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Obscenity Law in Ohio

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I. INTRODUCTION

OBSCENITY has always been a nebulous word, meaning different things to different people at different time periods; yet, the legal definition of obscenity has not changed as much as one might imagine. Challenges to the standards enunciated by the courts have been made over the years, but the law has been somewhat slow in adapting its definition of obscenity to the time period in which it is used. One's morals do change with the times. What is allowed to be printed in literature, displayed on film, and even depicted on stage today is quite different from what was tolerated a short, thirty years ago. Whether this change is good or bad remains to be seen.

State and local obscenity statutes are in force in one form or another throughout the United States. At the same time in virtually every city of any size one need only consult the local newspaper to get a listing of the theatres and show times for viewing "hard core," sexually explicit, adult films. If seeing it on film isn't enough, then one can always travel to Times Square, (the heart of Broadway), in New York City and see a live sex show on stage.

The Constitution of the United States expressly provides that Congress shall make no law which abridges the freedom of speech or of the press.[1] Obscenity is one form of expression and state obscenity statutes do try to put some restraint on this type of expression. Any kind of restraint on expression has always been given very careful review by the Supreme Court. Individual states have the right to put some control on "obscene publications" but their power is guided by major Supreme Court decisions in this area. States have the power to virtually allow anything to be shown within their territory through enactment of very liberal obscenity statutes as well as in their enforcement. Again, one need only look to see what is being tolerated in the Times Square area of New York City or the "Combat Zone" of Boston versus what is being shown in Cincinnati, Ohio to understand the point. (It is interesting to note, however, that there exists right across the river from Cincinnati in neighboring Kentucky a prolific number of adult bookstores and movie theaters.)

The press informs the public that it is next to impossible to extinguish this kind of evil for a multitude of reasons.

But this result is not surprising as it is always difficult to prohibit anything which a sizeable minority of the population desires. There is very little to show for the huge amount of money spent in trying to stamp out obscenity. Perhaps, as a result, it is time for public officials to re-evaluate their goals and policies in this area.

[1] U.S. CONST. amend. I.

Ohio's new obscenity statutes[2] enacted in 1972 and made effective on January 1, 1974 are interesting to examine in light of recent Supreme Court holdings. The changes made in Ohio's obscenity statutes over the years reflect the Supreme Court's guidelines in varying degrees. Before looking at some of these recent statutes, as well as the present one in effect today, it is necessary to review the major Supreme Court decisions which have set these guidelines.

II. The Legal Definition of Obscenity Before The Roth Decision

Regina v. Hicklin,[3] an English case decided in 1868 provided the first legal definition of obscenity used by states in this country. The pamphlet under scrutiny by the Queen's Bench in *Regina* consisted of a series of writings by theologians on the doctrine of the Romish Church. Apparently only half of the book was alleged obscene. The test of obscenity as determined by the Queen's Bench was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences."[4] Although the Court found the motives of the defendant innocent regarding the distribution and sale of the book, since he distributed them solely for exposing what he considered to be the wrongs of the Romish Church, the justices' order to destroy the publication was upheld by the Queen's Bench. Defendant's innocent motives would not justify or excuse his obscene publications. Parts of the *Hicklin* test can definitely be found in early Ohio obscenity law.

United States v. Bebout,[5] decided in 1886 was one of the first published Ohio decisions which formulated a test to determine the obscenity of a publication. In *Bebout*, defendants were indicted under the then existing federal obscenity statute[6] for unlawfully and knowingly depositing in the mails an obscene paper containing obscene words and illustrations. In charging the jury, Justice Welker attempted to define an obscene publication. According to Welker the word "obscene" as appearing in the statute was to be given its common meaning as defined by a dictionary.[7] The test to be applied to determine whether a publication is obscene within the meaning of the statute "is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences. . . ."[8] This is the identical test which Lord Cockburn proclaimed in the *Regina* decision. Thus, the early statutes tended to reflect a general concern as

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[2] Ohio Rev. Code Ann. §§ 2907.01 - 2907.32 (Page 1973).
[3] L.R. 3 Q.B. 360 (1868).
[4] *Id.* at 369.
[5] United States v. Bebout, 28 F. 522 (N.D. Ohio 1886).
[6] Rev. St. U.S. § 3893.
[7] 28 F. at 524.
[8] *Id.* at 524.

to the effect material of this nature would have on minors and those easily influenced.

State v. Lerner,[9] decided in 1948, was an important decision regarding obscenity for its time. In this case the defendant, owner of a bookstore in Cincinnati, was indicted for offering for sale a magazine published by the American Sunbathing Association, *Sunshine and Health,* and a series of twelve photographs of a female strip tease act. The statute under which the defendant was charged, provides in part:

> Whoever knowingly sells, lends, . . . or publishes . . . an obsence, lewd or lascivious book, magazine . . . motion picture film or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, . . . photographs . . . or advertises any of them for sale, . . . or manufacturers, draws, prints, or makes such articles or things, or sells, gives away or shows to a minor, a book, pamphlet, magazine, newspaper . . . devoted to publication . . . of criminal news, police reports, or accounts of criminal deeds, lust or crime, or exhibits upon a street or highway or in a place which may be within view of a minor, any of such books . . . shall be fined . . . .[10]

It was disclosed in the *Lerner* opinion that a couple of changes were made to the statute in 1943 when it was re-enacted. One of those changes was the addition of the clause "or book, pamphlet, paper, magazine not wholly obscene but containing lewed or lascivious articles . . ."[11] as quoted above. The statute then further defined not wholly obscene as being "any, some obscenity, less than the whole . . . an obscene verse, passage, photograph, any obscene verse, passage, photograph, any obscene thing in a book . . . ."[12] In other words, according to the revisions made to this statute in 1943, one obscene passage in a book could now cause the entire publication to be adjudged obscene and banned as a result. The standard used in this statute was known as the "any obscenity" test, (any publication containing any obscene drawing or picture). The "any obscenity" test, re-enacted in Ohio by way of amendment in 1943, replaced the "wholly obscene" test which had been previously used in the statute. Just as the name indicates, under the "wholly obscene" test a work was judged by looking at the entire article as a whole rather than by simply referring to a particular section.

Although section 13035, G.C.O. is much more specific and inclusive one can't help but notice the similarities between this statute and what was proclaimed in *Regina.* Again, section 13035, G.C.O. reflected a general concern as to what effect certain kinds of published material would have on minors. The "any obscenity" test can also be traced back to the days of *Regina.*

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[9] 51 Ohio L. Abs. 321, 81 N.E.2d 282 (1948).

[10] G.C.O. § 3035 (Baldwin 1943).

[11] 51 Ohio L. Abs. at 324, 81 N.E.2d at 284.

[12] *Id.* at 324, 81 N.E.2d at 284.

In that early English case,[13] only half of the pamphlet in question was considered obscene, but, this was sufficient by itself to judge the entire writing obscene and banned as a result.

The Ohio court in *Lerner* concluded for the first time in Ohio that "an obscene book must be held to be one 'wholly obscene' and that necessarily in testing a literary work for 'obscenity' it must be viewed in its entirety and only when and if the 'obscene' contents constitute the dominant feature or effect does it fall within the forbidden class."[14] The court in *Lerner* recognized that as presently worded, strict enforcement of the statute would prohibit the publication of any newspaper![15] The fact that the Ohio statute used a similar test for judging obscenity as was used in *Regina* in 1863 was quite disturbing to Judge Struble:

> How fundamentally unsound it is for example in Ohio for courts to enforce the moral concepts of the people of England of what obscenity in literature was in mid-Victorian times under a statute enacted in 1943 by the people of Ohio for the preservation of their own moral concepts of what is "obscene literature."[16]

The Court found the "any obscenity test" to be an invalid restraint on the freedom of the press.

The defendant in *Lerner* was found not guilty in the sale and possession of his obscene publications. The magazine alleged obscene contained a series of nude pictures of men and women in nudist camps with captions emphasizing the good health of this alternative lifestyle. The court concluded that nudity by itself was not obscene but would depend on how it is displayed instead. The series of twelve photographs of a woman disrobing was not considered obscene, since the Court found nothing distasteful in the manner in which she disrobed in the photographs.

The next significant case which had a major impact on Ohio's obscenity law was the Supreme Court decision in *Roth v. United States.*[17]

III. ROTH v. UNITED STATES

Roth v. United States,[18] decided in 1957, is the most important decision rendered on the issue of obscenity and its holding called for a revision of practically every state obscenity statute in the country. Roth was engaged in the publication and sale of obscene literature. He was indicted and found guilty of mailing obscene advertisements in violation of a federal obscenity statute.[19]

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[13] L.R. 3 Q.B. at 360.
[14] 51 Ohio L. Abs. at 330, 81 N.E.2d at 287.
[15] *Id.* at 330, 81 N.E.2d at 287.
[16] *Id.* at 334, 81 N.E.2d at 290.
[17] 354 U.S. 476 (1957).
[18] *Id.*
[19] Act of June 25, 1948, ch. 645, 62 Stat. 768 (Current version at 18 U.S.C. § 1461 (1977)).

The Court's historical analysis of obscenity and the first amendment resulted in conclusion that obscenity was not protected under the Constitution. The Court defined obscene material as "material which deals with sex in a manner appealing to prurient interest." The Court recognized an important distinction between the portrayal of sex in art and scientific works (which is given first amendment protection) and the portrayal of sex in obscene literature which is without protection.[20]

The Court further announced that in judging whether a book is obscene, it must be viewed as a whole unit rather than simply extracting a section from it and judging the entire piece of literature obscene in light of that one particular section.[21] Just as the district court in *Lerner* outlawed the "any obscenity test," the Supreme Court in *Roth* concluded that it would be unconstitutional to judge material as obscene based upon an isolated excerpt from the work.[22]

The obscenity test advanced in *Roth* is the following:

> [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[23]

The test which was specifically rejected by the Court as being too restrictive was the standard found in *Regina*.[24] This old English test used by some courts in one form or another for over eighty-nine years was finally put to rest. It is significant that under the *Roth* test it is the average person applying contemporary community standards who is to judge the impact of the material. Older obscenity statutes judged material in light of the effect it might have on those easily susceptible to influence or minors.

In *Roth,* the Court held that the fact that these statutes used words such as "obscene" or "indecent" without further defining what kind of conduct would come under those terms did not render such a statute unconstitutional by itself. "These words, applied according to the proper standard, for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark boundaries sufficient to judge the law."[25] The statute under which Roth was charged was upheld and the judgment against him was affirmed. Thus, the argument that the statutes were unconstitutional because they did not provide a reasonably ascertainable standard of guilt was rejected. Whether the *Roth* test would result in severe censorship remained to be seen. That fear was put to rest in a series of *per curiam* decisions reversing lower court obscenity convictions on the

[20] 354 U.S. at 487.
[21] *Id.* at 489.
[22] *Id.*
[23] *Id.*
[24] L.R. 3 Q.B. at 360.
[25] 354 U.S. at 491.

basis of the *Roth* decision.[26] The *Roth* test was more clearly defined in subsequent decisions.

In *Smith v. California,*[27] the owner of a book store was convicted under a city ordinance which made it unlawful "for any person to have in his possession any obscene or indecent writing. [or] book . . . in any place of business where . . . books . . . are sold or kept for sale."[28] The statute as construed by the Supreme Court appeared to impose strict liability on simple possession of an obscene publication without any proof of scienter. The Court reversed the conviction on the grounds that a statute which imposes strict criminal liability on the bookseller without any proof of scienter would inhibit constitutionally protected expression and as a result was unconstitutional.[29] The Court stated that:

> [I]f the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.[30]

The Court did make it clear that proof of knowledge of the contents of the book could be satisfied in a prosecution by circumstantial evidence. In other words, the State would not have to prove that they actually saw the bookseller peruse the book in question to meet the mens rea requirement which this court was now imposing in an obscenity trial.[31]

Jacobellis v. Ohio[32] decided by the Supreme Court in 1964 cleared up the problem of what was meant by contemporary community standards in *Roth.* Nico Jacobellis, a manager of a theater in Cleveland was convicted for possessing and exhibiting an obscene film.[33] The judgment against him was affirmed in the court of appeals and in the Ohio Supreme Court. The United States Supreme Court reversed the conviction holding that the French film called "Les Amants" was not obscene. In applying the standard set in *Roth,* the Court firmly held that only a national community standard could be employed. The reason as stated by Justice Brennan:

> A standard based on a particular local community would have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be

[26] *See* Times Film Corp. v. City of Chicago, 244 F.2d 432 (7th Cir. 1957), *rev'd,* 355 U.S. 35. One, Inc. v. Olesen, 241 F.2d 772 (9th Cir. 1957), *rev'd,* 355 U.S. 371 (1958); Sunshine Book Co. v. Summerfield, 249 F.2d 114 (D.C. Cir. 1957), *rev'd,* 355 U.S. 372 (1958); and Mounce v. United States, 247 F.2d 148 (9th Cir. 1957), *rev'd,* 355 U.S. 180 (1958).

[27] 361 U.S. 147 (1959).

[28] *Id.* at 148.

[29] *Id.* at 155.

[30] *Id.* at 153.

[31] *Id.* at 154.

[32] 378 U.S. 184 (1964).

[33] OHIO REV. CODE ANN. § 2905.34 (repealed 1974).

> considered offensive to prevailing community standards of decency . . . . Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places.[34]

The Supreme Court during the *Roth* era was concerned with safeguarding constitutionality protected expression which might be indirectly inhibited by suppression of obscene material. This concern is not found in some of the more recent Supreme Court decisions decided by the Burger Court.

On March 21, 1966 the Supreme Court decided three major cases in the area of obscenity: *Memoirs v. Massachusetts,*[35] *Ginzburg v. United States,*[36] *and Mishkin v. New York.*[37] In *Memoirs,*[38] the Supreme Court made the *Roth* test more specific by requiring three elements to coalesce before a work could be found obscene. In this case a suit was brought by the Attorney General of Massachusetts to have the book *Fanny Hill*[39] declared obscene. The trial judge entered a decree which adjudged the book obscene and the Massachusetts Supreme Judicial Court affirmed on appeal. In applying the *Roth* test, the Court held that three elements must be established:

> (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.[40] (emphasis added)

The lower court decision was reversed because the Supreme Judicial Court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene."[41] Here there was some evidence presented which indicated that the book did have some social value and the judgment was reversed as a result.

In *Ginzburg,*[42] defendants, an individual and three corporations controlled by him were charged with violating the federal obscenity statute[43]

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[34] 378 U.S. at 193.
[35] 383 U.S. 413 (1966).
[36] 383 U.S. 463 (1966).
[37] 383 U.S. 502 (1966).
[38] 383 U.S. at 413.
[39] J. CLELAND, FANNY HILL (1750).
[40] 383 U.S. at 418.
[41] *Id.* at 419.
[42] 383 U.S. at 463.
[43] 18 U.S.C. § 1461.

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by using the mails to distribute obscene literature. The Supreme Court affirmed the convictions in this case. In determining whether the publications were obscene, the Court allowed the use of evidence to show the basis upon which the publications were traded in the market place, the fact that the editors emphasized the sexually provocative aspects of the publication in their advertising campaign, and other circumstantial evidence concerning the mode of distribution. The Court held that this kind of evidence was probative in determining whether a publication was obscene under *Roth*.[44] In other words, a questionable publication might be adjudged obscene on the basis of the context in which it is advertised and promoted and to whom the advertising and promoting is directed.

Defendant in *Mishkin*,[45] was charged and convicted under a New York obscenity statute for publishing obscene books, possessing the books with intent to sell them, and hiring others to write them. The New York statute[46] under which defendant was convicted was stricter in its application than the standard set by *Roth*. The New York obscenity statute was directed towards prohibiting for sale only literature that would come under the class of hard core pornography. The Court held that since "the definition of obscenity is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of section 1141 below."[47] The argument was also made in this case that some of the literature was directed towards deviant sexual groups and that it would not appeal to the prurient interest of the average person as set forth in *Roth*. The Court rejected this argument and held that the requirements of *Roth* would be met if the material appealed to the prurient interests of a member of that deviant sexual group.

Redrup v. New York,[48] was a very significant decision reached by the Supreme Court in 1967 and it was subsequently used to reverse over thirty-five obscenity convictions in the following years.[49] The defendant in *Redrup* was a clerk at a New York City newsstand. In the racks at the newsstand were two books alleged to be obscene. These books were sold by the defendant to a plainclothes patrolman who had requested the purchase after seeing them in the racks. Defendant was convicted of violating a state penal law[50] and the conviction was affirmed on appeal. In a *per curiam* opinion, the Supreme Court reversed the conviction. The Court took the following into consideration in making its decision:

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[44] 383 U.S. at 474.

[45] 383 U.S. at 502.

[46] N.Y. PENAL LAW § 1141 (McKinney Supp. 1966) (repealed 1967).

[47] 383 U.S. at 508.

[48] 386 U.S. 767 (1967).

[49] Fahringer and Brown, *The Rise and Fall of Roth - A Critique of the Recent Supreme Court Obscenity Decisions*, 10 CRIM. L. BULL. 785, 789 (1974). (Hereinafter referred to as Fahringer).

[50] N.Y. PENAL LAW § 1141(1).

> In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*.[51]

The Court held that the distribution of these publications were constitutionally protected by the first and fourteenth amendments. This case seemed to suggest that a book store could sell obscene books as long as it did not actively solicit their sale, sell them to any minors, or display them in such a manner that an unwilling individual could not avoid exposure to them.

In a landmark case decided in 1969, the Supreme Court took its final step towards offering some protection to obscene material by reversing a conviction for mere private possession. In *Stanley v. Georgia*,[52] defendant's home was searched under an authorized search warrant as a result of defendant's alleged involvement in bookmaking activities. While searching his house, authorities found some film. Upon viewing the film at the house, defendant was arrested and subsequently convicted for having in his possession obscene material in violation of a Georgia obscenity statute.[53]

The case was appealed to the Supreme Court where the conviction was reversed. The Court held "that the mere private possession of obscene matter cannot constitutionally be made a crime."[54] The Court distinguished the *Roth* holding that obscenity was not constitutionally protected on the basis that *Roth* involved the regulation of commercial distribution of obscene matter whereas in *Stanley* the state was trying to regulate mere private possession. The Court strongly felt that the state had no right to tell any one what they can read or view in the privacy of their home. To the Court to hold otherwise would violate one's fundamental right to be free from unwanted governmental intrusions.[55]

IV. THE RETRACTION FROM STANLEY V. GEORGIA

The Court retracted from *Stanley* in 1971 in *United States v. Reidel*.[56] Here defendant's indictment for mailing an obscene book to those who had responded to his newspaper advertisement was dismissed by the district court. The argument was made that since *Stanley* gave the right to private possession of obscene material, then someone else ought to have the right

[51] 386 U.S. at 770.
[52] 394 U.S. 557 (1969).
[53] GA. CODE ANN. § 26-6301 (Supp. 1968).
[54] 394 U.S. at 559.
[55] *Id.* at 564.
[56] 402 U.S. 351 (1971).

to deliver the material to him.[57] The Supreme Court disagreed and ordered the reversal of the district court judgment claiming that *Roth* had placed the distribution of obscenity outside the realm of constitutional protection.[58]

The *Stanley* decision was even more narrowly construed in *United States v. Thirty-Seven Photographs*[59] decided on the same day as the *Reidal* case. Here the defendant had in his luggage thirty-seven pornographic pictures and upon his return to this country from Europe customs agents discovered them. The statute which defendant was charged with violating barred the importation of obscenity for private use as well as for commercial distribution.[60] The Court held that the right to private possession of obscenity in one's home established by *Stanley* did not extend to possession of obscene materials at a port of entry.[61] *"Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home."[62]

The Court used *Reidal* and *Thirty-Seven Photographs* to limit *Stanley's* holding to the precise facts of that particular case. It certainly was an abrupt change in the direction which prior case law had taken. This new attitude towards obscenity reflected a new change in the Court's composition. Richard Nixon, elected to office in 1969, during his term was able to appoint four new justices to the Supreme Court: Burger, Blackmun, Powell, and Rehnquist.[63] At least in the area of obscenity the new attitude of the Court was one of conservatism. The Burger Court decided that *Roth* and its progeny had its day and should be replaced with a new test. The new replacement came in June, 1973, with the announced opinions of *Miller v. California*[64] and four other major cases dealing with obscenity: *Paris Adult Theatre v. Slaton*,[65] *United States v. 12 200-Ft. Reels of Super 8mm Film*,[66] *United States v. Orito*,[67] *and Kaplan v. California*.[68]

V. THE MILLER DECISION AND ITS PROGENY

In *Miller v. California*[69] appellant was convicted for knowingly distributing obscene material.[70] Appellant had conducted a large mailing cam-

[57] *Id.* at 354.
[58] *Id.* at 355.
[59] 402 U.S. 363 (1971).
[60] 19 U.S.C. § 1305(a) (1977).
[61] 402 U.S. at 376.
[62] *Id.*
[63] Fahinger, *supra* note 49.
[64] 413 U.S. 15 (1972).
[65] 413 U.S. 49 (1973).
[66] 413 U.S. 123 (1973).
[67] 413 U.S. 139 (1973).
[68] 413 U.S. 115 (1973).
[69] 413 U.S. 15 (1972).
[70] CAL. PENAL CODE § 311.2 (a) (West 1970).

paign to advertise the sale of his obscene books. Five of his brochures had been received by a manager of a restaurant who had not specifically requested them. The brochures themselves contained explicit pictures.

The Court rejected the three stage test established in *Memoirs v. Massachusetts*[71] as being essentially unworkable. The Court felt that the burden put on the state to prove that the material be utterly without redeeming social value was virtually impossible to discharge.[72] The Court decided that a more specific standard was needed. The replacement for the *Memoirs* test was set forth in Miller:

> a) whether the average person, applying contemporary community standards would find 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.[73] (citations omitted).

According to *Miller*, every state obscenity statute must now specifically delineate the actual sexual conduct being proscribed. It should be noted that this is a three part test in the conjunctive. The Court explained in the opinion that the test would only restrict hard core pornography. "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."[74] It rejected the *Jacobellis* holding and decided that a local community standard rather than a national one could be used in judging obscenity.[75] "It is neither realistic nor constitutionally sound to read the first amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[76]

In defense of this new test the Court pointed out that there was no evidence that the strict censorship of sexual material during the 19th Century limited serious literary, artistic or scientific works. The Court concluded its argument by drawing an anology between the restriction of pornography and the restriction of heroin. "[C]ivilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine."[77] Likewise, civilized people should not be allowed unregulated access to pornography because it is a derivative of literature. Naturally many state

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[71] 383 U.S. at 413.
[72] 413 U.S. at 21.
[73] *Id.* at 24.
[74] *Id.* at 27.
[75] *Id.* at 31.
[76] *Id.* at 32.
[77] *Id.* at 36.

obscenity statutes were rendered unconstitutional as a result of this decision for lack of specificity of proscribed sexual conduct.[78]

In *Paris Adult Theatre v. Slaton*,[79] petitioner owned two "adult" theaters in Georgia. The Georgia Supreme Court held that the films being shown there were obscene and that their exhibition could be enjoined. The United States Supreme Court vacated the state supreme court decision and remanded the case for further consideration in light of *Miller*. In this decision the Supreme Court concluded that it was not necessary to introduce expert evidence to prove the obscenity of the material when the actual material is placed in evidence.[80] The Court also decided that pornographic films were not given constitutional protection simply because nothing on the outside of the theater was offensive to passers-by or because the theater owner took reasonable precaution in exhibiting the films only to consenting adults. The Court justified its conclusion on the basis of the social interest in order and morality. It also took note of the fact that a recent report indicated that a correlation may exist between obscenity and crime.[81]

In *United States v. 12 200-Ft. Reels of Super 8mm Film*,[82] defendant upon returning to the United States from Mexico had certain films, slides, and photographs taken from him because they were allegedly obscene. The materials in this case were being imported solely for private use unlike the factual situation in the *Thirty-Seven Photographs* case. Once again the Court refused to extend the holding in *Stanley* to this situation and did not give any constitutional protection to the importation of obscene material for private use. In this opinion the Court disclosed its dislike for the Stanley holding by alluding to the fact that the decision would most likely be different if *Stanley* were to be decided by this court today.[83] As Justice Douglas pointed out in his dissent:

> [O]ne's *Stanley* rights could be realized . . . only if one wrote or designed a tract in his attic and printed or processed it in his basement, so as to be able to read it in his study.[84]

Surely this was not the attitude of the Court when it decided *Stanley* in 1969.

Defendant in *United States v. Orito*,[85] was charged with knowingly transporting obscene materials in interstate commerce in violation of a federal statute.[85a] The Court did not extend the constitutionally protected

[78] *See* Fahringer, *supra* note 49, at 789.
[79] 413 U.S. at 49.
[80] *Id.* at 56.
[81] *Id.* at 60, 61.
[82] 413 U.S. at 123.
[83] *Id.* at 128.
[84] *Id.* at 137.
[85] 413 U.S. at 139.
[85a] 18 U.S.C. § 1462 (1970).

right of possessing obscenity in the privacy of one's home found in *Stanley* to possession in an airplane.

> It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral, or economic nature.[86]

The proprietor of an adult bookstore in *Kaplan v. California*,[87] was convicted under a state statute for selling an obscene unillustrated book. The issue presented in this case was whether an unillustrated book by itself could be considered obscene. The Court refused to afford constitutional protection. The fact that minors were precluded from viewing the material had no bearing to the Court on the constitutionality of the statute.

All five of these cases taken together had a major impact on state obscenity statutes with the *Miller* decision providing the actual standard to be used in judging obscenity.

VI. Ohio's Response To Miller v. California

At the time *Miller* and its progeny were decided, Ohio's obscenity statutes were sections 2905.34 and .41. The constitutionality of these statutes in light of *Miller* were upheld in two Ohio Supreme Court cases: *Keating v. Vixen*,[88] and *Sensenbrenner v. Adult Book Store*.[89] In *Vixen*, an injunction was issued by the trial court against the exhibition of the film, "Vixen," which was eventually upheld by the Supreme Court of Ohio after being remanded by the United States Supreme Court for further consideration. The Supreme Court of Ohio in its initial review of the case made the observations that only about half of the film actually dealt with sex and that no genital parts were exposed at all throughout the film.[90] In light of these observations it is obvious that the film could not be considered "hardcore pornography;" yet the injunction was allowed to restrain exhibition and Ohio's obscenity statutes were upheld as comporting to the standards enunciated in *Miller*. However, the Supreme Court in *Miller* expressly ruled that under the new standard being imposed by them, nothing would be suppressed that wouldn't be considered as "hard core pornography."[91] Less than three months after the *Miller* decision a soft core film was restrained by the Supreme Court of Ohio. The United States Supreme Court upon reviewing the initial determination simply remanded it for further consideration. Why

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[86] *Id.* at 144.
[87] 413 U.S. at 115.
[88] 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).
[89] 35 Ohio St. 2d 220, 301 N.E.2d 695 (1973).
[90] 27 Ohio St. 2d 278, 280, 272 N.E.2d 137, 139 (1971).
[91] 413 U.S. at 27.

this decision was not reversed in light of their own holding in *Miller* is not known.

This decision is especially interesting in light of *Jenkins v. Georgia,*[92] decided by the Supreme Court in 1974. In *Jenkins* appellant was convicted of violating Georgia's obscenity statute by exhibiting the "R rated" film, "Carnal Knowledge." Surprisingly enough the Supreme Court reversed the Georgia Supreme Court decision because the film was not hard core pornography.

> Appellant's showing of the film "Carnal Knowledge" is simply not "public portrayal of hard core sexual conduct for its own sake and for the ensuing commercial gain" which we said was punishable in *Miller*. We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendment because it is obscene.[93]

On January 1, 1974 a new series of Ohio obscenity statutes went into effect.[94] These new statutes are very similar to the prior statutes[95] with the exception that the new statutes are more precise in defining what constitutes obscenity. The new statute provides in part:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> (1) Create, reproduce, or publish any obscene material when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard. . . .[96]

Definitions as provided under the Ohio Revised Code include:

> (A) 'Sexual conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex . . . .
>
> (E) Any material or performance is harmful to juveniles, if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:
>
> (1) It tends to appeal to the prurient interest of juveniles;
>
> (2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity; . . .
>
> (5) It makes repeated use of foul language; . . .
>
> (7) It contains a display, description, or representation of criminal

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[92] 418 U.S. 153 (1974).

[93] *Id.* at 161.

[94] OHIO REV. CODE ANN. §§ 2907.01, .37 (Page 1975).

[95] OHIO REV. CODE ANN. §§ 2905.34, .41 (repealed 1974).

[96] OHIO REV. CODE ANN. § 2907.32 (Page 1975).

activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with references to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.[97]

There has been some question as to the constitutionality of this statute in light of *Miller*. To reiterate, the three part test set forth in *Miller* requires: 1) that the average person, applying contemporary community standards must find that the work, taken as a whole appeals to the prurient interest, 2) that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and 3) that the work, taken as a whole lacks serious literary, artistic, political, or scientific value.[98] Looking at the new Ohio obscenity statute in light of *Miller*, it should come as no surprise that its constitutionality has been questioned.

VII. OHIO REVISED CODE SECTION 2907.01 VERSUS THE MILLER STANDARD

The appellant in *State v. Burgun*,[99] (Burgun I), was convicted under section 2907.32(A) for pandering obscenity. Dalene Burgun worked in a news store in Cleveland which sold in the front section of the store magazines such as *Better Homes and Gardens, Flying*, etc., while the back of the store

[97] OHIO REV. CODE ANN. § 2907.01 (Page Supp. 1978).

[98] 413 U.S. at 24.

[99] 49 Ohio App. 2d 112, 359 N.E.2d 1018 (1976).

exhibited sexually oriented material for sale. The back section also contained several coin-operated booths where an individual could view a short, hard core pornographic film. In this case the Court of Appeals had the opportunity to consider the issue of the constitutionality of section 2907.01. Although the Court found the statute as being overbroad on its face because it did not incorporate all three elements of the *Miller* test, it nevertheless upheld its constitutionality on the basis that the trial judge had narrowed the statutory definition of obscenity to comply with the *Miller* requirements in his instructions to the jury.[100] The Court of Appeals cited to *Miller* and other decisions to substantiate their ruling. Indeed, the statement was made in *Miller* that, "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[101]

However, in a subsequent case, *State v. Burgun* (Burgun II) decided in August, 1977[102] the Sixth District Court of Appeals held that it was not necessary to narrowly construe section 2907.01 to comply with *Miller*. Because the United States Supreme Court previously upheld Ohio's former definition of obscenity,[103] the new Ohio obscenity statute would likewise not be considered overbroad or vague. The new obscenity statute[104] differs from the prior statute[105] only in its greater precision regarding the kinds of sexual conduct which could be defined as obscene. Therefore, for purposes of instruction to a jury, it is sufficient that ". . . they need only consider the statutory definition of obscenity, section 2907.01 (F) in determining whether or not material is obscene. . . ."[106] However, another Ohio court one month later did not agree.[107]

Sovereign News Co. v. Falke,[108] was a district court case decided in October, 1977. Sovereign News was a corporation involved in the distribution of adult books, magazines, and films. Much of this case deals with the question of using certain evidence seized during the search of Sovereign's premises in the prosecution. Once again, Plaintiff argued that sections 2907.01 and 2907.32 were unconstitutionally overbroad and vague. The district court in this case agreed with the plaintiff.

The Court began its determination of this issue by providing a short

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[100] *Id.* at 123.
[101] 413 U.S. at 25.
[102] State v. Burgun, Slip. Op. No. 36078 (D. Ohio, filed Aug. 18, 1977).
[103] 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).
[104] OHIO REV. CODE ANN. § 2907.01.
[105] OHIO REV. CODE ANN. § 2905.34.
[106] Burgun, Slip Op. No. 36078.
[107] 448 F. Supp. 306 (N.D. Ohio 1977).
[108] *Id.*

synopsis of the history of freedom of expression. The Court explained that pure expression which includes the printed media, books, and motion pictures, could not be restricted unless the State could prove the following:

> (1) A clear and present danger is presented to society by the pure expression, (2) The individual's interest in having the pure expression allowed is outweighed by the danger presented to society by permitting the conduct; and (3) The government has used the narrowest restriction on pure expression consistent with the furtherance of the governmental interest involved.[109]

Obscenity is not given this protection and the dissemination of such material may be restricted without meeting this "clear and present danger" test. To this court, the issue to be determined was whether sections 2907.01 and 2907.32 prohibit the dissemination of non-obscene material. These Ohio statutes would be considered overbroad if they restrict the dissemination of non-obscene material because they would be restricting pure expression without meeting the three-pronged clear and present danger test.[110] This court came to the conclusion that section 2907.01 restricted constitutionally protected expression in four different instances:

> First: section 2907.01 (F)(1)(2)(3)(4) and (5) fail to incorporate the three-part *Miller* test. The *Miller* test is a conjunctive three-part test, all three parts of which must be satisfied before the material may be found obscene. However, under Ohio revised Code 2907.01 material may be found obscene without the state being required to prove each of the three parts of *Miller* . . . .
>
> Second: section 2907.01(F)(3) unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty, or brutality. It is an express holding of *Miller* that only material depicting or describing sexual conduct may be barred as being obscene . . . .
>
> Third: sections 2907.01(F)(1)(2)(3) and (5) unconstitutionally restrict the display and description of non-active sexual conduct. For example, simple nudity, such as the showing of a female breast or a male buttocks may be considered obscene under sec. 2907.01(F) . . . .
>
> Fourth: section 2907.01(F)(1) does not define with requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose "dominant appeal is to prurient interest" is obscene. The subsection is unconstitutionally overbroad because it does not list the types of sexual conduct to be restricted, and therefore may be applied to the depiction of sexual conduct not subject to restriction.[111]

The court disagreed with the *Burgun* II finding that section 2907.01 is constitutional without a limiting instruction to the jury.

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[109] *Id.* at 391.

[110] *Id.* at 393.

[111] *Id.* at 400.

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> Because this court has found [section] 2907.01 to be overbroad on its face, and that it has not been narrowed to constitutionally permitted parameters by an authoritative state court interpretation, the Court finds Ohio Revised Code sec. 2907.01 and 2907.32 to be overbroad.[112]

The next issue to be decided by the district court in *Sovereign*, was whether the statute should be declared unconstitutional as a result. The Court came to the conclusion that it was unconstitutionally overbroad. Recognizing the fact that some overbroad statutes may be validated by a narrowing construction by the state courts, the court felt that it could not reasonably be done in this instance. Taking into account the fact that the statute goes beyond the mere suppression of obscene material in four places and the fact that the statute impinges on a first amendment right, the court concluded that section 2907.01 was "[s]o substantially overbroad that only radical surgery could save it."[113] Thus, under the principles established in the Supreme Court case, *Erznoznik v. Jacksonville*,[114] the Ohio statute was unconstitutional to this court. In *Erznoznik* the Court held "that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts . . ."[115]

VIII. THE RESPONSE BY THE SUPREME COURT OF OHIO

The Supreme Court of Ohio reviewed the *State v. Burgun*[116] decision and upheld the lower court's determination on the issue of the constitutionality of section 2907.01.[117] The court in arriving at its decision again relied on the fact that the United States Supreme Court had already upheld the predecessors of section 2907.01, sections 2905.34 and 2905.35 in two prior decisions: *Sensenbrenner v. Book Store*[118] and *Keating v. Vixen*.[119] However, the Ohio Supreme Court did overrule *Burgun II* and held that the statute was "[n]ot unconstitutionally overbroad nor void for vagueness when read in pari materia with the *Miller* decision. The *Miller* test for defining obscenity is, therefore, incorporated into that statute by an "authoritative" State Court construction specifically sanctioned by *Miller*.[120] This decision was subsequently upheld in *State v. Thomas*.[121]

IX. CONCLUSION

The fact that the Ohio Supreme Court upheld the constitutionality of Ohio's obscenity statute is not surprising in light of the *Sensenbrenner* and

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[112] *Id.* at 402.
[113] *Id.* at 405.
[114] 422 U.S. 205 (1973).
[115] *Id.* at 216 *citing Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965).
[116] 49 Ohio App. 2d at 112, 359 N.E.2d at 1018.
[117] 56 Ohio St. 2d 354, 384 N.E.2d 255 (1978).
[118] 35 Ohio St. 2d at 220, 301 N.E.2d at 695.
[119] 35 Ohio St. 2d at 215, 301 N.E.2d at 880.
[120] State v. Burgun, 56 Ohio St. 2d 354, 358, 384 N.E.2d 255, 261 (1978).
[121] 57 Ohio St. 2d 71, 387 N.E.2d 229 (1979).

Vixen decisions. Section 2907.01 is sufficiently similar to section 2905.34 that in all likelihood the United States Supreme Court would also uphold its constitutionality if ever called upon to decide that question. The real mistake occurred when the Supreme Court remanded the *Sensenbrenner* and *Vixen* cases to the Ohio courts for further consideration instead of reversing the convictions and holding the applicable obscenity statutes unconstitutional in light of *Miller*. *Sovereign News Co.* had clearly pointed out the major problems with the statutes; yet, there has been no response by the Supreme Court regarding any of these issues raised when it has had the chance. There are flagrant violations of the *Miller* standard set forth in section 2907.01, yet it has been given full effect for close to six years. The Supreme Court has refused to act rationally in the area of obscenity reflecting the individual members' personal biases and prejudices.

The United States Supreme Court has failed to truly demonstrate why they or anyone else should have the authority to tell consenting adults what they can see or read. The Court in *Miller* justified its censorship by comparing the distribution of pornography with heroin. But access to heroin has never been given explicit protection in the Constitution. The first amendment gives constitutional protection to free speech and the press. *Roth* carved out a narrow exception within the area of constitutionally protected speech and press by not extending protection to obscenity. Justice Douglas, vigorously dissenting from the majority, did not agree for he saw no such exception written into the first amendment and felt that the Court did not have the right to create one now.[122] To Douglas, the only kind of speech which could be regulated was speech that had "some relation to action which could be penalized by government."[123] The arousal of sexual thoughts has never been the kind of action which could be penalized by the government of this country; therefore it is impermissible to completely prohibit obscenity according to Douglas.

The liberal approach taken by Douglas in *Roth* and in subsequent decisions is completely opposite from the approach taken by the Burger Court. However, the majority in *Roth,* recognizing the importance of protecting fundamental freedoms of speech and press, realized that any exceptions to these constitutional freedoms should be very carefully scrutinized.

> Ceaseless vigilance is the watchword to prevent their (freedom of speech and press) erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.[124]

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[122] 354 U.S. at 509.
[123] *Id.*
[124] *Id.* at 488.

Clearly, Ohio's obscenity statutes leave the door ajar but now the Supreme Court is unwilling to close it.

All the same, pornography is present in most large Ohio cities as well as in other cities in other states. It wouldn't exist if people didn't desire it. Money, perhaps, would be better spent controlling it rather than trying to oppress it. What has happened in Boston is noteworthy. There a specific section of the city called the "Combat Zone" has been zoned for commercial distribution of obscenity. In other words adult bookstores, sex shops, and movie theaters are kept and tolerated within this one area. This enables the public to avoid exposure to these kinds of establishments if they so desire by avoiding that particular section of the city where it is tolerated while providing an access to this material to those who wish to purchase it. It is an interesting solution to the problems associated with the distribution of obscenity and should be given careful thought and consideration by other cities.

Since the United States Supreme Court is currently unwilling to reform unconstitutional state obscenity statutes, the burden of protecting the fundamental freedoms of speech and of the press now falls on the individual state courts and legislators. These freedoms must be protected for they are the essence of a free society.

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