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Jef I. Richards

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# ARTICLES

## OBSCENITY AND FILM: AN EMPIRICAL DILEMMA\*

By *Jef I. Richards* \*\*

*It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.*<sup>1</sup>

—Oliver Wendell Holmes

In just over three hundred years<sup>2</sup> the legal concept of “obscenity” has progressed, or regressed, to the point that a Supreme Court Justice can precisely define it by the simple statement, “I know it when I see it.”<sup>3</sup> The severe problems inherent in defining a concept so abstract and dynamic as obscenity have recurringly resulted in modifying the legal standards concomitantly with public opinion, to the point that the courts are now required to consider public opinion before rendering an opinion in an obscenity case.<sup>4</sup> As a result, a comment made by a legal scholar in

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\*\* The author is currently a doctoral candidate in Mass Communications at the University of Wisconsin-Madison, and holds a bachelor of science degree in photography from the Rochester Institute of Technology (1977), as well as a juris doctor from Indiana University-Bloomington (1981). He is licensed to practice law in the states of Indiana and Colorado.

1. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). The case involved the question of allowing a copyright on pictures used as advertisements. While not pertaining explicitly to obscenity, the statement is relevant to this subject matter, though the judiciary has never acknowledged this position when approaching a question of first amendment protection for visual erotica.

2. *Le Roy v. Sr. Charles Sidney*, 1 Sid. 168, pl. 29 (K.B. 1663); also reported as *Sir Charles Sydlyes' case*, 1 Keble 620, 83 Eng. Rep. 1146 (1663). This, the first known case of obscene *conduct*, involved the arrest of Sir Charles Sidney for having appeared on a balcony in London unclad and intoxicated, from whence he hurled bottles of “offensive liquor” on passers-by. The concept of obscene *literature* was not recognized by the courts until 1727, in *Dominius Rex v. Curl*, 2 Strange 788, 93 Eng. Rep. 849 (1727).

3. This oft-quoted statement appears in the concurring opinion of Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

4. *Roth v. United States*, 354 U.S. 476, 489 (1957), and *Miller v. California*, 413 U.S. 15, 33-34 (1973), require “applying contemporary community standards.” See also *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964); *United States v. Klaw*, 350 F.2d 155, 164 (2d Cir. 1965); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Kaplan v. California*, 413 U.S. 115, 121 (1973).

1938 still adheres: "There is no unity in describing what is obscene literature, or in prosecuting it. There is little more than the ability to smell it."<sup>5</sup> Given this obscurity of approach to regulation, it seems unlikely that all varieties of communication are equally subject to censorship.

Pornography is available in a myriad of packages, including poetry,<sup>6</sup> books,<sup>7</sup> movies,<sup>8</sup> plays<sup>9</sup> and even phonograph records.<sup>10</sup> Though the first amendment stands like Cerberus guarding the gates of free speech, each of these forms is subject to censure. It appears probable, however, that since each capitalizes on a different medium of idea exchange, its impact on a listener or viewer may very well be unique.<sup>11</sup> These differences have little bearing on whether or not any one particular form is chosen as a vehicle for political, philosophical, or some other valuable and constitutionally protected form of speech in any given instance, and each is therefore equally deserving of the protections afforded the others.<sup>12</sup> The primary questions addressed are 1) is there a different standard for visual communications vis-a-vis verbal communications<sup>13</sup> and 2) if so, what steps can be taken to remedy the inequities which may result from these differing standards? In order to answer these questions we must first consider the background of regulatory efforts directed at pornographic materials.

5. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 47 (1938).

6. *Kois v. Wisconsin*, 408 U.S. 229 (1972).

7. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413 (1966).

8. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

9. *P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757 (D. Mass.), *stay denied*, 398 U.S. 916 (1970).

10. *United States v. Alpers*, 338 U.S. 680 (1950).

11. For an overview of how the varying senses receive signals from stimuli outside the human physiological system, see H.S. BARTLEY, *PERCEPTION IN EVERYDAY LIFE* (1972). A large body of literature discusses how the several senses process information, but the magnitude and complexity of this topic puts it outside the realm of this article.

12. It should be noted that even "actions" can constitute protected "speech," such as sit-ins or wearing black armbands in a protest. See, e.g., *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Stromberg v. California*, 283 U.S. 359 (1931); *Brown v. Louisiana*, 383 U.S. 131 (1966); *United States v. O'Brien*, 391 U.S. 367 (1968); *Smith v. Goguen*, 415 U.S. 566 (1974).

13. The present discussion, for the sake of brevity, has been confined to movies and books as representatives of the visual and verbal classes of communications. These were chosen, in part, because more litigation and explicit commentary has arisen in these contexts. Statements in those cases and quoted herein, however, might be argued in the instance of still pictures as well as their moving counterparts, with the exception that still photographs lack the added dimensions of sound and motion. Live theater could certainly be equated to film. Another example deals with indecency standards under the jurisdiction of the Federal Communications Commission. See Roudner, *If You Can't Say It, Why Can You Show It? An Open Letter to the FCC*, 9 GOLDEN GATE L. REV. 617 (1978-79).

## OBSCENITY: AN EXCEPTION TO THE FIRST AMENDMENT

The first amendment of the United States Constitution states without qualification that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." This absolute statement of expressive freedom is subject to several exceptions. Libelous speech,<sup>14</sup> "fighting words,"<sup>15</sup> subversive speech,<sup>16</sup> deceptive advertising,<sup>17</sup> and limitations on where, when, and how speech is conducted in public places<sup>18</sup> are all types of expression that courts have decided the framers of the Constitution did not mean to be protected by their unlimited phraseology. So, too, obscenity has been etched away from the face of the Bill of Rights.

One of the first major obscenity cases to work its way to the Supreme Court was *Doubleday & Co. v. New York*<sup>19</sup> in 1948. In *Doubleday*, a complaint was filed by the New York Society for the Suppression of Vice, claiming that the novel *Memoirs of Hecate County*, by literary critic Edmund Wilson, was obscene. The publisher, Doubleday, was consequently charged with a violation of the state's criminal obscenity statute. Two descriptions of sexual intercourse in the book were held by the lower court to be a violation of the statute. The Supreme Court affirmed without rendering an express opinion about obscenity per se. While this affirmation gave credence to the "obscenity exception" to the first amendment, it provided no guidance in the matter.

Dicta in *Beauharnis v. Illinois*<sup>20</sup> alluded to an opinion by the Supreme Court that obscene materials will find no refuge under the first amendment. This same view was reflected in *Chaplinsky v. New Hampshire*:

There are certain well-defined and narrowly limited classes of

14. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

15. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cohen v. California*, 403 U.S. 15 (1971); *Hess v. Indiana*, 414 U.S. 105 (1973).

16. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Whitney v. California*, 274 U.S. 357 (1927).

17. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

18. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

19. 335 U.S. 848 (1948). This affirmed *People v. Doubleday & Co.*, 272 A.D. 799, 71 N.Y.S.2d 736 (1947), *aff'd* 297 N.Y. 687, 77 N.E.2d 6 (1947).

20. 343 U.S. 250, 266 (1952). "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances."

speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. *These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.*<sup>21</sup>

*Roth v. United States*<sup>22</sup> finally shed some light on this issue in 1957. *Roth* involved a defendant who conducted a business in New York publishing and selling books, photographs, and magazines. To advertise his wares he used circulars and other advertising materials. He was convicted in the United States District Court for the Southern District of New York under the federal obscenity statute. The charges included mailing obscene advertisements and an obscene book. Justice Brennan confronted the problem explicitly:

The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.<sup>23</sup>

Upon holding obscenity to be outside the umbrella of protected speech, he further explained:

All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important interests.*<sup>24</sup>

The theme that obscenity is utterly without redeeming social importance is echoed throughout the decision. Of significance, however, is the fact that sex and obscenity are distinguished as not being synonymous.<sup>25</sup>

The final standard elucidated by the Court was 1) whether, to the average person, 2) applying contemporary community standards, 3) the dominant theme, 4) taken as a whole, 5) appeals to the prurient inter-

21. 315 U.S. 568, 571-72 (1942) (emphasis added). See generally, *Winters v. New York*, 333 U.S. 507, 510 (1948); *Public Clearing House v. Coyne*, 194 U.S. 497, 508 (1904); *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *United States v. Chase*, 135 U.S. 255, 261 (1890).

22. 354 U.S. 476 (1957).

23. *Id.* at 481.

24. *Id.* at 484 (emphasis added).

25. *Id.* at 487.

est.<sup>26</sup> The “dominant theme” was further suggested to mean that the communication has, for example, no serious literary, artistic, political, or scientific merit.<sup>27</sup> This standard stood after *Roth* for the next several years.

In 1966, a subtle metamorphosis occurred in *Memoirs v. Massachusetts*,<sup>28</sup> which had the effect of posing a major blockade to prosecutors in proving obscenity. The Supreme Court faced the question of whether a book commonly known as *Fanny Hill*, by John Cleland (circa 1750), could be banned. The book had been declared obscene by the Massachusetts Supreme Judicial Court. In overturning that decision, the United States Supreme Court, in an opinion authored by Justice Brennan, announced that each of the three major elements of *Roth* had to be satisfied independently.<sup>29</sup> Under this new formulation, a work could not be adjudged obscene if it could pass any one of these elements. The Court’s opinion also announced a further qualification, that the matter must be “utterly” without redeeming social value.<sup>30</sup> Though this term had been used by the Court in *Roth*, it was stated there as a basis for rejecting protection for such speech under the first amendment, rather than as an element of proof.<sup>31</sup> In the *Memoirs* case, *Fanny Hill* was found to have only a modicum of literary value according to the lower court, but that was enough to save it from the jaws of censorship, since it was not “utterly” without value.<sup>32</sup> These changes altered the emphasis of the *Roth* test (now the *Roth-Memoirs* test). This was a major, though short-lived, victory for proponents of deregulation. It forced those attempting to prosecute alleged obscene speech or actions to prove a negative — that the challenged communication had *no* social value.<sup>33</sup>

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26. *Id.* at 489.

27. *Id.* at 487. “The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.” The term “political” is also included when interpreting *Roth* because several references are made to the value of free speech in countering governmental efforts to invade the public’s liberties.

28. A Book Named “John Cleland’s *Memoirs of a Woman of Pleasure*” v. Attorney Gen., 383 U.S. 413 (1966).

29. *Id.* at 418. The three elements stated by the Court are (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex, (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and (c) the material is utterly without redeeming social value.

30. *Id.* at 419-20.

31. *Roth*, 354 U.S. at 484.

32. *Memoirs*, 383 U.S. at 420.

33. “While *Roth* presumed ‘obscenity’ to be ‘utterly without redeeming social importance,’ *Memoirs* required that to prove obscenity it must be affirmatively established that the material is ‘utterly without redeeming social value.’ Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a

Finally, in *Miller v. California*,<sup>34</sup> the Court abandoned *Memoirs* and, to some extent, reaffirmed *Roth*. The petitioner in *Miller* was convicted for mailing to a restaurant in Newport Beach, California, five brochures which advertised four books with sexually explicit pictures and drawings. In rejecting *Memoirs*, the Court again enumerated specific considerations to be applied in measuring the constitutional protection afforded any given work:

- a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
- b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>35</sup>

In addition, the Court offered some new guidelines by giving "a few plain examples of what a state statute could define for regulation":

- a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.<sup>36</sup>

With this decision, the Court abolished the "utterly without socially redeeming value" standard in favor of the standard given as an example in *Roth*, that the communication lacks "serious literary, artistic, political, or scientific value." This represented a swing back toward *Roth*, and at the same time it completely obviated the advantage *Memoirs* had signified to those promoting obscenity-as-free-speech. Challenged speech could no longer be saved by a mere modicum of value; it had to be of "serious" value. Similarly, the list of "literary, artistic, political, or scientific value" was now inclusive rather than representative, and "social value" could arguably encompass varieties of speech no longer included by the *Miller* definition.

This represents the current state of "obscenity" regulation, but this brief overview of the history of obscenity has overlooked the earlier development of motion picture censorship. Long before *Roth*, the United

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negative, i.e., that the material was 'utterly without redeeming social value' — a burden virtually impossible to discharge under our criminal standards of proof." *Miller*, 413 U.S. at 21-22.

34. 413 U.S. 15 (1973).

35. *Id.* at 24.

36. *Id.* at 25.

States Supreme Court upheld the censorship of motion pictures.<sup>37</sup>

### MOVIE CENSORSHIP

The power and influence of motion pictures as tools or weapons of persuasion and propaganda have been an omnipresent concern of society. While this technology was in its infancy in the days of the five-and-ten-cent theater, the first instance of censorship arose in Chicago in 1909.<sup>38</sup>

The initial challenge involved two films. One, *The James Boys in Missouri*, was about the legendary James Gang. The other, *Night Riders*, dealt with the tobacco war and depicted "malicious mischief, arson, and murder." While the Illinois Supreme Court acknowledged that the films illustrated "experiences connected with the history of the country," it held that these films' portrayal of criminal activity was "immoral" and "would necessarily be attended with evil effects upon youthful spectators."<sup>39</sup> On this basis, the court upheld an ordinance "prohibiting the exhibition of obscene and immoral pictures and regulating the exhibition of pictures of the classes and kinds commonly shown in mutoscopes, kinescopes, cinematographs and penny arcades."<sup>40</sup> The court apparently took judicial notice of the "evil effects" disseminated by this new medium, without introduction of any supporting evidence. Judicial notice is normally reserved for facts of common knowledge, or those which are easily proved.<sup>41</sup> Since these challenges involved a new medium, and no cases preceded them, there seems to have been little justification for this assumption.

The film *Birth of a Nation*, by master filmmaker D.W. Griffith, was first shown at Clune's Auditorium in Los Angeles on February 8, 1915, under the title *The Clansman*.<sup>42</sup> This film, too, was quickly banned. The

37. *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915).

38. *Block v. City of Chicago*, 239 Ill. 251, 87 N.E. 1011 (1909).

39. *Id.* at 264, 87 N.E. at 1016.

40. *Id.* at 256, 87 N.E. at 1012.

41. *Harper v. Killion*, 345 S.W.2d 309, 311 (Tex. Civ. App. 1961), stated, "The doctrine of judicial notice is one of common sense. The theory is that, where a fact is well-known by all reasonably intelligent people in the community, or its existence is so easily determinable with certainty from unimpeachable sources, it would not be good sense to require formal proof." See also *Williams v. Commonwealth*, 56 S.E.2d 537, 542-43 (1949). For additional discussion, see Keeffe, Landis and Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664 (1950), and Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

42. E. DEGRAZIA & R. NEWMAN, *BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT 3* (1982). The title under which this film opened was the name of a popular novel by Thomas Dixon, Jr., which inspired much of Griffith's main story line. Both Griffith and *The Birth of a Nation* have had a profound impact on contemporary filmmaking, and the two are considered by today's practitioners to be the essence of artist and art. Despite this fact,

plot dealt with the Civil War and Reconstruction. It depicted the Ku Klux Klan as being central to the unification of the country during that period of history. In Minnesota, the mayor of Minneapolis threatened to revoke a theater's license if the movie was shown, and the owner sought an injunction against such revocation. The city charter of Minneapolis, however, provided that any license issued by the city council could be revoked by the mayor or city council at any time. The state court held that it had no reason "to doubt that the mayor, in proposing to revoke the plaintiff's license if he persists in presenting this play, is acting in the honest belief that such course is in the interest of public welfare and the peace and good order of the city."<sup>43</sup> The film was thus censored. This question of law had yet to reach the United States Supreme Court.

Thomas Dixon, Jr., author of *The Clansman*, met with Supreme Court Chief Justice White in 1915. Dixon persuaded the Court to see the film, though the Chief Justice admitted to having never seen a movie.<sup>44</sup> Four days after viewing this film, the Supreme Court handed down a unanimous decision in another motion picture case that crippled the film industry for thirty-seven years.

In *Mutual Film Corp. v. Industrial Commission of Ohio*,<sup>45</sup> the Supreme Court determined that motion pictures were excepted from first amendment protection more than forty years before obscenity was declared an exception to free speech.<sup>46</sup> Acknowledging the viability of film as a carrier of expression, the Court stated, "They indeed may be mediums of thought, but so are many things. So is the theater, the circus, and all other shows and spectacles. . . ."<sup>47</sup> The Court expressed its final assessment as follows:

It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion. They are mere representations of events, of ideas and sentiments pub-

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DeGrazia and Newman claim that it has been challenged in well over 100 incidents in and out of court and, despite the *Miller* test, as recently as 1980.

43. *Bainbridge v. City of Minneapolis*, 131 Minn. 195, 154 N.W. 964 (1915).

44. DEGRAZIA & NEWMAN, *supra* note 42, at 4-5.

45. 236 U.S. 230 (1915).

46. *Roth*, 354 U.S. at 489.

47. *Mutual Film*, 236 U.S. at 243. It is interesting to note that because this was the first Supreme Court decision confronting motion pictures, the Court described what a movie involved. "The film consists of a series of instantaneous photographs or positive prints of action upon the stage or in the open. By being projected upon a screen with great rapidity there appears to the eye an illusion of motion." *Id.* at 232.

lished and known; vivid, useful, and entertaining, no doubt, but, as we have said, *capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition*. . . . We cannot regard this as beyond the power of government.<sup>48</sup>

The key to the finding, therefore, was the commercial nature of movies — that they were conducted solely to entertain, not to educate or inform.<sup>49</sup> Once again, a court found no problem with assuming facts not in evidence about the psychological influence of movies. This decision rang the death knell for motion pictures as a means of expressing controversial ideas until 1952.<sup>50</sup> In May of that year, salvation arrived in the guise of *Joseph Burstyn, Inc. v. Wilson*.<sup>51</sup>

Joseph Burstyn was the distributor of a film called *The Miracle*, which was part of a trilogy entitled *Ways of Love*. Burstyn and his former partner, Arthur L. Mayer, had made a name for themselves by importing foreign films and stringing short artistic movies together into feature-length showings under a single title, such as *Ways of Love*.<sup>52</sup> Upon its introduction in New York, the Legion of Decency attacked *The Miracle* as “a sacrilegious and blasphemous mockery of Christian religious

48. *Id.* at 244-45 (emphasis added).

49. A substantial amount of comment and criticism has been generated as a consequence of this case. Notable historical analyses appear in Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); M. ERNST, *THE FIRST FREEDOM* (1946); R. INGLIS, *THE COMMISSION OF FREEDOM OF THE PRESS* (1947); Kupferman and O'Brien, *Motion Picture Censorship — The Memphis Blues*, 36 CORNELL L.Q. 73 (1951); Comment, *Censorship of Motion Pictures*, 49 YALE L.J. 87 (1939); Comment, *Movie Censorship and the Supreme Court — What Next?*, 42 CALIF. L. REV. 122 (1954); Note, *Film Censorship: An Administrative Analysis*, 39 COLUM. L. REV. 1383 (1939); Note, *Motion Pictures and the First Amendment*, 60 YALE L.J. 696 (1951).

50. The courts during this period consistently followed the *Mutual Film* decision. See, e.g., *RD-DR Corp. v. Smith*, 183 F.2d 562 (5th Cir.), *cert. denied*, 340 U.S. 853 (1950); *Mutual Film Corp. v. City of Chicago*, 244 F. 101 (7th Cir. 1915); *Mutual Film Corp. v. Breiting*, 250 Pa. 225, 95 A. 433 (1915); *Pathe Exch. v. Cobb*, 202 A.D. 450, 195 N.Y.S. 661 (1922), *aff'd* 236 N.Y. 539, 142 N.E. 274 (1923). It should be noted that *Mutual Film* arose ten years prior to *Gitlow v. New York*, 268 U.S. 652 (1925), which held that the first amendment applies as a restraint on state action through the fourteenth amendment. Consequently, there was no direct holding that films were not protected by the United States Constitution. See the comment of Justice Douglas in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). It is similarly valuable to recognize the changes that occurred in the motion picture medium during the several years following *Mutual Film*, and film's introduction as a news and information carrier.

51. 343 U.S. 495 (1952).

52. DEGRAZIA & NEWMAN, *supra* note 42, at 77-79. This book provides a good background for the various films that have been subject to censorship over the years. The authors trace 122 films that were banned between 1908 and 1981, providing the social and political backdrops for each, as well as discussing the legal significance of each of these decisions.

truth,"<sup>53</sup> because the film resembled the biblical story of the Virgin Mary and the birth of Christ. The conflict arose because *The Miracle* allegedly ridiculed the Virgin Birth.<sup>54</sup>

The United States Supreme Court was presented with the question of whether a New York statute could constitutionally ban a film on the basis that it was "sacrilegious."<sup>55</sup> In its finding that the statute violated first amendment guarantees, the court held:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. . . . The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as inform. . . . That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.<sup>56</sup>

It is at this point that the protection afforded other media of expression nearly merges with the new-found freedom of films. The commercial nature of this variety of speech, highlighted in *Mutual Film*, was thus rejected as a factor. Despite the seeming equivalence now enjoyed by movies as a consequence of the *Burstyn* decision, the Supreme Court sounded an alarm warning that all media are not created equal:

It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. *Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression.* Each method tends to present its own peculiar problems.<sup>57</sup>

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53. *Id.* at 79.

54. *Joseph Burstyn, Inc. v. Wilson*, 303 N.Y. 242, 101 N.E.2d 665 (1951). It is interesting to note that a film much like *The Miracle* is still the subject of great controversy today. *Hail Mary*, a 1985 film by French director Jean-Luc Godard, depicts the Virgin Mary as a gas station attendant whose language is somewhat less than pure. The film's highly vernacular version of the Annunciation and the Virgin Birth prompted 5,000 demonstrators to line the streets when the film opened at the New York Film Festival. In addition, at least one lay group has protested to the U.S. Commission on Civil Rights that the screening of *Hail Mary* violated their religious rights. Schickel, *Crying "Shame" at Lincoln Center*, *Time Magazine*, Oct. 21, 1985, at 81, col. 1.

55. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

56. *Id.* at 501-02.

57. *Id.* at 502-03 (emphasis added). See *Times Film Corp. v. City of Chicago*, 365 U.S. 43

This caveat, it so happens, was something of a prediction.

### VISUAL AND VERBAL STANDARDS

The Supreme Court in *Mutual Film*<sup>58</sup> was confronted with the issue of film's viability as a medium of political and ideological exchange.<sup>59</sup> Also at issue, and mentioned in that decision, was the efficacy of motion pictures as a conduit for persuasion. The Court mentioned that this new medium was "capable of evil, having the power for it, the greater because of their attractiveness and manner of exhibition. . . . It was this capability and power, and it may be in experience of them, that induced the state of Ohio . . . to require censorship before exhibition. . . ."<sup>60</sup> The Court, in this discussion, attributed much influence and power to moving pictures.<sup>61</sup> Similar assumptions were echoed in many other decisions as well.

Many years after *Mutual Film*, one legal commentator used this same argument to support the position that it is the very power of film that makes it a vital medium for transporting ideas and opinions.<sup>62</sup> That writer made the point as follows:

The significance of the motion picture as an organ of public opinion is due not only to the nature of movie content but also to the technological features of the medium. The addition of speech to the screen since the date of the *Mutual Film* decision has contributed to the effectiveness of movies as a communicator of ideas. Dramatization through a unique combination of sight and sound makes the ideas presented by movies comprehensible to more of the audience than is the case in any other medium except television. Moreover, movies assure a high de-

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(1961); *Trans-Lux Distrib. Corp. v. Board of Regents*, 14 N.Y.2d 88, 198 N.E.2d 242 (1964); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Landau v. Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), *aff'd*, 388 U.S. 456 (1967). Some of the cases cited by the Court in support of this position regarding the limitations on other media include: *Feiner v. New York*, 340 U.S. 315 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

58. *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915).

59. *Id.* at 243.

60. *Id.* at 244-45.

61. This opinion appears to associate an influence to films which would comport with what communications researchers refer to as the "hypodermic-type" effect, which is the model of a "manipulative media" that grew out of concerns over the use of such media during World War I and World War II as a political propaganda instrument. See, e.g., Becker, McCombs and McLeod, *The Development of Political Cognitions*, in *POLITICAL COMMUNICATION: ISSUES AND STRATEGIES FOR RESEARCH* 21 (S. Chaffee ed. 1975).

62. Note, *Motion Pictures and the First Amendment*, 60 *YALE L.J.* 696, 707 (1951).

gree of attention and retention. The focusing of an intense light on a screen, the dramatizing of fact and opinion, the semi-darkness of the room where distracting ideas and suggestions are eliminated all contribute to the effectiveness of movies in shaping and changing attitudes.<sup>63</sup>

This comment, unlike the Court's conclusion in *Mutual Film*, is supported by empirical research as evidence.<sup>64</sup> The concern of the author is not the danger of abuse or misuse of such an effective means of communication, but rather with its use as a legitimate channel of rapport within the intent of the free speech promise explicit in the first amendment.<sup>65</sup>

The statement of the Court in *Mutual Film*<sup>66</sup> was made at a time when the public was suspicious of the mass media and their effects in general. At that time, mass media effects were assumed to be extremely powerful.<sup>67</sup> However, by the time of *Burstyn*, in 1952, mass communication researchers had determined that such effects were probably not so powerful,<sup>68</sup> but rather mass media had only "limited effects."<sup>69</sup> In spite of this change in behavioral science theory, the Court in *Burstyn* did not change its suspicious approach to film.

The Supreme Court continued to reflect earlier public opinion with-

63. *Id.* at 707-08.

64. Some major studies are referenced in this work, such as P. LAZARFELD & P. KENDALL, *RADIO LISTENING IN AMERICA* (1948); C. DAVY, *FOOTNOTES TO THE FILM* (1937); E. LINDGREN, *THE ART OF THE FILM* (1948); Dale, *Communication by Picture, COMMUNICATIONS IN MODERN SOCIETY* 72 (B. Schramm ed. 1948); J. KLAPPER, *EFFECTS OF MASS MEDIA* (1950); L. DOOB, *PROPAGANDA: ITS PSYCHOLOGY AND ITS TECHNIQUE* (1935); and H. BLUMER, *MOVIES AND CONDUCT* (1933).

65. Another author, in 1954, made essentially the same argument while acknowledging the position alleged in *Mutual Film*. "[That m]ovies through their method of presentation do have a strong impact on the attitudes and behavior of viewers *is scarcely to be denied*. . . . This has resulted in many Americans feeling that movies must be subject to complete, even arbitrary, control and regulation for the preservation of what are thought to be 'good' morals. However, the other interest involved here has largely been ignored. This is the interest, on the one hand, of movie producers making honest, realistic pictures that convey controversial, challenging ideas, and the complementary interest of citizens to view these pictures, even at the risk of having a prejudice or two shaken in the process." Comment, *Movie Censorship and the Supreme Court: What Next?*, 42 CALIF. L. REV. 122, 128-29 (1954) (emphasis added).

66. *Mutual Film*, 266 U.S. at 244-45.

67. Becker, McCombs and McLeod, *supra* note 61.

68. See Star and Hughes, *Report on an Educational Campaign: The Cincinnati Plan for the United Nations*, 55 AM. J. SOC. 389 (1950); Bauer, *The Obstinate Audience*, 19 AM. PSYCHOLOGIST 319 (1964).

69. Becker, McCombs and McLeod, *supra* note 61, at 21. See also M. MCCOMBS & L. BECKER, *USING MASS COMMUNICATION THEORY* 41 (1979).

out seeking empirical evidence to support its position. As the Court observed:

[Motion pictures] may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. . . . It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. . . . If there be capacity for evil it may be relevant in determining the permissible scope of community control.<sup>70</sup>

In 1961, the Supreme Court decided *Times Film Corp. v. City of Chicago*.<sup>71</sup> In that case, a distributor refused to submit a film, *Don Juan*, for review by a Chicago city official in order to receive a license to exhibit the film. The distributor filed suit seeking the license, claiming the procedure requiring submission of the film constituted a prior restraint.<sup>72</sup> The result of this "broadside attack" was that, for the first time since its early decision in *Mutual Film*, the Court specifically sustained the right of a state to censor films without regard for the prohibition against prior restraints.<sup>73</sup>

Chief Justice Warren and Justices Black, Douglas, and Brennan dissented. In an opinion written by the Chief Justice, they expressed concern that the acquiescence to censorship could open a Pandora's Box:

[T]he decision presents a real danger of eventual censorship for every form of communication, be it newspapers, journals,

70. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952). In 1959, the Supreme Court again faced this issue in *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684 (1958). A film distributor challenged the denial of a license to exhibit the film *Lady Chatterly's Lover*. The distributor claimed the license was rejected on grounds that certain scenes were "immoral," and this action denied the constitutional freedoms as announced in *Burstyn*. The Court found such a denial unconstitutional, since it was based upon moral and religious precepts, thereby striking directly at the foundation of the first amendment. In this way the Court effectively sidestepped the question of equal protection for the various media. The finding addressed this issue tangentially. "Nor need we here determine whether, despite problems peculiar to motion pictures, the control which a State may impose upon this medium of expression are precisely co-extensive with those allowable for newspapers, books, or individual speech. It is enough for the present case to reaffirm that motion pictures are within the First and Fourteenth Amendments' basic protection." *Kingsley*, 360 U.S. at 689-90.

71. 365 U.S. 43 (1961).

72. *Id.* at 44.

73. One of the major protections afforded speech and the press is the prevention of prior restraints. This is recounted by the Court in *Burstyn*, 343 U.S. 495, 506, noting that limitations have been recognized only in exceptional cases. See also *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

books, magazines, television, radio or public speeches. The Court purports to leave these questions for another day, but *I am aware of no constitutional principle which permits us to hold that the communication of ideas through one medium may be censored while other media are immune.* Of course each medium presents its own peculiar problems, but they are not of the kind which would authorize the censorship of one form of communication and not others.<sup>74</sup>

Four of the nine Justices disagreed with the decision on the basis that such censorship boards would allow suppression to creep in with a potential for spreading throughout other media of speech. While the dissent was extensive, providing much insight into the majority opinion and discussing the history of censorship in great detail, other comments in the dissent are worthy of highlighting. The dissent alleged that the Supreme Court had no factual basis for its finding that film had an impact different from other modes of speech. Further, it implied that the reason the Court did not provide reasoning in the opinion was this very lack of factual evidence. Finally, the dissenters argued that even if such a basis were available, it could not justify impressing upon the motion picture industry a greater level of suppression than that imposed on other types of expression.<sup>75</sup>

The *Times Film* holding, that motion pictures can be censored, stands in contrast to a later case involving book censorship. In *Bantam Books, Inc. v. Sullivan*,<sup>76</sup> the Court struck down a statute creating a "Commission to Encourage Morality in Youth" as being a form of unconstitutional suppression of speech. One of the Commission's purposes

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74. *Times Film Corp.*, 365 U.S. at 51 (emphasis added). The opinion also noted, "It is not to be disputed that this Court has stated that the protection afforded First Amendment liberties from previous restraint is not absolutely unlimited. . . . But, licensing or censorship was not, at any point, considered within the 'exceptional cases' discussed in the opinion in *Near*." *Id.* at 53.

75. *Id.* at 76-77. "The Court, in no way, explains why moving pictures should be treated differently than any other form of expression, why moving pictures should be denied the protection against censorship — 'a form of infringement upon freedom of expression to be especially condemned.' . . . The contention may be advanced that the impact of motion pictures is such that a licensing system of prior censorship is permissible. . . . *Although it is an open question whether the impact of motion pictures is greater or less than that of other media, there is not much doubt that the exposure of television far exceeds that of the motion picture. . . .* But, even if the impact of the motion picture is greater than that of some other media, that fact constitutes no basis for the argument that motion pictures should be subject to greater suppression." *Id.* Justice Douglas, in a separate dissent, joined by the Chief Justice and Justice Black, further concluded, "The First Amendment was designed to enlarge, not to limit, freedom in literature and in the arts as well as in politics, economics, law, and other fields." *Id.* at 84.

76. 372 U.S. 58 (1963).

was to review books and to recommend prosecution in certain instances, though it had no real powers of enforcement. Its practice was to notify a distributor on Commission stationery that certain of its designated books or magazines had been reviewed by the Commission and had been declared objectionable.<sup>77</sup>

The Supreme Court found that the Commission's practices, while having no force of law and hence leaving a distributor free to ignore their persistent notices, had the effect of intimidating a distributor into "voluntary" compliance. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around. . . ."<sup>78</sup> In these circumstances, the Court found that even an "intimidation," which *might* cause some to abstain from exercising their constitutional rights vis-a-vis the sale of *books*, was an unconstitutional abomination; whereas *Times Film*, an outright censorship of *films*, was accepted as being within the power of the State to protect its citizens.

Another remark in the *Bantam* decision is interesting in light of *Times Film*: "Any system of prior restraints of expression comes to this court with a heavy presumption against its constitutional validity. . . . We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."<sup>79</sup> In *Times Film*, however, no mention was made of "judicial superintendence" or "immediate judicial determination." Apparently, the Court did not even consider these questions, despite the pervading tenor of the remark in *Bantam*. There were no such mechanisms at issue in *Times Film*, in which the statute provided that "[t]he action of the mayor on any application for a permit shall be final."<sup>80</sup> While the Court was very careful in applying a presumption of invalidity in the case of books, it showed no such concern where film was involved.

In *Freedman v. Maryland*,<sup>81</sup> the conflicting principles from *Times Film*<sup>82</sup> and *Bantam*<sup>83</sup> were confronted. In *Freedman*, the constitutional-

77. *Id.* at 61. Two of the books cited in this litigation as having been declared "objectionable" were *Peyton Place*, by Grace Metalious, and *The Bramble Bush*, by Charles Mergendahl. *Bantam*, 372 U.S. at 62.

78. *Id.* at 68.

79. *Id.* at 70.

80. *Times Film Corp.*, 365 U.S. at 45, n.2.

81. 380 U.S. 51 (1965).

82. *Id.* at 53-54. The Court reaffirmed that censorship of motion pictures was not necessarily unconstitutional.

83. *Id.* at 57. "[A]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Id.*

ity of a Maryland motion picture censorship statute was challenged. The petitioner exhibited the film *Revenge at Daybreak* without first submitting the picture to the State Board of Censors. The question raised by the petitioner focused on the procedure of the censorship board, its lack of judicial participation, and the time-consuming appeals procedure. The Court distinguished *Times Film*, where the question was whether a particular censorship board violated its constitutional leeway. Conversely, in *Freedman*, the question was "whether a prior restraint was necessarily unconstitutional *under all circumstances*."<sup>84</sup> Consequently, the *Freedman* court found that "[t]he Maryland statute lack[ed] sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contain[ed] the same vice as a statute delegating excessive administrative discretion."<sup>85</sup>

By integrating the procedural safeguards of *Bantam* with the prior holding of *Times Film*, the Court signaled a narrowing of the gap between the first amendment protections afforded books and those afforded film. Nonetheless, the Court continued to herald its belief that "films differ from other forms of expression."<sup>86</sup> Although no evidence of differing psychological impact from one medium to the next was cited, this proclamation was interpreted as a basis for allowing a different standard to be applied to films.<sup>87</sup>

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84. *Id.* at 53.

85. *Id.* at 57. Applying the rule recognized in its earlier decisions, the Court continued, "[W]e hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. . . . [T]he burden of proving that the film is unprotected expression must rest on the censor. . . ." *Id.* at 58.

86. *Id.* at 61. Justices Douglas and Black concurred with the decision in a separate, brief opinion. They addressed this differentiation, stating, "[A] pictorial presentation occupies as preferred a position as any other form of expression. If censors are banned from the publishing business, from the pulpit, from the public platform — as they are — they should be banned from the theatre." *Id.* at 62.

87. *Landau v. Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), makes the most explicit explanation of this proposition. "[W]e think that the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (*Freedman v. State of Maryland*, 380 U.S. 51 . . .). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television. . . . Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience. . . . Because of the nature of the medium, *we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word.*" *Id.* at 181 (emphasis added).

Finally, in *Kaplan v. California*,<sup>88</sup> the Supreme Court implicitly acknowledged that film is subject to a lower standard of protection than books:

Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. *A book seems to have a different and preferred place in our hierarchy of values, and so it should be.*<sup>89</sup>

This predominant judicial attitude indicates a bifurcated standard for verbal and visual media, which is manifested procedurally in an acquiescence to prior restraint on motion pictures.

The question remains, do books really have a preferred place within our value system? Do the "contemporary community standards" vary from one medium to the next? Social scientists have dedicated their interests, efforts, and resources to learning about human value systems. This research can lend valuable counsel in assessing factual judgments about the intangible human psyche.

#### APPLICATION OF EMPIRICISM

Prevalent in the cases discussed above are statements imputing qualities to motion pictures for which the courts cite no factual basis supporting their findings. These discussions have erected segregated legal constructs of regulable messages between visual and verbal methods of intercourse. While it is arguable that no form of censorship is justified,<sup>90</sup> at the very least the standard applied should be consistent, irrespective of medium,<sup>91</sup> or a court should have some evidence upon which to base this discriminatory analysis. This ideal, however, has not been adopted by the courts.

The varieties of evidence typically admitted in obscenity cases in-

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See also *Trans-Lux Distrib. Corp. v. Board of Regents*, 14 N.Y.2d 88, 92, 198 N.E.2d 242, 245 (1964); *United States v. A Motion Picture Film Entitled "I Am Curious-Yellow"*, 404 F.2d 196, 198, 201 (2d Cir. 1968); *P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757, 763 (D. Mass. 1970).

88. 413 U.S. 115 (1973).

89. *Id.* at 119 (emphasis added).

90. See, e.g., concurring opinion of Justice Douglas in *Memoirs*, 383 U.S. at 431 (1966). See also M. ERNST & W. SEAGLE, *TO THE PURE . . . A STUDY OF OBSCENITY AND THE CENSOR* (1928).

91. This is in accord with the dissent of Chief Justice Warren in *Times Film*, 365 U.S. at 76-77.

clude either lay testimony<sup>92</sup> or expert testimony.<sup>93</sup> Unfortunately, the former does little to add material evidence to the litigation. The fact that a statute exists mandating such regulation, along with the institutionalized proceedings under that statute, establishes that some citizens find certain material objectionable. Lay witnesses on the side of the prosecution are simply examples of that segment of the population.

The purpose of lay testimony is obviously an attempt to establish the "contemporary community standard" under the *Miller* test.<sup>94</sup> However, students of behavioral science know that such witnesses, unless chosen through random sampling, are quite unlikely to approximate representation of the community at large.<sup>95</sup> Simply stated, such testimony is at best minimally probative and at worst misleading to the jury. There is a serious danger that the members of the jury might impart greater probative value to such testimony than it can reasonably be accorded, not being educated in scientific research methodology. When each party presents such lay witnesses, with the same number on each side to balance the unrepresentative sampling, such testimony becomes nothing but an economic burden to the parties involved since it will likely have a null effect.

Experts, on the other hand, can play a useful function in obscenity cases, including expressing the psychological distinction between visual and verbal forms of expression. However, courts rarely receive more than the unbridled opinion of "experts" in the field of arts, literature, science, or religion.<sup>96</sup> Experts have not been used to teach the factfinder about the respective fields so that an informed opinion can be rendered. The

92. See, e.g., *United States v. 4200 Copies Int'l Journal*, 134 F. Supp. 490, 493 (E.D. Wash. 1955); *United States v. Klaw*, 350 F.2d 155 (2d Cir. 1965).

93. For a complete discussion of the function of experts in obscenity litigation, see Bates, *Pornography and the Expert Witness*, 20 CRIM. L.Q. 250 (1978); Frank, *Obscenity: Some Problems of Values and the Use of Experts*, 41 WASH. L. REV. 631, 633 (1966); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952); Lamont, *Public Opinion Polls and Survey Evidence in Obscenity Cases*, 15 CRIM. L.Q. 135 (1972-73); McGaffney, *A Realistic Look at Expert Witnesses in Obscenity Cases*, 69 NW. U.L. REV. 218 (1974); Stern, *Toward a Rationale for the Use of Expert Testimony in Obscenity Litigation*, 20 CASE W. RES. L. REV. 527 (1969); Comment, *Expert Testimony in Obscenity Cases*, 18 HAST. L.J. 161 (1966).

94. *Miller v. California*, 413 U.S. at 21-22. The applicable portion of the standard being "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."

95. See L. KISH, *SURVEY SAMPLING* (1965); E. BABBIE, *SURVEY RESEARCH METHODS* (1973).

96. See, e.g., *United States v. A Motion Picture Film Entitled "I Am Curious-Yellow"*, 404 F.2d 196, 198, 201 (2d Cir. 1968) (which paraded thirteen "experts" across the stand, including professional critics, English professors, a minister, sociology professors, a "professor of film," psychiatrists, and a novelist); *Landau v. Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966) (involving eight "experts").

Supreme Court, in *Paris Adult Theatre I v. Slaton*,<sup>97</sup> observed in a footnote:

[Obscenity] is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. No such assistance is needed by jurors in obscenity cases; indeed, the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.<sup>98</sup>

The Court acknowledged the intent of expert testimony, but went on, ironically, to conclude that it was not necessary in this situation because "hard core pornography . . . can and does speak for itself."<sup>99</sup> This conclusion is not explained. It is difficult to conceive of how pornography can "speak for itself" when determining all of the components of the *Miller* test,<sup>100</sup> such as deciding what the "contemporary community standard" might be. Experts can, however, be instrumental in determining such facts, as well as answering questions about the impact a visual or verbal work has on the "average person."

Another use of experts, rather than to have them testify as to their bare opinions,<sup>101</sup> is to have them gather and present empirical evidence. Evidence can be collected through accepted social science research techniques, such as sample surveys and controlled experiments. These methods could be employed to answer such factual questions as: 1) What are the standards of this community?; 2) Does this work appeal to the prurient interest of the average person?; and 3) Do visual works have a greater impact on the average person than verbal works? In a concurring opinion in *Smith v. California*,<sup>102</sup> Justice Frankfurter noted that "community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts."<sup>103</sup>

97. 413 U.S. 49 (1973).

98. *Id.* at 56, n.6.

99. *Id.*

100. *Miller*, 413 U.S. at 21-22.

101. *Hewitt v. Maryland State Bd. of Censors*, 254 A.2d 203 (Md. 1969), received the testimony of a psychiatrist, Dr. Robert M. Vidaver, which was composed of such bare opinions as, "I do feel that the appeal was very cleverly used to stimulate not so much the normal sexual drive of heterosexual relations and sexual intercourse, but a variety of perverted and infantile sexual themes." *Id.* at 206. The court appeared to place great probative value on this testimony and even stated, "Dr. Vidaver's qualifications as an expert witness are impressive." *Id.* at 205.

102. 361 U.S. 147, 160 (1959).

103. *Id.* at 165.

The Court of Appeal for Manitoba, Canada, in *R. v. Prairie Schooner News Ltd. and Powers*,<sup>104</sup> made the following observation:

[W]hen it becomes necessary to determine the true nature of community standards and to find a single normative standard, the Court should not be denied the benefit of evidence, scientifically obtained in accordance with accepted sampling procedure, by those who are expert in the field of opinion research. . . . The state of mind of a community is as much a fact as the state of one's health.<sup>105</sup>

The courts have not been quick to require such an evidentiary basis for these factual questions. The Supreme Court in *Kaplan v. California*<sup>106</sup> considered the question of whether a state should be able to regulate obscenity without proof that it is harmful. The Court's convictions were expressed as follows:

States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment or by a constitutional right to privacy. We have noted the power of a legislative body to enact such regulatory laws *on the basis of unprovable assumptions*.<sup>107</sup>

The point of empirical research is, however, that such facts are not unprovable. Survey research is not a perfect science, but its accuracy over the last forty years has become increasingly reliable, and it has certainly attained sufficient precision for serious consideration by the courts.<sup>108</sup> While it may have been necessary in the distant past to make assumptions, the state of the art is now such that the courts can no longer claim ignorance as justification for imposing their own biases. The bipartite approach to visual and verbal pornography is this sort of unjustifiable assumption.

In partial defense of the courts, no truly comparative studies of visual and verbal pornographic stimuli have been published. In the absence of such evidence, there appears to be no basis upon which to hold that a difference in relative effects is indeed a fact. On the contrary, if the par-

104. [1970], 75 W.W.R. 585, 12 CRIM. L.Q. 462, 1 C.C.C.(2d) 251, (Man.C.A.) (Dickson, J.A. concurring opinion).

105. *Id.* at 593, 12 CRIM. L.Q. at 477, 1 C.C.C.(2d) at 266.

106. 413 U.S. 115 (1973).

107. *Id.* at 120 (emphasis added).

108. The Gallup Poll, in the 1984 presidential election, predicted precisely the outcome of the election and the other major polls were within about three percent. Such factors as the level of confidence can be presented and explained to the factfinder so that the margins of error can be considered in assessing the probative value of the evidence.

ties wish to argue that there is a difference between books and film, research should be commissioned by the asserting party.

One substantial problem with a Brandeis Brief<sup>109</sup> approach to this issue is that other policy questions might require reevaluation in light of this new evidence. In fact, the entire *Miller* definition of obscenity, or even the very foundation of public policy on which this regulation is constructed, may be shaken. Empirical implications of the various impacts of obscenity, irrespective of sensory mode, could challenge our historical bases for excepting various manners of speech from the purview of the first amendment.

### THE DANGERS OF EMPIRICISM

Research on pornography has already tendered some insights into the effects of obscenity that were heretofore outside mere common sense. In 1970, for example, the Commission on Obscenity and Pornography, appointed by President Johnson, published a report summarizing scientific studies conducted between 1968 and 1970.<sup>110</sup> The Commission examined the effects of a variety of sexually explicit materials, and determined that they were neither harmful to individuals nor society, and in fact could be educational.<sup>111</sup>

As a result of this and other studies,<sup>112</sup> two schools of thought have emerged regarding the psychological repercussions of obscene materials. The first of these schools, and one which harmonizes with the apparent attitudes of the courts, is a behaviorist theory. This construct purports that sex roles are learned behavior, and that exposure to pornography teaches anti-social activity and, hence, attitudes. The other position takes a psychoanalytic stance, suggesting that this material can help people to resolve inner conflicts and rechannel their inherent aggressions.<sup>113</sup>

In 1977, two researchers, Dolf Zillman and Barry S. Sapolsky, attempted to discover the consequence of exposure to pornography on

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109. In 1908, Louis D. Brandeis, later to become a Justice of the Supreme Court, successfully defended an Oregon law establishing a ten-hour workday for women with a maneuver that many have heralded as the precursor to the use of social scientific evidence in court. The so-called "Brandeis Brief" consisted of only two pages of legal argument and more than 100 pages of social scientific evidence involving primarily labor statistics. See *Muller v. Oregon*, 208 U.S. 412 (1908).

110. COMMISSION ON OBSCENITY AND PORNOGRAPHY, *THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY* (1970).

111. *Id.* at 27.

112. See, e.g., M.J. GOLDSTEIN, *PORNOGRAPHY AND SEXUAL DEVIANCE* (1974).

113. For a discussion of these two philosophies, see English, *The Politics of Porn*, 5 *MOTHER JONES* 44 (April 1980).

male college students. They began by angering the men and then exposing them either to neutral photographs, soft-core pornography, or hard-core pornography. Their findings suggested that both the soft-core and hard-core pornography tended to defuse the anger of these subjects.<sup>114</sup> That result comports with research conducted by Robert A. Baron and Paul A. Bell at about the same time.<sup>115</sup> This is not to suggest, however, that all of the evidence supports the diffusion-of-anger theory. Several studies have shown that previously angered men can show increased aggressive tendencies following exposure to hard-core pornography, but that non-angered men display no such increase.<sup>116</sup> While the evidence is far from conclusive that the presumption of harmful effects from obscene materials is wrong, it does indicate that such impacts are not as clear a fact as common sense might lead the courts to believe.

A possibility is presented in these studies, though yet unresolved, that obscenity may have social value under the *Memoirs* standard<sup>117</sup> by assisting viewers to alleviate hostilities. The studies suggest both that visual obscenity might not be "capable of evil,"<sup>118</sup> and that neither visual nor verbal obscenity is harmful — the comparative powers of these two modes of expression, as a consequence, fading into immateriality.

A further possible outcome of turning to the social sciences for behavioral evidence could be the realization that it is some variable often (but not necessarily) associated with obscenity that is the purveyor of detrimental effects. A serious criticism of the report of the Commission on Obscenity and Pornography<sup>119</sup> is its failure to separate depictions of nudity and intercourse from those portraying violence related to sex.<sup>120</sup> The salient issue may, therefore, be violence. The well-known feminist, Gloria Steinem, has argued that it is not sexual activity which constitutes

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114. Zillman and Sapolsky, *What Mediates the Effect of Mild Erotica on Annoyance and Hostile Behavior in Males?*, 35 J. OF PERS. AND SOC. PSYCHOLOGY 587 (1977).

115. Baron and Bell, *Sexual Arousal and Aggression by Males: Effects of Type of Erotic Stimuli and Prior Provocation*, 35 J. OF PERS. AND SOC. PSYCHOLOGY 79 (1977). For a more recent study, which finds a differing response to mild versus strongly erotic stimuli, see Ramirez, Zillman, and Bryant, *Effects of Erotic Retaliatory Behavior as a Function of Level of Prior Provocation*, 43 J. OF PERS. AND SOC. PSYCHOLOGY 971 (1982).

116. Donnerstein, Donnerstein, and Evans, *Erotic Stimuli and Aggression: Facilitation or Inhibition?*, 32 J. OF PERS. AND SOC. PSYCHOLOGY 237 (1975).

117. This is an example of "redeeming social value" that may not qualify under the stricter Miller "literary, artistic, political, or scientific value" standard.

118. *Mutual Film*, 236 U.S. at 244-45.

119. COMMISSION ON OBSCENITY AND PORNOGRAPHY, *supra* note 110.

120. This weakness has been noted by several researchers, and is discussed in Vivar, *The New Anti-Female Violent Pornography: Is Moral Condemnation the Only Justifiable Response?*, 7 LAW AND PSYCH. REV. 53, 58 (Spring 1982). See also Zillman and Bryant, *Pornography, Sexual Callousness, and the Trivialization of Rape*, 32(4) J. OF COMM. 10, 11 (Fall 1982).

pornography, but rather "violence, dominance, and conquest."<sup>121</sup> In studies unrelated to obscenity, the viewing of violence on television has been found to be strongly related to violent action. In a review of this research, L. Rowell Huesman, at the University of Illinois at Chicago Circle, found that "[v]iolence viewing and aggressive behavior clearly are positively related, not just in our culture, but in other western cultures as well."<sup>122</sup> It could be that rather than regulating "dirty" pictures and stories, the courts would more profitably spend their efforts placing boundaries around the communication of violence.

The reticence of judges to deny their common sense may be understandable, but there is much to be learned from behavioral research. There is a whole world of knowledge outside the traditional training and expertise of legal practitioners with implications that touch the very cornerstone of many legal premises. The judiciary must begin to pay due notice to the discoveries of these specialists, and to integrate these factual revelations and their incumbent policy considerations into the advocacy process, to construct a stronger and more viable system of jurisprudence.

The law is necessarily social in nature, since it is aimed at regulating human behavior and revolves around public perceptions of right and wrong. To determine facts such as the contemporary community standards and whether a separate community standard adheres depending on the mode of expression, the courts now have the tool of empirical behavioral research at their disposal.

#### SUMMARY

As the Supreme Court explained in invalidating a movie licensing statute, "[T]he First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty."<sup>123</sup> In *Cohen v. California*,<sup>124</sup> the Court further described these basic guarantees:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be

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121. Steinem, *Erotica and Pornography: A Clear and Present Difference*, in TAKE BACK THE NIGHT: WOMEN AND PORNOGRAPHY (L. Lederer ed. 1980).

122. Huesmann, *Television Violence and Aggressive Behavior*, in TELEVISION AND BEHAVIOR (NIMH) (1982).

123. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684, 688 (1959).

124. 403 U.S. 15 (1971).

voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.<sup>125</sup>

This right of free expression is a grave and ominous responsibility which is pivotal to all other freedoms. It is a responsibility not taken lightly by the courts. Nonetheless, the courts appear hesitant to supplant traditional beliefs with scientific methodology when balancing this right against other seemingly conflicting rights. This cloud of suspicion and, perhaps, reluctance to forfeit some of their control, has resulted in the courts creating a separate standard for visual obscenity than the one it imposes on its verbal counterpart. Social science offers the tools to rectify this inequity, and it has reached such proficiency that it is now an appropriate technology to be used in circumventing the traditional "unprovable assumption" necessitated in the past. This is not to suggest that behavioral research is a fully matured science capable of a definitive answer to this dilemma, but merely that it has greater probative value than the alternative: the naked opinion of a judge. As Justice Black argued:

So far as I know, judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the Nation.<sup>126</sup>

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125. *Id.* at 24.

126. *Kingsley*, 360 U.S. at 690 (Black, J., concurring opinion).