During the one hundred and fifty years after the adoption of the first amendment, the United States Supreme Court had no occasion to pass on the constitutionality of laws which made obscenity a crime. Since the mid-1950's, however, the Court has been deluged with obscenity cases, and in that relatively short period of time it has confronted the principal questions relating to the problem. In attempting to define obscenity the Court has unfortunately failed to provide adequate guidelines for determining whether a work is obscene and has thus left inferior courts in a state approaching mass confusion. As recently as 1968, a Michigan judge observed that both the bench and the bar agreed that obscenity law "produces as many views as there are legal minds at work." He also indicated that in
the thirteen obscenity cases since *Roth v. United States* in which signed opinions were delivered, there had been a total of fifty-four separate opinions. In such a new area of law, perhaps it is inevitable that opinion will be strongly divided, especially where the first amendment is involved. Some argue that obscenity laws are unwarranted intrusions into the fundamental freedoms of speech, press and expression. In a

Professor Randall cites 1 CHAFEE, *GOVERNMENT & MASS COMMUNICATION* 210 (1947), for the proposition that there could never be a satisfactory solution to the problem since the “law likes to be logical, whereas it is impossible to be wholly logical in dealing with relations between the sexes. The subject by its very nature includes a large element of irrationality.” R. RANDALL, *CENSORSHIP OF THE MOVIES* 55 (1968).

In *Z. CHAFEE, FREE SPEECH IN THE UNITED STATES* 151 (Atheneum ed. 1969), it was stated:

When the law supplies no definite standard of criminality, a judge in deciding what is indecent or profane may consciously disregard the sound test of present injury, and proceeding upon an entirely different theory may condemn the defendant because his words express ideas which are thought liable to cause bad future consequences. . . . This breach of the peace theory is peculiarly liable to abuse when applied against unpopular expressions and practices. It makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.

Two of the better complications of the materials in the area are found in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960) (hereinafter cited as Lockhart & McClure), a massive study of the problem; and in the brilliant and provocative article by Anastaplo, *Obscenity and Common Sense: Toward a Definition of Community and Individuality*, 16 St. Louis U.L.J. 527 (1972). For an overview of the theoretical considerations on obscenity the reader may wish to examine a good collection of essays found in *CLOR, CENSORSHIP AND FREEDOM OF EXPRESSION: ESSAYS ON OBSCENITY AND THE LAW* (1971).


Since 1968 when *Olsen v. Doerfler*, was written, there have been seven obscenity cases in which a signed opinion was delivered. Heller v. New York, 413 U.S. 483 (1973), three opinions; United States v. Orito, 413 U.S. 139 (1973), three opinions; United States v. 12 200-Ft. Reels of Super 8 MM Film, 413 U.S. 123 (1973), three opinions; Kaplan v. California, 413 U.S. 115 (1973), two opinions; Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), three opinions; Miller v. California, 413 U.S. 15 (1973), three opinions; Blount v. Rizzi, 400 U.S. 410 (1971), two opinions; Stanley v. Georgia, 394 U.S. 557 (1969), three opinions. This brings to seventy-five the total number of judicial positions taken by members of the Court on obscenity matters in a period of sixteen years.
society where governmental regulation seems to be the rule of the day, it is not inconceivable that those who espouse the unorthodox could become easy prey for righteous prosecutors determined to impose their personal morality on society. These considerations necessitate a careful analysis of the maze of legal rules under which the nation is attempting to live. If a rule is of questionable soundness it should be interpreted in favor of breadth of expression. Conversely, where it is possible to construct a discernible norm which can protect society from perceived dangers and guard against capricious prosecution, it is the duty of the courts to adopt such a standard.

In *Miller v. California* and its companion cases the Court has recently attempted to redefine the area of obscenity. While the decision rejected the implication of a prior case that there is a national standard for judging obscenity, it left undecided serious questions of the source of the standard and how it should be determined. The Court has recently granted certiorari in a case which will hopefully allow the Court to clarify the bewildering area of contemporary community standards.

The purpose of this article is fourfold. First, it will be demonstrated that in a period of sixteen years, the Supreme Court of the United States, in attempting to define what obscenity is and how courts are to apply that definition, has never adequately addressed itself to the question of "contemporary community standards." Even in the most recent opinions of June, 1973, the Court, while addressing itself to the problem of community mores, left grave doubts as to what it meant. Second, the inferior courts, state and federal, will be shown to have read Supreme Court opinions in a variety of ways, thus producing no consistent body of law. The inevitable result is that instead of a discernible rule, the obscenity cases have been a source of confusion which unfortunately tends to stifle free expression. Third, the decisions of June, 1973, will be analyzed from a standpoint of their impact on this body of law. It will be suggested that, particularly in the area of contemporary community standards, the decisions were erroneous, for they fail to define specifically what community's standards are to be employed and they also fail to out-

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line an objective test which can be used to discover those standards. Fourth, it will be suggested that the Court return to a standard articulated by the California supreme court some five years ago. The California court called for the use of expert testimony to establish community mores.

THE EMERGING COMMUNITY STANDARDS TEST

ROTH V. UNITED STATES

Roth v. United States and Alberts v. California* were decided together in 1957. Roth had been convicted in New York for mailing obscene materials in violation of a federal obscenity statute. Alberts had been convicted of violating the California obscenity statute in that he had kept obscene books for sale. Two problems were presented: whether obscenity was protected by the first amendment, and if not, how to distinguish obscenity from protected expression. This was the first time the Court was squarely faced with the issue of whether obscenity was protected expression. Justice Brennan, speaking for the majority, pointed out that "expressions found in numerous [Supreme Court] opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press." 9

Justice Brennan discussed the test by which material could be adjudged obscene:

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. Regina v. Hicklin, [1868] L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. (Emphasis added). 10

12. 354 U.S. at 481.
14. 354 U.S. at 488-89.
The Court held that this test was satisfied by these instructions:

You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.15

In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*16, the book itself, not the distributor or publisher, was placed on trial. The Court was called upon to interpret the three-pronged test established in *Roth*:

(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.17

Justice Brennan announced the opinion of the Court and delivered an opinion in which the Chief Justice and Justice Fortas joined. He stated:

A book can not be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness.18

Justice Brennan indicated that an otherwise protected book might be banned under certain circumstances, that is, when the book was commercially exploited for the sake of prurient appeal. Where the

15. *Id.* at 490. The idea was, however, already more than forty years old. It had been applied by Judge Learned Hand in *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913), where he inquired whether obscenity should indicate the "present critical point in the compromise between candor and shame at which the community may have arrived here and now[.]. . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and last capable seems a fatal policy." *Id.* at 121.
17. *Id.* at 418.
18. *Id.* at 419.
purveyor's sole emphasis "is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value." 19

Thus, in Roth and Memoirs the Court adopted a verbal formula by which unprotected obscenity was distinguished from protected expression. The material in question was to be considered in relation to the "contemporary community standard." The exact meaning of that term, however, was not defined by the Court and was to present a problem for lower courts.

POST ROTH REFINEMENTS

During the period after Roth most of the Court's attention was directed to refining the standards established in Roth, the audience at which material was aimed and the concept of "prurient interest." Although the contemporary community standard is the yardstick by which the criteria for obscenity are measured, there has been surprisingly little discussion by the Court about it. Two questions are important: What is the "community" whose standards are to be applied? How does a court determine what these standards are?

After the Roth-Memoirs tests were adopted, courts and commentators were divided on whether the "community" was the nation, state or the particular locality. In 1960 it was argued that the community whose standards were to be applied was larger than a particular locality or state. 20 The writers argued that in Times Film Corp. v. City of Chicago 21 the Court disapproved the application of local standards; otherwise, "it would not so summarily have substituted its judgment of Chicago standards for the judgment of the city censors and federal courts in that part of the country." 22

The first Supreme Court case in which the size of the community was discussed was Manual Enterprises, Inc. v. Day. 23 The case primarily dealt with the tests for "patent offensiveness" and "prurient interest" under the federal obscenity statutes. Justice

19. Id. at 420. See also Ginzburg v. United States, 383 U.S. 463 (1966), which held that an otherwise protected book may be declared obscene if the book is commercially exploited on the basis of its appeal to sexual appetites. This is particularly puzzling for, reduced to the level of absurdity, does it mean that the Bible may be declared obscene if the salesperson resorts to pandering? See Dyson, Looking Glass Law: An Analysis of the Ginzburg Case, 28 U. Prrr. L. Rev. 1 (1966).
20. Lockhart & McClure at 111.
21. 244 F.2d 432 (7th Cir. 1957), rev'd mem., 355 U.S. 35 (1957).
22. Lockhart & McClure at 111.
Harlan, joined by Justice Stewart, stated:

We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. (Emphasis added).\(^{24}\)

_Manual Enterprises_ has been erroneously cited for the proposition that the Supreme Court has mandated a national standard for judging the mores of the community. That case did not refer to the forums where most obscenity laws are tested — state courts. At best, it established a rule for judging standards in cases in which federal law was involved. The misunderstanding was heightened by some language in Justice Brennan's opinion in _Jacobellis v. Ohio_.\(^{25}\)

In _Jacobellis_, the defendant was convicted for exhibiting an obscene motion picture in violation of state law. The principal opinion was written by Justice Brennan and joined in by Justice Goldberg. Justices Black and Douglas joined in a separate concurring opinion. Justice Stewart wrote a separate concurring opinion and Justice White concurred without opinion. The Chief Justice and Justice Clark joined in a dissenting opinion and Justice Harlan wrote a separate dissenting opinion. Thus, there was no majority opinion.

Justice Brennan rejected the contention that the Roth test implied the application of standards of the "particular local community."\(^{26}\) He quoted from Judge Learned Hand\(^{27}\) on the issue of community standards and concluded:

> It seems clear that in this passage [209 F. at 121] Judge Hand was referring not to state and local "communities", but rather to "the community ... at large ... the public, or people in general." Thus, he recognized that under his standard the concept of obscenity would have "a varying meaning from time to time" — not from county to county, or town to town.\(^{28}\)

Justice Brennan attempted to extend the language of Justice Harlan in _Manual Enterprises_ to every prosecution for obscenity un-

\(^{24}\) _Id._ at 488.
\(^{26}\) _Id._ at 192.
\(^{27}\) See note 15 _supra_.
\(^{28}\) 378 U.S. at 193.
dertaken in a state court. Conceding that Manual Enterprises dealt with a federal statute, he observed:

But the mails are not the only means by which works of expression cross local-community lines in this country. It can hardly be assumed that all the patrons of a particular library, bookstand, or motion picture theater are residents of the smallest local "community" that can be drawn around that establishment. Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places.

Thus, it was Justice Brennan who suggested that Roth required that the constitutional status of an allegedly obscene work must be determined by a national standard. This interpretation of the Roth requirement, therefore, was hardly a unanimous expression by the entire Court. As a matter of fact, long before Jacobellis was decided several lower courts believed that Roth required local standards of community mores to be applied in obscenity cases.

The Supreme Court has not directly dealt with the second important question raised by "contemporary community standards"—what the standards are and how they are to be determined. Since obscenity is determined by the application of community standards and since these standards may vary from time to time, it is certainly relevant to decide how standards may be determined by a court.

Dicta from the majority opinion in Ginzburg v. United States indicated that no extrinsic evidence was required in an obscenity case. Justice Brennan, again speaking for the Court, said:

In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question.

29. Id.
30. Id. at 193-94.
33. Id. at 465.
If no evidence other than the material itself need be introduced, the Court apparently assumed that the trier of fact knew what the community standards of decency were. Aside from the fact that this approach tempts the trier of fact to apply its own standards instead of the community’s standards, it is questionable to assume that members of the jury are knowledgeable of what the entire community will tolerate, especially if the “community” is larger than the area from which the jury is drawn. Justice Frankfurter addressed himself to this problem in a concurring opinion in Smith v. California and concluded it was error to exclude expert evidence.

"Community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts.... The interpretation of contemporary community standards ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what [the standards] are believed to be by the individual juror or judge.... Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of “due process” to exclude the constitutionally relevant evidence proffered in this case."

Justice Douglas struck an intriguing note in Memoirs when he analyzed the criterion of “redeeming social value.” He wrote:

"We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book except in our capacity as private citizens.... If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated."

Surely if judges concede their lack of expertise on the issue of whether material contains redeeming social value, it is but a short step to the concession that neither they nor members of a jury are ex-

34. 361 U.S. 147 (1959).
35. Id. at 165-66.
36. 383 U.S. at 427 (concurring opinion).
erts on the issue of what constitute the contemporary community standards relating to the description or representation of sexual matters.\textsuperscript{37}

A further dimension to the confusion was added by Mishkin v. New York.\textsuperscript{38} The Court rejected the argument that the books in question were not obscene because they were not designed to appeal to the prurient interest of the "average person":

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement . . . is satisfied if the material taken as a whole appeals to the prurient interest in sex of the members of that group.\textsuperscript{39}

If the prurient interest test is to be measured by contemporary community standards, there is a problem of deciding how the standard is to be defined. If the book is designed to appeal to deviates, the "average man" standard may not be used. How does the trier of fact determine that the book appeals to the prurient interest of a pervert?

This brief examination of the Supreme Court's major decisions reveals that the "contemporary community" standard developed to judge obscenity was vague and that members of the Court split on how the standard was to be determined. If the Supreme Court could not formulate a workable test for obscenity, it is not surprising that the inferior courts were inconsistent in the application of the "standards."

STATE AND FEDERAL COURTS WITHOUT AN ADEQUATE MAP

During the period between the decisions in Roth (1957) and the adoption of the narrow-scope "community standards" test in Miller v. California (1973), the Supreme Court did not deal directly with

\textsuperscript{37} Lawyers might well investigate the sociological literature on the doctrine of functionalism. This doctrine indicates that objective factors may be used in analyzing the social system. See Whitaker, The Nature and Value of Functionalism in Sociology, in AM. ACADEMY OF POL. & SOC. SCI., FUNCTIONALISM IN THE SOCIAL SCIENCES 127, 143 (Monograph No. 5, D. Martindale ed. 1965). It would hardly be outrageous but certainly surprising if lawyers acknowledged that members of another discipline might know a little more about human behavior than they.

\textsuperscript{38} 383 U.S. 502 (1966).

\textsuperscript{39} Id. at 508.
the question of how the standards were to be determined. The Court's language on the issue of the size of the "community" was unclear at best, and Justice Brennan's opinion in Jacobellis that a national standard should be applied made matters worse. Lower courts were nevertheless called upon to decide these and other questions.

It is not the purpose of this article to evaluate the wisdom of the three Roth-Memoirs tests (prurient interest; patently offensive to contemporary community standards; without redeeming social value), but rather to inquire into the consistency of application of those tests and the standard by which each is determined. While each of these tests must be applied independently, it makes sense that if, for example, a court required expert opinion to determine the socially redeeming value of a work, expert opinion should also be required to determine what is patently offensive and what the contemporary community standards are. While space does not permit an elaborate discussion of all the cases in which the issue of community standards was discussed, an examination of some will illustrate that there was indeed confusion and certainly no consistent rule applied across the nation.

The lower courts did not agree whether "community" meant the particular locality, the state, or the nation. The United States District Court for the Southern District of Mississippi,** the Missouri supreme court,*** the Criminal Court of the City of New York,**** and the Fifth Circuit Court of Appeals***** stated that the standard to be applied was a national standard. The United States District Court for the Middle District of Florida gave strong support to a national standard when it said that employment of a local standard would permit uneven censorship, "making criminal to show in one part of the state, or of the nation, that which is legal in another."***** Finding that such a situation would result in a chilling effect upon the dissemination of expression, the court attempted to outline the contours of the national standard:

42. State v. Vollmar, 389 S.W.2d 20, 27 (Mo. 1965).
44. Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721, 726 (5th Cir. 1966).
Moreover, this national standard is not a national "average" of permissibility that would result in half of the nation being brought under the more repressive standards of the other half, thereby depriving the public of access to expression permitted in their own locale. Although the contours of the national standard may be imprecise, the first amendment guarantee is a fundamental one that protects interstate (and intrastate) expression from the vagaries of local censorship and political opportunism.

New Jersey took a rather unusual approach. While it adopted a national standard for printed matter, the court distinguished between a live performance and printed material and found that the appropriate standard to be used in judging a live performance was the "local morality at the time and place of exhibition, if one could be established." Arizona declared that the standard was national, but since the United States Supreme Court is the only court that can authoritatively say what that standard is, courts should not be "concerned with standards of other states or an average of the standards of other communities."

Louisiana has adopted the rule that the community standards are presumed to be the standards in the nation "unless it is shown...that the community standard is not in accord with the national standard." Nebraska has said that failure to define "contemporary community standards" in jury instructions is not error since the meaning of that term is unknown. It also pointed out that individual jurors and witnesses did not know what the national standard of morality was.

Illinois, in interpreting a state statute, has adopted a statewide standard. The Texas Court of Criminal Appeals declined to impose a national standard but said that the community was not smaller

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46. 319 F. Supp. at 466.
50. Id. at 489 P.2d at 827.
than the state. Virginia adopted the rule that local standards are to be applied. Alabama defined the "community" to be the area from which the jury was drawn.

Apart from the question of whether Roth mandated a national standard of morality, a further question remained in those jurisdictions which required a national standard: How was the jury to ascertain what the national standard of morality was? Some commentators agreed with the statement of Judge Jerome Frank that "we do not know, with anything that approximates reliability, the 'average' American public opinion on the subject of obscenity." The courts in Arizona and Nebraska, for example, seem to have recognized this problem although little was done about it. There is less of a problem in jurisdictions which require expert opinion to prove the existence of a standard. But in jurisdictions which refuse to admit such expert opinion (or in jurisdictions which merely allow expert testimony but none is offered) how can the jury make anything but a stab in the dark as to what the national standard of decency is or whether the material in question violates that standard?

Most of the lower court cases have not dealt with the question of whether it is possible to establish an objective community standard of morality. Rather, they have split on the issue of whether an objective standard ought to be required. An article in the Wisconsin Law Review pointed out that "[c]ourts which utilize expert testimony take the approach that community standards have an objective, empirical quality which an individual with the proper training can extract from the community." The author indicated that sociologists

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58. Lockhart & McClure at 112.
59. Roth v. Goldman, 172 F.2d 788, 796 (2d Cir. 1949).
60. See text accompanying notes 49, 50, 52 supra.
61. E.g., New York and Missouri. See text accompanying notes 42, 43 supra, notes 70-75 infra.
62. An objective standard was not required in City of Chicago v. Kimmel, 31 Ill.2d 202, —, 201 N.E.2d 386, 387-88 (1964); City of Newark v. Humphres, 228 A.2d at 554. Objective standard was required in United States v. Klaw, 350 F.2d 155, 166 (2d Cir. 1965); Dunn v. Maryland Bd. of Censors, 240 Md. 249, —, 213 A.2d 751, 754 (Ct. App. 1965).
64. Id. at 116.
and law professors acquainted with the problem generally felt that "the only expert likely to aid the trier of fact is the expert who has gathered significant data through opinion-attitude survey methods." Some of the sociologists referred to in the article felt that a study of community standards could be made on a local, state or national scale in reference to a particular work but, to their knowledge, no such attempts had been made.

Another article concluded that the trier of fact should consider all the evidence — including expert testimony — in the determination of contemporary community standards. The author criticized courts which allowed jurors to consider their own experience alone. Such a line of reasoning overlooks two facts: (1) expertise is relative and some persons have a greater familiarity with what the community tolerates and, therefore, can enlighten less informed jurors; (2) without any evidential basis for determining contemporary community standards, an individual juror will be inclined mistakenly to think his own standards are those generally held by the community and proceed to impose his own standards rather than determine those of the community.

It might be argued that due process is satisfied even though the prosecution is not required to introduce expert evidence as to each of the three points, if the defendant is given an opportunity to introduce such evidence. That argument is unsound because it shifts the burden of proving criminal conduct from the state to the defendant, who must prove his conduct is not criminal.

Despite the logical reasons for expert testimony, many courts have not allowed such evidence. New York rejected the contention that expert opinion could determine whether a particular work appealed to the prurient interest of the community. In People v. Fritch, the court of appeals said, "It does not follow... that because an alleged work of literature does not appeal to the prurient interest of a small group of intellectuals that it is not obscene under the prurient interest, or for that matter, any other legal test of

65. Id. at 121 n.27.
66. Id. at 121.
68. Id. at 175-76.
69. This is the position taken in Nebraska. See Neb. Rev. Stat. § 28-926.08 (Reissue 1964).
obscenity." In People v. Hay, the New York City criminal court rejected expert opinion in determining community standards:

The judge must project himself into the collective thinking of the community, and . . . decide . . . what he believes the community wants for its own consumption . . . .

Similarly, the Missouri supreme court allowed the trier of fact to make a determination of the national standard of morality based upon its general knowledge. In State v. Smith the court said:

In Vollmar [389 S.W.2d 20] it was reasoned that judges and jurors have knowledge concerning the general community standards relating to moral conduct and obscenity; and that in the field of obscenity the average citizen is as capable of judging a publication "as an alleged expert." . . . [T]he courts are concerned with the dominant theme as it appears to the average person — not as it may be considered by the small segment of the population represented by the "experts" . . . .

The United States District Court for the Southern District of Mississippi also ruled that the standard was to be determined by the court, not by experts. Alabama held that expert testimony of community standards was properly excluded since the live performance in question was obviously prurient. South Dakota has indicated that expert evidence as to violation of community standards is not necessary for the state's case.

A Virginia case allowed testimony from a psychiatrist to the effect that, as a member of the community, she would consider the magazines in question offensive. The court found that her testimony was evidence only of the fact that they were offensive to her personally, and concluded that such was not evidence of the community standards.

71. Id. at 192 N.E.2d at 717, 243 N.Y.S.2d at 7.
73. Id. at 245 N.Y.S.2d at 714.
74. 422 S.W.2d 50 (Mo. 1967), cert. denied, 393 U.S. 895 (1968).
75. 422 S.W.2d at 58-59.
80. Id. at 169 S.E.2d at 576.
Nebraska has taken the position that the state need not present evidence on the question of community standards although the defendant may do so if he wishes. In another case, while the Nebraska court did not exclude expert opinion, it placed great faith in the jury when it refused to define specifically the community standard:

The words "average person" are words of common meaning which are readily understood by the jury. The opportunity of counsel to discuss the meaning of "average persons" in his argument to the jury affords ample protection against any misuse of the term by the jury in considering the case.

New Jersey, on the other hand, has allowed expert testimony in determining the contemporary community standard. California has adopted a rule by which community standards are to be determined on the basis of expert testimony, although such evidence need not be received on the issue of whether there was probable cause for an obscenity arrest.

Two courts have attempted to establish guidelines for the application of the standards in determining whether the material was obscene. The Pennsylvania supreme court said that there were two yardsticks by which to judge books:

One is to compare the challenged books to other books which

83. Id. at 649, 126 N.W.2d at 863.
85. People v. Rosakos, 268 Cal.2d 497, 74 Cal. Rptr. 34, 36 (Ct. App. 1968); People v. Cimber, 271 Cal.2d 867, 76 Cal. Rptr. 382, 384 (Super. Ct. 1968).
86. People v. Aday, 226 Cal.2d 520, 38 Cal. Rptr. 199, 206 (Dist. Ct. App.), cert. denied, 379 U.S. 931 (1964). A recent California case suggests that "community mores may even be judged by a state administrative agency. Section 5105 of the California Vehicle Code provides that the department "may refuse to issue any combination of letters or number, or both, that may carry connotations offensive to good taste and decency." In Katz v. Department of Motor Vehicles, 32 Cal. App.3d 679, 108 Cal. Rptr. 423 (Ct. App. 1973), the court upheld the department's denial of a certain combination of license plate letters to an individual stating that the above portion of the statute furthers a substantial governmental interest in vehicle identification "consistent with community standards of good taste and decency, and imposes at best a minimal and incidental restriction on Katz' alleged First Amendment freedom of expression." (Emphasis in original). Id. at 684, 108 Cal. Rptr. at 427.
have either been held entitled to protection of the First Amendment or, in the absence of litigation which meet contemporary standards and are substantially similar to the challenged book. The other is to consider the reception the book received from the community when it was released.**

Two years later the Pennsylvania court indicated that adjudicatory bodies need outside evidence to determine community standards.** It concluded: "[C]ourts of law are not capable of deciding what contemporary standards are, without the benefit of any evidence whatsoever."**

In People v. Bloss,** a case in which the defendant had been convicted of showing an obscene film, the Michigan court of appeals, found the necessary coalescence of the three Roth elements. It took pains to explain how it reached its conclusion:

[(I)n making this decision as to whether this film goes beyond the contemporary standards, we took into consideration not just the content of the film but also the impact of the conditions under which this content is conveyed to the viewer. By this we mean that even though the acts and occurrences if they were described in the written word would not be obscene, the visual impact of seeing the same thing acted out in a darkened room with sound accompaniment may cause it to be obscene.***

This examination of some of the cases indicates that there was disagreement on whether the "community" was to be local, state or national, and whether expert testimony should be allowed. Even where courts agreed on the size of the "community" its standards were applied unevenly. In Miller the Supreme Court held that national standards were not to be applied. However, it did not answer the question whether local or state standards should be applied.

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88. 427 Pa. at ____, 233 A.2d at 848.
90. Id. at ____, 258 A.2d at 863.
92. 18 Mich. App. at ____, 171 N.W.2d at 458.
In a series of cases in June, 1973, the Supreme Court established new guidelines for the determination of obscenity. The Chief Justice pointed out that since the initial formulation of obscenity standards in Roth, a majority of the Court has not agreed on a standard to determine what constitutes obscenity and that new concrete guidelines were required. In establishing new guidelines for the test for obscenity, the Chief Justice viewed the Memoirs requirement that a work be 'utterly' without socially redeeming value as an aberration of the Roth decision. According to Chief Justice Burger, the new holdings will set a standard of proof which will give fair notice as to the proscribable material, and relieve the burden on the Supreme Court as a national board of censorship. The Court said:

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

The majority expressly rejected the idea that the community standards to be applied were national standards. The Court said that it would be unrealistic to require a trier of fact to apply a national standard when the law has "historically permitted triers-of-fact to draw on the standards of their community." Because of the variation in tastes and attitudes across the country it is "neither realistic nor constitutionally sound" to require "that the people of Maine or

95. Id. at 24-25.
96. Id. at 27.
97. Id. at 24.
98. Id. at 30-34.
99. Id. at 30.
Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. The Court found that the trial court's instruction that the jury consider the state standard was not constitutional error.

It was also held that the prosecution may meet its burden of proving the material is obscene without submitting expert testimony. The Chief Justice felt that the field of obscenity did not lend itself to the traditional use of expert testimony. Expert testimony is usually admitted to explain to jurors what they otherwise could not understand, but no such assistance was needed in obscenity cases where the material itself was introduced.

The majority opinions in the companion cases emphasized that the Court's role is not to resolve empirical uncertainties except where legislation plainly infringes on constitutional rights. As with economic regulation, the states may reasonably determine that a nexus exists between anti-social behavior and pornographic material even though there is no conclusive proof of such a connection.

In a vigorous dissent in Paris Adult Theatre I v. Slaton, Justice Brennan thought that the underlying approach taken in the new opinions was basically the same as in the earlier cases. Consequently, he doubted that the current decisions could solve the various problems which had grown out of the prior standards. Because of differing personal perceptions, "obscenity" is impossible to define specifically enough to give notice to the Public of what was declared to be illegal. Uncertainty over what has been proscribed and how the courts will apply the indefinite standards tends to create a chilling effect on the exercise of first amendment rights. The chill is increased by the fact that inadequate notice and indefinite standards invite arbitrary and erratic enforcement of the law. He also

100. Id. at 32.
101. Id. at 33-34.
104. Id. The Court expressly reserved judgment where materials were directed at such a bizarre deviant group that the experience of the trier of fact would be inadequate to determine whether the materials appealed to prurient interest. Id.
105. Id. at 60.
106. Id. at 60-61; Kaplan v. California, 413 U.S. 115, 120 (1973).
107. 413 U.S. at 73.
108. Id. at 78-83.
109. Id. at 86-93.
110. Id. at 89.
111. Id. at 88.
pointed out that the lack of definite standards created a source of tension between state and federal courts since the need for an independent decision by the Supreme Court seems to render superfluous the analysis of a state court."

Since the suppression of obscene material does substantial damage to the first amendment right of expression, the interest of the state in proscribing obscene materials was examined. Justice Brennan conceded that states might have a legitimate interest in controlling the exposure to non-consenting adults or the distribution to juveniles." Outside of these areas, he concluded, the states did not have a sufficient interest in prohibiting obscenity to justify their interference with first amendment rights."

This article has shown that there was substantial disagreement in the lower courts as to the application of the Roth-Memoirs standards for determining obscenity. While Miller et al. rejected a national community standard and held that expert evidence was not required to prove the community standard, it is questionable whether the new decisions can produce a consistent body of law in the field of obscenity law. As Justice Brennan pointed out, the majority's approach was basically the same as in earlier cases."

The first requirement — dominant theme taken as a whole appeals to the prurient interest — is identical with the Memoirs test. The second requirement — depiction, in a patently offensive way, of sexual conduct specifically defined by state law — merely adds the reference to state law. The third requirement looks to the social value of the work as before but changes it from "utterly without redeeming social value" to without serious literary, artistic, political or scientific value. The majority provides no more guidance than the earlier cases as to how an author, distributor or performer can know the material or performance is obscene prior to a determination in a criminal proceeding. New verbal formulae provide little assistance without supporting standards. Thus, the chilling effect on protected expression which was created by earlier obscenity regulation is not reduced.

In the past, first amendment rights have been given a "preferred position." In recent years the Court has required states to show a

112. Id. at 93.
113. Id. at 106.07.
114. Id. at 112.13.
115. See text at note 108 supra.
116. In 1942, Chief Justice Stone felt that "the Constitution, by virtue of the First
compelling interest to justify a classification which affects the exercise of "fundamental rights."" Additionally, the Court has required statutes regulating expression to be drawn narrowly. In finding that the states have a sufficient interest in regulating obscenity even though there was no concrete evidence of a connection between anti-social behavior and obscenity, the majority attempted to equate obscenity regulation with business regulation which affects the exercise of first amendment rights. The Chief Justice declined to pursue a detailed analysis of whether the states had a sufficient interest in regulating obscenity. He said that securities and antitrust regulations had been upheld although they too were based upon various unprovable assumptions. This analogy, however, breaks down if one accepts the distinction between pure expression and derivative expression. If the first amendment is to retain any validity, pure expression should be granted more latitude than that accorded a decision to market a particular drug, regulation of which may affect advertising and thus freedom of expression.

It is certainly open to question whether the states have such an interest in regulating obscenity that the intrusion into first amendment rights is justified. But when that ill-defined interest (if there is one) is combined with the lack of specific standards by which to judge obscenity, the resulting uncertainty creates an unjustified chilling effect on protected expression.

and the Fourteenth Amendments, has put those freedoms in a preferred position." Jones v. Opelika, 316 U.S. 584, 608 (1942) (dissenting opinion). See also Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (Murphy, J., concurring):

"[N]othing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions."

Even Justice Rutledge, who had rejected the preferred position concept in 1944, Prince v. Massachusetts, 321 U.S. 158, 164 (1944), later referred to the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." Thomas v. Collins, 323 U.S. 516, 530 (1945).


119. The Court has continuously drawn a distinction between pure expression and expressions in conjunction with or through some extrinsic conduct. When "speech" and "non-speech" elements are combined in the same course of conduct, an important governmental interest in regulating the non-speech element can justify incidental limitations on first amendment freedoms. United States v. O'Brien, 391 U.S. 367, 376 (1968).

120. Professor Kalven has noted four possible "Target evils" which obscenity regulation is designed to cure: arousing sexual behavior, arousing sexual thoughts, thematic obscenity, arousing revulsion and disgust in a non-captive audience. The first two have been rejected as a basis for obscenity regulation by a variety of Justices. The third possible evil was held to be an unconstitutional basis for regulation. As of
In its rejection of a national community standard by which obscenity is to be judged, the majority failed to define specifically what the appropriate community is. The lower courts must now decide whether the standards are those of the state, county, city or village. While there never really was a doctrine of a national standard, the rejection of any pretense of such a standard may lead to a feudalistic system of regulation. Fiefdoms of prudery and permissiveness could emerge. What is obscene in the Bronx may not be so in Manhattan. The ill effects of a system in which a book is allowed in one locality but prohibited in another are obvious. For example, the author of a book dealing with sex will have to choose between two alternatives: either insuring the book will be distributed only in liberal states, counties, cities, etc., or allowing national distribution and writing the book so as to conform to the strictest standards in the country. This cannot bode well for the Arts. Cultural creativity cannot flourish when the standard becomes the lowest common denominator.

By holding that the prosecution is not required to introduce expert opinion concerning the various tests of obscenity when the material itself is introduced, the majority seems to be arguing that members of the jury know the prevailing standards of morality in the community.


Prof. Thomas Emerson has observed, with respect to the justifications alleged to exist for restricting obscenity:

Most of the factual assumptions underlying these justifications are unsupported by empirical evidence. According to a recent survey, such evidence as is available indicates that expression of an erotic nature does result in "heightened sexual arousal" in some persons under some circumstances, and is for some persons "a distinctly adverse experience." But there is virtually no evidence as to how or whether these responses "affect overt behavior" or "attitudes governing behavior and mental health." The ultimate resolution of the obscenity issue will undoubtedly be influenced by the development of a body of scientific knowledge pertaining to these matters.


In 1970, the Commission on Obscenity and Pornography, as its first legislative recommendation, urged the repeal of federal, state and local laws barring sale, exhibition or distribution of sexual materials to consenting adults. Part of its justification for this recommendation was that "[E]xtensive empirical investigation, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or nonsexual deviancy or severe emotional disturbances." COMM. ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMM. ON OBSCENITY AND PORNOGRAPHY 52 (1970).
That argument is less than persuasive because it assumes that members of the jury have the requisite exposure to all manner of descriptions or representations of sexual matters, whether spoken, written or performed.¹⁲¹ In effect, it is arguing that those who constitute a part of a sample can articulate the aggregate results of the entire sample. It also belies the fact that social scientists can and do measure human behavior in all areas of social phenomena by employing intricate and sophisticated devices.

RETURN TO A RATIONAL GUIDELINE

Among all the decisions on the subject of obscenity pouring forth from American courts, one stands out as a remarkable example of clarity and common sense. Decided before Miller, In re Giannini¹²² involved the conviction of a topless dancer and the manager of the club in which she performed for violating a state statute prohibiting lewd exposure and lewd or dissolute conduct. The Supreme Court of California first required a showing that the activity complained of so exceeded customary limits of candor as to affront contemporary community standards of decency. The court then concluded that the convictions must be set aside because the state failed to “introduce any evidence of community standards, either that defendants’) conduct appealed to prurient interest or offended contemporary standards of decency.”¹²³

Acknowledging that other courts were divided on whether obscenity could be determined without expert testimony, the court held that expert testimony should be introduced to establish community standards.¹²⁴ It required the application of an objective, rather than a subjective standard.¹²⁸ While such a standard might be “ephemeral”, it was nevertheless an “ascertainable phenomenon” subject to evidentiary proof.¹²⁸

The court felt it could not assume that the jurors expressed or reflected the standard of morality in the state.¹²⁷ And since the relevant “community” was the entire state,¹²⁸ it was unrealistic to expect

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¹²¹. See text accompanying note 68 supra.
¹²². 72 Cal. Rptr. 655, 446 P.2d 535 (1968).
¹²³. Id. at 663, 446 P.2d at 543.
¹²⁴. Id.
¹²⁵. Id.
¹²⁶. Id. at 664, 446 P.2d at 544.
¹²⁷. Id. at 663, 446 P.2d at 543.
¹²⁸. Id. at 664, 446 P.2d at 545.
the trier of fact to understand how the community as a whole would react to the obscene material.\textsuperscript{129}

Without evidence as to community standards, the jurors might be tempted to apply their own standards:

To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror.\textsuperscript{130}

Even if it could be said that the jury was a metaphysical embodiment of the "community" (and therefore intrinsically cognizant of community standards) extrinsic evidence of community standards was indispensable to effective appellate review.\textsuperscript{131} Since appellate courts must make an independent decision as to the obscenity of the material and do not constitute a cross-section of the community, it is impossible for them to carry out their responsibilities without evidence directed toward the proof of the community mores.\textsuperscript{132}

The dissenting judges indicated that a judge or jury was fully capable of determining whether conduct or material appeals to prurient interest and violates community standards.\textsuperscript{133} They also doubted whether an objective standard could be ascertained,\textsuperscript{134} and even if it could be, they lamented the burden placed on localities of proving such a standard.\textsuperscript{135} The dissenters also felt that application of a state standard would lower the standard in many communities.\textsuperscript{136}

Giannini applied the state, rather than the national or local, standards test. Since it is desirable that proscription of literature, if it is going to be proscribed at all, should be consistent within a jurisdiction, the statewide standard is sound.\textsuperscript{137}

The requirement of expert testimony to prove what the community standards are makes eminently good sense. It will reduce the chances that a jury will act arbitrarily, imposing its own standards instead of the standards of the community. It will also impose some

\begin{itemize}
  \item \textsuperscript{129} Id. at 664, 446 P.2d at 544.
  \item \textsuperscript{130} Id. at 663, 446 P.2d at 543.
  \item \textsuperscript{131} Id. at 664, 446 P.2d at 544.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id. at 668, 446 P.2d at 548.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} Id. at 667, 446 P.2d at 547.
  \item \textsuperscript{137} See text accompanying notes 45-46 supra.
\end{itemize}
degree of concreteness in an historically vague area. Insofar as community standards are susceptible of definition, the courts, prosecutors and potential defendants will be apprised of what the community standards are. An author or distributor will have some guidelines as to what the community standards are and can make an intelligent guess whether a jury might find his material obscene. Similarly, a prosecutor will not have as much freedom to impose his own personal morality upon society. Instead of introducing the material in question in the hope the jury will agree that it is obscene, the prosecutor will be forced to produce some extrinsic evidence that the material is an affront to the community's sense of decency. Thus, the chilling effect of censorship will be reduced somewhat.

CONCLUSION

In order to protect the exercise of first amendment rights and insure at least a modicum of due process in the area of obscenity, it will be necessary for the United States Supreme Court to retreat from the omniscience now vested in the jury system and the apparently provincial standards mandated by Miller. One may hope that the decisions in Miller et al. do not do to erotic literature what Abrams v. United States did to political literature by radically expanding governmental control to include arguably protected expression.

138. Two recent studies suggest that reliable data on the sexual morals of the community are possible to obtain. See Bisco, Social Science Data Archives: A Review of Developments, 60 Am. Pol. Sci. Rev. 93 (1966); Sex and the Contemporary American Scene, 376 Annals 1-218 (1968).

139. 250 U.S. 616 (1919). The defendants had been convicted for publishing leaflets intended to excite, provoke and encourage resistance to the United States during World War I. A majority of the Court affirmed the convictions, finding that the clear-and-present-danger test had been met. Although the primary purpose of the leaflets may have been the aid of the Russian Revolution, the Court found that the plan of action advocated by the defendants necessarily involved defeat of the U. S. war effort. Justice Holmes, dissenting, felt that the purpose of the leaflets was to prevent interference with the Russian Revolution without hindering the war effort of the United States. Id. at 628.