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A Critique of the Recent Supreme Court Obscenity Decisions

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The Rise and Fall of *Roth*— A Critique of the Recent Supreme Court Obscenity Decisions

By Herald Price Fahringer and Michael J. Brown***

I. Introduction

On June 21, 1973, five members of the United States Supreme Court suddenly overturned the whole body of law governing obscenity prosecutions.[1] Justices Douglas, Brennan, Stewart, and Marshall stood by and watched helplessly the collapse of this carefully constructed regime of law they had played an important part in developing.

The majority concluded that the community standards used to judge a work should be "local" rather than "national" and that no expert advice was needed to prove a book or film's obscene character. The requirement that a work be "utterly without redeeming social value" was renounced; rather, it must now have "serious literary, artistic, political or scientific value" to escape censure. In writing this most chilling chapter in first amendment history, the Court again rejected the right of consenting adults to privately read or see what they please.

The Court, in a bold but potentially dangerous experiment, concluded that the subject of obscenity must be calibrated by precise statutes which particularly describe the form of sexual depiction sought to be suppressed. In order to place in proper perspective these dramatic changes in the law of obscenity a short discussion of its legal history is required.

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[1] Kaplan v. California, 413 U.S. 139 (1973); United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973).

II. THE ADVENT OF *Roth*

Until 1957 the subject of obscenity had received relatively little attention from the United States Supreme Court.[2] However, in that year *United States v. Roth*[3] appeared on the Supreme Court's docket. The man who lent his name to this litigation was an experienced dealer in erotica in New York City. Roth was convicted of sending books called *Good Times, A Review of the World of Pleasure* and a quarterly called *American Aphrodite* through the mails. The Second Circuit affirmed his conviction.[4]

The Supreme Court sustained Roth's conviction, concluding that "obscenity is not within the area of constitutionally protected speech or press,"[5] and then forged the test which would be used for the next decade in measuring obscenity. That formula was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[6] Thus *Roth* became the landmark case, the progenitor of all the law produced in this legal realm.

Some legal scholars mistakenly feared this test was too vague and would invite severe censorship.[7] But in the shadow of *Roth,* the Court, in a series of per curiam decisions, overturned lower court decisions finding obscene the motion picture *The*

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[2] Under the old English common law, the distribution of obscene material was only illegal if it attacked organized religion. It was not until 1868 in Great Britain that a test for obscenity was adopted by the courts, which was subsequently used in the United States. In Regina v. Hicklin, [1868] L.R. 3 Q.B. 360, the first legal yardstick for measuring obscenity was carved out of the common law. The *Hicklin* test, as it came to be known, provided "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Id.* at 369.

[3] 354 U.S. 476 (1957). At the same time, the case of People v. Alberts, 292 P.2d 90 (Cal. 1955), reached the Court involving a California conviction for the distribution of obscene materials which had no literary pretentions whatsoever. A large part of the materials distributed by Alberts were sado-masochistic photographs popularly known as bondage pictures. But, by a strange quirk of fate, it was Roth's name that became identified with the Court's newly devised obscenity test.

[4] 237 F.2d 796 (2d Cir. 1956).

[5] 354 U.S. at 485.

[6] *Id.* at 489.

[7] Comment, *Constitutional Protection of Obscene Material Against Censorship as Correlated with Copyright Protection of Obscene Material Against Infringement,* 31 So. CAL. L. REV. 301, 306 (1958). *See also* 1957 DEPAUL L. REV. 111, 113 and 60 W. VA. L. REV. 89 (1957).

Game of Love;[8] a book called *One—The Homosexual Magazine;*[9] two nudist magazines entitled *Sunshine and Health* and *Sun;*[10] and an imported collection of student art publications.[11] In each of these significant per curiam opinions the Court merely cited *Roth.* The next year the Court, on procedural grounds, upset New York's assessment of *Lady Chatterly's Lover* as obscene.[12]

During the next seven years, the battlelines drawn across the first amendment became quiet with only sporadic fighting until 1966 when the famous trilogy of *Ginzburg, Mishkin* and *Fanny Hill* reached the Supreme Court.[13] However, two significant cases had broken the ten-year truce that followed *Roth.*

In *Smith v. California*[14] the Court decided that proof of scienter was a required constitutional predicate to any obscenity conviction. And in *Jacobellis v. Ohio*[15] the Court, in a plurality opinion held that a national community standard should apply to state and federal obscenity prosecutions. As a consequence, the conviction of the French film *Les Amants* (The Lovers) was reversed.

III. THE RISE OF *Roth*

Roth reigned supreme for a decade and, as we have seen, was used by the Court to strike down a number of obscenity convictions. However, on March 21, 1966, the Court decided the cases of Richard Ginzburg, Edward Mishkin and the book popularly known as *Fanny Hill.*[16] The Court affirmed the convictions of

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[8] Times Film Corp. v. City of Chicago, 355 U.S. 35, *rev'g* 244 F.2d 432 (7th Cir. 1957).

[9] One, Inc. v. Olesen, 355 U.S. 371 (1958), *rev'g* 241 F.2d 772 (9th Cir. 1957).

[10] Sunshine Book Company v. Summerfield, 355 U.S. 372 (1958), *rev'g* 249 F.2d 114 (D.C. Cir. 1957).

[11] Mounce v. United States, 355 U.S. 180, *rev'g* 247 F.2d 148 (9th Cir. 1957).

[12] Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959).

[13] Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); and A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1966).

[14] 361 U.S. 147 (1959).

[15] 378 U.S. 184 (1964).

[16] Ralph Ginzburg, who recklessly boasted of the sexual content of his publications was convicted of sending through the mail a hard-cover magazine of expensive format; *Liaison,* a bi-weekly newsletter; and *The Housewife's Handbook on Selective Promiscuity,* a short book. Ginzburg v. United States, 383 U.S. 463, 466 (1966). Ginzburg had unsuccessfully sought mailing privileges for his material from the postmasters of Intercourse and Blue Balls, Pennsylvania and

(Continued on next page)

Ginzburg and Mishkin but reversed the Massachusetts decision holding *Fanny Hill* obscene.[17] In *Ginzburg* the Court smuggled the much maligned doctrine of "pandering" into the law of obscenity. This ill-conceived doctrine came into the strange world of obscenity like a bastard child—half improvised and half compromised. The Court, thereafter, understandably shunned it and never invoked the rule again.

In *Mishkin* the Court decided that the prurient appeal test was satisfied in any instance where it could be shown that a book was designed for and disseminated to a well-defined deviant sexual group.[18] However, in the *Fanny Hill* case, the Court fortified the *Roth* test by welding onto it the requirement that before a book can be legally denounced it must be utterly without redeeming social value. The Court stressed:

> . . . three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[19]

The law continued in this state only until 1967. During the short intervening period the Supreme Court docket became clogged with a large number of obscenity cases involving a variety of materials found obscene by trial courts and juries. Hidden in this swarm of petitions was a little-known case entitled *Redrup v. New York.*[20]

On May 8, 1967, the Court decided *Redrup* and reversed New

(Footnote continued from preceding page)
thereafter deposited his materials with the postmaster at Middlesex, New Jersey.

Edward Mishkin was found guilty in New York City of manufacturing and selling a wide variety of books dealing with every conceivable form of sexual aberration. 207 N.Y.S.2d 390 (1960), *aff'd,* 234 N.Y.S.2d 342 (1962), *aff'd,* 204 N.E.2d 209, 255 N.Y.S.2d 881 (1964).

John Cleland's *Memoirs of a Woman of Pleasure (Fanny Hill)* was found obscene in a civil injunctive proceeding in Boston, Massachusetts and was affirmed by the Supreme Judicial Court of Massachusetts. 206 N.E.2d 403 (Mass. 1965).

[17] Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); and A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1966).

[18] Mishkin v. New York, 383 U.S. at 508-09.

[19] 383 U.S. at 418.

[20] 386 U.S. 767 (1967).

York's determination that two innocuous paperback books entitled *Lust Pool* and *Shame Agent* were obscene.[21] In *Redrup*, probably the most important per curiam opinion in the history of obscenity litigation, it was suggested that materials not pandered, sold to minors, or foisted upon unwilling audiences were constitutionally protected. This decision broke the logjam of Supreme Court cases. On June 12, 1967, a tidal wave of per curiam decisions swept down from our highest court, washing away some 15 obscenity convictions and leaving scattered in its path a wide range of constitutionally protected paperback novels, girlie magazines and motion picture films.[22] *Redrup* became the watchword in reversing no fewer than 35 obscenity convictions in the following years. This unconditional Supreme Court action led lawyers to conclude that any publication which was not sold to a minor, pandered or imposed upon the privacy of another, enjoyed first amendment immunity.

Two years after *Redrup*, on April 7, 1969, the Supreme Court electrified prosecutors across the nation when it reversed Robert Stanley's conviction for possessing obscene materials in his Atlanta home.[23] Relying on *Roth*, the Court held that mere possession of obscenity could not be made criminal.[24] *Stanley* became the Warren Court's valedictory opinion in the obscenity field.

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[21] On the same day the Court reversed the cases of Austin v. Kentucky, 386 U.S. 767 (1967) and Gent v. Arkansas, 386 U.S. 767 (1967), holding a collection of "girlie" magazines not obscene.

[22] Henry v. Louisiana, 392 U.S. 655 (1968); Felton v. Pensacola, 390 U.S. 340 (1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Central Magazine Sales Ltd. v. United States, 389 U.S. 50 (1967); Conner v. City of Hammond, 389 U.S. 48 (1967); Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Rosenbloom v. Virginia, 388 U.S. 450 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Corinth Publications, Inc. v. Westberry, 388 U.S. 448 (1967); Aday v. United States, 388 U.S. 447 (1967); Avansino v. New York, 388 U.S. 446 (1967); Shepard v. New York, 388 U.S. 444 (1967); Cobert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967); Austin v. Kentucky, 386 U.S. 767 (1967); Gent v. Arkansas, 386 U.S. 767 (1967).

[23] Stanley v. Georgia, 394 U.S. 557 (1969).

[24] The Court instructed:

> *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far.

Id. at 563.

Under *Stanley's* influence it was thought that the Court was finally on the road to renovating and modernizing the law of obscenity by holding sexually oriented material to be protected speech subject only to the limited control of safeguarding minors and those unwilling to receive it. But, as it developed, the authority of *Roth* had crested and was receding.

IV. THE DECLINE OF *Roth*

In the critical years following *Roth* and *Redrup*, the composition of the Supreme Court dramatically changed. Richard Nixon, elected President in 1968, began making appointments to the Court in 1969. Consequently, when the next battery of obscenity cases was considered by the Court, Chief Justice Burger had assumed its leadership with Justice Blackmun standing close by his side. On May 3, 1971, the Burger Court began to withdraw from the frontiers established by the Warren Court, rejecting the claim that the distribution of obscenity could only be criminal if made to minors or an unwilling audience.[25]

It had been argued, to no avail, that since a buyer of obscene materials had the absolute right to possess them in his home, and because no other citizen's privacy was offended, the government had no legitimate interest in interfering with or punishing private sales of obscenity. Justice Black, upstaging the majority's logic, lashed back at them by stressing ". . . in the future that case [*Stanley*] will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room."[26]

Reidel sounded the requiem for *Stanley*, and it was apparent that any further doctrinal expansion of *Roth* was foreclosed. All hope of the adult American public being able to read and see what it pleased was doomed. By 1971 Justices Powell and Rehn-

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[25] United States v. Reidel, 402 U.S. 351 (1971); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971). The Court in unmistakable language pointed out in *Reidel*:

> The District Court gave *Stanley* too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in *Reidel* to sell it to him would effectly scuttle Roth, the precise result that the Stanley opinion abjured. Whatever the scope of the "right to receive" referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings which *Roth* held unprotected by the the First Amendment.

402 U.S. at 355.

[26] 402 U.S. at 382 (Black, J., dissenting).

quist had joined the Court and had rushed to the aid of the "Burger Block." The tide had turned, and the decisions of June, 1973 were inevitable.

V. THE JUNE DECISIONS

On June 21, 1973, the Court announced opinions in five major cases dealing with the substantive law of obscenity.[27] Four days later, it decided three additional cases dealing with the search and seizure methods used in obscenity cases.[28] Subsequently, the Court remanded some 60 additional cases, either pending on direct appeal or on certiorari petitions, for reconsideration in light of the decisions of June 21st and June 24th. An understanding of the factual background of these cases helps to place the issues in proper perspective.

A. *Miller v. California*[29]

Marvin Miller had launched one of the largest mail order businesses on the west coast dealing in sexually-oriented materials. He was convicted under California's *Roth*-test obscenity law of mailing unsolicited ads and sexually-oriented magazines to the public. The trial judge instructed the jury that the challenged publications should be assessed in the light of California's contemporary community standards and not a national standard. The prosecutor produced no proof, expert or otherwise, bearing on the issue of obscenity.

The Supreme Court's opinion in *Miller* became that Court's most formidable pronouncement and dominates this collection of cases. In *Miller* the Court held that a local community standard was constitutionally adequate and that obscenity should be governed by statutes which specifically describe the types of sexual depiction sought to be suppressed. The Court also concluded that the state was not obliged to prove each of the elements of obscenity by expert testimony.

B. *Paris Adult Theatre I*[30]

In the *Paris Adult Theatre* case the District Attorney for

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[27] *See* note 1 *supra.*

[28] Alexander v. Virginia, 413 U.S. 836 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973); Heller v. New York, 413 U.S. 483 (1973).

[29] 413 U.S. 15 (1973).

[30] 413 U.S. 49 (1973).

Atlanta, Georgia and the state solicitor joined forces and filed civil complaints seeking to enjoin the general exhibition of two allegedly obscene films entitled *Magic Mirror* and *It All Comes Out in the End* at the Paris Adult Theatre I. These actions were initiated under a Georgia civil statute based on the *Roth* test.

The Atlanta trial judge dismissed the complaint on *Stanley* grounds, holding that the exhibition of these films in a commercial theater to consenting adults with the use of reasonable precautions preventing exposure to minors was "constitutionally permissible." The Georgia Supreme Court reversed the trial court, finding the film obscene.

In the *Paris* case the Supreme Court put to rest the claim that consenting adults should be allowed to see what they please.[31] The Court, apparently suffering under the legacy of its puritan forefathers, decided that the states have a right to "maintain a decent society."[32]

C. *Kaplan v. California*[33]

In *Kaplan v. California,* Murry Kaplan, who owned the Peek-A-Boo Bookstore, one of more than 250 adult bookstores in Los Angeles, was convicted of selling an unillustrated paperback novel suggestively entitled *Suite 69.* Since the book contained no pictures the petitioner urged that the written word could not under any circumstances be considered legally obscene. The Court disagreed, deciding that this historic form of expression enjoyed no absolute immunity.

D. *United States v. Orito*[34]

In *United States v. Orito,* George Joseph Orito was indicted for importing numerous reels of film claimed by the government to be obscene. The District Court for the Eastern District of Wisconsin dismissed the indictment on the ground that 18 United

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[31] The Court, in a faltering opinion which ignored the report of the President's Commission on Obscenity and Pornography, stated:

> Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.

413 U.S. 49, 60-61 (1973).

[32] *Id.* at 59-60.

[33] 413 U.S. 115 (1973).

[34] 413 U.S. 139 (1973).

States Code § 1462 was unconstitutionally broad because it failed to distinguish between public and nonpublic transportation. *Orito* had the distinction of being twice argued before the Supreme Court because of the troublesome issues presented. However, the Court finally concluded that commerce in obscene materials was unprotected by any constitutional doctrine of privacy and, thus, remanded the case to the district court.

E. *United States v. 12 200-Ft. Reels of Super 8mm Film*[35]

Claimant Paladini sought to import through Los Angeles certain motion picture films from Mexico which he insisted were for his own private use. The customs officers, however, seized these films because they were obscene under the authority of 19 United States Code § 1305(a) which prohibits the importation of any obscene or immoral materials.

The District Court for the Southern District of California dismissed the government's complaint, relying upon *United States v. Thirty-Seven Photographs*,[36] which held the statute unconstitutional. Acknowledging that the decision had been reversed,[37] the Court nevertheless heard the case because "the narrow issue directly presented in this case, and not in *Thirty-Seven Photographs*, is whether the United States may constitutionally prohibit importation of obscene material which the importer claims is for private, personal use and possession only."[38]

In his petition to the Supreme Court Paladini used the *Stanley* argument, urging that the right to possess obscene material in the privacy of one's home created the implied right to import it from another country for private use. However, the Supreme Court rejected this contention and reasoned that:

> This overlooks the explicity narrow and precisely delineated privacy right on which *Stanley* rests.
>
> We are not disposed to extend the precise, carefully limited holding of *Stanley* to permit importation of admittedly obscene materials simply because they are imported for private use only.[39]

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[35] 413 U.S. 123 (1973).
[36] 309 F. Supp. 36 (C.D. Cal. 1970).
[37] 402 U.S. 363 (1971).
[38] 413 U.S. 123, 125 (1973).
[39] *Id.* at 127-28.

With this synopsis of the cases, we turn now to a discussion of the major rules of law which have thus emerged.

VI. THE *Miller* MANIFESTO

In *Miller* the court drastically changed the formula for judging obscenity by declaring:

> 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.[40]

The Court concluded that for an obscenity statute to be constitutional it must specifically define the sexual depiction sought to be disallowed. The *Roth* test for evaluating obscenity was discarded because it was too vague for defendants to understand and impossible for prosecutors to implement.[41] Accordingly, the Court recognized that in light of the new *Miller* standards of obscenity the gravest "constitutional doubts" are raised regarding the existing statutes.[42]

Under these new guidelines most state obscenity statutes are patently unconstitutional. Therefore, the Court issued the clearest possible directive to state legislatures by stressing:

> State statutes designed to regulate obscene materials must be carefully limited . . . . As a result, we now confine the permissible scope of such regulation to works which depict or

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[40] 413 U.S. 15, 24 (1973).

[41] In *Miller* the Court stressed:

> The case we now review was tried on the theory that the California Penal Code . . . approximately incorporates the three-stage *Memoirs* test, *supra*. But now the *Memoirs* test has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation.

Id. at 23.

The Court emphasized that states must formulate standards more concrete than those of the past:

> We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

Id. at 27.

[42] United States v. 12 200-Ft. Reels of Super 8 mm Film, 413 U.S. 123, 130 n.7 (1973).

describe sexual conduct. That *conduct must be specifically defined by the applicable state law,* as written or authoritatively construed.

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.[43]

Courts in Arizona,[44] California,[45] Indiana,[46] Iowa,[47] Louisiana,[48] Massachusetts,[49] New Jersey,[50] and North Carolina[51] have already struck down those states' obscenity statutes because they lack the requisite degree of specificity.

However, in *United States v. 12 200-Ft. Reels of Super 8mm Film,* in a most significant footnote, the Court suggested:

> We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where "a serious doubt of constitutionality is raised . . ." and "a construction of the statute is fairly possible by which the question may be avoided." *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 369, 91 S. Ct. 1400, 1404, 28 L.Ed.2d 822 (1971) (opinion of White, J.), quoting from *Crowell v. Benson,* 285 U.S. 22, 62, 52 S. Ct. 285, 296, 76 L.Ed. 598 (1932). If and when such "serious doubt" is raised as to the vagueness of the words "obscene", "lewd", "lascivious", "filthy", "indecent", or "immoral" as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462, . . . we are prepared to con-

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[43] Miller v. California, 413 U.S. 14, 23-24, 27 (1973) (emphasis added).

[44] Rife v. Purcell, Civil No. 73-480 (D. Ariz., filed Aug. 17, 1973).

[45] People v. Bloom, No. A 282 816 (Super. Ct., Los Angeles County, July 6, 1973); *but see,* People v. Enskat, Crim. 22506 (Court of Appeals, Second Appellate District, August 8, 1973).

[46] Mohney v. Indiana, 276 N.E.2d 517 (Ind. 1971); and Stroud v. Indiana, 273 N.E.2d 517 (Ind. 1971). *See* Stroud v. Indiana, 413 U.S. 911 (1973); Mohney v. Indiana, 413 U.S. 911 (1973). In both *Stroud* and *Mohney* the Supreme Court granted certiorari and merely remanded the cases for further consideration in light of *Miller.*

[47] State v. Cahill, No. IM2-261 (Linn County, Iowa, Aug. 13, 1973); City of Fargo v. Wolfe (Municipal Court, Cass County, N. Dak., Aug. 9, 1973).

[48] Giarrusso v. Excalibor Books, Inc., No. 557-753 (New Orleans, La., July 13, 1973).

[49] Literature Inc. v. Quinn, 482 F.2d 372 (1st Cir. 1973).

[50] Hamar Theaters, Inc. v. Cryan, 13 Crim. L. Rptr. 2449 (D. N.J. July 26, 1973).

[51] State v. Bracken, 72 CR 26502 and State v. Cox, 72 CR 26503 (Super. Ct., Greensboro, N.C.).

> strue such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard-core" sexual conduct given as examples in *Miller v. California.* . . . Of course, Congress could always define other specific "hard-core" conduct.[52]

A. *Implementing Miller: A Task for the Legislatures*

The now famous "footnote 7" has become an oasis for prosecutors across the nation striving to redeem vague obscenity statutes by asking courts to construe them in keeping with the *Miller* mandate. Several courts have undertaken that hazardous task and have rescued state obscenity provisions by a strained judicial construction in accordance with *Miller.*[53]

It is indeed a dangerous venture for courts to perform open heart surgery on these ailing obscenity laws which fail to particularize the forms of sexual depiction sought to be suppressed. Such an ambitious undertaking ignores completely a legion of cases forbidding this form of judicial legislation.[54] There are indeed a number of reasons why courts should not become embroiled in the dangerous business of redrafting obscenity laws. Recognizing that the states are free to adopt a less inclusive definition of obscenity, the Supreme Court pointed out in *Miller*: "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts."[55] And, with respect to the scope of those "regulatory schemes," the Court added in *Paris Adult Theatre* that:

> It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they *may* chart their own courses in dealing with obscene material.[56]

Under the authority of *Miller,* state legislatures have the choice of adopting any of a number of definitions of obscenity.

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[52] 413 U.S. 123, 130 n.7 (1973).

[53] *See, e.g.,* People v. Enskat, Crim. 22506 (Cal. Ct. App., Aug. 8, 1973), where the court construed the California statute to meet *Miller* standards. Application for certiorari to the Supreme Court of California is pending.

[54] Gregory v. City of Chicago, 394 U.S. 111 (1969); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965); Niemotko v. Maryland, 340 U.S. 268 (1951). In each of these cases the court declared the statute unconstitutional without attempting to cure the statute's affliction through redrafting.

[55] 413 U.S. 15, 25 (1973).

[56] 413 U.S. 49, 53-54 (1973).

They may choose to include the *Miller* examples, or they may follow the course taken by such states as Arizona and Hawaii, which have chosen to abandon adult censorship.[57] Lawmakers likewise may decide to retain the redeeming social value test in its original form rather than accept the Supreme Court's modification of ". . . serious literary, artistic, political or scientific value." Given the many constitutional options for redefining obscenity laws, the choice must appropriately be made by the legislatures and not the courts.

A second reason for judicial abstention concerns the ancient doctrine of *nulla poena sine lege*, which provides that there can be no punishment without a specific law defining the conduct to be avoided. Although courts are regularly called upon to construe statutes in determining their compatibility with relevant constitutional principles, they are not authorized to rewrite the law. That power rests exclusively with the legislature. When a court undertakes this difficult task, it does so without the benefit of the fact-finding machinery and experience normally possessed by legislators. The judiciary is further disadvantaged because of its inability to determine whether certain proscriptions will be effective or easily administered.

Finally, courts are handicapped because they cannot tell whether the judicial construction will be compatible with unformulated legislative policies.[58] Thus, courts should not attempt to define criminal liability when the legislatures have failed to speak on that subject with precision. A court's attempted specification of the varied forms of proscribed sexual description will

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[57] Legislatures may decide to permit depictions of natural sex, but disallow depictions of abnormal sex. They may elect to forbid depictions of oral and anal intercourse, masturbation and excretory functions, but allow the lewd exhibition of genitals or ultimate sex acts either actual or simulated.

Since the portrayal of natural sex would not appeal to anyone's prurient interest, legislatures may elect to only forbid well defined sexual abnormalities such as bestiality, pedophelia, sadism, masochism, or sado-masochism, to name only a few.

[58] The New York Court of Appeals has repeatedly declined to rewrite statutes which have overrun the borders of the first amendment. *See* People v. Berck, 300 N.E.2d 411, 347 N.Y.S.2d 33 (1973), *cert. denied*, New York v. Berck, 14 L. Rptr. 4115 (12/10/73), declaring unconstitutional a loitering statute; People v. The Bookcase, Inc., 201 N.E.2d 14, 251 N.Y.S.2d 433 (1964), declaring unconstitutional § 484-h of the New York Penal Law which forbade the sale of obscene books to minors as being overly broad; Rabeck v. New York, 391 U.S. 462 (1968); People v. Bunis, 172 N.E.2d 273, 210 N.Y.S.2d 505 (1961), holding unconstitutional § 436-d of the New York Penal Law forbidding the sale of books with part of their covers removed.

surely spill out in all directions and cannot be penned up within the confines of a single decision. What is needed throughout the country are new laws, structured along the lines designated by *Miller,* which must be forged in the fires of the legislatures. While a legislative solution clearly should be preferred to judicial rescue attempts, this certainly does not imply that the task will be easy or the result satisfying.

B. *Miller: An Inflexible Standard*

There is a terrible leak in the *Miller* decision through which most of its logic escapes. The newly contrived requirement that an obscenity statute specify every form of proscribed sexual portrayal endangers the other two branches of the *Roth* equation which required that the material appeal to the average person's prurient interest and that it be patently offensive. For example, a state statute forbidding the depiction of cunnilingus by implication decrees that this form of description violates contemporary community standards and appeals to a person's prurient interest. Absent any serious literary, artistic, political or scientific value, it is proscribable. Thus, the critical important ingredients of prurient appeal and community approval are disabled.

The constitutional purpose of the community standards test is to allow the publication of sexual expressions which have acquired a degree of community tolerance. On the other hand, the prurient appeal test is designed to screen out only those sexual depictions which inspire a morbid or shameful interest in sex as contrasted with a normal or healthy appeal. Both these standards are flexible and will vary with changes in a society's sexual permissiveness. A statute which rigidly forbids a particular form of sexual description impairs these sensitive testing procedures designed to mobilize the judging process. Thus, the wrecking of *Roth* by the codification of offensive sexuality will prove to be a terrible misjudgment because the genius of the *Roth* rule is in its flexibility. It could, for example, expand for the *Tropic of Cancer* and constrict and condemn hard-core pornographic pictures. The Court's desire to simplify the management of obscenity by strict and detailed statutes is understandable but ill-advised. Not only will this form of legislation debase the first amendment, but it is bound to generate even more litigation in this troublesome field.

VII. PROOF OF OBSCENITY

Perhaps the most disappointing procedural aspect of the Court's recent obscenity decisions was the holding that the prosecution need produce no proof bearing on the issue of obscenity.[59] In an extended and unbroken series of cases it has been held postulate that in any criminal prosecution evidence must be offered to prove beyond a reasonable doubt each and every element of the crime charged.[60] Even in the simplest bookmaking case or narcotics prosecution the government must come forward with evidence, expert or otherwise, to show that the slips of paper seized or the chemical substance confiscated is the contraband proscribed by the statute. This well-settled rule of law had been applied in obscenity prosecutions in an overwhelming majority of the cases. For that matter, our courts have traditionally held that since pornography prosecutions always involve first amendment considerations they require even more stringent adherence to procedural safguards.[61]

State and federal courts had concluded that the prosecution must produce some proof that the challenged work appeals to the average person's prurient interest, is patently offensive and is utterly without redeeming social value.[62] Against this mountain

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[59] Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[60] *In re* Winship, 397 U.S. 358 (1970); Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Holland v. United States, 348 U.S. 121, 138 (1954); Leland v. Oregon, 343 U.S. 790, 795 (1952); Brinegar v. United States, 338 U.S. 160, 174 (1949); Michaelson v. United States, 266 U.S. 42 (1924); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Holt v. United States, 218 U.S. 245, 253 (1910); Davis v. United States, 160 U.S. 469, 488 (1895); Coffin v. United States, 156 U.S. 432 (1895); Miles v. United States, 103 U.S. 304, 312 (1880).

[61] Freedman v. Maryland, 380 U.S. 51 (1965); New York Times Co. v. Sullivan, 376 U.S. 254, 271, 277-80, 283-88 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Thompson v. Louisville, 362 U.S. 199 (1960); Smith v. California, 361 U.S. 147 (1959); Speiser v. Randall, 357 U.S. 513, 526 (1958).

[62] United States v. Palladino, 475 F.2d 65 (1st Cir. 1973); United States v. Alexander, 428 F.2d 1169, 1174 n.7 (8th Cir. 1968); Luros v. United States, 389 F.2d 200 (8th Cir. 1968); United States v. Thirty-Seven Photographs, 309 F. Supp. 36 (D.C. Cal. 1970); City of Phoenix v. Fine, 420 P.2d 26 (Ariz. 1966); *In re* Giannini and Iser, 446 P.2d 535, 72 Cal. Rptr. 665 (1968); People v. Rosakos, 74 Cal. Rptr. 34 (Ct. App. 1966); Hudson v. United States, 234 A.2d 903 (D.C. 1967); Dunn v. Maryland State Board of Censors, 213 A.2d 751 (Md. 1965); Keuper v. Wilson, 268 A.2d 753 (N.J. Super. Ct. 1970); Newark v. Humphres, 228 A.2d 550 (N.J. Super. Ct. 1967); Ramirez v. State, 430 P.2d 826 (Okla. 1967); Commonwealth v. Lalonde, 288 A.2d 782 (Pa. 1972); Commonwealth v. Dell Publications, Inc., 233 A.2d 840 (Pa. 1967); House v. Commonwealth 169 S.E.2d 572 (Va. 1969).

As a practical matter, federal prosecutors have produced some form of proof of obscenity in a large number of major prosecutions throughout the country.

(Continued on next page)

of authority, only two cases had held such proof unnecessary.[63]

This entire line of cases requiring proof of obscenity was obliterated by the Supreme Court's decisions of June 21, 1973. The Court, struggling with the social science of pornography, stated in the *Paris Adult Theatre* case:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. Wigmore on Evidence (3d Ed.), §§ 556, 559. No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.[64]

However, the Court did carve out a narrow exception to this rule by emphasizing:

> We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier-of-fact would be plainly inadequate to judge whether the material appeals to the prurient interest. [Citing authorities.][65]

The Court graciously acknowledged the right of the defense to provide expert proof establishing the non-obscene nature of the material charged. As a practical matter, if it is expected that the defense will produce such proof, the prosecution may be forced to call expert witnesses to meet the impact of the defendant's evidence.

(Footnote continued from preceding page)
United States v. Ewing, 445 F.2d 345 (10th Cir. 1971), *remanded* in light of *Miller*, 413 U.S. 15 (1973); United States v. I Am Curious—Yellow, 404 F.2d 196 (2 Cir. 1968); United States v. Thevis, 329 F. Supp. 265 (M.D. Fla. 1971), *appeal pending*, No. 71-2614 (5th Cir.); United States v. Connoisseur Publications, Indictment No. 68-319 (N.D. Ohio 1972); United States v. London Press, Indictment No. (C.D. Cal. 1972); United States v. Reed Enterprises, Indictment No. (S.D. Cal. 1971), (prosecution of the report of the President's Commisson on Obscenity and Pornography); United States v. Pattern of Evil, Civ. No. 69-2157 (S.D.N.Y. 1970). What all these cases have in common is that the prosecution must, as in any other case, produce some proof to establish its claim that the material charged is obscene.

[63] United States v. Groner, 479 F.2d 577 (5th Cir. 1973) (en banc reconsideration); United States v. Wild, 422 F.2d 34 (2d Cir. 1969).

[64] 413 U.S. at 56 n.6.

[65] *Id.*

The consequences of the *Paris* decision could be shattering. Failure to provide any proof on the essential elements of obscenity is an open invitation for jurors to confuse personal distaste with prurient appeal. It also encourages jurors to become puritanical and to suppress materials without any objective basis.

The Second Circuit, in its enormously influential decision of *United States v. Klaw*,[66] pointed this out in unmistakable language by declaring:

> . . . it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: "would you want your son or daughter to see or read this stuff?" A conviction in every instance would be virtually assured.[67]
>
> Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity.[68]

It is unrealistic to assume that 12 jurors in any community in this country will know whether a given work appeals to a person's prurient interest (a shameful or morbid interest in sex) or exceeds the national or state contemporary community standards. And in a great many cases jurors must have some guidance concerning whether a publication or film has serious literary, artistic, political or scientific value. The elimination of the need for any proof on the issue of obscenity (except the publication itself) is bound to launch juries on a rampage of legal sorcery that, in the words of *Klaw*, may put the Salem witch trials to shame.

VIII. ELUSIVE COMMUNITY STANDARDS

In 1964 the Supreme Court in *Jacobellis v. Ohio*,[69] in a plurality opinion, decided that the term "contemporary community standard" meant a national standard. A minority of the Court argued that since the Federal Constitution was being construed a national standard had to be applied. Otherwise, a book found legal in New York City could be illegal in Fargo, North Dakota, because of obvious differences in community standards.

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[66] 350 F.2d 155 (2d Cir. 1965).
[67] *Id.* at 170.
[68] *Id.*
[69] 378 U.S. 184 (1964).

The argument that the first amendment could not be geographically compartmentalized seemed sensible. However, this well-grounded rule also was capsized by the Court's recent rulings. In *Miller* the Court decreed:

> We hold the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.[70]

Elsewhere in the opinion the Court emphasized:

> People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[71]
>
> . . . .
>
> Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines.[72]

In the *Paris Adult Theatre* case, the Court specifically noted:

> . . . we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments.[73]

Since the *Miller* opinion is dominated by discussion of a state-wide standard, it is hoped the community used to judge books and motion pictures will be at least that large. Nowhere in the opinion does the Court say that the contemporary community could be restricted to that of a village, town, city or even county. Common sense dictates that a state prosecution should be based on a state-wide standard.[74]

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[70] 413 U.S. at 33.

[71] *Id.*

[72] 413 U.S. at 32, n.13.

[73] 413 U.S. 60 n.10, quoting from former Chief Justice Warren's dissenting opinion in Jacobellis v. Ohio, 378 U.S. at 199.

[74] On the remand of *Heller v. New York*, the New York Court of Appeals held that "in determining whether any material is patently offensive or obscene, the community standard to be applied is a 'state' standard." People v. Heller, 352 N.Y.S.2d 601, 608 (1973).

Significantly, Chief Justice Burger, who authored the *Miller* opinion, had earlier urged that a state-wide standard should be applied. *See* Hoyt v. Minnesota, 399 U.S. 524 (1970); Cain v. Kentucky, 397 U.S. 319 (1970).

The Court left open the question of whether a local contemporary community standard should apply to a federal prosecution. Although *United States* v. *Orito* and *United States v. 12 200-Ft. Reels of Super 8mm Film*[75] were remanded so that the lower courts could apply the newly devised *Miller* standards, this does not mean that local standards should apply in federal prosecutions. Logic dictates that where there is a prosecution under a federal statute which covers all 50 states, the equal protection clause and basic concepts of federalism mandate the use of a national standard.[76]

In a significant footnote the Court discussed the use of a "national" standard. The Court there suggested that the problems manifest in the use of a state-wide standard in a state prosecution will also apply to the use of a national standard in a federal prosecution. It emphasized:

> 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 ex-

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[75] 413 U.S. 123 (1973).

[76] For instance, § 1461 of Title 18 makes criminal the mailing of obscene matter anywhere in the United States. A prosecution under that section may be initiated in the district where the mailing is received or in the district where it originated. *See* 18 U.S.C. § 3237 (1970). Since the community standard by which the publication is judged forms an essential element of the crime, a national standard is constitutionally necessary for consistent application of each of the criminal elements of the offense.

If any other standard but a national one were applicable to federal prosecutions the parade of horrors that would follow in the path of such a policy would be endless. A few convincing illustrations point up the grave dangers in such a plan:

> Two distributors in San Francisco (distributors *A* and *B*) both send the same publication to a recipient in Sioux City, Iowa. Nothing would prevent the government from prosecuting distributor *A* in San Francisco and distributor *B* in Sioux City. Using local community standards, distributor *A* would probably be convicted in Sioux City. Whereas, the distributor prosecuted in San Francisco would probably be acquitted. The difference in these dispositions, unlike disparate results in criminal prosecutions due to differing views of jurors, must be attributed to a constitutionally impermissible alteration of an element of the crime.
>
> Another alarming example involves the publisher of a book who mails copies into the 50 states (certainly not unusual) or, for that matter, 94 federal districts. Under 18 U.S.C. § 3237(b), the government could prosecute the defendant in the district most favorable to it by reason of unusually high community standards. This is not merely a matter of forum shopping, which the government frequently does in other cases, but involves a substantive change in an essential ingredient of the crime, *i.e.*, the community standards branch of the newly-devised *Miller* test. Under such a rule the right of equal protection of the law would be left in a shambles.

> pression, 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, a point which Justice Harlan often emphasized.[77]

This language means that the use of state and national standards will inevitably involve some degree of suppression. Under a national standard, a film acceptable by New York City standards may still be condemned in a federal prosecution in that city because the national standard may be based upon a considerably lower level of tolerance for sexually explicit materials than existing in this community. Surely the better rule is the use of a state-wide standard for state prosecutions and a nation-wide standard for federal actions. However, despite the compelling logic favoring this rule, several federal courts have decided that the appropriate community from which to establish the standard in a federal prosecution is the judicial district in which the case is tried.[78]

The Fifth Circuit, deeply divided in a controversial en banc opinion, has reached the opposite conclusion by the narrowest margin.[79] The majority in an 8-7 vote adhered to the need for a national standard.[80] Thus, *Groner* authorizes the use of a national standard in a federal obscenity prosecution.

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[77] 413 U.S. at 32 n.13.

[78] United States v. Pinkus, No. 1144-DW-CD (C.D. Cal., July 16, 1973); United States v. Wassermen, No. A-72-Cr-71 (W.D. Tex. July 26, 1973); United States v. Various Articles of Obscene Merchandise, No. 73-Civ.-1341 (S.D.N.Y., August 17, 1973).

[79] United States v. Groner, 479 F.2d 577 (5th Cir. 1973).

[80] Judge Clark joined Chief Judge Brown and Judges Thornberry, Wisdom, Goldberg, Godbold, Simpson and Morgan in holding:

> Despite the considerable doubts about the use of wholly artificial national standards which were inartfully expressed in my former concurrence and which I still entertain, further study certainly indicates that Judge Thornberry's panel opinion may be correct in speculating that a national standard test should be applicable. The crime charged here is not only an interstate offense against the national sovereign, but one which can be prosecuted in any one of many districts in many states under the venue provisions of 18 U.S.C. § 3237(b). The difficulty of choosing, instructing on, and applying some local standard in such a situation is apparent.

United States v. Groner, 479 F.2d at 588 n.2.

When Mr. Justice Rehnquist was an Assistant Attorney General with the Department of Justice, he testified before the House Committee on the Judiciary concerning proposed anti-obscenity legislation designated H.R. 5171, 11009, 11031, and 11032 and stated:

> Yet, when you are talking about a federal statute that is enacted to cover

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Admittedly, *Groner* was decided before *Miller.* However, a serious question exists as to the geographical limits of the "community" in federal cases, even after *Miller.* In *United States* v. *Palladino*[81] the First Circuit considered this question and came to the conclusion that the *Miller* decision applied only to state prosecutions:

> The Court, in dealing with federal statutes, made it clear that the elements of obscenity which it spelled out for states also applied to federal statutes, but stopped short of applying to federal statutes its holding as to community standards in evaluating those elements. . . . Nevertheless, the Court manifested its wider skepticism [*sic*] as to national standards for all purposes by referring to the concept as "hypothetical and unascertainable".
>
> While the path of gracious acceptance of its role by an inferior court might be seen as that of applying the dictum and strongly expressed feeling of the Supreme Court to the federal statute before us, we think the step is not one to be taken without an explicit holding from that Court.[82]

This courageous decision was based upon the sound logic that federal venue provisions would create grave constitutional questions if applied to federal obscenity prosecutions in which the "community" was less than national.[83] Citing what is referred to as the "vice of selective prosecution" the court catalogued the possibilities and steadfastly refused to depart from past precedent, logic and common sense.

IX. THE WRITTEN WORD

The sweeping action of the Supreme Court in overturning convictions involving over 34 paperback novels on June 12, 1967, under the authority of *Redrup,*[84] left publishers with the in-

(Footnote continued from preceding page)
all 50 states, I think you have to pretty well come to the conclusion that as far as the federal statute is concerned it has to be a *nation-wide standard.* . . . I think states, to the extent that the Constitution permits them, are certainly not required to adhere to a national standard in their own dealings with literature for minors. But that I think for the federal government to try to adopt in its statute a state-by-state or community-by-community standard would be unworkable. (*Hearings before Subcommittee No. 3 of the House Comm. on the Judiciary,* 91st Congress, at 37, 46; emphasis added).

[81] 490 F.2d 499 (1st Cir. 1974).

[82] 490 F.2d 499, 502 (1st Cir. 1974) (footnote omitted).

[83] *Id. See also* notes 76 and 80 *supra.*

[84] *See* note 22 *supra.*

escapable impression that the printed word was constitutionally protected. Under this deluge of decisions, which covered every conceivable kind of writing, lawyers were led to believe that any story about people and places, no matter how frankly it described their sexual experiences, had some redeeming social value and thus was immune from criminal prosecution.

However, in *Kaplan v. California*[85] this very thesis dominated the petitioner's contentions.[86] Seeming to apologize for its conclusions, the Court turned its back on Kaplan's claims stating:

> Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be. But this generalization, like so many, is qualified by the book's content. As with pictures, paintings, drawings, and engravings, both oral utterances and the printed word, have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution.[87]

The consequences of *Kaplan* can be terrifying. Whether we approve or disapprove of these novels, they reflect the tenor of our times. Under our concept of first amendment freedoms the choice of what books a person may read in the privacy of his own home for his amusement or enlightenment must be left to the individual and not the community or the government. The suggestion is shocking that the state should attempt to regulate an individual's thoughts, and yet by censoring unillustrated books which may nourish a reader's sexual fantasies, the government in every respect controls his thoughts.

The Court had earlier said:

> What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society

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[85] 413 U.S. 115 (1973).

[86] The Court defined the issue as "whether expression by words alone can be legally 'obscene' in the sense of being unprotected by the First Amendment." 413 U.S. at 118.

[87] 413 U.S. at 119, 120.

> in these magazines, they are as much entitled to the protection of free speech as the best of literature.[88]

In a word, the most skillful or artistic writers hold no special franchise to the first amendment's freedom of expression. Thus the marginal works must be protected if the objectives of the first amendment are to be fulfilled.

Kaplan may well lead to the criminal exile of a large mass of literature to which the American public should have access if they so desire. The ultimate danger to a free people lies not so much in the elimination from the marketplace of a handful of paperback novels which some may define as trash, but rather in the fear such action will instill in writers, possibly staying their pens from writing words of some value to society, and in the invitation to judge for someone else what is or is not "trash."

X. LACK OF FAIR WARNING

In remanding more than 60 cases which had jammed its docket at the time of *Miller* the Supreme Court created a serious problem of retroactivity. Basic due process requires that a penal statute give fair warning of the conduct to be avoided.[89] Understandably, the notice must exist before the commission of the alleged offense.[90] In abandoning the *Roth-Fanny Hill* test the Court made it clear that it was setting forth a new and precise standard for determing what material comes within the purview of the term "obscene." It would also seem that in rejecting the past standards, the Court intended the newly created judicial test for prospective application only. In announcing the constitutional requirement of "fair warning" the Court stated:

> We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.[91]

Due process, in the area of first amendment rights, requires "reasonably ascertainable standards of guilt" to guide the trier

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[88] Winters v. New York, 333 U.S. 507, 510 (1948).

[89] Rabe v. Washington, 405 U.S. 313 (1972); United States v. Harriss, 347 U.S. 612 (1954); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[90] Watkins v. United States, 354 U.S. 178, 208 (1957).

[91] 413 U.S. at 27.

of facts.[92] When a trial is had under legal standards which are ambiguous and unascertainable, the effect is to "license the jury to create its own standard in each case."[93] It should also be noted that the retroactive application of the new standards announced in *Miller* would be comparable to ex post facto legislation, and such retroactive judicial construction has been specifically condemned as contrary to the due process provisions of the Federal Constitution.[94]

Predicting what the various state and federal courts will do with these remanded cases is hazardous, but it would seem that any conviction prior to June 21, 1973 cannot be retroactively sustained. Nonetheless, the New York Court of Appeals, judicially construing an obscenity statute which did not specify the forms of sexual conduct sought to be proscribed, by the most deceptive sleight of hand constitutionalized it and allowed it to be retroactively applied.[95] Since New York's judgment may be followed by other courts, some discussion of the history of the New York rule is needed to understand that recent decision.

XI. NEW YORK HARD-CORE PORNOGRAPHY TEST

During the decade in which the obscenity debate was raging in the United States Supreme Court, the New York Court of Appeals, perhaps more than any other court, was also plagued with this controversial subject. However, in 1961 the Court of Appeals, in a daring decision, concluded that under New York's obscenity statute, only "hard-core" pornography could be officially banned consistent with first amendment principles.[96] This decision was applauded in academic circles and favorably cited on at least two occasions by the United States Supreme Court.[97] In defining "hard-core pornography" the Court stated that:

> It [hard-core pornography] focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any

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[92] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 166 (1972); Winters v. New York, 333 U.S. 507, 515 (1948); Herndon v. Lowry, 303 U.S. 242, 264 (1937).

[93] Gooding v. Wilson, 405 U.S. 518, 528 (1972).

[94] Rabe v. Washington, 405 U.S. 313 (1972); Bouie v. City of Columbia, 378 U.S. 347 (1964).

[95] People v. Heller, 307 N.E.2d 805, 352 N.Y.S.2d 601 (1973).

[96] People v. Richmond County News, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

[97] Mishkin v. New York, 383 U.S. 502 (1966) and Manual Enterprises v. Day, 370 U.S. 478 (1962).

> artistic or scientific purpose or justification. Recognizable "by the insult it offers, invariably, to sex, and to the human spirit" . . . , it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, "a debauchery of the sexual faculty."[98]

It was felt that the hard-core pornography test was a precise and workable standard for assessing obscenity. By creating a test that "may be applied objectively," the more difficult subjective judgments involved in *Roth* were avoided. The test simply accepted, as a matter of law, an assumption that a certain category of photographic material may be proscribed as violating minimum standards by being too foul or revolting. Absent any redemming social value, such material is unprotected. The test directed the court's attention to the material itself and avoided the difficulty of trying to assess the pendency of its appeal or impact upon some hypothetical person's prurient interest. However, the New York Court of Appeals never particularized any "specifically defined sexual conduct" proscribed under the "hard-core pronography" test, as now required by *Miller*.

A year after the *Richmond County News* case a majority of the court of appeals concluded that two paperback books were obscene under the hard-core pornography test but still declined to define that epithet.[99] But, by the time *People v. Fritch*[100] reached the court, serious disagreement had developed among its members about the meaning of "hard-core pornography." Four judges found Henry Miller's *Tropic of Cancer* obscene while Judges Fuld, Dye and Van Voorhis registered furious dissents. A year later the United States Supreme Court found the *Tropic of Cancer* to be constitutionally protected.[101]

In 1965 the court of appeals again dramatically divided over the legal suitability of the novel *Memoirs of a Woman of Pleasure* by John Cleland. In *Larkin v. G. P. Putnam's Sons*,[102] that court,

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98 175 N.E.2d at 686, 216 N.Y.S.2d at 376.
99 People v. Finkelstein, 183 N.E.2d 661, 229 N.Y.S.2d 367 (1962).
100 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963).
101 Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964).
102 200 N.E.2d 760, 252 N.Y.S.2d 71 (1964).

by the margin of one vote, held that classic legally acceptable. It was immediately apparent, however, that the hard-core pornography doctrine was beginning to fall into disrepair, because in 1965 the same court found obscene four paperback books entitled *Lustime, Strumpet, Call Boy,* and *Sin Merchant,* which contained no four-letter words or pictures.[103]

Within six short years of its inception the hard-core pornograph test was barely recognizable.[104] In *People v. G.I. Distributors, Inc.,*[105] a paperback book with photographs of young men in various stages of undress engaged in attitudes of "embracing, wrestling, spanking," was found to be pornographic by the court. Chief Judge Fuld in the lone dissent complained about the defacing of the hard-core pornography formula fashioned under his leadership.[106]

By 1969 the hard-core pornography test had reached its lowest ebb. In that year the court found obscene two innocuous girlie magazines entitled *Candid* and *Hefty,* which contained photographs of semi-nude women and a number of respectable stories.[107] None of the photographs in these magazines portrayed any sexual activities, and the women photographed were not fully nude nor were their genital areas exposed. Again, the Supreme Court was compelled to reverse the New York court's findings under their much older and more restricted *Roth* test.[108]

As plainly revealed by these cases, the term "hard-core pornography," although well-intentioned, worked no better than other elusive terms such as "obscene," "lewd," or "patently offensive." These generic terms lack specificity and, consequently, are not functional in assessing obscenity. However, in 1967 the

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[103] People v. Matherson, 208 N.E.2d 180, 260 N.Y.S.2d 448 (1965).

[104] In 1966 the court denied leave to appeal in *People v. Friedman,* and *People v. Avansino,* where lower courts found obscene, photosets of girls posed in the nude without any exposure of the genitalia. The Supreme Court was forced to reverse both these judgements under the *Roth-Memoirs* test. Friedman v. New York, 388 U.S. 441 (1967); Avansino v. New York, 388 U.S. 446 (1967).

[105] 228 N.E.2d 787, 281 N.Y.S.2d 795 (1967).

[106] Judge Fuld exclaimed:

> But, in point of fact, there is neither indecent exposure nor portrayal of a consummated lewd act; indeed, the photographs are no worse than the magazine pictures of female models which we have previously held not to be pornographic.

228 N.E.2d at 790.

[107] People v. Carlos, 248 N.E.2d 924, 301 N.Y.S.2d 96 (1969).

[108] Carlos v. New York, 396 U.S. 119 (1969).

New York legislature stepped into the breach and revised the state's obscenity statute. The New York lawmakers brazenly discarded the New York Court of Appeals' hard-core pornography test and adopted the federal *Roth* definition of obscenity.[109] To the surprise of many and the disappointment of some, New York's highest court, whose membership had dramatically changed since 1961, yielded to the legislature and embraced the *Roth* test as incorporated in Section 235 of the New York Revised Penal Law.[110] The *Richmond County News* case, which had received national acclaim ten years before, was abandoned by the New York Court of Appeals and slipped slowly below the surface as lost precedent.

With the collapse of the hard-core pornography test in New York, pandemonium broke out in the lower courts as trial judges fumbled uncertainly for a judicial pathway out of the swamp of obscenity law. A judge in Rochester found magazines identical to those held constitutionally protected in New York City[111] to be obscene.[112] The search warrant in the Rochester case authorized the seizure of magazines with pictures of nude persons which "exposed the female and male genital organs, the female and male pubic areas, including the male penis and the female breasts." The Court of Appeals understandably reversed the

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[109] Section 235.00 provides in part:

> Any material or performance is obscene if (a) considered as a whole its predominant interest is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redemming social value.

The legislators deliberately turned their back on their court's hard-core pornography test recognizing full well that it was far less stringent than the federal standards. *See* McKinneys Penal Law, Book 39, Part 2, Practice Commentary p. 89.

[110] People v. Heller, 277 N.E.2d 651, 327 N.Y.S.2d 628 (1971). In that case the New York Court of Appeals, speaking through Judge Bergan, held:

> The elements which must be established to satisfy the constitutional protection afforded by the First Amendment to freedom of expression as laid down by *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 are established in this prosecution. *The statute itself meets the Roth standards (Overstock Book Co. v. Barry,* 436 F.2d 1289 [2d Cir. 1970]).
>
> Those elements justifying prosecution by the State and meeting Federal constitutional requirements are that the dominant theme of the production as a whole appeals to prurient interest in sex; is patently offensive as an affront to community standards; and is without redeeming social value.

Id. at 653, 327 N.Y.S.2d at 629 (emphasis added).

[111] People v. Stabile, 296 N.Y.S.2d 815 (Crim. Ct., N.Y. Co., 1969).

[112] People v. Abronovitz, 310 N.Y.S.2d 698 (Monroe Co. Ct., 1970).

judgment and dismissed the indictment, although on fourth amendment grounds.[113]

Judge Arthur Goldberg of the New York City Criminal Court found the play *Che* obscene because simulated acts of intercourse were performed on stage.[114] At the same time the play *O! Calcutta!*, in which naked actors and actresses romped about the stage and committed simulated sexual acts, ran undisturbed both on and off Broadway, and the film *I Am Curious—Yellow*, with explicit scenes of sexual intercourse, sodomy and castration, survived prosecution in the Second Circuit.[115] These decisions illustrate the utter chaos that occupied this province of the law.

The remand of *Heller* held out the promise of bringing order to all this confusion. Unfortunately, that hope was dashed on December 28, 1973 when the New York Court of Appeals, in a 4-3 decision, defied *Miller's* dictate and held that:

> Despite all their rhetoric, the practical tests for obscenity insofar as this Court has always applied them, have undergone no change in light of the *Miller* decision. Unless the Legislature amends the statute, as it is free to do, our tests will continue to be what they have been.[116]

Thus, the majority of the court unfortunately rejected the "concrete guidelines" of *Miller* designed to eliminate the subjectivity of the New York test. Therefore, the *Heller* case is but another decision in the ever lengthening catalogue of cases that have added to the confusion in this troubled area of the law. Accordingly, the Supreme Court's continued intervention in this unsettled region of the law is required.

XII. SEARCH AND SEIZURE DECISIONS

Three days after the June 21st decisions the Supreme Court decided three cases dealing with police procedures used in seizing obscene materials or enjoining their distribution.[117] Forty-three years ago the Supreme Court had cautioned that any prior

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[113] People v. Abronovitz, 286 N.E.2d 721, 335 N.Y.S.2d 279 (1972).
[114] People v. Bercowitz, 308 N.Y.S.2d 1 (Crim. Ct., N.Y. Co., 1970).
[115] United States v. A Motion Picture Entitled "I Am Curious— Yellow," 404 F.2d 196 (2d Cir. 1968).
[116] People v. Heller, 277 N.E.2d 651, 327 N.Y.S.2d 628 (1971).
[117] Roaden v. Kentucky, 413 U.S. 496 (1973); Heller v. New York, 413 U.S. 483 (1973); Alexander v. Virginia, 413 U.S. 36 (1973).

restraint on the dissemination of any form of speech constitutes an infringement upon freedom of expression to be especially condemned.[118]

Since then, only in the most extreme cases has the Court approved any prior restraint on the distribution of films or books. Even in the most exceptional cases, where some form of prior restraint might be permissible, the Court declared the restraint itself bears "a heavy presumption against its constitutional validity."[119] Thus, it was clear under these authorities that states were not free to adopt arbitrary procedures in the enforcement of their obscenity laws.

A. *The Adversary Hearing*

In an attempt to fix certain ground rules for the two warring American constituencies—those who sell sexy books and those who would regulate what the rest of society may read—the Supreme Court devised the prior adversary hearing. In *Marcus v. Search Warrants*,[120] and *Quantity of Books v. Kansas*,[121] decided back to back, the Supreme Court dictated that before any restraint can be imposed on the distribution of first amendment materials an adversary hearing to determine the legal propriety of the challenged work must be conducted before seizure. This principle is deeply woven into the fabric of the first amendment. *Marcus* and *Quantity of Books* have spawned a mass of authority holding that an adversary hearing is a constitutional predicate for the seizure of books or motion picture films.[122]

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[118] Near v. Minnesota, 283 U.S. 697 (1931).
[119] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).
[120] 367 U.S. 717 (1961).
[121] 378 U.S. 205 (1964).
[122] United States v. Alexander, 428 F.2d 1169 (8th Cir. 1970); Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1970); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), *cert denied*, 397 U.S. 920 (1970); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969); Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968); Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967); Mod Amusement Co. v. Murphy, 335 F. Supp. 1267 (S.D.N.Y. 1972), *aff'd*, —— F.2d —— (2d Cir. January 12, 1974); United States v. 50 Magazines 323 F. Supp. 395 (D.R.I. 1971); Jobbor Cinema, Ltd. v. Sedita, 309 F. Supp. 868 (W.D.N.Y. 1970) Morrison v. Wilson, 307 F. Supp. 196 (N.D. Fla. 1969); Entertainment Ventures, Inc. v. Brewer, 306 F. Supp. 802 (M.D. Ala. 1969); Central Agency Inc. v. Brown, 306 F. Supp. 502 (N.D. Ga. 1969); Drive-In Theaters, Inc. v. Huskey, 305 F. Supp. 1232 (W.D.N.C. 1969); Leslie Tobin Imports, Inc. v. Rizzo, 305 F. Supp. 1135 (E.D. Pa. 1969); Carter v. Gautier, 305 F. Supp. 1098 (M.D. Ga. 1969); Gundlach v. Rauhauser, 304 F. Supp. 962 (M.D. Pa. 1969); Delta Books Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969); Sokolic v. Ryan, 304 F. Supp. 213 (S.D. Ga. 1969); Fontaine v. Dial, 303 F. Supp. 436 (W.D. Tex. 1969); Gregory v. DiFloria,
(Continued on next page)

The purpose of an adversary hearing intelligently conducted before the seizure of presumptively protected books or films is manifest. It provides a superior means of deciding the complicated issue of probable cause in an obscenity case where that decision must be made on the basis of a large volume of facts and law. Although the adversary proceeding will not magically eliminate all error, it will reduce substantially the incidence of misjudgment by guarding against the possibility that the magistrate, through a lack of familiarity with materials previously held to be not obscene, will make a hasty or ill-considered decision as to whether the books or films being criminally investigated should be seized.

As a practical matter, the adversary hearing has been used as a means of displaying to the judicial officer similar publications found not obscene in high appellate courts. Once the magistrate is familiar with the material held not obscene by other respectable courts, he is in a much better position to decide whether or not the warrant should issue. When adversary hearings are ignored by the state, magistrates very often issue warrants for the seizure of books previously determined to be not obscene.[123]

Police abuse in this area has been rampant. Often unnoticed by courts is the high incidence of police seizures and the inexcusable impounding of books for long periods of time. More often than not these materials are eventually returned to the distributor or are found not obscene.[124]

(Footnote continued from preceding page)
298 F. Supp. 1360 (W.D.N.Y. 1969); Whilhelm v. Turner, 298 F. Supp. 1335 (S.D. Iowa 1969); City News Center, Inc., v. Carson, 298 F. Supp. 705 (M.D. Fla. 1969); Cambist Films, Inc. v. Illinois, 292 F. Supp. 185 (N.D. Ill. 1966); Evergreen Review, Inc. v. Kahn, 230 F. Supp. 498 (E.D.N.Y. 1964).

[123] *See* People v. Abronovitz, 310 N.Y.S.2d 698 (Monroe Co. Ct. 1970), where it was discovered after the seizure that three of the publications had been previously adjudicated not obscene in other courts.

[124] People v. Loar, No. C-26732 (Orange Co. Super. Ct., Cal.) [22,500 reels of film and 30,000 photographs]; People v. Parker, No. A270-417 (Los Angeles Co. Super. Ct., Dept. 116, Cal., Feb. 1972) [99 reels of film]; Raro, Inc. v. Goodman, No. 72-781 (S.D. Fla., August 15, 1972) [entire inventory of store including 4,000 books and magazines]; For Adults Only Inc. v. State, No. 717412 (Dade Co. Cir. Ct. Fla.) [192 books, 900 magazines, 32 reels of film and 79 newspapers]; People v. Tannahill (Madison Co., Ill., Oct. 1971) [1,500 magazines]; People v. Ward (Peoria City Cir. Ct., Ill., Sept. 1970) [400 magazines]; People v. Smith (Champagne Co. Cir. Ct., Ill., July 1970) [1,000 magazines]; Commonwealth v. Cornette, Nos. 13768-13770 (Campbell Co. Cir. Ct., Ky.) [defendant's entire inventory including business records and cash seized without search warrants on each of three days]; State v. Bryant (Greensboro Super. Ct. & Dist. Ct., N.C.) [4,000 magazines and reels of film]; State v. Johnson, No. 10451 (Franklin Co.
(Continued on next page)

It bears repeating that these "search and destroy" missions conducted by the police, which overrun the borders of the first amendment, are a serious threat to a free society. All that guards the frontiers of this important amendment against such assaults is the adversary hearing which must be surmounted by these hostile forces before free expression can be suppressed by the state.

These ill-considered and unauthorized seizures have also inflamed federal-state relations since litigants must often resort to federal courts in order to enforce their constitutional rights under § 1983 of Title 42.[125] It was against this legal backdrop that the Supreme Court was called upon to decide *Heller v. New York.*[126]

B. *Heller v. New York: The Blue Movie*

In 1968 Andy Warhol produced a motion picture called *The Blue Movie.*[127] The film was unique, to say the least, in that it contained no credits, no formal ending, and merely consisted of a man and woman in a small apartment apparently obsessed with trying a strange variety of sexual experiments.

Two New York City police officers observed the film being shown in the Garrick Theater on Bleeker Street in Greenwich Village and subsequently secured a search warrant without an adversary hearing. The film was seized, and a criminal prosecution was launched against the exhibitor, Saul Heller. The trial court summarily rejected the defense contention regarding a prior adversary hearing, and at the moment the seeds of a major constitutional controversy became deeply embedded in the case.

(Footnote continued from preceding page)
Mun. Ct., Ohio) [1,441 books and magazines]; State v. Barnett, Nos. 831, 1209, 1210 (Hamilton Co. Mun. Ct., Ohio) [54 magazines, 8 reels of film and 8 projectors]; State v. Sooner State News Agency, No. CRF 71-1957 (Tulsa Co. Dist. Ct., Okla) [$18,000 worth of books and magazines]; State *ex rel.* Keely v. Spracker, No. 380-311 (Mil. Co. Cir. Ct., Wis.) [500 paperback books, 2,000 magazines and 15 reels of film]; State *ex rel.* Nemoc v. Staffens, No. 380-118 (Mil. Co., Wis.); and *In re* Search Warrant for Best Buys Co., No. 42-2-A (LaCrosse Co., Wis.) [500 books, 1,000 magazines and 100 reels of film]. *Cf.* Heller v. New York, 413 U.S. 483 (1973).

[125] Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Tyrone Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969); Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968); Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967). *Cf.* Miller v. California, 413 U.S. 15 (1973).

[126] 413 U.S. 483 (1973).

[127] The film's original title was to be a four-letter word commonly used to describe human copulation. However, eventually the name *The Blue Movie* was substituted, presumably to make the film's advertising more socially acceptable.

The trial court found the film obscene, and the appellate term affirmed the defendant's conviction.[128] The New York Court of Appeals, obviously offended by the film, concluded that, under the circumstances of this case, no adversary hearing was necessary.[129]

The United States Supreme Court decided that the procedures used in seizing Heller's film were constitutionally adequate since only a single film was confiscated for evidentiary purposes. Thus, under the narrow circumstances of this case, the Court concluded that no adversary hearing was necessary. The Court emphasized:

> If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issues in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible.[130]

Nevertheless, the Court was careful to point out:

> In this case, of course, the film was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence.* There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself "become a form of censorship," even making the doubtful assumption that no other copies of the film existed.[131]

Significantly, the Supreme Court galvanized its earlier ruling governing massive seizures originally announced in the landmark case of *Quantity of Books* and *Marcus.* The Court, striking anvil blows, proclaimed:

> Those cases [*Quantity of Books and Marcus*] concerned the seizure of large quantities of books for the sole purpose of their destruction, and this Court held that, in those circum-

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[128] The Honorable William E. Ringel, presiding justice, Honorable Bernard Moldow and Honorable Morton Tolleris of the Criminal Court of the City of New York. The decision of the trial court is unreported.

[129] People v. Heller, 277 N.E.2d 651, 327 N.Y.S.2d 628 (1971). Chief Judge Fuld and Judge Gibson, both now retired, dissented.

[130] 413 U.S. at 489.

[131] Id. at 487. (Emphasis in original).

> stances, a prior *judicial* determination of obscenity in an adversary proceeding was required to avoid "danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books." *Quantity of Copies of Books v. Kansas, supra,* 378 U.S. at 213, 84 S. Ct. at 1727 (1964). *We do not disturb this holding.* Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of *Quantity of Copies of Books* and *Marcus* are fully met. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[132]

Thus, the Court in *Heller* extended the life expectancy of the adversary hearing rule relative to permanent restraints. Under *Heller,* the decision whether or not an adversary hearing must precede a police seizure of books or films depends directly upon the purpose of the taking. For instance, when the state seeks to prosecute a person criminally for the distribution of obscene materials, it may make a limited seizure of the challenged matter for evidentiary purposes without a prior adversary hearing. Under those circumstances there is a minimal interference with the distribution of the questioned work to the public; the determination of obscenity can await either a post-seizure hearing or the trial itself.[133]

If the state's objective is to destroy all of a distributor's films, however, or to enjoin their distribution, thereby totally abridging the given work's circulation, a pre-seizure determination of obscenity is constitutionally required. This well-defined principle is reinforced by another statement in *Heller*:

> But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film.[134]

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[132] *Id.* at 488. (Emphasis added).

[133] For that matter, the Second Circuit Court of Appeals, using great foresight, anticipated the coming of this rule in Overstock Book Co. v. Barry, 436 F.2d 1289 (2d Cir. 1970) and United States v. Wilde, 422 F.2d 34 (2d Cir. 1969).

[134] 413 U.S. at 488-89.

When the state or federal governments seeks to stop completely the showing of a film or the distribution of books, whether it be for a few hours or a few days, such a paralyzing restraint must be preceded by an adversary hearing under *Heller*. The Supreme Court's rule requiring a prior adversary hearing under those circumstances has never been relaxed; to the contarary, the validity of that rule has been strengthened by *Heller*. It would be a serious insult to the scholarship of the United States Supreme Court to suggest that the showing of a film could completely and permanently be interrupted without an adversary hearing. The Supreme Court's continued preoccupation with avoiding total restraints of any kind is reflected in the following language from *Heller*:

> . . . on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned.[135]

Compliance with the constitutional requirement of an adversary hearing imposes no real burden on the state because it in no way interferes with the criminal prosecution. On the other hand, if the state promptly proceeds with an adversary determination and a court concludes the materials are obscene, then their further distribution may be properly enjoined. An even-handed application of this reasonable rule will stop police from terrorizing book distributors by the taking of all of their merchandise and thus imposing upon them a Carthaginian peace. At the same time it will allow quixotic prosecutors to continue to joust at this country's ever-turning windmill of sexual materials thought by them to be socially unacceptable.

C. *Roaden v. Kentucky*[136]

In Pulaski County, Kentucky, a sheriff watched the film *Cindy and Donna* at a local drive-in theater. After he finished viewing the film, he arrested the theater manager for exhibiting an obscene motion picture in violation of Kentucky's obscenity law. The arrest was based solely on the sheriff's observation of the film with-

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[135] *Id.* at 489.
[136] 413 U.S. 496 (1973).

out judicial investigation of the issue of obscenity. The case was successfully prosecuted through the Kentucky courts and eventually reached the docket of the United States Supreme Court.

The Court, following its own precedent in *Lee Art Theater v. Virginia*,[137] distinguished the seizure of guns or stolen goods, as instruments of crime incidental to an arrest, from first amendment materials. It declared:

> Seizing a film, then being exhibited to the general public, presents essentially the same restraint on expression as the seizure of all books in a bookstore. Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in light of the values of freedom of expression.[138]

Thus, under *Roaden* a police officer may not seize, without a warrant incidental to an arrest, any first amendment materials. A prior judicial determination of obscenity is a necessary prerequisite to such a seizure.

Finally, in *Alexandria v. Virginia*,[139] the Court in a per curiam opinion held that a jury trial is not constitutionally required in a state civil obscenity forfeiture proceeding. This decision conforms to the prevailing practice in most jurisdictions, although very little has ever been written on it.

In asserting the damage done to the first amendment by the June 21st decisions, it appears that the procedural province emerged with fewer casualties. The greatest losses were suffered in the substantive sectors. The adversary hearing survived this deluge and was only incapacitated to the limited extent of seizures

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[137] 392 U.S. 636 (1968).
[138] 413 U.S. at 501.
[139] 413 U.S. 836 (1973).

for evidentiary purposes. We can expect that the seizure of first amendment materials will continue to constitute a constitutional zone carefully patrolled by the Supreme Court.

XIII. CONCLUSION

The recent Supreme Court obscenity decisions were deeply disappointing to those committed to a legal philosophy favoring greater freedom in what the American people may read and see. In deciding these cases, the Court has undeniably sown dragon's teeth in the once fertile soil of the first amendment. A likely result is that prosecutions will spring up that are bound to strangle many worthwhile films and books. Certainly Georgia's successful prosecution of the critically acclaimed film *Carnal Knowledge* is foreboding.[140]

However, we must never lose hope that the day will come in this country when the witchcraft of pornography will no longer be feared. For obscenity breeds and multiplies in the dark crevices of a frightened society preoccupied with a sense of self-censorship. Once pornography is exposed to the strong sunlight of a completely free and uninhibited people its appeal will surely diminish. And if that assumption proves to be wrong, then we must live with the level and variety of tastes which the marketplace theory of the first amendment encourages and protects.

Those who believe that this country's new breed of writers and film-makers should have their mouths washed out with soap for using four-letter words as shock weapons in their war on social complacency must remember that no one is compelled either to read or see what is repulsive to him. If the law suppressed that which sizable minorities in our society disliked, our cultural store would be sparsely stocked.

The prevalence in our society today of blue movies, smut books, peep shows, underground newspapers and live sex shows is distressing to many, but this phenomenon apparently proves that a nation gets the kind of art and entertainment it wants and

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[140] Publishers Weekly, July 23, 1973, at 48, col. 2. *Paper Moon* also found obscene in Albany, Georgia—N.Y. Times, August 21, 1973, at 38; the criminal prosecution of *Last Tango in Paris* was threatened in Albany, New York, by District Attorney Arnold Proskin; *The Devil in Miss Jones* was found obscene in Richmond, Virginia by a state court—Variety, August 23, 1973, at 7; to name only a few.

is willing to pay for. *The President's Commission on Obscenity and Pornography,* produced by the largest task force of social scientists ever assembled to study the influence of obscenity on people, concluded that hard-core pornography does not cause an increase in sexual crimes or alter the direction of sexual desires.[141] It is regrettable that many of our political leaders have disavowed the findings of this remarkable study merely because the conclusions it reached were unpopular.

The control of obscenity must be left to the self-regulating forces of the public's taste. Gresham's law has never prevailed in the world of entertainment; that is, the bad does not drive out the good. More importantly, the choice of what books people will read or what films they will see for their own amusement, education or enlightenment must be left to them and not to the government. The right to read and see what we choose must today include every book, film, magazine and newspaper, or in the long-run it may include none.

Under a democratic system, it is imperative that all new and unconventional ideas, no matter how offensive, be heard in order that we may discover the few that will be truly enlightening. History has taught us that the main restraining force on official misconduct is a free and independent press, which, of course, includes books, films, and underground newspapers. The exposure of the dreadful Watergate episode, which has convulsed this nation and drenched the White House in shame, is but one dramatic example. Although the uncovering of political espionage affects a wider range of public interest, the social commentaries evident in *Last Tango in Paris* and *The Love Machine* are also of value to some of us. Consequently, those who may be said to dwell on the dark side of the first amendment, selling so-called "dirty" books and making second-rate movies, must be protected if first-rate books and films are to remain safe. It is not for public officials to cleanse public debate or to act as arbiters of taste. The currency of contemporary thought must include dissent, rebellion, revolution, hedonism, libertinism, and anti-authoritarianism if our constitutional heritage of freedom is to survive. When our government posts guards among us to watch

141 PRESIDENT'S COMMISSION ON OBSCENITY AND PORNOGRAPHY, TASK FORCE REPORT 25-27 (1970).

over our morals, we must then ask ourselves the question put to the Romans by Juvenal 2,000 years ago—"But who will guard the guards themselves?"[142]

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[142] Satire VI, 347.