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OBSCENITY: A LEGAL PRIMER

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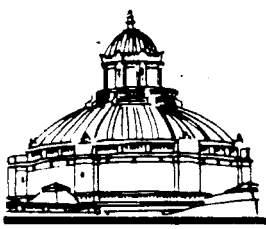

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ABSTRACT

This report provides an overview of the present law of obscenity and pornography, with emphasis on the following topics: (1) the legal definition of obscenity; (2) the constitutionality of restrictive zoning laws; (3) federal authority to legislate in this area; (4) child pornography; (5) regulation of the broadcast media in this context; (6) obscenity and cable television; (7) obscene prerecorded messages; (8) seizure of obscene materials; and (9) pornography as a form of sex discrimination.

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INTRODUCTION

The First Amendment to the United States Constitution in pertinent part provides, "Congress shall make no law ... abridging the freedom of speech, or of the press." However, despite this absolute language ("no law"), historical background and case precedents construing the amendment have developed certain exceptions to this apparent absolute right.

Obscenity is one type of speech which has never been afforded constitutional protection. This report provides an overview of the present state of the law in this area, with particular emphasis on the following topics: (1) definition of obscenity; (2) constitutionality of restrictive zoning laws; (3) federal authority to legislate in this area; (4) child pornography; (5) regulation of the broadcast media in this context; (6) obscenity and cable television; (7) obscene prerecorded messages; (8) seizure of obscene materials; and (9) pornography as a form of sex discrimination.

DEFINITION OF OBSCENITY: WHAT IS LEGALLY "OBSCENE"?

In everyday conversation, the terms "pornography" and "obscenity" are frequently used interchangeably. In legal parlance, however, these terms are not synonymous and the distinctions are important. As explained in the leading Supreme Court decision, Miller v. California,[1] the term "pornography" encompasses all erotic material; while obscenity, derived from the Greek word for "filth," is substantially more limited. While obscene material has no constitutional protection, much pornographic material in fact enjoys such protection. The problem which courts have confronted over the years is where to draw the line between protected and unprotected speech (the term encompasses both written and spoken material) in this context.

For nearly ninety years, American courts attempting to regulate obscenity followed the definition set forth in an 1868 English case, Regina v. Hicklin:[2]

> . . . [T]he test of obscenity is . . . whether the tendency . . . is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.

Over the years numerous lower courts expressed dissatisfaction with this standard, including Judge Learned Hand's statement in United States v. Kennerly that "[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."[3] A 1933 case, United States v. One Book Entitled "Ulysses,"[4] adopted a new standard, holding that in obscenity prosecutions the effect of a

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1/ 413 U.S. 15, 18-19 n. 3 (1973).

2/ L.R. 3 Q.B. 360, 371 (1868).

3/ 209 F. 119, 121 (S.D.N.Y. 1913).

4/ 4 F.Supp. 182 (S.D.N.Y. 1933), aff'd 72 F.2d 705 (2d Cir. 1934).

work should be determined by its effect on a "person with average sex instincts."[5] From that time on there was a split in judicial reasoning, with some courts adopting the Ulysses standard while others continued to folow that set forth in Hicklin.[6]

The first Supreme Court ruling on this point came in 1957, in Roth v. United States.[7] That case redefined the applicable standard as:

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

This standard proved extremely difficult to apply, and the Court over the next several years added and rephrased several elements. The next "watershed" standard was that adopted in a 1966 case, Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts:[8]

> Under [the Roth] definition, as eleborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of matters; and (c) the material is utterly without redeeming social value.

This standard, too, underwent several reformulations before it was abandoned by the Court as "unworkable" in Miller v. California, supra. Under the Miller standard, which with minor modifications remains in effect today:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work,

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5/ 5 F.Supp. at 184.

6/ Schauer, The Law of Obscenity chap. 1 (1976).

7/ 354 U.S. 476, 489 (1957).

8/ 383 U.S. 413, 418 (1966).

> taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 9/

The primary difference between the Memoirs and the Miller standards is that, under Miller, the material need no longer be "utterly without redeeming social value" to qualify as legally obscene.

The Supreme Court recently reaffirmed the Miller standard in Brockett v. Spokane Arcades, Inc., 10/ a case which partially invalidated a Washington State "public nuisance" obscenity statute which used the term "lust" as part of its definition. The Court held that this term was overbroad in the context of the challenged statute, in that it could be read as encompassing materials which evoke a normal, healthy interest in sex (as opposed to a morbid, perverse interest) and thus reach materials which are constitutionally protected. However, it reiterated its approval of the Miller standard as that which should be applied in obscenity determinations.

Under this standard it is clear that much, if not most, material depicting sexual activity is not legally obscene per se. For example, it may not be clear "beyond a reasonable doubt" (the standard in criminal prosecutions) whether "contemporary community standards" would condemn the challenged material, or whether it is "patently offensive." The fact that the work "taken as a whole" must lack serious literary, artistic, political, or scientific value poses another problem, as a significant portion of the work may in fact be obscene, but the overall work is not. (The second element of the tripartite test simply

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9/ 413 U.S. at 23.

10/ 105 S.Ct. 2794 (1985).

reflects the general rule that criminal statutes must be written with sufficient specificity so that those accused of violating them receive adequate notice of the wrongful nature of their acts.)

Also, the "contemporary community standards" criteria seemingly precludes the implementation of a national obscenity standard, as community standards may differ significantly in different parts of the country. Although the above Miller language indicates that state law is to be utilized in analyzing the questionable material, other language in that same opinion indicates that local standards of smaller communities, as shown perhaps through city or county obscenity ordinances, might be used for this purpose. This standard has led to situations such as that involving the motion picture "Deep Throat," which was banned in Baltimore[12/] but allowed to run in Binghamton, New York.[13/]

RESTRICTIVE ZONING

If the government cannot flatly prohibit non-obscene sexually oriented materials and performances, may it constitutionally restrict the location of businesses which offer such goods or activities? Such restrictive zoning ordinances typically take one of two opposite approaches: either they require that such establishments be widely dispersed, or they require that they be concentrated within a given area. Detroit's "dispersal" ordinance was upheld by the Supreme Court in a 1976 case, Young v. American Mini Theaters, Inc.[14/] That Court has not yet ruled on a "concentration" ordinance, but lower courts acting on a case by case basis have upheld those not found to be unreasonably restrictive of protected constitutional rights.

12/ Mangum v. State's Attorney, 275 Md. 450, 341 A.2d 786 (1975).

13/ People v. Binghamton Theaters, Inc., Binghamton City Ct., Dec. 16, 1972.

14/ 427 U.S. 50 (1976).

Young involved an "Anti-Skid Row Ordinance" which prohibited the location of an adult theater within 1,000 feet of any two other "regulated uses" (including establishments such as adult book stores, cabarets, bars, taxi dance halls, and hotels) or within 500 feet of a residential area. In upholding this ordinance, the Court found that there was a reasonable relationship between its land-use regulation and the city's interest in neighborhood preservation and the health, safety and welfare of its residents:

> The record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect . . . . [T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems. 15/

The key element in this holding was that the Council was able to document its "conclusion that this kind of restriction will have the desired effect." 16/ Thus this case should be distinguished from the Supreme Court's rulings in Erznoznik v. City of Jacksonville, 17/ which held facially invalid as an infringement of the first amendment an ordinance which prohibited a drive-in movie theater from exhibiting films containing nudity when the screen was visible from a public street or public place (which was true for all drive-in movies); and Schad v. Borough of Mount Ephraim, 18/ which struck down an ordinance excluding live entertainment (in this case, nude dancers) from a broad range of commercial uses permitted in the borough. In each case the Court held that the government in question failed to provide sufficient justification for its blanket prohibition of a constitutionally-protected activity.

15/ Id. at 71.

16/ Id.

17/ 422 U.S. 205 (1975).

18/ 452 U.S. 61 (1981).

The Supreme Court has now agreed to review a decision by the United States Court of Appeals for the Ninth Circuit, Playtime Theaters, Inc. v. City of Renton,[19] which invalidated a Renton, Washington, ordinance prohibiting adult movie theaters within 1000 feet of residential zones, single- or multi-family buildings, churches, or schools. The ninth circuit held that the ordinance imposed a substantial restriction of speech and that the city did not show a substantial governmental interest sufficient to justify this restriction. It distinguished the Renton situation from that present in Young by noting that there was no showing in Young that the ordinance seriously limited the number of sites available for adult theaters, while the Renton ordinance's prohibition would result in a substantial restriction on this activity.

As noted above, "concentrated" zoning ordinances have been upheld in this context by lower courts as long as they are not found to be unduly restrictive. See, e.g., Basiardanes v. City of Galveston,[20] which held that the government need not guarantee "choice commercial sites" for those wishing to sell erotic materials; and City of Minot v. Central Avenue News, Inc.,[21] which upheld a concentration ordinance which reserved a substantial area for adult entertainment. On the other hand, Purple Onion, Inc. v. Jackson[22] struck down an Atlanta ordinance which designated 81 sites within an area as appropriate for adult businesses, finding that "no more than three or four . . . [were] sites a reasonably prudent investor" would consider. Similarly, the court in E & B Enterprises v. City of University Park[23] invalidated an ordinance which it found had been

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19/ 748 F.2d 527 (9th Cir. 1984), cert. granted, 53 U.S.L.W. 3726 (U.S. Apr. 15, 1985)(No. 84-1360).

20/ 514 F.Supp. 975, 982 (S.D. Tex. 1981).

21/ 308 N.W.2d 851 (N.D. 1981).

22/ 511 F.Supp. 1207, 1216 (N.D. Ga. 1981).

23/ 449 F.Supp. 695 (N.D. Tex. 1977).

designed to "run out of town" an adult movie theater. Under that ordinance, only two suitable sites were available for showing adult films, one of which was owned by the city and the other by a competing interest. Also, there was no evidence such as that presented in Young that the theater had led to neighborhood deterioration or an otherwise unsafe or unhealthy environment.

FEDERAL INVOLVEMENT

Under the Constitution, the federal government has only limited authority to legislate on obscenity. Art. I, § 8, of the Constitution, the so-called "enumerated powers clause" which specifies areas in which Congress is authorized to legislate, does not on its face encompass obscenity legislation. Thus, under that clause and the tenth amendment, general authority to legislate on that subject is reserved to the individual states. Most states have in turn delegated a portion of this authority to lower governmental entities such as counties and municipalities.

However, two sections of the enumerated powers clause, § 3, which in pertinent part authorizes Congress "[t]o regulate commerce with foreign Nations, and among the several States;" and § 7, which authorizes the establishment of "Post Offices and Post Roads," serve as the basis, or nexus, for the following prohibitions in the federal criminal code: mailing obscene matter;[24/] importation or transportation of obscene matter;[25/] mailing indecent matter in wrappers or envelopes;[26/] broadcasting indecent, profane or obscene language;[27/] and trans-

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24/ 18 U.S.C. § 1461.

25/ 18 U.S.C. § 1462.

26/ 18 U.S.C. § 1463.

27/ 18 U.S.C. § 1464.

portation of obscene matters for sale or distribution.[28] In addition, the Federal Sexual Exploitation of Children Act[29] specifically prohibits the production, mailing, or transportation of materials depicting minors involved in sexually explicit conduct.

The Comprehensive Crime Control Act of 1984[30] added violations of various state and federal obscenity statutes to the listing of predicate offenses encompassed by the Federal Racketeer Influenced and Corrupt Organizations [RICO] law.[31] RICO imposes criminal penalties on those who acquire or conduct an "enterprise" engaged in or affecting interstate or foreign commerce through a "pattern of racketter activity," which term as amended now includes all state and federal obscenity violations which carry a maximum sentence of at least one year's imprisonment.

There are also federal statutory provisions[32] which authorize a person who does not wish to receive pandering advertisements sent through the mail to request that the mailer(s) of such materials refrain from sending any further such mailings to his or her address. This statute is not limited to legally obscene materials but includes any materials "which the addressee in his sole discretion believes to be erotically arousing or sexually provocative."[33] This language is arguably broad enough to encompass any unwanted advertisement, regardless of content, an interpretation accepted and upheld as constitutional by the Supreme

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28/ 18 U.S.C. § 1465.

29/ 18 U.S.C. §§ 2251 to 2253.

30/ P.L. 98-473, 98 Stat. 1837.

31/ 18 U.S.C. §§ 1961 to 1968.

32/ 39 U.S.C. §§ 3008, 3010, 3011.

33/ 39 U.S.C. § 3008(a).

Court in Rowan v. Post Office Department:[34/]

> We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient . . . . The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

Upon receipt of a request from a postal patron that he or she does not desire to receive such mailings from a specified source, the Postal Service issues an order prohibiting future mailings from that source as of 30 days after the effective date of the order, which is the 30th calendar day following its receipt. If the Postal Service believes that any person is violating such an order, it may request the Attorney General to commence a civil action against that party, seeking various alternative forms of relief to insure that the objectionable mailings are not repeated. Related criminal penalties for the violation of such orders may be imposed only when the mailings do in fact contain sexually explicit materials.[35/]

Problems involved with the possible establishment of a national obscenity standard are discussed under "Definition of Obscenity," supra pp. 4-5.

CHILD PORNOGRAPHY

In July 1982 the Supreme Court ruled in New York v. Ferber[36/] that states, and by analogy the federal government, can constitutionally regulate the production and distribution of material which depicts minors engaged in sexual

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34/ 397 U.S. 728, 738 (1970).

35/ 18 U.S.C. § 1737.

36/ 458 U.S. 747 (1982).

activity even when such material is not legally obscene. The court gave five related reasons for its holding: (1) the state's legislative judgment that the use of children as subjects of pornographic materials is harmful to their physiological, emotional, and mental health easily passes muster under the first amendment; (2) the obscenity standard set forth in Miller v. California, supra, is not a satisfactory solution to the child pornography problem; (3) the advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity which is illegal throughout the country; (4) the intrinsic value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is extremely modest, if not de minimis; and (5) recognizing and classifying child pornography as a category of material outside the scope of first amendment protection is not incompatible with earlier Supreme Court decisions as to what speech is unprotected. The Court concluded:

> When a definable class of materials, such as that covered by [the pertinent New York statute], bears so heavily and pervasively on the welfare of children engaged in the production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment. 37/

Again, the Miller obscenity standard provides:

> The basic guidelines for the trier of fact must be: (a) Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable State law; and (c) whether

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37/ Id. at 764.

> the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 38/

The Ferber Court adjusted the Miller formulation as follows, where material depicting children engaged in sexual activity is involved:

> A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. 39/

Under the Ferber standard, only a small portion of this material, that which does not involve live performances by the children depicted, remains constitutionally protected. However, the conduct in question cannot be prohibited unless it is adequately defined by the applicable law as written or authoritatively construed.

Although the decision was unanimous to the material involved in that particular case, two films devoted almost exclusively to depicting young boys masturbating, Justices Stevens, Brennan and Marshall argued that constitutional protection should be afforded to material depicting minors engaged in sexual activity where that material has serious literary, scientific, or educational value. The Ferber decision holds, however, that states and the federal government can constitutionally regulate all such material, regardless of any intrinsic value it might possess.

Federal law has now been brought into line with the Ferber decision (i.e., the requirement that the proscribed material be legally obscene was dropped) with the enactment of the Child Protection Act of 1984. 40/

38/ 413 U.S. at 24 (citation omitted).

39/ 458 U.S. at 764.

40/ Pub. L. 98-292, 98 Stat. 292.

REGULATION OF BROADCASTING

Judicial precedents indicate that a much greater measure of control is permissible with regard to the broadcast media than to their non-broadcast counterparts. The rationale behind this policy is that, at least theoretically, everyone is equally free to write, speak, and publish; there is no volume limitation as to the amount which may be spoken or published. This is in sharp contrast to the broadcast media, where there is only a finite range of frequencies available. Thus, while the Miller obscenity standard definitely applies in this context, the pertinent federal criminal statute[41/] prohibits "utter[ing] any obscene, indecent or profane language by means of radio communication." This broader standard as defined below was upheld as constitutional by the Supreme Court in a 1978 decision, FCC v. Pacifica Foundation.[42/]

The Pacifica case arose from the afternoon radio broadcast of a George Carlin record which used "seven dirty words" found by the FCC to be "indecent," and thus in violation of federal law, although they were found not to be legally "obscene." The FCC's definition of what is "indecent" for this purpose includes "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[43/] This differs from the Miller obscenity standard in that the indecent programming need not appeal to the prurient interest; it need not be taken as a whole when applying contemporary community

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41/ 18 U.S.C. § 1464.

42/ 438 U.S. 726 (1978).

43/ Pacifica Foundation, 56 FCC 2d 94, 98 (1975).

standards; and it may, in some context, have serious literary, artistic, political or scientific value.

In upholding this standard in this context, the Supreme Court emphasized that broadcasting involves "the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder [citing Rowan v. Post Office Dept., supra] . . . . [and] prior warnings cannot completely protect the listener or viewer from unexpected program content."[44/] As noted above, the applicable standard is restricted to "times of day when there is a reasonable risk that children may be in the audience;" the Court specifically stated that the question of whether broadcasting the same programming at a later hour when children were less likely to be listening would be acceptable "is an issue neither the Commission nor this Court has decided."[45/]

CABLE TELEVISION

Another question which has not yet been considered by the Supreme Court is whether the Miller obscenity standard or the lesser Pacifica indecency standard, or perhaps some intermediate standard, applies to programming presented on cable television. However, it appears that the lower courts which have considered the question have consistently held that the more stringent Miller standard should apply, because of the numerous distinctions which can be made between cable and over-the-air television broadcasting.[46/]

44/ 438 U.S. at 748.

45/ Id. at 750 n. 28.

46/ E.g., Cruz v. Ferre, 571 F.Supp. 125 (S.D. Fla. 1983); Home Box Office v. Wilkinson, 531 F.Supp. 986 (D. Utah 1982): Community Television of Utah v. Roy City, 555 F.Supp. 1164 (D. Utah 1982).

Cable does not utilize the radio frequency spectrum for its over-the-air transmission, so there is no scarcity of frequencies comparable to that which serves as the basis for the more stringent regulation of broadcast media (i.e., there is no limit to the number of cable channels which can be transmitted from or received at a given location). Cable does not "invade the home" as is true of the broadcast media, in that customers voluntarily subscribe to the service and must pay a fee in order to obtain it. Finally, technology is available to "lock out" certain channels on a cable system both at the cable office and in the home, providing still more consumer control over the type of programming received. For example, a parent can "lock out" those channels throught unsuitable for viewing by their children. For these reasons, cable is arguably more comparable to the print and cinema industries, to which the Miller standard applies, than to the television and radio industries, which are covered by Pacifica.

The Cable Communications Policy Act of 1984 [47/] enacted the following prohibition:

> Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than 2 years, or both. [48/]

This flexible language was adopted so that the law will not have to be amended should the pertinent constitutional standard be revised.

OBSCENE PRERECORDED MESSAGES

In December 1983, Congress amended the prohibition against obscene or harassing telephone calls in interstate commerce to include prerecorded obscene

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47/ Pub. L. 98-549, 98 Stat. 2801.

48/ 47 U.S.C. § 559.

messages, popularly known as "dial-a-porn."[49] However, the first regulations promulgated under this amendment, which were aimed at restricting access by minors to these recordings,[50] were invalidated by the United States Court of Appeals for the Second Circuit in Carlin Communications, Inc. v. FCC.[51] The court held that the FCC had failed to demonstrate that the regulations were well-tailored to the ends intended to be advanced by the statute or that those ends could not have been met by less drastic actions. Those regulations had required that "dial-a-porn" services be operated only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time or that payment be made by credit card prior to transmission of the message.

In October 1985, the FCC again issued final regulations for this purpose.[52] Under these regulations, providers of "dial-a-porn" services must require an authorized access or identification code or prepayment by credit card before transmission of the messages. The provider must issue the code by mail after reasonably ascertaining, through a written application procedure, that the applicant is at least 18 years of age. Also, providers must establish a procedure whereby codes will be canceled immediately when providers are notified that they are lost, stolen or misused, or no longer required.

SEIZURE OF OBSCENE MATERIALS

The fourth amendment's prohibition against unreasonable searches and seizures generally requires the issuance of a warrant prior to taking any such action; and this is especially true in the context of protected first

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49/ Pub. L. 98-214, 97 Stat. 1469, amending 47 U.S.C. § 223.

50/ 49 Fed. Reg. 24996, 25003 (1984).

51/ 749 F.2d 113 (2d Cir. 1984).

52/ 50 Fed. Reg. 24699 (1985).

amendment rights. As the Supreme Court explained in Marcus v. Search Warrant,[53] "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." Thus numerous cases indicate that particular care must be taken with regard to searches for and seizures of allegedly obscene materials to insure that first amendment rights are in fact protected.

For example, in Roaden v. Kentucky,[54] a county sheriff, after viewing a sexually explicit film at a local drive-in theater, arrested the theater manager for exhibiting an obscene film and seized, without a warrant, one copy of the film for use as evidence. There was no prior judicial determination of obscenity. The Supreme Court explained that this search was unreasonable, "not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression."[55]

In Lo-Ji Sales, Inc. v. New York,[56] a police investigator purchased two films from an adult bookstore and, after viewing them and concluding that they were obscene, took the films to a town justice who also viewed them. Based on an affidavit by the investigator, the justice issued a warrant authorizing

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53/ 376 U.S. 717, 729 (1961).

54/ 413 U.S. 496 (1973).

55/ Id. at 504 (footnote omitted).

56/ 422 U.S. 319 (1979).

seizure of other copies of the two films and "the following items which the Court independently [on examination] has determined to be possessed in violation"of the law. However, at the time the justice signed the warrant no items were listed or described following the statement, which was issued on the basis of the affidavit's assertion that "similar" films and printed matter portraying similar activities could be found on the premises. The resulting search, which lasted nearly six hours and resulted in the seizure of a large volume of material, was held to violate the fourth amendment.

Lee Art Theatre, Inc. v. Virginia[57/] involved the seizure of motion pictures under authority of a warrant issued by a justice of the peace. The warrant was issued on the basis of an affidavit of a police officer which contained only the titles of the films and a statement that the officer had determined from personal observation of them and of the billboard in front of the theater where they were being shown that the films were obscene. This seizure, too, was declared unconstitutional.

However, the Supreme Court recently ruled in Macon v. Maryland[58/] that the undercover purchase of obscene materials is not an unconstitutional search or seizure since a commercial sale does not constitute either a search or a seizure. It is not a search because the seller does not have any reasonable expectation of privacy in areas of the store where the public is invited to enter and to transact business; nor is it a seizure, since the seller voluntarily transfers any possessory interest in the goods to the purchaser upon receipt of the funds. The decision expands police authority to act against obscenity but as yet its practical impact is uncertain.

57/ 392 U.S. 636 (1968)(per curiam).

58/ 105 S.Ct. 2794 (1985).

PORNOGRAPHY AS A FORM OF SEX DISCRIMINATION

In 1984 the city councils of Minneapolis and Indianapolis each adopted an ordinance which defined pornography depicting abuse of women as a form of sex discrimination, and hence a civil rights violation.[59/] The Minneapolis ordinance was vetoed by the Mayor, and that in Indianapolis enjoined on first amendment grounds by the United States Court of Appeals for the Seventh Circuit in American Booksellers Ass'n, Inc. v. Hudnut.[60/] However, the questions presented in that case have not yet been definitively settled.

Both the Minneapolis City Council and the Indianapolis City-County Council made detailed findings that pornography helps create and maintain inequality between the sexes and thus differentially harms women in a number of ways. Each ordinance contained a detailed definition of pornography as the sexually explicit subordination of women, graphically depicted, that includes one or more additional elements such as presenting women who apparently enjoy pain or mutilation, or women as sexual objects who are tied up, cut up, bruised or physically hurt. The four types of prohibited discriminatory practices based on this definition include coercion into performing for pornography, forcing pornography on a person, assault or physical attack due to pornography, and trafficking in pornography. Men were given a similar cause of action if they could demonstrate that comparable male-oriented pornography resulted in a comparable injury. The ordinances were civil rather than criminal in nature, so they imposed civil sanctions rather than criminal fines and/or imprisonment on violators.

59/ Minneapolis Code of Ordinances § 139.10(a)(1), as proposed by Ordinance 83-Or-323, § 1; Indianapolis City-County Ordinance No. 24, 1984.

60/ 771 F.2d 323 (7th Cir. 1985).

The suit challenging the Indianapolis ordinance was originally heard by the Federal District Court for the Southern District of Indiana.[61] It held that much of the material it encompassed was constitutionally protected, since it was not legally obscene and did not incite to lawbreaking and imminent lawless action as required by the Supreme Court's decision in Brandenburg v. Ohio[62] for suppression on this ground. That court, while recognizing the substantial governmental interest in eliminating sex discrimination, held that this interest was not so strong as to justify the suppression of constitutionally protected speech to the extent envisioned by the Indianapolis ordinance. The circuit court did not address these issues; it rather viewed the ordinance as an impermissible attempt to establish "thought control"[63] and based its decision on the long line of Supreme Court cases which hold that thoughts in and of themselves, no matter now reprehensible or repugnant, cannot constitutionally be penalized.[64]

Those who support this approach to regulating pornography argue that there is in fact a strong correlation between material portraying sexual abuse of women and actual abuse of women.[65] However, it is difficult to empirically

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61/ 598 F.Supp. 1316 (S.D. Ind. 1984).

62/ 395 U.S. 444 (1969). In discussing the incitement standard, the Court stated: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id. at 447.

63/ 771 F.2d at 328.

64/ E.g., Brandenburg v. Ohio, supra note 62 (ideas of the Ku Klux Klan); Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied 439 U.S. 916 (1978) (Nazi propaganda).

65/ E.g., Jacobs, "Patterns of Violance: A Feminist Perspective on the Regulation of Pornography," 7 Harv. Women's L.J. 5 (1984).

demonstrate this point. If the correlation becomes more evident, it is possible that courts will become more sympathetic to this argument. However, only a small portion of such material is now viewed as constitutionally unprotected, and it is unlikely that this will change substantially in the forseeable future.