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By Robert P. Davidow*
and Michael O'Boyle**

Obscenity Laws in England And the United States: A Comparative Analysis †

I. INTRODUCTION

It has been 250 years since the offense of "obscene libel" first was clearly established as a common law offense in England.¹ It is, therefore, a particularly appropriate time to compare the developments in the law of obscenity in the Mother Country with those in one of her colonial offspring, the United States.

This comparison reveals many similarities as well as differences, despite the existence of a Bill of Rights in the United States Constitution and the absence of a bill of rights, constitutional or statutory, in England.² The similarities include a common judicial perception of the problem as one involving the need to distinguish socially valuable materials from those which are corrupting and worthless. The differences are most pronounced in the procedural area.

Whether a person is impressed primarily by the similarities or differences depends, in part, on his attitudes toward the conflict of values implicit in the obscenity controversy. Is he sympathetic

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1. *Dominus Rex v. Curl*, 93 Eng. Rep. 849 (1727).

2. Because obscenity has been treated as an exception to the first and fourteenth amendment rules prohibiting governmental limitations on freedom of speech and of the press, it would seem that both American and English governmental entities are free of constitutional restraints in the area of obscenity. See notes 6 and 8 *infra*. Thus, differences in the laws of the two nations may be less a result of specific constitutional limitations than a reflection of the general effect of a written constitution and the interrelationships among various provisions of that constitution.

to the obscenity laws' apparent goal to protect and uplift society? Does he see such laws as a threat to freedom of expression? Does he believe that the attempted enforcement of such laws conflicts with well-established due process principles?³

In light of the foregoing, it is appropriate to warn our readers that we, the authors, have strong views about laws relating to obscenity and that inevitably these views have affected our treatment of the subject to some extent. In particular, we believe that "obscenity" is an inherently vague concept, at least in a pluralistic society in which there is no consensus about the acceptability of sex-related materials.

Because of the need to keep the discussion within manageable limits, this article compares the current laws⁴ of obscenity—both statutory and judge-made—in England and Wales⁵ with the United States Supreme Court's delineation of constitutionally permissible obscenity laws in the United States.⁶ No effort is made to deal with the specific obscenity laws in the fifty states or with the many informal restraints upon the display and dissemination of sex-related materials in England and the United States.⁷

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3. The possible effect of procedural matters on substantive law is of great interest to some legal philosophers. See, e.g., L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969). A contrary view is at least implicit in H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).
 4. For a recent, comprehensive treatment of the legal aspects of obscenity in the United States, see F. SCHAUER, *THE LAW OF OBSCENITY* (1976). The appendix following the text discusses some of the historical development of current law and lists sources for further historical study.
 5. Although it may come as a surprise to many Americans, a good deal of legislation passed by the Parliament at Westminster is not applicable throughout the United Kingdom (England, Scotland, Wales and Northern Ireland). For example, the Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, is expressly inapplicable to Scotland and Northern Ireland. For this reason, the article focuses upon England and Wales.
 6. The main constitutional provision involved is the first amendment which provides, in part, "[c]ongress shall make no law . . . abridging the freedom of speech, or of the press . . ." This amendment is applicable to the states by virtue of the due process clause of the fourteenth amendment. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). For a brief summary of the United States Supreme Court's treatment of obscenity as an exception to first amendment guarantees, see the appendix.
 7. It is not always easy to draw the distinction between formal and informal limitations upon expression. In the area of American broadcasting, for example, the constraints imposed by the need for commercial sponsorship are informal, but those imposed by the Federal Communications Commission mix the formal with the informal. See, e.g., Note, *Filthy Words, the FCC, and the First Amendment: Regulating*

A. An Outline of Obscenity Law in the United States

The Supreme Court has held that "obscene" materials are not protected by the first amendment.⁸ The current definition of obscenity is found in *Miller v. California*:⁹

As a result, we 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, as written or authoritatively construed. 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.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁰

The community referred to is undefined, but less than nationwide, even in the case of the federal obscenity laws.¹¹

Several other factors characterize the treatment of obscenity in the United States. Expert testimony is not required to support the prosecution's contention that a particular item is obscene.¹² Al-

Broadcast Obscenity, 61 VA. L. REV. 579 (1975); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664 (1971). Ostensibly informal restraints by a state agency may become equivalent to state action. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-70 (1963). Klein, *Film Censorship: the American and British Experience*, 12 VILL. L. REV. 419 (1967), contains an example of informal restraint at the municipal level in the United States. A good discussion of informal censorship in the United Kingdom is found in P. O'HIGGINS, *CENSORSHIP IN BRITAIN* (1972).

8. *Roth v. United States*, 354 U.S. 476, 481-85 (1957).

9. 413 U.S. 15 (1973). For a generally favorable comment on *Miller*, see Clor, *Obscenity and the First Amendment: Round Three*, 7 LOY. L. REV. 207 (1974).

10. 413 U.S. at 24.

11. In *Hamling v. United States*, 418 U.S. 87, 105-06 (1974), the Supreme Court said that in a prosecution under the federal obscenity statute, the community standards to be applied would be the standards of the judicial district from which the jurors were drawn. Arguably this was dictum, because the trial judge had instructed the jury that the standard to be applied was a national standard and the Supreme Court in effect found that this was harmless error. The statement regarding local standards was thus unnecessary to the decision of the case. In *Miller*, however, the Court upheld the conviction in a case in which the trial court instructed that the standard was a state-wide standard.

12. "Nor was it error to fail to require 'expert' affirmative evidence that

though scienter is required for conviction for possession of obscene material, the defendant need not have a subjective belief that the materials are obscene, but merely knowledge of the contents of the material.¹³ One may not be punished constitutionally for possessing obscene matter in the privacy of one's home,¹⁴ but commercial efforts to make such material available to others are not constitutionally protected.¹⁵ Some material which is not obscene by adult standards may nevertheless be kept from children.¹⁶ There is no requirement that the prosecution obtain a judgment of obscenity in a civil action before prosecuting a defendant under the

the materials were obscene when the materials themselves were actually placed in evidence." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973). *Accord*, *Hamling v. United States*, 418 U.S. 87 (1974) (dictum). This is, of course, different from the question whether the defendant has a due process right to introduce such testimony. See notes 137 and 138 and accompanying text *infra*.

13. In *Smith v. California*, 361 U.S. 147 (1959), the Supreme Court invalidated a California statute which had totally eliminated a scienter requirement. In so doing, however, the Court did not indicate whether something more than mere knowledge of the contents was required. It has been suggested that the Court ought to announce a constitutional rule whereby the defendant in an obscenity prosecution could defend on the basis that he "reasonably believed that the material involved was not obscene." Lockhart, *Escape From the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 563 (1975).

In *Hamling v. United States*, 418 U.S. 87 (1974), however, the Supreme Court upheld a lower court instruction that the government had to prove that the defendants "had knowledge of the character of the materials" and that the defendants' "belief as to the obscenity or non-obscenity of the material is irrelevant"; in so doing, the Court stated: "We think the 'knowingly' language of 18 U.S.C. § 1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter." *Id.* at 119-20, 123.

14. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).
15. *United States v. Thirty-seven Photographs*, 402 U.S. 363, 376-77 (1971); *United States v. Reidel*, 402 U.S. 351, 355-56 (1971). Moreover, an individual may be punished for attempting to import obscene materials for his own private use. *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 128-29 (1973). In the light of these cases, it is not surprising that the Supreme Court also has held that there is no constitutional right to exhibit obscene movies merely because admission to the movies is restricted to consenting adults. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-67 (1973).
16. *Ginsberg v. New York*, 390 U.S. 629, 636-43 (1968). See *Butler v. Michigan*, 352 U.S. 380 (1957).

Children are not the only persons for whom special rules are applicable; material intended to appeal to the "prurient interest" of "deviant" groups can also be proscribed. *Mishkin v. New York*, 383 U.S. 502 (1966).

criminal law.¹⁷ Indeed, such a procedure is discouraged because a civil judgment cannot be the basis of a criminal prosecution of someone not a defendant in the civil action, and it is uncertain whether such a judgment can be used against the original defendant in a subsequent criminal case.¹⁸ No jury determination is required in a civil obscenity action.¹⁹ Prior censorship of obscene material is permissible if there is a procedure for prompt judicial review in an action initiated by the censor in which the censor bears the burden of proving obscenity.²⁰ A warrant is required prior to seizure of allegedly obscene material,²¹ and a police officer's conclusory allegations are insufficient to justify issuance of a warrant.²² Seizure of all copies of an allegedly obscene book or movie is apparently not permissible pending judicial determination of obscenity; presumably the prosecution can only secure one copy and retain it for evidentiary purposes.²³ Finally, the Supreme Court has been willing to declare that some materials are not obscene as a matter of constitutional law.²⁴

B. An Outline of Obscenity Law in England and Wales

The obscenity laws in England and Wales have developed through statutes and case law, untempered by the constraints of a written constitution. The laws vary according to context. Books and other publications are treated differently than plays.²⁵ These

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17. See *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).
 18. *McKinney v. Alabama*, 424 U.S. 669 (1976), held that the civil judgment may not be used against a nonparty but left open a number of questions regarding the possible effect of a civil determination on a defendant who is a party to a later criminal prosecution. In particular, the question arises whether one could give effect to the civil determination in a subsequent criminal trial if at the prior civil trial the fact finders were only required to find the material obscene under a preponderance of the evidence test. See *id.* at 678 (Brennan, J., concurring).
 19. *Alexander v. Virginia*, 413 U.S. 836 (1973).
 20. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).
 21. *Roaden v. Kentucky*, 413 U.S. 496 (1973). For an in-depth analysis of fourth amendment issues as they pertain to obscenity, see Burnett, *Obscenity: Search and Seizure and the First Amendment*, 51 DEN. L.J. 41 (1974).
 22. *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968).
 23. *Heller v. New York*, 413 U.S. 483, 490-93 (1973) (dictum).
 24. E.g., *Bucolo v. Adkins*, 424 U.S. 641 (1976); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Kois v. Wisconsin*, 408 U.S. 229 (1972). But see *Matheny v. Alabama*, 425 U.S. 982 (1976); *Pendleton v. California*, 423 U.S. 1058 (1976).
 25. The Lord Chamberlain was responsible for censoring stage plays un-

laws, in turn, differ from those relating to the sending of materials through the post²⁶ and from those relating to television broadcasts.²⁷ However, the laws relating to publications generally, and to the post office, fairly accurately represent the range of present laws dealing with obscenity.

Local authorities retain considerable power to adopt their own rules for the treatment of allegedly obscene motion pictures,²⁸ but *national* laws dominate the regulation of publications. The present standard for publications is contained in the Obscene Publications Act of 1959,²⁹ as amended by the Obscene Publications Act of 1964. Material is regarded as obscene under these statutes if it is, taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. The words "deprave and corrupt" do not refer merely to conduct resulting from the reading of publications; rather, materials may "tend to deprave or corrupt" if they cause the reader to have immoral thoughts.³⁰ Also, the term "obscenity" is not restricted to sex-related materials, but can refer to drug-taking or violence.³¹

der the Theatres Act, 1843, 6 & 7 Vict., c. 68. This was replaced by the Theatres Act, 1968, c. 54, which prohibits presentation of obscene performances of plays, but exempts performances that are justified as being for the public good in the interest of the arts, literature, or learning. The magistrate may issue warrants for the police to enter and inspect. Prosecution requires the consent of the Attorney-General and premises must be licensed for the public performance of plays.

26. Post Office Act, 1953, 1 & 2 Eliz. 2, c. 36.

27. Section 3(1) of the Television Act, 1964, c. 21, which applies only to independent television and not to the British Broadcasting Company, establishes a duty on the part of the Television Authority to satisfy itself that "nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or lead to disorder or to be offensive to public feeling." Television and sound broadcasting are specifically exempted from the Obscene Publications Act by § 1(3). See note 29 *infra*; Attorney-General v. Independent Broadcasting Authority, [1973] Q.B. 629 (C.A.); H. STREET, *FREEDOM, THE INDIVIDUAL AND THE LAW* 82 (3d ed. 1972).

28. The Cinematographic Act, 1909, 9 Edw. 7, c. 30, and the Cinematographic Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 68 (1952), give special licensing powers which may be used to exclude obscene films. See generally H. STREET, *supra* note 27, at 74; Zellick, *Films and the Law of Obscenity*, 1971 CRIM. L. REV. 126.

29. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 1.

30. See *Director of Public Prosecutions v. Whyte*, [1972] A.C. 849, 863 (Lord Wilberforce).

31. "It [the depravity and corruption] may be to induce erotic desires of a heterosexual kind or to promote homosexuality or other sexual perversions or drug-taking or brutal violence." *The Queen v. Calder & Boyars Ltd.*, [1969] 1 Q.B. 151, 172 (C.A. 1968). Also, a special statute

Under the Obscene Publications Act, it is an affirmative defense (to be established by the defendant "by the balance of the probabilities," or, in other words, by a preponderance of the evidence) that publication is for the public good in that the material "is in the interest of science, literature, art or learning, or of other objects of general concern."³² Not only is expert testimony not required for conviction, but also it is not even admissible with respect to the issue of obscenity;³³ it is admissible, however, with respect to the defense of public good.³⁴ Forfeiture provisions³⁵ permit the seizure of all allegedly obscene material following the securing of a warrant, but before final determination of obscenity. The writer or publisher of a publication can intervene in forfeiture proceedings to contest the claim of obscenity even though the original defendant is only a bookseller.³⁶

Despite language in the 1959 Act suggesting the inapplicability of the common law to obscene publications,³⁷ it has been held that the common law offense of conspiracy to corrupt public morals is applicable to the publication of obscene materials if more than one defendant allegedly is involved in the publication.³⁸ In such a situation, the defense of public good is not available. Apparently, there is also a common law offense of "conspiracy to outrage public decency."³⁹ Moreover, under the Post Office Act of

deals with publications intended for children which portray violence. Children and Young Persons (Harmful Publications) Act, 1955, 3 & 4 Eliz. 2, c. 28.

32. "The onus was clearly on the appellants to make out their defence under this section on the balance of probabilities." *The Queen v. Calder & Boyars Ltd.*, [1969] 1 Q.B. at 171.
33. *The Queen v. Anderson*, [1972] 1 Q.B. 304, 313 (C.A. 1971) (dictum). Expert testimony regarding obscenity, however, can be admitted with regard to the effect of materials on children. *Director of Public Prosecutions v. A. & B.C. Chewing Gum Ltd.*, [1968] 1 Q.B. 159 (1967).
34. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 4(2). *But see The Queen v. Staniforth*, [1976] 2 W.L.R. 849 (C.A.), *appeal dismissed sub nom. Director of Public Prosecutions v. Jordan*, [1976] 3 All E.R. 775 (H.L.).
35. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 3, *as amended by Obscene Publications Act, 1964*, c. 74, §§ 1(4)-1(5).
36. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 3(4).
37. "A person publishing an article shall not be proceeded against for an offense at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offense that the matter is obscene." *Id.* § 2(4).
38. *Knüller Ltd. v. Director of Public Prosecutions*, [1973] A.C. 435 (1972); *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220 (1961).
39. *In Knüller Ltd. v. Director of Public Prosecutions*, [1973] A.C. 435 (1972), the House of Lords allowed an appeal with regard to a count

1953,⁴⁰ one commits an offense by sending through the mail that which is *either* obscene or indecent, the latter being something less than obscene.⁴¹ The defense of public good is not available under the Post Office Act.

In accordance with more general procedural rules, a prosecution may be instigated by a private individual⁴² who is willing and financially able to hire a solicitor, who in turn can instruct a barrister in the actual trial. Also, voir dire in obscenity trials, as in criminal trials generally, is severely limited.⁴³ If, under the Obscene Publications Act of 1959, the prosecution is for a summary offense before a magistrate (as opposed to an indictable offense before a jury), the prosecution can sometimes appeal from what is, in effect, an acquittal by the magistrate.⁴⁴

II. AREAS OF SIMILARITY

A. Vague Standards

Putting to one side, for the moment, the possibilities in England of prosecution for sending "indecent" matter through the mail or for conspiring to corrupt public morals or outrage public decency, we focus first on the major expressions of each country's law: the Obscene Publications Act of 1959, and the *Miller* test.

In England, a Select Committee, organized in 1957 to examine the law of obscenity and import "greater certainty into the law," was unwilling to depart from the 1868 "deprave and corrupt" formula: "We agree with the opinion of a representative of the Society of Authors that the result of starting afresh with a completely new definition would be merely swapping horses and we

of conspiracy to outrage public decency; however, three of the Law Lords approved of the conspiracy to outrage public decency in principle, although two of them concluded that they would vote to grant the appeal because of inadequate jury instructions.

40. Post Office Act, 1953, 1 & 2 Eliz. 2, c. 36, § 11 (1) (b).

41. "The words 'indecent or obscene' convey one idea, namely, offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale." *The Queen v. Stanley*, [1965] 2 Q.B. 327, 333.

42. Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 2; Indictments (Procedure) Rules 1971, STAT. INST. No. 2084.

43. Although there is a statutory provision for jury challenges, both for cause and peremptory, there is no formal provision for voir dire. *Juries Act, 1974*, c. 23, § 12.

44. *Magistrates' Courts Act, 1952*, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 87 (1952). See, e.g., *Director of Public Prosecutions v. Whyte*, [1972] A.C. 849.

should find ourselves in the courts forced back on the use of dictionaries and, following the inevitable circle, right back to where we began."⁴⁵

The "deprave or corrupt" formulation in the Obscene Publications Act of 1959, has received little elucidation from the English courts. In *Director of Public Prosecutions v. Whyte*,⁴⁶ Lord Simon of Glaisdale stated that the purpose of the Act was

on the one hand to enable serious literary, artistic, scientific or scholarly work to draw on the amplitude of human experience without fear of allegation that it could conceivably have a harmful effect on persons other than those to whom it was in truth directed, and on the other to enable effective action to be taken against the commercial exploitation of "hard pornography"—obscene articles without pretention to any literary, artistic, scientific or scholarly value.⁴⁷

This is strikingly similar to the language of *Miller*.⁴⁸

It is not clear whether other Law Lords or judges share Lord Simon's views. What is clear is that this sort of gloss need not be given in the trial court's jury instructions. Said the Court of Appeal, Criminal Division, in *The Queen v. Calder & Boyars Ltd.*:⁴⁹

When, as here, a statute lays down the definition of a word or phrase in plain English, it is rarely necessary and often unwise for the judge to attempt to improve on or re-define the definition. Certainly, in the circumstances of the present case he cannot be blamed for saying no more than he did about the words "deprave and corrupt."⁵⁰

The trial judge's instructions, thus approved, were:

Those other vital words "tend to deprave and corrupt" really mean just what they say. You have heard several efforts to define them. "Tend" obviously means "have a tendency to" or "be inclined to." "Deprave" is defined in some dictionaries, as you have heard, as "to make morally bad; to pervert or corrupt morally." . . . The essence of the matter, you may think, is moral corruption.⁵¹

45. REPORT FROM SELECT COMMITTEE ON OBSCENE PUBLICATIONS, H.C. PAPERS 123/1 (1958).

46. [1972] A.C. 849.

47. *Id.* at 867.

48. One can only speculate upon the possibility that Chief Justice Burger read the *Whyte* case before writing the *Miller* decision, because *Whyte* was not cited in the *Miller* decision or in the briefs filed in that case.

49. [1969] 1 Q.B. 151 (C.A. 1968).

50. *Id.* at 168.

51. *Id.* at 167. It has also been said that obscene material is material that is more than merely "repulsive, filthy, loathsome or lewd." *The Queen v. Anderson*, [1972] 1 Q.B. 304, 314 (C.A. 1971).

Although the courts have devoted little time to the phrase "tend to deprave or corrupt," the character of the person subject to corruption or depravity has received considerable attention. In a case, decided before the 1964 amendment, *The Queen v. Clayton*,⁵² the Court of Criminal Appeal (as it was then called) quashed convictions⁵³ on the ground that, in the case of a sale to a particular person, the test was whether "the effect of the article in question on that person was such as to tend to deprave or corrupt *him*."⁵⁴ In these cases, the persons to whom the allegedly obscene photographs were sold were policemen who admitted, in effect, that they were not corrupted. In holding that the submission of no case to answer (the equivalent of a motion for judgment of acquittal) should have been accepted, the court said:

This court cannot accept the contention that a photograph may be inherently so obscene that even an experienced or scientific viewer must be susceptible to some corruption from its influence. The degree of inherent obscenity is, of course, very relevant, but it must be related to the susceptibility of the viewer. Further, while it is no doubt theoretically possible that a jury could take the view that even a most experienced officer, despite his protestations, was susceptible to the influence of the article yet, bearing in mind the onus and degree of proof in a criminal case, it would, we think, be unsafe and, therefore, wrong to leave that question to the jury. Accordingly, this court, though with some reluctance, has come to the conclusion that the convictions on these two counts must be quashed.⁵⁵

Two subsequent events raise doubts about the extent of the limitation developed in these cases. First, in 1964, the Obscene Publications Act was amended to permit prosecution of not only those who published "obscene" materials (as under the Act of 1959), but also those who possessed "an obscene article for publication for gain."⁵⁶ Thus, it is no longer so necessary to be concerned with the identity of the persons who actually have purchased an allegedly obscene item, because publication is not an element of the offense.

Also, in *Director of Public Prosecution v. Whyte*,⁵⁷ the House of Lords ruled, in a three-two decision, that it was error for the magistrates at trial to have acquitted the defendants merely

52. [1963] 1 Q.B. 163 (1962).

53. With one narrow exception, the Court of Appeals must quash a conviction rather than order retrial in a case requiring reversal of the lower court. Criminal Appeal Act, 1968, c. 19, §§ 2(2), 7, 23.

54. [1963] 1 Q.B. at 167.

55. *Id.* at 168.

56. Obscene Publications Act, 1964, c. 74, § 1.

57. [1972] A.C. 849.

because the magistrates had found that the likely readers of the allegedly obscene materials were "inadequate, pathetic, dirty-minded men, seeking cheap thrills—addicts to this type of material, whose morals were already in a state of depravity and corruption."⁵⁸ Said Lord Wilberforce, for example:

The Act's purpose is to prevent the depraving and corrupting of men's minds by certain types of writing: it could never have been intended to except from the legislative protection a large body of citizens merely because, in different degrees, they had previously been exposed, or exposed themselves, to the "obscene" material. The Act is not merely concerned with the once for all corruption of the wholly innocent; it equally protects the less innocent from further corruption, the addict from feeding or increasing his addiction.⁵⁹

In other words, unless those likely to see the allegedly obscene materials are restricted to either policeman or possibly "medical men or scientists," the personal characteristics of the ultimate reader are functionally unimportant, and although the allegedly obscene material has to have a particular tendency, relating to the mind of the reader, it can be inferred from the nature of the item itself. No objective consequences need follow from exposure to the allegedly prohibited material.⁶⁰ Despite protestations to the contrary on the part of some judges, as a practical matter a fact-finder is free to deal with the material in the abstract.

Thus, the law in England seems to be very close to that under *Miller*, which purports to apply an objective, abstract standard to allegedly obscene material in the United States. If it is true that context occasionally can make a difference under *Miller*—as, for example, where an "objectively" obscene book is sold only to doctors who find it useful in their work⁶¹—the same seems to be

58. *Id.* at 853.

59. *Id.* at 863.

60. In addition to the language from the opinion of Lord Wilberforce in *Whyte*, consider the following language from the opinion of Lord Pearson in the same case:

The words "deprave and corrupt" in the statutory definition refer, in my opinion, to the effect of an article on the minds of (including the emotions) of the persons who read or see it. Of course, bad conduct may follow from the corruption of the mind, but it is not part of the statutory definition of an obscene article that it must induce bad conduct.

Id. at 864.

61. In *Ginzburg v. United States*, 383 U.S. 463 (1966), a pre-*Miller* decision, the Supreme Court upheld an obscenity conviction based upon pandering—that is, the aggressive sale of material which might not otherwise have been regarded as obscene were it not for the representations made in the sales process. One of the items involved in this

true under English law, as illustrated by the requirement that the material deprave and corrupt those likely to read it.

The defense of public good under the Obscene Publications Act of 1959 may seem strange to one accustomed to thinking of obscenity in the light of the three-pronged test of *Miller*. The Act says that something can deprave or corrupt and yet be justified because it serves the interests of "science, literature, art or learning." This would make sense in the case just alluded to, i.e., where something which is otherwise corrupting is distributed only to those with scientific training who can use it in their work. But some may find it difficult to imagine how something that is genuinely "corrupting and depraving," and is generally distributed, can be said to be justified in the interest of art or literature. If it is worthy as art or literature, is it really corrupting? The American approach avoids the necessity of having a jury decide whether something is obscene before it has to decide whether it nevertheless has "serious literary, artistic, political, or scientific value," because something is not, by definition, obscene if it has such value. As a practical matter, however, the essential vagueness of the notion of obscenity remains, in part because the words "serious literary, artistic, political, or scientific" on the one hand, and "in the interest of science, literature, art, or learning," on the other, are themselves so subject to varying interpretations.

Further, in England the essential vagueness of the "deprave and corrupt" formula only can be made worse from the point of view

obscenity prosecution, *The Housewife's Handbook on Selective Promiscuity*, had previously been distributed to a very narrow range of persons:

Before selling publication rights to petitioners, its author had printed it privately; she sent circulars to persons whose names appeared on membership lists of medical and psychiatric associations, asserting its value as an adjunct to therapy. Over 12,000 sales resulted from this solicitation, and a number of witnesses testified that they found the work useful in their professional practice. The Government does not seriously contest the claim that the book has worth in such a controlled, or even neutral, environment.

Id. at 471-72. The implication is that such a limited distribution would enjoy constitutional protection. In *Hamling v. United States*, 418 U.S. 87 (1974), a post-*Miller* case, the Court upheld a conviction under the federal obscenity statute. In so doing, it announced that it was going to apply the principles laid down in *Miller* even though the conviction occurred prior to the decision in *Miller*. As the district court's instructions at trial were consistent with *Ginzburg* with respect to the issue of pandering, and since the Court approved of the district court's handling of the case, one can conclude that the notion of pandering survives.

of the jury by judicial pronouncements that it means something more than "repulsive, filthy, loathesome or lewd," and that articles may be so disgusting that their effect is aversive rather than corrupting.⁶²

The *Miller* test, involving the requirement of "sexual conduct," may seem, at first glance, to be a more precise test than that contained in the English Obscene Publications Act of 1959, as amended. When one begins to interpret the phrase "ultimate sexual act" or "lewd exhibition of the genitals," however, one is again confronted with substantial problems of vagueness. As Mr. Justice Brennan pointed out in his dissent in *Paris Adult Theatre I v. Slaton*,⁶³ problems of uncertainty become especially difficult when the *Miller* test is applied to writings, rather than to movies or photographs. What guidance does one have, for example, in deciding which of the infinitely variable descriptions of an "ultimate sexual act" are "patently offensive?"⁶⁴

We cannot leave the subject of standards without referring to other possible prosecutions relating to "obscenity" under English law. Reference has already been made to prosecutions for mailing

62. In *The Queen v. Calder & Boyers Ltd.*, [1969] 1 Q.B. 151, 171 (C.A. 1968), for example, the appeal was allowed because the trial judge failed to charge the jury in accordance with the defense theory that the book had the effect of so shocking the reader that the reader would be impelled to eradicate the evils described in the book.

63. 413 U.S. 49, 100 (1973).

64. See Comment, *New Prosecutorial Techniques and Continued Judicial Vagueness: An Argument for Abandoning Obscenity as a Legal Concept*, 21 U.C.L.A. L. Rev. 181 (1973).

Professor Jane Friedman has suggested that the problems of vagueness encountered in the application of the *Miller* test pale in comparison with the vagueness problems associated with the enforcement of zoning restrictions upheld in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). Under the ordinance upheld in *Young*, not only must a theatre owner decide whether the showing of an "adult" movie, such as "Midnight Cowboy," constitutes the presentation of material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," but also he must guess whether the activities of other theatre owners and bookstore proprietors whose establishments are within a 1000-foot radius of his theatre similarly constitute the presentation of such material. The problem is not in the definition of "Specified Sexual Activities" or "Specified Anatomical Areas," since these are defined in some detail. Rather, the problem is in the meaning of "material distinguished or characterized by an emphasis on" such activities or areas. Remarks of Professor Jane Friedman during the Law and Arts Committee Program at the Annual Meeting of the Association of American Law Schools in Houston, Texas, December 29, 1976.

“indecent” matter under the Post Office Act of 1953, and to prosecutions for the common law offenses of conspiracy to corrupt public morals and conspiracy to outrage public decency. With regard to the Post Office Act, the only thing that can be said with “certainty” is that “indecent” is a “milder term”⁶⁵ than “obscenity,” but because we do not know what “obscenity” is, it is difficult to say that the situation is altered practically by the existence of the category of “indecent.”

Analogously, the conspiracy offenses, although requiring proof of at least two persons acting in concert, theoretically are not encumbered by the ostensibly restrictive language of the Obscene Publications Act of 1959, as amended; nevertheless, as that restrictive language seemingly provides few if any practical limitations on prosecutions for obscenity, most juries probably would not alter their verdicts depending upon the type of charge.⁶⁶

One “concrete” difference in standards between England and the United States is that in the United States “obscenity” is restricted to matters pertaining to sex, whereas in England the concept extends at least to drugs and violence. The difference in scope will be discussed below.

B. Lack of Judicial Concern for Fair Notice

The major problem with a vague standard is that it fails to give notice to potential defendants. In other contexts—for example, in criminal cases generally and in criminal prosecutions based on conduct arguably protected by the first and fourteenth amendments—the United States Supreme Court frequently has invalidated statutes on the due process ground that defendants were not given fair notice of the proscribed conduct.⁶⁷ Somewhat surprisingly, the present majority has found no such problem of fair notice in the obscenity area. In *Miller*, Mr. Chief Justice Burger simply assumed

65. *The Queen v. Stanley*, [1965] 2 Q.B. 237, 333.

66. It must be conceded that in *The Queen v. Stanley*, [1965] 2 Q.B. 327, the jury did indeed find the defendant guilty of indecency but not guilty of obscenity. The question is, however, whether this is likely to occur frequently, given the vagueness of all the terms used, and whether the jury would have acquitted the defendants in *Stanley* if the only charge had been one of obscenity.

67. *E.g.*, *Smith v. Goguen*, 415 U.S. 566, 572-76 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). In situations in which criminal statutes arguably have impinged on first amendment freedoms, the Supreme Court has been concerned not only with fair notice as such, but also with the chilling effect which vague statutes are likely to have on the assertion of first amendment rights. *See, e.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 601-04 (1967).

that as the majority's guidelines were "concrete," there was no substantial problem of lack of adequate notice of prohibited conduct: "We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public commercial activities may bring prosecution."⁶⁸ Nowhere in the majority opinion does one find a reference to, or discussion of, Mr. Justice Douglas's suggestion, in dissent, that at the very least no prosecution should be permitted without a prior civil judicial determination of obscenity which would provide notice that the sale of a particular book entailed a risk of prosecution.⁶⁹

In England the absence of concern with fair notice is perhaps more understandable, in view of an absence of a Bill of Rights, if nonetheless regrettable. *Shaw v. Director of Public Prosecutions*,⁷⁰ in which the House of Lords resurrected the offense of "conspiracy to corrupt public morals," is an example of a departure from the principle of fair notice, in part because the alleged "conspiracy" consisted of an agreement to publish a directory of prostitutes—in other words, to assist in the carrying on of what was then a legal occupation: prostitution.⁷¹ The later case of *Kneller Ltd. v. Director of Public Prosecutions*,⁷² in which the rule of *Shaw* was reaffirmed, is a further example. Said Lord Morris of Borth-y-Gest, in reference to the problem of vagueness:

It was suggested and it has been suggested that there is an element of uncertainty which attaches to the offence of conspiracy to corrupt public morals. It is said that the rules of law ought to be precise so that a person will know the exact consequences of all his actions and so that he can regulate his conduct with complete assurance. This, however, is not possible under any system of law. If someone chooses to publish words in regard to another it may be possible to give advice as to whether the words are capable of bearing a defamatory meaning but there will be very many cases in which no certain advice could be given as to whether it will be held that the words were defamatory and as to whether he might be held liable to pay damages in a civil action. It may depend upon the collective view of twelve people on a jury. If

68. 413 U.S. at 27.

69. "My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained." *Id.* at 41.

70. [1962] A.C. 220 (1961).

71. The fact that solicitation by prostitutes in the street was forbidden by the Street Offences Act, 1959, 7 & 8 Eliz. 2, c. 57, § 1, does not mean that the defendant in *Shaw* had sufficient notice that his activity was unlawful. One might reasonably conclude that the legislature thought that public solicitation on the streets was offensive, but that less intrusive solicitations, such as those contained in a ladies' directory, were not to be condemned.

72. [1973] A.C. 435 (1972).

there is no jury it will depend upon the view which may be formed by one particular judge, which might well differ from that which would be formed by a different judge. In many cases there can be no certainty as to what the decision will be. But none of this is a reflection upon the law. Nor do I know of any procedure under which someone could be told with precision just how far he may go before he may incur some civil or some criminal liability. Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in. So when Parliament has made it an offence to publish an article which may tend to deprave and corrupt and has left it to a jury to decide whether an article may so tend it is no criticism of the law to say that a man will not be sure in advance whether he will be acquitted or convicted. *Shaw's* case is, therefore, not open to the criticism that it created or tolerated a state of uncertainty. It merely affirmed with certainty that an offence was known to the law.⁷³

Presumably, in Lord Morris's view, because some uncertainty is inevitable, one need not concern himself with the degree of uncertainty.⁷⁴

C. Toleration of Geographic Inconsistency

Reference already has been made to the absence of any requirement of geographic uniformity in the United States. This absence is surprising when one considers that the Supreme Court has not said, for example, that the fourth and fourteenth amendments' requirements of "reasonable" searches and seizures are to vary according to local concepts of reasonableness.⁷⁵ On the other hand, geographic diversity in at least some contexts is a traditional concomitant of federalism.⁷⁶

73. *Id.* at 463-64.

74. Lord Morris's reference to vagueness in suits for defamation is noteworthy in that it suggests that vagueness problems are the same regardless of whether the civil or criminal law is involved. Lord Morris thus disregards the notion that the criminal law is distinguished from the civil law in part because of the stigmatization resulting from conviction, which constitutes a finding of moral blameworthiness. See P. BRETT, *AN INQUIRY INTO CRIMINAL GUILT* (1963). Lord Morris also ignores a practical difference which usually distinguishes the civil from the criminal law—the threat of physical incarceration associated with the latter.

75. One could argue, however, that the Supreme Court is working in the direction of local standards for the interpretation of the fourth and fourteenth amendments, as a practical matter. This may be the effect of *Stone v. Powell*, 96 S. Ct. 3037 (1976), in which the Supreme Court held that federal district courts were not to entertain habeas corpus actions on behalf of persons convicted in state courts who were alleging violations of their fourth and fourteenth amendment rights, so long as they had had a full and fair hearing on the merits in state courts.

76. The assumption that the substantive criminal law should remain in the hands of the states, with a few exceptions essential to the main-

As the United Kingdom is not a federal state, many Americans may be surprised to learn of the extent of local differences in the law of obscenity. For example, the Obscene Publications Acts of 1959 and 1964 are expressly inapplicable to Scotland and Northern Ireland.⁷⁷ But even within England and Wales, local governmental units have been permitted by statute to exercise independent licensing authority with respect to moving picture theatres and the distribution of leaflets, for example.⁷⁸ This is not a question of different local interpretations of the same standard, but rather the enforcement of potentially different standards.

A clearer case of similarity between the United States and England, however, does relate to varying local interpretations of the same general standard, *e.g.*, that found in the Obscene Publications Act of 1959, as amended. As pointed out above, individual juries apply the general language of these statutes with little guidance from the trial judge. The phrase "tend to deprave or corrupt" means whatever any particular jury thinks it means. Of course, one jury determination has no binding effect on other juries, even in the same locality.

Similarly, with forfeiture proceedings, there is not necessarily any uniformity of decision among magistrates, although the advice of the Director of Public Prosecutions usually is sought by the police before they apply for a warrant.

D. Judicial Willingness to Let Personal Values Affect Decision-Making

Usually it is assumed that courts in the United States are characterized much more by "activism" than are their English counterparts. Indeed, one finds some persons objecting to a Bill of Rights for the United Kingdom on the ground that it would lead to the sort of exercise of discretion in policy matters that is thought to be typical of the United States Supreme Court.⁷⁹ An examina-

tenance of the federal system, is a common one. See, *e.g.*, McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663, 711-12. This assumption has, however, come under criticism. See Davidow, *One Justice For All: A Proposal to Establish, by Federal Constitutional Amendment, a National System of Criminal Justice*, 51 N.C.L. REV. 259 (1972).

77. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 5(3); Obscene Publications Act, 1964, c. 74, § 3(3).
78. A good description of such local control is found in P. O'HIGGINS, *supra* note 7, at 44-47, 78-80.
79. The contention that creation of a Bill of Rights for the United Kingdom would involve the judges too greatly in political matters is discussed in M. ZANDER, *A BILL OF RIGHTS?* 43-45 (1975).

tion of the obscenity decisions of English courts and the United States Supreme Court suggests, however, that, at least in this area, the differences are not that great.

Examples of fairly clear policy decisions are not hard to find in the Supreme Court's obscenity decisions. The exclusion of the category of "obscenity" from the protection of the first and fourteenth amendments was surely a policy decision of the first order. The scanty history of obscenity prosecutions prior to the ratification of the first amendment suggests that it was far from inevitable that such an exception would be recognized.⁸⁰ Even if history more clearly had supported the treatment of "obscenity" as outside constitutionally protected speech, the decision to adhere to this view would still be an exercise of discretion on policy grounds; in a number of other areas, such as desegregation⁸¹ and reapportionment,⁸² the Court has not permitted historical arguments to stand in its way. If the Court is sometimes willing to disregard history, the decision to adhere to it in a particular context cannot be anything other than an exercise of considerable discretion. Moreover, the result in *Miller*, in which the Court continued to view obscenity as beyond the constitutional pale, cannot be explained merely by the presence on the Court of new justices who are not judicial activists; after all, in the same term, with only one of the new justices dissenting, the Court made a basic policy decision regarding abortion, and in so doing rejected about 100 years of legal history.⁸³

Additionally, by 1973, the Supreme Court's decisions in other free speech areas had provided a standard for possible treatment of sex-related materials. In the area of advocacy of violence the Court had required, as a prerequisite to prosecution, a showing that the advocacy was "directed to inciting or producing imminent lawless action and [was] likely to produce such action."⁸⁴ Why did the Court not apply the same test to sex-related materials⁸⁵—

80. See F. SCHAUER, *supra* note 4, at 3-6; Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C.L. REV. 223, 235-36 (1973).

81. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

82. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

83. See *Roe v. Wade*, 410 U.S. 113 (1973). Of the four justices appointed by President Nixon, only Mr. Justice Rehnquist dissented.

84. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

85. See *Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A.2d 389 (1950) (discussed in F. SCHAUER, *supra* note 4, at 32); Buchanan, *Obscenity and Brandenburg: The Missing Link?* 11 HOUS. L. REV. 537,

requiring, for example, that they be shown to be directed at producing rape, fornication, or adultery and likely to result in the commission of these acts?⁸⁶

Apart from the basic decision of whether to provide constitutional protection for obscenity, the Supreme Court has also exercised considerable discretion in attempting to define the concept. How does one decide, for example, that certain books are not obscene if they have "serious literary or artistic value" but are obscene if they have value only as "entertainment?"⁸⁷ Perhaps the Court would say that "acceptable" entertainment has serious

570 (1974); Loewy, *Free Speech: The "Missing Link" in the Law of Obscenity*, 16 J. PUB. L. 81, 82-90 (1967).

86. The question of the possible effect of exposure to "pornographic" materials is discussed at length in the REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 139-243 (1970). Dr. Victor B. Cline's criticism of the Commission's use of some of the empirical data which it generated is found in *id.* at 390-412. A review of both the Commission's findings and the critique by Dr. Cline is found in Yaffe, *Research Survey, PORNOGRAPHY: THE LONGFORD REPORT* 460-98 (1972). Yaffe is critical of both the Commission and Cline. It is safe to conclude on the basis of these materials that the empirical data neither prove nor disprove that there is a causal link between exposure to pornography and later undesirable actions on the part of those exposed.

It is true that the Supreme Court in *Paris Adult Theatre I v. Slaton* pointed to at least one other value (besides the prevention of criminal acts) which the state could properly promote through its obscenity laws: the protection of "the tone of society . . . and [the] quality of life." 413 U.S. at 59. But concern with the moral tone of society still does not justify a different treatment of "obscenity" from that accorded advocacy of violent overthrow of the government. One who advocates violent revolution or anarchy (but who does so in a context in which his advocacy is "not directed to inciting or producing imminent lawless action and is likely to produce such action") can reasonably be thought to be adversely affecting the moral tone of society; nevertheless, his speech is protected under the first amendment as construed by the Supreme Court. See generally Barnett, *Corruption and Morals—The Underlying Issue of the Pornography Commission Report*, 1971 LAW AND SOC. ORD. 189; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

The notion that, in any event, the first amendment is irrelevant to "pornography" because the latter does not involve the expression of ideas, relied upon by the Supreme Court in *Miller*, 413 U.S. at 34-35, ignores the communicative aspects of "showing" as well as "telling." Pornography can thus be seen as a statement of one person's view of what constitutes a desirable lifestyle—presumably a matter well within the range of first amendment protections. See Katz, *Free Discussion v. Final Decision: Moral and Artistic Controversy and the Tropic of Cancer Trials*, 79 YALE L.J. 209, 211, 215 (1969).

87. See W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 1031 (4th ed. 1975); Gellhorn, *Dirty Books, Disgusting Pictures, and Dreadful Laws*, 8 GA. L. REV. 291, 298 (1974).

literary or artistic value, but this still does not explain why the Court chose to focus on "literary" or "artistic" value as opposed to other possible categories, in formulating its test of obscenity.

A further example of the Supreme Court's implementation of its own views of wise policy can be found in its decision to permit the application of local standards. Clearly there is nothing in the first and fourteenth amendments that suggests the propriety of such standards. Even if one can find in federalism a justification for differing standards in the interpretation of each state's own laws, this clearly cannot justify the Court's decision in *Hamling v. United States*⁸⁸ to permit juries in each federal district to apply the community standards of that district in the enforcement of the federal obscenity laws.⁸⁹

88. 418 U.S. 87 (1974).

89. At least since 1962 the accepted construction of amended § 1461 has been that of Mr. Justice Harlan and Mr. Justice STEWART "that the proper test under this federal statute, [§ 1461], reaching as it does all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency" Apart from the questions whether the Court's new construction trespasses upon the congressional prerogative . . . and whether constitutionally any "local" standard under amended § 1461 can properly be employed to delineate the area of expression protected by the First Amendment . . . since "[i]t is, after all, a national Constitution we are expounding," . . . the construction that a "local" standard applies in § 1461 cases raises at least another serious First Amendment problem.

The 1958 amendments to § 1461 constituted the mailing of obscene matter a continuing offense under 18 U.S.C. § 3237. The practical effect of this amendment—intentionally adopted by Congress for that express purpose—is to permit prosecution "in the Federal district in which [the disseminator] mailed the obscenity, in the Federal district in which the obscenity was received, or in any Federal district through which the obscenity passed while it was on its route through the mails." . . . Under today's "local" standards construction, therefore, the guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the chancy course of transit or place of delivery of the materials. . . . National distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander. Because these variegated standards are impossible to discern, national distributors, fearful of risking the expense and difficulty of defending against prosecution in any of several remote communities, must inevitably be led to retreat to debilitating self-censorship that abridges the First Amendment rights of the people.

Id. at 142-44 (Brennan, J., dissenting) (citations omitted) (footnotes omitted).

That Mr. Justice Brennan's fears have substance is illustrated by the federal prosecution in Wichita, Kansas, of Al Goldstein for sending *Screw Magazine*, published in New York City, through the mails. The

Exercise of similar discretion is easy to detect in some of the English obscenity decisions. Perhaps the clearest examples can be found in the cases dealing with conspiracy to corrupt public morals: *Shaw v. Director of Public Prosecutions*⁹⁰ and *Knüller Ltd. v. Director of Public Prosecutions*.⁹¹ Given the increasing willingness of Parliament over the last 100 years to enact criminal laws covering a wide range of activities, the court very well might have accepted appellant's arguments in *Shaw* that it was for Parliament to enact new offenses;⁹² there was no "brooding omnipresence in the sky"⁹³ which dictated the recognition in 1961 of a common law offense of conspiracy to corrupt public morals. Surely, apart from any other consideration, there was no necessity for the court's conclusion that a conspiracy prosecution was not prevented by section 2(4) of the Obscene Publications Act of 1959, which provides: "A person publishing an article shall not be proceeded against for an offense at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offense that the matter is obscene."⁹⁴ Reasonable men might very well come to the conclusion that a charge of conspiracy to corrupt public morals, based on an agreement to publish a directory of prostitutes, was within the coverage of this section, especially

prosecution was made possible when postal authorities in Wichita ordered and received, through the mails, an issue of that magazine. None of the approximately twelve regular subscribers in Wichita had complained, and there were no newsstand sales of the magazine there. See Dershowitz, *Screwing Around With the First Amendment*, PENTHOUSE, January, 1977, at 106, 142-43.

90. [1962] A.C. 220 (1961).

91. [1973] A.C. 435 (1972). Another dramatic example of the exercise of broad discretion is found in *John Calder Ltd. v. Powell*, [1965] 1 Q.B. 509 (1964).

92. The argument was summarized in the opinion of the court in *Shaw* when that case was heard before the Court of Criminal Appeal:

He [counsel] accepted for the purposes of his argument the claim of the Court of King's Bench to be *custos morum* but he contended that acting in that role the court had, so to speak, from time to time declared particular conduct to be an offence, thereby creating an offence rather than applying existing law to the particular facts. He went on to contend that Parliament in the last 100 years had concerned itself with legislation on issues of morality, decency and the like, that such legislation must be taken to be in effect a comprehensive code, and there is no longer any occasion for the courts to create new offences in its capacity as *custos morum*.

[1962] A.C. at 233.

93. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

94. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 2(4).

because in this very case the defendant was also convicted of publishing an obscene article (the directory) in violation of section 2 of the same Act.⁹⁵

The conclusion that at least some English judges are prepared to incorporate their own views of wise policy into law need not rest on inference. For instance, defending the majority view in *Shaw*, Viscount Simonds said:

In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. That is the broad head (call it public policy if you wish) within which the present indictment falls. It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another considering that it may succeed in its obvious intention of provoking libidinous desires it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of a public mischief or the undermining of moral conduct. The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society. Today a denial of the fundamental Christian doctrine, which in past centuries would have been regarded by the ecclesiastical courts as heresy and by the common law as blasphemy, will no longer be an offence if the decencies of controversy are observed. When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance to which my noble and learned friend Lord Tucker refers. Let it be supposed that at some future, perhaps early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until

95. When Parliament was considering what came to be the 1964 Amendment to the Obscene Publications Act, the Solicitor-General gave an assurance that a charge of conspiracy to corrupt public morals would not be used to circumvent the defense of public good under § 2(4) of the Obscene Publications Act of 1959. Zellick, *Films and the Law of Obscenity*, 1971 *CRIM. L. REV.* 126, 141-42.

Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them.⁹⁶

Knüller Ltd. v. Director of Public Prosecutions tested Viscount Simonds's theory about the ability of the courts to deal with pamphlets encouraging lawful homosexual activity. In the Sexual Offences Act of 1967,⁹⁷ Parliament legalized private homosexual acts between consenting adults. The defendant in *Knüller* published a magazine which contained, among other things, advertisements by homosexuals who were attempting to attract other homosexuals for the purpose of engaging in homosexual acts. Again, the prosecution resorted to the common law offense of conspiracy to corrupt public morals. Again, the appeal against this count was dismissed by the House of Lords. Despite the precedent of *Shaw*, the court in *Knüller* still exercised considerable discretion in dismissing the appeal because by this time it had acknowledged its power to overturn prior decisions.⁹⁸ Indeed it was urged to overturn *Shaw*, but did not.⁹⁹

Knüller thus demonstrated again an explicit judicial preference for some values over other values. Certainty in the sense of continuity is preferred to certainty in the sense of fair notice to potential defendants. We already have provided a quotation from the opinion of Lord Morris in *Knüller*, in which he exhibits an almost total lack of concern with problems of providing adequate notice of prohibited conduct.¹⁰⁰ Despite indifference to this type of uncertainty, however, Lord Morris expresses his view as to why *Shaw* should not be overturned:

The result of this is that even had I not been of the view that the decision in *Shaw's* case was as a decision correct, I would have thought it wholly inappropriate now to review it under the freedom expressed in the statement which was made in 1966 That would be for the following reasons: (1) The decision constituted a clear pronouncement of this House as to what the law was and had been; (2) It was a decision in relation to the criminal law where certainty is so desirable; (3) The decision has been acted upon and many criminal prosecutions have been based upon the authority of it; (4) The decision was one which attracted public attention and which on different occasions has been brought particularly to the attention of Parliament; (5) Parliament has not

96. [1962] A.C. at 267-68.

97. Sexual Offences Act, 1967, c. 60, § 1.

98. Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234 (H.L.).

99. Only Lord Diplock would have overturned *Shaw*. [1973] A.C. at 469.

100. See note 73 and accompanying text *supra*.

altered the law; (6) Whether a change in the law could or could not have been effected as part of the provisions of the Obscene Publications Act 1964, or of the Sexual Offences Act 1967, or of the Theatres Act 1968, is immaterial. The provisions and contents of those Acts could well have stimulated an alteration of the law as laid down in *Shaw's* case had Parliament so desired.¹⁰¹

Thus, part of his argument is the need for "certainty," here obviously meaning retention of the status quo. Continuous uncertainty is, in Lord Morris's view, preferable to changeable certainty.

III. AREAS OF DIFFERENCE

A. Treatment of Violence and Drug-Taking

At least since *Roth v. United States*,¹⁰² as reaffirmed in *Miller*, the concept of obscenity has been limited in the United States to matters pertaining to sex, whereas no such limitation exists in England.¹⁰³ In *Director of Public Prosecutions v. A. & B.C. Chewing Gum Ltd.*,¹⁰⁴ for example, the allegedly obscene materials were bubble gum "battle cards" designed for children, which apparently depicted scenes of violence. In *The Queen v. Calder & Boyars Ltd.*¹⁰⁵ the Court of Appeal, Criminal Division, said, in discussing the application of the Obscene Publications Act of 1959 to Hubert Selby Jr.'s book, *Last Exit to Brooklyn*: "The depravity and corruption may also take various forms. It may be to induce erotic desires of a heterosexual kind or to promote homosexuality or other sexual perversions or drug-taking or brutal violence."¹⁰⁶

Despite this seemingly clear distinction between English and American law, we note that occasionally some justices of the United States Supreme Court have had some difficulty in adhering to the notion that obscenity involves an "appeal to the prurient interest in sex."¹⁰⁷ For example, several justices, including the author of the *Miller* majority opinion, have used the word "obscene" to describe the use of the adjective "mother fucking" in contexts in which it was clear that there were no sexual denotations or connotations. In one case, for example, the expression was employed by a speaker as a term of derision and applied to "teachers, the

101. [1973] A.C. at 466.

102. 354 U.S. 476 (1957).

103. The earliest case applying the concept of obscenity to non-sexual materials is *John Calder Ltd. v. Powell*, [1965] 1 Q.B. 509 (1964).

104. [1968] 1 Q.B. 159 (1967).

105. [1969] 1 Q.B. 151 (C.A. 1968).

106. *Id.* at 172.

107. *Miller v. California*, 413 U.S. at 24.

community, the school system, the school board, the country, the county, and the town."¹⁰⁸

B. Greater Protection of the Expression of Ideas Relating to Sexual Matters in the United States

As the United States Constitution explicitly protects freedom of speech,¹⁰⁹ it is more likely that material which clearly advocates ideas or views about sexual behavior, even though contrary to prevalent moral standards and religious precepts, will be safeguarded in the United States. For example, in *Kingsley International Pictures Corp. v. Regents*,¹¹⁰ the Supreme Court set aside state efforts to suppress a movie which advocated the idea that adultery may be proper behavior.¹¹¹ In contrast to this, in England unpopular ideas concerning sexuality and even parental and political authority have been held to be obscene. The recent case of *The Queen v. Handyside (Little Red School Book)*,¹¹² which is presently the subject of a complaint before the European Commission on Human Rights in Strasbourg, affords a good example. The report of the European Commission in *Handyside* states that the United Kingdom Government proffered, *inter alia*, the following reasons for finding the *Little Red School Book* objectionable: (1) It is intended to undermine respect for marriage as a social institution. (2) A passage in the book dealing with "intercourse and petting" contains no injunction about exercising restraint in sexual matters. (3) The undesirable effects of the book are increased by the fact that its anti-authoritarian stance and hostile attitude to the teacher/child relationship tend to remove the restraining influences that otherwise might operate to minimize harmful tendencies which are likely to deprave and corrupt.¹¹³

108. *Rosenfeld v. New Jersey*, 408 U.S. 901, 909, 910-11 (1972) (Rehnquist, J., dissenting).

109. See note 6 *supra*.

110. 360 U.S. 684 (1959).

111. Cf. *Kois v. Wisconsin*, 408 U.S. 229 (1972) (newspaper account, charging police harassment in the arrest of a newspaper staff member on a charge of possession of obscene matter, accompanied by pertinent photographs, held constitutionally protected).

The present Court has suggested a distinction between "ideas of social and political significance" and "material that is on the borderline between pornography and artistic expression." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976).

112. Unreported Case, Inner London Quarter Sessions, October 29, 1971.

113. APPLICATION No. 5493/72, REPORT OF THE COMMISSION [adopted September 30, 1975] 79. The Commission itself has referred the case to the European Court of Human Rights.

Clearly under present United States law these passages of the book, although unconventional and perhaps immoral, would fall on the protected side of the margin.

C. Willingness to Find Certain Material Not Obscene as a Matter of Law

In *Jenkins v. Georgia*¹¹⁴ the United States Supreme Court made clear that, despite its "new," "concrete" guidelines announced in *Miller* (which were to enable juries to proceed with confidence), the Court is still willing to "second-guess" local courts and juries and find that some items cannot be suppressed constitutionally on grounds of obscenity.¹¹⁵ Thus, although the *Miller* test is vague, we know at least that the movie "Carnal Knowledge" is not obscene. Perhaps some—but not all—of the uncertainty in this area is removed in the case of movies which are "comparable" to "Carnal Knowledge." Presumably, movies dealing with sex in which "the camera does not focus on the bodies of the actors" when "sexual conduct including 'ultimate sexual acts' is understood to be taking place"¹¹⁶ are constitutionally protected. The status of many of those items found to be constitutionally protected prior to *Miller*, however, is not at all clear.¹¹⁷

114. 418 U.S. 153 (1974).

115. Citations to 31 cases decided after *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), but before *Miller* in which the Supreme Court reversed obscenity convictions in *per curiam* decisions (in which, of necessity, the holding was that the material found to be obscene at trial could not constitutionally be proscribed) are collected in Mr. Justice Brennan's dissenting opinion in *Paris Adult Theatre I v. Slaton*, 413 U.S. at 82-83 n.8.

On at least two recent occasions, Mr. Justice Brennan has, in dissenting from denials of certiorari, accused the majority of not fulfilling its obligation to apply the constitutional standard to material which has been suppressed by states. *Matheny v. Alabama*, 425 U.S. 982 (1976) (Brennan, J., dissenting); *Pendleton v. California*, 423 U.S. 1068 (1976) (Brennan, J., dissenting).

116. 418 U.S. at 161.

117. In the light of *Kaplan v. California*, 413 U.S. 115 (1973), in which the Court made clear the possible application of the *Miller* test to books without pictures, the status of John Cleland's *Memoirs of a Woman of Pleasure* is unclear. The plurality in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), did not find the book constitutionally protected; rather, the basis of the plurality opinion was that the Supreme Judicial Court of Massachusetts had improperly applied the "redeeming social value" prong of the test for obscenity. The Massachusetts court had apparently assumed, at least for the sake of argument, that Cleland's book had some social importance. The Supreme Court did not have to review this factual assumption, in the light of the state court's error in the application of the obscenity test. Even if the Su-

Of course, this willingness to review exacts institutional costs, as noted by Mr. Justice Brennan in his dissent in *Paris Adult Theatre I v. Slaton*:

These problems concern the institutional stress that inevitably results where the line separating protected from unprotected speech is excessively vague. In *Roth* we conceded that "there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls"

. . . Our subsequent experience demonstrates that almost every case is "marginal." And since the "margin" marks the point of separation between protected and unprotected speech, we are left with a system in which almost every obscenity case presents a constitutional question of exceptional difficulty.¹¹⁸

The English cases provide little guidance of the sort provided by *Jenkins*, because, with possibly one or two exceptions, the English judges have not declared matters not obscene as a matter of law under the Obscene Publications Act. In *The Queen v. Calder & Boyars Ltd.*,¹¹⁹ for example, the Court of Appeal, Criminal Division, quashed the conviction of certain publishers for having published Hubert Selby, Jr.'s book, *Last Exit to Brooklyn*. The court did so because of the trial court's failure properly to instruct the jury concerning the appellant's defense that the book, far from depraving, treated the questionable matter (violence and drug-taking) in such a way that the reader would be revolted by it and not encouraged to engage in such activities. However, the court refused to say that the book was not obscene as a matter of law, despite its own acknowledgment that the book had been "favourably reviewed in the U.S.A. by a number of eminent critics," that it had been "most favourably received by many distinguished British critics," and that "no one has ever suggested that this is not a serious book or that appellants did not genuinely believe that it ought to be published in the interest of literature."¹²⁰ The court viewed its role as a limited one:

We have been told by both sides that this case is one of the greatest importance. Indeed, it has been said on behalf of the appellants that the determination of this appeal may affect the whole future of literature and the right to free speech in this country. This court does not, however, propose to express any opinion whether this book or books like it are obscene; still less, whether

preme Court assumed that Cleland's book was protected under the test announced in *Memoirs*, it is not certain that the Court would now overturn a jury determination that the book lacked "serious" literary or artistic value. See note 115 *supra*.

118. 413 U.S. at 91.

119. [1969] 1 Q.B. 151 (C.A. 1968).

120. *Id.* at 165.

their publication is justified as being for the public good. These questions are not for this court to decide; they are wholly within the province of a jury. On an indictment under s. 2(1) of the Act of 1959 it is for the jury alone—representing the body of ordinary citizens—to decide these difficult questions after having had a proper direction on the law and an adequate summing-up of the case for the Crown and for the defence. The only question for us to decide is whether the criticisms, which have been so skilfully made by counsel for the appellants, of the learned judge's direction and summing-up to the jury are justified, and if so, whether the convictions can be allowed to stand.¹²¹

One could infer from this that the court would never rule something beyond the reach of the Obscene Publications Act as a matter of law. After all, if the court were willing to say in *Calder & Boyars* that admittedly serious literature was not, as a matter of law, "justified as being for the public good,"¹²² it is difficult to imagine a case in which the court would upset the verdict of a properly instructed jury. Of course, it must be remembered that the court did quash the conviction in this case, albeit for mere instructional error; thus, the court's declaration of its role was dictum.

There is one case in which Queen's Bench Division judges, hearing an appeal from magistrates in a forfeiture proceeding, indicated that some materials were obscene as a matter of law, and some not obscene as a matter of law. In *Burke v. Copper*¹²³ some magistrates had found 123 photographs and prints obscene and ordered their forfeiture, but had come to a contrary conclusion regarding some other photographs. On appeal the court sent the case back with directions to order the forfeiture of all photographs except a few which "on any conceivable view could be said to have any artistic merit or to provide any message or inspiration."¹²⁴ As the court made no effort to describe the differences between those finally ordered forfeited and those exempted from forfeiture,¹²⁵ this case, unlike *Jenkins v. Georgia*, can provide no guidance to those seeking to understand the differences between legal obscenity and non-obscenity.

D. Burden of Proof

As indicated above, the question whether a publication is of literary or other worth such as to justify publication under the

121. *Id.* at 166.

122. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 4(1).

123. [1962] 1 W.L.R. 700 (Q.B.).

124. *Id.* at 705-06.

125. Indeed the court relied upon the prosecution to decide which pictures "on any conceivable view could be said to have any artistic merit or to provide any message or inspiration." *Id.* at 706.

the Obscene Publications Act of 1959, as amended, is a matter to be raised in defense. The defendant's burden is not merely to go forward with the evidence, but rather to "make out [his] defense under this section on a balance of probabilities."¹²⁶ This is clearly different from the situation under *Miller* which requires the prosecution to prove beyond a reasonable doubt all elements of the offense, including lack of "serious literary, artistic, political, or scientific value."

The situation in civil cases in the United States is not so clear. That the burden is still upon the person seeking to suppress allegedly obscene materials is indicated by the Supreme Court's holdings in *Freedman v. Maryland*¹²⁷ and *Southeastern Promotions, Ltd. v. Conrad*,¹²⁸ in which the Court struck down censorship schemes which failed to meet, *inter alia*, the following requirement: "First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor."¹²⁹ This may be thought to settle the issue, but some doubt is raised by *McKinney v. Alabama*.¹³⁰ The defendant in *McKinney* was not allowed to raise the issue of obscenity at his state criminal trial, because, in a previous civil action to which the defendant had not been a party, an Alabama court had declared obscene a magazine which the defendant later possessed with knowledge of the court's civil determination of obscenity. In striking down this procedure, the Supreme Court referred to the deficiencies in such ambiguous language (for example, that the defendant had had "no opportunity to be heard" on the obscenity issue), that Mr. Justice Blackmun was moved to concur in part as follows:

I concur in the judgment of the Court and I join its opinion on the assumption that the Court is not deciding either of the following propositions:

. . . .

2. Whether a system which merely allows one to initiate a challenge to an *ex parte* determination of obscenity is constitutionally proper. I take it that the full paragraph on page 1193 of the Court's opinion does not resolve that question. If it does, I refrain from joining it. I had believed, in this connection, that it is settled that the burden of proving that a particular expression is unprotected rests on the censor . . . and is not to be shifted to the other side by a mere "avenue for initiating a challenge."¹³¹

126. *The Queen v. Calder & Boyars Ltd.*, [1969] 1 Q.B. 151, 117 (C.A. 1968).

127. 380 U.S. 51 (1965).

128. 420 U.S. 546 (1975).

129. *Id.* at 560.

130. 424 U.S. 669 (1976).

131. *Id.* at 677-78 (Blackmun, J., concurring) (citations omitted).

E. Handling of Expert Testimony

The United States Supreme Court has made it clear that it is not "error to fail to require 'expert' affirmative evidence that the materials [are] obscene when the materials themselves [are] actually placed in evidence" and that such materials "are the best evidence of what they represent."¹³² The following language, taken from a footnote to that quotation, is pertinent:

This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. . . . No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. . . . "Simply stated, hard core pornography . . . can and does speak for itself." *United States v. Wild*, 422 F.2d 34, 36 (CA2 1970), cert. denied, 402 U.S. 986 (1971). We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest.¹³³

One might conclude from this footnote that such evidence could also be excluded in the discretion of the trial court from both the prosecution and defense cases. After all, if it is not necessary, can it not be excluded? This possibility is suggested by the Court's discussion of the exclusion of certain expert testimony in *Hamling v. United States*.¹³⁴ The trial court excluded the testimony because it related to a local rather than national standard; at the time of the trial the trial court assumed that the national standard was pertinent. On review, the question was raised whether the defendant should have had a chance to introduce expert testimony as to the local standard in view of the Court's conclusion in *Hamling* that the local standard was applicable. In rejecting this contention, the Court said in part: "As we have noted, . . . the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony."¹³⁵

Before one leaps to the conclusion that this means that all expert testimony can be excluded, it ought to be noted that in *Hamling* the trial judge permitted four other experts to testify. Furthermore there is language in Mr. Justice Frankfurter's concurring

132. 413 U.S. at 56.

133. *Id.* at 56 n.6.

134. 418 U.S. 87 (1974).

135. *Id.* at 108.

opinion in the earlier case of *Smith v. California*¹³⁶ which suggests a contrary conclusion:

Since the law through its functionaries is "applying contemporary community standards" in determining what constitutes obscenity, *Roth v. United States*, 354 U.S. 476, 489, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporary community standards." Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? . . . Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of "due process" to exclude the constitutionally relevant evidence proffered in this case.¹³⁷

The Court in *Kaplan v. California*¹³⁸ spoke approvingly, in dictum, of the Frankfurter approach.

Under the Obscene Publications Act of 1959, expert evidence is admissible, but only as to the defense of public good. The trial court is supposed to exclude such testimony with regard to the tendency to deprave and corrupt.¹³⁹ The Post Office Act of 1953, which does not have a section equivalent to section 4(2) of the Obscene Publications Act, has been interpreted to preclude the admission of evidence from "persons of standing or repute" as to what effect allegedly "indecent" materials had on them.¹⁴⁰

An exception to the principle that expert testimony is not admissible regarding the question of corruption or depravity is found in *Director of Public Prosecutions v. A. & B.C. Chewing Gum Ltd.*,¹⁴¹ in which the court held it improper for the magistrates at trial to have excluded expert psychiatric testimony, tendered by the prosecution, regarding the effect of certain "battle cards" on children of various ages.

136. 361 U.S. 147 (1959).

137. *Id.* at 165-66 (Frankfurter, J., concurring).

138. 413 U.S. 115, 121 (1973).

139. *The Queen v. Calder & Boyars Ltd.*, [1969] 1 Q.B. 151, 171 (C.A. 1968) (dictum); *The Queen v. Anderson*, [1972] 1 Q.B. 304, 313 (C.A. 1971) (dictum).

140. *The Queen v. Stamford*, [1972] 2 Q.B. 391, 395 (C.A.).

141. [1968] 1 Q.B. 159 (1967).

Thus, apart from a case involving alleged corruption of children, it is clear that an English court does not even have discretion to admit expert testimony until the defendant tries to establish the defense of public good. Moreover, even with regard to the defense of public good, the availability of expert testimony may be more limited than might appear at first glance. In *The Queen v. Staniforth*,¹⁴² the Court of Appeal, Criminal Division, held that it was not error for the trial judge to have excluded expert testimony that the allegedly obscene materials (supposedly "hard pornography") were of therapeutic value to the "sexually repressed or perverted or deviant."¹⁴³ In the court's view, admission of such testimony would have been inconsistent with the Act because the presupposition of such testimony was that all pornography was of benefit to the public.¹⁴⁴

F. Procedure for Seizure of Allegedly Obscene Material

Section 3 of the Obscene Publications Act of 1959 provides in part:

(1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that, in any premises in the petty sessions area for which he acts, or on any stall or vehicle in that area, being premises or a stall or vehicle specified in the information, obscene articles are, or are from time to time, kept for publication for gain, the justice may issue a warrant under his hand empowering any constable to enter (if need be by force) and search the premises, or to search the stall or vehicle, within fourteen days from the date of the warrant, and to seize and remove any articles found therein or thereon which the constable has reason to believe to be obscene articles and to be kept for publication for gain.

(2) A warrant under the foregoing subsection shall, if any obscene articles are seized under the warrant, also empower the seizure and removal of any documents found in the premises or, as the case may be, on the stall or vehicle which relate to a trade or business carried on at the premises or from the stall or vehicle.

(3) Any articles seized under subsection (1) of this section shall be brought before a justice of the peace acting for the same

142. [1976] 2 W.L.R. 849 (C.A.), *appeal dismissed sub nom.* Director of Public Prosecutions v. Jordon, [1976] 3 All E.R. 775 (H.L.).

143. *Id.* at 854.

144. The nature of the expert testimony tendered at trial illustrates the proposition that people today simply disagree about the sort of material that should be made generally available. See note 167 *infra*. The problem is not only that people disagree about what constitutes "obscenity," but also that some people simply do not accept the concept of obscenity at all. In other words, they do not believe that the government has any business telling them what they may or may not read or see in the movies.

petty sessions areas as the justice who issued the warrant, and the justice before whom the articles are brought may thereupon issue a summons to the occupier of the premises or, as the case may be, the user of the stall or vehicle to appear on a day specified in the summons before a magistrates' court for that petty sessions area to show cause why the articles or any of them should not be forfeited; and if the court is satisfied, as respects any of the articles, that at the time when they were seized they were obscene articles kept for publication for gain, the court shall order those articles to be forfeited: . . .¹⁴⁵

Thus, although the original determination to search must be made by the magistrate, the determination of which items are to be seized is left to the constable executing the warrant. Moreover, the constable is empowered to seize, not just a single copy of an allegedly obscene item, but presumably all such copies. Furthermore, under subsection (2), if allegedly obscene items are seized, the business records of the establishment being searched also can be seized. Thereafter there is supposed to be a hearing before a Justice of the Peace to determine whether the allegedly obscene items are obscene and thus to be forfeited.¹⁴⁶

In the United States, on the other hand, massive seizures of books prior to a judicial determination of obscenity are forbidden.¹⁴⁷ No seizure is possible without a warrant, and the issuing magistrate cannot rely on conclusory assertions of obscenity by a policeman.¹⁴⁸ (Presumably the magistrate has to read the publications himself before issuing the warrant; it is not clear whether he has to see a movie himself before issuing a warrant.) As the seizure at this point is justified merely as an effort to secure evidence for a prompt judicial hearing on the issue of obscenity, the Supreme Court has said that, pending the hearing, the exhibitor of a film should be given an opportunity to copy the seized motion picture if the exhibitor does not have access to other copies.¹⁴⁹

G. Procedural Differences not Peculiar to Obscenity Prosecutions

In most cases summarily tried before a magistrate under section

145. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 3.

146. As it perhaps too frequently happens, theory and practice here diverge. "In many cases the police do not take the matter to the court. They caution the occupier and invite him to sign a 'disclaimer' disclaiming any interest in the material. They then destroy it." *The Queen v. Commissioner of Police of the Metropolis*, [1973] Q.B. 241, 251 (C.A. 1972).

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

148. *See Heller v. New York*, 413 U.S. 483 (1973); *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

149. *Heller v. New York*, 413 U.S. 483, 492-93 (dictum).

2(1) (a) of the Obscene Publications Act of 1959, as amended, a judgment of acquittal can be appealed by the prosecution with respect to matters of law but not findings of fact.¹⁵⁰ In *Director of Public Prosecutions v. Whyte*,¹⁵¹ the House of Lords allowed an appeal from what was, in effect, an acquittal by the trial magistrates. The court's justification for directing a conviction on remand was that the magistrates, who had heard all the evidence on both sides, had erroneously assumed that the likely readers of the allegedly obscene materials were incapable of further corruption. Dissenting, Lord Salmon believed that the majority's decision "turn[ed] entirely on their view of the facts. No point of law ar[ose]."¹⁵²

Clearly such a result would be impossible in the United States under the double jeopardy provision of the fifth amendment,¹⁵³ as made applicable to the states by the fourteenth amendment.¹⁵⁴

Another area where procedures vary is jury selection. Voir dire tends to be much more extensive in the United States, as illustrated by the lengthy voir dire in the recent case of Joan Little,¹⁵⁵ but the extent to which such practices are constitutionally protected is not clear.¹⁵⁶

IV. CONCLUSION

The major substantive difference in the treatment of obscenity in the United States and in England and Wales is that in England and Wales the notion of obscenity is not restricted to sex, but can include violence and drug-taking. It also is possible to point to other substantive differences, at least with respect to the Post Office Act of 1953 and the common law offenses of conspiracy to

150. See note 44 *supra*.

151. [1972] A.C. 849.

152. *Id.* at 876.

153. "No person shall . . . be twice put in jeopardy of life or limb" U.S. CONST. amend. V.

154. *Benton v. Maryland*, 395 U.S. 784 (1969).

155. See *Sarasota Herald-Tribune*, Nov. 23, 1975, § F, at 1, col. 1.

156. Although the Supreme Court held in *Ham v. South Carolina*, 409 U.S. 524 (1973), that under the facts of that case, it was a denial of due process for the trial court to refuse to permit an inquiry into possible racial bias on the part of jurors, the Court in *Ristaino v. Ross*, 424 U.S. 589 (1976), refused to extend the holding of *Ham* to every situation in which the defendant is black and the victim white. On the other hand, the Court's discussion of the problem of pretrial publicity in *Nebraska Press Association v. Stuart*, 96 S. Ct. 2791 (1976), suggests that the Court is willing in appropriate cases to recognize a constitutional requirement of extensive voir dire examination. *Id.* at 2805.

corrupt public morals and to outrage public decency, against which there is no defense of public good based upon the need to serve literature and the arts. In the light of the considerable vagueness of such concepts as "obscenity," "public decency" and "public good," one may question whether these latter substantive differences are as great as they first might appear.

The fact that "obscenity" is restricted to sexual matters in the United States, but is not so restricted in England and Wales, highlights the different approaches taken by the courts in the two countries resulting from the existence of a written Bill of Rights in the United States and the absence of such a Bill of Rights in England. The prohibition of "obscenity" in the United States has developed as an exception to otherwise constitutionally protected activity.¹⁵⁷ Because there is explicit protection of freedom of speech in the United States Constitution, the United States Supreme Court has provided some protection for the more obvious expressions of sex-related ideas, as illustrated by *Kingsley International Pictures Corp. v. Regents*.¹⁵⁸ The *Handyside*¹⁵⁹ case illustrates that less protection of this sort is provided in England and Wales.

Other major differences between the United States and England and Wales are of a procedural sort, but nevertheless may have substantive effects. For example, the willingness of the United States Supreme Court to declare certain materials not obscene as a matter of constitutional law may give some—though perhaps not much—guidance to distributors of potentially obscene materials in the United States by somewhat narrowing the offense of obscenity as actually administered.¹⁶⁰ The fact that the burden of proof is on the prosecution in the United States to prove an absence of serious literary or similar value again may make it a little more difficult for the prosecution to succeed there. Thus, the protected area may be a little broader in the United States than it is in England, where the defendant bears the burden of justifying material which might otherwise be said to tend to deprave or corrupt. Similarly, because the double jeopardy provision of the fifth amendment precludes appeals from what are in effect acquittals in the lower court, there is slightly less likelihood that a publisher will be prosecuted successfully in the United States.

157. It was not inevitable, of course, that obscenity would be limited to sexual matters, but the development of general first amendment principles has prevented the easy judicial expansion of the notion of obscenity which has characterized some English decisions.

158. 360 U.S. 684 (1959).

159. See note 112 *supra*.

160. This practice, however, has its institutional costs. See note 118 and accompanying text *supra*.

As indicated above, given the generality of the first amendment's treatment of speech, it was not inevitable that the Supreme Court would develop the notion of obscenity as an exception. Thus it would have been difficult to predict, simply on the basis of a written constitution in the United States, that the substantive laws in England and Wales and in the United States dealing with obscenity would become as similar as they indeed have become. On the other hand, to the extent that substantial differences exist as a result of procedural differences, these differences might have been a little easier to predict in view of the concern with procedural regularity which is manifested in the American Bill of Rights. Perhaps one can generalize and say that adherence to procedural requirements will have a limiting impact on attempted intrusions into areas which, according to some people, ought to be kept free from governmental interference.¹⁶¹

We cannot leave the subject of obscenity without alluding to a common source of difficulty which has plagued courts in both United States and England—a difficulty which we mentioned in the Introduction and touched upon in our discussion of the problem of vagueness. The problem lies in the lack of consensus, in a pluralistic society, regarding acceptable treatment of sexual matters. Despite such a lack of consensus, our legal systems have continued the tradition of insisting that "obscene" materials be proscribed. Thus, the attempt to describe what sort of material is "obscene," utilizing either the "deprave and corrupt" formula or the three-pronged *Miller* test, is founded on the fiction that a social consensus exists and readily can be identified. The Court of Appeal, Criminal Division, recognized this recently:

The difficulty, which becomes ever increasingly apparent, is to know what is the current view of society. In times past there was probably a general consensus of opinion on the subject, but almost certainly there is none today. Not only in books and magazines on sale at every bookstall and newsagent's shop, but on stage and screen as well, society appears to tolerate a degree of sexual candour which has already invaded a large area considered until recently to lie within the forbidden territory of the obscene.¹⁶²

In England this contradiction between the lack of social consensus and the assumption of social consensus is both reflected and entrenched in the unelaborated statutory "deprave and corrupt"

161. See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958).

162. *The Queen v. Staniforth*, [1976] 2 W.L.R. 849, 855-56 (C.A.), *appeal dismissed sub nom. Director of Public Prosecutions v. Jordan*, [1976] 3 All. E.R. 775 (H.L.).

formula, which fails to articulate the specific harm that the obscenity law is designed to combat. It is reflected further in the interpretation by the courts that juries are to decide whether an article "depraves or corrupts" as a question of fact without any psychological, sociological, or medical advice.

The result is, to use Lord Denning's phrase, that the law has "misfired."¹⁶³ The 1959 and 1964 English Acts are not reducing the amount of obscene material available. The police refrain from prosecuting because under the "deprave and corrupt" formula there is no assurance of a conviction, and attempts at prosecution either fail or result in slight penalties. Furthermore, as Lord Denning succinctly put it in *The Queen v. Commissioner of Police of the Metropolis*:¹⁶⁴

That test can be used skilfully to obtain an acquittal by this piece of sophistry: if the likely readers are those who are already depraved and corrupt, this item will not make them more so: but if the likely readers are just ordinary sort of folk, they will be so revolted that they will be turned away from it.¹⁶⁵

In the United States, the contradiction asserts itself partly in the disagreements among members of the Supreme Court as to whether a particular article is obscene.¹⁶⁶ The Supreme Court's approval of the use of a state-wide standard in *Miller* and a district-wide standard in *Hamling* is, arguably, a partial recognition of the

163. *The Queen v. Commissioner of Police of the Metropolis*, [1973] Q.B. 241, 250 (C.A. 1972).

164. [1973] Q.B. 241 (C.A. 1972).

165. *Id.* at 251. Lord Denning's views appear, at first glance, to be inconsistent with the result reached in the earlier case of *Director of Public Prosecutions v. Whyte*, [1972] A.C. 849. In *Whyte*, it will be recalled, an acquittal by the Magistrates was overturned by the House of Lords on the ground that the Magistrates had assumed erroneously that the readers of certain materials already were corrupted and hence incapable of being corrupted further. Lord Denning seems to be suggesting in *Commissioner of Police of the Metropolis*, however, that a jury is free to find that an individual is so debased that he cannot be corrupted further or that defense counsel can argue this to the jury. Because *Whyte* did not deal with a jury trial, the issues raised by Denning were not considered in *Whyte*. Perhaps, therefore, Lord Denning is correct as to juries, as distinguished from Magistrates. That different standards may, as a practical matter, apply to juries and Magistrates may seem strange to Americans, but it must be remembered that acquittals by Magistrates can be appealed sometimes in England, whereas the same is not true with respect to jury verdicts. See note 44 *supra*.

166. See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413, 441 (1966) (Clark, J., dissenting); *Ginzburg v. United States*, 383 U.S. 463, 497 (1966) (Stewart, J., dissenting).

lack of consensus. It is only a partial recognition of the problem because it fails to take into account the lack of consensus within the local communities.¹⁶⁷ A price is paid for this partial recognition: exacerbation of the problem of fair notice, at least with respect to state-wide and national publishers.¹⁶⁸

One of the best expressions of the problem in the United States is found in Mr. Justice Douglas's dissent in *Paris Adult Theatre I v. Slaton*:

Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that "obscenity" was not an exception to the First Amendment. 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. . . .¹⁶⁹

It is clear that the laws in both the United States and England and Wales have failed to resolve the difficulty inherent in a lack of consensus regarding obscenity. The justification for obscenity laws thus needs to be reexamined in the light of the costs of the present enforcement of such laws: imposition of substantial burdens on the appellate process (at least in the United States), violation of the principle of fair notice in criminal cases, and encouragement of self-censorship.

167. For example, a study of attitudes towards sex-related materials in the metropolitan area of Detroit showed substantial differences of opinion among those surveyed. See Wallace, Wuehmer, & Podany, *Contemporary Community Standards of Visual Erotica*, 9 TECH. REP. OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27. Even among college students, who are often thought to have attitudes different from the rest of the community, there appears to be substantial disagreement as to what, if anything, constitutes "pornography." See White & Barnet, *College Students' Attitudes on Pornography*, 1 TECH. REP. OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 181.

168. Moreover, the move toward local standards is a decentralization reminiscent of feudal society.

169. 413 U.S. at 70.

Appendix

For a history of obscenity from antiquity see N. ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* (1956). A good history of the development of obscenity in England is found in D. THOMAS, *A LONG TIME BURNING* (1969). A brief history of the development of the law of obscenity in England is also found in *Memoirs v. Massachusetts*, 383 U.S. 413, 428-29 (1966) (Douglas, J., concurring). The situation in the American colonies before ratification of the Constitution is recounted briefly in *Roth v. United States*, 354 U.S. 476, 482 (1957).

Prior to 1727, jurisdiction over obscenity was exercised in England by the ecclesiastical courts. The first successful prosecution of obscenity in the Court of King's Bench occurred in *Dominus Rex v. Curl*, 93 Eng. Rep. 849 (1727).

The historical origin of the modern legal test of obscenity in both the United States and England is found in *The Queen v. Hicklin*, [1868] 3 Q.B. 360, in which Lord Chief Justice Cockburn enunciated the following test in interpreting the word "obscene" as used in An Act For More Effectually Preventing the Sale of Obscene Books, Pictures, Prints, and Other Articles, 1857, 20 & 21 Vict., c. 83, § 1: "[A]nd I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." [1868] 3 Q.B. at 371.

In England and Wales, the basic concept of obscenity, as enunciated in *Hicklin*, has been carried forward in the Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 1. See note 29, and accompanying text *supra*.

In the United States, the Supreme Court did not make clear the status of obscenity laws under the Constitution until *Roth v. United States*, 354 U.S. 476 (1957), in which it held a federal statute prohibiting the mailing of obscene matter constitutional, since "obscenity is not within the area of constitutionally protected speech or press." *Id.* at 485. The Court in *Roth* defined obscene material as "material which deals with sex in a manner appealing to prurient interest." *Id.* at 487.

The *Roth* test was modified in a plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), in which the following test was enunciated:

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

Id. at 418. Admittedly, this was a plurality opinion, but since Justices Black and Douglas, who concurred in the judgment, opposed *any* laws which punished "obscenity," it is clear that five justices were willing to go at least as far as the plurality in protecting sex-related materials from suppression by the states.

The current American test is found in *Miller v. California*, 413 U.S. 15 (1973), discussed in the text of this article.