



# Chapter 7

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## Jury Instructions

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INTRODUCTION

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SUGGESTED INSTRUCTIONS

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SUGGESTED MEMORANDUM OF LAW  
IN SUPPORT OF PROPOSED INSTRUCTIONS  
FOR DETERMINING OBSCENITY

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## INTRODUCTION

Instructions, whether given to a jury as trier of fact or as advisory fact finders, should begin with a complete recitation of the applicable statute. The court should then add a few explanations of terms and concepts to guide in making the findings required by the statute.

The following language has been taken from United States Supreme Court decisions and would be a reasonable continuing instruction after the reading of the statute. These model instructions have not been drafted solely from the prosecutor's viewpoint or bias. Rather, they are an attempt to accurately set forth, in a fair and balanced way, proper instruction on the current law. Obviously you do not want any conviction reversed, so you should not attempt to "overreach." The prosecutor should be aware that defense counsel will likely offer instructions which are extremely pro-defense and clearly erroneous. Disappointingly, it is a common defense tactic to attempt to confuse or "swamp" the judge with instructions having no real basis in the law. The prosecutor should submit his proposed instructions to the judge with supporting memoranda of law, in advance of trial if possible. An accurate instruction of the law will generally be more helpful to the prosecution side. The more the judge is familiar with the supporting case law, the more likely he will be to accept the prosecutor's instructions, and reject the defense's. Again, having a "knowledgeable" judge will generally be to the prosecutor's advantage; an "unknowledgeable" judge is to the defendant's advantage.'

## SUGGESTED INSTRUCTIONS

### **First Amendment**

(1) Obscene material is not protected by the First Amendment to the United States Constitution.

### **Consenting Adults**

(2) It is not a defense to the crime of selling obscene material that the material was sold to consenting adults. The law prohibits the distribution of obscene material to any person, whether that person be an adult or child.

### **The Average Person**

(3) In deciding whether the material as a whole appeals to a

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'This refers to the judge's "knowledge" of obscenity law and in no way should be inferred as any form of criticism of the judiciary.

prurient interest, and whether the sexual conduct is portrayed in a patently offensive way, the jury must avoid subjective personal and private views in determining community standards and, instead, evaluate what judgment would be made by a hypothetical average adult person applying the collective view of the adult community as a whole.

(4) These questions are not to be determined by the effect of the material on any particularly sensitive or insensitive person, nor on the most prudish or the most tolerant, but rather by the standards of the average adult, which is a synthesis of all men and women, including the sensitive and insensitive, prudish and tolerant, educated and uneducated, religious and irreligious, and everyone in between.

### **Contemporary Community Standards**

(5) The jury is to decide what judgment would be made by this average person in his application of contemporary community standards. Community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness.

(6) In deciding what conclusion the average person, applying contemporary community standards, would reach in these respects, the jury is entitled to draw on its own knowledge of the views and sense of the average person in the community from which the jurors came.

### **Expert Testimony**

(7) There is no requirement that the parties prove or disprove the obscenity of the material by expert testimony when the material itself is placed in evidence. The material is the best evidence of what it represents.

(8) However, the parties are entitled to an opportunity to introduce relevant, competent evidence and testimony bearing on the issues, especially for the purpose of explaining to lay jurors what they otherwise could not understand, or when the material is 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 a prurient interest. As with all witnesses, the trier of fact may accept or disregard all or any part of the testimony and put as much weight on the testimony as the jury finds appropriate.

### **Appeal to Prurient Interest**

(9) As a general rule in obscenity law, the jury is asked to determine whether the average person would find that the predomi-

nant appeal of the material is to a prurient interest in sex. A prurient interest is a lewd, lascivious, erotic, shameful, or morbid sexual interest. It is an interest over and beyond a purely normal, healthy sexual interest. This prurient appeal requirement may be adjusted to social realities, however, by permitting the appeal of the material to be assessed in terms of the sexual interests of its intended and probable recipient group. Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to a prurient interest in sex of the members of that group.

(10) In determining whether the average person, applying contemporary community standards, would consider certain materials "prurient," the jury need not find that the material would necessarily have a tendency to excite lustful thoughts in an average person. Some material is intended to appeal to a specific deviant group. Such material may not stimulate the erotic in the average person, but disgust and sicken him. The jury may consider the prurient appeal to the intended and probable recipient group if the material is designed for that group.

### **Serious Value — Pandering**

(11) Another part of the statutory test for obscenity requires the jury to find whether the material taken as a whole lacks serious literary, artistic, political, or scientific value. In deciding whether or not the material has such value the jury must consider whether a reasonable person would find serious literary, artistic, political, or scientific value in the work, taken as a whole.

(12) Evidence of pandering to prurient interest in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene. "Pandering" is the commercial exploitation of erotica.

(13) In determining the question of whether the allegedly obscene material is lacking in serious literary, artistic, political, or scientific value, the trier of fact may consider the circumstances of distribution, and particularly whether such circumstances indicate that the material was being commercially exploited by the defendant for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the material and can justify the conclusion, especially if the question is a close one, that the material lacks serious literary, artistic, political, or scientific value. The weight, if any, such evidence is entitled to is a matter for the jury to determine.

Circumstances of production and dissemination are relevant to determining whether any serious value claimed for the material was, under the circumstances, a pretense or reality. If you conclude that the defendant's sole emphasis is on the sexually provocative aspect of the material, that fact can justify the conclusion that the matter is lacking in serious literary, artistic, political, or scientific value.

#### Patently Offensive Depictions

(14) The remaining part of the test for obscenity requires a finding of whether the material depicts or describes sexual conduct in a patently offensive way. The material as a whole or the circumstances of distribution are not considered as to whether it is patently offensive. The question is whether the average person, applying contemporary community standards, would find that the sexual conduct depicted or described in the material is portrayed in a patently offensive way.

(15) Patent offensiveness means substantially beyond customary limits of candor in describing or representing sexual matters. It means a deviation from society's standards of decency and morality because it affronts contemporary community standards relating to the description or representation of sexual matters.

(16) In this regard, contemporary community standards are set by what is in fact accepted in the community as a whole.

#### Scienter

(17) The prosecution must prove beyond a reasonable doubt that the defendant had scienter, or knowledge, of the materials at issue. It is not necessary that the defendant be shown to have actually seen or read the materials, or know their specific contents, but only that the defendant knew the nature and character of the materials. It does not matter that the defendant did not believe the materials were obscene. If the defendant knew the nature and character of the materials, that is, knew that they were sexually explicit and contained descriptions or depictions of sexual conduct, then the requirement of scienter would be satisfied.

## **SUGGESTED MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INSTRUCTIONS FOR DETERMINING OBSCENITY**

First Amendment — Consenting Adults

(1)(2) As stated in Miller, 413 U.S. 15, 23 (1973): "This much has

been *categorically settled by the Court, that obscene material is unprotected by the First Amendment*" (emphasis added). In *Paris Adult Theatre*, 413 U.S. 49,57,65 (1973), the Court specifically rejected the theory that the dissemination of obscene material acquires constitutional immunity simply because it is distributed exclusively to consenting adults. The Court recognized the legitimate state interest in regulating the commercial dissemination of obscene material, whether to adults or others. Hence, the defense that the prosecution was barred since only consenting adults would view the obscene material was rejected.

### **The Test for Obscenity**

In *Miller v. California*, 413 U.S. 15/24-25(1973), the Supreme Court, for the first time, enunciated a definitive "test" for determining obscenity and gave "a few plain examples" of the types of "hard-core" sexual conduct that could be depicted in a patently offensive way under state and federal law. This test has not been changed. The only significant explanation came from the Court in *Smith v. United States*, 431 U.S. 291, at 301-02, 309 (1977), when it clarified that patent offensiveness, as well as prurient appeal, were questions of fact to be determined by the application of contemporary community standards by the hypothetical average person. The Court elaborated on its *Smith* holding in *Pope v. Illinois*, 481 U.S. \_\_\_\_\_, 95 L.Ed.2d 439 (1987), where it held that unlike prurient appeal and patent offensiveness, whether a work lacks serious literary, artistic, political or scientific value, taken as a whole, is based on the jury's determination of whether a reasonable person would find such value. 95 L.Ed.2d at 445 and 445 n.3. In *Pinkus v. United States*, 436 U.S. 293,298,300 (1978), the Court held that children are not to be considered part of the "community" when applying contemporary standards but that "the community includes all adults who constitute it, and a jury can consider them all in determining relevant community standards."

The describing of "prurient interest" as a "shameful or morbid interest in nudity, sex, or excretion" follows the Model Penal Code definition approved by the Court in *Roth v. United States*, 354 U.S. 476, at 487 n.20 (1957). The Court in *Roth* referred to obscene material as that "which deals with sex in a manner appealing to prurient interest." In 1985 the Court in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), described "prurient interest" as a "shameful or morbid" or "lascivious" interest in sex, and as an "unhealthy lust." The Court has also used the word "erotica" to describe "prurient interest." *Ginzburg v. United States*, 383 U.S. 463,465-66 (1966); *Pinkus v. United States*, 436 U.S. 293,303 (1978); and see *Roth v. United States*, 354 U.S. 476,495-96 (1957) (Warren, C.J., concurring).

Examples of "hard core" sexual conduct were given in *Miller*, 413

U.S. at 25. *Miller* made it clear that it was not limiting the states, but only offering examples. In *Ward v. Illinois*, 431 U.S. 767, 773 (1977), the Court explicitly approved of bestiality and sadomasochism as being included as examples of sexual conduct which could be depicted in a patently offensive way under a state statute. In footnote 3 of *Ward*, the Court cites with approval the description of flagellation, homosexuality, oral contact, and intercourse which were included in Illinois by a decision of the Illinois Supreme Court. The Court also noted that this type of material had been upheld as obscene under state law in *Mishkin v. New York*, 383 U.S. 502, 505-10 (1966).

Cases subsequent to *Miller* point out the necessity of further limiting instructions in explaining various terms and concepts embodied within the basic "test." The suggestions for instruction on these terms and concepts are taken from those cases and would provide a lawful and constitutional charge on these issues.

#### The Average Person

(3) *Smith*, 431 U.S. at 301-02, made clear that prurient appeal and patent offensiveness were to be judged by "the average person applying contemporary community standards." In *Pinkus*, 436 U.S. at 300-01, the Court stated:

Cautionary instructions to avoid subjective personal and private views in determining community standards can do no more than tell the individual juror that in evaluating the hypothetical "average person" he is to determine the collective view of the community, as best as it can be done.

(4) *Pinkus*, 436 U.S. at 298, 300, held that it was the adult community which was to be considered. Many cases have held that obscenity is not to be determined by its effect on a "sensitive," "insensitive," "prudish," or "tolerant" person. Rather, it's to be judged by how the "average person" would view it. The "average person" is the synthesis of the entire adult community, including those people. See: *Pinkus*, at 298-300; *Smith*, at 304; *Miller*, at 30, 33; *Roth*, at 489-90. See also: Schauer, *The Law of Obscenity*, at 69-77 (D.C.: B.N.A., 1976).

#### Contemporary Community Standards

(5) As more fully set out below, the Supreme Court's language in *Roth*, *Mishkin*, and *Milk* requires the jury to determine whether the average person would consider certain material "prurient," i.e., whether that is the intended "appeal" of the work. In applying community standards, this average person's viewpoint is applicable to both prurience and offensiveness. It is not unlike deciding how the average person would measure the appeal of the material if the jury

handed the average person a hypothetical yardstick and the “yardstick” was contemporary community standards. As stated in *Smith*, at 302: “community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness.”

(6) Closely connected to the inappropriateness of expert testimony is the appropriateness of allowing jurors and courts to construct this community standards “yardstick” out of their own knowledge of the views on candor and decency of their neighbors in the community. This is analogous to the use of character evidence in other cases, where a character witness testifies not on his opinion of the defendant’s veracity and reputation but on the witness’s knowledge and familiarity with the defendant’s reputation for veracity which exists in others in the community as a whole.

The Court in *Smith*, at 302, repeated the language of *Hamling v. United States*, 418 U.S. 87,104-05 (1974), where the Court held:

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.

*Hamling*, at 105, also said it another way by stating, “our emphasis [is] on the ability of the juror to ascertain the sense of the ‘average person, applying contemporary community standards’ without the benefit of expert evidence.”

That the geographical area comprising the “community” need not be national, or even statewide, is evident. The preferred area is that from which the jury is drawn, in order to allow jurors as much freedom from confusion in using their own knowledge of the standards. *Miller*, at 30-32, sought to minimize the jury’s need to deal with an “abstract formulation” by allowing less than a national standard. As explained in *Hamling*, at 105: “Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a ‘statewide’ standard did not mean that any such precise geographic area is required as a matter of constitutional law.”

In *Jenkins v. Georgia*, 418 U.S. 153,157 (1974), the Court approved of a charge that did not specify any geographical size for the “community”:

We agree with the Supreme Court of Georgia’s implicit ruling

that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply "national standards." We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply "community standards" without specifying what "community." *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

In *Hamling*, at 105-06, the Court suggests that the best practice is to employ the vicinage or the area the jury is drawn from as the geographical "community":

The result of the *Miller* cases, 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. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw. But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide.

### **Expert Testimony**

(7) In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973), the Court held that once the allegedly obscene material is placed in evidence, the jury can decide all facets of the test on the application of its own knowledge, without the need for expert testimony. As stated by the Court at page 56:

Nor was it error to fail to require “expert” affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence...The films, obviously, are the best evidence of what they represent.

(8) The Court expanded on this concept in *Kaplan v. California*, 413 U.S. 115,121 (1973):

We also reject in *Paris Adult Theatre I v. Slaton*, ...any constitutional need for “expert testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence. *Paris Adult Theatre I*, 413 U.S. at 56,37 L.Ed.2d at 456. The defense should be free to introduce appropriate expert testimony, see *Smith v. California*, 361 U.S. 147,164-165,4 L.Ed.2d 205,80 S.Ct. 215 (1959) (Frankfurter, J., concurring), but in “the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question.” *Ginzburg v. United States*, 383 U.S. 463,465,16L.Ed.2d31,86S.Ct. 942(1966). See *United States v. Groner*, 479 F.2d 577,579-586 (CA 5 1973).

The purpose and misuse of expert testimony was mentioned by the Court in *Paris Adult Theatre*, at 56 n.6:

6. This 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...(emphasis added, citations omitted.)

The limitations on the admissibility of evidence lie in the broad discretion of the trial court, as evidenced by the many rulings upheld by the Court excluding comparables, expert witnesses, and other evidence in *Hamling v. U.S.*, at 124-27. See also: *Lung v. 230 Market Street*, 440 A.2d 517, 521 (Pa.Super. 1982), where the court refused testimony of an “expert” as to his knowledge of mere availability of similar pornography elsewhere in the state.

### Appeal to Prurient Interest

(9) In *Miller*, at 30, the Court phrased a reference to applying community standards to prurience in the words:

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 to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions of the law. (Emphasis added.)

In *Mishkin*, at 508, *Hamling*, at 127-29, and *Pinkus*, at 301-03, the Court made it clear that when materials are intended to stimulate a specific deviant group or a specific deviant sexual interest, then the jury can decide whether the average person would find the appeal of the matter to the "general" prurient interest *or* the deviant prurient interest. See discussion in *United States v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987).

(10) The Supreme Court has used various descriptive words to illustrate what prurience may mean. To the average person, material can be prurient when it either attracts or repulses, as stated in *Mishkin*, at 508. Attractively erotic material, even to the average person, has been held obscene. *Ginzburg; Hamling*. See also: *Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980). Bizarre material, repulsive to the average person, has also been found obscene. *Mishkin; Ward*. Bizarre sexual material may disgust or sicken the average person, but be obscene because it appeals to the prurient interest of an intended deviant group. *Mishkin*. See *Guglielmi*.

The Court used the words "lewd" and "lascivious" in *Roth*, footnote 20, and also gave approval to the Model Penal Code's use of "shameful or morbid." In another case which sought to separate protected sexual expression for political purposes from the pornographic prurience of obscenity, the Court in *Cohen v. California*, 403 U.S. 15, 20 (1971), said that "to prohibit obscene expression, such expression must be, in some significant way, erotic." In *Brockett*, the Court again approved "shameful or morbid" as well as "lascivious," and gave examples of many other adjectives in combination with lustful. In *Ginzburg v. United States*, 383 U.S. 463 (1966) and *Pinkus v. United States*, 436 U.S. 293, 303 (1978), the Court used "erotic."

Prurient appeal is properly a synthesis of these adjectives to de-

scribe an interest in sex for its own sake, or for commercial gain. See: Schauer, *The Law of Obscenity*, *supra* at 96-102; Model Penal Code, Commentaries, *supra* at 488-94. As stated in the Model Penal Code, Commentaries, *supra* at 491-92:

Prurient interest involves an exacerbated, morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and the equally universal social controls of sexual activity. The Model Code provision rests on the proposition that society may legitimately seek to deter the deliberate stimulation and commercial exploitation of emotional tensions arising from this conflict.

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The Model Code definition follows the great weight of prior authority in restricting obscenity to the erotic. This limitation is imposed by requiring that the prurient interest appealed to concern sex, nudity, or excretion.

One of the best analyses of this mixture of "tendency to excite lustful thoughts" and the appeal to a "shameful or morbid interest" is set out in *State v. Bartanen*, 591 P.2d 546, 550-52 (Ariz. 1979). The trial court charged the jury: "The term appeal to the prurient interest means to excite lustful thoughts, a shameful or morbid interest in sex or nudity, arouse sexual desires or sexually impure thoughts, inclined to or disposed to lewdness, having lustful ideas or desires." *Bartanen*, at 550. The Arizona Supreme Court upheld and approved this definition as a synthesis of the "appeal" and the "tendency" functions of prurience. As stated by the court, at 552:

The trial court herein used both the so-called "appeal" approach to obscenity, that is, does the material appeal to a morbid, shameful, disgusting, unhealthy, unwholesome, degrading interest in sex, as well as a "tendency" of the material to excite "lustful ideas or desires."

We believe the trial court correctly instructed the jury.

This language was also approved in *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir. 1987) as not in conflict with *Brockett*.

In *Hamling*, at 128, the Court noted that: "Petitioners appear to argue that if some of the material appeals to the prurient interest of sexual deviants while other parts appeal to the prurient interest of the average person, a general finding that the material appeals to a

prurient interest in sex is somehow precluded.” The Court relied on *Mishkin* in rejecting this contention, and stated in *Hamling*, at 129:

The District Court’s instruction was consistent with this statement in *Mishkin*. The jury was instructed that it must find that the materials as a whole appealed generally to a prurient interest in sex. In making that determination, the jury was properly instructed that it should measure the prurient appeal of the materials as to all groups.

In order to provide some objectivity to obscenity law, and avoid the problems with the old “Hicklin Rule” of judging obscenity by its impact on the young or sensitive, the Court has chosen its wording carefully. *Miller*, at 24, stated that the guideline is “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest.” *Roth*, at 489, stated “whether *to* the average person, applying contemporary community standards...” (emphasis added). *Miller*, at 30, also said: “triers of fact are asked to decide whether ‘the average person, applying contemporary community standards’ *would consider* certain materials ‘prurient’” (emphasis added).

It is important to note that the Court did not say that the “jury” was to decide whether the matter appealed to the prurient interest of the average person applying contemporary community standards, but rather that the jury determine whether the average person, if the average person applied those standards, would find the *appeal* to be *to* a prurient interest.

This subtle distinction is not a harmless one and is important. If a court were to charge a jury that it must find the matter obscene, if at all, only when it appeals or excites a shameful or morbid interest *in* an average person or *in* the jury, then confusion would result and the whole purpose of obscenity law would be thwarted.

This type of confusing result was anticipated and encouraged by a defense attorney who, writing an article for *Trial* magazine (May, 1978), entitled “The Defense of an Obscenity Prosecution,” offered this tactic for purposes of achieving acquittal: “Thus, if you have 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.” This defense tactic was the subject of another article on an acquittal of bestiality films where that same attorney who wrote the *Trial* article urged the jury to convict if

the films aroused the jury to participate in bestiality but to acquit if they found them repulsive and disgusting and not appealing to the sexual desires of an average person. See: Cohen, "Obscenity Cases: Anatomy of a Winning Defense," *Criminal Law Bulletin*, May-June, 1978. Compare *U.S. v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987).

The legal error in this tactic is clearly set out in *Mishkin*, at 508, where the Court explained:

Indeed, appellant's sole contention regarding the nature of the material is that some 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." We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.

It is, therefore, imperative that courts carefully repeat the language and phrasing of the *Miller* test and the applicable state law.

### **Serious Value — Pandering**

(11) The serious value part of the test is taken from the third prong of *Miller* at 24. The jury must decide whether the hypothetical "reasonable person," not any *one* "reasonable" person, would find serious literary, artistic, political, or scientific value in the work, taken as a whole. *Pope v. Illinois*, 481 U.S. \_\_\_\_\_, 95 L.Ed.2d 439, 445, and 445 n.3 (1987).

(12) Evidence of "pandering" undermines a claim of "serious...value" and supports a finding of obscenity. As stated in *Splawn v. California*, 431 U.S. 595, 598 (1977):

There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.

This is a clear statement of the principles applied in *Ginzburg*, at 466, where the Court stated that it was viewing the material "against a background of commercial exploitation of erotica solely for the sake of their prurient appeal." At 467-68 of *Ginzburg*, the Court outlined the advertising and promotion evidence and characterized the business involved as "the sordid business of pandering — 'the business of purveying textual or graphic matter openly advertised to appeal to

the erotic interest of their customers.” In *Ginzburg*, at 465, the Court explained its reasoning as to the admissibility and relevance of the evidence of commercial exploitation of sex to determine matter obscene that “standing alone...might not be obscene.”

*Pinkus*, at 303-04, made clear that no extensive evidence need be adduced before an instruction is warranted to assist the jury in determining whether the material was distributed for its prurient appeal or for its serious value. “In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation.” *Pinkus*, at 303. The Court noted that the trial court instructed the jury on pandering to which the jury could look if it found “this to be a close case” under the three-prong “test.” *Pinkus*, at 303. This addition to the pandering instruction on relevance of exploitation as applicable “if it found the case to be close,” was also given in *Hamling*, at 130. The Court went on to say, in *Pinkus*, at 303-04:

This 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,” *Ginzburg, supra*, at 466, 16 L.Ed.2d 31, 86 S.Ct. 942, if indeed the evidence admitted of any other purpose. And while it is true the Government offered no extensive evidence of the methods of production, editorial goals, if any, methods of operation, or means of delivery other than the mailings and the names, locations, and occupations of the recipients, the evidence was sufficient to trigger the *Ginzburg* pandering instruction.

In a practical application of this principle, the Supreme Court of Indiana upheld a pandering instruction, taken from *Splawn*, at 597-98, upon the evidence that the materials were sold from an “adult” bookstore, clearly marked as such, and dealing openly with sexual devices, books, and films of an explicit pornographic nature. *Sedelbauer v. State*, 428 N.E.2d 206, 207-08 (Ind. 1981), *cert. denied*, 455 U.S. 1035 (1982).

(13) In *Splawn*, at 597-98, the Court sets out the trial court’s instruction on pandering and notes that it was consistent with the language and holdings of *Ginzburg*, at 470-71, and with the instruction approved in *Hamling*, at 130. The Court recognized the latitude state courts have for forming instructions and held that *Ginzburg* and

*Hamling* "clearly show" that the charge violated no First or Fourteenth Amendment rights. *Splawn*, at 599.

The only changes required in the *Splawn* instruction, as set out in the Court's opinion, is to amend those pre-Miller phrases which were based on the "redeeming social importance" language of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), which was replaced in *Miller*, at 24, with the "serious value" language.

### **Patently Offensive Depictions**

(14) The criminal code reflects this part of its test in the words of prong two of the *Miller* test relating to the depiction or description of specifically defined sexual conduct in a patently offensive way. The statute on its face is valid as an adoption of *Miller*, at 24-25. Statutes need not even embody the language of *Miller* to be constitutional, as long as they are authoritatively construed to adopt the principles set out by the Court. *Ward v. Illinois*, at 774-76. See also: *State v. Burgun*, 384 N.E.2d 255,258-61 (Ohio 1978), approved and followed in *Sovereign News v. Falke*, 674 F.2d 484 (6th Cir. 1982), and *Turoso v. Cleveland Municipal Court*, 674 F.2d 486 (6th Cir. 1982); *People v. Neumayer*, 275 N.W.2d 230 (Mich. 1979); and *First Amendment Foundation v. State*, 364 So.2d 450 (Fla. 1978).

(15) Referring to patent offensiveness as "substantially beyond customary limits of candor in describing or representing sexual matters" was proposed by the Model Penal Code and is based on Judge Learned Hand's language in *U.S. v. Kennerly*, 209 F. 119,121 (S.D.N.Y. 1913). See: Model Penal Code, Commentaries, *supra* at 492. See also: F. Schauer, *The Law of Obscenity*, *supra* at 102-05.

This language was later adopted by a plurality of the Court in *Jacobellis v. Ohio*, 378 U.S. 184,191 (1964), which also approved of the statement of Justice Harlan in *Manual Enterprises v. Day*, 370 U.S. 478, 482 (1962), that to be "patently offensive" or "indecent" materials should be "so offensive on their face as to affront current community standards of decency." It was Justice Brennan, in *Jacobellis*, at 192, who referred to this as "a deviation from society's standards of decency."

The Court did not clarify or specifically adopt further language in *Miller*, at 24. The Court did make clear by its choice of words that it was not the material itself nor its manner of distribution which were to be considered patently offensive, but that the question is whether the matter depicts or describes, "in a patently offensive way," sexual conduct specifically defined by the applicable state law. In *Smith*, the Court merely clarified that determining patent offensiveness was a question of fact to be found by the average person, applying contem-

porary community standards. The holding of *Smith* that "patent offensiveness" must be determined by contemporary community standards was re-approved in *Pope v. Illinois*, 481 U.S. \_\_\_\_\_, 95 L.Ed.2d 439 (1987).

(16) In *Smith*, at 297-98, the Court affirmed the conviction and approved of a jury instruction as follows:

The court instructed the jury that contemporary community standards were set by what is in fact *accepted* in the community as a whole. (emphasis added)

Similarly see *Hamling v. U.S.*, 418 U.S. 87, 103 (1974).

This concept of community acceptance is both explicit and implicit in all the Court's decisions on patent offensiveness since *Ruth*, including *Jacobellis*, *Memoirs*, *Miller*, *Paris Adult Theatre*, *Smith*, and *Pope*. In *Pope*, the Court continued the tradition of using the term "acceptance" as opposed to "tolerance." The Court provided the following usage in *FCC v. Pacifica*, 438 U.S. 726, 740 (1978):

Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with *accepted* standards of morality. (emphasis added)

In *Pacifica*, the Court, at footnote 15, page 740, noted that "indecent" is a shorthand term for "patent offensiveness," and noted at 743 that "the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities."

In *Sedelbauer v. State*, 428 N.E.2d 206, 210-11 (Ind. 1981) *cert. denied*, 455 U.S. 1035 (1982), the Indiana Supreme Court held that it is "acceptance" rather than "tolerance" which governs the application of community standards to patent offensiveness. The court held that "the trial court did not err in using the word 'accept' in giving instructions to the jury rather than the word 'tolerate' as requested by the defendant."

Two circuit courts recently rejected use of the word "tolerance" in this type of instruction. In *Hoover v. Byrd*, 801 F.2d 740 (5th Cir. 1986), *reh'g denied*, 805 F.2d 1030 (5th Cir. 1986), the court upheld the constitutionality of the Texas Obscenity Statute which defined "patently offensive" as "so offensive on its face as to affront community standards of decency." The court rejected the petitioner's argument that "tolerance" be used. "Tolerance," stated the court, "embodies the

permissible deviations from standards;” whereas in *Miller* the very definition of obscenity is material or conduct ”which per se deviate from those of the community at large.” The Fifth Circuit Court of Appeals then cited *Olson v. Leeke*, 744 F.2d 1061 (4th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985), upholding South Carolina’s statute with language similar to the Texas statute.

In *Long v. 130 Market Street*, 440 A.2d 517,521 (Pa.Super. 1982), the court rejected a proffer of evidence that the availability of pornographic material throughout the Commonwealth ”established” a permissive community standard. The court focused on ”acceptability” as the standard, rather than availability. As stated at 521:

The contemporary community standard element, necessary to establish the obscenity or lack of obscenity of published material is not concerned with the availability of the material, but rather with its acceptability. The fact that one can walk into an ”adult book store” in some of the towns and cities of the Commonwealth and purchase a film or publication devoted, on the whole, to bestiality, sado-masochism, or any of a number of other often-questioned sexual predilections, by no means implies that the average Pennsylvanian would not find the subject matter appealing to prurient interest. The statewide availability of sexually explicit films and publications does not bespeak their acceptability.

This holding is supported by the same ruling of the Supreme Court in *Hamling*, at 125-26, where the Court cited with approval the language of *United States v. Manurite*, 448 F.2d 583,593 (2nd Cir. 1971): ”Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.”

### Scienter

(17) In *Smith v. California*, 361 U.S. 147 (1959), the Court said that in any criminal obscenity statute there must be some concept of scienter. As early as the case of *Rosen v. United States*, 161 U.S. 29 (1896), the Court held that it was not necessary for the defendant to have known that material was obscene for a conviction to stand. Rather it was sufficient if he had notice of the general contents of the material at issue, and the prosecution was not required to show that he knew it was legally obscene. *Rosen* at 41. The holding of *Rosen* is still the law today. The Court in *Hamling* specifically reaffirmed *Rosen*, holding that ”knowledge of the character of the materials” is sufficient. 418 U.S. at 119-120.

It is constitutionally sufficient that the prosecution show that a

defendant had knowledge of the contents of the materials 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. Such a formulation of the scienter requirement is required neither by the language of 18U.S. C. § 1461 nor by the Constitution.

*Hamling*, at 122-23. Hence it is no defense that defendant believes that the material was not obscene, so long as he knew the character of the material.

## CONCLUSION

The suggestions for jury instructions and guidelines for determining obscenity are adopted from and supported by the ruling case law of the U.S. Supreme Court and should be considered by the trier of fact in this case. Much argument can be made for individual preferences for instructions or guidelines by both the prosecution and defense, but the prudent course is for the trial court to rely on the exact words of the Supreme Court. This will allow the determinations of fact and law to be made with as little confusion as possible in such a complex case, but also ensure affirmance on appeal for any judgment reached.