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Obscenity law: Politics, morality, free speech, and the struggle to define obscenity

Lillie, Richard George, Ph.D.

Case Western Reserve University, 1990

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OBSCENITY LAW - 
POLITICS, MORALITY, FREE SPEECH. 
AND THE STRUGGLE TO DEFINE OBSCENITY.

by 
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Submitted in Partial Fulfillment of the 
Requirements for the Degree 
Doctor of Philosophy

Dissertation Advisor: Dr. Vincent McHale

Department of Political Science 
CASE WESTERN RESERVE UNIVERSITY 
May 20, 1990
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OBSCENITY LAW -
POLITICS, MORALITY, FREE SPEECH,
AND THE STRUGGLE TO DEFINE OBSCENITY.

ABSTRACT

by

RICHARD GEORGE LILLIE

The struggle to define obscenity has engaged
the great institutions and passions of
Anglo/American democratic society. Legislatures,
courts, religious groups, and free speech
absolutists have all participated in the battle
from time to time.

This struggle, sometimes contentious,
ocasionally reasonable, has revolved around four
main elements of obscenity: (1) the nature of the
work; (2) the community or class to be protected;
(3) the work as a whole; and (4) the purpose of
the work.

Regina v. Hicklin, the first major obscenity
case in Anglo/American law, established the first
two of the four elements of obscenity. The
Hicklin definition of obscenity dealt with the nature of the work ("The tendency of the matter ...to deprave and corrupt...") and the community or class to be protected ("...those whose minds are open to such influences, and into whose hands a publication of this sort may fall"), while United States v. Bennett, the first major American obscenity case, added the elements of the work as a whole (the jury "may confine [its] attention to the marked passages"), and the purpose of the work ("...the object with which this book is written is not material, nor is the motive which led the defendant to mail the book material"). Subsequent cases then brought these four elements together and set the course which other courts would follow, in one form or another, for the next one hundred years. Indeed, the modern definition of obscenity, as established first by Roth v. United States, and refined by Miller v. California, embraces all four elements of obscenity.

The modern definition of obscenity is set forth in Miller in three prongs: (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 patently offensive sexual conduct; and (c) whether the work, taken as a whole lacks serious value.

This paper represents an effort to answer the question: What is the definition of obscenity and how did we arrive at it?*
DEDICATION

For My

Wife

Mary Alice Lillie

Amor de mi Vida
Mujer de mi Corazón
PREFACE

In spite of the skepticism with which I am usually greeted, I wish it to be understood that I have come by my interest in obscenity law in a direct and honest manner.

A practicing attorney since 1979, I served as an assistant United States Attorney, U.S. Department of Justice, from 1982-1987. In 1984, the Department of Justice embarked upon an ambitious plan to vigorously prosecute the then newly amended Sexual Exploitation of Children Act. I was appointed Chief Coordinator of the Joint Task Force Against Child Pornography and Obscenity (Northern District of Ohio). In that capacity, I personally prosecuted over ten percent of the cases indicted nationwide from 1984-1987 under the 1984 Amendments to the Sexual Exploitation of Children Act; more cases, in fact, than any prosecutor in the United States. Included among these cases were the first case tried to a jury under the 1984 Amendments, as well as the first
case in the country to uphold the constitutionality of the 1984 Amendments.* For my efforts, I was awarded the U.S. Attorney General’s Special Achievement Award in December, 1986.

Needless to say, during the course of my prosecutive efforts, I was forced, of necessity, to become an expert, of sorts, in the field of obscenity law. To that end, I attended numerous seminars and courses (e.g., Obscenity Prosecution Seminar (1985), Obscenity Enforcement Seminar (1986), Obscenity Prosecution Conference (1987)), and was obliged to read all of the modern era obscenity cases. In addition, I was called upon in 1986 and 1987 to teach trial advocacy and obscenity law at the U.S. Attorney General’s Advocacy Institute, U.S. Department of Justice, Washington, D.C., and again in 1987 to teach obscenity law at the Criminal Justice Training Council, Vermont Police Academy Seminar, Rutland, Vermont.

Interestingly, it was partially as a result of the courses I was called upon to teach, that I began to discover the limited number of obscenity law treatises available to the student, instructor, social worker, and attorney. In addition, it was about this time that I became irrevocably engrossed with the subject of obscenity law, and determined to answer the question: What is the definition of obscenity and how did we arrive at it?

This paper is an attempt to answer that question.

The final decision with respect to organization of this paper was arrived at only after several alternative approaches were tried and discarded. Initially, an attempt was made to organize the subject under several major headings. Research was then organized and conducted by means of categorizing various cases under the umbrella of what I identified as the four elements of obscenity: The nature of the work, the community affected by or judging the work, the work taken as a whole, and the purpose of the work. Case selection was subjective. Cases were selected based primarily upon their contribution to, or
discussion of, one or more of the four elements of obscenity. Thus, on occasion, trial court
decisions are emphasized over Appellate or Supreme Court cases. Conversely, many trial court
decisions are ignored because the real contribution to the area came at the Appellate or
Supreme Court level.

While it cannot be denied that these four elements provide the supportive underpinning upon
which the law of obscenity is built, organizing an entire study in such a fashion was deemed to be
unworkable, although not because such a paper could not be written; to the contrary, such an
organizational structure was actually found to be easier to work with than that which was finally
decided upon. Rather, this approach was discarded because it provided little of value to the reader.

Accordingly, the reasons for choosing the developmental method found herein are simple
enough: First, by means of this paper, I hope to add to the political and legal literature in the
area of obscenity law. Second, I seek to simplify the complex, time consuming, and unorganized
condition of the literature and law of obscenity as it presently exists.
While several excellent works dealing with obscenity law up to Miller v. California are available to the researcher, few have been written since. Thus, given the inherent confusion of the law in the obscenity area, I attempted to deal with the law in a cogent, organized fashion, inviting the reader to learn more, to dig deeper. Many court decisions are simply all-over-the-map, as it were, and completely fail to properly state the law. This lack of precision is clearly due, at least in part, to the lack of step-by-step resources in the field.

The field of obscenity law, unlike some areas of law, does not lend itself to an impressionistic approach. It must be analyzed brick by brick, plank by plank. Thus, I have chosen the following approach, in hopes of providing a comprehensive learning and research tool that will help remedy these abiding deficiencies in the area of obscenity law.*

*Finally, it should be noted that this paper does not include a discussion of the application of the modern definition of obscenity to the 4th Amendment’s restrictions against unlawful search and seizure, broadcast obscenity, nuisance, and zoning laws. Such topics are beyond the scope of this paper.
ACKNOWLEDGMENTS

Utmost thanks to Cynthia Huff, who carried the burden of typing and re-typing this dissertation. Many thanks as well to Bruce Taylor and Mary Jo Tipping who assisted me in proof-reading the final draft. And finally, I would like to thank Dr. Vincent McHale, my friend and advisor, without whom this dream would never have been realized.
OBSCENITY LAW -
POLITICS, MORALITY, FREE SPEECH
AND THE STRUGGLE TO DEFINE OBSCENITY

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I. HISTORICAL EVOLUTION

A. INTRODUCTION:

Even the most ardent civil libertarian will seldom be heard to attack laws which protect traditional interests such as persons, property, and public order. However, laws which bear upon issues of morality and free speech are not so easily accepted. We chafe at the idea of censorship. One person's pornography is another person's art. Nevertheless, the criminal law has long invoked sanctions against certain sexually explicit materials, and while these sanctions may at times seem either trivial or oppressive, they nevertheless reflect society's attitudes, mores, and morals. Indeed, the criminal law is the embodiment of society's beliefs and desires. It is a reflection of society's efforts to define the parameters of the social contract under which its citizens will be governed. Certain actions, such as murder, rape and assault are almost universally condemned, while others, such as theft and bribery, are treated differently, depending upon the culture.
In Anglo-American law, perhaps no other crime has proven more difficult to define than that of obscenity. What, after all, is meant by the word obscene? The word is rife with ambiguity. Dr. Samuel Johnson reportedly defined obscene as "'immodest; not agreeable to chastity of mind; causing lewd ideas; offensive; disgusting; inauspicious; ill omened.'" In modern times the word obscene has come to connote sexual matters, and has long been used interchangeably with the word pornography. Indeed, we often think of obscenity as synonymous with pornography, but it is not. Pornography is not a legal term. It is of no legal significance. Pornography is derived from the Greek word pornographos, meaning "writing about prostitutes." It is generally used to refer to the presentation of sexually explicit material in photographs or film. The term obscenity, however,

1. The term Anglo-American as used here, is meant to relate to the common law traditions of England, the United States and Canada.


is inherently vague and overbroad. Whether one considers obscenity to be indicative of depravity or immorality or something else altogether, the definition of obscenity is always open to interpretation, always subjective. Yet, definition is critical, for if the law adjudges a matter obscene, then that matter becomes subject to censorship, and those individuals responsible for producing or pandering or distributing such material are thereby subject to the sanctions of the criminal law. Not surprisingly then, the struggle to define obscenity has become the focus of the law of obscenity. Indeed, those seeking to clarify and define obscenity often despair that perhaps "the attempt to understand obscenity in the terms of a simple definition is fruitless and best abandoned." Nevertheless, scholars and judges have repeatedly returned to the struggle, and interestingly, the roots of that struggle lie

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not in 18th century Victorian morality, but rather, in ancient history.
B. **CLASSICAL FOUNDATIONS:**

Both ancient Greece and Ancient Rome sanctioned a broad range of sexually explicit materials.6 Apparently this was tolerated due to the fact that only the elites were privy to such materials. The masses were protected from such materials by their very ignorance: They could not read. The elites, on the other hand, were educated, thus setting them apart from their more common brethren. Moreover, the elites were regarded as possessing the rectitude and insight which would allow them to properly review and assess the value of diverse, even obscene materials. The non-elites were not so blessed.

However, certain activities were considered to be beyond all tolerance, and most of these had to do with religious beliefs. Blasphemy and heresy were completely unacceptable. Indeed, "Socrates was put to death in large part for 'worshipping strange Gods'" and Plato later "advocated the censorship of plays which tell

untruths about the Gods."\(^7\) Nevertheless, it was customary in many cities, including Sparta during the feast of Dionysius, "for poets and others to take part in the public processions and to rally the populace with obscene and licentious songs and jokes."\(^8\) And while censorship in ancient Rome and the Middle Ages was harsh, relative to religious matters, "secular censorship remained non-existent,"\(^9\) at least for the elites.

The printing press changed all this. Indeed, Gutenberg’s phenomenal invention in 1428 changed more than the way in which books were printed; it also changed the market for books and other printed materials, making them accessible not just to the elites, but also to the masses. This revolution caused the Church much concern and resulted in what the Church regarded as the ever-increasing need for censorship of blasphemous and heretical books.\(^10\) Consequently, "Paul IV

\(^7\) St. John Stevas, p.2. Likewise, the author is indebted to St. John Stevas, Id., and Gerber, infra, for historical background.

\(^8\) Id.

\(^9\) Schauer, p.2.

\(^10\) Id. p.3.
had substantial legal force [at least] until the reformation."11

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11. Id.
C. **COMMON LAW BACKGROUND:**

The first flickers of pre-modern obscenity law began to surface in 17th Century England. Commentators differ as to which case ushered in the dawn of modern obscenity law, but it would not be injudicious to begin with the case of Sir Charles Sedley of Kent.\(^{12}\) Sedley’s case is especially noteworthy, because it did not involve issues more accurately characterized as those coming within the ambit of censorship. Prior to Sedley’s case, most obscenity prosecutions were inextricably intertwined with the ecclesiastical courts. Printed matter which touched upon religious themes was most likely to run afoul of the religious censors. Thus, while anti-obscenity laws were passed by Parliament during the 16th and 17th centuries,\(^{13}\) most obscenity offenses during the 1600’s and 1700’s were treated as being within the jurisdiction of the ecclesiastical courts.\(^{14}\)


\(^{13}\) St. John Stevas, p.12. For example, in 1580, the Puritans proposed that Parliament pass the *Act of Parliament for the Establishment of Governors of the English Print*, to license and thereby control licentious books. The act was never passed into law. Id.

\(^{14}\) St. John Stevas, p. 12.
Indeed, there is no apparent reference to obscene libel in Coke's *De Libellis Famosis* of 1606, nor apparently did he reference the offense when he treated libel as one of the subjects of his Institutes. Accordingly, Sedley's case is viewed with special interest within the context of the historical evolution of defining obscenity law. It appears first as an aberration, and later, as a crucial foundational block upon which the edifice of obscenity law was to grow.

Sir Charles Sedley of Kent was a contemporary and friend of King Charles II. In the manner of some of the aristocracy of the time, Sedley was apparently given to frequent wild drinking bouts during which time he and his friends would engage in various shenanigans. The basic facts of the case are as follows: One evening in 1663, Sedley and his friends left "The Cock" tavern, near Covent Garden, after a lengthy period of


17. Id. See the fine summary provided by Albert B. Gerber, *Sex Pornography and Justice* (New York: Lyle Stuart Inc. 1965), p.55, for this factual background.
drinking. They proceeded to climb the balcony of the public house, where they staged an obscene performance, (not unlike those which can now be seen nightly on the streets of most English and American cities). Sedley and his two friends, Charles Sackville (Lord Buckhurst, later Earl of Dorset), and Sir Thomas Ogle, undressed themselves, pantomimed a number of indecent proposals, and shouted indecencies to the public surrounding the tavern. Sir Charles bragged loudly of exceptional sexual prowess, and the three climaxed their show by urinating in bottles and throwing them at the passers-by. The act of dousing the public with urine so enraged the crowd as to incite a mob which stoned the performers until they fled from the scene.

Sedley was arrested, convicted, and "'fined 2000 mark, committed without bail for a week and bound to his good behaviour for a year, on his confession of information against him for shewing himself naked in a balcony, and throwing down bottles (pist in) vi et armis among the people of Covent Garden, contra pacem and to the scandal of the Government.'"18 Thus, did Sir Sedley take his

place in legal history as the subject of what is generally considered to be the first criminal obscenity prosecution under the common law.\textsuperscript{19} However, what makes Sedley’s case especially notable is the fact that it turned upon issues of public indecency, and not upon political or religious indecency.\textsuperscript{20}

Political and religious indecency continued to be the sole province of the ecclesiastical courts; at least, that is, until a publisher by the name of James Read was prosecuted in 1708 for publishing a pamphlet entitled The Fifteen Plagues of a Maiden-Head. The Queen’s Bench Court, however, dismissed the indictment and held that the publication committed "no offense at common law."\textsuperscript{21} The court rejected the then new concept of obscene libel, which would ultimately form the basis of future obscenity cases. Interestingly, the court went on to observe that proper

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19. Id.
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jurisdiction over such matters lay solely in the religious courts.

Following Read, the prosecution of obscenity law remained in the ecclesiastical courts for the next twenty years, until a political commentator and publisher named Edmund Curll was indicted and convicted for the sale of obscene literature.\textsuperscript{22} In convicting Curll, the court overruled its own Read decision, and held that the sale of obscene literature was clearly an offense against religion. Further, the Court held religion, being part of the common law, it then followed that the sale of obscene literature also violated the common law.\textsuperscript{23} In rejecting its precedent in Read, the court embraced the doctrine first set forth in Sedley's case that indecency or obscenity could be of such a nature as to be a violation of the common law and a breach of the peace.\textsuperscript{24} Thus, did


\textsuperscript{23} Rex v. Curll, Id.

\textsuperscript{24} Id., 2 Str. at 789, 93 Eng. Rep. at 850; discussed in Schauer, p.6.
the English courts first isolate obscenity as a prosecutable offense.

Obscenity prosecutions remained rather unusual throughout the remainder of the 18th Century, until the advent of the 19th Century, which brought with it the prudish ways of the Victorians. Obscenity prosecutions then began to mature and were used more predominantly against works which were sexually oriented and generally without the political or religious references which had characterized most earlier prosecutions.

This maturing of obscenity prosecutions was contemporaneous with a growing minority in both Britain and the United States that advocated the suppression of indecent literature. The actions of this vocal minority led to the passage of the Vagrancy Act of 1824, which punished the exhibition of obscene pictures, and Lord

25. Schauer, Id. Among the more notorious prosecutions was that of John Wilkes, King v. John Wilkes, 2 Wils., K.B. 151, 95 Eng. Rep. 737 (1764). Wilkes, an opponent of George III, and supporter of the American colonies, was prosecuted for primarily political reasons. See Gerber at 69-80 for a more detailed account of Wilkes and others.

Campbell's Act of 1857, which gave magistrates the power to destroy books, pictures and prints, if the Magistrate deemed them to be obscene.\textsuperscript{27} That which a magistrate would routinely deem to be obscene was not at all clear, and therein lay the danger. The law of obscenity had grown in such a haphazard fashion that no set definition of obscenity had yet been established. Thus, in 1868 when the Court of Queens Bench set down the definition of obscenity in \textit{Regina v. Hicklin}, they could not have known that they would transform the law of obscenity forever.

\textsuperscript{27} Gerber, p.81.
D. Regina v. Hicklin:

There can be little doubt that Regina v. Hicklin is the most important case in the history of Anglo-American obscenity law. The direction of English and American obscenity law would be completely dominated by Hicklin for over one hundred years. Indeed, as will be seen in our discussion infra, the struggle of the U.S. Courts to reach the present, "workable," definition of obscenity, was made more difficult as a result of Hicklin. As such, while there were numerous English obscenity cases following Hicklin, "the effect of English law on American obscenity law after Hicklin, was insignificant."²⁹

Hicklin involved a well regarded metal broker named Henry Scott. Scott was active in his local Protestant organization which was actively engaged in Catholic bashing. As a member in good standing, Scott wished to do his part in exposing the alleged corruption of the Catholic Church. To that end, Scott purchased and resold a number of pamphlets entitled The Confessional Unmasked: The

²⁸ L.R. 3 Q.B. 360 (1868).
²⁹ Schauer, p.8.
Inequity of the Confessional, and the Questions Put to Females in Confession.

The Magistrate of Wolverhampton, acting in authority with the power granted him by Lord Campbell’s Act, adjudged the pamphlets obscene and ordered them destroyed. Scott appealed to the Court of Quarter Sessions, and the Judge (Recorder) Benjamin Hicklin, reversed the Magistrate and held the material was not obscene in that, among other things, it was simply meant to criticize the Catholic Church. Recorder Hicklin’s decision was appealed to the Queen’s Bench. 30 Chief Justice Cockburn reversed Recorder Hicklin’s decision. In so doing, Chief Justice Cockburn laid down his definition of obscenity as follows:

I think the best 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 hand a publication of this sort may fall. 31

Interestingly, Chief Justice Cockburn’s landmark definition of obscenity came in dicta, as

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31. Id. at 371.
the issue of obscenity had been determined by the Magistrate in the first legal proceeding. This, of course, was the Magistrate’s Prerogative, pursuant to Lord Campbell’s Act.\textsuperscript{32} Perhaps nowhere in Jurisprudence has the historical impact of dicta been greater than in what has become known as the \textit{Hicklin} definition or test of obscenity.\textsuperscript{33}

Simply put, the Hicklin test focuses upon the \textit{tendency} of a matter to corrupt those whose minds are particularly open to such corruption. Moreover, such a determination could be made simply by viewing certain limited passages of a work, as opposed to viewing the work as a whole. Thus, censors in the years following \textit{Hicklin} were able to bring cases against works which, based upon certain limited passages, had an alleged \textit{tendency} to deprave or corrupt even a child.

A clear reading of the \textit{Hicklin} test reveals that this is a test which is vague, overbroad, and seemingly lacking in the necessary exactitude to withstand constitutional challenge. Yet, Hicklin

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\textsuperscript{32} Schauer, p.7. See also, \textit{Gerber}, p.81.

\textsuperscript{33} These terms will be used interchangeably throughout this paper.
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ultimately became the rule in the United States. How the United States got from there to here -- from Hicklin to a workable definition of obscenity -- is the subject of the following discussion.
II. **EARLY AMERICAN OBSCENITY LAW**

A. **1600-1870—THE UNEVENTFUL YEARS**

The colonists clearly did not fret about obscenity; blasphemy, yes, obscenity, no. Blasphemy was punishable by death in Maryland, Plymouth Colony, and the Massachusetts Bay Colony. As was pointed out by Justice Brennan in *Roth v. United States*, all the colonies at the very least outlawed blasphemous material by statute.

In 1711 Massachusetts passed what is generally considered to be the first law in the United States against obscenity. The law was entitled, *An Act Against Intemperance, Immorality, and Profaneness, and for Reformation of Manners*. It made illegal the act of "'composing, writing, printing, or publishing...any filthy, obscene, or profane song, pamphlet, libel or mock sermon, in imitation or in mimicking of preaching, or any other part of divine worship.'”

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36. Lewis, p.3, citing *Acts and Laws, Passed by the Great and General Court or Assembly of the Province of the Massachusetts - Bay in New*
The 1711 Massachusetts Act Against Intemperance embraces conduct similar to that involved in earlier obscenity cases, such as blasphemy and sedition, but adds to it conduct related to sexual issues or erotica, as some commentators refer to it.\textsuperscript{37} Basically then, the act made illegal anything that society finds unacceptable; that is, blasphemy, sedition and erotica. Interestingly, all "three are linked by one very telling common denominator: All are arrows aimed at the heart of society—blasphemy undermining its Gods, sedition its Government, and obscenity its fundamental social mores."\textsuperscript{38}

In any event, no prosecutions were conducted under the 1711 Massachusetts Act Against Intemperance until 1821.\textsuperscript{39} During this time, however, the common law crime of obscene libel, first recognized in \textit{King v. Curll}, became part of the American common law as a result of two

\footnotesize\textbf{England From 1692, to 1719} (London: Printed by John Baskett, 1724).

37. Lewis, p.3.

38. Id.

separate but remarkably similar cases decided between 1815 and 1821. The first, *Commonwealth of Pennsylvania v. Sharpless*¹⁰ involved one Jesse Sharpless, who was prosecuted for the exhibition of a picture. The Court viewed the exhibition as being tantamount to a publication, and held that the exhibition constituted the common law crime of obscene libel as first established by the English Courts in *King v. Curll*. In *Commonwealth v. Holmes*,¹¹ Peter Holmes was convicted for publishing John Cleland’s, *Memoirs of a Woman of Pleasure*, originally published in 1748. The Court held that obscene libel would be recognized as a common law misdemeanor.

While the Courts were just beginning to recognize common law obscene libel, the legislatures of the various states began to pass anti-obscenity laws. For example, Vermont passed the first obscenity Statute in 1821, prohibiting the distribution of obscene books or pictures.¹² Connecticut¹³ and Massachusetts¹⁴ followed shortly

¹² Laws of Vermont, 1824, Ch. XXIII, No. 1 SS23, Schauer, p.10. See also Gerber, p.90.
thereafter. Finally, in 1842 the first federal law was passed. The Federal Statute initially sought to stem the tide of French postcards by prohibiting the importation of indecent and obscene prints and pictures.

Notwithstanding the legislatures' apparent interest in the subject, obscenity prosecutions were rare during the Nineteenth Century, until the arrival of one Anthony Comstock in the mid-1860's. Comstock was born in Connecticut in 1844, and raised in a strict religious home. He

43. Stats. of Conn. (1830) 182-184, Schauer, p.10. See also Gerber, p.90.

44. This 1835 Statute expanded upon the 1711 Act of Intemperance, discussed supra. Mass. Rev. Stat. Ch. 310 SS10, Schauer, p.10. See also Gerber, p.90.


46. Id. 5 Stat. 566 SS28. Schauer, p.10 (footnotes omitted).

served in the union army during the civil war and upon his discharge from the army, embarked upon his life's work: Social reform and the suppression of vice. He formed the Committee for the Suppression of Vice, among whose mottoes was the adage, "morals, not art or literature." The Committee later came to be known by its more famous name, the Society for the Suppression of Vice. Using his position as Secretary of the Society, Comstock obtained an appointment as a special agent of the post office. In 1872-1873 he engaged in intense lobbying of Congress for passage of a law prohibiting the mailing of obscene literature. With help from numerous wealthy industrialists, such as J.P. Morgan, Comstock was able to drive a bill through Congress with little or no debate in either House of Congress. The bill, which was signed into law in March, 1873, became known as the Comstock Act. Over one hundred years later it survives, albeit in a somewhat modified form.

49. Schauer, p.13. See also Gerber, p.91.
50. 17 Stat. 598. See Schauer, Id., Gerber, Id.
From humble beginnings, Comstock came to play an instrumental role in the prosecution of obscenity throughout at least the next half-century, and remarkably, even after his death in 1915.
B. 1870-1920 - THE COMSTOCK YEARS

The Comstock Laws precipitated a veritable flurry of obscenity cases, as score after score of individuals were put in the dock for mailing obscene material. By his own account, Comstock claimed to have convicted enough persons of obscenity charges, in the first year after the passage of the Comstock Act, "to fill a passenger train of sixty-one coaches, sixty coaches containing sixty passengers each and the sixty-first almost full. [In addition,] I have destroyed 160 tons of obscene literature."\textsuperscript{52} Even discounting for exaggeration and boastfulness, these are extraordinary statistics. Statistics which, it should be added, are at least partially borne out by the increase in the number of obscenity cases reported after 1870.

1. Hicklin Comes to America

First among these Comstock related cases was \textit{United States v. Bennett}.\textsuperscript{53} Bennett was charged with having mailed a publication called "Cupid's Yokes or Binding Forces of Conjugal Life." The

\textsuperscript{52} Kilpatrick, p.35, also quoted in Schauer, p.13.

\textsuperscript{53} 24 Fed. Cas. 1093 (1879)
Defendant was convicted in Federal District Court of violating the then Federal Statute which forbade depositing into the stream of mail, any obscene or indecent publication.\textsuperscript{54} The \textit{Bennett} court was the first to recognize the applicability of the \textit{Hicklin} test for obscenity to federal obscenity cases.\textsuperscript{55} The \textit{Bennett} court stated unequivocally that the test to be applied was that of \textit{Hicklin}, but then adopted the rule as set forth by the District Court in its instructions to the jury:

\begin{quote}
Whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall. If you believe such to be the tendency of the matter in these marked passages, you must find the book obscene.\textsuperscript{56}
\end{quote}

\textsuperscript{54} Section 3893 of the Revised Statutes, as amended by Section 1, of the July 12, 1876 Act (19 Stat. 90). A violation of this section was a misdemeanor, punishable by a $100-$5,000 fine and/or 1-10 years in prison. This was obviously before misdemeanors were reclassified to call for sentences of one year or less.


\textsuperscript{56} \textit{Bennett}, at 1102 (emphasis added).
The significance of the emphasized passage above is to underscore the Bennett court's expansion of the Hicklin rule, to allow for the prosecution of obscene materials based solely upon limited, isolated passages. Indeed, the court emphasized that juries were to confine their attention to the marked passages, and that "it is upon those passages alone that...case[s] must turn."

The import of this judicial gloss, was to expand the number and kinds of obscenity prosecutions which could be brought under Federal law, for, if a multi-page work could be prosecuted based upon one allegedly obscene passage or sentence, almost anything was subject to prosecution, including literary classics.

Yet, as if this expansion of Hicklin was not enough, the Bennett court went on to dismiss any attempts to defend an obscenity case based upon the purpose of the work. The court stated, "...the object with which this book is written, is not material, nor is the motive which led the Defendant to mail the book material." 58

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57. Id.
58. Id.
Finally, the Bennett court made it clear that it would view the tendency of the material to corrupt even the young and naive as a violation of Federal Law.\textsuperscript{59} This aspect of the Bennett decision was to result in the prosecution of any material which was thought to affect children; thus, was the first U.S. community standard established at the childhood level.

2. Emergence of the Four Elements of Obscenity
   a. The Nature of the Work
   b. The Community Affected by or Judging the Work
   c. The Work Taken as a Whole
d. The Purpose of the Work

Whether attributable to the growing influence of the Comstock laws, or to the illuminating effect of the Bennett case, courts seemed more willing to jump into the obscenity fray after the Bennett decision was rendered in 1879. While it may be an exaggeration to argue that Bennett served as the impetus for subsequent cases, it clearly had a considerable effect, inasmuch as the case was decided by the Court of Appeals for the Southern District of New York; then, as in the

\textsuperscript{59} "It is within the law [i.e. a violation of this law] if it would suggest impure or libidinous thoughts in the young and inexperienced." Id. at 1102.
Modern Era, the country’s most influential Circuit Court of Appeals, vis a vis obscenity cases.

For example, United States v. Chesman,\(^{60}\); United States v. Britton,\(^{61}\); United States v. ReBout,\(^{62}\); and, United States v. Wightman,\(^{63}\) all adopted Hicklin and Bennett in the years immediately following the Bennett decision.

Following Chesman, the Eastern District of Missouri again confronted the Federal Obscenity Laws in 1889, and again Hicklin and Bennett were relied upon as seemingly rock-solid precedent. However, what made United States v. Clarke,\(^{64}\) distinctive in the annals of obscenity law, was the court’s cogent dissection of the law into four

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\(^{60}\) 19 Fed. Rep. 497 (E.D. Mo. 1881) (Holding that author’s purpose may be important in mitigation of punishment but not in justification of offense.)


\(^{62}\) 28 F. Rep. 522 (N.D. Oh. 1886) (Holding Hicklin test to be a question of fact for the jury and expanding the scienter requirement to require defendant to know at the time the material was mailed that it contained objectionable matter as charged in the indictment.)

\(^{63}\) 29 Fed. Rep. 1093 (W.D. Pa. 1886) (Holding that a letter was not obscene "according to the well considered case of United States v. Bennett").

\(^{64}\) 38 Fed. 732 (E.D. Mo. 1889).
main areas: The nature of the work, the community to be protected, the work as a whole, and the purpose of the work.

In Clarke, the Defendant was convicted of mailing obscene pamphlets and circulars entitled "Dr. Clarke's Treatise on Venereal, Sexual, Nervous and Special Diseases," in violation of Federal law (25 U.S. Stat. 496). The Treatise consisted primarily of a description of the causes, effects, and symptoms of venereal diseases. As was often the case with early reported trial decisions, the Judge's charge to the jury constitutes the bulk of the court's decision.

In dealing with the nature of the work, the Clarke court noted that the word "'obscene' ordinarily means something that is offensive to chastity, something that is foul or filthy and for that reason is offensive to pure-minded persons." Notwithstanding the recitation of a standard definition of obscenity, the jury was instructed to apply the Hicklin definition as set forth in Bennett. However, the Clarke court

65. Id. at 733.

66. Id.
broke new ground in that it sought to clarify certain terms routinely referred to in obscenity cases. Lewd was defined as something "that describes dissolute and unchaste acts, scenes, or incidents," or something which, by reading its contents "is calculated to excite lustful and sensual desires (that is to say, a desire for the gratification of the animal passions) in those whose minds are open to such influences." The word, "lascivious", was deemed to be so synonymous with the word "lewd," so as not to require the court "to undertake to draw a distinction between the two words." Nevertheless, despite its efforts to clarify the terms of obscenity, the trial court seemed to recognize the obvious limitations of such definitions when it charged "these are as precise definitions as it is possible for me to give you." In addition to reasserting the compelling authority of Hicklin and Bennett and attempting to clarify some of the more common obscenity terms,

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67. Id.
68. Id.
69. Id. at 734.
relative to analyzing the nature of the work, the Clarke court also grappled with the issues of the work as a whole (whether the jury need look to the whole work or just portions of the work), the community of individuals to be protected (whether the influence of the work on the most intelligent or most susceptible class of individuals was to be controlling), and finally, The purpose of the work (whether the author's purpose, intent, or scienter should have any bearing upon the final determination of obscenity.)

While other courts had dealt with one or more of these four elements\(^\text{70}\) in earlier decisions, the Clarke court was the first to address all four in a cogent and succinct manner. Indeed, it is probably not an overstatement to say that these four elements, as set forth in Clarke and its predecessors,\(^\text{71}\) established the major framework upon which all subsequent obscenity law decisions were to be built. Whether this framework was intentional or unconscious cannot be determined. However, it is clear that the Hicklin definition

\[^{\text{70}}\text{See notes 60-63 and accompanying text.}\]
\[^{\text{71}}\text{Id.}\]
of obscenity dealt only with the nature of the work ("The tendency of the matter ... to deprave and corrupt..."\textsuperscript{72}) and the community or class to be protected ("...those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall"\textsuperscript{73}), while Bennett added the elements of the work as a whole (the jury "may confine [its] attention to the marked passages"\textsuperscript{74}), and the purpose of the work ("...the object with which this book is written is not material, nor is the motive which led the defendant to mail the book material"\textsuperscript{75}). The Clarke court then brought these four elements together and set the course which other courts would follow at least the next thirty years.

However, the Clarke court was not without assistance in drafting its landmark obscenity decision. Interestingly, the jury, during the course of its deliberations, submitted a question to the court inquiring as to whether a finding

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73. Id.
74. 24 Fed. (Cas) 1093, 1102 (1879).
75. Id.
that any portion of the book, pamphlet, or circular was obscene, would be sufficient grounds to condemn the whole book. The court answered by instructing the jury that if it found the material to fall within the instructed definition of obscenity, it would not matter "whether such effect on the minds of readers is produced by single passages or portions of the pamphlets or circulars or by many passages or portions." 76

As concerns the community of individuals to be protected, the court adhered to the trend of protecting the public from material which might affect even the lowest common denominator of the citizenry. The court held that the community or class to be protected was "that class of persons whom the Statute aims to protect;" that is, "... the young and immature, the ignorant, and those who are sensually inclined - [those] who are liable to be influenced to their harm by reading indecent and obscene publications." 77 Then, as if anticipating the growing criticism of obscenity laws which protected the few at the expense of the

76. *Clarke* at 733.

77. Id. at 734.
many, the Clarke court stated that "the effect such publications would have on people of a high order of intelligence, and those who have reached mature years, who by reason of their intelligence, or years are steeled against such influences,"\(^{78}\) are not the class or community the statute was aimed at protecting.

Finally, as regards the purpose of the work, the Clarke court reaffirmed the holdings of its predecessors that the author's or distributor's purpose should have no bearing upon the jury's ultimate determination of obscenity. However, in taking this position, the court acknowledged that it would be proper and lawful for standard medical texts to be sent through the mail (i.e. "...standard medical works that are studied and consulted by physicians, and are kept in medical and public libraries..."\(^{79}\)), or for persons to lawfully communicate physical ailments to their physicians through the mails, and for physicians to respond accordingly.

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78. Id.

79. Id. at 735.
Likewise, the court observed that it would be proper for the jury to make comparisons of obscene references in the works of Shakespeare, Suetonius and the Bible, if doing so would "aid [the jury] in reaching a correct conclusion."\textsuperscript{80} Consequently, while the Clarke court rejected an obscenity defense based upon the purpose of the work or the author's intent, it nevertheless recognized the validity of such evidence in defense of an obscenity prosecution.

What is remarkable, then, about the Clarke case, is the vast canvas across which the judge's brush swept. The Missouri District Court brought cohesion to the Hicklin and Bennett decisions, while at the same time providing guidance for future courts. Indeed, as will be discussed at greater length infra, the four elements of obscenity brought together by the Clarke court were to provide the major foundation for virtually all future attempts to define obscenity.\textsuperscript{81}

Yet, some courts, possibly reflecting their elitest membership, were not impervious to the

\textsuperscript{80} Id. at 736.

\textsuperscript{81} See e.g. Miller v. California, 413 U.S. 15 (1973), discussed infra.
arguments of their educated class peers, who advocated the publishing and distribution of certain classical works. These works, which might otherwise be deemed obscene, were protected because their literary reputations had considerable currency. A fascinating case in point is that of In Re Worthington Co.\textsuperscript{82}, wherein the receiver for the bankrupt Worthington Company, a publishing house, made an application concerning the disposition of certain books which were among the assets of the then defunct Worthington Company. Anthony Comstock objected to any sale of the books which would permit them to enter into general circulation. Comstock argued that the books constituted "immoral literature."\textsuperscript{83} Among the books which Comstock sought to censor were Payne's Arabian Nights, Tom Jones by Henry Fielding, Ovid's Art of Love, and The Decameron by Boccaccio.\textsuperscript{84}

Addressing the nature of the works in question, the Court queried "upon what theory

\textsuperscript{82.} 3 NYS 361 (1884).
\textsuperscript{83.} Id. at 362.
\textsuperscript{84.} Id.
these world renowned classics can be regarded as specimens of that pornographic literature which it is the office of the Society for the Suppression of Vice to Suppress...."\textsuperscript{85} The Court went on to observe that it would be absurd to call these works, which had become the very standards of Classical Literature, "foul and unclean."\textsuperscript{86}

Moreover, as if to lend credence to the trends which began to surface in \textit{Clarke}, the Worthington court held that it would be ludicrous "to condemn a standard literary work, because of a few of its episodes."\textsuperscript{87} Indeed, the court went on, to do so "would compel the exclusion from circulation of a very large proportion of the works of fiction of the most famous writers of the English language."\textsuperscript{88} After all, "a seeker after the sensual and degrading parts of a narrative may find in all these works, as in those of other great authors something to satisfy his prurience."\textsuperscript{89}

\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
Finally, the Worthington court provided additional clarification of the community or class to be protected by the obscenity statutes. Once again, as in Clarke, it became clear that while the young and easily influenced were to be protected, the mature and educated (read elites) were in need of no such protection: "[These works] would not be bought nor appreciated by the class of people from whom unclean publications ought to be withheld. They are not corrupting in their influence upon the young, for they are not likely to reach them."90

Hence, while the courts slowly continued to refine and narrow the scope of the obscenity definitions as set forth in Hicklin and Bennett, it would be twenty years before another New York Court removed yet another plank in the Hicklin definition of obscenity. Yet, while obscenity prosecutions did not diminish during the next twenty years—Comstock lived and crusaded until 1915—defendants in obscenity cases were not without resourcefulness in attacking the obscenity

90. Id. at 363.
laws on other grounds besides the validity of the
*Hicklin* definition.

In *Grimm v. United States*, the defendant
was convicted of mailing an obscene letter to a
postal inspector. The defendant raised an
entrapment defense, although it was not
specifically characterized as such. The Supreme
Court gave the defendant's argument short shrift:
"The mere facts that the letters were written
under an assumed name, and that he was a
government official, a detective he may be
called—do not of themselves constitute a defense
to the crime actually committed."  

In *Rosen v. United States*, the defendant
was convicted of mailing an obscene paper

91. 156 U.S. 604 (1895).

92. Id. at 609-610. "Upon these facts it is
insisted that the conviction cannot be sustained
because the letters of defendant were deposited in
the mails at the instance of the government, and
through the solicitation of one of its officers;
that they were directed and mailed to fictitious
persons; that no intent can be imputed to
defendant to convey information to other than the
persons named in the letters sent by him; and
that, as they were fictitious persons, there could
in law be no intent to give information to any
one." Id.

93. Id. at 610.

consisting of pictures of females partially covered by lamp black, "that could be easily erased with a piece of bread," thus revealing the females in "different attitudes of indecency."\textsuperscript{95}

The defendant appealed on two grounds: First, that he was lacking in the requisite scienter, and second, that the indictment was fatally defective in that it did not set out with particularity the obscene parts of the charged mailing.

The Court held that the knowledge necessary for an accused to be held liable for mailing obscene matters, was that of awareness of the nature of the mailed matter, at the time it was deposited in the mails.\textsuperscript{96} Regarding the validity of the indictment, the court held that the controlling law was set forth in \textit{Commonwealth v. Holmes},\textsuperscript{97} to the effect that a court must never be compelled to stoop to such a level "'that an

\textsuperscript{95} Id. at 16 S.Ct. 434.


\textsuperscript{97} 17 Mass. 336 (1821). See \textit{supra}, note 41, and accompanying text.
obscene book and picture should be displayed upon the records of the court."\textsuperscript{98} Therefore, a defendant is considered to be adequately informed "of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense, and to plead the judgment in bar of any further prosecution for the same crime."\textsuperscript{99}

Thus, did the Supreme Court affirm Rosen's conviction, without dwelling upon the \textit{Hicklin/Bennett} definition of obscenity.\textsuperscript{100} Again, the task of sorting out a workable definition of obscenity was left to the lower courts, and again they proved themselves worthy of the challenge.

Judge Learned Hand, writing as a U.S. District Court Judge, charted a new course in obscenity law when, in \textit{United States v. Kennerley},\textsuperscript{101} he disapproved the \textit{Hicklin}

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\textsuperscript{98} Rosen at 16 S.Ct. 436, quoting from \textit{Holmes}, Id. at 336.

\textsuperscript{99} Rosen at 16 S.Ct. 435.

\textsuperscript{100} The \textit{Rosen} court mentioned \textit{Bennett} only as it related to the validity of the indictment, \textit{Rosen} at 16 S.Ct. 437-438, and approved an instruction based upon \textit{Hicklin} without citing it.

\textsuperscript{101} 209 F.119 (S.D.N.Y. 1913).
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definition of obscenity, and firmly established the concept of community standards. In Kennerley, the defendant filed a demurrer (motion to dismiss the indictment) on grounds that the alleged obscene book was so innocent that the matter should not go to the jury for consideration. Judge Hand held that "whatever be the rule in England, in this country the jury must determine under instructions whether the book is obscene." He goes on to acknowledge that Hicklin is the established test of obscenity: "That test has been accepted by the lower Federal Courts until it would be no longer proper for me to disregard it." However, he argues, it is nevertheless antiquated and inflexible: "[T]he rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words 'obscene, lewd, or lascivious.'"

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102. Id. at 120.
103. Id.
104. Id.
In addition, Hand chafed at the idea of censoring a book based upon the corrupting influence limited parts of the book might have on certain susceptible individuals. Indeed, he observed, "it would be just those susceptible individuals who would be most likely to concern themselves with those parts alone, forgetting their setting and their relevancy to the book as a whole." 105 He wonders whether society really wishes to reduce its treatment of sex "to the standard of a child's library in the supposed interest of a salacious few...." 106

Finally, as if pondering the movement of the next fifty years toward a more flexible definition of obscenity, Judge Hand notes that "...the words of the statute [have] a varying meaning from time to time." 107 Accordingly, Judge Hand proposes the establishment of standards to be determined by each jury (community), sitting in judgment of an obscenity case. "If letters must, like other kinds of conduct, be subject to the social sense

105. Id.
106. Id. at 121.
107. Id.
of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence.\textsuperscript{108}

Without question, his was a brilliant and insightful proposal; but, as will be seen, one which would take many years to become fully accepted. Nevertheless, the judicial trend was clearly toward modification of the strict Hicklin/Bennett test of obscenity. In Re: Worthington\textsuperscript{109} demonstrated at least one court’s willingness to make exceptions for certain widely accepted literary classics, and United States v. Kennerley\textsuperscript{110} was emblematic of at least one court’s willingness to question the Hicklin/Bennett procedure of condemning a work based upon limited passages, and the effects such passages might have on a limited class or community of individuals. Moreover, United States v. Kennerley, marked the first major attempt by a court to substantially broaden the standard from

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\begin{footnotesize}
108. Id. (Emphasis added).
109. 3 NYS 361 (1894), discussed supra.
110. 209 F.119 (1913).
\end{footnotesize}
that of "a child's library... [or] a salacious few," to that of a community standard as determined by, "the jury [of the community]...in each case." In 1922, *Halsey v. New York Society for the Suppression of Vice* helped bring Judge Learned Hand's *Kennerley* dicta to fruition. In *Halsey*, the plaintiff brought an action for malicious prosecution against the defendant for swearing out an obscenity complaint against Plaintiff. The criminal complaint had charged Halsey with selling a copy of the English translation of *Mademoiselle De Maupin*, by Theodore Gautier, originally published in 1835. The plaintiff, after trial and acquittal on the criminal charges, brought suit against the defendant, and was awarded a judgment from which the defendant appealed.

Speaking for the Court of Appeals, Judge Andrews (joined by, among others, Judge Benjamin Cardozo), affirmed for the plaintiff and held that

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111. Id. at 121.
112. Id.
113. 136 N.E. 219 (1922).
a book "must be considered broadly, as a whole." Thus, while not a criminal case, the decision is nevertheless a landmark in that it represents the first significant departure from prior decisions which held that a book could be adjudged obscene based simply upon selected passages.

The court acknowledged that the work contained many paragraphs "which, taken by themselves are undoubtedly vulgar and indecent. However, no work may be judged from a selection of paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible. The book, however, must be considered broadly, as a whole. So considered, critical opinion is divided. Some critics, while admitting that the novel has been much admired, call it both 'pornographic and dull'". 115

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114. Id. at 220.

115. Id., quoting from The Nation, Nov. 2, 1883, (Emphasis added).
Accordingly, the court held that it was appropriate for the jury to determine if "the book as a whole [was] of a character to justify the reasonable belief that its sale was a violation of the penal law."¹¹⁶ As such, while it is futile to draw strict lines of demarcation between cultural or legal eras, it would be fair to say that Halsey helped bring an end to the Comstock era of obscenity law. Following Halsey, the definition of obscenity was to undergo fifty years of further transformation, which would ultimately culminate with the Roth¹¹⁷ decision and the modern definition of obscenity.

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¹¹⁶. Id.

C. 1920-1957 TOWARD A MODERN DEFINITION OF OBSCENITY

Mary Dennert was a young mother of two boys, aged eleven and fourteen. Wishing to teach her children "about the sex side of life," Dennert read "'several dozen books on sex matters for the young with a view to selecting the best for [her] own children.'"¹¹⁸ Her research led her to conclude that the available books then in circulation contained "'very misleading and harmful impressions.'"¹¹⁹ For this reason, she decided to draft a manuscript which would "'explain frankly the points about which there is the greatest inquiry.'"¹²⁰ The pamphlet then went on to advocate sex relations only between people who truly love each other, and who "'belong to each other in a way that they belong to no one else...[for] people's lives grow finer and their characters better if they have sex relations only with those they love.'"¹²¹ Indeed, "'those who

¹¹⁸. United States v. Dennert, 39 F.2d 564, 565 (2d Cir. 1930), quoting the defendant, Mrs. Dennert.

¹¹⁹. Id. at 565.

¹²⁰. Id.

¹²¹. Id. at 567.
make the wretched mistake of yielding to the sex impulse alone when there is no love to go with it, usually live to despise themselves for their weakness and their bad taste." 122

Finally, Mrs. Dennert warned against perversion, venereal disease, prostitution and promiscuity. 123 Clearly, her arguments hardly seem the stuff of obscenity. In fact, many renowned institutions ordered her pamphlet for educational purposes, and paid a price for them which brought no profit to its author. 124 Notwithstanding this seemingly stellar record of accomplishment, Mrs. Dennert was convicted at trial of mailing obscene materials, with the trial court holding that the defendant’s motive in distributing the pamphlet was of no consequence, and that the only issues to be considered were

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122. Id.

123. Id.

124. Id. at 565. Among the organizations which ordered pamphlets were The YMCA, The YWCA, The Union Theological Seminary, The Public Health and Welfare Departments of numerous states, and at least four hundred other welfare and religious organizations, as well as clergymen, professors, doctors, and educators.
whether the pamphlet was mailed, and whether the pamphlet was obscene.\textsuperscript{125}

The Second Circuit, Judge Augustus Hand writing for the court, held that the pamphlet was not obscene as a matter of law. Therefore, the author’s purpose in mailing the pamphlet was held to be irrelevant. Judge Hand framed the key issue in the case as relating to the nature of the work in question; that is, "the meaning and scope of those words of the Statute which prohibit the mailing of an 'obscene, lewd, or lascivious...pamphlet.'"\textsuperscript{126} Further, such determination was for the trial court to make before submitting the question to the jury.

Continuing, Judge Hand observed that "while there can be no doubt about its constitutionality [the statute] must not be assumed to have been designed to interfere with serious instruction regarding sex matters unless the terms in which the information is conveyed are clearly indecent."\textsuperscript{127}

\textsuperscript{125} Id. at 565.
\textsuperscript{126} Id. at 568.
\textsuperscript{127} Id. at 569.
Mrs. Dennert's pamphlet was, in fact, anything but indecent; rather, the court held, it "tends to rationalize and dignify [sexual] emotions rather than to arouse lust."\(^{128}\) Clearly, to have ruled otherwise would have been to interpret the statute so broadly as to ban from the mails both fiction and non-fiction instrumental to the flow of information in a free society.\(^{129}\) If anything, the court seemed to commend Mrs. Dennert's efforts at responsible sex education: "Accurate information, rather than mystery and curiosity, is better in the long run and less likely to occasion lascivious thoughts than ignorance and anxiety."\(^{130}\)

With regard to the work as a whole, the court stated that "any incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect."\(^{131}\)

\(^{128}\) Id.

\(^{129}\) Id. at 568. The court noted that the statute was never "thought to bar from the mails everything which might stimulate sex impulses. If so, much chaste poetry and fiction, as well as many useful medical words would be under the ban." Id. at 568. (Emphasis original.)

\(^{130}\) Id. at 569.

\(^{131}\) Id. at 569, (Emphasis added).
This last phrase, as emphasized, is of considerable importance, in that the court’s statement, bolstered by the entire decision, unequivocally supports judging a work as a whole, and not based upon limited passages.

Thus, beginning with the dicta of Judge Learned Hand in Kennerley, followed by the Halsey decision, and culminating with the Dennert case, the movement away from judging a work in part, was complete. The finalization of the work as a whole controversy, along with the community standard suggestions made by Judge Learned Hand in Kennerley, consequently set the stage for the benchmark obscenity decisions of Judge Woolsey in the 1930’s.

It is unlikely that Judge Woolsey could have known that his obscenity decisions of the early 1930’s would be repeatedly cited and quoted by free speech advocates some fifty years after the decisions were rendered. Nevertheless, such is the case, due in no small part to the passion of Woolsey’s opinions. Agree or disagree with Woolsey’s decisions, one cannot deny that they are comprehensive. Beginning with United States v. One Obscene Book Entitled "Married Love".132
Woolsey made no secret of his discomfort with the then-existing obscenity laws. Thus, while the eroding Hicklin rule, as discussed supra, continued to be the established law, Judge Woolsey chose simply to ignore Hicklin altogether. In Married Love, Judge Woolsey held that the seized book did not come within the definition of obscenity as set forth in Murray's Oxford English Dictionary. He made no reference to Hicklin, but rather, simply cited Dennett as supporting the proposition that Married Love did "for adults what Mrs. Dennert's book [did] for adolescents." Woolsey's opinion is most compelling not so much for what it said, but for what it failed to say. The rendition of such an important

132. 48 F.2d 821 (S.D.N.Y., 1931).

133. The case concerned a Custom's office forfeiture of the book, Married Love. The proceeding, referred to as a "libel" action, was dismissed by Judge Woolsey.

134. 48 F.2d at 823.

135. Id. at 824.

136. Notwithstanding Judge Woolsey's reticence about Hicklin, he showed no reluctance to address the First Amendment aspects of the Tariff Act's (19 U.S.C. 1305) forfeiture provisions. He stated, "[t]he section does not involve the suppression of a book before it is published, but the exclusion of an already published book which is sought to be brought into the United States.
decision without reference to Hicklin was to have the effect of further diminishing the importance of the Hicklin/Bennett definition of obscenity. However, Woolsey's Married Love decision was simply his first major (and total) rebuke of Hicklin. He later sought to complete the rebuke in United States v. One Book Called "Ulysses."\(^{137}\)

In Ulysses, the government filed a libel action for forfeiture of the novel, Ulysses, written by James Joyce.\(^{138}\) Random House, Inc., the importer of the book, moved to dismiss the Government's case on grounds that Ulysses was not obscene within the meaning of the Statute. The District Court, per Judge Woolsey granted Random House's Motion and ruled the book admitted.\(^{139}\)

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After a book is published, its lot in the world is like that of anything else. It must conform to the law and, if it does not, must be subject to the penalties involved in its failure to do so. Laws which are thus disciplinary of publications, whether involving exclusion from the mails or from this country, do not interfere with freedom of the press." Id. at 822.

137. 5 F.Supp. 182 (S.D.N.Y. 1933).

138. The action was brought under the Tariff Act 1930, SS305 (19 U.S.C. SS1305).

139. As will be seen infra, Judge Woolsey's decision was appealed to the Second Circuit Court of Appeals. See United States v. One Book Entitled Ulysses by James Joyce (Random House, Inc., Claimant), 72 F.2d 705 (1934).
With regard to the alleged obscene nature of the work, Woolsey notes at the outset that he would not be bound by the "spectrum of condemnatory adjectives found commonly in laws dealing with matters of this kind." In making his determination as to whether *Ulysses* was obscene, Woolsey stated that he need only concern himself with "the meaning of the word 'obscene' as legally defined by the courts [i.e.] tending to stir the sex impulses or to lead to sexually impure and lustful thoughts."

In setting forth the definition of obscenity as being outside the *Hicklin/Bennett* definition, Woolsey once again permitted himself the wide discretion of which earlier courts found themselves deprived. This self appointed latitude permitted him to freely exploit the powerful

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140. *Ulysses* at 184.

141. Id. (citations, including *Married Love* and *Dennert*, omitted).

142. See *Married Love*, supra..
position he had been granted as Judge and jury of Ulysses. Indeed, he mentions in passing that his bench trial approach is the preferable one in obscenity cases "on account of the length of 'Ulysses' and the difficulty of reading it." Interestingly, under the Hicklin selected passages approach, a jury would never have been confronted with having to undertake the task of reading and judging the work as a whole. Under the Hicklin approach the mere review of a limited number of selected passages would have been sufficient to permit a jury to make a determination of obscenity.

In re-emphasizing his break with the past, Woolsey goes on to explain how he gave Ulysses to two learned friends, asked them to read the novel through and, giving them the legal definition of obscenity, asked them to determine whether, in

143. Both parties waived a jury. Ulysses at 183.

144. Id. at 183. Judge Woolsey continues: "A jury trial would have been an extremely unsatisfactory, if not an almost impossible method of dealing with it." Id.

145. Woolsey does not say what definition this was, but it is probably safe to assume that it conformed with his definition as set forth in the text accompanying supra, note 141.
their opinions, Ulysses was obscene. Not surprisingly, both individuals agreed with Woolsey that Ulysses was not obscene. If nothing else, Woolsey's test was unique. While it appears somewhat unusual at first, closer examination reveals that Woolsey was careful to frame his little test within the context of the four elements of obscenity. That is, he asked his friends to examine the nature of the work, as a whole ('...reading "Ulysses" in its entirety, as a book must be read on such a test as this...\textsuperscript{146}', in determining how it affected them as a class or community. ("[It] did not tend to excite sexual impulses or lustful thoughts, but [rather] its net effect on them was only that of a somewhat tragic and very powerful commentary on the inner lives of men and women."\textsuperscript{147}) Woolsey goes on to observe that the proper community to judge a serious literary work such as Ulysses is that of the "normal person" and not that of the weak or most susceptible: "It is only with the normal person that the law is concerned."\textsuperscript{148}

\textsuperscript{146} Ulysses at 185.

\textsuperscript{147} Id.

\textsuperscript{148} Id.
As regards the purpose of the work, Woolsey joined the Dennert court, and cited his own Married Love, in moving fully away from prior tests which, ironically, completely ignored the author's purpose. Rather, Judge Woolsey stated, it was necessary in the case of Ulysses and other important works to take such time as was necessary to determine "the intent with which the book was written." 149

In fact, so confident is Woolsey in the rightness of his approach, that he goes on to coin a new term to be used in determining the underlying purpose of a work: "In any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called according to the usual phrase, pornographic, that is, written for the purpose of exploiting obscenity." 150

"Pornographic intent." A succinct, descriptive term, pregnant with meaning. One would think, as Woolsey no doubt did, that such a term would likely gain currency in the annals of

149. Id. at 183.
150. Id. at 183, (Emphasis added).
obscenity law; but, alas, this was not to be the case. However, this was apparently not the only instance of Woolsey writing for posterity or an audience other than just the legal community. In fact, it would be impossible to read Woolsey’s well-considered opinion without noticing that Woolsey is all too cognizant of the momentousness of his ruling. The reality that his audience was not just judges and lawyers, but also the New York literary community, has a noticeable effect on Woolsey’s decision. He seems to grovel for their approval, such as in passages referencing Joyce’s "screen of consciousness with its ever-shifting kaleidoscopic impressions...." 151

Having thus noted what might be characterized as Woolsey’s cultural or societal weaknesses, it

151. Id. at 183. Woolsey’s use of the term "screen" of consciousness is improper. The correct term is "stream" of consciousness. The entire (self-conscious) quote is as follows: "Joyce has attempted--it seems to me, with astonishing success--to show how the screen of consciousness with its ever-shifting kaleidoscopic impressions carries, as if it were on a plastic palimpsest, not only what is in the focus of each man’s observation of the actual things about him, but also in a penumbra zone residue of past impressions, some recent and some drawn up by association from the domain of the subconscious. He shows how each of these impressions affects the life and behavior of the character which he is describing." Id. at 183.
would be unfair to minimize the scope of his accomplishment by dwelling on the few weaknesses in his argument. The fact remains that Judge Woolsey's decision in *Ulysses* was just as monumental as he had surmised it might be. Indeed, the significance of Woolsey's decisions is made even greater when read with reference to the Court of Appeals decision upholding it. *United States v. One Book Entitled Ulysses by James Joyce (Random House, Inc., Claimant)*152 incorporates the thrust of Woolsey's decision, with the brilliance of Judge Augustus Hand's reasoning (joined by Judge Learned Hand, dissent by Judge Manton).

Judge Augustus Hand begins by referring to Joyce's "stream of consciousness" style.153 He acknowledges that it is "rated as a book of considerable power by persons whose opinions are entitled to weight."154 Nevertheless, he frames the key issue in the case as "whether such a book

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152. 72 F.2d 705 (2d. Cir. 1934).
153. Id. at 706. See *supra*, note 151.
154. Id.
of artistic merit and scientific insight should be regarded as obscene...."155

In dealing with the Nature of the Work, Judge Hand begins by rejecting the "dictum" of Chief Judge Cockburn set forth in Hicklin, as being "inconsistent with our own decisions in [inter alia] United States v. Dennert... [and] Halsey v. N.Y. Society for Suppression of Vice...."156 Thus, Hand concludes that "the proper test of whether a given book is obscene is its dominant effect."157 Implicit in this definition is the emphasis which the court advocates be focused upon the author’s purpose: "...[T]he motive of an author to promote good morals is not the test of whether a book is obscene...,"158 but rather, the test is whether the work "...when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication."159

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155. Id.
156. Id. at 708, (citations omitted).
157. Id.
158. Id.
159. Id. at 707.
Judge Hand then incorporated into his revised test of obscenity the ever expanding concept of viewing the work as a whole: "The question in each case is whether a publication taken as a whole has a libidinous effect." Specifically, as concerned Ulysses, the court held that there was no "excess of prurient suggestion".

Finally, as concerns the community or class to be protected, Judge Augustus Hand echoes his colleague Judge Learned Hand's earlier comments in Kennerley, when he states that the banning of standard works of literature because they might contain a few obscene passages, "would destroy much that is precious in order to benefit a few." 162

Accordingly, Judge Hand makes the circle complete by rejecting Hicklin and redefining obscenity. To paraphrase, the Ulysses Rule of Obscenity, may be stated as follows: Whether the dominant effect of the work taken as a whole is to

160. Id.

161. Id. This appears to be one of the first uses of the term "prurient" in obscenity law; a word which would later form one of the three prongs of the modern test of obscenity, discussed infra.

162. Id. at 707.
have a libidinous effect on the majority of the community. In addition, a work’s libidinous effect may be judged by determining whether there is an excess of prurient suggestion.

Judge Hand’s clarified definition of obscenity was to have a lasting effect on the law of obscenity. Justice Brennan was to use elements of the Ulysses decision when framing his modern definition of obscenity twenty years later. In addition, Judge Augustus Hand’s colleague, Judge Learned Hand, was to refer to the Ulysses decision in several of his later decisions.¹⁶³ However, not everyone was pleased with Judge Hand’s reasoning. Judge Manton wrote an eloquent dissent in support of Hicklin, arguing that "it has become the test thoroughly entrenched in the federal courts."¹⁶⁴ The focus of Manston’s dissent was primarily on the effect of a work on the community: "No matter what may be said on the

¹⁶³ See e.g. United States v. Levine, 83 F.2d 156 (2d Cir. 1936), citing Ulysses as standing for the premise that "the work must be taken as a whole, its merits weighed against its defects." Levine at 157.

¹⁶⁴ Ulysses at 710.
side of letters, the effect on the community can and must be the determining factor."

Interestingly, Manton's dissent appears to be the first to focus almost primarily on the element of community.

In the years following *Ulysses* numerous courts were to continue the (somewhat facilitated) struggle to define obscenity. However, it was not until the 1957 *Roth* decision, authored by Justice Brennan, that the modern definition of obscenity was ushered in. In the meantime, the major cases reflect an astonishing disparity between courts that boldly (in the face of conservative movements) held certain works to be not obscene,

165. Id. at 711. "[T]o destroy a test which protects those most easily influenced, we can discard a test which would protect only the interests of the other comparatively small groups of society. If we disregard the protection of the morals of the susceptible, are we to consider merely the benefits and pleasures derived from letters by those who pose as the more highly developed and intelligent? To do so would show an utter disregard for the standards of decency of the community as a whole and an utter disregard for the effect of a book upon the average less sophisticated member of society, not to mention the adolescent. The court cannot indulge any instinct it may have to foster letters. The statute is designed to protect society at large, of that there can be no dispute; notwithstanding the deprivation of benefits to a few, a work must be condemned if it has a depraving influence." Id. at 711.
and courts which bravely (in the face of liberalizing mores) held works to be obscene.

Among the half-dozen major cases which bridged the eras between the Comstock laws and the Roth decision, was United States vs Levine.\(^{166}\) wherein the second circuit Court of Appeals reversed a trial court decision which held certain advertisements\(^{167}\) to be obscene, under what was ostensibly the Hicklin rule. Judged Learned Hand observed that, contrary to the trial court's holding below, the Hicklin/Bennett standard was never approved by the Supreme Court, although it had "at times been supposed to [have done] so"\(^ {168}\) in Rosen.\(^{169}\) Furthermore, as Hand goes on to point out, the Hicklin rule erroneously focused

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166. 83 F.2d 156 (1936).

167. The mailed circulars advertised obscene books. Among them was The Secret Museum of Anthropology described by the Appellate court as a "reproduction of a collection of photographs for the most part of nude female savages of different parts of the world; the legitimacy of its pretensions as serious anthropology is, to say the most, extremely tenuous, and while in the hands of adults it could not be considered obscene, it might be undesirable in those of children or youths." Id. at 156.

168. Id. at 157.

upon the effects a book might have on "'the young and immature, the ignorant, and those who are sensually inclined.'"\textsuperscript{170} Instead, Hand states, the duty to find an acceptable compromise must fall to the jury, since "the [community] standard they fix is likely to be an acceptable mesne and because in such matters a mesne most nearly satisfies the moral demands of the community."\textsuperscript{171} Accordingly, the second circuit went on to approve and expand its definition of obscenity as set forth in \textit{Ulysses}.\textsuperscript{172}

Clearly, the most important aspect of the \textit{Levine} decision was Hand's re-emphasis of the ever-expanding concept of the community standard, which concept was to find its ultimate imprimatur in \textit{Roth}; not, however, before other courts held to the contrary.

For example, the defendant in \textit{People v. Dial Press}\textsuperscript{173} was convicted in the City Magistrate's

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\textsuperscript{170} Id. at 156, quoting from the trial court's instruction to the jury.

\textsuperscript{171} Id. at 157. Citing \textit{Rosen} at 42, in support of such position.

\textsuperscript{172} Id. at 157-158.

\textsuperscript{173} 48 N.Y.S. 2d 480 (1944).
Court of New York of possessing the book, *Lady Chatterly*, by D. H. Lawrence. The court held that the book was obscene. Interestingly, the court based its ruling upon the *Ulysses* decision, while at the same time rejecting the *Ulysses* court's emphasis upon the literary qualities of the book.174

*Commonwealth of Pennsylvania v. Gordon*, et al.,175 also concerned the prosecution of significant literary works, albeit with a different outcome than that of *Dial Press*. In *Gordon* the defendants were booksellers who possessed nine allegedly obscene books, intending to sell them at certain dates and times. Among the books alleged to be obscene were *The Studs Lonigan Trilogy* by James Farrell, *Sanctuary* and *Wild Palms* by William Faulkner, *God's Little Acre*, etc., et al.

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174. "If judgment in such a case as this will depend upon the determination of the author's skill as a writer, the judicial officer responsible for the enforcement of the statute would have to surrender his own judgment and base his opinions on the opinions of experts who have no responsibility in the premises. More than this, it is easy to imagine a book, let us say, by another Oscar Wilde, clever, scintillating, even brilliant in its writing and utterly foul and disgusting in its central theme and dominating effect." Id. at 482.

175. 66 D. & C. 101 (1949).
by Erskine Caldwell, and *Never Love a Stranger* by Harold Robbins. The *Gordon* opinion, written by Judge Bok, represents one of the first attempts by an American jurist to distinguish between written, pictorial, and spoken obscenity. Indeed, Judge Bok even goes so far as to refer to the *Gordon* case as a "literary obscenity"\(^{176}\) case.

Bok dismisses the applicability of the *Hicklin* rule while at the same time acknowledging its importance in the development of obscenity law: "The American jurisdictions have had to face it before they could disregard it and force the modern rule."\(^{177}\) Nevertheless, Bok severely criticizes *Hicklin*, observing that "strictly applied...[it] renders any book unsafe since a moron could pervert to some sexual fantasy to which his mind is open the listings in a seed catalogue."\(^{178}\) He goes on to note the difference between "the language of vulgarity" and that of "erotic allurement."\(^{179}\)

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176. Id. at 123.

177. Id. at 124.

178. Id. at 125.

179. Id. at 108. Judge Bok seeks to establish, "...a clear division between the words of the bathroom and those of the bedroom: the former can
Yet, in his effort to reach a precise definition of obscenity, Bok rues the fact that obscenity simply has no clear accepted definition, unlike sedition, blasphemy, and lewdness which, he states are specifically defined by statute.\textsuperscript{180}

Ultimately, Bok finds "that the market place is the best crucible in which to distill an instinctive morality."\textsuperscript{181}

Consistent with this belief is Bok’s finding that community standards are the linchpin in defining obscenity, if viewed within the framework of "the tenor of the times."\textsuperscript{182} That is, "current standards create both the book and the judgment of it."\textsuperscript{183}

\begin{itemize}
\item no longer be regarded as obscene, since they have no erotic allurement, and the latter may be so regarded, depending on the circumstances of their use. This reduces the number of potentially offensive words sharply. With such changes as these, the question is whether the legal mace should fall upon words or upon concepts--language or ideas." Id. at 114.
\end{itemize}

180. Id. at 115.
181. Id. at 127.
182. Id. at 132-133.
183. Id. at 136.
Bok concludes his definition of obscenity with an eloquent testimonial in support of community standards and a discussion of the effect the books in question might have on his own daughters.\textsuperscript{184}

Judge Bok then completes his comprehensive opinion with a twenty page discussion of obscenity law and the constitutional questions raised by such laws.\textsuperscript{185} He begins by observing that the

\textsuperscript{184} "It will be asked whether one would care to have one's young daughter read these books. I suppose that by the time she is old enough to wish to read them she will have learned the biologic facts of life and the words that go with them. There is something seriously wrong at home if those facts have not been met and faced and sorted by then; it is not children so much as parents that should receive our concern about this. I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further, they will learn what is in the world and in its people, and no parents who have been discerning with their children need fear the outcome. Nor can they hold it back, for life is a series of little battles and minor issues, and the burden of choice is on us all, every day, young and old. Our daughters must live in the world and decide what sort of women they are to be, and we should be willing to prefer their deliberate and informed choice of decency rather than an innocence that continues to spring from ignorance. If that choice be made in the open sunlight, it is more apt than when made in shadow to fall on the side of honorable behavior." Id. at 110.

\textsuperscript{185} Id. at 138-156.
"clear and present danger" rule first established by Justice Holmes in Schenck v. United States\textsuperscript{186} would apply to an allegedly obscene book only "if the publication in question creates a clear and present danger that there will result from it some substantive evil which the legislature has a right to proscribe and punish."\textsuperscript{187}

Using Schenck as his foundation, Bok then goes on to conclude that the key to determining what is and what is not obscene, lies in the "community" and its ability to "answer back"; that is, "the idea that free speech may not be curbed where the community has the chance to answer back."\textsuperscript{188} Thus, Bok wonders aloud, "how can it be said that there is a 'clear and present danger' -- granted that anyone can say what it is -- when there is both time and means for ample discussion."\textsuperscript{189}

Thus, we see through Bok's exhaustive review of first amendment decisions,\textsuperscript{190} that the

\textsuperscript{186} 249 U.S. 47 (1918).
\textsuperscript{187} Gordon at 140.
\textsuperscript{188} Id. at 140, citing Justice Brandeis' opinion in Whitney v. California, 274 U.S. 357 (1927).
\textsuperscript{189} Id. at 154.
\textsuperscript{190} Id. at 142-150.
inevitable fact of obscenity law is that the community, through its jury representatives, must ultimately decide what is obscene. The jury becomes the ultimate arbiter.

Other courts in the pre-Roth era did not see things quite as clearly as did Judge Bok in Gordon. For example, the obscenity rulings in Attorney General v. God's Little Acre\(^{191}\) and Besig v. United States\(^{192}\) clearly demonstrate a reluctance on behalf of the courts to apply post-Hicklin/Comstock laws to the vagaries of obscenity law. Indeed, the Supreme Judicial Court of Massachusetts can be taken to task not just for failing to deal with the evolving law of obscenity, but more egregiously, for refusing to recognize the very existence of the post Hicklin/Comstock decisions. The court states that the tests to be applied have already been stated in other cases, therefore, "they need not be restated."\(^{193}\) Thus, we never know what test the court applies to Erskine Caldwell's book. We

\(^{191}\) 93 N.E. 2d 819 (Mass. 1950)
\(^{192}\) 208 F.2d 142 (9th Cir. 1953)
\(^{193}\) God's Little Acre at 820.
learn only that the court found the book, taken as a whole, to be obscene. Moreover, the court refused to consider the author’s purpose in writing the book. Finally, with regard to Judge Bok’s decision in *Gordon*, we learn only that Justice Spalding, writing for the court in *God’s Little Acre*, regarded a discussion of the *Gordon* case to be unprofitable. 194 However, as Spalding’s decision shows, what is truly unprofitable is the mere reading of his decision. And yet, it is noteworthy because it was rendered by a major court at a time when ample obscenity decisions were available to assist the court in fashioning a cogent rule of obscenity. That Spalding failed to write such a decision is probably more reflective of the confusion that continued to surround the law of obscenity at this time, than it is of Spalding’s or the Court’s personal biases. For in retrospect, it would surely have been better for the court to have found against *God’s Little Acre*, based upon the then available law, than to simply ignore precedent and arbitrarily find the book obscene.

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194. Id. at 822.
In rendering its decision as it did, the court lost credibility and missed an opportunity to make a contribution to a crucial area of the law, as was its duty. Nevertheless, *God’s Little Acre* was not the only court to find certain books to be obscene in the pre-*Roth* era. The Ninth Circuit, with all the major obscenity law at its behest, showed how difficult it is for uniformity to blanket the area of obscenity law. In *Besig v. United States*, Henry Miller's two "Tropics" books, *The Tropic of Cancer* and *The Tropic of Capricorn*, were intercepted at an American port of entry and libeled under U.S. Customs Law, which forbade the importation of obscene books. The District Court found the books to be obscene and ordered them destroyed. Besig, the owner of the books, appealed on the grounds that neither book was obscene. The Circuit Court affirmed and held the books to be obscene. Judge Stephens, writing for the court, found the books to be shameful and disgusting.

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195. 208 F.2d 142 (9th Cir. 1953).
The Appellant, however, argued that the test applied by the District Court was contradictory because, on the one hand, the court said obscenity was dirt for dirt's sake, while on the other hand, held that obscenity was that which fell within the Hicklin test (i.e., material having a tendency to deplete and corrupt those into whose hands the materials may fall), by implanting in their minds lewd or lascivious thoughts or desires. The Appellant contended that such a test was unclear because the court was stating simultaneously that obscenity both repelled and seduced.198 The court, however, returned the Appellant's volley adroitly by observing that "language can be so nasty as to repel and of course to seduce as well."199 In support of this position, the court quoted from Alexander Pope's Quatrain about

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197. "The vehicle of description is the unprintable word of the debased and morally bankrupt. Practically everything that the world loosely regards as sin is detailed in the vivid, lurid, salacious language of smut, prostitution, and dirt." Id. at 145.

198. Id. at 146.

199. Id. at 146-147.
"Monster Vice," which "when too prevalent is embraced."200

Interestingly, it is in this regard more than any other, that Judge Stephens embraces the time-honored appellate court practice of applying the law as he sees fit, and then denying he has done so, thereby preventing the losing party from taking a successful appeal. In this instance, Judge Stephens states, "neither the number of the 'objectionable' passages nor the proportion they bear to the whole book are controlling."201 Thus, while Judge Stephens insists that he has judged the books as a whole, it would appear that he actually judged the books based upon selected passages. Yet, it is never possible to know if a court has indeed applied the law correctly and fairly, or simply tailored the law to fit its own limited world view.

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200. Id. at 147, n.5: "Alexander Pope (1688-1744), English poet, from his poem entitled "Essay on Man": 'Vice is a Monster of so frightful mien as to be hated needs but to be seen. Yet even too oft, familiar with her face, we first endure, then pity, then embrace.'" Id.

201. Id. at 146.
In any event, Judge Stephen's decision in Besig is not without some cogent and prophetic reasoning as regards community standards. Clearly, his opinion reflected the growing acceptance by courts of having a representative group, or jury, determine what was acceptable within a community at any given time. That is, the courts began to recognize that the standards might vary, depending upon the tenor of the times. With the Besig decision, rendered in 1953, the law of obscenity began closing quickly upon its modern era. As if to presage that event, the Supreme Court decided Butler v. State of Michigan in February, 1957. (Roth was decided in June, 1957.)

In Butler, the defendant's obscenity conviction

202. The court gives a perceptive definition of contemporary community standards, laced with not a little bit of good humor: "The statute forbidding the importation of obscene books is not designed to fit the normal concept of morality of society's dregs, nor of the different concepts of morality throughout the world, nor for all time past and future, but is designed to fit the normal American concept in the age in which we live. It is no legitimate argument that because there are social groups composed of moral delinquents in this or in other countries, that their language shall be received as legal tender along with the speech of the great masses who trade ideas and information in the honest money of decency." Id. at 145-146.

was reversed. The Court, in an opinion authored by Justice Frankfurter, held that it was nonsense to "quarantine[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence...."204 Surely, he ruminated, this had the effect of burning down the house "to roast the pig."205 Thus, he concluded, the Michigan Statute violated the First and Fourteenth Amendments.

In retrospect, it would be interesting to know if Frankfurter believed he had put the obscenity issue to rest with his decision in Butler. No matter. Four months later, Frankfurter's Supreme Court colleague, Justice William Brennan, was to change the face of obscenity law forever.

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204. 352 U.S. at 383.
205. Id.
III. MAJOR DEVELOPMENTS IN U.S. OBSCENITY LAW

A. THE STRUGGLE TO DEFINE OBSCENITY

1. Roth v. United States - The First Modern Definition of Obscenity.

The road to Roth was a bumpy and uncertain one; the road after Roth was equally bumpy, but less uncertain. In Roth v. United States, Justice William Brennan held for a divided court that obscene material has no right of protection under the First Amendment and may, therefore, be regulated by the State and Federal Governments.

While it had long been accepted that certain limited types of speech were not protected by the First Amendment, the Roth decision was the first Supreme Court case to hold that obscenity would also fall outside the protection of the First Amendment. Thus, obscenity was to take its place alongside, *inter alia*, libel, slander, and false advertising as speech unprotected by the First Amendment.

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207. Roth was a 6-3 decision. Chief Justice Warren wrote a separate concurring opinion, Justice Harlan concurred in *Alberts* but dissented in *Roth* (See discussion *infra*), and Justices Black and Douglas dissented.
The Roth decision combined two cases with similar fact patterns. In Roth the defendant was convicted of violating the Federal obscenity statutes,\textsuperscript{208} for having mailed obscene circulars, advertisements, and an obscene book.\textsuperscript{209} Defendant Alberts conducted a mail order business and was convicted of possessing obscene books for sale, and writing and publishing obscene advertisements.\textsuperscript{210} Alberts was convicted under the California penal code.

Judge Brennan began by framing the issue as follows: "The dipositive question is whether obscenity is utterance within the area of protected speech and press."\textsuperscript{211} Moreover, Brennan noted that this was "the first time the question has been squarely presented to th[e] court."\textsuperscript{212}

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\textsuperscript{208} 18 U.S.C. SS1461.
\textsuperscript{209} 237 F.2d 796.
\textsuperscript{210} 292 F.2d 90.
\textsuperscript{211} Roth, 77 S.Ct. at 1307. Brennan also made it clear in a footnote that while the Roth case concerned the issue of obscenity and free speech, "no issue is presented in either case concerning the obscenity of the material involved." Id. at 1307, n.8.
\textsuperscript{212} 77 S.Ct. at 1307.
\end{flushleft}
Brennan begins by observing that the Supreme Court had always assumed that obscenity fell outside the protection of the First Amendment. He points out that by 1792, ten of the fourteen states which had by then ratified the Constitution, did not provide complete protection for every type of speech.\textsuperscript{213} Thus, he concludes, "in light of this history, it is apparent that the unconditional phrasing of the first amendment was not intended to protect every utterance."\textsuperscript{214}

Rather, Brennan states, the phrasing of the First Amendment was meant to ensure the free exchange of ideas relative to political and social matters. Therefore, all ideas, however questionable, have the full protection of the First Amendment, excluding several limited areas of speech\textsuperscript{215}, and obscenity, which is "utterly without redeeming social importance."\textsuperscript{216}

\textsuperscript{213} Id.

\textsuperscript{214} Id. at 1308.

\textsuperscript{215} 77 S.Ct. at 1309: "...excludable because they encroach upon the limited area of more important interests." (footnote omitted).

\textsuperscript{216} Id. at 1309.
Brennan then goes on to address the Appellant's contention that the obscenity laws violate constitutional guarantees of free speech, because convictions appear to be possible "without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct." 217 Without directly confronting the Appellant's arguments, Brennan concludes that the Court need not reach such arguments in light of the Court's position that obscenity is not protected by the First Amendment.

Interestingly, Brennan's refusal to deal with the implications of the "clear and present danger" doctrine, is reminiscent of the Besig court's failure to answer a similar question. In Besig the court refused to explain how obscenity could repel and seduce at the same time. 218 This is essentially the same question the Court leaves unanswered in Roth; that is, how can obscenity create a clear and present danger (repel), and induce recipients to questionable conduct (seduce)

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217. Id. at 1310.
218. Besig, supra, at notes 195-200, and accompanying text.
at the same time. Sadly, this compelling question was summarily dismissed by both courts.

Nevertheless, having thus held that obscenity is not protected by the First Amendment, Brennan moves on to establish a new test for obscenity. Brennan first observes that freedom of speech and the press are vital to a free society. Accordingly, any restraints imposed upon these freedoms must carry with them stringent safeguards to protect the public against unwarranted prosecutions. Therefore, it is imperative that material "which does not treat sex in a manner appealing to prurient interest,"\textsuperscript{219} be diligently protected. Obscene material, on the other hand, is "material which deals with sex in a manner appealing to prurient interest"; that is, Brennan states, "material having a tendency to incite lustful thoughts."\textsuperscript{220} Quoting from the A.L.I. Model Penal Code,\textsuperscript{221} Brennan observes that prurient has also been defined as "'a shameful or morbid interest in nudity, sex, or excretion.'"\textsuperscript{222}

\textsuperscript{219} 77 S.Ct. at 1311, (Emphasis added).
\textsuperscript{220} 77 S.Ct. at 1310, n.20, (Emphasis added).
\textsuperscript{221} SS207.10(2) (Tent. Draft No. 6, 1957).
Yet, Brennan warns, it is important to remember that "sex and obscenity are not synonymous."

And then, as if to gild the lily, Brennan points out that "sex, [is] a great and mysterious force in human life, [and] has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

From this foundation then, Brennan fashions a new test for obscenity. He notes that while Hicklin was long the standard test for obscenity, it was later rejected, and for good reason: Its focus on isolated passages and their effect on the most susceptible persons, impacts on material which deals legitimately with sex. He concludes, therefore, that Hicklin "must be

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222. 77 S.Ct. 1310, n.20: Brennan also quotes from Webster's New International Dictionary (unabridged, 2d ed., 1949) defining prurient as: "...itching; longing; uneasy with desire or longing; of persons having itching, morbid or lascivious longings; of desire, curiosity or propension, lewd...."

223. 77 S.Ct. at 1310.

224. Id. at 1310. This particular observation has received little criticism.

225. Id. at 1311.
rejected as unconstitutionally restrictive of the freedoms of speech and press."\textsuperscript{226}

Thus, did Brennan brush aside the redoubtable Hicklin definition and its influence upon one hundred years of obscenity law. In its place, Brennan substituted a test which "provides safeguards adequate to withstand the charge of constitutional infirmity."\textsuperscript{227} The new test is set forth as follows: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."\textsuperscript{228}

In this way did Brennan fashion the first, and probably the most important element of what was later to become the three-prong Miller test.\textsuperscript{229} Moreover, it should be noted that the Roth test and supporting opinion as set forth by Brennan, also embrace the four elements of obscenity: The test deals with the nature of the work ("prurient"), the work taken as a whole ("as

\textsuperscript{226.} Id.
\textsuperscript{227.} Id.
\textsuperscript{228.} Id.
\textsuperscript{229.} See Miller, discussed infra.
a whole"), the community to be protected ("average person, applying contemporary community standards") and the purpose of the work ("utterly without redeeming social importance"). The last of these is implicit in the test,\textsuperscript{230} and was the subject of many subsequent decisions until its ultimate rejection.\textsuperscript{231}

While Brennan's comprehensive opinion in Roth\textsuperscript{232} is generally considered to have established the first modern test of obscenity, it was not then, and is not now, without its detractors. Justice Harlan saw Brennan's new test for obscenity as nothing more than an assimilation of the previous tests "into one indiscriminate potpourri."\textsuperscript{233} Justice Douglas was even less

\textsuperscript{230} 77 S.Ct. at 1309: "...implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." The court did not, however, officially accept this factor as part of the obscenity test until \textit{Memoirs v. Massachusetts}, 383 U.S. 413 (1966). See discussion infra.

\textsuperscript{231} See \textit{Miller}, discussed infra.

\textsuperscript{232} Brennan also wrote upholding the adequacy of the Statute's precision in protecting against violations of due process, and upholding the right of the Congress to regulate the mails.

\textsuperscript{233} 77 S.Ct. at 1317.
kind: "The question remains, what is the Constitutional test of obscenity?" Eloquent in defeat, Douglas nevertheless sounds petulant when he poses such questions, for Brennan's test of obscenity is commendable, and workable. It does, after all, strike a balance between competing interests, and at the risk of sounding trite, compromise is, after all, the hallmark of democracy. Thus, when Douglas denounces all laws against obscenity, his intransigence becomes all too revealing: "I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the court...." Yet, in spite of Douglas' uncompromising nature one can almost feel the depth of his commitment. Indeed, he acknowledges that he can understand and sympathize with church and civic groups and with the Anthony Comstocks of the country. Still, he insists, "if the First Amendment guarantee of freedom of speech and press is to mean anything in

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234. Id. at 1322.
235. Id. at 1324.
236. Id. at 1323.
this field, it must allow protests even against
the moral code that the standard of the day sets
for the community."\textsuperscript{237}

Douglas, joined by Justice Black, expresses
in his dissent the absolutist view of the First
Amendment; that is, that "the First Amendment, its
prohibition in terms absolute, was designed to
preclude courts as well as legislatures from
weighing the values of speech against silence."\textsuperscript{238}
In retrospect, however, one wonders whether
Douglas might grudgingly admit that the Roth test
of obscenity actually had the effect of loosening
the reins of restraint on obscenity, by giving
producers and distributors a better idea of what
would and what would not be acceptable. Indeed,
many commentators at the time went so far as to
predict that the Roth decision would result in the
liberalization of the obscenity laws.\textsuperscript{239} This
does not necessarily appear to have been the case,
however, in that a steady line of obscenity cases

\textsuperscript{237} Id.

\textsuperscript{238} Id. at 1324.

\textsuperscript{239} See e.g. Harry Kalven, Jr., "The Metaphysics of
the Law of Obscenity", (1960), in Commentaries
on Obscenity, ed. D. Sharp, (Metuchen, New Jersey:
was to follow *Roth* to the door of the Supreme Court, where, with decreasing aplomb and increasing rancor, the Court would continue its struggle to define obscenity.

2. **Smith v. California** - Absence of a Scien ter Requirement is Unconsti-
tutional.

Essentially, the numerous cases which followed *Roth* reaffirmed, expanded upon, and clarified the *Roth* test of obscenity, while the dissenters in *Roth* grew ever more frustrated, and seemingly more militant. Justice Brennan's *Roth* opinion was quickly recognized as a landmark, and virtually all subsequent Supreme Court decisions paid tribute to Justice Brennan's brilliance.240

The first major case following *Roth* was **Smith v. People of the State of California**,241 wherein the Defendant/Appellant was convicted in Los Angeles Municipal Court of violating an ordinance which made it unlawful "for any person to have in his possession any obscene or indecent writing,

240. After *Roth*, virtually all major obscenity cases were decided by the U.S. Supreme Court.

[or] book ... in any place of business where ... books ... are sold or kept for sale." Because the ordinance did not include a scienter requirement, it was construed as imposing strict or absolute liability on the offender. In framing the issue of the case, Justice Brennan questioned whether the elimination of the scienter requirement might "tend to work a substantial restriction on the freedom of speech and of the press."  

Interestingly, while one might assume that any strict liability statute would be unconstitutional, Justice Brennan acknowledges the existence of such statutes in the area of criminal law, noting however, that the power of the states to create such statutes "is not without limitations."  

242. 80 S.Ct. at 216, quoting from selected portions of SS41.01.1 of the Municipal Code of the City of Los Angeles.

243. 80 S.Ct. at 217.

244. Id. at 217: "'The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" quoting Dennis v. United States, 341 U.S. 494, 500.
Justice Brennan defines scienter, within the context of the Smith case, as "knowledge by appellant of the contents of the book."\textsuperscript{245} Yet, what most concerns Justice Brennan is not the absence of a \textit{mens rea} requirement, in general, but rather, the absence of such a requirement, in particular, as it relates to a statute such as the one in Smith, which bears upon freedom of speech and the press. Clearly, Brennan states, the failure of the legislature to include a scienter requirement in such a statute may have "a potentially inhibiting effect on speech."\textsuperscript{246}

In addressing the dangers of such a statute, Brennan sets forth a series of principles for guidance. Chief among these is that principle which holds that laws "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual more reluctant to exercise it."\textsuperscript{247} Thus, while states may be free to determine the burden of proof applicable in their respective

\textsuperscript{245} 80 S.Ct. at 216.

\textsuperscript{246} Id. at 218.

\textsuperscript{247} Id. at 217.
courts, where a regulatory device "was being applied in a manner tending to cause even a self-imposed restriction of free expression, [the Court would strike] down its application." 248

Accordingly, while the Court had only recently held in Roth that obscenity was not protected by the constitutional guarantees of freedom of speech and the press, the Court made it clear in Smith that it would not condone the enforcement of obscenity laws which might have the collateral effect of muting free speech. As such, the Court viewed the California strict liability statute in Smith with displeasure, since it tended to give the State the "power to restrict the dissemination of books which are not obscene." 249

In addition, such ordinance "penaliz[ed] booksellers, even though they had not the slightest notice of the character of the books they sold." 250 The Court made it clear that Roth never recognized "any state power to restrict the

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248. Id.

249. Id. at 218.

250. Id.
dissemination of books which are not obscene.\textsuperscript{251} Thus, did the court apply its first gloss to the \textit{Roth} decision.

\textit{Smith} is one of the few obscenity cases about which little criticism can be found. In fact, even Justices Black and Douglas wrote concurring opinions.\textsuperscript{252} However, Justice Frankfurter takes Brennan to task for not clarifying the level of knowledge or scieenter that will be necessary in future cases. On this subject Brennan says very little,\textsuperscript{253} yet his use of the phrase "awareness of its contents"\textsuperscript{254} serves as a precursor of the scieenter rule set down in later cases.\textsuperscript{255} In

\textsuperscript{251} Id.

\textsuperscript{252} Only Justice Harlan dissents in part, based upon his view that "the scieenter question involves considerations of a different order depending on whether a state of federal statute is involved." 80 S.Ct. at 227.

\textsuperscript{253} "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene books in stock; but we consider today only one [statute] which goes to the extent of eliminating all mental elements from the crime." 80 S.Ct. at 219.

\textsuperscript{254} "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." 80 S.Ct. at 219.
Frankfurter's opinion, this does not go far enough. He submits, albeit politely, that "invalidating an obscenity statute because a state dispenses altogether with the requirement of obscenity does require some indication of the scope and quality of scienter that is required." 256 Finally, Frankfurter's concurring opinion is also noteworthy for his passing comments on the testimony of expert witnesses and community standards, both of which were to become topics of further scrutiny in later obscenity cases. 257

As noted previously, Justices Black and Douglas filed concurring opinions; however, it appears that their opinions were less for purposes of concurrence than they were for purposes of elucidating their theory of "doctrinaire absolutism." 258 That is, the view that the First


256. 80 S.Ct. at 223.


258. 80 S.Ct. at 221, n.2.
Amendment is unequivocal: "I read 'no law...abridging' to mean no law abridging." In support of this position, Black quotes extensively from the works of Madison and Jefferson, and argues persuasively that all forms of restriction constitute a form of censorship, which is "the deadly enemy of freedom and progress. The plain language of the constitution forbids it."  

Justice Douglas likewise goes along with the majority, although appearing to relish his role as the ever-fervent dissenter: "What the court does today may possibly provide some small degree of safeguard to booksellers by making those who patrol bookstalls proceed less high handedly than has been their custom."  

While Smith did not substantially further the definition of obscenity, it did provide a harbinger of the multitude and variety of obscenity issues to come.


259. Id. at 221, (Emphasis original).

260. Id. at 221, n.2.

261. Id. at 222.

262. Id. at 227.
Roth v. United States set forth the first prong of what would ultimately become the three-prong test for obscenity:

Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. 263

Also implicit in the test is the fact that obscenity is "utterly without redeeming social importance." 264

Manual Enterprises, Inc. v. Day, 265 added the patent offensiveness element of the obscenity test. The Petitioners/Appellants were three corporations owned by one Herman Womack. Womack had himself been convicted of selling obscene photographs via the U.S. mails, and in this, an unrelated case, the Postmaster General used an administrative proceeding to seize magazines of nude men which the petitioners had directed to a homosexual audience by means of the U.S. mails. The petitioners brought a suit for injunctive

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263. 77 S.Ct. at 1311.

264. 77 S.Ct. at 1309. See also text accompanying supra, note 230.

265. 370 U.S. 478, 82 S.Ct. 1432 (1962)
relief against the post office. The District Court rendered a judgment denying injunctive relief, and the petitioners appealed. The Court of Appeals affirmed, and the petitioners appealed to the Supreme Court.

Justice Harlan, writing for the Supreme Court, reversed, holding inter alia, that the magazines in question were not obscene and did not violate the community standards. Justice Harlan framed the issue before the Court as whether the rulings of the lower courts were consistent with the Court’s prior rulings in Roth and Smith. He begins with a brief but informative history of obscenity law, and then goes on to brilliantly re-define obscenity under the Federal Obscenity Statute as being made up of two distinct elements: content and effect.

266. Manual was a 6-1 opinion in which Justice Stewart joined Justice Harlan’s opinion. Justice Black concurred in the result. Justice Brennan, concurring in the reversal, wrote a separate opinion in which he was joined by Justices Warren and Douglas. Justice Clark dissented. Justices Frankfurter and White took no part in the decision.

267. 82 S.Ct. at 1434-1436, notes 4-8.

These two elements require proof of (1) prurient interest,269 and (2) patent offensiveness. Noting that "prurient interest" was comprehensively dealt with in Roth, Harlan goes on to define "patent offensiveness," as an "element which, no less than 'prurient interest,' is essential to a valid determination of obscenity."270 "Patent offensiveness" is then defined as "indecency" or an "affront to current community standards of decency."271

Insorar as these two elements converge, Justice Harlan counsels that patent offensiveness need only be determined when "the 'prurient interest' appeal of the material is found limited to a particular class of persons";272 for, to treat allegedly obscene material otherwise, would be to condemn even masterpieces whose dominant theme might well appeal to the prurient interest, but which theme is rendered in a less than patently offensive manner. Thus, the Court

269. 82 S.Ct. 1436: "Both must conjoin before challenged material can be found obscene...."

270. 82 S.Ct. at 1434.

271. Id.

272. Id. at 1436.
declined "to attribute to Congress any such quixotic and deadening purpose as would bar from the mails all material not patently offensive, which stimulates impure desires relating to sex." 273

And what was to be the relevant community "in terms of whose standards of decency the issue must be judged[?]" 274 Judge Harlan states: "We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds is a national standard of decency." 275 This national community standard would remain the law until modified by the Miller Court 276 in 1973.

Regarding the purpose of the work, the Court acknowledged that while the magazines in issue had no literary, scientific, social, educational, or entertainment value, they would still not be deemed obscene, 277 unless they were found to come

273. Id. at 1437.

274. Id.

275. Id.

within the ambit of the prurient interest and patent offensiveness elements of the obscenity test.

While the Manual case was also noteworthy for its holdings relative to scienter,278 and criminal versus civil obscenity proceedings,279 its greatest contribution to the law of obscenity was its addition of the "patent offensiveness" element to the obscenity test.


277. 82 S.Ct. at 1434. See also Justice Clark dissenting, Id. at 1457.

278. Scienter was deemed a necessary element of proof in a parallel obscenity civil proceeding. Congress included a scienter requirement for an accused indicted under the criminal statute, and the no scienter alternative for civil cases was considered to be unacceptable: "In the constitutional climate in which this statute finds itself, we should hesitate to attribute to Congress a purpose to render a publisher civilly responsible for the innocuous advertisements of the materials of others, in the absence of any showing that he knew that the character of such materials was offensive." 82 S.Ct. at 1440.

279. In Justice Brennan's concurring opinion, he states that the judgment below should be reversed, not because the materials are non-obscene, but rather, because the administrative proceeding whereby the post office may interdict obscene materials was expressly not authorized by Congress in Title 18, U.S.C. SS1461.
In *Jacobellis v. Ohio*, 280 the Court's opinion seems pregnant with concerns over the nation's ever more strident obscenity enforcement. Justice Brennan, announcing the judgment of the Court, in which Justice Goldberg joined, 281 set forth the issue in the case in its simplest form: "Whether the State courts properly found that the motion picture involved, a French film called "Les Amants" ("The Lovers") was obscene and hence not entitled to the protection for free expression that is guaranteed by the First and Fourteenth Amendments." 282 The Court concluded that the film was not obscene and reversed the conviction. 283


282. 84 S.Ct. at 1677.

283. Nino Jacobellis was the manager of a Cleveland Heights, Ohio, motion picture theatre. He was convicted on two counts of possessing and exhibiting an obscene film. He was convicted by a three judge panel after waiver of trial by jury, and the conviction was reaffirmed by the Court of Appeals and the Ohio Supreme Court. The case was prosecuted and argued on appeal by long-time Cuyahoga County, Ohio (Greater Cleveland) Prosecutor, John T. Corrigan.
To those who suggest that the Supreme Court should not even concern itself with obscenity cases, limiting its review to a "sufficient evidence" standard of review,284 Justice Brennan offers a simple rebuff: "Such an abrogation of judicial supervision in this field would be inconsistent with our duty to uphold the Constitutional guarantees."285

With that, Justice Brennan reiterated the standard for obscenity as that set forth in Roth; i.e., "'whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole appeals to the prurient interest.'"286 Brennan warns, however, that this standard is clarified by the following savings clause; i.e., that the work must also be "'utterly without redeeming social importance,'" and that "'[T]he portrayal of sex, e.g., in art, literature, and scientific works, is not itself sufficient reason to deny material the

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284. 84 S.Ct. at 1678.
285. Id.
286. Id. at 1680, quoting from Roth, 77 S.Ct. at 1311.
Constitutional protection of freedom of speech and press." 287 Thus, Justice Brennan concludes, (1) "material dealing with sex in a manner that advocates ideas" 288 or, (2) "that has literary, scientific, or artistic value," 289 or (3) "any other form of social importance, may not be branded as obscenity and denied the constitutional protection." 290

This serious value element, which was first outlined in Roth, expanded upon in Jacobellis, and formally added to the test of obscenity in Memoirs v. Massachusetts. 291 reflected the Supreme Court's growing discomfort with overly broad obscenity Statutes and prosecutions. It was added in an attempt to further clarify and restrict the kinds of materials which would be subject to civil or criminal prosecution. However, what is most astonishing about Justice Brennan's reliance upon the "utterly without redeeming social value"

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287. Id. quoting from Roth, 77 S.Ct. at 1310.
288. Id.
289. Id.
290. Id., (citations and footnotes omitted.)
savings clause, is his failure to refer to Justice Harlan's *patent offensiveness* element set forth only two years before *Jacobellis* in *Manual Enterprises v. Day*. It would appear that had the *Jacobellis* Court placed appropriate reliance upon Justice Harlan's *patent offensiveness* element, it may not have had to enhance and expand the value element of the obscenity definition.

Granted, Justice Brennan cites *Manual* when wondering how, "in the absence of ... a deviation from Society's standards of decency," a work can be found constitutionally obscene. Justice Harlan refers in passing to *Manual* in his dissent, when he states he would "apply to the Federal Government the Roth standards as amplified in my opinion in Manual." However, it bears repeating, that what is remarkable about Brennan's majority opinion, and Harlan's dissent, is that neither expands upon the *patent offensiveness* element which Harlan so ably set forth in *Manual*. This is even more surprising in view of the fact


293. 84 S.Ct. at 1680.

294. Id. 1687.
that the patent offensiveness element of the obscenity test was ultimately to survive into another generation of obscenity definitions as part of the three-prong Miller test for obscenity,\textsuperscript{295} while the "utterly without redeeming social value" element was to be rejected by the Miller court as unworkable.\textsuperscript{296}

Yet, Harlan’s opinion in Manual was not to be completely ignored. Brennan relied upon Harlan’s reasoning with regard to community standards, when reiterating the Court’s position in favor of national versus local standards. Acknowledging that the concept of community standards was first introduced by Judge Learned Hand in United States v. Kennerley,\textsuperscript{297} Brennan points out that Hand was "referring not to State and local ‘communities,’ but rather to ‘the community’ in the sense of ‘society at large;...the public, or people in general.’"\textsuperscript{298} Thus, he concludes, "the

\textsuperscript{295} See Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973), discussed infra.

\textsuperscript{296} Miller, 413 U.S. at 22, 93 S.Ct. at 2613.

\textsuperscript{297} 109 F.119 (S.D.N.Y. 1913), see discussion, supra.

\textsuperscript{298} 84, S.Ct. at 1681, quoting from Webster’s New International Dictionary (2d ed. 1949), at 542.
constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding."\textsuperscript{299} Like various other aspects of the then developing modern test for obscenity, the concept of a national community standard would survive until altered by \textit{Miller}.

As should be obvious by now, most obscenity decisions involved numerous opinions, be they concurring or dissenting. In \textit{Jacobellis}, Justice Potter Stewart uttered his oft-quoted phrase concerning obscenity, to the effect that he knew it when he saw it. Like most phrases excerpted from Supreme Court decisions, Stewart's has come to be used out of context and improperly. He wisely observed that criminal laws in the area of obscenity "are constitutionally limited to hard-core pornography."\textsuperscript{300} And what, exactly, is hard-core pornography? Potter continued: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I

\textsuperscript{299} 84 S.Ct. at 1682. (Footnotes omitted.)

\textsuperscript{300} Id. at 1683 (footnote omitted).
could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."\textsuperscript{301} In spite of the occasional unfair ridicule to which Stewart's phrase has been subjected, it cannot be denied that there is an Everyman's insight to its uttering.

Finally, in a dissent that is noteworthy for its prescience, Chief Justice Warren takes issue with the concept of a national community standard. He states: "I believe there is no provable National Standard, and perhaps there should be none."\textsuperscript{302} Nor is Warren put off by the argument that differing communities will bar different materials. This, he argues, is as it should be: "[C]ommunities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals."\textsuperscript{303} As will be seen later, Chief

\textsuperscript{301} Id.

\textsuperscript{302} Id. at 1685.

\textsuperscript{303} Id.
Justice Warren was clearly on the right track.


March 21, 1966, was a relatively big day in the history of obscenity law. On that day, the Supreme Court issued three major decisions having to do with obscenity law: **Ginzburg v. United States**,\(^{304}\) **Mishkin v. New York**,\(^{305}\) and **Memoirs v. Massachusetts**.\(^{306}\) **Ginzburg v. United States**, the first case among these equals, so to speak, concerned one Ralph Ginzburg and three corporations controlled by him. Ginsberg and his corporations were convicted of mailing obscene publications or advertisements. The Third Circuit confirmed the convictions and the Supreme Court granted certiorari. Justice Brennan delivered the opinion of the Court in the 5-4 decision.\(^{307}\)


Justice Brennan begins by noting that since Roth, the Court had decided obscenity questions based solely upon the content of the materials; i.e., whether the materials were obscene based upon the Roth standard (as expanded upon by Manual and Jacobellis), or whether the materials were simply distasteful, but not obscene? However, in Ginzburg, the Court, almost with a nervous glance backward at obscenity law's historical roots in Hicklin, focuses upon the effect of the material, "within the context of the circumstances of production, sale, and publicity."

In other words, the court stepped away from its previous emphasis on content, and held that "the question of obscenity may include consideration of the setting in which the publications were presented, as an aid to determining the question of obscenity," even if the publications could not otherwise be prosecuted as obscene. Thus, the Court approved a further gloss on the obscenity standard, in which publications are viewed "against a background of

308. 86 S.Ct. at 944.
309. Id. at 945.
commercial exploitation of erotica solely for the sake of their prurient appeal.\textsuperscript{310} The practical effect of this approach was to create a type of mutable obscenity which permits prosecutors to finely tune obscenity prosecutions based upon the pandering of the materials to certain susceptible members of the community, such as intended customers.

Indeed, as if to demonstrate the broad applicability of such a doctrine, the Government in \textit{Ginzburg} stipulated at trial that the mailed advertisements were not obscene. Nevertheless, Ginzburg was convicted because "each of the accused publications was originated or sold as stock in trade of the sordid business of pandering - 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest and their customers'"\textsuperscript{311} While Chief Justice Warren had not used the word pandering, Justice Brennan adopts the Chief Justice's language in support of his new doctrine.

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\textsuperscript{310} Id. (footnotes omitted).

\textsuperscript{311} Id., quoting from \textit{Roth}, 77 S.Ct. at 1314-1315 (Warren, C.J. concurring), (Emphasis added), (Footnotes omitted).
Thereafter, materials which were not legally obscene could nevertheless be found obscene based upon the manner in which they were sold, distributed, or promoted. The Court stated: "Petitioner's own expert agreed, correctly we think, that '[i]f the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite,' the work is pornographic."312

While reserving comment upon the petitioners' experts, it bears repeating that the Court seemed intent upon pursuing the "purveyors" of obscenity, as well as the "obscenity" itself. Chief Justice Warren's concurring opinion in Roth had been otherwise ignored in the Court's evolving test for obscenity; with Ginzburg, Justice Brennan brought Warren's opinion out into the open and placed the Court's imprimatur upon it.

In any event, what is especially confusing about the Court's decision in Ginzburg, is not the logic behind the pandering doctrine, which is sound even if somewhat tortured, but rather, the decision's place in the evolution of the obscenity

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312. Id. at 948., quoting Petitioner's expert.
test. Up until *Ginzburg* the Court had concentrated upon the four factors of obscenity: Principally, the *nature of the work*, and the three other supporting elements, the *work as a whole*, the *community to be protected*, and the *purpose of the work*. However, with the advent of the pandering doctrine in *Ginzburg*, the focus of the obscenity test shifted, if ever so slightly, from the obscene *nature of the work*, to the *person* involved in selling the obscene work. Chief Justice Warren stated in his concurring opinion in *Roth*: "It is not the book that is on trial; it is a *person*. The conduct of the defendant is the central issue, not the obscenity of a book or picture."\(^{313}\) By framing the issue in this fashion, Chief Justice Warren shifted the spotlight in obscenity cases from an *in rem* (the thing) determination, to an *in personam* (the person) determination.\(^{314}\) This shift had the effect of judging obscenity based upon the manner

\(^{313}\) 77 S.Ct. at 1314-1315. (Emphasis added).

in which the material was used and advertised, instead of on its content or substance. 315

Notwithstanding Ginzburg's confusing, albeit intriguing, emphasis on pandering, it is pandering in the context of community which Brennan seems intent upon exploring. Accordingly, he points out that The Housewife's Handbook of Selective Promiscuity (referred to throughout the opinion as "The Handbook"), which Ginzburg also sold, would not have been deemed obscene had it been directed to medical and psychiatric workers. Instead, Ginzburg mailed the work to a non-select group. He "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed." 316

What is remarkable about this approach is the haunting presence of Hicklin. After one hundred years and numerous rejections by U.S. Courts, the Hicklin decision once again made its presence known. Indeed, the Court in Ginzburg seems to embrace the susceptible few test ("...those whose

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315. Id. at 54.

316. 86 S.Ct. at 948.
minds are open to such immoral influences and into whose hands a book of this sort may fall\(^{317}\). The Ginzburg Court even quotes approvingly from the Government's argument at sentencing, wherein the Government admitted that had Ginzburg sold and advertised his handbook solely to physicians, he would not have been prosecuted.\(^{318}\) Thus, Ginzburg's fatal error was not in mailing the material, but in targeting the material; a not illogical, but rather curious distinction in view of the Court's prior pronouncements on obscenity. In this way does the Court adopt Chief Justice Warren's theory of obscenity in context, or a shifting obscenity,\(^{319}\) so to speak; that is, the idea that the obscene nature of certain materials may depend upon "the context from which they draw color and character."\(^{320}\) Consequently, an obscenity determination may depend upon its setting,\(^{321}\) so much so, in fact, that "through the

\(^{317}\) Regina v. Hicklin, L.R.3Q.B. 360, 371 (1868).

\(^{318}\) 86 S.Ct. at 948, n.13.

\(^{319}\) Roth, 77 S.Ct. at 1315 (Warren, Chief Justice concurring).

\(^{320}\) Id. at 1315. Quoted in Ginzburg, 86 S.Ct. at 950.

\(^{321}\) Id.
pervasive treatment or description of sexual matters, ...evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation." 322 What is of particular importance here, is the fact that Ginzburg did not cause pandering to become a new element of the obscenity test. Rather, pandering becomes a "rule of evidence," permitting the introduction of evidence related to pandering. This evidence, in turn, may be applied to the prevailing test of obscenity. 323

Unlike the majority, the dissenters in Ginzburg tend not to break any new ground. Justice Black reiterates his theory of "doctrinaire absolutism" as it relates to the first amendment. 324 Justice Harlan worries that the Ginzburg majority has added yet another test to Roth which will cause obscenity to be judged,

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322. 86 S.Ct. at 950. (Emphasis added).
323. "This evidence, in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt." 86 S.Ct. at 947.
324. 86 S.Ct. at 950.
not on its face, but also "in light of the defendant's conduct, attitude, and motives."\footnote{325} Justice Stewart again sets forth his belief that there exists "a distinct and easily identifiable class of material in which all these elements coalesce.,"\footnote{326} and that class of material is "hard-core pornography".\footnote{327} Finally, as if anticipating the difficulties the "patent offensiveness" element would cause future courts, Justice Stewart refers to patent offensiveness as "patent indecency," an easier and perhaps more descriptive definition.\footnote{328}

The pandering evidentiary element of obscenity was to have a lasting effect on obscenity prosecution. Indeed, rare is the obscenity case today in which the Government fails to introduce evidence of commercial exploitation in an effort to prove certain material to be obscene.


\footnote{325}{Id. at 954.}

\footnote{326}{Id. at 957.}

\footnote{327}{Id., citing \textit{Jacobellis v. Ohio}, 84 S.Ct. 1676, at 1683 (Stewart, J., concurring opinion).}

\footnote{328}{86 S.Ct. at 957.}
Mishkin v. New York\textsuperscript{329} is a case which continues to figure prominently in the litigation of current obscenity cases, due in large part to the multitude of interpretations ascribed to it.

Mishkin concerns a defendant who was convicted not for ideas he promoted, but rather for producing and selling obscene books.\textsuperscript{330} The books depicted various forms of deviant sexual activity such as flagellation, sadomasochism and fetishism. Many of the drawings included semi-nude women being tortured, whipped, beaten or abused.

The Defendant/Appellant argued that the books were not obscene and that the New York Statute under which he had been convicted did not require adequate proof of scienter. Justice Brennan, again writing for a divided court,\textsuperscript{331} began with

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\textsuperscript{330} 383 U.S. at 504-505.
\textsuperscript{331} 383 U.S. 502. Justice Brennan wrote on behalf of five members of the court. Justices Black and Douglas dissented on grounds of "doctrinaire absolutism." Justice Stewart dissented on grounds that the material was not hard core pornography. Justice Harlan dissented and reiterated his view that states need only apply rationally related criteria to their definitions of obscenity.
\end{flushleft}
the nature of the work ("material"), and noted that "states are free to adapt other definitions of obscenity only to the extent that those adopted stay with the bounds set by the Constitutional criteria of the Roth definition."\(^{332}\) The New York Courts had interpreted obscenity to cover only hard core pornography. Therefore, since their definition of obscenity was even more stringent than the Roth definition, it easily passed constitutional muster.\(^{333}\)

The defendant, however, cleverly argued that the deviant sexual practices depicted in the materials could not be deemed obscene under the Roth test of obscenity, because they did not satisfy the prurient appeal requirement.\(^{334}\) The defendant argued that the materials did not appeal "to a prurient interest of the 'average person' in sex, that 'instead of stimulating the erotic, they disgust and sicken.'"\(^{335}\) The Court rejected this argument as "being founded on an unrealistic

\(^{332}\) 383 U.S. at 507.

\(^{333}\) Id. at 508.

\(^{334}\) Id.

\(^{335}\) Id.
interpretation of the prurient-appeal requirement." 336 The proper application of the prurient appeal test was stated as follows: "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." 337

In clarifying the applicability of the prurient interest element to exceptionally deviant material, the court pointed out that its reference to the "average" or "normal" person in Roth, 338 was employed only in the context of Roth’s rejection of Regina v. Hicklin. 339 The Hicklin test, it may be remembered, made determinative the impact of materials on the most susceptible persons. In addition, the Mishkin Court made clear that Roth’s emphasis on the "average" person

336. Id.

337. Id.

338. Roth 354 U.S. at 489.

339. L.R. 3 Q.B. 360 (1868).
was concentrated within the ambit of the constitutionality of the obscenity laws; it was "not intended to develop all the nuances of a definition required by the Constitutional guarantees." 340

Thus, the Court dealt sensibly with a resourceful defense argument which, if upheld, would have effectively nullified much of the Court's work following Roth. 341 The Court "adjust[ed] the prurient appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group." 342

The application of the prurient interest test to probable recipient groups would appear to require that such material must also appeal to the

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341. As noted previously, these and similar defense arguments are still raised, often successfully, in current obscenity litigation.

342. 383 U.S. at 509. (Emphasis added). The Court continued, "...since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the Hicklin test." Id. at 509.
average person, and not just limited deviant groups. Using this fact to their advantage, defense attorneys have emphasized the fact that materials must appeal to the "shameful or morbid" interests of average people to be deemed obscene. Thus, in the case of mildly obscene material, defendants argue that material is not obscene because it does not appeal to a shameful and morbid interest in average individuals. Conversely, regarding material that is truly revolting, defendants argue that while the material may be exceptionally explicit, it does not arouse average individuals because they do not have a shameful or morbid interest in sex. In this way, defendants have frequently attempted to use the Roth to Mishkin menu of decisions to confine the anti-obscenity laws to material which falls somewhere between Playboy and snuff-films.

The Mishkin contribution to obscenity law was not, however, confined to the confusing concept of


344. See also text accompanying notes 334-335, supra.

345. A name occasionally used for pornographic films in which a party/actor is actually murdered.
prurient appeal. Rather, the Court, in dealing with the issue of scienter, sought to expand upon its earlier decision in Smith v. California. 346 As Justice Brennan notes, "the Constitution required proof of scienter to avoid the hazard of self censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity"; as such, the necessary mental element in obscenity cases is that the defendant be "'aware of the character of the material'" 347 he attempts to distribute.

The issue of scienter, unlike that of prurient-appeal, was largely settled by the Mishkin court. Indeed, future courts would merely clarify the scienter requirement as set forth in Mishkin. 348 Thus, with its decision in Mishkin, the Court completed the second of its three landmark 1966 cases; only Memoirs v. Massachusetts remained.

346. 80 S.Ct. 215. See discussion supra.

347. 383 U.S. at 510-511, quoting from People v. Finkelstein, 174 N.E.2d 470, 471 (1961). "Character of the material" is the phrase routinely used with respect to obscenity and scienter. See e.g. cases cited at note 96, supra.

348. See e.g. Hamling v. United States, 94 S.Ct. 2887 (1973), discussed infra.

Absent a computer analysis, it would probably be impossible to state unequivocally that John Cleland's *Memoirs of a Woman of Pleasure*, written in 1750, and also known as *Fanny Hill*, has been the most prosecuted "obscene" book in the history of English literature;\(^{349}\) Nevertheless, it would be a fair guess that it has been in the dock more than any other book. *Memoirs v. Massachusetts*\(^{350}\) is a case in point. *Memoirs*, decided the same day as *Ginzburg* and *Mishkin*, involved a civil equity suit brought by the State of Massachusetts against "Fanny Hill" (*Memoirs*), which book dealt with the experiences of a young girl who became a prostitute. The book was held to be obscene, and thus not entitled to the protections of the First Amendment. The defendant appealed and the Supreme Court reversed. However, in keeping with the usual disunity caused by obscenity cases, none of

\(^{349}\) See e.g. *Commonwealth v. Holmes*, 17 Mass. 336 (1821), discussed *supra*, at note 41.

the six members of the Court who voted for reversal could agree upon their reason for doing so, thus resulting in a plurality opinion.

Justice Brennan, joined by Chief Justice Warren and Justice Fortas, held that the Massachusetts Supreme Judicial Court had based its ruling upon a misinterpretation of the Roth definition of obscenity, "as elaborated in subsequent cases." 351 Under that definition, the Court stated, "Three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 352

Where the Massachusetts Court had erred, was "in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.'" 353

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351. 383 U.S. at 418.

352. Id.

353. Id. at 419, quoting from 206 N.E. 2d 403, 406 (1965).
To the contrary, Justice Brennan writes, "a book cannot be proscribed unless it is found to be utterly without redeeming social value." 354

Indeed, this is true even if the work is found to fulfill the other two elements of the test: prurient appeal and patent offensiveness. 355

Accordingly, an interpretation like that of the Massachusetts court constituted an improper interpretation of the obscenity standard. If a work contained only a modicum of special value, it could not be deemed obscene. 356 Moreover, each of the three elements of obscenity had to be applied separately; the special value of a work could not be weighed against or canceled out by the state of its prurient appeal or patent offensiveness. 357

Without a doubt, Memoirs constituted the clearest definition of obscenity since Roth. In Memoirs, Justice Brennan officially brought together the brilliance of Roth and the general

354. Id. (Emphasis original)

355. Id. at 419.

356. Id. at 420.

357. Id. at 419.
insight of the Court as "elaborated upon in subsequent cases." 358 However, this still left the problem of how to handle the issue of pandering and its effects upon "patent offensiveness" and "serious value." Justice Brennan acknowledges this problem when he observes that Memoirs' minimum social value could be affected by the circumstances of production, sale, and publicity. 359 For example, the fact that a book had been "commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social value." 360 As for Memoirs, Justice Brennan concluded that no such evidence was presented, and in any event, the possibility that the book may have been exploited by panderers would not be enough to deem the work obscene, since it did, in fact, possess a modicum of literary and historical value.

As noted previously, Justice Brennan, in announcing the judgment of the Court, wrote only

358. Id. at 418.

359. Id. at 420.

360. Id. at 421, citing Ginzburg, supra, 383 U.S. 463, 476.
for himself and two other members of the Court, Justices Warren and Fortas. Justices Black and Stewart concurred in the reversal for reasons set forth in their respective dissenting opinions in Ginzburg and Mishkin.\(^{361}\) Justice Douglas wrote a lengthy dissenting opinion, drawing heavily on historical and sociological literature. Justices Harlan and White dissented primarily on grounds that the states had authority to control obscenity within their boarders, and Justice Clark, in perhaps the most scathing opinion, dissented on grounds that the majority had "import[ed] a new test into that laid down in Roth ...namely that '[a] book cannot be proscribed unless it is found to be utterly without redeeming social value.'\(^{362}\)

Justice Clark argues that the appropriate test of obscenity was that set out in Roth and Manual (patent offensiveness element), and that "in no subsequent decision of this court... [was any] reference whatever [made] to such a requirement...,"\(^{363}\) as utterly without redeeming


\(^{362}\) 383 U.S. at 441 (citations omitted).

\(^{363}\) 383 U.S. at 442.
social value. Justice Clark notes that the first reference to such element was in Jacobellis, and there, only by Justice Brennan. However, what Justice Clark seems to forget is that Justice Harlan’s "patent offensiveness" element was first mentioned in Manual and thereafter virtually ignored, even by Harlan himself, until resurrected in the 1966 cases (Ginzburg, Mishkin, and Memoirs). As such, Clark’s criticism of the "utterly without redeeming social value" element as being immature, seems to fall wide of its mark. The fact is, "patent offensiveness" and "utterly without redeeming social value" both officially became part of the test for obscenity in Memoirs. Perhaps Justice Clark would have regarded it more highly had its development marinated for a few more years.

And yet, Clark’s criticism is not to be completely dismissed. Indeed, it is impossible to read his opinion without anticipating the kinds of problems which would ultimately cause the Supreme Court to reject the "utterly without redeeming social value" test. 364

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364. See Miller v. California, 413 U.S. 15, 22 (1973), discussed infra, wherein the Court referred to the "utterly without redeeming social

As may be obvious by now, the struggle to define obscenity reached its highest level of execution following the 1966 cases (*Ginzburg, Mishkin, and Memoirs*). A prevailing test of obscenity had, at last, been "agreed upon," although continual sorting out would result in a final revision in *Miller v. California*. Still, there were peripheral issues to be resolved, as defendants continued to engage in creative attacks on the obscenity laws.

One such case was *Ginsberg v. State of New York*, wherein the defendant was convicted of violating a New York Statute which prohibited the "value" test adopted by *Memoirs*, as being "a burden virtually impossible to discharge under our criminal standards of proof."

365. Under that definition, the Court stated, "Three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs*, 383 U.S. at 418.


sale of obscene materials to minors under seventeen years of age. Justice Brennan, once again delivering the opinion of a divided court,\textsuperscript{368} held that the States have the power to adjust the Roth/Memoirs test of obscenity to define charged material based upon its appeal to minors. Thus, did the Court endorse the concept of variable obscenity,\textsuperscript{369} outlined in Lockhart & McClure, \textit{Censorship of Obscenity: The Developing Constitutional Standards}.\textsuperscript{370} The Court's adoption of variable obscenity was based upon the sound doctrine that material which might otherwise not be obscene for adults, could be legally obscene if

\textsuperscript{368.} Justice Stewart concurred in the result. Justice Harlan wrote a concurring opinion (See 88 S.Ct. 1313). Justices Douglas, Black and Fortas dissented.

\textsuperscript{369.} "'Variable obscenity . . . furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audience in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance.'" 88 S.Ct. at 1278. Quoting from Lockhart & McClure, \textit{Censorship of Obscenity: The Developing Constitutional Standard}, 45 Minn. L.R. 5 (1960), at 85.

\textsuperscript{370.} 45 Minn. L.R. 5 (1960).
directed to a specially protected class of consumers; i.e., minors.

Therefore, the Court held a state statute's definition of obscenity based upon its appeal to minors has a rational relationship to the objective of safeguarding children, and is therefore constitutional: "Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of the community by barring the distribution to children of books recognized to be suitable for adults." 371

Continuing then, in language which would later form the basis for the Court's landmark ruling on child pornography, 372 the Court stated that at least two interests justified the State's limitations upon the availability of obscenity to minors. 373 First, since the courts had


373. 88 S.Ct. at 1280.
traditionally recognized the authority of parents over their children, legislatures could properly conclude that parents and teachers were "entitled to the support of laws designed to aid discharge of that responsibility." 374 Second, the state itself "has an independent interest in the well-being of its youth." 375 Therefore, laws such as that of New York State in Ginsberg, which support the State's interests in the welfare and well-being of its youth, will be upheld.

The Court's affirmance of Ginsberg's conviction is given additional support by Justice Potter Stewart's concurring opinion. Concise, cogent, and commonsensical as always, Justice Stewart points out that "when expression occurs in a setting where the capacity to make a choice is absent, Government regulation of that expression may co-exist with and even implement First Amendment Guarantees." 376 Accordingly, in certain carefully delineated areas, states may deprive children of rights generally accorded to adults,

374. Id.
375. Id. at 1281.
376. Id. at 1285.
such as marriage and voting. As Stewart reasons, children are a captive audience, "not possessed of that full capacity for individual choice which is the presupposition of First Amendment Guarantees."\^377

Notwithstanding the seeming logic of Justice Stewart's opinion, this being an obscenity case, there are always dissenters. Justice Fortas remarks acerbically that "in the face of this Court's asserted solicitude for First Amendment values, [the majority's opinion] is to give the State a role in the rearing of children which is contrary to our traditions and to our conception of family responsibility."\^378

\textit{Ginsberg v. New York}, (1968), provides an interesting bookend to \textit{Ginzburg v. United States}, (1966),\^379 in that both cases involved "adjustments" to the then prevailing obscenity test. Pandering and variable obscenity represented, for good or ill, yet two more

\^377. Id. at 1286.

\^378. Id. at 1298 (citations omitted).

\^379. 86 S.Ct. 942. The cases involved different defendants. The Defendant in \textit{Ginzburg v. United States} concerned one Ralph Ginzburg. \textit{Ginsberg v. New York} involved one Sam Ginsberg.
examples of the Supreme Court's willingness to apply a new concept to an established test.


If ever there was a case which stood proudly for the proposition that a man's home is his castle, it is **Stanley v. Georgia**.\(^{380}\) Despite one's feelings about obscenity, it is probably fair to say that most people would support the notion that a person ought to be lawfully permitted to read whatever he wishes in his own home, be it trash or literature. This, in essence, is the Supreme Court's holding in **Stanley**. In **Stanley**, Justice Marshall, writing on behalf of six members of the Court,\(^ {381}\) held that the mere private possession of reading matter or films, be they obscene or not, is protected by the First Amendment, made applicable to the States by operation of the Fourteenth Amendment.


\(^{\text{381}}\) Justice Black concurred on his usual grounds; i.e., that the First Amendment does not permit laws against obscenity. Justice Stewart, joined by Justices White and Brennan, concurred in the result but believed the conviction should be reversed on grounds that Stanley's films were seized in violation of the Fourth Amendment prohibition against unlawful search and seizure.
Defendant Stanley was a bookmaker. His activities led to the issuance of a search warrant for his home. 382 During the execution of the search warrant, Federal and State agents found three allegedly obscene eight-millimeter films. The films were seized and Stanley was charged with and convicted of possession of obscene matter, in violation of Georgia State law.

The State contended that inasmuch as obscenity was not protected by the First Amendment, it was free to control obscenity in any way necessary, subject, of course, to the Roth/Memoirs limitations. 383 The State reasoned that since it could lawfully protect the physical well-being of its citizens, it could also lawfully protect the mental well-being of its citizens. 384

The Supreme Court disagreed, noting that nothing in Roth or the subsequent cases supported the proposition that the Court wished to control private possession of obscene material. Rather, those cases dealt with the power of the State and

382. Facts as set forth at 89 S.Ct. at 1244.
383. 89 S.Ct. at 1245.
384. Id.
Federal Governments to regulate the sale, distribution, or possession with intent to sell or distribute obscene materials.\textsuperscript{385}

Accordingly, the Court concluded that since the "... Constitution protects the right to receive information and ideas[,] 'This freedom [of speech and press]...necessarily protects the right to receive...'\textsuperscript{386} obscenity. Indeed, Justice Marshall notes, the Court consistently supported the "right to receive information and ideas, regardless of their social worth."\textsuperscript{387} Clearly,

\textsuperscript{385} 89 S.Ct. at 1245-1246. In fact, as Justice Marshall points out, the Court was able to discover only one case in which the issue of private possession of obscene material had even been considered. In \textit{State v. Mapp}, 170 Ohio St. 427, 166 N.E. 2d 387 (1960), "the view of the 'dissenting' judges was expressed by Judge Herbert: 'I cannot agree that mere private possession of ...[obscene] literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual." 170 Ohio St., at 437, 166 N.E.2d, at 303. Id. at 1246, n.7.

\textsuperscript{386} 89 S.Ct. at 1247, quoting from \textit{Martin v. City of Struthers}, 319 U.S. 141, 143. (string citations omitted).

\textsuperscript{387} 89 S.Ct. at 1247, citing \textit{Winters v. New York}, 333 U.S. 507, 510 (1948). The Court's strong convictions regarding the constitutional right to receive information or materials would be
the Court showed no stomach for embracing a law which would prohibit a person from reading what he wished in the privacy of his own home, of being free to satisfy his own private psychological and intellectual needs, and/or being "free from state inquiry into the contents of his library." \(^{388}\)

Moreover, as Justice Marshall points out in a keen analogy, reading pornography is no more likely to lead to anti-social behavior than possession of chemistry books is likely to lead one to manufacture homemade liquor. \(^{389}\)

Finally, in one of Justice Marshall's most memorable statements, he writes for the Court: "If the First Amendment means anything it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." \(^{390}\)

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dramatically altered thirteen years later in *New York v. Ferber* 458 U.S. 747 (1982), which deals with child pornography. See discussion *infra*.

388. 89 S.Ct. at 1248.
389. Id. at 1249.
390. Id at 1248.
This noble statement of the country's highest aspirations served as an intriguing prelude to Miller v. California, unquestionably the most influential obscenity case in North American jurisprudence.\textsuperscript{391}

\textsuperscript{391} Miller v. California, 93 S.Ct. 2607 (1973).
B. ESTABLISHMENT OF THE MODERN DEFINITION OF OBSCenity


Only sixteen years after the landmark Roth decision, the Supreme Court sought yet again in Miller v. California,392 to narrow and refine the definition of obscenity. Chief Justice Burger, seeking to put his signature on this difficult area of the law, established the modern test of obscenity. The basic guidelines for the trier of fact would be:

(a) [W]hether "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.393

At the same time, the Court rejected the "utterly without redeeming social value" test of Memoirs, noting that such element has "never


393. 93 S.Ct. at 2615.
commanded the adherence of more than three judges at one time."394

With the establishment of the foregoing Miller test, Chief Justice Burger did more than simply restate the previous Roth/Memoirs test of obscenity. He effectively brought together in one three-prong test over one hundred years of judicial cogitation, to define the seemingly indefinable. And while numerous cases would come before the Court in the ensuing years which would highlight the test's shortcomings, Burger's test was, and is, nevertheless, a sound and workable definition of obscenity. To paraphrase Winston Churchill's observation about democracy, the Miller test is not the best test, but is is the best we have. Thus, did Miller, along with the other four cases decided on June 21, 1973, pull the curtain on the modern test for obscenity.

Chief Justice Burger, delivering the opinion of the Court,395 began by noting that the "obscenity-pornography" cases enunciated in

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394. Id. at 2615. (citations and footnotes omitted).

earlier decisions constituted an
"'intractable...problem.'"396 Thus, "a
re-examination of standards enunciated in earlier
cases..."397 was necessary.

The facts of the case are not unlike those of
many obscenity cases. Defendant/Appellant Miller
was convicted of a mass mailing of unsolicited
advertisements related to adult materials, which
materials included sexually graphic pictures. The
case required the court "to define the standards
which must be used to identify obscene material
that a state may regulate without infringing on
the First Amendment as applicable to the States
through the Fourteenth Amendment."398

Chief Justice Burger opens by reviewing the
two "landmark decisions in the somewhat tortured
history of the Court's obscenity decisions";399
Roth and Memoirs. As Chief Justice Burger points
out, these two cases differ in one glaring

396. 93 S.Ct. at 2610, quoting Justice Harlan in
Interstate Circuit Inc. v. Dallas, 390 U.S. 676,
704 (1968).

397. 93 S.Ct. at 2610.

398. Id. at 2612.

399. Id. at 2612-2613.
respect: the Memoirs plurality decision added the "utterly without redeeming social value" element of the obscenity test. Consequently, "while Roth presumed 'obscenity' to be 'utterly without redeeming social importance,' Memoirs required that to prove obscenity it must be affirmatively established that the material is 'utterly without redeeming social value.'" This test, Chief Justice Burger reasoned, was utterly unacceptable, in that it required prosecutors "to prove a negative, i.e., that the material was 'utterly without redeeming social value'--a burden virtually impossible to discharge under our criminal standards of proof." As such, the above stated Memoirs test of obscenity was "abandoned as unworkable," even, the Chief Justice observes, by its author Justice Brennan.

401. 93 S.Ct. at 2613. (Emphasis added).
402. Id. at 2613. (Emphasis original).
403. Id. at 2614. Citing dissenting opinion of Justice Brennan in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct., 2628, 2642, (1973), decided the same day as Miller and discussed infra.
Accordingly, the basic guidelines of the new 

Miller test for obscenity were set forth by the Court, in "agreed...concrete guidelines to isolate 'hard-core' pornography from expression protected by the First Amendment..." and "...to provide positive guidance to federal and state courts alike."\(^{405}\)

Included among the guidelines provided by the Court, were illustrations of matters a state statute might properly define as patently offensive conduct:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.\(^{406}\)

At the very least, material seeking protection under the umbrella of the First Amendment, would be required to have serious literary, artistic, political or scientific value to merit such protection.\(^{407}\)

\(^{404}\) See supra, note 393, and accompanying text.

\(^{405}\) 93 S.Ct. at 2617-2618. (Emphasis added).

\(^{406}\) Id. at 2615.
Finally, the Court sought to clarify the meaning of "community standards" as used in the first prong of the Miller obscenity test:

"Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest."\(^{408}\) Clearly, this first prong of the obscenity test is rife with elements of proof: (1) average person, (2) contemporary community standards, (3) work taken as a whole, (4) appeals to the prurient interest. However, most of these elements, although abstract, were based upon years of judicial precedent. These elements, such as prurient interest,\(^{409}\) Chief Justice Burger chose

\(^{407}\) Id. at 2616. This element of the test is occasionally referred to by the acronym, LAPS.

\(^{408}\) Id. at 2615.

\(^{409}\) "i.e., material having a tendency to excite lustful thoughts. Webster’s New International Dictionary (Unabridged, 2d ed. 1949) defines prurient in pertinent part, as follows:

‘...Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd....’

Prurience is defined, in pertinent part, as follows:

‘...Quality of being prurient; lascivious desire or thought....’

See also Mutual Film Corp. v. Industrial Com. 236 US 230 242, 59 L.Ed. 552, 559, 35 S Ct. 387, Ann Cas 1916C 296, where this Court said as to motion pictures: ‘...They take their attraction
not to disturb. However, as noted previously, he
did seek to provide examples of patent
offensiveness, and did not shirk what he saw as
his responsibility to redefine other confusing
elements. Indeed, Chief Justice Burger took issue
with those who differed with the majority's desire
to redefine the obscenity test. He rejected the
contention made by Justice Brennan in dissent,
that the proper course for the Court would be the
adoption of "an absolutist, 'anything goes' view
of the First Amendment - because it will lighten
our burdens. 'Such an abrogation of judicial
supervision in this field would be inconsistent
with our duty to uphold the constitutional
guarantees.'"410

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from the general interest, eager and wholesome it
may be, in their subjects, but a prurient interest
may be excited and appeal to..." (Emphasis
added.)

We perceive no significant difference between
the meaning of obscenity developed in the case law
and the definition of the A. L. I. Model Penal
Code, SS 207.10(2) (Tent Draft No. 6, 1957), viz.:
'...A thing is obscene if, considered as a
whole, its predominant appeal is to prurient
interest, i.e., a shameful or morbid interest in
nudity, sex, or excretion, and if it goes
substantially beyond customary limits of candor in
description or representation of such matters
....' See comment, Id., at 10, and the discussion
at pages 29, et seq." Roth, 354 U.S. at 487 n. 20
(emphasis added).

410. 93 S.Ct. at 2618, quoting from Justice
hence, Chief Justice Burger's clarification of the community standards element of the first prong of the obscenity test was consistent with his desire to confront the intractable obscenity problem head-on. This he accomplished by changing the theretofore national community standard to a local standard. He first acknowledged that ours is a national constitution, but, he states, "this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the prurient interest or is patently offensive."\textsuperscript{411} The country is simply too big, too diverse, too unique from community to community, ". . . to reasonably expect that such standards could be articulated for all 50 states in a single formulation, even assuming the prerequisite consensus exists."\textsuperscript{412}

Thus, quoting from Chief Justice Warren's dissent in \textit{Jacobellis}, the \textit{Miller} court held that

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\textsuperscript{411} 93 S.Ct. at 2618.

\textsuperscript{412} Id.
by community standards, the Roth Court "'means community standards—not a national standard, as is sometimes argued. . . . There is no provable 'national standard.'" 413

Having revolutionized obscenity law in the face of vigorous dissent, Chief Justice Burger completed his tome by lambasting the dissenters "who sound the alarm of repression,"414 and those whose "doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material."415 Indeed, in assailing the dissenters he makes the point that their doctrinaire absolutism ignores reality; after all, "civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine."416

Justice Douglas was not moved. He dissents on his usual grounds that the First Amendment forbids the Federal or State Governments from

413. Id. at 2619, quoting from Jacobellis v. Ohio, 378 U.S. 184, 200, 84 S.Ct. 1676, 1685, (1964).
414. Id. at 2620.
415. 93 S.Ct. at 2621.
416. Id.
banning allegedly obscene publications. Justice Brennan, in a brief dissent, joined by Justices Stewart and Marshall, argues that the statute under which Miller was prosecuted is unconstitutionally overbroad and invalid on its face. However, while Justice Brennan quietly acknowledges that his dissents in Miller and Paris Adult Theatre I v. Slaton\(^4\)\(^1\)\(^7\) "represent[] a substantial departure from the course of our prior decisions,"\(^4\)\(^1\)\(^8\) the intensity of his exceedingly lengthy dissent in Paris Adult Theatre I makes clear that Justice Brennan reluctantly turned his face against the Roth/Memoirs tradition as redefined by the Miller majority.


The Burger court decided five major obscenity cases on June 21, 1973. None was more important than Miller v. California.\(^4\)\(^1\)\(^9\) However, Paris Adult Theatre I v. Slaton,\(^4\)\(^2\)\(^0\) Kaplan v.

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417. 413 U.S. 49, 73, 93 S.Ct. 2628, 2642 (1973).

418. 93 S.Ct. at 2627.

419. 413 U.S. 15, 93 S.Ct. 2607 (1973), discussed supra.

California, 421 United States v. 12 200-Ft. Reels, 422 and United States v. Orito 423 were instrumental in illustrating the direction of the Court's intended application of the obscenity laws. After Miller, Paris Adult Theatre I is the most important of the "Miller cases," owing to the eloquence of its two main authors; Chief Justice Burger delivering the opinion of the Court, and Justice Brennan dissenting, wherein he acknowledges his "substantial departure from the course of [his] prior [opinions]." 424

Yet, there are other elements of Paris Adult Theatre I that make it noteworthy. Paris Adult Theatre I concerned an attempt by the State of Georgia to enjoin two adult movie theatres from exhibiting allegedly obscene films. The theatres had prominently displayed signs which forbade entry to minors and there was no evidence


424. Miller, 93 S.Ct. at 2627, (Brennan, J. dissenting).
presented at the non-jury trial that minors had ever entered the theatres.\footnote{425} As such, the trial judge dismissed the State's civil complaints, notwithstanding his finding that "'obscenity is established.'"\footnote{426} He held that the theatres had posted adequate notices of the adult nature of their films; therefore, the theatres' "'reasonable protection against the exposure of these films to minors, is constitutionally permissible.'"\footnote{427} The Georgia Supreme Court unanimously reversed and held that the films "'should have been enjoined since their exhibition is not protected by the First Amendment.'"\footnote{428}

Chief Justice Burger, delivering the opinion of the Court, began by underlining the Court's desire to encourage the States to carefully "define the area in which they may chart their own course in dealing with obscene material."\footnote{429}

Thus, the Court approved civil actions, such as

\footnote{425} 93 S.Ct. at 2632.
\footnote{426}  Id.
\footnote{427}  Id. at 2632-2633.
\footnote{428}  Id. at 2633, quoting from 228 Ga. 343, 347, 185 S.E.2d 768, 770.
\footnote{429} 93 S.Ct. at 2633.
those in *Paris Adult Theatre I*, so long as they comply with the standards set forth in *Miller v. California*, wherein, Burger reiterates, the Court "sought to clarify the constitutional definition of obscene material subject to regulation by the States."\(^{430}\) Under those guidelines, the court vacated and remanded *Paris Adult Theatre I* for reconsideration under "the First Amendment standards set forth in *Miller v. California*."\(^{431}\)

In addition to endorsing the applicability of civil sanctions in the obscenity area, the Court also held that expert testimony was unnecessary to prove obscenity. Rather, the Court held, "the films, obviously, are the best evidence of what they represent."\(^{432}\) This, the Court held, had been the law in obscenity cases since *Roth*. Quoting *Ginzburg v. United States*, the court added, "'the materials [are] sufficient in themselves for the determination of the question'" of obscenity.\(^{433}\)

\(^{430}\) Id.

\(^{431}\) Id. at 2642.

\(^{432}\) Id. at 2634, footnote omitted.

Finally, with respect to the community affected by the work, Chief Justice Burger wrote for Court, "we categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only." 434 He then goes on, in a cogent and thorough manner, to support the Court's long recognition of the States' rights to regulate obscene material in both commerce and in public places, provided such regulation is consistent with First Amendment guarantees. 435 Specifically, with respect to the necessity for such regulation, Chief Justice Burger observes that "from the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs." 436 For example, Congress restricts

434. Id. at 2635.
435. Id.
436. Id. at 2637.
associational rights by means of Anti-Trust and Securities Laws.\textsuperscript{437} In light of such accepted regulations, he wonders at the First Amendment absolutist's apparent hypocrisy in advocating restrictions "in the marketplace of goods and money, but not in the marketplace of pornography."\textsuperscript{438}

Why then, he queries, do those who accept the assumption that a proper education requires the reading of certain books, which study enriches one's life, then deny "the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to anti-social behavior?"\textsuperscript{439}

A fine argument, no question; however, it still begs the question--will watching Woody Allen movies turn one into a comedian? This, of course, Chief Justice Burger does not address, nor would his doing so serve to resolve the intractable obscenity question. Nevertheless, the Chief

\textsuperscript{437} Id.

\textsuperscript{438} Id. at 2637-2638.

\textsuperscript{439} Id. at 2638.
Justice is nothing if not relentless in his support of the constitutionality of obscenity laws, and the skewering, albeit mild, of what he sees as the hypocritical posturing of his opponents. Again, he wonders at the sincerity of those who willingly advocate regulations to protect what they view as public health and public places, while at the same time insisting that the states await a "'laissez-faire' market solution to the obscenity-pornography problem";\textsuperscript{440} And this, no less, from "'people who have never otherwise had a kind word to say for laissez-faire,' particularly in solving urban, commercial, and environmental pollution problems."\textsuperscript{441}

Likewise, the advocates of obscenity who base their reasoning on rights of privacy are also given short shrift by Chief Justice Burger: "Nothing, however, in this Court's decision intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty'

\textsuperscript{440} Id. at 2639.

to watch obscene movies in places of public accommodation." Thus, while giving credence to the privacy rights set out in Stanley v. Georgia, Chief Justice Burger goes on to state that the zone of privacy set out in Stanley applies only to one's home and does not follow distributors or consumers throughout the chain of supply. "The idea of a privacy right and a place of public accommodation are, in this context, mutually exclusive."

Finally, with regard to the doctrinaire absolutist's claims that the state has no right to control an individual's moral thoughts, Chief Justice Burger analogizes that "the fantasies of a drug addict are his own and beyond the reach of Government, but Government regulation of drug sales is not prohibited by the Constitution." Likewise, the idea that consenting adults are free

442. 93 S.Ct. at 2640. (emphasis added).

443. Id. at 2640, citing inter alia United States v. Orito, 413 U.S. 139, 141-143, 93 S.Ct. 2674, 2676-2678; and United States v. 12 200 Ft. Reels, 413 U.S. 123, 126-129, 93 S.Ct. 2665, 2667-2669, discussed infra.

444. 93 S.Ct. at 2640.

445. Id. at 2641.
to do as they please is without foundation, as laws against specific unacceptable conduct are common to all the states.\textsuperscript{446} Thus, Chief Justice Burger concludes, it is the right of a free society "'to maintain a decent society,'"\textsuperscript{447} and State obscenity laws which comply with the \textit{Miller} mandate shall be deemed constitutional.

While Chief Justice Burger’s opinion may not be perfect, the intensity of Justice Brennan’s dissent seems surprising. After all, \textit{Miller} and \textit{Paris Adult Theatre I} were not dramatic departures from \textit{Roth}. Granted, \textit{Miller} eliminated Justice Brennan’s "utterly without redeeming social value test," and \textit{Paris Adult Theatre I} extended the applicability of State obscenity laws, but neither opinion drastically altered the \textit{Roth/Memoirs}

\textsuperscript{446} Id., n.15." The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.' Statutes making bigamy a crime surely cut into an individual’s freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision." (citations omitted.) Id.

\textsuperscript{447} 93 S.Ct. at 2641, quoting from \textit{Jacobellis v. Ohio}, 378 U.S. at 199, 84 S.Ct. at 1684 (Warren, C.J., dissenting opinion).
obscenity test which Justice Brennan had himself authored. Thus, we must take Justice Brennan at
his word when he declares in Paris Adult Theatre I that he is convinced the approach he initiated
sixteen years before in Roth, culminating in the
"Miller cases," could possibly "bring stability to
this area of the law without jeopardizing the
fundamental First Amendment values, and I have
concluded that the time has come to make a
significant departure from that approach."448

Justice Brennan begins by noting the obvious;
that is, that the Roth/Memoirs test of obscenity
"did not provide a definition covering all
situations. . . nor, finally, did it ever command a
majority of the court."449 Accordingly, in an
effort to deal with the diversity of opinion in
the obscenity area the Court began the practice of
"per curiam reversals of convictions for the
dissemination of materials that at least five
members of the court, applying their separate
tests, deemed not to be obscene."450 While

448. 93 S.Ct. at 2642.
449. Id. at 2646.
450. Id. at 2646-2647. This procedure was the
result of the Court's decision in Redrup v. New
York, 386 U.S. 767, 87 S.Ct. 1414 (1967), and
Justice Brennan appears to prefer the *per curiam* approach to that which he felt would result from the *Miller* cases," he apparently continued to agonize over an approach which resolved cases on a case by case basis but offered no guidance to legislators as to what materials could be designated as unprotected by the First Amendment. Thus, Brennan concluded that the problem of vagueness could not be resolved when attempting to define obscenity. Indeed, Brennan ruminates that "no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations...." The result then, is a failure of the law to provide adequate notice of exactly what kinds of materials are prohibited from dissemination, which denies an accused the right to be held responsible only for that which

resulted in the disposal of at least thirty-one cases between 1967 and 1973. 93 S.Ct. at 2647, n.8. (citations omitted.)

451. "...I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level...." 93 S.Ct. at 2647.

452. 93 S.Ct. at 2648.

453. Id. at 2649 (citations omitted).
he could reasonably understand to be proscribed.454

Yet, Brennan stops short of adopting the First Amendment absolutist views of his fellow justices Douglas and Black.455 He states that such an approach would "strip[] the States of power to an extent that cannot be justified by the demands of the Constitution...."456 Furthermore, as Justice Brennan makes clear, there are legitimate areas of regulation that support the constitutionality of laws prohibiting obscenity as they relate to concerns about juveniles, obtrusive exposure of publications, and pandering.457

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455. Justice Black left the Court in 1971.

456. 93 S.Ct. at 2657.

457. In this regard, Justice Brennan quotes from Redrup v. New York, 386 U.S. at 769, 87 S.Ct. at 1415 as articulating "the state interests at stake." 93 S.Ct. at 2658-2659: "'In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Massachusetts, 321 U.S. 158 [64 S.Ct. 438] 88 L.Ed. 645; cf. Butler v. Michigan, 352 U.S. 380 [77 S.Ct. 524] 1 1Ed.2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' Cf. Breard v. Alexandria, 341 U.S. 622 [71 S.Ct. 920] 95 L.Ed.
however, as is obvious from the foregoing discussion, Justice Brennan strongly disagrees with the majority's elimination of the "utterly without redeeming social value" element of the Roth/Memoirs definition of obscenity. It is this element which Justice Brennan believes ensures a modicum of protection from those who would otherwise usurp First Amendment guarantees in the area of obscenity. Indeed, Justice Brennan appears to save his sharpest criticism for Justice Burger's argument that requiring the State to prove a work "utterly without redeeming social value" forces prosecutors to prove a negative. Brennan states, "one should hardly need to point out that under the third component of the Court's test the prosecution is still required to 'prove a negative' -- i.e., that the material lacks serious literary, artistic, political or scientific value." Brennan wonders whether this will make

1233; Public Utilities Common v. Pollak, 343 U.S. 451 [72 S.Ct. 813] 96 L.Ed. 1068. And in none was there evidence of the sort of "pandering" which the Court found significant in Ginzburg v. United States, 383 U.S. 463 [86 S.Ct. 942] 16 L.Ed.2d 31."

458. Miller, 93 S.Ct. at 2613.

459. 93 S.Ct. at 2655.
it easier to suppress questionable material, since
determinations of obscenity "will necessarily
remain in doubt until final decision by this
Court."460 As such, he argues: "[T]he new
approach will not diminish the chill on protected
expression and derives from the uncertainty of the
underlying standard. I am convinced that a
definition of obscenity in terms of physical
conduct cannot provide sufficient clarity to
afford fair notice, to avoid a chill on protected
expression, and to minimize the institutional
stress, so long as that definition is used to
justify the outright suppression of any material
that is asserted to fall within its terms."461

Whether one considers Justice Brennan's
predictions to have been especially prophetic
would likely depend upon whether one accepts the
logic of the Miller test. Advocates of the Miller
test, and there are many, would argue that the
Miller test has, since its inception, provided
sufficient constitutional notice to producers and
distributors of obscenity, so as to avoid Justice


460. Id. at 2656.

461. Id.
Brennan's dire predictions of state obscenity laws having a chilling effect on protected expression. Conversely, opponents of the Miller test, and there are also many, would argue that Brennan's predictions have been borne out.

In any event, what is apparent from Justice Brennan's dissent in Paris Adult Theatre I, is the fact that he makes demands of specificity upon obscenity laws that are not made upon other laws. For example, Justice Brennan's primary point is that obscenity laws cannot avoid an element of vagueness which requires judicial interpretation. However, this argument simply ignores the fact that numerous laws require the application of judicial interpretation. Indeed, "such judgment is characteristic of a body of law containing terms such as 'breach of peace,' 'negligence,' and 'due process of law.'" Notwithstanding the fact that these terms do not lend themselves to precise definition, they are


463. Id.
nevertheless given effect throughout Anglo-American jurisprudence. 464

Justice Brennan’s criticism of Miller’s elimination of the "utterly without redeeming social value" element of Roth/Memoirs, ultimately fails for the same reasons. He worries that the Miller "LAPS" element ("literary, artistic, political, or scientific value") will prove more restrictive than Roth/Memoirs: "Before today, the protections of the First Amendment have never been thought limited to expressions of serious literary or political value." 465 However, this reading of the Miller "LAPS" prong overstates the importance of the Roth/Memoirs "utterly without redeeming social value element," which Brennan himself regarded as "the key to the conceptual basis of Roth and our subsequent opinions." 466 The Miller "LAPS" test simply removed the hypocrisy of certain results under the Roth/Memoirs test which "required only some skillful additions and

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464. Id.

465. 93 S.Ct. at 2654-2655 (Emphasis original), (Footnotes omitted).

466. Id. at 2654.
references to save the most extreme materials from regulation."467

Consequently, while Justice Brennan makes a strong case for the adoption of obscenity laws which, as advocated by Redrup, are addressed only to concerns about distribution of obscene materials to juveniles, obtrusive exposure of obscene materials to unconsenting adults, and pandering, his arguments in support of his position are not as persuasive as his earlier obscenity opinions. Nevertheless, beginning with his dissent in Paris Adult Theatre I, Justice Brennan’s position vis-a-vis obscenity was to be predicated upon the following conclusion: "I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly ‘obscene’ contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and

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legitimate interests through regulation of the manner of distribution of sexually oriented material."\textsuperscript{468}


Chief Justice Burger framed the issue in \textit{Kaplan v. California},\textsuperscript{469} as "whether expression by word alone can be legally 'obscene' in the sense of being unprotected by the First Amendment."\textsuperscript{470} \textit{Kaplan} involved the purchase, by an undercover police officer, of a book entitled \textit{Suite 69}. The book contained no pictures, and so differed with the only prior case in which the Supreme Court had found a book to be obscene.\textsuperscript{471} The Court had routinely gone to great lengths to protect books on the basis of First Amendment guarantees.\textsuperscript{472} Indeed, books clearly "seem[ed] to

\begin{itemize}
\item \textsuperscript{468} 93 S.Ct. at 2662.
\item \textsuperscript{469} 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492, (1973).
\item \textsuperscript{470} 93 S.Ct. at 2683.
\item \textsuperscript{471} 93 S.Ct. at 2683, n.3: "That case was \textit{Mishkin v. New York}, 383 U.S. 502, 86 S.Ct. 958 (1966). . and the books involved were very similar in content to \textit{Suite 69}. But most of the \textit{Mishkin} books, if not all, were illustrated."
\item \textsuperscript{472} 93 S.Ct. at 2683, n.3, (string citations omitted). See e.g. \textit{Memoirs v. Massachusetts}, 383 U.S. 413, 86 S.Ct. 975 (1966).
\end{itemize}
have a different and preferred place in our hierarchy of values, and so it should be."\textsuperscript{473}

Nevertheless, the Kaplan Court held that obscenity was not confined to solely pictorial material: "Obscenity can, of course, manifest itself \textsuperscript{[1]} in conduct, \textsuperscript{[2]} in the pictorial representation of conduct, or \textsuperscript{[3]} in the written and oral description of conduct."\textsuperscript{474} Therefore, the court stated, all such materials would be imbued with First Amendment protections unless and until they "collide with the long settled position of this Court that obscenity is not protected by the Constitution."\textsuperscript{475} Thus, the Court concluded that written material would be subject to state regulation, even if based upon "unproveable assumptions" and speculation about anti-social behavior caused by obscene materials.\textsuperscript{476} Interestingly, this prompted less comment by both the majority and dissenters than did prior cases dealing with pictorial obscenity.\textsuperscript{477} This

\textsuperscript{473} 93 S.Ct. at 2684.

\textsuperscript{474} Id.

\textsuperscript{475} Id.

\textsuperscript{476} Id.

\textsuperscript{477} Id.
inexplicable anomaly appears all the more curious
in the face of the Court's long-standing
uneasiness with regulations which threatened First
Amendment rights related to books. Surely, there
is less threat to unconsenting adults and
juveniles from materials which are non-pictorial
in nature than there is from pictorial materials.
Likewise, there would appear to be less likelihood
of pandering non-pictorial materials.
Notwithstanding these factors, the dissenters'
options are nevertheless correspondingly weak, at
least in relation to the obvious and potential
threat of censorship caused by state regulations
of allegedly obscene written material.

In any event, while Kaplan is not the most
important of the "Miller cases," it demonstrates
dramatically the extent to which obscenity law was
changed by Miller. In addition to Chief Justice
Burger's succinct application of Miller to written
material, he also quickly dispatches with the
lingering question of the use of expert testimony
in obscenity cases. In Kaplan, the prosecution

477. Chief Justice Burger delivered the opinion of
the court. Justice Douglas filed a separate
dissent. Justice Brennan filed a brief dissent
and was joined by Justices Stewart and Marshall.
tendered expert testimony concerning the obscene nature of the book, *Suite 69*. Based upon its decision in *Paris Adult Theatre I*, the Court in *Kaplan* rejects "any constitutional need for 'expert' testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence."\(^{478}\)

In other words, in obscenity cases, the material "speaks for itself."

4. *United States v. 12 200 Ft. Reels of Super 8mm Film* - The Modern Test of Obscenity and the Right of Privacy.

*Stanley v. Georgia*\(^ {479}\) (1969), firmly established the right of an individual to privately possess obscene material. The defendant in *United States v. 12 200 Ft. reels of Super 8mm Film*,\(^ {480}\) sought to extend the scope of *Stanley* to the importation of obscene materials for strictly

\(^{478}\) 93 S.Ct. at 2685. (Citations omitted). However, "the defense should be free to introduce appropriate expert testimony." 93 S.Ct. at 2685, citing *Smith v. California*, 361 U.S. 147, 164-165, 80 S.Ct. 215 (1959) (Frankfurter, J. concurring).

\(^{479}\) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, (1969), See discussion supra.

\(^{480}\) 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d. 500, (1973).
personal use. The Court had earlier refused to extend the privacy protections of *Stanley* to the importation of obscene materials for commercial use. However, *12 200 ft Reels* posed the difficult issue of whether the rights of individual privacy in the home as enunciated by *Stanley* create correlative rights of an individual to acquire and import obscene materials for private use in the home. Thus, what would appear to have been a logical extension of *Stanley* instead created an illogical dilemma for the Court. The Court had made it abundantly clear that it would not sanction obscene materials, yet, the Court’s holding in *Stanley* served to lead inevitably to the conclusion that importation or distribution for private use would be tolerated. How, for example, could an individual exercise his constitutional right to privacy by possessing obscenity in his own home, while at the same time be prohibited from getting it there in the first place? Good question; but, as the Court notes, *Stanley* depended, not on any First Amendment

right to purchase or possess obscene materials, but on the right to privacy in the home."\textsuperscript{482} To extend the right further, Chief Justice Burger wrote for the Court, would be to "overlook[] the explicitly narrow and precisely delineated privacy right on which \textit{stanley} rests."\textsuperscript{483}

Nevertheless, Chief Justice Burger recognizes the logic of the defendant's argument. Yet, he attributes the argument to "the seductive plausibility of single steps in a chain of evolutionary development of a legal rule [which] is often not perceived until a third, fourth or fifth, 'logical' extension occurs."\textsuperscript{484} Thus, the Court's ruling in \textit{stanley} might, several steps down the evolutionary chain, lead to the inevitable conclusion that to possess obscenity one must also be permitted to acquire and import it. The Court, however, refuses to sanction such a conclusion. Instead, as Chief Justice Burger

\textsuperscript{482} 93 S.Ct. at 2668, citing \textit{United States v. Orito}, 413 U.S. 139, 141-143, 93 S.Ct. 2674, 2677-2678 (1973), discussed \textit{infra}, decided the same day as the other \textit{Miller} cases," including 12 200-ft. Reels.

\textsuperscript{483} 93 S.Ct. at 2668.

\textsuperscript{484} Id.
states, such "gestative propensity" dictates that a line be drawn, beyond which the law may not go. 485 Stanley "represents such a line of demarcation," 486 as between obscenity and the right to privacy. Consequently, the Court refuses to extend the holding of Stanley to protect the importation of obscenity for private use.

Chief Justice Burger notes that while Congress has it within its power to allow an exemption for the importation of obscenity for private use, it has chosen not to do so. 487 Finally, Chief Justice Burger makes one last parry at his detractors, 488 by observing that arguments in favor of importing obscenity for private use hold no more water than would an argument

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485. Id.
486. Id.
487. 93 S.Ct. at 2669.
488. Justice Douglas may fairly be described as Chief Justice Burger's detractor. His dissent is vintage Douglas, making ample use of historical and sociological allusions in support of his absolutist view of the First Amendment. See dissent of Justice Douglas, 93 S.Ct. at 2670. Justice Brennan also dissents (joined by Justices Stewart and Marshall) on grounds that the Federal Statute in question, Title 19, U.S.C., Section 1305(a), is "overbroad and unconstitutional on its face." 93 S.Ct. at 2674.
"compelling the Government to permit importation of prohibited or controlled drugs for private consumption as long as such drugs are not for public distribution or sale."


To those libertarians who had hoped that the privacy rights established by Stanley v. Georgia would logically extend to other links in the chain of possession, United States v. Orito was the final nail-in-the-coffin. Certainly United States v. 12-200 ft. Reels, and other cases represented the first nails in that coffin; however, it was Orito which most clearly delineated the parameters of the constitutionally protected zone of privacy. As Chief Justice Burger describes the case, the issue is whether "Stanley has firmly established the

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489. 93 S.Ct. at 2669.
right to possess obscene material in the privacy of the home and that this creates a correlative right to receive it, transport it, or distribute it."\textsuperscript{494} The Court answers in the negative. Chief Justice Burger, writing for the Court,\textsuperscript{495} states that obscene materials lost their constitutional protection when such material "moved outside the home area protected by \textit{Stanley}."\textsuperscript{496}

Hopeful libertarians had reasoned that earlier decisions which upheld the Constitutional right to possess obscene materials, must logically lead the Court to find a Constitutional right to transport and distribute obscene materials. They posited the question, how can one possess obscene materials in the privacy of one’s home if one cannot receive it, by means of some transportation, through the chain of distribution? They reasoned that logical deduction dictates that to do one, a person must also be permitted to do

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\textsuperscript{494} 93 S.Ct. at 2677.

\textsuperscript{495} Justice Douglas dissented and filed an opinion. Justice Brennan dissented and was joined by Justices Stewart and Marshall.

\textsuperscript{496} 93 S.Ct. at 2675. (footnote omitted).
the other. Yet, it is this argument which the Supreme Court rejected in *Orito*.

Chief Justice Burger responds to such arguments by noting that nothing in the Constitution mandates that the special safeguards applicable to privacy in the home, shall apply equally to public venues. 497 Indeed, he observes, "it is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public." 498 Accordingly, the Court held that the government had "a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce." 499

It is worth noting that Chief Justice Burger's use of the phrase "commercial environment," is particularly instructive here. It reflects his continuing frustration with the

497. Id. at 2677: "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education." (citations omitted).

498. 93 S.Ct. at 2677.

499. Id. at 2678.
then liberal proponents of obscenity who also championed protection of the environment. Chief Justice Burger viewed their position as hypocritical and wondered how they could advocate restrictions on development of the natural environment while rejecting all restrictions on development of the commercial environment. 500

Moreover, the Chief Justice writes, the fact that obscene materials might be transported in interstate by a private carrier and for private use would not negate the power of Congress to regulate the distribution of such materials, inasmuch as private materials obviously become public once they leave the zone of privacy encompassed by the home; furthermore, this would be true regardless of the intent of the transporter. 501 Nor does transportation by common carrier, protect obscene materials from regulation, regardless of intent. Acknowledging the cogency of the Solicitor General’s arguments on behalf of the government, the Chief Justice

500. Other Burger examples of First Amendment absolutist’s inconsistencies appear in Paris Adult Theatre I, 93 S.Ct. at 2637-2641.

501. 93 S.Ct. at 2678.
points out that tariffs issued to common carriers routinely include a right of inspection:
"Resorting to common carriers, like entering a place of public accommodation, does not involve the privacies associated with the home." Thus, did the Court reverse and remand the case to the U.S. District Court for the Eastern District of Wisconsin for reconsideration of its order dismissing the indictment on grounds of overbreadth. Justice Brennan, joined by Justices Stewart and Marshall dissented on grounds that the Statute was overbroad. Justice Douglas dissented, reasoning that since the First Amendment protected the citizenry from Government control of their minds, it must also protect the citizenry from

502. Id. at 2677, n.5.

503. The District Court had dismissed the indictment, finding it void on its face for overbreadth. The District Court held that the Statute (Title 18, Section 1462, U.S.C.), which prohibited the transportation of obscene material by common carrier in interstate commerce, failed to distinguish between public and non-public transportation. The Government appealed directly to the Supreme Court under the then applicable law, Title 18, Section 3731, U.S.C., later amended. 93 S.Ct. at 2676.

504. 93 S.Ct. at 2680.
Government control over the kinds of books, including obscene books, which an individual could read while on a common carrier.505

505. Id. at 2679.
C. CLARIFYING THE ELEMENTS OF THE THREE-PRONG MILLER TEST

1. Hamling v. United States - Community Standards to be Determined by the Vicinage From Which the Jurors are Drawn.

Just as Roth reflected the culmination of almost one hundred years of obscenity law, and set the Court on a new course, so too did Miller reflect the culmination of the Roth/Memoirs test of obscenity and set the court on yet another new tack in obscenity law. Likewise, while the effectiveness of the Roth test of obscenity lay in the clarifying decisions such as Memoirs, which followed it, so too was the effectiveness of the Miller test of obscenity to be determined by the clarifying decisions, such as Hamling, which followed it.

Hamling v. United States\textsuperscript{506} was the first major case to be decided following the Miller cases. In many respects, it serves as a companion piece to Miller, in that it represents a solidification of the Miller doctrine. Hamling was also the first major obscenity case authored by Justice Rehnquist. In Hamling, Justice

\textsuperscript{506} 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590, (1974).
Kennquist expands upon the community standard element of the Miller test of obscenity, and addresses, inter alia, the issues of community standards, vagueness, and scienter.

Justice Rehnquist begins his tome on obscenity law by discussing the evolution of the Roth/Memoirs/Miller troika of obscenity law decisions. He notes that just as "the Memoirs plurality test . . . represented a sharp break with the test of obscenity as announced in Roth v. United States, . . . our decision in Miller v. California reformulated the test for the determination of obscenity vel non . . ."507

Indeed, he continues, the Court of Appeals in Hamling held that Miller "prescribed a more relaxed standard of review under the Federal Constitution for obscenity convictions."508

Whether a non-national community standard represents a more relaxed standard of review is open to question; nevertheless, the Hamling Court held that the standards to be applied are those of

507. 418 U.S. at 102. Justice Rehnquist seems particularly enamored of the Latin phrase vel non, meaning, or not.

508. Id. at 102-103.
the community or vicinage from which the jury is
drawn. 509

To those who would question the average
juror’s ability to apply the standards of his or
her own community, Justice Rehnquist responds that
the average juror is well suited to making such a
determination, "just as he is entitled to draw on
his knowledge of the propensities of a
'reasonable' person,"510 in a non-obscenity case.
Moreover, he states, such holding is consistent
with the "Miller holdings":511 "Miller rejected
the view that the First and Fourteenth Amendments
require that the proscription of obscenity be
based on uniform nationwide standards of what is
obscene, describing such standards as
'hypothetical and unascertainable.' "512

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509. Id. at 105.
510. Id. at 104.
511. 418 U.S. at 104. Also referred to by Justice
Rehnquist as the "Miller cases" and the "Miller
decisions," this term has been applied throughout
this paper as referring to the five obscenity
cases decided by the Court on June 21, 1973. See
discussion supra, regarding Miller v. California,
413 U.S. 15, 93 S.Ct. 2607; Paris Adult Theatre I
v. Slaton, 413 U.S. 49, 93 S.Ct. 2628; Kaplan v.
California, 413 U.S. 413 U.S. 115, 93 S.Ct. 2680;
United States v. 12 200-Ft. Reels, 413 U.S. 123,
93 S.Ct.2665; and United States v. Orito, 413 U.S.
139, 93 S.Ct. 2674.
Interestingly, Justice Rehnquist, not unlike his brethren before him, cannot ignore the slings and arrows of Justice Brennan's trenchant dissent. In response to Justice Brennan's contention that it is unconstitutional to try a Federal obscenity case based upon local community standards, Justice Rehnquist points out that, in fact, most obscenity prosecutions involve the application of differing community standards. For example, distributors of obscenity who are prosecuted under the Federal statutes "may be subjected to varying community standards in the various judicial districts into which they transmit the materials...." Similarly, "those same distributors may be subjected to varying degrees of criminal liability in prosecutions by the States for violation of State obscenity statutes...." Thus, Rehnquist concludes, Brennan's objections to local community standards are not persuasive.

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512. 418 U.S. at 104, quoting from Miller, 413 U.S. at 31.
513. Id. at 106.
514. Id.
515. Id.
516. Id. In addition to the examples noted,
observes, the principal reason for instructing a jury that their "judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."517 In other words, the application of local community standards was meant to protect, not oppress, the accused. While Justice Rehnquist's conclusion may be disputed by some, the fact remains, that Justice Rehnquist's position vis a vis local community standards was to remain the controlling law in obscenity cases.

In any event, while the Court in Hamling advocated the application of local community standards, it refused to limit the admission by trial courts of evidence confined solely to the Judicial District in which an obscenity trial is conducted. Indeed, the Court held, "evidence of standards existing in some place outside of [the]

Rehnquist also cites United States v. 12 200-Ft Reels of Film, supra, and Chief Justice Warren's dissent in Jacobellis v. Ohio, supra in support of local community standards.

517. Id. at 107. (citations omitted).
particular district" would be properly admissible if the trial court believed it would assist the jury. 518

Consistent with Rehnquist's holding on community standards is his dismissal of Justice Brennan's support for the use of expert witnesses by the Defense. He notes that District Courts have wide discretion in their determination of whether expert witness testimony should be admitted, 519 and specifically, with regard to obscenity cases, he notes that the Court had already determined that expert testimony was not necessary in obscenity cases 520.

With regard to the Petitioner's argument that the Federal obscenity laws 521 are unconstitutionally vague, Justice Rehnquist notes that such arguments ignore both the Miller decision and its precedents. He points out that in Roth, the Court reiterated its long held position, that a statute's "lack of precision is

518. Id. at 106.
519. Id. at 108.
520. Id. at 104, citing Paris Adult Theatre I v. Slaton, supra, 413 U.S. at 56, 93 S.Ct. at 2628.
not itself offensive to the requirement of due process."\textsuperscript{522} Thus, when the obscenity statutes are weighed on the scales of common sense,\textsuperscript{523} they "give adequate warning of the conduct proscribed and mark... 'boundaries sufficiently distinct for judges and juries fairly to administer the law....'\textsuperscript{524}

Justice Rehnquist goes on to cite \textit{Miller} and \textit{12 200-Pt. Reels of Film} as further supporting the constitutionality of the obscenity laws.\textsuperscript{525}

Indeed, he states, to hold otherwise would be to place impossible burdens upon statutory draftsmen. \textit{Miller} established "a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is "patently offensive" within the meaning of the obscenity test set forth in the Miller cases.... [which

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\textsuperscript{522} 418 U.S. at 111.

\textsuperscript{523} Id. "...'[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices...'" \textit{United States v. Petrillo}, 332 U.S. 1, 7-8, also quoted in \textit{Roth}, 354 U.S. at 491-492. Id.

\textsuperscript{524} Id. at 111, quoting \textit{Roth}, at 491-492, quoting \textit{Petrillo}, at 7.

\textsuperscript{525} 418 U.S. at 112-113.
cases] were intended neither as legislative drafting handbooks nor as manuals of jury instructions.\textsuperscript{526} Likewise, Rehnquist gives short shrift to the petitioner's contention that the obscenity statutes fail to give an adequate warning of criminality. Once again, Rehnquist notes the \textit{Miller} cases made the definition of obscenity clearer, by adding a "'clarifying gloss'" to prior constructions of the Federal obscenity statutes.\textsuperscript{527}

Finally, as concerns the issue of scienser, Justice Rehnquist held that the Supreme Court had long before resolved the issue, by holding that an accused could be convicted if he is shown to have had knowledge of the nature and contents of the mailed materials. In \textit{Rosen v. United States},\textsuperscript{528} the Court held that under the then existing Federal obscenity statute,\textsuperscript{529} an accused would be held accountable if a lewd and lascivious paper

\textsuperscript{526} Id. at 114-115.

\textsuperscript{527} Id. at 116, quoting \textit{Bouie v. City of Columbia}, 378 U.S. 347, 353 (1964).

\textsuperscript{528} 161 U.S. 29 (1896), discussed \textit{supra}.

\textsuperscript{529} Rev. Stat. SS 3893, 19 Stat. 90, c. 186.
"'was deposited in the mail by one who knew or had notice at the time of its contents,'" even if the accused "'did not regard the paper as one that the statute forbade to be carried in the mails.'" In addition, later obscenity cases, such as *Mishkin v. New York* and *Ginsburg v. New York* also support the *Rosen* decision that knowledge of the contents, character, and nature of the materials is constitutionally sufficient to bring an accused within the ambit of the Federal obscenity statutes.

In concluding his *Hamling* opinion, Justice Rehnquist deals with several evidentiary and procedural matters by holding for the Court that the petitioner's claims of error do not give rise to reversible error.

530. 418 U.S. at 120, quoting *Rosen* at 41.
531. Id. "'Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States.'" Id.
532. 383 U.S. 502 (1966), discussed *supra*.
533. 390 U.S. 629 (1968), discussed *supra*.
534. 418 U.S. at 123.
535. "Petitioners have very much the laboring oar in showing that such rulings constitute reversible
Justice Brennan, following his dissent in *Paris Adult Theatre I v. Slaton*, \(^{536}\) seeks to demonstrate by way of a lengthy dissent in *Hamling*, \(^{537}\) that he is fully converted to the cause of libertarianism, vis a vis obscenity. As noted previously, Justice Brennan views the obscenity statutes as "unconstitutionally overboard and therefore invalid on [their] face." \(^{538}\) While he maintains that that ground alone compels reversal, he goes on to argue that the Court’s establishment of local community standards must, in his view, compel reversal, \(^{539}\) in that it denies the petitioners due process of law. \(^{540}\) Inasmuch as Justice Brennan’s dissent is error, since ‘in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence.’” Id. at 124-125, quoting from *NLRB v. Donnelly Co.*, 330 U.S. 219, 236, (1947).

536. 413 U.S. 49, 113 (1973), discussed supra.

537. 418 U.S. at 141. Justice Brennan was joined in dissent by Justices Stewart and Marshall. Justice Douglas filed a short separate dissent, Id. at 140-141.

538. 418 U.S. at 142.

539. Id. at 142-152.

540. See Justice Rehnquist’s counter arguments, supra.
primarily an expansion upon his earlier dissent in Paris Adult Theatre I,\textsuperscript{541} he tends not to break any new ground. Nevertheless, the Hamling opinions provide an interesting harbinger of the obscenity decisions handed down over the ten year period following Hamling. Not surprisingly, the ideological counterpoint precipitated by the Miller decisions and expanded upon in Hamling, continued in earnest, causing scholars to wonder if obscenity could ever be adequately defined.


Defendant Billy Jenkins was convicted of distributing, that is, showing the film "Carnal Knowledge" in a movie theatre in Albany, Georgia.\textsuperscript{542} The U.S. Supreme Court reversed. Justice Rehnquist, writing for the Court in \textit{Jenkins v. Georgia},\textsuperscript{543} held pursuant to Hamling v.

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\textsuperscript{541} 413 U.S. 49, 113 (1973).

\textsuperscript{542} The Georgia Supreme Court affirmed, and the Defendant appealed to the U.S. Supreme Court.

\textsuperscript{543} 417 U.S. 815, 94 S.Ct. 2750, 41 L.Ed.2d. 642, (1974). Justice Brennan concurred in the result and filed an opinion in which he was joined by Justices Stewart and Marshall. Justice Douglas concurred in the result and filed a statement.
United States, that Defendants convicted prior to the Miller cases, would be afforded the benefit of appellate review. Under that standard, Jenkins, who was convicted under the definition of obscenity set forth in Memoirs v. Massachusetts, was entitled to such review. Memoirs, it may be recalled, defined material as being obscene, if, inter alia, "its predominant appeal is to prurient interest," which, of course, is not inconsistent with the Miller definition of obscenity. However, where the Georgia Supreme Court ran afoul of Miller, was in concluding that the jury's finding of obscenity precluded further appellate review. While Miller stated that

544. 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590 (1974), discussed supra, and decided the same day as Jenkins v. Georgia.

545. This was true only of those defendants who, like Jenkins, had cases on appeal when the Miller cases were decided in 1973.


547. Memoirs at 977. "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." (Citations and footnotes omitted). Id.

548. 94 S.Ct. at 2754-2755.
"the questions of what appears to the 'prurient interest' and what is 'patently offensive' under the obscenity test which it formulates are 'essentially questions of fact,' "549 nothing in Miller indicated that juries would henceforth have unbridled discretion in determining what is 'patently offensive.' "550 To the contrary, the Court in Miller, "made it plain that under that holding 'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or described patently offensive 'hard core' sexual conduct....'." 551 Thus, the Court concluded in Jenkins, "it would be wholly at odds with this aspect of Miller to uphold an obscenity conviction based upon a Defendant's depiction of a woman with a bare

549. Id. at 2754, quoting Miller, 93 S.Ct. at 2618.

550. Id. at 2755.

551. Id., quoting from Miller, 93 S.Ct. at 2616. Two examples of 'hard core' conduct given by the Miller court were: "(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25, 93 S.Ct. 2607.
midriff, even though a properly charged jury
unanimously agreed on a verdict of guilty."\(^{552}\)

In this respect, Jenkins draws a compelling
distinction between "soft-core" and "hard-core"
depictions of sexual conduct. Jenkins makes clear
that nudity alone will not bring a work within the
ambit of the Miller definition of obscenity,
regardless of the community in which the work is
distributed or shown.

Yet, Jenkins was not the watershed
libertarians may have hoped it would be, since the
Court once again strengthened the community
standard element of Miller, by holding that trial
courts may instruct juries to apply community
standards, without specifying what community is
involved. Thus, the Court concluded, states have
wide latitude in framing statutes that define
obscenity in terms of "contemporary community
standards" as provided in Miller, "without further
specification, as was done [in Jenkins], or [they]
may choose to define the standards in more precise
geographic terms as was done by California in
Miller."\(^{553}\) Accordingly, juries would henceforth

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\(^{552}\) Id. at 2755.

\(^{553}\) Id. at 2753.
be permitted to rely solely upon their understanding of the community from which they were drawn.\textsuperscript{554} Clearly the Court's holding served to further diminish attacks on jury instructions which did not finely circumscribe the parameters of the applicable community.

Justice Brennan's concurring opinion is a reiteration of his exasperation with the Court's continuing attempts to deal with "'the intractable obscenity problem,'"\textsuperscript{555} through repeated "case by case determinations of obscenity."\textsuperscript{556} Quoting from his dissent in \textit{Paris Adult Theatre I},\textsuperscript{557} he observes that the "'institutional stress,'"\textsuperscript{558} on the Court will never be alleviated so long as the court is forced to review each case and "make an independent determination of obscenity vel non."\textsuperscript{559}

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554. Id.


556. Id. at 2756.


558. 94 S.Ct. at 2756, quoting from \textit{Paris Adult Theatre I}, 93 S.Ct. at 2656.

559. 94 S.Ct. at 2757.
Although Justice Brennan will henceforth fight an uphill battle in this regard, his observations are not without validity. The *Miller* definition of obscenity did resolve many of the earlier problems related to defining obscenity, however, the prosecution of "Carnal Knowledge" in *Jenkins*, proved that probably no definition of obscenity could completely protect distributors of questionable obscenity and provide "'sufficient clarity to afford fair notice.'" 560

3. *Smith v. United States* - Community Standards Based Upon what is Accepted in the Community.

Federal Postal Inspectors have long been among the more aggressive advocates of undercover sting operations. Such operations usually involve inspectors using fictitious names to communicate through the mails with targeted individuals. *Smith v. United States* 561 involved just such an operation. The defendant Smith was convicted of violating a Federal statute 562 which prohibited

560. Id. at 2756, quoting from *Paris Adult Theatre* I, 93 S.Ct. at 2656.


562. Title 18, United States Code, Section 1461.
the mailing through the U.S. mails, of obscene materials. Smith had mailed the materials within
the State of Iowa at the request of an undercover postal inspector.

Smith challenged his conviction by arguing that his mailings did not violate Iowa state law
at the time of the mailings, since Iowa law at that time punished as a misdemeanor, only the
dissemination of obscenity to minors.563 Smith had, of course, mailed only to adult postal
inspectors.

The Supreme Court agreed with the District Court below,564 that community standards in
Federal prosecutions were to be established by "what is in fact accepted in the community as a
whole. [Moreover] in making that determination, the jurors were entitled to draw on their own
knowledge of the views of the average person in the community as well as the evidence presented as
to the State law on obscenity and as to materials available for purchase."565

563. "Dissemination of obscene materials to adults was not made criminal [at the time] or even
proscribed." 431 U.S. at 294.

564. 431 U.S. at 297-298.

565. Id.
Thus, Justice Blackmun, writing for the Court, rejected the Appellant's argument that the District Court should have defined community standards consistent with the State legislature's definition of community standards. As Justice Blackmun noted, this was, after all, a Federal prosecution, and "the community standards aspects of §§1461 likewise present issues of Federal Law, upon which a state statute such as Iowa's cannot have conclusive effect." 567

Justice Blackmun then posits the question: Does such an approach effectively obliterate the States' rights to control or not to control obscenity as they see fit? That is, if the states wish not to regulate obscenity, will not the Court's holding in Smith render the states impotent, since all obscenity prosecutions will then be handed over to the Federal Government? Blackmun thinks not.

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566. Justice Blackmun was joined in his opinion by Chief Justice Burger, as well as Justices White, Powell, and Rehnquist. Justice Powell filed a concurring opinion. Justice Brennan dissented, joined by Justices Stewart and Marshall, and Justice Stevens dissented.

567. 431 U.S. at 303-304.
He observes that the Court's holding in *Stanley v. Georgia*\(^{568}\) permitting individuals to possess obscene materials in the privacy of their own homes, did not create a correlative right to distribute obscenity.\(^{569}\) Thus, he concludes, "the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive state."\(^{570}\)

Finally, Justice Powell, in a typically succinct concurring opinion, noted his agreement with the majority that Congress never intended to incorporate state obscenity statutes into Federal obscenity statutes,\(^{571}\) and that changes in state statutes do not alter a state's community standards.\(^{572}\) Nevertheless, Justice Powell re-emphasized his belief that *Smith* did not limit


\(^{569}\) 431 U.S. at 307.

\(^{570}\) Id.

\(^{571}\) Id. at 310.

\(^{572}\) Id.
a state's power to tailor its obscenity statutes to its needs and to define community standards "as it chooses for purposes of applying its own laws."

4. **Splawn v. California** - Evidence of Pandering Relevant to Determination of Obscenity.

**Splawn v. California** came as a considerable shock to those who had believed the relative comprehensiveness of the **Miller** definition of obscenity would eliminate the Government's use of pandering evidence in future prosecutions. Petitioner Splawn was originally convicted in 1971 for the sale of two reels of obscene film. After years of procedural machinations which would have destroyed someone of less apparent conviction, Splawn found himself in the U.S. Supreme Court for the second time in 1977, some six years after his initial conviction. He challenged, *inter alia*, the trial court's

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573. Id. "Within the boundaries staked out by **Miller**, the States retain broad latitude in this respect." Id.


575. 431 U.S. at 596-597.
instructions on pandering, as well as the ex post facto nature of his conviction.\textsuperscript{576}

Justice Rehnquist, writing for the Court,\textsuperscript{577} dealt with the issue of pandering in typically unequivocal fashion: "\textit{There is no doubt} that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion or dissemination of material is relevant in determining whether the material is obscene."\textsuperscript{578} Period.

With respect to the Appellant's contention that his conviction violated the ex post facto provisions of the Constitution, Justice Rehnquist once again gives the Appellant short shrift. Splawn contended that the jury instructions given at his trial "were given pursuant to a statute enacted after the conduct for which he was prosecuted."\textsuperscript{579} Rehnquist, however, concluded

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\textsuperscript{576} See discussion \textit{infra}, accompanying note 579-581.

\textsuperscript{577} Justice Rehnquist was joined by Chief Justice Burger, and Justices White, Blackmun, and Powell. Justices Brennan, Stewart, Stevens and Marshall dissented. All but Marshall filed separate dissenting opinions.

that the new statute section cited by the Petitioner did not create a substantially new offense. 580 Rather, the new section simply approved the use of pandering evidence while refusing to create a separate offense for pandering. 581

Three out of the four dissenters filed opinions; of these, Justice Stevens makes perhaps the most salient observation when he argues that Splawn should not be convicted based upon evidence of pandering, when all he did was advertise and sell the materials as "sexually provocative" 582 materials; which, indeed they were. Thus, Justice Stevens states, "truthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose." 583

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580. 431 U.S. at 600.
581. Id. at 601.
582. Id. at 602.
Clearly, he continues, such advertising
should be encouraged, since it advises both the
interested and the repelled as to exactly what
type of material is available. Accordingly,
Justice Stevens concludes, it is absurd that Mr.
Splawn should be sent "to jail for telling the
truth about his shabby business." 585

5. Ward v. Illinois — Patently Offensive
Depictions of Sexual Conduct.

Ward v. Illinois 586 is particularly
noteworthy, not just for its commentary on the
necessary specificity required in state obscenity
statutes, but also for its exposition of the kinds
of sexually explicit materials which could be
prosecuted by the States under the second prong of
the three-prong Miller test of obscenity.

Ward was convicted under the Illinois
Obscenity Statute of selling obscene
publications. 587 The publications depicted
sadomasochistic acts. The Illinois Supreme Court

584. Id. at 604.

585. Id.

586. 431 U.S. 767, 97 S.Ct. 2085, 52 L.Ed.2d. 738,

587. 97 S.Ct. at 2088.
upheld the constitutionality of the Illinois statute and Ward appealed. On appeal, Ward argued, *inter alia*, that the Illinois statute was vague and overbroad, and that sadomasochistic materials did not conform with the examples of patently offensive materials set forth in *Miller*. Quoting from the length and breadth of the major portions of *Miller*, Justice White, writing for the Court, affirmed Ward's conviction.

The Court first found the Illinois statute to be devoid of vagueness and overbreadth. Indeed, the Court noted that the Illinois statute clearly complied with the tenets of the *Miller* test of obscenity. The Appellant had argued that

588. Id. at 2087, quoting from *Miller v. California*, 413 U.S. 15, 24-25, 93 S.Ct. 2607, 2615.

589. Justice White was joined by Chief Justice Burger, and Justices Rehnquist, White, Blackmun, and Powell. Justice Brennan filed a dissent on usual grounds of overbreadth, and was joined by Justice Stewart. Justice Stevens filed a dissenting opinion in which Justices Brennan, Stewart, and Marshall joined.

590. 97 S.Ct. at 2088-2089. The Court pointed out, however, that even if the Illinois statute had not complied with *Miller*, the "appellant had ample guidance from the Illinois Supreme Court that his conduct did not conform to the Illinois law," Id. at 2088, in that Illinois had had previously held sadomasochistic materials to violate Illinois law. (Citations omitted.)
sacons companionship in the examples of sexually explicit materials which would be deemed patently offensive. 592 The examples in Miller were "'[never] intended to be exhaustive.'" 593

Most assuredly, writes Justice White, "there was no suggestion in Miller that we intended to extend constitutional protection to the kind of flagellatory materials that were held obscene in Mishkin v. New York." 594

The necessity of clarifying the patently offensive element of the Miller test had long been anticipated by the Court. Indeed, as noted above, the Court had been compelled to deal with a similar question in Hamling, decided only a year after Miller. Justice Burger had simply set out

591. Miller, 93 S.Ct. at 2615.

592. 97 S.Ct. at 2089, citing Miller, Id.


in Miller to provide "a few plain examples of
patently offensive descriptions as guideposts for
the States."\footnote{595} Nothing in his opinion suggests
that only those descriptions would thereafter be
considered obscene.

In addition, Appellant Ward failed in his
tryptna to attack his conviction on general
grounds that his materials were not obscene under
Miller. The Court held that this attack was
foreclosed to the Appellant by virtue of the fact
that the Illinois statute not only conformed to
Miller, but went beyond it by retaining the
stricter "no redeeming social value" test of
Memoirs v. Massachusetts.\footnote{596} Thus, the Court
held, state obscenity statutes which adhere to
even stricter guidelines than Miller, will be
deemed constitutional.\footnote{597}

Likewise, the Court held that a state statute
is not to be considered overly broad or
"open-ended" because it does not provide an
express and exhaustive list of the kinds of

\footnotemark

\footnotetext{595. Miller, 93 S.Ct. at 2615.}

\footnotetext{596. 97 S.Ct. at 2089, citing Memoirs v.
Massachusetts, 383 U.S. 413, 86 S.Ct. 975 (1966).}

\footnotetext{597. 97 S.Ct. at 2089-2090.}
conduct intended to be proscribed under the second prong of the *Miller* test.\(^{598}\) A state's intention, as in *Ward*, to embrace the *Miller* test of obscenity, must lead inevitably to the conclusion that the state meant to proscribe the kinds of material embodied in the second prong of the *Miller* test.\(^{599}\) To assume otherwise would lead "...to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its statute by refusing to take cognizance of the specificity requirement set down in *Miller*.\(^{600}\)

Accordingly, the Court established the validity of state statutes that conform to *Miller*, and noted, as well, that it had previously upheld various federal obscenity statutes by using "an identical approach" in interpreting those statutes.\(^{601}\)

\(^{598}\) Id. at 2090.

\(^{599}\) Id.

\(^{600}\) Id.

\(^{601}\) Id. at 2091, citing *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 n.7, 93 S.Ct. 2665, 2670 n.7, (1973).
Nevertheless, Justice Stevens strongly
dissented, arguing that specificity was lacking in
the Illinois statute. 602 Interestingly, he quotes
Miller as supporting his position that only "hard
core" sexual material should be proscribed; which
causes one to wonder what sadomasochistic
materials are, if not "hard core." 603
Justice Stevens further argues that while many
states had "tak[en] Miller at face value" 604 and
amended their statutes accordingly, many others,
such as Illinois, had done "'little more than pay
lip service to the specificity requirement in
Miller.'" 605 Indeed, Justice Stevens observes,
the Court had stated in Jenkins v. Georgia, 606
that "...all expression which is not 'within
either of the two examples [of patently offensive
conduct] given in Miller' or 'sufficiently similar

602. Id. at 2091-2094.
603. Id. at 2091, quoting Miller, 93 S.Ct. at
2616-2617.
604. Id. at 2092.
605. Id., quoting from F. Schauer, The Law of
Obscenity 167 (1976). See other citations to
Professor Schauer's brilliant study of obscenity
noted supra, at the beginning of this paper.
to such material to justify similar treatment" would be constitutionally protected.607

In any event, it is clear that what Justice Stevens finds so exasperating, is the continuing attempts by the Government to control obscenity through the use of criminal sanctions. Surely, he argues, given the "inherent vagueness of the obscenity concept,"608 controlling the dissemination of obscenity would be better left to the civil law.

6. **Pinkus v. United States** - Community Standards not Determined by Children or Most Sensitive Members of Community.

In yet another refinement of the community standard element of the **Miller** test of obscenity, the Supreme Court in **Pinkus v. United States**,609 held that children and the most sensitive members of a community should not be included in the definition of the community by whose standards the obscenity was to be judged.

607. 97 S.Ct. at 2093, quoting **Jenkins**, Id., 94 S.Ct. at 2755.

608. 97 S.Ct. at 2093.

The Defendant/Petitioner in Pinkus was first convicted of mailing obscene materials in 1973 under the Miller definition of obscenity, even though the charged crimes had taken place when Roth/Memoirs was the law. The trial Court had instructed the jury that the respective community affected by the materials, could include children and sensitive persons. The Ninth Circuit reversed and remanded on grounds that the defendant should be retried under the Roth/Memoirs definition of obscenity. The defendant was convicted again in 1976 under essentially the same jury instructions relative to children and sensitive persons.

The Supreme Court granted certiorari to address, inter alia, the defendant's argument that children and most sensitive members of the community should not have been included in the trial court's instructions.610

Chief Justice Burger, writing for the Court,611 acknowledged that "the Court had been

610. The jury instruction read as follows: "'In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men women and children from all walks of life.'" 436 U.S. at 296. (Emphasis added by Supreme Court).
ambivalent on this point, having sustained the conviction in *Roth* ... where the instruction included children, and having intimated in *Ginzburg* ... that it did not necessarily approve the inclusion of 'children' as part of the community instruction." 

Thus, while the trial court had given virtually the same instruction at the petitioner’s trial as that approved in *Roth*, the *Pinkus* Court held that "children are not to be included for these purposes as part of the 'community' as that term relates to the 'obscene materials' proscribed by 18 U.S.C. §1461." 

Chief Justice Burger noted that a jury instruction which included children would undoubtedly cause a jury to lower the average.

611. Chief Justice Burger was joined by Justices White, Blackmun, Rehnquist, and Stevens. Justice Stevens wrote a concurring opinion, and Justice Brennan wrote a dissenting opinion in which he was joined by Justices Stewart and Marshall on grounds that the obscenity statute was overbroad. Justice Powell dissented on grounds that any error was harmless beyond a reasonable doubt.


613. Id. at 297, n.3.

614. Id. at 297.
person standard by which the obscene materials were judged.\textsuperscript{615} In addition, while a jury instruction including "sensitive persons" as part of the equation was held to be proper, the Court held it improper to instruct the jury to focus upon the effect of the materials on the most susceptible or sensitive members of the community.\textsuperscript{616} Thus, an instruction which includes sensitive persons is acceptable, so long as the instruction does not center upon such persons.\textsuperscript{617}

This would appear, however, to be a sword that cuts both ways. At the other end of the spectrum, an instruction which includes members of a deviant sexual group, would be proper. The trial court in \textit{Pinkus} had instructed the jury that they should consider the appeal of the obscene materials, "'...to the prurient interest of the average person of the community as a whole or the prurient interest of members of a deviant sexual group at the time of mailing.'"\textsuperscript{618} The Court

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\textsuperscript{615} Id. at 298.
\textsuperscript{616} Id. at 300.
\textsuperscript{617} Id. at 301.
\textsuperscript{618} Id. at 302, (Emphasis added).
concluded that nothing should prevent a trial court from instructing a jury "on prurient appeal to deviant sexual groups as part of an instruction pertaining to appeal to the average person when the evidence ... would support such a charge."\textsuperscript{619}

Justice Stevens graciously provided the fifth vote for the majority in \textit{Pinkus}, albeit not without a parting shot. He points out that his preference would have been to have the Petitioner’s case reversed with instructions to dismiss the indictment; however, given the fact that Chief Justice Burger’s opinion "is faithful to the cases on which it relies,"\textsuperscript{620} he agreed to join the majority.

7. \textit{Brockett v. Spokane Arcades, Inc.} - Prurient Interest and Shameful or Morbid Interest in Sex.

\textit{Brockett v. Spokane Arcades, Inc.}\textsuperscript{621} is an example of a case given preferential treatment by both the Court of Appeals and the Supreme Court, owing solely to its free speech implications. In \textit{Brockett} the State of Washington passed a nuisance

\textsuperscript{619} Id.

\textsuperscript{620} Id. at 305.

\textsuperscript{621} 472 U.S. 491, 105 S.Ct., 2794, 86 L.Ed.2d 394 (1985).
statute which included as part of its definition of "prurient," "that which incites lasciviousness or lust." Four days before the statute was to have taken effect, seven various businesses and individuals filed suit in U.S. District Court seeking injunctive and declaratory relief. Following trial, the District Court upheld the constitutionality of the Statute and the Plaintiffs appealed. On appeal, the Ninth Circuit Court of Appeals reversed on grounds that the statute was overbroad. The Court of Appeals held that the Washington state legislature had rendered the statute unconstitutional, "by including 'lust' in its definition of 'prurient', [thus causing] ... the statute to reach material that merely stimulated normal sexual responses...." 623

The Supreme Court accepted the case, but not without some misgivings. Indeed, Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, was compelled to write a concurring opinion, in which she expressed her and her fellow Justices' concerns about accepting

622. 86 L.Ed. at 399, quoting from Wash. Rev. Code SS 7.48A.010. (8).

623. 86 L.Ed. at 400.
cases for Federal review before the highest state courts had the opportunity to construe their statutes. 624

The Brockett case was cause for considerable expectation among many in the First Amendment bar, in that it represented the Court’s first major case dealing primarily with prurience since the Miller cases twelve years before. In retrospect, it is fair to say that the decision was a disappointment to liberals and conservatives alike. To some conservatives, no question, it was a relief, in that it eliminated only a natural, healthy connotation of "lust" as an element of "prurience," while others had hoped the Court would either eliminate prurience from the equation altogether, or broaden it by embracing the Washington definition of prurience as "lust" as set out in Brockett. The Brockett Court’s decision to focus on abnormal, unhealthy lust and

624. Justice White wrote the Court’s opinion and was joined by Chief Justice Burger and Justices Blackmun, Rehnquist, Stevens and O’Connor. As noted above, Justice O’Connor wrote a concurring opinion in which she was joined by the Chief Justice and Justice Rehnquist. Justice Brennan joined by Justice Marshall dissented on grounds that the entire statute was overbroad. Justice Powell did not participate in the decision.
lascivious interest, and the shameful or morbid
interest in sex, was a disappointment to many
conservatives. Liberals, on the other hand, were
pleased to have at least a modicum of "lust"
removed from the definition of "prurience".

Justice White begins his discussion of
prurience by setting forth the oft-quoted
definition of prurient interest set out in Roth v.
United States.interestingly, the importance

625. 454 U.S. 476, 487, n.20, quoted in Brockett,
86 L.Ed. at 401:
"I. e., material having a tendency
to excite lustful thoughts. Webster's
New International Dictionary (Unabridged,
2d Ed., 1949) defines 'prurient', in
pertinent part, as follows:
"'itching; longing; uneasy with desire
or longing; of persons, having itching,
morbid, or lascivious longings; of
desire, curiosity, or propensity,
lewd...."

"Pruriency is defined, in pertinent part,
as follows:
"'...Quality of being prurient; lascivious
desire or thought....'"

"See also Mutual Film Corp v. Industrial
Comm'n. 236 U.S. 230. 242 [59 L. Ed. 2d
552, 35 S.Ct. 387], where this Court said as
to motion pictures: '...They take their
attraction from the general interest,
eager and wholesome it may be, in their
subjects, but a 'prurient interest' may be
excited and appealed to ......." (Emphasis
added).

"We perceive no significant difference
between the meaning obscenity developed
in the case law and the definition of the
of this footnote definition has probably made it one of the most quoted footnotes in the last thirty years. Indeed, Justice White goes on to note that even the **Miller** test of obscenity "...retained, as had **Memoirs**, the **Roth** formulation as the first part of the test, without elaborating on or disagreeing with the definition of 'prurient interest' contained in the **Roth** opinion."^{626}

Thus, did **Miller** also accept the definition of prurience set forth in **Roth** "footnote 20."^{627} However, Justice White continues, the Court concurred with the Court of Appeals that the reference to "'materials having a tendency to excite lustful thoughts,'"^{628} was not "...intended

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**ALI, Model Penal Code, SS207.10(2) (Tent Draft No. 6, 1957), viz:**

"'...A thing is obscene if, considered as a whole its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters ...' See Comment, id., at 10, and the discussion at page 29 et seq."

626. 86 L.Ed. at 402.

627. Id.

to characterize as obscene material that provoked only normal, healthy sexual desires."\textsuperscript{629}

Accordingly, the Court goes on to conclude with the Court of Appeals, that the case law supports a definition of prurience which includes the following phrase: "'a shameful or morbid interest in nudity, sex, or excretion.'\textsuperscript{630} Clearly, Justice White states, any statute such as Washington's, which condemns 'good, old fashioned healthy' interest in sex,\textsuperscript{631} is overbroad and invalid on its face.\textsuperscript{632} Thus, the Court held given the absence of "countervailing considerations," the Washington law could be invalidated only to the extent that the word "lust" was overbroad and thus affected materials otherwise protected by the First Amendment.\textsuperscript{633}

\textsuperscript{629} Id. at 402.

\textsuperscript{630} Id., quoting from Roth, 454 U.S. at 487 n.20. "[W]e have held, prurience may be constitutionally defined for the purposes of identifying obscenity, as that which appeals to a shameful or morbid interest in sex." Brockett, 86 L.Ed., at 406, citing Roth.

\textsuperscript{631} Id. at 403, quoting from the Ninth Circuit's opinion, 725 F.2d. 482, 492 (1984).

\textsuperscript{632} Id. at 403.

\textsuperscript{633} Id. at 406.
As noted previously, Justice White's solution to the severability issue, that is, severing out that portion of the statute which is invalid, was not overwhelmingly popular with his fellow justices. Justice O'Connor argues in her concurring opinion that henceforth "Federal Court[s] should await a definitive construction by a state court rather than precipitously indulging a facial challenge to the constitutional validity of a state statute."\textsuperscript{634}

Even if one agrees with Justice O'Connor's views concerning federal restraint, there can be no doubt that \textit{Brockett} provided both sides of the First Amendment obscenity bar with a welcome clarification of the "prurience" element of the \textit{Miller} definition of obscenity: more grist for the mill, as it were.

8. \textit{Pope v. Illinois} - Serious Value Determined by Reasonable Person Test and not Community Standards.

As has been discussed, \textit{supra}, the first two prongs of the \textit{Miller} test of obscenity, prurient interest and patent offensiveness, are to be determined with reference to community standards.

\textsuperscript{634}. Id. at 409.
The third prong, serious value, however, is to be determined not with reference to contemporary community standards, but rather, with reference to a "reasonable person" test. This was ruling of the Supreme Court in *Pope v. Illinois*,\(^6^3^5\) an opinion of relatively recent vintage, which gives credence to the observation that obscenity is indeed, an intractable problem. Justice White, writing for a fractured court,\(^6^3^6\) reversed the Petitioner's case, holding that the trial court's serious value instruction violated the First and Fourteenth Amendments. The Court then remanded the case to the Court of Appeals to determine if the violation constituted harmless error. The trial court had erroneously instructed the jury that they were to determine serious value by applying contemporary community standards.


\(^6^3^6\). Justice White was joined by Chief Justice Rehnquist, and Justices Powell, O'Connor, and Scalia. Justice Blackmun filed an opinion concurring in part and dissenting in part. Justice Brennan filed a dissenting opinion. Justice Stevens filed a dissenting opinion in which Justices Blackmun, (in part), Marshall (in part) and Brennan joined.
The Court held unequivocally (to the extent this is possible in an obscenity case), that there was never any suggestion in the Court's obscenity cases "... that the question of the value of an allegedly obscene work is to be determined by reference to community standards."\(^{637}\) Indeed, the Court noted, cases such as Smith v. United States,\(^{638}\) were explicitly "to the contrary."\(^{639}\) In Smith the Court had stated plainly that the first two prongs of the Miller test, relative to prurient interest and patent offensiveness, were to be "issues of fact for the jury to determine applying contemporary community standards."\(^{640}\) However, the Smith Court continued, the serious value prong of the Miller test, "...is not discussed in Miller in terms of contemporary community standards."\(^{641}\) Rather, the proper test of literary, artistic, political, or scientific

\(^{637}\) 95 L.Ed. 2d at 445.

\(^{638}\) 431 U.S. 291, 97 S.Ct. 1756 (1977), cited in Pope, Id.

\(^{639}\) 95 L.Ed. 2d. at 445.

\(^{640}\) Id.

\(^{641}\) Id., quoting from Smith, 431 U.S. at 301.
value, is whether a reasonable person could find value in the materials, taken as a whole. Justice Scalia, in his concurring opinion, joined with the majority relative to its harmless error holding, observing that it was "implausible that a community standard embracing the entire State of Illinois would cause any jury to convict where a 'reasonable person' standard would not." Nevertheless, Justice Scalia, while joining with the Court’s majority in its embrace of the "reasonable man" standard with respect to the third prong of the Miller test, expresses his exasperation with the enduring difficulty of trying to clearly define obscenity. After all, he observes, is it not so that "...many accomplished people... have found literature in Dada, and art in the replication of a soup can." For the Courts then to attempt to decide pursuant to the LAPS test, "'What is Beauty' is a novelty even by today's standards." Thus, he concludes, all

642. Also referred to by the acronym, LAPS.
643. Id. at 445.
644. Id. at 447.
645. Id. at 448.
646. Id.
the opinions in *Pope* suggest nothing short of a re-examination of *Miller*. 647

In light of Justice Scalia's comment, it is interesting to ruminate on the likely outcome of a re-examination of *Miller*. As Justice Blackmun notes in his opinion, 648 Justice Scalia appears to support the view advocated by the dissenters, 649 that the *Pope* opinion "envisions that even a minority view among reasonable people that a work has value may protect that work from being judged 'obscene.'" 650

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647. Id.

648. Id., concurring in part and dissenting in part.

649. See Justice Stevens' dissent, Id. at 449-457, joined by Justice Marshall, Justice Blackmun, and Justice Brennan (except for footnote 11, wherein Justice Stevens states that "the insurmountable vagueness problems involved in criminalization are not, in my view, implicated with respect to civil regulation of sexually explicit material, an area in which states retain substantial leeway." Id. at 455, n.11 (citations omitted)).

650. 95 L.Ed.2d. at 449. The majority's opinion in this regard is as follows: "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole. The instruction at issue in this case was therefore unconstitutional." Id. at 445.
Likewise, as Justice Stevens points out in his dissent,\textsuperscript{651} "communicative material of this sort is entitled to the protection of the First Amendment if \textbf{some reasonable persons} could consider it as having serious literary, artistic, political, or scientific value."\textsuperscript{652} Such views as Justices Blackmun's and Stevens' thus beg the question of how the Court might rule on future obscenity cases. If Justice Scalia is actually more of a libertarian than a conservative, as is suggested by his opinion in \textit{Pope},\textsuperscript{653} he could conceivably constitute the fifth vote, along with Justices Brennan, Marshall, Blackmun, and Stevens in overturning \textit{Miller}. Only time will tell.


\textit{New York v. Ferber}\textsuperscript{654} was decided in 1982; thus, approaching \textit{Ferber} at this point in our

\begin{verbatim}
651. 95 L.Ed. at 449.
652. Id. at 452. (Emphasis original).
653. Id. at 447-448. See e.g., \textit{Texas v. Johnson} _____ U.S. _____, 109 S.Ct. 2533, 105 L.Ed.2d. 352 (1989), wherein Justice Scalia sided with the "libertarian" majority in holding that free speech protects burning of the American flag.
\end{verbatim}
discussion, does not conform with our prior approach in which cases were generally discussed in order of their place within the development of a definition of obscenity. There is a reason for this. Ferber represents a sort of bookend in the struggle to define obscenity, a struggle which, in Anglo-American law began with Regina v. Hicklin,655 and, ostensibly, ended with Ferber. Hicklin and Ferber represent what may paradoxically be considered both opposite ends of the obscenity spectrum, and common ends of the obscenity spectrum.

Hicklin, it may be recalled, defined obscenity as follows: "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 hand a publication of this sort may fall."656 The practical effect of this definition was to create an obscenity per se rule; that is, if any portion of a work tended to corrupt a susceptible mind (such as that of a child), the

655. L.R. 3 Q.B. 360 (1868).

656. Id. at 371.
work would be deemed obscene, per se. The practical effect of Ferber, on the other hand, was an obscenity per se rule for child pornography; that is, if a work depicts a child engaged in sexually explicit conduct (as defined by statute), the work is deemed obscene, per se. Thus, the elaborate safeguards established by the Miller test of obscenity, do not apply to child pornography.657

The Ferber decision was not unexpected in view of the Court's prior decisions. The Court had long expressed concern about obscene materials which affected children. As Justice Brennan noted in his concurring opinion in Ferber, "The State has a special interest in protecting the well-being of its youth.... This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it

657. "The Miller standard, like all general definitions of what may be banned as obscene, does not reflect the state's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." 458 U.S. at 761.
seeks only to protect consenting adults from exposure to such material."\textsuperscript{658}

The chain of events which led bookstore owner Paul Ira Ferber to the Supreme Court, was not unlike that of other convicted purveyors of obscene materials. Petitioner Ferber was convicted under a New York statute\textsuperscript{659} which prohibited persons from promoting a sexual performance by a child under the age of 16. Ferber was convicted of distributing, that is selling, films which depicted young boys masturbating. Following a jury trial, Ferber was convicted under the New York statute of promoting an obscene sexual performance,\textsuperscript{660} which Section did not require proof of obscenity.\textsuperscript{661} In other


\textsuperscript{659} Article 263.15, New York Penal Law. Applicable statute sections set forth at 458 U.S. at 750-751.

\textsuperscript{660} Id.

\textsuperscript{661} Id. at 752.
words, the New York Statute was a per se, or strict liability statute. Ferber’s convictions were upheld by the Appellate Division of the New York State Supreme Court. However, the New York Court of Appeals (The Supreme Court in New York) reversed, holding that the statute would adversely affect the dissemination of material otherwise protected by the First Amendment, and holding the statute overbroad because it would adversely affect material "which dealt with adolescent sex in a realistic but non-obscene manner."

JUSTICE WHITE, writing for the Court, addressed the sole issue of whether the First Amendment permits a state to proscribe "...the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene." The answer was a

662. Id. at 753, quoting 52 N.Y. 2d. 674, 681.

663. JUSTICE WHITE was joined in his opinion by Chief Justice Burger, and Justices Powell, Rehnquist, and O’Connor. Justice O’Connor filed a concurring opinion. Justice Brennan filed an opinion concurring in the judgment, in which Justice Marshall joined. Justice Blackmun concurred in the result. Justice Stevens filed an opinion concurring in the judgment.

664. Id. at 753, (Emphasis added), quoting from the State’s petition for certiorari, 454 U.S. 1052 (1981).
resounding, yes.

The Court held that free speech does not give individuals the right to exploit children for their own sexual gratification. Within this context, the Court noted that there are certain limited areas of speech which are of such nominal social value that "any benefit which may be derived from them is clearly outweighed by the social interest in order and morality." Child pornography was deemed to be one such area of speech.

The Court thus recognized that while Miller represented an accommodation between protection and censorship, no such accommodation was necessary where child pornography was involved. In support of this position, Justice White noted that the states' interests in "safeguarding the physical and psychological well-being of a minor is compelling," in that "a democratic society rests, for its continuance, upon the healthy,


666. Id. at 756.

well-rounded growth of young people into full maturity as citizens."\textsuperscript{668} Therefore, the Court was compelled to sustain legislation "aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."\textsuperscript{669}

Accordingly, the Court held that the Miller test for obscenity was not applicable to child pornography and adjusted the Miller test in the following manner: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."\textsuperscript{670} Likewise, the Court held that the serious value, third prong of the Miller test, is inapplicable to child pornography, since "a work which, taken on the whole, contains serious literary, artistic,

\textsuperscript{668} Id. at 757, quoting from \textit{Prince v. Massachusetts}, 321 U.S. 158, 168 (1944).

\textsuperscript{669} Id. at 757.

\textsuperscript{670} Id. at 764.
political, or scientific value may nevertheless embody the hardest core of child pornography."$^{671}$

The effect of *Ferber* was thus to effectuate a per se or strict liability test for obscenity. The Federal Government, as well as numerous states, responded to *Ferber* by prohibiting both the distribution, and in many cases, the mere possession of child pornography.$^{672}$ Congress responded to *Ferber* by passing the May, 1984 Amendments to Title 18, Sections 2251-2255, United States Code. The Amendments now make it unnecessary to prove that a visual depiction is obscene: If the visual depiction involves the use of a minor engaging in sexually explicit conduct, and the production of such depiction involved the use of a minor engaged in such conduct, it is obscene, *per se*.$^{673}$

$^{671}$ Id. at 761. Justice O'Connor also saw fit to re-emphasize this point in her concurring opinion, Id. at 774.


$^{673}$ "Section 2252. Certain activities relating to material involving the Sexual exploitation of minors.
   (a) Any person who--
   
   (1) Knowingly transports or ships in
It is important to note that the Amendments were passed after the Supreme Court had spoken on the subject. Thus, their constitutionality had

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interstate or foreign commerce or mails any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or though the mails, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than two years nor more than 15 years, or both. Any
already, in essence, been upheld. In passing the
Child Protection Act of 1984, Congress found
that: "(1) child pornography has developed into a
highly organized multi-million dollar industry
which operates on a nationwide scale; (2)
thousands of children including large numbers of
runaway and homeless youth are exploited in the
production and distribution of pornographic
materials; and (3) the use of children as subjects
or pornographic material is harmful to the
physiological, emotional, and mental health of the
individual child and to society." 675

In so finding, Congress echoed the opinion of
Justice White in Ferber. Writing for the Court,
Justice White stated that the only conceivable way
to control the production and distribution of
child pornography, was to dismantle every link in
the chain of its creation and dissemination. 676

674. Public Law 98-292, 98th Congress; May 21,
1984.

675. Id.

676. "The distribution of photographs and films
depicting sexual activity by juveniles is
intrinsically related to the sexual abuse of
children in at least two ways. First, the
Indeed, compelling state interests in the protection of children dictated no less drastic approach.677

Thus, did Ferber bring obscenity law full circle. From Hicklin's awkward attempts to control the dissemination of all obscene materials on grounds that they may tend to corrupt children, to Ferber's eloquent attempt to proscribe the production of obscene materials which did, in fact, corrupt children, the definition of obscenity returned, in part, to its source. Obscene materials for adults, while not protected by the First Amendment, nevertheless retain some protection from unchecked censorship, owing to the strict definition of obscenity set forth in Miller and its progeny. While First Amendment absolutists may disagree, the circumscription of obscenity is a policy supported by a vast majority

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materials produced are a permanent record of the children's participation and her harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which required the sexual exploitation of children is to be effectively controlled." 458 U.S. at 759. (Emphasis added).

677. See discussion supra.
of the general public. Accordingly, the Miller definition of obscenity, does indeed represent "an accommodation between the state's interests in protecting the 'sensibilities of unwilling recipients' from the exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws." 678

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678. 458 U.S. at 756.
IV. THE MODERN DEFINITION OF OBSCenity IN PERSPECTIVE

It seems almost querulous to question the extraordinary accomplishments of the American courts in their journey from the Hicklin definition of obscenity to Miller, and on through Ferber, but in examining obscenity law from the perspective of one hundred years of legal precedents, one is compelled to ask whether the intractable obscenity problem has finally been resolved. The very nature of law in a democratic society dictates that conflicting opinions be compromised in order to reach acceptable resolutions to difficult legal problems. Obscenity law is clearly an area in which the courts have sought to achieve the best possible compromise between First Amendment absolutists, and anti-pornographers. As the following review illustrates, the Miller definition of obscenity has not completely resolved the difficult question of how a democratic society should define obscenity. However, Miller and its progeny represent a laudable attempt to reach parity between conflicting interests. The Miller definition of obscenity is completely concordant
with the political and cultural evolution of obscenity law, and in this respect it is faithful to the hopes, desires, and concerns of its legal predecessors. The struggle to define obscenity is reflective of our society's concerns about the political, moral and free speech implications of permitting, or not permitting, the dissemination of obscene materials within the community. As such, the courts have repeatedly been asked to determine how obscenity is to be regulated, if indeed it is to be regulated at all. Miller has answered this question, but has not resolved it. Thus, the courts will undoubtedly continue to struggle, if not with the definition of obscenity, then with the application of the definition.

A. The Four Elements of Obscenity

The four elements of obscenity are (1) the nature of the work; (2) the community or class to be protected; (3) the work as a whole; and (4) the purpose of the work.

The Regina v. Hicklin\textsuperscript{679} definition of obscenity dealt with only the nature of the work.

\textsuperscript{679} L.R. 3 Q.B. 360 (1868).
"The tendency of the matter ...to deprave and corrupt...")\textsuperscript{680} and \textit{the community} or class to be protected ("...those whose minds are open to such influences, and into whose hands a publication of this sort may fall")\textsuperscript{681}, while \textit{United States v. Bennett}\textsuperscript{682} added the elements of the \textit{work as a whole} (the jury "may confine [its] attention to the marked passages")\textsuperscript{683}, and \textit{the purpose of the work} ("...the object with which this book is written is not material, nor is the motive which led the defendant to mail the book material")\textsuperscript{684}. \textit{United States v. Clarke}\textsuperscript{685} then brought these four elements together and set the course which other courts would follow, in one form or another, for the next one hundred years. Indeed, the modern definition of obscenity, as established first by \textit{Roth v. United States},\textsuperscript{686} and refined by \textit{Miller v.}

\textsuperscript{680} Id. at 371.
\textsuperscript{681} Id.
\textsuperscript{682} 24 Fed. Cas. 1093 (1879).
\textsuperscript{683} Id. at 1102.
\textsuperscript{684} Id.
\textsuperscript{685} 38 Fed. 732 (E.D. Mo. 1889).
\textsuperscript{686} 354 U.S. 476, 77 S.Ct. 1304 (1957).
California,\textsuperscript{687} embraces all four elements of obscenity.

The modern definition of obscenity is set forth in \textit{Miller} in three prongs:

(a) \textit{W}hether '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 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.\textsuperscript{688}

1. \textbf{The Nature of the Work}

The nature of the work is dealt with in the first two prongs of the \textit{Miller} definition of obscenity: prurient interest and patent offensiveness.

a. \textbf{Prurient Interest—}

Prurient interest was first established as an element of the modern definition of obscenity in \textit{Roth v. United States}.\textsuperscript{689} Recognizing that any

\textsuperscript{687} 413 U.S. 15, 93 S.Ct. 2607 (1973).

\textsuperscript{688} 93 S.Ct. at 2615. (Citations omitted).

\textsuperscript{689} 354 U.S. 476, 77 S.Ct. 1304 (1957). The term "prurient" was, however, first utilized in a major obscenity case by Judge Augustus Hand in \textit{United
restraints imposed upon freedom of speech must carry with them stringent safeguards to protect the public against unwarranted prosecutions, Justice Brennan stated that only "material which deals with sex in a manner appealing to prurient interest,"⁶⁹⁰ would be deemed obscene. Prurient interest is then defined in Justice Brennan's oft-quoted footnote 20, as, inter alia, "material having a tendency to incite lustful thoughts,"⁶⁹¹ and material whose primary appeal is to "a shameful or morbid interest in nudity, sex, or excretion."⁶⁹²

While this explanatory definition would seem to suffice, it was the vast scope of the additional definitions set out in footnote 20 that caused the Court to have to confront the prurience issue again and again. Indeed, the prurient

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States v. One Book Entitled Ulysses (Random House, claimant), 72 F.2d 705, 707 (1934), wherein Judge Hand stated that Ulysses displayed "no excess of prurient interest."

⁶⁹⁰. 77 S.Ct. at 1310 (emphasis added).

⁶⁹¹. Id., n.20.

⁶⁹². Id., quoting from the ALI Model Penal Codes, Section 207.10(2) (tent. Draft No. 6, 1957), comment at p. 10 and discussion at p. 29, et seq.
interest element of the obscenity definition did not reach its zenith until almost thirty years later in *Brockett v. Spokane Arcades, Inc.*, 693 wherein the Court held that Roth's reference to "'materials having a tendency to excite lustful thoughts,'"694 was not intended "...to characterize as obscene material that provoked only normal, healthy sexual desires."695 Rather, the Court held, the cases following Roth supported a definition of prurience which focused upon material emphasizing "'a shameful or morbid interest in nudity, sex, or excretion,'"696 and not upon material which condemns "'good, old fashioned healthy' interest in sex."697 Thus, the word "lust" in an obscenity statute would be overbroad and unconstitutionally affect materials otherwise protected by the First Amendment. However, the other definitions of prurience set

694. 86 L.Ed., at 402, quoting from Roth, 77 S.Ct., at 1310, n.20.
695. 86 L.Ed. at 402.
696. Id. at 403, quoting from Roth, Id.
697. 86 L.Ed. at 403, quoting from the Ninth Circuit's opinion, 725 F.2d 482, 492 (1984).
out in footnote 20 of Roth are still considered to be lawful when used within the context of an otherwise valid statute.

Likewise, prurience is not understood to be that which appeals only to the prurient interest of the average person. The Court in Mishkin v. New York⁶⁹⁸ rejected this argument in holding that when material is "designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied...."⁶⁹⁹ In other words, if materials are directed towards a specific deviant group, such as individuals interested in sadomasochistic materials, the materials as a whole need only to appeal to the prurient interest of that group to come within the ambit of the prurient interest prong.⁷⁰⁰ The materials need not excite or arouse the average person to be deemed prurient; rather, they may be deemed prurient if they appeal only to

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⁶⁹⁹. 383 U.S. at 508.
⁷⁰⁰. Id.
a "specifically conceived and marketed for... group." In point of fact, this would appear to contradict with the first prong of the Miller test which requires simply that "the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." However, the Court in Mishkin clearly sought to establish a test for obscenity which would reach outlandish material, which test ultimately survived the changes brought about by Miller. To hold otherwise would result in a situation wherein straight heterosexual obscenity would be deemed obscene, while inordinately deviant materials would not.

b. Patent Offensiveness—
Justice Harlan, writing for the Court in Manual Enterprises, Inc. v. Day, engrafted the second, patent offensiveness prong, onto the Roth definition of obscenity.

701. Id. at 509.

702. 93 S.Ct. 2607, 2615 (citations omitted) (Emphasis added). See also, United States v. Guglielmi, 419 F.2d 451, (4th Cir. 1969); Ripplinger v. Collins, 868 F.2d 1043, (9th Cir. 1989).

703. 370 U.S. 478, 82 S.Ct. 1432.

704. As noted supra, the Roth definition of
defined patent offensiveness as "indecency" or an "affront to current community standards of decency." 705 As such, Justice Harlan sought to clarify the Roth definition by making clear that henceforth, "only material whose indecency is self demonstrating," 706 and which appeals to the prurient interest, would be deemed obscene. 707 Thus, it may be observed that in this respect, Justice Harlan anticipated Justice Stewart's insistence that only hard-core materials be circumscribed. 708

In any event, the patent offensiveness prong of the obscenity test was not formally

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obscenity is as follows: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." 77 S.Ct. at 1311. Also presupposed in the test is the fact that obscenity is "utterly without redeeming social importance." 77 S.Ct. at 1309. See discussion, infra.

705. 82 S.Ct. at 1434.

706. Id. at 1437.

707. Id. at 1437.

adopted by the Court until *Memoirs v. Massachusetts*\(^709\) was handed down in 1966. However, unlike the "utterly without redeeming social value" element set out in *Memoirs*, the patent offensiveness element survived into the modern era of obscenity law, ultimately becoming the second prong of the three prong *Miller* definition of obscenity.\(^710\)

In *Miller*, Chief Justice Burger set forth "examples" of the kinds of representations which would be considered patently offensive:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.\(^711\)

It is important to note, however, that the list was not meant to be all-encompassing. In *Hamling v. United States*,\(^712\) and later in *Ward v. Illinois*,\(^713\), the Court emphasized that the

\(^709\) 383 U.S. 413, 86 S.Ct. 975 (1966).

\(^710\) *Miller*, 93 S.Ct. at 2615.

\(^711\) Id.


examples of patently offensive materials set out in *Miller* "'were not intended to be exhaustive'". 714 Accordingly, just as the Court in *Mishkin* broadened the reach of prurient appeal beyond that of the average person, 715 to reach materials directed at deviant groups, so too did the Court in *Ward* broaden the reach of patent offensiveness so as to proscribe the kinds of materials held to have been obscene in *Mishkin*. 716

Thus, we see that as the various elements of the modern definition of obscenity begin to coalesce, adjustments are made to accommodate various kinds of deviant materials which the courts and legislatures obviously intended to proscribe. Indeed, as the Court stated in *Smith v. United States*, 717 and *Pope v. Illinois*, 718 the first two prongs of the *Miller* test, relative to prurient interest and patent offensiveness, were

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716. 97 S.Ct. at 2089.


to be "issues of fact for the jury to
determine..." 719  This willingness to have a
properly instructed trier of fact determine the
issues of prurient interest and patent
offensiveness, would appear to be consistent with
the various adjustments made to these two prongs
of the obscenity test. In Mishkin and Ward, the
Court's explanations have the clear effect of
accommodating the needs of legislative draftsmen
who, in writing obscenity statutes, must be
specific enough to cause the statute to pass
constitutional muster, yet at the same time not be
so precise so as to require a specific statutory
reference to every sort of deviant sexual material
known to man.

2. The Community to be Protected

The second of the four elements of
obscenity, the community or class to be protected,
is encompassed by the first prong of the Miller
definition of obscenity: "[W]hether 'the average
person, applying contemporary community standards'

719. Id. at 445. Contemporary community standards
are applicable to the first and second prongs
while a reasonable person test applies to the
third (serious value) prong. See discussion
infra.
would find that the work, taken as a whole appeals
to the prurient interest."\textsuperscript{720}

The \textit{Hicklin} definition of obscenity had
effectively quashed early attempts to
differentiate among recipients of obscene
materials. Under \textit{Hicklin} the mere tendency of the
material to corrupt "...those whose minds are open
to such influences, and into whose hands a
publication of this sort may fall,"\textsuperscript{721} was enough
to condemn an entire work. Nevertheless, some
courts apparently remained sensitive to the
differing views of their educated class peers, who
advocated the publishing and distribution of
certain classical works, which might otherwise
have been classified as obscene under \textit{Hicklin}. In
\textit{Re Worthington}\textsuperscript{722} is a case in point. The court
in \textit{Worthington} reasoned that classical literature,
such as Ovid's \textit{Art of Love}, and \textit{The DeCameron} by
Boccaccio,\textsuperscript{723} "would not be bought nor appreciated
by the class of people from whom unclean

\textsuperscript{720} 93 S.Ct. at 2615, (citations omitted)
\textit{(emphasis added)}.

\textsuperscript{721} L.R. 3 Q.B. 360,371 (1868).

\textsuperscript{722} 3 N.Y.S. 361 (1884).

\textsuperscript{723} Id. at 362.
publications ought to be withheld. They are not corrupting in their influence upon the young, for they are not likely to reach them."

Judge Learned Hand expanded upon this general concept in United States v. Kennerley when he set forth the modern canon of community standards, noting that the defining words of obscenity statutes have differing meanings from time to time, or from one generation to the next. Judge Hand suggested that the proper measurement of a community's tolerance should be determined solely by jurors drawn from the respective community. In effect, Judge Hand sought to broaden the Hicklin standard from that of "a child's library ... [or] a salacious few," to that of a community standard as determined by, "the jury [of the community]...in each case."

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724. Id. at 363.
726. Id. at 121.
727. Id.
728. Id.
729. Id.
The final break with the Hicklin "least susceptible" standard, came in Judge Woolsey's decision in United States v. One Book Called "Ulysses," 730 wherein Judge Woolsey held that the proper community to judge an allegedly obscene work, is that of the "normal person," and not that of the weak or most susceptible: "It is only with the normal person that the law is concerned." 731

Judge Woolsey's holding was then refined and consolidated by the Court of Appeal's decision upholding it. In United States v. One Book Entitled Ulysses by James Joyce (Random House, Inc., claimant), 732 Judge Augustus Hand, joined by Judge Learned Hand, rejected the condemnation of a work simply because doing so may benefit the susceptible few. 733 Judge Hand then established what was to be the framework for the modern definition of obscenity. To coin a phrase, the Ulysses Rule of Obscenity may be stated as follows: Whether the dominant effect of the work

730. 5 F.Supp. 182 (S.D.N.Y. 1933).
731. Id. at 185.
732. 72 F.2d 705 (1934).
733. Id. at 707.
taken as a whole is to have a libidinous effect on
the majority of the community.  

A work's
libidinous effect may be judged by determining
whether there is an "excess of prurient
suggestion."  

This crystallized definition of obscenity
was later utilized by Justice Brennan in framing
the first modern definition of obscenity in Roth:
"Whether to the average person, applying
contemporary community standards, the dominant
theme of the material, taken as a whole appeals to
the prurient interest."  

Which test, of course, was later incorporated into the first prong of the
Miller definition of obscenity.  

The
difference, however, was that the Roth community
standard was a national one.  Miller changed this
national community standard to a local community
standard.

In Miller, Chief Justice Burger
acknowledged the seeming contradiction of a

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734. Id. at 707-708.
735. Id. at 707.
736. 77 S.Ct. 1304, 1311 (1957).
737. 93 S.Ct. at 2615.
national constitution versus a local community standard, but noted, "this does not mean that there are, or should or can be, fixed, uniform national community standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'" 738 The country is simply too big, too diverse, too unique from community to community, "...to reasonably expect that such standards could be articulated for all states in a single formulation, even assuming the prerequisite consensus exists." 739 Indeed, there is simply "'no provable 'national standard.'" 740

Following Miller, the element of local community standards was repeatedly challenged in the courts. The first such challenge appeared before the Supreme Court only a year after Miller, when the Court in Hamling v. United States, 741 held that the proper community standards to be applied in an obscenity case are those of the

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738. Id. at 2618.
739. Id.
community or vicinage from which the jury is drawn.\textsuperscript{742} Moreover, Justice Rehnquist observed, the average juror is well suited to making such a determination, "just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person,"\textsuperscript{743} in a non-obscenity case. Furthermore, he states, such holding is consistent with the "Miller holdings": "Miller rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as 'hypothetical and unascertainable.'\textsuperscript{744}

Notwithstanding the power Miller and Hamling vested in juries to determine community standards, the Supreme Court was not beyond reigning in the scope of that power. In Jenkins v. Georgia\textsuperscript{745} the Court held that the film "Carnal Knowledge" was not obscene, and stated unequivocally that nothing in Miller indicated

\textsuperscript{742} 418 U.S. at 105.
\textsuperscript{743} 418 U.S. at 105.
\textsuperscript{744} Id., quoting Miller, 413 U.S. at 31.
\textsuperscript{745} 417 U.S. 815, 94 S.Ct. 2750 (1974).
that juries would henceforth "have unbridled discretion in determining what is 'patently offensive.'"\textsuperscript{746}

Yet, at the same time, the \textit{Jenkins} Court went on to strengthen the local community standard element of \textit{Miller}, by holding that trial courts may instruct juries to apply community standards, without specifying what community is involved. Thus, the Court concluded, states have wide latitude in framing statutes that define obscenity in terms of "contemporary community standards" as provided in \textit{Miller}, "without further specification, as was done [in \textit{Jenkins}] or [they] may choose to define the standards in more precise geographic terms as was done by California in \textit{Miller}."\textsuperscript{747} Accordingly, juries would henceforth be permitted to rely solely upon their understanding of the community from which they were drawn.\textsuperscript{748} Clearly the Court's holding served to further diminish attacks on jury instructions

\textsuperscript{746} 94 S.Ct. at 2755.
\textsuperscript{747} Id. at 2753.
\textsuperscript{748} Id.
which did not finely circumscribe the parameters of the applicable community.

How then, does a jury go about determining the applicable community standards to be applied in obscenity cases? In part, the Supreme Court held in Smith v. United States,\(^\text{749}\) by determining "what is in fact accepted in the community as a whole. [Moreover] in making that determination, the jurors [are] entitled to draw on their own knowledge of the average person in the community as well as the evidence presented as to the State law on obscenity and as to materials available for purchase."\(^\text{750}\) In addition, it was later held in Pinkus v. United States\(^\text{751}\) that children and the most sensitive members of the community should not be included in the definition of the community by whose standards the obscenity was to be judged. Finally, the jury is to determine only the first two prongs of the Miller test of obscenity, prurient interest and patent offensiveness, with reference to community standards. The third


\(^{750}\) 431 U.S. at 297-298.

\(^{751}\) 436 U.S. 293, 93 S.Ct. 1808 (1978).
prong, serious value, is to be determined by application of a "reasonable person" test. 752

3. The Work as a Whole

This third, of the four elements of obscenity, the work as a whole, also comes within the confines of the first prong of the modern definition of obscenity: "[W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." 753

The Hicklin definition of obscenity first adopted in the United States by United States v. Bennett. 754 held that the jury "may confine [its] attention to the marked passages." 755 In other words, an entire work could be condemned based solely upon a single sentence or picture.

In short order, this position came to be viewed with distaste by the American courts. A case in point is that of In Re Worthington, 756


753. Miller, 193 S.Ct. at 2615, (citations omitted) (emphasis added).

754. 24 Fed. Cas. 1093 (1879).

755. Id. at 1102.

756. 3 N.Y.S. 361 (1884).
wherein the court held it would be ludicrous "to condemn a standard literary work, because of a few of its episodes."757 Indeed, the court went on, to do so "would compel the exclusion from circulation of a very large proportion of the works of fiction of the most famous writers of the English language."758 After all, "a seeker after the sensual and degrading parts of a narrative may find in all these works, as in those of other great authors something to satisfy his prurience."759

Judge Learned Hand expressed similar views in United States v. Kennerley760 when he questioned the practice of censoring a book based upon the corrupting influence limited parts of the book might have on certain susceptible individuals. Indeed, he observed, "it would be just those susceptible individuals who would most likely to concern themselves with those parts

757. Id. at 362.
758. Id.
759. Id.
alone, forgetting their setting and their relevancy to the book as a whole." 761 Further, he queried whether society really wished to reduce its treatment of sex "to the standard of a child's library in the supposed interest of a salacious few". 762

The first major case to hold that a work must be considered as a whole was *Halsey v. New York Society for the Suppression of Vice*. 763 Speaking for the Court of Appeals, Judge Andrews (joined by, among others, Judge Benjamin Cardozo), held that a work "must be considered broadly, as a whole." 764 This approach gained additional currency several years later when the Second Circuit ruled in *United States v. Dennert*, 765 that "any incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect." 766 This

761. Id. at 120.
762. Id. at 121.
763. 136 N.E. 219 (1922).
764. Id. at 220.
765. 39 F.2d 564 (2d. Cir. 1930).
766. Id. at 569 (Emphasis Added).
last phrase is of considerable importance, in that the court's statement, bolstered by the entire decision, unequivocally supports judging a work as a whole, and not based upon limited passages. Indeed, this issue was the subject of only very limited controversy following *Dennert*.

In *United States v. One Book Entitled Ulysses* by *James Joyce* (Random House, *Claimant*), the Second Circuit Court of Appeals adopted the *work as a whole* position in establishing the final pre-modern definition of obscenity, which test would later be incorporated into the *Roth* definition of obscenity: "Whether to the average person, applying contemporary community standards, the dominant theme of the material, *taken as a whole* appeals to the prurient interest."*

The depth of cases dealing with the *work as a whole* probably reflects the general reluctance

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767. 72 F.2d 705 (1934).
768. Id. at 707-708: Whether the dominant effect of the work taken as a whole is to have a libidinous effect on the majority of the community.
769. See discussion, *supra*.
770. 77 S.Ct. 1304, 1311 (1957), (emphasis added).
of the courts to sanction laws which, by their overbreadth, would condemn much that is precious for the sake of a few pages of salaciousness. This is not to suggest that the courts were unconcerned about possible obscenity in selected passages; far from it. Rather, the development of the work as a whole element is probably better explained as a reaction to early obscenity cases which, in essence, had the effect of throwing the baby out with the bath water.

4. The Purpose of the Work -

The third prong of the Miller definition of obscenity provides that the following determination be made: "[W]hether the work, taken as a whole lacks serious literary, artistic, political or scientific value."\(^{771}\) Earlier cases had ignored the author's purpose in determining whether a work was obscene. The Hicklin/Bennett definition of obscenity held that "the object with which this book is written is not material, nor is the notice which led the Defendant to mail the book material."\(^{772}\) This position was later

\(^{771}\) 93 S.Ct. at 2615 (citations omitted).

\(^{772}\) Bennett, 24 Fed. Cas., 1093, 1102 (1879).
rejected as untenable, and contrary to sound public policy.\textsuperscript{773} 

The purpose of the work element of obscenity is implicit in the Roth definition of obscenity,\textsuperscript{774} although, the concept that obscenity is "utterly without redeeming social importance,"\textsuperscript{775} as established by Roth, was to be the subject of continual dispute. However, this serious value element did not officially become part of the obscenity test until Memoirs v. Massachusetts.\textsuperscript{776} In Memoirs, Justice Brennan set forth the following three-prong test of obscenity: "Three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or

\textsuperscript{773} See eg. United States v. Dennert, 39 F.2d 564, 565 (2d Cir. 1930).

\textsuperscript{774} See supra, note 770, and accompanying text, and infra, note 775.

\textsuperscript{775} Roth, 77 S.Ct. at 1309: "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

\textsuperscript{776} 383 U.S. 413, 419 (1966).
representation of sexual matters; and (c) the material is utterly without redeeming social value."777 Thus, under Memoirs, if a work contained only a modicum of serious value, it could not be deemed obscene.778

Miller dispatched with the serious value prong in one fell swoop. Chief Justice Burger reasoned that the "utterly without redeeming social value" test of Roth and Memoirs was totally unacceptable, in that it required prosecutors "to prove a negative; i.e., that the material was 'utterly without redeeming social value' - a burden virtually impossible to discharge under our criminal standards of proof."779 As such, the Memoirs serious value test was abandoned as unworkable.780

777. 383 U.S. at 418.
778. Id. at 420.
779. 93 S.Ct. at 2613.
780. Justice Brennan strongly disagreed with Chief Justice Burger's contention that the "utterly without redeeming social value" test required prosecutors to prove a negative. If so, Brennan argued "one should hardly need to point out that under the component of the Court's test the prosecution is still required to 'prove a negative' -- i.e., that the material lacks serious literary, artistic, political or scientific value." Paris Adult Theatre I v. Slaton 93 S.Ct. 2628, 2655 (1973). (Brennan, J. dissenting).
The purpose of the work would henceforth constitute the third prong of the *Miller* definition of obscenity: "[W]hether the work, taken as a whole lacks serious literary, artistic, political or scientific value."\textsuperscript{781}

This third prong of the *Miller* test went a long way toward clarifying the *savings clause* aspect of the serious value element of the obscenity definition. Under the earlier *Memoirs* prong, the state had to prove that materials were completely lacking in social value. After *Miller*, the state had only to prove that the materials lacked serious literary, artistic, political, or scientific value. However, the question remained: By what standard is the third prong of the obscenity test to be judged -- by "community standards" or by a "reasonable person" test? The Supreme Court answered this question in *Pope v. Illinois*,\textsuperscript{782} wherein the Court held the first two prongs of the *Miller* test of obscenity, prurient interest and patent offensiveness, are to be determined with reference to community standards.

\textsuperscript{781} 93 S.Ct. at 2615.

The third prong, serious value, however, is to be
determined not with reference to contemporary
community standards, but rather, with reference to
a "reasonable person" test.

The application of a "reasonable person"
test, however, fails to address one important
point relative to serious value: the effect of
pandering on serious value. Even Justice Brennan
acknowledges that pandering and the circumstances
of production, sale, and publicity,\textsuperscript{783} of
allegedly obscene materials, can have an effect on
whether they would be deemed legally obscene.

For example, the fact that a book had been
"commercially exploited for the sake of prurient
appeal, to the exclusion of all other values,
might justify the conclusion that the book was
utterly without redeeming social value.\textsuperscript{784}

Justice Brennan's salient reference was to
the landmark \textit{Ginzburg}\textsuperscript{785} decision decided the same
day as \textit{Memoirs}; landmark, that is, because of its

\textsuperscript{783} \textit{Memoirs v. Massachusetts}, 383 U.S. 413, 420
(1966).

\textsuperscript{784} Id. at 421, citing \textit{Ginzburg v. United States},

\textsuperscript{785} \textit{Ginzburg}, Id.
enduring nature. It is one of the few decisions to survive the continual re-working of the Roth and Miller definitions of obscenity throughout the seventies.

Ginzburg established the evidentiary rule of pandering, in holding that "the question of obscenity may include consideration of the setting in which the publications were presented, as an aid to determining the question of obscenity,"786 even if the publications could not otherwise be prosecuted as obscene. Thus, the Court approved a further gloss on the obscenity standard, in which publications are viewed "against a background of commercial exploitation of erotica solely for the sake of their prurient appeal."787

The concept of pandering, however, was first contemplated by Chief Justice Warren in his concurring opinion in Roth: "[T]he business of purveying textual or graphic matter openly advertised to appeal to the erotic interest and their customers".788 While Chief Justice Warren

786. Ginzburg, 86 S.Ct. at 945.
787. Id. (Footnotes omitted).
788. Roth, 77 S.Ct at 1314-1315.
did not use the word *pandering*, Justice Brennan adopted the Chief Justice's language in *Ginzburg* in support of the doctrine. Thereafter, materials which were not legally obscene could nevertheless be found to be obscene based upon the manner in which they were sold, distributed, or promoted. The Court stated: "'...If the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite,' the work is pornographic."\(^{789}\)

Clearly, the Court was intent upon pursuing the "purveyors" of obscenity, as well as the "obscenity" itself. Chief Justice Warren's concurring opinion in *Roth* had been otherwise ignored in the Court's evolving test for obscenity; with *Ginzburg*, Justice Brennan brought Chief Justice Warren's opinion out into the open and placed the Court's imprimatur upon it.

The *Ginzburg* decision provides an interesting point of reference for our study of obscenity law, in that both before and after *Ginzburg*, the courts had concentrated upon the four elements of obscenity previously identified:

\(^{789}\) *Ginzburg*, 86 S.Ct. at 947-948, quoting Petitioner's expert.
Principally, the nature of the material, and the three other supporting elements, the community affected, the work as a whole, and the purpose of the work. However, with the advent of the pandering doctrine in Ginzburg, the focus of the obscenity test shifted, if ever so slightly, from the obscene nature of the work, to the person involved in selling the obscene work. Chief Justice Warren stated in his concurring opinion in Roth: "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture."790 By framing the issue in this fashion, Chief Justice Warren shifted the spotlight in obscenity cases from an in rem (against the thing) determination, to an in personam (against the person) determination.791 This shift had the effect of judging obscenity with an emphasis upon the manner in which the material was used and advertised, instead of solely upon its context or substance.792

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790. Roth, 77 S.Ct. at 1314-1315. (Emphasis added).


792. Id.
Yet, it is important to remember that pandering is an evidentiary question, not a substantive element of the definition of obscenity. Thus, the three-prong test of Miller remains the standard by which all obscenity is judged. Likewise, the focus of the Miller definition remains upon the four elements of obscenity; however, the overbreadth of the elements which characterized early obscenity law, is now more refined and type-specific under Miller.

B. Afterword

The end result of all these machinations is that the Miller definition of obscenity has survived essentially intact, some seventeen years after its rendering (as of this writing). True, the definition has undergone considerable retooling over the years; however, the basic framework endures.

Chief Justice Burger, building upon the brilliance of his predecessors, such as Judges Hand and Woolsey, and Justices Brennan, Harlan, and Warren, C.J., revolutionized obscenity law. His modern definition of obscenity, as set forth in Miller, represented an attempt to strike a
balance between anti-pornographers and First Amendment absolutists. Clearly, the Miller definition provides a sensible regulatory scheme for controlling obscenity; however, to those who would argue against all regulation of obscenity, Chief Justice Burger responded by observing that "civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine." 793

Moreover, he noted the irony of those who insist upon strict regulation of commercial and business affairs, to protect what they view as public health and public places, while at the same time insisting that the states await "a 'laissez-faire' market solution to the obscenity-pornography problem." 794 And this, no less, from "'people who have never otherwise had a kind word to say for laissez-faire,' particularly in solving urban, commercial, and environmental pollution problems." 795

793. Miller, 93 S.Ct. at 2621.

794. Id. at 2639.

Indeed, Chief Justice Burger wondered at the First Amendment absolutists’ apparent hypocrisy in advocating restrictions "in the marketplace of goods and money, but not in the marketplace of pornography." 796

Why, he queries, do those who accept the assumption that a proper education requires the reading of certain books, the study of which enriches one’s life, then deny "the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to anti-social behavior?" 797

This then, is the ever "intractable obscenity problem", 798 in a nutshell; a struggle first to define obscenity and then to reach parity between conflicting interests in the regulation and control of obscenity.

Where is the definition of obscenity headed? In Pope v. Illinois, 799 Justice Scalia

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796. 93 S.Ct. at 2637-2638.

797. Id. at 2638.


suggested a re-examination of the *Miller*
definition of obscenity. As Justice Blackmun
noted in his opinion in *Pope*, Justice Scalia
appears to support the view advocated by the
dissenters, that the *Pope* decision "envisions
that even a minority view among reasonable people
that a work has value may protect that work from
being judged 'obscene.'"

Likewise, as Justice Stevens pointed out in
his *Pope* dissent, "communicative material of
this sort is entitled to the protection of the
First Amendment if *some reasonable persons* could

800. 95 L.Ed. 2d at 448.

801. Id., concurring in part and dissenting in
part.

802. See Justice Stevens' dissent, Id. at 449-457,
joined by Justice Marshall, Justice Blackmun, and
Justice Brennan (except for footnote 11, wherein
Justice Stevens states that "the insurmountable
vagueness problems involved in criminalization are
not, in my view, implicated with respect to civil
regulation of sexually explicit material, an area
in which states retain substantial leeway." Id.
at 455, n.11 (citations omitted)).

803. 95 L.Ed. 2d. at 449. The majority's opinion
in this regard is as follows: "The proper inquiry
is not whether an ordinary member of any given
community would find serious literary, artistic,
political, or scientific value in allegedly
obscene material, but whether a reasonable person
would find such value in the material, taken as a
whole." Id. at 445.

804. 95 L.Ed. at 449.
consider it as having serious literary, artistic, political, or scientific value." Such views as Justices Blackmun's and Stevens' thus beg the question of how the Court might rule on future obscenity cases. If Justice Scalia is actually more of a libertarian than a conservative, as is suggested by his opinion in Pope, he could conceivably constitute the fifth vote, along with Justices Brennan, Marshall, Blackmun, and Stevens in overturning Miller.

805. Id. at 452. (Emphasis original).

806. Id. at 447-448. See also Texas v. Johnson, _____ U.S. _____, 109 S.Ct. 2533, 105 L.Ed.2d 352 (1989), wherein Justice Scalia sided with the "libertarian" majority which held that free speech protects burning of the American flag.
VI. CONCLUSION

Obscenity, as we know it, grew largely as a result of the individualism released by the free enterprise system. Newfound freedom of expression took a variety of forms, including obscenity. Our political, legal and economic systems encourage expansive freedom of speech and expression. Efficient and unfettered response to market demands is imperative. There is no serious premium placed upon the religious or moral qualities of goods and services; if it sells, it is good, if it does not sell, it is of no consequence. The only restraints placed upon the engine of free enterprise are those imposed by the State.

The First Amendment absolutists believe that no laws, whatever, should be placed upon freedom of speech and expression. As Justice Black stated in Smith v. California, "I read 'no law abridging' to mean no law abridging".807 The First Amendment absolutists regard the free trade of ideas and expression in the market place to be the cornerstone of true democracy.

The anti-pornography interest groups strongly object to this unequivocal interpretation of the First Amendment. They maintain that it is the sovereign’s duty to impose moral law. They view the eradication of pornography as a legitimate moral aspiration consistent with the moral laws that govern the universe.

Politics, as we all know, require conflict and cleavage. And we would be hard pressed to find an area of politics which is more rife with conflict and cleavage than the area of obscenity. There is no compromise between the two antagonists, no willingness to co-exist. (In this regard, the obscenity debate is probably somewhat similar to the abortion debate.) The antagonists are characterized by a high degree of insecurity; continual confrontation, mutual antagonism and hostility are the norm. However, what is especially instructive about the debate over obscenity, is the way in which it reflects our political culture: Our values and orientation; our attitudes and symbols. All are mirrored in the struggle to define obscenity.

Judge Benjamin Cardozo wrote that the "law accepts as the pattern of its justice the morality
of the community whose conduct it assumes to regulate"; 808 which, compelled me to ask, what is the pattern of our justice in the area of obscenity? What I discovered is that the pattern of our justice in obscenity law, is tantamount to a pattern of illusion.

Obscenity really is, in Justice Harlan's memorable phrase, "the intractable obscenity problem," 809 and as can be seen by the struggle to define obscenity, it simply does not yield itself to clear definition. Indeed, even the "workable" modern definition of obscenity as set forth in Miller, is fraught with inexactitude and ambiguity. What, after all, is the "average person", the "community standard", "prurient interest", "serious value"? All are subject to continual interpretation.

Thus, the struggle to define obscenity was illusory from the very beginning. In an effort to define the indefinable, the courts resorted to the illusion of artifice. What I have attempted to do


in this dissertation is pierce the veil of that artifice and present both a descriptive and normative analysis of obscenity law. In so doing, I identified four elements common to almost all definitions of obscenity: (1) the nature of the work; (2) the community to be protected; (3) the work as a whole; and, (4) the purpose of the work.

These four elements represent a migration of ideas from Hicklin, which represented an archaic or Victorian value system, to Miller, which represents the exposition of Chief Justice Burger’s moral value system. A moral value system or moral vision, which nevertheless recognizes the natural limitations of the law. Indeed, Chief Justice Burger tacitly admits to the necessity of artifice in the law, when he acknowledges: "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs."810 Clearly, we despair of perfect definition, and ultimately we become "reconciled to the impossibility of discovering any form of

words that will ring with perfect clarity and be automatically self-executing. Alas, there is no magic push button in this or in other branches of the law. 811

Indeed, the modern definition of obscenity may well be colored with ambiguity, but it is nevertheless an admirable structure—an admirable artifice.

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