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COMMENTS

CHANGING STANDARDS OF OBSCENITY IN TEXAS

by Dan Rosen

Texas obscenity laws traditionally have changed as the United States Supreme Court's standards for judging obscenity have changed.¹ The most recent modification of the Texas laws took effect September 1, 1979.² The 1979 revisions, closely tracking the Supreme Court's language in *Miller v. California*,³ establish new definitions of obscenity⁴ and expand the prohibitions against its distribution.⁵ Punishment for the use of children in pornography has been strengthened.⁶ The 1979 statutes, however, still fail to encourage consistency in obscenity prosecutions. Because juries in each community are allowed to set the standards for obscenity,⁷ publishers are denied notice of what they may promulgate legally and arguably are deprived of due process of law.⁸ This Comment charts the changing standards of obscenity in Texas, analyzes the current statutes,

1. The evolution of Supreme Court obscenity standards began with *Roth v. United States*, 354 U.S. 476 (1957), continued through *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413 (1966), and reached its current state in *Miller v. California*, 413 U.S. 15 (1973). For a discussion of these cases, see notes 30-55 *infra* and accompanying text.

2. See TEX. PENAL CODE ANN. §§ 43.21, .23, .25 (Vernon Supp. 1980-1981).

3. 413 U.S. 15 (1973). For a discussion of *Miller*, see notes 42-55 *infra* and accompanying text.

4. See TEX. PENAL CODE ANN. § 43.21 (Vernon Supp. 1980-1981).

5. See *id.* § 43.23.

6. See *id.* § 43.25.

7. 413 U.S. at 26. The *Miller* Court rejected a national standard for obscenity, stating that the nation is too large and diverse for such a test. *Id.* at 30.

8. Due process requires that the law put a person of reasonable intelligence on notice as to what is prohibited. See *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (regulation of charities inadequately defined terms and conditions for compliance); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926) (language of wage regulation required persons of common intelligence to guess at its meaning); J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 727 (1978) [hereinafter cited as J. NOWAK]. To the extent that community standards differ as to obscenity, publishers lack the information necessary to determine whether their material is legal in a given locale. Thus, vagueness is the vice. Because the *Miller* test allows juries to determine what the community finds acceptable, statutes may be interpreted in various and conflicting ways. Because regulation of speech and press requires special safeguards, the community standards approach falls short of what arguably is a minimum level of protection. See *Smith v. Goguen*, 415 U.S. 566 (1974) (statute criminalizing contemptuous treatment of the United States flag held void for vagueness); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy ordinance drafted in archaic English held void for vagueness); Comment, *New Prosecutorial Techniques and Continued Judicial Vagueness: An Argument for Abandoning Obscenity as a Legal Concept*, 21 U.C.L.A. L. REV. 181 (1973); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

and concludes that the Texas law fails to promote predictability in obscenity regulation.

I. THE DEFINITIONAL PROBLEM

Defining obscenity has proved difficult.⁹ Justice Harlan has called the situation "intractable,"¹⁰ and Justice Stewart once resorted to an "I know it when I see it" test.¹¹ Nevertheless, courts and legislatures continually have tried to reach a consensus on a formula that offers uniformity and predictability. Their efforts have been frustrated by the fact that concepts of obscenity have changed on three levels: time, space, and depth. Whatever was thought to be obscene in one year has not been considered necessarily obscene in the next; whatever was thought to be obscene in one state has not been considered necessarily obscene in another; and whatever was thought to be obscene by one person has been perfectly acceptable to another.¹² The constant evolution has prevented any definition from becoming anything more than a connotation. Thus, the word "obscenity" merely conjures up individual notions of what is intolerable, much like Justice Stewart's "I know it when I see it" crucible. The current constitutional standard for obscenity, as fixed in *Miller*,¹³ simply masks this subjective test in the guise of an objective "community standards" test.

A. Early Developments

Nineteenth century obscenity laws changed frequently as the legal community attempted to respond to the mores of the community as a whole.¹⁴ In the early part of the century obscenity regulation was quite limited.¹⁵ The first recorded American case dealing with obscenity was decided in 1815 when a Pennsylvania court convicted a defendant of filthy conduct

9. See generally M. ERNST & A. LINDLEY, *THE CENSOR MARCHES ON* (1940); M. ERNST & A. SCHWARTZ, *CENSORSHIP: THE SEARCH FOR THE OBSCENE* (1964); F. LEWIS, *LITERATURE, OBSCENITY, AND LAW* (1976).

10. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

11. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

12. Mark Twain's *Huckleberry Finn*, now a schoolchild's staple, once was censored for its purported adverse effect on juveniles. See E. DE GRAZIA, *CENSORSHIP LANDMARKS* 154 (1969); Tobolowsky, *Obscenity: A Continuing Dilemma*, 24 Sw. L.J. 827, 828 (1970). *Hustler* magazine, tolerated in most states, has been declared obscene in Georgia. See *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669 (1980). Furthermore, the market for so-called adult material demonstrates that it is not considered offensive by a significant minority in many communities. One estimate is that sexually explicit material grosses \$41.7 million in Texas annually. The state is said to have 292 establishments selling such material. See HOUSE SELECT COMM. ON CHILD PORNOGRAPHY: ITS RELATED CAUSES AND CONTROL, 66TH LEGISLATURE OF TEXAS, INTERIM REPORT 66 (1978) [hereinafter cited as HOUSE REPORT].

13. 413 U.S. at 24.

14. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 656-58 (1978); Tobolowsky, *supra* note 12, at 827-28.

15. See Tobolowsky, *supra* note 12, at 827. Massachusetts was the only state that had an obscenity statute at the time of the American Revolution. The law prohibited anything "wicked, profane, impure, filthy and obscene." L. TRIBE, *supra* note 14, at 657-58 (quoting Ancient Charter, Colony Laws and Province Laws of Massachusetts Bay (1814)).

for displaying a lewd picture.¹⁶ Congress did not impose sanctions until 1842 and then only for the importation of obscene pictures.¹⁷ In 1873, however, Congress passed what came to be known as the Comstock law, banning possession of any "obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing . . . or other article of an immoral nature," and barring such material from the United States mail.¹⁸ To determine what was obscene, the courts applied the standard of *Regina v. Hicklin*,¹⁹ a test formulated by the Queen's Bench based on the material's tendency to deprave those persons already receptive to immoral influences and into whose hands the material might fall.²⁰ Under the *Hicklin* approach, isolated passages were used to determine the effect on the most susceptible persons.²¹ The test also was used by state courts, which applied it strictly to ban books otherwise considered to be important literature.²²

Opponents of the *Hicklin* rule and the Comstock law took solace in the 1913 district court decision in *United States v. Kennerley*.²³ Judge Learned Hand's opinion in *Kennerley* marked the beginning of a judicial retreat from the strict standards of the previous century. Concerned about the homogenization of ideas that results from an inflexible definition of obscenity, Judge Hand found that the old standards did not comport with modern notions of obscenity.²⁴ Although criticizing the *Hicklin* rule, he

16. Commonwealth v. Sharpless, 2 Serg. & Rawl. 91 (Pa. 1815).

17. See Act of Aug. 30, 1842, ch. 270, § 28, 5 Stat. 566 (repealed 1933). The law was aimed at controlling the French postcard trade. At the time, Congress did not consider words proper for obscenity regulation. See Tobolowsky, *supra* note 12, at 827-28.

18. Act of Mar. 3, 1873, ch. 258, §§ 1-3, 17 Stat. 598 (repealed 1933). See also Act of July 12, 1876, ch. 186, §§ 1-2, 19 Stat. 90 (repealed 1940). The Act is referred to as the Comstock law because of the lobbying efforts of Anthony Comstock, the leader of the New York Society for the Suppression of Vice.

19. L.R. 3 Q.B. 360 (1868). In *Hicklin* a pamphlet criticizing the Roman Catholic Church was held to be obscene.

20. *Id.* at 369. American cases applying the *Hicklin* rule include *United States v. Clarke*, 38 F. 500 (E.D. Mo. 1889) (overruling demurrer to indictment for mailing "Dr. Clarke's Treatise on Venereal, Sexual, Nervous, and Special Diseases"), and *United States v. Bennett*, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879) (affirming conviction for mailing "Cupid's Yokes, or The Binding Forces of Conjugal Life").

21. The *Hicklin* rule banned a whole work based on any section found to be obscene, no matter how short or inconsequential.

22. Among the works of literature declared obscene were *Lady Chatterly's Lover* by D.H. Lawrence in *Commonwealth v. Delacey*, 271 Mass. 327, 171 N.E. 455 (1930), and *An American Tragedy* by Theodore Dreiser in *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930). The Supreme Court's decision in *Roth v. United States* ended the efficacy of the *Hicklin* rule. See notes 30-35 *infra* and accompanying text.

23. 209 F. 119 (S.D.N.Y. 1913). The court in *Kennerley* overruled a demurrer to the indictment of the publisher of *Hagar Revelly*, a book chronicling a young woman's life in New York.

24. *Id.* at 120. Judge Hand wrote:

[I]t seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature.

Id. at 121.

nevertheless applied it as the law of the land.²⁵

Judge Hand's concern in *Kennerley* was echoed twenty-one years later in *United States v. One Book Entitled Ulysses*,²⁶ wherein the Second Circuit rejected the "most susceptible persons" and "isolated passages" approach of the *Hicklin* rule. Instead, the court decided that a book or presentation would be protected if it was "sincere, and the erotic matter [was] not introduced to promote lust and [did] not furnish the dominant note of the publication."²⁷ The fact that the book might promote salacious thoughts in some people was irrelevant.²⁸ The *Ulysses* decision thus set the stage for the use of community standards and foreshadowed Supreme Court decisions judging a work as a whole rather than by its most provocative part.²⁹

In 1957 the Supreme Court finally announced a constitutional standard for obscenity in *Roth v. United States*.³⁰ Affirming a federal conviction for mailing obscene material,³¹ the Court first removed obscenity from the realm of the first amendment, stating that it was not protected by the constitutional guarantees of freedom of speech and press.³² The Court held, however, that descriptions or depictions of sex in art, literature, and science were entitled to first amendment protection.³³ Justice Brennan, writing the majority opinion, then prescribed the proper test: To be obscene the dominant theme of the material taken as a whole must appeal to the prurient interest of the average person, applying contemporary community

25. *Id.* Judge Hand anticipated the modern approach of judging obscenity on the basis of contemporary community standards, stating, "[t]o put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy." *Id.*

26. 72 F.2d 705 (2d Cir. 1934).

27. *Id.* at 707.

28. *Id.* In contrast, the *Hicklin* rule had judged a work on the effect of isolated passages on the most susceptible members of society.

29. See notes 30-55 *infra* and accompanying text. The *Ulysses* test, however, remained subject to varying subjective interpretations as the concepts of sincerity and intent were difficult to reduce to precise standards. See *Walker v. Popenoe*, 149 F.2d 511, 512 (D.C. Cir. 1945); *United States v. Rebhuhn*, 109 F.2d 512, 514 (2d Cir. 1940); *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936).

30. 354 U.S. 476 (1957). The Court previously had ruled on obscenity convictions without considering the constitutionality of the statutes involved. See *United States v. Limehouse*, 285 U.S. 424 (1932); *Rosen v. United States*, 161 U.S. 29 (1896).

31. 354 U.S. at 493. The defendant was convicted of violating 18 U.S.C. § 1461 (1948) (amended 1971), which punished the mailing of "obscene, lewd, lascivious or filthy" materials. In a companion case, *Alberts v. California*, 354 U.S. 476 (1957), the Court affirmed a similar conviction under a California statute. *Id.* at 493-94.

32. The Court found that obscenity was not speech within the meaning of the first amendment, concluding that it serves "no essential part of any exposition of ideas, and . . . that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality." 354 U.S. at 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, (1942)). Thus, the Court concluded that obscenity was utterly without redeeming social value. 354 U.S. at 484-85; see Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834 (1964); Miller, *Obscenity and the Law of Reflection*, 51 KY. L.J. 575 (1963).

33. 354 U.S. at 487.

standards.³⁴ The Court expressly abandoned the *Hicklin* and Comstock tests, stating that the effect of isolated sections of material on the most susceptible persons was an improper benchmark.³⁵

Despite its status as the constitutional test for obscenity, the *Roth* formula failed to create consistency,³⁶ and nine years later even the Supreme Court divided when it decided the constitutionality of a book titled *John Cleland's Memoirs of a Woman of Pleasure*.³⁷ The Court held that *Memoirs* was not obscene,³⁸ but a majority could not agree on a reason.³⁹ The plurality opinion refined the *Roth* test, adding the requirement that to be obscene the material must be "utterly without redeeming social value."⁴⁰ Additionally, to be obscene the dominant theme of the material taken as a whole had to appeal to a prurient interest in sex, and the material had to be patently offensive in that it affronted contemporary community standards as to the description or depiction of sexual matters.⁴¹

34. *Id.* at 489.

35. *Id.*

36. See Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 MICH. L. REV. 185 (1969); Fahringer & Brown, *The Rise and Fall of Roth—A Critique of the Recent Supreme Court Obscenity Decisions*, 62 KY. L.J. 731 (1974); Annot., 41 L. Ed. 2d 1257 (1975). *Malone v. State*, 170 Tex. Crim. 231, 339 S.W.2d 666 (1960), displayed the confusion in the courts. In *Malone* the Texas Court of Criminal Appeals reversed an obscenity conviction because the trial court did not inform the jury of the *Roth* standard. See 6 S. TEX. L.J. 57 (1961).

37. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966). The plurality, Justice Brennan writing and joined by Chief Justice Warren and Justice Fortas, overturned a conviction involving the novel popularly known as *Fanny Hill*. Justices Black, Douglas, and Stewart concurred. Justices Clark, Harlan, and White dissented. The book also had been the subject of an obscenity trial in the same state more than 100 years earlier. See *Commonwealth v. Holmes*, 17 Mass. 335 (1821), in which the supreme judicial court convicted the book's publisher of obscenity. Excerpts from *Memoirs* may be found in A. GERBER, *SEX, PORNOGRAPHY, AND JUSTICE* (1965).

38. 383 U.S. at 419. Oral arguments before the Supreme Court in *Memoirs* and other landmark cases are transcribed in *OBSCENITY* (L. Friedman ed. 1970).

39. Justice Stewart concurred in reversing the conviction because in his opinion the book was not hard-core pornography. 383 U.S. at 421. See also *Ginzburg v. United States*, 383 U.S. 463, 499 (1966) (Stewart, J., dissenting). Justice Black concurred in *Memoirs* because he believed the Court did not have the power to censor any speech or press. 383 U.S. at 421. See also *Ginzburg v. United States*, 383 U.S. at 481 (Black, J., dissenting). Justice Douglas concurred on similar grounds, stating that the Constitution confers no power on the government to control the expression of ideas. 383 U.S. at 431. Justice Douglas's position conflicted with the Court's underlying theory in *Roth* that obscenity was something other than the expression of an idea.

40. 383 U.S. at 418. *Memoirs* presented prosecutors with an almost impossible burden. Not only were they required to prove a negative, utterly without redeeming social value, but they also were required to prove it beyond a reasonable doubt in criminal cases. See *Miller v. California*, 413 U.S. 15, 22 (1973). The dissenters in *Memoirs* anticipated the burdens that the "utterly without redeeming social value" test would place on prosecutors. Justice Harlan wondered if the phrase had any meaning at all. 383 U.S. at 459 (Harlan, J., dissenting).

41. 383 U.S. at 418. Justice Brennan abandoned his *Memoirs* formula in a dissenting opinion in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (decided at the same time as *Miller v. California*, 413 U.S. 15 (1973)), concluding that the "utterly without redeeming social value" test was unworkable. 413 U.S. at 79. The Court's frustration with the test was evident in *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972), in which it stated that "[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication." For a more detailed analysis of the evolution of American obscenity law through *Memoirs*, see Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and*

B. *The Miller Test*

The *Memoirs* test persisted until 1973 when in *Miller v. California*⁴² the Court returned to a test similar to that in *Roth*. Limiting obscenity to specifically defined "hard core" sexual material,⁴³ the five-Justice majority reemphasized that obscene material is not protected by the first amendment,⁴⁴ but stated that the Constitution requires potential defendants to be put on notice by specific definitions of proscribed material.⁴⁵ According to the *Miller* Court, obscenity regulation is limited to patently offensive works that taken as a whole depict or describe sexual conduct in a manner that lacks "serious literary, artistic, political, or scientific value,"⁴⁶ a standard much less protective than that espoused by the *Memoirs* plurality. Moreover, the *Miller* test requires the trier of fact to find that because of the work's patent offensiveness "the average person, applying contemporary community standards," would find it appealing to his prurient interest.⁴⁷ The *Miller* Court also explained the meaning of the phrase "community standards."⁴⁸ More precisely, the Court explained what that phrase does not mean, stating that "contemporary community standards" does not mean a national standard.⁴⁹ The first amendment does not require that the people of Mississippi accept conduct that is tolerable in Las Vegas.⁵⁰ Rather, triers of fact are to consider the standards of their community.⁵¹

The *Miller* decision prompted the Texas Legislature to revise its obscen-

Obscenity Per Quod, 76 YALE L.J. 127 (1966); Comment, *Obscenity Standards in Current Perspective*, 21 SW. L.J. 285 (1967).

42. 413 U.S. 15 (1973).

43. *Id.* at 27-28. Although the Court used the phrase "hard core" in quotes, it never really defined the term. An inference may be made from the opinion that the state laws cited by the Court, *see* HAWAII REV. STAT. §§ 1210-1216 (1972) (current version at HAWAII REV. STAT. §§ 712-1210 to -1216 (1975)), OR. REV. STAT. §§ 255-262 (1971) (current version at OR. REV. STAT. §§ 167.060-.095 (1979)), provide examples of constitutional legislation that represent such "hard core" activities. The Court made clear that the states are not limited to these examples. 413 U.S. at 25. Accordingly, the parameters of hard-core sexual material are imprecise and perhaps illusory.

44. 413 U.S. at 34-37. The Court limited first amendment protection to "serious literary, artistic, political, [and] scientific" works taken as a whole. *Id.* at 34. *See also* *Roth v. United States*, 354 U.S. 476, 484-85 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

45. 413 U.S. at 27.

46. *Id.* at 24.

47. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)). The Court thus has evolved from its position in *Roth* that obscenity is unprotected because it is utterly worthless, through its *Memoirs* approach by which obscenity was unprotected only if utterly worthless, to its conclusion in *Miller* that obscenity may be unprotected even if it is not utterly worthless. *See* L. TRIBE, *supra* note 14, at 661-62.

48. 413 U.S. at 30-31.

49. *Id.* In *Miller* the State of California, the state of the forum, was considered an appropriate community. *Id.* at 33-34.

50. *Id.* at 32.

51. *Id.* at 33-34. In his dissent Justice Douglas expressed concern about the effect that the "community standards" approach would have on a defendant's first amendment rights because, under *Miller*, publishers are subject to at least 50 different standards. *Id.* at 44.

ity statutes to conform to the new standards.⁵² Despite the *Miller* Court's declaration that it was not trying to propose specific regulatory schemes for the states,⁵³ the Texas Legislature incorporated the Court's examples of obscenity almost verbatim.⁵⁴

The *Miller* approach adopted by Texas, however, poses difficulties. As a result of the "community standards" focus, the effect of the Court's requirement that states provide specific definitions of proscribed material is undermined. The statutory definitions give defendants little notice, as the definitions are filtered through jurors' perceptions of what the community finds patently offensive. Because different communities have different standards, publishers can ascertain those standards only by distributing their material and being tried for obscenity. Even juries in the same city, one in state court and the other in federal court, could reach different results on the same material at the same time.⁵⁵ Accordingly, while the *Miller* formula may be more tolerant than the early nineteenth century tests for obscenity, it results in little or no progress toward uniformity.

II. CHANGING DEFINITIONS OF OBSCENITY IN TEXAS

Since its days as an independent republic, Texas has recognized the right of free speech.⁵⁶ Despite the constitutional language, though, that "[n]o law shall ever be passed to curtail the liberty of speech or of the press,"⁵⁷ the state traditionally has curtailed speech and printed material deemed obscene.⁵⁸ Early laws were concerned primarily with the effect of obscenity on children. The Penal Code of 1857, for example, defined obscene material as that which was "manifestly designed to corrupt the morals of youth."⁵⁹ Early cases also reflected that concern. In *State v. Hanson*⁶⁰ the

52. See notes 2-6 *supra* and notes 115-17 *infra* and accompanying text.

53. 413 U.S. at 25. In *Hamling v. United States*, 418 U.S. 87 (1974), the United States Supreme Court reiterated that the examples in *Miller* were not intended to be the only activities the state could regulate. *Id.* at 114.

54. The Court in *Miller* gave the following examples of what a state could define as obscene: "(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. TEX. PENAL CODE ANN. §§ 43.21(a)(1)(B)(i)-(ii) (Vernon Supp. 1980-1981), include the Court's examples plus other provisions added by the legislature. See notes 118-46 *infra* and accompanying text.

One commentator suggested that the presence of "excretory functions" in the list implies that the true basis of obscenity regulation is not fear of the effect of obscenity but rather offensiveness. See A. GERBER, *supra* note 37, at 213-14. The inclusion of "excretory functions" is a curious anomaly given the fact that the Court claims to restrict obscenity regulation to sexual conduct.

55. See Comment, "Contemporary Community Standard" in *Obscenity Prosecutions—Smith v. United States*, 30 BAYLOR L. REV. 317 (1978).

56. "Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege. No law shall ever be passed to curtail the liberty of speech or of the press . . ." REPUBLIC OF TEX. CONST., DECLARATION OF RIGHTS—FOURTH (1836).

57. *Id.* TEX. CONST. art. I, § 8 has similar language.

58. See Tex. Penal Code art. 365 (1895); *id.* art. 343 (1879); *id.* art. 399 (1857).

59. *Id.* art. 399 (1857).

60. 23 Tex. 233 (1859).

defendant had been indicted for publishing an allegedly indecent and obscene newspaper called *John Donkey*. The paper purportedly had been manifestly designed to corrupt the morals of the youth of Galveston County.⁶¹ The indictment, however, did not reveal the contents of the newspaper, perhaps in deference to the sensitivities of those who might have read the official document. Ruling that the omission rendered the indictment insufficient, the court held that a description of the obscenity was necessary so that the court could assess its character.⁶²

The holding in *Smith v. State*⁶³ affirmed the right of the judge to determine whether written material was obscene.⁶⁴ In *Smith* the defendants were indicted for carving "Ass-Hole Work" into the back of a church bench while the rest of the congregation was kneeling at prayer.⁶⁵ The court first noted that the indictment contained the actual words alleged to be obscene, thus avoiding the insufficiency problem of *Hanson*. The court then found the material to be obscene, but held that the jury also had to find that it was designed to corrupt the morals of youth.⁶⁶ According to the court, that element of the offense referred to the intent of the defendants⁶⁷ without regard to whether the statement produced a corrupting result.⁶⁸ Rather, the jury had to discern what was in the mind of the accused. After *Hanson* and *Smith* the standard for obscenity consisted of two elements: objectionable words and corrupting intent. Both were necessary; neither one alone was sufficient. In *Edwards v. State*⁶⁹ only the intent to corrupt appeared to be present. The defendant had been indicted for passing a note which read, "Stay with me after school. I have secured a powder through the mail that will make you safe."⁷⁰ Despite the finding of intent, the court ruled that the message was not the type that the law sought to punish.⁷¹ Similarly, in *Hudnall v. State*⁷² the court refused to convict a defendant who had driven a car on which was drawn a rooster followed by the word "wagon."⁷³ The indictment alleged that the car conveyed "the information and impression that [it] was a cock wagon."⁷⁴ Adding to the innuendo, the back of the car bore the legend, "chase me, chickens, front full of corn."⁷⁵ The court, however, found nothing offensive about the picture and words. Searching the dictionary in vain for an

61. *Id.*

62. *Id.* at 234.

63. 24 Tex. Crim. 1, 5 S.W. 510 (1887).

64. *Id.* at 3, 5 S.W. at 510.

65. *Id.* at 2, 5 S.W. at 510.

66. *Id.* at 3, 5 S.W. at 510-11.

67. *Id.* at 3, 5 S.W. at 511.

68. *Id.*

69. 47 Tex. Crim. 611, 85 S.W. 797 (1905).

70. *Id.* at 612, 85 S.W. at 797.

71. *Id.*, 85 S.W. at 798. Furthermore, the recipient was not a minor; so, morals of youth were not affected. *Id.*

72. 109 Tex. Crim. 79, 3 S.W.2d 86 (1928).

73. *Id.*

74. *Id.*

75. *Id.*

offensive definition of "cock," the court refused to find the defendant guilty without an explanation of the vulgar connotation, whatever might have been the driver's motive.⁷⁶ Therefore, intent alone would not support an obscenity conviction in Texas, even if the publisher specifically designed his message to corrupt the morals of youth.

By the turn of the century the Texas Legislature had expanded obscenity regulation beyond the focus on children as the most susceptible or at least the most impressionable members of society. The 1925 Texas Penal Code prohibited publication "of scandals, whoring, lechery, assignations, intrigues between men and women and immoral conduct of persons."⁷⁷ In addition, the penalty increased from the \$100 maximum of the prior statutes⁷⁸ to a prison term of as long as five years.⁷⁹ As in other jurisdictions with similar statutes, the Texas courts strictly interpreted the law based on the *Hicklin* rule.⁸⁰ For example, in *Garcia v. State*⁸¹ the court affirmed the conviction of a newsstand owner for possessing for sale *Confessions of a Young Venus*, a pamphlet allegedly describing and depicting sexual intrigues between a man and woman.⁸² The court was convinced that the pamphlet was immoral and expressed surprise only at the leniency of the jury in assessing the lowest penalty, two years in jail.⁸³

With the advent of the *Roth* decision in 1957, the legislature for the first time was required to conform Texas's obscenity laws to a federal constitutional standard.⁸⁴ The legislature changed the Penal Code to reflect the *Roth* standard, including specific words from the decision such as "contemporary community standards."⁸⁵ Additionally, the statute defined the applicable community as "no . . . less than the State of Texas."⁸⁶

The importance of *Roth* in interpreting the new statute became evident in *Malone v. State*.⁸⁷ In *Malone* a conviction for promulgating immoral publications was overturned because the lower court had failed to instruct the jury to apply the *Roth* test. The defendant had requested a charge that instructed jurors not to consider the magazine in separate portions but rather to judge the work as a whole, using standards of literature sold in the community.⁸⁸ The trial court's refusal to issue a *Roth* charge was held

76. *Id.*

77. Tex. Penal Code art. 527 (1925).

78. *See id.* art. 399 (1857); *id.* art. 343 (1879); *id.* art. 365 (1895).

79. *Id.* art. 527 (1925).

80. For a discussion of *Hicklin*, see notes 19-22 *supra* and accompanying text.

81. 141 Tex. Crim. 444, 149 S.W.2d 113 (1941).

82. *Id.* at 445, 149 S.W.2d at 113.

83. *Id.*

84. For a discussion of *Roth*, see notes 30-35 *supra* and accompanying text.

85. *See* Tex. Penal Code Ann. art. 527(3) (Vernon Supp. 1962). Article 527 tested obscenity by "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, . . . the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas." *See Roth v. United States*, 354 U.S. 476, 489 (1957).

86. Tex. Penal Code Ann. art. 527(3) (Vernon Supp. 1962).

87. 170 Tex. Crim. 231, 339 S.W.2d 666 (1960).

88. *Id.* at 233, 339 S.W.2d at 668.

to constitute reversible error.⁸⁹ Then, in *Carter v. State*⁹⁰ the court found that the statutory definition of community as not less than the State of Texas was consistent with the *Roth* requirement.⁹¹ The interpretation imposed another variation on the most susceptible person test. Obscenity was to be judged by its effect on the most sensitive communities in the state. Theoretically, material unacceptable in Dime Box, Texas, also was unacceptable in Dallas. In fact, though, localized standards could be applied because local jurors were the ones who determined the community standards,⁹² and they hardly knew the standards of every city and town in the state. Moreover, subsequent Supreme Court decisions confirmed the jurors' right to disbelieve the conclusions of experts and even judges that the material was obscene.⁹³

Although the *Roth* decision placed certain constitutional limitations on obscenity regulation, *Roth* did not destroy the ability of states or localities to enact different statutes shielding children from obscenity. For example, through 1969 article 527 of the Texas Penal Code punished the sale of lewd or suggestive comic books.⁹⁴ Additionally, the city of Dallas enacted an ordinance establishing a film classification board to determine which movies were suitable for persons younger than sixteen.⁹⁵ A challenge to that ordinance in *Interstate Circuit, Inc. v. City of Dallas*⁹⁶ resulted in a decision that foreshadowed the *Miller* standard for specificity. Although the Court in *Interstate Circuit* recognized the city's right to protect minors,⁹⁷ it held the ordinance unconstitutional because its vagueness gave unbridled discretion to the censor.⁹⁸ The Court also observed that the reg-

89. *Id.* at 234, 339 S.W.2d at 668.

90. 388 S.W.2d 191 (Tex. Crim. App. 1965).

91. *Id.* (citing *Baxter v. State*, 363 S.W.2d 475 (Tex. Crim. App. 1963)).

92. The Supreme Court cautioned against defining "community" too narrowly in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). In *Jenkins v. Georgia*, 418 U.S. 153 (1974), however, the Court held that the trial court is not required to specify what community should be considered in applying the appropriate test of obscenity.

93. In *Hamling v. United States*, 418 U.S. 87 (1974), the Court stated that juries are permitted to draw on their knowledge of the community to decide what conclusion the average person applying contemporary community standards would reach. The trial court, however, is not precluded from admitting expert testimony. See generally Comment, *supra* note 41; see also *United States v. Groner*, 479 F.2d 577 (5th Cir.) (en banc), (literature and psychology experts testify that material is not obscene), *vacated on other grounds*, 414 U.S. 969 (1973).

94. Tex. Penal Code Ann. art. 527b (Vernon Supp. 1956).

95. DALLAS, TEX., REV. CODE ch. 46A (1960).

96. 390 U.S. 676 (1968).

97. *Id.* at 684. The Court affirmed the right of the state to prohibit the display of explicit sexual material to minors in *Ginsberg v. New York*, 390 U.S. 629, 637-43 (1968).

98. 390 U.S. at 688. Noting that the only limit on the censor's discretion under the ordinance was his understanding of what was meant by the terms "desirable, acceptable or proper," the Court found that such latitude was too wide. *Id.* (quoting *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 701 (1959) (Clark, J., concurring)). See also *Gelling v. Texas*, 343 U.S. 960 (1952) (per curiam) (striking down film licensing standards due to unconstitutional vagueness); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (striking down statute allowing film censorship for sacrilege).

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court stated that for a prior censorship system to pass constitutional muster, it must include procedural safeguards designed to obviate the danger of abuse. *Id.* at 58. These include placing the burden of proof on the censor,

ulation affected the rights of adults because with limited hope for profits from more mature pictures, filmmakers and theater owners might produce and show only the "totally inane."⁹⁹ Noting that the Dallas ordinance might be used as a model for other cities,¹⁰⁰ the Court struck down the ordinance before such a law could proliferate across the country.

One year later, in *Stein v. Batchelor*,¹⁰¹ a federal district court declared unconstitutional article 527 of the Texas Penal Code. Citing overbreadth as the statute's major defect, the court stated that the statute should have been confined to public or commercial dissemination.¹⁰² Furthermore, the court found that the statute failed to include the requirement that the material be "utterly without redeeming social value," a standard mandated by the Supreme Court's *Memoirs* decision.¹⁰³ The holding of unconstitutionality had little effect, however, as the legislature already had changed the law. The *Stein* court struck down the contested article 527 on June 9, 1969; its successor took effect the next day.¹⁰⁴

After the revised article 527 took effect, Alton A. West was convicted of exhibiting obscene material, and the Texas Court of Criminal Appeals affirmed the conviction in *West v. State*.¹⁰⁵ The United States Supreme Court granted West's petition for certiorari¹⁰⁶ and vacated the judgment in light of *Miller v. California*, a decision rendered four months earlier that required specific statutory examples of the prohibited conduct.¹⁰⁷ On remand the court of criminal appeals affirmed West's conviction.¹⁰⁸ The conviction was upheld again on motion for rehearing.¹⁰⁹ In both the original appeal and on remand the criminal appeals court construed article 527 to prohibit the offensive treatment of all sexual matters. The court reasoned that because the language of the statute was all-inclusive it included the examples of obscenity given in *Miller* even though the examples were not specifically set forth in the statute. Accordingly, the court concluded

allowing restraint only for a brief specified period of time, and affording prompt judicial review. *Id.*; see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (reversing decision of municipal board not to allow program in auditorium due to lack of procedural safeguards).

99. 390 U.S. at 684. The United States Supreme Court struck down a "most susceptible persons" statute that prohibited distribution to adults of material that was harmful to minors in *Butler v. Michigan*, 352 U.S. 380 (1957).

100. 390 U.S. at 684.

101. 300 F. Supp. 602 (N.D. Tex. 1969) (no finding of irreparable injury and therefore no basis for federal interference in state prosecution), *vacated sub nom.* *Dyson v. Stein*, 401 U.S. 200 (1971); see *Tex. Penal Code Ann. art. 527* (Vernon Supp. 1962).

102. 300 F. Supp. at 607.

103. *Id.* at 607-08.

104. *Tex. Penal Code Ann. art. 527* (Vernon Supp. 1970). The 1969 Code defined obscenity in terms of "the description or representation of sexual matters." *Id.*

105. 489 S.W.2d 597 (Tex. Crim. App. 1972), *vacated*, 414 U.S. 961 (1973). The defendant had shown a 16 mm. film of women who disrobed and feigned self-induced sexual satisfaction.

106. *West v. Texas*, 414 U.S. 961 (1973).

107. *Id.*

108. *West v. State*, 514 S.W.2d 433, *reh. denied*, 514 S.W.2d 441 (Tex. Crim. App. 1974).

109. 514 S.W.2d at 441.

that article 527 was definitive enough to provide the appropriate notice.¹¹⁰ In considering West's motion for rehearing, the court decided that it had erred in its construction of the statute. Because article 527 did not specifically define the sexual conduct intended to be prohibited, the court resorted to judicial construction¹¹¹ to restrict the term "sexual matters" to the examples set forth in *Miller*.¹¹² The court, however, affirmed the conviction, concluding that any vagueness in the statute had been cured by a decision prior to *West* that had found pictures of men and women engaged in sexual intercourse obscene.¹¹³ The film in *West* had depicted similar activities, and therefore the court reasoned that the defendant had notice of the state standard sufficient to satisfy *Miller*.¹¹⁴

In 1974 a new Penal Code took effect in Texas.¹¹⁵ To comport with *Miller*, the legislature subsequently revised the obscenity statutes in 1975.¹¹⁶ Then, in 1979 the current set of obscenity laws took effect.¹¹⁷

III. THE CURRENT STATUTES

A. Section 43.21

This section contains definitions of the terms used in the obscenity statutes, including the definition of obscene.¹¹⁸ The 1979 version differs sig-

110. *Id.* at 440-41.

111. *Id.* at 445.

112. See note 54 *supra*.

113. See *Phelper v. State*, 396 S.W.2d 396 (Tex. Crim. App. 1965).

114. 514 S.W.2d at 445.

115. See Tex. Penal Code Ann. §§ 43.21-.24 (Vernon 1974); Bubany, *Texas Penal Code of 1974*, 28 Sw. L.J. 292 (1974); Steele, *The Impact of the New Penal Code on First Amendment Freedoms*, 38 TEX. B.J. 245, 251-52 (1975).

116. Tex. Penal Code Ann. § 43.21 (Vernon Supp. 1976-1977). Section 43.25, punishing the use of children in obscenity, was added in 1977. *Id.* § 43.25 (Vernon Supp. 1978-1979).

117. TEX. PENAL CODE ANN. §§ 43.21, .23, .25 (Vernon Supp. 1980-1981); see notes 118-186 *infra* and accompanying text.

118. Section 43.21 provides:

(a) In this subchapter:

(1) "Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

(2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observa-

nificantly from its predecessor.¹¹⁹ Subsection (a)(1)(A) adopts language directly from *Miller*, incorporating the community standards test and limiting the purview of the statute to sex.¹²⁰ In contrast, the 1975 amendments had attempted to impose the limitation in a patchwork way by removing language from the 1974 Penal Code that had defined obscenity in terms of

tion, sound, or in any other manner, but does not include an actual three dimensional obscene device.

(3) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

(5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(6) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.

(7) "Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

(b) If any of the depictions or descriptions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawfully included herein, this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

TEX. PENAL CODE ANN. § 43.21 (Vernon Supp. 1980-1981).

119. As amended in 1975, § 43.21 stated the following:

In this subchapter:

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to the prurient interest of the average person applying contemporary community standards;

(B) depicts or describes sexual conduct in a patently offensive way; and

(C) lacks serious literary, artistic, political, or scientific value.

(2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a play, dance, or performance; a statue or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment, or machine.

(3) "Prurient interest" means an interest in sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) "Distribute" means to transfer possession, whether with or without consideration.

(5) "Commercially distribute" means to transfer possession for valuable consideration.

(6) "Sexual conduct" means:

(A) any contact between any part of the genitals of one person and the mouth or anus of another person;

(B) any contact between the female sex organ and the male sex organ;

(C) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl; or

(D) patently offensive representations of masturbation or excretory functions.

Tex. Penal Code Ann. § 43.21 (Vernon Supp. 1976-1977).

120. TEX. PENAL CODE ANN. § 43.21 (Vernon Supp. 1980-1981); see *Miller v. California*, 413 U.S. 15 (1973).

"sex, nudity, or excretion"¹²¹ and replacing it with words consistent with *Miller*.¹²²

The new subsection (a)(1)(B) provides the specificity the Supreme Court requires in an obscenity statute. The *Miller* Court gave examples of the type of conduct a state may prohibit,¹²³ and the legislature included the examples in the 1979 Penal Code. In subsections (a)(1)(B)(i)-(ii) the legislature expanded upon the *Miller* examples as well as the stop-gap list that it had added in 1975.¹²⁴ Under subsection (a)(1)(B)(ii) the appearance of sexual stimulation is proscribed. In addition, a patently offensive depiction or representation of "covered male genitals in a discernibly turgid state" is obscene.¹²⁵ The prohibition against such a depiction arguably conflicts with the Supreme Court's mandate that only hard-core pornography be punished.¹²⁶ Further, the use of the term "patent offensiveness" only begs the question of what is obscene.¹²⁷ Finally, while the obscenity of a depiction of the genitals can be judged on the basis of public lewdness and indecent exposure statutes,¹²⁸ no statute exists for judging the obscenity of covered male genitals. Jurors therefore are left to intuition when such a depiction is obscene. Heretofore, such a decision was not necessary because the law did not punish representations of covered male genitals, discernibly turgid or otherwise.

Subsection (a)(1)(B)(ii) also defines as obscene the depiction or description of a device used for genital stimulation. The previous statutory definitions did not include such devices,¹²⁹ and the law did not criminalize them as does the new section 43.23.¹³⁰ Subsection (a)(1)(B)(ii) raises serious questions of interpretation as to what is an obscene device. Many brand-

121. See Tex. Penal Code Ann. § 43.21(1)(A) (Vernon 1974).

122. Under the 1975 Code, subsection (1)(A) replaced "a prurient interest in sex, nudity, or excretion" with "the prurient interest of the average person applying contemporary community standards." Tex. Penal Code Ann. § 43.21 (Vernon Supp. 1976-1977).

123. For the examples given in *Miller*, see note 54 *supra*.

124. For the 1975 version of § 43.21(6), see note 119 *supra*.

125. The *Miller* Court had cited an Oregon law, OR. REV. STAT. § 255(5) (1971) (current version at OR. REV. STAT. § 167.060(5) (1979)), proscribing *inter alia* "covered human male genitals in a discernibly turgid state" as an example of the precision required in regulation. See 413 U.S. at 24 n.6. While the Court did not rule on the Oregon subsection specifically, its general endorsement of the language of the whole statute indicates that such language might be acceptable to the current Court.

126. See *Miller v. California*, 413 U.S. 15, 27-28 (1973).

127. See TEX. PENAL CODE ANN. § 43.21(a)(4) (Vernon Supp. 1980-1981). Subsection (a)(4) defines patent offensiveness as that which affronts contemporary community standards of decency. What offends these standards is the question. Prior to a jury determination, one cannot tell which depictions or representations of "covered male genitals in a discernibly turgid state" are obscene and which are not.

128. Tex. Penal Code Ann. § 21.07 (Vernon 1974) defines public lewdness as knowingly engaging in sexual intercourse or contact, normal or deviate, in public or doing so anywhere with reckless disregard as to who is present and will be offended. *Id.* § 21.08 defines indecent exposure as exposing one's anus or genitals with the intent to arouse or gratify another's sexual desire with reckless disregard of who is present and will be offended.

129. *Id.* § 43.21 (Vernon Supp. 1976-1977); see note 119 *supra* for the text of former § 43.21.

130. TEX. PENAL CODE ANN. § 43.23 (Vernon Supp. 1980-1981); see notes 151-52 *infra* and accompanying text.

name companies are marketing products designed for genital stimulation.¹³¹ The statute proscribes promotion of such products and their depiction or description only if they are "designed or marketed as useful primarily for the stimulation of human genital organs."¹³² To avoid prosecution, manufacturers most likely will market their devices as useful for stimulating many parts of the body.¹³³ The company that dares to disclose the true function of the device runs the risk of indictment, even though its product may not differ at all from others of supposedly more general use.

Subsection (a)(1)(C) is derived directly from the *Miller* decision and reflects the abandonment of the *Memoirs* "utterly without redeeming social value" requirement in favor of the less protective "taken as a whole lacks serious . . . value" test. The evolution began when the 1974 Penal Code included the *Memoirs* test. The 1975 amendment then changed the test to resemble more closely the *Miller* language.¹³⁴ Now, the Texas law tracks the Supreme Court decision almost verbatim.¹³⁵

Subsections (a)(2)-(3) of section 43.21 define obscene material and obscene performance, respectively. The new definition of obscene material is written in more general terms than was its predecessor. The 1974 statute set out the types of media, such as book or photograph.¹³⁶ The 1979 version, however, defines obscene material in terms of the senses. Performance is defined as a play, motion picture, dance, or other exhibition before an audience. An overlap arguably exists between subsections (a)(2) and (a)(3) as both could be read to include motion pictures. As a result, prosecutors may choose to pursue purveyors of obscene films under either definition. The significance of the overlap is that under section 43.23¹³⁷ a conviction for obscene material constitutes a third degree felony¹³⁸ while under sections 43.22¹³⁹ and 43.23¹⁴⁰ a conviction for an obscene performance is only a misdemeanor.¹⁴¹

Subsection (a)(4) defines the phrase "patently offensive" in terms of affronting "current community standards of decency."¹⁴² The term is used

131. See Swartz, *For the Woman Who Has Almost Everything*, *ESQUIRE*, July 1980, at 56.

132. TEX. PENAL CODE ANN. § 43.21(a)(7) (Vernon Supp. 1980-1981).

133. See Swartz, *supra* note 131, at 62-63.

134. Subsection (1)(C) of the 1975 amendment replaced "utterly without redeeming social value" with "lacks serious literary, artistic, political, or scientific value." Tex. Penal Code Ann. § 43.21(1)(C) (Vernon Supp. 1976-1977).

135. TEX. PENAL CODE ANN. § 43.21(a)(1)(C) (Vernon Supp. 1980-1981). The only difference between the language of this section and *Miller* is the use of the conjunction "and" rather than "or."

136. Tex. Penal Code Ann. § 43.21(2) (Vernon 1974).

137. TEX. PENAL CODE ANN. § 43.23(b) (Vernon Supp. 1980-1981).

138. A third degree felony carries a sentence of two to ten years imprisonment and as much as a \$5,000 fine. *Id.* §§ 12.34(a)-(b) (Vernon 1974).

139. *Id.* § 43.22(b).

140. *Id.* § 43.23(d) (Vernon Supp. 1980-1981).

141. A class A misdemeanor carries a sentence of as long as one year imprisonment and a fine of as much as \$2,000. *Id.* §§ 12.21(1)-(3) (Vernon 1974). A class C misdemeanor carries a fine of up to \$200. *Id.* § 12.23.

142. *Id.* § 43.21(a)(4) (Vernon Supp. 1980-1981). *Miller*, however, ties patent offensiveness to the conduct defined by state law, not to community standards; thus, the Court ap-

in conjunction with subsections (a)(1)(B)(i)-(ii), which set out in detail what is obscene.¹⁴³ Read together, the subsections constitute a "shopping list" of what may be found obscene, but they give little guidance to jurors as to how to determine which sexual acts, for example, affront current community standards of decency. Juries, apparently, must act on intuition. The specificity of subsections (a)(1)(B)(i)-(ii) only limits the class within which the jury may exercise such intuition. The statute, however, no longer allows the trier of fact to judge material by its effect on the most susceptible person as the *Hicklin* rule had required.¹⁴⁴

Section 43.21 of the 1979 statute also changes the language describing the promulgation of obscenity. Formerly, the law spoke of distribution and commercial distribution, both of which involved a transfer of possession.¹⁴⁵ Subsections (a)(5)-(6) now deal with promotion and wholesale promotion, respectively. Although the definitions have been made more specific, the major change is that the transfer of possession no longer is required. Offering or agreeing to promote now is sufficient to constitute an offense.¹⁴⁶

B. Section 43.22

This section¹⁴⁷ remains unchanged, but its utility is now questionable as it attempts to salvage something from the discarded *Hicklin* rule. Under the statute, one who recklessly disregards the fact that a person present may be offended by obscene material is guilty of a misdemeanor. The offense is judged in terms of the particular audience, a remnant of the *Hicklin* most susceptible person approach.¹⁴⁸ Moreover, because section

appears to have reserved the right to review such a finding, as it arguably is not within the jury's community standards determination. See 413 U.S. at 27. For a discussion of what constitutes "community," see notes 92-93 *supra*.

143. The list is an expanded version of the examples given in *Miller*. See note 54 *supra*.

144. For a discussion of the *Hicklin* rule, see notes 19-35 *supra* and accompanying text.

145. See Tex. Penal Code Ann. §§ 43.21(4)-(5) (Vernon Supp. 1976-1977).

146. See TEX. PENAL CODE ANN. §§ 43.23(a), (c)(1) (Vernon Supp. 1980-1981). Previously, the law had prohibited only possession for sale. The mere intent to give, provide, or lend obscenity in a noncommercial context, and the mere intent to offer to do the same was not an offense. Commentary accompanying § 43.22 indicates that the legislative intent was to protect an unwilling observer, a goal sanctioned by the Supreme Court in *Redrup v. State*, 386 U.S. 767 (1967), involving a New York statute. *But see Miller v. California*, 413 U.S. at 27 ("No one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law . . .").

147. Section 43.22 states:

(a) A person commits an offense if he intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person is present who will be offended or alarmed by the display or distribution.

(b) An offense under this section is a Class C misdemeanor.

TEX. PENAL CODE ANN. § 43.22 (Vernon 1974).

148. See notes 19-35 *supra* and accompanying text. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Supreme Court struck down an ordinance that prohibited drive-in theaters from showing nudity, even though passers-by might be offended. The Court, however, implied that a tightly drawn ordinance requiring such theaters to shield the screen from public view would pass constitutional muster. *Id.* at 215 n.13. *But see Mishkin v. New*

43.22 was not updated by the legislature, its language does not conform to that in section 43.21, the new definitional statute. Section 43.22 uses the term "distributes," the word used in the 1974 Penal Code. As noted above, however, the 1979 statute replaces distribution with the concept of promotion.¹⁴⁹ As a result, the new statute does not define a term crucial to section 43.22. Furthermore, section 43.22 is redundant. Section 43.23 punishes the promotion of obscenity,¹⁵⁰ and promotion as defined in section 43.21 includes the concepts of exhibition and presentation as well as distribution. Accordingly, both the display and distribution elements present in section 43.22 are subsumed in section 43.23. The only element of section 43.22 not present in section 43.23 is the most susceptible person test, and the constitutionality of that standard is doubtful in light of *Roth* and its progeny. Finally, the punishment is less severe under section 43.22, wherein offenses are categorized as class C misdemeanors than under section 43.23, wherein they rank as class A misdemeanors.

C. Section 43.23

This section punishes what now is termed promotion of obscenity.¹⁵¹ The new statute differs from its predecessor¹⁵² both in language and penalties. Subsection (a) adopts the term "wholesale promotion" in place of "commercial distribution." As defined in section 43.21, promotion need

York, 383 U.S. 502 (1966) (upholding conviction for distributing literature of a particular fetish to persons disposed toward that fetish and judging the prurient interest by the material's appeal to that particular group rather than to the average person).

149. See notes 145-46 *supra* and accompanying text.

150. Section 43.23 is set forth in note 151 *infra*.

151. Section 43.23 provides:

(a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.

(b) An offense under Subsection (a) of this section is a felony of the third degree.

(c) A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(d) An offense under Subsection (c) of this section is a Class A misdemeanor.

(e) A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of his business is presumed to do so with knowledge of its content and character.

(f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.

(g) This section does not apply to a person who possesses or distributes obscene material or obscene devices or participates in conduct otherwise prescribed [*sic*] by this section when the possession, participation, or conduct occurs in the course of law enforcement activities.

TEX. PENAL CODE ANN. § 43.23 (Vernon Supp. 1980-1981).

152. In the 1974 Penal Code, § 43.23 read as follows:

not include actual transfer of possession.¹⁵³ As a result, merely intending to agree to provide obscene material or an obscene device for resale violates section 43.23. As in the 1974 statute, the defendant still must possess the requisite mens rea before he can be found guilty. An offense is committed only if the accused knows the character and content of the material or device. The new version, however, creates a presumption of knowledge on the part of the commercial promoter.¹⁵⁴ In addition, the penalty for such activity has been increased from a class B misdemeanor to a third degree felony.

Other offenses under section 43.23 have been upgraded from class B¹⁵⁵ to class A misdemeanors.¹⁵⁶ Subsection (c)(1) prohibits not only the non-commercial promotion of obscenity but also the mere possession with intent to promote. Subsection (f) creates a presumption that one who possesses six or more obscene devices or identical or similar obscene articles intends to promote them.¹⁵⁷ Further, the presumption triggers the subsection (e) presumption that one who intends to promote has the necessary mens rea. As a result of this chain of presumptions, the person who merely possesses six or more devices or similar articles is presumed guilty of a subsection (c)(1) offense. The violence that these presumptions do to the concept of "innocent until proven guilty" is underscored by the fact that private possession of obscenity is protected by the first amendment.¹⁵⁸

Subsection (g) does not discriminate between the adult bookstore owner and the adult who has obscene books for his own use. The subsection operates equally against the commercial distributor and the private citizen.

(a) A person commits an offense if, knowing the content of the material:

(1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;

(2) he presents or directs an obscene play, dance, or performance or participates in that portion of the play, dance, or performance that makes it obscene; or

(3) he hires, employs, or otherwise uses a person under the age of 17 years to achieve any of the purposes set out in Subdivisions (1) and (2) of this subsection.

(b) It is an affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.

(c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this section, in which event it is a Class A misdemeanor.

Tex. Penal Code Ann. § 43.23 (Vernon 1974).

153. See notes 145-46 *supra* and accompanying text.

154. See TEX. PENAL CODE ANN. § 43.23(e) (Vernon Supp. 1980-1981). New York's statute has a similar presumption. See N.Y. PENAL LAW § 235.10(1) (McKinney 1980). See also *People v. Kirkpatrick*, 32 N.Y.2d 17, 295 N.E.2d 753, 343 N.Y.S.2d 70, *appeal dismissed sub nom. Kirkpatrick v. New York*, 414 U.S. 948 (1973) (dismissing an appeal to the enforcement of the New York obscenity laws).

155. Tex. Penal Code Ann. § 43.23(c) (Vernon 1974).

156. TEX. PENAL CODE ANN. § 43.23(d) (Vernon Supp. 1980-1981).

157. New York has a similar presumption. See N.Y. PENAL LAW § 235.10(2) (McKinney 1980).

158. See *Stanley v. Georgia*, 394 U.S. 557 (1964). The Court implied, however, that such protection was limited to in-home use. *Id.* at 565.

To the extent that the presumption shifts the burden of proof to the private possessor, the subsection is overbroad. Unless the state can show that the presumption more likely than not flows from the proven fact, the possession of six or more devices or articles, the statute may be unconstitutional.¹⁵⁹ The shift in the burden of proof is new to Texas's obscenity law and creates a danger of police harassment of individuals who choose to read or watch explicit sexual material privately and who are entitled to do so constitutionally. The potential public embarrassment of an arrest and the expense of a trial may create a chilling effect¹⁶⁰ on the exercise of first amendment rights.

Subsection (c)(2) punishes participation in an obscene performance. The subsection is similar to subsection (a)(2) in the prior statute. The new version, however, expands the coverage to include not only participation in a portion of the performance that makes the presentation obscene but also participation in a portion that merely contributes to the obscenity. The difference may be nothing more than semantics,¹⁶¹ but under the new section 43.23 one need not expose himself to be guilty. Rather, participation in a performance in which someone else does so may suffice.

The new statute also deletes the affirmative defense of the previous statute. Formerly, persons possessing pornography for scientific, educational, governmental, or other justifiable purposes were protected from prosecution. New subsection (g) limits justifiable use to law enforcement activities. Law enforcement activity, however, is hardly the only justifiable use for explicit material. In its revised version section 43.23 allows no protection to those conducting sex research, be it psychological, medical, or clinical. Therefore, an academician studying responses to sexually explicit material could be indicted for simply providing the material to his subject,¹⁶² and his student assistant could be indicted for agreeing to help provide the material.¹⁶³ Therapists could be prosecuted for engaging in the

159. *See* *Leary v. United States*, 395 U.S. 6 (1969) (presumption is regarded as irrational and arbitrary unless shown that the presumed fact is more likely than not to flow from the proved fact on which it depends); *Shinall v. Worrell*, 319 F. Supp. 485 (E.D.N.C. 1970) (presumption that possessor of more than three copies of obscene material intends to disseminate them is arbitrary and therefore invalid); *Morrison v. Wilson*, 307 F. Supp. 196 (N.D. Fla. 1969) (presumption from transportation of two copies of any obscene publication or five copies of several publications that they are intended for sale violates due process clause and privilege against self-incrimination).

160. *See* *Baggett v. Bullitt*, 377 U.S. 360 (1964) (striking down loyalty oath for teachers); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (striking down use of civil libel statute to punish criticism of government officials). *But see* *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("[a]llegations of a subjective 'chill' are not an adequate substitute for . . . a threat of specific future harm" to confer standing). *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

161. In substance, subsection (c)(2) resembles the related offenses of public lewdness, TEX. PENAL CODE ANN. § 21.07 (Vernon 1974), and public indecency. *Id.* § 21.08.

162. The library of the University of Texas School of Law contains a collection of sexual material called "litigated literature." Included are publications that have figured prominently in court cases. Theoretically, by allowing access to these materials, the University may run afoul of the obscenity laws.

163. TEX. PENAL CODE ANN. §§ 43.21, .23 (Vernon Supp. 1980-1981), require only the intent to transfer possession.

practice of providing adult material and devices to cure impotence and frigidity. Although prosecutors probably will not pursue scientific and educational "promoters" vigorously, nothing prevents them from doing so under section 43.23. Further, the threat of selective enforcement has become quite real. A district attorney facing a difficult reelection fight might make headlines by prosecuting a legitimate sex researcher in a conservative community. In revising section 43.23, the legislature invited such harassment.

D. Section 43.24

This section also remains unchanged,¹⁶⁴ expressing the long-established belief that the state has a special interest in protecting minors from obscenity.¹⁶⁵ To that extent, the section stands as a variation on the *Hicklin* rule, measuring obscenity by its effect on the most susceptible person. Unlike other sections that speak in terms of obscenity, section 43.24 prohibits the sale, distribution, or display of "harmful material."¹⁶⁶ The assumption of the legislature is clear: Sexual material is not merely something that children are unprepared to see; it is something that may harm them.

The test for determining harmfulness resembles the community standards test for determining obscenity, but under section 43.24 harmful material is judged by the "prevailing standards in the adult community as a

164. Section 43.24 provides:

- (a) For purposes of this section:
 - (1) "Minor" means an individual younger than 17 years.
 - (2) "Harmful material" means material whose dominant theme taken as a whole:
 - (A) appeals to the prurient interest of a minor, in sex, nudity, or excretion;
 - (B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
 - (C) is utterly without redeeming social value for minors.
 - (b) A person commits an offense if, knowing that the material is harmful:
 - (1) and knowing the person is a minor, he sells, distributes, exhibits, or possesses for sale, distribution, or exhibition to a minor harmful material;
 - (2) he displays harmful material and is reckless about whether a minor is present who will be offended or alarmed by the display; or
 - (3) he hires, employs, or uses a minor to do or accomplish or assist in doing or accomplishing any of the acts prohibited in Subsection (b)(1) or (b)(2) of this section.
 - (c) It is a defense to prosecution under this section that:
 - (1) the sale, distribution, or exhibition was by a person having scientific, educational, governmental, or other similar justification; or
 - (2) the sale, distribution, or exhibition was to a minor who was accompanied by a consenting parent, guardian, or spouse.
 - (d) An offense under this section is a Class A misdemeanor unless it is committed under Subsection (b)(3) of this section in which event it is a felony of the third degree.

TEX. PENAL CODE ANN. § 43.24 (Vernon 1974).

165. See *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 (1968); *Ginsberg v. New York*, 390 U.S. 629, 637-43 (1968); *Redrup v. New York*, 386 U.S. 767, 769 (1967) (*per curiam*); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964). See also *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944).

166. TEX. PENAL CODE ANN. § 43.24(b) (Vernon 1974).

whole with respect to what is suitable for minors."¹⁶⁷ In addition, patent offensiveness by those standards is necessary for a finding of harmfulness, but it is not sufficient. As in the obscenity statutes, the material must also appeal to the child's prurient interest in sex, but unlike the adult standards, prurient interest in mere nudity will support a conviction. Thus the prohibitions in the children's statute go beyond those in the adult statute. Adult standards are not applicable to children,¹⁶⁸ however; so, section 43.24's nudity component might survive a constitutional challenge.

If, as the statute implies, nudity can be harmful to minors, its use in an instructional context might be threatened. Section 43.24, however, reduces that possibility by preserving the *Memoirs* "utterly without redeeming social value" test.¹⁶⁹ Nevertheless, the subject is a volatile one. For example, the sex education book *Show Me* has been banned from public libraries in some communities.¹⁷⁰ The book displays normal growing children, but its nude photographs have caused concern across the state. While subsection (c) provides an affirmative defense for educational uses, communities that have banned books like *Show Me* will be less likely to find such an educational purpose being served. In the final analysis, section 43.24 defers to parental discretion as subsection (c)(2) sets forth a defense for distribution to a minor who was accompanied by a consenting parent, guardian, or spouse.

E. Section 43.25

The legislature's concern about the use of children to produce pornography is expressed in this section.¹⁷¹ The 1979 changes make the law consid-

167. *Id.* § 43.24(a)(2)(B).

168. The Supreme Court has recognized that standards of obscenity for children may differ from those for adults. For example, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court upheld the FCC's ability to regulate a radio broadcast of George Carlin's "filthy words" comedy routine when prompted by the complaint of a parent whose young son heard the broadcast.

169. *See A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413 (1966); TEX. PENAL CODE ANN. § 43.24(a)(2)(C) (Vernon 1974).

170. *See HOUSE REPORT*, *supra* note 12, at 64.

171. Section 43.25 provides:

(a) In this section:

(1) "Sexual performance" means any performance or part thereof that includes sexual conduct by a child younger than 17 years of age.

(2) "Obscene sexual performance" means any performance that includes sexual conduct by a child younger than 17 years of age of any material that is obscene, as that term is defined by Section 43.21 of this code.

(3) "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

(4) "Performance" means any play, motion picture, photograph, dance, or other visual representation that is exhibited before an audience.

(5) "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.

(6) "Simulated" means the explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which the persons

erably more specific than the 1977 version¹⁷² that had been declared unconstitutional in *Graham v. Hill*.¹⁷³ The 1977 language did not require a showing of obscenity to sustain a conviction. Rather, the statute punished the commercial use of pictures of minors engaging in sexual conduct or observing sexual conduct. The *Graham* court stated that the law would have been upheld had it been limited to depiction of engaging in actual

engaging in the conduct exhibit any uncovered portion of the breasts, genitals, or buttocks.

(7) "Deviate sexual intercourse" has the meaning defined by Section 43.01 of this code.

(8) "Sado-masochistic abuse" has the meaning defined by Section 43.24 of this code.

(b) A person commits an offense if, knowing the character and content thereof, he employs [*sic*], authorizes, or induces a child younger than 17 years of age to engage in a sexual performance. A parent or legal guardian or custodian of a child younger than 17 years of age commits an offense if he consents to the participation by the child in a sexual performance.

(c) An offense under Subsection (b) of this section is a felony of the second degree.

(d) A person commits an offense if, knowing the character and content of the material, he produces, directs, or promotes an obscene performance that includes sexual conduct by a child younger than 17 years of age.

(e) A person commits an offense if, knowing the character and content of the material, he produces, directs, or promotes a performance that includes sexual conduct by a child younger than 17 years of age.

(f) An offense under Subsection (d) or (e) of this section is a felony of the third degree.

(g) It is an affirmative defense to a prosecution under this section that the defendant, in good faith, reasonably believed that the person who engaged in the sexual conduct was 17 years of age or older.

(h) When it becomes necessary for the purposes of this section to determine whether a child who participated in sexual conduct was younger than 17 years of age, the court or jury may make this determination by any of the following methods:

- (1) personal inspection of the child;
- (2) inspection of the photograph or motion picture that shows the child engaging in the sexual performance;
- (3) oral testimony by a witness to the sexual performance as to the age of the child based on the child's appearance at the time;
- (4) expert medical testimony based on the appearance of the child engaging in the sexual performance; or
- (5) any other method authorized by law or by the rules of evidence at common law.

TEX. PENAL CODE ANN. § 43.25 (Vernon Supp. 1980-1981).

172. The 1977 version of § 43.25 read as follows:

(a) A person commits an offense if, knowing the content of the material, he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any motion picture or photograph showing a person younger than 17 years of age observing or engaging in sexual conduct.

(b) It is an affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.

(c) An offense under this section is a felony of the third degree.

Tex. Penal Code Ann. § 43.25 (Vernon Supp. 1978-1979).

173. 444 F. Supp. 584 (W.D. Tex. 1978).

sexual conduct.¹⁷⁴ Because it was not so limited, the court struck down the statute as overbroad. The legislature then produced the current section 43.25, which was designed to meet the court's objection.

While the state law existing in 1979 already prohibited the abuse of children to produce obscene material,¹⁷⁵ section 43.25 expanded the prohibition to include providers of children who do not actually touch the children themselves.¹⁷⁶ Subsection (a) sets out the definitions applicable to section 43.25. Children are those younger than seventeen. Sexual conduct is described in a "shopping list" that resembles the actions set out in section 43.21(a)(1)(B)(i)-(ii). Under subsection (b), a person commits an offense if he knowingly employs, authorizes, or induces a child to engage in any of these activities. A parent or guardian also can be convicted for consenting to the participation. The crime is categorized as a second degree felony,¹⁷⁷ and producing, directing, or promoting¹⁷⁸ such a performance qualifies as a third degree felony.¹⁷⁹ The law thus imposes a penalty on those who provide the children for the performance and those who make use of the children to produce the pictures. Because promotion is not limited to commercial distribution, the statute applies equally to the private citizen who shares photos with his friends and the dealer who sells the material in a bookstore.¹⁸⁰ Once the material reaches the citizen, the state cannot act because private possession of obscenity is constitutionally protected.¹⁸¹ Agreeing to share obscene material is a different question, though, and is one that arguably fits within the purview of the state law.

Section 43.25 is not a strict liability statute. Subsection (g) sets forth an affirmative defense for lack of mens rea. A person who reasonably believes that the child is seventeen or older is not guilty of an offense under the statute. This approach may be contrasted with Texas's statutory rape law, which does not allow such a defense.¹⁸²

Subsection (h) of section 43.25 outlines the methods for determining the

174. *Id.* at 592. See generally Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809 (1978).

175. See TEX. PENAL CODE ANN. § 21.09 (Vernon Supp. 1980-1981); Tex. Penal Code Ann. § 43.23 (Vernon 1974).

176. See TEX. PENAL CODE ANN. §§ 43.25(b), (d)-(e) (Vernon Supp. 1980-1981). During 1977 and 1978 political pressure increased to toughen child pornography laws. A Select Committee of the Texas House investigated the causes of the problem and explored possibilities for its control. See generally HOUSE REPORT, *supra* note 12. More than 50 witnesses testified in hearings held across the state. *Id.* at 195-98. The Committee found a thriving market in Texas for sexual material involving children. *Id.* at 62-78. Purchasers were receiving magazines, books, and films from three sources: commercial bookstores, mail order suppliers, and private citizens. *Id.* at 66, 69, 74.

177. TEX. PENAL CODE ANN. § 43.25(c) (Vernon Supp. 1980-1981).

178. *Id.* §§ 43.25(d)-(e).

179. *Id.* § 43.25(f).

180. These are two of the three outlets itemized in the House Committee Report. See note 176 *supra*. The third outlet, mail distribution, is the responsibility of the federal government. See HOUSE REPORT, *supra* note 12, at 69-73.

181. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

182. See TEX. PENAL CODE ANN. § 21.09 (Vernon Supp. 1980-1981).

age of a child. The subsection includes both formal¹⁸³ and informal¹⁸⁴ procedures. The informal options may prove to be quite important in many cases because the actors in child pornography are often runaways,¹⁸⁵ and documentary evidence of the children's ages may not be readily available. Under section 43.25 the determination of age may be based on such imprecise methods as inspection of the child's picture and testimony as to the child's appearance at the time of the performance. Official or expert information is not necessary. Rather, any of the approaches itemized in subsection (h) may be sufficient. Moreover, the affirmative defense of subsection (g) does not depend on an actual finding that the actor was seventeen or older. All that the law requires is a reasonable, good faith belief.¹⁸⁶ Thus, subsection (h) aids the prosecution more than the defense because it allows more flexibility in proving minority. Without such proof, a conviction under section 43.25 could not be obtained.

IV. RECENT DEVELOPMENTS

Soon after the 1979 statutes took effect, their constitutionality was challenged. In Houston the United States District Court granted a temporary restraining order enjoining the district attorney from enforcing sections 43.21 and 43.23.¹⁸⁷ In Dallas another district court granted a similar request.¹⁸⁸ Thereafter, both courts dissolved the orders, finding the statutes constitutional.¹⁸⁹ Plaintiffs in both cases consolidated their appeals to the Fifth Circuit. Until the court makes a decision, the 1979 statutes are being enforced.

The appellants in these pending cases attack the statutes as being unconstitutionally vague and overbroad, in violation of the first and fourteenth amendments.¹⁹⁰ The appellees, the district attorneys, first contend that the ambiguity arising from section 43.21's failure to define "prurient interest" can be cured by judicial instruction to the jury.¹⁹¹ They defend other

183. *Id.* § 43.25(h)(4).

184. *Id.* §§ 43.25(h)(1)-(3).

185. See HOUSE REPORT, *supra* note 12, at 93-95, 117-19.

186. See TEX. PENAL CODE ANN. § 43.25(g) (Vernon Supp. 1980-1981).

187. See *Red Bluff Drive-In, Inc. v. Vance*, No. H-79-1747 (S.D. Tex., filed Sept. 26, 1979) (dissolving temporary order restraining district attorney and denying request for permanent injunction).

188. See *Crystal Theater, Inc. v. Wade*, No. CA-3-79-1077-D (N.D. Tex., filed Oct. 26, 1979) (dissolving temporary order restraining district attorney and denying request for permanent injunction).

189. See notes 187-88 *supra* and accompanying text.

190. Brief for Appellants at 3, *Crystal Theater, Inc. v. Wade*, No. CA-3-79-1077-D (N.D. Tex., filed Oct. 26, 1979); see Comment, *New Prosecutorial Techniques and Continued Judicial Vagueness: An Argument for Abandoning Obscenity as a Legal Concept*, 21 U.C.L.A. L. REV. 181 (1973); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 884 (1970).

191. Brief for Appellee at 24, *Red Bluff Drive-In, Inc. v. Vance*, No. H-79-1747 (S.D. Tex., filed Sept. 26, 1979). The appellees suggest that "prurient interest" could be defined as it was in the prior version of § 43.21: "'Prurient interest' means an interest in sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct." Tex. Penal Code Ann. § 43.21(3) (Vernon Supp. 1976-1977).

terms as being neither vague nor overbroad in context or on their face.¹⁹² Additionally, the state argues that the challenged prohibition of obscene devices is constitutional in light of the Supreme Court's prior dismissal of three appeals based on a similar Georgia statute.¹⁹³

The appellees also dispute any challenge to the double presumption of section 43.23.¹⁹⁴ They urge a limited construction that would prevent a prosecutor from applying both presumptions against the same defendant in the same case.¹⁹⁵ Although the statute itself does not contain any prescription against the use of both presumptions, the appellees argue that an ordinary rule of statutory construction requires an interpretation that will make the statute constitutional and consistent with state law.¹⁹⁶ Thus, they contend that article 43.23 should not be declared invalid on its face.

In addition to the Texas Penal Code's obscenity prohibitions, until 1980 Texas prosecutors also could use a civil nuisance statute to restrain commercial obscenity.¹⁹⁷ In *Vance v. Universal Amusements Co.*,¹⁹⁸ however, the Supreme Court held that article 4667(a), authorizing injunctions to abate public nuisances, was unconstitutional. In *Vance* the district attorney of Harris County sought to employ the statute to enjoin the operation of an adult theater.¹⁹⁹ Section (a)(3) of the article allowed such a suit to stop the habitual use of premises for commercial manufacture, distribution, or exhibition of obscene material.²⁰⁰ The United States Court of Ap-

192. Brief for Appellee at 26-34, *Red Bluff Drive-In, Inc. v. Vance*, No. H-79-1747 (S.D. Tex., filed Sept. 26, 1979). The terms defended were "material," "performance," "promote," "wholesale promote," and "patently offensive." *But see* *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947) (vague statute may be declared void when legislature reasonably could have drafted more precise language).

193. Brief for Appellee at 35, *Red Bluff Drive-In, Inc. v. Vance*, No. H-79-1747 (S.D. Tex., filed Sept. 26, 1979); *see* *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187 (1977), *appeal dismissed sub nom.* *Sewell v. Georgia*, 435 U.S. 982 (1978); *Simpson v. State*, 144 Ga. App. 657, 242 S.E.2d 265, *appeal dismissed sub nom.* *Simpson v. Georgia*, 439 U.S. 887 (1978); *Teal v. State*, 143 Ga. App. 47, 238 S.E.2d 128 (1977), *appeal dismissed sub nom.* *Teal v. Georgia*, 435 U.S. 989 (1978).

194. Brief for Appellee at 38-45, *Red Bluff Drive-In, Inc. v. Vance*, No. H-79-1747 (S.D. Tex., filed Sept. 26, 1979); *see* Brief for Appellant at 16-17, *Crystal Theater, Inc. v. Wade*, No. CA-3-79-1077-D (N.D. Tex., filed Oct. 26, 1979). *See also* notes 154-58 *supra* and accompanying text. The possession of six or more similar articles or devices gives rise to a presumption of intent to promote, which triggers a presumption of knowledge of the items' content and character.

195. Brief for Appellee at 38-45, *Red Bluff Drive-In, Inc. v. Vance*, No. H-79-1747 (S.D. Tex., filed Sept. 26, 1979). The presumptions are similar to those of N.Y. PENAL LAW § 235.10 (McKinney 1980), which was upheld in *People v. Kirkpatrick*, 32 N.Y.2d 17, 295 N.E.2d 753, 343 N.Y.S.2d 70, *appeal dismissed sub nom.* *Kirkpatrick v. New York*, 414 U.S. 948 (1973).

196. *But see* *Hart v. State*, 152 Tex. Crim. 537, 215 S.W.2d 883 (1948) (presumptions upon presumptions cannot take the place of evidentiary facts).

197. TEX. REV. CIV. STAT. ANN. art. 4667 (Vernon Supp. 1980-1981) allows prosecutors to obtain injunctions to abate habitual use of premises for production or distribution of obscenity. *See* Justice Sutherland's opinion in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), in which he stated that "[a] nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."

198. 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980).

199. *Id.* at 1157-58, 63 L. Ed. 2d at 416.

200. TEX. REV. CIV. STAT. ANN. art. 4667(a)(3) (Vernon Supp. 1980-1981).

peals for the Fifth Circuit found that the statute unconstitutionally authorized indefinite prior restraint of films that had not been judged obscene.²⁰¹ On writ of certiorari, the Supreme Court affirmed, stating that ordinary nuisances might be restrained in such a manner, but the regulation of communicative activity such as the exhibition of a motion picture must adhere to more narrowly drawn procedures.²⁰² The Court noted that the burden of sustaining an injunction against a future exhibition is even heavier than the burden of justifying a criminal sanction for a past communication.²⁰³ Then, recalling its prior decisions that had held that any system of prior restraint must bear a heavy presumption against its constitutional validity,²⁰⁴ the Court found that article 4667(a) had not overcome the presumption.²⁰⁵ Accordingly, criminal statutes imposing penalties after the fact remain the state's principal tools in regulating obscenity.

What effect the 1979 statutes have had on law enforcement is beyond the scope of this Comment. In Dallas police activity has increased statistically, but vice division officers state that they are not consciously doing anything differently.²⁰⁶ Other researchers may want to study the number of arrests statewide, the number of convictions, and the severity of the penalties imposed.²⁰⁷

Beyond the question of whether the new law has made a difference in law enforcement is the question of whether it should even exist. The President's Commission on Obscenity concluded that explicit sexual material does not cause sex crimes.²⁰⁸ Zoning ordinances can control the exterior

201. See 100 S. Ct. at 1161-62, 63 L. Ed. 2d at 421.

202. *Id.* at 1160-61, 63 L. Ed. 2d at 420.

203. *Id.*

204. *Id.* at 1161 n.13, 63 L. Ed. 2d at 420 n.13.

205. *Id.* at 1162, 63 L. Ed. 2d at 421.

206. In 1978 Dallas Vice Squad officers instituted 113 obscenity cases. In 1979 the total rose to 146. In the first seven months of 1980 the police department has made 167 cases. Interview with Sgt. R.E. Riley, Dallas Police Vice Division, in Dallas, Tex. (Aug. 15, 1980). The one area in which the new law clearly has made a difference is regulation of obscene devices. Previously, no state law prohibited their distribution. Thus, whatever the number of prosecutions for promotion of obscene devices, it represents an increase.

207. The Chairman of the House Select Committee on Child Pornography is pessimistic about the effect of section 43.25. State Representative Ralph Wallace believes that the use of children in Texas to create pornography has gotten much worse. Wallace maintains that the judicial system discourages the reporting of offenses because of vigorous cross-examination of victims, many of whom decide they never should have reported the crime. To that extent the problems of child pornography victims resemble the problems of rape victims. The safeguards of the legal system, however, are unlikely to be changed. Child pornography prosecutions also are complicated by the transience of the victims. Many of them are runaways, Wallace says, or people who will not testify under any circumstances. Telephone interview with Texas Representative Ralph Wallace (July 1980). While it may not be a panacea, the new law does go a long way toward discouraging such abuse of children. Any future procedural changes should be scrutinized carefully so that they do not adversely affect other important rights, such as courtroom confrontation by the accused.

208. See REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 32 (1970); Project, *An Empirical Inquiry Into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U. L. REV. 810 (1977) (national survey indicating that since *Miller* the quantity and explicitness of sexually oriented material has increased without a similar increase in prosecution).

appearance of buildings,²⁰⁹ shielding members of the public from unwanted viewing of offensive material. The laws in Texas and other states, however, seek to prevent even those who want obscene materials from having them. A system of law that criminalizes the distribution of obscenity but protects the private possession of such material is at best inconsistent and at worst hypocritical.²¹⁰ Until the contradiction is resolved, regulation of sexual material will remain an intractable problem.

V. CONCLUSION

In 1979 the Texas Legislature revised the Texas obscenity laws to reflect the standards required for obscenity regulation as set forth by the United States Supreme Court in *Miller v. California*. The dissonance between the *Miller* approach and Texas law as it existed before the new enactments had created a climate of confusion for prosecutors and defendants. Under the new law, examples of obscenity are specified so as to put potential offenders on notice as to what is prohibited. Juries, however, serve as the ultimate arbiters of obscenity, and they make their determinations by applying contemporary community standards. This system is likely to lead to wide variances in decisions and thus to more confusion. As a result, the obscenity legislation likely will suffer from the same problem that has plagued such efforts since governments first set out to regulate obscene material: the definitional problem.

No one can define obscenity satisfactorily. Standards change in time, space, and depth. Texas's 1979 law is merely another attempt to codify the uncodifiable. If history repeats itself, the Supreme Court will change its standards in a few years; Texas will follow suit and change its laws again, and the "intractable obscenity problem" will remain unresolved. Because public sentiment appears to favor some type of control over none, the obvious solution to the dilemma, abandoning attempts to regulate, is a remote possibility. The new Texas law is neither fair nor equitable. Definitions of obscenity may have been changed, but the resulting statutes are no less confusing than their predecessors.

209. See Note, *Using Constitutional Zoning to Neutralize Adult Entertainment—Detroit to New York*, 5 FORDHAM URB. L.J. 455 (1977); 22 N.Y.L. SCH. L. REV. 753 (1977). See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (zoning regulation is a valid exercise of state's police power).

210. The Court, in *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973); and *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363 (1971), indicated that the right to private possession of obscene material did not include the right to buy or sell it.

