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OBSCENITY: THE JUSTICES' (NOT SO) NEW ROBES

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I. INTRODUCTION

Freedom of speech, like democracy, has its problems. On balance, we embrace freedom of speech because the alternatives are worse. In embracing free speech, we trust ourselves to hear and evaluate the speech of racists, Klansmen, Communists, Nazis, Republicans, and Democrats.¹ In so doing, we do not accept all that is spoken or propagated. Indeed, much speech that we allow advocates values that are evil and repugnant. Because censorship is more dangerous than the alternatives, we permit that which we

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1. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

abhor. Yet we follow a different approach where sexually explicit books and films are involved.²

To say all of this is not to negate concern with values. Values of equality, democracy, fidelity, commitment, love and tenderness are basic. Whether censorship is the way to promote these values (and at what cost to other values) is a much more difficult question.

In October 1985, North Carolina made it a felony punishable by three years in prison to disseminate obscene materials.³ Possession of the same materials may be another three-year felony.⁴ The materials potentially subject to sanction include those that show or describe actual or simulated sexual activities or exhibit the genitals in a "lewd" way.⁵

The new statute raises again the question of the extent to which it is proper for the state to use the criminal sanction to prohibit expression that the legislature finds, or at least thinks its constituents find, abhorrent.

It is clearly permissible to employ the criminal sanction to prohibit the dissemination of sexually explicit expression to the extent that identifiable rights of third parties are directly infringed by material that can be clearly defined. Censoring a book because it allegedly causes crime raises more serious problems. Works of great literature and news reports may have such an effect on some people. Still, adults should not be reduced to reading only what is fit for the unbalanced.

2. *E.g.*, *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

3. N.C. GEN. STAT. § 14-190.1 (Cum. Supp. 1985).

4. *Id.* at § 14-190.1(e). Prior to October 1985, the statute prohibited the intentional dissemination of obscenity "in any public place." The 1985 statute eliminated the requirement that the dissemination be in a public place, thereby raising the inference that dissemination in a private place—the home—would violate the statute.

5. The sexual conduct which is proscribed by the statute is set out in subsection (c):

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

Id. at § 14-190.1(c).

Some types of regulation are justified. Dissemination of child pornography, carefully defined, should be prohibited in the interest of protecting children—including protecting their rights to privacy.⁶ Moreover, zoning may be an appropriate response to certain types of “adult” establishments. Protection of minors and unwilling viewers, though not simple, justifies regulation.⁷

Absent such circumstances, imposition of the criminal sanction is fraught with danger and should be pursued, if at all, only as to very narrow categories of sexually explicit expression. The North Carolina statute, which embraces all the censorship the Justices find permissible, takes the opposite approach. Under the statute, individuals are subject to prosecution without fair notice of the line between what is permitted and what is forbidden. Consequently the statute inhibits protected expression in a manner that is unacceptable in a democratic society. For the natural effect of vague prohibitions aimed at prohibited expression and reinforced by harsh punishment is a dramatic restriction of *protected* expression.

The first portion of this article examines obscenity regulation both in the federal arena and in North Carolina and looks briefly at how we got to where we are today. The second part examines the current North Carolina statute and the constitutional problems which are inextricably connected with it. The final section considers directions that the courts (or legislature) should take in consideration of the new North Carolina statute.

II. A HISTORICAL OVERVIEW

A. *Developments in the Federal Arena*

Obscenity, as most Justices of the Supreme Court tell us, is not protected by the first amendment.⁸ From this point of clarity

6. *New York v. Ferber*, 458 U.S. 747 (1982) (allowing suppression of child pornography).

7. *Ginsberg v. New York*, 390 U.S. 629 (1968) (state may prohibit distribution of certain material to minors which may not be barred for adults); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (dictum) (proper for state to prevent dissemination of obscene material to minors without prohibiting dissemination to other persons); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 n.13 (1975) (a “narrowly drawn nondiscriminatory traffic regulation requiring screening of drive-in theatres from public view” would be permissible); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding zoning ordinance limiting the places where movie theatres showing “adult” films may be located).

8. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S.

the law of obscenity quickly fades into murk. For sex and obscenity, the Justices have said, are not synonymous.

[S]ex and obscenity are not synonymous. . . . The portrayal of sex, *e.g.*, in art, literature, and scientific works, is not sufficient reason to deny the material the Constitutional protection of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.⁹

The problem then is to distinguish obscene from non-obscene portrayals of sexual conduct. Yet making these distinctions has proved enormously difficult.

Justice Potter Stewart once suggested that obscenity consisted of hard core pornography, and that while perhaps he could not define it, he knew it when he saw it.¹⁰ In response, a writer for the Yale Law Journal commented that Justice Stewart had not seen it yet and it was beginning to look as though he never would.¹¹ The prediction was prophetic. Nine years later, Justice Stewart joined three of his colleagues in concluding that at least where sales to consenting adults were concerned, and at least as to most types of sexually explicit material, it was impossible to frame a test that was not unconstitutionally vague.¹²

Since the 1950's the Supreme Court has embraced at least three different tests for obscenity. In *Roth v. United States*,¹³ the Court announced that obscenity was not constitutionally protected speech—ignoring whether the photographs disseminated by Mr. Roth were in fact obscene—and Mr. Roth went off to jail for materials that, in later years at least, would probably have been held protected.¹⁴ In *Roth* the Court made its first stab at defining

15 (1973). Only two justices have taken the view that obscene expression is protected by the first amendment. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 508 (Douglas, J., dissenting).

9. *Roth*, 354 U.S. at 487 (footnotes omitted).

10. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it, and the motion picture involved in this case is not [obscene]").

11. Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364, 1377 (1966).

12. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., with whom Stewart, J., and Marshall, J., join, dissenting). Justice Douglas dissented separately.

13. 354 U.S. 476 (1957).

14. *See Redrup v. New York*, 386 U.S. 476 (1957).

obscenity: it was material which appealed to a prurient interest of the average person.¹⁵

In this respect *Roth* was a step forward. It departed from the English case of *Regina v. Hicklin*,¹⁶ which had provided an important doctrinal basis for defining what was obscene. Under *Hicklin*, material was to be judged in terms of its effect on the most susceptible members of the community, including children, and the obscene nature of particular material could be evaluated by the effect of isolated passages and not by the work as a whole.¹⁷ The rule was rejected in the 1930's in the prosecution of James Joyce's *Ulysses*. In that case, both federal trial judge Wooley, and the appellate judge, Augustus Hand, rejected the *Hicklin* rule in favor of a definition of obscenity which gauged the effect of the material as a whole on the average person in the community.¹⁸ That rule became the law in *Roth*.

Roth rejected a challenge to the "fair notice" of the obscenity statute in question. The law, the Court announced, did not require impossible standards.¹⁹ Ironically, sixteen years later, Justice Brennan, the author of the *Roth* opinion, would conclude that in fact it was impossible to define obscenity clearly while at the same time protecting expression that should not be suppressed.²⁰

Having held obscenity not protected expression, the Court in *Roth* hastened to try to close the door it seemed to have opened to substantial censorship. In the area of sexual expression, the *Roth* Court warned, "ceaseless vigilance" is required to prevent erosion of fundamental freedoms of speech and press by Congress or by the states. "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."²¹

In *A Book Named "John Cleland's Memoirs of a Woman of*

15. 354 U.S. at 489.

16. 3 Q.B. 360 (1868).

17. *Id.*

18. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd. sub. nom. United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

19. 354 U.S. at 491.

20. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

21. 354 U.S. at 488.

Pleasure" v. Attorney General of Massachusetts²² the Court seemed to close the door even more. Expanding on a statement in *Roth* that obscenity was utterly without redeeming social value,²³ a plurality of the Court announced a new three part test. To be obscene, material had to be utterly without redeeming social value—defined as having no value at all. It had to appeal to a prurient—shameful or morbid—interest in sex. And it had to be patently offensive because it affronted contemporary national community standards relating to the depiction of sexual matters.²⁴ Because two Justices, Black and Douglas, believed obscenity laws violated the first amendment, the plurality view became the controlling law.²⁵

The book in question in the *Memoirs* case was *Fanny Hill*, a novel that depicted in explicit 18th-century prose the sexual adventures of a young woman in a whorehouse. The book was literally pornographic (writing about prostitutes), but the Court found it was not obscene, much to the horror of its dissenting members.²⁶

The new definition reflected the struggle within the Court over how to define obscenity. Between 1957 and 1968, thirteen Supreme Court obscenity decisions produced fifty-five separate opinions. In 1966, Justice Black captured the confusion created by the Court and the serious constitutional implications of that confusion:

[A]fter the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of "obscenity"²⁷

Unable to agree on the tests for what constituted obscenity, the Court began dealing with obscenity cases summarily. Between 1967 and 1973 the Court reversed thirty-one obscenity convictions without benefit of opinion.²⁸

22. 383 U.S. 413 (1966).

23. *Roth*, 354 U.S. at 489.

24. *Memoirs*, 383 U.S. at 418.

25. 383 U.S. at 421 (Black, J., concurring); 383 U.S. at 424 (Douglas, J., concurring). See, e.g., *United States v. 35 mm. Motion Picture Film Entitled "Language of Love"*, 432 F.2d 705 (2d Cir. 1970).

26. 383 U.S. at 441 (Clark, J., dissenting); 383 U.S. at 455 (Harlan, J., dissenting); 383 U.S. at 460 (White, J., dissenting).

27. *Ginzburg v. United States*, 383 U.S. 463, 480-81 (1966) (Black, J., dissenting).

28. F. SCHAUER, *THE LAW OF OBSCENITY* 44 (1976).

In the meantime, lower courts and juries struggled with the difficult task of applying the Supreme Court's tests for obscenity. Some courts expressed concern about the prospect of allowing the majority to dictate what the minority may read or watch:

In final analysis is freedom of speech and expression, including exhibition of motion picture films, to be based on the opinions of 51 percent or even 80 percent of our populace? If so, it might well be that on a national plebiscite the "Language of Love", "I Am Curious (Yellow)", "Les Amants", "Memoirs" and others would all be condemned by a majority vote. Minorities would then read and see what their fellow men would decide to permit them to read and see. The shadow of "1984" would indeed be commencing to darken our horizon.²⁹

Other courts noted that in fact the reading and viewing habits of Americans seemed to include sexually explicit materials:

[T]he courts cannot be wholly oblivious to contemporary community standards. A glance at the "movie" advertisements in the daily newspapers reveals that titillating but sure-fire announcement "For Adults Only" in a large number of ads

. . . .
. . . . To gauge "contemporary community standards", a glance at the Best Seller List (fiction and general) is revealing. A best seller (general) records the response of hundreds of people, wired on virtually every section of their anatomy to electrical recording devices, while they perform their sexual functions, naturally and artificially, under Kleig lights before a medical group noting, cataloging and analyzing their every reaction. A best seller (fiction), continuing and developing further a technique which proved more than palatable to the community two years ago introduces a different nymphomaniac every few chapters and to leave nothing to the imagination describes with particularity the stalwart hero's chivalry in accommodating them.³⁰

Nor did the interest in sexually oriented material seem to abate with time. As the Second Circuit noted:

The proliferation of books and articles in the general area of human sexuality by general practitioners, psychiatrists and psychologists, theologians and humorists, as well as manuals and

29. *United States v. 35 mm. Motion Picture Film Entitled "Language of Love"*, 432 F.2d 705, 715 (2d Cir. 1970) (footnotes omitted).

30. *United States v. One Carton Positive Motion Picture Film Entitled "491"*, 367 F.2d 889, 896-97 (2d Cir. 1966) (footnotes omitted).

films like the present one for laymen in the last five years would indicate that the breadth of interest we discerned then has shown no signs of abating. Masters & Johnson, *Human Sexual Inadequacy*, is presently No. 6 on the Best Seller List, the No. 1 spot being occupied by Reuben, *Everything You Always Wanted To Know About Sex*. Third on the list is "J", *The Sensuous Woman*³¹

According to *Publisher's Weekly*, *The Sensuous Man* by "M" was the number one best seller for 1971. Seven million paperback copies of *The Sensuous Woman* were sold in 1970-71.³² These books were followed by other popular books, all illustrated by drawings or photographs, including *The Joy of Sex*, *The Joy of Gay Sex*, *Making Love*, and a host of others.

The wide acceptability of sexually oriented books and films suggested that the community might not be offended, and if it was, the offense was hardly patent. The name of one case, *United States v. The Language of Love*,³³ epitomized the emerging struggle between those who sought to impose their ideas of decency on those who sought greater freedom for sexual expression.

After *Memoirs* a number of courts began to take the "utterly" without redeeming social value test seriously. Sexually explicit books and movies discussing the history, politics, and sexual desirability of oral sex and sexual freedom in Denmark began to receive constitutional protection, despite rather profuse illustrations.³⁴ But greater freedom for materials that many found desirable also meant it was more difficult to jail those selling far less desirable publications.

In the meantime, a massive report by the President's Commission on Obscenity and Pornography, released in 1970 after three years of study, concluded that sexual materials sold to adults should not be subject to criminal prosecution.³⁵ The Commission further concluded that there was little demonstrable connection between much sexually explicit material and anti-social behavior,³⁶

31. *Language of Love*, 432 F.2d at 713 n.6.

32. PUBLISHER'S WEEKLY, Feb. 7, 1972, at 53.

33. 432 F.2d 705 (2d Cir. 1970).

34. *E.g.*, *United States v. Palledino*, 475 F.2d 65 (1973); *United States v. Stewart*, 336 F. Supp. 299 (E.D. Pa. 1971).

35. COMM'N ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 23-26 (1970).

36. *Id.* But see *Raleigh News & Observer*, May 11, 1986, at 1A, col. 1 where a new report by the Attorney General's Commission on Pornography finds that ex-

a conclusion which seems to still be the predominant view among social scientists.

President Nixon hotly rejected the report. He had campaigned against the Supreme Court in 1968 announcing that the Court had gone too far in strengthening the criminal forces against the peace forces.³⁷ By 1973 he had appointed four new justices. For purposes of obscenity cases, the most critical appointment was that of Justice Lewis Powell in 1972 to replace Justice Hugo Black. Justice Black, along with Justice Douglas, was one of two justices who held that the first amendment prohibited obscenity laws. Justice Powell provided the key fifth vote in a 5-4 majority in 1973 in *Miller v. California*.³⁸ There the Court formulated its *third* definition of obscenity in sixteen years.

The direction the Court took in *Miller* was by no means fore-ordained. The 1969 case of *Stanley v. Georgia*³⁹ held that criminal prosecution of the private possession of obscene materials violated the first amendment. In so holding, the Court noted that the real interest of the state in regulating obscenity lay in the distribution rather than the private possession of obscene matter. Obscene expression, so long as it was privately possessed and not distributed, was entitled to first amendment protection.

The state in the *Stanley* case had argued that it had an interest in protecting individuals from the morally corrupting influence of obscenity. The Court rejected that argument as "wholly inconsistent with the philosophy of the First Amendment."⁴⁰ Second, the state argued that it had an interest in preventing sexual violence caused in part by the consumption of obscene materials. The Court rejected that argument on the grounds that "[t]here appears to be little empirical basis for that assertion" and that there existed a variety of less restrictive alternatives available to combat anti-social conduct that might result from the consumption of ob-

posure to most pornography bears a relationship to sexual aggression. However, the report has been heavily criticized by many of the researchers whose data was used in the Commission's findings. The researchers have criticized the report as a biased reading of inconclusive data. Raleigh News & Observer, May 18, 1986, at 5A, col. 1.

37. A. SINGER, CAMPAIGN SPEECHES OF AMERICAN PRESIDENTS 1928-1972, 361 (1976).

38. 413 U.S. 15 (1973).

39. 394 U.S. 557 (1969).

40. *Id.* at 566.

scene materials.⁴¹ Finally, the state argued that it had an interest in controlling the sale and distribution of obscenity. The Court rejected that argument as a justification for prosecuting the private possession of obscene materials on overbreadth grounds.⁴² So the *Stanley* Court seemed to require some justification for obscenity regulation other than the simple desire to control the moral quality of the thoughts of the citizenry.

Yet cases immediately following *Stanley* refused to extend its holding beyond the home.⁴³ In response, Justice Black protested that the freedom established in *Stanley* was the freedom to write a book in the attic, print it in the basement, and read it in the living room.⁴⁴

Any notion that the *Stanley* holding might eventually be extended to cover the right to purchase or to disseminate obscene materials was squarely rejected in *Miller* and its companion cases.⁴⁵ Chief Justice Burger, writing for the majority, announced a new definition of obscenity. According to Chief Justice Burger, the new definition would overcome problems of vagueness and overbreadth.⁴⁶ The new test was as follows:

(a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.⁴⁷

Under this formulation, the "utterly without redeeming social value test" had been replaced with a new one—the material must lack "serious literary, artistic, political or scientific value."⁴⁸ Under the old test the material had to be patently offensive because it affronted contemporary *national* standards relating to the descrip-

41. *Id.*

42. *Id.* at 568.

43. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).

44. *Id.* at 382 (Black, J., dissenting).

45. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. 12 200-Ft. Reels of Super 8 mm. Film*, 413 U.S. 123 (1972); *United States v. Orito*, 413 U.S. 139 (1973).

46. *Miller*, 413 U.S. at 27 (citations omitted).

47. *Id.* at 24 (citations omitted).

48. *Id.*

tion or representation of sexual matters. National standards would be replaced with community standards, and the community apparently could be statewide or local. The prurient interest test was similar in both cases.⁴⁹

Vagueness was overcome, according to the Court, by a new list of sexual acts which were potentially obscene.⁵⁰ (Portrayal of the acts could be written or pictorial.) The sexual expression that could be banned included actual or simulated intercourse and lewd exhibition of the genitals. These acts were to be written into state law. If material lacked such sexual conduct, then the vendor could know that the product was safe. If the sexual conduct was present, then the vendor would know that his public and commercial activities might bring prosecution.⁵¹

All that was true enough. The only thing it overlooked was the fact that the books and films now brought within the potential scope of state criminal statutes included an extraordinary number of books, magazines, and films from reputable publishers and producers, materials that were being consumed by millions of Americans each year.

One of the most interesting aspects of the *Miller* group of decisions was Justice Brennan's dissent. Justice Brennan had written a majority of the Court's obscenity decisions.⁵² He had constructed the tests in *Roth* and in *Memoirs*. He had upheld the convictions in *Ginzburg*⁵³ and in other cases.⁵⁴ But now Justice Brennan concluded that the attempt to define obscenity in situations involving sales to willing adults (where children were not involved and where unwilling viewers were not affronted), was hopeless.

It was one of the most remarkable changes of position in the history of the Court. Between the power of the state to compel adults to read only acceptable books and the protection of first

49. *Id.*

50. *Id.* at 25.

51. *Id.* at 27.

52. *E.g.*, *Roth v. United States*, 354 U.S. 476 (1957); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Ginzburg v. United States*, 383 U.S. 463 (1966); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966); *Ginsberg v. New York*, 390 U.S. 629 (1968).

53. *Ginzburg v. United States*, 383 U.S. 463 (1966).

54. *E.g.*, *Mishkin v. New York*, 383 U.S. 502 (1966).

amendment rights, Justice Brennan came down on the side of first amendment rights, stating:

[A]fter 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

. . . .
. . . The Due Process Clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of "what the State commands or forbids." In the service of this general principle we have repeatedly held that the definition of obscenity must provide adequate notice of exactly what is prohibited from dissemination In this context, even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes "[b]ook selling . . . a hazardous profession," but as well because it invites arbitrary and erratic enforcement of the law.⁵⁵

In the *Miller* group of cases, the Court set out the justifications for the prosecution of those who consume and disseminate "obscene" expression. The Court offered three justifications: First, the possible causal relation between such materials and anti-social conduct, including criminal activity; second, the effect on the total community environment; and third, the effect on the "privacies" of

55. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84, 86-88 (Brennan, J., dissenting) (citations omitted).

third parties.⁵⁶ In offering those justifications, the Court conceded that "there is no conclusive proof of a connection between anti-social behavior and obscene material . . ."⁵⁷ One crucial factor for the Court was the right of the state to regulate the moral quality of its communities. The majority concluded that such a legislative judgment should not be disturbed by the courts.⁵⁸

Miller announced that national standards were unascertainable and nonexistent.⁵⁹ The "utterly without redeeming social value test" was meaningless.⁶⁰ So it seemed that the unlucky defendants who had been convicted under those standards might have their convictions reversed. A meaningless and unknowable standard might be thought not to give defendants fair notice. The four dissenting justices now agreed such tests were unconstitutionally vague.

In a later decision it became apparent that freeing convicted disseminators of obscenity was not what the Court majority had in mind in *Miller*. In an opinion by Justice Rehnquist, the Court explained that the previous tests had been denounced as meaningless, ambiguous, and unknowable for the purpose of replacing them with different tests. But such tests were quite good enough to meet a vagueness challenge.⁶¹

B. *The North Carolina Response*

In the meantime, in North Carolina, the law zigged and zagged to follow the definitions of the Supreme Court. After the *Memoirs* decision and after a federal court found the prior North Carolina statute unconstitutional for failure to comply with *Memoirs*,⁶² the legislature passed a new statute embodying the *Memoirs* test.⁶³ In some cases, juries convicted and convictions were affirmed.⁶⁴ In over half the cases however, juries acquitted where sexually ex-

56. *Id.* at 58-59.

57. *Id.* at 60.

58. *Id.* at 69.

59. 413 U.S. 15, 31.

60. *Id.* at 24-25.

61. *Hamling v. United States*, 418 U.S. 87 (1974).

62. *Shinall v. Worrell*, 319 F. Supp. 485 (E.D.N.C. 1970).

63. 1971 N.C. Sess. Laws 405, (codified as amended at N.C. GEN. STAT. § 14-190.1 (1981 & Cum. Supp. 1985)). The 1971 statute repealed the prior statute, N.C. GEN. STAT. § 14-189.1 (1969). See *State v. McCluney*, 280 N.C. 404, 185 S.E.2d 870 (1972).

64. *E.g.*, *State v. Bryant*, 16 N.C. App. 456, 192 S.E.2d 693 (1972).

PLICIT books from "adult" book stores were involved.⁶⁵ Judges also failed to find all sexually explicit expression obscene.⁶⁶ From the censor's point of view, this was an unsatisfactory state of affairs. In 1973 the Supreme Court seemed to come to the rescue in the *Miller* case with its broader definition of obscenity.

Yet after *Miller*, a remarkable thing happened in North Carolina. Some state legislators, concerned with the first amendment implications of the *Miller* case, persuaded the legislature to require a prior adversary civil hearing before the state could initiate an obscenity prosecution.⁶⁷ At such a hearing, the defendant would be permitted to offer evidence. If a judge found the material in question to be obscene, then it could be seized and destroyed. But it was not a crime to sell the book or show the movie unless the judge had ruled particular materials obscene and the conduct continued after the hearing.⁶⁸ Later, the adversary hearing requirement was refined to exclude sales to children and display to unwilling viewers.⁶⁹

By requiring the prior adversary civil proceeding, North Carolina had effectively taken care of the vagueness problem. Except for sales to children and imposition on unwilling viewers, no one could be arrested unless he disseminated an item after a judge had ruled it obscene in a hearing. Book sellers and film exhibitors knew exactly where they stood. For regular booksellers and theaters the chilling effect of penalties for disseminating obscenity was eliminated. And there would be no informal censorship by warnings from the vice squad. No one would go to jail unless he or she had fair notice that the material in question had previously been found obscene by a court.

Later, North Carolina passed a statewide nuisance statute that

65. *E.g.*, State v. Weinke, Nos. 71CRS26052 & 72CRS706, (Durham County Super. Ct. Feb. 24, 1972); State v. Bell, No. 71CRS26053, (Durham County Super. Ct. Mar. 25, 1972); State v. Richardson, No. 72CR4351, (Onslow County Dist. Ct. Apr. 1, 1972); State v. Thille, Nos. 71CRS21571 & 71CRS21572, (Cumberland County Super. Ct. Sept. 7, 1972).

66. *E.g.*, State v. Thille, No. 71CR21570, (Cumberland County Dist. Ct. Sept. 3, 1971) (*Photo Illustrated Oralism and Sexual Intercourse*).

67. N.C. GEN. STAT. § 14-190.2 (1981), *repealed by* 1985 N.C. Sess. Laws 703, N.C. GEN. STAT. § 14-190.2 (Cum. Supp. 1985). *See* State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975) (no arrest or indictment until adversary judicial determination that material in question is obscene and thereafter disseminated by accused).

68. N.C. GEN. STAT. § 14-190.2 (1981).

69. *Id.* at § 14-190.2(h) (1981).

seemed to be of doubtful constitutionality.⁷⁰ Injunctions could be issued to ban the sale of obscenity. State and federal courts have upheld the statute⁷¹ but for reasons not very clear, the nuisance statute has not been widely used to control obscenity.

Finally, in the 1985 legislative session, the North Carolina General Assembly, with the backing of the new Democratic Attorney General, the new Republican Governor and the United States Attorney for the Eastern District, changed the obscenity law in a way that went as far as its sponsors thought possible in suppressing sexually explicit expression. The basic tests for obscenity—prurient interest, patent offensiveness, and lack of serious value—were taken from *Miller*. The “fair warning” adversary hearing was eliminated.⁷² This change was advertised as necessary to effectively curb pornography, including child pornography.⁷³ In fact, child pornography had largely disappeared from commercial establishments because of a tough new federal law on the subject.⁷⁴ At any rate, child pornography could simply have been withdrawn from the adversary hearing just as the legislature had done with the sale and display of obscene materials to minors and the display of obscene materials to unwilling viewers. Despite the articulated concern for child pornography, the potential effect of the statute seems to be the suppression of all sexually explicit expression through the threat of harsh criminal penalties.

In the new North Carolina statute, the requirement of the prior North Carolina statute that material lack educational value to be obscene was eliminated,⁷⁵ making it easier to apply the statute to a wide range of explicit sex education materials available in major book stores from major publishers. The prior requirement that dissemination take place in a public place was eliminated⁷⁶ and no requirement that the dissemination be commercial was inserted, making possible the prosecution of a wife who showed sexu-

70. N.C. GEN. STAT. § 19-1(a) (1981). For discussion regarding the constitutionality of controlling obscenity through the North Carolina nuisance statute, see Note, *Control of Obscenity Through Enforcement of a Nuisance Statute*, 4 CAMPBELL L. REV., 139 (1981).

71. *Fehlhaber v. North Carolina*, 675 F.2d 1365 (4th Cir. 1982).

72. 1985 N.C. Sess. Laws 703, N.C. GEN. STAT. § 14-190.1 (Cum. Supp. 1985).

73. See Shouplin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535 (1981).

74. 18 U.S.C.S. §§ 2252-55 (Law. Co-op. Cum. Supp. 1986)

75. N. C. GEN. STAT. § 14-190.1 (Cum. Supp. 1985).

76. *Id.*

ally explicit material to her husband, or of one adult who showed it to another.⁷⁷ The statute was changed to include "lewd" nudity and simulated sexual acts.⁷⁸ Moreover, instead of a two-year misdemeanor as in the prior statute, the crime became a three-year felony. One adult who showed a Penthouse magazine to another might face a presumptive sentence of two years in prison and a possible six-year sentence.⁷⁹

The new North Carolina statute assumed that under community standards it was intolerable for adults to view sexually explicit films or books showing other adults engaged in sexual acts. In fact, however, a recent survey of national public opinion indicates public opposition to such broad restrictions.⁸⁰ In Maine, over seventy percent of the voters rejected a proposed pornography statute similar to North Carolina's.⁸¹ Surveys of public opinion in Forsyth and Guilford Counties (used as evidence by the defense in obscenity prosecutions), show most adults found it acceptable for other adults to see representations of other adults engaged in actual or simulated sexual intercourse.⁸²

The results of prosecution as of May 1, 1986 show no consensus. One jury has convicted, one has acquitted, two have failed to reach agreement, and one has convicted on some sexually explicit magazines and acquitted on others.⁸³

III. CONSTITUTIONAL PROBLEMS WITH THE LAW—THE REAL WORLD AND THE JUDGES' WORLD

One basic problem with the North Carolina statute is its vagueness. It is impossible for an accused to know in advance whether his or her conduct falls on the permitted or forbidden side

77. *Id. But cf. Stanley v. Georgia*, 394 U.S. 557 (1969) (first amendment prohibits making mere private possession of obscene material a crime); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute forbidding use of contraceptives held to violate the right of marital privacy).

78. Previously, N. C. GEN. STAT. § 14-190.1 had been limited to representations of actual sexual intercourse and exhibition of the genitals in the context of sexual activity.

79. See *infra* note 109.

80. NEWSWEEK, Mar. 18, 1985 at 60. Sixty-six percent of adults believed adults should be allowed to rent X-rated videos provided there was no public display of such videos. Fifty-two percent supported the right to buy magazines showing adults in sexual relations under the same circumstances.

81. New York Times, June 12, 1986, at 17, col. 2.

82. See appendix for Guilford and Forsyth County Surveys.

83. Greensboro Daily News, Mar. 16, 1986, at E2, col. 1.

of the line regulating sexual expression. As a result, the statute has the effect of inhibiting much expression that is deserving of first amendment protection. Greatly increased punishment increases the chilling effect of the statute.

The criminal sanction, a necessity in an ordered society, is “an exercise of one of government’s most awesome and dangerous powers.”⁸⁴ The Supreme Court has noted that vague criminal statutes offend important values. Vague criminal statutes fail to give appropriate notice to those who may be prosecuted. As Chief Justice Warren once said:

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.⁸⁵

In addition, vague laws allow for discriminatory enforcement, delegating “basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”⁸⁶ But the vice of vagueness is particularly noxious where the statute deals with expression.⁸⁷ The fact that people cannot tell clearly what is permitted and what is prohibited means that they avoid protected conduct out of fear of prosecution. Society loses protected expression. The *Miller* test warns book sellers that sexually explicit expression may bring prosecution.⁸⁸ It gives them full notice of the danger faced. What it fails to do with any success at all is to help the book seller segregate in advance the protected from the forbidden.

The vagueness of the *Miller* tests in the North Carolina statute is apparent from an examination of them. To be obscene, material must appeal to the prurient interest, lack serious value, and describe sex in a patently offensive way—one which affronts community standards.⁸⁹ Prurient interest is an unhealthy, shameful or

84. *Ginzburg v. United States*, 383 U.S. 463, 477 (1966) (Black, J., dissenting).

85. *United States v. Harriss*, 347 U.S. 612, 617 (1954) (footnote omitted).

86. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

87. *Id.*; *Hines v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976).

88. *Miller*, 413 U.S. at 27.

89. *Id.*

morbid interest in sex. The fact that the material is erotic is not enough, though if the material is not erotic it does not meet the prurient interest test. In fact, the Supreme Court has recently indicated that a statute banning material that arouses healthy "lust" goes beyond what is constitutionally permissible.⁹⁰

The second part of the test is that material must depict sexual conduct in a patently offensive way. The conduct, spelled out in the North Carolina law, is actual or simulated sexual intercourse, including anal and oral intercourse, and lewd exhibition of the genitals. Except for the puzzling question of what exhibitions of the genitals are "lewd", the definition of sexual conduct seems relatively clear. But more is required. The conduct is, as one court noted, only a threshold test. Once it is satisfied, the trier of fact must go on to consider whether the material is in fact offensive to the standards of the community.⁹¹

In 1973, Justice Burger announced that hard core pornography, which apparently meant any material showing or describing sexual acts, could speak for itself.⁹² No further evidence was required to show that the material actually affronted contemporary community standards, or was prurient, or lacked value.⁹³ Still, patent offensiveness and prurient appeal were questions of fact. What was tolerable in New York City, the Court was fond of saying, might not be acceptable in Maine.⁹⁴

The patent offensiveness test assumes that consensus is required for a standard to exist. Chief Justice Burger rejected national standards because the nation was too large for one standard, "even assuming that the *prerequisite* consensus exists."⁹⁵

The tests for obscenity may work with fair predictability in a community where consensus reigns. In most places in modern America, however, no consensus exists because members of the community have very different personal tastes and standards.

Because sexually oriented material generates such strong emotional reactions (by both the proponents and opponents of censor-

90. *Brockett v. Spokane Arcade*, 105 S. Ct. 2794 (1985). See also *Cohen v. California*, 403 U.S. 15 (1971) (to be obscene material must be erotic in some sense).

91. *United States v. Various Articles of Obscene Material*, 709 F.2d 132, 135 (2d Cir. 1983).

92. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973).

93. *Id.*

94. *Miller*, 413 U.S. at 32.

95. *Id.* at 30 (emphasis added).

ship) tests like serious value, patent offensiveness, and prurient interest have little objective content. As Justice Brennan noted, "the meaning of these concepts necessarily varies with the experience, outlook and even idiosyncrasies of the person defining them."⁹⁶ As the foreman of the Winston-Salem jury that deadlocked eight to four for acquittal put it: "An awful lot is left up to interpretation and personal feelings."⁹⁷

Jury verdicts under these tests constitute the work of a "tiny autonomous legislature."⁹⁸ And since each jury is composed of different individuals, the effect, as Judge Frank noted thirty years ago, is "hundreds of diverse jury-legislatures" enacting "hundreds of diverse statutes," each reflecting its own particular moral sensibilities.⁹⁹ As one dissenting juror in the Winston-Salem case candidly noted: "I believe that as jurors, we were supposed to *represent* the community and establish the community standard."¹⁰⁰ But as Justice Black observed, "a case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary."¹⁰¹

The situation is made much worse by the fact that each book or magazine or motion picture film disseminated may be a six-year felony. There comes a point where quantitative changes produce qualitative ones. The escalation and the punishment of dissemination of obscenity is such a case. As a result the legislature has deterred protected speech.

The policy behind the rules against vagueness and the different rules against prior restraint is to make sure that protected speech reaches the public. Escalated punishments for obscene speech have the same effect as prior restraints or vague statutes—they chill protected speech, restraining it at the source.¹⁰²

96. *Id.* at 84, (Brennan, J., dissenting).

97. Winston-Salem Journal, Mar. 13, 1986, at 1, col. 1.

98. *United States v. Roth*, 237 F.2d 796, 822 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957).

99. *Id.* at 823.

100. Winston-Salem Journal, Mar. 13, 1986 at 1, col. 1 (emphasis added).

101. *Ginzburg v. United States*, 383 U.S. 463, 480 (1966).

102. *Cf. Near v. Minnesota*, 283 U.S. 697 (1931) (statute provided that unless publisher proved that publication was true, published with good motives, and for justifiable ends, the publication is suppressed and further publication is punishable as contempt); *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610 (1976) (ordinance requiring advance notice of political or charitable solicitation held unconstitutionally vague because of potentially inhibiting effect on speech).

They do so by increasing the penalties for guessing wrong as to whether or not certain materials are obscene.

In fact, in North Carolina suppression of protected expression is exactly what is going on. A college professor who has taught a course on freedom of expression has taken the sexually explicit exhibits out of his lectures on obscenity. Booksellers have removed from the shelves illustrated sexual guides provided by major publishers.¹⁰³

State judges have typically treated the *Miller* tests as though they had definite meaning. Some jurors, on the other hand, have been more candid about problems with the law. They sometimes utter embarrassing truths: "I personally don't know what an ordinary adult or average person in Forsyth County would consider the community standard. If I could be dictator for a day, then I know where I would draw the line. But I suspect that we would all draw lines in different places."¹⁰⁴ A juror in Greensboro who thought "it's all filth" and who voted to convict nonetheless seemed to concede the absence of *one* community standard in Guilford County. "We all come from different communities, and we all feel very differently."¹⁰⁵

Even the courts cannot apply the tests with predictability. After *Miller*, the Supreme Court of Georgia ruled the critically acclaimed film *Carnal Knowledge* to be obscene.¹⁰⁶ The United States Supreme Court reversed, holding that the film did not even involve sufficient sexual conduct to meet the threshold test.¹⁰⁷ Needless to say, to reach its decision the Supreme Court of Georgia had to conclude that the film lacked serious value. In North Carolina, the film *Memories Within Miss Aggie* was found to have serious value by one Superior Court judge and no value by another.¹⁰⁸

The Fifth Circuit Court of Appeals found an issue of Pent-

103. Greensboro News & Record, Mar. 9, 1986, at E4, col.1.

104. See *supra* note 100 at 4, col. 2.

105. Greensboro News & Record Mar. 29, 1986 at D1, col. 6.

106. See *Jenkins v. Georgia*, 230 Ga. 726, 199 S.E.2d 183 (1973), *rev'd*, 418 U.S. 153 (1974).

107. *Id.*

108. See *State ex rel. Yeager v. Neal*, 26 N.C. App. 741, 217 S.E.2d 576 (1975) where the North Carolina Court of Appeals affirmed for technical reasons a decision from Forsyth County. In Guilford County, Judge Rousseau reached the opposite result.

house magazine to be obscene.¹⁰⁹ The case illustrates however, that the *Miller* standards simply cannot be applied in a consistent or meaningful way. The District Judge had found that Penthouse magazine did not appeal to a prurient interest, depict sexual conduct in a patently offensive way, or lack serious value.¹¹⁰

The appellate court reversed. Despite its observation that Penthouse had an annual worldwide circulation of 60 million copies and that the issue in question contained foreign policy analysis, fiction, and film reviews, two members of the panel found the magazines lacked value, appealed to the prurient interest, and were patently offensive. The dissenter found Penthouse not to be prurient and to have serious value. After all was said and done, four federal judges had scrutinized Penthouse. Two found it had serious value. Two found it valueless.¹¹¹ The case illustrates the truth of the observation made by Justice Brennan when he quoted Justice Black in *Paris Adult Theatre I*:

For I know of no satisfactory answer to the assertion by Mr. Justice Black, "after the 14 separate opinions handed down" in the trilogy of the cases decided in 1966, that "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case . . . whether certain material comes within the area of obscenity."¹¹²

IV. THE TESTS ON TRIAL

Troublesome as the statute is in general, its application at trial is even worse. The difficulty of proving what the community finds offensive has been solved by a wave of the judicial wand. In 1973, Chief Justice Burger announced that hard core pornography, which apparently meant any material showing or describing sexual acts or "lewd" genitals, could speak for itself.¹¹³ No further evidence was required to show that the material actually affronted contemporary community standards or was prurient or lacked value.¹¹⁴ Still, patent offensiveness and prurient appeal were questions of fact.¹¹⁵

109. *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d. 1353 (5th Cir. 1980).

110. *Penthouse International, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977).

111. *See supra* notes 109-10.

112. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 87 (1973) (Brennan, J., dissenting) (quoting *Ginzburg v. United States*, 383 U.S. 463, 480-81 (1966)).

113. *Paris Adult Theatre I* at 56 n.6.

114. *Id.*

115. *Miller v. California*, 413 U.S. 15 (1973).

When a jury is told that the "materials speak for themselves" and that the state is not required to prove the things the statute sets out as the elements of the crime (except by presenting the materials) problems with obscenity statutes are seriously aggravated.

The contradictory truth about materials speaking for themselves has been noted by the Second Circuit: "While the materials provide the best evidence of their substantive content, they do not supply any information about the community standards by which they are to be judged."¹¹⁶ But if the materials themselves provide no information about community standards, then they do not answer by themselves whether they meet the patent offensiveness test. What the courts really mean by saying that the materials speak for themselves is simply that the prosecution is not required to offer proof of the things the law requires it to prove.

This leaves two possibilities. The jury may in fact "know" from its experience, without any assistance whatsoever, what community standards are. In large and diverse communities, this possibility seems unlikely. There is no answer, really, to the embarrassing truth uttered by Judge Jerome Frank years ago: no social scientist would regard the jury as a truly representative sample of the community.¹¹⁷

The other possibility is that the jury does *not* know what community standards really are. Sex is a private area of most people's lives. Many, perhaps most, people do not discuss their sex lives with their friends and casual acquaintances. (This fact reflects privacy, not shame, for surely the love life of a married couple is not shameful.) The same reserve is probably true, to a lesser degree, with reference to the pornography people choose to view.

If the jury is not aware of community standards, what will it do? Ideally, of course, it should acquit. But language about materials speaking for themselves and using personal experiences may give the jury a different message, the message that once the juror has looked at the book he has all the evidence he needs. The message about the book speaking for itself may be read by the juror to

116. *United States v. Various Articles of Obscene Material* 709 F.2d 132, 135 (2d Cir. 1983).

117. *United States v. Roth*, 237 F.2d 796, 822 (2d Cir. 1956) (Frank, J., concurring).

imply that the juror has been elected censor for a day and that he may ban books and films at personal whim—or at least based on the limited experience of the juror and his friends. In federal trials the Supreme Court will not even permit inquiry during voir dire into whether or not jurors know community standards.¹¹⁸

As a result of statements by jurors to the press we have some idea of how the system works in fact. In Forsyth County the majority of the jurors took the test seriously and without knowledge of what the community standard was, voted to acquit. But a minority juror followed the scarcely-veiled invitation the statute gives to follow personal views. As she explained, "I believe as jurors, we were supposed to *represent* the community and *establish* the community standard."¹¹⁹

In Greensboro, jurors were told that the prosecution need not present expert evidence and the jurors could base their decision on obscenity on their own experience. One juror explained that she used the standards of people in her home, at work and at church in deciding whether the material was obscene.¹²⁰ This approach leaves out a substantial portion of the community. It also takes as assumed the attitudes and behavior of people in an area most regard as private, and which may not even have been the subject of much discussion in the limited community. Although jurors in Greensboro were told to use the standards of Guilford County and to judge the materials based on their experience, a number interpreted the instruction to mean that they should judge the materials based on much smaller and more intimate communities. "We all come from different communities, and we all feel very differently,"¹²¹ one of the Guilford jurors who voted for conviction explained.

There are practical steps that appellate courts can take under state law to reduce the danger posed by the statute. Jurors should be told explicitly that they need to consider the views of all adults in the county in arriving at community standards and that in considering this matter the jurors should consider both the evidence offered in the case as well as their own experience. Furthermore jurors should affirmatively be told that if they do not believe they know what the standards of the entire community are it is their

118. *Smith v. United States* 431 U.S. 291, 308 (1977).

119. *Winston-Salem Journal*, Mar. 13, 1986 at 1, col. 1 (emphasis added).

120. *Greensboro News & Record*, Mar. 20, 1986, at D2, col. 5.

121. *Id.* at col. 6.

duty to acquit.¹²²

How is the test for patent offensiveness to be explained to the jury? What does it mean that materials affront the standards of the community? Where the dissemination is to adults, the community to be affronted is made up of adults. The material is then tested by what is acceptable to adults. Adults may not be limited to reading matter fit only for children.¹²³

The better test for patent offensiveness is one of toleration. Does the community find it intolerable for adults who wish to view the material to do so? There is language in opinions of the Court to suggest that tolerance is the test. "[C]ontemporary community standards must be applied by juries in accordance with their understanding of the tolerance of the average person in their community"¹²⁴ In *New York v. Ferber*,¹²⁵ the Court also indicated that the question was "a community's toleration for sexually oriented material"¹²⁶ A number of state courts have followed a standard of tolerance.¹²⁷ Others have followed somewhat different standards.¹²⁸

State courts, with their own constitutions, should consider the implications of harsh new censorship acts for freedom of expression. At the very least they could and should require obscenity trials to be conducted under substantive and procedural standards which will give freedom of expression a fair chance of survival in the arena of a jury trial. One standard that should be required under the state constitution is a standard of tolerance. Both Colorado and Tennessee have found such a standard required by their state constitutions.¹²⁹

The defendant in an obscenity case needs to try to overcome the dangers of a purely subjective (and perhaps even hypocritical) decision. There are several ways of doing so. Because the evidence the defendant is permitted to offer has a crucial bearing on whether or not the jury will view the question objectively or en-

122. *Commonwealth v. Mascolo*, 7 Mass. App. 275, 386 N.E.2d 1311 (1979).

123. *Butler v. Michigan*, 352 U.S. 380 (1957); *Pinkus v. United States*, 436 U.S. 293 (1978).

124. *Smith v. United States*, 431 U.S. 291, 305 (1977).

125. 458 U.S. 747 (1982).

126. *Id.* at 761 n.12.

127. *Leech v. American Booksellers Association, Inc.*, 582 S.W.2d 738 (Tenn. 1979); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

128. *State v. Barrett*, 278 S.C. 92, 292 S.E.2d 590, 592 (1982).

129. *See supra* note 127.

tirely subjectively, undue restrictions on proof should be scrutinized with care under the law of the land clause in the North Carolina Constitution.¹³⁰

The best way for the defendant to offer evidence on the issue of community standards is by a scientifically conducted survey of public opinion. A number of state appellate courts have considered surveys in obscenity cases.¹³¹ The better reasoned and prevailing state authorities support admission of surveys.

In *Saliba v. State*,¹³² the court reversed a conviction for exclusion of public opinion surveys. The court noted that the jury is permitted to find obscenity based only on examination of the items.

However, expert evidence on this issue may be highly relevant. The jurors are not instructed to evaluate obscenity based on their personal opinions but are charged with applying contemporary community standards In the absence of expert testimony, the jury's determination of contemporary community standards runs the risk of incorporating the individual juror's "necessarily limited, hit or miss subjective view on the basis of his personal upbringing or restricted reflection or particular experience of life." . . . Consequently, the defendant in an obscenity prosecution is entitled to introduce relevant and appropriate expert testimony on the issue of contemporary community standards.

Expert testimony based on a public opinion poll is uniquely suited to a determination of community standards. Perhaps no other form of evidence is more helpful or concise: "A properly conducted public opinion survey itself adequately ensures a good measure of trustworthiness, and its admission may be necessary in the sense that no other evidence would be as good as the survey evidence or perhaps even obtainable as a practical matter."¹³³

130. N.C. CONST. art. I, § 19. Where a defense turns upon a factual adjudication, the defendant has a constitutional right to an adequate and fair hearing including the opportunity to test, explain, or rebut evidence received by the court. *In re Gupton*, 238 N.C. 303, 77 S.E.2d 716 (1953).

131. *Saliba v. State*, ___ Ind. App. ___, 475 N.E.2d 1181 (1985); *Carlock v. State*, 609 S.W.2d 787 (Tex. Crim. App. 1980); *People v. Nelson*, 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980). *Contra* *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888 (1980).

132. ___ Ind. App. ___, 475 N.E.2d 1181 (1985).

133. *Id.* at ___, 475 N.E.2d at 1185 (quoting *Smith v. California*, 361 U.S. 147, 165 (1959) (Frankfurter, J., concurring) and *Commonwealth v. Trainor*, 374 Mass. 796, 803, 374 N.E.2d 1216, 1221 (1978)).

The court concluded that the poll was relevant. It rejected the argument that the poll should have been excluded because the particular item alleged obscene was not shown to the respondents. It also rejected an attack on the wording of the questions.

We must emphasize that the majority of the community need not desire to view sexually explicit materials in order to establish community acceptance or tolerance of such materials. Rather the issue concerns the population's perception of what is generally acceptable in the community considering the intended and probable recipients of the materials.¹³⁴

In *Carlock v. State*,¹³⁵ the court held the exclusion of a similar poll to be reversible error. The court held that objections to the survey raised by the State went to the weight of the evidence, and not admissibility.

In another case involving a similar poll, *People v. Nelson*,¹³⁶ the court noted: "The survey established that the majority of Illinois adults found it acceptable to view, buy, or read such material as contained in the movies This weighs heavily against a finding that the movies are patently offensive."¹³⁷ The court concluded:

[T]he survey results are strong evidence that the community standard would accept or at least would not reject the portrayal of sexually explicit material in movies when access to the movies is limited to adult viewers. In fact, survey evidence may be the only way to prove degree of acceptability¹³⁸

The court ruled that excluding the survey left the jurors in ignorance and deprived the defendant of the right to introduce the best evidence he could on community standards.¹³⁹

Just as juries should be allowed to know the true state of public opinion, other evidence bearing on community standards should be admissible, to ensure that juries are not required to make their decisions in a factual vacuum. The better reasoned cases hold that the defendant is entitled to offer evidence of comparable materials which in fact enjoy wide acceptance in the community. Avid acceptance of X-rated videos in the community tends to show that

134. *Saliba*, _____ Ind. App. at _____, 475 N.E.2d at 1186.

135. 609 S.W.2d 787 (Tex. Crim. App. 1981).

136. 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980).

137. 88 Ill. App. 3d 196, 198-99, 410 N.E.2d 476, 478.

138. *Id.* at 199, 410 N.E.2d at 479.

139. *Id.*

adult viewing of the depiction of sexual acts by other adults does not affront community standards.¹⁴⁰

If Penthouse magazine is filled with pictures of things within the list of sexual conduct described in the statute, jurors should be permitted to know something about the circulation and acceptability of the magazine.¹⁴¹

Of course there should be limits. The number of such exhibits must be limited in the interest of time. But if the same type of sexual conduct is portrayed in two publications, the question of comparability should be for the jury.¹⁴²

Courts have taken different approaches to the question of proof of community standards. Some judges have suggested that it would violate constitutional guarantees to exclude such evidence.¹⁴³ Others have set formidable barriers to overcome in an effort to get information to the jury.¹⁴⁴ The barriers themselves raise constitutional questions.¹⁴⁵

V. CONCLUSION

This article attempts to suggest solutions. One possible solution is to limit prosecutions to cases of direct, certain and immediate harm caused by clearly definable materials. A second possible solution is legislative. Because of the chilling effect, obscenity laws should not be coupled with harsh punishments. More important however, categories subject to regulation should be severely limited so as to reflect broad social consensus. For many classes of sexually-oriented materials the adversary hearing should be restored. Exclusion from the adversary hearing should be made with a scalpel, not with a meat ax.

State courts should take a fresh look at the vexed question of

140. *United States v. Various Articles of Obscene Material*, 709 F.2d 132 (2d Cir. 1983); *Berg v. State*, 599 S.W.2d 802 (Tex. Crim. App. 1980); *Keller v. State*, 606 S.W.2d 931 (Tex. Crim. App. 1980); *People v. Heller*, 96 Cal. App. 3d Supp. 1, 157 Cal. Rptr. 830 (1979).

141. *See* 2 E. DEVETT & C. BLACKMER, *FEDERAL JURY INSTRUCTIONS*, § 62.07 at 534 (1977).

142. *Id.*

143. *Cf. Smith v. California*, 361 U.S. 147, 167 (1959) (Frankfurter, J., concurring) (right to introduce such evidence should be a requirement of due process).

144. *E.g., Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, *cert. denied*, 448 U.S. 888 (1980).

145. The effect is to exacerbate the vagueness problem.

obscenity in light of experience. The North Carolina Constitution, like virtually all state constitutions, prohibits vague criminal statutes.¹⁴⁶ With the history of enforcement and interpretation of the new obscenity statute, the North Carolina courts are now in a position to compare the facts to the rule. At least as to those types of material for which no consensus exists, the North Carolina statute is *in fact* unconstitutionally vague as applied. One solution to the vagueness problem would be to find an adversary hearing constitutionally required, at least as to materials for which no consensus exists. No cases yet seem to support these results. But the tests are clear and the facts are there for judges who choose to look.

Short of holding the statute unconstitutional as a matter of state constitutional law, the state court should require trials that reduce instead of enhance the subjectivity of the result. Liberal admission of state and defense evidence of community standards (including materials showing comparable sexual activity), requiring affirmative proof by the prosecution, and cautionary instructions designed to avoid purely subjective reactions should all be required under state constitutional law.¹⁴⁷

Running throughout the history of obscenity regulation is the problem of squaring such regulation with first amendment jurisprudence. The Supreme Court's initial answer was to distinguish types of expression and to deal with obscenity as expression which is not protected by the first amendment. The last thirty years of obscenity regulation have shown the difficulty of that route. Distinguishing sexually explicit speech which is protected from that which is not protected has proved extraordinarily difficult.

The criminal sanction, because of its tremendous power and potential for abuse, should be employed in a limited fashion. Other avenues in a free society are available to convey one's abhorrence of the propagation of bad values: pamphleteering, preaching and organizing. Indeed, as Judge Frank noted:

Public opinion, by influencing social attitudes, may create a convention, with no governmental "sanction" behind it, far more coercive than any statute

. . . .

146. N.C. CONST. art. I, § 19. See also *State v. Sanders*, 37 N.C. App. 53, 245 S.E.2d 397 (1969) (criminal statute must be sufficiently definite to inform citizens of common intelligence of the particular acts which are forbidden).

147. See N.C. CONST. art. I, § 19 and *supra* note 127. So far, there has been little consideration of the question as a matter of state constitutional law.

. . . [E]xperience teaches that democratically exercised censorship by public opinion has far more potency, and is far less easily evaded, than censorship by government. The incessant struggle to influence public opinion is of the very essence of the democratic process. The basic purpose of the First Amendment is to keep that struggle alive, by not permitting the dominant public opinion of the present to become embodied in legislation which will prevent the formation of a different dominant public opinion in the future.

. . . [D]emocracy accepts the postulate that in the long run, the struggle to sway public opinion will produce the wisest policies.¹⁴⁸

To the extent that the criminal sanction in the obscenity context is imposed to prevent direct, immediate, and certain harm to identifiable third parties and identifies behavior with sufficient specificity to alleviate vagueness concerns, the imposition of the sanction may be justified. The problem grows murkier when harm is less immediate and certain¹⁴⁹ particularly since the effect of sexual material on aggression is dubious.¹⁵⁰

Basically the state justifies its regulation of sexual expression by the effect on the moral character and values of the community. This is perhaps the oldest and most deeply entrenched reason offered for obscenity regulation. The argument is that obscene materials promote bad values and that the state has an interest in promoting good values among its citizens.

There are difficulties with this concept even assuming that imposing the criminal sanction on consenting adults for the purpose of improving their moral values is wise and compatible with a free society—as it may well be. The first problem is in defining what is and what is not obscene. The second is in segregating those types of sexually explicit materials which promote good values from

148. *United States v. Roth*, 237 F.2d 796, 805 & nn.10-11 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957).

149. See MacKinnon, *Not a Moral Issue*, YALE L. & P. REV. 321, 338 (1984).

150. Baron, *The Aggression-Inhibiting Influence of Heightened Sexual Arousal*, 30 J. OF PERSONALITY AND PSYCHOLOGY 318 (1974); Baron and Bell, *Sexual Arousal and Aggression by Males: Effects of Types of Erotic Stimuli and Prior Provocation*, 35 J. OF PERSONALITY AND SOC. PSYCHOLOGY 79 (1977); Donnerstein & Barrett, *Effects of Erotic Stimuli on Male Aggression Towards Females*, 36 J. OF PERSONALITY AND SOC. PSYCHOLOGY 80 (1978); Donnerstein, Donnerstein & Evans, *Erotic Stimuli and Aggression: Facilitation or Inhibition*, 32 J. OF PERSONALITY AND SOC. PSYCHOLOGY 237 (1975).

those which promote bad values. The third is the problem of overbreadth and underinclusiveness. The statute is not designed in terms of values but in terms of sexually explicit speech. As a result, it deters expression which describes or represents the acts set out by the legislature with little relation to the moral context of the expression. This is so, at least, if one assumes that the portrayal of sexual acts can be positive, negative, or neutral depending on the context. Conversely, under the statute, one may espouse bad values provided one does so artistically.¹⁵¹ Finally the endeavor to censor morally bad ideas is not compatible with the most basic principles of first amendment law. If the first amendment protects only expression that the majority believes will promote the right values, it does not protect much—perhaps not even expression by minority political parties. As long as certain varieties of sexual intercourse between men and women—possibly even husbands and wives—are punished as felonies under state law, portrayal of and advocacy of the acceptability of such activity is, of course, political expression.

Sexually explicit materials, by their very nature arouse intense and strongly-held feelings. Questions of sexual expression touch the deepest roots of our moral sensibilities. Consequently, the reaction of many (as embodied in the recent North Carolina statute) to the existence and dissemination of sexually explicit materials is understandable. It is a natural reaction to forbid that which we abhor. Many of the values proponents of censorship seek to promote deserve general support.

But the danger of broad statutes that forbid sexual expression to insure suppression of expression we find abhorrent is particularly troubling in a democratic society. The result is that people will be sent to prison under an act which gives no meaningful notice of the line between acceptable and non-acceptable sexually explicit expression.

The general philosophy of the first amendment is one of toleration for the spoken and printed word. North Carolina has departed from that philosophy in a way that is deeply troubling.

151. *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

*Appendix*ESCO Community Standards Poll
Summary of Results

	<u>Guilford County</u>	<u>Forsyth County</u>
Date of Survey:	November/December 1985	November/December 1985
Methodology:	Telephone, random digit N=351, Weighted N=371	Telephone, random digit N=300

1. AGE:

	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Under 18	0	0.0	0	0.0
18-25	64	17.3	40	13.3
26-35	89	24.0	56	18.7
36-50	100	27.0	83	27.7
51-65	72	19.4	84	28.0
Over 65	42	11.3	37	12.3
No answer (18 or over)	<u>4</u>	1.0	<u>0</u>	0.0
	371		300	

2. SEX:

Male	166	44.7	153	51.0
Female	205	55.3	147	49.0

3. POLITICAL PARTY:

Democrat	143	38.5	116	38.7
Republican	88	23.8	76	25.3
Independent	77	20.8	42	14.0
Not one of these categories	42	11.3	43	14.3
Don't know, not sure	6	1.6	3	1.0
No answer	15	4.0	20	6.7

4. IN YOUR PERSONAL OPINION, DO YOU THINK IT IS
ACCEPTABLE OR NOT ACCEPTABLE FOR ADULTS WHO
WANT TO, TO SEE MOVIES SHOWING OTHER ADULTS IN
ACTUAL OR PRETENDED SEXUAL ACTIVITIES?

	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Acceptable	208	56.1	141	47.0
Neither	11	3.0	14	4.7
Not acceptable	139	37.5	138	46.0
Don't know	5	1.3	5	1.7
No answer	8	2.2	2	0.7

5. IN YOUR PERSONAL OPINION, DO YOU THINK IT IS ACCEPTABLE OR NOT ACCEPTABLE, FOR ADULTS WHO WANT TO, TO SEE MAGAZINES AND BOOKS PORTRAYING OTHER ADULTS IN ACTUAL OR PRETENDED SEXUAL ACTIVITIES?

	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Acceptable	225	60.6	142	47.7
Neither	6	1.6	11	3.7
Not acceptable	133	35.8	141	47.0
Don't know	2	.5	5	1.7
No answer	5	1.3	0	0.0

6. IN YOUR OPINION, DO YOU THINK IT IS ACCEPTABLE OR NOT ACCEPTABLE FOR ADULTS WHO WANT TO, IN THE PRIVACY OF THEIR HOMES, TO SEE MOVIES SHOWING OTHER ADULTS IN ACTUAL OR PRETENDED SEXUAL ACTIVITIES?

	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Acceptable	241	65.0	182	60.7
Neither	4	1.1	9	3.0
Not acceptable	118	31.7	102	34.0
Don't know	4	1.1	7	2.3
No answer	4	1.1	0	0.0

7. IN YOUR OPINION, DO YOU THINK IT IS ACCEPTABLE OR NOT ACCEPTABLE FOR ADULTS WHO WANT TO, IN THE PRIVACY OF THEIR HOMES, TO SEE MAGAZINES AND BOOKS PORTRAYING OTHER ADULTS IN SITUATIONS INVOLVING NUDITY AND ACTUAL OR PRETENDED SEXUAL ACTIVITIES?

	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Acceptable	237	63.9	185	61.7
Neither	6	1.6	9	3.0
Not acceptable	120	32.3	102	34.0
Don't know	3	.8	4	1.3
No answer	5	1.3	0	0.0

8. IN YOUR OPINION, IS IT ACCEPTABLE OR NOT ACCEPTABLE, FOR ADULTS WHO WANT TO, TO PURCHASE MAGAZINES THAT PORTRAY OTHER ADULTS IN ACTUAL OR PRETENDED SEXUAL ACTIVITIES?

	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Acceptable	219	59.0	153	51.0
Neither	7	1.9	6	2.0
Not acceptable	130	35.0	138	46.0

Don't know	9	2.4	3	1.0
No answer	6	1.6	0	0.0

9. IN YOUR OPINION, IS IT ACCEPTABLE OR NOT ACCEPTABLE FOR MOVIE THEATERS THAT RESTRICT ATTENDANCE ONLY TO ADULTS TO SHOW FILMS PORTRAYING OTHER ADULTS IN ACTUAL OR PRETENDED SEXUAL ACTIVITIES?

	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Acceptable	207	55.8	161	53.7
Neither	5	1.3	11	3.7
Not acceptable	147	39.6	126	42.0
Don't know	5	1.3	2	0.7
No answer	7	1.9	0	0.0

10. IN YOUR OPINION, IS IT ACCEPTABLE OR NOT ACCEPTABLE FOR BOOKSTORES THAT RESTRICT ADMITTANCE ONLY TO ADULTS TO SELL PUBLICATIONS AND EXHIBIT MOVIES PORTRAYING OTHER ADULTS IN SITUATIONS INVOLVING NUDITY AND ACTUAL OR PRETENDED SEXUAL ACTIVITIES?

	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Acceptable	209	56.3	161	53.7
Neither	6	1.6	9	3.0
Not acceptable	143	38.5	126	42.0
Don't know	8	2.2	4	1.3
No answer	5	1.3	0	0.0

11. THANK YOU FOR YOUR RESPONSES. WE HAVE BEEN USING THE TERM "SEXUAL ACTIVITIES" IN THIS INTERVIEW. WHAT WE MEAN BY THIS TERM INCLUDES ADULTS SHOWN IN TOTAL MALE AND/OR FEMALE NUDITY, ACTUAL OR PRETENDED SEXUAL INTERCOURSE, AND ALL KINDS OF SEXUAL VARIATIONS. IS THAT WHAT YOU UNDERSTOOD THE TERM TO MEAN, OR DID YOU THINK WE MEANT SOMETHING ELSE?

	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Understood	369	99.5	296	98.7
Thought we meant something else	0	0.0	0	0.0
Don't know	0	0.0	1	0.3
No answer	2	.5	3	1.0

