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OBSCENITY '73:
Something Old, A Little Bit New,
Quite a Bit Borrowed, But Nothing Blue

[T]he Greek delegate (too Socratic by half) suggested that it might be a good thing to establish a preliminary definition of the word “obscene.” Sir Archibald Bodkin sprang to his feet with a protest. “There is no definition of indecent or obscene in English Statute Law.” The law of other countries being, apparently, no more explicit, it was unanimously decided that no definition was possible. After which, having triumphantly asserted that they did not know what they were talking about, the members of the Congress settled down to their discussion.¹

Operating in a somewhat similar definitional vacuum, the Supreme Court re-examined its position on obscenity² and set forth the results of its efforts to “formulate standards more concrete than those in the past,” in a series of five opinions handed down on June 21, 1973: Miller v. California;³ Paris Adult Theatre I v. Slaton;⁴ United States v. Orito;⁵ Kaplan v. California;⁶ United States v. 12 200-Ft. Reels of Film.⁷ The purpose of this Note is to examine the new guidelines and, by comparison of these guidelines to the previously defined standards, to indicate what, if any, real changes have been made.

¹. ALDOUS HUXLEY, VULGARITY IN LITERATURE I (1930), describing a Geneva conference on the suppression of the traffic in obscene publications.
². The legal commentators, just as the Justices, have had a field day with obscenity, as attested to by the almost endless literature on the subject. One of the most extensive surveys of the area is Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 MINN. L. REV. 295 (1954) [hereinafter cited as Lockhart & McClure (1954)], supplemented six years later by Lockhart & McClure, The Developing Constitutional Standards, 45 MINN. L. REV. 5 (1960) [hereinafter cited as Lockhart & McClure (1960)]. Informative treatments of the topic can also be found in Kalven, The Metaphysics of the Law of Obscenity, 1960 SUP. CT. REV. 1 [hereinafter cited as Kalven]; Katz, Privacy and Pornography: Stanley v. Georgia, 1969 SUP. CT. REV. 203; Krislow, From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation, 1968 SUP. CT. REV. 153; and Magrath, The Obscenity Cases: Grapes of Roth, 1966 SUP. CT. REV. 7 [hereinafter cited as Magrath].
⁴. 413 U.S. 49 (1973).
⁵. 413 U.S. 139 (1973).
Speaking for the same five-Justice majority which prevailed in all five of the cases, Chief Justice Burger offered in *Miller* the most extensive explanation of the Court's current reasoning on obscenity. Reflecting upon the "somewhat tortured history of the Court's obscenity decisions," Chief Justice Burger noted, "[W]e are called on 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." In summary, the resulting standard reaffirms the principle that obscene material is not protected by the first amendment, and it confines the permissible scope of such regulation to works which depict or describe sexual conduct . . . [as] specifically defined by the applicable state law, [and it limits the regulation] to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The Court specifically excluded from its newly announced standard the old "utterly without redeeming social value" test and asserted that factual determinations of obscenity are to be made by reference to contemporary community standards, not national
standards. In order to understand fully the thrust of the new test, an analysis of each of the elements of that test is necessary.

Roth Reaffirmed

Perhaps seeking to build upon past solidarity, an all too uncommon characteristic of the Court's history in obscenity litigation, the majority in Miller chose to continue its adherence to the holding originally set forth by Justice Brennan, speaking for the majority in Roth v. United States, that "obscenity is not within the area of constitutionally protected speech or press." This principle has been widely criticized since it first appeared in Roth, primarily because the Court offered no more analytical justification for its holding than that:

[all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.]

14. Id. at 37.
15. The decision in Roth v. United States, 354 U.S. 476 (1957), was a majority opinion. Between the two touchstone decisions of Roth in 1957 and Memoirs v. Massachusetts, 383 U.S. 413 (1966), there were no majority opinions in cases concerning obscenity. The prevailing opinion in Memoirs was adhered to by only 3 Justices. See text accompanying note 85 infra.
16. 354 U.S. 476 (1957). This was the first time the Supreme Court had been called on to decide whether obscenity was within the area of constitutionally protected speech and press. Id. at 481. In finding that it was not, the Court offered what has come to be known as the Roth test for obscenity: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Id. at 489. Roth dealt with the constitutionality of a federal criminal obscenity statute. The companion case of Alberts v. California dealt with the constitutionality of a state criminal obscenity statute, 354 U.S. 476 (1957).
17. Id. at 485.
19. 413 U.S. at 20, citing 354 U.S. at 484 (emphasis added). This justification was in part derived from the historical premise that the first amendment was not intended by the Framers to protect every type of speech. To the Roth majority, a desire that obscenity not be protected was clearly manifested in eighteenth century America's distaste for libel, blasphemy, and profanity—and in the colonial and state statutes prohibiting these utterances. See discussion, 354 U.S. at 482-84.
Apparently, the *Miller* Court was content to rely upon the implicit exclusion of obscene material\(^{20}\) from protected expression, for it merely restated the *Roth* rationale; the Court added only that while "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes . . ."\(^{21}\) the public portrayal of hard core sexual conduct, for its own sake, and for the ensuing commercial gain, is a different matter."\(^{22}\) The Court

In addition, the *Roth* majority's justification was derived from the reasoning of a prior Supreme Court decision, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), in which the Court first declared that certain types of speech are excepted per se from the protection of the first amendment. In that case, "fighting words" were deemed to fall within this exception, words, which the *Roth* majority considered to be similar to obscene utterances because both "are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 354 U.S. at 485, citing 315 U.S. at 571-72. Implicit in this excerpt from *Chaplinsky*, is a recognition of the metaphysical validity of these utterances. Balanced against the possibly disruptive effect upon non-appreciative fellow citizens, the paucity of rational communication and any non-rational content of such utterances are insufficient to warrant constitutional protection. Query whether this balancing is now carried through to the determination of obscenity or if it ever was in the prior determination of obscenity based on a finding of the absence of any redeeming social value. See discussion *infra* at note 88.

20. Citing *Roth*, the Court noted that the judicial meaning of "obscene material" is limited to that "which deals with sex." 413 U.S. at 18-19 n.2.

21. *Id.* at 34-35.

22. *Id.* at 35. The *Miller* opinion cited *Roth* for the proposition that "the stern nineteenth century American censorship of public distribution and display of material relating to sex . . . in no way limited or affected expression of serious literary, artistic, political or scientific ideas." 413 U.S. at 35, citing *Roth*, 354 U.S. at 482-85, and social histories, 413 U.S. at 35 n.16. Thus, the Court indicates that this concept of the first amendment, as implemented in laws and judicial action, did not impede the fullest and freest operation of speech as envisioned by the Framers.

In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, the Court transformed the purpose behind the first amendment—the protection of and the fostering of the interchange of ideas—from a mechanism for defining obscenity to a rationale for permitting the states in certain circumstances, some of which are arguably private, to regulate obscenity in the hands of consenting adults, non-consenting adults, and juveniles. See 413 U.S. at 61 n.12. The Court discounted the possibility that such regulation leads to thought control, by blithely observing that obscenity communicates no thought.

At first glance, both the statement in *Miller* and the intended purview of the *Paris Adult Theatre I* holding are limited to the public display of obscenity in a commercial setting. The *Miller* quote contrasts communication that merits first amendment protection with pornography displayed for its own sake and for the ensuing commercial gain (a quote from Chief Justice Warren's concurring opinion in *Roth*, in which he limited his agreement with the *Roth* majority to the context of commercial exploitation of obscenity). *Id.* at 35 & 15. It is reasonable to infer from the *Miller* opinion that a public display of sexually oriented works by an artist, who is later determined to have exhibited obscene materials, may not be proscribed. However, in *Paris Adult Theatre I*, 413 U.S. at 68-69, the Court stated that permissible state regulation extends to obscene material which is publicly exhibited or to commerce in this material. The Court therefore appears to con-
never explained why expression describing sex should be treated in a different manner than that dealing with politics, science, education, and other matters. It merely reaffirmed the assumption that sexual expression has always been subject to different first amendment considerations. By having failed either to abandon or to substantiate its prior reasoning, the Court remains vulnerable to continued criticism of its approach to the most fundamental question—why is obscenity excluded from the protections of the first amendment? Until this question is ade-

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23. *Id.* at 23. This distinction between "obscenity" and "other expression" has become known as the "two-level approach." For an evaluation and criticism of this different treatment of obscenity, see *Clor,* supra note 18, at 27; *Magrath,* supra note 2, at 10; *Note, First Amendment: The New Metaphysics of the Law of Obscenity,* 57 Calif. L. Rev. 1257, 1260 (1969); *Note, Obscenity: The Lingering Uncertainty,* 1972 N.Y.U. Rev. Law & Soc. Change 1, 6; *Thought Control,* supra note 18, at 655; and *Note, Still More Ado About Dirty Books,* 81 Yale L.J. 309, 310 (1971).

The inherent "bootstrap" approach that colors any rationale for the lack of constitutional protection of obscenity has not deterred a majority of the Court from extending the scope of criminal laws that regulate it. In *Roth,* the majority found it unnecessary to determine whether obscene material "will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct." 354 U.S. at 486. But in *Paris Adult Theatre I,* the Court held that, because obscenity is not constitutionally protected, a state legislature, exercising its police power to bar the public sale of obscene publications to consenting adults, could determine that obscene material is reasonably likely to "adversely affect men and women or their society," 413 U.S. at 60, and, in particular, that it "has a tendency to endanger the public safety," *Id.* at 69. The unsubstantiated hypotheses that the *Roth* majority deemed irrelevant to a decision about the constitutional protection of obscenity have now become suggested operative assumptions, still unproven, which tip the scale in favor of majority rule of individual taste.

24. For a general discussion of the more basic question of why the government should legislate in the area of morals and of the relationship of this question to obscenity, see *Henkin,* *Morals and the Constitution: The Sin of Obscenity,* 63 Colum. L. Rev. 391 (1963) [hereinafter cited as Henkin]; *Thought Control,* supra note 18.

*Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), a case dealing with a film shown only to consenting adults, provides the context for an articulation by the dissenting Justices of their views of obscenity and the first amendment. Justice Douglas, in the same approach to the problem that he has taken since the *Roth* decision, characterizes the obscenity exception to the first amendment as a "legislative and judicial tour de force," and concludes that obscenity should be given full first amendment protection. *Id.* at 71.

Justice Brennan, joined by Justices Marshall and Stewart, accepts for the sake of argument the majority's premise that obscenity is not protected by the first amendment. However, he characterizes the approach to obscenity that has prevailed since *Roth* as "unable to bring stability to this area of the law without jeopardizing fundamental First Amendment values," and states that a new, more constitutionally sound approach must be found. *Id.* at 73-74. Justice Brennan's dismay is a result of his view that any regulation of obscene material is void for vagueness because of the inherent inability to define obscenity effectively without thereby proscribing protected speech. *Id.* at 83. Within this flaw, he identifies three specific problems: the inevitable failure to provide prior notice of the definition of a standard; the nearly infinitesimal breadth of any definition of unprotected speech so as to provide the necessary breathing space for constitutionally protected
quately dealt with, the Court’s efforts in the area of obscenity will continue to suffer from a lack of basic constitutional underpinnings.

**Obscenity: Depiction of Sexual Conduct as Defined by State Law**

Recognizing the legitimate State interest in prohibiting dissemination or exhibition of obscene materials, the Court sought to minimize the inherent dangers involved in regulating any form of expression by narrowly confining the “permissible scope of such regulation to works which depict or describe sexual conduct . . . specifically defined by the applicable state law, as written or authoritatively construed.”

speech; and the institutional stress upon the Supreme Court, in terms of the number of cases, the case-rooted determination of the obscenity of particular matter, and the inability of lower courts to implement this area of the law without exceptional interference from appellate courts. Id. at 86-92.

Brennan’s call for abandonment of the Roth approach is not reached by a visceral reaction to these problems, but by the logical elimination of various alternatives. The first alternative, denying constitutional protection to all sexually oriented speech, he denounces as inconsistent with the first amendment; the second, redefining the standards of obscenity, he brands a hopeless task, dependent upon the personal outlook of the judge and the context of the exhibition of the material; the third, abandoning appellate review, he believes, would only compound the problem for the lower courts; the fourth, granting first amendment protection to obscenity would be too radical a route to take. Id. at 93-103.

In order to justify any infringement of protected speech, Justice Brennan seems to fall back on a balancing test and insists at a minimum upon the existence of a strong countervailing state interest, two examples of which he deems to be the protection of juveniles and of non-consenting adults to whom obscenity is offensively presented. 413 U.S. at 113. It should be noted that Justice Brennan reserves judgment concerning the constitutionality of such a statute until faced squarely with the issue, id. at 114 n.29, and hints that at that time he might depart from the majority’s premise and not deny first amendment protection to sexually descriptive material which is directed to juveniles and non-consenting adults. Id. at 85-86 n.9.

In the interim, Justice Brennan would declare most, if not all, existing statutes void for vagueness. He took this tact in Miller. See 413 U.S. at 47-48. However, he would also permit the states to regulate the manner of presentation of obscenity, which would not involve total suppression of obscene material. Id. at 113.

25. 413 U.S. at 18-19. The Court specifically noted the traditionally recognized state interest “when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.” Id.

26. Id. at 23.

27. Id. at 24. In so confining the scope of regulation, the Court excluded violence as conduct which might be deemed obscene for the purpose of state regulation. It could be argued that explicit portrayals of violence are more harmful and offensive to the public than exposure to materials dealing with sexual conduct. However, given the “sexual conduct” restriction of Miller, the states will have to look elsewhere to find their power to control such portrayals.

Later on in the Miller opinion, the Court noted that there are two other protective devices in the drawing of the fragile Roth line dividing constitutionally protected speech
The effect of this portion of the Miller decision on individual state statutes remains to be seen; it is highly probable, however, that vast revision will be necessary. This view was reflected by Justice Brennan, when he stated that the Court’s action may prove sufficient to invalidate virtually every state law relating to the suppression of obscenity. . . . It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus to bring them into conformity with the Court’s requirements.28

Chief Justice Burger specifically discounted the value of Justice Brennan’s prediction by citing in Miller two examples of state laws regulating “depiction of defined physical conduct, as op-

from obscenity. The first device is the availability of the jury trial, “accompanied by the safeguards that judges, rules of evidence, presumptions of innocence and other protective features provide as . . . with rape, murder, and a host of other offenses against society and its individual members.” 413 U.S. at 26. However, the subjective nature of the standards which are the essence of the alleged crime—possession of obscene material—surely undermines these safeguards. The other protective device is the availability of appellate review, discussed infra at notes 95 to 98 and accompanying text.

Query whether the intended result in Miller offers any more first amendment protection than that rendered by a broad definition of obscenity which does not contain a specific description of the sexual conduct to be regulated. If a state, for example, were to restrict only depictions or descriptions of intercourse, this specificity would give notice to potential dealers in material that depicts or describes this conduct. However, if, as the Supreme Court in Miller indicates, a state may permissibly regulate all otherwise obscene depictions or descriptions of sexual conduct, then a state that does so will possibly be giving a person no more notice and certainly no more freedom from possible criminal prosecution than before.

28. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 95 n.13 (1973) (Brennan, J., dissenting). At least one state supreme court’s action has reflected Justice Brennan’s reasoning. In State v. Shreveport News Agency, Inc., 287 So. 2d 464 (La. 1973), the defendant was charged with violating a state statute by intentionally possessing, with intent to sell, exhibit, give, and advertise, a magazine which was obscene as defined by LA. REV. STAT. § 14: 106(A) (Supp. 1973), which reads as follows:

Obscenity is the intentional:

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition . . . .

The defendant challenged the statute on the grounds of vagueness and lack of specificity as required by the recent Supreme Court obscenity decisions. The State urged the court to incorporate into the statute the two examples offered by the majority in Miller (see note 38 infra) in order to provide the requisite specificity. Noting that the two examples were in “pure obiter dictum” in Miller, the Louisiana Supreme Court rejected the state’s argument and concluded that “it would be an unconstitutional usurpation of the legislative function for us [the court] to engraft these limiting two examples into a broad, general statute which clearly conveys the obvious legislative intention to prohibit many other ‘offensive representations or descriptions.’” 287 So. 2d at 470.
posed to expression," which would comply with the Court's specificity standard. It should be noted, however, that the two examples are recent revisions of state efforts to define proscribed

29. 413 U.S. at 24 n.6.
30. Id. Ore. Rev. Stat. § 167.060 (1971), and Hawaii Penal Code, Tit. 37 §§ 1210-1216, 1972 Hawaii Session Laws, pp. 126-129, Act 9, Pt. II. The relevant portions of each are as follows:

(5) "Nudity" means uncovered, or less than opaquely covered, post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered human male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered.
(6) "Obscene performance" means a play, motion picture, dance, show or other presentation, whether pictured, animated or live, performed before an audience and which in whole or in part depicts or reveals nudity, sexual conduct, sexual excitement or sado-masochistic abuse, or which includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct.
(7) "Obscenities" means those slang words currently generally rejected for regular use in mixed society, that are used to refer to genitals, female breasts, sexual conduct or excretory functions or products, either that have no other meaning or that in context are clearly used for their bodily, sexual or excretory meaning.

(9) "Sado-masochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
(10) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act for apparent sexual stimulation or gratification.
(11) "Sexual excitement" means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

Hawaii Penal Code: Tit. 37 § 1210, Definition of terms.
(5) "Pornographic." Any material or performance is "pornographic" if all of the following coalesce:

(a) Considered as a whole, its predominant appeal is to prurient interest in sexual matters. In determining predominant appeal, the material or performance shall be judged with reference to ordinary adults, unless it appears from the character of the material or performance and the circumstances of its dissemination that it is designed for a particular, clearly defined audience. In that case, it shall be judged with reference to the specific audience for which it was designed.
(b) It goes substantially beyond customary limits of candor in describing or representing sexual matters. In determining whether material or a performance goes substantially beyond the customary limits of candor in describing or representing sexual matters, it shall be judged with reference to the contemporary standards of candor of ordinary adults relating to the description or representation of such matters.
(c) It is utterly without redeeming social value.

(7) "Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bes-
material, and one of the examples, the Oregon statute, is rather atypical in that, as Justice Brennan noted, it prohibits only the distribution of obscene material to nonconsenting adults or to juveniles. Other states' statutes are less recent and more inclusive in scope, and they more probably would require at least some legislative or judicial revision for them to be brought in line with the new requirements. This revision, if required to meet the specificity standard, can be made either by legislative enactment or by authoritative construction by the courts. Given the vague state statutory language which is most often used to provide for the regulation of obscenity, at least initially, the job of revising the existing stat-

31. Paris Adult Theatre I, 413 U.S. 40, 95 n.13. However, the Oregon statute was amended in 1973 so that persons are prohibited from “disseminating obscene material.” See Ore. Laws 1973, c. 699, § 1.


33. For a somewhat dated but no less relevant discussion of the problems inherent in the enactment of obscenity legislation, see ALI-ABA, The Problem of Drafting an Obscenity Statute (1961).

34. 413 U.S. at 24.

35. The statutory law of obscene literature is peculiar. Though obscenity is one of the most elusive and difficult concepts known to the law, legislative bodies have seldom made any effort to provide a workable definition of the term. Instead, the typical statute or ordinance begins with the word “obscene” and continues with a string of synonyms selected haphazardly from the following list: disgusting, filthy, immoral, improper, impure, indecent, lascivious, lewd, licentious, suggestive, and vulgar. But the additional epithets have made little or no difference in judicial interpretations of the statutes and ordinances; their draftsmen might just as well have contented themselves with the single word “obscene.” And in the few instances in which legislatures have attempted statutory definitions of obscenity, the
utes will most likely fall to the courts. While noting that it "must leave to state courts the construction of state legislation . . . ," the Court did state that it would authoritatively construe federal statutes dealing with obscenity to limit the material regulated to "patently offensive representation or descriptions of that specific 'hard-core' sexual conduct given as examples in Miller v. California . . . ." It is conceivable that the state courts could adhere to the letter of the law and obtain the necessary specificity by merely incorporating by reference the Supreme Court's two examples; the spirit of the Supreme Court's mandate, however, seems to require a more comprehensive treatment than that afforded by a sub silentio incorporation often found in state court obscenity opinions.

Even though the Court did give two examples of what type of state statutory definition would suffice under the new standard, the examples themselves seem to be lacking in specificity, in that they are replete with totally subjective words such as "ultimate acts," "lewd," and "normal or perverted." Indeed, definitions they have devised are not likely to be any more useful than a string of synonyms.

In consequence, courts confronted with concrete cases for decision are left to work out for themselves their own meaning for obscenity, with little or no guidance from the legislature.

Lockhart & McClure, Obscenity in The Courts, 20 LAW & CONTEMP. PROB. 587 (1955). This Lockhart & McClure article is one of a series in the excellent Symposium on Obscenity and The Arts (begins id. at 531).

37. Id. See notes 51, 120 & 122 infra.
38. 413 U.S. at 25:
   (a) Patently offensive acts, normal or perverted, actual or simulated.
   (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.
40. In Paris Adult Theatre I, Justice Brennan noted the definitional vagueness of "lewd" and "ultimate" sexual acts, 413 U.S. at 99. The inherently ambiguous nature of these terms is evident from the Miller majority's second example, which includes in part the lewd exhibition of genitals. Justice Brennan was quick to seize upon the vagueness of this physical conduct test. In particular, he characterized as nearly impossible an a priori determination of whether such exhibition is "lewd," and extrapolated this conclusion from the previous "valiant attempts" of one lower federal court to draw the constitutional line at depictions of sexual conduct. 413 U.S. at 99. However, the author of that "valiant attempt," (United States v. Huffman, 470 F.2d 386 (D.C. Cir. 1971), the Honorable Harold Leventhal, Judge of the United States Court of Appeals of the District of Columbia Circuit, has recently noted that the Miller majority's "circularity is not always an evil" and that, even after the Miller decision, only depictions of "unmistakable sexual arousal" are possibly obscene. The 1973 Round of Obscenity-Pornography Decisions, 59 A.B.A.J. 1261 (Nov. 1973).
some states have defined "lewd" to mean obscene, and this presents the situation of specifically defining "obscene" as "that which is obscene." This result would offer no more "concrete guidance" than past efforts.\(^4\)

**Average Person and Contemporary Community Standards**

Once again defining the "new" standard by using the language from the "old," the court relied on the wording, if not the reasoning, of *Roth* to hold that the determination of obscenity is to be made by reference to the "average person, 'applying contemporary community standards' . . . not national standards."\(^4\)

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41. For criticism of the uncertainties remaining after *Roth*, see R.H. KUH, FOOLISH FIGLEAVES? PORNOGRAPHY IN AND OUT OF COURT 41 (1967) [hereinafter cited as KUH]; and Magrath, *supra* note 2, at 90.

42. 413 U.S. at 30, 37 (quoting *Roth*, 354 U.S. at 489, on 413 U.S. at 37).

Some question remains concerning the proper application of the "contemporary community" standard to the three elements of the basic guidelines: prurient interest, patently offensive, and serious "value."

The only reference to the "contemporary community" in the technical presentation of the guidelines (413 U.S. at 24) is contained in the prurient interest element, and it is clear that whatever the proper community—local, state, or national—the determination of the appeal to the prurient interest is by reference to that specific community. *Id.* The propriety in using the "contemporary community" standard to ascertain patent offensiveness and serious "value" is less certain, as no reference to these standards is included in either a technical presentation of the guidelines or within these two specific elements themselves. It seems probable that the defined "contemporary community" standard was intended to be used in determining all three of the requirements; however, the Court's ambiguous phrasing in the initial presentation of the guidelines precludes a definite interpretation. Other portions of the *Miller* opinion indicate that the element of patent offensiveness (which by definition is based on the mores and social norms of a group of people) is to be determined by the "contemporary community." *Id.* at 30.

If the serious literary, artistic, political, or scientific value of the material is to be determined by reference to the community's sense of serious value, far more than Pandora's Box will have been opened if the local community's views are determined to be the proper standard. See, e.g., *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183, *probable jurisdiction noted*, 94 S. Ct. 719 (1973), where the film "Carmal Knowledge" was found to be obscene after having been shown in Albany, Georgia, a community located 145 miles south of Atlanta. The film had previously been exhibited in major American cities and in many of the cities and towns of Georgia without any legal efforts to have it judged obscene. A majority of the Supreme Court of Georgia did not specifically review the soundness of the finding of any of the three required elements for obscenity. However, since the material must meet all of the elements, it can be assumed that the court concluded that the film lacked serious artistic value. This disposition prompted one of the dissenting judges to warn against "the grave danger to free speech and expression inherent in the . . . tacit approval of small towns and hamlets as being the 'community' from which the standard for obscenity is drawn . . . ." *See also* Price v. Commonwealth, discussed at note 60 *infra*.

The *Jenkins* case is noteworthy in other respects. Neither the majority nor the dissent felt obligated to "read into" the Georgia statute any specified instances of sexual conduct. The majority apparently judged the movie not on the basis of its predominant theme, but on the basis of a few isolated instances of nudity and sexual conduct. Finally, the majority
The "average person" element was originally added in Roth as a more rational substitute for the standard set forth in Regina v. Hicklin, which "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." Although the application of this average person standard has been criticized as a wholly artificial exercise, it has been retained in every Court-devised obscenity standard since Roth. It has been adjusted at least once by the Court, in Mishkin v. New York. To facilitate the determination of obscenity where the material is designed for and primarily disseminated to a "clearly defined deviant sexual group . . . " the Court in Mishkin allowed the material's appeal to the prurient interest "to be assessed in terms of the sexual interests of its intended and probable recipient group," i.e., the average sexual deviant.

upheld the use of a public indecency statute both to form the basis of the criminal prosecution and to provide the standards for an "obscenity" conviction.

43. See Mishkin v. New York, 383 U.S. 502 (1966): "[T]he concept of the 'average' or 'normal' person was employed in Roth to serve the essentially negative purpose of expressing our rejection of that aspect of the Hicklin test, Regina v. Hicklin, [1868] L.R. 3 Q.B. 360, that made the impact on the more susceptible person determinative." Id. at 509. However, the Court in Roth also noted a positive purpose — that the impact of the allegedly obscene material is to be gauged by reference to those whom it is likely to reach, the average person in the community. 354 U.S. at 490. At this point, the Roth opinion quotes from the instructions given by the trial judge in that case, which express the theory that

the test is not whether it would arouse sexual desires in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called-worldly-wise and sophisticated indifferent and unmoved.

Id. Thus, the rationale of the Court, while perhaps not fully implemented by any legal test, is that obscenity is not protected speech because the reaction of the ordinary man to obscene material in certain ways characterizes it as obscene. An absolutist position, which excepts obscenity from the protection of the first amendment because of a failure to promote public intellectual progress, requires that there be a truly public litmus of obscenity.

44. L.R. 3 Q.B. 360 (1868).
45. 354 U.S. at 488-91.
46. See Kuh, supra note 41, at 34-36; Lockhart & McClure (1960), supra note 2, at 71-75.
47. 383 U.S. 502 (1966). Mishkin was convicted of employing others to write obscene books, and of publishing and selling the books which dealt predominantly with sadomasochism, fetishism and homosexuality. On appeal, Mishkin contended that the books did not satisfy the prurient interest requirement of the obscenity standard, in that, rather than appealing to the prurient interest of the average person, the books sickened and disgusted him. The Court rejected this imaginative argument.
48. Id. at 508.
49. Id. at 509.
50. Some commentators have argued that this approach is a return to the old Hicklin "most susceptible person" standard. Lockhart & McClure (1960), supra note 2, at 73; Note, More Ado About Dirty Books, 75 YALF L.J. 1364, 1398 (1960). However, the
Other than this exception, the standard has consistently been taken to refer to the average man-on-the-street, whose attitudes, the Court assumes, will be shared by the triers of fact—either the lay jury or the trial judge.

Again echoing Roth, the guidelines set forth by the Court in Miller to assess the prurience and offensiveness of the work require that the trier of fact apply "contemporary community standards." The majority in Roth made no effort to define what that particular phrase meant, and it was not until 1962 in Manual Enterprises, Inc. v. Day, that the Court attempted to define the relevant community whose standards of decency must be utilized in determining the obscenity issue. While leaving undefined the technicalities of how and by whom this standard was to be determined, the Court in that case concluded 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." 

Court in Mishkin noted that the recipient group must be defined with more specificity than "sexually immature persons." 383 U.S. at 509.

51. 370 U.S. 478 (1962). The Post Office Department, pursuant to 28 U.S.C. § 1461 (1970) (the statute that deals with "[m]ailing obscene or crime-inciting matter"), had barred from the mails magazines designed to appeal primarily to male homosexuals. The dispositive issue in the court of appeals was the propriety of assessing the appeal to the prurient interest in terms of the average person as opposed to the average homosexual. The Supreme Court did not reach that issue, but decided the case on the basis of patent offensiveness. The relevant sections of 18 U.S.C. § 1461 are as follows:

Section 1461. Mailing obscene or crime-inciting matter.—Every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance;

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination.

52. 370 U.S. at 488.

53. Id. (emphasis added). The Supreme Court in Manual Enterprises specifically refused to consider whether Congress could constitutionally prescribe a standard that derives from the social mores of the residents of a geographical area, smaller than the entire United States. 380 U.S. at 488.

A forced resolution of that issue may now be imminent. In United States v. Thevis, 484 F.2d 1149 (1973), the Fifth Circuit held that material which was not "utterly without
The Court's first attempt to define the appropriate standard to be used in dealing with state statutes came two years later in *Jacobellis v. Ohio.* Justice Brennan, speaking for a sharply divided Court, declared that a national community standard must also be applied in state obscenity prosecutions:

We do not see how any "local" definition of the "community" could properly be employed in delineating the area of expression that is protected by the Federal Constitution.

We thus reaffirm the position taken in *Roth* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national stan-

redeeming social value" lacked serious literary merit. Implicit in the fact that an expert was not required to testify with regard to this element of the *Miller* guidelines (which would be necessary if the standards were those of the national community) was a disregard of the use of national standards. However, the determination with respect to the prurience and offensiveness of the material involved was the same under the *Miller* test as under the *Memoirs* test. This indicates that, at least with very hard core pornography, there is not much of a difference in result when a national or a local standard is used. See, e.g., the Fifth Circuit's comparison of the testing of various magazines' obscene character under the *Memoirs* and the *Miller* standards, infra at 435, found at 484 F.2d at 1156.

Chief Justice Burger noted in *Miller* that the imposition of a national community standard upon state obscenity actions could result in the banning of material that would be found tolerable in the area of intended receipt. 413 U.S. at 32 n.13. But, would criminal prosecutions of the distributors of such material be undertaken in the locality? Other interesting questions will surely be debated in the context of the philosophy of the Court that the states should be free, within constitutional limit, to ban obscenity. Could the federal government, using a national community standard, under the *Miller* guidelines, seize material in interstate commerce that is intended for distribution in a state such as Oregon or Hawaii, which does not ban the material?


55. The Court split six ways, with only Justice Goldberg joining in Justice Brennan's prevailing opinion, although he also wrote a separate concurring opinion. Justice White concurred in the judgment of Justice Brennan.

56. 378 U.S. at 193. In a somewhat garbled fashion, the Court attempted to impute to the author of the *Roth* opinion a familiarity with "contemporary community standards' as a term of art in legal history. The Court noted that the term was first used in United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913), an opinion authored by Judge Learned Hand, in which he posited the concept of obscenity as a societal concept, not restricted to the populace of any one political unit. 378 U.S. at 192-93. Chief Justice Warren, in dissent, maintained that as a matter of "plain meaning," the term "community standards" could not be used to connote national standards. *Id.* at 200.

The two policy arguments of the prevailing opinion are much more convincing. The first argument was that the community generally cuts across local political boundaries. To give a concrete example of this position, it would be arbitrary to expect a jury in Baltimore City to fail to take into account the mores of the Baltimore metropolitan area. The second argument was that banning material in one community would deter distribution in other, possibly more liberal communities. In contemporary legal jargon, there would be an impermissible restriction of constitutionally protected free speech.
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<th>Magazine Titles</th>
<th>Memoirs</th>
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**TABLE 1**

**Memoirs**

(a) Dominant theme, taken as a whole, appeals to a prurient interest in sex
(b) Patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters
(c) Utterly without redeeming social value

**Miller**

(a) The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest
(b) Patently offensive depiction or description of sexual conduct specifically defined by applicable statute
(c) Taken as a whole, lacks serious literary, artistic, political or scientific value
standard. It is, after all, a national Constitution we are expounding.\textsuperscript{57}

This position was immediately criticized by Chief Justice Warren, who stated that \textit{Roth} did not mandate a national standard, and that indeed "there is no provable 'national standard' and perhaps there should be none . . . and it would be unreasonable to expect local courts to divine one . . . [when] this Court has not been able to enunciate one."\textsuperscript{58}

Faced with this division of judicial opinion, the Court in \textit{Miller} held that the trial court's instruction to the jury that a state community standard be applied was permissible\textsuperscript{59} and that obscenity is to be determined against contemporary community standards, not national standards. In so doing, the Court was only partially successful in providing more definite guidelines for all to follow. What it did clarify is that national standards are not required, at least in litigation involving state statutes. Also approved is the use of "state community standards"\textsuperscript{60} in cases involving violations of state statutes. At least two areas, however, remain unclarified: the standards to be used in federal obscenity statute violations and those to be used in situations involving violations of local obscenity regulations.

Prior decisions had definitely established that a standard based on a \textit{national} community had to be applied in federal obscenity cases.\textsuperscript{61} Nevertheless, given the specific disapproval of a national standard in \textit{Miller}, and the assertion in \textit{12 200-Ft. Reels} that the \textit{Miller} "standards are applicable to federal legislation,"\textsuperscript{62} the appropriate community standard on which to base a federal determination of obscenity is less than clear. Even more troublesome is the problem of ascertaining the proper base community from which to derive a standard when a local obscenity

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\textsuperscript{57} \textit{Id.} at 195.
\textsuperscript{58} \textit{Id.} at 200-01 (Warren, C.J. and Clark, J., dissenting).
\textsuperscript{59} 413 U.S. at 31.
\textsuperscript{60} From the wording of the instruction to the jury, it is also evident that these community standards were applied to both the "prurient interest" element and to the "patently offensive" element of the obscenity standard. See \textit{Id.} at 31.
\textsuperscript{61} \textit{Id.} The Court was assuming that views of what is obscene do vary from state to state, and possibly within the state. The actual existence of these variable concepts was reflected in \textit{Price v. Commonwealth}, \textit{Va.}, \textit{201 S.E.2d 798} (1974), where the court, emphasizing that intra-state disparities result from local citizens serving on juries, upheld the use of local standards in a prosecution under a state obscenity statute. The rationale of the Virginia Supreme Court was that in light of the statement in \textit{Miller} dealing with city and state diversity, the use of local standards in obscenity prosecutions is permissible.
\textsuperscript{62} 413 U.S. at 130.
\end{flushleft}
regulation is involved. This confusion was created by the Court when, in explaining the need for diverse standards, it fell into the trap of comparing apples and oranges: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept depiction of conduct found tolerable in Las Vegas or New York City." If the Court were advocating that only state standards should be used, why did it compare states with cities? It can be argued that the Court meant only to justify state-wide standards—especially in view of its explicit approval in *Miller* of the state community of California. In light of the treasured rights involved in freedom of expression, however, this Court-created confusion can only lead to more serious problems in an area already characterized by chaos.

*Appeal of the Work, Taken as a Whole, to Prurient Interest*

In requiring that a work be considered in its entirety in determining whether or not it is obscene, the *Miller* court continued the precedents set forth in *United States v. One Book Called Ulysses*, *Roth*, and *Jacobellis*, which had rejected the old

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63. In several instances of local prosecution of allegedly obscene materials, the courts have cavalierly implemented the *Miller* standards. In Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183, probable jurisdiction noted, 94 S.Ct. 719 (1973), a five justice majority of the Supreme Court of Georgia upheld appellant's conviction for the exhibition of the film *Carnal Knowledge*. The court simply stated that *Miller* permits juries to consider state or local community standards.

In Redlich v. Capri Cinema, 347 N.Y.S.2d 811 (1973), the state brought suit to enjoin the exhibition of an allegedly obscene film. The Supreme Court, Special Term, New York County, held that the statute which authorized the injunctive procedure was void for overbreadth, and that the statute which defined obscenity was also overbroad. On appeal, the Supreme Court of New York held that the film was hard core in the eyes of the average person in New York City, County; and State. Disregarding the scrupulous and methodical approach of the lower court to an interpretation of the obscenity statute, the Court held that it could be and would be construed in light of *Miller* to preserve its constitutionality. 349 N.Y.S.2d 697 (1973). See also *Price v. Commonwealth*, which upheld the Virginia criminal obscenity statute against the contention that it was unconstitutionally overbroad. The Virginia Supreme Court noted that because a prior Virginia case held that "a portrayal of nudity is not, as a matter of law, a sufficient basis for a finding that a work is obscene," the statute was specifically authoritatively construed within the meaning of the *Miller* decision.

The prosecutions in *Miller* and in *Kaplan* occurred in Los Angeles County, California, but involved a California statute. Similarly, the injunctive proceedings in *Paris Adult Theatre I* involved the alleged violation of a Georgia statute by an Atlanta theatre. Given the fact that the Supreme Court in *Miller* differentiated between the tastes of individuals of New York City or Las Vegas, and those of Maine or Mississippi, query whether the scope of the community must be delimited to the political unit in which the material is seized.

64. 413 U.S. at 32.
65. Id. at 34.
66. 72 F.2d 705 (2d Cir. 1934).
Hicklin rule that allowed a work to be judged on the basis of isolated excerpts; in general, decisions must be based on a rational consideration of the entire work and its theme, not upon an isolated profanity or explicit narrative or scene.

The "prurient interest" portion of the standard, a recurring element in all of the Court's obscenity decisions, first appeared in the Roth decision where it was used to define obscene material as that "which deals with sex in a manner appealing to prurient interest," that is, "material having a tendency to excite lustful thoughts." While not elaborating on the meaning of the word "prurient," the Court in Miller apparently accepted the efforts of Justice Brennan, quoting, in Roth, Webster's New International Dictionary, to provide a definition of "prurient": "itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, of propensity, lewd . . . ." That definition, and its silent acceptance in Miller, still suffers from the most common weakness in the judicial treatment of obscenity—subjectivity. As aptly expressed by one legal commentator, "[I]t tells us what obscenity-pruriency allegedly does to the viewer of obscene material; it does not inform us what obscenity is."

Patently Offensive

By restricting the operation of obscenity statutes to situations where the sexual conduct is depicted or described in a "patently offensive way," the Miller Court continued to "borrow from the old." In this instance, however, it was not Roth, but Manual

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67. See text accompanying notes 36 to 38 supra.
68. This element of the standard has had some criticism. See CLOR, supra note 18, at 32; Kent, supra note 41, at 38.
69. 354 U.S. at 487.
70. Id. at n.20. The variety of stimuli which could incite "lustful thoughts" is almost infinite. A representative sampling of these stimuli is contained in a questionnaire which was sent to "college and normal school women graduates. . . . In answer to the question of what things were most stimulating sexually, of the 409 replies, 9 said 'Music,' 18 said 'Pictures,' 29 said 'Dancing,' 40 said 'Drama,' 95 said 'Books,' and 218 noted very simply 'Man.' " Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 73 (1938).
71. See CLOR, supra note 18, at 33-34, for a comparison of the Roth definition with that contained in The American Law Institute's Model Penal Code: "a shameful or morbid interest in sex, nudity or excretion." MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957).
OBSCENITY '73

Enterprises that contributed to the new standard. In Manual Enterprises, Justice Harlan asserted that if materials
cannot be deemed so offensive on their face as to afford current community standards of decency—a quality we shall
hereafter refer to as "patent offensiveness" or "indecency" . . . [they] cannot be deemed legally "obscene," . . . . Obscenity . . . thus requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal.74

While unconvincingly asserting that the Roth test included both these elements all along,75 Justice Harlan succeeded in
granting first amendment protection to works which would have been unprotected under the old singular "prurient interest" test of Roth.76 This widening of the area of constitutionally protected expression was a direct result of the application of the two-fold standard, for, under it, a work can have an infinite appeal to prurient interest, but unless it is also patently offensive it cannot be legally judged obscene.77

74. 370 U.S. at 482, 486.
75. The Justice asserts that the Roth decision established the "patent offensiveness" concept no less than the "prurient interest" concept. But his opinion does not succeed in revealing just where in the Roth case this concept is to be found. Its endeavors to do so are ambiguous. Justice Harlan maintains that the expression "prurient interest" was "but a compendious way" of embracing both tests. But it is most difficult to discover "patent offensiveness" in the Roth terminology which sets forth "prurient interests."

However, Justice Harlan's assertion may be justified if the Roth decision is viewed in the context of Anglo-American case law dealing with obscenity. The Regina v. Hicklin decision has been interpreted by the Commonwealth courts to contain a two pronged test for obscenity. The requirement of "patent offensiveness" derives from the precise meaning of "obscene" as that which is "offensive to current standards of decency, and not things which may induce to sinful thought." 370 U.S. at 484. Viewing the rationale of the Supreme Court in Roth both as an acceptance of the common law definition of obscene (except for the "most susceptible person" element) and as an attempt to define obscenity standards in order to make them constitutionally impeccable, Justice Harlan concluded that the "appealing to the prurient interest" standard in Roth was merely a shorthand expression for the two pronged test.

This linguistic analysis retains some viability after Miller. Chief Justice Burger noted that what may be constitutionally proscribed is material that deals with sex—technically "pornography"—rather than obscenity, which is defined as that which disgusts. 413 U.S. at 18 n.2. Although much of the post-Roth case law on obscenity has been swept aside by Miller, this statement of the Chief Justice both bases the "patently offensive" element in Roth and provides some explanation for its retention.

76. The result, explains Kuh, was to "set the law of obscenity running around in circles." Kuh, supra note 41, at 37-58.
77. Justice Harlan noted that without the "patent offensiveness" standard, the American public might be denied access to many worthwhile works of literature, science, or art:
Again, the Court's silence in *Miller* forces reliance upon the assumption that the concept of patent offensiveness outlined in *Manual Enterprises* is the one adopted in *Miller*. Without further explanation from the Court, it can also be assumed that the criticism directed toward the inherently subjective nature of the standard will continue as in the past.

**Lack of Serious Value**

It is easier to concentrate on what was rejected rather than on what was accepted as the final element of the *Miller* standard, if for no other reason than that the discarded "redeeming social value" test has been more widely utilized and discussed than the new "lacks serious value" test. As noted by Chief Justice Burger in a short historical narrative in *Miller*, the rejected standard was first mentioned in *Roth* as a premise for denying constitutional protection to obscenity. In *Roth* Justice Brennan stated that "all ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties [of the first amendment]. . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Seven years later, in *Jacobellis*, Justice Brennan again emphasized that "any . . . form of social importance" would prohibit the exclusion of a work from the protection of the first amendment. At the same time, however, he declared that constitutional protection could not "be made to turn on a 'weighing' of its social importance against its prurient appeal . . . ." By *Jacobellis* standards, then, for a work to be deemed obscene, it must appeal to prurient interests and be ut-

78. Unlike its treatment of the "appeal to prurient interest" element (which was attributed to *Roth*), the Court did not cite *Manual Enterprises*. See 413 U.S. at 24.
79. See *Clk*, *supra* note 18, at 67; *Magrath*, *supra* note 2, at 11; *Thought Control*, *supra* note 18, at 659-60.
80. 413 U.S. at 20-23.
81. 354 U.S. at 484 (emphasis added).
82. 378 U.S. at 191.
83. *Id.* For criticism of this elimination of the balancing test in situations involving works with only slight social value, see *Frank*, *Obscenity: Some Problems of Values and the Use of Experts*, 41 WASH. L. REV. 631, 664 (1966).
terly without redeeming social importance.\textsuperscript{84}

While the dual requirements of prurient interest and utterly without social importance were specifically adhered to in \textit{Jacobellis} by only Justices Brennan and Goldberg, the later case of \textit{Memoirs v. Massachusetts}\textsuperscript{85} brought at least the social importance element full circle from a reason for denying first amendment protection in \textit{Roth}, to a prerequisite which must be established before a work can be judged obscene and thus be denied the protections of the first amendment. Justice Brennan, joined by Chief Justice Warren and Justice Fortas, announced the opinion of the Court in \textit{Memoirs}:

Under [the \textit{Roth}] definition [of obscenity], as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to 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.\textsuperscript{86}

Adding that "[e]ach of the three federal constitutional criteria is to be applied independently,"\textsuperscript{87} the Court continued to adhere to the reasoning from \textit{Jacobellis} that a weighing of the elements against one another is not permitted.

Unfortunately, the wording itself—utterly without redeeming social value—is semantically incongruous,\textsuperscript{88} and the failure of the Court to give any guidance for the application of the standard has only encouraged criticism both by members of the bench and by legal commentators. In view of this criticism and the convoluted history of the standard, the Court’s decision to abandon it

\textsuperscript{84} "[A] work cannot be proscribed unless it is ‘utterly’ without social importance." 378 U.S. at 191.

\textsuperscript{85} 383 U.S. 413 (1966). John Cleland’s book, \textit{Memoirs of a Woman of Pleasure}, commonly known as \textit{Fanny Hill}, was judged obscene by a Massachusetts trial court. The decision was affirmed by the Massachusetts Supreme Judicial Court. The Supreme Court reversed.

\textsuperscript{86} \textit{id.} at 418.

\textsuperscript{87} \textit{id.} at 419.

\textsuperscript{88} As to the incongruity in wording: “utterly” is an absolute concept; it recognizes no middle ground, no compromise; “redeeming,” on the other hand, is the essence of compromise; it intimates a variable amount. . . ; “importance” too . . . is a word of degree. The phrase “utterly without redeeming social importance” thus juxtaposes an absolute concept against two variables. What, then, is its meaning?

\textit{Kuh, supra} note 41, at 39.
is not surprising.\textsuperscript{89}

An evaluation of the results of this abandonment may prove to be somewhat mixed, however, because arguably the Court has succeeded only in disguising the old standard in a set of new words: “Taken as a whole lacks serious literary, artistic, political, or scientific value.”\textsuperscript{90} Indeed, in \textit{Jacobellis}, the Court referred to “literary or scientific or artistic value, or any other form of social importance.”\textsuperscript{91} The four itemized values seem merely to be sub-categories of an all-encompassing social value.

While clearly noting that “no Member of the Court today supports the \textit{Memoirs} formulation,”\textsuperscript{92} the Court itself virtually reproduces the \textit{Memoirs} language to describe its newly announced standard: “At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”\textsuperscript{93} In substance, how does this differ from

\textsuperscript{89} See, \textit{e.g.}, Bender, \textit{The Obscenity Muddle}, HARPER'S MAGAZINE, Vol. 246, No. 1473, Feb. 1973:

It appears that a new crisis in the law of obscenity is upon us. [In attempting to deal with the crisis, the Court] will likely permit the use of local—rather than national community standards of offensiveness. It may relieve prosecutors of the burden of affirmatively proving that a work is prurient, offensive, or valueless (and permit the jury to make that decision on the basis of the work alone). And it could easily hold that some redeeming value does not automatically insulate a work from the law, but that value must merely be weighed in determining prurience and offensiveness.

\textit{Id.} at 46, 51.

\textsuperscript{90} 413 U.S. at 24.

\textsuperscript{91} 378 U.S. at 191 (emphasis added).

\textsuperscript{92} 413 U.S. at 23.

\textsuperscript{93} \textit{Id.} at 26. The Court also gave the example of a graphically illustrated medical book for the education of medical personnel as indicative of certain types of depiction of sexual conduct which would not be obscene. \textit{Id.} This example raises the question of the relevance of the size, function, and educational level of the anticipated audience. Educated individuals ironically may provide a stricter definition of serious. Furthermore “serious” could be construed to mean that which is not comic so that comedy which involves sexual conduct may be prohibited.

However, the Court has made at least one step towards implementing a working definition of “lacks serious literary value.” In Kaplan v. California, 413 U.S. 116 (1973), the Court upheld the determination of a state court that an \textit{unillustrated book} was obscene. Framing the issue as being “squarely . . . whether expression by words alone can be legally obscene,” \textit{id.} at 118, the Court held that the book’s content was obscene. Thereby, the Court intentionally qualified its stated premise that “a book seems to have a different and preferred place in our hierarchy of values, and so it should be,” on the basis of the “hard core” nature of the material presently before it. \textit{Id.} at 118-19. However, the Court also recognized that prior Supreme Court cases dealing with unillustrated material had “rigorously scrutinized” lower court decisions and had regularly reversed all convictions therein. See extensive citations listed in 413 U.S. at 118 n.3.

Nevertheless, this is the first decision of the Supreme Court, since \textit{Roth}, in which the
Memoirs? If there is a material difference, it is difficult to perceive how this new standard can be of any assistance in clarifying matters, when it is based on so subjective a term as serious. How is this seriousness to be judged and by whom? Indeed, if there

Court has failed to give tacit approval to constitutional protection of unillustrated books. Perhaps here, the difference between the "utterly without redeeming social value" and "lacks serious literary value" standards can be seen. Compare Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966), in which the Court noted that the Massachusetts court had found some minimal value in the unillustrated book before the court, and used this state finding to illustrate the extreme "debasity" to which the "utterly without redeeming social value" standard must go.

In Miller, the Court gave an example of what would not be considered "serious literary value": A quotation from Voltaire in the flyleaf of . . . an otherwise obscene publication . . . ." 413 U.S. at 25 n.7, citing Kois v. Wisconsin, 408 U.S. 229, 231 (1972). This earlier obscenity case also provides a clue as to what "serious literary value" means. In Kois, the Court held that a sex poem, which was one of eleven poems in an inside two page spread of an underground newspaper, was not obscene. Acknowledging that the poem was an "undisguisedly frank, play by play account of the author's recollection of sexual intercourse." the Court cited Roth for the proposition that not every literary portrayal of sex is obscene. Then, stating that a reviewing court must look at context as well as content, the Court held that "it bears some of the earmarks of an attempt at serious art." Significantly, while the Court noted that "many would conclude that the author's reach exceeded his grasp," the standard used was whether the dominant theme of the material appealed to the prurient interest. Id. at 231-32. Thus, the Court, in a per curiam opinion in which Chief Justice Burger, Justices Powell and Rehnquist joined, acknowledged that an attempt at serious art would not be something that appeals to the prurient interest. This approach may be justified in that surely poetry could be found to have some redeeming social value under the Memoirs test, but it does bear on the meaning of "serious literary value" and leads to the conclusion that contextual, as well as textual, considerations must be used by the jury and by reviewing courts. Hopefully, the Court will explicate this—especially the necessity that the work as a whole be obscene—in its disposition of Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183, probable jurisdiction noted, 94 S.Ct. 119 U.S. (1979), which involves the so called obscene film "Carnel Knowledge."

Kois also involved a newspaper printing of two pictures, which were similar to ones seized in a police raid, accompanying a story of the arrest of the publisher of the paper. The Court held that it did not have to decide if the pictures appealed to the prurient interest because, quoting Roth, all matters which are of public concern are protected.

94. This problem has been a recurring one in obscenity litigation, especially with regard to the literary merits of a work. "To those who place a high value upon literary qualities, the censorious are philistines. To the censorious, on the other hand, literary qualities are suspect — they serve only to make the obscene palatable and, therefore, all the more insidious and dangerous." Lockhart & McClure, supra note 35, at 602. Justice Brennan, in dissent, took a dim view of this "old wine in new bottles" approach. As he notes, the Court's approach necessarily assumes that some works will be deemed obscene—even though they clearly have some social value—because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently "serious" to warrant constitutional protection. 413 U.S. at 97. In practice, he adds, the prosecution may find it as difficult to prove a "lack of serious literary value" as to prove that the material is "utterly without redeeming social value." Id. at 98. However, in the watershed case of Memoirs v. Massachusetts, 383 U.S. 413 (1966), a finding of fact was made that Fanny Hill has a nominal amount of social value.
is a new standard, it may prove as elusive and difficult to apply as the old one.

Appellate Review

Having outlined the basic standards for permissible state action in regulating obscenity, the Court emphasized its belief that adherence to the guidelines would offer adequate protection of first amendment rights. To be doubly sure that freedom of expression would not suffer, the Court stressed that there always remained the ultimate power of appellate courts to review constitutional claims when necessary.

While admitting that the courts have been overly burdened in their role as Super Censor, the Court seemingly perpetuates the problem by maintaining the vague standards, as outlined above, which often, if not inevitably, lead to a final decision in the individual cases only at the Supreme Court level. Thus, the Court seems to concede that the "institutional stresses," referred to by Justice Brennan in his dissent in Paris Adult Theatre I, are inherent in the area of obscenity litigation and that its recent decisions will do nothing to overcome them.

Hard Core Only?

It should be noted that, while placing great stresses on defining what standards a state must use in regulating obscenity, the Court repeatedly made use of the term "hard core" pornography. At one point, Chief Justice Burger summarized the Court's accomplishments in Miller as agreeing upon "concrete guidelines

95. 413 U.S. at 25.

96. "It is certainly true that the absence, since Roth, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts." Id. at 29.

97. One problem which seems inherent in the new approach is the issue of the effectiveness of independent judicial review of local or state community standards. It is possible that a jury verdict will be conclusive on the issue of community standards, and therefore the retention of the right to judicial review would be meaningless for at least that element of the standard. See O'Meara & Shaffer, Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Law. 1 (1964).

98. Paris Adult Theatre I, 413 U.S. at 91.

99. 413 U.S. at 27, 28, 29, 35, 36. There have been recurring suggestions in prior decisions of the Court that only "hard core" pornography can constitutionally be regulated (see discussion of Justice Douglas, dissenting in Miller, id. at 39). See, e.g., Manual Enterprises v. Day, 370 U.S. at 489 (Harlan, J., for the Majority); and Jacobellis v. Ohio, 378 U.S. at 197 (Stewart, J., concurring) (citing People v. Richmond County News, 9 N.Y. 2d 578, 175 N.E.2d, 681, 216 N.Y.S.2d, 369 (1961), which still provides the seminal definition of "obscenity" in New York).
[that] isolate 'hard core' pornography from expression protected by the First Amendment." In a footnote involving the authoritative construction of federal statutes, he referred to the Court's two examples of specific conduct as "hard core." If the Court meant to equate hard core pornography with obscenity and to permit regulation and suppression of "hard core" material only, its intention should have been explicitly stated. This concept has been advocated many times by members of the bench and the legal community, and perhaps this "hard core only" approach is what the Court in Miller had intended to adopt. But in face of the interchanging use of the terms "obscenity" and "'hard core' pornography," it is almost impossible to determine the Court's real intent. Even if it were intended to be a "hard core" only standard, this would be of little assistance, as the term "hard core" itself is incapable of precise definition. Perhaps the only way to know what the Court means is to follow the advice of one commentator and ignore what they say and look at what they do.

For all its efforts to clarify, the Court in Miller seems to have precisely defined only two concerns in obscenity litigation — that a national standard is not required when applying "contemporary community standards" in a case involving a state statute and that specificity of proscribed conduct is required in obscenity regulation. Other than these, the uncertainties of the old guidelines remain.

**Obscenity: Expert Witnesses, Private Possession, Commercial Interests**

Having set forth in Miller its new general guidelines for the

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100. 413 U.S. at 29.
101. 12 200-Ft. Reels, 413 U.S. at 130 n.7.
102. See, e.g., Kalven, supra note 2, at 43; Magrath, supra note 2, at 71.
103. Professors Lockhart and McClure have concluded that that is the concept which has been held by most members of the Court all along. Lockhart & McClure (1960), supra note 2, at 60.
104. While the Court asserted that, as a result of the Miller decision and its four companion cases, "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct," 413 U.S. at 27 (emphasis added), it should be noted that the term "hard core" is not included in the exact standards and guidelines set forth in the opinion, (Id. at 24) and the only reference to it occurs in obiter dictum. See also 413 U.S. at 36 and note 99 supra for the statement that the new guidelines ban "hard core" pornography.
regulation of obscenity by the states, the Court, in its four companion decisions, dealt with several recurring problems in obscenity litigation: the use of expert witnesses, the boundaries of the zone of constitutional protection which surrounds the private possession of obscene material, and the interests of the state and federal governments in prohibiting obscenity from entering the stream of commerce. While an in-depth analysis of each of these areas is beyond the scope of this note, a review of the actions in these cases will provide the reader with a summary of the current stance of the Court.

Expert Testimony

The majority's holdings in *Paris Adult Theatre I v. Slaton* and *Kaplan v. California* indicate a reversal of a growing trend of judicial opinion which required that expert testimony be used in defining "contemporary community standards" in order to satisfy procedural due process. The Court, citing *Ginzburg v. United States,* asserted that since the material, once placed in evidence, "can and does speak for itself," the necessity for expert testimony is obviated.

The requirement of expert testimony has been based on the belief that "community standards of the psychological or physiological consequences of questioned literature" cannot be established except through the use of experts. With the emphasis in *Miller* that the trier of fact is the best judge of the contemporary

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106. *In Paris Adult Theatre I, 413 U.S. 49 (1973), Slaton sued to enjoin the exhibition by Paris Adult Theatres of two allegedly obscene films. In a jury-waived trial, the trial court (which did not require "expert" affirmative evidence of obscenity) viewed the films and dismissed the complaints on the ground that the display of the films in commercial theatres to consenting adult audiences (reasonable precautions having been taken to exclude minors) was "constitutionally permissible." The Georgia Supreme Court reversed, holding that the films constituted hard core pornography not within the protection of the first amendment.

107. *In Kaplan, 413 U.S. 115 (1973), the proprietor of an "adult" bookstore was convicted of violating a California obscenity statute by selling a plain-covered unillustrated book which contained repetitively descriptive material of an explicitly sexual nature. Both sides offered testimony of the nature and content of the book, but there was no "expert" testimony that the book was "utterly without redeeming social importance." The trial court used a state community standard in applying and construing the statute. The appellate court, affirming, held that the book was not protected by the first amendment.*


109. *Paris Adult Theatre I, 413 U.S. at 56 n.6, citing United States v. Wild, 422 F.2d 34, 36 (2d Cir. 1970).*

community standard, it is easily understood why the Court decided that there was no longer a need for an expert to explain current outlooks on national morals and sexual trends. Arguably, however, the application of the Court-sanctioned "state community standard" would still require that some guidance be given to local citizens who make up the average jury. Otherwise, the new guidelines will succeed only in reducing the task for the juror to divining a state-wide standard of moral tolerance rather than a national one—no small task, if indeed at all possible for a local layman.

Private Possession of Obscenity Protected Only in the Home

In 1969, in *Stanley v. Georgia,* the Supreme Court made at least one exception to its theory that obscene material is subject to governmental regulation. The Court ruling in *Stanley,* that private possession of obscene material in the home could not be made a crime, was based on the theory that the first amendment protects the right to receive ideas and information regardless of their social worth, especially in the privacy of the home. Some commentators viewed this as a step toward the liberalization of the obscenity laws, for they reasoned that the right to receive necessarily required a correlative absolute right to acquire and to transport the material. These thoughts were quickly dispelled by two cases, *United States v. Reidel,* and *United States v. Thirty-Seven Photographs,* which were decided in 1971.

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111. 394 U.S. 557 (1969). Stanley was convicted of knowingly having possession of obscene material in violation of a Georgia statute. The materials, three reels of film, were seized by the police after they had entered Stanley's home, pursuant to a search warrant, in an attempt to discover evidence of alleged bookmaking activities. The Supreme Court reversed the Georgia Supreme Court's affirmance.

112. *Id.* at 564. This reasoning in *Stanley* was the first and, to date, only evidence of a deviation from the Court's traditional approach of altogether denying obscene matter first amendment protection. Understandably, some viewed this departure as a fatal blow to the "two-level theory [see note 23 *supra*] and, if followed to its logical end, could herald a new and more rational approach to the regulation of material dealing with sex." Comment, *Stanley v. Georgia: New Directions in Obscenity Regulation?*, 48 TEXAS L. REV. 646, 649 (1970).


114. 402 U.S. 351 (1971). Reidel was convicted of knowingly using the mail to distribute obscene material, in violation of 18 U.S.C. § 1461. Reidel had stipulated in the advertisements soliciting orders for the materials that customers must be 21 years of age or older. A federal district court held that § 1461 was unconstitutional as applied to the defendant. The Supreme Court reversed.

115. 402 U.S. 363 (1971). In *Thirty-Seven Photographs,* the materials in question
In *Reidel*, the Court held that the federal government may prohibit the commercial distribution of obscenity to willing adult recipients (this holding thus negating any thoughts of a right to sell or to acquire commercially), and in *Thirty-Seven Photographs* the Court ruled that obscene material may legally be seized through customs procedures at the port of entry when the material is intended for commercial use. Four of the Justices in *Thirty-Seven Photographs* would have imposed more stringent standards and would have ruled that the importation could be prohibited even when the material is intended solely for private use.

The restrictive views enunciated in *Reidel* and *Thirty-Seven Photographs* were continued by the Court in *Paris Adult Theatre I*. The Court discounted the idea of a "penumbra" of constitutionally protected privacy for obscenity and held that the "states have a legitimate interest . . . in regulating exhibitions of obscene material in places of public accommodation, including so-called adult theatres . . . ." In *Orito*, the Court held that the constitutionally protected zone of privacy does not extend beyond the home, and it therefore does not cover the transportation of obscene material in common carriers in interstate com-

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were seized by customs agents pursuant to 19 U.S.C. § 1305(a) (1970) which prohibits the importation of obscene material. The statute was challenged for overbreadth in that it included within its ban material protected by the privacy doctrine of *Stanley*. The federal district court found the statute unconstitutional. The Supreme Court reversed.

116. Burger, C. J., and Blackmun, Brennan and White, J.J.

117. 402 U.S. at 376.

118. 413 U.S. at 66.

119. *Id.* at 69. Query whether the term "public accommodations" in the realm of obscenity regulation will be interpreted by the courts the same way as in the civil rights area. Perhaps the courts will permit litigants to carve out a "private club" exception to that regulation.

120. United States v. Orito, 413 U.S. 139 (1973). The prosecution was based on knowing transportation of obscene material by common carrier in interstate commerce, in violation of 18 U.S.C. § 1462 (1970). The relevant provisions of the statute are as follows:

**Importation or transportation of obscene matters.**—Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound;

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.
merce.\textsuperscript{121} In \textit{Twelve Two-Hundred Foot Reels},\textsuperscript{122} the Court held that Congress may prohibit the importation of obscene material, even if it is intended for private use only.\textsuperscript{123}

These three decisions, coupled with \textit{Reidel} and \textit{Thirty-Seven Photographs}, effectively restrict the scope of \textit{Stanley} to its particular facts. The Court has said that the possession of obscene material within the home is a private matter. However, the government does have a right to regulate the commercial distribution, importation, and transportation of the material. The result is that \textit{Stanley} rights could be realized, as has been suggested,\textsuperscript{124} only if one wrote or designed a tract in his attic, printed or processed it in his basement, so as to be able to read it in his study.

\textit{The Exclusion of Obscenity From the Flow of Commerce}

While re-emphasizing the importance of the states’ interest in regulating the exposure of obscene material to juveniles and unconsenting adults,\textsuperscript{125} the Court stressed that these are not the

\begin{itemize}
\item \textbf{Immoral articles — Importation prohibited}
\end{itemize}

All persons are prohibited from importing into the United States from any foreign country any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney [United States Attorney] of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

\textsuperscript{121} 413 U.S. at 142.

\textsuperscript{122} United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973). The United States brought an action for forfeiture of allegedly obscene motion pictures which had been seized in customs procedures at the time of their entry into the United States. The seizure was made pursuant to 19 U.S.C. § 1305 (1970). The pertinent provisions of the statute are as follows:

\begin{itemize}
\item \textbf{Immoral articles — Importation prohibited}
\end{itemize}

All persons are prohibited from importing into the United States from any foreign country any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney [United States Attorney] of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

\textsuperscript{123} 413 U.S. at 128.

\textsuperscript{124} \textit{Thirty-Seven Photographs}, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

\textsuperscript{125} \textit{Paris Adult Theatre I}, 413 U.S. 49, 57, citing \textit{Miller}, 413 U.S. at 18-20. The protection of juveniles and unconsenting adults has traditionally been viewed as one of the most fundamental objectives of obscenity regulation. In most instances it has gone unchallenged, perhaps as a result of the widely held belief that children's minds are too vulnerable to the depersonalization of sex which often forms the basic theme of obscene
only legitimate interests which can be protected by obscenity legislation. In *Paris Adult Theatre I*, the interests involved in stemming the tide of commercialized obscenity were declared to include those "of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." In *Orito*, the federal government was found to have a similar legitimate interest in protecting the public commercial environment by preventing such obscene materials from entering "the stream of commerce."

The two rationales for the regulation of obscenity which are most often asserted are the interests of society in protecting the public decency and the possibility of anti-social behavior resulting from exposure to obscene materials. While the Court based its decisions on both of these rationales, it placed considerably more emphasis upon the decency aspect than upon "adverse effects." This lack of emphasis upon resulting anti-social behavior is understandable, in that a majority of the studies by social scientists and psychiatrists have failed to establish a definite causal connection between anti-social behavior and exposure to obscenity.

This lack of affirmative evidence of causality was highlighted in the summary of findings by the United States Commission on Obscenity and Pornography:

> If a case is to be made against "pornography" in 1970, it will have to be made on grounds other than demonstrated effects of a damaging personal or social nature. Empirical research designed to clarify the question has found no reliable ev-

\[126.\] 413 U.S. at 57.
\[127.\] Id. at 58.
\[128.\] 413 U.S. at 143.
\[129.\] A number of legal commentators, while recognizing both these rationales, perceive the more forceful motivation to be the protection of the moral sensitivities. See, e.g., Henkin, *supra* note 24, at 391: "I believe, despite common assumptions and occasional rationalizations, that obscenity laws are not principally motivated by any conviction that obscene materials inspire sexual offenses. Obscenity laws, rather, are based on traditional notions, rooted in this country's religious antecedents, of governmental responsibility for communal and individual 'decency' and 'morality.'"

Obscenity to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults. 131

The Court admitted that there is no definite proof of a connection between anti-social behavior and obscene material, 132 but nevertheless maintained "that there is at least an arguable correlation between obscene material and crime." 133 As long as this possibility of a correlation exists, the Court will not find it unreasonable for the federal and state legislatures to proceed upon the assumption that there is in fact such a nexus. 134

Perhaps realizing the weakness of this argument, the Court fell back on the decency standard and summarized its reasoning by asserting that common sense and experience would afford "an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex." 135 This approach is somewhat reminiscent of Justice Stewart's "I know it when I see it" technique, 136 and it is unfortunate that the protection of treasured rights such as those guaranteed in the first amendment should be based on ever varying subjective standards such as "common sense" and "experience."

Obscenity in Maryland

An evaluation of the overall effects of the recent Supreme Court obscenity cases on Maryland law will have to await further action by the state courts and the legislature. To date, only one case, Village Books, Inc. v. Marshall, 137 has been decided by the Maryland Court of Appeals after Miller and its companion cases. An analysis of the case presents a variety of problems, especially

132. 413 U.S. at 60-61.
133. Id. at 59 & n.8. The Court based its reasoning on the Hill-Link Minority Report of the Obscenity Commission. See 413 U.S. at 61.
134. The nexus-no nexus debate has taken a tit-for-tat posture ever since Roth, where Justice Harlan strongly supported the reasonableness of a nexus, 354 U.S. 476, 501-03, and Justices Douglas and Black just as strongly criticized it, id. at 508-13. The debate was taken up again in Memoirs, with Justice Clark advocating the possibility of a nexus, 383 U.S. 413, 451-53, and Justice Douglas once again criticizing it, id. at 431-32, n.10, with both citing numerous surveys to support their conflicting views.
135. 413 U.S. at 63.
in the areas of community standards, specificity of proscribed conduct, and the sufficiency of the authoritative construction by the Court of Appeals in bringing the Maryland law in line with the Miller requirements. A review of these problems indicates that the recent action by the Maryland Court of Appeals may have clouded rather than clarified the obscenity issue in Maryland.

The general Maryland obscenity statute\(^{138}\) prohibits the sale and distribution of "any obscene matter." While the words "matter," "person," "distribute" and "knowingly" are defined within the statute, the key word, obscene, is not.\(^{139}\) In the absence of a legislative definition, the courts have concluded that the "Maryland Legislature intended by its use of the word 'obscene' to connote that which the word 'obscene' means in prevailing leading legal thought."\(^{140}\) The result, therefore, is that obscene has been construed in Maryland to mean whatever the Supreme Court says it means.\(^{141}\) Presumably, then, the Miller test for obscenity is the Maryland test.

One crucial element of the Miller standard, however, is that state regulation be limited "to works which depict or describe sexual conduct . . . specifically defined by the applicable state

\(^{139}\) Id.
law, as written or authoritatively construed." 142 Although sufficient specificity is contained in one Code section which deals with the sale and distribution of obscene matter to minors, 143 the specific definitions of that section do not apply to the general obscenity statute and indeed could not, since there is no mention of "sexual conduct" in section 418. As a result, the statute as written is lacking the specificity required by the Miller Court. This inadequacy was not corrected by the Court of Appeals in Village Books.

In Village Books, the trial judge, in an oral opinion, asserted that the material was to be judged by the contemporary community standards of Prince George's County. 144 Finding the materials obscene, he then issued an order enjoining their sale and directing their destruction, pursuant to a provision of the obscenity statute. 145 On appeal, the Court of Appeals affirmed the circuit

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142. Miller v. California, 413 U.S. at 24 (emphasis added).
§ 416A. Definitions.

The following words and phrases, as used in this subheading, have the meanings indicated:
(b) Minor means any person under eighteen years of age.
(c) Sadomasochistic abuse means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bound, or otherwise physically restrained.
(d) Sexual conduct means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.
(e) Sexual excitement means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.


In view of the fact that the Supreme Court has never defined what community is involved in defining "community standards" I suppose it would be desirable for this Court to make some determination. When I speak of "community" I mean the same community from which jurors are drawn to decide any factual issues involved in any cases in this court. Therefore, I am speaking of Prince George's County, which is the same area from which jurors are drawn to sit in cases in this County. And I conclude and find that this material is patently offensive because it affronts contemporary standards in Prince George's County ....

§ 418A. Injunctive remedy.

The circuit courts of the counties and the equity courts of the Supreme Bench of Baltimore City have jurisdiction to enjoin the sale or distribution of any book, magazine, or any other publication or article (including a motion picture film or showing) which is prohibited from sale or distribution, as hereinafter specified.

1. The State's attorneys of the counties and Baltimore City in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his
The court's decision without mentioning community standards although the appellant contended, *inter alia*, that the trial court's use of a county community standard constituted reversible error. The appellant again questioned the validity of the county standard in its petition to the Supreme Court for certiorari.

possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph (including a motion picture film or showing) or any article or instrument of use which is obscene, within the meaning of § 418 of this article may maintain an action for an injunction against such person, firm or corporation in the circuit court of the counties or the equity courts of the Supreme Bench of Baltimore City to prevent the sale or further sale or the distribution or further distribution or the acquisition, publication or possession within this State of any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph (including a motion picture film or showing), or any article or instrument of use which is obscene.

3. In the event that an order or judgment be entered in favor of the State's attorney and against the person, firm or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm or corporation to surrender to such peace officer as the court may direct or to the sheriff of the county in which the action was brought any of the matter described in this section and such sheriff or officer shall be directed to seize and destroy the same.

146. The Appellants' other contentions were the following:

1. Was Appellee required to produce expert testimony to establish the alleged obscenity of the eighteen books and magazines held obscene by the court below?

2. Was it necessary for Appellee to introduce testimony that the books and magazines were to be exhibited or sold to juveniles, advertised obtrusively, or pandered, to sustain a finding of obscenity if the questioned literary materials did not constitute hard-core pornography?

3. Is the statute, Md. Ann. Code art. 27, § 418A, unconstitutional because it denies Appellants a trial by jury on the issue of obscenity and allows an ex parte prior restraint of literary material?

The Attorney General in voicing his support of the local community standard stated:

Community standards, as set forth by Judge Powers, the trial judge below, include those contemporary community standards of candor in the expression of sexual matters in erotic literature which are found in Prince George's County, Maryland. This is the area over which the Court has jurisdiction and from which it draws its jurors. Until such time as the United States Supreme Court determines otherwise, the State of Maryland has determined that the community standards of the court's own community will govern. Consequently, Judge Powers was correct in applying the community standards of candor as they prevail in Prince George's County.


147. The other questions presented for review were the following:

1. Are the five magazines, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim," *obscene in the constitutional sense* without sales or exhibition to juveniles, obtrusive advertising or pandering?

2. Is the statute, Md. Ann. Code art. 27, § 418A unconstitutional as allowing an ex parte prior restraint of literary material and denying a trial by jury on the issue
Supreme Court granted certiorari, vacated the judgment and remanded the case "for further consideration in light of Miller v. California . . . ." 148

In a memorandum filed in support of reaffirmance on remand, the Attorney General argued that a state-wide standard is the appropriate community standard; 149 he apparently reversed his prior support of a "local community" standard. 150 The Attorney General noted that, although the trial court judge had used a county-wide standard in deciding the case, reversal was not required since the Court of Appeals in its initial review "used a state-wide standard of obscenity as expressed by the United States Supreme Court to be applied across the state as a whole." 151 A careful reading of the Court of Appeal's original opinion, however, reveals no mention of community standards, and indeed its affirmance would indicate at least silent approval of the trial judge's use of the county as the proper community.

The Attorney General also argued that Miller did not require the Court of Appeals to give an authoritative definition of specifically proscribed sexual conduct. The State reasoned that Maryland's definition of obscene is that of "the prevailing leading legal thought." 152 Since Chief Justice Burger had indicated that the Supreme Court was "prepared" 153 to construe the word obscene in federal statutes to incorporate the examples of sexual conduct given in Miller, the same construction would automatically apply to the Maryland statute and therefore would give it the specificity required under the new guidelines.

The Court of Appeals responded to the remand of Village Books and the Attorney General's memorandum as follows: "[T]his Court has reconsidered its opinion and judgment in light of the cases set forth above [Miller, et al.] and finds that the opinion and judgment should be reaffirmed . . . ." 154 This action indicates the court's belief that the Maryland statute, as written and presently construed, will pass muster under the new Supreme

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of obscenity?

Reproduced in the Memorandum in support of reaffirmance at 3-4, filed August, 1973 by the Attorney General of Maryland to the Maryland Court of Appeals in Village Books, Inc. v. Marshall [hereinafter cited as Memo.].

149. Memo. at 10-15.
150. See note 11 supra.
152. See note 5 supra.
Court guidelines. However, the court's failure to proscribe specific sexual conduct militates against the continued constitutionality of the Maryland general obscenity statute.

While the Court of Appeals gave no reasoning for its decision, it can be contended that, by reconsidering and reaffirming Village Books in light of Miller, the Court intended to incorporate affirmatively the Supreme Court's new standards into Maryland law, sub silentio. This silent incorporation, however, without more, would seem to lack the required specificity. Presumably, the Court of Appeals accepted the Attorney General's analysis and viewed the two examples of sexual conduct set forth in Miller as being sufficient to provide specificity in the Maryland statute. If indeed this is the basis of the Court's action, its approach is faulty in several respects.

The Supreme Court in Miller required the states to define specifically what sexual conduct, when described or depicted, would warrant a finding of obscenity. While noting that it "must leave to State Courts the construction of state legislation ... ,"155 the Court, in an effort to give some guidance to the states, gave "a few plain examples of what a state statute could define for regulation ... ."156 The Court in no way authoritatively incorporated the examples into the overall guidelines. The Court did mention in a footnote that if and when it is faced with a serious doubt concerning the constitutionality of a federal statute because of "the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral,'" it was "prepared to construe" the words as limited to "that specific 'hard core' sexual conduct given as examples in Miller v. California ... ."157 The Court was not actually presented with the issue of the definitional sufficiency of the words, and, therefore, this statement is at best dictum. Since this cannot be viewed even as a present authoritative construction of the word obscene for specificity purposes with regard to the federal statutes, it is impossible to see how it can be incorporated into the Maryland standard as a reflection of "the prevailing leading legal thoughts."

It thus seems that the Maryland Court of Appeals, by incorporating only the general guidelines for the regulation of obscenity, failed to provide an authoritative construction which would have preserved the validity of the current Maryland statute. The

155. 413 U.S. 123, 130 n.7 (1973).
156. 413 U.S. at 25 (1973).
court could have supplied the required specificity through construction by merely including verbatim the examples of sexual conduct cited in *Miller.*\(^{158}\) A variety of other states have been

158. The Maryland Court of Special Appeals took this approach in a recent case which dealt with the State's power to regulate the exhibition of motion picture films. Ebert v. Maryland State Board of Censors, 19 Md. App. 300, 313 A.2d 536 (1973). Ebert, as agent for Ellwest Stereo Theatres, Inc. (hereinafter referred to as Stereo), submitted thirty peep show films to the Maryland State Board of Censors for approval and licensing in accordance with the provisions of the Maryland Annotated Code, article 66A. The relevant portions are as follows:

§ 2. *Unlawful to show any but approved and licensed film.*

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted . . . and duly approved and licensed by the Maryland State Board of Censors, . . . hereinafter in this article called the Board.

§ 6. *Board to examine, approve or disapprove films; what films to be disapproved.*

(a) [T]he Board shall examine . . . all films . . . and shall disapprove such as are obscene . . . .

(b) [F]or the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

§ 19. *Review and approval or disapproval of film by Board; judicial determination; appeal.*

(a) Any film duly submitted to the Board for examination and licensing shall be reviewed and approved within five (5) days, unless the Board shall disapprove such films under the provisions of § 6 hereof, in which event the Board shall, within not later than three (3) days thereafter, apply to the Circuit Court for Baltimore City for a judicial determination as to whether such film is obscene . . . . If the [Circuit Court's] decree and order disapproves said film as being in violation of the provisions of § 6 hereof, then the person presenting such film for licensing may appeal such determination to the Court of Special Appeals of Maryland . . . .

The films were disapproved by the Board and application was made to the Circuit Court for a judicial determination of the obscenity issue. The Board's evidence at the Circuit Court consisted entirely of the films themselves. Stereo's evidence included the testimony of an expert witness in the field of human sexuality. The expert testified that in his opinion the films were not obscene (using a national community standard) and were not utterly without redeeming social value. The expert also testified that he could not define hard core pornography. 19 Md. App. at 316-17, 313 A.2d at 545-46. The Circuit Court found the films to be obscene and ordered that they be disapproved. Stereo then appealed to the Court of Special Appeals.

In vacating and remanding the case for a rehearing at the Circuit Court level, the Court of Special Appeals reviewed the recent Supreme Court obscenity decisions and Maryland precedent, and it authoritatively construed the Maryland movie censorship statute to bring it into conformity with the new obscenity guidelines. The court noted that the definition of obscene embodied in article 66A, section 6(b) had been declared to be unconstitutionally broad, and that "the standard of obscenity is limited to what can be deemed obscene in the constitutional sense." 19 Md. App. at 313, 313 A.2d at 543, citing
faced with the same Miller-created problems, but, unlike the situation resulting from the court's disposition of Village Books, they have reached conclusions which are constitutionally sound.

An Indiana case, Mohney v. State, is closely analogous to Village Books. Both cases were before the Supreme Court on certiorari and were vacated and remanded in light of Miller. Like the Maryland statute, the Indiana obscenity statute does not define "obscene," and uses the prevalent Supreme Court definition. However, the Indiana Supreme Court, noting that the statute "doesn't set out specifically the sexual or obscene acts which . . . constitute a violation of the statute," held their statute to be unconstitutional.

Other states present a variety of resolutions. In State v. J-R Distributors, the Washington Supreme Court construed an obscenity statute similar to Maryland's by specifically defining proscribed sexual conduct. In Papp v. State, a Florida intermediate appellate court construed Florida's obscenity statute in the same way, but the court applied it only prospectively. The court held that the judicial limitation of the obscenity statute denied

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The Court found that a review of the Miller decision clearly indicated that the Supreme Court was equating obscene material with hard core pornography, 19 Md. App. at 305, 313 A.2d at 539, and that a state community standard was permissible in determining obscenity, id. at 309, 313 A.2d at 541-42 n.8.

Noting that the "Court of Appeals of Maryland has declared that the clear legislative intent was to authorize the Board 'to disapprove films which are obscene by any valid test . . . ,'" Id. at 314, 313 A.2d at 543, citing Sanza v. Maryland Bd. of Censors, 245 Md. 319, 339, 226 A.2d 317, 327-28 (1967), the Court construed the word obscene "as used in article 66A in light of [Miller]" and therefore determined that the statute, as now construed, requires that the Board disapprove any film which:

(1) portrays sexual conduct in a patently offensive way in that it contains patently offensive:
(a) representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated; OR
(b) representations or descriptions of masturbation, excretory functions, and lewd exhibitions of genitals; AND
(2) taken as a whole:
(a) would be found by the average person, applying contemporary community standards of the State, to appeal to the prurient interest in sex; AND
(b) does not have serious literary, artistic, political, or scientific value.


This construction is a verbatim incorporation of the examples given by the Supreme Court in Miller, 413 U.S. at 25, and it provides the movie censorship statute with the specificity required for constitutionality.

159. ___ Ind. ___, 300 N.E.2d 66 (1973).
160. Id.
161. 82 Wash. 2d 584, 512 P.2d 1049 (1973).
162. 281 So.2d 600 (Fla. Dist. Ct. of Appeal, 4th Dist. 1973).
Papp due process, since it failed to give him adequate notice of the proscribed conduct at the time of the offense. An intermediate appellate court in California, in People v. Enskat,\(^1\) held that the state obscenity statute had previously been authoritatively construed to reach only "graphic descriptions of sexual activity," including specific sexual acts.\(^2\) While this list of state rulings is not exhaustive, it demonstrates a wide range of responsible judicial reaction to Miller, by which Miller's specificity mandate is authoritatively and conclusively met.

While the Supreme Court in Miller established overall guidelines for the regulation of obscenity, it affirmatively cast upon the states the responsibility of ascertaining the parameters of community tolerance and of articulating in specific detail sexual conduct, the depiction of which will transgress these parameters and will thus justify proscription. By vacating and remanding Village Books, the Supreme Court presented the Maryland Court of Appeals with an obvious opportunity to fulfill its task of providing the required specificity by authoritatively construing the current Maryland obscenity statute. The Court of Appeal's failure to meet this responsibility renders the present Maryland obscenity statute constitutionally deficient in light of Miller.

CONCLUSION

While the intent of the Supreme Court to create order out of chaos in the area of obscenity\(^3\) was laudable, its success will

\(^{163}\) 33 Cal. 3d 900, 109 Cal. Rptr. 433 (Ct. of Appeals, 4th Dist. 1973).

\(^{164}\) Id. at 909, 109 Cal. Rptr. at 439.

\(^{165}\) The Court may be unintentionally setting an example of appellate inaction, for in none of the five cases did the Court hold that the material involved was obscene, although it intimated that the material was hard core. Surely, with respect to the "prurient interest" standard and the "patently offensive" standard, if the mores of the local community are to be used, only a clearly erroneous standard of review is available. However, with respect to the element of "lacks serious literary value," the Court may be reviewing more extensively, premising its review upon a "Constitutional fact" basis as in Kois v. Wisconsin, 408 U.S. 229, 232 (1972) (per curiam).

But, the Court apparently intends to take an active role. Ascribing to the new standards a quality of "concreteness" lacking since Roth, Chief Justice Burger in Miller noted that the road in the future for the Court may be rough, but that each case must be decided on its own facts. See 413 U.S. at 29-30. With a majority of Justices agreeing on one standard, the Chief Justice feels confident that most cases—although not the borderline ones—can be disposed of by a few "model" decisions which will indicate what this "fin de siecle" Court considers to be obscene.

A docket currently crowded with obscenity decisions provides the Court with an opportunity to clarify many of the ambiguities of the Miller guidelines. The following are among the questions presented: (1) the specificity of the definition of "sexual conduct" in a state statute. (J.R. Distributors, Inc. v. Washington, 82 Wash. 2d 584, 512 P.2d 1049
probably prove to be worthy of considerably less praise. Through
the continued use of such standards as "patently offensive," "prurient appeal," and "lacks serious value," the Court perpetu-
ated the much criticized subjective nature of the old standard. By
denying first amendment protection to privately possessed ob-
scene material outside the home, the Court-sanctioned right to
possess the material in the home is rendered almost meaningless.
By allowing determinations of obscenity to be made on a basis
other than a national standard of decency, with its concommitant
varieties of standards and divergence of state responses, the
Court continued the need for a case-by-case review to ensure the
protection of first amendment rights. All of these failings can be
traced to the recurring basic problem of imposing regulations
upon obscenity without first answering adequately the following
two questions: What is it that is being regulated, 6 and why does
it need to be regulated? Until the Court satisfactorily deals with
these basic threshold inquiries, all its efforts, no matter how well
intentioned, will be doomed to failure.

(1973), petition for certiorari filed, 42 U.S.L.W. 3391 (No. 73-937)) (in particular, whether
a state court may authoritatively construe broad state statute. See 512 P.2d at 1060,
dissent at 1091-92). (2) The use of state or local community standards. (local standards
—Trinker v. Alabama, Ala. Ct. of Crim. App. (6/29/73), petition for certiorari filed,
11/28/73, 42 U.S.L.W. 3453 (No. 73-844)). (state standards—J.R. Distributors, Inc., 512
P.2d at 1065). (3) Definition of "lacks serious literary, etc. value" (Southeastern Promo-
tions, Ltd. v. Conrad, 486 F.2d 894, (6th Cir. 1973), cert, granted,
2/19/74, 42 U.S.L.W.
3468 (No. 73-1004). (Issue presented—"Is play 'Hair' obscene for purposes of denial of use
of municipal auditorium?"). (See 486 F.2d at 897, 898, 899, 903-04. The Sixth Circuit
Court of Appeals recognizes that a play is distinct from literature because conduct as well
as words are used.) (4) Definition of "taken as a whole". Id. (5) Constitutionality of federal
obscenity law (Brown v. United States, __ F.2d ___ (4th Cir. 1973), petition for certiorari
filed 11/15/73, 42 U.S.L.W. 3443 (No. 73-788); constitutionality of 18 U.S.C. § 1462).

166. Judge Learned Hand's attempt to answer this question provides perhaps the
most eloquent judicial effort to date: "If there be no abstract definition, such as I have
suggested, should not the word 'obscene' be allowed to indicate the present critical point
in the compromise between candor and shame at which the community may have arrived
here and now?" United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913). Standards
however, not eloquence, decide cases; and Judge Hand's eventual recognition of the need
for a more objective standard, one capable of definite (if discreet) measurement, is re-
lected in the following comment by Kuh:

Long years after this decision, in an off-the-bench comment, a much older Learned
Hand, whose lusty humor provided relief from the majesty commanded by his
appearance, his manner and his incisive mind, was to suggest that the appropriate
judicial test for obscenity was to see whether the disputed matter physically
aroused the judge, not any judge, but an exceedingly old, old—old one.

Kuh, supra note 41, at 23.