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FEDERAL OBSCENITY PROSECUTIONS: DIRTY DEALING WITH THE FIRST AMENDMENT?

INTRODUCTION

The first amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."¹ The Courts have consistently held that the right of free speech is not absolute and have traditionally used a balancing approach in determining whether governmental action has unconstitutionally infringed on this right.² However, in Roth v. United States,³ the Court rejected this approach as applied to obscenity prosecutions and held that "obscenity is not within the area of constitutionally protected speech or press."⁴ In a 1973 landmark decision, Miller v. California,⁵ the Court reaffirmed the Roth holding that obscene material is not protected by the first amendment and held that obscenity is to be defined by referring to local community standards.⁶

Subsequently, in Hamling v. United States,⁷ the local standards construction was applied to federal legislation,⁸ which makes criminal the mailing of obscene material. The constitutionality of the Court’s conclusion in Hamling, that local standards apply in prosecutions for mailing obscene matter in violation of 18 U.S.C. § 1461, is the basic question with which this comment will deal. Although there has been a flood of legal commentary in the wake of Miller, two recent cases⁹ indicate that a closer analysis of the constitutionality of applying local standards to federal obscenity legislation is necessary.

In laying the ground work for the discussion of section 1461, this comment will initially examine the major doctrinal

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¹ U.S. Const. amend. I.
⁴ Id. at 485.
⁶ Id. at 37.
⁸ Federal legislation prohibits mailing obscene or crime-inciting matter, 18 U.S.C. § 1461 (1976); importation or transportation of obscene matters, id. § 1462; mailing indecent matter on wrappers or envelopes, id. § 1463; broadcasting obscene language, id. § 1464; and transportation of obscene matters for sale or distribution, id. § 1465.
developments that have characterized the Supreme Court’s treatment of obscenity issues. Following this examination, it will investigate the history and construction of applicable federal legislation as they relate to the local standards definition of Miller. Finally, it will demonstrate how the constitutional infirmities in the local standards rule have been amplified by recent federal obscenity prosecutions.

**Evolution of the Federal Constitutional Obscenity Standard**

*Roth v. United States*

It was not until 1957,\(^{10}\) in the landmark case of *Roth v. United States,*\(^{11}\) that the Supreme Court established as a matter of federal constitutional law a standard of obscenity applicable in both federal and state courts. In *Roth* the Supreme Court affirmed the conviction of a defendant under a federal statute\(^ {12}\) prohibiting the mailing of obscene material. After concluding that “obscenity is not within the area of constitutionally protected speech or press,”\(^ {13}\) the Court fashioned a test for measuring obscenity that rendered invalid any more stringent standards: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”\(^ {14}\)

**Post-Roth Developments**

Although it was feared that the *Roth* test would encourage severe censorship, the Court used *Roth* for the next decade to overturn convictions obtained in a number of obscenity prose-

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10. The first legal standard for measuring obscenity was defined by the English courts in Regina v. Hicklin, [1868] L.R. 3 Q.B. 359. The test adopted by the courts, which came to be known as the *Hicklin* test, provided: “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.” *Id.* at 369.

Although this test was subsequently adopted by many American courts, it was rejected by later decisions. See, e.g., United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934). Recognizing the potential broad application of the *Hicklin* test, which allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons, the court in *Ulysses* held that “the proper test of [determining] whether a given book is obscene is its dominant effect.” *Id.* at 708.

13. 354 U.S. at 485.
14. *Id.* at 489.
During this ten year period, two significant cases appeared on the Supreme Court docket: *Smith v. California* and *Jacobellis v. Ohio*. In *Smith*, the court reasoned that a conviction for possession of obscene material could not be sustained against a bookstore operator absent proof that the operator had some knowledge of the character of the material. Thus, the Court established that proof of scienter could not be dispensed with in obscenity prosecutions, to avoid the danger that distributors would self-censor in order to avoid possible prosecution. The *Jacobellis* Court, in a plurality opinion, announced that the appropriate community to be utilized when measuring the "contemporary community standards" as defined by *Roth* was a national one. Since the first amendment is national in character, the Court reasoned that "the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.

Also in the decade after *Roth*, though breaking with its pattern of overturning prosecutions, the Court decided three additional cases which served to further define or modify the *Roth* obscenity formula. These cases included: *Mishkin v. New*
York,22 Ginzburg v. United States,23 and A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Mass.24 In Mishkin, the Court affirmed the conviction of the appellant and concluded that “[w]here the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.”25 In Ginzburg, the Court also affirmed the conviction of the appellant and perceived no threat to the first amendment guarantees in stating that in “close cases” evidence of pandering may be probative in determining the question of obscenity under federal constitutional standards.26 Ginzburg graphically demonstrated the breadth of the term “obscenity” under the Roth formula, indicating that the term encompassed not only the content of the material, but also the manner in which it was distributed.

In Memoirs, the final case in the trilogy, the Supreme Court, in a plurality opinion, reversed a finding that the book Fanny Hill was obscene and added an additional element to the Roth formula, which made it considerably more difficult for material to be characterized as obscene. Thus, the Court stated that a book could be termed obscene only if the following elements are satisfied:

[I]t 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

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25. 383 U.S. at 508. The Court’s holding was not foreclosed by the references in Roth to the “average” or “normal” person. Since the Court’s adjustment of the prurient-appeal requirement demands that “the recipient group be defined with more specificity than in terms of sexually immature persons, . . . the inadequacy of the most susceptible-person facet of the Hicklin test [was avoided].” Id. at 509.
26. Evidence that the defendants engaged in the sordid business of pandering, “purveying textual or graphic material openly advertised to appeal to the erotic interest[s] of the defendants’ customers,” is relevant to the question of obscenity, even though the material involved was not obscene in the abstract. Although the Court rarely invoked the rationale of Ginzburg in subsequent obscenity prosecutions, in Hamling v. United States, 418 U.S. 87 (1974), the Court stated that the district court had not erred in instructing the jury that evidence of pandering may be relevant, if it found the question of whether the materials involved were obscene to be a close one. Id. at 130.
the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.27

Until 1967, the law remained stable, as many cases involving obscenity convictions reached the Supreme Court. However, in Redrup v. New York,28 decided in May, 1967, the Court reversed the appellants' obscenity convictions and concluded that publications not sold to minors, forced upon unwilling individuals, or pandered were protected by the first and fourteenth amendments from governmental suppression, whether criminal or civil.29 This important obscenity decision was the catalyst in subsequent years for a number of per curiam Supreme Court decisions which reversed numerous obscenity convictions, leaving many provocative books, magazines and films constitutionally protected.30

In 1969, the Court reached its zenith in affording constitutional protection to sexually oriented material in Stanley v. Georgia.31 In Stanley, the Court reversed the appellant's conviction for "private" possession of obscene material and held that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."32 However, the constitutional protections established by the Warren Court for the distribution of obscene material, subject only to

27. 383 U.S. at 418 (emphasis added).
29. Id. at 769, 770.
32. Id. at 568. The Court stated:
   But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. at 565.
the limitation of safeguarding minors and unwilling recipients, were subsequently eroded by the Burger Court in the years following Redrup and Stanley.

**Miller v. California**

The first pivotal obscenity case decided by the Burger Court concerned the issue of whether the distribution of obscene materials to willing recipients who state they are adults is constitutionally protected. In *United States v. Reidel*, after concluding that *Stanley* neither questioned the validity of *Roth* nor applied to the facts of the present case, the Court determined that an individual has no first amendment right to distribute or sell obscene materials, even though another individual has the right to receive and possess this material. As a result of *Reidel*, the distribution of obscene material was clearly placed outside the reach of the first amendment, prompting one commentator to remark that "[a]ll hope of the adult American public to be able to read and see what it pleased was doomed." Inevitably, the stage was set for the case of *Miller v. California*, which elaborated and refined, yet did not repudiate, the *Roth* test. The Court in *Miller* reformulated the "standards which must be used to identify obscene material

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34. The Court stated:
    The District Court gave *Stanley* too wide a sweep. To extrapolate from Stanley’s right to have and pursue obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle *Roth*, the precise result that the *Stanley* opinion abjured. Whatever the scope of the “right to receive” referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here . . . dealings that *Roth* held unprotected by the First Amendment.


that a *State* may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment."

The Court reaffirmed the *Roth* holding that obscene material is not protected by the first amendment and held that 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 (citation omitted); (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.

Most importantly, the Court concluded that for purposes of the element of "contemporary community standards" the relevant community was a local and not a national one.39

The *Miller* test for the determination of obscenity became the leading standard in the obscenity area and was held applicable in *Paris Adult Theatre v. Slaton*,40 which was decided on the same day. In *Paris* the Court was presented with the issue of whether the exhibition or display of obscene materials to consenting adults in places of public accommodation could be constitutionally prohibited.41 The Court reasoned that "the

37. 413 U.S. at 20 (emphasis added).
38. Id. at 24. The "utterly without redeeming social value" test of *Memoirs* was consequently rejected as a constitutional standard. Furthermore, the Court stated that "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, as written or construed." Id. at 27.
39. Id. at 37. In *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913) the concept of "contemporary community standards" was first expressed by Judge Learned Hand where he stated that "the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived now." Id. at 121.

The trial judge in *Miller* instructed the jury that the relevant "community standards" in making the factual determination of obscenity were those of the State of California. The Supreme Court concluded that the trial court's failure to instruct the jury in the language of a "national standard" was not constitutional error. Although the Court in *Miller* explicitly stated that national standards were not to be used in state obscenity prosecutions, it failed to articulate and define the relevant community standard that was to be used in subsequent obscenity prosecutions.
40. 413 U.S. 49 (1973).
41. The trial judge dismissed the respondent's complaint on the theory that obscene films are constitutionally immune from state regulation when exhibited to consenting adults only with proper notice of their nature and reasonable protection against exposure to minors. The Georgia Supreme Court unanimously reversed on appeal and held that the films were obscene and their exhibition should have been enjoined. Id. at 53.
States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation."\(^2\) Therefore, the state of Georgia was not precluded from regulating the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided the applicable Georgia law met the first amendment standards set forth in Miller.\(^3\)

**Post-Miller Developments**

After the June 21, 1973 obscenity decisions, the Court remanded a number of cases pending on appeal with directions to apply the *Miller* standards. On remand a number of localities strictly applied the *Miller* test, resulting in a barrage of obscenity prosecutions that attracted considerable criticism from the press. The fear that the obscenity determination was left to the unbridled discretion of local jurors was faced by the Court in *Jenkins v. Georgia*.\(^4\) In *Jenkins*, the Court, after viewing the film "Carnal Knowledge," concluded that the film was not obscene under the constitutional standards of *Miller* and

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42. 413 U.S. at 69. The Court in *Paris* was unwilling to categorically state that conduct involving consenting adults only is always beyond state regulation. *Id.* at 68-69 (citation omitted).

43. The judgment was subsequently vacated and the case remanded to the Georgia Supreme Court for reconsideration in light of *Miller*. *Id.* at 70. Similarly, in *Kaplan v. California*, 413 U.S. 115 (1973), *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973), and *United States v. Orito*, 413 U.S. 139 (1973), which were decided the same day, the Supreme Court remanded the cases to the courts below for further proceedings not inconsistent with *Miller*. In *Kaplan*, the Court held that obscene material in book form, i.e., expression by words alone, was not entitled to first amendment protection. 413 U.S. at 118. In *12 200-Ft. Reels of Film*, the Court held that the importation of obscene material, even though the material was for the importer's private, personal use and possession, could be constitutionally prohibited (i.e., the right to possess obscene material in the privacy of the home creates no right to import it from another country). 413 U.S. at 128. In *Orito*, the Court held that federal regulation of interstate transportation of obscene material was not constitutionally forbidden merely because the transport was by private carriage or because the material was intended for the private use of the transporter. 413 U.S. at 143.


44. 418 U.S. 163 (1974).
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that the defendant’s conviction must be reversed, even though a state court jury had determined the film to be obscene. After Jenkins, it was theoretically possible that appellate courts, including the United States Supreme Court, would be required to continually engage in independent review of the constitutional fact of obscenity, according no finality to the Miller formulation.

As the preceding discussion makes clear, the Supreme Court’s treatment of obscenity issues has, since Roth, focused on the definition of what is obscene. In attempting to refine this focus, the Court has promulgated several tests to aid in the obscenity determination. The most permissive of these tests was propounded in Memoirs, which required that obscene material must be utterly lacking in redeeming social value.

In Miller, the current controlling formula, the Court moved away from the liberal Memoirs construction. Under Miller, an obscene work must, among other things, simply lack serious literary, artistic, political, or scientific value. While the more conservative Miller formula might potentially uphold

45. Id. at 155. The Court in Jenkins focused on the requirement of patent offensiveness, utilizing the examples given in Miller of what constitutionally meets the “patently offensive” element: “representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,” and “representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.” 413 U.S. at 25. After concluding that the film could not be found to depict sexual conduct in a patently offensive way under the Miller standard, the Court stated:

While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards.

418 U.S. at 161.

46. The Court’s holding was buttressed by Miller, where the court stated that “the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.” 413 U.S. at 25. The Court in Jenkins concluded that “[e]ven though questions of appeal to the ‘prurient interest’ or of patent offensiveness are ‘essentially questions of fact,’ it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is ‘patently offensive.’ ” 418 U.S. at 160. Justice Brennan, concurring, observed that the court’s decision would maintain the determination of obscenity on a case-by-case basis, with the result that the obscenity of any material is not certain “until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.” Id. at 164-65.

For a discussion concerning whether independent appellate review of findings of prurient interest and patent offensiveness is actually possible in federal obscenity prosecutions after Hamling, see notes 124-130 and accompanying text infra.
more state obscenity prosecutions, the language of the *Miller* opinion has posed constitutional problems for many state statutes regulating obscenity.

In *Miller*, the Court stated that state obscenity statutes must specifically define the types of sexual representation that are to be regulated. A number of courts applying these guidelines have struck down the state obscenity statutes as unconstitutional. The applicability of this "specific definition" requirement to federal obscenity statutes was left unanswered by the Court in *Miller*. This was a critical question, since expansive federal obscenity legislation provides a springboard for a significant number of obscenity prosecutions.

**Federal Obscenity Legislation**

**Mailing Obscene Matter**

The power of Congress to regulate the channels of interstate commerce to the extent of forbidding the use of those channels to promote or spread evil, immorality, or dishonesty is a well-settled principle. The congressional motive and purpose of a regulation that imposes conditions and requirements on those who use the channels of interstate commerce is not subject to constitutional restriction or judicial control. In

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47. 413 U.S. at 23-24.


49. However, in United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973), cert. denied, 418 U.S. 932 (1974), the court was faced with the question of whether 18 U.S.C. § 1462 (1976), which proscribes the interstate transportation of "obscene, lewd, lascivious, or filthy" materials, could "satisfy the *Miller* requirement that the applicable statute specifically define sexual conduct whose depiction or description is thereby restricted." Id. at 1155. The court relied on United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973), where the Court stated it was "prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller,*" and therefore concluded that the federal statute met the Miller specificity requirement by authoritative judicial construction.


51. See, e.g., United States v. Darby, 312 U.S. 100, 115 (1941).
short, "[w]hatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."  

The plenary power of Congress to prohibit the use of the channels of interstate commerce to promote or spread evil or immorality was extended to the regulation of obscene material. Pursuant to the postal power granted in Article I, section 8, clause 7, Congress enacted the obscenity statute currently codified at 18 U.S.C. § 1461.  

Section 1461, which generally makes punishable the mailing of material that is obscene, lewd, lascivious, filthy, or vile, is the focal point of this comment. In 1958, section 1461 was amended to bring it within the purview of 18 U.S.C. § 3237, which establishes the proper venue for offenses involving the use of the mails. It is the interaction of section

52. Id. at 115.

   Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . .
   Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
   Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

In 1865, Congress first enacted a law prohibiting the passage of obscene material through the mails. Act of March 3, 1865, ch. 89, § 16, 13 Stat. 507 (current version at 18 U.S.C. § 1461 (1976). As originally enacted, the statute provided:

That no obscene book, pamphlet, picture, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States; any person or persons who shall deposit or cause to be deposited, in any post-office or branch post-office of the United States, for mailing or for delivery, an obscene book, pamphlet, picture, print or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor, and, being duly convicted thereof, shall for every such offence be fined not more than five hundred dollars, or imprisoned not more than one year, or both, according to the circumstances and aggravations of the offence.

This statute was subsequently revised, rewritten and expanded in later years. See Act of June 8, 1872, ch. 335, § 148, 17 Stat. 302; Act of March 3, 1873, ch. 258, 17 Stat. 598; Act of July 12, 1876, ch. 186, 19 Stat 90.


1461 and section 3237 and the subsequent judicial interpretation of the impact of that interaction that has raised post-
Miller constitutional problems. As a result, it is important to examine the judicial construction of section 1461, as amended.

Pre-1958 Judicial Interpretation and Construction

In Roth v. United States, the constitutionality of the federal obscenity statute, before its venue amendment, was at issue. The Court in Roth considered the following constitutional questions:

whether the federal obscenity statute violates the provision of the First Amendment that “Congress shall make no law . . . abridging the freedom of speech or of the press . . . .

. . . whether these statutes violate due process, because too vague to support conviction for crime; whether power to punish speech and press offensive to decency and morality is in the States alone, so that the federal obscenity statute violates the Ninth and Tenth Amendments. The Court sustained the constitutionality of the statute and held that “obscenity was not within the area of constitutionally protected speech or press”; that section 1461, “applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited”; and “that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7.”

56. Id. at 479, 480 (footnotes omitted).
57. Id. at 485.
58. Id. at 492. After considering the appellant’s argument that the federal obscenity statute violated the constitutional requirement of due process since it did not provide reasonably ascertainable standards of guilt, the Court stated:

Many decisions have recognized that [the] terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process . . . . “[T]he Constitution does not require impossible standards”; all that is required is that the language “conveys sufficiently definite warning as to the proscribed content when measured by common understanding and practices . . . .” United States v. Petrillo, 332 U.S. 1, 7-8.

Id. at 491.
59. Id. at 493. The Court’s holding that the federal obscenity statutes does not unconstitutionally infringe upon rights reserved by the ninth and tenth amendments to the states was buttressed by Public Clearing House v. Coyne, 194 U.S. 497, 506-08 (1904).
1958 Venue Amendment

As originally enacted, section 1461 provided: "Whoever knowingly deposits for mailing or delivery anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both."\(^{60}\) In 1958, one year after Roth, section 1461 was amended by deleting "deposits for mailing or delivery" and substituting "uses the mails" so that the statute read: "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years . . . ."\(^{61}\) The 1958 amendment was intended to place the venue for federal obscenity prosecutions within the purview of 18 U.S.C. § 3237, which provides in pertinent part:

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.\(^{62}\)

As a result, mailing obscene matter in violation of section 1461 became a continuing offense and federal prosecutions could be commenced in the district where the matter was mailed, the district where the matter was received, or any district through which the matter passed. The scope of permissible venue for federal obscenity prosecutions was broadly expanded, and, as will be shown, federal prosecutors became armed with a powerful and dangerous device to select the forum most favorable to the government and chill the first amendment rights of the distributor.

Post-1958 Judicial Interpretation and Construction

The constitutionality of section 1461 as amended by the 1958 venue provision was at issue in Reed Enterprises v.

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\(^{62}\) 18 U.S.C. § 3237 (1976) (emphasis added). The mailing of obscene material thus became a continuing offense from the time of deposit to the time of delivery and throughout transit. United States v. Ross, 205 F.2d 619 (10th Cir. 1953), which held that the unlawful act proscribed in § 1461 was the "deposit for mailing and not a use of the mails which may follow such deposit," was in effect overruled.
Clark. In Reed the plaintiffs contended that the 1958 venue provisions:

constitute[d] a 'prior restraint' upon freedom of expression in violation of the First Amendment; deprive[d] persons . . . of their liberty and property without due process of law, in violation of the Fifth Amendment; and . . . deprive[d] persons of their right to a fair trial in a criminal prosecution guaranteed by the provisions of the Sixth Amendment.44

The Court rejected the plaintiffs' contentions and concluded that congressional power to designate proscribed offenses, here the use of the mails for transporting obscene materials, as continuing offenses does not violate the sixth amendment venue provision of the Constitution45 and the venue provision of section 1461 as amended in 1958 was constitutional.46 Thus, after Reed it was constitutionally permissible for federal prosecutors to forum shop and commence multiple criminal prosecutions for mailing obscene material in districts throughout the United States.

Roth and Reed, each of which upheld the constitutionality of section 1461, were reaffirmed by a number of courts in subsequent obscenity prosecutions.47 The federal obscenity statute, if applied according to the proper standard for judging obscenity,48 simply did not offend the constitutional guarantees of freedom of the press and due process. Subsequently, in Miller v. California, the Court reformulated the proper standard for

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64. Id. at 375, 380.
65. Id. at 380. The sixth amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ." U.S. Const. amend. VI.
66. Id. at 383. The Court initially recognized that first amendment rights, like other individual rights are not absolute. Id. at 381. The Court then noted that since the venue statute was applied only after obscene material had been mailed there was no direct "prior restraint" upon free speech. Id. The Court then concluded that the publishers' subjective fears of criminal prosecution, and pressures toward self-censorship, which are implicit in any criminal statute, were not materially increased by the multiple venue provisions, since the applicable obscenity standard was constitutionally sufficient and uniformly applied. Id. at 382.
68. See text accompanying note 27 supra.
identifying obscene material.\textsuperscript{69} The "utterly without redeeming social value test" of \textit{Memoirs} was rejected and local community standards were adopted for determining whether materials were obscene as a matter of fact. Whether section 1461, as a matter of constitutional law and federal statutory construction, incorporated this new standard for defining obscene material was left unanswered by \textit{Miller}.

In \textit{Hamling v. United States},\textsuperscript{70} decided one year after \textit{Miller}, the Court squarely faced the issue of whether the Constitution requires the use of national standards in federal obscenity prosecutions. The petitioners contended, paradoxically,\textsuperscript{71} that the standards in federal obscenity prosecutions must be national in order to avoid serious constitutional questions.\textsuperscript{72} The Court rejected the petitioners' contention and stated that "§ 1461 is not to be interpreted as requiring proof of the uniform national standards which were criticized in \textit{Miller}."\textsuperscript{73} The Court then concluded that section 1461 incorporates the \textit{Miller} standard of the average person applying local community standards, in defining obscenity.\textsuperscript{74}

\begin{footnotesize}
\textsuperscript{69} See text accompanying note 38 supra.
\textsuperscript{70} 418 U.S. 87 (1974).
\textsuperscript{71} The petitioners also contended that the trial court's instruction to the jury, which embodied the principle of "national standards" for judging obscenity, was improper under the standards laid down by \textit{Miller}. \textit{Id.} at 103.
\textsuperscript{72} \textit{Id.} The petitioners relied on \textit{Manual Enterprises, Inc. v. Day}, 370 U.S. 478 (1962), and \textit{United States v. Palladino}, 490 F.2d 499 (1st Cir. 1962), to support their contention that a "national standard" must be applied. In \textit{Manual Enterprises}, the Court stated that the proper test for judging obscenity under § 1461 was a national standard of decency. 370 U.S. at 488. In \textit{Palladino}, the Court applied the statutory construction used in \textit{Manual Enterprises}, thereby promoting the uniform application of federal legislation and avoiding the constitutional problems of due process and equal protection. 490 F.2d at 502-03.
\textsuperscript{73} 418 U.S. at 105. The Court's conclusion was primarily based on a combined analysis of \textit{Miller} and \textit{Paris Adult Theatre v. Slaton}, 413 U.S. 49 (1973). Since \textit{Miller} rejected a uniform national standard of obscenity as hypothetical and unascertainable and \textit{Paris} reaffirmed the rule that expert testimony on behalf of the prosecution as to the obscenity of the materials involved was not constitutionally required, the Court concluded that § 1461 does not require proof of a national standard, and that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required [obscenity] determination." 418 U.S. at 104-05.
\textsuperscript{74} 418 U.S. at 105. Since § 1461 was construed to incorporate the \textit{Miller} obscenity formula, the court in \textit{Hamling} held that statute satisfied the specificity requirement of \textit{Miller}. \textit{Id.} at 114.
\end{footnotesize}
After Hamling, jurors in federal obscenity prosecutions are permitted “to draw on knowledge of the community or vicinage from which they come in deciding what conclusion ‘the average person, applying contemporary community standards’ would reach in a given case.” For example, the Court in Hamling suggested that the jurors, in a case tried in the Southern District of California, would draw on the standards of that judicial district. However, the Court was quick to add that the district court would be free to admit evidence of standards existing in areas beyond the limits of that judicial district if it perceived that such evidence would assist the jury in making their determination.

Hamling has been reaffirmed by a number of courts in subsequent prosecutions involving the mailing of obscene material in violation of section 1461. For example, in United States v. Dachsteiner the Court stated that “contemporary community standards must be applied as a matter of statutory construction” in federal obscenity prosecutions. The district court, however, was not required to define the geographical limits of the community from which the jurors would draw their knowledge.

The Court’s latest pronouncement on the application of local standards to federal obscenity legislation is Smith v. United States. In Smith, the Court was presented with the issue “of the constitutional effect of state law, that leaves unregulated the distribution of obscene material to adults, on the determination of contemporary community standards in a prosecution under 18 U.S.C. § 1461 for a mailing that is wholly intrastate.” The Court reaffirmed Hamling and held that “a state law regulating distribution of obscene material could not

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75. Id. at 105.
76. Id. at 106.
77. See, e.g., United States v. Cutting, 538 F.2d 835 (9th Cir. 1976); United States v. McManus, 535 F.2d 460 (8th Cir. 1976); United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976); United States v. Dachsteiner, 518 F.2d 20 (9th Cir. 1975); United States v. Henson, 513 F.2d 156 (9th Cir. 1975); United States v. Miller, 505 F.2d 1247 (9th Cir. 1974).
78. 518 F.2d 20 (9th Cir. 1975).
79. Id. at 21. See United States v. Various Articles of Obscene Merchandise, 433 F. Supp. 1132, 1136 (S.D.N.Y. 1976), where the court stated that national standards may not be applied, even when a federal statute is involved.
80. 518 F.2d at 22.
82. Id. at 293. Since § 1461 was enacted under Congress’ postal power, the court in Smith noted that the statute reached intrastate as well as interstate mailings. Id. at 305.
conclusively define contemporary community standards” in a federal prosecution under section 1461, although such a law could be introduced as evidence of the community standard. As a result, in federal obscenity prosecutions the issues of appeal to prurient interest and patent offensiveness are to be determined by the jury in light of their understanding of contemporary community standards, even though the state statute regulating the distribution of obscene material does not proscribe dissemination of such material to adults.

The use of the local community standards test of Miller and the continuing offense doctrine of section 3237 in federal obscenity prosecutions is now firmly established. Federal prosecutors, armed with these devices, are permitted to select the forum most favorable to the government. As a result, defendants, particularly national distributors of potentially “obscene” material, have claimed that they are subject to unnecessary hardships and serious abuses. As will be shown, such hardships and abuses are extended to an unconstitutional degree when section 1461, as amended by the 1958 venue provisions, is construed as incorporating the Miller local community standards formulation. In short, the application of local community standards and the venue provisions of section 3237 to section 1461 yields a sum greater than the total of its parts and provides federal prosecutors with a dangerous tool that seriously threatens first amendment freedoms.

CONSTITUTIONAL INFIRMITIES IN THE APPLICATION OF LOCAL COMMUNITY STANDARDS TO FEDERAL OBSCENITY PROSECUTIONS

Introduction

The application of local standards to federal obscenity prosecutions mandated by Hamling arguably restricts the activities of distributors of allegedly obscene materials to the extent of interfering with constitutional freedoms. This section of the comment begins with an analysis of the Court’s holding in Hamling, continues with an examination of the effects of the local standards construction upon the constitutional freedoms of distributors and the public, and concludes with a look at two recent cases which illustrate the dangers inherent in the local standards construction as practically applied.
Hamling v. United States

As noted earlier, the Court in Hamling clearly expressed its opinion that the application of local community standards to federal obscenity legislation was constitutional. Despite the Court's firm edict, the application of local standards to federal obscenity prosecutions is arguably vulnerable to constitutional attack.

Prior to Hamling, the proper construction of section 1461, as amended in 1958, was that national standards in federal obscenity prosecutions were constitutionally required in order to avoid serious first amendment problems. Thus, in Manual Enterprises v. Day, the Court, in a plurality opinion, declared that the proper community standard for judging obscenity "under the federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." Furthermore, the Court stated that the 1958 venue amendments to section 1461, permitting criminal prosecution at the place of deposit, delivery, or intervening district, revealed no congressional purpose to make the proper standard for judging obscenity less than national.

In Jacobellis v. Ohio, the Court, also in a plurality opin-

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85. The court stated:

[the fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.

418 U.S. at 106.

86. The legislative history of § 1461 gives not the slightest indication that the application of local standards was contemplated. Indeed, the remarks of an early sponsor of the provision indicate that application of a national standard was intended:

"If there be a trial in this country or anywhere else of an obscene character — of that character that a report of it would corrupt the morals of the country generally — then I do not think the United States should provide the means to circulate this kind of literature in whatever paper or in whatever book it may be published." 4 Cong. Rec. 696 (1876) (remarks of Rep. Cannon) (emphasis added).

Id. at 143 n.1 (Brennan, J., dissenting).


88. Id. at 488.

89. Id. at 488 n.10. Justice Harlan noted that the adoption of a local standard for judging obscenity may have "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." Id. at 488.

ion, extended the rationale of Manual Enterprises to local obscenity prosecutions and held that the "constitutional status of an allegedly obscene work must be determined on the basis of a national standard."91 The Court stated that the application of a local standard would result in restricting the public's access to materials "which the State could not constitutionally suppress directly."92 The Court reasoned that the dissemination of a film or book to localities where it might be held not obscene would be significantly deterred if the film or book had been previously suppressed by the conservative standards of a different locality. Rather than risk additional criminal convictions, a national distributor would be induced to practice a form of indirect self-censorship.93

The construction of section 1461 established by Manual Enterprises and recognized by Jacobellis was subsequently overruled in Hamling, where the Court held that local community standards apply in federal obscenity prosecutions. The Court's rejection of the view that national standards must be applied in federal obscenity prosecutions was based largely on their interpretation of United States v. 12 200-Ft. Reels of Film,94 a case decided with Miller. Since 12 200-Ft. Reels of Film established that the standards for testing the constitutionality of state legislation regulating obscenity announced in Miller are applicable to federal legislation,95 the Court in Hamling held that section 1461 incorporates the average person, applying the local community standards test.96

91. Id. at 195. The Court found support for their interpretation of "contemporary community standards" in United States v. Kennerly, 209 F. 119 (S.D.N.Y. 1913), where Judge Learned Hand recognized that the concept would vary temporally but not geographically. See Comment, The Scope of Supreme Court Review in Obscenity Cases, 1965 DUKE L.J. 596, 598-99.
93. Id.
95. See note 73 supra.
96. The Court's holding in Hamling, however, can be criticized since the Court's application of 12 200-Ft. Reels was arguably beyond the scope of that case. Although the Court in 12 200-Ft. Reels stated that the obscenity standards announced in Miller were applicable to federal legislation, the Court there refrained from applying local community standards to federal legislation. The Court's textual reference to Miller concerning the standards applicable to federal legislation "cited the pages of Miller describing the elements of obscenity, appeal to prurient interest, portray sex in patently offensive way, lack of serious literary, artistic, political, or scientific value, not the pages discussing community standards." United States v. Palladino, 490 F.2d 499, 502 & n.8 (1st Cir. 1974). Thus, under 12 200-Ft. Reels, the Miller standards were applicable to federal legislation only for the limited purpose of properly construing the words "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" that are used to describe material subject to regulation. See 413 U.S. at 130 n.7.
Difficulties Inherent in Local Standards

The Hamling Court's extension of local standards to federal obscenity prosecutions not only lacks firm constitutional underpinning but it fails to take into account some basic realities inherent in federal obscenity prosecutions. The rights of the diverse local communities throughout the nation to protect their moral fiber does not justify the use of a varying local standard in federal obscenity prosecutions. Although the rights of the local communities to regulate obscene material and protect the general welfare may outweigh the rights of individuals to express themselves freely as guaranteed by the first and fourteenth amendments in local obscenity prosecutions, it is an entirely different matter when these rights are asserted to exist in federal obscenity prosecutions. Since the federal statute proscribing the mailing of obscene matter incorporates the Miller standard for defining obscenity, an essential element of such a crime is whether the material appeals to the prurient interest of the average person applying local community standards. By requiring the use of local standards in federal obscenity prosecutions the Court is, in effect, altering an element of the crime of mailing obscene matter and permitting juries within the ninety-four federal districts to reach different results when judging identical material. This modification raises serious issues under the equal protection clause of the federal Constitution, which demands that the elements of a crime be consistently applied throughout the nation.

A simple hypothetical illustrates the pitfalls of the Court's construction. Suppose that two Los Angeles distributors send identical allegedly obscene material to Memphis, Tennessee. Under the venue provisions of section 1461, the government could prosecute one distributor in Los Angeles and the other distributor in Memphis. Arguably, the distributor prosecuted in Memphis could be convicted while the distributor prosecuted in Los Angeles could be acquitted, depending on which

98. See note 105 infra.
99. See Fahringer & Brown, supra note 35, at 749 n.76; Schauer, Obscenity and the Conflict of Laws, 77 W. Va. L. Rev. 377, 396 n.86 (1975), where the author states that the applicable community standard "is a substantive element of the offense because virtually all obscenity statutes prohibit the transportation, distribution, or mailing of obscene material only, and according to Roth and Miller, matter is not obscene unless it offends some community's standards."
100. See Fahringer & Brown, supra note 35, at 749 n.76.
101. See id. at 749; Hunsaker, supra note 43, at 952-53.
district has the more conservative obscenity standard. Even though jurors in Los Angeles and Memphis could conceivably reach a different result if a national standard were applied, this would be due to the variable and diverse nature of the jury rather than a modification of an element of the crime, which is constitutionally inform.\textsuperscript{102} Therefore, in a prosecution for mailing obscene matter in violation of section 1461, “a national standard is constitutionally necessary for consistent application of each of the criminal elements of the offense.”\textsuperscript{103}

The Court in \textit{Hamling} disposed of the contention that the application of local standards to federal obscenity prosecutions was constitutionally infirm by stating that since “distributors may be subjected to . . . varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes, . . . there is no constitutional impediment to a similar rule for federal prosecutions.”\textsuperscript{104}

The Court failed, however, to recognize that the threat of prosecution for violation of state obscenity statutes has an entirely different effect on the national distributor than the threat of prosecution for violation of federal obscenity statutes.\textsuperscript{105} Although a national distributor may be restrained by the threat of conservative local standards in state obscenity prosecutions,\textsuperscript{106} “the power of the state to prosecute crimes that are essentially extraterritorial” is constitutionally limited.\textsuperscript{107} Under the venue amendment to the federal obscenity statute, the national distributor can be prosecuted in practically any district throughout the United States.\textsuperscript{108} As a result, federal prosecutors are able to continually commence criminal obscenity actions in the district with the most conservative obscenity

\textsuperscript{102} See Fahringer & Brown, supra note 35, at 749 n.76.
\textsuperscript{103} Id.
\textsuperscript{104} 418 U.S. at 106.
\textsuperscript{105} The Court in \textit{Hamling} also failed to recognize that “a federal statute defining a criminal offense should prescribe a uniform standard applicable throughout the country.” Smith v. United States, 431 U.S. 291, 312 (1977) (Stevens, J., dissenting); see notes 87-89 and accompanying text supra. Mr. Justice Harlan consistently distinguished between federal and state regulation of obscenity and stated that “the States are constitutionally permitted greater latitude in determining what is bannable on the scope of obscenity than is so with the Federal government.” Jacobellis v. Ohio, 378 U.S. 184, 203 (1964) (dissenting opinion). When the power of the federal government must be balanced against the limitations of the first amendment, the application of a uniform standard becomes more apparent. See id. at 194-95.
\textsuperscript{106} See text accompanying notes 92-93, supra.
\textsuperscript{108} See note 62 and accompanying text supra.
National distributors are then no longer subject to the varying obscenity standards of the local communities, but rather are subject to one conservative standard which has, in effect, been established on a national level. In short, the conservative local standard which has been superimposed on the nation as a whole in federal obscenity prosecutions more severely restrains the distributors' exercise of first amendment rights and more severely deprives the public access to published materials than does the use of a conservative local standard in state obscenity prosecutions.

Finally, the Court in *Hamling* relied on the dissenting opinion of Mr. Chief Justice Warren in *Jacobellis*, which was cited with approval in *Miller*, to dispose of the constitutional objections to the application of local standards to federal obscenity prosecutions. In *Jacobellis*, Mr. Chief Justice Warren stated:

> [W]hen the Court said in *Roth* that obscenity is to be defined by reference to "community standards," it meant community standards — not a national standard, as is sometimes argued. I believe that there is no provable "national standard," and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.\(^{111}\)

Since it would seemingly be futile to require the jury to make the obscenity determination on the basis of "hypothetical" and "unascertainable" national standards, the Court in *Hamling* concluded that section 1461 was not rendered unconstitutional because of the failure to apply a uniform national standard of obscenity in federal prosecutions.\(^{112}\)

Although theoretically a national standard could be a "many headed hydra, only ingenuously to be spoken of as within the competence of any expert short of Hercules," the

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109. This is especially true when federal prosecutors combine a charge of violation of the federal obscenity statute with a charge of conspiracy to violate that statute.


111. 378 U.S. at 200.

112. Although "the adversary system . . . has historically permitted triers of fact to draw on the standards of their community," *Miller* v. California, 413 U.S. at 30, the application of local standards to federal obscenity prosecutions cannot be justified when constitutional rights are transgressed.

Court in *Hamling* failed to perceive that the same difficulty inheres in a local standard. Under the Court's formulation, jurors in a federal obscenity case tried in the Central District of California are permitted to draw on their knowledge of the standards of that judicial district. Arguably, this judicial district, like a nation composed of many states, is too large and diverse to permit a reasonable articulation of an obscenity standard for the entire district. As a result, jurors under the *Hamling* formulation are compelled to apply a local standard that is nearly as abstract, hypothetical, and unascertainable as a national standard.

**First Amendment Problems Posed by Hamling**

The Court's approval of local community standards as applied in *Hamling* also raises serious first amendment prob-

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114. See Smith v. United States, 431 U.S. 291 (1977), where Mr. Justice Stevens stated that:

> [t]he conclusion that a uniformly administered national standard is incapable of definition or administration is an insufficient reason for authorizing the federal courts to engage in ad hoc adjudication of criminal cases... .

> The most significant reasons for the failure to define a national standard for obscenity apply with equal force to the use of local standards. Even the most articulate craftsman finds it easier to rely on subjective reaction rather than concrete descriptive criteria as a primary definitional source... . The diversity within the Nation which makes a single standard of offensiveness impossible to identify is also present within each of the so-called local communities in which litigation of this kind is prosecuted... . For surely, the standard for a metropolitan area is just as "hypothetical and unascertainable" as any national standard. For a juror, it would be almost as hard to determine the community standard for any large urban area as it would be to determine a national standard. Metropolitan areas typically contain some commercial districts devoted to the exploitation of sex, in bookshops, adult theaters, night-clubs, or burlesque houses; a juror might have seen respectable citizens frequenting the entertainments of such areas and therefore conclude that the community standard was one of "anything goes." Another juror might predicate his standard on residential enclaves which include nothing even closely resembling an adult bookstore, and decide that such an area reflects the proper standard. Under that test, the juror would probably conclude that any magazine sold from under the local drugstore counter must be obscene because its presence on the magazine rack might offend customers. A third juror might try to apply a hybrid standard.


115. See text accompanying notes 75-76 *supra*; United States v. Dachsteiner, 518 F.2d 20, 22 (9th Cir.), cert. denied, 421 U.S. 954 (1975).

lems. As outlined previously, federal obscenity prosecutions under section 1461, with its accompanying venue provision, are permissible in any district in which the obscene material has been mailed or received or in any district through which the obscene material has passed. When the availability of forum shopping is viewed in conjunction with the Court’s local standards construction, it becomes readily apparent that “the guilt or innocence of distributors of identical materials mailed from the same locale can . . . turn on the chancy course of transit or place of delivery of the materials.”

As a result, national distributors of potentially obscene material must not only attempt to discern the virtually unascertainable community standards of every locality into which the material may wander, but are also faced with the risk, expense, and hardship of prosecution in remote districts. Under this combination of factors, national distributors must inevitably be unconstitutionally restrained in the exercise of their first amendment rights.


Although the continuing offense doctrine permits prosecutions in any district through which the obscene material has passed, federal prosecutors have been disinclined to bring actions in these districts. Arguably, prosecutions brought in these intermediate districts raise “substantial constitutional considerations” in regard to appropriate venue. See Schauer, supra note 99, at 392.


In answer to the argument that the application of local standards to obscenity prosecutions would have a chilling effect on the dissemination of constitutionally protected materials, the Court in Miller stated that:

[The use of national standards . . . necessarily implies that materials found tolerable in some places, but not under the “national” criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes . . . .

413 U.S. at 32 n.13. However, many commentators have attacked the Court’s response as “weak” and “merely negative in character.” See Hunsaker, supra note 43, at 926; 40 BROOKLYN L. REV. 442, 449 (1973); 26 U. FLA. L. REV. 324, 328 (1974). “It is not enough for the court to say only that local standards are no worse than national standards when the difference in application of standards could produce altered effects on fundamental first amendment freedoms.” Id. at 328.
The plight of the national distributor is further compounded by the fact that the prosecution is not constitutionally required to introduce expert testimony as to obscenity if the alleged obscene material has been placed into evidence.\textsuperscript{121} Furthermore, even if such expert testimony is produced (e.g., by the defense), the trier of fact is not bound to give any weight to such evidence in making the obscenity determination.\textsuperscript{122} As a result, national distributors are faced with the implicit threat that the obscenity judgment may be the result of the subjective moral outlook and personal upbringing of local jurors, who are largely insensitive to the basic values of freedom of expression.\textsuperscript{123}

The chilling effect caused by the myriad of local standards and the exclusion of expert testimony cannot be obviated by the safeguard of independent appellate review, which is essential to the "preservation of freedom of expression."\textsuperscript{124} Although the serious value element of the \textit{Miller} obscenity formulation is presumably determined on the basis of a national standard,\textsuperscript{125} the prurient interest and patent offensiveness factors are determined by applying local community standards. These standards present serious obstacles to meaningful appellate review in federal obscenity prosecutions due to the ambivalent

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One commentator has stated that:

\textquote[One commentator has stated that:] {[the consequences of the Paris decision could be shattering. Failure to provide any proof on the essential elements of obscenity is an open invitation for jurors to confuse personal distaste with prurient appeal. It also encourages jurors to become puritanical and to suppress materials without any objective basis . . . . The elimination of the need for any proof on the issue of obscenity (except the publication itself) is bound to launch juries on a rampage of legal sorcery that, in the words of Klaw, may put the Salem witch trials to shame.}

Fahringer & Brown, \textit{supra} note 35, at 747. Similarly, the Court in United States v. Klaw, 350 F.2d 155, 170 (2d Cir. 1965), stated that unless proper proof was adduced, "it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured."

\textsuperscript{124} Lockhart & McClure, \textit{supra} note 123, at 119.
\textsuperscript{125} Although the court in \textit{Miller} did not explicitly state that the serious value element of the obscenity formulation was to be determined by applying national standards, most commentators have so held. See, e.g., Lockhart, \textit{Escape From The Chill of Uncertainty: Explicit Sex and the First Amendment}, 9 GA. L. REV. 533, 552-55 (1975).
nology of the relevant community. In *Hamling*, the court stated that jurors are permitted “to draw on knowledge of the community or vicinage from which they come,”128 yet a district court is free to admit evidence of standards existing in areas beyond the limits of that particular judicial district if it perceives that such evidence would assist the jury.127 As a result, the appellate courts may be ignorant of the specific community whose standards were applied since no particular geographic community need be specified by the district court, and, if a particular community was so specified, the jurors are “free to apply their own conceptions of community mores.”128 For an appellate court, which on the one hand is unable to ascertain the specific community standard and on the other hand is unable to compare the jury’s findings with the weight of the evidence,129 direct review of findings of prurient interest and patent offensiveness becomes exceedingly difficult.130

The power to select venue and apply local standards in criminal obscenity prosecutions not only induces national distributors to engage in self-censorship but also abridges the first amendment rights of the public at large, by restricting their access to published and possibly protected material. As Justice Brennan noted in his *Hamling* dissent, the application of local standards to federal obscenity prosecutions and the resulting self-censorship “would tend to restrict the public’s access to forms of sexually oriented materials which the United States could not constitutionally suppress directly . . . a censorship . . . hardly less virulent for being privately administered, for through it, the distribution of all sexually oriented materials, both obscene and not obscene, would be impeded.”131 Therefore, in many localities the public will be “protected” from sexually oriented materials to which the government could not otherwise constitutionally deny them access.

126. 418 U.S. at 105.
127. *Id.* at 106.
129. See text accompanying note 122 supra.
131. 418 U.S. at 144 (Brennan, J., dissenting).
Vagueness Problems Posed by Hamling

The Supreme Court has traditionally "taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values." Therefore, individuals have a right to notice of that conduct which is proscribed before criminal proceedings can be commenced. Many commentators have suggested that statutes which proscribe the mailing or distribution of obscene material fail "to provide adequate notice of the types of materials that are prohibited" due to the vagueness of the obscenity concept as defined by Miller. As a result, distributors have been induced to engage in self-censorship by suppressing the distribution of protected as well as unprotected materials.

The dangers of an inherently vague obscenity concept to the right of free speech are exacerbated when undefined local community standards are applied in making the obscenity determination. Since local community standards form an integral part of the obscenity definition in prosecutions under the federal statutes, it becomes imperative for the distributor to know the boundaries of the relevant community.

However, as has previously been noted, the relevant community for federal obscenity prosecutions is largely undefined, making the distributor's task of determining the confines of the appropriate community virtually impossible. When this relevant community problem is viewed in conjunction with the well-grounded fears that the obscenity determination may be

132. Marks v. United States, 430 U.S. 188, 196 (1977); see United States v. Harris, 347 U.S. 612 (1954), where the court stated:

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Id. at 617.


134. See, e.g., New Prosecutorial Techniques, supra note 43, at 198-200; Lockhart, supra note 125.

135. See Lockhart, supra note 125, at 559, where the author states:

The vague standard suffices to make those who deal in material that "may" be covered aware that they "may" be prosecuted, but it fails to provide adequate means for determining in advance of final adjudication, even with advice of counsel, which materials are subject to the law and which ones are constitutionally protected, thereby discouraging the distribution of all material that might possibly be unprotected — including constitutionally protected materials.

136. See text accompanying notes 126-28 supra.
made according to the subjective and personal outlook of the jury, it is evident that a distributor involved in a federal obscenity prosecution has no notice of that conduct which is proscribed and the statute, therefore, seems impossibly vague. Additionally, the vagueness argument clearly supports the proposition that the statute has a chilling effect on the distribution of protected material.

An examination of the Court's opinion in Hamling thus reveals that the application of local standards to federal obscenity prosecutions theoretically has paved the way for abusive prosecutorial forum shopping, definitional inconsistency in the elements of a federal statute, adverse chilling of first amendment freedoms, and legitimation of an unconstitutionally vague statute. Unfortunately, the theoretical difficulties presented by Hamling have emerged and withstood challenge in two recent federal obscenity prosecutions.

Practical Application of Hamling: Emergence of the Dangers Inherent in the Local Standards Construction

Smith v. United States

In Smith v. United States, the United States Supreme Court concluded that a state law which left unregulated the distribution of obscene material to adults could not conclusively define contemporary community standards in a federal obscenity prosecution under section 1461. In reaching this conclusion, Smith has compounded the constitutional infirmities inherent in Hamling's application of local standards to federal obscenity legislation.

In Smith, a distributor mailed various materials totally within the state of Iowa, where the dissemination of obscene materials to adults was not made criminal or even proscribed by the applicable state regulations. Although the distributor had not violated any state laws, he was indicted under section

137. See notes 121-30 and accompanying text supra.
139. 431 U.S. at 309 (Powell, J., concurring).
140. Id. at 293-96. The Iowa obscenity legislation, effective July 1, 1974, and applicable to petitioner, "made it a 'public offense' to disseminate obscene material to minors (defined as persons 'under the age of eighteen')." Id. at 294. In 1976, the Iowa legislature enacted a new code, which generally revised the state's "substantive criminal laws." The new law, effective January 1, 1978, regulates to a limited extent, conduct aimed at adults. Id. at 295.
1461 for mailing obscene materials. The jurors, who were instructed to draw on their own knowledge of the views of the average person in the community and to consider the state law as evidence of the community standard, found the distributor guilty. The Supreme Court affirmed the distributor's conviction and held that the statute was not unconstitutionally vague as so applied.

Flowing directly from the Court's decision in Hamling, Smith draws an ominous conclusion for the distributors of allegedly obscene materials: a distributor can no longer rely on state regulation as an accurate reflection of the community standard. Thus, Smith not only ignores the vagueness problem inherent in the "local standard" but also eliminates state regulations as a conclusive source for determining what conduct is proscribed. In the end, a distributor faced with an undefinable community standard may feel forced to forego the exercise of his constitutional right to publish, or circulate possibly protected material.

Some commentators have suggested that "[t]he protection of first amendment rights will be greatly enhanced by interpreting community standards to mean state-wide stan-

141. 431 U.S. at 296.
142. Id. at 297-98.
143. Id. at 309.
144. In Smith, the district court observed that "Iowa's decision not to regulate distribution of obscene material did not mean that the people of Iowa necessarily 'approve[d] of the permitted conduct' ... whether they did was a question of fact for the jury." Id. at 298. In addition, the Supreme Court stated that:
the significance of Iowa's decision in 1974 not to regulate the distribution of obscene materials to adults is open to question. Iowa may have decided that the resources of its prosecutors' offices should be devoted to matters deemed to have greater priority than the enforcement of obscenity statutes. Such a decision would not mean that Iowa affirmatively desired free distribution of those materials; on the contrary, it would be consistent with a hope or expectation on the State's part that the Federal Government's prosecutions under statutes such as § 1461 would be sufficient for the State's purposes. The State might also view distribution over the counter as different from distribution through the mails. It might conclude that it is easier to keep obscene materials out of the hands of minors and unconsenting adults in retail establishments than it is when a letter or package arrives at a private residence. Furthermore, the history of the Iowa law suggests that the State may have left distribution to consenting adults unregulated simply because it was not then able to arrive at a compromise statute for the regulation of obscenity.
Id. at 306. Although the significance of Iowa's decision not to regulate the distribution of obscene material may indeed be open to question, this does not justify the application of unascertainable local standards to federal obscenity prosecutions when first amendment rights are implicated.
The application of statewide or districtwide standards to federal obscenity legislation arguably would ease the chilling effect that obscenity statutes have on speech, since distributors would not be required to guess at a multitude of undefinable local standards. Adoption of a statewide or districtwide standard has the following additional advantages: (1) it avoids administrative problems and encourages uniformity; (2) it reduces litigation since a judgment rendered under a statewide or districtwide standard, rather than a local standard, would have broader estoppel effect; (3) it provides fair warning to the distributor of the relevant community by which to gauge his conduct; and (4) it makes appellate review more plausible. Furthermore, if it is determined that the appropriate community is the state or federal district, the courts could require that expert testimony be required to prove the community standards, thus reducing the possibility that jurors would impose their own personal standards.

146. See Comment, Obscenity 1973, supra note 35, at 170.
147. See New Prosecutorial Techniques, supra note 43, at 205.
149. See A Step Forward, supra note 43, at 797.
151. See In re Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968), cert. denied, 395 U.S. 910 (1969). The court in Giannini applied statewide standards to an indecent exposure prosecution and required the use of expert testimony to prove the community standards. The court stated:

Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards. . . . To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror.

Id. at 574-75, 446 P.2d at 543, 72 Cal. Rptr. at 663. However, after Giannini, the legislature adopted California Penal Code § 312.1 which provides, in part, that "neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter or live conduct which is the subject of any . . . prosecution" for violation of Chapter 7.5 (obscene matter). CAL. PENAL CODE § 312.1 (West 1978). Additionally, the United States Supreme Court decided Kaplan v. California, 413 U.S. 115 (1973), which held that expert testimony was not constitutionally required when the alleged obscene material is placed into evidence.
United States v. Peraino

A vague obscenity standard not only induces self-censorship of protected materials among distributors but also provides "for the 'self-appointed watch-guards' of the moral fiber of our society a convenient justification for instigating obscenity 'witch hunts,' harassing constitutionally protected material in the process." In September, 1975, after a massive four year federal investigation, a series of ten obscenity trials was commenced in the Western District of Tennessee. Larry Parrish, the assistant United States attorney and "self-appointed watch-dog of the moral fiber," had indicted more than sixty persons and corporations on the basic charge of conspiracy to distribute obscene material in interstate commerce in violation of 18 U.S.C. § 1465.

In United States v. Peraino, one of the Memphis cases, the jury held that the movie "Deep Throat" was obscene under local community standards and that the film's male lead (Harry Reems), its producers, and local distributors were guilty of conspiracy to distribute an obscene film in interstate commerce. Although Reems was granted a new trial and his conspiracy conviction was subsequently reversed, use of the conspiracy doctrine in federal obscenity prosecutions poses a serious threat to the exercise of the constitutionally protected right of free speech.

The federal conspiracy statute provides in pertinent part:

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155. Id.
157. For an excellent analysis and criticism of the use of the conspiracy doctrine in federal obscenity prosecutions, see Mayer & Mayer, supra note 156.
158. 18 U.S.C. 371 (1976). Under the federal statute, "[t]he conspiracy is complete on the forming of the criminal agreement, and the performance of at least one overt act in furtherance thereof." Hall v. United States, 109 F.2d 976, 984 (10th Cir. 1940) (emphasis added); see Pinkerton v. United States, 151 F.2d 499 (5th Cir. 1945), aff'd, 328 U.S. 640 (1946); Hunnicutt v. United States, 149 F.2d 888 (5th Cir.), cert. denied, 326 U.S. 757 (1945). At common law, the conspiracy is complete when the defendants enter into the proscribed agreement, and there is no requirement that the prosecution prove in addition to the agreement an overt act pursuant to the agreement. See, e.g., Hyde v. United States, 225 U.S. 347, 359 (1912); Deacon v. United States, 124 F. 2d 352, 357-58 (1st Cir. 1941); United States v. Grunewald, 162 F. Supp. 626, 628 (S.D.N.Y. 1958).
If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Although federal prosecutors have often combined a charge of violation of the federal obscenity statutes with a charge of violation of the federal conspiracy statute, United States v. Peraino marked the first time that an actor was convicted of conspiracy to distribute an obscene film in interstate commerce. Conceivably, the extension of the conspiracy charge to actors, as well as authors, editors, cameramen, etc., who were not involved with the selling, distribution or transportation of the material, will further chill the exercise of first amendment rights, when viewed in conjunction with Hamling's local standards construction and the potential abuses inherent in the conspiracy doctrine.

For example, defendants charged with conspiracy to distribute obscene material in interstate commerce may be prosecuted in the district where the criminal agreement was formed or in any district where any of the overt acts pursuant to the agreement were committed. This broad conspiracy venue doctrine permits federal prosecutors to engage in the same indiscriminate forum shopping that is available under section 1461, since criminal prosecutions may be commenced in any district where an individual conspirator has committed any overt act, regardless of the act's significance to the common


160. In United States v. Luros, 243 F. Supp. 160 (N.D. Iowa 1965), "management, personnel, editors, photographers and authors," who were not involved with the sale or distribution of the alleged obscene material, were found guilty of conspiracy to violate the obscenity statutes. Venue, supra note 117, at 371 & n.79.

161. In Peraino it was undisputed that "Reems' status in the production of the film was that of a salaried employee... Reems did not receive any profits from the film, nor did he participate in the film's editing, distribution or promotion. It is of particular note that Reems had no role in the shipment of the film in interstate commerce or in the selection of locations in which the film was to be shown." Mayer & Mayer, supra note 156, at 387 (footnote omitted).


objective. Federal prosecutors are thus able to select among forums where the obscene material has either been mailed or where any individual conspirator has committed any overt act in order to find the forum most favorable to the government. Again, this in effect imposes the most conservative local obscenity standard on the nation as a whole.  

As a result, actors, authors, editors, cameramen, etc., who are faced not only with the possibility of criminal prosecution in a jurisdiction with a conservative obscenity standard, but also with the burden of a trial in an inconvenient forum, will refrain from exercising their first amendment rights in order to avoid potential prosecution.

The problems engendered by invoking the conspiracy doctrine in federal obscenity prosecutions are particularly acute where there are multiple indictments and joint trials. In multidefendant cases the ability of the federal prosecutor to institute criminal proceedings in a forum most favorable to the government is greatly enhanced since the overt acts of all defendants can be considered in making the venue determination.

Furthermore, joint trials primarily “serve the convenience of the prosecutor and the court” and may subject defendants to serious abuse. For example, the following dangers are inherent in any multidefendant conspiracy trial: (1) a defendant whose participation was relatively minor may be compelled to endure a rather lengthy trial at substantial expense and inconvenience; (2) a jury may overlook the duty to determine the sufficiency of the evidence as to each defendant (i.e., guilt by mere association); (3) a substantial amount of inadmissible evidence against one defendant may be introduced against others; and (4) a co-defendant may assert a defense that is antagonistic to that of another defendant. Under this combination of factors, it is evident that a multidefendant con-

164. See generally Mayer & Mayer, supra note 156, at 370-71.
165. The burdens and hardships imposed on a defendant by trial in a remote district generally include the following: (1) interference with the defendant’s business activities and family responsibilities; (2) substantial travel and living expenses; (3) representation by counsel in a strange and new community. See id. at 371.
166. See generally Johnson, supra note 162, at 1179.
167. Id. at 1172.
168. Id.
169. See id.
170. Id.
171. Id. at 1173.
sporadic trial "poses an extreme threat to vital first amendment rights."\textsuperscript{172}

Furthermore, a defendant whose joinder was initially proper under Federal Rule of Criminal Procedure \textsuperscript{173} may find it difficult to avoid such joinder under federal joinder law.\textsuperscript{174} Although a defendant at a joint trial may be faced with the dangers previously mentioned,\textsuperscript{175} such a defendant is not automatically entitled to a severance under Federal Rule of Criminal Procedure 14.\textsuperscript{176} If the trial court, in its discretion, decides not to grant the defendant's motion for a severance, the defendant may be forced to utilize Federal Rule of Criminal Procedure 21,\textsuperscript{177} which controls motions for change of venue.

Federal Rule of Criminal Procedure 21 (b) provides that "[f]or the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings . . . to another district."\textsuperscript{178} The rule, which "interjects into criminal law an analogue to the civil doctrine of forum non conveniens,"\textsuperscript{179} was promulgated to safeguard defendants from the physical and financial hardship of prosecutions in remote districts.\textsuperscript{180} Although the government's

\textsuperscript{172} Mayer & Mayer, supra note 156, at 372.

\textsuperscript{173} Fed. R. Crim. P. 8 provides in part:

\textsuperscript{174} See Johnson, supra note 162, at 1173.

\textsuperscript{175} See notes 165 and 168-71 and accompanying text supra.

\textsuperscript{176} Fed. R. Crim. P. 14 provides in part:

\textsuperscript{177} Fed. R. Crim. P. 21.

\textsuperscript{178} Id.

\textsuperscript{179} United States v. McManus, 535 F.2d 460, 463 (8th Cir. 1976), cert. denied, 429 U.S. 1052 (1977).

\textsuperscript{180} See, e.g., United States v. Luros, 243 F. Supp. 160, 175 (N.D. Iowa 1965). Prior to the establishment of the Federal Rules of Criminal Procedure, there was no venue transfer provision.
choice of venue is ordinarily presumed to be proper, the courts have discretionary power to transfer cases under the rule.\textsuperscript{181}

Rule 21 (b), however, cannot remedy the chilling effect produced by the application of local standards and the conspiracy doctrine to federal obscenity prosecutions brought in the districts where the allegedly obscene materials were distributed. Federal courts have consistently refused to transfer obscenity prosecutions under Rule 21 (b) which were brought in the district where the alleged obscene material was distributed.\textsuperscript{182} For example, in United States v. Elkins,\textsuperscript{183} the defendants were indicted for mailing alleged obscene movies from California to Iowa.\textsuperscript{184} Chief Judge Edward J. McManus of the Northern District of Iowa granted the defendants' motion for change of venue pursuant to Rule 21 (b) and the case was transferred to the Central District of California.\textsuperscript{185} The California District Court dismissed the indictment since the jury could not determine the contemporary community standards of the Northern District of Iowa, which were applicable under the guidelines established by Hamling.\textsuperscript{186} The defendants were subsequently reindicted in the Northern District of Iowa, on essentially the same charges as in the previous indictment.\textsuperscript{187} Judge McManus once again granted the defendants' motion for change of venue.\textsuperscript{188} The government petitioned the court of appeals for a writ of mandamus, asserting that the district court erred in granting the motion for change of venue.\textsuperscript{189} The court of appeals in United States v. McManus\textsuperscript{190} held that the trial court's transfer of the case to the defendants' district of residence was an abuse of discretion since Hamling mandated that obscenity vel non must be determined according to local

\begin{thebibliography}{99}
\bibitem{183} United States v. Elkins, No. CR 74-4015 (N.D. Iowa 1974).
\bibitem{185} Id. at 462.
\bibitem{186} Id.
\bibitem{187} Id.
\bibitem{188} Id.
\bibitem{189} Id.
\end{thebibliography}
community standards. The Court concluded that the government's choice of forum in postal obscenity cases must not be disturbed unless the defendant has introduced strong evidence of "intentional overreaching" by the government. The ameliorating effect of Rule 21 (b) in postal obscenity prosecutions is thus largely illusory.

In sum, applying the conspiracy doctrine to federal obscenity prosecutions "appears particularly ominous in view of the chilling effect such prosecutions have upon free expression." Under a charge of conspiracy to violate the federal

191. Id. at 461, 464. In McManus, the court's refusal to transfer the case was largely influenced by their reading of the legislative history of § 1461, particularly the 1958 venue amendments, which indicated Congress' intent to allow the district to which the alleged obscene material was mailed to institute the criminal prosecution. 535 F.2d at 463. However, the court was quick to add that:

[In addition to the specific intent demonstrated by Congress to allow the recipient district to prosecute, we are faced with the fact that by its decisions in Hamling and Miller, the Supreme Court has determined that one of the constitutional standards used to determine obscenity is local rather than national in character. This requirement, coupled with the decision of the government to bring this indictment in Iowa, mandates that the obscenity vel non of these materials must be determined according to the Iowa contemporary community standards.

Id. at 464.

Whether federal courts would refuse to transfer prosecutions for conspiracy to violate the obscenity statutes under Rule 21(b) which were brought in a district where only an overt act in furtherance of the criminal agreement has been committed has not yet been answered. Although the legislative history of § 1461 played an important part in the court's consideration and districts where only an overt act in furtherance of the conspiracy has been committed have not been harmed by the receipt of allegedly obscene materials, the court's statement in McManus that the local standards of the district where the prosecution is brought must be applied under Hamling seems to mandate the use of the local standards of the district where the conspiracy prosecution is brought, even though the alleged obscene material was never mailed into that district. For an interesting analysis of the conflict of law problems posed by the application of local standards and the conspiracy doctrine to federal obscenity prosecutions, see Schauer, supra note 99, at 399-400.

192. 535 F.2d at 464. However, in a multidefendant prosecution for conspiracy to violate the obscenity laws, where the local standards of the district in which the conspiracy prosecution is brought must apparently be applied even though the allegedly obscene materials were never mailed into that district, a distributor may be held to "the standards of a community that are not relevant to his actions," since the scope of the conspiracy for that particular co-conspirator may not have encompassed the district where the conspiracy prosecution was brought. Schauer, supra note 99, at 400. As a result, when a conspiracy prosecution is brought in a district where only an overt act in furtherance of the criminal agreement was committed and no material was actually distributed in that district, a co-conspirator may justifiably claim that the federal government has intentionally overreached the boundaries of proper jurisdiction and thereby overcome the government's choice of forum. A prosecution for conspiracy to distribute obscene materials nationwide is arguably unjustifiable since the material may or may not be legally obscene depending on where it is distributed.

obscenity statutes, actors, authors, cameramen, producers, etc., can be prosecuted for the distribution of obscene material in a jurisdiction with a conservative obscenity standard, even though they were not involved with the material's distribution and the material was never shipped into that jurisdiction. The application of the conspiracy doctrine to federal obscenity prosecutions compounds the constitutional infirmities inherent in *Hamling*'s local standards construction and makes the need for reassessment of that opinion all the more pressing.

**CONCLUSION**

It is now well established that the power vested in Congress to establish post offices and to regulate the entire postal system of the nation may be constitutionally exercised to exclude objectionable matter from the United States mails. It is likewise well established that obscenity is not within the area of constitutionally protected speech or press. However, as stated by Mr. Justice Brandeis, "the postal power . . . is subject to the limitations of the Bill of Rights . . . Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional."194 The application of local standards and the continuing offense doctrine of section 3237 to the postal obscenity statutes arguably transgresses first amendment rights; the distributor is induced to engage in "debilitating" self-censorship and the public is denied access to sexually oriented materials.

The Court's local standards construction in *Hamling* has essentially backfired. Since distributors can be prosecuted in districts with the least tolerant obscenity standards, the effect has been to establish on a national level conservative locally derived rules concerning what material can be distributed. Although a national standard may be viewed as an illusory concept, the Constitution mandates that a national standard be applied to federal obscenity prosecutions to adequately safeguard the first amendment rights of the distributor and the public.

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