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OBSCENITY: SEARCH AND SEIZURE AND THE FIRST AMENDMENT

BY ARTHUR L. BURNETT*

INTRODUCTION

The recent Supreme Court decisions on obscenity will undoubtedly precipitate a great deal of discussion among legal scholars, practitioners, and within the judiciary as to the wisdom, effect, and scope of the law in this highly controversial area. Much attention will be devoted to the impact of these recent decisions on the first amendment, but equally important is the interaction between the first and fourth amendments. This article will examine the current state of the law on obscenity as a prelude to an analysis of the myriad issues that must be dealt with when the attempts of the federal or state governments to suppress allegedly obscene material conflict with an individual's wishes to retain freedoms guaranteed by the Constitution.

I. THE STATE OF THE LAW OF OBSCENITY

In June 1973 the Supreme Court handed down eight related decisions which dealt with various aspects of the law of obscenity. Although the decisions themselves do not represent the definitive statement which many judges, lawyers, and scholars had hoped for, they do represent an effort by the Court to offer some concrete standards in this most confused area of the law. An attempt is made here to announce the current state of the law of obscenity and to isolate related issues which remain unresolved.

A. *From Roth to Miller: The Current Doctrine*

Any meaningful discussion of a test of obscenity must commence with *Roth v. United States*,¹ in which the Supreme Court observed:

[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states,

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¹354 U.S. 476 (1957).

and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.²

In *Roth* the Supreme Court established the test of obscenity as being "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."³

Elaboration of the *Roth* test occurred in 1964 in *Jacobellis v. Ohio*,⁴ a case involving a motion picture film. In an opinion by Justice Brennan, joined in only by Justice Goldberg, emphasis was placed on the concept of "utterly without redeeming social value." Finally, in 1966, the *Roth* test was restated and amplified in another plurality opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*,⁵ in which Justice Brennan stated that in determining the obscenity of any publication or film three elements must coalesce. First, the dominant theme of the material taken as a whole must appeal to a prurient interest in sex; second, the material must be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and third, the material must be utterly without redeeming social value.⁶ It was further pointed out that in evaluating the alleged obscenity *vel non*, judges and juries must be careful not to weigh a work's social importance against its prurient appeal, for these elements must be considered individually and not balanced one against the other.⁷

During the years following *Memoirs*, the inability of a major-

²*Id.* at 484-85.

³*Id.* at 489. It has been stated that this was the only test in which a majority of five Justices of the Supreme Court agreed. *Wagonheim v. Maryland State Bd. of Censors*, 255 Md. 297, 258 A.2d 240 (1969), *aff'd by an equally divided court sub nom. Grove Press, Inc. v. Maryland State Bd. of Censors*, 401 U.S. 480 (1971).

⁴378 U.S. 184 (1964).

⁵383 U.S. 413 (1966).

⁶*Id.* at 418. This test as enunciated by Justice Brennan received only the approval of Chief Justice Warren and Justice Fortas. In a dissenting opinion Justice Clark observed that the social value test was "novel" and that only three members of the Supreme Court held to it. He further pointed out that, in his opinion, such a test rejects the *Roth* test to which a majority of the Court did agree.

Even in *Redrup v. New York*, 386 U.S. 767 (1967), the per curiam opinion was careful to state that the necessity of meeting the 3-point test was a view held only by certain Justices in *Memoirs* and did not cite the 3-point test as the test of the Court. However, it is noted that in *Roth* the majority spoke of obscenity "as utterly without redeeming social importance." 354 U.S. at 484-85.

⁷383 U.S. at 419.

ity of the Court to agree on a definitive formulation of a test for obscenity resulted in the repeated use of the approach developed in *Redrup v. New York* in 1967.⁸ Justice Brennan notes that “[n]o fewer than 31 cases”⁹ were disposed of by these “*per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene.”¹⁰

On June 21, 1973, the Supreme Court handed down the decision of *Miller v. California*,¹¹ in which a majority of the Court—for the first time since *Roth*—agreed on “concrete guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment.”¹² First, the Court reaffirmed the basic tenet of *Roth* that obscene material is not entitled to the protection of the first amendment, but rejected the 3-part *Memoirs* test as a constitutional standard.¹³

Secondly, in acknowledging the power of the states to regulate obscenity, the Court delineated the following guidelines:

[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.¹⁴

Thirdly, the Court provided a sample instruction for the trier of fact which incorporates the new standard as set forth above,¹⁵ but noted that the state legislatures, not the Court, are to draft

⁸386 U.S. 767 (1967). See text accompanying notes 23-28 *infra*.

⁹*Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628, 2647 n.8 (1973).

¹⁰*Id.* at 2647.

¹¹93 S. Ct. 2607 (1973).

¹²*Id.* at 2617. The majority consisted of Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and White.

¹³*Id.* at 2614. Note that the “utterly without redeeming social value” test is not included in the new standard. *Id.* at 2615.

¹⁴*Id.* at 2614-15.

¹⁵*Id.* at 2615:

The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest [citations omitted] . . . (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.

their own regulatory schemes.¹⁶

Finally, the determination by the jury of what is obscene under the new test is to be made not by the application of national standards, but rather by applying contemporary community standards as they exist in the forum community.¹⁷

One may question the clarity of the *Miller* decision and, even in a moment of cynical hindsight, wonder whether the Court is abdicating its responsibility of defining clearly the scope of the first amendment. However, it seems certain that as a matter of law the *Miller* test will remain constitutionally valid for some time, and that the scope of protection to be afforded to allegedly obscene material by the first amendment will be determined by where the material is found.

B. *The Average Person versus a Limited Class*

The *Miller* decision, despite the formulation of a new test, apparently has not altered the attitude of the Court toward the appeal of obscene material to a limited class of people. In 1962, the contention was advanced that the prurient interest element could be evaluated on the basis of appeal to a particular class of people, such as sexual deviates, and need not be determined on the issue of appeal to the average person. However, in announcing the judgment of the Court in *Manual Enterprises, Inc. v. Day*,¹⁸ Justice Harlan—joined by Justice Stewart—concluded that the Court did not have to consider the issue of the proper audience by which the prurient interest appeal should be judged, and the case was decided instead on the issue of “patent offensiveness” in connection with determining whether the offending material exceeded contemporary community standards.¹⁹

In 1966, the Supreme Court decided the issue raised in *Manual Enterprises, Inc. v. Day* of whether prurient appeal could be assessed on the basis of a limited audience, even though such material might not appeal to the prurient interest of the average

¹⁶*Id.* at 2615.

¹⁷*Id.* at 2618-20. See text accompanying note 162 *infra*.

¹⁸370 U.S. 478 (1962).

¹⁹*Id.* at 486-91. Justice Harlan, elaborating upon this concept of “patent offensiveness” in connection with contemporary community standards, indicated that this test was to be applied so as to determine whether the material goes substantially beyond the customary limits of candor and decency which the community will tolerate in connection with the representation or depiction of sexual matters, and that this evaluation must be based on a national standard of decency, at least in connection with federal statute. *Id.*

person. In *Mishkin v. New York*,²⁰ a case involving publication of books most of which depicted such deviations as sado-masochism, fetishism, homosexuality, and drawings of scantily-clad women being whipped, beaten, tortured, and abused, the Court held:

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.²¹

Although *Miller* has changed the thrust of the legal standard for obscenity, it is clear that *Mishkin*, modified accordingly, will still be constitutionally valid and will control with materials appealing to a limited audience.²²

C. *Distribution of Obscene Materials: From Redrup to Paris Adult Theatre I*

In 1966, the Supreme Court decided the case of *Redrup v. New York*,²³ the application of which caused much confusion within the lower state and federal judiciaries, and among law enforcement officials and prosecuting attorneys. In *Redrup* the Court overturned the convictions of three distributors of allegedly obscene books and magazines. The per curiam opinion noted that

²⁰383 U.S. 502 (1966).

²¹*Id.* at 508.

²²In *Miller* Chief Justice Burger, addressing himself to the issue of whether a national community standard was required, stated:

People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in *Mishkin v. New York*, 383 U.S. 502, 508-09 . . . (1966), the primary concern with requiring a jury to apply the standard of "the average person, applying community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.

93 S. Ct. at 2620.

In *Paris Adult Theatre I v. Slaton*, 93 S. Ct. at 2634 n.6, the majority noted in dealing with the need for expert testimony that:

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

Here, the Court cited *Mishkin* and *United States v. Klaw*, 350 F.2d 155, 167-68 (2d Cir. 1965). However, the Court held that in routine obscenity cases, expert testimony is not required.

²³386 U.S. 767 (1967). The decision actually dealt with three cases involving similar issues.

in none of the cases was there a claim that the statute in question reflected a specific and limited 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*.²⁴ However, the Court further noted that it had originally limited review in these three cases to certain particularized questions upon the hypothesis that the material involved in each case was of a character described as "obscene in the constitutional sense" in *Memoirs*, but had concluded that this hypothesis was invalid.²⁵ After noting the various views of the individual justices as to what constituted obscenity, the Court concluded, "Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand."²⁶ It is apparent that the Supreme Court did not reach the issues posed by its reference to the concern for juveniles, intrusion upon the sensibilities of nonconsenting adults, and pandering.

Redrup was interpreted by some courts as meaning that the fact that a given publication is "'obscene' no longer justifies suppression or criminal prosecution unless it is pandered, obtrusively advertised, or disseminated to unconsenting adults, or placed in an environment in which it is likely to fall into the hands of children."²⁷ Other courts took the position that the reference in

²⁴383 U.S. 463 (1966). In *Ginzburg* the Court indicated that a defendant's manner of advertising sexually-oriented material could be considered in assessing prurient appeal and redeeming social value. The Court also commented extensively about the defendant's conduct in foisting these materials on an unwilling public.

²⁵386 U.S. at 769-70. Review had been granted on the issue of scienter in two of the cases and on the issue of "vagueness" and "prior restraint" of a comprehensive anti-obscenity statute in the third case.

²⁶*Id.* at 771.

²⁷*Hayse v. Van Hoomissen*, 321 F. Supp. 642, 644 (D. Ore. 1970), *vacated and remanded on juris. grounds*, 403 U.S. 927 (1971).

In *State v. Carlson*, 202 N.W.2d 640 (Minn. 1972), the Minnesota Supreme Court, after reviewing and analyzing some 29 obscenity convictions reversed by the United States Supreme Court on the authority of *Redrup*, noted: "If any pattern has developed from the decisions, it appears that hard-core pornography is outside of the scope of *Redrup*, whatever its application is claimed to be." *Id.* at 646. Under this approach, *Redrup* has significance only where the alleged obscenity does not rise to the level of hardcore pornography. Then the supplemental standards of pandering, obtrusiveness, and exposure to juveniles added by *Redrup* should be considered. *State v. Lebewitz*, 202 N.W.2d 648, 651 (Minn. 1972).

Another commentator has noted approximately 34 per curiam reversals of convictions

Redrup to the concern for juveniles, intrusion upon the privacy or sensibilities of nonconsenting adults, and pandering had no significance and declined to interpret *Redrup* as a pronouncement that all or any of these three matters must be shown before an obscenity conviction can be sustained.²⁸

In 1969 the Court held in *Stanley v. Georgia*²⁹ that an individual could not be prosecuted for the mere possession of obscene matter in the privacy of his own home. *Redrup* and *Stanley* were subsequently combined by distributors of questionable material to create the argument that if an adult may possess obscene matter for his personal use in the privacy of his home, he has the right to receive such material, and therefore someone has the corresponding right to distribute or sell it to him as long as he is a consenting adult and there is no intrusion upon nonconsenting adults, no distribution to juveniles, and no pandering. Based upon this approach, it was quite routine for the argument to be advanced that there is a right in a seller or distributor to make obscene matter available commercially as long as the recipient is a consenting adult.³⁰ It was also contended that obscene movies may be shown in a commercial theater as long as juveniles are excluded and only consenting adults patronize the exhibition.³¹

On June 21, 1973, the Supreme Court held in *Paris Adult Theatre I v. Slaton*³² that the exhibition of obscene material (here, films) in places of public accommodation may be regulated by the

by the Supreme Court since 1967 that cited *Redrup* as the ground for reversal. *Reno, Obscenity Revisited—1972*, 58 A.B.A.J. 736-37 (1972).

²⁸*Johnson v. Commonwealth*, 475 S.W.2d 893, 894-95 (Ky. Ct. App. 1971).

²⁹394 U.S. 557 (1969).

³⁰Some courts accepted this argument. *See, e.g., Hayse v. Van Hoomissen*, 321 F. Supp. 642 (D. Ore. 1970); *United States v. Lethe*, 312 F. Supp. 421 (E.D. Cal. 1970); *Karalexis v. Byrne*, 306 F. Supp. 1363 (D. Mass. 1969), *vacated and remanded on jurisdiction*, 401 U.S. 216 (1971).

³¹In *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 185 S.E.2d 768 (1971), *cert. granted*, 408 U.S. 921 (1972), the theater exhibitors argued that they could commercially exhibit obscene movies as long as minors were excluded and there was no obtrusive and indiscriminate exhibition to nonconsenting adults. In *People v. Kaplan*, 23 Cal. App. 3d 9, 100 Cal. Rptr. 372 (App. Dep't Super. Ct. 1972), *cert. granted*, 408 U.S. 921 (1972), the bookseller claimed a derivative right of his customer, as a consenting adult, to purchase and read what he chose and a corresponding right to make it available to him as long as there were no sales to minors nor any intrusions on the sensibilities of adults. Reference is also made to the *Redrup-Stanley* issues in the briefs in *Heller v. New York*, 93 S. Ct. 2789 (1973), involving the conviction of a theater exhibitor for the exhibition of a motion picture film, *Blue Movie*. *See People v. Heller*, 29 N.Y.2d 319, 277 N.E.2d 651, 327 N.Y.S.2d 628 (1971), *cert. granted*, 406 U.S. 916 (1972).

³²93 S. Ct. 2628 (1973).

states regardless of whether there is any pandering, obtrusive advertising, or exposure to juveniles or nonconsenting adults. The Court stated that the states have a legitimate interest in regulating the use of obscene material in local commerce and in all places of accommodations because the interest involved includes not only juveniles and nonconsenting adults, but also "the interest of the public in the quality of life and the total community environment"³³ Since the constitutional right of privacy inherent in *Stanley* does not extend to places of public accommodation such as a movie theater, the exhibition of the obscene material is not entitled to protection under the first amendment.³⁴

D. *The Zone of Constitutionally-Protected Privacy: Stanley Restricted*

The Court's decision in *Stanley v. Georgia*³⁵ established the doctrine that the individual's home and his actions within it— as far as the *possession* of obscene materials is concerned—are within the zone of privacy protected by the first amendment. However, a series of decisions during the past 2 years have restricted the range of this zone and certain alleged rights emanating therefrom.

In *United States v. Reidel*,³⁶ the Court held that the right to possess obscene materials did not imply the right to publish and commercially distribute allegedly obscene matter through the mails even to consenting adults, and reversed the district court's dismissal of an indictment on the ground that *Stanley* required the concomitant right to receive obscene materials for one's own use and the right of another person to furnish obscene material to such a recipient.³⁷

In *United States v. Thirty-seven Photographs*,³⁸ the Court held that the United States could regulate the possession and importation of obscene materials through a port of entry into the United States under its power to control foreign commerce, even where the possession would be for one's own use, although Luros,

³³*Id.* at 2635.

³⁴*Id.* at 2639-40.

³⁵394 U.S. 557 (1969).

³⁶402 U.S. 351 (1971). This opinion appears to reflect the views of six Justices.

³⁷*Id.* at 355. See *People v. Luros*, 4 Cal. 3d 84, 480 P.2d 633, 92 Cal. Rptr. 833 (1971), cert. denied, 404 U.S. 824 (1972), in which the California Supreme Court, in a very thorough opinion, arrived at the same conclusion as the United States Supreme Court had in rejecting similar contentions in *Reidel*.

³⁸402 U.S. 363 (1971).

the possessor, had stipulated with the Government that the materials were imported for commercial purposes.³⁹ Before the district court, on the authority of *Stanley*, Luros had urged the trial court to construe the first amendment as forbidding any restraints on obscenity except where necessary to protect children or where there was an actual intrusion into the privacy of an unwilling adult. Without rejecting this position, the trial court read *Stanley* as protecting, at the very least, the right to read obscene material in the privacy of one's own home and to receive it for that purpose, and thus concluded that the statute⁴⁰ which barred the importation of obscenity for private use as well as for commercial distribution was overbroad and hence unconstitutional.⁴¹

In *Thirty-seven Photographs*, Mr. Justice White commented specifically:

The trial court erred in reading *Stanley* as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use.⁴²

This limitation by the plurality opinion of the four Justices led Mr. Justice Black, in his dissent (joined by Justice Douglas), to respond:

Since the plurality opinion offers no plausible reason to distinguish private possession of "obscenity" from importation for private use, I can only conclude that at least four members of the Court would overrule *Stanley*. Or perhaps in the future that case will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.⁴³

These two decisions clearly indicated that the future of *Stanley* was uncertain in that stricter views toward permitting the sale and distribution of allegedly obscene matter would constrict even more the *Stanley* zone of privacy. Two recent Court decisions have confined permissible possession "within the home" to such an extent that in retrospect Justice Black's dissent in *Thirty-seven Photographs* was accurate as well as prophetic.

³⁹*Id.* at 376-77. The plurality opinion reflected the views of four members of the Court: Chief Justice Burger; Mr. Justice White; Mr. Justice Brennan; and Mr. Justice Blackmun. Justices Harlan and Stewart, relying on the stipulation of commercial use, concurred in the result and indicated that they would not reach the issue of purely private use.

⁴⁰19 U.S.C. § 1305(a) (1970).

⁴¹*United States v. Thirty-seven Photographs*, 309 F. Supp. 36 (C.D. Cal. 1970).

⁴²402 U.S. at 376.

⁴³*Id.* at 382.

In *United States v. Orito*,⁴⁴ the Court reaffirmed that the zone of privacy that *Stanley* protects does not extend beyond the home⁴⁵ and held that under the commerce clause Congress can regulate interstate transportation of obscene material by a passenger on a common carrier even though such material is intended for the passenger's private use.⁴⁶ In *United States v. Twelve 200-foot Reels*,⁴⁷ the statute which was held unconstitutional by a district court in *United States v. Thirty-seven Photographs*⁴⁸ was upheld as constitutional. The Court stated that Congress can regulate the importation of obscene matter, notwithstanding the fact that the matter is intended solely for the importer's private use and possession in his own home.⁴⁹

These two decisions dispel any doubt that the *Stanley* zone of privacy with regard to possession will ever extend beyond the four walls of a private dwelling. The Supreme Court has restricted the distribution of obscene materials in an indirect but highly effective manner by narrowly limiting the holding in *Stanley* to its facts and has thus provided both federal and state governments with a great deal of freedom—within the confines of *Miller*—to regulate the dissemination of allegedly obscene material.

E. *Speech versus Conduct: A Dilemma in the Law of Obscenity*

In approaching the subject of whether given material is obscene *vel non*, one must consider the medium utilized and whether that medium partakes more of the expression and communication of ideas and thoughts, or whether it presents conduct, although that conduct ostensibly is meant to communicate an idea or thought which is claimed to have first amendment protection. Thus the printed novel which depicts prostitution, adultery, fornication, or other similar forms of conduct might be entitled to constitutional protection,⁵⁰ while the depiction or representation of that identical conduct on a stage or in a motion picture might not be so protected.

⁴⁴93 S. Ct. 2674 (1973).

⁴⁵*Id.* at 2677.

⁴⁶*Id.* at 2678.

⁴⁷93 S. Ct. 2665 (1973).

⁴⁸See notes 40-41 *supra*.

⁴⁹93 S. Ct. at 2668-69.

⁵⁰A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966). *But see* Kaplan v. California, 93 S. Ct. 2680 (1973).

In *California v. LaRue*,⁵¹ Mr. Justice Rehnquist, speaking for the Court, observed:

[A]s the mode of expression moves from the printed page to the commission of public acts which may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases.⁵²

Thus, it would appear that the performance of sexual intercourse in public, whether real or simulated, whether live or on film, whether thespian or not, should be held obscene,⁵³ while a description of the same events in a novel or in story form, if not in violation of the *Miller* test, should not be so held. However, the recent decision of *Kaplan v. California*⁵⁴ held:

Obscenity can . . . manifest itself in conduct, in the pictorial [sic] representation of conduct, or in the written and oral description of conduct.⁵⁵

The Court in *Kaplan* went on to hold that obscene material in book form is not necessarily entitled to first amendment protection merely because it contains no pictures or diagrams.⁵⁶ The *Kaplan* decision obscures somewhat the delineation between speech and conduct noted by Justice Rehnquist in *LaRue* and at the same time offers no alternative method for distinguishing the two concepts.⁵⁷

One of the more perplexing problems in this area is whether motion pictures are to be evaluated with reference to portrayals of sexual activities on the basis of expression of ideas and thoughts, or whether they should be evaluated on the basis that such activity constitutes "conduct." One of the most analytical

⁵¹409 U.S. 109 (1972).

⁵²*Id.* at 117.

⁵³*See, e.g.,* *Bowling v. California*, 12 CRIM. L. REPR. 4027 (Cal. Ct. App. 2d App. Dist., filed Mar. 7, 1972), *cert. denied*, 409 U.S. 912 (1972), in which the Supreme Court denied review of a California Court of Appeals ruling which had held that a "live sex show" including an act of intercourse is not a 'theatrical performance' excluded from the ambit of the California Penal Code's prohibition against soliciting or engaging in lewd or dissolute conduct in [a] place open to the public."

⁵⁴93 S. Ct. 2680 (1973).

⁵⁵*Id.* at 2684.

⁵⁶*Id.*

⁵⁷It is clear, however, that textual or printed material cannot be used as a "mere vehicle" for presentation of sexually explicit illustrations and pictures, thus removing the material from statutes regulating obscenity. *See, e.g.,* *State v. J-R Distributors, Inc.*, 512 P.2d 1049, 1078 (Wash. 1973). "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . ." *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972).

cases on this distinction is *Trans-Lux Distributing Corp. v. Board of Regents*,⁵⁸ in which the majority of the Court of Appeals for New York, after a lengthy analysis of the distinction between "speech" and "conduct,"⁵⁹ concluded:

[A] filmed presentation of sexual intercourse, whether real or simulated, is just as subject to state prohibition as similar conduct if engaged in on the street. . . . [T]he nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen.⁶⁰

⁵⁸14 N.Y.2d 88, 198 N.E.2d 243, 248 N.Y.S.2d 857 (1964).

⁵⁹*Id.* at 91-92, 198 N.E.2d at 244-45, 248 N.Y.S.2d at 859-60 (citations omitted):

While typically applicable to "speech" and "press" in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures. . . . Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amendment to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State labor laws that are not themselves designed as restrictions on freedom of speech. Conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression. For example, in *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272, *supra*, app. dsmd. for want of a substantial Federal question 375 U.S. 42, 84 S. Ct. 147, 11 L.Ed.2d 107, this court upheld an "Aesthetic" ordinance prohibiting the display of soiled laundry on a clothesline in the defendants' front yard, despite the fact that the display was an expression of social protest.

Films, by their nature, may lie on either side of the division between speech and conduct. The opinions of the Supreme Court reversing this court in the cases of advocacy of adultery and thematic sacrilege make that plain. But it also follows that if "picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation" then so may films. In this regard, it will be noted that the Supreme Court has not yet expressed its opinion in a case involving allegedly obscene *behavior* on the screen. In such a case, the First Amendment must be applied to films according to their special nature, just as it has been applied to conduct. This much has, of course, been explicitly recognized in the leading case on films and the First Amendment: "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." (*Joseph Burstyn, Inc., v. Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098, *supra*.)

See *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959), where the Court "repeatedly distinguishes between the right to communicate any idea, however deviant from orthodoxy, and the manner of its portrayal."

⁶⁰14 N.Y.2d at 92, 198 N.E.2d at 245, 248 N.Y.S.2d at 860. In connection with the

If such portrayals of sexual intercourse, oral copulation, or anal-genital contact have no relevance to a social value theme which the film is endeavoring to communicate, and if they are solely reproductions of sexual conduct aimed at titillating the audience and arousing the viewers' sexual interests and desires, it is difficult to conceive why the "conduct" rationale should not be applied.⁶¹ In this context, it is significant to note that even Justice Douglas has acknowledged that obscene conduct may be prohibited. In his *Roth* dissent he stated:

I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.⁶²

In *Paris Adult Theatre I v. Slaton*,⁶³ the Court confined its holding not to thoughts or speech, but to:

depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights.⁶⁴

However, in his dissent Mr. Justice Brennan pointed out that the mere formulation of the *Miller* physical conduct test does not resolve the difficulty of applying it to either pictorial or textual material.⁶⁵ Indeed, the Court has yet to draw a clear line on what type of conduct depicted in films is protected versus that which is not protected. Mr. Justice Brennan's despair is apparent from his statement:

Ultimately, the [*Miller*] reformulation must fail because it still leaves in this Court the responsibility of determining in each case whether the materials are protected by the First Amendment.⁶⁶

distinction between books and films, see *United States v. A Motion Picture Film Entitled "I Am Curious-Yellow"*, 404 F.2d 196 (2d Cir. 1968); *McGrew v. City of Jackson*, 307 F. Supp. 754 (S.D. Miss. 1969); *Landau v. Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (Dist. Ct. App. 1966), *aff'd*, 388 U.S. 456 (1967); *Wagonheim v. State Bd. of Censors*, 255 Md. 297, 258 A.2d 240 (1969), *aff'd by an equally divided Court*, 401 U.S. 480 (1971).

⁶¹See, e.g., *State v. Lebewitz*, 202 N.W.2d 648 (Minn. 1972), in which the Minnesota Supreme Court upheld the conviction of two theater owners for exhibiting an obscene motion picture entitled *The Art of Marriage*, which the exhibitors claimed had the effect of a cinematic marriage manual. The film explicitly portrayed heterosexual intercourse, frequently of prolonged duration. The Court held that the guise of educational value was a mere pretense to commercially exploit its prurient appeal.

⁶²354 U.S. 476, 512 (1957).

⁶³93 S. Ct. 2628 (1973).

⁶⁴*Id.* at 2641-42.

⁶⁵*Id.* at 2655-56.

⁶⁶*Id.* at 2656.

Prior to the recent decisions in *Miller* and its companion cases, the Court refused to find obscenity in films involving mere suggestion of sexual activity⁶⁷ or in those with sexual episodes which, though explicit, were "so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed."⁶⁸ On the other hand, a conviction was left standing where the film portrayed explicit "sexual activity" which included deviant conduct or oral copulation and sodomy as well as fantasies of sexual intercourse.⁶⁹ In connection with still photographs and photographic publications and magazines, the Supreme Court has refused to upset findings of obscenity where the photographs depicted overt sexual activity, parties engaged in sexual intercourse, and unnatural and deviant sexual practices.⁷⁰

Since the case was remanded in *Paris Adult Theatre I*, it is difficult to predict how a jury will apply the *Miller* and *Paris* tests to any given film. It is possible that the film *Deep Throat* may very well not withstand the new obscenity test,⁷¹ but there are still lacking some definitive and precise guidelines as to exactly what types of portrayals of sexual matters in motion pictures, as well as in books and other types of publications, should be prohibited.

II. FIRST AND FOURTH AMENDMENT PROBLEMS

As if the perplexing and vexatious problems associated with defining obscenity were not enough, the law of obscenity as it developed during the past decade brought forth other and even more frustrating problems for the lower level judiciary in both federal and state courts. These problems centered around certain procedural issues, such as whether a prior adversary hearing to determine the obscenity of the questioned material was constitutionally required before a judicial officer could issue a search warrant in connection with an alleged obscenity criminal offense,

⁶⁷*Times Film Corp. v. Chicago*, 355 U.S. 35, *rev'g* 244 F.2d 432 (7th Cir. 1957).

⁶⁸*Jacobellis v. Ohio*, 378 U.S. 184, 197-98 (1964) (Goldberg, J., concurring).

⁶⁹*Landau v. Fording*, 388 U.S. 456 (1967), *aff'g* 245 Cal. App. 2d 280, 54 Cal. Rptr. 177 (Dist. Ct. App. 1966).

⁷⁰*Mishkin v. New York*, 383 U.S. 502 (1966) (publications depicting sadomasochism, fetishism, homosexuality, and drawings of scantily-clad women being whipped, beaten, tortured, or abused); *Levin v. State*, 1 Md. App. 139, 228 A.2d 487 (Ct. App. 1967), *cert. denied*, 389 U.S. 1048 (1968); *Phelper v. State*, 396 S.W.2d 396 (Crim. App. Tex. 1965), *cert. denied*, 382 U.S. 943 (1965).

⁷¹See Judge Tyler's opinion in *People v. Mature Enterprises*, 41 U.S.L.W. 2498 (N.Y. City Crim. Ct., filed Mar. 1, 1973). See also *United States v. One Reel of Film*, 481 F.2d 207 (1st Cir. 1973) (holding *Deep Throat* obscene under 19 U.S.C. § 1305(a)).

or before there could be an arrest by a law enforcement official, with or without a warrant or, in the case of a warrantless arrest, prior to the incidental seizure of allegedly obscene materials. In addition, the first amendment ramifications of obscenity cases required the development of different standards for determining probable cause in the issuance of warrants for a search or arrest. The response to these problems was a plethora of conflicting decisions demonstrating an overriding need for the Supreme Court to provide some definitive and meaningful guidance.

Just 4 days after the decisions in *Miller* and its companion cases were announced, the Supreme Court handed down two opinions involving the issue of a prior adversary hearing and the requirement for a search warrant to be issued prior to the seizure of allegedly obscene materials.⁷² The following sections examine the extent to which the procedural aspects of obscenity prosecutions have been settled and raise questions about those situations which remain unresolved.

A. *The Adversary Hearing Prior to Seizure*

The genesis of the prior adversary hearing seems to have been in *Marcus v. Search Warrant*,⁷³ and the concept was further developed in the plurality opinion of four Justices in *A Quantity of Books v. Kansas*.⁷⁴ In *Marcus* the discussion of the idea of an adversary hearing prior to the issuance of a search warrant was actually dictum, for the Court, in the final analysis, stated:

Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants [were] issued on the strength of the *conclusory assertions of a single police officer*, without any scrutiny by the judge of any materials considered by the complainant to be obscene.⁷⁵

It thus appears that the decision in *Marcus* was in reality based on traditional fourth amendment grounds, *i.e.*, the failure of the affidavit to set forth sufficiently detailed factual information for the judge to make an independent judgment of probable cause.⁷⁶

⁷²Heller v. New York, 93 S. Ct. 2789 (1973); Roaden v. Kentucky, 93 S. Ct. 2796 (1973).

⁷³367 U.S. 717 (1961).

⁷⁴378 U.S. 205 (1964).

⁷⁵367 U.S. at 731-32 (emphasis added).

⁷⁶For a similar analysis of the *Marcus* opinion, see *State v. Eros Cinema, Inc.*, 264

A Quantity of Books v. Kansas, involving the seizure of some 1,715 copies of 31 titles of various publications for purposes of destruction in a civil proceeding upon a search warrant, became the judicial vehicle which brought the concept of a prior adversary hearing firmly into the law.⁷⁷ The Court's opinion caused so much confusion as to the occasions which require an adversary hearing that state and lower federal court decisions which dealt with this case produced conflicting applications of the rule. One state court interpreted the holding in *Quantity of Books* in this manner:

This opinion of four members of the Supreme Court, two of whom no longer sit, is authority only for the proposition that *total suppression* of any expression of speech or press as obscenity cannot be had except after an adversary hearing. The repeated mention of the mass seizure of *all* copies of all titles clearly points to the alternative the majority felt was available in the control of obscenity—that is, the seizure of one copy of each title for evidence to determine whether all copies may be suppressed as obscene.⁷⁸

So. 2d 615 (La. 1972).

Marcus involved the seizure of 11,000 copies of some 280 different publications pursuant to a search warrant for purposes of destroying or burning them to suppress their contents in a civil proceeding. In the course of the opinion, the Court noted that the regulation of obscenity must conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity by "a dim and uncertain line," citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). The Court also noted that the separation of legitimate from illegitimate speech calls for "sensitive tools," citing *Speiser v. Randall*, 357 U.S. 513, 525 (1958), and that the Constitution requires a procedure "designed to focus searchingly on the question of obscenity." *Marcus v. Search Warrant*, 367 U.S. 717, 731-32 (1961).

See also Note, *The Prior Adversary Hearing: Solution to Procedural Due Process Problems in Obscenity Seizures?*, 46 N.Y.U.L. REV. 80 (1971).

⁷⁷The plurality opinion was by Mr. Justice Brennan, joined by Chief Justice Warren and Justices White and Goldberg.

Mr. Justice Stewart, in a concurring opinion, noted, "If this case involved hard-core pornography, I think the procedures which were followed would be constitutionally valid, at least with respect to the material which the judge 'scrutinized.'" 378 U.S. at 214. The opinion discloses that the judge who issued the search warrant had conducted a 45-minute *ex parte* inquiry during which he "scrutinized" several books prior to issuing the warrant for 59 novels by title, and concluded that those scrutinized and others published by the same publisher (the latter based on their titles) gave him reason to believe that all were obscene. Upon execution of the warrant on the same day, only 31 of the titles were actually seized.

Justices Black and Douglas concurred on the grounds that the first amendment precluded state regulation of obscene matter and indicated that *Roth* should be overruled. Justices Harlan and Clark indicated that they would affirm the procedures utilized and the judgment of the Kansas Supreme Court.

⁷⁸*State v. Eros Cinema, Inc.*, 264 So. 2d 615, 618 (La. 1972). See *Heller v. New York*, 93 S. Ct. 2789, 2794 (1973), in which the Supreme Court approved this interpretation.

A number of federal courts have held, however, that *Quantity of Books* dictates that a pre-seizure adversary hearing is required before a search warrant can ever be issued and executed. The leading cases, both of which involved films, are *Tyrone, Inc. v. Wilkinson*⁷⁹ and *Bethview Amusement Corp. v. Cahn*.⁸⁰

One of the most analytical opinions holding that no pre-seizure adversary hearing is required is *Bazzell v. Gibbens*.⁸¹ In *Bazzell* the court commenced its analysis with the observation that whether a pre-seizure adversary hearing is required "must depend upon the nature and purpose of the seizure."⁸² The court held that a single copy seizure of a motion picture film for the sole purpose of preserving it as evidence was valid without a pre-seizure adversary hearing prior to the issuance of the search warrant, albeit a side effect coincidentally prevents that copy from being further disseminated pending the outcome of the criminal prosecution.⁸³ The court further noted:

To deprive the District Attorney . . . of the right to seize evidence pursuant to a search warrant issued on the basis of probable cause, and to preserve that evidence intact for use during future criminal proceedings, would be to effectively deny the State the right in a case such as this to prosecute at all under a statute already declared to be constitutional. . . . Surely such a procedure would not have offended . . . freedom of expression. It would merely have prevented the possible destruction or disappearance of the evidence. . . .⁸⁴

The Louisiana Supreme Court, when faced with the identical issue in *State v. Eros Cinema, Inc.*,⁸⁵ stated:

[T]o hold to the contrary would be ridiculous. . . . [for] the best evidence . . . is the allegedly obscene material. Unless such material can be purchased . . . the only lawful means in cases such as this for producing and preserving this evidence is under search and

⁷⁹410 F.2d 639 (4th Cir. 1969), *cert. denied*, 396 U.S. 985 (1969).

⁸⁰416 F.2d 410 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). See also *United States v. Alexander*, 428 F.2d 1169 (8th Cir. 1970); *Astro Cinema Corp. v. Mackell*, 422 F.2d 293 (2d Cir. 1970); *Fontaine v. Dial*, 303 F. Supp. 436 (W.D. Tex. 1969), *appeal dismissed*, 399 U.S. 521 (1970). For an illustrative state case taking the same position, see *State ex rel. McDevitt v. Harvey*, 491 P.2d 563 (Colo. 1971).

⁸¹306 F. Supp. 1057 (E.D. La. 1969).

⁸²*Id.* at 1059.

⁸³*Id.*

⁸⁴*Id.* at 1060. *Accord*, *Scott v. Frey*, 330 F. Supp. 365, 368 (E.D. La. 1971), observing that to order return of the films seized while state criminal prosecutions are pending would be almost unwarranted interference with the orderly procedure and operation of the state criminal process. *Compare Cinema Classics, Ltd. v. Busch*, 339 F. Supp. 43 (C.D. Cal. 1972).

⁸⁵264 So. 2d 615 (La. 1972).

seizure which comply with the Fourth Amendment requirements for a valid search warrant.⁸⁶

In *People v. Heller*,⁸⁷ the Court of Appeals for New York stated that the decisions of the Second Circuit in *Astro Cinema Corp., Inc. v. Mackell*⁸⁸ and *Bethview Amusement Corp. v. Cahn*,⁸⁹ requiring adversary hearings before search warrants can issue for the seizure of a single copy of an allegedly obscene motion picture film, went beyond any requirement imposed on state courts by the United States Supreme Court and that New York was not required to follow them.⁹⁰ On appeal, in *Heller v. New York*,⁹¹ the Supreme Court upheld this position and therefore rejected the requirement of a prior adversary hearing before the

⁸⁶*Id.* at 619.

⁸⁷29 N.Y.2d 319, 277 N.E.2d 651, 327 N.Y.S.2d 628 (1971).

⁸⁸422 F.2d 293 (2d Cir. 1970). For a more recent case dealing with the procedures in the Second Circuit, see *Perial Amusement Corp. v. Morse*, 482 F.2d 515 (2d Cir. 1973), decided June 1, 1973, which also explicitly upholds the power and authority of the United States Magistrate to conduct the adversary hearing.

⁸⁹416 F.2d 410 (2d Cir. 1969).

⁹⁰See *People v. DeRenzy*, 275 Cal. App. 2d 380, 382, 79 Cal. Rptr. 777, 778 (Ct. App. 1969). In referring to DeRenzy's reliance on *Metzger v. Percy*, 393 F.2d 202 (7th Cir. 1968), the court noted that "[o]f course, although such a decision of a United States Court of Appeals is entitled to great respect, we are not bound thereby, even on questions relating to the federal Constitution." For other cases dealing with this issue, see *United States v. Gower*, 316 F. Supp. 1390 (D.D.C. 1970); *United States v. Pryba*, 312 F. Supp. 466 (D.D.C. 1970); *People v. Steinberg*, 60 Misc. 2d 1041, 304 N.Y.S.2d 858 (Westchester County Ct. 1969).

The *Pryba* case involved allegedly obscene stag films and other materials being shipped in interstate commerce observed by an airline employee during the course of shipment. Based on information obtained from that employee, a search warrant was issued. Because of the furtive manner in which the package was being shipped, the court held that no pre-seizure adversary hearing was required. The court noted that law enforcement officials should not be required to make futile gestures in attempting to set up an adversary hearing and to have the prospective defendant produce the offending material. The court further observed that to believe the same films would be proffered to the court in the same condition as when first viewed by the airline employee would be to blink at reality. *Contra*, *United States v. Alexander*, 428 F.2d 1169 (8th Cir. 1970).

See also *Kaplan v. United States*, 277 A.2d 477 (D.C. App. 1971), holding that no adversary hearing was required prior to the issuance of a search warrant to seize a 12-minute film in a peepshow machine: "Law enforcement officials have no right to require the operator to bring the machine to court and the court has no reason to go to the machine." *Id.* at 480. In *Vali Books, Inc. v. Murphy*, 343 F. Supp. 841, 844 (S.D.N.Y. 1972), involving the seizures of peepshow films both incident to arrests without warrants and pursuant to a search warrant without a prior adversary hearing, the court held that the seizure of a few samples to be used as evidence does not become illegal absent a prior adversary hearing, but that the indiscriminate seizure of such film without regard to the charge on which the arrests were made or unrelated to the basis for the issuance of a search warrant is illegal.

⁹¹93 S. Ct. 2789 (1973).

seizure under a warrant of a *single copy* of a film for evidentiary use in the exhibitor's obscenity trial. However, the Court reaffirmed the holdings in *Marcus* and *A Quantity of Books* requiring an adversary hearing prior to the seizure of a large quantity of books for the sole purpose of their destruction,⁹² and also reaffirmed the rule announced in *United States v. Thirty-seven Photographs*⁹³ and *Freedman v. Maryland*⁹⁴ requiring an adversary hearing prior to imposing a "final restraint" on any obscene materials.⁹⁵ The rationale of the *Marcus* and *Quantity of Books* doctrine was based on the "danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books."⁹⁶ For that reason the Court also dictated that in the case of the seizure of a single copy of a film, as in *Heller*, copying of the seized film shall be permitted if necessary to ensure its continued exhibition during the legal proceedings.⁹⁷

The holding in *Heller* must be limited to its facts. The case involved the seizure of a single evidentiary copy of an allegedly obscene film based on a warrant issued after a neutral magistrate's determination of probable obscenity. Additionally, the *Heller* opinion requires a prompt judicial determination of obscenity following a "fully adversary" trial.⁹⁸ Nevertheless, *Heller* appears to be the definitive decision on this single copy issue, for one may presume that *Heller* will also apply where allegedly obscene books and/or photographs are involved.

B. *The Adversary Hearing Prior to Arrest*

The interpretation and application of the *Quantity of Books* rule has resulted in mass confusion and chaos in law enforcement procedures for initiating criminal prosecutions of obscenity violations.⁹⁹ Cases can be found supporting almost any proposition

⁹²*Id.* at 2794.

⁹³402 U.S. 363 (1971).

⁹⁴380 U.S. 51 (1965).

⁹⁵93 S. Ct. at 2793.

⁹⁶*A Quantity of Books v. Kansas*, 378 U.S. 205, 213 (1964).

⁹⁷93 S. Ct. at 2795. *See also* *Perial Amusement Corp. v. Morse*, 482 F.2d 515, 523 n.9 (2d Cir. 1973).

⁹⁸The determination in *Heller* took 48 days due to the failure of petitioner to request expeditious judicial consideration of the obscenity issue. *Heller v. New York*, 93 S. Ct. 2789, 2793-94 (1973).

⁹⁹The action of federal district courts in considering and granting injunctions against state criminal prosecutions because no pre-seizure adversary hearing was conducted before the seizure of alleged obscene materials, and in some cases ordering the suppression of the material, may have in some instances resulted in exacerbating the relations between

which might be advanced. For instance, in *Delta Book Distributors, Inc. v. Cronvich*¹⁰⁰ a 2-judge majority of a 3-judge district court held that an adversary hearing was necessary prior to an arrest, even where the allegedly obscene material had been purchased by law enforcement officials. The court noted:

Since prior restraint upon the exercise of First Amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizure and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity.¹⁰¹

The majority also suggested that distributors and exhibitors should be given immunity from prosecution for conduct engaged in prior to the determination of obscenity at an adversary hearing and that they could be subjected to criminal prosecution only for subsequent dissemination which occurs after the finding of obscenity at such a hearing.¹⁰² To this, Judge Rubin responded in dissent:

It is no longer an acceptable proposition in tort law that a dog is entitled to one free bite; there should be no rule in criminal law—even by virtue of the protection accorded to freedom of speech—that every peddler of pornography is entitled to one free essay at scatology.¹⁰³

It would appear that two recent decisions by the Supreme

local federal district and state courts. In some cases, however, in ordering the return of the seized materials minus samples, the federal courts have not enjoined the state criminal prosecution. In other cases, *e.g.*, *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969), *cert. denied*, 396 U.S. 985 (1969), while requiring a sample to be furnished to the prosecution, the court has expressly declined to comment on the admissibility of the evidence in the state criminal prosecution.

¹⁰⁰304 F. Supp. 662 (M.D. La. 1969), *rev'd in part on juris. grounds sub nom. Perez v. Ledesma*, 401 U.S. 82 (1971). *See also City News Center, Inc. v. Carson*, 298 F. Supp. 706 (N.D. Fla. 1969).

¹⁰¹304 F. Supp. at 667.

¹⁰²This immunity theory was also espoused in *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969). The court there stated that any criminal prosecution prior to an adversary hearing and without the distributor's having a subsequent opportunity to refrain from selling the materials determined to be obscene would be a violation of his first amendment rights. *Id.* at 216.

Such a procedure would be equivalent to giving distributors and film exhibitors advisory opinions, since if they declined to sell the offending materials or exhibit the motion picture film in question thereafter, no criminal prosecution would result. This is not the normal role of the judiciary. *See State v. Shackman*, 29 Ohio Misc. 56, 278 N.E.2d 61 (Franklin County Mun. Ct. 1971).

¹⁰³304 F. Supp. at 674.

Court should have laid to rest the notion that a prospective defendant is entitled to an adversary hearing even prior to an arrest for an obscenity violation, even where there is no seizure incidental to the arrest. In *Milky Way Productions, Inc. v. Leary*¹⁰⁴ it had been argued that an arrest could be as effective a chilling influence or restraint as a seizure of obscene material.¹⁰⁵ On appeal the Supreme Court affirmed per curiam the district court decision which had held that an adversary hearing was not required before an arrest made pursuant to a constitutional state obscenity statute not involving a seizure of material.¹⁰⁶ In *Gable v. Jenkins*,¹⁰⁷ it was contended that the Georgia statute was unconstitutional in that it did not provide for a prior judicial hearing before an arrest.¹⁰⁸ The Supreme Court affirmed the disposition by the district court which rejected this contention.¹⁰⁹

C. Adversary Hearing Prior to a Seizure Incident to Arrest

A much more substantial argument has been made that distributors and exhibitors have a right to a pre-seizure adversary hearing in those cases involving the seizure of allegedly obscene materials, publications, and motion picture films incident to a warrantless arrest. A substantial number of courts have accepted this argument. In *Bongiovanni v. Hogan*,¹¹⁰ the court stated that it was difficult to perceive why seizure in a civil instead of a criminal case, or by the federal rather than a state government, or incidental to an arrest rather than by use of a warrant, would alter the impermissible "chilling effect" of first amendment freedoms which results from seizure without a prior adversary hearing.¹¹¹ The court further noted that the government "cannot make a 'chilling' seizure permissible by removing the label of a search warrant and pasting on that of seizure incidental to a lawful arrest."¹¹² In *Entertainment Ventures, Inc. v. Brewer*,¹¹³ the court observed that to permit a warrantless seizure would make an

¹⁰⁴305 F. Supp. 288 (S.D.N.Y. 1969).

¹⁰⁵*Id.* at 290.

¹⁰⁶*New York Feed Co., Inc. v. Leary*, 397 U.S. 98 (1970). *See also* *United States v. Fragus*, 428 F.2d 1211 (5th Cir. 1970).

¹⁰⁷309 F. Supp. 998 (N.D. Ga. 1969).

¹⁰⁸*Id.* at 1001.

¹⁰⁹*Gable v. Jenkins*, 397 U.S. 592 (1970).

¹¹⁰309 F. Supp. 1364 (S.D.N.Y. 1970).

¹¹¹*Id.* at 1366.

¹¹²*Id.*

¹¹³306 F. Supp. 802 (N.D. Ala. 1969).

officer rather than a judge the arbiter of what is obscene.¹¹⁴

Perhaps the best reply to this line of reasoning is that set forth in *Rage Books, Inc. v. Leary*.¹¹⁵ The court there observed that no adversary hearing is required when law enforcement officials are engaged in the normal function of effecting an arrest, and when the seizure is of a sample of the evidence necessary for the prosecution of the suspected crime being committed in the officer's presence.¹¹⁶ The court further observed that in such circumstances such a seizure is not tantamount to a prior restraint, since the restraint is essentially the restraint of the obscenity law itself.¹¹⁷ Thus, the existence of the criminal statute proscribing the distribution of the obscene matter, and not the incidental seizure of evidence in connection with an arrest for a violation of that statute, was viewed as the restraint.

In *Cambist Films, Inc. v. Duggan*,¹¹⁸ the district court indicated that a "motion picture film itself is perhaps the best evidence, or at least indispensable evidence, on the question as to its nature" ¹¹⁹ The court further noted that films are often cut or altered for showing at different theaters. Observing that it is important (for the prosecution) to establish the exact content of the film as exhibited on the occasion giving rise to the prosecution, the court concluded that it was thus necessary that law enforcement officials be allowed to seize a single copy at the time

¹¹⁴*Id.* at 809. Based on a similar approach and reasoning, the California Supreme Court has required that absent an emergency involving a high probability that the evidence may be lost, destroyed, or spirited away, all seizures must be pursuant to a search warrant and not incident to a warrantless arrest. *Flack v. Municipal Court*, 66 Cal. 2d 981, 429 P.2d 192, 59 Cal. Rptr. 872 (1967).

Note also the views of Justice Brown of the Ohio Supreme Court, in dissent, in *State v. Albini*, 31 Ohio St. 2d 27, 34, 285 N.E.2d 327, 332 (1972):

The holding of the majority today constitutes an unlawful delegation to the police of the plenary duty of the courts to so determine whether there is probable cause to believe the films obscene after all parties have had an opportunity to express and present [their arguments]. . . .

Although the seizure of the films in question was incident to an arrest, *the arrest itself*—and hence the seizure—is invalid. In the absence of a prior judicial hearing to determine *probable* cause to believe the films obscene, the arrest is the product of the unlawful delegation of authority.

See also *Cambist Films, Inc. v. Duggan*, 420 F.2d 687 (3d Cir. 1969) and *Metzger v. Percy*, 393 F.2d 202 (7th Cir. 1968), both requiring a pre-seizure adversary hearing prior to a seizure incident to a warrantless arrest.

¹¹⁵301 F. Supp. 546 (S.D.N.Y. 1969).

¹¹⁶*Id.* at 549.

¹¹⁷*Id.*

¹¹⁸298 F. Supp. 1148 (W.D. Pa. 1969).

¹¹⁹*Id.* at 1152 n.4.

of the arrest without a prior adversary hearing.¹²⁰ Notwithstanding these cogent observations, the Third Circuit Court of Appeals reversed the district court.¹²¹

To require that a motion picture film be brought into court for a showing at an adversary hearing prior to seizure provides no guarantee against cutting, alteration, or substitution between the time of the notice and actual production, or the prehearing shipment of the film out of the jurisdiction of the court.¹²² Testimonial evidence as to the content of a motion picture may well not suffice since it is the factfinder who must apply the *Miller* test. The judge or the jury must determine if the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law, and, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹²³ Arguably, no factfinder could adequately make such a judgment without viewing the entire motion picture film—oral statements of witnesses describing segments are not sufficient. It could also be contended that without the material before the judge it would be impossible to know whether the *Miller* test had been correctly applied,¹²⁴ although the test at the initial adversary hearing is

¹²⁰*Id.*

¹²¹420 F.2d 687 (3d Cir. 1969).

¹²²*See* *Hosey v. City of Jackson*, 309 F. Supp. 527, 534-35 (S.D. Miss. 1970), where the court speaks not only of alteration of motion picture films, but also of shipping such films to another theater or location while an attempt is being made to set up an adversary hearing.

It is further noted that theater exhibitors frequently lease their films from a distributor with a firm return date in the contract, and they could assert, after receiving notice of an adversary hearing to be held at some future date, that they have returned the film to the distributor pursuant to their contract obligation.

See also *Crecilius v. Commonwealth*, 14 CRIM. L. RPTR. 2133 (Ky. Ct. App., filed Oct. 10, 1973), where it was held that a court could not order an exhibitor to reclaim and submit an allegedly obscene motion picture, and that forcing a potential defendant to be an agent for the police in securing a copy of the evidence that may be used to convict him raised grave constitutional issues concerning the fifth amendment. *See also* *Perial Amusement Corp. v. Morse*, 482 F.2d 515 (2d Cir. 1973).

¹²³*Miller v. California*, 93 S. Ct. 2607, 2614-15 (1973). However, *see* *Perial Amusement Corp. v. Morse*, 482 F.2d 515 (2d Cir. 1973), for determination of obscenity at adversary hearing without considering the motion picture film itself.

¹²⁴In *Bryers v. State*, 480 S.W.2d 712, 718 (Crim. App. Tex. 1972), the court reversed an obscenity conviction based upon testimonial evidence and stated:

In conclusion, we hold that the evidence is insufficient to sustain an obscenity conviction unless (1) the alleged obscene matter, in this case a film, is introduced into evidence or (2) the defendant expressly and affirmatively stipulates or admits that the material is obscene. . . .

probable obscenity and not proof of obscenity beyond a reasonable doubt.¹²⁵

It has also been asserted that police officers not only have the right but also the duty to seize evidence which was the very means or vehicle of the commission of a crime committed in the officer's presence, and that to prohibit the seizure of such evidence under these circumstances would completely frustrate criminal prosecution and necessarily the arrest for a crime witnessed by the arresting officers.¹²⁶ To require a pre-seizure adversary hearing before there can be a seizure of publications or of a motion picture film incident to an arrest would be to carve out a unique exception to the traditional law of arrest, for it would require the courts to engage in the executive function of deciding when an arrest or an arrest and incidental seizure should be made, thus in effect rendering advisory opinions to both the prosecutor and the prospective defendant.

A canvass and review of the reported decisions discloses that while a substantial number of federal courts required an adversary hearing prior to a seizure of allegedly obscene materials incident to an arrest, the majority of state courts did not.¹²⁷

In *Longoria v. State*, 479 S.W.2d 689 (Crim. App. Tex. 1972), the court reversed a jury conviction for obscenity on the grounds that the testimony of two officers describing the contents of the motion picture films was insufficient evidence for the jury, or the appellate court, independently, to determine obscenity.

However, in *People v. Goulet*, 21 Cal. App. 3d Supp. 1, 98 Cal. Rptr. 782 (Super. Ct. App. Dep't 1971), the appellate court reversed the dismissal of charges by a municipal court judge on the ground that the prosecutor did not have the actual films to exhibit to the jury. While the appellate court indicated that secondary evidence could be received, it did acknowledge that "there may be cases where it is difficult to establish the contents of a film or book by oral secondary showings, particularly where its obscenity may be borderline in character." *Id.* at 4, 98 Cal. Rptr. at 784.

The nature of appellate review required in obscenity cases further fortifies the conclusion that the actual allegedly obscene material is indispensable evidence in a criminal prosecution. In *State v. Carlson* the Minnesota Supreme Court felt obliged to reverse some of the convictions because the allegedly obscene material involved was missing from the appellate record and the court could not fulfill its obligation under *Jacobellis v. Ohio* to make its own independent review of the facts. 202 N.W.2d 640, 647 (Minn. 1972).

¹²⁵See *Perial Amusement Corp. v. Morse*, 482 F.2d 515 (2d Cir. 1973).

¹²⁶*Hosey v. City of Jackson*, 309 F. Supp. 527, 534 n.9 (S.D. Miss. 1970), *vacated and remanded on juris. grounds*, 401 U.S. 987 (1971).

¹²⁷See also Note, *Prior Adversary Hearings on the Question of Obscenity*, 70 COLUM. L. REV. 1403, 1416 n.79 (1970), and cases cited therein.

Some federal courts have also declined to require a pre-seizure adversary hearing in cases not involving the seizure of motion picture films. In *United States v. Cangiano*, 464 F.2d 320, 326 (2d Cir. 1972), the court took the position that samples of allegedly obscene reels of 8-millimeter film, playing cards, books, magazines, and photographs could properly be seized incident to an arrest without a pre-seizure adversary hearing. In *United*

On June 23, 1973, the Supreme Court removed the seizure of allegedly obscene materials from the "incident to arrest" exception. In *Roaden v. Kentucky*,¹²⁸ the Court held that books and films could not be seized without the authority of a constitutionally valid warrant "because prior restraint of the right of expression, whether by books or film, calls for a higher hurdle in the evaluation of reasonableness."¹²⁹ The clear implication of *Roaden* is that there should be no seizure of allegedly obscene material without the benefit of a search warrant based on an affidavit which affords a judge an ample opportunity to focus searchingly on the issue of obscenity. The rationale of *Roaden* is that seizures incident to a warrantless arrest would afford less protection to first amendment rights than seizures based on conclusory affidavits and would be made solely on the individual evaluation of the seizing law enforcement officer or of the prosecutor who advises him. The majority in *Roaden* made it unmistakably clear that even the limited prior restraint involved in such seizures based on the personal predilections and value judgments of individual law enforcement officials, often overzealous in their efforts against alleged pornography, imposed too great a burden on first amendment freedoms, and that the impartiality, objectivity, and independence of judges are a *sine qua non* to a valid seizure. Predicated upon a higher standard of "reasonableness" because of such considerations under the fourth amendment, such a requirement will impose a much more substantial demand upon judges in the issuance of search warrants in this area of the law. Law enforcement officials in a situation such as that in *Roaden*—the showing of an allegedly obscene motion picture film at an outdoor theater—will have to proceed according to one of two alternatives. They must obtain a search warrant prior to

States v. Wild, 422 F.2d 34, 37-38 (2d Cir. 1969), *cert. denied*, 402 U.S. 987 (1971), the court stated that a prior adversary hearing was not required where, after a lawful arrest, a few samples of allegedly obscene color slides, photographs, some reels of stag-type films, and other materials were seized as evidence for a subsequent prosecution, where such seizure did not substantially restrain distribution of the material involved. The court specifically stated that *A Quantity of Books* and *Marcus* were "inapposite since they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings seeking their destruction." The court also distinguished its earlier decision of *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), involving a motion picture film exhibited in a public theatre, as it had equated the seizure of such a film, which could be viewed by as many as 4,000 people in a week, with a massive seizure of books.

¹²⁸93 S. Ct. 2796 (1973).

¹²⁹*Id.* at 2801.

making an arrest, either with or without an arrest warrant, or after making a warrantless arrest they must refrain from seizing the offending material until a search warrant has been obtained.¹³⁰ Whether *Roaden* will permit any exception based on a clear and convincing showing of necessity to make a seizure without benefit of a warrant—such as where a warrantless arrest is made and any delay to obtain a search warrant would permit the destruction of the allegedly obscene material or the removal of it beyond the jurisdiction of the court—remains to be seen. It appears that courts faced with such a situation based on a strong factual record showing such an emergency or exigent circumstances could distinguish *Roaden* and uphold a seizure incident to a warrantless arrest in this very narrow and limited situation. Even then the combination of *Heller* and *Roaden* would apparently require a prompt post-seizure adversary hearing as soon as all interested parties could be notified and the court could schedule such a hearing.

D. Application of Fourth Amendment Standards

Although the Supreme Court in *Heller v. New York* has held that the seizure of a minimal number of copies of publications or of a single copy of motion picture film can be accomplished without a pre-seizure adversary hearing, the requirement of a warrant announced in *Roaden v. Kentucky* means that a magistrate or judge must still be very careful to ensure that basic fourth amendment requirements are met in the affidavit submitted in support of the search warrant application. It appears to be universally accepted that since first amendment ramifications are involved, a more stringent standard of probable cause is justified in obscenity cases.¹³¹ An application to seize allegedly obscene

¹³⁰See *Crecelius v. Commonwealth*, 14 CRIM. L. RPTR. 2133 (Ky. Ct. App., filed Oct. 26, 1973); *Kansas City v. O'Conner*, 14 CRIM. L. RPTR. 2161 (Mo., filed Oct. 8, 1973).

Indeed, in *Kansas City v. O'Conner*, Justice Seiler, in dissent, raised the question of whether, absent exigent circumstances which indicate that seizure of allegedly obscene material for preservation as evidence is a "now or never" situation, seizure even pursuant to a search warrant is only permissible after some type of hearing on the issue of obscenity. He suggests that the hearing can be a prior adversary hearing to determine obscenity or an *ex parte* hearing.

This view appears to impose more than required by *Heller* as long as there is a sufficiently detailed factual affidavit, although a United States Magistrate or a state judge could supplement the affidavit by taking *ex parte* testimony under oath from the affiant and/or other witnesses. See FED. R. CRIM. P. 41(c).

¹³¹See, e.g., *United States v. Santiago*, 424 F.2d 1047, 1048 (1st Cir. 1970), which speaks in terms of a "particularly strong showing" being required to "justify a search for matter prima facie entitled to the special protection of the First Amendment."

books, magazines, or other publications, or stag or motion picture films cannot be treated in the same manner as an application for a warrant to search for narcotics, adulterated foods, gambling paraphernalia, stolen goods, burglar tools, and other normal types of contraband or evidence of a crime.¹³²

Judges, prosecutors, defense lawyers, and officials involved in law enforcement must be more than merely knowledgeable about the general theory of and the justification for the laws regulating obscenity. They must come to grips with the problem of applying the obscenity test enunciated in *Miller v. California*. This task is especially complicated and demanding for those judges who issue warrants and preside at adversary hearings and trials. It has been stated:

There is perhaps no area of criminal law in such utter state of confusion and frustration as that visited upon the publication and dissemination of obscene material. "Confusion now hath made its masterpiece." (Macbeth, Act II).¹³³

The difficulty is further compounded by the fact that obscenity is considered a mixed question of law and fact, and thus a jury's decision as to the obscenity of given material does not carry the same weight as in the normal case in which a reviewing court will not reverse if there is substantial evidence supporting the verdict.¹³⁴ In the area of obscenity, reviewing judges have decided that they must view the offending materials themselves since obscenity is not solely a fact question. Yet each judge is a product of his own particular environment with regard to upbringing, moral and religious training, and educational and cultural influences. As Judge Pettine stated in *United States v. Fifty Magazines*:¹³⁵

¹³²*A Quantity of Books v. Kansas*, 378 U.S. 205, 212 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 730 (1961); *Cinema Classics, Ltd. v. Busch*, 339 F. Supp. 43, 48-49 (C.D. Cal. 1972).

¹³³*People v. Kirkpatrick*, 64 Misc. 2d 1055, 316 N.Y.S.2d 37, 42 (Crim. Ct. 1970), *aff'd*, 329 N.Y.S.2d 769 (App. T. 1971).

¹³⁴Mr. Justice Harlan in his opinion in *Roth* noted that if "obscenity is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact, but a question of constitutional judgment of the most sensitive and delicate kind." 354 U.S. at 497-98. See also *Jacobellis v. Ohio*, 378 U.S. 184, 187-88 (1964).

For an application of this principle, see *United States v. A Motion Picture Film Entitled "I Am Curious-Yellow"*, 404 F.2d 196, 199 (2d Cir. 1968), setting aside a jury's verdict that *I Am Curious-Yellow* was obscene. See *Wagonheim v. Maryland State Bd. of Censors*, 255 Md. 297, 258 A.2d 240 (1969), which, in effect, upheld the barring of a license to show *I Am Curious-Yellow* in Maryland.

¹³⁵323 F. Supp. 395 (D.R.I. 1971).

It is not an overstatement to say that one's own tastes, values and standards have been molded by a set of stimuli which are unique to him and to his cultural milieu, and those standards inevitably influence one's particular judgment as to what constitutes hard-core pornography.¹³⁶

Indeed, it is for this reason that appellate judges in the same case may differ as to whether a given book, pamphlet, magazine, motion picture, or other medium of communication is obscene *vel non*.¹³⁷ For the same reasons, individual magistrates and judges, in issuing warrants or in presiding at adversary hearings and trials, may differ in making a factual-legal decision as to whether given matter is obscene. Nevertheless, judicial officials must have some concrete guidance and must not act solely on personal predilection.

As with any normal search warrant application, a magistrate or judge cannot rely on the conclusory assertions of the affiant, but must be given sufficiently detailed factual information to make an independent judgment as to whether or not the law enforcement officials have sufficient cause to make a seizure consistent with the requirements of the fourth amendment. This requirement is even more demanding since the issuing magistrate must be satisfied that the three elements of the *Miller* test are met under a probable cause standard.¹³⁸ It would appear that considerable detail in the affidavit would be required—much in the form of a book report for an allegedly obscene novel or book or a narrative time and motion explanation in connection with an allegedly obscene stag or motion picture film—if the magistrate is to be satisfied that the *Miller* test is met.¹³⁹ The more summary

¹³⁶*Id.* at 402.

¹³⁷See *United States v. A Motion Picture Film Entitled "I Am Curious-Yellow"*, 404 F.2d 196 (2d Cir. 1968) (compare the views of Circuit Judge Hays for the majority and the views of Chief Judge Lumbard, dissenting); *Wagonheim v. Maryland State Bd. of Censors*, 255 Md. 297, 258 A.2d 240 (1969), a 4-to-3 decision upholding a local circuit court ruling that *I Am Curious-Yellow* be banned from exhibition in Maryland as being obscene. In reviewing the Maryland Court of Appeals action, the United States Supreme Court divided four to four with Justice Douglas abstaining.

¹³⁸The affidavit in *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961), was condemned because it was based on conclusory assertions, as was the affidavit in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968). See also *Hanby v. State*, 479 P.2d 486, 493 (Alas. 1970).

¹³⁹See *Overstock Book Co. v. Barry*, 436 F.2d 1289 (2d Cir. 1970), where an undercover policeman's affidavit consisted of 32 paragraphs and described the material in graphic detail according to the court; *State v. Eros Cinema, Inc.*, 264 So. 2d 615, 616 (La. 1972), where the court observed that the officer who viewed the films gave numerous details of what was pictorially depicted, fully descriptive, "reciting in detail the various sexual

the presentation by the affiant, the more likely the facts may be colored by the affiant's opinions and moral judgments.

Under the fourth amendment a warrant must describe with particularity the items or things to be seized. This specificity requirement is even more stringent "where first amendment rights are involved."¹⁴⁰ The warrant must describe with "scrupulous exactitude" the things to be seized when the "things" are books, magazines, newspapers, other forms of publications, or stag or motion picture films.¹⁴¹ For example, a warrant which described the property to be seized as "reels of 8 millimeter film, playing cards, books, magazines, photographs and other similar material which are obscene, lewd, lascivious and filthy as defined under Section 1465, Title 18, U.S. Code" was held invalid as giving too broad discretion to the executing law enforcement officials as to what was to be seized, becoming in effect a general warrant.¹⁴² On the other hand it has been suggested that where a warrant commands, for example, the seizure of films "depicting natural and unnatural sexual acts," this would have restricted significantly the discretion of the executing officials, and it is intimated that such a warrant would be sufficient.¹⁴³

activities performed in the film." See also *Monica Theatre v. Municipal Court*, 9 Cal. App. 3d 1, 16, 88 Cal. Rptr. 71, 82 (Dist. Ct. App. 1970), observing that one or more affidavits submitted to a magistrate can be composed in a manner "to focus searchingly on the question of obscenity . . . Detailed pictorial word description of the continuity of the film plus the opinions of experts, whose qualifications are adequately given, can serve this purpose initially." See *Commonwealth v. State Amusement Corp.*, 356 Mass. 715, 248 N.E.2d 497 (1969); and the description of the affidavit involved in *Perial Amusement Corp. v. Morse*, 482 F.2d 515 (2d Cir. 1973).

¹⁴⁰*United States v. Cangiano*, 464 F.2d 320, 325 (2d Cir. 1972); *Flack v. Municipal Court*, 66 Cal. 2d 981, 429 P.2d 192, 59 Cal. Rptr. 872 (1967). See also note 130 *supra*.

¹⁴¹*Cf. Stanford v. Texas*, 379 U.S. 476, 485 (1965) (seizure of materials associated with the Communist Party).

¹⁴²*United States v. Cangiano*, 464 F.2d 320, 326 (2d Cir. 1972). See also *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961); *Gregory v. DiFlorio*, 298 F. Supp. 1360 (W.D.N.Y. 1969).

Query whether a warrant which authorizes a search for and seizure of "the magazines 'Modern Girls' and 'Girls' as well as other magazines of a similar appearance and contents" is sufficient in describing with particularity what is to be seized. See *Huffman v. United States*, 470 F.2d 386 (D.C. Cir. 1971), which involved such a warrant, but wherein the court did not deal with this issue.

¹⁴³*United States v. Marti*, 421 F.2d 1263, 1268 (2d Cir. 1970), *cert. denied*, 404 U.S. 947 (1971). However, in *Cinema Classics, Ltd. v. Busch*, 339 F. Supp. 43, 46-48 (C.D. Cal. 1972), when faced with a warrant which described the items to be seized, in part, as "eight millimeter color and/or black and white films which are sexually oriented and which depict specific acts of oral copulation, sexual intercourse and masturbation," which the court had characterized as being quite limited in the description of what could be seized thereunder, and with the particularity issue, the court felt that it was involved in a gray

In *Lee Art Theatre, Inc. v. Virginia*,¹⁴⁴ the Supreme Court held that the admission into evidence of allegedly obscene motion picture films seized under the authority of a warrant issued by a justice of the peace on an affidavit giving the films' titles, and stating that the affiant had determined from personal observation of the films and of the theater's billboard that they were obscene, was erroneous. The affidavit did not set forth sufficient factual bases for the officer's conclusions to allow the justice of the peace to make an independent determination of probable obscenity. The Court noted that it might not be as convenient for a judge to see a movie in his chambers as it would be for him to read a book, but the Court avoided further discussion on this issue and decided the case on the grounds that the procedure under which the warrant was issued was constitutionally defective in that it failed "to focus searchingly on the question of obscenity."¹⁴⁵

A warrant should not issue to seize more than the number of copies needed for evidentiary purposes. Thus, in *Overstock Book Co. v. Barry*,¹⁴⁶ the court observed that instead of limiting the seizure to a reasonable sample for evidentiary purposes, the officers seized over 17,500 books, magazines, and other materials. The court held that "a seizure of materials obviously not needed for evidence would, under the Fourth Amendment, be *prima facie* unreasonable [and] would also result in the same immediate suppressing effects" condemned by *Marcus* and *A Quantity of Books*.¹⁴⁷ In *Huffman v. United States*,¹⁴⁸ the court suggested that:

[i]f the Government's purpose in seizing such quantities [of a magazine] was to refute any claim [by prospective defendants] that the magazines were not in their possession for purposes of sale, this end could have been accomplished simply by a temporary seizure, accompanied by an offer to release the magazines [to the prospective defendants] upon execution of a stipulation as to the number of copies of each edition in their store.¹⁴⁹

area of the law in which there was no clear guidance from higher courts. The distributors had contended that the warrant contained no specific identification of the items to be seized, en masse, of material which might fall outside of the definition of obscenity, such as visual representations of human sexual intercourse in settings which would not be obscene as indicated in *United States v. 35 MM. Motion Picture Film "Language of Love"*, 432 F.2d 705 (2d Cir. 1970). The court decided the case on other grounds.

¹⁴⁴392 U.S. 636 (1968).

¹⁴⁵*Id.* at 637, citing *Marcus v. Search Warrant*, 367 U.S. 717, 731-32 (1961).

¹⁴⁶436 F.2d 1289 (2d Cir. 1970).

¹⁴⁷*Id.* at 1296. See also *Potwora v. Dillon*, 386 F.2d 74, 75-76 (2d Cir. 1967).

¹⁴⁸470 F.2d 386 (D.C. Cir. 1971).

¹⁴⁹*Id.* at 392.

Heller v. New York, as did *Lee Art Theatre v. Virginia*, left open the question of whether the issuing magistrate should view an allegedly obscene motion picture prior to issuing a search warrant. The same question could be asked in connection with an allegedly obscene book, magazine, or other publication. Frequently, law enforcement officials may be able to purchase a copy of a book or magazine and submit it as an attachment to the affidavit, but this is not possible with a motion picture print. However, as the court observed in *Rage Books, Inc. v. Leary*,¹⁵⁰ the "police are not constitutionally required to fill the coffers of suspects,"¹⁵¹ and it should be sufficient if the affidavit describes the contents of a book, magazine, or other publication in descriptive detail.¹⁵²

The problem of the issuing magistrate viewing a motion picture exhibition prior to issuance of a search warrant presents even more complex issues. In *Merritt v. Lewis*¹⁵³ the court observed that the magistrate could "go to the theatre, view the film in question, and determine if it was obscene," but he was not required to do so.¹⁵⁴ In *People v. De Renzy*¹⁵⁵ the court posed the following question in connection with the magistrate's visiting the theatre:

If so, should the visit be clandestine or open? The former would be unfitting; a judge should not assume the role of an undercover investigator. If the magistrate makes his presence known, what reasonable assurance exists that the exhibitor will show the film, thus perhaps aiding in his own conviction?¹⁵⁶

As illustrated by the actual situation in *Heller v. New York*, where the judge viewed the motion picture film clandestinely before issuing the search warrant, he may become a government witness at the trial concerning the film in order to identify it as the one he saw at a given time, date, and place and to establish

¹⁵⁰301 F. Supp. 546 (S.D.N.Y. 1969).

¹⁵¹*Id.* at 549.

¹⁵²*See, e.g., Overstock Book Co. v. Barry*, 436 F.2d 1289 (2d Cir. 1970).

¹⁵³309 F. Supp. 1249 (E.D. Cal. 1970).

¹⁵⁴*Id.* at 1253.

¹⁵⁵275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (Ct. App. 1969).

¹⁵⁶*Id.* at 384, 79 Cal. Rptr. at 781. *See also* *Milonas v. Schwalb*, 65 Misc. 2d 1042, 319 N.Y.S.2d 327 (Sup. Ct. N.Y. City 1971), in which the court discussed the propriety of a judge who had viewed a motion picture prior to issuance of a search warrant and who subsequently conducted an adversary hearing concerning that film. The court noted the built-in bias of a judge toward upholding his prior action, thus compromising his impartiality, and observed that in viewing the motion picture exhibition the judge becomes a witness and a part of the accusatory process in issuing the warrant.

the defendant's possession and exhibition of the same. A thoughtful appraisal of this situation raises questions of whether under these circumstances the judge has become a functional law enforcement official participating in the executive function with a possible encroachment upon the separation of powers and the neutrality and detachment which the judiciary should maintain.

III. THE *Miller-Paris Adult Theatre* SEQUEL

Although the Supreme Court has endeavored to establish some concrete, definitive standards on obscenity for the police, prosecutors, and judges, the question remains whether "the intractable obscenity problem"¹⁵⁷ will persist to the consternation of all the officials who must grapple with it. It is predicted that the problem will remain, though in a somewhat muted form, since concepts such as "appeal to the prurient interest in sex" or "lack of serious literary, artistic, political, or scientific value" involve subjective value judgments and not merely simplistic factual determinations.¹⁵⁸ Every judge, at least subconsciously, takes into account his own moral, philosophical, and cultural background every time he makes a decision on any matter before him, but this is particularly so when obscenity is at issue.¹⁵⁹ In addition, it is not a feasible alternative to the problem to leave the matter of obscenity unregulated by law, for there must be some thread of reason, tempered by a standard of decency imposed by society, to govern this as well as other areas of the law.¹⁶⁰

It is therefore apparent that each judge or magistrate will have to confront the difficult constitutional issues involved in

¹⁵⁷Mr. Justice Harlan's characterization in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968) (concurring and dissenting opinion).

¹⁵⁸The United States Commission on Obscenity and Pornography, in commenting on the *Roth-Memoirs* standard, stated:

These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinctions made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its scope also cause interference with the communication of constitutionally protected materials.

REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 59 (1970).

¹⁵⁹See Mr. Justice Douglas' statement in dissent in *Paris Adult Theatre I v. Slaton*, 93 S. Ct. at 2663: "Art and literature reflect tastes. . . . For matters of taste, like matters of belief, turn on the idiosyncracies of individuals. They are too personal to define and too emotional and vague to apply. . . ."

¹⁶⁰See Chief Justice Burger's statement in *Paris Adult Theatre I v. Slaton*, 93 S. Ct. at 2636 n.10.

each obscenity case. Undoubtedly, most conscientious judges attempt to set aside—to as great an extent as possible—personal moral judgments and try to apply objectively the pertinent obscenity definitions and standards. It is in this area that the change wrought by *Miller* may have its most profound impact, for a finding of no obscenity under the old *Roth-Memoirs* test may not be constitutionally permissible under the *Miller* standard.¹⁶¹ This is especially significant in view of the Supreme Court's determination that expert testimony is not necessary to support a decision of obscenity and that the material can speak for itself.¹⁶²

Perhaps of equal significance is the statement in *Miller* that material need not be proven obscene under a hypothetical national standard but can be so established based on the prevailing standards of the forum community. It appears that the courts will have far greater difficulty in obscenity cases because of this change.¹⁶³

Although it might seem easier to obtain convictions or to suppress allegedly obscene material as a result of the recent Supreme Court decisions, there is one statement in the *Miller* decision which imposes stricter requirements on the government:

[N]o 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.¹⁶⁴

This pronouncement has resulted in a substantial number of attacks on state statutes which prohibit obscenity in such general terms as "obscene, lewd, lascivious, filthy, indecent," on the basis of overbreadth and vagueness. Thus far, most courts that have dealt with this specificity requirement have been willing to

¹⁶¹See, e.g., *Jenkins v. State*, 199 S.E.2d 183 (Ga. 1973), where the court in a 4-3 decision upheld an obscenity determination of the motion picture "Carnal Knowledge." The dissenting justices indicated their amazement that what they considered to be an anti-erotic movie could be considered obscene by anyone, particularly appellate judges. Certiorari has been granted by the Supreme Court. *Jenkins v. Georgia*, 42 U.S.L.W. 3347 (Dec. 10, 1973). For an equally illustrative decision as to how the difference between the *Roth-Memoirs* standards and the *Miller* test can be significant, see *United States v. Thevis*, 484 F.2d 1149 (5th Cir. 1973), in which the court reviewed the conviction of the defendants based on the transportation of obscene material by common carrier in interstate commerce. The court found that all of the 12 allegedly obscene magazines failed the *Miller* test, but that six were not obscene under the *Roth-Memoirs* test.

¹⁶²*Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628, 2634-35 (1973).

¹⁶³See, e.g., *Jenkins v. State*, 199 S.E.2d 183 (Ga. 1973). See also Note, 51 DENVER L.J. 75 (1974).

¹⁶⁴93 S. Ct. at 2616.

supply the necessary judicial construction to save even the broadest of obscenity statutes.¹⁶⁵

CONCLUSION

An analysis and perception of the progeny of *Miller*, *Paris Adult Theatre*, and related cases demonstrate that "the intractible obscenity problem" still exists and that the factual, legal, and constitutional issues in obscenity cases will continue to be among the most difficult and perplexing of those facing judges on both the state and federal levels. That this is so is not remarkable, for in the areas of freedom of speech and the guarantee against unreasonable search and seizure the courts must always be sensitive to the rights of the individual. The line dividing obscenity and constitutionally protected expression is dim and uncertain, and each judge who is confronted with an issue in this area must be careful to balance the competing interests of the individual and society in such a way as to reflect accurately what the community will tolerate as well as to prevent the dilution of the rights guaranteed by the first and fourth amendments.

¹⁶⁵*E.g.*, the court in *United States v. Thevis*, 484 F.2d 1149, 1155 (5th Cir. 1973), rejected such an attack on 18 U.S.C. § 1462, noting that the Supreme Court itself in *United States v. Twelve 200-foot Reels*, 93 S. Ct. 2665 (1973), indicated, with reference to 19 U.S.C. § 1305(a), that it was prepared to construe such terms "as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller*. . . ."

A majority of state courts have adopted a similar approach: *see, e.g.*, *Rhodes v. State*, 283 So. 2d 351 (Fla. 1973); *State v. J-R Distributors*, 512 P.2d 1049 (Wash. 1973). *But see* *Stroud v. State*, 300 N.E.2d 100 (Ind. 1973), where the Indiana Supreme Court struck down a statute that failed to satisfy, on its face, the *Miller* specificity standard.