, lending, distribution, exhibit, gift or show of such publication constitutes a danger to the welfare or peace of the community. The district attorney shall not be required to give bond.

Id.

39. 464 Pa. at 461-63, 347 A.2d at 304-05. *McDonald* served as the precedent for later cases invalidating the granting of injunctive relief. *See* Zimmerman v. Philjon, Inc., 470 Pa. 409, 368 A.2d 694 (1977); Ranck v. Bonal Enterprises, Inc., 467 Pa. 569, 359 A.2d 748 (1976).

40. 18 PA. CONS. STAT. ANN. § 5903 (Purdon Cum. Supp. 1978-1979).

41. *Id.* § 5903(a). For a further discussion of section 5903(a) as presently enacted, *see* notes 44-56 and accompanying text *infra*.

42. 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon Cum. Supp. 1978-1979). For a full discussion of section 5903(b) as presently enacted, *see* notes 57-61 and accompanying text *infra*.

43. 18 PA. CONS. STAT. ANN. § 5903(g) (Purdon Cum. Supp. 1978-1979). For a further discussion of section 5903(g) as presently enacted, *see* notes 62-75 and accompanying text *infra*.

44. 18 PA. CONS. STAT. ANN. § 5903(a) (Purdon Cum. Supp. 1978-1979). Section 5903(a) now provides:

No person, knowing the obscene character of the materials involved, shall:

(1) display or cause to permit the display of any obscene materials in or on any window, showcase, newsstand, display rack, billboard, display board, viewing screen, motion picture screen, marquee or similar place in such manner that the display is visible from any public street, highway, sidewalk, transportation facility or other public thoroughfare;

(2) sell, lend, distribute, exhibit, give away or show any obscene materials to any person 17 years of age or older or offer to sell, lend, distribute, exhibit or give away or show, or have in his possession with intent to sell, lend, distribute,

its language from the prior statutory formulation,[45] three significant changes have been made.

First, the amended statute adds the element of scienter by expressly requiring that the accused know the obscene character of the material

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exhibit or give away or show any obscene materials to any person 17 years of age or older, or knowingly advertise any obscene materials in any manner;

(3) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials;

(4) write, print, publish, utter or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom, or by what means any obscene materials can be purchased, obtained or had;

(5) hire, employ, use or permit any minor child to do or assist in doing any act or thing mentioned in this subsection.

Id.

This section underwent substantial changes before it was passed by the General Assembly. *See* 161 PA. LEGIS. J. S376 (daily ed. May 24, 1977). As originally proposed, section 5903(a) would have included only subsection (1), prohibiting the public display of obscene materials. *Id.* The manufacture, advertisement, or sale or distribution to adults to obscene materials would thus not have been prohibited. Such a formulation would have been in conformity with the recommendations of the Commission on Obscenity and Pornography issued in a report formulated after two years of extensive research. REPORT, *supra* note 18, at 51-62 & 65-67. This report recommended the repeal of laws forbidding dissemination of explicit sexual material to willing adult buyers, the enactment of laws forbidding commercial dissemination of pictorial pornography (as explicitly defined) to children without parental consent, and the adoption of "public display" and postal laws designed to protect unwilling viewers from offensive and intrusive depictions of sexual activity. *Id.* These recommendations were based on findings of a lack of a significant causal relationship between pornography and antisocial behavior, a reasonably minor degree of public concern about sexually explicit materials and their growing availability, and a possibly beneficial effect of pornography as an outlet for those with potential antisocial tendencies. SCHAUER, *supra* note 11, at 63. The report of the Commission was characterized as "morally bankrupt" by President Nixon. N.Y. Times, Oct. 25, 1970, at L-71. Thirteen days after the Report was issued, the United States Senate rejected it by a vote of ninety-six to three. S. Rep. No. 477, 91st Cong., 2d Sess. (1970). It should be noted that the Commission's recommendations concerning obscenity laws relating to adults are now effective in six states. Three of these have repealed their adult obscenity statutes. *See* MONT. REV. CODES ANN. § 94-8-110 (Mont. Crim. Code 1973); S.D. COMPILED LAWS ANN. §§ 22-24-27 to 22-24-54 (Supp. 1974). W. VA. CODE §§ 61-8A-1 to 61-8A-7 (Cum. Supp. 1974). Three other states have enacted only child obscenity statutes. For example, the Iowa Supreme Court held that the Iowa obscenity statute violated current constitutional standards in State v. Wedelstedt, 213 N.W.2d 652 (Iowa 1973), and the Iowa legislature enacted only a child obscenity statute the following year, apparently deciding against revising the adult statute to meet the new constitutional standards. *See* IOWA CODE ANN. §§ 725.1-725.10 (West Cum. Supp. 1977). *See also* N.M. STAT. ANN. §§ 40-50-1 to 40-50-8 (Supp. 1973); VT. STAT. ANN. tit. 13, § 2802 (1974).

For a further discussion of the Commission's Report, *see* Barnett, *Corruption of Morals — The Underlying Issue of the Pronography Commission Report,* 1971 L. & SOC. ORDER 189 (1971); Clor, *Science, Eros and the Law: A Critique of the Obscenity Commission Report,* 10 DUQ. L. REV. 63 (1971); Johnson, *The Pornography Report: Epistemology, Methodology and Ideology,* 10 DUQ. L. REV. 190 (1971); Lockhart, *The Findings and Recommendations of the Commission on Obscenity and Pornography: A Case Study of the Role of Social Science in Formulating Public Policy,* 24 OKLA. L. REV. 209 (1971).

45. 18 PA. CONS. STAT. ANN. § 5903(a) (Purdon 1973). For the text of this section, *see* note 31 *supra.*

involved.[46] "Knowing" is defined by the statute as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry of, the character or content of any material [described in section 5903(a)] which is reasonably susceptible of examination by the defendant."[47] This "knowledge of the character of the materials" test was approved by the United States Supreme Court in *Hamling v. United States,*[48] in which the Court held that a prosecution's

46. 18 PA. CONS. STAT. ANN. § 5903(a) (Purdon Cum. Supp. 1978-1979). The Supreme Court of the United States had previously held in Smith v. California, 361 U.S. 147 (1959), that obscenity statutes must incorporate at least some concept of scienter. *Id.* at 150-52. *Smith* involved a city ordinance which made it a crime for a bookseller to have obscene books on his premises, with no proof of knowledge on the part of the bookseller required for a finding of criminal liability. *Id.* at 148-49. The Court found that the concept of strict liability was unacceptable where the crime had some relationship to freedom of speech. *Id.* at 151. To permit strict liability to be imposed, the Court felt, would "chill" free speech since the bookseller would "tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." *Id.* at 153. It was felt that this, in turn, would restrict public access to constitutionally protected reading matter and thus violate the heart of the concepts underlying the first amendment. *Id.*

While the Court in *Smith* held that any criminal obscenity statute must contain some element of scienter, it was careful to leave the exact boundaries of the definition to the legislatures and the lower courts. *Id.* at 154-55. For the issues involved in defining the exact nature of the scienter requirement in obscenity cases, *see* notes 48 & 49 and accompanying text *infra.*

Earlier statutory formulations of section 5903(a) did not contain an express scienter requirement. *See* note 31 *supra.* A number of Pennsylvania courts construing the same or similar statutory language, however, concluded that the failure to expressly require scienter as an element of the offense of obscenity was not fatal to the statute. Commonwealth v. Evan, 63 Pa. D. & C.2d 722, 727-28 (1973), *rev'd on other grounds,* 467 Pa. 42, 345 A.2d 541 (1976) (scienter implied); Commonwealth *ex rel.* Davis v. Van Emburg, 35 Lehigh Co. L. J. 356, 365-68 (1973), *rev'd on other grounds,* 464 Pa. 618, 347 A.2d 712 (1975) (scienter implied); Commonwealth v. Burtnick, 86 York 133, 134-35 (1971); Commonwealth v. Mormando, 18 Bucks Co. L. Rep. 151, 157 (1968) (indictments framed in statutory language); Commonwealth v. Morton, 23 Camb. Co. L. J. 61, 71 (1959); Commonwealth v. Levan, 52 Berks 160, 164-65 (1959) (obscenity at common law required scienter); Commonwealth v. Fisher, 76 Montg. Co. L. R. 427, 431-32, 21 D. & C.2d 396, 398-99 (1959). *See also* Commonwealth v. Amick, 223 Pa. Super. Ct. 237, 241 n.4, 298 A.2d 905, 908 n.4 (1972); Smith v. Crumlish, 207 Pa. Super. Ct. 516, 524-25, 218 A.2d 596, 601 (1966).

47. 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon Cum. Supp. 1978-1979).

48. 418 U.S. 87 (1974). The issue of a defendant's intent in obscenity regulation was first placed before the United States Supreme Court in 1896 in Rosen v. United States, 161 U.S. 29 (1896). In *Rosen,* the Court was faced with the question of whether a charge of mailing obscene material must be supported by evidence that a defendant "knew or believed that such [material] could be properly or justly characterized as obscene." *Id.* at 41. The Court rejected this contention, stating:

> The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States.

Id. at 41. In *Hamling,* the Court specifically reaffirmed *Rosen* to the effect that "knowledge of the character of the materials" is sufficient, and that it need not be shown that the defendant believed the material to be obscene. 418 U.S. at 119-20.

demonstration that a defendant had knowledge of the contents of the materials he distributed and that he knew the character and nature of the materials was constitutionally sufficient to prove scienter.[49]

The amended section also expressly prohibits the distribution of obscene motion pictures,[50] thereby codifying the judicial gloss to the old section 5903(a). The earlier formulation of section 5903(a) prohibited only the showing of "any obscene . . . photograph, figure or image," without specifically mentioning motion pictures.[51] The *McDonald* court, however, had held that motion pictures were "photographs" or "images" within the meaning of section 5903(a),[52] and the legislature adopted this definition in the 1977 amendments.[53]

Finally, the amendments to section 5903(a) place a ban upon the public display of obscene materials.[54] This subsection, designed to prevent intrusive displays of obscenity where the public would be forced to view it,[55] was recommended by the federal Commission on Obscenity and Pornography.[56]

B. *The Redefining of Obscenity*

The most substantial change made by the amendments to the Pennsylvania obscenity law occurred in section 5903(b), the statute's definitional section.[57] Under the pre-amendment obscenity statute, the

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49. 418 U.S. at 123.

50. 18 PA. CONS. STAT. ANN. § 5903(a)(1) (Purdon Cum. Supp. 1978-1979). For the text of this subsection, *see* note 44 *supra*. Section 5903(b) includes motion pictures in the definition of "obscene materials." 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon Cum. Supp. 1978-1979). For the text of this section, *see* text accompanying note 59 *infra*.

51. 18 PA. CONS. STAT. ANN. § 5903(a) (Purdon 1973). For the text of this section, *see* note 31 *supra*.

52. 464 Pa. at 441-43, 347 A.2d at 294-95. The defendants in *McDonald* had argued that the failure to make any specific reference to motion pictures in the list of prohibited materials indicated a legislative intent to omit motion pictures from the scope of the statute's prohibition. *Id.* at 441, 347 A.2d at 294. Defendants based their argument on the fact that section 5903(c) of the statute, prohibiting the distribution of obscene materials to minors, specifically mentioned motion pictures. *Id. See* 18 PA. CONS. STAT. ANN. § 5903(c) (Purdon 1973).

53. *See* note 50 and accompanying text *supra*.

54. 18 PA. CONS. STAT. ANN. § 5903(a)(1) (Purdon Cum. Supp. 1978-1979). For the text of this subsection, *see* note 44 *supra*. Section 5903(a)(1) prohibits the "display of any obscene materials . . . in such manner that the display is visible from any public street, highway, sidewalk, transportation facility or other public thoroughfare." 18 PA. CONS. STAT. ANN. § 5903(a)(1) (Purdon Cum. Supp. 1978-1979). A transportation facility is defined as "any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, rail, motor vehicle or any other method including aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations." *Id.* § 5903(b).

55. 161 PA. LEGIS. J. s377 (daily ed. May 24, 1977) (remarks of Sen. Hill). As originally proposed, the amended section 5903(a) only contained subsection one, prohibiting the public display of obscene materials. *Id. See* note 44 *supra*.

56. For a discussion of the Commission, its findings, and its recommendations, *see* note 44 *supra*.

57. 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon Cum. Supp. 1978-1979).

Pennsylvania Supreme Court defined obscenity in terms of the *Roth* standard as interpreted by *Memoirs*.[58] As a result of the 1977 amendments, however, Pennsylvania now defines "obscene materials" as:

> Any literature, including any book, magazine, pamphlet, newspaper, storypaper, comic book or writing and any figure, visual representation, or image including any drawing, photograph, picture or motion picture, if:
>
> (1) the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest;
>
> (2) the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and
>
> (3) the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.[59]

The statute defines "community," for the purpose of applying "contemporary community standards," as the state of Pennsylvania.[60] "Sexual conduct" is defined as "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and patently

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58. 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon 1973). For a discussion of this section and its interpretation by the Pennsylvania Supreme Court, *see* note 32 and accompanying text *supra*. For a discussion of the *Roth* test, *see* notes 17 & 18 and accompanying text *supra*. For a discussion of the *Memoirs* standard, *see* note 25 and accompanying text *supra*.

59. 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon Cum. Supp. 1978-1979). The origin of this language is the United States Supreme Court's holding in *Miller*. *See* 413 U.S. at 24. *See generally* notes 12-29 and accompanying text *supra*.

60. 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon Cum. Supp. 1978-1979). Determination of the relevant community for the purpose of obscenity regulation has posed difficulties. The phrase "contemporary community standards" was first used by the Supreme Court in *Roth*. 354 U.S. at 489. *See* note 20 and accompanying text *supra*. This test was apparently designed to prevent the evaluation of obscenity from being made on the basis of whether the material had an adverse effect on a "particularly susceptible subclass" of the community. 354 U.S. at 488-89. The *Roth* Court, however, did not specifically consider the issue of defining the relevant community. In Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), Justice Harlan, joined by Justice Stewart in a plurality opinion, stated that "a national standard of decency" was appropriate in a federal action since the statute reached the entire United States, and that therefore the relevant community for a federal prosecution would be the entire country in the absence of congressional action setting a more local geographic standard. *Id.* at 488 (plurality opinion). In Jacobellis v. Ohio, 378 U.S. 184 (1964), which dealt with a state obscenity prosecution, Justice Brennan stated that the scope of constitutional protection must be uniform throughout the country. *Id.* at 193-95 (plurality opinion). To hold otherwise, Justice Brennan noted, would have a deterrent effect on the total distribution of material which might be considered offensive in only a small part of the country, as no distributor would risk the varying judicial determinations that would result from a variable standard. *Id.* at 194 (plurality opinion). The majority of lower courts which have faced the issue of national v. local standards after *Jacobellis* have employed a national definition of "community." SCHAUER, *supra* note 11, at 119-20.

National standards were rejected in *Miller*, in which the Court found no error in instructing a jury to apply the contemporary community standards of the relevant state. 413 U.S. at 30-34. Chief Justice Burger argued that a national standard was nonexistent, or, at best, not capable of determination. *Id.* Chief Justice Warren had

offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals."[61]

C. *Equitable Remedies Against Obscenity*

Pennsylvania's pre-amendment obscenity statute provided for injunctive relief as a remedy in obscenity actions,[62] but *McDonald* invalidated the applicable provision for want of a constitutionally acceptable definition of obscenity.[63] While the amendments redefining obscenity may be sufficient to cure the constitutional infirmity, the 1977 amendments also made three significant changes in the equity provisions of the Pennsylvania obscenity law.[64]

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earlier expressed this same opinion in *Jacobellis*. 378 U.S. at 200–01 (Warren, C.J., dissenting).

While *Miller* held that the contemporary community standards, by which the prurience and patent offensiveness of allegedly obscene materials were to be judged, need not be national in scope, the Court did not specify what their scope should be; *Miller* only upheld the use of a statewide standard. 413 U.S. at 30–34. While this issue was subsequently discussed in Jenkins v. Georgia, 418 U.S. 153 (1974), and Hamling v. United States, 418 U.S. 87 (1974), the Court emphatically declined to define the "community" whose standards were to be applied. 418 U.S. at 157; 418 U.S. at 103–10.

A number of states, however, have relied on the acceptance by the *Miller* Court of the concept of a statewide community, adopting statutes defining the "community" in terms of a statewide standard. *See* CONN. GEN. STAT. ANN. § 53(a)–193(a)(3) (West Cum. Supp. 1978); MASS. GEN. LAWS. ANN. ch. 272, § 31 (West Cum. Supp. 1977–1978); MONT. REV. CODES ANN. § 94–8–110(d)(2)(i) (Mont. Crim. Code 1973); N.C. GEN. STAT. § 14–190.1(b)(2) (Cum. Supp. 1977); S.D. COMPILED LAWS ANN. § 22–24–27(1) (Cum. Supp. 1977); TENN. CODE ANN. § 39–3010(G) (1975); VT. STAT. ANN. tit. 13, § 2801(6)(B) (Cum. Supp. 1977). *See also* ILL. ANN. STAT. ch. 38, § 11–20(c) (Smith-Hurd Cum. Supp. 1977) (degree of public acceptance of material in state is admissible evidence).

61. 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon Cum. Supp. 1978–1979). This definition of "sexual conduct" is based on the examples of specifically defined sexual conduct posited by Chief Justice Burger in *Miller*. 413 U.S. at 25. Pennsylvania, through legislative action, has accomplished what a significant number of jurisdictions had accomplished through judicial gloss. *See* note 36 and accompanying text *supra*.

62. 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973). For the full text of this section, *see* note 38 *supra*.

63. 464 Pa. at 461–63, 347 A.2d at 304–05. *See* notes 38 & 39 and accompanying text *supra*.

64. 18 PA. CONS. STAT. ANN. § 5903(g) (Purdon Cum. Supp. 1978–1979). Section 5903(g) provides:

> The attorney for the Commonwealth may institute proceedings in equity in the court of common pleas of the county in which any person violates or clearly is about to violate this section for the purpose of enjoining such violation. The court shall issue an injunction only after written notice and hearing and only against the defendant to the action. The court shall hold a hearing within three days after demand by the attorney for the Commonwealth, one of which days must be a business day for the court, and a final decree shall be filed in the office of the prothonotary within 24 hours after the close of the hearing. A written memorandum supporting the decree shall be filed within five days of the filing of the decree. The attorney for the Commonwealth shall prove the elements of the violation beyond a reasonable doubt. The defendant shall have the right to trial by jury at the said hearing.

Id.

The right to a jury trial in the injunction proceeding was also ensured under the prior statute. 18 PA. CONS. STAT. ANN. § 5903(i) (Purdon 1973). The United States

Section 5903(g) now prohibits the issuance of an ex parte injunction.[65] Under the prior statute, a preliminary injunction could be issued without a hearing, provided that the issuance of the injunction was in conformity with the Pennsylvania Rules of Civil Procedure.[66] Such practice, however, was disapproved by the courts on constitutional grounds.[67] The statute as

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Supreme Court summarily rejected the right to a jury trial in civil obscenity proceedings in Alexander v. Virginia, 413 U.S. 836 (1973). Persuasive arguments to the contrary, based on the nature of the substantive obscenity standard set forth in *Miller,* have been advanced. In Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), Justice Brennan argued that since the community established the standards under substantive obscenity law, and a jury represents a cross section of the community, a jury is "the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." *Id.* at 448 (Brennan, J., dissenting). The *Miller* Court reemphasized the importance of the community and the local jury as the arbiter of community values by rejecting a national obscenity standard. 413 U.S. 30-34. *Hamling* further stressed the jury's role in discerning and applying community standards. 418 U.S. at 103-08. *See also* McKinney v. Alabama, 424 U.S. 669, 687-89 (1976) (Brennan, J., concurring). At least one state requires that obscenity injunctions be tried by "advisory juries," with the trial court being bound by a jury verdict that the material was not obscene. McNary v. Carlton, 527 S.W.2d 343, 347-48 (Mo. 1975).

65. 18 PA. CONS. STAT. ANN. § 5903(g) (Purdon Cum. Supp. 1978-1979).

66. 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973). Rule 1531 of the Pennsylvania Rules of Civil Procedure provides in relevant part:

> (a) A court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the court may issue a preliminary or special injunction without a hearing or without notice.

PA. R. CIV. P. 1531.

67. In Commonwealth v. Guild Theatre, Inc., 432 Pa. 378, 248 A.2d 45 (1968), a district attorney was granted an ex parte injunction, with no record made of the proceedings, to enjoin the showing of an allegedly obscene motion picture. *Id.* at 379, 248 A.2d at 46. The Pennsylvania Supreme Court vacated the injunction, stating:

> The procedure followed in this case was shockingly defective in at least two respects — the hearing without notice . . . and the censorhip without provision for a prompt judicial decision.
>
> The hearing which transpired . . . was reminiscent of the Star Chamber proceedings of yore. It was held ex parte, and no record was made of these proceedings . . . . [I]t must be apparent that such practices must not be allowed to continue.

Id. at 380-81, 248 A.2d at 47. The Pennsylvania Supreme Court also held that the exhibition of a motion picture could not be restrained on obscenity grounds absent a statutory provision for a prompt, final judicial decision; a hearing alone within four days of the issuance of the injunction was held insufficient. *Id.* at 382, 248 A.2d at 48. *See also* Commonwealth *ex rel.* Davis v. Van Emberg, 464 Pa. 618, 620-623, 347 A.2d 712, 713-15 (1975).

In Freedman v. Maryland, 380 U.S. 51 (1965), the United States Supreme Court ruled that a system of administrative licensing of motion pictures is constitutional only if conducted pursuant to "procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. The Court determined that a constitutionally valid licensing scheme must assure a prompt judicial determination of obscenity, place the burden of instituting judicial proceedings on the administrator, and limit the duration of any restraint imposed prior to judicial involvement to that required for brief preservation of the status quo. *Id.* at 58-59. *Cf.* Fuentes v. Shevin, 407 U.S. 67 (1972) (statute allowing plaintiff to replevy personal property in the possession of another without notice is inconsistent with due process absent extraordinary situation); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968) (invalidating ex parte injunction against racist rally on ground that rally presented clear and present danger of violence).

amended obviates such objections by permitting the issuance of an injunction only after written notice and a hearing.[68]

The amended statute also provides that the state must prove the elements of the offense "beyond a reasonable doubt."[69] While normally a civil plaintiff need only meet the lesser burden of proof of a preponderance of the evidence,[70] this provision circumvents the dangers inherent in applying a lesser burden of proof to obscenity cases. For instance, it has been noted that application of the lesser standard endangers the dissemination of constitutionally protected materials in that such materials will either be erroneously suppressed[71] or kept out of circulation due to the possibility of erroneous imposition of civil sanctions.[72]

Finally, the res judicata and collateral estoppel effects of a finding of obscenity in an equity proceeding are strictly limited by the terms of the amended statute. The statute provides that an injunction shall issue only against the defendant to the action *sub judice,*[73] and therefore a determination that certain materials are obscene, and the resulting injunction, are limited to the defendant at bar; the finding may not be used to obtain an injunction against persons not parties to the original action. Section 5903(h)(3) also provides that the elements of a criminal prosecution for enjoined activities "shall be determined de novo at the criminal proceeding and findings made in the equity action shall not be binding in the criminal

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68. 18 PA. CONS. STAT. ANN. § 5903(g) (Purdon Cum. Supp. 1978-1979).

69. *Id.*

70. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 339 (2d ed. 1972).

71. McKinney v. Alabama, 424 U.S. 669, 684 (1976) (Brennan, J., concurring). Justice Brennan wrote:

> Inherent in all factfinding procedures is the potential for erroneous judgments and, when First Amendment values are implicated, the selection of a standard of proof of necessity implicates the relative *constitutional* acceptability of erroneous judgments. "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of . . . [the existence of the fact] beyond a reasonable doubt." In the civil adjudication of obscenity *vel non,* the bookseller has at stake such an "interest of transcending value" — protection of his right to disseminate and the public's right to receive material protected by the First Amendment. Protection of those rights demands that the factfinder be almost certain — convinced beyond a reasonable doubt — that the materials are not constitutionally immune from suppression.

Id., quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (emphasis supplied by the Court). This danger of erroneous suppression, it was noted, is especially acute where the civil proceeding and the restraint imposed operate as a prior restraint, since the material may consequently never be available to the public and thus never face the test of acceptance under prevailing community standards. 424 U.S. at 685.

72. 424 U.S. at 685-86 (Brennan, J., concurring).

73. 18 PA. CONS. STAT. ANN. § 5903(g) (Purdon Cum. Supp. 1978-1979).

proceedings."[74] A civil determination of obscenity *vel non* will thus not have a preclusive effect on a later criminal prosecution.[75]

IV. UNCERTAINTY, DUAL SANCTIONS, AND THE NEED FOR PRIOR ADJUDICATION

As noted above, the pre-*Miller* Pennsylvania obscenity statute was invalidated because the definition of obscenity set forth therein was unconstitutionally vague in that it failed to specifically define the types of depictions or descriptions considered to be obscene.[76] The Pennsylvania legislature, attempting to remedy this shortcoming by conforming with *Miller,* incorporated into the statutory language the examples of sexual conduct that Chief Justice Burger stated would meet the specificity requirement.[77] It is submitted, however, that the Supreme Court's mandate in *Miller* requires a more comprehensive reformulation,[78] and that the amendments have done little to remove the chill of uncertainty from the area of obscenity regulation as contemplated therein.

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74. 18 PA. CONS. STAT. ANN. § 5903(h)(3) (Purdon Cum. Supp. 1978-1979). This statutory provision is in conformity with current constitutional standards. *See* McKinney v. Alabama, 424 U.S. 669 (1976). In *McKinney,* a prosecuting attorney, pursuant to a state statutory procedure, brought an in rem equity action in state court against four magazines and two other parties, seeking an adjudication of the magazines' obscenity, which resulted in a decree that the magazines were obscene. *Id.* 670-72. Petitioner, a bookstall operator who had not been given notice of or made a party to the equity proceeding, was officially notified of the decree concerning the specific magazines. *Id.* at 672. After officers later brought one of the magazines from petitioner's bookstall, he was charged with violating a criminal statute by selling "mailable matter known . . . to have been judicially found to be obscene." *Id.* at 672-73. At petitioner's trial, which resulted in his conviction, later upheld on appeal, petitioner was not allowed to have the issue of the magazine's obscenity presented to the jurors, who were instructed that they were not to be concerned with determining obscenity, but only with whether or not petitioner had sold material judicially declared to be obscene. *Id.* at 673. The Supreme Court held that the Alabama procedures, insofar as they precluded the petitioner from litigating the obscenity of the magazine as a defense to his criminal prosecution, violated the first and fourteenth amendments. *Id.* at 673-74.

75. Although the earlier civil action will not have a preclusive effect on a later criminal prosecution, a civil judgment may lead to the imposition of punitive sanctions in the later proceeding through other means. First, the civil judgment may be admissible and relevant in a criminal trial to prove scienter — that the merchant was aware of the nature of the materials in question. *See generally* MCCORMICK, *supra* note 70, at § 318. Second, since the civil decision under the Pennsylvania statute is an injunction, subsequent criminal prosecution does not prevent the state from also punishing the defendant for contempt. *See* In re Debs, 158 U.S. 564, 594 (1895). This double sanction for the same conduct may not escape interdiction under the double jeopardy clause. Rendleman, *Civilizing Pronography: The Case for an Exclusive Obscenity Nuisance Statute,* 44 U. CHI. L. REV. 509, 509-10 (1977).

76. 464 Pa. at 452, 347 A.2d at 299. *See generally* notes 33-39 and accompanying text *supra.*

77. *See* 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon Cum. Supp. 1978-1979); 413 U.S. at 25.

78. *See* text accompanying note 83 *infra. See also* note 23 and accompanying text *infra.*

While any determination of obscenity is of necessity a subjective one,[79] the definitions adopted by the legislature are themselves vague, replete with subjective terms such as "ultimate sexual acts," "normal or perverted," and "lewd."[80] While the legislature's adoption of the *Miller* examples conforms with current constitutional doctrine concerning the requirement of a strictly drawn statute,[81] it is submitted that the legislature could have better conformed with the spirit of the *Miller* specificity requirement by adopting language specifically describing prohibited materials,[82] rather than reiterat-

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79. Lockhart, *supra* note 11, at 548.

80. 18 PA. CONS. STAT. ANN. § 5903(b) (Purdon Cum. Supp. 1978-1979). In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), Justice Brennan commented upon the vagueness of the *Miller* examples:

> Of course, the Court's restated *Roth* test does limit the definition of obscenity to depictions of physical conduct and explicit sexual acts. And that limitation may seem, at first glance, a welcome and clarifying addition to the *Roth-Memoirs* formula. But, just as the agreement in *Roth* on the abstract definition of obscenity gave little hint of the extreme difficulty that was to follow in attempting to apply that definition to specific material, the mere formulation of a "physical conduct" test is no assurance that it can be applied with any greater facility. . . . The Court surely demonstrates little sensitivity to its own institutional problems, much less the other vagueness-related difficulties, in establishing a system that requires us to consider whether a description of human genitals is sufficiently "lewd" to deprive it of constitutional protection; whether a sexual act is "ultimate"; whether the conduct depicted in materials before us fits within one of the categories of conduct whose depiction the State and Federal Governments have attempted to suppress; and a host of equally pointless inquiries.

Id. at 99 (Brennan, J., dissenting).

81. In DeSalvo v. Codd, 386 F. Supp. 1293 (S.D.N.Y. 1974) (three judge court), it was held that when the *Miller* descriptions are embodied in a statute, the requisite specificity exists. *Id.* at 1300. Other courts have judicially added these standards into existing statutes, thus adding the necessary specificity by interpretation. *See* note 36 and accompanying text *supra*. This same method of judicial interpretation was adopted by the United States Supreme Court in United States v. Twelve 200-Ft. Reels of Film, 413 U.S. 123 (1973), a companion case to *Miller*. *See* note 29 *supra*. In *Twelve Reels*, the Court indicated that it was prepared to define "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as being limited to the *Miller* examples. *Id.* at 130 n.7. The Court has also specifically reaffirmed the validity of § 1461 of the Criminal Code, 18 U.S.C. § 1461 (1976) (mailing obscene or crime inciting matters), against a vagueness challenge. Hamling v. United States, 418 U.S. 87, 110-16, (1974). In light of note 7 in *Twelve Reels* this judicial interpretation would also apply to other federal obscenity statutes. SCHAUER, *supra* note 11, at 167 n.66. *See also* United States v. Friedman, 506 F.2d 511, 514-15 (8th Cir. 1974).

82. Statutes containing greater degrees of specificity in their definitions of prohibited material have been proposed or adopted. For instance, the Commission on Obscenity and Pronography drafted, but did not recommend, an adult obscenity statute which would have prohibited the dissemination of:

> any material which is made up in whole or almost entirely of pictures or three-dimensional representations of human sexual intercourse, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), direct physical stimulation of unclothed genitals, or flagellation or torture in the context of a sexual relationship, and which includes, as part of its depictions, depictions of sex organs and their condition; provided that, material shall not be deemed to be obscene if it has artistic, literary, historical, scientific, educational or other similar social value (except that in the case of material with slight social value that value shall not remove the material from the foregoing definition if that value is so slight as to make it extremely improbable that the material will be disseminated to any significant number of persons on the basis of that social

ing examples which, in the Supreme Court's own language, were not intended to serve as a proposed regulatory scheme for the states.[83]

A second criticism of the statute involves its use of parallel sanctions, since the availability of criminal and noncriminal remedies provides a potential for prosecutorial harassment that could easily chill free expression. Adding the civil injunction remedy to the prosecutorial arsenal provides authorities with an additional means of focusing on particular distributors.[84] Due to the availability of multiple remedies (zoning, building codes, criminal liability, injunctions, seizures), the authorities may proceed in separate actions under each available theory.[85] Regardless of the outcome, a

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value). Advertising and manner of distribution may be considered, where relevant, in determining the obscenity of material for the purpose of this section. REPORT, *supra* note 18, at 42 n.7. Furthermore, the Pennsylvania legislature was far more specific in defining prohibited material with regard to minors. See 18 PA. CONS. STAT. ANN. § 5903(e) (Purdon 1973). This section of the law was left undisturbed by the 1977 amendments. 18 PA. CONS. STAT. ANN. § 5903(e) (Purdon Cum. Supp. 1978-1979). Finally, the *Miller* Court noted the Oregon obscenity statute as an example of sufficiently specific legislation. 413 U.S. at 24 n.6. The Oregon law provides in pertinent part:

> (5) "Nudity" means uncovered, or less than opaquely covered, post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered human male genitals in a discernibly turgid state. For the purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered.
>
> (6) "obscene performance" means a play, motion picture, dance, show or other presentation, whether pictures, animated or live, performed before an audience and which in whole or in part depicts or reveals nudity, sexual conduct, sexual excitement or sadomasochistic abuse, or which includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct.
>
> (7) "Obscenities" means those slang words currently generally rejected for regular use in mixed society, that are used to refer to genitals, female breasts, sexual conduct or excretory functions or products, either that have no other meaning or that in context are clearly used for their bodily, sexual or excretory meaning.
>
> . . . .
>
> (9) "Sadomasochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
>
> (10) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act for apparent sexual stimulation or gratification.
>
> (11) "Sexual excitement" means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

OR. REV. STAT. § 167.060(5)-(7) & (9)-(11) (1971).

83. 413 U.S. at 25.

84. *See* Universal Amusement Co. v. Vance, 404 F. Supp. 33, 46-56 (S.D. Tex. 1975) (multiple seizures of film and projector constituted bad faith and harassment).

85. *See* Llewelyn v. Oakland County Prosecutor's Office, 402 F. Supp. 1379 (E.D. Mich. 1975) (injunctions based on zoning ordinances, seizures and arrests).

series of legal actions will burden the hapless distributor, and may result in self-censorship or the financial destruction of a small business.[86]

It is submitted that an amendment to the obscenity statute requiring an equitable finding of obscenity prior to criminal prosecution would solve this problem,[87] since this type of amendment would ease the inherent harshness of the current statute by allowing obscenity to be determined without the immediate threat of criminal sanctions.[88] Additionally, such a determination would put the defendant on clear notice of the obscene nature of his materials as well as settle any threshold question of the existence of obscenity involved in any of the above noted remedies. The chilling effect of unwarranted obscenity actions could thus be avoided.

It should be noted, however, that a complete ban on all criminal prosecutions without a prior civil adjudication of obscenity might unnecessarily hamper the enforcement of, and encourage the disregard of, obscenity laws by permitting the distribution of all sexually explicit materials, regardless of their illegality, until the necessary procedures for obtaining an injunction are met.[89] The Commission on Obscenity and Pornography therefore suggested that prior civil adjudication be required only when doubt exists concerning the legal status of the material in question.[90] In its report, the Commission offered a proposed statute which, after authorizing civil actions for declaratory judgments of obscenity[91] and mandating the use of such judgments to support injunctions and to establish scienter in subsequent criminal prosecutions,[92] provides:

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86. Rendleman, *supra* note 75, at 509-10.

87. Lockhart, *supra* note 11, at 569-86. *See* N.C. GEN. STAT. § 14-190.2 (Cum. Supp. 1977); VT. STAT. ANN. tit. 13, § 2809 (Cum. Supp. 1977) (relating to printed verbal material only under obscenity law limited to minors).

88. 413 U.S. at 43-44 (Douglas, J., dissenting). Justice Douglas has argued persuasively that "until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained." *Id.* at 41 (Douglas, J., dissenting) Justice Douglas also argued that "[t]o send men to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." *Id.* at 43-44 (Douglas, J., dissenting). *See also* Ward v. Illinois, 431 U.S. 767, 777-82 (1977) (Stevens, J., dissenting); Smith v. United States, 431 U.S. 291, 317-21 (1977) (Stevens, J., dissenting); Marks v. United States, 430 U.S. 188, 198 (1977) (Stevens, J., dissenting in part and concurring in part).

Because of the *in terrorem* effect of criminal sanctions, a majority of the United States Supreme Court has approved the use of prior civil procedures to determine whether the material sought to be suppressed is protected by the first amendment. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973). The Court first articulated the rationale behind the use of prior civil adjudications as follows:

> Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him . . . .

Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957). *See also* McKinney v. Alabama, 424 U.S. 669, 683 (1976) (Brennan, J., concurring).

89. Lockhart, *supra* note 11, at 570-71.

90. REPORT, *supra* note 18, at 63.

91. *Id.* at 68.

92. *Id.* at 68-69.

> [C]riminal prosecutions shall be brought prior to the obtaining of a declaration . . . only in cases of material which is unquestionably within the applicable definitional provision. In all other cases, the provisions of this Act shall be used prior to prosecution, which shall not be based upon conduct engaged in before notice of a declaration obtained pursuant to this Act. Prosecutions brought contrary to this subsection shall be dismissed by the trial court. . . .[93]

The Commission's proposal, it is submitted, functions best in conjunction with a definite standard of obscenity which can be applied to the material in question with a minimum of subjective evaluation. Absent such a standard, very few cases would be "unquestionably within the applicable definitional provision."[94] The proposal nevertheless would eliminate a large measure of the in terrorem effect of the current statute by curtailing criminal prosecution whenever there is any reasonable belief that the material in question may not be within the statutory definition of obscenity. Such a statute, coupled with a clear statutory definition of obscenity, would eliminate uncertainty and foster enforcement of obscenity regulation while limiting instances of official harassment.

V. CONCLUSION

Despite the imperfections discussed above, the Pennsylvania statute does remove some of the difficulties associated with obscenity regulation. For example, the legislature has gone beyond current constitutional limits in providing for a right to a jury trial in civil proceedings involving obscenity[95] and in mandating that the elements in such proceedings be proven beyond a reasonable doubt.[96] Furthermore, the adoption of the *Miller* "definitions" as the statutory definition of "sexual conduct" does provide a slight degree of specificity where none was present before. Since the legislature adopted the *Miller* standards and examples verbatim,[97] it can be concluded that the amended Pennsylvania law is within the current constitutional framework governing obscenity regulation.[98]

This focus on constitutionality, however, misconceives much of the issue, for it suggests incorrectly that if a measure is constitutional it must perforce be good. The Constitution sets boundaries beyond which a statute may not go in interfering with individual rights, but it does not imply that everything within those outer boundaries is socially desirable.[99] In recent

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93. *Id.* at 69.
94. *Id. See* note 93 and accompanying text *supra.*
95. *See* note 64 *supra.*
96. *See* notes 69–72 and accompanying text *supra.*
97. *See* notes 23 & 59 and accompanying text *supra.*
98. *See* note 81 and accompanying text *supra.*
99. Justice Frankfurter, dissenting in a compulsory flag salute case, framed the issue in this manner:

> Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutional-

cases, the Court has endeavored to remind the states that they are free to eliminate all controls if they so desire.[100]

The strong stand taken by the Pennsylvania legislature against obscene materials and their distribution is particularly incongruous in light of the eroding national consensus concerning the proper role of government in controlling obscenity.[101] While the prosecutions for obscenity continue, often with widespread publicity, a majority of Americans have expressed a surprising lack of concern over the increasing availability of sexually explicit materials,[102] and distributors continue to enjoy the silent, but commercially lucrative, support of a significant segment of the population.[103] Not suprisingly, therefore, there is a growing conviction within the law that any form of restriction on the availability of sexually explicit materials to willing adult buyers is incompatible with the guarantees of the first amendment.[104]

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> ity synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

Board of Educ. v. Barnette, 319 U.S. 624, 670-71 (1943) (Frankfurter, J. dissenting).

100. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973). The Court in *Paris* wrote that "[t]he States, of course, may follow . . . a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer . . . ." *Id.* In United States v. Reidel, 402 U.S. 351 (1971), the Court agreed that the legislatures were entirely free to conclude, if they wished, that the concepts involved in present obscenity statutes are "so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential." *Id.* at 356-57.

101. Rendleman, *supra* note 75, at 509-10.

102. REPORT, *supra* note 18, at 352. With regard to the sexual materials which adults may obtain, it is clear that American public opinion does not strongly favor restricting such materials; a majority (almost 60%) believe that adults should be permitted to read or view any explicit material they choose. *Id.* For a further discussion of the Commission's findings, *see* note 44 *supra*.

103. REPORT, *supra* note 18, at 74. The Commission on Obscenity and Pornography estimated the total value of sexually explicit materials sold annually in the United States to be between $537 million and $574 million. *Id.*

104. *See, e.g.*, Ward v. Illinois, 431 U.S. 676, 777-82 (1977) (Stevens, J., dissenting); McKinney v. Alabama, 424 U.S. 669, 678 (1976) (Brennan, J., concurring); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83-85 (1973) (Brennan, J., dissenting); Bloom v. Municipal Court, 16 Cal. 3d 71, 86-100, 545 P.2d 229, 239-48, 127 Cal. Rptr. 317, 327-36 (1976) (Tobriner, J., dissenting).