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# Prurient Interests as a Guide to the State Courts

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# NOTES

## "PRURIENT INTERESTS" AS A GUIDE TO THE STATE COURTS

Numerous articles have been written about *Roth v. United States*[1] analyzing it as to the precise meaning of the constitutional test for obscenity promulgated therein. However, there are few, if any, expository articles showing how the states have implemented the test in their obscenity adjudications.

The special importance of state legislation, and probably less remotely judicial decision, in the area of obscenity was emphasized by Justice Harlan in his concurring and dissenting opinions to *Alberts v. California*[2] and *Roth v. United States*.[3] He said:

> In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgments under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We inquire only whether the State action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power.[4]

He dissented in the *Roth* decision which had come up from the lower Federal Courts because in his words:

> . . . the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Con-

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1. 354 U.S. 476 (1957).
2. 354 U.S. 476, 500 (1957). Alberts v. California and Roth v. United States were heard and decided together. To simplify procedure they will hereafter be cited as Roth v. United States or the Roth case unless a distinction between the two is to be made.
3. **Id.** at 503.
4. Alberts v. California, **supra** note 2, at 501, (Harlan, J., concurring). **Compare** with the words of Justice Jackson's majority opinion in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943):

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First became its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech, and of press, of assembly and of worship may not be infringed on such slender grounds.

> gress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric.[5]

That the majority of the Court was not interested in adopting a universal standard applicable to all parts of the nation is obvious by their inclusion of the "contemporary community standards" test in the overall standard for judging obscenity.[6] It was also emphasized by the broad definition the Court gave to "prurient interest" allowing the state courts a wide discretion to render their decision outside the confines of constitutional limitation and yet according to the prevailing opinion of their respective geographical areas.

Thus, if the states individually are to be responsible for local morals, of primary interest should be how the state courts reacted to *Roth v. United States* in applying the tests therein advanced, and what cumulative affect the *Roth* case and subsequent Supreme Court decisions had upon the law of obscenity within the states. How the states treated the "prurient interest" test and the later scienter requirement of *Smith v. California*[7] is the question which this article will attempt to answer.[8]

## PRURIENT INTEREST TEST

The shattering of the older inadequate tests[9] for obscenity began with *Butler v. Michigan*.[10] The *Butler* decision revolved around a Michigan statute which made it illegal to publish matter of any sort that would " . . .incite minors to

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5. Roth v. United States, 354 U.S. 476, 504 (1957) (Harlan, J., dissenting).

6. **Id.** at 488-490.

7. Smith v. California, 361 U.S. 147 (1959). A Los Angeles ordinance prohibiting distribution of obscene materials was declared unconstitutional because it lacked the necessary element of scienter.

8. The two most recent Supreme Court decisions, Marcus v. Search Warrant, 367 U.S. 717 (1961) and Bantam Books, Inc. v. Sullivan, 83 S. Ct. 631 (1963), concerning procedural due process and the protection of nonobscene materials will be given only cursory treatment because the state court decisions in this regard are few and inconclusive.

9. Probably the most famous of these tests was the one advanced in Regina v. Hicklin, L.R. 3 Q.B. 360, 369 (1868); ". . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

10. 352 U.S. 380 (1957). The Hicklin test was declared unacceptable.

violent or depraved or immoral acts . . . ."[11] The statute was declared unconstitutional—Mr. Justice Frankfurter noting: "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[12] This laid the judicial groundwork for the two cases heard and decided together four months later: *Roth v. United States* and *Alberts v. State of California*.[13]

The *Roth* case finalized the conjecture established by previous dictum of the Court[14] that "obscenity" does not fall within the purview of constitutionally protected freedom of expression.[15] The Court proceeded, per Mr. Justice Brennan, to give us a definition of "obscenity" in the constitutional sense of the word:

> Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.[16]

In order to give the words "appeals to the prurient interest" more definitive expression for the use of the lower courts, the Supreme Court said: the majority saw no "significant difference between the meaning of obscenity developed in the case law and the definition of A.L.I. . . ."[17] thereby incorporating into the concept of prurient interest, not only the test of tendency "to stir sexual impluses and thoughts" (*Roth* case)[18] and the definition of obscene as that which tends "to deprave or corrupt (*Alberts* case),[19] both of which had been explicitly rejected by the A.L.I.[20] from whom the Court borrowed the words "prurient interest,"[21] but also all the tests from previ-

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11. Mich. Comp. Laws § 750.343 (Supp. 1954).
12. Butler v. Michigan, **supra** note 10, at 383.
13. 354 U.S. 476 (1957).
14. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene. . . ."
15. Roth v. United States, 354 U.S. 476, 485 (1957).
16. **Id.** at 489.
17. **Id.** at 487.
18. Roth v. United States, 354 U.S. 476, 498 (1957).
19. **Ibid.**
20. Model Penal Code § 207.10, comments, p. 10 (Tent. Draft No. 6, 1957).
21. Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957) defines "prurient interest" as follows: "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."

ous case authority. It was this broad definition of the words including all the former tests which Mr. Justice Harlan in his concurring opinion called an "indiscriminate potpourri."[22]

Following *Roth v. United States* the state courts were in somewhat of a quandary over the "actual meaning of the words"—a dilemma which left them no other recourse than a "vain repetition" of the phrases in the Court's opinion.[23] Their predicament was not alleviated until the later decisions of the Court[24] demonstrated more precisely what was meant.[25] These subsequent decisions, however, did not vitiate the differing opinions on the value of the *Roth* case as a guide to state court adjudications.[26]

The wide latitude allowed the states resulted in multifarious definitions under the guise of "prurient interest" which are often tempered according to the frequency that the problem presents itself to the state court.[27]

Using "prurient" as their touchstone the state courts began elucidating its meaning: "tendency to corrupt or deprave,"[28] "substantial tendency to excite lustful desires,"[29]

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22. Roth v. United States, 354 U.S. 476, 500 (1957) (Harlan, J., concurring and dissenting).

23. City of Cincinnati v. Walton, 167 Ohio St. 14, 145 N.E.2d 407, 412 (1957). "Once having determined that the matter is calculated to appeal to the prurient interest we then come to the second test. This is that the material must have a substantial tendency to excite lustful desires or be material dealing with sexual perversion." State v. Williamson, 24 Cal. Rptr. 734 (1962); Malone v. State, 339 S.W.2d 666 (Tex. 1960).

24. Manuel Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc., v. Olesen, 355 U.S. 371 (1958); Mounce v. United States, 355 U.S. 180 (1957); and Time Film Corp. v. Chicago, 355 U.S. 35 (1957).

25. See also Lockhart and McClure, **Censorship of Obscenity: The Developing Constitutional Standards,** 45 Minn. L. Rev. 5, 32-33 (1960).

26. Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328, 333 (Mass. 1962). "Roth case in some respects is a dim beacon." **Contra:** Zeitlin v. Arneberg, 27 Cal. Aptr. 320 (1962).

27. In jurisdictions such as New York, Ohio and California where convictions for obscenity are relatively frequent there has been greater opportunity for a definition to evolve based on the actions of the Supreme Court itself. Whereas in those states where the issue has possibly been raised only a single time, it is important to note the dates of the decision in relation to the dates of the decisions handed down by the Supreme Court subsequent to Roth v. United States.

28. State v. Williamson, 24 Cal. Rptr. 734 (1962). Older **Wepplo** definition (78 Cal. App. 2d Supp. 959, 178 P.2d 853, 855, 1948) was reaffirmed, but it was not prejudicial to the rights of defendant to use the "prurient interest test" because the latter is probably more succinct.

29. City of Cincinnati v. Walton, 167 Ohio St. 14, 145 N.E.2d 407, 412 (1957). Further elucidated: ". . . dirt for dirt's sake. . . . author or designer had one purpose, namely to sell his material by such an appeal. . . . material dealing with sexual perversion." In regard to this last statement see the later case of Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959), reversing a New York ruling on "thematic obscenity."

"shameful and morbid interest in nudity, sex or excretion,"[30] "shameful and disgusting . . . outside the pale of what is acceptable to the community at large,"[31] and finally, though not exhausting the definitional possibilities, "covers any material which is devoted not only to the presentation and exploitation of illicit sex, but also passion, depravity or immorality."[32]

At least one jusisdiction rejected the prurient interest test altogether saying: "Under our statute . . . the test of the obscene . . . is not in the tendency or appeal of the material but rather in its content objectively appraised."[33]

The variety of opinion, on the one hand, resolved the issue of defining "prurient interest" by holding that it was simply "hard-core pornography."[34] They concurred with Mr. Justice Harlan's statement in *Roth v. United States*[35] that obscenity "involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind."[36]

In the light of the Supreme Court's subsequent decisions some decided that though the words of the Court impliedly give a broad meaning to that which "appeals to the prurient interest," the actions of the Court would restrict it to the definition given by the A.L.I. [37]

Though Lockhart and McClure in their article on obscenity[38] interpret the later Supreme Court decisions to mean that "what is obscene" and hence not "protected" to be limited to hard-core pornography, there is an unwillingness among most of the state courts to do the same. Some of them have explicitly rejected the theory[39] whereas many others have done so by

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30. State v. Sul, 146 Conn. 78, 147 A.2d 686, 690 (1958); State v. Jackson, 224 Ore. 337, 356 P.2d 495, 507 (1960).

31. State v. Jackson, 224 Ore. 337, 356 P.2d 495, 507 (1960).

32. Rachleff v. Mahon, 124 So. 2d 878, 882 (Fla. 1960); see dissent in People v. Richmond County News, 9 N.Y.2d 578, 175 N.E.2d 681, 689 (1961).

33. People v. Richmond County News, 9 N.Y.2d 578, 175 N.E.2d 681, 689 (1961).

34. Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328, 333-34 (Mass. 1962); People v. Richmond County News, 9 N.Y.2d 578, 175 N.E.2d 681, 685-686 (1961). The Court limited "prurient interest" and then rejected it altogether. See, **supra** note 33 and text.

35. 354 U.S. 476 (1957).

36. See, **supra** note 34.

37. State v. Jackson, 224 Ore. 337, 356 P.2d 495, 507 (1960).

38. Lockhart and McClure, **Obscenity Censorship: The Core Constitutional Issue—What is Obscene?** 7 Utah L. Rev. 295 (1961).

39. Rachleff v. Mahon, 124 So. 2d 878 (Fla. 1960).

implication.[40] This line of decisions, for the most part, held that the question of obscenity is primarily one of fact to be decided by a jury.[41]

That the courts recognized that the basic concepts of what constitutes obscenity had been changed there can be no doubt. Even states' attorneys realized that something more definitive would be demanded of them to obtain a conviction for obscenity.[42] The criterion set forth has not been especially enlightening; the Court merely succeeded in removing an already evasive concept one degree into abstraction. Instead of deciding what is obscene, courts now try to determine what appeals to the "prurient interest." Is the new test actually a different test? Granted, the Supreme Court indicated by its decisions after *Roth v. United States* that it expected different results, but the difficulties inherent in a judicial formulation of a test for identifying non-constitutionally protected speech have not necessarily been aided by the change in nomenclature.

## CONTEMPORARY COMMUNITY STANDARDS TEST

The Supreme Court in promulgating its test for adjudging material obscene and hence not protected by the First Amendment included the "contemporary community standards" test. How would the material effect the average normal person in the community? Is the material "utterly without redeeming social importance?"[43]

Mr. Justice Frankfurter expounded on how this test should be implemented in somewhat greater detail in *Smith v. California*.[44] He said:

> Since the law through its functionaries is "applying contemporary community standards" in determining what constitutes obscenity, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are.

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40. Zeitlin v. Arneberg, 27 Cal. Rptr. 320 (1962); Beil v. Mahoning Valley Distributing Agency, Inc., 186 N.E.2d 631 (Ohio 1962); State v. Chobot, 12 Wis. 2d 110, 106 N.W.2d 286 (1960).

41. State v. Williamson, 24 Cal. Rptr. 734, 735 (1962). See also, **supra** notes 39 and 40.

42. Lockhart and McClure, **supra** note 38, at 290.

43. Roth v. United States, 354 U.S. 476, 484 (1957).

44. 361 U.S. 147, 165 (1959).

In the same case Mr. Justice Harlan, agreeing with Frankfurter, said: "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates."[45]

Even before *Roth v. United States* the Supreme Court declared a state statute which prohibited the sale of books that were of such content as to be harmful to minors invalid.[46] The *Roth* case substantiated this decision and established that no standard for judging obscenity shall ever be based on the effect of questionable material on especially susceptible groups.[47]

The state courts have generally relied on the Supreme Court's stipulation that the material must be "utterly without redeeming social importance" in order to be suppressed.[48] Their greatest lack of uniformity lies in the question of who shall be called to testify to aid the court in determining what the "prevailing community standards" are or what the material's "redeeming social importance" is?

In *Attorney General v. Book Named "Tropic of Cancer,"*[49] the Massachusetts Court held that obscene material was limited to "hard-core pornography." They implied this was so because only "hard-core pornography" is without "redeeming social importance." Upon the testimony of seven professors they decided that the book was not obscene in the constitutional sense.

The lower court decision of *State v. Williamson*[50] that the book *Fear of Incest* is obscene was affirmed by the California appellate division. There were only two witnesses called in the lower court to testify as to the contemporary community standards; they were the Pastor of Bethel Reform Church and the Project Manager at Western Gear Corporation who also served on the Lakewood Youth Committee and Committee of Lakewood Citizens for Decent Literature. Another California

45. **Id.** at 171.

46. Butler v. Michigan, 352 U.S. 380 (1957).

47. Roth v. United States, **supra** note 43.

48. Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328 (Mass. 1962); Zeitlin v. Arneberg, 27 Cal. Rptr. 320 (1962) (Utterly means "predominantly"); People v. Richmond County News, 9 N.Y.2d 578, 175 N.E.2d 681 (1961).

49. 184 N.E.2d 328 (Mass. 1962).

50. State v. Williamson, 24 Cal. Rptr. 734 (1962).

appellate decision some months later affirmed a holding that *Tropic of Cancer* is obscene.[51] The array of witnesses called in the lower court in this decision represented a cross-section of the community including: "college presidents, superintendents of school — active and retired, college professors, clergymen (Jewish and Protestant), psychiatrists, a penologist and a distributor of periodicals—one of the three largest in the country."[52]

A federal court reversed a lower court proceeding that had allowed a psychiatrist to testify concerning the effect the material in issue would have upon juveniles and sexual deviates.[53] The Maryland Supreme Court reversed a lower court decision on obscenity because all relevant evidence on present community standards and literary merit should have been introduced.[54]

The New York Court of Appeals on the second appeal of *People v. Finklestein*[55] affirmed the lower court decision declaring the material in question obscene although no evidence on the "contemporary community standards" had been received. The court held that another book that was generally accepted in the "community" which had been offered by the defendant as a comparison was properly excluded.[56]

The only type of limitation upon the "contemporary community standards" test was given by the Oregon Court via dictum in *State v. Jackson*[57] when it approved the statement of the A.L.I.:[58] "Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience."[59]

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51. Zeitlin v. Arneberg, 27 Cal. Rptr. 320 (1962).

52. **Id.** at 323.

53. Volanski v. United States, 246 F.2d 842 (6th Cir. 1957).

54. Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962). **Contra,** Rachleff v. Mahon, 124 So. 2d 878 (Fla. 1960).

55. 11 N.Y.2d 300, 183 N.E.2d 661 (1962).

56. See also Beil v. Mahoning Valley Distributing Agency, Inc., 186 N.E.2d 631, 632 (Ohio, 1962), wherein the Court disqualified all the "experts" giving testimony for the defendant.

57. 224 Ore. 337, 356 P.2d 495, 507 (1960).

58. Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957).

59. See also Lockhart and McClure, **supra** note 38 at 304. They consider the special audience as a criterion for judging obscenity

Most state courts have accepted without much deviation that the material in question must be considered "as a whole" with regard to its "dominant purpose."[60] A qualification, however, was a holding that in regard to magazines the individual articles might be considered—the rationale being that the features in a magazine are generally not related.[61] Other jurisdictions in dealing with allegedly obscene magazines did not consider this type of qualification necessary.[62]

It is clear that the state courts are in general agreement that "contemporary community standards" must be taken into consideration in making a sound adjudication on questionable material. The cleavage comes in deciding how the evidence should be obtained or whether external evidence is needed as a guide to the judge and jury. Though it is apparent that there is no uniformity among the various courts in the matter of how this evidence should be procured, strong undercurrents indicating an erosion of the fundamental precepts are conspicuously absent. The real problem comes in application and emphasis; the state courts would rather ask whether the material under consideration is "utterly without redeeming social importance" than whether it "appeals to the prurient interest of the average normal individual in our society."[63]

## THE REQUIREMENT OF SCIENTER

The states soon discovered that not only was it incumbent upon them to see that there was a careful distinction made between what was obscene and what was not, but they must individually be cognizant of the "finely distinguished procedures" which would hinder the dissemination of constitutionally protected expression of ideas.

Among the procedures proscribed were those employed in obtaining a conviction in *Marcus v. Search Warrant*.[64] The Court held, per Justice Brennan, that a Missouri statute did

60. See Grove Press Inc. v. Christenberry, 276 F.2d 433, 442 (2d Cir. 1960). Judge Moore criticizes the doctrine of the "book as a whole," points out its impracticability.

61. City of Cincinnati v. Walton, 167 Ohio St. 14, 145 N.E.2d 407 (1957).

62. Malone v. State, 339 S.W.2d 666, 668 (Tex. 1960); People v. Richmond County News, 9 N.Y. 578, 175 N.E.2d 681 (1961).

63. Perhaps this is the catholicity of opinion which Justice Harlan thinks the Fourteenth Amendment encourages. See, **supra** note 9 and text.

64. 367 U.S. 717 (1961).

not provide the safeguards necessary to assure material, included within the scope of constitutionally-protected speech, the free and unhindered distribution required.[65] The procedures permitted by the statute for search and seizure were too broad and susceptible to misuse to be constitutionally allowable.[66]

In its most recent decision regarding procedural due process in the enforcement of obscenity statutes[67] the Supreme Court re-emphasized its position in *Marcus v. Search Warrant* that if the freedom of speech and press is to receive the proper protection given by the First Amendment, the procedures used for enforcement within the area of obscenity must be as strictly defined as obscenity itself. The Court declared a law creating the "Commission to Encourage Morality in Youth" unconstitutional saying that it was merely an extra-legal device with "color of authority" to suppress books which were constitutionally allowable.

But the second real milestone in the law of obscenity affecting the states was the Supreme Court's holding in *Smith v. California*.[68] The Court held a Los Angeles ordinance invalid because it failed to include the element of scienter. Practically speaking, the Court said that obscenity could not be a strict liability crime after the fashion of the pure food and drug laws since "expression of ideas in print" unlike food and drugs is specifically granted constitutional protection from governmental restraint.[69]

After this decision the state courts grappled with what was already an arduous task and in some instances showed remarkable candor in their solution of the new problems presented.

They *held*: Knowledge can be proven by circumstantial

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65. See also Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). A New York statute regarding seizure and adjudication of allegedly obscene materials met all the requirements of "procedural due process" and was sustained.

66. A perusal of the holdings as well as the Missouri statute declared unconstitutional compared with N.D. Cent. Code §§ 12-21-11, 12, 13 (1961) indicates that a revision is in order. The statute would very likely be declared unconstitutional if it were ever tested.

67. Bantam Books, Inc. v. Sullivan, 83 Sup. Ct. 631 (1963).

68. 361 U.S. 147 (1959).

69. See N.D. Cent. Code § 12-21-09 (1961). The North Dakota statute in the pertinent aspects regarding scienter is similar to the one declared invalid in Smith v. California.

evidence.[70] It can be imputed to the seller if there was general knowledge that the material was questionable and the average man would have known or been aware of the possibilities.[71] It is enough that the seller "knew" the book; he did not need to know that it was obscene.[72] The holder of questionable materials does not become liable the moment he discovers their nature but when he acts thereafter with intention to exhibit or sell them.[73]

A reading of the *Roth* case and the *Smith* case and an analysis of the state court decisions interpreting them reveal that an obscenity statute which was to be constitutionally sound had to have a scienter requirement, but the showing of scienter was generous indeed.[74] The reason for this is self-evident. Never before had the "vagueness of the prurient interest test" created such a difficult problem. It threatened to make conviction for obscenity an impossibility. The dilemma presented was: How could one knowingly violate the obscenity statute when it is not readily apparent until a judicial decision has been obtained whether the questionable material is obscene? More pointedly: " . . . the defendant can always, with some plausibility, argue that he did not think the item was obscene and is astonished that others so view it."[75]

In reality none of the decisions make it clear how a holder of questionable materials could be convicted for violating the obscenity statutes before the material had been adjudged obscene. The holdings collectively represent a rather deft avoidance of the problem.

*Smith v. California*, as could be assumed, had its most profound affect in those states where the legislatures as well as the courts were under the assumption that "obscenity" could be a strict liability crime and had enacted and construed statutes to that effect. Many states found themselves with

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70. State v. Andrews, 186 A.2d 546, 552 (Conn. 1962).

71. State v. Oman, 110 N.W.2d 514, 525 (Minn. 1961).

72. State v. Williamson, 24 Cal. Rptr. 734 (1962).

73. State v. Jacobellis, 173 Ohio St. 22, 179 N.E.2d 777, 781 (1962). "He could only be said to violate the law when and if he . . . forms the **mens rea** and acts in furtherance thereof."

74. Smith v. California, 361 U.S. 147, 154 (1959).

75. Kalven, **The Metaphysics of the Law of Obscenity**, 1960 Sup. Ct. L. Rev. 1, 37 (1960).

statutes lacking the required scienter. Were these statutes to be declared unconstitutional?

When the issue arose, there were those jurisdictions which naturally declared the statutes invalid.[76] These decisions, however, did not prevail and represent the minority view. The majority held that their statutes were constitutional[77] by including the element of scienter by implication — some whether they had previously held to the contrary or not.[78]

The New York decision in *People v. Finkelstein*[79] is probably the leading case on the issue.[80] The statute being considered was similar to the Los Angeles ordinance declared invalid.[81] The difficulty of the court was increased because the prevailing precedent at the time the prosecution began[82] had interpreted the statute as not requiring scienter for conviction.[83] In spite of this the court said: "Although our statute might possibly be interpreted to exclude scienter, we feel, *inter alia*, guided by the strong constitutional presumption attending legislative enactments that the statute was not intended to unreasonably restrict or inhibit our inalienable 'liberty' protected by due process."[84] They continued: "In any event, the statute is at least susceptible of either interpretation, and we are, therefore, clearly obliged by statute and decisional law to embrace that which will preserve its validity."[85] After admitting that their precedent was to the contrary they eased the extraordinary nature of their holding by quoting from a Supreme Court case to the effect: "The

76. Lally v. Gump, 57 Wash. 2d 224, 356 P.2d 289 (1960); City of St. Louis v. Williams, 343 S.W.2d 16 (Mo. 1961); State v. Kuebel, 172 N.E.2d 45 (Ind. 1961); City of Cincinnati v. Marshall, 172 Ohio St. 280, 175 N.E.2d 178 (1961).

77. Cohen v. State, 125 So. 2d 560 (Fla. 1960); State v. Jackson, 224 Ore. 337, 356 P.2d 328 (1960); State v. Finkelstein, 9 N.Y.2d 342, 174 N.E.2d 470 (1961); State v. Oman, 110 N.W.2d 514 (Minn. 1961); Demetropolos v. Commonwealth, 175 N.E.2d 259 (Mass. 1961); State v. Hudson Co. News Co., 35 N.J. 284, 173 A.2d 20 (1961); State v. Locks, 91 Ariz, 394, 372 P.2d 724 (1962); State v. Andrews, 186 A.2d 546 (Conn. 1962).

78. People v. Finkelstein, 9 N.Y.2d 342, 174 N.E.2d 470 (1961).

79. **Ibid.**

80. See, **supra** note 77. People v. Finkelstein was often quoted and cited by all the decisions following it.

81. N.Y. Penal Laws § 1141 reads: "A person who sells . . . or has in his possession with intent to sell . . . any obscene . . . book . . . is guilty of a misdemeanor."

82. People v. Finkelstein, 9 N.Y.2d 342, 174 N.E.2d 470, 471 (1961).

83. People v. Shapiro, 177 N.Y. Supp. 2d 670 (1958).

84. People v. Finkelstein, **supra** note 82, at 471.

85. **Ibid.**

interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature."[86]

Obviously the problem as presented here in its simplified form has more profound ramifications. The judiciary in construing the statute to include the element of scienter by implication made it more difficult to convict the accused, but in so doing they deprived the defendant of the opportunity to have the statute construed strictly in his favor and thereby have it declared unconstitutional. The result would have been different if the Court had used the "Preferred Position Theory" suggested in *United States v. Carolene Products*[87] or if the court had followed the "spirit" of Justice Jackson's majority opinion in *West Virginia State Board of Education v. Barnette* as set out earlier in this article.[88] The holding pits the interests and rights of the individual against the presumption of constitutional validity (which *ipso facto* should be overcome when an essential element is missing; otherwise, what basis is there for unconstitutionality?) and settles the issue with a somewhat caustic sting against the individual rights of the defendant.

The statute was drafted, enacted and interpreted during a period when it was thought that scienter was not required; therefore, any rule which makes men's reasoning an essential part of any criminal statute even though not required in express terms, would not apply.[89]

The Court in its opinion seemed to exercise the prerogative of "*ex post facto* legislation" which it has always denied the legislature itself. The defendant asked for a dismissal on this ground on his second appeal to the Court of Appeals;[90] it was summarily disallowed, the Court denying that it had legislated at all saying that the statute was "instinct with the element of scienter."[91]

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86. **Ibid.**

87. 304 U.S. 144, 152 (1938) (See footnote).

88. See, **supra** note 4, where Justice Jackson's words are set out.

89. City of St. Louis v. Williams, 342 S.W.2d 16, 19 (Mo. 1961).

90. People v. Finkelstein, 11 N.Y.2d 300, 183 N.E.2d 661 (1962), **Cert. denied,** 371 U.S. 863 (1962).

91. **Id.** at 663. Compare with People v. Shapiro, 177 N.Y. Supp. 2d 670, 674 (1958). "It is our opinion that the language employed in and the history of, the statute invoked and the statutes from which it is derived

## CONCLUSION

According to recent state court decisions, subsequent Supreme Court decisions, and commentators, "hard-core pornography" has emerged to provide a limited definition of "prurient interest." The meaning of "obscenity" is consequently removed another degree into abstraction. Probably this was the long sought after distinction between "prurient interest" and "obscene?" If this is a victory, it is indeed a pyrrhic one.[92] *What* is "hard-core pornography?"

Unfortunately, there is an indication during this transitional period that justice in the area of obscenity is equivalent to perseverance. If the defendant has the perseverance and resources to take his case to the Supreme Court, he would seem to have a better than even chance for a reversal. The subsequent decision of the Supreme Court as opposed to the more conservative holdings of the state judiciary give support to this as well as negate the idea that the "contemporary *community* standards test" ever existed. Of course, no one yet knows what type of geographical delineation the Court had in mind in its use of the word "community."

As they pertain to the law of obscenity itself the multifarious meanings given to "prurient interest" by the various courts and commentators appear to be paradoxical. If especially susceptible groups cannot be explicitly protected by any statute on obscenity, then this leaves only the normal average member of the community to be considered. However, if this "average member" must find the material "repugnant," "bizarre," "morbid" etc. in order for the law to protect him from it, than necessity for any obscenity statute has been obviated because the material by definition precludes any interest or appeal. It has never been adequately substantiated that there is any correlation between "obscene material" and immorality on a cause and effect basis. Is the law based upon the contingency that this possibility exists? Or is the law as now interpreted an indirect way to protect

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clearly indicate the legislative intent to dispense with scienter as an element of the crime defined . . ." See also the dissenting opinions in the first appeal of People v. Finkelstein, 9 N.Y.2d 342, 174 N.E.2d 470, 472 (1961).

92. Smith v. California, 361 U.S. 147, 156 (1959) (Black, J., concurring).

our "especially susceptible groups" without depriving the "average person" of any material that has even the minutest "redeeming social importance?"

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