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## The Law of Obscenity in Comic Books

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## THE LAW OF OBSCENITY IN COMIC BOOKS

*Rachel Silverstein*\*

### I. INTRODUCTION

“I know it when I see it” are the infamous words written by Justice Potter Stewart regarding how to spot obscenity issues.<sup>1</sup> From a legal standpoint, the courts’ interpretations of obscenity have been overly broad for decades.<sup>2</sup> In many state statutes, the word “prurient” often goes hand-in-hand with the word “obscene.” Prurient means “exhibiting, or arousing inappropriate, inordinate, or unusual sexual desire.”<sup>3</sup> While the definition of “prurient” is generally understood to mean an extreme appeal to sexual interests, courts have attempted to define obscenity at common law with varying amounts of success; even the federal obscenity statute<sup>4</sup> does not directly define “obscenity,” and obscenity laws can vary drastically from state to state.<sup>5</sup>

Since there is no clear definition of the word “obscene,” courts have struggled to separate obscenity from hardcore pornography.<sup>6</sup> Courts have also failed to differentiate between art and literature and pornography.<sup>7</sup> This distinction has an important effect on obscenity law because it raises the issue of whether comic books, especially those

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<sup>1</sup> *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964).

<sup>2</sup> *See, e.g.*, *Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

<sup>3</sup> *Prurient*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>4</sup> 18 U.S.C. § 1460.

<sup>5</sup> *Infra* section II.

<sup>6</sup> *See, e.g.*, *United States v. Wild*, 422 F.2d 34, 36 (2d Cir. 1969) (“Simply stated, hard core pornography . . . can and does speak for itself.”).

<sup>7</sup> *See infra* section VII.

that “appeal to the prurient interest,” can be saved from obscenity laws for having artistic and literary value. However, courts have not sufficiently identified the line between art, literature, and unappealing. Modern pornographic comic books, such as *Sunstone*<sup>8</sup> and *Sex Criminals*,<sup>9</sup> all feature varying degrees of sexual activity, ranging from vanilla<sup>10</sup> to fetishist,<sup>11</sup> yet courts do not consider these comics within the purview of obscenity, possibly due to their inherently artistic and literary nature. Although there have been numerous cases surrounding obscene literary and visual media,<sup>12</sup> courts have not addressed whether having both features may distinguish comic books. This poses the question of whether comic books may be obscene when they possess a combination of literary and visual values.

Comic shop owners have been adversely affected by obscenity laws for decades.<sup>13</sup> Comic shop owners are permitted to sell pornographic comic books, yet comic books deemed “obscene” may not be sold. Comic book companies and comic shop owners attempt to remedy this issue; modern “adults-only” comic books are typically kept separate from other comics in “adult-only” sections of the store, and are shipped from the distributor to the stores for sale in plastic or black-out wrapping to keep peeping minors away from sexually graphic comics.<sup>14</sup> Shop owners make pennies off the sale of single-issue comic books, and it can all be thrown away with the sale of the wrong comic book to the wrong person.<sup>15</sup> The sale of one single “obscene” comic book to an undercover police officer can lead to the arrest of the store clerk or owner.<sup>16</sup>

Store clerks and shop owners arrested for violating obscenity laws have attempted to assert First Amendment free speech defenses

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<sup>8</sup> STJEPAN SEJIC, *SUNSTONE VOLUME 1* (2014).

<sup>9</sup> MATT FRACTION & CHIP ZDARKSY, *SEX CRIMINALS VOLUME 1: ONE WEIRD TRICK* (2014).

<sup>10</sup> Vanilla sex means, “‘regular’ sex-intercourse, oral sex, etc.” (PEGGY J. KLEINPLATZ & CHARLES MOSER, *SADOMASOCHISM: POWERFUL PLEASURES* 285 (2006)).

<sup>11</sup> Freud describes fetishism as when “the normal sexual object is replaced by another which bears some relation to it, but is entirely unsuited to serve the normal sexual aim.” (Sigmund Freud, *Three Essays on the Theory of Sexuality* (1905), STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 153 (2017)).

<sup>12</sup> See *infra* section VI.

<sup>13</sup> See *infra* section V.

<sup>14</sup> Deb Aoki, *A Guide to the “M - Mature Age 18+” Content Rating in Manga Comics*, LIVEABOUTDOTCOM (May 9, 2019), <https://www.liveabout.com/mature-content-rating-2282729>.

<sup>15</sup> See *infra* section V.A.

<sup>16</sup> See *infra* section V.A.

with no success.<sup>17</sup> The First Amendment protects freedom of speech, but this does not include obscenity;<sup>18</sup> however, pornography is protected.<sup>19</sup> The protection of pornography poses the issue of where the line is drawn between obscene and pornographic comic books in the eyes of the law.

The goal of this Note is to determine whether hardcore pornography or graphic visuals in comic books should be deemed legally obscene when the definition of obscenity is murky. Section II of this Note will discuss the current definition of obscenity, determine how it differs from pornography, and delve into state and federal definitions of obscenity. Section III will define the three modern tests for obscenity applied by courts. Section IV will discuss “freedom of speech” interpretations of the First Amendment. Section V will discuss the differences between comic books and obscenity. Section VI will compare other types of obscene literary and visual media to comic books and determine whether comic books can be “saved” for having both artistic and literary features. Finally, Section VII will propose a new definition of obscenity for the modern age.

## II. OBSCENITY DEFINED

Obscenity and pornography are not the same; rather, obscenity is considered a “narrow category of pornography that violates contemporary community standards and has no serious literary, artistic, political or scientific value.”<sup>20</sup> From a legal standpoint, the definition of obscenity differs from state to state, and state definitions differ from the federal statute for obscenity.<sup>21</sup>

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<sup>17</sup> See *infra* section V.A.

<sup>18</sup> See *infra* section IV.

<sup>19</sup> David L. Hudson, Jr., *Obscenity and Pornography*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1004/obscenity-and-pornography>, (last visited June 5, 2019).

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* section II.B.

### A. Obscenity vs. Pornography

Pornography, as a whole, is defined as “material produced for the manifest purpose of arousing erotic feelings.”<sup>22</sup> For example, the purpose of *Playboy* magazine is to elicit a sexual response to the naked women featured within.<sup>23</sup> However, nudity and pornography should not be confused. An artist might create a sculpture that openly displays male genitals (such as Michelangelo’s *David*), but these may not be created to elicit a sexual or erotic response.<sup>24</sup> Similarly, medical books may show nudity for anatomical purposes, but the nudity in those texts is not pornographic because their use is for education.<sup>25</sup>

Courts have defined obscenity as “anything disgusting to the senses.”<sup>26</sup> The Supreme Court, in *Roth v. United States*,<sup>27</sup> stated that “sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest.”<sup>28</sup> However, there are instances of obscenity that are not pornography, such as graphic depictions of war or sexual abuse.<sup>29</sup> While the federal obscenity statute focuses on criminal aspects of obscenity, state statutes tend to focus on sexual or pornographic aspects.<sup>30</sup>

### B. Federal and State Statutes for Obscenity

Federal statutes relating to obscenity originated in 1873 with what is known as the Comstock Act (the “Act”).<sup>31</sup> The Act was entitled “An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use.”<sup>32</sup> The Act prohibited importation and distribution of “every article or thing intended or adapted for any indecent or immoral use.”<sup>33</sup> Today, Congress

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<sup>22</sup> Steven T. Holmes and Ronald M. Holmes, *SEX CRIMES: PATTERNS AND BEHAVIOR* 154 (3d ed. 2009).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 354 U.S. 476 (1957).

<sup>28</sup> 354 U.S. 476, 487 (1957).

<sup>29</sup> *Supra* note 22.

<sup>30</sup> *See e.g.* *Miller v. California*, 413 U.S. 15 (1973) (The three-pronged *Miller* test addresses matter that appeals to the prurient interest and sexual matter that is patently offensive.).

<sup>31</sup> 42 Cong. Ch. 258, March 3, 1873, 17 Stat. 598.

<sup>32</sup> *Id.*

<sup>33</sup> *United States v. Chase*, 135 U.S. 255, 257 (1890).

legislates obscenity in 18 U.S.C. §§ 1460-70. However, the words “obscene” or “obscenity” are not defined anywhere in the United States Code.<sup>34</sup> Regardless, the pertinent federal statute relevant to this Note is § 1466 because it discusses the intent to distribute books, magazines, pictures, and paper. Subsection A of § 1466 states:

[w]hoever is engaged in the business of producing with intent to distribute or sell, or selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.<sup>35</sup>

Subsection B of § 1466 defines “engaged in the business” as a person who sells, transfers, or offers to sell or transfer obscene matter.<sup>36</sup> For this Note, comic book store owners are in the business of selling books, magazines, and papers, some of which may fall within this federal statute.

Statutes for obscenity vary at the state level. Some states define “obscenity,” whereas others do not. For example, subsection A of the Texas state law reads, “[a] person commits an offense [of obscenity] if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.”<sup>37</sup> Here, the word “obscene” is not defined at all.<sup>38</sup> However, New York and California’s obscenity statutes follow the modern norm for defining obscenity.<sup>39</sup> Most state statutes have adopted language from *Miller v. California*,<sup>40</sup> stating that an obscene work is illegal, “[when] taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>41</sup> This language was the result of decades of court decisions attempting to rework tests to define obscenity.

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<sup>34</sup> 18 U.S.C. §§ 1460-70.

<sup>35</sup> 18 U.S.C. § 1460.

<sup>36</sup> 18 U.S.C. § 1466(b).

<sup>37</sup> Tex. Penal Code Ann. § 43.23.

<sup>38</sup> *Id.*

<sup>39</sup> *See infra* section III.C.

<sup>40</sup> 413 U.S. 15 (1973).

<sup>41</sup> *Id.* at 24.

### III. TESTS FOR OBSCENITY

Courts have struggled to define obscenity at common law.<sup>42</sup> To determine whether the material is obscene, courts have adopted various tests. The *Roth* test laid the foundation for modern obscenity laws in the 1950s.<sup>43</sup> However, the *Memoirs* test, stemming from the 1966 case *Memoirs v. Massachusetts*,<sup>44</sup> reworked and expanded the *Roth* test. Further, the *Miller* Court built upon *Memoirs*, thus reflecting the most modern and widely used test to define obscenity.<sup>45</sup>

#### A. Roth Test

In *Roth v. United States*,<sup>46</sup> the defendant, Roth, was convicted by a jury in federal court in New York for “mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute.”<sup>47</sup> The Second Circuit affirmed Roth’s conviction.<sup>48</sup> On appeal, the Supreme Court reviewed the history of obscenity, tracing it back to 1712, when Massachusetts made it illegal to “publish ‘any filthy, obscene, or profane song, pamphlet, libel or mock sermon’ in imitation or mimicking of religious services.”<sup>49</sup> For a more modern approach to obscenity, the *Roth* Court defined obscene material as “material which deals with sex in a manner appealing to prurient interest.”<sup>50</sup>

The *Roth* test asks, “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>51</sup> The Court in *Roth* also focused on whether an obscene material had “redeeming social importance.”<sup>52</sup> Ultimately, the Supreme Court stated that all ideas having social importance, even unorthodox, controversial, or

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<sup>42</sup> See *infra* sections III.A-C.

<sup>43</sup> 354 U.S. 476 (1957).

<sup>44</sup> 383 U.S. 413 (1966).

<sup>45</sup> 413 U.S. 15 (1973).

<sup>46</sup> 354 U.S. 476 (1957).

<sup>47</sup> *Id.* at 480.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 483.

<sup>50</sup> *Id.* at 487.

<sup>51</sup> 354 U.S. 476, 489 (1957).

<sup>52</sup> *Id.* at 484.

hateful ideas, are protected by the First Amendment.<sup>53</sup> However, the Court also stated that First Amendment protection is not afforded to obscene material that deviates from social importance.<sup>54</sup> This test was reworked in 1966 by the *Memoirs* Court.

### B. Memoirs Test

In *Memoirs v. Massachusetts*,<sup>55</sup> the Attorney General of Massachusetts sought to have the 1748 book *Memoirs of a Woman of Pleasure*, by John Cleland, deemed obscene.<sup>56</sup> The book was first deemed obscene in 1821 in a lawsuit against Peter Holmes, the publisher of the book, who was found guilty of libel.<sup>57</sup> *Memoirs of a Woman of Pleasure* followed the life of a prostitute and recounted her sexual experiences through text and pictures, including “[l]esbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration.”<sup>58</sup> In the 1960s, the book was allegedly reprinted and copyrighted by G.P. Putnam’s Sons;<sup>59</sup> the Attorney General of Massachusetts brought suit against the book itself, as required by the State’s general laws,<sup>60</sup> after a mother complained to the Massachusetts’s Obscene Literature Control Commission upon discovering her son had purchased the book.<sup>61</sup> In considering whether the book was obscene under the *Roth* test, the Supreme Court set forth a new test that incorporated the *Roth* test, now referred to as the *Memoirs* test: (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

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<sup>53</sup> *Id.*

<sup>54</sup> *Roth v. U.S.*, 354 U.S. 476, 484 (1957).

<sup>55</sup> 383 U.S. 413 (1966).

<sup>56</sup> MASS. GEN. LAWS, ch. 272, §§ 28C-28H.

<sup>57</sup> *Commonwealth v. Holmes*, 17 Mass. 336 (1821).

<sup>58</sup> *Attorney Gen. v. Book Named “John Cleland’s Memoirs of a Woman of Pleasure,”* 349 Mass. 69, 71, 206 N.E.2d 403, 405 (1965), *rev’d sub nom. A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney Gen. of Com. of Mass.*, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966).

<sup>59</sup> *Id.* at 415.

<sup>60</sup> *Id.*

<sup>61</sup> Ruth Graham, *How ‘Fanny Hill’ stopped the literary censors*, BOSTON GLOBE (July 7, 2013, 12:00 AM), <https://www.bostonglobe.com/ideas/2013/07/06/how-fanny-hill-stopped-literary-censors/YEx9KPUHMv5O5avhB87MeI/story.html>.



relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.<sup>62</sup>

The Court held that since memoirs have literary and historical significance, the book may have “redeeming social value,” and reversed the 1965 decision.<sup>63</sup> The Court continued by stating that all aspects of a book must be considered, and the fact that a book is inherently sexual should not affect the fact that it has some social importance.<sup>64</sup> However, the Court’s attempt to define obscenity did not end; the *Miller* Court modified the *Memoirs* test.

### C. Miller Test

The case of *Miller v. California*<sup>65</sup> set a precedent for the modern test of obscenity. In *Miller*, the defendant was convicted of violating a California statute for “intend[ing] to distribute”<sup>66</sup> obscene illustrated brochures for his pornographic books via mail.<sup>67</sup> A restaurant owner received one of the unsolicited brochures and called the police to complain.<sup>68</sup> The brochures contained depictions of men and women engaging in sexual activities with their genitals visible to the viewer.<sup>69</sup> The Supreme Court recognized the state interest in keeping obscene material away from disapproving recipients and minors.<sup>70</sup> Therefore, the Court found a new approach to the *Memoirs* test, creating a modern standard for defining obscenity. The *Miller* test states:

(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

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<sup>62</sup> 383 U.S. 413, 418 (1966).

<sup>63</sup> *Id.* at 421.

<sup>64</sup> *Id.*

<sup>65</sup> 413 U.S. 15 (1973).

<sup>66</sup> Cal. Penal Code § 311.2.

<sup>67</sup> 413 U.S. 15, 16 (1973).

<sup>68</sup> *Id.* at 17.

<sup>69</sup> *Id.* at 18.

<sup>70</sup> *Id.* at 18-19.

work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>71</sup>

The Supreme Court held:

[i]n sum, we (a) reaffirm the Roth holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is ‘utterly without redeeming social value’; and (c) hold that obscenity is to be determined by applying ‘contemporary community standards’ . . . not ‘national standards.’<sup>72</sup>

Even with the *Miller* test in place at common law, courts are still challenged with addressing First Amendment and obscenity issues on a case-by-case basis.

#### IV. THE FIRST AMENDMENT AND OBSCENITY

The Supreme Court in *R.A.V. v. St. Paul*<sup>73</sup> stated that “‘freedom of speech’ referred to by the First Amendment does not include a freedom to disregard [the] traditional limitations” of obscenity, defamation, or fighting words, for example.<sup>74</sup> A recurring issue involving obscenity is its relationship to the First Amendment of the Constitution. The First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>75</sup> In modern times, the definition of “freedom of speech” has been expanded to include pictures, films, paintings, drawings, and engravings.<sup>76</sup> The Supreme

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<sup>71</sup> *Id.* at 24.

<sup>72</sup> 413 U.S. 15, 36-37 (1973).

<sup>73</sup> 505 U.S. 377 (1992).

<sup>74</sup> *Id.* at 383.

<sup>75</sup> U.S. CONST. amend. I.

<sup>76</sup> *Kaplan v. California*, 413 U.S. 115, 119 (1973).

Court has held that while these additional forms of freedom of speech are protected by the First Amendment, the line is drawn at obscenity.<sup>77</sup>

Adult pornography that simply arouses the reader or viewer is protected by the First Amendment.<sup>78</sup> However, pornography that is obscene or involves children is not protected.<sup>79</sup> Courts have recognized that any material deemed obscene cannot be protected by the First Amendment, even though obscene material constitutes free speech.<sup>80</sup> The Supreme Court has stated, “the First Amendment requires that procedures be incorporated that ‘ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.’”<sup>81</sup> The Supreme Court has also recognized that “the portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.”<sup>82</sup>

## V. COMIC BOOKS AND OBSCENITY

Comic book store owners have had difficulty asserting their First Amendment rights when it comes to distributing legally obscene comic books.<sup>83</sup> The opening page of issue two of the 1970s pornographic comic book *Harold Hedd*<sup>84</sup> perfectly encapsulates the intersection of comic books and obscenity in a comedic manner. The one-page short cartoon is entitled “Police Should be Obscene and not Absurd” and depicts two men, Harold Hedd and Elmo, discussing what the word “obscene” means.<sup>85</sup> Harold says, “[i]t probably means ‘anything the morality squad disagrees with at any given time’ . . . like this simulated hard-on here.”<sup>86</sup> The next panel shows Harold with a strap-on around his waist saying, “[n]ow if this was a for real ‘hard-

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<sup>77</sup> *Id.* at 119-20.

<sup>78</sup> David L. Hudson, Jr., *Obscenity and Pornography*, The First Amendment Encyclopedia, <https://www.mtsu.edu/first-amendment/article/1004/obscenity-and-pornography>, (last visited June 5, 2019).

<sup>79</sup> *Id.*

<sup>80</sup> *City of Rolling Meadows v. Kohlberg*, 83 Ill. App. 3d 10, 15 (1980).

<sup>81</sup> *Blount v. Rizzi*, 400 U.S. 410, 416 (1971), quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

<sup>82</sup> *Roth v. U.S.*, 354 U.S. 476, 487 (1957).

<sup>83</sup> See *infra* sections V, VI.

<sup>84</sup> RAND H. HOLMES, *HAROLD HEDD NUMBER. 2*, 1 (1973).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

on' this cartoon would be judged obscene . . . good thing it's only a fake rubber dildo!"<sup>87</sup> A few panels later, the cartoon echoes Justice Potter's "I know it when I see it" quote about obscenity.<sup>88</sup> Harold states, ". . . [Y]'know, maybe that's it! Maybe obscenity—like beauty—is in the eye of the beholder . . . kinda depends on what yer lookin [sic] for."<sup>89</sup> Finally, the last panel depicts what appears to be an angry-looking police officer saying, "[w]ell 'I' think it's sick-sick-SICK! And anyone who disagrees with 'ME' is under arrest!"<sup>90</sup> The short comic in *Harold Hedd* is a perfect representation of how comic book creators themselves feel about obscenity laws, especially regarding comics that are more likely to be considered pornographic.<sup>91</sup>

One of the most infamous stories regarding comic book creators and obscenity laws pertains to comic artist Michael Diana.<sup>92</sup> Diana was the first-ever American comic book artist convicted of violating obscenity laws.<sup>93</sup> He became the eye of a police investigation in Florida in 1991 when a murder suspect was found having Diana's "underground" mini-comic, *Boiled Angel*, in his possession.<sup>94</sup> Police showed copies of his comic book to the District Attorney, who charged Diana with publishing, distributing, and advertising obscene material.<sup>95</sup> In 1994, the Florida jury found Diana guilty of all three obscenity charges because the comic book "lacked serious literary, artistic, political or scientific value."<sup>96</sup> Ultimately, the jury sentenced Diana to three years in prison, and he was directed to have no interaction with minors under the age of 18.<sup>97</sup> Further, the court ordered Diana to be the subject of psychological tests, take an ethics course, pay a \$3,000 fine, and complete 1,248 hours of community

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<sup>87</sup> *Id.*

<sup>88</sup> See *supra* note 1.

<sup>89</sup> RAND H. HOLMES, *HAROLD HEDD* NO. 2, 1 (1973).

<sup>90</sup> *Id.*

<sup>91</sup> For example, in *Harold Hedd*, the comic is merely poking fun at police finding male genitalia patently offensive.

<sup>92</sup> Comic Book Legal Defense Fund, *History of Comics Censorship, Part 4*, <http://cbldef.org/resources/history-of-comics-censorship/history-of-comics-censorship-part-4/>, (last visited June 10, 2019).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Comic Book Legal Defense Fund, *History of Comics Censorship, Part 4*, <http://cbldef.org/resources/history-of-comics-censorship/history-of-comics-censorship-part-4/>, (last visited April 9, 2019).

service.<sup>98</sup> Diana appealed, and Florida's appellate court affirmed the publishing and distribution charges but reversed the advertising charge because Diana had not yet actually created any advertising material for his comic book.<sup>99</sup> In 1997, the Comic Book Legal Defense Fund and American Civil Liberties Union wrote a petition to the United States Supreme Court to hear Diana's case,<sup>100</sup> but the Supreme Court denied *certiorari* without comment,<sup>101</sup> and Diana carried out his sentence.<sup>102</sup>

Michael Diana was not the only person adversely affected by the laws restricting the distribution of "obscene" art or literature.<sup>103</sup> There have been many cases in which comic books were deemed obscene, and comic shop owners were arrested and jailed for selling these comics to undercover police officers.<sup>104</sup> On the other hand, courts have also recognized comic books that police thought were obscene to merely be sexual with no obscene effect on society.<sup>105</sup>

## A. Comic Books Found Obscene

### 1. *Kingsley Books, Inc v. Brown*

The comic book *Nights of Horror* at issue in *Kingsley Books, Inc. v. Brown*<sup>106</sup> is an example of a comic book that may very well have an effect that triggers the proposed definition of obscenity discussed in this Note.<sup>107</sup> The underground comic book *Nights of Horror* debuted in 1954, and sixteen volumes were printed.<sup>108</sup> Each *Nights of Horror* publication contains two parts—first, a textual book-like aspect with words depicting sexually graphic chapters of stories, and second, artwork depicting various disturbing and violent sexual activity in

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Diana v. Florida*, 521 U.S. 1122 (1997).

<sup>102</sup> Comic Book Legal Defense Fund, *History of Comics Censorship, Part 4*, <http://cblfd.org/resources/history-of-comics-censorship/history-of-comics-censorship-part-4/>, (last visited April 9, 2019).

<sup>103</sup> *See supra* section VI.

<sup>104</sup> *Infra* section V.A.

<sup>105</sup> *Infra* section V.B.

<sup>106</sup> 354 U.S. 436 (1957).

<sup>107</sup> *See* section II.C.

<sup>108</sup> CRAIG YOE, *SECRET IDENTITY: THE FETISH ART OF SUPERMAN'S CO-CREATOR JOE SHUSTER* 17 (2009).

connection with the stories.<sup>109</sup> The series was shockingly drawn by Joe Shuster, the renowned co-creator and artist of the original *Superman* comics.<sup>110</sup>

Shuster's artistic contribution to *Nights of Horror* was described by comic book legend Stan Lee as a story of "S&M erotic horror."<sup>111</sup> The comic book became of interest to police when members of the Brooklyn Thrill Killers, a prominent gang in the early 1950s, admitted they read and were influenced by *Nights of Horror*.<sup>112</sup> During the trial of their crimes, expert witness Dr. Fredric Wertham, known for his belief that comics have an adverse effect on the minds of youth,<sup>113</sup> noted that the gang members used whips and demanded actions from young women similar to those actions depicted in *Nights of Horror*.<sup>114</sup> Myra Mannes, a reporter who interviewed Dr. Wertham, wrote:

*Nights of Horror* might leave the mature adult with no other reaction but disgust. What it might do to the immature—even the 'normal' immature—is anybody's guess. In any case it is a fact that [gang member] Koslow and his companions have tried most of the refinements in the series. [Koslow] even told Wertham that they made one of their beating victims kiss their feet in between blows and kicks, a scene clearly illustrated in *Nights of Horror*.<sup>115</sup>

Ultimately, this led New York Mayor Robert Wagner to promote a ban on the selling of "objectionable books, comics, magazines, and other publications that teach lust, violence, perverted sex attitudes, and disregard for law and order."<sup>116</sup> These events were the precursor to the Supreme Court case *Kingsley Books, Inc. v. Brown*.<sup>117</sup>

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<sup>109</sup> CLANCY, NIGHTS OF HORROR (1954).

<sup>110</sup> CRAIG YOE, SECRET IDENTITY: THE FETISH ART OF SUPERMAN'S CO-CREATOR JOE SHUSTER 16-17 (2009).

<sup>111</sup> *Id.* at 5.

<sup>112</sup> *Id.* at 26.

<sup>113</sup> *See, e.g.*, FREDERICK WERTHAM, SEDUCTION OF THE INNOCENT (1954).

<sup>114</sup> CRAIG YOE, SECRET IDENTITY: THE FETISH ART OF SUPERMAN'S CO-CREATOR JOE SHUSTER 27 (2009).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 29.

<sup>117</sup> 354 U.S. 436 (1957).

In *Kingsley Books*, a complaint charged an adult bookstore and other defendants with displaying and selling the obscene comic book *Nights of Horror*.<sup>118</sup> According to the Supreme Court, the comic book consisted of horrific fetishes including, “working a female’s skin away from her flesh with a knife, gouging and burning eyes out of their sockets, [and] ringing the nipples of the breast with needles.”<sup>119</sup> The plaintiff’s complaint sought an injunction against the defendants and destruction of the obscene comic books.<sup>120</sup> The New York Supreme Court held that the comic books were “dirt for dirt’s sake,” and ruled for the plaintiffs.<sup>121</sup> Eventually, the defendants appealed to the New York Court of Appeals on the ground that the New York state statute for obscenity was unconstitutional.<sup>122</sup> The Court of Appeals held there were no issues of constitutionality, and the defendants then appealed to the United States Supreme Court.<sup>123</sup> Based on *Roth v. U.S.*,<sup>124</sup> the Court held that the defendants could be convicted for having and intending to distribute the obscene comic books.<sup>125</sup> The holding in *Kingsley* is crucial because the Court recognized that the prior restraint upon merchants regarding obscenity laws is narrow.<sup>126</sup> Ultimately, the Supreme Court affirmed the New York Court of Appeals’ decision, holding that the statute was constitutional because “New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene.”<sup>127</sup>

It is clear how *Nights of Horror*<sup>128</sup> would be deemed obscene. This comic book, though sexual, goes beyond pornography or prurient interest and is meant to appeal to the extreme fetishist. It is likely that no community would find this acceptable, and individuals reading the comic may have an extreme adverse reaction to it. However, there are

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<sup>118</sup> 354 U.S. 436, 438 (1957).

<sup>119</sup> *Burke v. Kingsley Books, Inc.*, 208 Misc. 150, 159, 142 N.Y.S.2d 735 (Sup. Ct. 1955), *aff’d sub nom. Brown v. Kingsley Books, Inc.*, 1 N.Y.2d 177, 134 N.E.2d 461 (1956), *aff’d*, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957).

<sup>120</sup> *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 438-39 (1957).

<sup>121</sup> *Id.* at 439.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> 354 U.S. 476 (1957).

<sup>125</sup> 354 U.S. 436, 444 (1957).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 440.

<sup>128</sup> CLANCY, NIGHTS OF HORROR (1954).

cases, such as *People v. Kirkpatrick*,<sup>129</sup> where courts deem comic books obscene when they should have merely been considered pornography.

## 2. *People v. Kirkpatrick*

*People v. Kirkpatrick* revolves around the legally obscene comic book *Zap Comix Number 4*.<sup>130</sup> The 52-page comic is a collection of 13 short comics written and illustrated by different artists. For example, the first story, entitled *Hocus Pocus*, contains what appears to be various well-known cartoon characters, such as Mickey Mouse and Donald Duck, engaged in sexual activity with other distinguishable creatures.<sup>131</sup> The next story, *Joe Blow*, follows a mother, father, and two children engaged in sexual activities with each other.<sup>132</sup> The art is certainly graphic and leaves nothing to the imagination. Later, in a short comic called *Dormasintoria*, a deranged-looking vulva with arms and eyes narrates the story of galaxies that come together sexually.<sup>133</sup> In the end, the narrator vulva character says, “that, my star-gazing friend, is ‘the big bang theory.’”<sup>134</sup> Each story contains at least some sexual activity, and many are likely to be considered humorous by an impartial reader.

In *People v. Kirkpatrick*, the New York Supreme Court charged defendants Kirkpatrick, Dargis, and McCoy with violating a New York statute<sup>135</sup> for intending to promote obscene material and knowing that the material was obscene because they were employees of a comic book store.<sup>136</sup> Police officers arrested defendants for selling the undercover officers copies of *Zap Comix Number 4*, which the court deemed to be obscene.<sup>137</sup> Defendant Dargis testified he had taken a peek at the end pages of the comic and noticed the words “adults only” printed on the cover, but had not read it in its entirety.<sup>138</sup>

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<sup>129</sup> *People v. Kirkpatrick*, 64 Misc. 2d 1055, 316 N.Y.S.2d 37 (Crim. Ct. 1970), *aff'd*, 69 Misc. 2d 212, 329 N.Y.S.2d 769 (App. Term 1971), *aff'd*, 32 N.Y.2d 17, 295 N.E.2d 753 (1973).

<sup>130</sup> VICTOR MOSCOSO ET AL., *ZAP COMIX NUMBER 4*, 3<sup>rd</sup> Printing (1970).

<sup>131</sup> VICTOR MOSCOSO, *ZAP COMIX NUMBER 4*, 3d Printing, 3-8 (1970).

<sup>132</sup> ROBERT CRUMB, *ZAP COMIX NUMBER 4*, 3d Printing 9-14 (1970).

<sup>133</sup> ROBERT WILLIAMS, *ZAP COMIX NUMBER 4*, 3d Printing 17-20 (1970).

<sup>134</sup> *Id.* at 20.

<sup>135</sup> N.Y. Penal Law § 235.05 (McKinney).

<sup>136</sup> 316 N.Y.S.2d 37, 39 (Crim. Ct. 1970).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 40.



Defendant Kirkpatrick testified he had never read *Zap Comix Number 4*, but had read numbers 0 and 1 and assumed the contents of *Zap Comix Number 4* were similar.<sup>139</sup> On the matter of whether the comic book was legally obscene, the court examined whether the artwork within the comic “save[d] the material from legal condemnation.”<sup>140</sup> The first few pages of the comic contain a naked woman with her breasts and pubic hair showing, but the court did not find this obscene.<sup>141</sup> Overall, the court concluded that many of the short comics in *Zap Comix Number 4* were patently offensive due to their visually graphic and sexual nature, and therefore, violated the New York statute for obscenity.<sup>142</sup> The court ultimately held that it is not a meritorious defense for an artist to claim he is creating the artwork “for art’s sake;” instead, the court described the comic as “filth for filth’s sake.”<sup>143</sup> The New York Court of Appeals affirmed the Criminal Court’s convictions.<sup>144</sup>

Cases like *Kirkpatrick* make it difficult for future courts to separate pornography from obscenity in comic books. The obscenity in *Zap Comix Number 4* is not likely to be viewed as hardcore as the graphic depictions of sexual activity in *Nights of Horror*. This raises the issue of whether the seemingly low threshold of graphic pornography is what is considered obscene in the eyes of courts. Some comics fall in the middle of the “vanilla-to-hardcore” spectrum<sup>145</sup> of “obscene” pornography, such as the manga comic (Japanese comic books often translated into English) *Demon Beast Invasion, The Fallen* at issue in *Castillo v. State*.<sup>146</sup>

### 3. *Castillo v. State*

In *Castillo*, defendant Castillo was a comic shop owner who sold the manga comic entitled *Demon Beast Invasion, The Fallen* Volume 2 to an undercover officer.<sup>147</sup> The Texas Court of Appeals deemed the manga comic to be obscene because it “depicted genitals

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<sup>139</sup> *Id.* at 41.

<sup>140</sup> *Id.* at 42.

<sup>141</sup> 316 N.Y.S.2d 37, 64 (Crim. Ct. 1970).

<sup>142</sup> *Id.* at 66.

<sup>143</sup> *Id.* at 67.

<sup>144</sup> *People v. Kirkpatrick*, 32 N.Y.2d 17 (1973).

<sup>145</sup> *See infra* section VII.B.

<sup>146</sup> 79 S.W.3d 817 (2002).

<sup>147</sup> *Id.* at 821.

in a state of arousal and contained acts of sodomy, masturbation, excretory functions, sadism, and masochism,” and “one scene in which a demon [] transformed into a tree [] [and] penetrated a female with its roots.”<sup>148</sup> The Texas statute for obscenity states, “[a] person commits an offense if, knowing its content and character, he promotes or possesses with intent to promote any obscene material or obscene device.”<sup>149</sup> The State did not have to prove that Castillo knew about the “obscenity” within the manga comic, but rather that he knew the content was sexually explicit.<sup>150</sup> The court concluded that a jury could find that Castillo had knowledge about the sexually explicit nature of the manga comic and that he knew the content and character of the manga comic.<sup>151</sup>

Additionally, the court analyzed the facts of the case and applied the *Miller* test to determine whether the manga comic could be considered “constitutionally obscene.”<sup>152</sup> Ultimately, the court concluded it was not protected by the First Amendment because “the average person, applying contemporary community standards in [the state of Texas], would find ‘Demon Beast Invasion, The Fallen—Volume 2,’ taken as a whole, would only appeal to those who have a prurient interest in sex and therefore is obscene.”<sup>153</sup>

In *Castillo*, like in *Kingsley Books* and *Kirkpatrick*, the court deemed the manga comic obscene due to its prurient nature. However, courts may find that certain comic books deemed “obscene” by police are merely pornographic. In the case of *People v. Correa*,<sup>154</sup> none of the books confiscated by police were considered obscene, but rather humorous pornography.

## B. Comic Books Found Not Obscene

In *People v. Correa*, the defendant was the manager of a comic book store and was convicted of possessing obscene comic books with the intent to distribute them.<sup>155</sup> Undercover officers noticed that seven sexually explicit comic books were not segregated from the rest of the

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<sup>148</sup> *Id.*

<sup>149</sup> Tex. Penal Code Ann. § 43.23(c)(1).

<sup>150</sup> 79 S.W.3d 817, 823 (2002).

<sup>151</sup> *Id.* at 824.

<sup>152</sup> *Id.* at 826.

<sup>153</sup> *Id.*

<sup>154</sup> 191 Ill. App. 3d 823 (1989).

<sup>155</sup> *Id.* at 824.

books and were positioned randomly across all shelf levels.<sup>156</sup> The Appellate Court of Illinois stated that “. . . [S]exuality is not synonymous with obscenity; [an] expression which is sexually oriented, but not obscene, commands full constitutional protection as speech. However, regardless of the form of expression, these constitutional guarantees do not protect obscene material.”<sup>157</sup> Illinois’s statutory definition of obscenity was heavily influenced by the *Miller* Court’s opinion and it incorporated the three-pronged *Miller* test.<sup>158</sup> The appellate court determined that none of the seven books purchased by the undercover officers contained statutory “hardcore obscenity” because the nudity pertained to either the plot of the story, included “juvenile humor in extremely poor taste” or made no sense in general.<sup>159</sup> The court noted that although the comics did not have literary or artistic value, they nonetheless lacked hardcore obscenity.<sup>160</sup> Therefore, the Appellate Court reversed the defendant’s conviction.<sup>161</sup>

*People v. Correa* is different from *Kingsley Books* and *Castillo* because it shows that courts can separate pornographic comic books from statutorily obscene ones. The court in *Correa* recognized that mere pornography cannot be obscene and stated that “expression which is sexually oriented, but not obscene, commands full constitutional protection as speech.”<sup>162</sup> *Correa* differs from *Kingsley Books* in the sense that, in *Kingsley Books*, the comic book was considered grotesque by the court.<sup>163</sup> In *Correa*, the comics were merely pornographic because they did not “constitute[] patently offensive hard-core obscenity as stated in the [Illinois] statute.”<sup>164</sup> The comics in *Castillo*, *Kirkpatrick*, and *Kingsley Books* all contained graphic depictions of fetishism with no real plot, as opposed to the comics in *Correa* which had a clear plot line and vanilla sexual activity. The difference between the cases shows that courts tend to draw the line of obscenity at fetishist comic books where the sexual activity does not pertain to the plot of the story.

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<sup>156</sup> *Id.* at 825.

<sup>157</sup> *Id.* at 825-26.

<sup>158</sup> *Id.* at 826.

<sup>159</sup> 191 Ill. App. 3d 823, 827 (1989).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 825.

<sup>163</sup> *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 439 (1957).

<sup>164</sup> 191 Ill. App. 3d 823, 827 (1989).

Comic books are not alone; courts have also struggled to separate pornography from obscenity in other forms of mass media.<sup>165</sup>

## VI. OBSCENE COMIC BOOKS COMPARED TO OTHER LITERARY AND VISUAL MATERIAL

Comic books are unique because they contain both literary and visual aspects. Therefore, comic book shop owners and comic book creators are not the only people affected by obscenity laws in the literary and visual entertainment worlds. Obscenity laws also impact adult bookstore owners and employees, literary authors, and movie theater owners.

### A. Literary Material Deemed Obscene

What is deemed obscene is in the eye of the beholder, and this is strongly shown in *People v. Finkelstein*.<sup>166</sup> In *Finkelstein*, defendants Finkelstein and Schaffer were arrested at their bookshop for selling the books *Queen Bee* and *Garden of Evil* to an undercover detective.<sup>167</sup> Upon the detective stating that the books were pornographic, Schaffer admitted he had “. . . seen much worse . . .”<sup>168</sup> Finkelstein agreed that he had seen more egregious material and said, “it all depends on how you look at [the books].”<sup>169</sup> The New York Court of Appeals found that the books were obscene under the *Roth* test because they “contain descriptions of sexual experiences, with emphasis on the abnormal,”<sup>170</sup> and “focus ‘predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification.’”<sup>171</sup> Therefore, the New York Court of Appeals affirmed the defendants’ convictions for violation of the New York Penal Law for distributing obscene books.<sup>172</sup>

The conviction of the defendants in *Finkelstein* is similar to the conviction in the cases of *Kingsley Books* and *Castillo*. In these cases,

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<sup>165</sup> *Infra* section VI.

<sup>166</sup> 11 N.Y.2d 300 (1962).

<sup>167</sup> *Id.* at 303.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> 11 N.Y.2d 300, 305 (1962), *citing* *People v. Richmond County News*, 9 N.Y.2d 578, 587 (1961).

<sup>172</sup> 11 N.Y.2d 300, 305 (1962).

the contents of the books went beyond pornography, and the scale was tipped toward the side of hardcore. These three cases show that perverse sexual activity depicted in books or comics are likely to be considered obscene. Compared to *Kirkpatrick*, these cases are dissimilar; in *Correa*, the sex depicted in the short stories could be considered inoffensive or merely humorous to the average reader compared to the sexually explicit bizarre perversion found in the books in *Finkelstein*.

### B. Literary Material Deemed Not Obscene

Courts do not consider all books containing sex obscene, as shown in *U.S. v. 2,200 Paper Back Books*.<sup>173</sup> In *2,200 Paper Back Books*, port officers confiscated 2,200 paperback books upon arrival on a vessel at the Port of Los Angeles coming from Japan.<sup>174</sup> A customs official viewed the books, which consisted of titles, including some with pictures, that pertained to sex in various places, sex with nurses, and “erotic oralism.”<sup>175</sup> The customs official deemed the books and defendant Meridian Books, Inc. to be in violation of the federal obscenity statute<sup>176</sup> for international transporting of obscene material.<sup>177</sup> In determining whether the books were obscene, the district court judge admitted he “had very limited experience in determining what was pornographic . . . so that he could not ascertain the applicable community standards under the test delineated in *Miller v. California*.”<sup>178</sup> The district court judge also determined “that the contemporary community standards of Los Angeles ‘may well tolerate’ the [books].”<sup>179</sup> The Ninth Circuit held that, since the district court judge was a reasonable member of the Los Angeles area, his determination that the books were not obscene was valid even though he did not have any background in determining what is or is not obscene.<sup>180</sup> Essentially, the court’s holding in *2,200 Paper Back Books* shows that graphic depictions of vanilla sexual activity are not considered obscene when considered against a reasonable community

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<sup>173</sup> 565 F.2d 566 (9th Cir. 1977).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* n.2.

<sup>176</sup> 19 U.S.C. § 1305.

<sup>177</sup> 565 F.2d 566, 568 (9th Cir. 1977).

<sup>178</sup> *Id.* at 569.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 571.

standard. *2,200 Paper Back Books* can be compared to *Correa*, where the depictions of sex within the comic book were also vanilla and were not considered obscene.<sup>181</sup>

Another example is *Haldeman v. U.S.*,<sup>182</sup> where the defendant was charged with violating the federal obscenity statute<sup>183</sup> for mailing informational books about sex that were “obscene, lewd, lascivious, indecent and filthy.”<sup>184</sup> The court stated that, “[a]ll the booklets discuss revolting, nauseating, filthy and disgusting incidents, but they are no more repulsive than any discussion of the same subjects for medical, scientific, educational or general information purposes.<sup>185</sup> Although the court found each book unappealing, it considered them medical in nature and therefore concluded that the books had a scientific and educational purpose.<sup>186</sup> The court recognized that the information about sex within the books concerned “common problems” about sex found in many types of literature.<sup>187</sup> The court then applied the *Roth* test and determined that the books “do not make pleasant reading, but [the court is] convinced that it cannot be said that they are utterly without social importance or that their descriptions and representations go substantially beyond customary limits of candor.”<sup>188</sup> Therefore, the Court deemed that the books were not obscene.<sup>189</sup>

In both *2,200 Paper Back Books* and *Haldeman*, the Ninth and Tenth Circuits, respectively, took similar approaches in determining that the books were not obscene. Both of these courts, as well as the *Correa* court,<sup>190</sup> considered the reasonable community standard. The Tenth Circuit also recognized that the books had value to the community, which courts have not yet recognized in comic books.

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<sup>181</sup> *Supra* note 164.

<sup>182</sup> 340 F.2d 59 (10th Cir. 1965).

<sup>183</sup> 18 U.S.C. § 1461.

<sup>184</sup> 340 F.2d 59, 60 (10th Cir.1965).

<sup>185</sup> *Id.* at 60-61.

<sup>186</sup> *Id.* at 61.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 62.

<sup>189</sup> 340 F.2d 59, 62 (10th Cir. 1965).

<sup>190</sup> *Supra* note 158.

### C. Visual Material Deemed Obscene

In a world of visual materials such as movies and television, movie theaters specifically have often faced issues showing “obscene” movies. For example, in *Paris Adult Theatre I v. Slaton*,<sup>191</sup> defendants were accused of violating the Georgia state statute for obscenity for exhibiting to the paid public two allegedly obscene movies.<sup>192</sup> The Georgia Supreme Court deemed the movies obscene because they constituted “hard-core pornography” and “left little to the imagination.”<sup>193</sup> The movies contained “scenes of simulated fellatio, cunnilingus, and group sex intercourse.”<sup>194</sup> Plaintiffs demanded that the court enjoin the defendants from further showings of the movies.<sup>195</sup> The movie theater had explicit signs before entering that stated, “Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter.”<sup>196</sup> The Supreme Court reaffirmed *Roth v. U.S.* and held that the First Amendment did not protect the movies because the depiction and description of the movies fell within the sexual prohibitions of the Georgia state statute.<sup>197</sup>

This case is similar to *People v. Kirkpatrick*,<sup>198</sup> where the Court struggled to separate mere pornography from obscenity. Vanilla scenes of fellatio or group sex, for example, are pornographic and should not be considered obscene when compared to other court-deemed obscenity, such as grotesque fetishist sexual activity.

## VII. A NEW TEST FOR OBSCENITY

The First Amendment does not protect obscenity; however, not all comic books with sexual depictions and themes should be deemed obscene. The ban on distribution of what is considered obscene material hurts certain types of comic books that are, arguably, erroneously considered obscene. A new, clear definition of obscenity should be established and not only applied to comic books, but also other literary and visual material. The proposed definition must

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<sup>191</sup> 413 U.S. 49 (1973).

<sup>192</sup> *Id.* at 51.

<sup>193</sup> *Id.* at 51-52.

<sup>194</sup> *Id.* at 52.

<sup>195</sup> *Id.*

<sup>196</sup> 413 U.S. 49, 52 (1973).

<sup>197</sup> *Id.* at 69.

<sup>198</sup> 316 N.Y.S.2d 37 (Crim. Ct. 1970).

differentiate between what is obscene and what is permissible based on its having social importance and not causing extreme discomfort.

### A. Proposed Definition of Obscenity

What is deemed obscene should not be vague. The law needs a definition of obscenity that is clear and applicable in any situation when “obscene” material is sold to consumers. Obscenity should not be defined in consideration of pornography; even pornography, which is protected by the First Amendment, may be considered prurient and unappealing based on community standards.<sup>199</sup> The author of this Note suggests that defining obscene material should move away from the subjective and focus on the objective. Obscene material should be defined as any material that elicits unwanted feelings of extreme agonizing discomfort or mental or emotional distress. A plaintiff’s extreme agonizing discomfort or mental or emotional distress may be proven on a factual basis according to psychotherapist records or witness testimony. This definition requires a more proof-based test, rather than an “I know it when I see it” situation. Additionally, the proposed test focuses less on the pornography aspects of the *Miller* test, and encompasses all obscene material, including, for example, graphic depictions of violence that are extremely offensive to the viewer.

Sellers of “borderline” obscene material should still be wary of reasonable community standards when knowingly selling this material. Blog writer Rob Parkin defined community as, “a group of people with a shared characteristic or common interest.”<sup>200</sup> Community standards should be considered on the basis of technological advancements, such as social media analytics,<sup>201</sup> that show a tendency to view material within the community as appealing or unappealing. For example, modern comic book stores typically use digital platforms to preorder comic books for their customers. If a “borderline” obscene comic book is advertised for preorder, and no person within the community preorders it, it may be a sign that the

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<sup>199</sup> Prurience and community standards in consideration of obscenity are discussed *supra* Section III.

<sup>200</sup> ROB PARKIN, *Detecting communities using social network analysis*, PULSAR, July 1, 2014, <https://www.pulsarplatform.com/blog/2014/detecting-communities-using-social-network-analysis/> (last visited Sept. 29, 2019).

<sup>201</sup> *Id.*



community would have a negative reaction towards the comic book, and thus may potentially be considered obscene.

### B. The Scale of Vanilla to Hardcore Obscenity

“Borderline” obscene comic books should fall somewhere on the scale between vanilla and hardcore obscenity. What is considered vanilla should not only revolve around pornography but also artistic visuals and mental images formed from reading literary works. Hardcore obscenity in comic books should follow the proposed obscenity definition and should be the result of visuals and words that cause unwanted feelings of extreme agonizing discomfort or mental or emotional distress. Vanilla comic books should not be considered obscene; rather, courts should follow an informal definition of vanilla meaning “all that is not perverted.”<sup>202</sup> What is perverted should follow an earlier definition of obscenity, that being “anything disgusting to the senses;”<sup>203</sup> however, reasonable community standards should also apply to what is considered vanilla. Therefore, an appropriate definition of vanilla should be: all that is not disgusting to the senses based on reasonable community standards.<sup>204</sup>

Courts may draw the line between pornography and obscenity based on decisions like *Correa*. For example, the manga comic *Citrus* follows two girls who are sexually involved with one another, but they later discover they are stepsisters.<sup>205</sup> When analyzing this manga comic, courts must consider the scale of vanilla pornography to hardcore obscenity. Stepsisters having sexual relations may constitute fetishist prurience as in *Kirkpatrick*; however, the fact that they are in love may add to the plot of the story, therefore making the manga comic simply porn-with-plot based on the *Correa* analysis. Courts must strive to make a clear boundary between what is merely pornography and what might cause extreme agonizing discomfort or mental or emotional distress. This shift to the new definition and obscenity scale should be reflected not only at common law but also at state and federal statutory levels.

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<sup>202</sup> LAUREN ROSEWARNE, PART-TIME PERVERTS: SEX, POP CULTURE, AND KINK MANAGEMENT, 3 (2011).

<sup>203</sup> Steven T. Holmes and Ronald M. Holmes, SEX CRIMES: PATTERNS AND BEHAVIOR 154 (3d ed., 2009).

<sup>204</sup> An example of a comic book that may be considered “vanilla” is MATT FRACTION & CHIP ZDARKSY, SEX CRIMINALS VOLUME 1: ONE WEIRD TRICK (2014).

<sup>205</sup> SABUROTA, CITRUS VOLUME 1 (2012).

### C. Visual and Literary Value

Comic books contain both literary and visual elements.<sup>206</sup> The *Memoirs* court stated that a book should be taken as a whole, rather than just analyzed for allegedly obscene instances.<sup>207</sup> The analysis of obscene comic books should not be treated differently than the analysis for obscene literature and visuals. When examined under the *Miller* test, works having artistic and literary elements meet the factors of the third branch, which examines “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>208</sup> All forms of literature, art, politics, and science should follow the new obscenity definition and only be considered obscene if they cause extreme agonizing discomfort or mental or emotional distress. The court in *Kirkpatrick* held that the defendant’s defense of artistic value was without merit because the court considered the comic “filth for filth’s sake.” Following the outdated thought that obscenity is “filth for filth’s sake,” there is no reason addressed by courts why it should not equally apply to literature, visuals, and its nexus of comic books.

### D. Social Importance vs. Obscenity

The *Roth* Court first reflected upon the notion of socially important ideas as pertaining to the First Amendment.<sup>209</sup> In *Roth*, the Supreme Court stated: “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”<sup>210</sup> Society should view controversial material, as opposed to obscene material, as having some social importance. Courts should still consider whether social importance is a redeeming factor when analyzing whether material is obscene. For example, in *Batman: The Killing Joke*,<sup>211</sup> it is implied that Barbra Gordon is brutally raped and shot by the Joker.<sup>212</sup> Feelings of discomfort were shared with a library in Nebraska for its graphic

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<sup>206</sup> See *supra* Section VI.

<sup>207</sup> 383 U.S. 413, 421 (1966).

<sup>208</sup> 413 U.S. 15, 24 (1973).

<sup>209</sup> See *supra* Section III, A.

<sup>210</sup> 354 U.S. 476 (1957).

<sup>211</sup> ALAN MOORE ET AL., *BATMAN: THE KILLING JOKE* (1988).

<sup>212</sup> *Id.*

depictions of rape and violence.<sup>213</sup> Ultimately, three out of five library board members opted to keep *Batman: The Killing Joke* on the library shelves.<sup>214</sup> When applying the *Roth* social importance theory, *Batman: The Killing Joke* has a social impact because the topic of rape is always a social issue. This is an example of discomfort not meeting the proposed standard of extreme agonizing discomfort as set forth in the proposed obscenity definition.

Even inherently sexual comic books have social importance. For example, the comic series *Sunstone*<sup>215</sup> features two fetishist women in what becomes a loving relationship. Although the depictions of sex are not hardcore, the appeal to fetishists is apparent. However, the social importance in *Sunstone* is its depiction of love and communication between the characters. Arguably, a comic about spreading romantic love and good communication skills with a partner can benefit society.<sup>216</sup> Additionally, this follows the *Correa* analysis of porn-with-plot rather than obscenity. Another example is the comic book *Sex Criminals*,<sup>217</sup> in which the two main characters realize that when they have sex with each other, time stops, and they conspire to rob banks while time is frozen. Although the comic is about sex and the dangers of stopping time, there is still social importance in the love between the two characters, thus following the *Correa* analysis as well.

### VIII. CONCLUSION

Courts must tighten-up obscenity laws in order to protect seemingly innocent comic shop owners from selling comic books that should not be considered obscene in the first place. There is a wide gap in what is considered pornographic and what is obscene; adjusting the laws of obscenity should start with an accurate definition of the term “obscene” in all state and federal statutes. Courts must recognize that obscenity is one extreme on the scale of pornography, and the laws should provide clear examples of what legislatures deem “obscene.” The beloved *Miller* test is over four decades old; perhaps it is time for

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<sup>213</sup> Comic Book Legal Defense Fund, *Case Study: Batman: The Killing Joke*, <http://cbldef.org/banned-challenged-comics/case-study-batman-the-killing-joke/>, (last visited Mar. 19, 2019).

<sup>214</sup> *Id.*

<sup>215</sup> STJEPAN SEJIC, *SUNSTONE VOLUME 1* (2014).

<sup>216</sup> William J. Goode, *The Theoretical Importance of Love* 24 AM. SOC. REV. No. 1, 41-42 (1959).

<sup>217</sup> MATT FRACTION & CHIP ZDARKSY, *SEX CRIMINALS VOLUME 1: ONE WEIRD TRICK* (2014).

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a new test that provides further clarity on the scale of vanilla to hardcore pornography and determines where pornographic obscenity fits in on that scale. Until there is change, comic shop owners and creators of comic books must continue to be wary of distributing content that may be unappealing in the eyes of the law.