
Chapter 6

Proof of Obscenity

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GENERAL PRINCIPLES

In this chapter, we will discuss in detail the law of obscenity and its practical application "in court." The three-part test of obscenity will be discussed and analyzed, and we will touch briefly on several issues of evidence and proof which should be of concern to any prosecuting attorney preparing for an obscenity trial.¹

Before we begin this discussion on the law's "application," we must first lay a foundation of general principles about the law itself. The first general principle is that material which is obscene has *no* First Amendment protection and can be regulated by federal, state, or local government. This principle has been well settled by the Supreme Court of the United States. See: *Roth v. United States*, 354 U.S. 476 (1957), and its progeny. It is also a settled question of constitutional law that it is *not* a defense to a crime of distributing obscene material that the films or magazines were distributed to "consenting adults." See: *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). Further, it is a settled question of constitutional law that even though an individual has the right to possess obscene material in the privacy of his own home, there is no corresponding right to distribute that material to him, whether by sale, gift, loan, or by mailing. It also has been held that even though an individual may have the right to possess obscene material in the privacy of his own home, he has no right to mail it, ship it, or bring it himself through customs back into the United States from another country, even for private purposes. See: *Stanley v. Georgia*, 394 U.S. 557 (1969) (mere private possession of adult obscenity in one's own home is protected). But see: *United States v. Reidel*, 402 U.S. 351 (1971) (limits *Stanley v. Georgia* to possession in the home); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (limits *Stanley v.*

¹Almost every state follows the three-part test of obscenity enunciated by the Supreme Court in the case of *Miller v. California*, 413 US 15 (1973). In *Miller*, the Court stated the test as follows:

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.

413 US at 24 (citations omitted). For a detailed discussion of the *Miller* test and problems with its enforcement, along with a suggestion of how to improve obscenity enforcement, see Bruce A. Taylor, "Hard-Core Pornography: A Proposal for a Per Se Rule." 21 U. MICH. J.L. REF. 255 (1988). For purposes of this text, all references will be to the *Miller* test, as enacted by state and federal law and as interpreted by the courts. The Oregon and Hawaii Supreme Courts held their state statutes unconstitutional and those states now have no enforceable obscenity test. *State v. Henry*, 732 P.2d 9 (Or. 1987); *State v. Kam* 748 P.2d 372 (Hawaii 1988).

Georgia to the home and upholds the right of society to exclude obscene material from commerce); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (there is no "right of privacy" to watch obscene movies in places of public accommodation, and theatres are places of public accommodation); *United States v. 12 200-Ft. Reels*, 413 U.S. 123 (1973) (limits the right of possession of obscene material to the home, and states that there is no right to sell or give it to others, ship it, or personally transport it into this country from another); and *United States v. Orito*, 413 U.S. 139 (1973) (rejects constitutional protection for obscene material outside the home). *Stanley* only protected adult pornography. Child pornography is illegal to possess in several states and has been held unprotected contraband. See: *State v. Meadows*, 503 N.E.2d 697 (Ohio 1987), *cert. denied*, 480 U.S. _____, 94 L.Ed.2d 771 (1987); *Felton v. State*, 526 So.2d 635 (Ala.Crim.App. 1986), *aff'd.*, 526 So.2d 638 (Ala. 1988); *People v. Geever*, 522 N.E.2d 1200 (Ill. 1988).

Furthermore, the Supreme Court has never made a distinction between different forms of distribution — if material is obscene, it does not matter whether it is distributed by film, by pictures in a magazine, by videocassette, by cable television, or by any other means. *Kaplan v. California*, 413 U.S. 115 (1973). If material is obscene, it has no First Amendment protection and its distribution is a violation of federal law and the laws of most states.

Recently, there has been uncertainty and confusion over whether obscenity laws can be applied to cable or satellite TV programming. The settled questions of law discussed above should eliminate this uncertainty and confusion. Moreover, the passage of time further demonstrates that this confusion was unjustified. To hold that obscenity laws are inapplicable to cable television, the U.S. Supreme Court would have to reverse its entire history and reasoning in this area of law. Based on the recent decisions of the Court, it is inconceivable that it would rule that it is permissible to distribute "hard-core" pornographic films over a TV set, when it is a violation of the federal racketeering law and of most state laws to distribute these same films in any other manner.

There also have been recent questions concerning whether the Federal Communications Commission (FCC) has sole regulatory power over cable television. The FCC has never demonstrated an intent or willingness to preempt this field by regulating "X-rated," "hard-R" or unrated films (whether obscene, indecent, or harmful to minors) on cable TV. In fact, the FCC has denied authority on numerous occasions in its responses to complaints and inquiries. Any confusion that existed has now been eliminated by the "Cable Franchise Policy and Communications Act of 1984," 47USCS § 552, *et. seq.*

The Act states at § 558 that:

Nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the federal, state, or local law of...obscenity...or similar laws...

The Act at § 559 also specifically establishes an additional federal crime relating to the transmission of obscene material over any cable system.

Numerous federal courts have recognized that cable television is subject to state and local obscenity law. See: *Jones v. Wilkinson*, 800 F.2d 989, 990-91 (10th Cir. 1986); *Community Television v. Wilkinson*, 611 F.Supp. 1099, 1103-06 (D.C. Utah 1985), *aff'd.*, 800 F.2d 989 (10th Cir. 1986); *Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987, 1002 (D.C. Utah 1982); *Cruzy v. Ferre*, 571 F.Supp. 125 (S.D. Fla. 1983), *aff'd.*, 755 F.2d 1415 (11th Cir. 1985).

Having shown that obscenity law is a constitutional law enforcement tool, and that it is a tool with a variety of applications, it must be stressed that it is a "successful" tool in those cities which have applied it consistently and diligently. No major city has successfully dealt with the problems caused by businesses dealing in "hard core" pornography *unless* they have included effective obscenity law enforcement as a part of their strategy. The practical advice and experience which follows (and which already has been given) is based on thousands of successful obscenity cases in Cincinnati, Atlanta, Buffalo, Cleveland, Norfolk, Jacksonville, Orlando, Miami, Fort Lauderdale, Fort Wayne, Indianapolis, Charlotte, Arlington, Norfolk, Oklahoma City, Salt Lake City, Louisville, Memphis, New Orleans, Houston, Dallas, Denver, and many other cities which have a successful record in obscenity enforcement.

PRURIENT APPEAL

The first prong of the *Miller* test of obscenity is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...." *Miller v. California*, 413 U.S. at 24. This prong of the test has proven to be the most difficult for prosecuting attorneys and judges to handle. In this section, we will discuss the history and purpose of the "prurient interest" test, defense tactics relating to definitions of the term, and the proper application of the test.

The History of the Prurient Appeal Test: From "Tendency to Arouse" to "Intended Appeal"

The prurient appeal test finds its modern origins in *Rofhp. United States*, 354U.S. 476 (1957). (Prior to *Roth*, the obscenity test was derived from the English case of *Regina v. Hicklin*, L.R., 2 Q.B. 360 (1868), which determined obscenity solely by its tendency to arouse sexual desire in susceptible persons.) Shortly after oral argument in the *Roth* case, the American Law Institute published Tentative Draft No. 6 of its Model Penal Code, which dealt with the law of obscenity. The A.L.I. repudiated the old test which required sexual arousal or tendency to arouse, and substituted a test based upon "appeal." The A.L.I. test was as follows:

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.

The A.L.I. appended this explanation of its position:

We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debase.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking; if actual proof of tendency to corrupt were required, prosecutors would have a difficult task. On the other hand, 'appeal to prurient interest' refers to qualities of the material itself the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters. (p. 10)

Following publication of the Model Penal Code, the United States Supreme Court announced its decision in *Roth* and adopted the Model Code definition even though the Court defined prurient in part as "tendency to arouse lustful thoughts" in footnote 20. Justice Brennan's majority opinion defined the proper standard to be "...whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole

appeals to prurient interest.” 354 U.S. at 489. The Court also stated that “[o]bscenematerial is material which deals with sex in a *manner* appealing to prurient interest.” *Id.* (emphasis added). The Court’s focus was on the *intent* or *aim of the material*. If its purpose and intent was an appeal to prurient interest, it was obscene. The Court cited the comment to the A.L.I. Model Penal Code, previously discussed, 354 U.S. at 487 n.20, even though the Institute rejected the old “test of tendency to arouse lustful thoughts or desire.” The Court also stated that “‘appeal to prurient interest’ refers to *qualities of the material itself*...” 354 U.S. at 500 (emphasis added). In “judging obscenity,” the Court continued, we must “safeguard...material which does not *treat sex in a manner* appealing to prurient interest.” *Id.* (emphasis added). The Court was speaking not about the impact material might have on viewers, but about “qualities of the material itself.”

The *Roth* opinion should have made clear that the prurient interest test did *not* require that material in question actually arouse anyone. The “appeal” to prurient interest need not be successful in order to pass the legal test. Yet defense attorneys to this day continue to argue, sometimes successfully, that everyone from judges to jurors to the “average person” must be successfully aroused in order for the material to “appeal” to the prurient interest; put another way, it is argued that the jury must find that the material would actually stimulate or “turn-on” the “average person.” (Eventhough this is the whole purpose of hard-core pornography — to arouse men into buying it and engaging in self-stimulation so they will buy more of it.)

They make these arguments despite the Court’s explicit rejection of that interpretation of prurient interest just five months after *Ruth*. In *Times Film Corporation v. City of Chicago*, 355 U.S. 35 (1957), the Court reversed a 7th Circuit decision which upheld an Illinois Supreme Court ruling construing a Chicago obscenity ordinance to require sexual arousal. The Seventh Circuit had stated:

The ordinance now under attack...uses the words “immoral or obscene”...[T]hese words are synonymous and...[the] motion picture is obscene...within the meaning of the ordinance, if, when considered as a whole, its calculated purpose or dominant effect is substantially to *arouse sexual desires*, and if the probability of this effect is substantially to *arouse sexual desires*, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal average person....

244 F.2d 432,435 (1957) (emphasis added). The Seventh Circuit ruled

that this was the "proper test" in obscenity cases. *Id.* The Supreme Court reversed, citing *Alberts v. California*, 354 U.S. 476 (1957). *Alberts* and *Roth* are, of course, the same case. See: *Roth v. United States* and *Alberts v. California*, 354 U.S. 476 (1957). In this ruling, decided less than five months after *Roth-Alberts*, the Court rejected the notion that the prurient appeal test *required* sexual arousal.

Court after court has explicitly or implicitly rejected the notion, appearing in various forms, that actual effect rather than *intended* effect is the measuring stick for prurient appeal. The best example is the recent 4th Circuit case of *United States v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987) which squarely ruled on this issue. The court held that the "prurient interest" prong did not require finding that the average person would experience sexual arousal in viewing (the bestiality) films in order to find such films obscene. The court pointed out that the reaction of the "average person" to many obscene films is one of rejection and disgust, not arousal. As the court pointed out:

The average person comes into the test not as the object of the appeal but as its judge. It is he, not the most prudish, who, applying contemporary community standards, determines whether or not the work appeals to the prurient interest...[W]e reject defendant's contention that material may not be found to be obscene unless it excites the sexual drive of the average person....

Id., 454-55. See also: *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984); *Childs v. Oregon*, 431 F.2d 272 (9th Cir. 1970); *Armijo v. United States*, 384 F.2d 694 (9th Cir. 1967); *Ackerman v. United States*, 293 F.2d 449 (9th Cir. 1961); *Cain v. United States*, 274 F.2d 598 (5th Cir. 1960), *cert. denied*, 362 U.S. 952 (1960); *State v. Jackson*, 356 P.2d 495 (Or. 1960).

While not discussing this point directly, *Miller* makes clear the Court's view that prurient appeal refers to the intent of the material, not sexual stimulation of the viewer, average person, or trier of fact. The Court stated:

At a minimum, *prurient*, patently offensive *depiction or description of sexual conduct* must have serious literary, artistic, political, or scientific value to merit First Amendment protection.

413 U.S. at 26 (emphasis added). To underscore the fact that prurient appeal referred to the nature of the material, the Court distinguished prurient from non-prurient materials. "[M]edical books for the education of physicians and related personnel necessarily use graphic illustrations and description of human anatomy," yet because they do

not "appeal" to or aim at the "prurient interest" they are not obscene. 413 U.S. at 26. See also: *Ginzburg v. United States*, 383 U.S. 463, 471-74 (1966). Whether a physician is sexually aroused by the material is not relevant. Even if the doctor is aroused, that is not the aim of the textbook and it does not become prurient. The trier of fact is to focus on whether the material is *directed at* (or attempts to commercially exploit or pander to) the prurient interest. This is further supported by the following *Miller* language:

When triers of fact are asked to decide whether "the average person, applying contemporary community standards" *would consider certain materials "prurient,"* it would be unrealistic that the answer be based on some abstract formulation.

413 U.S. at 30 (emphasis added).

The Supreme Court's series of pandering cases are illustrative of the point. Nine years after *Roth*, Justice Brennan authored the majority's opinion in *Ginzburg v. United States*, 383 U.S. 463 (1966). There the Court held that even if the material was not obscene in the abstract (it was not even explicit conduct), evidence showing that the purveyors engaged in the sordid business of "pandering" justified a finding of obscenity. "Pandering" was defined as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interests of ...customers." 383 U.S. at 467. The Court made clear that the intent or purpose of the material was the central focus of the "prurient interest" test. If the purpose or intent of the material is an appeal to prurient interest, as evidenced by pandering, this is sufficient. The prurient appeal prong may be satisfied by the purveyor's "efforts to sell their publications on the basis of salacious appeal." *Id.* In determining appeal to prurient interest, the Court focuses on the aim or intent of the work:

The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content... *Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of Obscenity.*

383 U.S. at 470 (emphasis added). The "deliberate and studied" presentation of material "for the purpose of appealing predominantly to prurient interest" is sufficient to meet the test. 383 U.S. at 471.

"[I]f the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite," the

work is pornographic...Petitioners...deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity.

383 U.S. at 471,472 (brackets in original). Appeal to prurient interest is "no more than appeal...to the salaciously disposed...." 383 U.S. at 474. In discussing the publications at issue in *Ginzburg*, the Court stated:

[T]he fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.

383 U.S. at 474-75. The Court concluded:

Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene...

383 U.S. at 475-76. If the purveyor "appeals" to prurient interest, the material may be obscene. But if he "appeals" to medical or scientific interest, the material may not be obscene. 383 U.S. at 469,472-73. The test is not successful sexual arousal, it is purposeful sexual exploitation.

In the 1977 case of *Splawn v. California*, 431 U.S. 595 (1977), the Court held, inter alia, that the circumstances of sale and distribution could be considered on the issue of appeal to prurient interest where the material was being commercially exploited for the sake of its prurient appeal. The Court again made clear that the intent or purpose of the material was the central question in determining whether it appealed to a prurient interest or some other interest, and specifically approved of the pandering jury instruction used in the state court.

If "the purveyor's sole emphasis is in the sexually provocative aspect of the publication," that may be determinative in resolving whether the material appeals to prurient interest. 431 U.S. at 598.

Evidence of pandering to prurient interests in the creation, promotion or dissemination of material is relevant in determining whether the material is obscene....This is so partly because, as the Court pointed out before, the fact that the accused made such an appeal has a bearing on the ultimate constitutional tests

for obscenity: The deliberate representation of petitioner's publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content.

Id.

In *Pinkus v. United States*, 436 U.S. 293 (1978), the Court again emphasized that the crucial question involves the aim, intent or purpose of the material. Whether the jury is sexually stimulated or revolted by the material is not relevant to consideration of the prurient interest question. In affirming a conviction, the Court stated:

Examination of some of the *materials* could lead to the reasonable conclusion that their prurient appeal would be more acute to persons of deviant persuasions, but it is equally clear that they were *intended* to arouse the prurient interest of any reader or observer.

436 U.S. at 302 (emphasis added). The Court is focusing on the "material's...prurient appeal" and the *intent* of the material in making such an appeal. The arousal of the viewer is not required, but is merely an incidental consequence which may or may not occur. As the Court stated:

[T]he jury [may] consider...the materials themselves to determine whether *they were intended to appeal* to the recipients' prurient interest in sex.

436 U.S. at 303-04 (emphasis added). And see: *Hamling v. United States*, 418 U.S. 87, 130 (1974) (trier may consider "editorial intent" to appeal to prurient interest as "relevant in the determination of the obscenity of the materials at issue"). Both *Pinkus* and *Hamling* approved pandering instructions, and held that no extensive evidence was required to entitle the prosecution to argue and have a charge on pandering.

The prurient interest test received an interesting explanation in the case of *Mishkin v. New York*, 383 U.S. 502 (1966). In *Mishkin*, the defendant-appellant argued:

[S]ome of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that "instead of stimulating the erotic, they disgust and sicken."

383 U.S. at 508. The practical effect of such an interpretation is that as the material becomes more bizarre and deviant, it will become less obscene. The Court quickly moved to correct that misinterpretation, stating:

We reject this argument as being founded on an unrealistic interpretation of the prurient appeal requirement.

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

* * *

We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient groups;...

383 U.S. at 508-09 (emphasis added). Even though the Court rejected this "unrealistic interpretation" of prurient interest in *Mishkin*, we will see in the defense tactics subsection that defendants continue to make these same arguments in trial courts, and that acquittals and mistrials are sometimes obtained as a result.² See also: *U.S. v. Guglielmi*, 819 F.2d at 458, for discussion of the argument that the worst porn is the least obscene (so the least offensive and most attractive must be the most obscene).

Professor Frederick F. Schauer, of the University of Michigan School of Law and former member of the Attorney General's Commission on Pornography, is the author of the authoritative treatise "The

²See *Riplinger v. Collins*, CIV. 86-2072 PHXWPC (D. Ark., March 30, 1987), attached as Appendix D (memorandum and order) rejecting this frequent defense argument:

Plaintiffs contend that in order to be obscene, material must appeal to the prurient interest of the average person. The law appears to hold that in order to be obscene, an average person must find that the material appeals to a prurient interest. *This does not imply that the average person must be aroused by the material.* [citations omitted.] This does not appear to be a distinction without a difference, at least in this context. *The statute provides that the item need not be successful at arousing or exciting the average person. This provision does not contradict the law in the area.* (emphasis added.)

On July 31, 1987, *Riplinger* was appealed to the 9th Circuit by the pornographer plaintiffs.

Law of Obscenity,” which was cited with approval by the Supreme Court in *Smith v. United States*, 431 U.S. 291, 300 n.6 (1977) and *Pope v. Illinois*, 481 U.S. _____, 95 L.Ed.2d 439, 445 (1987). Professor Schauer is clear in his denunciation of the notion that sexual arousal is the requirement that must be met for the prurient interest test to be satisfied:

There remain some problems as to the words surrounding the prurient-interest test. That is, the test is that “the average person, applying contemporary community standards” must find that the work appeals to the prurient interest. If “appeal” is used in the sense of “he has an appealing personality,” then it is the effect that is determinative. *Alternatively, “appeal” may refer merely to the intentions or focus of the publications. The latter is clearly what the Roth Court had in mind, and is the only one which is consistent with other concepts in obscenity law.* The average person would probably find that most hard-core pornography has little effect on him, and it may well disgust him. Or he may find that it is so overdone as to have anything but a stimulative effect. It is apparent that neither the Supreme Court nor the legislatures intended that tasteful pornography be suppressed while distasteful pornography remains unregulated. Rather, the emphasis must be on the intent or aim of the publication as a whole. If this aim is to produce psychic or physical stimulation, on a less than intellectual plane, and on a short-term basis, then the prurient-interest aspect of the test for obscenity has been met.

F. Schauer, *The Law of Obscenity*, 102 (1976) (emphasis added). Thus, Professor Schauer instructs that the prurient appeal test does not require that anyone — whether the average person, the intended recipient, or trier of fact — be sexually aroused by the material, as does *U.S. v. Guglielmi*, 819 F.2d 451, 454-55 (4th Cir. 1987).

Defense Tactics Relating to the Prurient Interest Test

The distinction between arousal and appeal cannot be stressed too much. The point is important because of the results defense attorneys have obtained by arguing that appeal to prurient interest means successful sexual stimulation of a shameful or morbid interest in the “average person” or jury. (Note also that the pandering cases use prurient appeal as “erotic” appeal.) Despite the case law discussed above, pornography defense attorneys continue to argue that material must sexually arouse the audience (especially where the material is violent or deviant). A favorite tactic of attorney Herald Price Fahringer and other defense attorneys is to argue that material is so repulsive that it could not possibly arouse the average person. They do this

despite the rejection of this argument in *Mishkin* as "being founded on an unrealistic interpretation of the prurient interest requirement." 383 U.S. at 508. By cleverly shifting attention from the *intended effect* to the *actual effect* of the material, defense attorneys have occasionally obtained acquittals and mistrials for defendants charged with selling extremely explicit and perverse material. Mr. Fahringer explains how this misinterpretation of the "prurient interest" test can be used successfully to defend even the most abhorrent material. He writes:

The material charged with being obscene is to be judged by its impact on the normal person, not by its effects on persons who are easily influenced or sensitive.

Thus, if you have a work that obviously appeals to a bizarre sexual appetite, an argument can be made by the defense that it would not appeal to the average person's (or juror's) sexual desires. Consequently, an acquittal is mandated under this part of the obscenity test if the average person is unaffected by the material charged.

Fahringer, "The Defense of an Obscenity Prosecution," *Trial Magazine*, (May 1978).

Mr. Fahringer's use of this strategy in an actual trial was discussed in another article. (Cohen, "Obscenity Cases: Anatomy of a Winning Defense," *Criminal Law Bulletin*, Vol. 14, No. 3, 225-31 (May-June 1978)). The author wrote of a New York City trial in which Mr. Fahringer's defendants were prosecuted for selling films which depicted "explicit sex acts between two male homosexuals with one of the performers committing an act of oral sodomy on a dog." *Id.* The author made the following observations about Mr. Fahringer's closing argument:

He acknowledged that the films charged against his client were the most distasteful he had ever seen. He confided to the jury that he too had difficulty looking at them during their exhibition in the courtroom. However, the defense attorney stressed that the definition of obscenity had to be carefully adhered to like any other rule of law involved in a criminal trial.

Fahringer reminded the jurors that before they could find the films obscene, they had to be convinced, beyond a reasonable doubt, that they appealed to the "average person's prurient interest in sex." ...He stressed the point to the jurors that they were "average" people. "Prurient appeal" meant a "morbid or shameful interest in sex," and the word "interest," as defined

by Webster's dictionary, meant "inducing one to engage in or participate in." *He then insisted that if the films aroused them to the extent that they would be induced to participate in acts of bestiality — then they should find them obscene!* If, on the other hand, they found the films so repulsive and disgusting that they were repelled by them, they should return a verdict of not guilty. With that, he concluded argument and sat down.

Id. at 229 (emphasis added). The author informs us that Mr. Fahringer obtained an acquittal in this case by "turning obscenity on its head." *Id.* at 231. He concludes his article with the observation that, under Fahringer's misinterpretation, the more perverse or bizarre the sex depicted, the less likely it will meet the (defense) test of obscenity. This absurd misconstruction of obscenity law, and specifically the prurient appeal requirement, is indeed an attempt to turn the law of obscenity on its head. It would immunize from prosecution the most vile and repugnant material. Yet this type of misinterpretation can lead to acquittals only when prosecutors allow defense lawyers to shift attention away from the material's *intent* to its *effect* on the trier of fact. In the case just mentioned, the misinterpretation tactic was successful in a New York City obscenity trial 11 years after the Court ruled in *Mishkin* that such an argument was "founded on an unrealistic interpretation of the prurient appeal requirement." 383 U.S. at 508. This defense argument was discussed and rejected in *U.S. v. Guglielmi*, 819 F.2d at 452-55 (a case which should be copied and handed to every judge).

No view of the prurient interest test is acceptable unless it is consistent with other concepts in the law. An interpretation of the prurient interest element requiring that the average person be sexually aroused or stimulated makes nonsense of the law. The average person finds much modern pornography repulsive and sickening. The law is not interpreted so as to regulate only the mild erotica that the average person would find stimulating while leaving the most explicit or bizarre material untouched. Obviously, such an interpretation would undercut one of the basic purposes of obscenity law, which is to prevent the infringement of community standards by the commercial exploitation of hard-core sexual conduct. More importantly, from the legal standpoint, the interpretation creates contradictions within the law of obscenity. First, as suggested, it produces a contradiction between the "community standards" and the "prurient appeal" elements involved in the prurient test. Both "prurient appeal" and "patent offensiveness" are to be judged by the "average person, applying contemporary community standards." *Smith v. United States*, 431 U.S. 291, 299, 301-02 (1977). But under the arousal interpretation, as long as material is so violative of community stan-

dards that it disgusts or repulses the average person, it is not obscene. Second, a contradiction is generated between the "prurient appeal" and "patent offensiveness" prongs of the test. Under the patent offensiveness requirement, you must prove that the average person would — under contemporary community standards — find the depictions patently offensive. *Miller v. California*, 413 U.S. at 24-25,30-34; *Smith v. United States*, 431 U.S. at 301-02. Yet under the view promoted by many defense attorneys, the material must at *the same time* stimulate or arouse the average person. The same "community standards" cannot both be patently offended by the way sex is depicted and be acceptable to the "prurient interest."

In a newspaper article, a reporter from Fairfax, Virginia, described how another obscenity defense attorney was allowed to misinterpret the "prurient appeal" test to obtain acquittals in obscenity prosecutions. (George, "Porn Peddlers Take Edge in Legal Duel," *Fairfax Journal*, June 16, 1982):

Fairfax County is losing the battle against pornography.

Skillfully designed and lavishly financed defense tactics are chipping away at the county's once solid attack against sellers of adult books, like Croatan Books, Inc.

Until recently, county prosecutors had tallied up more than 100 indictments against the corporation for the sale of obscene magazines. From 1974 until April, 1982, the county won 84 cases bringing in \$664,000 in fines from Croatan.

But the tide turned this past month when Croatan won eight straight cases with the aid of Baltimore attorney Burton W. Sandler, who has a national reputation for expertise in handling First Amendment obscenity cases.

Calling the court's decision a "giant step for freedom of expression in Fairfax County," Sandler said his victory demonstrates that the average county resident does not have a "prurient" (morbid, degrading and shameful) interest in sex when they read Croatan's adult magazines.

* * *

[Prosecutor James] Hurd said his defeat was due primarily to Croatan's "high-powered" and expensive defense, which brought in such witnesses as sexologists from California and a psychologist from John Hopkins University.

And it was a new defense tactic presented by Sandler that caught prosecutors, witnesses and jurors off guard, Hurd said.

..Sandler tried a new defense by cross-examining Hurd's witnesses, including the police officer who bought the magazine and a woman civic leader, and asking three questions:

Are you an average person in Fairfax County? Do you have a healthy interest in sex? Do you have a shameful, morbid, or sick interest in sex?

All witnesses answered yes to the first two questions and no to the last question, Sandler said.

He then asked witnesses to read the magazines in court. After they finished he asked, "Do you have a prurient interest — an itching or longing to jump someone — after reading this material?" No one answered yes, Sandler said.

"If that prurient interest element was not met...the material is not obscene. That has not been done in Fairfax County before," Sandler said.

Id. (emphasis added).

The defense in these Virginia cases contains several elements. First, the defense attorney was permitted to offer evidence through cross-examination and through defense "expert" testimony (the Reverend—"doctor" Ted McIlvenna and Doctor Laney) that an average person does not have a shameful or morbid interest in sex — but only a healthy interest in sex. Thus he argued that the "prurient interest" test was not met and an acquittal was mandated. He went on to ask whether or not the material *aroused* interest in the witnesses to such an extent that the witnesses would have "an itching or longing to jump someone — after reading this material." Sandler merely refined the argument and tactic of attorney Fahringer from 1978, by not only arguing that the material does not arouse sexual interest and is therefore not obscene, but by using a paid "expert" to testify that the average person does not even have a shameful, morbid or sick interest in sex which *can* be appealed to. This defense strategy in effect improperly nullifies the Supreme Court's definition of obscenity. As the court in *U.S.v. Guglielmi* states, "Many persons, perhaps most persons, have a normal, healthy interest in sex and would have no shameful or morbid interest in nudity, sex or excretion." *Guglielmi* goes on: "The average person would view such material with an intellectual curiosity..., but not experience a whetting of sexual

appetite...for these reasons we reject the defendant's contentions that material may not be obscene unless it excites the sexual drive of the average person." 819 F.2d at 455.

Another successful convolution of the "prurient appeal" requirement occurred in a 1981 case involving the motion picture, "Caligula." *Penthouse International, Ltd. v. McAuliffe*, Civil Action No. C80-2172A (N.D.Ga. 1977). On appeal, a panel of the 11th Circuit reversed in part and affirmed in part. 702 F.2d 925 (11th Cir. 1983). The 11th Circuit reheard the case *en banc*, vacated the panel opinion, and affirmed the District Court opinion "by operation of law" when the *en banc* court split by a vote of six to six on a disposition of the case. 717 F.2d 517 (11th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984). In this case, the trial court ruled that to appeal to the "prurient interest" the material must "sexually stimulate the viewer or reader." *Id.*, slip op. at 6. The trial judge was greatly impressed by the "expert testimony" provided by the makers of the film. In his order, the judge emphasized the testimony of Dr. Downing Tait, Jr., who testified that:

...to the average person in Fulton County, the overwhelming depictions of violence, cruelty, and sexual explicitness in *Caligula* would *not arouse erotic interest*.

Id., slip op. at 7 (emphasis added).

Another witness testified that the average person would likely find the film revolting and offensive but *lacking in stimulative effect*. All of this "expert testimony" convinced the judge to determine the following:

The concept of prurient appeal has never been adequately defined by the Supreme Court. It is clear from the cases, however, that the presence of shocking, disgusting, or explicitly sexual scenes in a movie is insufficient to satisfy the "prurient interest" test of *Miller*...While *Caligula*, taken as a whole, *certainly does not appeal to a healthy or normal interest in sex, neither does it appeal to a prurient interest in sex*. The tendency of *Caligula* instead is to *inhibit sexual stimulation*. The court finds, as did the advisory jury, that to the average person applying contemporary community standards, the film *Caligula* viewed in its entirety, does not appeal to the prurient interest in sex.

Id., slip op. at 9 (emphasis added). The producers of "Caligula" persuaded a judge that an average person would not be aroused by the depictions of sexual activity in the film and that, therefore, the film was so shocking, disgusting, and sexually explicit that it did not

satisfy the "prurient appeal" test of *Miller* and was not obscene. Soon after the Supreme Court denied *certiorari* in the *McAuliffe* case, a New York newspaper commented:

The Supreme Court yesterday agreed with the movie review offered by the lower court and decided that the film "Caligula" is so repulsive that it can't be considered obscene. The high court left intact the ruling of the lower court, which said that the Bob Guccione film is not legally obscene because it does not arouse people, but repels and offends them.

Norman, "Top Court: Film too Vile to be Obscene," *New York Post*, March 20, 1984.

The error in the trial court opinion is clear. There are only two types of sexual interest involved in obscenity law, the non-prurient (purely normal and healthy) and the prurient (an abnormal or unhealthy lustful or erotic interest, or lascivious, or shameful and morbid, for example). If the film did not appeal to a healthy or normal interest (which would protect it), it should have been found to (illegally) appeal to the other (prurient) interest. The court's conclusion that it appeals to "neither" is illogical and reflects a personal philosophy that nothing is or should be obscene.

As we have seen, by wrongly changing the focus of courts from the material's intended appeal to its actual effect, defense attorneys have managed to obtain acquittals for explicit materials which clearly are within the range of material defined by *Miller*. Under their strategy, it becomes easier to gain an acquittal as the material becomes *more* disgusting, degrading and perversely explicit.³ This application is exactly opposite of what was intended by the Supreme Court, and the denial of *certiorari* in the *Caligula* case does not mean the Court agreed with this absurd judgment, especially in light of the failure of the Court of Appeals to reach the merits.

Allowable Descriptions of Prurient Interest

The Supreme Court's most recent treatment of the "prurient interest" test came in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). There the Court overturned a 9th Circuit decision which struck down Washington's obscenity statute in its entirety because of its

³Cases involving deviant, perverse and violent pornography are no longer isolated incidents. For an excellent study of the type of material available in "adults only" bookstores, see Park Elliot Dietz and Alan E. Sears, "Pornography and Obscenity Sold in 'Adult Bookstores': A Survey of 5132 Books, Magazines and Films in Four American Cities." 21 U. MICH. J.L. REF. 7 (1988).

definition of "prurient interest." The Supreme Court discussed, but did not rule directly on, the constitutionally allowable descriptions of "prurient interest" contained in obscenity statutes. The 9th Circuit had ruled that the statute reached protected material by including the word "lust" in its definition of "prurient interest." "Lust," the Ninth Circuit assumed, could describe a "normal, healthy" and therefore nonobscene interest in sex. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482,490-91 (9th Cir. 1984). The Supreme Court reversed, on statutory interpretation and federalism grounds, ruling that the statute should have been invalidated only insofar as the word "lust" might be *understood* to mean a "purely normal, healthy interest," if the federal court could find that such would indeed be the interpretation of "lust" by the state courts (which could not have occurred under the Washington cases). The Court ruled that the word "lust" could be used to describe "prurient interest" so long as it meant an "unhealthy interest in sex." The Court also stated that the words "shameful or morbid" and "lascivious" could be used to describe "prurient interest." 472 U.S. at 498-500. Note that in this technical decision, the Court did not hold, nor suggest, that these adjectives were the only words to describe "prurient" or that it was reversing or abandoning all previous cases on prurience and pandering which used other adjectives.

As a practical matter, you should determine prior to trial which definition or description of "prurient interest" will be used. Even if your statute provides a definition, further explanatory instructions can be given to the jury. For example, in Georgia "prurient" is defined by statute as "shameful or morbid." But juries have also been instructed that the term can be defined as "a tendency to excite lustful thoughts," a definition permitted by the Supreme Court in *Roth v. United States*, 354 U.S. 476,487 n.20 (1957). See, *Spry v. State of Georgia*, 274 S.E.2d 2 (Ga.Ct.App. 1981). To avoid misapplication of the law, definitions other than "shameful" and "morbid" *should* be used. The *Brockett* court approved extra definitions such as "lascivious." It only disapproved of the word "lust" to describe "prurient interest" to the extent that the meaning of "lust" might be considered to reach "normal, healthy sexual desires." 472 U.S. at 497. An abnormal or unhealthy lust can still be prurient under *Brockett*. See also: *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir. 1987), upholding a state obscenity statute that used words such as "lustful," "longing," and "lewd" in its definition of "prurient interest." The Court has also described prurient as an "erotic" sexual interest. *Pinkus v. United States*, 436 U.S. 293, 303 (1978); *Splawn v. California*, 431 U.S. 595 (1977); *Miller California*, 413 U.S. at 18n.2; *Ginzburg v. United States*, 383 U.S. 463 (1966); *Roth v. United States*, 354 U.S. 476,495-96 (1957) (Warren, C.J., concurring).

PATENT OFFENSIVENESS

”Patent offensiveness” is the second prong of the three-part obscenity test under *Miller v. California*, 413 U.S. 15, at 24-25 (1973), and is measured in relation to the contemporary community standard. See: *Smith v. United States*, 431 U.S. 291 (1977); and *Jenkins v. Georgia*, 418 U.S. 153 (1974). It was not a part of the obscenity test under *Roth v. United States*, 354 U.S. 476 (1957), but was first announced as a requirement in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), where ”patent offensiveness” was described as affronting ”prevailing community standards of decency.” 370 U.S. at 488. It ”formally” became the second part of the three-part test in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), where the Court stated: ”it must be established that...the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.” 383 U.S. at 418.

In *Miller*, the Court enunciated the current obscenity test. The second element was the requirement that the ”work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.” 413 U.S. at 24. As examples of the types of depictions of sexual conduct which the states could define for regulation, the Court listed:

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25. The examples of sexual conduct that may be found to be represented in a ”patently offensive way” given in *Miller* ”were not intended to be exhaustive.” *Hamling v. United States* 418 U.S. 87, 114 (1974). For example, ”sado-masochistic” materials were found obscene in *Ward v. Illinois*, 431 U.S. 767 (1977). Furthermore, existing statutes which do not contain such specifically defined sexual conduct can be ”authoritatively construed” to include them. *Miller*, 413 U.S. at 24. You should also be aware that even though the element of ”patent offensiveness” is essentially a question of fact, it can be independently reviewed by appellate courts. *Jenkins v. Georgia*, 418 U.S. 153 (1974) (reversing a jury verdict of obscenity and holding that the movie ”Carnal Knowledge” failed to meet the sexual conduct—*Miller* examples — requirement). Totally written, non-pictorial material may also be determined obscene. *Kaplan v. California*, 413 U.S. 115 (1973).

As noted, patent offensiveness is "measured by contemporary standards of the community." *Smith*, 431 U.S. at 293. In *Smith*, the Court approved a jury instruction which stated "that contemporary community standards" are "set by what is in fact accepted in the community as a whole." 431 U.S. at 297-98. A recent Supreme Court decision upheld *Smith* in this regard. See *Pope v. Illinois*, 481 U.S. _____, 107 S.Ct. 1918, 95 L.Ed.2d 439, 443 (1987) ("The first and second prongs of the *Miller* test — appeal to prurient interest and patent offensiveness — are issues of fact for the jury to determine applying contemporary community standards"). Generally, patent offensiveness is equated with an affront to community standards of decency or morality. See, e.g., *FCC v. Pacifica*, 438 U.S. 726, 740 (1978); *State v. Hudson County News Co.*, 196 A.2d 225 (N.J. 1963); and *City of Youngstown v. Deloreto*, 251 N.E.2d 491 (Ohio Ct. App. 1969). Note that *Miller* approved a trial court jury instruction which stated that "in determining whether material 'goes substantially beyond customary limits of candor and affronts contemporary community standards of decency,' it was to apply the community standards of the state of California." 413 U.S. at 31 (emphasis added).

The prosecutor should be aware that quite often defense attorneys will attempt to twist the "patent offensiveness" test by arguing that it must be applied in the context of the sale or ultimate usage, by creating a sort of "time, place and manner" basis for evaluation. The argument then asserts that the jury must decide whether it is "patently offensive" for an adult to view such material in the privacy of his own home or to sell it for that purpose from an "adults only" store. This is a bogus argument, a misinterpretation of the "patent offensiveness" concept, and a misapplication of "context" as used in obscenity law.⁴ The portrayal or depiction of "sexual conduct" either is or is not "patently offensive" independent of its circumstances of sale or usage. The correct question is, as a matter of fact, *whether the depiction of the "sexual conduct" as contained in the material is "patently offensive" under "contemporary community standards."* The 2nd Circuit in *U.S. v. Various Articles of Obscene Merchandise*, 600 F.2d 394, 406 (2nd Cir. 1979), squarely addressed this issue. The court rejected the notion that "patent offensiveness" is to be considered in the context of where the material was viewed or its intended private use.

The assumption throughout the development of this area of the law has been that the portrayal of sexual activity either is or is not "patently offensive." The question which the Supreme Court is instructing the lower courts to ask in this regard is as

⁴ The "context" issue is important in determining if "pandering" is present, discussed *infra*.

follows: Is, as a matter of fact, the depiction, description or representation of sexual conduct contained in the article in question "patently offensive" under "contemporary community standards?"...[T]he manner in which sexual conduct is depicted, described or represented in allegedly obscene materials is not affected by the manner or place in which the materials themselves are, or are intended to be, used and enjoyed. Under the Supreme Court cases handed down to date, such information is simply not relevant to the determination of the materials' "patent offensiveness."

Id. (emphasis added.) Thus, in determining the question of "patent offensiveness" the jury is not to consider that it is intended for use in the privacy of the home or whether, in that setting, it would be "patently offensive." This is a bogus argument? The Court also rejected the "consenting adults" argument in *Paris Adult Theatre I v. Slaton*, 413 U.S. at 57.

Another bogus argument is in defense attorneys' frequent attempts to twist the application of this prong from a "patently offensive" way of depicting or describing sexual conduct, to a test of whether the sex acts depicted are themselves patently offensive. The question is not whether it is patently offensive for adult humans to engage in intercourse, or group sex, or homosexual acts, or even incest or rape. Obscenity is not the portrayal of illegal sex acts, it is the illegal portrayal of sexual acts, whether those acts are normal or perverted. Though some types of sexual activities depicted are clearly offensive, all certainly are not. This is not what the Supreme Court intended and the prosecution should prevent improper defense tactics that seek to turn this part of the test into a referendum on certain types of sex acts. *Miller*, at 24-25, requires sexual conduct ("normal or perverted, actual or simulated") represented "in a patently offensive way," not patently offensive sex acts. The commercial exploitation of even the most "normal" sex acts by pornographers can be, and is often, done in a way which is patently offensive. Sex with animals, bondage, children, violence, etc. may be offensive sex acts, but they may be depicted in a non-offensive or in a patently offensive way. Which way the acts are depicted is the question under prong two.

⁵ While not concerned specifically with the issue of "patent offensiveness," it is worth noting that the Supreme Court has made clear that commerce in obscenity may be regulated even though its intended use will be in the privacy of one's own home. *U.S.v. 22* 200-Ft. *Reels of Film*, 413 U.S. 123 (1973); *U.S.v. Orito*, 413 U.S. 139 (1973); *U.S.v. Reidel*, 402 U.S. 351 (1971). Hence, one can state that any defense argument under *Stanley v. Georgia*, 394 U.S. 557 (1969), that material is not "patently offensive" because its intended use will be in the privacy of one's home, must fail.

COMMUNITY STANDARDS

Purpose of the Concept

The concept of “community standards” is applicable to the “prurient interest” and “patent offensiveness” prongs of the test of obscenity. The third part of the *Miller* test, the “serious literary, artistic, political, or scientific value” prong of the test is *not* determined by the application of “community standards.” *Pope v. Illinois*, 481 U.S. _____, 95 L.Ed.2d 439 (1987). It is important to note that “[t]he phrasing of the *Miller* test makes clear that contemporary community standards take on meaning *only* when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case.” *Smith v. United States*, 431 U.S. 291, 300 (1977).⁶ The reason for use of the “community standards” guideline in obscenity law was stated by the Supreme Court as follows:

This Court has emphasized on more than one occasion that a principle concern in requiring that a judgment be made on the basis of “contemporary community standards” is to assure that the material is judged neither on the basis of each juror’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.

Hamling v. United States, 418 U.S. 87, 107 (1974). See: *Miller v. California*, 413 U.S. at 33; *Mishkin v. New York*, 383 U.S. 502, 508-09 (1966); and *Ruth v. United States*, 354 U.S. 476, 488-90 (1957). The Court has further stated that “...community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness.” *Smith v. United States*, 431 U.S. at 302.

When it is understood that the concept of “community standards” is intended solely to provide a frame of reference for jurors so that they will not apply their *own* standards, subsequent rulings of the Court relating to the definition and interpretation of this concept are not surprising. For instance, obscenity defendants often attempt to limit or expand the “size” of the community to *their* advantage, but the Court has treated such arguments with indifference — it really does not matter as long as the jurors do not apply their own standards. See: *Miller v. California*, 413 U.S. 15 (1973) (rejected the necessity for use of “national” standards and approved use of “contemporary standards of the State of California”); *Hamling v. United States*, 418 U.S. 87, 105

⁶This statement takes on significance when efforts are made to determine community standards through public opinion polls, with no reference to the types or content of materials being prosecuted.

(1974) (no precise geographic area is required, but the preferred rule should be that a juror is permitted to draw on knowledge of the community or vicinage "from which he comes" which in this case was the federal district); and *Jenkins v. Georgia*, 418 U.S. 153 (1974) (where the Court ruled that it is not necessary to specify in jury instructions "what" community or the "size" of the community). The Court has made it clear, however, that children are not to be included in the "community" for purposes of applying the "prurient interest" and "patent offensiveness" tests — "community" means the "adult" community. *Pinkus v. United States*, 436 U.S. 293 (1978). Where there is a choice, however, the preferred rule is the Hamling vicinage from which a jury is drawn, so they can determine standards without hypothetical or expert judgment of views elsewhere.

The Supreme Court has never reversed a case because the "community" was too small, since the only constitutional requirement is that jurors apply the standards of their community and not their own. Unless the law or the courts have determined the size of the community in your state or jurisdiction, in a trial you can define the "community" as state, county, or city and there would be no "correct" choice — it only relates to what is best in your jurisdiction for effective enforcement of your obscenity law.

"Proof" of Community Standards

Whether the case is criminal or civil, the party with the burden of proof is not required to offer evidence of obscenity — the material can and does speak for itself. Within clear and established legal guidelines, the people of the community (through juries) make the decision of obscenity and whether the films or magazines violate the standards of their community in the way they depict (normal or perverted) sex and in the prurient or non-prurient appeal to sexual interest. The only limitation placed on this application of "community standards" is that only material which depicts or describes the types of "hard core" sexual conduct specified in *Miller* can be determined legally obscene. See: *Jenkins v. Georgia*, 418 U.S. 153, 159-61 (1974).

On numerous occasions, the Supreme Court has made it clear that the material speaks for itself. As early as 1966, the Court stated:

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

Ginzburg v. United States, 383 U.S. 463, 465 (1966). In *Paris Adult Theatre IV v. Slaton*, 413 U.S. 49, 56 (1973), the Court restated this principle: "The films, obviously, are the best evidence of what they represent." See

also: *Kaplan v. California*, 413 U.S. 115,121-22 (1973). The Court has also made it clear that this is a *people's* law, where jurors are entitled to draw on their own common sense and knowledge of their community in making the determination of obscenity. The Court has ruled:

A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law...The result of the *Miller* case, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion "the average person, applying contemporary community standards" would reach in a given case.

Hamling v. United States, 418 U.S. 87,104-05 (1974). See also: *Smith v. United States*, 431 U.S. 291,302-03 (1977).

As a result of the above cited authority, obscenity cases are not necessarily the burdensome and costly monsters that they have been criticized to be. Obscenity prosecutions can be simple and direct, and yet be very effective in their practical results. Many of the difficulties arise only when obscenity defendants spend tens or even hundreds of thousands of dollars to assist the jurors in "understanding" the standards of their community.

The Use and Abuse of Expert Witnesses in Obscenity Trials

As stated in the previous section, you are not required to "prove" the obscenity of the materials at issue in the trial. Therefore, "expert" evidence that the materials are obscene is not necessary where the materials themselves are placed in evidence. "The films, obviously, are the best evidence of what they represent." *Paris Adult Theatre I v. Slaton*, 413 U.S. at 56.7 See: *Kaplan v. California*, 413 U.S. 115,121 (1973)

⁷The Court went on to explain in *Paris Adult Theatre* that:

"obscenity...is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. No such assistance is needed by jurors in obscenity cases; indeed the expert witness practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. 'Simply stated, hard core pornography...can and does speak for itself.' We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." (Footnote continued on page 114.)

(no other evidence of obscenity is necessary, once the material itself is placed in evidence); and *Hamling v. United States*, 418 U.S. at 108-10 (discusses the discretion of the trial judge to exclude expert witnesses).

If jurors do not need expert testimony to render a decision in an obscenity case, it might logically be asked why so much attention is being devoted to the subject on the pages of this text. The answer to this question is simple — defense attorneys in obscenity cases would rarely win acquittals were it not for their use of experts. We have already discussed the use of expert testimony as it relates to the “prurient appeal” test of obscenity, and we will discuss their testimony as it relates to the “serious value” test in the next section.

Defense experts should not be feared. In fact, an experienced obscenity prosecutor can often use a defense expert to his advantage. In any trial, however, you should first attempt to exclude the proposed expert based on his or her lack of qualifications or lack of familiarity with the local community. As the Supreme Court stated in *Hamling v. United States*, 418 U.S. at 108 (emphasis added): “...the District Court has *wide discretion* in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony.” Note that in *Hamling*, the Court did not overrule the trial court’s decision to exclude the testimony of a defense expert and a public opinion survey that she had conducted. Also, refer back to the Court’s statements in the *Paris Adult Theatre* case that the use of experts in obscenity cases has often made a mockery of the concept of expert testimony, and the Court’s language in *Smith v. United States*, 431 U.S. at 300-01, that the concept of “community standards” takes on meaning only when considered in conjunction with application of the “prurient interest” and “patent offensiveness” tests. Defendants often attempt to introduce expert testimony only on “community standards” — this is totally improper unless the testimony is directly related to one of the tests of obscenity. You may be successful in having a defense expert excluded if you can demonstrate that his testimony is inappropriate, contrary to the law, or that the “expert” does not possess knowledge which would properly aid the jury to apply the correct test. Recent cases excluding defense experts include *U.S. v. Pryba*, 678 F.Supp. 1225 (E.D.Va. 1988) and *State v. Anderson*, 366

⁷ (continued from previous page) *Paris Adult Theatre v. Slaton*, 413 U.S. at 56 n. 6 (emphasis added, citations omitted). The Court has never reversed a case for failure to provide expert testimony in a “bizarre deviant group” case, since the jury can consider the appeal of the material to the “prurient interest” (to the average person), as well as the “prurient appeal to deviant sexual groups.” *Pinkus v. United States*, 436 U.S. at 302. See also: *U.S. v. Klaw*, 350 F.2d 155 (2nd Cir. 1965). See previous section relating to “Prurient Appeal.”

S.E.2d 459 (N.C. 1988) *reversing* the North Carolina Court of Appeals decision reported at 354 S.E.2d 264 (1987).

Remember that the *Miller* test is not whether pornography violates community standards but whether the material appeals to a prurient interest and depicts sex in a patently offensive way, as judged by community standards (and is therefore obscene and illegal even for the "consenting adults" in that community).

If the trial judge allows the defense expert to testify, your first consideration should be to prevent the witness from testifying contrary to the law. If you can keep the defense experts "honest," they can help you win your case. As discussed in the earlier section on "prurient interest," it is totally improper for a witness to testify that the Supreme Court was incorrect in 1973 when it formulated the three-part test of obscenity, since the "average person" does not even have a ("shameful and morbid") "prurient interest" that *can* be appealed to. *Miller* and all the Court's cases *assume* the existence of the prurient interest (lascivious, or abnormally or unhealthy lustful or erotic interest, as well as shameful or morbid interest) that is the obvious target of such commercial pandering, and which provides the motive for production of pornographic materials.

The majority of expert witnesses will be psychologists. The psychologists who testify in obscenity trials will often describe themselves as "sexologists" and their practice or discipline as "sexology." "Sexologists" may be sex therapists who counsel clients who are experiencing various sexual problems, or they may just be people who study "sex," such as the staff of The Institute for the Advanced Study of Human Sexuality in San Francisco. ("The Institute" of Ted McIlvenna, Wardell Pomeroy, and Loretta Haroian.) Depending on the material at issue in the trial, you might occasionally see English professors, drama professors, or political scientists. The most common defense expert, however, and the one most crucial to defense strategy, is the psychologist or sexologist. (Defense attorneys identify potential local witnesses by the records of those who take courses at "The Institute" or at the "Kinsey Institute," or who have ordered sexually explicit "therapy" films from "The Institute," d.b.a. Multi Media. Many of these films are made at "The Institute" by faculty, students, clients, and patients.)

You can use these defense experts to your advantage in a variety of ways. First of all, the experts usually have some *bias* or *interest* that can be exposed. They are usually paid large sums of money for their time and testimony. Some college professors make more as witnesses than as teachers. Some have testified in numerous obscenity trials,

almost always, for the defense. Many of the sexologists have an extensive "professional" and "personal" involvement with hard core pornographic materials. Some are very closely aligned with the pornography industry and with the Adult Video Association (A.V.A.), formerly the Adult Film and Video Association (A.F.V.A.), formerly the Adult Film Association of America (A.F.A.A.). (Which means the hard-core film producers, the supply arm of the "porn syndicate.") And some have even granted incredibly candid interviews to some of the more common newsstand pornography publications such as *Hustler* and *Chic*. One of the most often used "group" of sexologists operates "The Institute" in San Francisco and even offers a course to "student" sexologists on methods and techniques for testifying as a defense expert in an obscenity trial.* Finally, most defense experts strongly oppose obscenity legislation and the enforcement of such laws — you may be able to exploit this bias in front of the jury.

Another way of using defense experts to your advantage is to simply let them talk. Many of the experts, especially the sexologists, hold opinions relating to sexuality that differ greatly from the public generally. These "sexperts" (as they are sometimes called) are so impressed with their credentials and wisdom that they fail to realize that their opinions differ substantially from those of the people seated in the jury box. As an example, the following excerpt of an interview with a sexologist appeared in *Chic* magazine, a Larry Flynt publication: "Wardell Pomeroy — Kinsey Coauthor Speaks Out," *Chic*, February 1981, p. 70.

Chic: Speaking of children, you've said that incest could be a positive experience in some cases.

Pomery: I'm certainly not advocating incest, but I think that's possible. Studies currently in progress have found that incest isn't always catastrophic.

In father-daughter incest — which, after brother-sister, is the most common form — the daughter's age makes all the difference in the world. The older she is, the likelier it is that the experience will be a positive one. When it's negative, it isn't necessarily because of the sexual contact per se, but because the father then imposes all sorts of restrictions after the fact, such as not allowing the girl to date boys. The best sort of incest of all,

⁶They will call themselves "forensic sexologists," since they testify for these defendants in obscenity trials.

surprisingly enough, is that between a son and a mother who's really educating him sexually, and who then encourages him to go out with girls.

Pomeroy has appeared as a defense expert in many obscenity trials, but prosecutors who have been armed with a copy of this interview have usually cross-examined him effectively. There is likewise a wealth of ammunition in "Rev. Dr." Ted McIlvenna's interview as the "Apostle for Sexual Rights" in *Hustler*, April 1979.

In summary, let the experts talk and listen carefully to what they say. These people are usually experienced and are often itching for an opportunity to testify. Understanding this, you can see that these people *will never say what you want them to say and they will not change their testimony*, but you can expose the ridiculousness of their opinions and their biases to the jury. You can make your points by the way you ask your questions and the wording of the questions.

If you suspect that the defense will be using experts in your trial, contact prosecutors in your area or in other states who have done obscenity trials recently to see what their experience has been. In contacting other prosecutors, you may be able to obtain trial transcripts for use during trial or in preparation for cross-examination. The same experts are often used many times, and each time their effectiveness should be diminished as we learn more about them and as we share information. You might also wish to contact one of the lawyers at CDL — we keep extensive defense expert files, and if we haven't heard of him or her, you can assist us in building a file on that individual for further reference. We have attached at Appendix E, a list of possible cross-examination questions.

Public Opinion Polls

From a prosecution and common sense perspective, public opinion polls are not helpful in obscenity trials and should generally not be used. These polls are not reliable because very few people are aware of the nature of the material being sold in "adult" bookstores and theatres, or even at video stores, and those who are aware are probably consumers of these products. Either way, it is very difficult to obtain accurate information on community standards through public opinion polling. Defense polls never ask questions in the correct context of Miller and do not relate to specific films or books, but rather on general sexual items for private use by consenting adults. You should also refer back to the Community Standards subsection of this section, where we stated the Supreme Court's opinion that "community standards" have *no* meaning or application apart from the underlying questions of fact (i.e., prurient appeal and patent offen-

siveness). Unless the individual being questioned is applying the concept of "community standards" in conjunction with one of the tests of obscenity, and unless these same principles are being applied to the films, magazines, or books at issue in the trial, of what value is a general answer to a general question about "community standards?" We would submit that such answers are of no relevance to a finder of fact in an obscenity trial, and that they are inadmissible to *prove* community standards if offered by the defendant.⁹

As with other evidentiary matters which have been discussed, the trial judge has wide discretion to admit or exclude such polls from evidence. If such a poll is admitted, however, the results are usually suspect, and the results and credibility of the sponsoring witness are easily impeached. Typically, the questions are extremely general in nature and bear no direct relationship to the issues before the jury. Typical questions might include the following:

- (1) Do you think consenting adults should have the right to view films or books depicting nudity and sex in the privacy of their own home?
- (2) Do you feel that community standards have changed in recent years so that the depiction of nudity and sexual activities in films and magazines is more acceptable (or is tolerated)?
- (3) Do you feel that the community objects to the dissemination of materials depicting nudity and sex to consenting adults?
- (4) Are you an average person in this county?
- (5) Do you feel that an average person in this county has a shameful and morbid interest in sex, nudity, and excretion?
- (6) Do you have a healthy, average, and normal interest in sex, nudity, and excretion?¹⁰

⁹For a good discussion of the foundation which must be established before a public opinion survey can be introduced into evidence, and on the power to exclude such surveys, see *U.S. v. Pryba*, 678 F.Supp. 1225 (E.D.Va. 1988); *State v. Anderson*, 366 S.E.2d 459 (N.C. 1988), *reversing*, 354 S.E.2d 264 (N.C.Ct.App. 1987); *State v. Mayes*, 359 S.E.2d 30 (N.C.Ct.App. 1987); *People v. Hull*, 491 N.E.2d 757 (111.App.Ct. 1986); *Flynt v. State of Georgia*, 264 S.E.2d 669 (Ga.Ct.App. 1980); and *Saliba v. State*, 475 N.E.2d 1181 (Ind.Ct.App. 2 Dist. 1985). See also: *Mass. v. Trainor*, 374 N.E.2d 1216 (Mass. 1978).

¹⁰See the Prurient Appeal section of this chapter relating to "prurient interest" and **use** of expert testimony, and the exclusion of such testimony or evidence which is contrary to the law.

Such questions as these listed above obviously bear little relation to the issues before the jury, and are objectionable for a variety of reasons.

In *U.S. v. Pryba*, 678 F.Supp. 1225 (E.D.Va. 1988) a survey was excluded. The court stated at 1228-29:

Each respondent was...asked (1)whether he thought that the portrayal of "nudity and sex" in materials available to adults only had become more or less acceptable in recent years; (2) whether he agreed or disagreed with the statement that adults who want to should be able to obtain and view materials depicting "nudity and sex;" (3) whether he believed that he should be able to buy or rent materials depicting "nudity and sex;" and (4)whether he agreed or disagreed with the statement that adults who want to should not be able to buy or rent materials depicting "sex and nudity."

The government objected to the introduction of this survey on the grounds that it was both irrelevant to the issues in this case and methodologically flawed. After examining the poll, its methodology and results, the Court ruled that the proffered opinion poll was not relevant to whether the charged materials were obscene and therefore excluded evidence concerning the poll. The Court also concluded that even if relevant, the probative value of the poll was so slight that it was plainly outweighed by the unfair prejudicial effect the poll would have had. See: Fed.R.Evid. 403.

Evidence concerning the poll was irrelevant because the pollster's questions were not designed to elicit information about whether there was community acceptance of the actual materials in question or similar materials. Rather, the questions focused more on the general political question whether adults should be able legally to obtain pornography. In other words, the poll's questions seemed designed to measure public opinion not on whether the charged materials were accepted in the community but on whether laws banning obscenity should be repealed.

Further stated in *Pryba* at 1232:

Defendants sought to introduce the testimony of Dr. Joseph Scott, a sociologist with a background in statistical methodology. Dr. Scott conducted an "ethnographical" study which allegedly showed that the materials here in question are ac-

cepted by the adult community in the Alexandria division. According to Dr. Scott, an ethnographic study "looks at what is going on in the community." (citation omitted.) To get a look at "what is going on" in the Alexandria Division of the Eastern District of Virginia, Dr. Scott did the following:

"(1) He viewed the subject materials.

"(2) He 'probably went' to eighty or ninety bookstores, approximately sixty-nine of which sold what Dr. Scott described as 'male sophisticate' magazines. He also visited about seventy-five video stores, of which forty-three sold adult videotapes.

"(3) He talked to the operators and customers of the stores he visited about sexually explicit (male sophisticate) materials.

"(4) He called newspaper editors and discussed with them the number and content of 'letters to the editors' to ascertain the number and type of complaints relating to sexually explicit material."

As a result of this "ethnography," Dr. Scott was prepared to offer the jury his opinion that the "overwhelming majority" of adults in the community have at one time or another viewed sexually explicit material and that such materials, including the materials here in question, are readily acceptable by the average adult in the community. He prepared no report; he had only his notes. To reach his sweeping conclusion, Dr. Scott, who has never lived in Virginia, required only eight days.

The issue is whether such testimony is competent expert evidence of the prevailing community standards. It is not. Such testimony is inadmissible, for it is unreliable, unfairly prejudicial, and confusing and misleading to the jury.

For purposes of this discussion, you should be aware that a public opinion survey might be offered. If you can't exclude the survey from evidence, you must be ready to attack its methodology and credibility, usually by calling a legitimate pollster, statistician, political scientist, sociologist, etc., from a local college. Attached at Appendix F is an outline for cross-examining a defense expert pollster on methodology.

Use of Comparable Material to Prove Community Standards

Defendants in obscenity trials often attempt to prove "community standards" by the introduction of "comparables" — other sexually explicit films or magazines which are available in the community. The defendant's argument will be that the presence of this material demonstrates that the "community" *tolerates* or accepts such items for consenting adults. As will be shown, such evidence is not properly admissible.

If you were prosecuting a narcotics case, evidence would not be admissible to show that this defendant is innocent because other people are also selling or buying drugs. Such evidence should not be admissible in an obscenity case either. As the Supreme Court has stated:

"Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities."

Hamling v. United States, 418 U.S. at 126 (quoting *United States v. Manarite*, 448 F.2d 583, 593 (2nd Cir. 1971)). In addition, a party offering such comparison evidence must lay a foundation for its admissibility. A defendant offering a "comparable" film or magazine must demonstrate that the proffered evidence is:

- (1) *similar* to the items at issue in the present trial; and
- (2) that it enjoys a "reasonable degree of community *acceptance*" (emphasis added).

See: *Flynt v. State of Georgia*, 264 S.E.2d 669, 673-78 (Ga. Ct. App. 1980), *cert. denied*, 449 U.S. 888 (1980); ¹¹*Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1961); *Long v. 130 Market Street*, 440 A.2d 517, 521 (Pa. Super. 1982); *Dunlap v. State*, 728 S.W.2d 155 (Ark. 1987); *United States v. Womack*, 509 F.2d 368, 376 n.18 (D.C. Cir. 1974), *cert. denied*, 422 U.S. 1022 (1975). See also: *United States v. Various Articles of Merchandise*, 750 F.2d 596, 599-600 (7th Cir. 1984); *United States v. Battista*, 646 F.2d 237 (6th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981); *United States v. Pinkus*, 579 F.2d 1174, 1175 (9th Cir. 1978), *cert. dismissed*, 439 U.S. 999 (1978); *United States v. Pinkus*, 551 F.2d 1155, 1160-61 (9th Cir. 1977), *rev'd*, 436 U.S. 293 (1978); *United States v. Various Articles of Merchandise*, 625 F.Supp. 861, 867 (N.D. Ill. 1986); *United States v. Various*

¹¹ In *Flynt*, the Georgia Court of Appeals upheld the exclusion of comparison evidence, noting that "availability" or distribution figures (as opposed to actual sales) of the magazines or evidence do not show a "reasonable" degree of community acceptance.

Articles of Obscene Merchandise, 411 F.Supp. 1328,1330 (S.D.N.Y. 1976); *Matheny v. State*, 313 So.2d 547 (Ala. Crim. App. 1975), *cert. denied*, 313 So.2d 552 (Ala. 1975), *cert. denied*, 425 U.S. 982 (1976); *Pierc v. State*, 296 So.2d 218 (Ala. 1974), *cert. denied*, 419 U.S. 1130 (1975); *Baird v. State*, 671 S.W.2d 191,193 (Ark.Ct.App. 1984), *cert. denied*, 471 U.S. 1004 (1985); *People v. Mazzone*, 363 N.E.2d 947 (Ill. 1978); *Saliba v. State*, 475 N.E.2d 1181, 1190 n. 14 (Ind.Ct.App. 2 Dist. 1985); *State v. Short*, 368 So.2d 1078,1082 (La. 1979), *cert. denied*, 444 U.S. 884 (1979); *Commonwealth v. Dane Entertainment Services, Inc.*, 452 N.E.2d 1126, 1132-34 (Mass. 1983); *State Ex. Rel. Martin v. XLNT Corporation*, 525 S.W.2d 616 (Mo.Ct.App. 1975); *City of Sioux Falls v. Mini-Kota Art Theatres*, 247 N.W.2d 676,678-79 (S.D. 1976); and *Gill v. State*, 675 S.W.2d 549,550-51 (Tex.Ct.App. 1984).

If you are knowledgeable about this issue, you can probably exclude most comparison evidence, and perhaps even the mention of the general availability of sexually explicit materials in the community. The exclusion of this evidence will avoid much confusion for the jury, and will enhance the possibilities for a verdict in the state's favor.

"Tolerance" versus "Acceptance"

In *Miller v. California*, 413 U.S. at 32, the Supreme Court made the following statement during its discussion of the concept of "community standards":

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi *accept* public depictions of conduct found *tolerable* in Las Vegas, or New York City. (Emphasis added.)

Since this 1973 decision, defendants in obscenity cases have been arguing to state and lower federal courts that the concept of community standards can only be applied in accordance with a community's "tolerance" of "adult" bookstores and the hard core pornography which they sell. Their argument to the jury is that since these businesses exist in the community, this is evidence that such businesses are "tolerated" for "consenting adults." To counter this tactic, a prosecutor must insist that the jury be instructed that community standards are determined by what the community "accepts" — "acceptance" is a much stronger measure of "community standards" than "tolerance." This problem will be discussed in more detail in a later chapter dealing with jury instructions. See: *Smith v. United States*, 431 U.S. 291,297-98 (1977) (affirming conviction and approving jury instruction stating that: "[c]ontemporary community standards were set by what is in fact accepted in the community as a whole"); *Hamling v. U.S.*, 418 U.S. 87,103 (1974); *Sedelbauer v. State*, 428 N.E.2d 206 (Ind.

1951), *cert. denied*, 455 U.S. 1035 (1982); *U.S. v. Gilman*, 684 F.2d 616, 621 (9th Cir. 1982); *U.S. v. Battista*, 646 F.2d 237, 245 (6th Cir. 1981), *cert. denied* 454 U.S. 1046 (1981).

SERIOUS VALUE

Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value is the third prong of the three-part obscenity test under *Miller v. California*, 413 U.S. 15 (1973). The "value" or "merit" of objectionable material was not a part of the obscenity test under *Roth v. United States*, 354 U.S. 476 (1957). *Roth* did, however, implicitly recognize that a work's value could be considered by the Court in its ultimate determination of obscenity: "[t]he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." 354 U.S. at 487. Obscene material under *Roth* was said to be "utterly without redeeming social importance," presupposing a lack of serious value. 354 U.S. at 484. In 1964, in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), the serious value element came closer to being a formal part of the test. There the Court reasoned that since obscenity is "utterly without redeeming social importance, ... [i]t follows that material dealing with sex in a manner that advocates ideas, ... or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection." 378 U.S. at 191.

In its 1966 decision of *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966), the Court changed the *Roth* obscenity test by formally adding two new elements, "patent offensiveness" (discussed earlier), and the requirement that obscene material be "utterly without redeeming social value." The Court held:

The Supreme Judicial Court [of Massachusetts] erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be utterly without redeeming social value.

383 U.S. at 419. In *Miller*, seven years after the *Manoirs* decision, the Court enunciated the current three-part test. It rejected the "utterly without redeeming social value" element as "unworkable," and instead declared that material could be obscene if "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 22-25 (emphasis added). The Court reasoned that the *Memoirs* test created "a burden virtually impossible to discharge under our

criminal standards of proof." 413 U.S. at 22.

Under the *Miller* test, if the first two elements are satisfied, a work is obscene unless, taken as a whole, it has serious literary, artistic, political, or scientific value. Obviously under *Miller*, the burden of proof for the prosecutor is lessened. Under *Memoirs*, we essentially had to eliminate any value. Under *Miller*, we need only eliminate *serious* value when the work is "taken as a whole." Hence, the quantum of value necessary to save a work under *Miller* is much greater.

The alleged value cannot amount to mere pretense or sham. The Court must consider the work "as a whole."

A quotation from Voltaire in the flyleaf of a book will not Constitutionally redeem an otherwise obscene publication.

Miller, 413 U.S. at 25 n.7. If a work is to be redeemed under this third element, its serious value must be integrated into the totality of the work. For example, if obscene pictures "were inserted between each of the books of the Bible," *PenthouseInternational, Ltd. v. McAuliffe*, 610 F.2d 1353,1368 (5th Cir. 1980), or if an "obscene picture of a Roman orgy" were "accompanied by an account of a Sunday school picnic," *Flying Eagle Publications, Inc. v. United States*, 285 F.2d 307,308 (1st Cir. 1961), or if "obscene pictures" were attached to a "political letter," *United States v. Mewill*, 746 F.2d 458, 464 (9th Cir. 1984), the work, "taken as a whole" would not have "serious...value." As the court stated in *State v. Walden Book Co.*, 386 So.2d 342,345 (La. 1980):

The addition of the 'serious' element allows the trier of fact to look at the intent upon which the assertion of literary, artistic, political or scientific material is based. If the intent is to convey a literary, artistic, political or scientific idea, or to advocate a position, then the intent is serious...In order to determine whether the magazine, taken as a whole, lacks serious value, it is necessary to weigh those portions of the magazines which possess serious value against those which do not. The contents must be balanced quantitatively and qualitatively to take the work as a whole.

The sexual aspect should be sufficiently integrated with the serious literary, artistic, political, or scientific value so that there is no appearance of pretense or sham. Moreover, serious value must be of a significant amount, *State v. Shapiro*, 300 A.2d 595,604-06 (N.J. Super. 1973), and must be a major purpose of the work. For example, "[m]erely giving an intellectual gloss to literary trash cannot auto-

atically render the courts powerless to act.” *United States v. Gundlach*, 345 F.Supp. 709, 717 (M.D.Pa. 1972); *United States v. Four (4) Books*, 289 F.Supp. 972 (C.D. Cal. 1968). Hence, the Miller test was intended to protect “genuinely serious, literary, artistic, political or scientific expression.” *Miller*, 413 U.S. at 22-23 (emphasis added). See also: *United States v. A Motion Picture*, 404 F.2d 196 (2nd Cir. 1968); *United States v. 56 Cartons*, 373 F.2d 635 (4th Cir. 1967); and *United States v. Ginzburg*, 338 F.2d 12 (3rd Cir. 1964).

While the advocacy of ideas *per se* will not automatically save an otherwise obscene work, the Court indicated an intent to be somewhat more protective of such works. *Miller*, 413 U.S. at 20-21; *Hamling v. United States*, 418 U.S. 87 (1974). Further, if the attempt at value appears serious, the Court will consider this in making its decision. *Kois v. Wisconsin*, 408 U.S. 229 (1972). But the “mere” existence of a plot or storyline does not give a work literary value. *Kaplan v. California*, 413 U.S. 115, 116-17 (1973); *United States v. Four (4) Books*, 289 F.Supp. 972 (C.D. Cal. 1968). The fact that pornography is well-written will not prevent a finding of obscenity. See: *G.P. Putnam’s Sons v. Calissi*, 205 A.2d 913 (N.J. Super. 1964); and *People v. Bookcase, Inc.*, 244 N.Y.S.2d 297, 299-300 (Crim. Ct. 1963). The “inclusion in...magazines of some insignificant text” will not give it “serious...value.” *Hagood v. State*, 395 N.E.2d 315, 317 (Ind. Ct. App. 1979).

It is important to be aware that Miller rejected the notion that the presence of “social importance” could redeem an otherwise obscene work. Social importance is an inherently “ambiguous concept,” *People v. Heller*, 307 N.E.2d 805 (N.Y. 1973) cert. denied sub nom. *Buckley v. New York*, 418 U.S. 944 (1974), and can mean virtually anything to different people. The misleading argument that an allegedly obscene work has “social importance” because it encourages sexual liberation and is instructive as to sex techniques should be rejected by the court. See: *People v. Birch*, 269 N.Y.S.2d 752 (App. Div. 1966), appeal dismissed, 220 N.E.2d 804 (N.Y. 1966). The argument that because an obscene work has social importance, it therefore has serious literary, artistic, political, or scientific value also has been rejected. In *United States v. One Reel of Film*, 481 F.2d 206 (1st Cir. 1973), for example, it was argued that the movie *Deep Throat* had value under part three of the Miller test because it encouraged sexual liberation and was instructive as to oral-genital and other sex techniques. The Court held that “the argument proves too much.... We can only read the recent cases as an express rejection of any argument that pornography itself, because of its liberating impact, has for that reason alone, serious literary, artistic, political, or scientific value.” 481 F.2d at 210. See also: *United States v. Miscellaneous Pornographic Magazines*, 400 F.Supp. 353, 355 (N.D. Ill. 1975).

Serious literary or artistic value may sometimes be proven by published critical reviews or acclaim. Such reviews have been admitted in evidence in some cases and judicially noticed in others.¹² See: *Jenkins v. Georgia*, 418 U.S. 153, 158-59 (1974) (reviews of movie "Carnal Knowledge"); *Memoirs v. Massachusetts*, 383 U.S. 413, 447 nn.2, 3 (1966) (Clark, J., dissenting) (reviews of book *Fanny Hill*); *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (reviews of French movie "Les Amants"); *People v. Mature Enterprises, Inc.*, 343 N.Y.S.2d 911, 912-14, 917, 920-21 (Crim.Ct. 1973) (reviews of movie "Deep Throat"). However, the fact that a work has received acclaim or good reviews or has a large number of viewers does not *per se* indicate serious literary or artistic value. *State v. Smith*, 422 S.W.2d 50, 60-62 (Mo. 1967), *cert. denied*, 393 U.S. 895 (1968); *Lackin v. G.P. Putnam*, 243 N.Y.S.2d 145, 148-49 (Sup.Ct. 1963). Simply because material has entertainment value, or alleged value because it satisfies the curiosity of some people, does not satisfy the third prong of the obscenity test. *Price v. Comm.*, 189 S.E.2d 324, 329 (Va. 1972) ("No doubt the film has entertainment value for sexual deviants and for other persons who may enjoy viewing simulated sex acts of sexual perversion...[T]his dubious distinction falls short of furnishing the redeeming...value contemplated under the obscenity test.") Thus, it has been repeatedly held that simply because a work entertains, that does not indicate that it has serious literary or artistic value. *People ex rel. Hicks v. "Sarong Gals"*, 103 Cal. Rptr. 414, 417 (Cal.Ct.App. 1972); *People v. Mature Enterprises, Inc.*, 343 N.Y.S.2d 911, 913 (Crim.Ct. 1973); *United States v. New Orleans Book Mart, Inc.*, 328 F.Supp. 136, 142-43 (E.D. La. 1971).

In determining whether a work has serious political value, the Court has been highly protective of materials containing criticisms of

¹²Although appellate courts and trial judges sometimes rely on critical reviews, you should be prepared for a "hearsay" objection in a jury trial. The defense will claim that the "declarant" must be in court for cross-examination, or else his hearsay statements are inadmissible. The case of *Penthouse International, Ltd. v. McAuliffe*, Civil Action No. C80-2172A (N.D. Ga. May 15, 1981), discussed in the "prurient interest" subsection of this chapter, is a good example of where reviews could have been used. The *Penthouse* Case involved the movie "Caligula," which was criticized as trash by every movie critic in the country. The attorneys representing McAuliffe attempted to introduce these newspaper and magazine reviews as evidence of a lack of "serious artistic" value, and to show the lack of critical appreciation among the nation's movie critics. Obviously, the cost of bringing these people to Atlanta for the trial from all across the country would have been enormous, and economically impossible from prosecutor McAuliffe's point of view. The evidence was offered by McAuliffe's lawyers as a hearsay exception under Rule 803 of the Federal Rules of Evidence. Subsection 24 of Rule 803 creates a hearsay exception where "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." The trial judge refused to admit the reviews (not unexpectedly, as his "prurient interest" rulings would indicate); and in doing so, he excluded the *best* evidence of "serious value" that was available (it would have been the only evidence considered by the Court which was not "purchased" by *Penthouse*).

the government or country. This is so even though the accompanying matter is highly sexually offensive and objectionable. See: *Kois v. Wisconsin*, 408 U.S. 229 (1972); and *Cohen v. California*, 403 U.S. 15 (1971). Advocacy of abolition of obscenity laws and of different standards for sexual conduct have been considered political views. *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959).

Serious scientific value will, of course, also save a work. However, if such value is to physicians, psychologists, and sociologists and the work is intentionally distributed to persons outside this group, this may greatly undermine the claim of scientific value. *Ginzburg v. United States*, 383 U.S. 463, 471-74 (1966), relying, in part, on *United States v. Rebhuhn*, 109 F.2d 512 (2nd Cir. 1940) (L. Hand, J.). Educational value is often argued to be within the concept of scientific value. However, scientific value does not arise if the educational value comes from the exposure to the obscene work. *United States v. One Reel of Film*, 481 F.2d 206, 210 (1st Cir. 1973).

The Court has made clear that unlike prurient interest and patent offensiveness, the "serious...value" prong is not judged in accordance with contemporary community standards. *Miller v. California*, 413 U.S. at 34; *Smith v. United States*, 431 U.S. at 301. Whether a work has serious literary, artistic, political or scientific value does not vary from community to community; there is only one standard. *Smith* was reaffirmed by the U.S. Supreme Court in *Pope v. Illinois*, 481 U.S. _____, 95 L.Ed.2d 439 (1987). In *Pope*, the Court ruled that in determining the legal definition of obscenity, only the first and second prongs of the *Miller* test — appeal to prurient interest and patent offensiveness — should be decided with reference to contemporary community standards. The "serious...value" prong is based on a "reasonable person" test.

Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

Pope, 95 L.Ed.2d at 445. Note that the Court suggested the following jury instruction:

The jury [should]...decide the value question by considering

whether a reasonable person would find serious literary, artistic, political, or scientific value in the work, taken as a whole.

95 L.Ed.2d at 445 n.3. Although discussed elsewhere, it is important to note that if materials are pandered, this may diminish a claim of "serious...value." Where it can be shown that the intent of a work, (for example, through the way it is advertised), is to sexually stimulate or arouse, this is relevant to show a lack of serious literary, artistic, political, or scientific value. *Ginzburg v. United States*, 383 U.S. 463 (1966). The concept of "pandering" will be further discussed later in this chapter.

SCIENTER

We have previously discussed the three-part test of obscenity, proof of obscenity, and the use of community standards in making the required findings of fact and law. We now come to a very important part of any criminal trial — proof that the defendant possessed sufficient guilty knowledge to be convicted of a crime. This might seem like a subject so basic that very little time should be devoted to it. However, in proving the defendant's "knowledge," you also have an opportunity to educate the court and the jury as to the nature of this type of business. The same evidence which will be used to prove intent (or "knowledge") will also relate to the evidentiary issue of "pandering," which will be discussed later in this chapter.

Notice of Character and Nature is Sufficient

Defendants have always argued that they cannot be guilty of an obscenity offense unless they have specific knowledge of the contents of the book or film on trial. As will be shown, this is not the law. The Supreme Court has given much direction on this issue beginning in 1896 with the case of *Rosen v. United States*, 161 U.S. 29 (1896). In *Rosen*, the Court stated:

The inquiry under the statute is whether the paper charged to have been obscene, lewd and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one *who knew or had notice*, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails.

161 U.S. at 41 (emphasis added). In this early case, the Court established that a defendant does not have to be aware of the legal status of

the material or aware of the precise contents of the material, but it must only be shown that the individual had "notice" of the material's contents. If it were necessary to prove precise knowledge of the contents of films, magazines, or books at issue in obscenity trials, you would seldom get convictions. Defendants would testify that they had not looked at the material, and there would be no way to prove scienter unless the individuals involved had been observed by your investigators perusing the magazines or films.

It can be stated as a general summary of all Supreme Court cases, that the only scienter requirement that has ever been ruled unconstitutional by the Supreme Court was the *complete absence* of scienter as discussed in the case of *Smith v. California*, 361 U.S. 147 (1959). In the *Smith* case, the appellant was the proprietor of a bookstore. The question before the Court was whether the City of Los Angeles could impose "strict liability" for the distribution of obscene material, with no scienter requirement whatsoever. The Court held that the complete absence of a scienter requirement was not permissible. The Court also held as follows:

Eye witness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained despite his denial.

361 U.S. at 154.

In the case of *Mishkin v. New York*, 383 U.S. 502 (1966), the Supreme Court had an opportunity to consider the constitutionality of the scienter definition of the New York obscenity statute, and whether proof of scienter in that case was adequate. The Court accepted the definition of scienter as given to the statute by the New York Court of Appeals. The New York court defined the element of scienter as follows:

A reading of the statute (§ 141) as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised...

383 U.S. at 510 (quoting *People v. Finkelstein*, 174 N.E.2d 470, 471 (N.Y. 1961) (emphasis added)). The Court held that this definition of scienter fully meets the demands of the Constitution. In the case of *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court again accepted the New York definition of scienter as providing punishment for "only those who are in some manner aware of the character of the material they

attempt to distribute.” 390 U.S. at 644.

Finally, in the case of *Hamling v. United States*, 418 U.S. 87 (1974), the Court had an opportunity to rule on the sufficiency of the scienter element in a case involving convictions for mailing obscene materials in violation of federal law. In *Hamling*, the petitioners argued that their convictions could not be upheld on appeal because the government must prove that they knew that the materials mailed were obscene. The trial court, contrary to the wishes of the petitioners, instructed the jury that the government’s burden in the case was only to demonstrate that petitioners “had knowledge of the character of the materials.” 418 U.S. at 119-20. In a ruling on this question, the Court reviewed its earlier decisions in *Smith v. California*, *Mishkin v. New York*, and *Ginsberg v. New York*. After reviewing its earlier decisions on this issue, the Court held:

It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the material he distributed, and that he knew the character *and nature* of the materials. To require proof of a defendant’s knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

418 U.S. at 123. (Emphasis added).

After reviewing the Supreme Court rulings on the issue of scienter in obscenity cases, it is clear that it is constitutionally sufficient for the prosecution to prove scienter on the part of the defendant by showing that he has knowledge of the “general character” of the material. It should again be noted that the only scienter requirement which the Supreme Court has ever ruled unconstitutional was the complete lack of a scienter requirement in *Smith v. California*, *supra*.

Most states have followed these above cited cases by providing general awareness or constructive knowledge requirements in their obscenity statutes. Georgia requires that a defendant cannot be convicted unless he knows the obscene nature of the material, but defines “knowing” as:

[E]ither actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has *knowledge* of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material;...

Ga. Code Ann. § 16-12-80(a)(emphasis added). The Georgia scienter provision has been upheld on numerous occasions by state courts and by the Supreme Court. See: *Sewell v. State*, 233 S.E.2d 187 (Ga. 1977), appeal dismissed for want of a substantial federal question, 435 U.S. 982 (1978). Arizona defines "knowledge of character" as:

[H]aving general knowledge or awareness, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of that which is reasonably susceptible to examination by the defendant...

(a) That the item contains, depicts or describes nudity, sexual activity, sexual conduct, sexual excitement or sado-masochistic abuse, whichever is applicable, whether or not there is actual knowledge of the specific contents thereof. This knowledge can be proven by direct or circumstantial evidence, or both.

A.R.S. § 13-3501(3). This statute was upheld in *Ripplinger et al. v. Collins*, Civ. 86-2074PHX-WPC (D. Ariz., March 30, 1987) (Memorandum and Order). See Appendix D. In *Ripplinger*, the state asserted that an obscenity statute requires only proof of knowledge of the character of the material, not of the content. The pornographers challenging the statute argued that knowledge of both character and contents is required under case law in this area. The court, citing *Humling* and *Mishkin*, agreed with the state. The federal district court ruled that in *Humling*, 418 U.S. at 119-120, the prosecution was only required to demonstrate that the accused "had knowledge of the character of the materials." The Supreme Court "declined the invitation" to extend this requirement to a "proof both of knowledge of contents of the material and awareness of the obscene character of the material."

The Georgia and Arizona definitions are illustrative of most state definitions. See also: *State v. Burgun*, 384 N.E.2d 255 (Ohio 1978). We are not aware of a state that requires precise knowledge of contents for a conviction of obscenity.

"Proving" Knowledge

Having discussed the law, the essential question becomes how we prove scienter or knowledge and what is the significance of such proof. Obviously, since we cannot prove the precise knowledge of a defendant's thoughts, we must rely on circumstantial evidence. Paraphrasing the Arizona and Georgia laws, we must show that the defendant had a general knowledge of the character of the material; that he had knowledge of facts which would have placed a reasonable

and prudent person on notice as to the suspect nature of the material. This circumstantial evidence will be provided by your investigating officers and their observations, through photographs of the businesses, and by any other evidence which will demonstrate a defendant's knowledge of his business and its products. Many video dealers belong to associations which advise them of law enforcement activity and how to avoid prosecutions. Proof of activities recommended by such associations may be very helpful in demonstrating knowledge.

At least one of your witnesses must describe the business involved *in detail*, and state when and how often the defendants have been seen on the premises of this business. You should provide the court and jury with the following evidence:

- (1) the types of products available for sale or rental in this store;
- (2) the nature of the pictures on the magazines and films on display for sale or rental;
- (3) any signs or advertising for the products;
- (4) any signs or advertising on the exterior of the building;
- (5) any limitations upon who may enter the premises, rent or buy the materials;
- (6) any conversations with the defendant that would be relevant to his knowledge of the business generally or the specific items on trial;
- (7) the defendant's length of employment at the business and his observed responsibilities; and
- (8) any records, licenses, permits, corporate, payroll, bank, utility, insurance, and other accounting or business documents showing involvement or control.
- (9) Additionally, photographs are an invaluable tool in proving scienter, because they demonstrate to the court and to the jury that anyone walking in the door of such a business would be aware of the nature of the business and the contents of the materials available for sale. Always use photographs!

A prosecuting attorney should be given considerable latitude in presenting evidence to show scienter, since it can be proven by circumstantial evidence. For extensive research on scienter and types of evidence submitted at trial, we would recommend that you look to the case law of states such as Georgia, Ohio, Indiana, and Texas, where there have been extensive prosecution efforts over the past several years. You can look to the case law from Texas both as a good and bad example of how scienter should be proven. The Texas law contains a "presumption" of knowledge, which has given prosecuting attorneys in Texas trouble in recent years.¹³ See: Texas Penal Code Annotated § 43.23(e) and Appendix G. But see: *Young v. Abrams*, 698 F.2d 131 (2nd Cir. 1983) (upholding a New York presumption of scienter statute for commercial promotion). We do not recommend the use of such a presumption because of the type of problems it has caused in Texas, and also because it negates a prime opportunity to educate the jury and the court concerning the nature of the business involved in the trial. (Most scienter evidence also proves pandering.) Even when Texas prosecuting attorneys have avoided the presumption there has been some difficulty proving scienter by circumstantial evidence. In a recent case, *Beier v. State*, 687 S.W.2d 2, (Tex.Ct.App. 1985),¹⁴ the defendant was the manager of an "adult" bookstore and convicted of a misdemeanor obscenity charge. The prosecution attempted to prove scienter by showing that the defendant removed money from the cash register, that the store was stocked with large quantities of explicit sexual films and magazines, and that he had in his possession a memorandum instructing store clerks to cooperate with vice officers. The court ruled that simply because the manager cleared the cash register prior to the clerk's sale of an obscene film does not prove that the defendant "directed, aided, encouraged, or assisted in committing an offense. This evidence did not prove the requisite scienter. The court went on to state that it would not infer the duties of a manager, when the evidence did not establish what those duties are. In essence, this would be punishing the manager for his status,

¹³ In *Davis v. State*, 658 S.W.2d 572 (Tex.Crim.App. 1983), the court held that where the accused is charged with promoting material presumptively protected by the federal or Texas constitution, the jury may not be instructed that it can find the accused had knowledge of the content and character of the promoted material solely by using the presumption provided by V.T.C.A., Penal Code, Sec. 43.23(e), which provides "A person who promotes...obscene material...or possesses the same with intent to promote...in the course of his business is presumed to do so with knowledge of its content and character." This holding was affirmed in *Shealy v. State*, 707 S.W.2d 683 (Tex.Ct.App. 1 Dist. 1986) and *Gonzales v. State*, 676 S.W.2d 437 (Tex.Ct.App. 1 Dist. 1984), review refused by *Gonzales v. State*, 689 S.W.2d 631 (Tex.Crim.App. 1985). The court stated that it is incumbent upon the prosecution to prove that the defendant had knowledge of the content and character of the magazine.

¹⁴ This decision reversed the earlier *Beier v. State*, 681 S.W.2d 124 (Tex.Ct.App. 14 Dist. 1984).

not his conduct. With enough evidence, however, scienter can be established. *Carroll v. State*, 701 S.W.2d 913 (Tex.Crim.App. 1986).

In another case, however, similar circumstantial evidence was used successfully to prove scienter. In *Commonwealth v. Croll*, 480 A.2d 266 (Pa.Super. 1984), the prosecutor introduced the following evidence of scienter: the defendant was instructing an individual on the use of the cash register; the defendant was acting in a supervisory capacity during sales transactions; the doors of the peep show viewing booths provided notice of the nature of the films available by means of a placard indicating the type of film shown therein; conversations relating to the contents of the films; and the defendant's ability to answer specific questions concerning the availability of additional items within the store. The court stated that this evidence reflected the defendant's knowledge of the store's merchandise, and thus provided evidence from which the jury could reasonably infer that the defendant was *aware of the character* of the films sold to the police officers.¹⁵

Other state courts have affirmed convictions under similar circumstances. If a defendant has such an "awareness" or a general knowledge, he can be held accountable for having sufficient scienter to establish the requisite *mens rea*. There have been many instances where scienter has been established by showing that a defendant had an awareness of a magazine's sexually explicit cover. See: *Sedelbauer v. State*, 428 N.E.2d 206 (Ind. 1981), *cert. denied*, 455 U.S. 1035 (1982), where a counter clerk handled the material enough to observe its exterior:

Any adult human being who could pick the packages, above described, and sell them to a customer in a store, as above described, would indeed be out of touch with reality if he did not know and understand the nature of the object he was selling.

For a similar fact pattern and result see *McNeal v. State*, 434 N.E.2d 127 (Ind.Ct.App. 1982); and *State v. Burgun*, 384 N.E.2d 255 (Ohio 1978). In *Riley v. State*, 389 N.E.2d 367 (Ind.Ct.App. 1979), a store manager was convicted even though he had never been seen on the premises, since it was shown that he should have been aware of the general character of the material being distributed. In *Beier v. State*, however, even

¹⁵ See also: *People v. Anderson*, 473 N.E.2d 1345, 1352 (Ill.App.Ct. 1985), *aff'd*, 490 N.E.2d 1263 (Ill. 1986), for a good discussion of "scienter" and the evidence used to establish "scienter" in that case. Also, note the court's statement that "courts are permitted to infer scienter more easily when the bookseller deals exclusively in sexually explicit material because such a bookseller would not likely engage in self-censorship."

though the manager collected the money from the "adult" bookstore's register, scienter of the general character and content of the item on trial could not be proven from that alone. In *Triplett v. State*, 722 S.W.2d 633 (Mo.Ct.App. 1986) and *Carroll v. State*, 701 S.W.2d 913 (Tex.Crim.App.1986), the handling and/or selling of a magazine with a sexually explicit cover gave the clerk sufficient notice of the nature of the material. In two Georgia cases, the courts found that the defendant employees had a constructive knowledge of the nature of the material being shown or sold. In *Allen, et al. v. State*, 240 S.E.2d 754 (Ga.Ct.App. 1977), *cert. denied*, 439 U.S. 899 (1978), the defendant, a projectionist and ticket taker, had sufficient knowledge of the nature of the material where the theatre marquee advertised "Adult Movie No one under 18 admitted" and "Triple XXX Rated Movies." In *Hays v. State*, 243 S.E.2d 263 (Ga.Ct.App. 1978), *cert. denied*, 439 U.S. 947 (1978), the prosecution established knowledge where the defendant was the manager of a theatre-bookstore that admitted only adults, where exterior signs advertised X-rated movies and "sexually explicit material," where the store openly exhibited sexual devices, and where the defendant sold the magazines to a police officer.

As stated earlier in this text, your goal should be to inform the jurors of a community problem, and to place them to the greatest extent possible inside the business. Evidence of scienter not only demonstrates that the defendants were aware of the nature of their activity, but also educates the jury as to the nature of these businesses, and why they should be concerned. Juries will certainly be less sympathetic to a defendant if you have put on proper evidence of scienter, demonstrating that he surrounded himself each work day with hundreds of sexually explicit, and potentially obscene, items. As will be shown in a later section of this text, this evidence is also relevant to the evidentiary matter of "pandering" and, therefore, to the determination of obscenity generally.

The cases and facts cited above give you an indication of the types of evidence that can be used to prove knowledge on the part of the defendant; however, this certainly has not been intended to be an exhaustive list of evidence. Since knowledge and scienter must be proven by circumstantial evidence, you obviously have a wide latitude within which to establish all types of facts and circumstances which would have educated the defendant as to the suspect nature of the materials and the nature of his business. By being aware of these items of proof, your investigative officers can greatly assist you in winning your case by educating the jury as to the nature of the defendant's knowledge and the nature of the business. You can also use incidents of *other* criminal conduct in the businesses to prove scienter. Quite often, when police officers are making arrests for

obscenity violations, they may also have the opportunity to make arrests of customers for various solicitation and public indecency crimes. If police officers are aware of these other crimes taking place in the business, the clerks and managers of the businesses should also be aware. Police should tell the employers and operators, in person and in writing and serve them copies of arrest and conviction papers from indecent exposure or public lewdness cases. These sexual acts between customers in peep show viewing booths are certainly relevant to the knowledge of the defendants of the nature of the business, and also to the obscenity (prurient appeal) of the material which may be at issue. (Note: many public health code violations may be occurring simultaneously and, with growing concerns relating to A.I.D.S. transmission, these should not be ignored.) For a list of additional cases relating to proof of "scienter," see Appendix G.

PANDERING

In making its determination of obscenity, the jury should consider all facts and circumstances surrounding the creation, promotion and distribution of the material at issue — this is the evidentiary concept of "pandering."¹⁶ This concept was recognized by Chief Justice Earl Warren in *Roth v. United States*, 354 U.S. 476,495-96 (1957) (Warren, C.J., concurring) (emphasis added), where he stated:

It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

The personal element in these cases is seen most strongly in the requirement of scienter...In his charge to the jury, the district judge stated that the matter must be "calculated to corrupt or debauch. The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the *erotic* interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effects. I believe that the State and Federal Governments can constitutionally punish such conduct.

As stated earlier in this text, it should be one of your major objectives

¹⁶It is defined as the "commercial exploitation of erotica." See: *Ginzburg v. United States*, 383 U.S. 463,465-66 (1966).

in a trial to present the jury with a community problem by placing the materials at issue *and* the defendant in the context of the material's distribution —evidence of "pandering" will accomplish this purpose. It also should be obvious that most of the same evidence used to show the circumstances of distribution (relating to obscenity), will also be circumstantial evidence of "scierter."

Obscenity distributors and their attorneys obviously dislike evidence of the circumstances of promotion and sale. They want the material presented out of context in as "sterile" an environment as possible. You should expect strenuous objections from defense counsel during trials on the basis that such evidence is "irrelevant" and prejudicial — as will be shown, this evidence does hurt the defendant and it is also admissible.¹⁷ Your aim during a trial will be to present evidence of promotion and sale, and then to request a "pandering" jury instruction, which will inform the jury that they are entitled to consider the manner of distribution as relevant to their deliberation regarding obscenity. Defendants, on the other hand, equate "pandering" with *forcing* or thrusting magazines or films on the public, but this is not the Supreme Court's definition or use of the concept.

The case of *Ginzburg v. United States*, 383 U.S. 463 (1966),¹⁸ is the Court's most significant "pandering" case, where many statements are made relating to this evidentiary concept. In *Ginzburg*, the defendant was charged with mailing obscene publications.¹⁹ The interesting fact in *Ginzburg* was that "the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene."²⁰ 383 U.S. at 465. The Court affirmed the conviction of Ginzburg, and stated generally:

¹⁷ The defendant in a trial will probably attempt to isolate the material and himself from actual circumstances of promotion and distribution, preferring to concentrate on "expert" testimony and other evidence concerning "community standards."

¹⁸ The recitation of facts contained in *Ginzburg* will provide useful examples of the types of facts which can be used to "prove" a "commercial exploitation," and how these facts relate to a determination of obscenity.

¹⁹ A violation of 18 U.S.C. § 1461.

²⁰ The Court went on to note that "[o]ver 12,000 sales resulted from this solicitation, and a number of witnesses testified that they found the work useful in their professional practice. The Government does not seriously contest the claim that the book has worth in such a controlled, or even neutral, environment. *Petitioners, however, did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work in order to catch the salaciously disposed.*" 383 U.S. at 472 (emphasis added). The reader may wish to remember this emphasized passage quoted above during his closing argument, where the defendant's "paid" experts have claimed "serious value" for the magazines or films during their testimony.

We agree that the question of obscenity may include consideration of the *setting* in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As in *Mishkin v. New York*, we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.

383 U.S. at 465-66 (citations omitted)(emphasis added). If the Supreme Court considers the "setting" and the "background of commercial exploitation" essential, it is equally important that publications and films be judged in such a context in trial courts and lower appellate courts.

Finally, the Court makes clear in *Ginzburg* that evidence of "pandering" is relevant to all three tests of obscenity,²¹ that the qualities of the material should not be considered in the "abstract,"²² and that the consideration of such evidence does not threaten First Amendment guarantees.²³ As a practical matter, you will probably not prosecute a case like *Ginzburg* where such strong emphasis was placed on the "commercial exploitation" evidence.²⁴ *Ginzburg* does support the proposition, however, that in every case, circumstances of production, promotion, and distribution are relevant to the tests of obscenity and should be admitted into evidence for the jury's consideration. And see: *Paris Adult Theatre I v. Slaton*, 413 U.S. 49/55 n. 4 (1973) (where the Court raises the possibility that a finding of non-obscenity could be overruled in a later proceeding by evidence of pandering); and *Humling v. United States*, 418 U.S. 87, 130 (1974) (pandering is not a different crime, but only an evidentiary issue).

As stated earlier, obscenity defendants argue that "commercial exploitation" evidence and jury instructions are improper, absent "extensive" evidence that the publications were *forced* on the public.²⁵

²¹ 383 U.S. at 470.

²² 383 U.S. at 474 n. 15.

²³ 383 U.S. at 474.

²⁴ However, you should be aware of the case of *Penthouse International, LTD. v. Webb*, 594 F.Supp. 1186 (N.D.Ga. 1984), where a federal judge determined that there was probable cause for a county prosecuting attorney to believe that the September and October, 1984 issues of "Penthouse" magazine were obscene. The September issue involved the much-publicized photographs of former Miss America Vanessa Williams. Much of the prosecutor's case is based on the fact that *Penthouse* "pandered" the sexual explicitness of the Williams photos — the magazine's September issue was marketed as a "commercial exploitation of erotica," featuring Miss America.

²⁵ This is a variation of the defendant's "consenting adults" theory, that where the materials are distributed to "consenting adults" there can be no "pandering." See: *Puns Adult Theatre I v. Slaton*, 413 US 49,57 (1973), where the "consenting adults" defense was rejected by the Supreme Court.

The Supreme Court rejected this argument in the cases of *Splawn v. California*, 431 U.S. 595,597-601 (1977) (where the Court specifically approved the language of a state court pandering instruction), and *Pinkus v. United States*, 436 U.S. 293 (1978). The Court in *Pinkus* defined "pandering" as "the business of purveying textual or graphic matter openly *advertised* to appeal to the *erotic* interest of their customers." 436 U.S. at 303 (quoting *Ginzburg v. United States*) (emphasis added). The Court discussed the purpose of such evidence:

[T]o aid a jury in its determination of whether materials are obscene, the methods of their creation, promotion, or dissemination are relevant. In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation.

436 U.S. at 303. Finally, very little evidence was apparently offered by the prosecution in *Pinkus* relating to methods of creation, promotion, and distribution; however, the Court held the trial court's "pandering" instruction to be appropriate because:

[t]his was not a so-called finding instruction which removed the jury's discretion; rather it permitted the jury to consider the touting descriptions along with the materials themselves to determine whether they were intended to appeal to the recipient's prurient interest in sex, whether they were "commercial exploitation of erotica solely for the sake of their prurient appeal."

436 U.S. at 303-04 (quoting *Ginzburg v. United States*).

The cases cited above are ample authority for the admission of evidence relating to the circumstances of creation, promotion, and distribution. Many states have codified the "pandering" concept into their state obscenity statute (such as California and Georgia), and this would be additional authority for such evidence if you reside in such a state. Other than the publications or films themselves, "commercial exploitation" evidence will be the most persuasive part of a prosecuting attorney's case. The materials draw their true "color and character" from their promotion and context of distribution. If you fail to present all possible evidence relating to context, you have committed a serious injustice to your jury, since this is the most accurate and meaningful evidence that a jury will hear. "Pandering" evidence is what the defendant says about his products "outthere" in the marketplace, as opposed to what he says or pays people to say in the courtroom. (See the *Splawn* instruction.)

You may also be placed in a position of having to persuade the trial court that such evidence is *essential* to the proper application of the three tests of obscenity and to the defendant's "scienter." There has been a disturbing trend in recent years for trial courts to isolate the publications or films at issue from their context, probably as a result of their lack of experience in handling obscenity cases, and contrary to the above-cited Supreme Court authority. You might profit if you have difficulty introducing "pandering" evidence by quoting the statement of Chief Justice Warren, that "[t]he conduct of the defendant is the central issue, not the obscenity of a book or picture." *Ruth*, 354 U.S. at 495. By presenting adequate and persuasive factual evidence of promotion and distribution, you will have given meaning to the three-part test of obscenity and will have eased the jury's burden in its application of the test.

CLOSING ARGUMENT

It is not possible to give the perfect formula which a prosecutor may use for closing argument in every obscenity trial. While the law may generally remain constant, facts and circumstances will vary with each case. The prosecutor must adapt the presentation to accommodate the circumstances of each trial. However, a number of suggestions can be made which may prove helpful to the prosecutor in the summation of the case.

The prosecutor should begin by thanking the jurors for their time, attention, and patience. Because the material before them is exploitative, distasteful, shameful, and offensive, they are owed a special debt of gratitude for their service. You may wish to point out that through this type of trial a citizen is given an opportunity to protect the quality and decency of his or her community. Rarely does an individual have occasion to have a direct impact in preserving the quality and character of our family environment.

The prosecutor should explain that he or she will give an opening argument, then the defendant's attorney will give a summation, and that the prosecutor will have an opportunity to address the jury for rebuttal, speaking to them for the last time before they retire to the jury room.

The prosecutor should cogently explain the law of the case. At all cost, however, avoid confusing the jury. Emphasize the "hard core" nature and content of the material. Accentuate the most explicit, degrading and shameful portion of the materials. Make the point that

these are much more explicit than the pictures found in "milder" pornographic magazines like most jurors may be familiar with.²⁶ To drive the point home, the prosecutor may consider actually reading brief sections of the works to the jury. You may conclude by showing incredulity that anyone in his or her right mind would consider such material not patently offensive. You can emphasize that under the defendant's approach, if such material were not obscene, then virtually nothing could be obscene. The local community would then take on a red-light atmosphere and lifestyle.

The prosecutor should emphasize that these magazines are not readily sold in the community. Emphasize that they are not seen in any of the typical places where magazines can be found, such as, in drug stores, supermarkets, typical bookstores, doctors or dentists' offices, or in barber shops. The reason they cannot be found in such places is because they exceed the contemporary community standard. The works go beyond (i.e., violate) the contemporary community standard. Moreover, such materials are legally obscene and when they are found, the people selling them are indicted and charged with distributing obscenity.

On the issue of *acceptance* under contemporary community standards, the prosecutor must emphasize that it is the jurors themselves who are the best judges of what is acceptable in the community. The jurors can rely upon what they see around them and what they see others read. Jurors may ask themselves whether they see these magazines for sale elsewhere in the community. They might be able to find them in hard-core porn shops or hidden under the video store counter, but they cannot find them in public and they are not accepted in this city.

The prosecutor may emphasize that the jury need not accept the expert testimony provided by either side on the issue of obscenity. The magazines or films themselves are the best evidence of what they contain; i.e., the materials speak for themselves. These materials and what they contain speak louder and "testify" more forcefully than any witness possibly can on this issue.

The prosecutor must correct any distortions in the law which defense counsel may have created. This is essential and is most

²⁶ However, some issues of *Penthouse* and *Oui* may also meet the "legal" definition of obscenity and have been found obscene. *Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *Penthouse v. Webb*, 594 F.Supp. 1186 (N.D. Ga. 1984). *Hustler* has also been found obscene. *State v. Triplett*, 722 S.W.2d 633 (Mo.Ct.App. 1986); and *Flynt v. State*, 264 S.E.2d 669 (Ga.Ct.App. 1980), *cert. denied*, 449 U.S. 888 (1980).

achievable in the prosecutor's rebuttal argument.

The defendant will likely argue that the films or books are protected by the First Amendment and that this is a First Amendment case. It is essential that the prosecutor correct this assertion and advise the jury that obscenity is not protected by the First Amendment anymore than is libel, falsely yelling "fire" in a crowded theatre, child pornography or speech in contempt of court.

As in any criminal case, explain that reasonable doubt is not guilt proven to a mathematical certainty. Moreover, the prosecutor should explain that reasonable doubt is not a hunch or uneasiness about the verdict, or sympathy for the defendant. While it is true that every criminal defendant is clothed with a presumption of innocence until proven guilty, that same presumption follows every single person on the way to prison. Every defendant in every trial was presumed innocent until convicted. Yet, that did not stop juries from convicting them.

The defense attorney will argue that this offense is a victimless crime. If such arguments are relevant, the prosecutor may argue that it is not a victimless crime; that people are influenced by what they read in such magazines. Just as good conduct is influenced by reading good or uplifting books like the Bible or Shakespeare, bad conduct such as sadomasochism, child molestation, and other deviant behavior is influenced by the types of materials before the court. Indeed the materials attempt to legitimize such deviant behavior. We all know, for example, that television influences behavior. How else could the networks charge advertisers a half-million dollars for 30 seconds of air time during the Super Bowl? Should we ignore this and pretend that people are not influenced by what they read or see? If the door is sufficiently opened by defense counsel, launch into an argument based on learning by "modeling" and "imitative behavior."

If the defendant argues that the magazine was purchased in an adult bookstore *and that no children were involved*, this may open the door to the prosecutor's arguing that once these materials leave the video store, there are absolutely no controls on their further distribution. Children are free to obtain copies of these videos. Depending on the latitude of the court, and how far the defendant has "opened the door" the prosecutor may then successfully argue that a child of 12 or 13, if exposed to such material, is not old enough or emotionally stable enough to understand it. The material is capable of traumatizing him for the rest of his life. Simply because it is for sale for the first time in an adult bookstore or other outlet does not mean that children cannot obtain it. Indeed, these materials teach children that it is permissible

to engage in sexually deviant behavior, sadomasochism, and to degrade and injure women. This is the greatest tragedy. Argue that the owner should be ashamed and that he has no sense of responsibility.

The prosecutor should "attack" the defendant's expert witnesses. If the expert is from out of town and he is receiving a fee for his services, the prosecutor should mention over and over again that his testimony is being purchased. The prosecutor should argue that no one from out of town can come into this community and tell jurors who have lived in the community all of their lives, what their contemporary community standard is. To believe so is patently absurd and asks jurors to ignore everything they have seen and heard around them for their entire lives. Also, experts who conduct surveys on contemporary community standards will generally not show the actual materials to the individuals whom they interview. The prosecutor may successfully argue that if the expert had shown the actual materials to the interviewees, their answers would have been much different. Indeed, most people would have been so offended they would have refused the interview. The prosecutor may assert that the defense wishes to deal with this subject in generalities, in the abstract, and intentionally avoids showing the specific materials to the individuals whom they claimed to interview. The prosecutor may argue that if the defense went to the trouble of bringing in a "high-priced, out-of-town expert" to conduct a survey, it was not by accident that they failed to give him the actual magazines to show the people he talked with; it was intentional. If the expert testifies that the material does not appeal to the prurient interest in sex, the prosecutor may argue that such an allegation is patently absurd because somebody is paying \$10 or \$12 to purchase these magazines, or twice or three times the normal video rental fees. They are not being bought for use as centerpieces during Thanksgiving dinner. Their appeal is to one thing — prurient interest in sex. If the expert testifies that the material has serious literary, artistic, political, or scientific value, the prosecutor may argue that the material, in actuality, is merely exploitation of sex. True works of art, etc., are not found in peep show booths or in X-rated bookstores. Stress the intent of the material; that it is exclusively sexual. Point out the defense's failure to produce any testimony from producers or publishers that the intent behind the material is serious. The notion that such materials are in a category with Shakespeare or Plato "flies in the face" of human experience and makes a mockery of what our own eyes tell us. If the defense expert is from out of town or out of state, point out that there are hundreds of in-state experts on this subject. The reason they weren't called was because the defense wanted the porn industry "expert" — someone who has been bought by the industry. They wanted someone who has been pre-pro-

grammed.

In discussing the "contemporary community standard" remind them that a "standard" is what people "strive for," what they attempt to "live up to." For example, you want your children to "live up to" certain standards. People in the community may sometimes tell a lie (e.g., a phony compliment), but you counsel your children to always tell the truth because that is the "standard" and you want them to "live up to it." Community standards are not based on the lowest level of conduct, but on the highest. A standard is what the community "strives" to achieve, not the lowest common denominator. Analyze plumbing or fire code standards; people violate them frequently, yet they are still the standard.

The prosecutor should point out that these materials contain virtually every type of sexual conduct that such works could show. He should point out that if such works are not obscene, then nothing can be obscene. Stress that to follow the defendant's argument would leave the community in a situation wherein only "snuff" films or depictions of bestiality could be legally obscene. This result would leave us in a state similar to that of ancient Rome in the period of Nero. The porno industry will set the community standard as whatever it can pander to the sickest among us.

If the defendant argues that the material cannot be obscene because it is so hard core or perverse that it would not appeal to the prurient interest of the average person, the prosecutor must clarify to the jury that the material may appeal to the prurient interest of the intended and probable recipient group of the material. For example, if material contains sadomasochism or bestiality, then the material may be judged against the prurient interest of sadomasochists or individuals who engage in, or are sexually aroused while fantasizing about bestiality.

To demonstrate that material appeals to a prurient interest which is shameful, morbid, or degrading, the prosecutor might ask jurors if they would read or display the material in public, in mixed company. The answer, of course, is "no" because they would be too ashamed. The prosecutor may argue that it is morbid and degrading to pay people to engage in deviant sex acts so others can watch and take pictures. Isn't it degrading to depict a *close-up* of a woman down on her knees before a man who is ejaculating on her face? Isn't this really an exercise in shameful voyeurism? Isn't it morbid to pay a woman (or a man) to have a penis jammed up her (or his) anus while other people film that act, standing by and gawking? Isn't watching these people, in this way, a shameful and morbid way of getting sexually

aroused? With the A.I.D.S. epidemic and venereal disease, isn't this unhealthy sex? (Where are the condoms, the "safe sex" practices?)

The defendant will stress that these materials are intended to be viewed in the privacy of someone's home and that it shouldn't be regulated. Argue that this case deals with the *public* distribution of obscene materials in the *public* marketplace; that's why the sale of it is the *public's* business. If someone wants to engage in various sex acts in the privacy of their bedroom *that* is their business. But if they do it in public, *that* is the public's business. Privacy ended when the camera entered the scene and recorded the activity. It was processed, duplicated, distributed and sold. And whether we like it or not it is in the public environment where we raise our families. The public sale of obscenity pollutes the public environment in the same way that toxic waste does. We have to deal with both in a responsible manner so that the community is not injured. As a practical matter there is little difference between pimps making people engage in sex acts on a public street and someone making a photograph of that activity and exposing it on the same public street. Both actions threaten public safety and teach irresponsible sexual promiscuity, the primary spreader of A.I.D.S.

If you practice in a state which has retained jury sentencing, the prosecutor will want to argue that imposing a mere fine has absolutely no deterrent effect on stopping this type of activity. The price of these materials will simply be adjusted to absorb the payment of the fines. The only real deterrence is jail time and that's why imprisonment is the only appropriate punishment.