STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 94-3188-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

C & S MANAGEMENT, INC.,
d/b/a CROSSROADS NEWS AGENCY,

Defendant-Appellant,

Appeal From The Order Entered In The Circuit Court For Kenosha County, The Honorable David M. Bastianelli, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED FOR REVIEW

Sections 970.02(1)(c) and 971.02(1) of the Wisconsin Statutes purport to deny corporations charged with felonies the same right to a preliminary examination enjoyed by all other natural and artificial persons charged with felony offenses. Does this discrimination against one particular form of artificial person violate the equal protection clauses of the Wisconsin and United States Constitutions?

The Circuit Court held that Crossroads as a corporation was not entitled to a preliminary examination and that sections 970.02(1)(c) and 971.02(1) do not violate equal protection.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). At such time as counsel for appellant has had sufficient opportunity to review the brief of respondent, it may be that oral argument will be unnecessary because the briefs may fully present and meet the issues on appeal. Wis. Stat. (Rule) 809.22(2)(b). Until the brief of respondent has been reviewed, however, appellant wishes to preserve his right to request oral argument.

Publication may be appropriate in light of the importance of the issue presented. *See* Wis. Stat. (Rule) 809.23(1)(a)5.

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

On or about September 2, 1994, the state filed a criminal complaint charging Crossroads and Yancy Bock with two counts of exposing a child to harmful material, a Class E felony (R1).[1] *See* Wis. Stat. §948.11(2)(a). Crossroads then moved the Circuit Court to hold a preliminary examination

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[1] Throughout this brief, references to the record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as App. __.

before an information is filed and an arraignment held, arguing that denying corporations the same right to a preliminary examination enjoyed by all other natural or artificial persons charged with felony offenses denied it equal protection of the laws (R4; R5). The state responded (R7).

On November 10, 1994, the Circuit Court, Hon. David M. Bastianelli, presiding, heard argument and denied the motion orally (R9:7-8; App. 8-9). The Court entered a written order reflecting that decision on November 28, 1994 (R10; App. 1).

By Order dated December 27, 1994, this Court granted Crossroads' petition for leave to appeal the order denying it a preliminary hearing (R12).

ARGUMENT

DENYING CORPORATE DEFENDANTS THE RIGHT TO A PRELIMINARY EXAMINATION VIOLATES EQUAL PROTECTION

Wisconsin purports to deny a corporation the right to a preliminary examination, although every other organizational or individual defendant in this state enjoys that entitlement.[2] But the Equal Protection Clauses of the

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[2] While Wis. Stat. §971.02 does not explicitly deny corporations the right to a preliminary examination, the statute excepts corporations from the class of defendants entitled to a preliminary examination and permits the filing of an information against a corporation without benefit of a preliminary examination.

Fourteenth Amendment and the Wisconsin Constitution guarantee that not even a corporation can be subjected to such discrimination when it finds itself accused criminally in a Wisconsin courtroom. Crossroads demands the same procedural protections afforded to other criminal defendants in Wisconsin, including a preliminary examination at which to test the merits of the state's case.

The constitutionality of a statute is a question of law reviewed *de novo*, without deference to the lower court. *State v. McManus*, 152 Wis.2d 113, 447 N.W.2d 654, 660 (1989).

A. The Wisconsin Criminal Procedure Code Denies Corporations, And Only Corporations, The Right To A Preliminary Examination.

In virtually all cases, a preliminary examination, or a waiver of the preliminary examination by the defendant, is a prerequisite to the filing of the information. It is irrelevant, except to the timing of the preliminary examination, whether the defendant is in custody or released on bail or even, as is permitted by statute, *see* Wis. Stat. §969.03, released without posting a bond or bail.

The preliminary examination is intended to protect a felony defendant from having to defend against baseless charges:

> "the object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged

> from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based."

State v. Richer, 174 Wis.2d 231, 496 N.W.2d 66, 69 (1993) (quoting *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539 (1922)); *see, e.g., State v. Webb*, 160 Wis.2d 622, 467 N.W.2d 108, 109 n.4 (1991), *cert. denied*, 502 U.S. 889 (1991); *State v. Dunn*, 121 Wis.2d 389, 359 N.W.2d 151, 153-54 (1984).

In addition to this primary purpose of the preliminary examination, it also provides collateral benefits to a defendant. It serves an important notice role, provides an opportunity to gauge the testimony of state witnesses, may expose weaknesses in the state's case which may aid the parties in reaching a reasonable resolution prior to trial, and may disclose the bases for pretrial motions. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *Whitty v. State*, 34 Wis.2d 278, 149 N.W.2d 557, 560-61 (1967), *cert. denied*, 390 U.S. 959 (1968); Note, *Preliminary Examination Potential*, 58 Marq. L. Rev. 159, 170-72 (1974) ("*Preliminary Examination Potential*"); G. Anderson, *The Preliminary Hearing -- Better Alternatives Or More Of The Same?*, 35 Mo. L. Rev. 281, 284-89 (1970) ("*The Preliminary Hearing*").[3]

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[3] Of course, the state benefits from the preliminary examination as well.

(continued...)

There is one, and only one, exception to this required procedure in felony cases in Wisconsin. For reasons which can be described only as inequitable and obsolete, the Wisconsin criminal procedure code denies corporations the protections of a preliminary examination, Wis. Stat. §§970.02(1)(c), 971.02(1) (App. 16-17).[4]

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[3](...continued)

> The preliminary provides an opportunity to test the state's as well as defendant's witnesses to see how they react to cross-examination. It may expose a weakness in the state's case because of a prejudicial witness or one motivated by an ulterior motive. It may also save needless expense and time consumed in proceeding to trial.

Preliminary Examination Potential, 58 Marq. Law Rev. at 172. *See also The Preliminary Hearing*, 35 Mo. L. Rev. at 288-89:

> The most important benefit for the prosecution is the early opportunity afforded to weed out cases that should go no further. Defense counsel can assist the prosecutor in testing state witnesses under adversary conditions. The prosecutor may learn that the charge is based on misinformation or prejudice. He may also discover that certain state witnesses are weak, unwilling to cooperate, or adverse to the prosecution. The hearing may show that the charge should be changed, reduced, or dismissed.

[4] Wis. Stat. §967.05(1) similarly provides that prosecutions must be commenced by complaint or indictment, except that prosecutions against corporations may be commenced by information. Because this action was commenced by a criminal complaint (R1), Crossroads does not challenge the discrimination against corporations under §967.05(1).

In December 1993, the Wisconsin Legislature authorized a new kind of corporation known as a "limited liability company" and extended the "corporate exception" under Sections 967.05(1)(b), 970.02(1)(c) and 971.02(1) to such an entity. *See* 1993 Wis. Act 112, §§423, 425 & 426. This amendment does (continued...)

This exception to the usual criminal procedure in Wisconsin felony cases applies solely to corporations. It does not apply to similarly situated individuals; neither does it apply to similarly situated artificial persons such as associations, cooperatives, partnerships, and the like, all of which may be charged and convicted of crimes.

B. The Corporate Exception To The Criminal Complaint And Preliminary Hearing Requirements Denies Equal Protection.

It has been clear for over a century that corporations enjoy the rights to due process and to equal protection. *E.g., Santa Clara Co. v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886). Forcing corporations, and only corporations, to defend against serious felony charges without the benefit of a preliminary examination unlawfully deprives corporations of those rights.

The proper standard to apply to issues of equal protection turns in large part upon whether a fundamental right is infringed by the classification. In the usual case, equal protection requires simply that "there exist reasonable and practical grounds for the classifications drawn by the legislature." *State v. McManus*, 152 Wis.2d 113, 447 N.W.2d 654, 660 (1989) (citation omitted). A party challenging a

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[4](...continued)
not change the analysis here; it merely expanded the invalid discrimination.

statute on equal protection grounds under this "rational basis" standard must show that the legislative classification lacks a rational relationship to a proper statutory objective. *Id.*, 447 N.W.2d at 660-61; *Wisconsin Wine & Spirit Institute v. Ley*, 141 Wis.2d 958, 416 N.W.2d 914, 917 (Ct. App. 1987). "The basic test is not whether some inequality results from the classification, but whether there exists a rational basis to justify the inequality of the classification." *Milwaukee Brewers v. DH&SS*, 130 Wis.2d 79, 387 N.W.2d 254, 263 (1986).

While the "rational basis" standard applies in most cases, the courts have recognized that, "when a statutory classification infringes upon a fundamental right ..., a heightened judicial standard of scrutiny is appropriate." *Matter of Guardianship of Nelson*, 98 Wis.2d 261, 296 N.W.2d 736, 738 (1980) (footnote omitted). Specifically, statutory classifications which impinge upon fundamental rights must be more than rationally related to a legitimate government interest; they must be no broader than necessary to serve a compelling governmental interest. *E.g., Chicago Police Dept. v. Mosley*, 408 U.S. 92, 101 & n.8 (1972).

A defendant's interest in prompt relief from an oppressive prosecution, protected by the right to a preliminary examination, is just such a fundamental right. The United States Supreme Court has held that "the right to a meaningful opportunity to be heard within the limits of practicality," no less than the rights to religious freedom

and free speech or assembly, "must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie v. Connecticut*, 401 U.S. 371, 379-80 (1971) (citations omitted).

More directly on point is Article I, §9 of the Wisconsin Constitution:

> **Remedy for wrongs.** Section 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, *promptly and without delay*, conformably to the law.

(Emphasis added).

This case is directly analogous to that in *Werner v. Milwaukee Solvay Coke Co.*, 252 Wis. 392, 31 N.W.2d 605 (1948). The Supreme Court there held that the trial court's refusal to decide a controlling constitutional issue until after trial violated Article I, §9:

> On hearing of the motion the court declined to pass upon the constitutionality of the Portal-to-Portal Act until after trial of the case on the merits, although it is conceded that if the act is constitutional there can be no recovery for the activities alleged in the complaint. If the act is constitutional to submit the defendant to the expense of a trial and disruption of business such a trial of issues of fact under the complaint and answer and supplemental answer would involve would constitute a great and unnecessary hardship, and seems plainly to deny the defendant his rights under sec. 9, Art. I of the Wisconsin Constitution... .

31 N.W.2d at 606.

This case is also analogous to that in *D.H. v. State*, 76 Wis.2d 286, 251 N.W.2d 196, 201 (1977). The Court there relied upon Article I, §9 as authority for it to fashion an adequate remedy of interlocutory review of juvenile waiver decisions, finding that withholding review until after a criminal conviction is "unacceptable" because of the inevitable delay and damage caused the juvenile by the criminal trial itself.

The undue hardship arising from the denial of a prompt preliminary hearing is especially acute in cases such as this in which the division between noncriminal and criminal behavior directly corresponds with the division between constitutionally protected and unprotected speech. The United States Supreme Court has recognized that prosecutions such as this can have a grave, "chilling effect" on protected speech even without a conviction. *See Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

Accordingly, there is ample reason to apply the strict scrutiny standard here. Resolution of the exact standard to apply is academic, however, as this statutory discrimination against corporations is neither rationally related to a legitimate state interest nor necessary to promote a compelling state interest. Even under the rational basis standard,

> [t]he test is not whether the legislature had a rationale. It will always have a rationale for anything it does. The test is whether the rationale is rational. If the concept of equal protection is to be meaningful, equal protection cannot be interpreted so as to allow the legislature to exercise its will on a minority of citizens any time it desires so long as there is any rationale to do so, regardless of how remote, fanciful, or speculative the rationale may be. To be rational for the purpose of equal protection analysis, the legislative rationale must be reasonable.

Milwaukee Brewers, 387 N.W.2d at 265.

Where a court can find no rational basis for a statutory classification, that classification violates equal protection. *See, e.g., Milwaukee Brewers*, 387 N.W.2d at 363-66 (statute, siting new prison in Menomonee Valley and imposing truncated WEPA and judicial review only to those challenging this prison, violated equal protection); *Wisconsin Wine, supra* ("grandfather" provision of tied house law violated equal protection). Something more is expected of state legislators, after the Civil War amendments, than spite, caprice, or mere legerdemain, in other words; and that something more is missing here.

1. Denying a preliminary examination to corporations alone is irrational.

Sections 970.02(1)(c) and 971.02(1) offend the Fourteenth Amendment and Wisconsin's own constitutional promise of equal protection and due process because they

arbitrarily separate corporations charged with felony offenses from all other similarly situated natural and artificial persons so charged. All natural persons, and all unincorporated cooperatives, partnerships and other associations in exactly the same circumstances, conducting exactly the same business, and charged with exactly the same criminal offense, are entitled to a preliminary examination. Thus, Crossroads, as a corporation, is denied the right to a preliminary hearing, but would be entitled to a preliminary examination if it was doing business in the form of a partnership or unincorporated cooperative or association.

This classification appears to be unique to Wisconsin. Crossroads has found no other state which denies to corporations or to any artificial person the same rights to a preliminary examination available to natural persons. Neither has Crossroads discovered any possible rational basis for, let alone any compelling interest promoted by, this unique form of discrimination.

a. An "anti-corporate" attitude cannot justify the discrimination.

Although the legislature gave no reason for this classification when first imposing it over 110 years ago, circumstances suggest that it may have resulted from the general "anti-corporate" feelings of the time.

The Wisconsin Constitution originally provided that

"no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury." Wis. Const. art. I, §8 (1848). Following Michigan's lead,[5] however, that clause was amended in 1870 to read "no person shall be held to answer for a criminal offense without due process of law," the intent being to do away with the indictment requirement. *See Rowan v. State*, 30 Wis. 129, 144-45 (1872).

After due process, with its objective criteria, replaced the grand jury, the legislature promptly enacted legislation permitting the courts to try criminal prosecutions on informations the same as on indictments. *See* 1871 Wis. Laws ch. 137 (App. 18-27). Section 7 of that law, however, provided that:

> No information shall be filed against any person for any offense until such person shall have had a preliminary examination, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination; *provided*, that informations may be filed without such examination against fugitives from justice, within the meaning of the constitution and laws of the United States.

Id. §7 (App. 19). *See also* Rev. Stat. §4654 (Wis. 1878) (App.

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[5] In 1850, Michigan became the first state to remove the right to an indictment from its constitution. In 1859, it also became the first state to authorize felony prosecution by information. 1 S. Beale & W. Bryson, *Grand Jury Law & Practice*, §1:05 (1986).

28). The preliminary examination

> was designed, to some extent, to accomplish the purpose of a presentment by the grand jury under the law as it existed before in protecting a party against being subject to the indignity of a public trial for an offense before probable cause had been established against him by evidence under oath.

People v. Annis, 13 Mich. 511, 515 (1865); *see* Wis. Stat. §4654 (1898) & Annotations (App. 30-31). *See also State v. Lehtola*, 55 Wis.2d 494, 198 N.W.2d 354, 356 (1972) ("The preliminary hearing is more analogous to the grand jury procedure than is the filing of the information." (citation omitted)).

As originally enacted, the statute permitted exceptions to the preliminary examination requirement only for fugitives or in cases of waiver. *See State v. Leicham*, 41 Wis. 565, 575 (1877), *overruled on other grounds*, *State v. Burke*, 153 Wis.2d 445, 451 N.W.2d 739 (1990). In 1881, however, the legislature enacted the corporate exception. *See* 1881 Wis. Laws ch. 173 (App. 29). There seems no legislative history suggesting any reason for this exception. The exception was not enacted as part of a more wide-ranging revision of criminal procedure, and the explanatory clause is unenlightening. No court decision has discussed the exception or suggested any rationale for it.

Newspaper articles of the time likewise provide no direct evidence of a purpose for this exception. The Milwau-

kee Sentinel did not even note its enactment. The Wisconsin State Journal merely listed, without comment, its introduction, Wis. St. Journal, Feb. 9, 1881, at 1, and eventual passage, along with several other bills, *see id.*, Mar. 17, 1881, at 1 (passed Assembly); *id.*, Mar. 21, 1881, at 1 (Senate concurred).

The papers do, however, reflect the generally anti-corporate feelings of the times. In late January, 1881, Charles L. Colby, president of the Wisconsin Central Railroad, was charged with perjury. After a three-day preliminary examination, the court dismissed the charges as unfounded. Milw. Sentinel, Jan. 27, 1881, at 5; *see id.*, Jan. 29, 1881, at 6. At about the same time, the Sentinel recognized the imminence of "[a] regular crusade against corporations in the Legislature," brought on in large degree by their tremendous profits the previous year. *Id.* at 2. *See also id.*, Feb. 10, 1881, at 2. Less than two weeks later, on February 9, 1881, the bill excepting corporations from the preliminary hearing requirement was introduced.

A "crusade against corporations" cannot form a constitutional basis for denying corporations equal protection. Discriminating against corporations simply because they are corporations is not a legitimate state objective. *See, e.g., State v. Nashville, C. & St. L. Ry. Co.*, 135 S.W. 773 (Tenn. 1911) (statute criminalizing certain acts of corporations but not those of similarly situated partnerships, firms,

associations, or individuals, violates equal protection).

The argument that corporations, as creatures of the state, have only those rights granted them by the state, long ago was rejected. *See, e.g., First National Bank of Boston v. Bellotti,* 435 U.S. 765, 778 n.14 (1978) and cases cited therein; *Philips Petroleum Co. v. Jenkins,* 297 U.S. 629, 634 & n.4 (1939), and cases cited therein. "[A] corporation is as much entitled to the equal protection of the laws as an individual." *Frost v. Corporation Commission of the State of Oklahoma,* 278 U.S. 515, 522 (1929); *see Kiley v. Chicago, Milwaukee & St. Paul Railway Co.,* 138 Wis. 215, 219, 119 N.W. 309 (1909).

b. That corporations may not be imprisoned does not justify the discrimination.

The Wisconsin Supreme Court observed in 1914 "that the chief object of a preliminary examination is to prevent innocent persons from being incarcerated for a considerable length of time awaiting trial." *State v. Solomon,* 158 Wis. 146, 150, 147 N.W. 640 (1914). Because an artificial person such as a corporation cannot be incarcerated, one might argue, as the state did below (R7:6-7), that it would have no need for a preliminary examination if this were the sole purpose of the examination.

This possible rationale, however, fails on at least two grounds. First, even if this reasoning would justify

granting preliminary examinations to all natural persons while denying them to all artificial persons, it could not provide a rational basis to discriminate among different types of artificial persons. Indeed, the Circuit Court recognized as much:

> THE COURT: . . . Where my problem lies is the rationale of distinguishing, again, on that as a class where other classes which are fairly similar, whether it's partnerships, cooperative associations, etc., which are all subject, based on what I saw in the brief, to criminal penalties and being charged, if there's some basis for distinguishing between the two. And that I hadn't saw [sic], as I indicated, Counsel [referring to prosecutor], in your brief, and I think that may be the determining feature.
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> . . .
>
> Again, where I have some difficulty is why they carve out the niche for a corporate entity as opposed to a partnership or certain associations.

(R9:4-5; App. 5-6).

Unincorporated business entities are subject to criminal liability just as corporations and natural persons are. Although neither corporations nor unincorporated partnerships or associations could be subjected to criminal liability at common law, *see United States v. A&P Trucking Co.*, 358 U.S. 121, 124 (1958); *Vulcan Last Co. v. State*, 194 Wis. 636, 641, 217 N.W. 412 (1928), the legislature could and did extend criminal liability to such artificial persons. *Id.* at 643-44; *see* Wis. Stat. §939.05 (criminal liability extends to any "person [who] is concerned in the commission of the

crime"); Wis. Stat. §990.01(26) (defining "person" throughout the statutes as including "all partnerships, associations and bodies politic or corporate").

The reasons cited in *Vulcan Last Co., supra*, for imposing criminal liability upon corporations, apply fully to unincorporated organizations. Many Wisconsin criminal statutes prohibit acts which can be performed by such organizations, do not expressly exempt them, and impose a punishment -- a fine -- which can be inflicted upon such organizations. "So far as the purpose to be accomplished by this statute is concerned ... it can make no difference whether the [actor] is [an organization] or an individual." 194 Wis. at 644.

As the Supreme Court has noted, "[s]ome of the most powerful private institutions in the Nation are conducted in the partnership form," *Bellis v. United States*, 417 U.S. 85, 93 (1974), and it is inconceivable that such an institution could be immunized from criminal liability solely because it operates as a partnership rather than in the corporate form, *cf. id.* at 94. "The business entity cannot be left free to break the law merely because its owners, stockholders ... partners ... do not personally participate in the infraction." *A&P Trucking*, 358 U.S. at 126.

A partnership, as an entity separate from its partners, is liable for the wrongful acts or omissions of any partner acting in the ordinary course of the partnership's business. Wis. Stat. §178.10. That liability extends to

criminal acts or omissions as well. *See A&P Trucking Co., supra* (criminal prosecution of partnership); *Western Laundry & Linen Rental Co. v. United States*, 424 F.2d 441 (9th Cir. 1970) (same), *cert. denied*, 400 U.S. 849 (1971); *United States v. J. Treffiletti & Sons*, 496 F. Supp. 53, 55 (N.D.N.Y. 1980); *United States v. Bookman Co.*, 229 F. Supp. 862 (N.D. Cal. 1964); *King Coal Co. v. Commonwealth*, 475 A.2d 939 (Pa. Comm. Ct. 1984) (partnership convicted of operating coal mine without a drainage permit); *State v. Westside Fish Co.*, 608 P.2d 562 (Or. App. 1980); *People v. Smithtown General Hospital*, 92 Misc. 2d 144, 399 N.Y.S.2d 993 (Sup. Ct. 1977).

Other unincorporated entities likewise have been subjected to criminal liability. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258 (1947) (union convicted of and fined for criminal contempt); *United States v. Adams Express Co.*, 229 U.S. 381 (1913) (unincorporated joint stock company criminally liable for interstate commerce act violation); *Jund v. Town of Hempstead*, 941 F.2d 1271, 1283-84 (2d Cir. 1991) (unincorporated association subject to Hobbs Act); *State v. Stow Veterans Association*, 519 N.E.2d 660 (Ohio App. 1987) (non-profit association convicted of operating gambling house); *State v. North Dakota Education Association*, 262 N.W.2d 731 (N.D. 1978) (teachers' association convicted of publishing anonymous political advertisement, but reversed on First Amendment grounds); *People v. Clark Memorial Home*, 252 N.E.2d 546 (Ill. App. 1969) (unincorporated association

charged with gambling offenses); *Day v. State*, 341 N.E.2d 209 (Ind. App. 1976) (association may be convicted of lobbying offense); *cf. State v. Portney & Pennlen Associates*, 550 A.2d 1295 (N.J. App. 1988) (conviction of business for violating municipal ordinance).

Wisconsin has abolished the common law fiction that an association is nothing more than an aggregate of its members. Now, unincorporated associations and cooperatives may sue and be sued as entities separate from their members, *Teubert v. Wisconsin Interscholastic Athletic Corp.*, 8 Wis.2d 373, 99 N.W.2d 100, 101 (1959); *see* Wis. Stat. §185.03(2), and may be subjected to punitive measures as well. *See Kenosha Unified School District v. Kenosha Education Association*, 70 Wis.2d 325, 234 N.W.2d 311, 315 (1975) (unincorporated association may be held in contempt of court and fined accordingly).

The fact that no artificial person may be incarcerated while awaiting trial simply does not provide a valid basis for denying preliminary examinations to corporations while granting them as of right to unincorporated associations, partnerships and cooperatives. *Cf. Milwaukee Brewers*, 387 N.W.2d at 263-65 (*statewide* need for prison space may justify truncated environmental and judicial review of *all* new prison construction but does not justify imposing such truncated review rights only upon challengers in single, limited part of state).

Second, whatever the perceived purpose of the preliminary examination in 1914, it is clear now that preventing unjustified incarceration is no longer the only, or even the primary, purpose.[6] The Wisconsin Supreme Court in 1922, in language quoted earlier in this brief, recognized a much more expansive purpose for the examination, focusing upon the right to be free from all of the detrimental effects of the official accusation and prosecution, not simply freedom from incarceration. *See Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539 (1922). That Court has continued to cite *Thies* as the leading authority on this point. *See, e.g., Richer*, 496 N.W.2d at 69; *Webb*, 467 N.W.2d at 109 n.4; *Dunn*, 359 N.W.2d at 153-54; *Goyer v. State*, 26 Wis.2d 244, 131 N.W.2d 888, 890 (1965); *Johns v. State*, 14 Wis.2d 119, 109 N.W.2d 490, 492 (1961). *See also Whitty*, 149 N.W.2d at 560-61.

Although preventing unjustified incarceration remains *one* purpose of the preliminary examination, *e.g., Webb*, 467 N.W.2d at 109 n.4, it is not the defining purpose. The entire prosecution ends if there is no bindover, not just the defendant's stint in jail before trial. With the excep-

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[6] Indeed, it is questionable whether the incarceration rationale ever was the primary one. Wisconsin's procedure was derived from that in Michigan. Long before Wisconsin adopted that procedure, however, the Michigan Supreme Court observed that the major purpose of the preliminary examination was to protect the defendant against "being subject to the indignity of a public trial for an offense before probable cause had been established against him by evidence under oath." *Annis*, 13 Mich. at 575.

tion of corporations, every felony defendant now is entitled to a preliminary examination absent a waiver, regardless whether that defendant is a natural or artificial person, and regardless whether that person is being held in jail or has been released pending trial. *See* Wis. Stat. §§970.02(1)(c), 970.02(1). Indeed, preliminary examinations are now provided, as of right, even if the defendant was a fugitive, *see* 1973 Wis. Laws ch. 45 (repealing fugitive exception to preliminary hearing requirement),[7] and even if a grand jury already has found probable cause and returned an indictment against the defendant, *see* Wis. Stat. §968.06.

The purposes of the preliminary examination identified in *Thies* apply as fully to corporations as to individuals. Corporations, as well as other natural and artificial persons, may be subjected to "hasty, malicious, improvident, and oppressive prosecutions," and should be equally entitled to protection from "the humiliation and anxiety involved in public prosecution." Corporations also are equally entitled to avoid the enormous expense of a public trial on charges for

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[7] The Wisconsin Supreme Court previously had rejected an equal protection attack on the fugitive exception. *See Johns, supra*. The Court there found that the process of extradition satisfied the purposes of a preliminary hearing identified in *Thies*, rendering the statutory classification a reasonable one. 109 N.W.2d at 492. *See also State v. Shears*, 68 Wis.2d 217, 229 N.W.2d 103, 123 (1975). No such alternative process is available to corporate defendants.

which probable cause cannot be shown.[8] *See Werner*, 31 N.W.2d at 606. Certainly, the purposes for the preliminary examination requirement suggest no rational basis to discriminate between corporate and unincorporated organizations let alone the need to further a compelling state interest.

c. The preliminary examination's status as a purely statutory right does not justify the discrimination.

Finally, the state might say that the preliminary examination is "solely a statutory right," *see Dunn*, 359 N.W.2d at 153, so that it may be limited, even arbitrarily, by statute. There is a short and decisive answer to that suggestion. While the state has no federal constitutional obligation to provide for preliminary examinations, *see Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Lem Woon v. Oregon*, 229 U.S. 586 (1913), once it provides for such

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[8] Although the Double Jeopardy Clause, U.S. Const. amend. V, obviously is not at issue here, the defendant's interests parallel those protected by that clause, *i.e.*, avoiding the "embarrassment, expense and ordeal" of a prosecution and being compelled "to live in a continuing state of anxiety and insecurity," as well as the possibility of being convicted even though innocent. *See Green v. United States*, 355 U.S. 184, 187-88 (1957). *See also Webb*, 467 N.W.2d at 115 (Abrahamson, J., dissenting). The United States Supreme Court has recognized in the double jeopardy context that these interests apply fully to corporate as well as individual defendants. *See United States v. Martin Linen Supply Company*, 430 U.S. 564 (1977) (government appeal from acquittal of corporations on contempt charges barred by Double Jeopardy Clause).

hearings, it cannot arbitrarily deny them to a given class of defendants consistent with the Equal Protection Clause. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (although no constitutional right to appeal, when an appeal is afforded by state law, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause") (citations omitted); *Eubanks v. Louisiana*, 356 U.S. 584 (1958) (although no federal constitutional right to indictment by grand jury, Equal Protection Clause applies when state nonetheless provides for such a right). *See also* Wis. Const. art. I, §9.

CONCLUSION

In short, there is no rational or legitimate basis for denying to corporate defendants the same right to a preliminary examination enjoyed by all other felony defendants, whether natural or artificial persons. That discrimination surely is not necessary to further any compelling state interest. As one court has observed:

> Where corporations are as much within the mischief aimed at by a penal statute as individuals, both the prohibition of the statute and the method of its enforcement should be extended alike to each of them.

Commonwealth v. N.Y. Cent. & H.R.R. Co., 206 Mass. 417, 92 N.E. 766, 769 (1910) (rejecting argument that corporation may be prosecuted only by indictment) (citation omitted).

Corporations lose sympathy, rightly, when they seek

treatment different from the rest of us. But even if sympathy were the issue, which it is not, this is the opposite of what Crossroads asks; it asks to be treated as every other criminal accused. Above the columns fronting the United States Supreme Court are etched in Vermont marble the words "Equal justice under law." Crossroads values that ideal. Let the Wisconsin legislature do the same.

The corporate exception is irrational and thus violates Crossroads's rights to equal protection of the laws. The proper remedy for this violation is to strike the unconstitutional exception from the criminal procedure code, leaving in place the requirement of a preliminary examination, applicable to *all* felony defendants. *See Milwaukee Brewers*, 387 N.W.2d at 263.

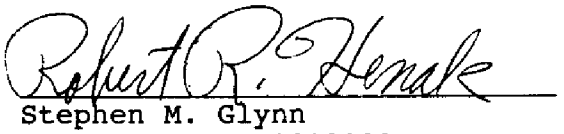
The Circuit Court erred in denying Crossroads' request for a preliminary examination. For these reasons, Crossroads respectfully asks that this Court find invalid the "corporate exception" in Wis. Stat. §§970.02(1)(c) and 971.02(1) to the statutory right to a preliminary examination, reverse the Circuit Court's order, and remand this case for a preliminary examination.

Dated at Milwaukee, Wisconsin, March __, 1995.

Respectfully submitted,

C&S MANAGEMENT, INC., Defendant

SHELLOW, SHELLOW & GLYNN, S.C.



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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief and appendix produced with a mono-spaced font. The length of this brief is 25 pages.

Robert R. Henak

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 97-0642

COUNTY OF KENOSHA,

Plaintiff-Respondent,

v.

C & S MANAGEMENT, INC.
d/b/a CROSSROADS NEWS AGENCY,

Defendant-Appellant.

Appeal From The Final Judgment Entered In The Circuit Court For Kenosha County, The Honorable Bruce E. Schroeder, Circuit Judge, Presiding

SEPARATE APPENDIX OF DEFENDANT-APPELLANT

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JUDGMENT OF CONVICTION
~~SENTENCE XXXXCONFINEMENT~~

FILED

JAN 29 1997

GAIL GENTZ
Clerk of Circuit Court

STATE OF WISCONSIN PLAINTIFF.

VS.

C & S MANAGEMENT INC DEFENDANT.
D.O.B: /00/0000

STATE OF WISCONSIN
COUNTY: KENOSHA
COURT: CIRCUIT

CASE NO: 94OR000592

Upon all the files, records, and proceedings, it is adjudged that the defendant has been convicted upon his or her plea(s) of Not guilty, Judgment After Jury Trial - Guilty on 1/29/97 of the crime OBSCENITY ORDINANCE in violation of S.9.10 committed on September 09, 1993

It is ADJUDGED that the defendant is guilty as convicted.

It is ADJUDGED that the defendant is ordered to pay a fine $4,000.00 (and the costs of this action) TOTALING $5,030.00. STAYED PENDING APPEAL.

IT IS ORDERED that the Clerk deliver a Duplicate Original of this Judgment to the Sheriff who shall forthwith execute the same.

Dated: 1|29|97

Judge: BRUCE E. SCHROEDER

Defense Attorney: STEPHEN M. GLYNN
District Attorney: BRUCE W. BECKER

CIRCUIT COURT

Gail Gentz
Clerk of Circuit Court
By Maria O. Orie
Deputy Clerk

STATE OF WISCONSIN : CIRCUIT COURT, BRANCH 3 : KENOSHA COUNTY :

COUNTY OF KENOSHA,

Plaintiff,

MOTION HEARING

-vs-

File #94-OR-468/469/456/592/590/591/536/538/457/470/537/471

SUBURBAN VIDEO, INC., SATELLITE NEWS & VIDEO, INC., and C&S MANAGEMENT, INC.,

Defendants.

BEFORE THE HONORABLE BRUCE E. SCHROEDER

JUDGE PRESIDING

APPEARANCES: ROBERT JAMBOIS, District Attorney, and ANGELINA GABRIELE, Assistant District Attorney, appear on behalf of the County of Kenosha.

JEFF SCOTT OLSON, Attorney at Law, appears on behalf of Suburban Video, Inc.

DEIDRE BAUMANN and WILLIAM RICHARDSON, Attorneys at Law, appear on behalf of Satellite News & Video.

STEPHEN GLYNN and ROBERT HENAK, Attorneys at Law, appear on behalf of C&S Management, Inc.

Barbara Mason
Court Reporter

Date of Proceedings: May 26, 1995

Hanaway, which is cited in both briefs, is very instructive and persuasive. And based upon the precedent therein this -- well, persuasive precedent therein, the motion is denied.

On the fifth motion, any further comment?

MR. GLYNN: If I may, Judge, just very briefly. The fifth motion raises issues that a casual observer of the law of obscenity might think are already resolved and were resolved in Miller. But as we attempted to point out in our briefs, first, there is a clear development occurring in the United States Supreme Court, as evidenced as we have cited by Justice Scalia's recent pronouncements in this area. And, frankly, since the time the parties have filed the briefs, the United States Supreme Court in Lopez just very recently indicated a willingness to re-examine this entire concept of control of what happens on a governmental level.

And so my first point is simply that I am not so sure that Miller is as solid as it may appear to be. But even if we lost on that issue and the Court says, you may not think it's so solid, but it's still the law of the land, the second part of our argument, which is really the lengthier part of our memo, is one that isn't addressed at all in either the Seventh Circuit decision

in Kucharek or the U.S. Supreme Court in Miller, and that is the State Constitution and the overbreadth doctrine under Wisconsin constitutional provisions. That's all I wanted to point out to the Court.

THE COURT: Thank you. Mr. Jambois.

MR. JAMBOIS: *Your Honor, when the State Supreme* Court has considered obscenity issues, it has applied the Miller standard and there is no indication that the -- in Wisconsin the State Constitution provides a broader range of freedoms or any different freedoms than those provided by the Federal Constitution. And in any event, I believe that the County has adequately addressed this issue in its brief.

MR. GLYNN: Just one sentence if I may reply to that, Judge. The exact argument that the State is making here was made in Oregon in the case that we have not only cited but appended to our brief; semi-colon, since I said this would be one sentence; a court is simply required to conduct an analysis under State law when that's raised by the parties, comma, which has been done here. Thank you.

THE COURT: Well, there are a couple of things on that whole subject. First of all, are you so sure that Justice Scalia's resolution would be unfavorable to the government in these areas?

MR. GLYNN: No, in honesty, Judge, I am not, given his general approach on other issues. But one thing that at least allows me to say with no hesitation and passing any straight-faced test that the Court would ever impose on a defense lawyer, if there is anyone on that Court who is concerned about government's restriction of conduct that doesn't have any apparent and direct harm to the citizenry, it's Justice Scalia. And that's the reason I brought up this recent Lopez decision. And I don't want to get into a long discussion of this, Judge, but as the United States Supreme Court indicated just earlier this week, there is a big fight on that Court right now. I mean Lopez went 5-4 against the government. The case that has the name of the inquiry in the case caption itself -- it was just decided on Monday of this week, and I apologize, I can't give you the name of it, went 5-4 the other way because Justice Kennedy in that case --

THE COURT: Term limits you're talking about?

MR. GLYNN: Term limits, thank you, Judge. Justice Kennedy in that case joined the four parties on the other side. And as the New York Times has pointed out, this whole question of how much power the government has to control actions of individuals in this country is the quote, first principles, closed quote,

discussion that is generating a lot of interest in that Court.

And, again, I don't -- I don't want to take the time to repeat what's in our brief. But I wanted you to understand that this is not simply our taking an argument that was made in this county some years ago that never did get itself resolved in the appellate courts because Teunas went out on procedural grounds, but this is not a matter of our taking that same argument and simply putting it in here. The law is -- (a), has changed in some regards; (b), is changing in the U.S. Supreme Court; and, (c), relates on this motion to a State law ground that simply has never been addressed by the Wisconsin Supreme Court.

Princess Cinema, which is the last time the Supreme Court of Wisconsin took much of a look at the obscenity statute, at least in an overbreadth area, never even got to the question of the effect of the Wisconsin Constitution. And we are mindful of Justice Abrahamson's telling lawyers who seek to challenge statutes on State law grounds that they had better give you -- give the trial judge an analysis under the State Constitution. And that's why our memo is as lengthy as it was.

I just -- and I guess, you know, the bottom line

here is that I think our briefs say what we need to say. But I just wanted the Court to be aware that this State law issue is independently raised and I think pretty strongly raised.

MR. OLSON: Your Honor, if I may, I would like to add to Mr. Glynn's request that the Court take the State law constitutional issue seriously in this case. I handled Jacobs v. Major in the Wisconsin Supreme Court, which I think was the last serious attempt to get the Wisconsin Supreme Court to hold that the State constitutional free speech provision Article 1, Section 3, provides more protection for free speech than the Federal Constitution. In that context we were talking about whether the Constitution gives you free speech rights against private parties, particularly shopping mall owners to engage in leafletting, etc. in shopping malls.

That case was resolved against us 4 to 3, but the Supreme Court majority never said the Wisconsin Constitution's protection is only as broad as the Federal Constitution. It has said on many occasions, including that case, it is at least as broad and might be broader in some areas. So I think the Court has to look seriously at whether the cases cited in Mr. Glynn's brief establish that this is one of those areas. Thank

you.

THE COURT: Thank you. Well, anybody else want to speak on it?

MR. JAMBOIS: None from the County, your Honor.

THE COURT: Well, there are a couple of things. One, I look at the Oregon ruling; and, of course, they are deciding what's good for Oregon, but I don't care for their English. I don't think that robust and rugged are antonyms to prudish, which is the grammar that they use. I don't think that's true. One can be robust and rugged and prudish or none of the above. So that's number one.

Number two, it strikes -- the argument that is made by the defendants in this case is that our State, the first law that was passed regulating obscenity, which incidentally was in the very first session of the legislature after the adoption of the Constitution, which is very instructive on the attitudes then prevailing, that that statute suggests that only material which is corrupt to minors, which is liable to corrupt the morals of minors can be prohibited, which leaves two questions. One, does that mean that material which can be corrupting to the morals of minors can be regulated whether or not it's exposed to minors? And, two -- well, and the second observation I guess is that

the defense briefs suggests that that statute tells us the outer limit of the power of the government to restrict freedom of speech in the area of obscenity.

And I don't think that's a logical conclusion. And certainly not one which I wish to draw. There is nothing suggested in any history with which I am familiar that when the first legislature outlawed obscenity, that it decided to use the entire reservoir of its power to regulate it. Because there is a wide area of governmental action before the government violates rights which are guaranteed by the Constitution. The government can regulate obscenity a little bit or it can regulate it a great deal. And it may be that the first session of the legislature chose to regulate just sparingly. But the fact of the matter is it did decide to regulate obscenity in this State. And the fact that it is merely contemporaneous with the State Constitution says much about what was intended by the founders of the State.

Secondly, the culture in which both the Federal and State Constitutions were adopted were very different from the culture today. As the defense briefs point out, blasphemy of any kind was viewed very seriously. The assumption is that because there were no statutes prohibiting obscenity in some areas, Wisconsin not

included, that this suggests that obscenity was viewed with permissive attitude. And nothing could be further from the truth. It was so underground historically that it was not deemed necessary to regulate it very much. And I think that's an historically supportable fact. Plus, there wasn't much of an opportunity to transact business with pornography as there is today. There were no photographs. There were no videotapes. There were no motion pictures. And that's the bulk of the obscenity business today. I think that in those days obscenity would have been limited to written word. And even if you read the great literature or what literature is available from that time, there is not a lot that would be considered even remotely obscene by today's standards because of the culture in which those people live. And I suppose pictures that you could draw, that would be about what could be distributed in those days. So they didn't face nearly the problem that we did, and yet they did in our first session of the legislature choose to enact legislation about it.

So while the founders of Oregon and Wisconsin may have been rugged and robust in chopping down trees, I am not so sure that they were quite as non-prudish as the Oregon Supreme Court would suggest.

Now, Miller has been the guiding principle both

in State and Federal law for 20 years and nothing has been shown to disturb it remaining so. And, therefore, Motion V is dismissed -- or denied.

VI, State Right to Obtain Obscene Materials for Private Use. Any further comment on that?

MR. OLSON: No, Judge.

MR. JAMBOIS: None in the County, your Honor.

THE COURT: All right. I think the premise of the Stanley v. Georgia is the right of privacy, that the government has no legitimate business in people's private homes. That's very different from the trading in obscenity. And, in fact, contrary to the suggestion in the defendant's brief that if you can't get the pornography into the house, you can't -- it makes hollow the right to view it, well, number one, again the right is not a right to view obscenity, pornography. The right is a right to be free from the arm of the government in your own home.

And, secondly, with today's videotapes and the machinery that's available, if you're of a mind to create obscene videos, you can do them right in your own home. So I don't agree that it makes hollow any claimed right of a person to view what he wants in his own home, which, again, I don't think is a right that the Court announced in Stanley vs. Georgia anyway. So that motion

is denied.

VII, Void for Vagueness, any further comment?

MR. OLSON: No, sir.

MR. JAMBOIS: Nothing from the County, your Honor.

THE COURT: All right. I think that the State has correctly analyzed that issue in its brief and that motion is denied.

VIII, complaint is facially insufficient for failure to identify a prohibited -- well, because it doesn't -- because videotapes are not banned under the local ordinance. Any further comment on that?

MR. JAMBOIS: None from the County, your Honor.

MR. OLSON: No, sir.

THE COURT: If I were going to rent a videotape that, as Mr. Glynn's excellent briefs phrase it, that was protected, albeit, sexually explicit, I would -- and I were going to tell somebody about it, I would say I am going to go rent a dirty movie. I wouldn't say I am going to go rent a dirty tape because people would say what does he wants a dirty tape for? They are movies. And that's what we call them. That's common language. I think common language is what we use to interpret statutes. And a movie, if you look it up in the dictionary, is a motion picture. And a motion picture

STATE OF WISCONSIN CIRCUIT COURT COUNTY OF KENOSHA

COUNTY OF KENOSHA,

Plaintiff,

-vs-

C & S MANAGEMENT, SATELLITE NEWS, SUBURBAN VIDEO,

Defendants.

ORIGINAL

No. 94 OR

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable BRUCE E. SCHROEDER, Judge of said Court, on Wednesday, the 9th day of August, A.D. 1995.

PRESENT:

MR. ROBERT JAMBOIS and MS. ANGELINA GABRIELE,

appeared on behalf of the County of Kenosha.

MESSRS. SHELLOW, SHELLOW & GLYNN, by MR. STEVEN GLYNN and MR. ROBERT HENAK,

appeared on behalf of C&S Management.

MICHAEL NOEL & ASSOCIATES, by MS. DIEDRE BAUMANN,

appeared on behalf of Satellite News and Videc.

MR. JEFF SCOTT OLSON,

appeared on behalf of Suburban.

Did you want to say anything on the record on this?

MR. JAMBOIS: Your Honor, you have said you're going to deny the motion.

THE COURT: Right.

MR. JAMBOIS: Then I don't need to say anything more, do I?

THE COURT: All right.

Mr. Glynn.

MR. GLYNN: The next motion, Judge, is -- actually there are a couple of new motions, both of which deal with evidence, both of which are -- I don't know -- maybe they're susceptible to stipulation.

The first one is entitled motion to dismiss discriminatory prosecution.

In a nutshell, Judge, what we're saying then is that the County has chosen to prosecute these three stores, only when precisely the same activity is engaged in by a store that is not located on the highway or near the highway, and at least 8 or 9 other stores in the community which sell or rent video tapes depicting precisely the same activity that we have at issue here.

And what I'm prepared to do on that is to call Mr. Jambois as a witness to testify to the matters on which he's quoted in newspaper articles that are appended to our motions.

And I assume he'll say, yes, those are fair comments.

To ask the Court to take Judicial notice of a transcript of a proceeding before it back in May, when Mr. Jambois said the same thing that's in the newspaper articles.

And to call, if necessary, Angela Kahidra, who is seated in your courtroom, who is a private investigator, who, at my direction, went to a number of other book stores or video stores in the Kenosha County environs and purchased or viewed as being available for rent, but did not want to run afoul of the State statute that says if you rent a video and don't return it in time, you're violating the law.

So we don't have the videos here. We simply have her description of them. And will testify and produce as exhibits what we have here which consist of video tapes showing anal sex that are available for sale or rent at other stores in this County, video tapes showing transsexual activity. What I referred to earlier as, quote, She-Male, close quote activity, which are for sale or rent at other stores in this community.

And other video tapes depicting explicit sexual activity.

And we'll present that testimony to show that these materials are available.

Mr. Jambois will testify, I believe, based on the looking that we have done at the filings in the Court system here, that none of those stores is subjected currently to a prosecution.

And I guess I could probably look at my notes to

see what other fact issues that we would want to present through Mr. Jambois.

But the simple fact of the matter is that these -- we assert that these stores are being singled out for prosecution because of their geographical location.

And that the prosecutor, in our second motion, which is entitled motion to dismiss, colon, intent to suppress protected speech.

We assert by that motion that the purpose underlying these prosecutions is as Mr. Jambois has stated time and time again.

And that is, to shut down these stores.

MR. OLSON: Your Honor, if I may: up to now we have been discussing motions which were filed many months ago.

It is my understanding that the Court's ruling when we were last together, that the other Defendants would be permitted to adopt the motions file on behalf of Cross Roads covers these more recently filed motions as well.

But in case there is any ambiguity on that point, I want it clearly on the record that my client adopts these motions and adopts the arguments, and evidence submitted in support of that.

THE COURT: Any objection to his request to adopt?

MR. JAMBOIS: No, your Honor.

I'm scheduled to be at a sentencing at 3:00 o'clock

in front of Judge Wilk, and he has a jury trial right now.

What I'll request is a five minute recess.

For the record, I did come here with a subpoena. It was actually a subpoena deuces tecum, which is where exhibit number one originates from.

A response to the subpoena the Defendants have filed. I don't believe they've made a showing, by the way, that even supports the basis for an evidentiary hearing, if you assume everything that Mr. Glynn has said is true -- and I believe Mr. Glynn to be an honest and truthful person -- so what. That doesn't establish discriminatory prosecution.

When we prosecute people for delivering drugs, we know there are many other people in the community that are selling drugs, and we're not prosecuting them. Maybe because we don't know about them. Maybe we don't feel the time is right to prosecute them for delivering drugs.

When we prosecute people for speeding, we know maybe some of them are prosecutors, maybe some of whom are judges, maybe some of whom are regular ordinary citizens. If the officer catches them, the officer decides to get them. Does that mean somebody who is arrested for speeding has charge of discriminatory prosecution?

If Counsel were arguing we're only prosecuting book store owners who are black, then that would be a suspect classification. Or, only book store owners who are gay, that

would be a suspect classification.

But book store owners who happen to be located close to the interstate, if they're prosecuted, first, being close to the interstate is not a suspect classification.

If their argument is that we're selectively prosecuting people, that's true. We are. We are selectively prosecuting people, just as the IRS checks certain people they're going to prosecute.

They prosecute the people who are the most visible, who will make the most visible target for income tax evasion.

The State has selected those who are to be prosecuted first.

Now, that's not to say we're not in the works of investigating some other persons. And if I'm asked questions about any pending investigations, I'll assert privilege and indicate that any pending investigations are privileged.

And I don't choose to discuss any pending investigations. They're not matters of public record until such time as we file charges, if we file charges.

I don't think that Mr. Glynn has made an argument for selectively or discriminatory prosecution. He has alleged selective prosecution, but I can be selective.

In fact, I have to be selective. I can't prosecute everybody who breaks the law in the community of Kenosha. Some of those people haven't been apprehended.

And if some have been apprehended, there are reasons for not prosecuting them, which don't pertain to any category under the U.S. Constitution.

Assuming everything Mr. Glynn says is true, she's not an investigator who purchased tapes that she considers to be obscene --

MR. GLYNN: We've got them here. That's why we checked with the clerk to see if there was video equipment available so the Court can decide whether or not the material here is of the same nature as the material that's charged, so it's not just going to be her.

Frankly, I hadn't even intended to have her try to testify as to whether it's obscene.

THE COURT: I think Mr. Jambois makes a good point.

If they put radar on Sheridan Road and all the people who live in Allendale, which is the southeast part of town who are speeding down Sheridan Road, getting tickets, can complain they are selectively being prosecuted because they happen to be on the road which was selected for strict enforcement.

If -- or even with respect to what you bring in, what you mention as an effort to suppress speech.

You mean to tell me that it's an in -- that it's an abuse of discretionary determination for the District Attorney, if he has somebody who picks up a magazine, which is, in his opinion, obscene, picks it up at a Convenient Store that has always run a

very clean ship and it happens to be on the rack in between Sports Illustrated, and well, I shouldn't mention them, but in between Newsweek and the Catholic Digest, and it happens to be there?

The District Attorney is forced to prosecute in order to avoid a claim that he's misusing his power when he prosecutes institutions that apparently carry an inventory that it has generally -- the inventory is generally of sexually explicit materials.

Whether some of them are protected or not.

MR. OLSON: Your Honor, I think that's precisely the point Mr. Jambois characterizes our three clients as the most ostentatious violators of his new Obscenity Ordinance.

But I think that's the wrong way of looking at the collection of what's made here.

Our three clients are in the business of selling and renting sexually explicit video tapes to the general public.

We know that not all sexually explicit video tapes are obscene, just by virtue of being sexually explicit.

If they're not obscene they're protected by the first amendment. They're protected by the first amendment.

And our clients are being selected out for prosecution because they're in this business, then the prosecution has made its selection based upon the exercise of a first amendment protected right.

THE COURT: I don't buy that at all. I really don't.

And that, to me, is akin to -- let's get something straight. Obscenity is not now and has never been protected by the Bill of Rights.

If somebody is selling obscene material, there is no protective covenant involved at all.

If you're right on the border line, if you insist on walking the tightrope, then you have to take the chance that you're going to fall off.

And this idea that the people who are walking the tightrope should be treated by the prosecutor as the same as mom and pop's store that happens to make a mistake on one occasion, and that the one who walks the tightrope has a right to come running over to Court and say, well, our rights are being violated -- I don't buy it.

I don't think there is any precedent for that.

And to the extent that there is, it would be, in my opinion, an example of the excesses of the 70's.

MR. JAMBOIS: May I interrupt?

May we take a five minute recess so I can go down to Judge Wilk's Court and come back here?

MS. BAUMANN: In the case of Satellite News and Video, everything we're saying here today, all the motions which have been filed, subsequent to the motions filed for previous Court appearances, and so forth be incorporated as well, all briefs and statements.

THE COURT: Any objection to that?

MR. JAMBOIS: No, your Honor.

THE COURT: All right.

Let's take a five minute recess.

(Thereupon followed a brief recess, after which the following further proceedings were had herein:)

THE COURT: Don't misunderstand what I have said.

I'm not saying that people who have had their rights violated don't have a right to come to Court and complain about it.

But just if you're walking the tightrope with respect to what is and what is not protected by the Constitution. I just think that the Courts are going to be less inclined to be solicitous than would be the case as has been identified by the District Attorney.

Someone who comes in and says we're being prosecuted because of our race or our religious beliefs or something like that.

Did you want to be heard further on this subject?

MR. GLYNN: Judge, it seems to me we can do this one of a couple ways.

I can simply use the affidavit I submitted in connection with our motion to dismiss as an offer of proof.

And if you say that if we were able to establish

those facts we would be entitled to some relief, then we could go ahead with an evidentiary hearing.

If, on the other hand, you say Mr. Glynn, even if you can establish everything in your affidavit that is not going to be enough to get over the hurdle, then we don't need to take your time.

And I appreciate the fact that as a consequence of the way our scheduling came about you probably haven't even had a chance to read this stuff.

THE COURT: Yes, I did.

MR. GLYNN: Oh, have you. Okay.

Well, then, however you want to do this is fine.

THE COURT: Well, I didn't give the District Attorney a chance to respond in full.

Do you want to respond further to what was said?

MR. JAMBOIS: Well, your Honor, I'm looking over, I'm considering -- I would like to consider Mr. Glynn's proposal that the Court accept everything in his affidavit as true, and then that would conclude his argument and then I would respond to both the affidavit and --

THE COURT: I don't think he said that would conclude his argument.

He said if I said it wouldn't make any difference that would conclude his presentation.

MR. GLYNN: At that stage, we can't presumably -- you

would say we're not entitled to a hearing, and if we're not entitled to a hearing we obviously couldn't present facts to sustain a motion, so the motion would fail.

If, on the other hand, you would say we're entitled to a hearing, then we would go forward with that.

And if you felt that that was sufficient, I understood the State to be saying that even if it accepted what we were saying, even if the Court accepted what we were saying, the Court should deny our motion.

So we're saying, okay, if that's the way you want to do it, this is one way of handling it instead of going on with a lengthy, convoluted offer of proof.

THE COURT: So did you want to respond?

MR. JAMBOIS: What I was saying, let's assume for a moment everything contained in his affidavit is accurate. Defendant still has not set forth sufficient argument to support everything on the issue of discriminatory prosecution.

He hasn't alleged anything that would suggest that the prosecutor's office is selectively prosecuting, based upon any improper factors or improper considerations.

I haven't decided to prosecute these people because I dislike them.

THE COURT: Well, you're putting evidence in now.

MR. JAMBOIS: Pardon me.

It hasn't been alleged, your Honor, it hasn't been

alleged that I have selected these people to prosecute them.

THE COURT: Maybe I misunderstood what you were saying.

MR. JAMBOIS: It hasn't been alleged that I selected these people because of any personal animosity, because of any reason for which I have a conflict of interest, because of any protected classification factors.

There is simply no allegations here that support an allegation of discriminatory prosecution.

Now, what they're really alleging is selective prosecution.

They['re saying that their clients have been selected for prosecution and there's other people in Kenosha doing the same thing.

Well, your Honor, if that was grounds for dismissing this case, it would be grounds for dismissing virtually ever single case in the community, except for charges of first degree murder.

Because, and even cases of first degree murder, because we don't always catch the people that did it.

Because the fact of the matter is for every sexual assault that is prosecuted, there are a number of others that are not prosecuted. For every drug delivery case that is prosecuted, there are literally hundreds, if not thousands of others that are not prosecuted.

With respect to speeding violations, there are a

number of citizens who are not prosecuted every day for speeding violations, even though they break the law, they speed.

So it's okay for prosecutors to be selective. It's okay for law enforcement officers to be selective.

There is nothing wrong with that. It is not illegal and it's not grounds for relief.

And as long as they have not alleged any discriminatory purpose that is based upon improper motivations, they don't have a case.

There is no reason for any kind of an evidentiary hearing.

Although, I have indicated to Mr. Glynn I would be interested in hearing what his investigator recovered and where she recovered it from, because we may subpoena her as a witness, and charge those people with violations.

He doesn't want to produce her and produce that to your Honor unless it becomes necessary.

I submit it is not necessary.

The Defense has not even raised a basis as a matter of law, not alleged a basis for a hearing.

THE COURT: Supposing Mr. Jambois singled out your clients for prosecution because they're all lined up on I-94.

I don't think there is any showing that he is misusing his power in doing that, and I think that is the essence of a claim of this nature in that some way he's misusing his power

in directing the -- or utilizing the great power of the prosecutor's office in an inappropriate fashion. The District Attorney -- Mayor Julianni in New York can say, I'm going to clean up Times Square, and I don't think there is any question that that's well within the scope of his, not only his authority, but his responsibility.

The same thing is true. I-94 is the entry to Wisconsin. It is the entry to this County, and people may not realize it now, but it was only a few years ago that the unemployment rate in this community was 15 per cent.

It's because a lot of new industry has come to this community that the 12,000 people who lost their jobs at the Chrysler plant have been able to find some other work.

And if the District Attorney feels that having the entryway to the State cleared of the type of institution that Mayor Julianni wanted to clean out of Times Square, I think that's a legitimate use of his power.

Whether he's right or wrong to do it is a political decision, and that's what he's charged with doing.

I agree that there's been no showing that he's singled out some case for an improper purpose.

So even if what is alleged in your motion were established, I don't think it would change the Court's ruling.

So I'm going to, if that's the close of it, I'll deny the motion on that basis.

MR. GLYNN: Judge, so I don't have to repeat everything again, we were discussing the motion to dismiss, colon, discriminatory prosecution.

As our additional motion, entitled motion to dismiss, colon, intent to suppress protected speech indicates, it also incorporates by reference, although I notice that the word, incorporates is mis-spelled -- let me correct that right now.

Incorporate, to begin with, should begin with an I, not an E -- incorporate by reference, my affidavit.

And so we would be making the same factual offer and presentation that we did on the motion entitled motion to dismiss discriminatory prosecution.

So, rather, if I can just incorporate the arguments from that one into this one, it will save time.

THE COURT: Any objection?

MR. JAMBOIS: No, your Honor.

THE COURT: All right.

That's so permitted.

MR. GLYNN: And I assume that's denied for the same reasons as the other one.

THE COURT: Did you want to say anything?

MR. JAMBOIS: Are you going to deny that motion as well, your Honor?

THE COURT: You're asking for my ruling before you decide to speak?

MR. JAMBOIS: Since Defense Counsel doesn't have anything more, I don't see anything to be added.

I have no intent to suppress protected speech, your Honor. Neither does the County.

THE COURT: I don't think there's been a sufficient showing to warrant further inquiry on the subject.

And the motion is denied.

MR. GLYNN: Then, at least according to my list, Judge, that takes care of the motions that might have had evidentiary components.

If you want to address the others, we can.

THE COURT: Which are those, now?

MR. GLYNN: I think we've still got the State's motion to consolidate some cases for trial, and motions for protective order relating to discovery.

I have already told --

THE COURT: If I thought -- go ahead.

MR. GLYNN: I'm sorry.

We have that motion that we filed that I have already discussed that says that because this ordinance is not in conformity with the State statute, the District Attorney's office can't prosecute.

If you want me to argue that more, I will.

THE COURT: No.

MR. GLYNN:; I don't think it requires any evidentiary

STATE OF WISCONSIN : CIRCUIT COURT, BRANCH 3 : KENOSHA COUNTY :

COUNTY OF KENOSHA,

Plaintiff, JURY TRIAL

-vs- File #94-OR-592

C & S MANAGEMENT, INC.,
d/b/a CROSSROADS,

Defendant.

BEFORE THE HONORABLE BRUCE E. SCHROEDER

JUDGE PRESIDING

APPEARANCES: BRUCE BECKER, Assistant District Attorney, appears on behalf of the County of Kenosha. STEPHEN GLYNN and ROBERT HENAK, Attorneys at Law, appear on behalf of the defendant.

Barbara Mason
Court Reporter

Date of Proceedings: January 27, 1997

(Previous motion for summary judgment under separate cover.)

THE COURT: All right. Now what's next?

MR. GLYNN: We have a few motions in the 592 case, your Honor. One of them has to do with the admission of comparable materials. And I believe, Judge, that I can shorten that motion somewhat.

THE COURT: All right.

MR. GLYNN: The motion as it stands right now has two components; one asserting that we ought to be allowed to put into evidence comparable materials consisting of two videotapes, which have been considered by juries in this county, one of which was purchased by the same officer on the same day as the case in issue here today. The other of which was purchased by the same officer, but approximately 110 or 120 days later as the tape that was purchased today. All of these cases were charged on or about the same day and the first time any defendant had notice that any of these videotapes was alleged to be obscene occurred on or about the same day.

We believe that these other videotapes have clearly been considered by members of the community and have been considered to be acceptable by members of this community.

The law that we set forth in our memorandum would be equally applicable to the other type of testimony, which our motion indicates we are prepared to present; and that would be testimony from an investigator who visited at least nine stores in the Kenosha community looking for sexually explicit videotapes that depicted the same exact types of sexual activity as are involved in the tape at issue here. She made purchases at six of the stores and she observed rental information relating to similar movies in the stores from which she could not make purchases because they were only rental stores and not sale stores. She would be prepared to testify about how each of the videos, whether purchased or observed for rental, contained again the exact same types of sexual activity depicted in this group of videos. I am sorry, in this video, singular video that's in court today. And that the videos that she observed elsewhere either by purchase or through the rental business included videos, which like this one, involved completely consensual activity, no group sex, no children, no animals, no factors that might be considered exacerbating factors; that what they depicted is the same thing that this videotape at issue here today depicts; and, that is, consensual sexual activity between one couple at a time in each of three separate

vignettes.

And to get to the point of how I think I could shorten this, your Honor, we think that we are clearly entitled to put into evidence relating to the videotapes that were considered by members of a jury and that what the jury ended up with, as I understand it, was a unanimous verdict in the first case and a single dissenting vote in the second case.

We would be prepared again through the testimony of the same investigator, who sat through those trials, observed those movies and was present at the return of the jury verdict and saw what was said, that those two videotapes, (a) are comparable; and, (b) were considered acceptable within the community. That much we think is clear.

And if it would speed things up, we would be willing to limit our offer and, of course, then our testimony to that and not get into the other videos; (a), it would shorten time; (b), it would not be cumulative although I suppose it could be seen as showing more of the community at issue here. But I think that that's one way to deal with this comparability issue.

THE COURT: Permit me to interrupt if I want. If the district attorney were to come in and say, well,

there were some trials of obscenity cases a few years ago, most of which resulted in findings of guilt --

MR. GLYNN: Some

THE COURT: And have one of their investigators come in and say these are comparable movies and were found not acceptable to the community, do you think that would be proper?

MR. GLYNN: I think it would be proper for them to offer that testimony, your Honor, because one of the things that is at issue then is what the community's view is. I mean, Judge, I would agree that what I am saying here --

THE COURT: Well, there is more of a problem. Let me interrupt you because there is more of a problem than just the community view. It's the investigator's view that is the biggest problem. That is to say, who is the investigator to say they are comparable. I read -- let's not talk about books. I watched Independence Day and I watched Twister and I thought they were comparable movies. And I talk to other people and they say what are you talking about there is nothing comparable about them at all. And why am I any better as a judge at determining whether these films are comparable than determining whether those two films were comparable. And, question number two, why would the

investigator be any better than I am?

MR. GLYNN: I don't know that the investigator is any better than the Court would be. But the Court just like the investigator could describe with detail on points of material similarities or material dissimilarities from one movie to the other. And the activity that is at issue in these cases is not for example the, oh, I don't know, the question of the furnishings in the room in which the parties meet each other. The question that is at issue is the sexual activity between the two people if, indeed, it is two people or more than two people, and the questions about consent, the questions about bondage, the questions about types of sexual activity.

I mean if, for example, one is simply a nudist camp movie and the other is a sexually explicit adult X-rated film with intercourse and lots of other activity going on, I agree at one level a person could say these are similar because they both show naked human beings. But I'm telling you that through the offer of proof that we could make and through the testimony that we could put on, we could show that these things are so similar that if you put a different face on the person, there would be no difference whatsoever. In fact, as between Anal Madness and Anal Vision No. 5, not only is the same

sexual activity engaged in, they are engaged in in the same order. This happens and then that happens and then the other thing happens and another thing happens. So neither of them has any significant amount of dialogue. Both of them have consensual activity displayed. I mean there is no force or threat of force that is used. The parties in both of the videos are smíling and encouraging each other to engage in the activities that they are. In neither one is one person subjugating the other so that one is only doing the other's wishes. In fact, they are both doing each other's wishes. There are those kind of similarities.

But if someone said and wanted to, for example, on cross-examination try to impeach on that basis, she would be prepared to play the movies because we have the movies. We have the videos. On the six videos that were available, that is the six stores of the nine stores that were visited that sold videos ended up with the videos being purchased if we were going to go into that, what I call, second category. But if we were to limit ourselves to the videos that were at issue here, frankly, the one that I would be most interested in showing to the jury if someone said I want to challenge the investigator's description, would be the video in the first trial called Anal Madness.

So I could do it either way, Judge. I could do it with the investigator on the stand describing similarities; and if the prosecutor wants to show that there are dissimilarities, that could be done on cross. And those are issues which I would submit, your Honor, would go to the weight of her testimony as opposed to the admissibility of it anyway.

You know, you say it's similar, I say it's dissimilar. Well, the jury is the one that will ultimately decide because it's the jury that has to decide whether or not there is a community that has accepted or not accepted this particular video.

So that's how I would suggest that we could deal with this issue of comparables. I don't think, Judge, there can be a serious dispute that if we can lay an adequate foundation, comparables are admissible. And I know that your Honor had expressed some doubt early on in these matters before any of the cases went to trial, for example, as to whether such a record could be established because just as the Court said, so have some other courts said, that the mere fact that something is available doesn't mean it's accepted. And, again, that's something there could be some argument about. But when a jury that has to find that something does or does not offend contemporary community standards, is or

is not patently offensive; and by that I mean substantially exceeds the customary limits of candor in sexual activities, and that jury says, no, we're not going to find this particular video to be in violation of that ordinance, then there isn't any longer an acceptance question.

And I grant you I suppose you could say it's acceptance only by the 12 people who are here. But I mean they are 12 people from throughout the county. They under our law represent a cross section of our community.

Anyway, so, and to come back to your original question about could a prosecutor do that? Absolutely. And we would try to show dissimilarities if we believed they were dissimilar. And if they were not dissimilar, we could say, yes, that group of people found that they were not to be accepted within our community; and, therefore, found a verdict of guilt.

But that's just simply the argument that we would make. I mean I am not suggesting, Judge, that because this comparable video was admitted and played for a jury and led to a verdict of acquittal, that the facts of that process when admitted in this case should require a verdict of not guilty. It's a piece of evidence. It's a piece of evidence, which I would argue and presumably

the county would argue the other side of. But just on the admissibility question, which is all our motion's to, I think it ought to be admissible. Thank you.

THE COURT: Thank you. Mr. Becker.

MR. BECKER: We object to this, your Honor. And I think the standard argument is that it invades the province of the jury. But I think that is a proper argument to be made. I don't think comparables, whatever the legal term may be, are admissible in a case like this.

If speeding is done, if cocaine is readily available within a half mile of the courthouse does not mean that that is accepted or even tolerated. I just cannot see how we can ask this one jury to let another jury basically decide this case.

MR. GLYNN: And, your Honor, in terms of whether or not they are admitted, the cases that we have cited in our memorandum make it clear that they can be admitted if there is an adequate foundation. And I submit that there is an adequate foundation for both types of evidence that the investigator could offer; that is, those two videotapes which were reviewed by juries in this county and found not to be obscene, and the other videotapes which she either purchased or observed available for rent in other bookstores within

this same community. And Womack is pretty clear on this. And we have to show that the proffered evidence, that is, the videotapes from the other cases, is similar to our own. And I have already indicated in what I would hope the Court could consider as an offer of proof that this is similar and we could offer such testimony; and, second, that this proffered evidence enjoys a reasonable degree of community acceptance. A reasonable degree is shown by the fact that two juries in this community have accepted it. And I think that that's a reasonable degree.

I also think, your Honor, completely independent of this, the fact that there are at least nine stores just -- actually, I am sorry, let me correct that. There are nine stores not on the expressway dealing with this type of merchandise and three stores which are on the expressway, all of which have been charged in these cases, being a total of at least a dozen stores in Kenosha County selling the same type of material is a fact from which a reasonable jury could infer that there is a market for this.

THE COURT: Let me ask you a question. If all nine of them were selling child pornography, would that create an acceptance to child pornography in the community?

MR. GLYNN: With all respect, your Honor, child pornography is a whole different category.

THE COURT: No, it's not.

MR. GLYNN: It's a value --

THE COURT: No. The Constitution says Congress shall make no law. So what you're saying is your values are more important than somebody else's who thinks the line should not be drawn at child pornography, but just at plain old traditional obscenity.

MR. GLYNN: With all respect, your Honor, the United States Supreme Court has said that child pornography is different.

THE COURT: And the United States Supreme Court has also said that obscenity is not protected by the Constitution. And the point of what's available -- for that matter, what is child pornography? They pass a law that they say at a certain bright line age it ceases being child pornography. These are questions that reasonable people differ about. And what you're telling me that -- is that because something has gained acceptance in the community, it could never be rooted out because it's available in nine stores.

MR. GLYNN: No. I am not, your Honor. Again, I'm not saying that because one jury acquitted and then a second jury acquitted that there can be no more

prosecutions. I'm saying that the evidence that one jury and then another jury acquitted is admissible in a trial for the same activity before a third jury. That's all I am saying.

THE COURT: And I am not even at that issue yet because I am still struggling with why the investigator has any competence to say what's similar and what isn't?

MR. GLYNN: I wouldn't be calling her as an expert, your Honor. I would be simply be calling her as an observer of fact just as I would --

THE COURT: To say that one movie -- she has watched three movies and they are similar.

MR. GLYNN: Well, I wouldn't have her state it in quite so conclusory a fashion. I mean I would ask her, for example, in video A versus video B is there group sex in either one of those? No. Is there sex between two people? Yes. Is there sex between more than two people? No. Does the sex that goes on between the two people consist of masturbation? Yes. In both? Yes. Intercourse?

THE COURT: I am going to stop you because I know you could go on and go through it all.

MR. GLYNN: But I want your Honor to be aware of what I would prove. And I think you know what I'm saying.

THE COURT: Right.

MR. GLYNN: And so I don't need to belabor this with a longer offer of proof. Is that acceptable to you?

THE COURT: It is.

MR. GLYNN: And to the State?

MR. BECKER: Yes.

MR. GLYNN: So --

THE COURT: And I am not going to allow it.

MR. GLYNN: Okay. On either side; that is, either what's available in the stores or what the other juries have done.

THE COURT: I don't want to give you any preliminary rulings on evidence. I don't think I am supposed to do that, nor do I desire to do it. The only thing I am going to tell you is I am not going to permit your investigator to make a statement even in less blunt terms that one motion picture is similar to another in content when the issue to be determined by the jury is whether a specific depiction of events in a specific motion picture is or is not obscene. That's the extent of the evidence -- the ruling I am going to make in advance. I don't think I should make preliminary rulings on evidence.

MR. GLYNN: Okay. Well, then I will deal with

yourselves. And that's particularly true -- well, the instructions, I guess I am not giving you enough time if I say 8:15, but what I want to do, we have to finish this case tomorrow because I didn't ask the jury about Wednesday.

MR. BECKER: I will put it on fast forward.

THE COURT: I suspect that they take multiple shots of the same activity and then they run it as if it were a continuous sequence.

MR. BECKER: There are three parts and they are all about the same.

MR. GLYNN: And the most common line of dialogue is oh, yeah; oh, yeah; oh, yeah; oh, yeah. So you can get that on fast forward probably.

THE COURT: I can hardly wait. All right.

MR. BECKER: Well, the only reason I brought up that Mr. Scott was because of the possibility of mentioning him in the opening statement; and if I object, and the objection is sustained --

THE COURT: Well, all right. I suppose I better talk about it for a second right now. Is there going to be a mention of Mr. Scott? There was already.

MR. GLYNN: I don't know.

THE COURT: But is there going to be?

MR. GLYNN: Only to the extent of saying that if

we get to the stage where we call witnesses, we may present testimony; and if we do, if we do, it could include a person who has done a community standard survey. And, you know, so I would talk about it to that extent.

THE COURT: I guess we better talk. Have you got a few minutes? Well, let's spend a few minutes talking about it right now. Why don't we start as Judge Learned Hand once said, go ahead, you have my biased attention. The reason I start by saying that is because we went through this once before and I want to know where either, (a), I'm wrong -- well, I know that you think I'm wrong -- or something new that you think I should consider, or, (b), what's different?

MR. GLYNN: Your Honor, the notes -- the notes that we took from the hearing on January 24 of 19 -- well, I think it was 1996, although the handwritten note says 1995, indicate that the Court -- first of all, the Court didn't rule, but instead expressed some concerns.

THE COURT: Mm-hmm.

MR. GLYNN: And one concern was whether or not the survey at issue had obtained a representative sample of the State of Wisconsin and wanted to know whether, for example, there were a large number of people who for whatever reasons, but including, for example, religious

reasons, simply hung up when the interviewer called. And the Court indicated that the answer to that question would be valuable information to the Court.

I can tell you that Mr. Scott will be able to identify the precise number of people who declined to respond and at what point in the process they declined to respond, but that his testimony will be regardless of the number of people -- I am sorry, regardless of the fact that a number of people at various points decline to respond, the results of the survey have not been affected in terms of its validity. That is, there was not, for example, such a higher number of people responding by saying I don't want to answer your questions, that that became an issue. And he'll be prepared to testify about all that. But he has that information which the Court wanted to know.

The Court also wanted to know the total number of people who called -- I am sorry, who were when called, terminated the interviews. And, again, he'll have that information.

Wanted to know about, oh, the Court said a person responding may have something significantly different in mind and that each movie must be determined on its own merits. And the Court was disturbed about the grouping of what was described in the survey instrument as X-

rated movies and magazines or something like that. And toward that end I can inform the Court that I don't -- and the Court was concerned -- I am sorry, the Court was also concerned that the respondents to the survey might simply be people thinking of the movie "Showgirls" as opposed to what might be considered a hard-core, sexually-explicit movie. And toward that end, your Honor, I would invite the attention of the Court to what was marked as an exhibit on January 24, 1996 as Exhibit 1. And page 10 of that exhibit, which informs the respondents that the videos and magazines "may have little or no plot". Their contents are primarily graphic depictions of nudity and sex, showing a variety of actual sexual activities, including vaginal intercourse, ejaculation, bondage, oral sex, masturbation, anal sex, use of vibrators, lesbian sex, group sex, and variations of these by adult performers. No minors are involved and these materials can only be purchased, rented or viewed by adults who desire them. That was the definition that was used to make sure that the concern expressed by the Court was not realized; that is, that the respondents would understand that the movie "Showgirls", which I understand not to show any of this, except perhaps nudity, would not be included in the types of matters that the survey was dealing with.

Moreover, Mr. Scott will be able to testify on the basis of other scientific tests that have been performed that there is virtually no difference in responses received from people who get a description such as the one I have just read and responses received from people who actually physically have the materials before them, or have just viewed the materials, for example. And he'll further be able to testify that the use of a description such as this alerts people to the fact that these are not surveys dealing with magazines such as Playboy or movies such as "Showgirl" even though both of them might be considered by some people to be sexually explicit magazines or movies and "Showgirl" may or may not be considered by a viewer to be an X-rated movie. So to the extent the Court had those concerns, I think that we can address all of them.

Mr. Scott is not a stranger to this process. He has testified about these sorts of matters a number of times. The survey instrument was prepared with his involvement in the same way that they have been involved in many other surveys that he has done. The people who actually did the telephoning, the survey company, who I believe is a company called SSI, yes, SSI, has already been described on the record in this case as being a company called Survey Sampling, Inc., and I have

indicated on the record when we were here before that the sorts of companies that SSI does its work for indicate, I think, and fairly allow the inference to be drawn, that they have sufficient experience in this area so that they know how to elicit information from people; and the results that they obtain are reliable as demonstrated by the -- their repeated use by many Fortune 500 industry companies that frankly use their information for marketing purposes and they wouldn't -- I mean the inference is that these companies wouldn't waste their money with this company if they didn't do good work. So that's my response to the questions the Court asked last time.

We have submitted the report by Mr. Scott so that the State understands what it is he would be testifying to. If the Court declines to allow his testimony or even at this stage is inclined to decline his testimony, I would ask permission to make a more organized offer of proof at some time when we are not all so tired frankly. But I think -- I think this Court understands what it is that we wish to do. I don't know whether or not the prosecutor does just because he didn't have the benefit of the earlier appearances. But if there is -- if there is a question in the Court's mind as to what it is that Mr. Scott will testify to, I can do that in a more

detailed offer of proof or I can simply put in his curriculum vitae together with these reports and give it as a more general offer of proof. I just don't want, frankly, to have to do that now and it's late and I am tired and I know the court reporter and the Court are probably tired as well. Thank you.

THE COURT: Thank you, Mr. Glynn. Mr. Becker.

MR. BECKER: Yes, everything that Mr. Glynn has said I don't think any of it warrants legally admissibility of such evidence to be presented to a jury and allow them to abdicate basically their responsibilities in determining community standards in this particular case. I don't know of at least a local case that has allowed such testimony.

THE COURT: The trouble I am having, Mr. Glynn, is that the type of survey that you want to present seems to me to be more valid to be presented to the County Board to say, look at how many percent of the public think this should be allowed; not in the court where the question is not whether these folks -- we spent the greater part of half a day already going through this -- not whether these folks think this should be available for sale, but whether this specific depiction should be found to be in violation of a very intricate statute or ordinance.

I mean there could be depictions of sexual intercourse with very little play line that could affect the same person in different ways. One depiction could be very artistic. One could be very medical. Another could be just -- well, I don't want to say medical and artistic I guess because you say no plots. But I just think that the mode of depiction, there are so many different factors that are in play when you're talking about presenting this, that it's impossible for that survey to really capture a specific item that has to be judged on its own merit. It's like my trying to summarize Hamlet. You would have to read it to really appreciate it or make a decision that you don't appreciate it. I don't think it's of any value at all.

And if those results indicated that 92 percent of the people in the survey said that the material should not be allowed to be sold, you would be screaming bloody murder if the district attorney said let's present this evidence to show that people don't think that anal sex should be depicted on a motion picture, that they think -- and they are not even answering the question.

The questions, as I recollect -- I don't have the survey in front of me -- dealt with whether they felt it should be available to those who want to look at it, which is a different question altogether as to whether

this work is obscene or whether something meets -- is within or outside community standards.

MR. GLYNN: If I may, I will be brief on this. First, the concerns raised by the Court could, I submit, all be addressed by Mr. Scott to the satisfaction of the Court. The manner in which the publications are understood by the respondents to the survey is I submit a function of the language that is spoken to the respondents. And we have in writing in Exhibit 1, which was received at the motion hearing, that language. And I don't think that there is a great concern that language which describes, quote, graphic depictions of nudity and sex, including that long list of sexual activities, would leave much to the imagination of the respondents.

THE COURT: Yes, it does, and I will tell you why. Supposing the depiction, graphic depiction is of the back side of one person engaged in an act of sexual intercourse. That's very different from a variety of angles actually showing the entry of the penis into the vagina. Now those are two depictions which people might think are graphic that would be very different. Now, both of them might be obscene, neither of them might be obscene. There is no way that the term "graphic" can mean anything.

MR. GLYNN: If I may, Judge. The purpose of the survey is not to determine whether or not a described item is or is not obscene.

THE COURT: Okay.

MR. GLYNN: It is simply to determine two things. First, what are the community attitudes toward distribution of materials which graphically depict the type of sexual activity described in the questions. And, second, to get some determination as to whether or not these materials would fit within the patently offensive prong of the Miller test; that is, the materials are so far beyond customary limits of sexual candor as to be patently offensive. I mean taking the language from the instruction which the Court has used in the two prior cases to define the term patently offensive. And the opinion that Mr. Scott would express is that the community standards would tolerate this kind of material; that is, material which does graphically depict sexual activity. And that the depiction of this activity is so far accepted within this community as to mean that materials which depict that sort of behavior are not substantially beyond the customary limits of sexual candor.

THE COURT: Well, you couldn't tell it from the jury we had in here today.

MR. GLYNN: Well, you get different juries and different people, Judge.

THE COURT: Yes, you do.

MR. GLYNN: And you get different responses when people make comments out in the public as opposed to comments among their friends. I mean -- and you also get a certain tone that is set by the first people that respond. And if, for example, one or another of the first responders had been saying, well, wait a second, I don't understand what right the State has to tell me what I can read or see; and unless you're going to prove to me that having a magazine or a video that depicts this stuff somehow causes someone else to go out and commit a crime or some socially unacceptable behavior, then I'm not going to be willing to convict, I submit there would have been a difference in what would have been said.

THE COURT: I will not dispute that with you, which is a good point. Which gets into the second issue, which is the manner in which the question is asked has a great deal to do with the results of the poll. And any pollster will tell you that.

MR. GLYNN: Yeah. But if I may, Judge, let me respond to one other comment that the Court made. And that is that the Court indicated that if the State had

come in with a poll that said 92 percent of the people think that this stuff ought to be banned and those who engage in selling it ought not just to have an ordinance prosecution, but they ought to be felons or something, we would be -- we would be upset about their trying to get it. Sure we would because it would hurt us. That's the same reason that the County is complaining about this because it hurts them. And the question isn't whether we are upset. The question is whether or not there is a sufficient legal basis to exclude it. And I submit that Mr. Scott, by virtue of the credentials set forth in his curriculum vitae, in which I would be happy to lay on the record in detail, is an expert.

I submit, secondly, that the question of community standards is an issue on which the jury could use some help from an expert. That is, I believe what he has to say would be of assistance to the jury in resolving that issue. Therefore, I submit under Wisconsin law his opinion testimony is admissible.

The questions that the Court is raising and that the State through the County is raising all deal with issues, which I respectfully submit go to the weight of Mr. Scott's testimony, not to the admissibility of it. And if there are flaws in it, those flaws can affect the weight that the jury seeks to attribute to it. I submit

those flaws don't exist. I submit that to the extent there is a difference of opinion between the prosecutor and Mr. Scott, as to the reliability of Mr. Scott's survey information, that is an issue which the jury should resolve. And, therefore, rather than saying that this evidence should be blocked now, I submit that it ought to be, it ought to be allowed and let the prosecutor cross-examine to the extent that he thinks he can demonstrate the unreliability of it.

But we have in this State a relatively low threshold. I mean Walstead establishes a reasonable threshold for admissibility of expert opinion. There is nothing that has changed in the state of the law governing admissibility of expert opinion that would say that something as well established as survey information, which is I submit an extraordinarily well-established, scientifically sound method of gathering public opinion information, is junk science or is voodoo science to such an extent that no matter what the qualifications of the expert, it ought not be admitted. I mean I submit that the fact that this sort of evidence is used throughout the commercial society of this country, and, in fact, the very same company that is involved here uses this information, the fact that Mr. Scott can testify that he has been asked by prosecutors

to prepare survey documents and has done so all suggest to me that -- well, not suggest to me -- all indicates to me that the evidence itself as a general proposition should be admissible.

And then the question is whether or not there is a flaw in this particular case. That to me is the classic distinction between admissibility and weight. And -- and if the Court ends up saying, look, I understand what you're saying; I am just not letting it in here, then I would like at some other point to either gather the documents and review them and see whether they make a sufficient offer of proof, or else have to go through the painstaking, I would ask him, he would say, I would ask him, he would say version of an offer of proof just because I feel so strongly about this, Judge, and I want to make sure that I have a record.

If we have an honest disagreement, we have an honest disagreement. And obviously the Court knows I live with that and I will accept it. But I just don't want to be in a position where if there is a conviction in this case and there is an appeal, a Court of Appeals doesn't say that I should have done more in making a record. We have had segments here and there and I haven't really gotten it organized. So --

THE COURT: You called my kind a record thief. I

was at one of your presentations.

MR. GLYNN: Called what?

THE COURT: You called my kind the record thieves.

MR. GLYNN: I was going to say certainly not you.

THE COURT: No, no. You talked about the judges, whom you call the record thieves.

MR. GLYNN: Judge, with all sincerity, I can tell you you wouldn't fit into that category. Truly. Because you do give counsel an opportunity to make a record. And I'm just saying that if you are going to rule on this, please do it in such a way that allows me at a later point still to review this and determine whether the record I have made is sufficient.

THE COURT: Well, here is what I am going to do. I am going to give you my ruling tomorrow so if you have anything further to say on it tomorrow, you will have to say it before I rule. Because once I have ruled, I am not going to allow supplementation of the record. And I, of course, because this is an issue that needs to be determined before the opening statement, it needs to be done promptly and briefly, briefly, in the morning. So we will do it at that point. But I have to tell you I am inclined, as you said, as you phrased it so aptly, I am inclined to be disinclined to receive your evidence.

MR. GLYNN: Okay.

THE COURT: For the reasons I have already indicated. And I just think that there is a substantial risk of confusion from this jury, or of confusing this jury in what is always an admittedly a dangerous issue -- or a difficult issue, I should say -- a difficult issue in having them rely upon results that are really -- they might be fine for the sale of soap and that type of thing, but I don't think they lend themselves to a determination of the kind we need to make when determining whether the First Amendment is being violated or not. I hope we haven't come to that. And the other -- well, I guess I have lost that. So we will talk about it further in the morning. Anything else?

MR. BECKER: No.

THE COURT: Okay. Thank you. And you will be invited to respond in the morning further if you want to.

MR. BECKER: Okay.

MR. GLYNN: Since we are going to be limited -- are going to be on a short time schedule tomorrow morning, I am wondering whether the State and the Court can indicate to me whether a summary offer of proof as opposed to an offer of proof in question and answer form is acceptable.

STATE OF WISCONSIN : CIRCUIT COURT, BRANCH 3 : KENOSHA COUNTY :

COUNTY OF KENOSHA,

Plaintiff, JURY TRIAL

-vs- File #94-OR-592

C & S MANAGEMENT, INC.,
d/b/a CROSSROADS,

Defendant.

BEFORE THE HONORABLE BRUCE E. SCHROEDER

JUDGE PRESIDING

APPEARANCES: BRUCE BECKER, Assistant District Attorney, appears on behalf of the County of Kenosha. STEPHEN GLYNN and ROBERT HENAK, Attorneys at Law, appear on behalf of the defendant.

Barbara Mason
Court Reporter

Date of Proceedings: January 28, 1997

THE COURT: Now before we call the jury down, you indicated you wanted to say something more, Mr. Glynn.

MR. GLYNN: If I could, Judge. And I think I can do this in a fairly organized fashion that should not take all that long. We already have as exhibits the community standard survey. I would like to add as an exhibit the Curriculum Vitae for Mr. Scott. Can I just give that to the Court?

THE COURT: Yes. I will have it marked. It will be marked as Exhibit A so if there are exhibits -- well, there will be exhibits, it won't be confusing to the jury.

MR. GLYNN: Sure. And may I do this while I'm seated, Judge, because I have papers to shuffle through here.

THE COURT: Oh, absolutely.

MR. GLYNN: First, I believe that through the testimony of Mr. Scott we can establish that this poll was conducted by an expert in the field of survey. Mr. Scott's vitae indicates that he has got an educational background that includes a Bachelors Degree with Magna Cum Laude credentials, a Masters and a Ph.D. He also has a Juris Doctor, which he received approximately three years ago.

His background includes having been a Research

Associate at Indiana University in the Institute for Sex Research, otherwise known as the Kinsey Institute. His research and professional societies reflect involvement in the areas that are pertinent to what this case involves, including being a person who holds elected offices in the American Sociological Association and the American -- I am sorry, the American Society of Criminology, and the Society for the Scientific Study of Sex and is a member of their Ethics Committee and has been for a number of years.

His papers presented at professional meetings number somewhere between 50 and 100; and as the Court would note at the bottom of page 7, for example, he has been presenting papers dealing with Social Science Data in Obscenity Trials for at least 10 years. He has actually been doing research in this area for closer to 25 years. His published papers, which begin at page 10, also include materials pertinent to the issues here, starting as early as 1972, referring to The Changing Nature of Sex References in Mass Circulation Magazines, going on to page 13, Obscenity and the Law: Can a Jury Apply Contemporary Community Standards in Determining Obscenity, published in Law and Human Behavior. Probably the most reliable publication in this entire field is called Public Opinion Quarterly. Mr. Scott has

published there on this very topic in an article entitled "Estimating Community Tolerance for Obscenity: The Use of Social Science Evidence. Including -- included with him, by the way, as publishers in that article are Edward Donnerstein from the University of Wisconsin, who is a well-known researcher in this area, and Kenneth Land, who is I believe from Duke.

And Mr. Scott's research is continual and current as indicated by the very last entry in his published work, which has been submitted, although not yet published in Law and Society Review. Again entitled "Defining Community Standards for Sexually Explicit and Violent Materials: A Field Experiment.

So I think that we would be able to indicate that Mr. Scott, who as I have already put on this record, has testified in at least 20 different cases on the very subject of community opinion polling for purposes of determining contemporary community standards is, in fact, an expert in this area. His surveys have been admitted by courts in Pennsylvania, Ohio, Michigan, Illinois, Indiana, Texas, Florida, Tennessee, Kentucky, Virginia, Missouri and Kansas.

And just so the Court understands, he has not been exclusively hired by those defending these types of cases. In point of fact, he has been hired by

prosecutors on at least three occasions to deny surveys. And, in fact, his survey results do not always favor defendants. In fact, surveys that he did in Missouri and Kansas and about which he testified, as I understand it, both found that at least in those communities the community standards would not accept sexually explicit materials. Mr. Scott has done surveys in countries other than the United States, including European countries, Great Britain, Holland, Scandanavian countries, India. And he has testified as an expert and presented results to the Canadian Parliament on survey issues. So I think we could establish that the poll was conducted by an expert in the field of survey.

Mr. Scott would testify with respect to the examination of the relevant universe as reflected in the survey document, which is Exhibit 1 in the hearing that was held on January 24, 1996. And if I could, your Honor, at some point I would just like to make sure that that document is still in the file. Mine has an exhibit sticker on it.

THE COURT: Oh, it's your copy. I couldn't look for it. You don't have an extra?

MR. GLYNN: If I don't have it here, I certainly do at my office. If I could simply refer to this one and I will give the one with the exhibit sticker back to

the Court. This says Exhibit 1, 1/24/96.

THE COURT: That's fine.

MR. GLYNN: Anyway, because much of what Mr. Scott would testify to is actually in this document, I can briefly summarize this. First of all, Mr. Scott would testify that he identified the relevant universe as adult residents of the State of Wisconsin. He would further testify that a representative sample was drawn from that relevant universe by statistically significant means and the use of random generated telephone numbers with prefixes that are common to areas within the State of Wisconsin. Then having identified those prefixes, the last four numbers were randomly generated so as to allow for people who have unlisted phones, people who are newly listed or, I am sorry, newly subscribers, newly subscribing to the phone service and perhaps not yet in a published phone directory.

These questions were -- questions of the representative sample were determined by Mr. Scott, who I suppose technically could be called Dr. Scott since he does have a PhD, but doesn't use his doctor title most of his testimony. When the sample was drawn from that universe, that involved the participation of the company known as Survey Sampling, Inc., otherwise known as SSI. Mr. Scott would identify SSI as the leading survey

sampling group in the United States, whose customers include companies that are listed at page 73, and beginning at page 73 of Exhibit 1, which is the list of clients. And a review of this indicates that not only do many of the top corporations in this country use their services, but so do not-for-profit organizations, so do political organizations, so do a number of universities that require the assistance of survey offices.

The process followed by Mr. Scott, by Mr. Scott and SSI is described in Exhibit 1 and I will not repeat all of that now. The mode of questioning that was utilized here again as demonstrated by Exhibit 1 was telephone questioning. Telephone questioning was carried out by Edwards & Associates, again a company described in Exhibit 1. They are the ones who made the actual telephone calls. There was a group of I believe 16 telephoners consisting of men and women, whose average formal education was 16.4 years. The questioning began with non-threatening questions. The question respondents did not know until substantially into the questioning process --

THE COURT: I am sorry to interrupt you, Mr. Glynn, but I think that this material is all included in the written report and that will be made a part of the

record.

MR. GLYNN: And I'm trying, Judge, not to go into the depth. I am trying to sort of skim what I would call the headings of the report if you will.

THE COURT: Okay.

MR. GLYNN: And I will do it briefly. I appreciate what the Court's concerns are.

THE COURT: Okay.

MR. GLYNN: That the sample was designed -- the questionnaire was designed, the interviews were designed in accordance with generally accepted standards as followed by not only Joseph Scott, but also others within his field. The data that were gathered are reported accurately and Mr. Scott has with him, and he is in Wisconsin today and could be available to testify today, he has with him the original documents that were actually utilized by the people involved in the polling; so that the Court doesn't have to rely simply on his final conclusion report, and so that there could be a comparison between his report and the actual data gathered to determine that they were accurately reported. And then, last, the data were analyzed in a statistically correct manner, again as demonstrated by Exhibit 1.

I submit that with those showings, we would have

established the reliability of this evidence and the expertise of Dr. Scott. The relevancy of what Dr. Scott would testify to I don't think is in debate here. The case involves contemporary community standards. There are numerous courts, as we have discussed in our memorandum entitled "Trial Memorandum: Admissibility of Survey of Community Standards and Expert Testimony Concerning Community Standards" that was submitted and considered by the Court in January of 1996, at the time we had the report marked as Exhibit No. 1. And I won't repeat everything that's there. I believe that the relevancy discussion there can be simply be transferred into this discussion today.

THE COURT: That will be done.

MR. GLYNN: Now, the results that Dr. Scott obtained from the report are reflected in the report and I will not go into them in detail. I will point out that it is Dr. Scott's view that these survey results are entirely reliable, that the results are internally consistent. That the results demonstrate that the reader was -- or the respondent was listening closely to the questions because the responses that were given and that this is not some abnormally skewed group of respondents because one of the things that Dr. Scott did, interestingly enough, was to go back to people who

had originally declined to be interviewed and attempt a re-interview. And I can report to the Court that out of 500 people, who were questioned and who were involved in the report itself, 18, that's 18 people, terminated throughout the process. And I can break it down as to what --

THE COURT: How many phones were answered?

MR. GLYNN: How many phones were answered? Let's see, let's see. Well, I guess if we talk about total answered, Judge, it would be a thousand 88

THE COURT: Okay. I don't want to guess. The total number of phones answered were 1,088?

MR. GLYNN: Right.

THE COURT: And 500 people responded?

MR. GLYNN: No. Let me break that down. There were 40 numbers that were call-backs that never connected. There were -- that just it wasn't convenient, they asked if they could call back. When they called back, the party wasn't available.

THE COURT: Wait a minute. There is problem, number one, right there. What's not convenient? I mean I get a call from AT&T trying to sell me telephone service and I say you're calling me during dinner, I am not interested. Is that a termination because it's not convenient or I am not interested having anything to do

with your call?

MR. GLYNN: It's neither of those. That -- what the call-backs reference is is a reference to people who said it's not convenient for me now, could you call back.

THE COURT: But that could be just a get lost.

MR. GLYNN: Sure, it could. And there were many of those, which I'm coming to.

THE COURT: And my point that I tried to make last time was that some of those people might just be polite and just trying to say I don't want to answer your questions.

MR. GLYNN: Sure, absolutely.

THE COURT: Go ahead.

MR. GLYNN: And understand, your Honor, that at the time we are starting with a thousand 88 people who are called, none of those people knows whether this survey has to do with sex, toothpaste, General Motors automobiles or how much they would like to get back on their tax returns. I mean all they know is that they are being asked to participate in a telephone survey. That's all they know. So it may indicate someone who doesn't want to be bothered at that particular hour. It may indicate nothing. It may indicate a genuine inability to have time to respond at the moment, but

anyway --

THE COURT: But who determines who goes into which category? Supposing they get into the survey and they say, well, I will participate in the survey and then the questions start getting a little more offensive and they say, gee, could you call back another time.

MR. GLYNN: No. If they begin the survey, the only way they are out is if they terminate. And those who terminated are defined separately. Let me, if I can, just continue through this, Judge. I think you will understand what I'm saying.

THE COURT: Go ahead.

MR. GLYNN: For 23 of the 1,088 eligible households, there were sufficient communication difficulties, either because of language, deafness or apparent senility so that the questioner terminated the conversation before they got into the responses.

There were 318 people who just said, no, I am not going to participate in the survey; I don't have time, I don't have whatever, but did not say please call me back as distinguished from the call-back group.

There were 116 calls that were answered by answering machines. There were 72 calls that were answered by people who were not eligible. For example, someone who does not live in Wisconsin, but just

happened to be staying at the residence of someone who does, or an answer in which the person indicated that he or she was not an adult.

There was one interview that was terminated by the survey person because the respondent appeared to be highly intoxicated and difficult to speak to. There were 500 of these that were completed. That's the break down on the 1,088.

Now of the 500 that were completed, again, and I won't take the time to identify what the question was, but one person terminated at question 5, two at question 6, one at 9, one at 10, three at 12, one at 15, one at 16, one at 17 and 18, your Honor, which is the questions where it starts beginning to deal with sexual material, four terminated, one at 24, one at 25, one at 26. For a total number of terminations of 18.

Dr. Scott would describe that response as being very high on the list of responding groups. It was sufficient to allow a level of confidence in the results of these survey reports of 95 percent with a margin of error of 4.4 percent.

In preparing the sample he considered 1,910,057 households, 97.3 percent of which had telephones and 87.9 percent of which had their telephone numbers listed. The results show overwhelmingly that the

Wisconsin community accepts materials as described as not applying to a prurient interest in sex and as not being patently offensive, again as reflected by the responses to the questions. As an indication that the respondents were not simply sort of saying what they thought the questioner wanted, the --

THE COURT: On that subject, if I can interrupt you for a minute, maybe I missed it. What is his background in statistics?

MR. GLYNN: Well, he has published in the area of statistics. He has a Masters and a PhD, which include education in statistics, and he is also involved -- he has also involved both the Survey Sampling, Inc. and Edwards & Associates for their statistical assistance as well.

THE COURT: But in making these interpretations, you say his education included statistics. What did it include?

MR. GLYNN: Well, yes, your Honor. I mean as being a research institute at the Institute for Sex Research -- as being a -- let's see here.

THE COURT: I am interested -- he is making some assumptions as to the reliability of statistical information and its application to a broader population.

MR. GLYNN: Right.

THE COURT: And I'm wondering what his educational -- let's start with the educational and then we can get into the experience, educational background in statistics is.

MR. GLYNN: Your Honor, I don't have a focus on that right now. I can make a telephone call and provide that information in five minutes. And, frankly, given the vitae that we have here, I really don't think there is going to be any question about the ability to establish his expertise in statistics. He has -- he has written about it, he has researched in it. He has been educated in it. He has published frequently in journals such as the Public Opinion Quarterly, which probably deals more with statistics as it relates to public opinion than any journal in the world. So I don't think that will be a -- will be an issue.

THE COURT: Okay.

MR. GLYNN: Oh, and with respect to the question asked by the Court or technically, I guess, first raised by the County in its opposition to our memo concerning the admissibility of such testimony, and that was how do we know that responses to a survey questionnaire are as reliable as responses given by people who have actually seen the material or have the material in front of them, Dr. Scott invited my attention to the article published

in Public Opinion Quarterly, Volume 55, No. 1, a 1991 article of some 32 pages, entitled "Estimating Community Tolerance for Obscenity: The Use of Social Science Evidence", as an article reporting on the results of an experiment in which people were given copies of material and questioned about it and people were given a description of the material similar to the description used, and for all I know identical to the description used in this exhibit, and the results were found to be of such high level of similarity as to allow Dr. Scott to express his professional opinion to a reasonable degree of certainty within his field that the survey is as reliable as a laboratory experiment; and that the research done by the professors from Duke, South Carolina, Wisconsin and others who participated in that would establish that fact. And a similar -- similar result is found in the research that is reflected in the article that has been submitted to Law and Society Review appearing at page 14 of the Scott vitae.

Again, the fact that the -- continuing, the fact that the survey respondents answered by a majority in the negative to the question of do you believe neighborhood video stores in Wisconsin should or should not be allowed to rent such X-rated videos; and, again, the term "such X-rated videos" relates back to the

preceding question that talks about videos depicting such sexual conduct, and that relates back to the description of such sexual conduct as I read into the record yesterday, suggests to Mr. Scott that the questioners truly were -- I am sorry -- the respondents truly were listening to the questions that were read to them and responding to them as truthfully as they believed.

While on the one hand a substantial majority, 68.8 percent believed that adults should be able to obtain and view videos --

THE COURT: I am -- this is all in the report, Mr. Glynn so please --

MR. GLYNN: Okay. Then I will stop. I mean we would simply say that the comparison between the responses to questions 21 and 22 would demonstrate the reliability of this information.

Now, the significance of all of this, Judge, deals in what conclusions Dr. Scott draws from this. The conclusions are reflected in Exhibit 1 so I will not go into them, except to state that his testimony would allow the defense to demonstrate that the materials in question in this case are accepted within the Wisconsin community as not going beyond what contemporary community standards would allow in this State. Second,

they would also allow us to demonstrate that the materials here would not appeal to a prurient interest in sex as determined by the contemporary community standards of the State of Wisconsin. And for that reason we believe such testimony should be admitted.

We assert that to deny us the right to produce that testimony is not only a violation of the Wisconsin Rules of Evidence in depriving us of an opportunity to present relevant evidence, but it is also a denial of our right to present expert evidence under the 700 series of Wisconsin Rules of Evidence and raises constitutional implications because we think it's a denial of due process for us not to be allowed to introduce such testimony.

We further believe that it is a denial of our right to present a defense, recognizing that that's a right typically reflected in criminal cases and the Court has found that this is not sufficiently a criminal case to allow criminal procedures to apply, it may very well be that this is not sufficiently a criminal case for constitutional rights to apply either. But to the extent this may be considered a quasi-criminal criminal case, we assert that the right to present a defense is also deprived by a ruling that prohibits Dr. Scott from testifying or his survey results from being admitted.

Thank you.

THE COURT: Thank you, Mr. Glynn. Did you want to respond, Mr. Becker?

MR. BECKER: Just we oppose that for the same reasons indicated yesterday. It's confusion for the jury. I think it's not sufficiently indicated that this is a science to justify presenting it to the jury. That's all. And I will stand on what I said yesterday.

MR. GLYNN: And I will present Exhibit 1 back up to the Court, if I may, so it's part of the record. Thank you.

THE COURT: Potter Stewart I think is the one who made the statement, I know not how to define obscenity, but I know it when I see it. And I think this is kind of the reverse of that situation. People who may give a telephone definition of what they consider acceptable, unacceptable, acceptable or unacceptable, but when they see it, they may not know what to make of their opinions.

I would say that it would be a grievous error by the Court and certainly highly likely to confuse the jury when they are talking about something as important as the First Amendment, which is what they are doing, because their verdict really says this is protected by the First Amendment and this isn't because they are

deciding what's obscene and what isn't, and the First Amendment protects the non-obscene and does not protect the obscene. So they are deciding what the First Amendment says. And for them -- and for me to admit as evidence ambush interviews conducted over the telephone would be a grievous error. I think it would serve only to confuse the jury and not be of any value to them in making their decision, which has to be made on the basis of what's in this motion picture and community standards. And these interviews on the telephone are not of any value to them at all.

To compare a First Amendment survey compared to detergent or soap is very offensive to me. And I don't have any doubt that people -- there are some people who would indicate a very great acceptance of this type of material in a telephone interview when it's addressed with a term such as fellatio or cunnilingus or sexual intercourse, and who would then view the motion picture and say, no, this is obscene. By the same token, there are some people who would say they would not accept the material and then view the motion picture and say this is no worse than what a lot of people consider acceptable so I think it's within the realm of community tolerance.

So I don't think these answers of questions put

at an ambush are of any value to the jury at all. It's not clear to me how people would respond if they saw this particular motion picture.

You made a statement yesterday that this man had some familiarity with what the results are, that they are not skewed by the presence or absence of the particular materials. I don't know what you mean by that; as if people are shown some pictures or shown motion pictures or if they are shown this motion picture. If they were shown this motion picture, it might be of some value. But that's not asserted and so it makes it quite irrelevant.

If the district attorney came in here with an identical survey showing that 80 percent of the people asked said that they did not think -- the same questions, said that 80 percent said shouldn't be available, I would expect to be reversed and rightly so if I admitted that kind of evidence at the trial because it is not of any value to the jury.

This expert would not even be able to give an opinion as to what percent of the people, who stated that this material was acceptable within community standards, would say that this motion picture should be available either under the same circumstances as was sold in this case or at -- generally available. And, of

course, there are a lot of factors that the jurors have to consider. If they determine that the motion picture is obscene when it is sold out on the Interstate, or not obscene, they are also determining that it's not obscene if they are shown at their 18 year-old daughter's prom party. That's the law. They are also determining that it's not obscene if it's shown in the corner grocery store.

So these things are not given to the jurors when they make -- or to the people when they receive these phone calls, these ambush phone calls, which are things that the jury does get to consider in these cases. So I'm going to refuse your offer. Well, the offer is accepted, but the evidence is denied receipt.

MR. GLYNN: Your Honor, I think the Court is aware of this, but I should state it. Obviously, we object to the Court's factual statements about whether or not people would respond the same way to the movies or videos as they do to questions. As I have already indicated, Dr. Scott and others have done research in this area and found that they would react exactly the same way and do react exactly the same way.

THE COURT: Did they do it with this movie?

MR. GLYNN: No. But there is no significant difference between this movie and other movies depicting

the same acts and the same degree of sexual explicitness, which the testimony would indicate they did.

THE COURT: Okay. I accept your disagreement.

MR. GLYNN: And also, you know, the Court's references to ambush phone calls. If that's a reference that's intended to cover any survey that's conducted by telephone, I accept it. If it's intended to single out this survey, I think that there is -- I don't think that's a founded statement.

THE COURT: And I didn't mean to single out this survey. And I know there is a wide variety. Some people are perfectly happy to answer surveys. Some people at the dinner hour being solicited for siding on their house or new windows, some people consider those ambush calls. And whether it comes from Dr. Scott or from AT&T or whoever, it's an ambush.

And -- and, well, an ambush -- an interview is done by ambush for a reason. I mean someone who is doing a marketing survey is going to make an initial determination what results will I get if I do this on the street corner, what results if I do it at the courthouse, what results if I do it by sending people a letter in advance saying I am going to call you next week and ask you some questions. What percent are going

to respond in which way if I do it by ambush. This is an ambush interview. All right. Anything else?

MR. GLYNN: Just that Dr. Scott obviously would testify consistently with the report that's Exhibit 1 and I think we have said that enough. But, no, other than that on the Scott issue, if I could, if I could confer with somebody just to make a phone call.

THE COURT: Yes.

MR. GLYNN: Your Honor, while we were doing other matters, I asked an investigator to call Dr. Scott, who is in my office right now in Milwaukee on the statistical information. He has, in fact, published papers based on data analysis. He has taught post graduate and graduate courses in statistics both here and abroad. He has reviewed --

THE COURT: You can stop right there. That is satisfactory. You don't have to stop if you want to go on.

MR. GLYNN: His Masters and PhD programs were both based on empirical studies of statistics and he has reviewed the papers of at least 50 authors based on statistical information.

THE COURT: That's fine then.

MR. GLYNN: And I take it then I can inform Dr. Scott that he'll not be allowed to testify so I can let

him go back home?

THE COURT: He can get back to his phone.

MR. GLYNN: Thanks.

(*Short recess taken. Court reconvenes outside* the jury's presence.)

MR. GLYNN: Thanks, Judge.

THE COURT: All right. Thank you. Ready to go now?

MR. GLYNN: Yes, sir.

MR. BECKER: Right. I guess the jury instruction, substantive jury instruction is perhaps an issue you want to take up before --

THE COURT: No. I don't want to take it up before. If I could --

MR. BECKER: Well, I think we are agreed on the elements and everything.

MR. HENAK: The general type things.

MR. BECKER: I think we can take it up later.

THE COURT: Well, if you have agreed on it, then I can give it to them beforehand. I was going to wait until after --

MR. BECKER: No, we haven't.

MR. GLYNN: We have not agreed. But, on the other hand, it's not going to be a problem for opening.

MR. BECKER: Right. I agree with that.

for acquittal and we can talk about it and argue it later.

THE COURT: That makes sense. Any objection to that?

MR. BECKER: No objection.

THE COURT: That's fine.

MR. GLYNN: And then the last thing is just the question of whether or not I am going to be allowed to put on Ms. Kvidera. And the offer of proof is as I indicated earlier. And it would be in the two areas, comparable tapes available for sale or purchase in other video stores, and comparable tapes that were purchased by the same officer who purchased this tape on or about the same time and, you know, found by two juries not to be obscene. That's the sort of testimony I would seek to elicit. Ms. Kvidera has with her both the videotapes -- has with her not only the videotapes that she purchased, but also copies of the videotapes that were involved in the prior two trials. So that in the event the Court thought that her statement as to what was on those videos was inadequate or insufficient, we could play the videos or portions of them; however the Court and the prosecution wished to proceed to take care of that problem. Thank you.

THE COURT: Did you wish to be heard?

MR. BECKER: I object. I don't think the idea of "comparables" is appropriate nor admissible.

THE COURT: Well, you know the problem comes in -- the idea is a good one. It makes some sense logically. The problem is what is comparable. For example, the same acts, the same routine, they could have the same script, the same background music and a motion picture that would depict say -- I hope I will be forgiven for naming individual's names, but say Victor Bono and Kate Smith might be viewed differently on the subject of obscenity than one involving say Clark Cable and Faye Ray, really, as what's obscene and what isn't. So I don't know exactly what is a comparable.

Secondly, I saw Spanner Piss and I saw this movie and I don't think they are in the least bit comparable. There certainly were some similar acts depicted, but that's like saying that the Man For All Seasons and a Randolph Scott movie were comparable because in both cases there was someone depicted riding on a horse. Just because there are similar acts are depicted doesn't mean the movies -- some similar acts are depicted doesn't mean the movies are comparable.

MR. GLYNN: But if I may --

THE COURT: But then there is a question was there digital penetration of the anus in the other

movies that were tried here? I don't remember that. Was there licking of the anus as is depicted in the motion picture that we saw today. Are there repeated references to God during the acts of sexual intercourse in the other movies, which may have an effect on some people as to what community standards are. Some people may find that offensive, more offensive than if someone is just making other noises rather than invoking God's name. That may have an effect on community standards. So it's really difficult for me to say that either of these pictures, and I saw all three of them, would be comparable.

MR. GLYNN: If it helps, I offer to prove that Anal Madness, which is one of the movies that was shown in the first trial of this series of cases, involved a male and female actor involved in vaginal intercourse, fellatio, cunnilingus, digital anus penetration as well as anal intercourse in at least one segment.

THE COURT: Was there analingus in there? Is that a word?

MR. GLYNN: That is a word and I can't answer that from the note that I have.

THE COURT: That was in this picture.

MR. GLYNN: It was.

THE COURT: And that may be offensive to some.

MR. GLYNN: What I would suggest, Judge, is that I make as an offer of proof and submit the two reports that I have from Ms. Kvidera and inform the Court that she would testify consistent with these reports concerning her purchase of videos and the availability of other videos for rent. That's in the report dated August 7, 1995. And in response to my request a more recent report dated, I don't know, yesterday talking about the review of videos for the purpose of determining what sexual activity is portrayed; and offer those as an offer of proof and inform the Court that the videotapes that were purchased as well as the two videotapes that were subject to prior trials are in the courtroom and would be available if necessary.

THE COURT: Okay.

MR. GLYNN: And with that, I take it the Court is accepting the offer of proof, rejecting the offered testimony. And in that event I will not call Ms. Kvidera.

THE COURT: You're correct on both points.

MR. GLYNN: Okay. Can I give these to your clerk and have them marked what would that be Exhibit C?

THE COURT: Your point is a good one, C and D, is that it?

MR. GLYNN: Right. With C being the August

report and D being the January report if that's okay.

CLERK: That will be fine.

MR. GLYNN: Thanks.

THE COURT: I am sustaining the objection because I do not believe it has been shown that the motion pictures are comparable for the reasons I indicated. And that it has not been shown -- it has not been claimed that either of the motion pictures depicts analingus, use of divine name during the presentation and Spanner Piss is substantially different in content.

MR. GLYNN: And, your Honor, let me just so this record is complete, also have made a court exhibit, as I guess group Exhibit E we could do this, videotapes Anal Madness and Spanner Piss, which are contained in this black plastic bag; and a videotape named Alien Lust, and a receipt indicating it was purchased from the Four Star Video Store; a videotape entitled Princess of Persia and a receipt indicating that it was bought from another Four Star Video Store, this one located on 60th Street, and the Alien Lust one located on Sheridan Road. A videotape called Kink-o-Rama, Volume 21, purchased at Video Explosion; and unfortunately I don't have a street address for that, but it appears in Ms. Kvidera's report; two videotapes both purchased from Gold Star Video, 2211 - 80th Street, and a receipt that depicts

the date and purchase price, but is a form receipt that doesn't list the name of the store; and last a video entitled Easy Binder --

THE COURT: Easy Binder as in a book binder.

MR. GLYNN: Exactly.

THE COURT: I hate to think --

MR. GLYNN: Purchased from Sheridan News & Video located at 12212 South Sheridan Road. These are the videotapes -- well, actually these six videotapes that I described as not having been in the black vinyl bag I will place back in the white vinyl bag and these are the tapes referenced in Ms. Kvidera's reports, which are here as offer of proof Exhibit C and D. And if it's okay with the Court, just so we have fewer exhibits floating around, let me put the black bag with the two videos inside the white bag with the six videos so we now have a white bag with eight videos.

THE COURT: Wrap it all in a plain brown bag.

MR. GLYNN: Okay. And if it's okay, I can put a tape across the top and mark it as an exhibit.

THE COURT: Sure, that's fine. The last five or six that were not previously on file here, I am rejecting those also because the mere availability of the material is not indicative of community standards. And that's --

their effort to make the decisions that they have to make.

MR. GLYNN: Okay.

THE COURT: Anything else?

MR. GLYNN: No, Judge. I am going to be prepared to rest then subject to the motion at the close of the State's case and a motion at the close of the defense case. I don't know if there is any rebuttal so that we would have to worry about a motion -- yet a separate motion at the close of all evidence. So if I could, Judge.

THE COURT: Go ahead.

MR. GLYNN: Let me do that and I will rest normally in the jury's presence when they are back. But the defendant moves for directed verdict of acquittal on the charge that is pending against it. Whether the Court uses the evidence at the close of the County's case, which is that there was no evidence whatsoever presented that related to either the community standards, or more importantly, I believe, the lack of serious educational or scientific value, or instead the motion is considered in its present posture, which is in the face of evidence that the material has serious educational value, clearly the County has not carried its burden on that matter. And for those reasons I

would move for judgment of acquittal or otherwise known as a directed verdict. Mr. Henak requested the opportunity to speak briefly to this issue as it relates to some of the matters that were discussed yesterday. So with leave of the Court, I turn it over to him.

THE COURT: Okay.

MR. HENAK: Thank you, your Honor. I believe that where we are at right now is exactly the same position we were in when the Court granted summary judgment yesterday on the other two cases, which is that the defense has presented evidence, specific evidence, uncontroverted evidence, that these materials, in fact, do have legitimate serious educational value; and the government, the County, has presented absolutely no evidence to rebut that.

As the Court said yesterday, we have the tape, but the tape doesn't add anything to that third prong of the Miller test. The jury obviously can look at the tape and based on their own perceptions of the community standard, determine prurient interest and patently offensive. But as the Court said yesterday when it said that having the tape here would not help on the third prong, it likewise does not help today. There absolutely is no evidence, other than the evidence presented by the defense, that this does have serious

educational value presented in the case. It is the government's burden to prove a lack of serious value, but the only evidence we have is to the direct contrary.

I would again point the Court's attention to the Luke case, the nasty-as-we-want-to-be case, that Mr. Olson cited the Court to yesterday, in which the 5th Circuit, I believe it's the 5th Circuit. The 11th Circuit, sorry. They split it up a long time ago and I never keep track of -- of it. The 11th Circuit held that in a case very similar to this where the State just rests on the material and doesn't present any evidence rebutting the defense evidence of value, that a directed verdict in favor of the defense is required. And for that reason we request just that verdict here, your Honor.

THE COURT: Thank you. Did you want to be heard?

MR. BECKER: I oppose it, Judge, but for the same reason we indicated earlier.

THE COURT: I don't think the case is in the same posture as it was yesterday in the sense, number one, that the tape has been received in evidence now. In addition, there were statements made during the witness Alvarez' testimony that I think create serious issues for the jury. He did not -- he indicated that he had never prescribed, I will use that word, viewing of a

videotape of this nature, at least, in the recent past, he said. And, in fact, it would not surprise me, although I don't make this as a statement of judicial notice, but it would not surprise me in the climate of malpractice being what it is, that he would have; that any reputable psychiatrist or psychologist would prescribe that a patient watch something of this nature because -- well, I won't even get into that. What he said was that the patients would come in and they would discuss the tape. And I didn't feel that it reached the level that the jury would be -- and, well, let me start over.

The jury is specifically instructed that they are not bound by the opinion of any expert. And they have the right in their discretion to disregard the testimony of this witness should they feel called upon to do so. And if this decision is inconsistent with what I said yesterday, then I guess I was in error yesterday because -- and this is what I complained about yesterday that I wish I had had the whole deposition so I could have been clear on exactly what Dr. Jackson was saying. I guess I don't want to leave it as saying I would have been wrong yesterday because there was no evidence, there was no contraverting evidence yesterday. And today there is the tape. And the jury can make what it will of the

tape, and including on the issue of value, since they are not bound by this expert witness' opinion.

And I have to say that it was not entirely clear to me on whether this witness was -- well, I will leave it at that. The motion is denied. Anything else?

MR. GLYNN: That is the motion at the close of the County's case and the motion at the close of all evidence.

THE COURT: Okay.

MR. GLYNN: Is that true that both of those are denied?

THE COURT: Yes.

MR. GLYNN: Then I guess, Judge, the question is how you want to handle the instructions issues and do you want to tell the jury that we are going to be on a break for, I don't know, half an hour or something and let us get instructions resolved and closing arguments organized and then come back and have us both rest and indicate no rebuttal and then just go straight to close?

THE COURT: Why don't we see what we can do on instructions now and then call the jury back in and have you both rest in front of the jury and then give them instructions.

MR. GLYNN: Okay.

THE COURT: All right. Civil Instruction 110 is

requested. Any objection to that?

MR. BECKER: No.

THE COURT: 115, objections. Any objection?

MR. BECKER: No.

THE COURT: Tell me if you have any objection to any of these. 120, ignoring the judge.

MR. BECKER: No.

THE COURT: 260, expert testimony.

MR. BECKER: No.

THE COURT: 103, evidence defined.

MR. BECKER: I don't have any objection to any of those.

THE COURT: 157, 160, Okay. Now, let's see, Instruction No. 1, do you have any objection to that?

MR. BECKER: Yes, I do. I didn't get a chance to talk with Mr. Henak very much yet, but I just indicated to him that I would be requesting the Court give the same instruction it gave in the last trial.

THE COURT: I don't have it so I can't use it as a basis. And there was one thing in there that I wanted to look at, all of which escapes me right now.

MR. BECKER: This is what you gave me.

MR. HENAK: Which one is that, Suburban?

MR. BECKER: Suburban. Is it any different from the Satellite?

MR. HENAK: I think that it is. I don't know for sure where the differences are, but --

MR. BECKER: This is a six-page substantive jury instruction from 94-OR-456, Suburban Video.

THE COURT: I guess to expand on what I wanted to say before about the expert witness' testimony that I was having trouble forming my words, you know there is a big difference between what I understood Dr. Jackson to being -- to say, which was that a reasonable therapist might say that this was an appropriate thing for somebody to do to get one of these movies and view it as opposed to someone saying that if somebody views one of these things and then you discuss it, well, it could be helpful. That's fine, it could be helpful. I suspect, though, the unspoken fact is, and I don't think I am stepping outside the evidence when I say this, that there are a lot of people with a lot of particular psychological difficulties for whom this type of information would be extremely damaging; and that that is why I would suspect that this man would not prescribe that someone watch a videotape like this.

Now to say that someone, someone can be helped, quote, by looking at a videotape like this because it will desensitize the person is a far cry from saying it has medical value unprescribed. And to say that to open

up a shop on the Interstate that will show to anybody who happens to have a hang-up that he can come in and watch and buy a video like this and go and do further damage to himself or herself as the case might be just -- and to say that that's constitutionally protected because some people might get helped by it, I don't see it.

And that's what this -- that's what I understood this witness to say is because when he talked about the doctor-prepared videos, he said they were, I think he said, considerably less graphic than this, or words to that effect. What was being used, what were being prepared by Dr. Cole, I think he referred to, at the Mayo Brothers or something like that, he referred to those as considerably less graphic than this.

So it's a far cry from someone who is going out with a helping hand to somebody to try to make the person better, working with medically accepted devices to saying that someone could be helped by looking at a motion picture like this. And this isn't -- I am not saying this well, but we went through this not so many years ago when psychiatrists -- it was not a felony for a psychiatrist to have sexual relations with a patient. And some of them were selling it on the basis that these people were going to be helped by it. Now -- now, just

because -- well, some of them maybe were. I bet if we scoured the countryside, we could find some people who actually experienced a psychological improvement as a consequence of that. But we also now know that so many people's lives have been ruined by it that it's against the law. It's a felony for them to do it. They lost their licenses for it.

So this man now says for quite a few years he hasn't suggested that somebody view something like this. I don't know exactly why he put in the qualifying phrase, for some years, but it may be because of potential consequences for prescribing a course like that. And to say that, as I say, to open up shop on the freeway open 24 hours to anybody over 18, who happens to walk in, to say that equates with having a psychiatric value is like saying it would have a psychiatric value for the psychologists to have sexual relations with a patient. Maybe in some cases it did. Maybe in some cases it would. But that isn't -- isn't a safe general statement.

So I think that that is the difference between what this witness has said and what I took Dr. Jackson to be saying in the limited remarks that I had available to my yesterday.

So I am sorry I interrupted this discussion. Let

me do this. Rather than go through the instruction that you prepared, Mr. Glynn, because I have used already the Suburban Video instruction from the last trial, what is it, if any, that you find objectionable to that?

MR. HENAK: Okay. In Suburban -- well, one thing so I can just make clear, defendant's Instruction 1 is modeled after the Suburban and Satellite instructions. Most of it, probably at least 50 percent of it, is taken directly from the Court's prior instructions in those cases. The places where we had objections to the Court's language in the prior instructions or whether we thought that the cases supported better language, we put in there and footnoted or endnoted exactly what the -- where we got the new language. If you want to go through the instructions that were given previously, we can make the objections to specific parts of it, but then we will have to go back to my requested Instruction 1 and say we should include these as well to correct problems. We can do it either way. We can go through my instruction or go through your instruction.

THE COURT: Let's go through mine.

MR. HENAK: Go through yours. That's what you said in the first place. Okay. In the very first paragraph, last line, or second to the last line and the last line last, or last in his possession for sale, any

of morbid?

THE COURT: Well, well, does shameful, unwholesome, degrading or morbid interest in sex --

MR. HENAK: And that's way overbroad.

THE COURT: Diseased.

MR. HENAK: Diseased or shameful or morbid. Diseased or shameful.

MR. BECKER: I wouldn't want diseased. It sounds too physical.

THE COURT: Well, maybe the jurors know what morbid means. I mean I knew. Just because Dr. Alvarez either misstated or didn't know doesn't mean the jurors won't.

MR. BECKER: I think it needs more definition. I think --

THE COURT: Why? It's not a legal term.

MR. BECKER: No, but it's an unusual term.

THE COURT: You think so?

MR. BECKER: I think so.

THE COURT: Just us hypochondriacs, I guess.

MR. HENAK: Are we done with that paragraph?

THE COURT: I am going to allow your paragraph.

MR. HENAK: Thank you, your Honor.

THE COURT: However, I think I will just give both paragraphs.

MR. HENAK: The State's paragraph?

THE COURT: Right.

MR. HENAK: You mean the County's paragraph that they are proposing?

THE COURT: Right.

MR. HENAK: That one is totally an inaccurate statement of the law?

THE COURT: What's wrong with it?

MR. HENAK: When it attempts or intends to appeal, and generally -- I think those -- the issue of what attempts, first of all, a material cannot attempt anything. Somebody who is doing it might attempt something. If somebody attempts it, but is unsuccessful, then that's irrelevant in a case like this. Or if someone intends to appeal, it's irrelevant. The question is whether the material itself appeals to the prurient interest.

THE COURT: You want to say means the material appeals generally?

MR. HENAK: What I think the problem is is with the entire paragraph to the extent that we take out the objectionable parts of it, it's merely redundant to what we already have.

THE COURT: All right. Well, I don't agree with you. Let's see. It's going to read a prurient interest

in sex is not the same as candid, wholesome or healthy sexual desires or interest in sex. Material does not necessarily appeal to the prurient interest in sex just because it deals with sex or shows nude bodies. A prurient interest is a morbid or shameful interest in sex. Appealing to the prurient interest does not encompass normal healthy sexual desires, but means the material appeals generally to an unhealthy or abnormally lustful or erotic interest --

MR. HENAK: And that's another problem.

THE COURT: Well, that language probably is a little archaic.

MR. HENAK: Constitutionally overbroad.

THE COURT: Archaic. I am going to say appeals generally to a unhealthy or abnormal interest --

MR. HENAK: But it's still abnormal. We are still talking about something within a realm of community -- of a community standard. And something can be out of the normal, but still within that broad range of what's acceptable or tolerated.

THE COURT: Yeah, but that's a different area.

MR. HENAK: Yes.

THE COURT: What's accepted and tolerated. We are talking about something else.

MR. HENAK: And we don't want to confuse the jury

with using language in one section that would appear to conflict with language in another section.

THE COURT: I don't think it does. Appealing to the prurient interest does not encompass normal healthy sexual desires, but means the material appeals generally to an unhealthy or abnormal erotic interest or to a shameful, unhealthy, unwholesome, degrading or morbid interest in sex or excretion -- sex, nudity or excretion. The material need not sexually stimulate the average person. So that will be -- any objection to that other than what's already been stated?

MR. HENAK: I have no problem with the last sentence. The first sentence misstates the law and is unnecessarily cumulative to the extent that it doesn't misstate the law.

THE COURT: Okay. That's overruled.

MR. BECKER: No objection.

THE COURT: Okay. Now getting back to the Shellow, Shellow & Glynn submission.

MR. HENAK: Judge, just back on that last paragraph really briefly, what is abnormally erotic? I don't understand what that means. I think that the jury is going to see that as including a lot of things.

THE COURT: Abnormal erotic interest?

MR. HENAK: Yes. If it's not shameful or morbid,

it, of course, and maintain our objection. But I have no need to say anything further. Thank you.

THE COURT: Okay.

MR. HENAK: On the first paragraph of that, from 4 to 5, the Court did, I believe, give that first paragraph previously. There probably is support somewhere for the first two sentences. I do not know if there is support for the third sentence, which is in order for material to pass this test, it must have genuinely seriously value. I think that that is nothing more than an effort by the County to make serious value something more than what is required, or at least make something more than serious value required. The jury can determine whether something is serious or not without trying to raise the standard that the defense has to meet. So I would object. Even though we object to the whole paragraph, I object to that one sentence as improperly stating the standard that we have to meet for a defense.

THE COURT: Okay. Let me take that up one at a time. You're saying that the first sentence of the material does not have value merely because, etc., that's already been stated?

MR. HENAK: Yeah, actually I think that entire paragraph has been -- was in the last two cases --

THE COURT: Oh, I thought you meant it's already stated in --

MR. HENAK: No, no, no, no.

THE COURT: So are you objecting?

MR. HENAK: We are objecting to the whole thing for the reasons already stated. I am specifically objecting to the last sentence because it will confuse the jury and it reduces the burden of proof on the County. That's the genuinely serious.

THE COURT: You want to be heard on that, Mr. Becker?

MR. HENAK: We can take the word genuinely --

MR. BECKER: I believe that language was given in both the prior trials and I apologize for not having the case that apparently would support that. I am assuming there is because it was given previously, I believe.

MR. HENAK: He is accurate. It was given previously. It was wrong previously, but apparently they didn't object to it.

MR. GLYNN: And --

THE COURT: Just because it was given previously, doesn't preclude argument.

MR. GLYNN: We don't know if it was objected to or not, Judge. It's the same kind of problem that we have been referring to earlier. We have got law that

says material has to have serious value. That comes out of the case law that comes out of the statute, that comes out of the ordinance. In none of those places is it defined as genuinely serious. It's one of these things that the County wants to improve its position, but so what? I mean it would be equivalent to our saying it doesn't have to be the most serious value in the world, or the most serious value you can imagine. It just has to be serious value.

THE COURT: Well, actually I think that the most offensive part of the last sentence is the quotation marks; that is to say, I have told them in the first sentence what is not value, and the second sentence I tell them what is not value, but I think it really is appropriate that I tell them what is value. But I think the genuinely serious kind of wings --

MR. GLYNN: That's right. Makes it seem that this is a term that the law is using, but it doesn't really mean anything.

THE COURT: So I am going to take out those quote marks, but otherwise --

MR. HENAK: Take out the word "genuinely" as well, I think it will achieve what the Court wants to achieve without the word "genuinely" increasing the County's chances or undermining the County's obligation

to prove.

MR. GLYNN: If I may, Judge, two sentences earlier you have told the jury that the material must lack serious value. To now say that in order to pass the test it must have genuinely serious value, I think, (a), runs the risk of being confusing; and, (b), is redundant. But, by the way, just one very minor point. There is a little typo right above that. I just noticed in the paragraph called the third sub-element, would find that the material lack, and I think that should be lacks.

THE COURT: You're correct. Well, again, I'm going to give that sentence because I do think that the first two sentences tell them what is not value and I think it's important to tell them what is value. The quotation marks will be omitted and your objection is noted and overruled.

MR. GLYNN: And I just mean to put the County on notice that if in its argument tomorrow it makes reference to the value as being anything other than serious, including genuinely serious, I am going to move for a mistrial. I just want people -- I don't believe in sandbagging. And I think that that's a serious enough issue and so changes the burden of proof in this matter, that if the County -- frankly, I mean, again, I

am going to end up moving for mistrial on the basis of it just on the instructions. But if the County argues that, I suggest it exacerbates the problem to such an extent that an additional mistrial motion may be necessary. People can do what they wish obviously.

THE COURT: Okay.

MR. HENAK: The next two paragraphs are objectionable because although they -- some courts might have once considered them to be the law, they are no longer the law after Pope v. Illinois, and Princess Cinema. What we are dealing with here is an objective standard. Either the material has value or it lacks value. Whatever the person who sells the material might try to present it as doesn't change the inherent nature of the material. And what these two paragraphs are telling the jury is that somehow because it is sold at an adult bookstore rather than in a library or in a Barnes& Noble, that that changes whether it's obscene. And it doesn't.

THE COURT: This material was -- we went over this at great length in the other trials, and this material does come from the Supreme Court.

MR. HENAK: Yes, it does. It comes, I believe, from Ginzburg in the 1960's.

THE COURT: In Middlesex, Pennsylvania.

STATE OF WISCONSIN : CIRCUIT COURT, BRANCH 3 : KENOSHA COUNTY :

COUNTY OF KENOSHA,

Plaintiff, JURY TRIAL

-vs- File #94-OR-592

C & S MANAGEMENT, INC.,
d/b/a CROSSROADS,

Defendant.

BEFORE THE HONORABLE BRUCE E. SCHROEDER

JUDGE PRESIDING

APPEARANCES: BRUCE BECKER, Assistant District Attorney, appears on behalf of the County of Kenosha. STEPHEN GLYNN and ROBERT HENAK, Attorneys at Law, appear on behalf of the defendant.

Barbara Mason
Court Reporter

Date of Proceedings: January 29, 1997

(Court recesses. Court reconvenes with the same appearances, but outside the presence of the jury.)

THE COURT: Now we are back on the case of County against C & S Management. And let's finish the record on that. Mr. Glynn had desired to make a motion, reserved the right to make a motion.

MR. GLYNN: Thank you. On behalf of the defendant in this case, I move for a mistrial on the following grounds both separately and cumulatively. First, the Court's disallowing the testimony of Joseph Scott concerning a public opinion survey, which would have gone to community standards. Second, disallowing the testimony of Angela Kvidera regarding comparable materials, which would go both to the question of community standards and to that of patent offensiveness in that it would have shown other juries' acceptance of materials virtually identical in the case of Anal Madness and similar in the case of Spanner Piss to the movie that was tried here. And, third, in disallowing the testimony of the newspaper reporter, whose reporting of a statement by District Attorney Jambois would have constituted an admission by an agent of a party opponent.

All three of those witnesses were available and able to testify and would have had material testimony.

We feel that the cumulative effect of their exclusion has been such as to deny the defendant a fair trial.

In addition, and as separate matters, but also part of the same mistrial motion; that is, each of these we believe is a separate basis for a mistrial and cumulatively part of the other bases, the Court's allowing the jury instructions to refer to genuinely serious value, the Court's allowing the conviction based on an isolated passage or scene by its rulings on our proffered instructions regarding taken as a whole.

With respect to that last point, I acknowledge that the Court changed some of the language and, in fact, does make some reference to the jury's inability to find a conviction based upon a nothing but isolated passage. However, think that the cumulative effect of that is to allow the jurors to pick portions of the tape that they don't like and return a verdict of guilty on that basis. Thank you.

THE COURT: Thank you, did you want to respond at all, Mr. Becker?

MR. BECKER: I oppose the motion for mistrial.

THE COURT: Motion will be denied.

MR. GLYNN: Thanks for letting me make the record.

THE COURT: Anything else that either of you

STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

COUNTY OF KENOSHA,

Plaintiff,

INSTRUCTIONS

-vs-

Case No. 94 OR 592

C & S MANAGEMENT, INC.,
d/b/a CROSSROADS
NEWS AGENCY,

Defendant.

The sale of obscene material, as defined in §9.10.2 of the Kenosha County Ordinances, is committed by one who, with knowledge of the character and content of the material, sells any obscene material for commercial purposes.

The burden of establishing every fact necessary to constitute guilt is upon the County. Before you may find the defendant guilty of this offense, you must be satisfied to a reasonable degree of certainty by evidence which is clear, convincing, and satisfactory that the following four elements are present:

The first element requires that the defendant sold the material.

The defendant may be an individual, partnership, firm, association, corporation, or other legal entity.

The second element requires that the defendant sold the material for commercial purposes.

The third element requires that the defendant had knowledge of the character and

content of the material at the time that it was sold.

The fourth element requires that the material be obscene. You may not substitute your own definition of obscenity for the definition which I will give you. You are bound to accept the definition given to you in these instructions.

The depiction of sexual activity, by itself, does not necessarily render material obscene. Rather, "obscene material" means a material which, if taken as a whole:

1. The average person, applying contemporary community standards, would find:

    a. appeals to the prurient interest, and

    b. describes or shows sexual conduct in a patently offensive way, and,

2. A reasonable person would find lacks serious literary, artistic, political, educational or scientific value. The material must be considered as a whole, looking to the dominant theme, and should not be considered on the basis of isolated passages, except as they contribute to the material as a whole.

The first sub-element is that the average adult, applying contemporary community standards, would find the material, taken as a whole, appeals to the prurient interest. A prurient interest in sex is not the same as candid, wholesome, or healthy sexual desires or interest in sex. Material does not necessarily appeal to the prurient interest in sex just because it deals with sex or shows nude bodies. A prurient interest is a morbid or shameful interest in sex.

"Appealing to the prurient interest" does not encompass normal healthy sexual desires but means the material appeals generally to a shameful, unhealthy, unwholesome, degrading or morbid interest in sex, nudity, or excretion. The material need not sexually

stimulate the average person.

The material must be considered as a whole, looking to the dominant theme, and should not be considered on the basis of isolated passages. Inclusion of innocuous dialogue in the material will not serve to redeem the material if the dominant theme of the material is an appeal to the prurient interest in sex.

The second sub-element requires that the material, under contemporary community standards, describes or shows sexual conduct in a patently offensive way.

"Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals.

"Patently offensive" means clearly offensive, that is, substantially beyond customary limits of sexual candor. Not all descriptions or depictions of sexual conduct are patently offensive. A depiction or description of sexual conduct must clearly exceed the customary limits of sexual candor for adults in the State of Wisconsin for it to be patently offensive.

In determining whether or not the material appeals to a prurient interest in sex or is patently offensive, you must determine whether the average adult person in the statewide community would so find.

"Contemporary community standards" are determined by what is in fact accepted by the community in the state of Wisconsin taken as a whole. Contemporary community standards means the customary limits of candor and decency in this state at the time of the alleged violation of the law. Standards are that which are established by authority, custom, or general consent, as a model or example. What one person or some people think the

community ought or ought not accept is not to be considered. You are entitled to draw on your own knowledge of what is accepted by the average person in this community in arriving at this determination. You must decide whether this material violates those standards.

When the Court talks of "average person," this means a synthesis. It does not mean simply the most susceptible members of the community or the most easily offended, and does not include children. It is necessary for you to decide this case based on your understanding of the spectrum of adult persons in the entire community.

It is also important to remember that you are judging the facts in this case not by your own personal standards but by the standards of the average person in May of 1993. The line between protected expression and punishable obscenity must be drawn at the limits of the community's acceptance rather than in accordance with individual propriety and taste.

The third sub-element requires that a reasonable person would find that the material lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

In judging whether this films lacks serious literary, artistic, political, educational or scientific value, you are not to utilize contemporary community standards.

In determining whether or not the material has serious literary, artistic, political, educational or scientific value, you should not rely upon your own personal assessment of the value of the material. Instead you must determine whether a reasonable person would find serious literary, artistic, political, educational or scientific value

in the material, taken as a whole.

Material does not have value merely because it has a plot, however tenuous, or merely because it is well written or elaborately presented. Moreover, it does not have

serious value simply because it communicates the information that such material exists. In order for material to pass this test it must have genuinely serious value.

In determining this question, you may consider the circumstances of the distribution, and particularly whether the circumstances indicate that the matter was being commercially exploited by the defendant for the sake of its prurient appeal. The weight, if any, such evidence is entitled to is a matter for the jury to determine.

Circumstances of dissemination are relevant to determining whether serious value claimed for the material was, under the circumstances, pretense or reality. You may consider the motives or intent of the Defendant in distributing the material in question.

It is not a defense to the violation of selling obscene material that the material was sold to consenting adults. The law prohibits the commercial sale of obscene material to any person. You are not to consider whether adults should have the right to choose to view such material in determining whether the material is obscene. If the evidence shows by clear and convincing evidence that the defendant sold obscene material to another person, it is no defense that no minors or unconsenting adults were exposed to the material. Before you can find the film obscene, you must find that the prosecution has convinced you to a reasonable degree of certainty by clear, convincing, and satisfactory evidence of all of the three separate prongs of obscenity.

If you are satisfied to a reasonable degree of certainty by clear, convincing, and satisfactory evidence that the defendant, with knowledge of the character and content of the material, sold obscene material for commercial purposes, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY
BRANCH 3

COUNTY OF KENOSHA,

Plaintiff,

v.

C & S MANAGEMENT, INC., d/b/a CROSSROADS,

Defendant.

Case Nos. 94-OR-00457
94-OR-00469
94-OR-00538
94-OR-00592

AFFIDAVIT OF ATTORNEY STEPHEN M. GLYNN

STATE OF WISCONSIN)
) SS.
MILWAUKEE COUNTY)

Stephen M. Glynn, having been first duly sworn on oath, deposes and states as follows:

1. I am an attorney licensed to practice in the state of Wisconsin and before this Court. I am one of the attorneys representing C & S Management, Inc., d/b/a Crossroads, in this case.

2. Crossroads is an "adult bookstore" operating adjacent to Interstate 94 in Kenosha County, Wisconsin. Much of its inventory is sexually explicit. Crossroads advertizes the nature of its business with signs on its building which can be seen and read from Interstate 94. The signs themselves are not sexually explicit.

3. Based upon my examination, most, if not all, of Crossroads'

inventory is constitutionally protected and not obscene. With the exception of the tapes at issue in these four cases, and one additional tape charged in citation number 95FO469, filed on July 17, 1995, I know of no citation or complaint in which either the state or Kenosha County has claimed that any of Crossroads' inventory is obscene.

4. Several newspaper articles have attributed statements to the prosecutors in these cases and other government officials reflecting their desire to use these prosecutions, and those of Suburban Video, Inc. and Satellite News & Video, Inc., not simply to insure that true obscenity is excluded from the defendants' stock, but to shut the defendants down completely due to the sexually explicit nature of their inventory and their proximity to Interstate 94. See Attachments A-E.

5. District Attorney Jambois confirmed in open court that the purpose of these prosecutions is to close down entirely the defendant's business, and those of Suburban Video, Inc. and Satellite News & Video, Inc., and that the County would dismiss these charges if only those defendants would cease doing business in Kenosha County. Tr. 5/26/95 at 47-48

6. Rather than filing one complaint, which would have granted Crossroads an opportunity to purge its inventory of those similar items which the prosecution may deem obscene, the prosecutors filed multiple citations (5 against Crossroads as of the date of this motion), and in these four cases delayed filing the citations until 10 months to a year or more after the supposed violations took

place.

7. I approached DA Jambois before these citations were filed in an effort to determine which portions, if any, of Crossroads' inventory the prosecutor believed might be obscene. I did this so that Crossroads would have an opportunity to comply with the ordinance and purge its inventory of any obscene materials. See Attachment F. D.A. Jambois, however, refused that offer.

8. Despite the ready availability of a civil procedure to determine whether particular materials are obscene without the imposition of sanctions, see Wis. Stat. §806.05, Crossroads has received no notice that the prosecutors have attempted to apply that provision with regard to materials in its inventory or to those videotapes alleged in these cases to be obscene.

9. Despite the availability of a mechanism for an independent evaluation of allegedly obscene materials by the Attorney General, see Wis. Stat. §165.25(3m), it is my understanding, based upon the County's responses to defense motions, that the prosecutors did not apply that provision in this case.

10. On information and belief, based upon statements of ADA Angelina Gabrielle, the only individuals or entities charged with having violated Kenosha County Ordinance No. 9.10.2 are Crossroads and two other businesses along Interstate 94 specializing in sexually explicit, adult entertainment, those being Satellite News & Video and Surburban Video.

11. On information and belief, based upon review of the prosecutor's open files and police reports in these cases, as well as the newspaper

articles attached as Attachments A-E, these charges are the result of an investigation specifically targeting only those three businesses.

12. On information and belief, based upon our investigation in this case, at least 9 video stores in Kenosha County sell or rent adult videotapes comparable to those alleged in these cases to be obscene. Each of those 9 video stores also sells or rents other videotapes which are not sexually explicit. None of those nine video stores has been cited for violation of Kenosha County Ordinance No. 9.10.2.

Stephen M. Glynn

Subscribed and sworn to before me
this 4th day of August, 1995.

Notary Public, State of Wisconsin
My Commission ~~Expires:~~ is permanent

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Panel to consider hiring prosecutor

By J.Taylor Rushing
Staff Writer

Kenosha County could move closer to enforcing its existing obscenity ordinance with a resolution before the Judiciary and Law Enforcement Committee Wednesday night.

Targeting several adult bookstores along Interstate 94, the resolution calls for the county to pay the state $24,378 in 1994 and another $24,378 in 1995 to hire a new county assistant district attorney to prosecute offenders of the ordinance for one year.

The move is necessary because by law the state must pay the salaries of county assistant district attorneys.

If passed, a prosecutor could be hired as early as late this week to serve for the last six months of 1994 and the first six months of 1995.

The new prosecutor would serve solely to enforce the county's obscenity ordinance that was passed on Oct. 20, 1992.

District Attorney Robert Jambois called the latest action "a one-time intensive effort."

Jambois had originally estimated it would cost $125,000 to hire a prosecutor to enforce the ordinance when it first passed. He now believes the job can be done for about half that, but pointed out the funds for the new position do not include the cost of any additional investigators or investigative costs.

Jambois said the bookstores have been in violation of the ordinance since it was first passed, but the county has always lacked the funds to provide a prosecutor.

"I told the county board when they passed the ordinance that if they want it enforced, they'll have to pay for it," he said. "I anticipate this (prosecutor) position will be supported."

Kenosha County last passed an obscenity ordinance on Jan. 7, 1986, but it was found unconstitutional by the state Supreme Court on Feb. 11, 1988, because counties do not have the authority to pass stronger laws than the state.

That decision was upheld by the U.S. Supreme Court on Jan. 7, 1991, when it refused to review a ruling by the 7th U.S. District Court of Appeals that reaffirmed the Wisconsin Supreme Court's decision.

Jambois also pointed out the new ordinance does not violate the First Amendment to the U.S. Constitution because the amendment does not protect obscenity.

Pat Nelson, chairperson of the committee, said the attempt at prosecuting the ordinance is in response to a variety of comments and criticism.

"We have gotten a great deal of criticism, and people want the ordinance prosecuted," she said. "That's why we passed it before — there was concern in the community.

"We've had a great deal of comments from businesses that we've lost, who apparently made some comments to authorities that they'd love to locate in the county but the bookstores on the interstate don't look too good."

Jambois would not disclose his immediate intentions if the position is added to his staff, but did say he had someone prepared for the job.

County obscenity ordinance

Kenosha County's current obscenity ordinance was passed Oct. 20, 1992. It duplicated a state law that made it a misdemeanor carrying fines of $500 to $10,000 for "importing, printing, selling or having in possession for sale, publishing, exhibiting or transferring obscene material; producing or performing in any obscene performance; or requiring as a condition to the purchase of periodicals that a retailer accept obscene material."

The ordinance defines obscenity as "a writing, picture, sound recording, film or performance which the average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole; Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole."

> "I told the county board when they passed the ordinance that if they want it enforced, they'll have to pay for it. I anticipate this (prosecutor) position will be supported."
>
> Robert Jambois, district attorney

ATTACHMENT A

Panel approves pay for prosecutor

By J. Taylor [illegible]
Staff Writer

The county Judiciary and Law Enforcement Committee Wednesday night voted to authorize funding for a prosecutor to enforce the county's obscenity ordinance.

The committee passed, 4-0, a resolution allowing the county to reimburse the state $48,756 for a new assistant district attorney to enforce the county's existing obscenity ordinance for the next 12 months. As required by law, the state would then pay the salary for the new assistant district attorney.

District Attorney Robert Jambois told the committee a new prosecutor is necessary if the county wants to shut down several adult bookstores along Interstate 94. He has said the bookstores have been in violation of the obscenity ordinance since it was passed in October 1992.

Jambois said the county has lacked the funds necessary to prosecute the stores, and may still be in for a tough fight.

"The last time Kenosha County prosecuted its obscenity ordinance some lawyers (for the bookstores) were showing up in Ferraris," he said. "We will be going up against some high-priced talent. But the law is on our side."

The resolution next goes to the County Finance Committee on July 30. If approved, it will reach the County Board.

But it may face some opposition in Finance — namely Vice Chairman Terry Rose. Rose, who has opposed county obscenity ordinances in the past, said the county should not have to pay for the new prosecutor position.

"This would be a wildly irresponsible precedent to set because it would be shifting the burden to local taxpayers," Rose said. "There is no reason for local taxpayers to pick up the tab for an assistant DA — that should be the state's responsibility."

Rose said the state began funding all county district attorney staffs in the late 1980s.

Sheriff Allan Kehl reported to the committee his department is finishing a three-month undercover investigation of the bookstores.

Kehl said all information from the investigation has been forwarded to Jambois' office.

Jambois said the bookstores would be prosecuted similarly to past efforts that shut down stores selling fireworks along the interstate.

$1 million for prisoner costs OK'd

Still struggling with effects of an overcrowded jail, the county Sheriff's Department Wednesday night asked for and received nearly $1 million to transport and house prisoners.

Sheriff Allan Kehl and Chief Deputy Charles Smith asked the county Judiciary and Law Enforcement Committee for $977,300 to help pay for the costs for sending and housing prisoners in other county jails.

Patricia Nelson, chairman of the committee, said, "In the six years I've sat on this committee this is the largest amount I've ever seen."

Kehl said the department had reduced its request from $1.4 million.

"There is not much in the cupboard as far as our budget is concerned," he said. "We've pared this down considerably... We need a jail."

The committee unanimously approved the request, which will send the money from a general county surplus fund to the sheriff's department.

Board approves hiring prosecutor

By Jennifer Buchleiter
Staff Writer

Kenosha County's obscenity ordinance will be put to the test.

In a 23-4 vote, the County Board Tuesday approved $24,378 to hire an assistant district attorney this year to help prosecute violations of the county's obscenity ordinance.

District Attorney Robert Jambois will have to request the additional $24,378 needed for the job for the first half of next year during preparation of the 1995 budget later this year.

Voting against the funding were Supervisors Terry Rose, Anne Bergo, Richard Lindgren and Richard Hart.

Supervisor Eunice Boyer said she intended to vote against providing the money because she thought it should be approved during the budget process, but changed her mind.

"I think the ordinance should be tested," Boyer said. "I don't think it will stand up in court, but we shall find that out."

Boyer said she believes prosecution of violations of the county's health regulations that require strict building and maintenance requirements for video viewing booths is a more effective tool against the adult bookstores.

The board approved the obscenity ordinance in October 1992. That ordinance also repealed the county's previous obscenity ordinance, which had been declared unconstitutional by the [illegible] Supreme Court in [illegible].

When the ordinance was approved in 1992, Jambois told the board he would be returning at some point to request additional money to prosecute violators. He had estimated the cost would be $125,000 at that time.

Jambois told the board Tuesday he predicts that if the $24,378 is provided for prosecution efforts, the three adult bookstores along Interstate 94 will be closed at this time next year or will be under court order to shut down.

"We will give it our all and I expect we will win," Jambois said.

Barbara Wisneski, wife of Supervisor Mark Wisneski, and long-time anti-pornography activist, said the money is a small investment for the benefits of possibly closing the adult bookstores.

"Had I known that's all it would cost to prosecute, I would have raised the money myself," she said.

Joanne Mitchell, 920 10th Place, who told the board she is 85, called the prosecution cost "a piddly amount."

"What you have in the front yard of your house shows who you are and we don't want our front yard to be filled with dirty bookstores," Mitchell said.

In other business, several citizens spoke against county plans to look at 80 acres on Bain Station Road and Green Bay Road as a location for a new county jail.

ATTACHMENT C

3 stores challenging obscenity charges

8-27-94

By John Krerowicz
Staff Writer

Three Kenosha County adult-video stores on Friday requested jury trials in obscenity cases against them.

The charges are based on the county's revised, October 1992 obscenity law and have $10,000 forfeitures per violation as penalties.

Sept. 16 pre-trials were set for the three stores: Superb Video, 6006 120th Ave., Odyssey-Satellite News and Video, 9720 120th Ave., and Crossroads Video, 9230 120th Ave.

The store's employees sold allegedly obscene videotapes to a Sheriff's detective on May 27, 1993 and July 13, 1993.

The stores also have Sept. 2 court dates for additional obscenity charges for selling more videotapes to the same detective.

Assistant District Attorney Brian Austin said the aim of the prosecutions is to put the stores out of business.

"Our feeling is that most of the inventory probably violates the obscenity ordinance," Austin said. "We would like to see the stores shut down."

> **"We would like to see the stores shut down."**
>
> Brian Austin, assistant D.A.

Austin said more obscenity charges will be filed.

Austin said the 1992 obscenity ordinance is based on the state's law. He said that law has been upheld by a federal appellate court. The previous county obscenity ordinance was determined to be unconstitutional by the state Supreme Court in 1988.

The county board on July 20 approved some $24,378 to help pay for an assistant D.A. to prosecute violations of the obscenity ordinance. At least one county board supervisor said at the time she didn't believe the ordinance would withstand a legal challenge.

In a related matter, a Sept. 19 jury trial has been set for Satellite's alleged violations of the county Health Department's adult video booth regulations.

Other video stores, including Sheridan News & Video, 12212 Sheridan Road, and Superb Video, 6005 120th Ave., have paid fines and costs totaling $5,895 each, a total of $11,790, so far for their violations.

The regulations, approved by the county Board of Health in September 1992, apply to construction, maintenance and use of movie viewing booths. The regulations are intended to prevent the spread of AIDS and other sexually transmitted diseases.

Common violations are having doors on booths and holes between them. "Glory holes," as they are called, allow for sexual contact between patrons. The regulations permit only one individual in each booth, no sexual activity and no bodily discharges while there.

The regulations have been ruled constitutional in Kenosha Circuit Court. Superb Video is appealing that ruling.

ATTACHMENT D

APP. 126

KENOSHA TODAY

Saturday, July 15, 1995

Supervisors target adult bookstores

Three recruited to view, report on allegedly obscene videotapes

By [illegible]
Staff Writer

At least three Kenosha County Board supervisors have been watching and writing summaries of allegedly obscene videotapes as part of the prosecution of local adult bookstores.

District Attorney Robert Jambois said he asked supervisors Mark Wisnefski, Tony Garcia and Raffaele Montemurro to become involved to save money, among other reasons.

Wisnefski bought a video about women with certain cravings from Crossroads News Agency, 8220 120th Ave., on June 13 and a movie called "Eurotrash" from Odyssey Satellite Video News, 9720 120th Ave., on June 14.

Garcia on June 6 bought "Erotica Obedience III" and Montemurro on June 3 bought a movie about nymphomaniacs from Suburban Video, 8008 120th Ave.

Charges that the stores violated the county's obscenity ordinance with the videotapes were filed Wednesday. An Aug. 3 initial appearance is scheduled.

About a dozen previous obscenity charges against the stores are on file in Kenosha courts. Those cases involved deputies who bought and viewed videotapes and wrote reports on them for the prosecution.

Jambois said the Sheriff's Department is strained financially and, using supervisors, cuts down on deputy posts. Sheriff Allen Kehl said he understood community involvement was the reason for using the supervisors.

"I don't have any problem with supervisors doing this," said Kehl.

Jambois said the arrangement would help the members of the County Board, which passed the obscenity ordinance, understand the prosecutions.

"I thought the supervisors' involvement was a sign of their commitment to the community," Jambois said. He said there is no requirement that deputies buy and watch the tapes.

Jambois said any citizen interested in buying videos from the stores for possible prosecution should call his office.

Jambois said other recent video purchases have been made, but he wouldn't say whether supervisors were involved or whether complaints would be filed in those cases.

Montemurro said he became involved because he supports the obscenity ordinance.

"Watching the tape was the most disgusting thing I've had to do to date, but it's my way of following through and not taking the easy way out by saying, 'Let someone else do it.'

"Everybody always complains about things, but few people will take a stand and do something. When I believe in something, I don't stand by the sidelines. This is my way of helping the Sheriff's Department and District Attorney do their jobs."

He said he couldn't remember how the idea for him to buy the tapes came up.

He said he watched the adult video at his home but in the middle of the night, so that his wife and children wouldn't see it.

Jambois and Montemurro said the supervisors' actions did not blur the usually separate legislative and enforcement arms of government. "We're all on the same team," said Montemurro. "And as a team player."

Garcia and Wisnefski couldn't be reached for comment.

SHELLOW, SHELLOW & GLYNN, S.C.
ATTORNEYS AT LAW

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July 22, 1994

Mr. Robert J. Jambois
District Attorney, Kenosha County
Kenosha County Courthouse
912 56th Street
Kenosha, Wisconsin 53140

RE: C&S Management d/b/a Crossroads

Dear Mr. Jambois:

This letter is to follow-up on what we discussed by telephone approximately a week-and-a-half ago.As I indicated during our telephone conversation, this law firm represents Crossroads, and the comments I make in this letter have been authorized by my client.

It is the desire of the management and employees at Crossroads to comply with all applicable laws relating to adult establishments. Toward that end, as you are aware, this store, as distinct from all other adult entertainment facilities in Kenosha County, has complied with the booth ordinance completely. No other store in Kenosha County has done so.

It is our belief that nothing contained within our store meets the definition of obscenity. Moreover, it is unquestionable that what is available in our store is no different from what is available at literally dozens of other stores throughout the state of Wisconsin. Nonetheless, since it is the desire of Crossroads to remain in compliance with the law, I propose the following:

1. If there is any magazine, video or other work which my client possesses and which your office believes to be obscene, we would be happy to review the item upon notice and, if we agree that it is obscene, remove it from our shelves. If we do not agree it is obscene, there are civil remedies, including a declaratory judgment, that we would be happy to par-

ATTACHMENT F

ticipate in.

2. Because we believe that the Kenosha County community standards are sufficiently tolerant of materials made available to consenting adults, we would be willing to split the cost or, perhaps, even pick up all costs, for a county-wide survey to determine whether materials are considered obscene.

If either of these offers is of interest to you, but you have questions or suggestions about them, please contact me and we can discuss them. As I told you during our telephone conversation, both these offers are made in good faith and we will be wlling to consider any suggestions you have for modification.

Thank you for your cooperation.

Sincerely,

SHELLOW, SHELLOW & GLYNN, S.C.

Stephen M. Glynn

SMG:sg

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CHAPTER 9
PUBLIC PEACE AND GOOD ORDER

9.01 BATTERY
Section 940.19 and 940.20, Wis. Stats., regarding battery, exclusive of any penalty imposed thereby, is adopted by reference and made a part of this chapter as though set forth in full. (9/28/82)

9.02 CARRYING CONCEALED WEAPON
Any person except a peace officer who goes armed with a concealed and dangerous weapon shall be subject to a forfeiture of not less than $200 nor more than $500, and in default of payment, shall be imprisoned in the County Jail for not more than 90 days.

9.03 RESISTING OR OBSTRUCTING OFFICER
Sec. 946.41, Wis. Stats., regarding resisting or obstructing officer, exclusive of any penalty imposed thereby, is adopted by reference and made a part of this chapter as though set forth in full. Any person who violates this section upon conviction thereof, shall be subject to a forfeiture of not more than $500, and in default of payment, shall be imprisoned in the County Jail for not more than 90 days.

9.04 THEFT
Sec. 943.20, Wis. Stats., regarding theft, exclusive of any penalty imposed thereby, is adopted by reference and made a part of this chapter as though set forth in full.

9.05 SHOPLIFTING
Sec. 943.50, Wis. Stats., regarding shoplifting, exclusive of any penalty imposed thereby, is adopted by reference and made a part of this chapter as though set forth in full.

9.06 MALICIOUS DAMAGE TO PROPERTY
Sec. 943.01(1), (4) and (5), Wis. Stats., regarding malicious damage to property, exclusive of any penalty imposed thereby, is adopted by reference and made a part of this chapter as though set forth in full.

9.07 TRESPASS TO LAND
Sec. 943.13, Wis. Stats., regarding trespass to land, is adopted by reference and made a part of this chapter as though set forth in full.

9.08 TRESPASS TO DWELLINGS
Sec. 943.14, Wis. Stats., regarding trespass to dwellings, exclusive of any penalty imposed thereby, is adopted by reference and made a part of this chapter as though set forth in full.

9.09 DISORDERLY CONDUCT
Sec. 947.01, Wis. Stats., regarding disorderly conduct is adopted by reference and made a part of this chapter as though set forth in full.

9.10 LEWD AND LASCIVIOUS BEHAVIOR
Sec. 944.20(1) and (2), Wis. Stats., regarding lewd and lascivious behavior, exclusive of any penalty imposed thereby, is adopted by reference and made a part of this chapter as though set forth in full.

9.10.2 OBSCENITY (10/20/92)

(1) The county board intends that the authority to prosecute violations of this section shall be used primarily to combat the obscenity industry and shall never be used for harassment or censorship purposes against materials or performances having serious artistic, literary, political, educational or scientific value. The county

board further intends that the enforcement of this ordinance shall be consistent with the First Amendment to the United States Constitution, Article I, Section 3, of the Wisconsin Constitution and the compelling state interest in protecting the free flow of ideas.

(2) In this section:

(a) "Community" means the State of Wisconsin.

(b) "Internal revenue code" has the meaning specified in Wisconsin Statutes section 71.01(6).

(c) "Obscene material" means a writing, picture, sound recording or film which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

(d) "Obscene performance" means a live exhibition before an audience which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

(e) "Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals.

(f) "Wholesale transfer or distribution of obscene material" means any transfer for a valuable consideration of obscene material for purposes of resale or commercial distribution; or any distribution of obscene material for commercial exhibition. "Wholesale transfer or distribution of obscene material" does not require transfer of title to the obscene material to the purchaser, distributee or exhibitor.

(3) Whoever does any of the following with knowledge of the character and content of the material or performance and for commercial purposes is subject to the penalties under sub. (5):

(a) Imports, prints, sells, has in his or her possession for sale, publishes, exhibits, or transfers any obscene material.

(b) Produces or performs in any obscene performance.

(c) Requires, as a condition to the purchase of periodicals, that a retailer accept obscene material.

(4) Whoever does any of the following with knowledge of the character and content of the material is subject to the penalties under sub. (5):

(a) Transfers or exhibits any obscene material to a person under the age of 18 years.

(b) Has in his or her possession with intent to transfer or exhibit to a person under the age of 18 years any obscene material.

(5) Any person violating sub. (3) or (4) shall forfeit not less than $500 nor more than $10,000. Each day a violation under sub. (3) or (4) continues constitutes a separate violation under this section.

(6) A contract printer or employee or agent of a contract printer is not subject to prosecution for a violation of sub. (3) regarding the printing of material that is not subject to the contract printer's editorial review or control.

(7) (a) The county board finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and pluralistic nature of American society. The county board further finds that it is in the interest of the county to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employee, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employee, a member of the board of directors or a trustee:

1. A public elementary or secondary school.

2. A private school, as defined in Wisconsin Statutes section 115.001(3r).

3. Any school offering vocational, technical or adult education that:

a. Is a vocational, technical and adult education district school, is a school approved by the educational approval board under Wisconsin Statutes section 38.51 or is a school described in Wisconsin Statutes section 38.51(9)(f), (g) or (h); and

b. Is exempt from taxation under section 501(c)(3) of the internal revenue code.

4. Any institution of higher education that is accredited, as described in Wisconsin Statutes section 39.30(1)(d), and is exempt from taxation under section 501(c)(3) of the internal revenue code.

5. A library that receives funding from any unit of government.

(8) In determining whether material is obscene under sub. (2)(c)1 and 3, a judge or jury shall examine individual pictures or passages in the context of the work in which they appear.

(9) The provisions of this section, including the provisions of sub. (7), are severable and if any section, clause, provision or portion of this section is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this section shall not be affected thereby.

9.10.3 COIN-OPERATED MOVING PICTURE HOUSES

(1) Intent. The intent of this ordinance is to control the transmission of communicable disease which may or could occur in establishments which show videotapes, coin-operated movies or pictures to individuals in viewing booths in these establishments. This ordinance establishes standards for booth construction and regulations for customers as well as managers of these establishments to prevent the spread of communicable disease.

(2) Private Visual Presentations in Commercial Establishments. Commercial establishments which offer private viewing of movies, tapes, slides, pictures or live performances of any kind must comply with the following requirements:

(a) Booth Access. Each booth shall be totally accessible to and from aisles and public areas of the establishment. Access to a booth shall be unobstructed by doors, locks or other control-type devices and open to an unobstructed view by the individual manager, supervisor, clerk, owner or employee responsible for the operation of the establishment.

(b) Booth Construction.

1. Any booth used to view a movie, tape, slide, picture or live performance of any kind must be so constructed as to discourage sexual activity and the spread of communicable disease by including, but not being limited to the following requirements:

a. Every booth shall be separated from adjacent booths and any nonpublic areas by a wall.

b. Every booth shall have at least one side totally open to a public and a lighted aisle so that there is an unobstructed view at all times of anyone occupying the booth.

c. All walls shall:

1) Be solid, without any openings.

2) Extend from the floor to a height of not less than six (6) feet.

3) Be light-colored, non-absorbent, smooth-textured and easily cleanable.

2. The floor must be light-colored, non-absorbent, smooth-textured and easily cleanable.

3. The lighting level of each booth when not in use shall be a minimum of 10 foot candles at all times.

[5] Finally, the appellant asserts that the cumulative effect of the errors occurring at trial requires reversal, or modification of the sentence. This Court has consistently held that where there is no individual error, there can be no error by accumulation. *Woods v. State*, 674 P.2d 1150 (Okl.Cr.1984). This assignment of error is likewise without merit.

The judgments and sentences are AFFIRMED.

BRETT, P.J., and PARKS, J., concur.

302 Or. 510

[1]STATE *of* Oregon, Petitioner on Review,

v.

Earl A. HENRY, Respondent on Review.

CC 31-300; 31-301; CA A26439; SC S32941.

Supreme Court of Oregon.

Argued and Submitted Oct. 8, 1986.

Decided Jan. 21, 1987.

Defendant was convicted in the Circuit Court, Deschutes County, John N. Copenhaver, J., of dissemination of obscene material, and he appealed. The Court of Appeals, 78 Or.App. 392, 717 P.2d 189, reversed, and appeal was taken. The Supreme Court, Jones, J., held that obscene expression is protected speech under Oregon Constitution, and thus, statute making dissemination of obscene material a crime is unconstitutional.

Affirmed.

Obscenity ⇐2.5

Statute making dissemination of obscene material a crime is unconstitutional, as obscene expression does not fall within any historical exception to plain wording of Oregon Constitution that no law shall be passed restraining expression of speech freely on any subject whatsoever; disagreeing with *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031; rejecting *State v. Jackson*, 224 Or. 337, 356 P.2d 495. Const. Art. 1, § 8.

Stephen F. Peifer, Asst. Atty. Gen., Salem, argued the cause for petitioner *on review*. Dave Frohnmayer, Atty. Gen., James E. Mountain, Jr., Sol. Gen., and Virginia L. Linder, Asst. Sol. Gen., Salem, filed the petition for review.

Timothy J. Sercombe, of Harrang, Swanson, Long & Watkinson, Eugene, and Rex Armstrong, Portland, argued the cause for respondent *on review*. *On the response to* the petition for review with Mr. Armstrong was Edward E. Hill, of Larry O. Gildea, P.C., Eugene.

Before PETERSON, C.J., and LENT, LINDE, CAMPBELL, CARSON and JONES, JJ.

[2]JONES, Justice.

Shortly after defendant Earl Henry opened an adult bookstore in Redmond, Oregon, a search warrant was issued by a Deschutes County district judge which resulted in the seizure of almost the entire inventory of the store, including 78 magazines, 142 paperback books, seven newspapers, nine films, one film projector, six decks of playing cards, an additional six periodical magazines, and various business records. Defendant was charged with disseminating obscene material and possession of obscene material with the intent to disseminate under ORS 167.087, which provides in pertinent part:

"(1) A person commits the crime of disseminating obscene material if the person knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.

"(2) As used in subsection (1) of this section, matter is obscene if:

(a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;

(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and

(c) Taken as a whole, it lacks serious literary, artistic, political or scientific value."

A jury found defendant guilty of dissemination of obscene material and possession of obscene material with the intent to disseminate. Judgment was entered on the two convictions and in each case defendant was fined $1,000 and sentenced to imprisonment for 30 days with the jail sentences to run consecutively. Execution of the sentences was stayed pending appeal.

Defendant raised four issues in his appeal to the Court of Appeals: (1) The search and seizure violated state and federal constitutions; (2) the trial court erred in excluding comparable evidence; (3) the jury verdicts were inconsistent as a matter of law; and (4) ORS 167.087 is unconstitutional under Oregon Constitution, Article I, section 8.

[1] The Court of Appeals, 78 Or.App. 392, 717 P.2d 189, reversed the convictions, holding that ORS 167.087 is unconstitutionally vague. Defendant had not made an argument based on vagueness apart from his claim under Article I, section 8, but we understand the Court of Appeals opinion to have seen the two issues as related. Although we proceed to decide the constitutional issue as presented, we should say a word about the vagueness issue.

The indeterminacy of the crime created by ORS 167.087 does not lie in the phrase "sexual conduct" that is further defined in ORS 167.060(10).[1] It lies in tying the criminality of a publication to "contemporary state standards." [2] Even in ordinary criminal law, we doubt that the legislature can make it a crime to conduct oneself in a manner that falls short of "contemporary state standards." In a law censoring speech, writing or publication, such an indeterminate test is intolerable. It means that anyone who publishes or distributes arguably "obscene" words or pictures does so at the peril of punishment for making a wrong guess about a future jury's estimate of "contemporary state standards" of prurience.

Though we do not disagree with the Court of Appeals, we hold that in any event ORS 167.087 contravenes Article I, section 8, of the Oregon Constitution and cannot be justified as an "historical exception" from Oregon's constitutional guarantee of freedom of expression.

Article I, section 8, of the Oregon Constitution sets forth in plain words that

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

What does the expression "every person shall be responsible for the abuse of this right" mean? This court [1] obliquely addressed that language in *State v. Jackson*, 224 Or. 337, 347, 356 P.2d 495 (1960). There Justice George Rossman related this final clause of the section to the statement in Blackstone's Commentaries that the "liberty of the press" extended only to freedom from "previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 Blackstone, Commentaries, ch 11, p. 142, 151. But Article I, section 8, does not in terms refer to "freedom of * * * the press" (as the First Amendment does),[3] and Blackstone's narrow view of the extent of freedom of publication has long been rejected in this country as inadequate to the

1. ORS 167.060(10) provides:
> "'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification."

2. For the intrinsic difficulties of such a standard, *cf. Ross v. Springfield School Dist. No. 19*, 300 Or. 507, 716 P.2d 724 (1986).

3. The First Amendment to the United States Constitution provides:
> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

intended sweep of the American guarantees. Since *State v. Jackson*, this court has related the clause holding every person "responsible for the abuse of" the right of free expression to civil responsibility for harm done thereby. *Wheeler v. Green*, 286 Or. 99, 118, 593 P.2d 777 (1979). If the "abuse" clause leaves one subject to criminal prosecution for publications, it could hardly be confined just to "obscene" publications. The clause does not affect the decision of the case before us.

We have recently said in *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982), and *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983), that the guarantee of freedom of expression of the Oregon Constitution forecloses the enactment of any prohibitory law backed by punitive sanctions that forbids speech or writing on any subject whatever, unless it can be shown that the prohibition falls within an original or modern version of an historically established exception to the protection afforded freedom of expression by Article I, section 8, that this guarantee demonstrably was not intended to displace.

ORS 167.087 as adopted by the legislature captured the obscenity test set forth by the Supreme Court of the United States in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Defendant concedes that the statute passes muster under the federal Court's current view of the First Amendment and therefore focuses his attack directly on the viability of the statute under Article I, section 8, of the [1] Oregon Constitution. We therefore address this issue as our own interpretation of the Oregon Constitution independent of any First Amendment analysis by the Supreme Court of the United States. *See State v. Kennedy*, 295 Or. 260, 265–68, 666 P.2d 1316 (1983). We discuss the federal constitution and federal cases only when of assistance in the analysis of the Oregon Constitution.

We note that Article I, section 8, separately precludes laws "restraining the free expression of opinion" as well as laws "restricting the right to speak, write, or print freely," whereas the First Amendment restrains "abridging the freedom of speech, or of the press." The text of Article I, section 8, is broader and covers any expression of opinion, including verbal and nonverbal expressions contained in films, pictures, paintings, sculpture and the like. The Oregon constitutional provision also covers "any subject whatever" and does not contain any express exception for obscene communications.

The question remains whether "obscene" expressions fall within such historical exceptions as "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." *State v. Robertson*, *supra*, 293 Or. at 412, 649 P.2d 569.

The first part of the *Robertson* test for determining whether a restriction on expression comes within an historical exception focuses on whether the restriction was well established when the early American guarantees of freedom of expression were adopted, *i.e.*, by the late eighteenth and mid-nineteenth centuries. Laurence Tribe, American Constitutional Law 657 (1978), reports:

> "In the sixteenth century, ecclesiastical and royal censorship of expression in England was more concerned with political and religious themes than with the sexually obscene. The earliest licensing systems were primarily addressed to the vices of sedition and heresy. During the seventeenth century, the influence of puritanism resulted in a sober intolerance of bawdy literature; the portrayal of sexual pleasure was strictly condemned. Shortly after the restoration, in the year 1663, Sir Charles Sedley, an intimate of the King and a notorious profligate, after a drinking spree in a tavern by Covent Garden, mounted the balcony of the tavern as a crowd gathered below. There he proceeded to diarobe, haranguing his audience with antireligious epithets as he showered them with bottles of urine. The crowd, now turned mob, stormed [1] the tavern. Sedley's subsequent conviction [Sir Charles Sydlyes

Case, 1 Keble 620 (K.B.1663). See 8 The Cambridge History of English Literature 158 (1912)] is widely regarded as the first reported English case on obscenity—making Sedley the first adjudicated 'streaker.' * * * Sedley's * * * case was subsequently relied upon in *Dominus Rex v. Curl* [2 Strange 788 (K.B. 1727)] for the proposition that obscenity alone—that is, Sedley's nakedness—was a breach of the peace. In a third early case, *Rex v. Wilkes* [4 Burr. 2527 (K.B. 1770)], the Tory government used the new common law of obscenity to send Wilkes, a whig foe, to jail for having published a poem entitled 'Essay on Woman.' There was little further common law development in England; there was no common law development in the American colonies at all. And at the time of the revolution, only one state [Massachusetts] had any statutory law on the subject." (Text of some footnotes in brackets; others omitted.)

See also U.S. Dept. of Justice, Attorney General's Commission on Pornography 236–40 (Regulation and the Role of Religion) (1986).

The Massachusetts statute addressed pornography as a sacrilegious work. In 1711 the colony of Massachusetts enacted a statute stating that "evil communication, wicked, profane, impure, filthy, and obscene songs, composures, writings, or prints do corrupt the mind and are incentives to all manner of impieties and debaucheries, more especially when digested, composed or uttered in imitation or in mimicking of preaching or any other part of divine worship." Ancient Charter, Colony Laws and Province Laws of Massachusetts Bay (1814). The law prohibited the "composing, writing, printing, or publishing of any filthy, obscene or profane story, pamphlets, libel or mock sermon, in imitation of preaching or any other part of divine worship." Despite this enactment, there were no reported obscenity prosecutions until 1815. The first reported obscenity case in the United States is *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (1815). The Pennsylvania court relied on *Sir Charles Sydlyes Case*[4] and found crimes against public decency to be indictable at common law.

The first case involving a book alleged to be obscene [in] arose in Massachusetts six years later. Peter Holmes was charged with publishing a lewd illustration along with the book "Memoirs of a Woman of Pleasure." *Commonwealth v. Holmes*, 17 Mass. 336 (1821). Relying on both the common law and the statute, the Massachusetts court convicted Holmes.

Tribe, *supra* at 658, reports that several states, beginning with Vermont in 1821, subsequently passed obscenity statutes. The first federal statute, passed in 1842, was aimed at the "French post card" trade and prohibited the importation of obscene pictorial matter. 5 Stat. 566 (1842). Tribe continues:

> "Few of the cases prior to the late nineteenth century attempted to define the obscene. In 1868, in *Regina v. Hicklin*, Lord Chief Justice Cockburn was called upon to provide a definition under the recently enacted Lord Campbell's Act. For him, the 'test of obscenity' was 'whether the tendency of the matter charged ... 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.' [L.R 3 Q.B. 360, 368 (1868).]"

"The *Hicklin* test[5] was widely adopted by American courts. * * * [P]rosecu-

4. There are two different reports of this case: 1 Keble 620 (KB), 83 Eng.Rep. 1146 (1663), and 1 Sid. 168, 82 Eng.Rep. 1036 (1663). This and many of the other early cases are reprinted in De Grazia, Censorship Landmarks (1969).

5. The *Hicklin* rule had been under attack for some time prior to 1930. In 1913, Judge Learned Hand criticized the *Hicklin* test in *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913), questioning whether the treatment of sexual topics should be reduced to the standard found in a child's library. Twenty years later, Judge Augustus Hand rejected *Hicklin* completely and ruled that excerpts of a work could no longer be used to determine obscenity. *United States v. One Book Entitled "Ulysses,"* 72 F.2d 705 (2d Cir.1934).

tions under the *Hicklin* rule took a heavy toll on contemporary literature. In * * * 1930, * * * Theodore Dreiser's *An American Tragedy* [*Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930)] and D.H. Lawrence's *Lady Chatterly's Lover* [*Commonwealth v. Delacey*, 271 Mass. 327, 171 N.E. 455 (1930)] were declared obscene." Tribe, *supra* at 658–59 (text of some footnotes in brackets; other footnotes omitted).

The United States Supreme Court addressed the [its]history of obscenity laws in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). Justice Brennan, in his first year on the Supreme Court, wrote that "obscenity is not within the area of constitutionally protected speech or press," relying on an excerpt from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942), which had excluded "the lewd and obscene [and] the profane" from the category of protected speech. *Roth*, 354 U.S. at 485, 77 S.Ct. at 1309. Thus, for the first time the United States Supreme Court opined that "obscenity" was without First Amendment protection. The Court stated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484, 77 S.Ct. at 1309. Justice Brennan noted that the Court "has always assumed that obscenity is not protected by the freedoms of speech and press," but he admitted that *Roth* was the first time the question had been squarely presented to the Court under the First or the Fourteenth Amendment. 354 U.S. at 481, 77 S.Ct. at 1307. Brennan attempted to justify his conclusion that obscenity was not historically protected by quoting statutes relevant to libel, blasphemy and profanity, and then coupled those references with a side reference to the 1712 Massachusetts statute that we previously cited which made it criminal to publish any obscene imitation or mimicking of religious service. Without further analysis he precipitously concluded, "thus profanity and obscenity were related offenses." The opinion did acknowledge that "[a]t the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law," but it nevertheless asserted that "there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." 354 U.S. at 483, 77 S.Ct. at 1308. The Court went on to label "obscene material" as "material which deals with sex in a manner appealing to prurient interest." *Roth*, 354 U.S. at 487, 77 S.Ct. at 1310.

The history of obscenity regulations at the time of adoption of the federal constitution was better summarized by Justice Douglas in his dissent in the 1973 case of *United States v. 12 200–Ft. Reels of Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500, which more closely coincides with our review of the history. Justice Douglas prefaced his dissent by observing

> "there is not the slightest evidence that the Framers intended to put the newly created federal regime into the role of [a]ombudsman over literature. Tying censorship to the movement of literature or films in interstate commerce or into foreign commerce would have been an easy way for a government of delegated powers to impair the liberty of expression. It was to bar such suppression that we have the First Amendment. I dare say Jefferson and Madison would be appalled at what the Court espouses today." 413 U.S. at 132, 93 S.Ct. at 2671.

He then noted:

> "The First Amendment was the product of a robust, not a prudish, age. The four decades prior to its enactment 'saw

It was not until 1948 that the Supreme Court squarely faced the contention that legal restraints on the publication of obscenity were unconstitutional violations of the First Amendment's guarantees of freedom of speech and press. In that year Doubleday & Co. was convicted under a New York law for having published an allegedly obscene work, Edmund Wilson's "Memoirs of Hecate County." Despite the fact that Wilson was a leading literary critic, the conviction was upheld by an evenly divided court. *Doubleday & Co. v. New York*, 335 U.S. 848, 69 S.Ct. 79, 93 L.Ed. 398 (1948).

the publication, virtually without molestation from any authority, of two classics of pornographic literature.' D. Loth, The Erotic in Literature 108 (1961). In addition to William King's The Toast, there was John Cleland's Memoirs of a Woman of Pleasure which has been described as the 'most important work of genuine pornography that has been published in English....' L. Markun, Mrs. Grundy 191 (1930). In England, Harris' List of Covent Garden Ladies, a catalog used by prostitutes to advertise their trade, enjoyed open circulation. N. St. John-Stevas, Obscenity and the Law 25 (1956). Bibliographies of pornographic literature list countless erotic works which were published in this time. See, *e.g.*, A. Craig, Suppressed Books (1963); P. Fraxi, Catena Librorum Tacendorum (1885); W. Gallichan, The Poison of Prudery (1929); D. Loth, *supra*; L. Markun, *supra*. This was the age when Benjamin Franklin wrote his 'Advice to a Young Man on Choosing a Mistress' and 'A Letter to the Royal Academy at Brussels.' When the United States became a nation, none of the fathers of the country were any more concerned than Franklin with the question of pornography. John Quincy Adams had a strongly puritanical bent for a man of his literary interests, and even he wrote of Tom Jones that it was "one of the best novels in the language."' Loth, *supra*, at 120. It was in this milieu that Madison admonished against any 'distinction between the freedom and licentiousness of the press.' S. Padover, The Complete Madison 295 (1953). The Anthony Comstocks, the Thomas Bowdlers and Victorian hypocrisy—the predecessors of our present obscenity laws—had yet to come upon the stage." 413 U.S. at 132–33, 93 S.Ct. at 2671–72 (footnote omitted).

The dissent then discussed the early English cases we have cited in this opinion, including *Sir Charles Sydleys Case*, 83 Eng.Rep. 1146, 1146–47 (KB 1663), and *Dominus Rex v. Curl*, 93 Eng.Rep. 849, 851 (KB 1727), concluding:

"The advent of the printing press spurred censorship in [1520] England, but the ribald and the obscene were not, at first, within the scope of that which was officially banned. The censorship of the Star Chamber and the licensing of books under the Tudors and Stuarts was aimed at the blasphemous or heretical, the seditious or treasonous. At that date, the government made no effort to prohibit the dissemination of obscenity. Rather, obscene literature was considered to raise a moral question properly cognizable only by ecclesiastical, and not the common-law, courts. 'A crime that shakes religion (*a*), as profaneness on the stage, &c. is indictable (*b*); but writing an obscene book, as that entitled, "The Fifteen Plagues of a Maidenhead," is not indictable, but punishable only in the Spiritual Court (*c*).' *Queen v. Read*, 88 Eng.Rep. 953 (K.B.1707). * * *" 413 U.S. at 134–35, 93 S.Ct. at 2672 (footnote omitted).

Frederick F. Schauer in his extensive work "The Law of Obscenity," The Bureau of National Affairs, Inc. (1976), traces the history of obscenity regulation in England and America. His work parallels that of Justice Douglas and reaches a similar conclusion that early American laws made blasphemy or heresy a crime, but sexual materials not having an antireligious aspect were left generally untouched. We agree that blasphemy and profanity laws restricting expression that is contemptuous toward God cannot be equated with obscenity laws, but to the extent that obscenity laws share these antecedents, they cannot be said to have survived the adoption of the American constitutional guarantees.

From our review of the English and American cases and statutes, we conclude that restrictions on sexually explicit or obscene expressions were not well established at the time the early freedoms of expression were adopted. We disagree with the writers of the *Chaplinsky* and *Roth* opinions that sexually explicit expression was historically unprotected for that reason. The point of our historical review and the historical review relied upon by the United States Supreme Court in *Roth* is that while there may long have been a view that "obscene" materials were improper and not privileged, the pejorative label has not described any single type of impropriety. The term "obscene" simply functioned as a condemnatory term declaring words, pictures, ideas or conduct as improper by definition, whatever may, from time to time, be placed within the definition, *e.g.*, "blasphemous," "profane," "immoral," "depraved," "corrupt," "lewd," "lascivious," "impure" and "hard-core pornography."

[1821] We now turn to Oregon history to determine if there is any indication that legislation existing at or near the time of the adoption of Article I, section 8, of the Oregon Constitution demonstrates that "obscene" expressions should be included as an historical exception under the *Robertson* test.

In *Robertson* we said that Article I, section 8,

> "forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted *and that the guarantees then or in 1859 demonstrably were not intended to reach.*" 293 Or. at 412, 649 P.2d 569 (emphasis added).

We emphasize this last clause because the constitutional guarantee of free speech and press will not be overcome by the mere showing of some legal restraints on one or another form of speech or writing. The party opposing a claim of constitutional privilege must demonstrate that the guarantees of freedom of expression were not intended to replace the earlier restrictions. We were convinced that they were not so intended with regard to common law prosecutions for "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud." 293 Or. at 412, 649 P.2d 569. But the state claims that "obscenity" would have been a conventional crime when Oregon's Bill of Rights was adopted in 1857. The state argues that

> "in the Oregon Codes of 1853 and 1855, sale, distribution, and possession of obscene writings or pictures was punishable as a misdemeanor by fine and/or imprisonment. Thus, it is apparent that the same type of conduct prescribed under ORS 167.087, i.e., dissemination of obscene writings and/or pictures, constituted a crime at least 5 years prior to adoption of the Oregon Bill of Rights. Therefore, such a crime falls within the historical exception delineated in *Robertson*."

As we cautioned in *State ex rel. Oregonian Pub. Co. v. Deiz*, 289 Or. 277, 284, 613 P.2d 23 (1980), "[c]ontemporaneous legislative actions should not necessarily be given much weight when construing constitutional principles. Constitutional draftsmen are concerned with broad principles of long-range significance." The only relevant Oregon territorial [1822] legislation enacted before Article I, section 8, included prohibitions against the sale, distribution and possession of obscene writings or pictures which manifestly tended to corrupt the morals of youth. Chapter 11, section 10, of the Oregon Code of 1853 ("Steamboat Code"), effective May 1, 1854, and a similar provision of the Oregon Code of 1855, p. 234, provided:

> "If any person shall import, print, publish, sell or distribute any book or any pamphlet, ballad, printed paper or other thing containing obscene language or obscene prints, pictures, figures, or other descriptions, *manifestly tending to the corruption of the morals of youth*, or shall introduce into any family, school or place of education, or shall buy, procure, receive, or have in his possession, any such book, pamphlet, ballad, printed paper or other thing, either for the purpose of loan, sale, exhibition or circulation, or with intent to introduce the same into any family, school, or place of education, he shall, on conviction, be punished by imprisonment in the county jail not more than six, nor less than three months, or by a fine not more than three hundred,

nor less than fifty dollars." (Emphasis added.)

The territorial statute, which contained no definition of "obscene" and which was directed primarily to the protection of youth, certainly does not constitute any well-established historical exception to freedom of expression and that statute is in no way the equivalent of statutes punishing libel, perjury, forgery and the like.

In 1960, in *State v. Jackson*, *supra*, a 4–3 decision in which the regular members of this Court divided equally, Justice Rossman, joined by Justices McAllister and Perry and Pro Tem Judge Millard, wrote:

"Neither party to this appeal argues that obscenity falls within the free speech guarantees of the federal or state constitutions. We think that the authorities marshalled by the majority opinion in *Roth v. United States*, supra, convincingly demonstrate that obscene speech enjoys no such immunity as a matter of history, and we reject an interpretation of our constitution which would protect it in Oregon." 224 Or. at 354, 356 P.2d 495.[6]

1[2] We reject that language as historically unsound. Our approach in more recent cases is that stated in Justice O'Connell's dissenting opinion for three members of this court. *See, e.g., State v. Kennedy*, *supra*. He recognized that in interpreting Article I, section 8, of our Oregon Constitution, the federal *Roth* case was of value only if the reasoning supporting that Court's interpretation of the federal constitution could be used as a guide in construing our own. The dissenting opinion in *Jackson* disagreed with the conclusion in *Roth* that "obscenity is not within the area of constitutionally protected speech or press." Justice O'Connell further commented that it is difficult to see how language or material dealing with love, lust and sex is any less entitled to First Amendment scrutiny when regulation is attempted than is the language or depiction of violence and revolution.[7]

In *Roth*, Justice Douglas observed that the First Amendment was a product of a robust, not a prudish age. Likewise, although Oregon's pioneers brought with them a diversity of highly moral as well as irreverent views, we perceive that most members of the Constitutional Convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others. We conclude as we did in reviewing English and American history that restrictions on sexually explicit and obscene expression between adults were not well established at the time of the adoption of Article I, section 8, of the Oregon Constitution. The history of restriction on undefined obscenity contrasts sharply with the Oregon and common law crimes involving expression such as perjury, theft, forgery and fraud that were well established by 1859. The very fact that "obscenity" originally was pursued and repressed for its "anti-establishment" irreverence rather than for its bawdiness elsewhere and only to protect the morals of youth in this state leads us to conclude that no broad or all-encompassing historical exception from the guarantees of free expression was ever intended. The restriction on sexually explicit expression embodied in ORS 167.087 does not satisfy the first part of the *Robertson* test.

We now turn to the issue whether ORS 167.087 censors 1[3] free speech as guaranteed by the Oregon Constitution. As mentioned, this statute captured the obscenity test set forth by the 1973 Supreme Court of the United States in *Miller v. California*, *supra*. After *Roth*, the Supreme Court in numerous subsequent opinions[8] for 15 years was unable to muster five votes for any theory of censorship of obscenity until *Miller* and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). By that time Justice Brennan had come to regret that he ever went for the idea of excluding "obscenity" from the First Amendment in the first place, and he dissented. He concluded that the *Roth/Miller/Paris Adult Theatre* approach is incompatible with a coherent theory of free expression under the First Amendment. We agree with Justice Brennan for the reasons previously expressed and conclude that it is equally incompatible with Article I, section 8, of our state constitution.

Roth assumed "obscenity" to be "utterly without redeeming social importance," 354 U.S. at 484–85, 77 S.Ct. at 1309, but in *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), the plurality opinion treated the lack of such "redeeming social importance" not as a reason to exclude obscenity but as part of its definition.

In *Miller v. California*, *supra*, a five-Justice majority modified the *Roth* test and converted it to (1) 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. In *Paris Adult Theatre*, a case decided the same day as *Miller*, the Supreme Court rejected the argument that obscene films are constitutionally immune from state regulation simply because they are exhibited to consenting adults only. The Court previously had held, in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), that mere private possession of obscene matter cannot be proscribed and the constitution protects the right to receive information and ideas and to be generally free from government intrusion into one's privacy. *Miller v. California* continues to represent the federal standard and the federal courts continue to exclude obscenity as defined in *Miller* from First Amendment protection.

1[4] Although the *Miller* test may pass federal constitutional muster and is recommended as a model for state legislatures by the Attorney General's Commission on Pornography, *supra* at 491, the test constitutes censorship forbidden by the Oregon Constitution. As Judge Tanzer aptly noted in *State v. Tidyman*, 30 Or.App. 537, 547, 568 P.2d 666, *rev. den.* 280 Or. 683 (1977), the problem with the United States Supreme Court's approach to obscene expression is that it permits government to decide what constitutes socially acceptable expression, which is precisely what Madison decried: "The difficulty [with the United States Supreme Court's approach] arises from the anomaly that the very purpose of the First Amendment is to protect expression which fails to conform to community standards."

We hold that characterizing expression as "obscenity" under any definition, be it *Roth*, *Miller* or otherwise, does not deprive it of protection under the Oregon Constitution. Obscene speech, writing or equivalent forms of communication are "speech" nonetheless. We emphasize that the prime reason that "obscene" expression cannot be restricted is that it is speech that does not fall within any historical exception to the plain wording of the Oregon Constitution that "no law shall be passed restraining the expression of [speech] freely on any subject whatsoever."

6. The majority opinion in *State v. Jackson*, 224 Or. 337, 355, 356 P.2d 495 (1960), recognized the impossibility of finding any acceptable definition of the word "obscene"; in fact the court felt that it would have been enough for the state to have alleged that the book was obscene or indecent without more.

7. The Attorney General's Commission on Pornography at 927 reports that a 1985 Newsweek-Gallup Survey disclosed that while only 21 percent of the population would ban materials that show nudity and 47 percent of the population would ban material showing adults having sexual relations, 73 percent of the population would oppose material that shows sexual violence. Apparently the public is more concerned with sexual violence than with the display of sex itself.

8. *See* Schauer, The Law of Obscenity 30–48 (The Emerging Constitutional Standards: From *Roth* to *Miller*) (1976).

We do not hold that this form of expression, like others, may not be regulated in the interests of unwilling viewers, captive audiences, minors and beleaguered neighbors. No such issue is before us. But it may not be punished in the interest of a uniform vision on how human sexuality should be regarded or portrayed. *See* Tribe, *supra* at 662. We also do not rule out regulation, enforced by criminal prosecution, directed against conduct of producers or participants in the production of sexually explicit material, nor reasonable time, place and manner regulations of the nuisance aspect of such material or laws to protect the unwilling viewer or children. Again, no such issue is before us. However, no law can prohibit or censor the communication itself. In this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered "obscene."

The Court of Appeals is affirmed, but for the reasons stated in this opinion.

302 Or. 582

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellant,

v.

DEPARTMENT OF REVENUE, State of Oregon, Respondent.

TC 1093, 1189, 1282, 1362 SC S32370, S32371, S32372, S32373.

Supreme Court of Oregon, In Banc.

Argued and Submitted Sept. 3, 1986.

Decided Feb. 3, 1987.

Department of Revenue appealed from decrees of the Tax Court, Carlisle B. Roberts, J., which held that valuation unit for railroad did not include a subsidiary. The Supreme Court, 295 Or. 47, 664 P.2d 401, reversed and remanded. On remand, the Tax Court, Carl N. Byers, J., concluded that no adjustment in valuation and apportionment formulas was necessary, and railroad appealed. The Supreme Court, Lent, J., held that use of three-factor formula that assigned value to property investment, ton-miles of weight, and originating or terminating freight tonnage, to apportion total value of property of railroad both within and without state, for purposes of taxation in state, was proper, notwithstanding contention of railroad that inclusion of much more profitable outstate subsidiary of railroad in railroad's valuation unit substantially increased value of unit.

Affirmed.

1. Taxation ⇐20

Constitutional requirement of fair apportionment in property taxation means that state may not tax extraterritorial value.

2. Taxation ⇐116

Constitutional limits on state taxation of interstate corporations are not stringent; states are given wide latitude in use of formulas to measure value of property located within their borders.

3. Taxation ⇐98

Taxation apportionment formula need only bear rational relationship, both on its face and in its application, to property values connected with taxing state.

4. Taxation ⇐98

"Apportionment" is not means of determining value of property in given geographic area, but rather, it is means of apportioning individual unit to geographical area for purposes of taxation.

See publication Words and Phrases for other judicial constructions and definitions.

5. Taxation ⇐144

Use of three-factor formula, that assigned value to property investment, ton-miles of weight, and originating or terminating freight tonnage, to apportion total value of property of railroad, both within and without state, for purpose of taxation in state was proper, notwithstanding contention of railroad that inclusion of much more profitable outstate subsidiary of railroad in railroad's valuation unit substantially increased value of unit.

John H. Doran, Portland, for appellant. With him on briefs were George L. Kirklin and Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland.

Elizabeth S. Stockdale, Asst. Atty. Gen., Salem, for respondent. With her on brief was Dave Frohnmayer, Atty. Gen., Salem.

LENT, Justice.

In these consolidated actions, Southern Pacific Transportation Company (Southern Pacific) challenges the Department of Revenue's (the Department) assessments of Southern Pacific's Oregon property for the years 1976–79. We held in a previous decision in this case that the property of Southern Pacific's subsidiary, St. Louis & Southwestern Railroad (also known as, and hereinafter denominated, Cottonbelt), was included in Southern Pacific's property for the purpose of the unit valuation method employed by the Department to make these assessments. *Southern Pacific Trans. Co. v. Dept. of Rev.*, 295 Or. 47, 664 P.2d 401 (1983). We remanded the case to the Tax Court so that it could consider whether the valuation and apportionment formulas, which were not before us, should be adjusted in light of our decision. 295 Or. at 65, 664 P.2d 401. The Tax Court concluded that no adjustment was necessary. *Southern Pacific Trans. Co. v. Dept. of Rev.*, 10 OTR 80 (1985). We affirm.

I.

The relevant facts are not in dispute and are set forth in our previous opinion. For convenience, we will restate them in somewhat abbreviated form.

A.

Southern Pacific is a railroad that operates in Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas and Louisiana. It has three principal routes: Portland to Los Angeles; San Francisco to Ogden, Utah; and Los Angeles to New Orleans. At Corsicana, Texas, and Shreveport, Louisiana, Southern Pacific connects with Cottonbelt. Cottonbelt is a railroad operating in Texas, Louisiana, Arkansas, Tennessee, Missouri and Illinois. During the time at issue in this case, Cottonbelt was almost wholly owned by Southern Pacific.[1] In addition, Cottonbelt's principal officers and nearly all its directors were officers or employees of Southern Pacific, were selected by Southern Pacific, and reported to Southern Pacific.

The most significant distinction between Cottonbelt and Southern Pacific is in their respective functions in the continental rail transportation system. Cottonbelt is primarily a "bridge" railroad for other carriers. That is, most of the traffic over Cottonbelt's routes originates and terminates with other railroads. In contrast, 90 percent of the traffic over Southern Pacific's routes either originates or terminates with Southern Pacific. The distinction is significant because "bridge" railroads tend to be much more profitable. For example, during 1978 the *net* railway operating income of Cottonbelt was 91 percent of that of Southern Pacific, although Cottonbelt's gross income was only 14 percent, and its total assets only 18 percent, of Southern Pacific's.

B.

The Department assesses the property of designated utilities, including railroads, and apportions this assessment among Oregon's counties. ORS 308.505 to 308.665. In making an assessment, the Department

1. Southern Pacific's ownership of Cottonbelt was at all times greater than 98 percent but less than 100 percent.

regarding the voluntariness of his consent to the withdrawal of his blood. The issue is whether a warrant was required to test the blood. We conclude that no warrant was required, and we reverse and remand.

Deputy Sheriff Bailey investigated an automobile accident. He learned that the driver had been taken to the hospital. Bailey went to the hospital where he met defendant, who acknowledged that he was the driver. Bailey read him *Miranda* warnings. Defendant said that he understood his rights and that he was willing to talk about the accident.

Bailey asked defendant if he would give a blood sample. He then read a "consent for test for intoxicants" form to defendant. The form stated in part:

"PATIENT CONSENT

"I voluntarily consent to have a sample of my blood withdrawn * * * for the purpose of testing for alcohol or controlled substances to determine whether or not I am under the influence of alcohol or controlled substances."

Defendant read the form and then he signed it. After the blood was drawn, it was sent to the state crime lab for testing. No warrant was obtained to test it.[1]

Defendant moved to suppress the blood and the test results on the ground that the seizure at the hospital and the subsequent testing were done without a warrant.[2] The trial court found in part:

"1. On February 15, 1985, defendant was contacted at Meridian Park Hospital by Deputy Bailey of the Clackamas County Sheriff's Office.

"2. Deputy Bailey advised defendant of his *Miranda* rights and requested that he consent to the taking of a blood sample. Deputy Bailey prepared and defendant signed the consent to having his blood drawn for the purpose of testing.

"3. Deputy Bailey did not discuss with defendant the testing of the blood sample."

The court ordered:

"[D]efendant's motion to suppress the seizure of the blood sample from Meridian Park Hospital is denied;

"* * * [D]efendant's motion to suppress evidence of the testing of the blood sample is allowed."

The issue is whether the scope of defendant's consent extended to the testing of his blood. We conclude that it did.

Defendant contends that, once the state had seized the blood, a warrant was necessary to test it. He argues:

"Thus, though the seizure of the defendant's blood was allowed by the defendant through the hospital consent form, the subsequent further testing of his blood was a 'search' and a further intrusion into his privacy. As such, it must be justified by a warrant. Under the cited case law, once the blood had been seized the investigation reached a logical stopping point and the need to proceed without a warrant stopped."

He relies primarily on *State v. Lowry*, *supra* n. 1, and *State v. Westlund*, *supra* n. 2.

[1, 2] Searches conducted without a warrant are *per se* unreasonable, subject to a few specifically established and well-delineated exceptions. One of those exceptions is that for consent searches.[3] *State v. Kennedy*, 290 Or. 493, 500, 624 P.2d 99 (1981). If defendant's consent was validly given to the taking and testing of his blood, no warrant was needed. Bailey testified:

"Q. For the purpose of your discussion between you and Mr. Johnson regarding the blood draw am I correct that you filled out the top part of this form and you read him this paragraph and its your testimony that Mr. Johnson signed it? Does that cover your interaction with Mr. Johnson regarding the blood draw?

"A. Basically I explained the form to him—said we were going to draw the blood to test the alcohol in his blood system. He read and looked at the form. He agreed to it—signed the form. That's basically what happened."

The trial court found as a fact that defendant consented "to having his blood drawn *for the purpose of testing.*" (Emphasis supplied.) The form clearly stated that the purpose of drawing the blood was to test for the presence of alcohol or controlled substances. Further, defendant was expressly told that Bailey's intent was "to test the alcohol in his blood system." Defendant read the form and signed it. The form was general and unqualified. It did not restrict consent to the seizure of his blood. To the contrary, it consented to the withdrawal of blood for the express purpose of testing. To say that defendant's consent was insufficient to encompass testing is simply wrong. No search warrant was necessary to test the blood.

Reversed and remanded.

1. Testing is a form of search. *State v. Lowry*, 295 Or. 337, 345, 667 P.2d 996 (1983).

2. "No law shall violate the right of the people to be secure in their persons, papers, houses, and effects, against unreasonable search, or seizure * * *." Or. Const., Art. 1, § 9. Defendant grounded his motion to suppress on the Oregon Constitution only. This case is distinguishable from *State v. Langevin*, 78 Or.App. 311, 715 P.2d 1355 (1986), where blood was drawn from the defendant while he was *unconscious*. *Langevin* relied on *former* ORS 487.835(2) (now ORS 813.140). On the authority of *State v. Lowry*, *supra* n. 1, and *State v. Westlund*, 75 Or.App. 43, 705 P.2d 208, *rev. allowed* 300 Or. 332, 710 P.2d 146 (1985), we held that a warrant was required to test the blood. In this case, defendant consented to the taking and testing of his blood. Therefore, no warrant was required to test.

3. It is more accurate to say that the Constitution is not implicated when a valid consent is given.

* DEITS, J., not participating.

78 Or.App. 392

STATE of Oregon, Respondent,

v.

Earl A. HENRY, Appellant.

31300, 31301; CA A26439.

Court of Appeals of Oregon, In Banc.*

Argued and Submitted Jan. 20, 1984.

Resubmitted In Banc Dec. 4, 1985.

Decided April 9, 1986.

Defendant was convicted in the Circuit Court, Deschutes County, John M. Copenhaver, J., of dissemination of obscene material. He appealed. The Court of Appeals, Young, J., held that statutory definition of obscenity is unconstitutionally vague.

Reversed.

Joseph, C.J., filed a concurring opinion.

Van Hoomissen, J., filed an opinion concurring in part and dissenting in part in which Warden and Rossman, JJ., joined.

1. Constitutional Law ⇐204

A vague penal statute violates constitutional provision providing for equality of privileges and immunities of citizens in that it invites standardless and unequal application of penal laws. Const. Art. 1, § 20.

2. Constitutional Law ⇐90(1)

A statute will be struck down as unconstitutionally overbroad if its terms could hypothetically prohibit protected speech even if, in the instance before trial court, defendant's conduct could be constitutionally prohibited by more narrowly drawn statute. Const. Art. 1, § 8.

3. Constitutional Law ⇐90(1)

Constitutional challenge to statute on vagueness grounds requires strict standard of analysis when protected speech is implicated. U.S.C.A. Const.Amend. 1.

4. Obscenity ⇐2.5

Statutory definition of obscenity as depicting or describing in a patently offensive manner sadomasochistic abuse or sexual conduct which average person applying contemporary state standards would find, taken as a whole, appeals to prurient interest in sex and which taken as a whole, lacks serious literary, artistic, political or scientific value is unconstitutionally vague. ORS 167.087(2); Const. Art. 1, §§ 20, 21.

Timothy J. Sercombe, ACLU Foundation of Oregon, Eugene, argued the cause for appellant. With him on brief were Harrang, Swanson, Long & Watkinson, Eugene.

Robert E. Barton, Asst. Atty. Gen., Salem, argued the cause for respondent. With him on brief were Dave Frohnmayer, Atty. Gen., and James E. Mountain, Jr., Sol. Gen., Salem.

YOUNG, Judge.

Defendant appeals his conviction for dissemination of obscene material.[1] ORS 167.087(1). He was indicted, *inter alia*, for dissemination of magazines entitled "Bronco Buster" and "3-Way Cum." He demurred to the indictment on the ground that the facts stated do not constitute an offense, because ORS 167.087 is unconstitutional. He stipulated that he had sold the magazines in question. The sole issue for the jury was whether the magazines were obscene within the definition of ORS 167.087(2). He was found guilty only in connection with the magazine "3-Way Cum." On appeal he argues that the court erred in overruling the demurrer.[2]

[1] Defendant argues that ORS 167.087 is unconstitutionally "vague" and "overbroad" and violates his right to freedom of expression under Article I, section 8, of the Oregon Constitution. "Vagueness" is a catchword for a number of possible constitutional violations. For example, in *State v. Hodges*, 254 Or. 21, 27, 457 P.2d 491 (1969), the court explained:

> "A vague statute lends itself to an unconstitutional delegation of legislative power to the judge and jury, and, by permitting the jury to decide what the law will be, it offends the principle, if not the rule, against *ex post facto* laws."[3]

A vague statute also violates Article I, section 20, of the Oregon Constitution, in that it invites "standardless and unequal application of penal laws."[4] *State v. Graves*, 299 Or. 189, 197, 700 P.2d 244 (1985); *State v. Robertson*, 293 Or. 402, 408, 649 P.2d 569 (1982). Defendant's argument here is that the definition of obscenity, ORS 167.087(2), is so subjective that it fails to give potential defendants notice of its scope and allows the fact finder to decide, after the fact and according to its own sensibilities, whether particular material is obscene.

[2] A claim of "overbreadth" asserts that the terms of the statute exceed constitutional boundaries by purporting to reach conduct protected by constitutional guarantees. *State v. Robertson, supra*, 293 Or. at 410, 649 P.2d 569. "Overbreadth" in this context refers to a violation of Article I, section 8, which provides in part:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever * * *."

A statute will be struck down as unconstitutionally overbroad if its terms could *hypothetically* prohibit protected speech even if, in the instance before the court, the defendant's conduct could be constitutionally prohibited by a more narrowly drawn statute. *See State v. Robertson, supra; State v. Woodcock*, 75 Or.App. 659, 706 P.2d 1012 (1985), *rev.den.* 300 Or. 506, 713 P.2d 1059 (1986).

[3] Finally, defendant contends that ORS 167.087 is unconstitutional, because Article I, section 8, *flatly* bans the enactment of legislation directed to the substance of communication. This contention is distinct from an overbreadth challenge, because overbreadth analysis assumes that, although in the particular instance some regulation of the subject might be constitutional, the means reach too far. Defendant's argument here is that the *subject* of obscenity is wholly withdrawn from legislative purview.[5]

[4] Vagueness and overbreadth are distinct constitutional challenges. However, the constitutional principles of freedom of expression and certainty of penal laws interact in that a statutory prohibition of "communication" is particularly vulnerable to constitutional attack for vagueness. *State v. Blair*, 287 Or. 519, 523, 601 P.2d 766 (1979). We conclude that the statutory definition of obscenity, ORS 167.087(2), is unconstitutionally vague under Article I, sections 20 and 21, of the Oregon Constitution.[6]

ORS 167.087 provides in part:

> "(1) A person commits the crime of disseminating obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.
>
> "(2) As used in subsection (1) of this section, matter is obscene if:
>
> "(a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;

1. Under a separate indictment (case no. 31301), defendant was also convicted of "possession of obscene material with intent to disseminate" involving a magazine entitled "Crystal Dawn." Defendant's demurrer on constitutional grounds was denied. The state concedes that that conviction must be reversed, because the magazine was seized pursuant to an invalid search warrant. However, we reverse the conviction in that case for the reasons stated in this opinion.

2. Defendant also argues that the jury verdict is fatally inconsistent, that the court erred in precluding comparison evidence, that this court has an independent obligation to review the magazine in question and that it is not obscene as a matter of law. Because we determine that ORS 167.087 violates the state constitution, we do not reach these issues.

3. Oregon Constitution, Article I, section 21, provides in part:

> "No *ex post facto* law * * * shall ever be passed."

4. Article I, section 20, provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Application of a vague statute may violate the defendant's right to fair notice guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The due process requirement of fair notice to potential defendants of a criminal statute's scope and reach is embodied in the commitment of the criminal code set forth in ORS 161.025(1)(c) to "give fair warning of the nature of the conduct declared to constitute an offense." *State v. Robertson, supra*, 293 Or. at 409, 649 P.2d 569.

5. Defendant cites *State v. Robertson, supra*, for the proposition that Article I, section 8, forbids the legislature from enacting an obscenity proscription, because it is necessarily directed to the content of speech rather than an unlawful effect. The state cites *Robertson* for the proposition that "obscenity" is a historical exception to Article I, section 8. It is unnecessary, in this instance, to determine whether Article I, section 8, flatly bans the enactment of any obscenity proscription, because we determine that ORS 167.087(2), as written, violates Article I, sections 20 and 21. *See In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983); *see also State v. Moyle*, 299 Or. 691, 705 P.2d 740 (1985).

6. Defendant demurred to the indictment before trial on the ground that ORS 167.087 is "vague" and "overbroad." He again demurred to the indictment after verdict, arguing that ORS 167.087 violates Article I, section 8. The focus of defendant's argument on appeal is that ORS 167.087 violates Article I, section 8, under the analysis developed by the Supreme Court in *State v. Robertson, supra*. Defendant also argues on appeal that the definition of obscenity in ORS 167.087(2) "has led to a great deal of uncertainty," because "the standards are largely indefinite, providing inadequate warning to potential violaters. Vague laws allow arbitrary enforcement. There is a high risk of subjectivity in jury determinations on offensiveness, contemporary community standards and social value[.] * * * [T]he obscenity standards create a community of twelve seated in the box and permit their standards to largely determine *ex post facto* whether material is obscene." Despite the comments of the dissent to the contrary, we conclude that the vagueness issue has been adequately raised below and on appeal.

"(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and

"(c) Taken as a whole, it lacks serious literary, artistic, political or scientific value."

The definition of "obscenity" in subsection (2) was first enunciated in *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614–15, 37 L.Ed.2d 419 (1973),[7] and was later applied to consensual adult pornography in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). The court in *Miller*, determined that the "specific prerequisites [of the *Miller* test] will provide fair notice to a dealer in such material that his public and commercial activities may bring prosecution." Justice Brennan, dissenting in *Paris Adult Theatre I*, explained:

"[A]fter 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish between protected and unprotected speech." 413 U.S. at 84, 93 S.Ct. at 2647–48. (Citations omitted.)

Despite Justice Brennan's views, the *Miller* formula embodied in ORS 167.087 meets the requirement of the First and Fourteenth amendments to the United States Constitution. Our obligation, however, is to consider the statute first under the Oregon Constitution. *State v. Robertson, supra.* In discussing defendant's challenge to ORS 167.087 under the state constitution, we find it useful to review the Oregon obscenity cases.

In *State v. Jackson*, 224 Or. 337, 356 P.2d 495 (1960), the court reversed the trial court's ruling that *former* ORS 167.150(1)[8] was unconstitutionally vague under the state constitution.[9] The majority first recognized "[t]he impossibility of finding any popularly accepted definition for the word 'obscene' * * *." 224 Or. at 355, 356 P.2d 495. The court then adopted the Model Penal Code definition of obscenity for application on remand:

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 224 Or. at 360, 356 P.2d 495.

The court noted that the Model Penal Code definition also satisfied the standard adopted by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 487 n. 20, 77 S.Ct. 1304, 1310 n. 20, 1 L.Ed.2d 1498 (1957). 224 Or. at 361, 356 P.2d 495. Judge O'Connell, dissenting (joined by Judges Warner and Sloan), agreed that *former* ORS 167.150, as interpreted by the majority, satisfied the First and Fourteenth Amendments to the United States Constitution. 224 Or. at 365, 356 P.2d 495, citing *Roth v. United States, supra.* However, unlike the majority, the dissenters concluded that the United States Supreme Court opinion in *Roth* was not a useful guide in determining the constitutionality of the statute under the state constitution, because the *Roth* opinion "evades the very problem which must be met in dealing with the constitutionality of this type of legislation." 224 Or. at 366, 356 P.2d 495. The dissent stated:

"The court held, 'obscenity is not within the area of constitutionally protected speech or press.' If, as Justice Harlan points out in his concurring and dissenting opinion, we could isolate ' "obscenity" as a particular *genus* of "speech and press" which is as distinct, recognizable and classifiable as poison ivy is among other plants,' there would be no difficulty in separating obscene material from constitutionally protected expressions and in sustaining a statute which suppresses 'obscenity.' " 224 Or. at 366, 356 P.2d 495. (Citations omitted.)

The dissent argued:

"[G]ranting that the legislature is entitled to restrict freedom of expression when it decides that competing social values predominate, the restraint is valid only if there is some ascertainable criteria [sic] by which the courts can, in specific cases, determine whether the statute is applicable." 224 Or. at 377, 356 P.2d 495.

The dissent would have held that the breadth and vagueness of the Model Penal Code definition of obscenity did not meet the higher standard of definiteness required of a criminal law which extends to expression.

State v. Childs, 252 Or. 91, 447 P.2d 304 (1968), *cert den*, 394 U.S. 931, 89 S.Ct. 1198, 22 L.Ed.2d 460 (1969), involved a constitutional challenge to *former* ORS 167.151. The statute, enacted after *State v. Jackson, supra*, also included the Model Penal Code/*Roth* definition of obscenity. The court admitted that "the concept of obscenity does not lend itself to precise mathematical definition" but "reject[ed] the contention that obscenity is not capable of a sufficiently precise definition." *State v. Childs, supra*, 252 Or. at 100, 447 P.2d 304. The court, rejecting defendant's vagueness claim, relied on *Roth v. United States, supra*, and did not independently consider a vagueness challenge under the state constitution.

In *State v. Liles*, 22 Or.App. 132, 537 P.2d 1182, *rev. den.* (1975), *cert den* 425 U.S. 968, 96 S.Ct. 1749, 48 L.Ed.2d 209 (1976), the defendant challenged ORS 167.087 on the grounds of vagueness and overbreadth under the First and Fourteenth Amendments. ORS 167.087 was enacted to conform to the First and Fourteenth Amendment standards set forth in *Miller v. California, supra.* Therefore, the question under the federal constitution was whether the state legislature had succeeded in enacting the *Miller* formula. We determined that the statute was not unconstitutionally vague, because it "follows the guidelines of *Miller v. California* * * * as to what may be defined and regulated as 'obscenity.' " 22 Or.App. at 140, 537 P.2d 1182.

7. *Miller v. California, supra*, requires that the average person applying "contemporary community standards" find that the work appeals to prurient interest. In *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), the Supreme Court held that "community standards" need not be national standards to pass constitutional muster. "Contemporary community standards" in ORS 167.087(2)(b) refers to a statewide community. *See State v. Liles, supra*, 22 Or.App. at 139, 537 P.2d 1182.

8. *Former* ORS 167.150(1) (*repealed by* Or.Laws 1961, ch. 579, § 2) imposed misdemeanor punishment on any person who:

"(1) Imports, designs, copies, draws, photographs, prepares, publishes, sells, lends, gives away, distributes, shows or exhibits or has in his possession with intent to publish, sell, lend, give away, distribute, show or exhibit any article or instrument of indecent or immoral use, or any obscene or indecent book, paper, writing, printed matter, picture, drawing, photograph or engraving."

9. The trial court concluded that *former* ORS 167.150 was invalid for three reasons:

"(1) It imposes prior restraints upon publications contrary to the Oregon Constitution, Article I, section 8;

"(2) It prohibits publication of crime news and deeds of lust and bloodshed thereby invading freedom of speech;

"(3) The word 'obscene' as used by the act, is unconstitutionally vague, measured by the requirements of the Oregon Constitution." *State v. Jackson, supra*, 224 Or. at 342, 356 P.2d 495.

For a history of Oregon obscenity legislation before the enactment of ORS 167.087, *see* Meyer and Seifer, "Censorship in Oregon: New Developments in an Old Enterprise," 51 Or L Rev 537 (1972).

The issue of vagueness under the federal constitution was again raised in *Film Follies, Inc. v. Haas*, 22 Or.App. 365, 539 P.2d 669, *rev. den.* (1975), *appeal dismissed* 426 U.S. 918, 96 S.Ct. 2617, 49 L.Ed.2d 368 (1976). The argument was summarily rejected on the basis of *State v. Liles, supra.* The last time we addressed the constitutionality of ORS 167.087 was in *State v. Tidyman*, 30 Or.App. 537, 568 P.2d 666, *rev. den.* (1977). In that case, Judge Tanzer wrote:

> "Finally, defendant contends that Oregon's obscenity statute, ORS 167.087, is unconstitutionally vague and overbroad. This writer, not joined by his colleagues, would concur if controlling law were not settled otherwise. We therefore adhere to our prior decision to the contrary. *Film Follies, Inc. v. Haas* * * *." 30 Or.App. at 554, 568 P.2d 666.

The Oregon Supreme Court has consistently held that a particular type of expression labeled "obscenity" may be prohibited under Article I, section 8. However, as evidenced by the dissent in *State v. Jackson, supra*, the members of the court have not always agreed that a particular legislative or judicial definition was capable of separating "obscene" expression from protected expression. The court has not considered the current definition of obscenity based on *Miller v. California, supra*, and codified in ORS 167.087(2). *See State v. Liles, supra; Film Follies, Inc. v. Haas, supra;* and *State v. Tidyman, supra.* We turn to defendant's vagueness challenge under the Oregon Constitution and discuss federal cases only to aid in that analysis.

In *Miller v. California, supra*, the United States Supreme Court premises its opinion on its oft-repeated view that "obscenity" is not "speech," *Roth v. United States, supra*, 354 U.S. at 485, 77 S.Ct. at 1309, and, therefore, is not entitled to protection under the First and Fourteenth Amendments to the United States Constitution. The Oregon legislature, in adopting the *Miller* definition in ORS 167.087(2), apparently made the same assumption with respect to Article I, section 8, of the Oregon constitution. The parties offer competing contentions in their briefs as to that assumption, raising the question whether the right to "speak, write, or print freely on any subject whatever" includes the right to disseminate obscenity.

The question is one we are not required to answer in this case because, even assuming that some abstraction called "obscenity" is not protected speech under Article I, section 8, the statute we consider here does not satisfactorily draw a line between such material and other forms of communication.[10] ORS 167.087(1) proscribes "disseminating obscene material." The words "disseminating" and "material" are particularly described in terms of specific acts and objects. The word "obscene" is defined by ORS 167.087(2). To be obscene, material must depict or describe "sadomasochistic abuse or sexual conduct." ORS 167.087(2)(a). The claim in this case is that the magazine in question depicts "sexual conduct." ORS 167.060(10) provides:

> " 'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification."

In *State v. House*, 66 Or.App. 953, 957, 676 P.2d 892 (1984), *aff'd* 299 Or. 78, 698 P.2d 951 (1985), we construed the language "in an act of apparent sexual stimulation or gratification" to mean "any touching of the described areas that a reasonable person would perceive as sexually stimulating or gratifying." So interpreted, we determined that the definition of "sexual conduct" is sufficiently clear to withstand a vagueness challenge.[11]

The difficulty, however, is not in separating depictions of sexual conduct from depictions of nonsexual conduct. The difficulty is in separating "obscene" depictions of sexual conduct from depictions that are not "obscene."[12] Because a depiction or description of sexual conduct is expression, any proscription must be drawn with particular care and precision to satisfy Article I, section 8. *State v. Blair, supra.* The only tool which a judge and jury have to distinguish the obscene sexual expression from protected sexual expression is the three-part *Miller* test embodied in ORS 167.087(2).

First, the material must be "patently offensive." ORS 167.087(2)(a). "Patent" means "evident" or "obvious." *Webster's Third New International Dictionary*, 1654 (1976). "Offensive" "describes what is disagreeable or nauseating or painful because of outrage to taste and sensibilities * * *." *Webster's Third New International Dictionary*, 1566 (1976). As a threshold matter, under those definitions, the jury must find the depiction of sexual conduct to be obviously outrageous to the average person's sensibilities.

Second, the jury must determine that "[t]he average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex." ORS 167.087(2)(b). Prurient means a "shameful or morbid" interest in sex. *State v. Jackson, supra*, 224 Or. at 368, 356 P.2d 495. Jurors are required to apply contemporary state standards of the average person and to avoid determining prurience based on their own personal opinions of the propriety of sexual expression. A "juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage [or state] from which he comes," *Hamling v. United States*, 418 U.S. 87, 104, 94 S.Ct. 2887, 2901, 41 L.Ed.2d 590 (1974), and may base the determination of prurience on the juror's own "common sense and innate sensibilities." *State v. Tidyman, supra*, 30 Or.App. at 551, 568 P.2d 666. If the jury determines that the material depicts sexual conduct in a manner that is patently offensive and that it appeals to a prurient interest in sex, then under ORS 167.087(2)(c) the jury must determine whether the material has "serious literary, artistic, political or scientific value."

Whether a particular work is obscene within the three-part definition of ORS 167.087 is a question of fact. *Miller v. California, supra; State v. Tidyman, supra.* In making the factual determination, the jury is, in essence, making a constitutional distinction between protected and unprotected sexual expression. *See* Kalven, "The Metaphysics of the Law of Obscenity," 1960 S Ct Rev 1, 20–21. When the material depicts "sexual conduct," the critical distinction between protected and criminal expression must be made on the basis of offensiveness, appeal to prurient interest and lack of serious literary, artistic, political and scientific value. Each of those determinations is necessarily subjective. *See* Kassner, "Obscenity Leads to Perversion," 20 NYLF 551 (1975); Hardy, "*Miller v. California* and *Paris Adult Theatre I v. Slaton:* The Obscenity Doctrine Reformulated," 6 Colum H R L Rev 219 (1974);

10. As the dissent points out at length, other state courts have accepted the *Miller* standards, often without engaging in a careful analysis of them. Some of those cases have more or less persuasive dissents, as does *Miller* itself. *See, e.g., Bloom v. Municipal Court*, 16 Cal.3d 71, 86, 127 Cal. Rptr. 317, 545 P.2d 229 (1976) (Tobriner, J., dissenting); *City of Portland v. Jacobsky*, 496 A.2d 646, 650 (Me.1985) (Scolnik, J., concurring and dissenting). This is one of those cases in which we find the arguments of dissenters and of commentators more helpful in determining the meaning of the Oregon constitution than are majority opinions from other jurisdictions. *See State v. Soriano*, 68 Or.App. 642, 645, 684 P.2d 1220, *opinion adopted*, 298 Or. 392, 693 P.2d 26 (1984).

11. In *State v. House, supra*, we found that ORS 167.062, which proscribed "sexual conduct in a live public show," to be overbroad, because the proscription included such works as "Romeo and Juliet" and "Cat on a Hot Tin Roof." We do not have the same constitutional invalidity here, because ORS 167.087(2)(c) excludes works with "literary" or "artistic" value.

12. As one commentator put it: "It may be possible to distinguish between degrees of explicitness in discussions of sex, but among explicit discussions of sex it is heroic to attempt to distinguish the good from the bad." Kalven, "The Metaphysics of the Law of Obscenity," 1960 S Ct Rev 1, 3.

Comment, "Community Standards, Class Actions, and Obscenity Under *Miller v. California*," 88 Harv L Rev 1338 (1975); *Comment*, "New Prosecutorial Techniques and Continued Judicial Vagueness: An Argument for Abandoning Obscenity as a Legal Concept," 21 UCLA L Rev 181 (1973); *Comment*, "In Quest of A 'Decent Society': Obscenity and the Burger Court," 49 Wash L Rev 89 (1973).

The United States Supreme Court, by requiring that prurient appeal be determined by reference to "contemporary community standards," *intended* those standards to vary according to the location and the sophistication of the viewing audience. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller v. California*, *supra*, 413 U.S. at 32, 93 S.Ct. at 2619. (Footnote *omitted*.) The Oregon statute, by referring to contemporary *state* standards, provides a geographically uniform standard. Material that appeals to the "average person's" prurient interest would not vary, at least theoretically, from Baker to Portland, Klamath Falls to Eugene. However, the reference to "contemporary" state standards anticipates fluctuations over time. For example, the type of sexually oriented materials published and considered acceptable in the 1970's may now, in what may be a different social atmosphere, be determined unacceptable and obscene.

The *Miller* formula was intended to restrict only "hard core" pornography. *Miller v. California*, *supra*, 413 U.S. at 27, 93 S.Ct. at 2616. In determining that "obscenity," as limited to hard core pornography, may be constitutionally proscribed, the United States Supreme Court made two vital assumptions. The first is that hard core pornography is "self identifying." *See Comment*, "In Quest of a 'Decent Society': Obscenity and the Burger Court," *supra*, 49 Wash L Rev at 107. In other words, judges and jurors are entitled to conclude that they "know it when [they] see it." *See Jacobellis v. United States*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring). The second assumption is that some uncertainty on the part of potential defendants as to whether particular sexually explicit materials are legally obscene is constitutionally acceptable.

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." *Hamling v. United States*, *supra*, 418 U.S. at 124, 94 S.Ct. at 2911; quoting, *United States v. Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 169, 74 L.Ed. 508 (1930).

The *Hamling* principle has its Oregon constitutional parallel. In discussing the constitutional principles prohibiting vague penal laws, the Oregon Supreme Court has noted:

> "A criminal statute need not define an offense with such precision that a person in every case can determine in advance that a specific conduct will be within the statute's reach." *State v. Graves*, *supra*, 299 Or. at 195, 700 P.2d 244.

However, *Graves* did not arise within the strict limitations of Article, I, section 8. Rather, the statute challenged as vague in *Graves* defined "burglar tool," the use of which enhances the penalty for burglary. ORS 164.225(1)(a). To withstand constitutional scrutiny under Article I, section 8, the *Miller* definition of obscenity, as enacted in ORS 167.087(2), is required to do more than simply separate one degree of criminal conduct from another (as in *Graves*) or to separate conduct the legislature chooses to prohibit from conduct which it does not; it must separate prohibited expression from expression that *cannot be prohibited*.

Because ORS 167.087(2) must be used by judges, juries and potential defendants to assess the criminality of particular conduct, we hold that its definitions are not sufficiently precise to determine whether particular sexually explicit material is legally obscene. It is not acceptable, as a matter of state constitutional law, that the precise course of the line dividing obscene expression from protected expression be uncertain and that a person who chooses to disseminate sexually explicit materials must bear the risk of that uncertainty. The constitutional right to communicate freely on "any subject whatever" guaranteed by Article I, section 8, requires more than the statute provides by way of guidance. A person who trades in sexually explicit materials cannot discern that his wares are legally obscene under the statute; a trial judge is left with no legal standard to apply; and jurors are required to determine what is or is not obscene on the basis of their personal ideas of contemporary state standards. ORS 167.087(2) is unconstitutional. The demurrer should have been sustained.

In case no. 81300, conviction reversed; in case no. 81301, conviction reversed.

JOSEPH, C.J., concurs.

VAN HOOMISSEN, J., concurs in part and dissents in part.

JOSEPH, Chief Judge, concurring.

I concur in Judge Young's majority opinion. However, if the Oregon Supreme Court had not precluded it, I would hold the statute unconstitutional under Article I, section 8, of the Oregon Constitution, which provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.—"

Those words are so clear that there is nothing about them to be construed. However, the Oregon Supreme Court, in *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982); *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983); and *State v. Moyle*, 299 Or. 691, 705 P.2d 740 (1985), has refused to read the words for what they plainly say. Instead, the court has made the existence of an "historical exception" the *first* point of inquiry in determining whether a statute which is directed at the content of speech or writing is valid. The most complete statement of that judicial addition to the constitution appears in *In re Lasswell*, *supra*, 296 Or. at 124, 673 P.2d 855:

> "Recent decisions have explained that this guarantee forecloses the enactment of prohibitory laws, at least in the form of outright prohibitions backed by punitive sanctions, that in terms forbids speech or writing 'on any subject whatever,' *unless it can be shown that the prohibition falls within an original or modern version of a historically established exception* that was not meant to be ended by the liberating principles and purposes for which the constitutional guarantees of free expression were adopted. *See State v. Robertson/Young* * * *." (Emphasis supplied.)

At the time that Article I, section 8, was adopted, there was a territorial statute that provided:

> "If any person shall import, print, publish, sell or distribute any book or any pamphlet, ballad, printed paper or other thing containing obscene language or obscene prints, pictures, figures, or other descriptions, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education, or shall buy, procure, receive, or have in his possession, any such book, pamphlet, ballad, printed paper or other thing, either for the purpose of loan, sale, exhibition or circulation, or with intent to introduce the same into any family, school, or place of education, he shall, on conviction, be punished by imprisonment in the county jail not more than six, nor less than three months, or by a fine not more than three hundred, nor less than fifty dollars." Statutes of the Territory of Oregon, Ch. XI, § 10 (1854).

In the face of the language from *Lasswell*, and the quoted statute, this court is not free to read the Oregon Constitution as it

is written. Instead, Article I, section 8, turns out to exist in an historical straitjacket that makes any "liberating principle" very difficult to perceive, let alone implement.

BUTTLER, J., and GILLETTE, J., Pro Tem., join in this opinion.

VAN HOOMISSEN, Judge, concurring in part; dissenting in part.

The majority concedes that ORS 167.087 passes muster under the United States Supreme Court's current view of the First Amendment.[1]

I respectfully dissent from that portion of the majority's opinion that concludes that ORS 167.087 is unconstitutionally vague under Article I, sections 20 and 21, of the Oregon Constitution.

Assuming that the vagueness issue has been raised,[2] the question, as I see it, is whether the standard established in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, *reh. den.*, 414 U.S. 881, 94 S.Ct. 26, 38 L.Ed.2d 128 (1973), and its progeny, which is incorporated in ORS 167.087, satisfies the anti-vagueness requirement of the Oregon Constitution. *See State v. Moyle*, 299 Or. 691, 707, 705, P.2d 740 (1985); *State v. Graves*, 299 Or. 189, 195, 700 P.2d 244 (1985); *State v. Robertson, supra* n.2; *State v. Blair*, 287 Or. 519, 601 P.2d 766 (1979); *State v. Hodges*, 254 Or. 21, 27, 457 P.2d 491 (1969). I conclude that it does.

I fail to comprehend how a statute that the majority and defendant concede is not vague under federal constitutional analysis can be vague when examined in the light of Article I, sections 20 and 21, of the Oregon Constitution.[3] As the Maine Supreme Court recently observed:

> "Indeed, it is difficult to see how an ordinance that so precisely follows the *Miller* definition of proscribable obscenity could be unconstitutionally vague." *City of Portland v. Jacobsky*, 496 A.2d 646, 649 (Me.1985).

By not explaining in a principled manner its radical departure from federal authority, the majority utterly fails to show the "high respect for the opinions of the [United States] Supreme Court," that the Oregon Supreme Court has stated repeatedly should be shown. *See, e.g., State v. Kennedy, supra* n. 2, 295 Or. at 267, 666 P.2d 1316; *City of Portland v. Thornton*, 174 Or. 508, 512, 149 P.2d 972, *cert. den.* 323 U.S. 770, 65 S.Ct. 123, 89 L.Ed. 616 (1944). The objective is a *principled* interpretation of the independent provisions of our state constitution, not result-oriented jurisprudence. There is no basis in *a priori* logic or in the history or text of the Oregon Constitution to presume that the provisions of Article I invariably curtail governmental power more restrictively than parallel provisions of the United States Constitution. Unless a *principled* explanation for sharp divergence from federal authority is given, Article I is little more than a handy grab bag filled with a bevy of clauses that may be exploited in order to evade disfavored decisions of the United States Supreme Court. *See* Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 Hastings Const L Q 1, 2 (1981).

In *Miller v. California, supra*, the United States Supreme Court held that any state statute that meets the standard in that case "will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." 413 U.S. at 27, 93 S.Ct. at 2616–17. The *Miller* standard requires:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24, 93 S.Ct. at 2615. (Citations omitted).

ORS 167.087(2) incorporates the *Miller* standard. It provides:

> "As used in [ORS 167.087(1)], matter is obscene if:
>
> "(a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;
>
> "(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and
>
> "(c) Taken as a whole, it lacks serious literary, artistic, political or scientific value."

ORS 167.060 defines sadomasochistic abuse and sexual conduct:

> "(9) 'Sadomasochistic abuse' means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
>
> "(10) 'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification."

In *State v. Tidyman*, 30 Or.App. 537, 568 P.2d 666, *rev. den.* 280 Or. 683 (1977), the defendant challenged ORS 167.087 as vague under *both* the state and federal constitutions. We rejected the defendant's constitutional claims. In *State v. Childs*, 252 Or. 91, 100, 447 P.2d 304 (1968), *cert. den.* 394 U.S. 931, 89 S.Ct. 1198, 22 L.Ed.2d 460 (1969), the Supreme Court stated:

> "Admittedly, the concept of obscenity does not lend itself to precise, mathematical definition. It is not, however, alone among imprecise terms having constitutional implications. It is hardly less precise than such terms as 'clear and present danger,' 'probable cause,' 'involuntariness' and 'due process,' all of which are in acceptable constitutional use and equally incapable of exact definition. In *Roth* [*v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, (1957)] the United States Supreme Court said:
>
> "'Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the re-

1. In *State v. Lilas*, 22 Or.App. 132, 140, 537 P.2d 1182, *rev. den.* (1975), *cert. den.* 425 U.S. 963, 96 S.Ct. 1749, 48 L.Ed.2d 209 (1976), we held that ORS 167.087 passes muster under the First Amendment. *See also Film Follies, Inc. v. Haas*, 22 Or.App. 365, 539 P.2d 669, *rev. den.* (1975), *appeal dismissed* 426 U.S. 913, 96 S.Ct. 2617, 49 L.Ed.2d 368 (1976).

2. At trial, defendant only challenged ORS 167.087 as being unconstitutional under Oregon Constitution, Article I, section 8. He did not specifically challenge the statute on vagueness grounds. *See State v. Kennedy*, 295 Or. 260, 265–68, 666 P.2d 1316 (1983) (issues of state constitutional law should be analyzed, briefed and argued); *Sterling v. Cupp*, 290 Or. 611, 613 n. 1, 625 P.2d 123 (1981) (specific bases of constitutional claims should be raised and analyzed). Defendant's brief in this court states: "The bases (*sic*) for the demurrers was that ORS 167.087 is unconstitutional under Oregon Constitution, Art. I, § 8." Neither defendant's brief nor his oral argument in this court indicate that he separately challenges the statute on the ground of vagueness. No doubt that explains why the state's brief and its oral argument do not even address the vagueness issue.

3. The *dissenting* opinions of Justice Brennan in *Paris Adult Theatres I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 466, *reh. den.* 414 U.S. 881, 94 S.Ct. 27, 38 L.Ed.2d 128 (1973), Justice Tobriner in *Bloom v. Municipal Court*, 16 Cal.3d 71, 127 Cal.Rptr. 317, 545 P.2d 229 (1976), and Judge O'Connell in *State v. Jackson, supra*, are the *dicta* of the losers in earlier wars fought on different battlefields. They are simply irrelevant here.

In the context of this case, I understand *State v. Robertson*, 293 Or. 402, 414, 649 P.2d 569 (1982), to hold that we must first address the Article I, section 8, issue before proceeding to consider a vagueness challenge. The majority opinion here turns *Robertson's* sequence of analysis on its head.

On the issue whether the legislature is flatly prohibited from legislating against "obscenity," *see* concurring opinion by Joseph, C.J., *supra*, 78 Or.App. at ——, 717 P.2d at 197; *see also In re Lasswell*, 296 Or. 121, 124, 673 P.2d 855 (1983); *State v. Spencer*, 289 Or. 225, 230–231, 611 P.2d 1147 (1980); *State v. Tusek*, 52 Or.App. 997, 1000 n. 2, 630 P.2d 892 (1981).

quirement of due process. * * * [354 U.S. at 491, 77 S.Ct. at 1312]."[4]

In *State v. Graves, supra*, 299 Or. at 195, 700 P.2d 244, the Supreme Court explained:

"A criminal statute need not define an offense with such precision that a person in every case can determine in advance that a specific conduct will be within the statute's reach. However, a reasonable degree of certainty is required by Article I, sections 20 and 21."

I would hold that a "reasonable degree of certainty" is provided by the definitions found in ORS 167.087(2). The statute is sufficiently explicit to adequately inform persons of ordinary intelligence of the prohibited conduct.[5] It does not delegate uncontrolled discretion to a judge or jury to punish or withhold punishment. It is not vague.

The majority does not explain why it does not attempt to give the statute a judicial interpretation that would give it the required definiteness. *See State v. Robertson, supra*, 293 Or. at 411, 649 P.2d 569; *State v. Jackson*, 224 Or. 337, 345, 364, 356 P.2d 495 (1960). The majority of states judicially save vague statutes. *See* I Emerson, Haber, and Dorsen, *Political And Civil Rights In The United States*, 565–66 (4th ed 1976).

Judicial opinions from other jurisdictions are helpful in interpreting the Oregon Constitution to the extent that their reasoning is persuasive and their background is applicable to Oregon. I have attempted to find any judicial opinions from other jurisdictions that have considered, under state constitutions, the vagueness issue in obscenity statutes incorporating the *Miller* standard. My research indicates that, although fewer than half the states have dealt with the vagueness issue after *Miller* under their state constitution, *no* state has reached the conclusion the majority reaches here.

The relevant portions of Article I, sections 20 and 21, of the Oregon Constitution, are taken *verbatim* from the 1851 Indiana Constitution. Carey, *A History of the Oregon Constitution* 463–469 (1926). Indiana in turn drew liberally on the constitutions of Kentucky, Ohio, Tennessee and Pennsylvania. *State v. Kessler*, 289 Or. 359, 363, 614 P.2d 94 (1980). The Indiana statutes which prohibit the distribution of obscene material (Ind.Code § 35–49–2–1 together with the definition in Ind.Code § 35–49–1–1 *et seq.* and Ind.Code § 35–49–3–1) adopt, almost verbatim, the *Miller* standard. I have found no Indiana case that specifically discusses Indiana's obscenity statutes under its state constitution. However, three recent cases have been decided on federal grounds.

In *Porter v. State*, 440 N.E.2d 690, 692–93 (Ind.App.1982), the court stated:

"Appellant first assails the Indiana obscenity statute as vague for its failure to adequately define the type of activity which will subject a seller to criminal liability. Appellant specifically alleges that certain terms in the definitional section of the statute are unclear as to the type of conduct intended to be included within the purview of the statute. Since the prohibited activity cannot be clearly delineated, the appellant argues that the statute must fail as being unconstitutionally vague. We cannot agree.

"* * * In *Miller v. California*, [*supra*], the Supreme Court of the United States laid out the standards by which works which depict or describe sexual conduct are to be judged. The Court noted that

"'[t]he basic guidelines for trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'

"[*Id.* 413 U.S. at 24 93 S.Ct. at 2615], (citations omitted). This is substantially the language adopted by our legislature to determine whether a matter or performance is obscene. Indiana Code Section 35–30–10.1–1(c) [(Supp 1981)] states that

"'(c) A matter or performance is "obscene" if: (1) the average person, applying contemporary community standards, finds that the dominant theme of the matter of [*sic*] performance, taken as a whole, appeals to the prurient interest in sex; (2) the matter or performance depicts or describes, in a patently offensive way, sexual conduct; and (3) the matter of performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.'

"Subsections (a), (b), (d) and (e) define certain terms used within our legislature's definition of what is to be considered obscene. This is further supplemented by other sections of the Code which define such terms as deviate sexual conduct. *The definitions used by the legislature are unequivocally clear and would not confuse a person of ordinary intelligence as to what type of conduct is prohibited by the statute. The statute is not unconstitutionally vague* and the trial court did not thereby err in denying appellant's motion to dismiss." (Emphasis supplied, footnote and citations omitted.)

In *Ford v. State*, 182 Ind.App. 224, 394 N.E.2d 250, 253–54 (1979), the court stated:

"Next, defendant assails the constitutionality of the Indiana obscenity statute, IC 1971, 35–30–10.1–1, on First Amendment grounds. The first prong of this attack is premised on the erroneous assumption that all sexual expression is constitutionally protected. It is well established that obscenity is not within the area of constitutionally protected speech or press. *Roth v. United States*, [*supra*]; *Miller v. California*, [*supra*]; *Paris Adult Theatre I v. Slaton*, [413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446, *reh. den.* 414 U.S. 881, 94 S.Ct. 27, 38 L.Ed.2d 128 (1973)]; *Kaplan v. California*, [413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492, *reh. den.* 414 U.S. 883, 94 S.Ct. 28, 38 L.Ed.2d 131 (1973)].

"Secondly, defendant insists that the statute is vague and overly broad since it does not provide adequate notice of what acts are prohibited. The upshot of this assertion is that the language of the statute is not sufficiently precise because the words do not mean the same thing to all people in every instance.

"*A criminal statute is vague when it fails to inform persons of ordinary intelligence what their conduct must be in order for them to be guilty of a violation thereof. Platt v. State*, [168 Ind.App. 55, 341 N.E.2d 219 (1976)]. The criteria for determining what constitutes obscene material subject to state regulation was delineated in *Miller v. California, supra*, where it was held that appraisal of the nature of the matter by 'contemporary community standards' was an adequate basis for establishing obscenity.

"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, *Kois v. Wisconsin*, [408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972)], quoting *Roth v. United States*, [*supra*, 354 U.S. at 489, 77 S.Ct. at 1311]; (b) whether the work

4. *State v. Childs, supra*, deals with *former* ORS 167.151, which is not in form or, totally, in substance the same as ORS 167.087, the relevant statute here. Further, *Childs* involved the so-called *Roth-Memoirs* test derived from *Roth v. United States, supra*, and *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). The source for ORS 167.087 is *Miller v. California, supra*, and its progeny.

5. A constitutional challenge on vagueness grounds requires a strict standard of analysis when protected speech is implicated. However, obscenity is not protected speech. *See* n. 2, *supra*; concurring opinion of Joseph, C.J., *supra*. Therefore a strict standard of analysis is not required here. *See Young v. American Mini Theatres*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976); *State v. Graves, supra*, 299 Or. at 195, 700 P.2d 244; *State v. Manzo*, 58 Hawaii 440, 573 P.2d 945, 957–58 (1977).

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. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, [383 U.S. 413, 419, 86 S.Ct. 975, 978, 16 L.Ed.2d 1 (1966)]; that concept has never commanded the adherence of more than three Justices at one time. * * * If a state law that regulates obscene material is thus limited, as written or construed, 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. *See Kois v. Wisconsin, supra*, [408 U.S. at 232, 92 S.Ct. at 2247]; *Memoirs v. Massachusetts, supra*, [383 U.S. at 459–60, 86 S.Ct. at 998] (*Harlan, J., dissenting*); *Jacobellis v. Ohio*, [378 U.S. 184, 204, 84 S.Ct. 1676, 1686, 12 L.Ed.2d 793 (1974)]; *New York Times Co. v. Sullivan*, [376 U.S. 254, 284–85, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964)]; *Roth v. United States, supra*, [354 U.S. at 497–98, 77 S.Ct. at 1315–16] (Harlan, J., concurring and dissenting.)' [413 U.S. at 24–25, 93 S.Ct. at 2615]. (Footnote omitted)

"The Indiana statute is written in the form prescribed by *Miller*. Indeed, the language of the statute mirrors the holding in that case. Defendant has not demonstrated an infringement upon any First Amendment guarantees.

"As a corollary to his void-for-vagueness assault, Ford claims that the statute violates the constitutional requirements of due process.

"In *Roth v. United State, supra*, the Supreme Court was confronted with a similar argument. There the statutes under attack punished the sale, advertising, or mailing of obscene material.

"'Many decisions have recognized that these 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 conduct when measured by common understanding and practices...." *United States v. Petrillo*, [332 U.S. 1, 7–8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877 (1947)]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark "... boundaries sufficiently distinct for judges and juries fairly to administer the law.... That there may be marginal cases in which is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense...." Id., [332 U.S. at 7, 67 S.Ct. at 1542]. *See also United States v. Harriss*, [347 U.S. 612, 624 n. 15, 74 S.Ct. 808, 815 n. 15, 98 L.Ed. 989 (1954)]; *Boyce Motor Lines v. United States*, [342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367 (1952)]; *United States v. Ragen*, [314 U.S. 513, 523–24, 62 S.Ct. 374, 378, 86 L.Ed. 383 (1942)]; *United States v. Wurzbach*, [280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930)]; *Hygrade Provision Co. v. Sherman*, [266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402 (1925)]; *Fox v. State of Washington*, [236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573 (1915)]; *Nash v. United States*, [229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232 (1913)].

"'In summary, then, *we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.*' [354 U.S. at 491–92, 77 S.Ct. at 1313]. (Emphasis supplied, footnotes omitted.)

"*See also: Hamling v. United States*, [*supra*]; *United States v. Reidel* [402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971)].

"The legal definition of obscenity in the Indiana statute does not change with each indictment. *It is a term sufficiently specific to provide adequate notice of proscribed conduct.*" (Emphasis supplied.)

In *Riley v. State*, 180 Ind.App. 540, 389 N.E.2d 367, 368–69 (1979), the court stated:

"The first issue we consider is whether the statute is unconstitutionally vague. * * *

"* * *

"We note that the Indiana statute follows the guidelines set out by the United States Supreme Court in *Miller v. California*, [*supra*], almost word for word. The guidelines set the permissible scope of state regulation of obscene material weighed against First Amendment considerations. Using the guidelines, as found in IC 35-30-10.1-1(c), and specifically defined sexual conduct, such as found in IC 35-30-10.1-1(d), the Supreme Court stated, '[w]e are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.' *Miller, supra*, [413 U.S. at 27, 93 S.Ct. at 2616–17]. Yet Riley contends that the language found in the statute and *Miller* 'enhances' the vagueness problem and that the statute is not sufficiently certain to show what the legislature intended to prohibit.

"The standard of specificity in Indiana is that a statute will not be found unconstitutionally vague if individuals of ordinary intelligence would comprehend it to adequately inform them of the conduct to be proscribed. Sumpter v. State, [261 Ind. 471, 306 N.E.2d 95 (1974), *cert. den.* 425 U.S. 952, 96 S.Ct. 1727, 48 L.Ed.2d 196 (1976)]; *Hunter v. State*, [172 Ind.App. 397, 360 N.E.2d 588, *cert. den.* 434 U.S. 906, 98 S.Ct. 306, 54 L.Ed.2d 193 (1977)].

"And it has been stated in *Roth v. United States*, [*supra*]:

"'Many decisions have recognized that these 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 conduct when measured by common understanding and practices * * * [t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *."' [Footnotes and citations omitted].

"We determine that the statutes are sufficiently clear as to give notice of the conduct proscribed." (Emphasis supplied.)

My research indicates that every jurisdiction that has specifically reviewed its post-*Miller* obscenity statute under its state constitution has concluded that, if its statute meets the *Miller* standard, it is not vague under the state constitution.

In *Bloom v. Municipal Court, supra* n. 3, the California Supreme Court rejected the defendant's claim that an obscenity statute which incorporated the *Miller* standard was unconstitutionally vague under the California constitution. The court stated:

"Section 311 has been and is to be limited to patently offensive representations or descriptions of the specific 'hard core' sexual conduct given as examples in *Miller I*, * * *. [*Supra*, 413 U.S. at 25, 93 S.Ct. at 2615]. As so construed, the statute is not unconstitutionally vague.

"Assuming *arguendo* that section 311 as authoritatively construed is as 'specific' as *Miller I* requires, plaintiff contends

the statute is, nevertheless, so vague as to deny him due process of law. Plaintiff argues that judging a work's 'prurient interest' or 'social value' is so subjective a process that its outcome is inherently unpredictable, denying a potential violator fair notice of what is prohibited. Rejecting this argument, the United States Supreme Court has repeatedly upheld obscenity legislation against attacks mounted under the due process clause of the federal Constitution. (*Hamling v. United States*, [418 U.S. 87, 89, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)]; *Miller v. California*, [*supra*]; *Roth v. United States*, [*supra*]). *The due process clause of the California Constitution does not impose a stricter standard in this regard.*" 127 Cal.Rptr. at 328, 545 P.2d at 235. (Emphasis supplied.)

In *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980), and *People v. Tabron*, 190 Colo. 149, 544 P.2d 372 (1976), the Colorado Supreme Court struck down that state's obscenity statutes, on federal constitutional grounds, for failure to meet the *Miller* standard. However, in *People ex. rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo.1985), the Colorado Supreme Court upheld, under both the state and federal constitutions, on vagueness grounds, that state's obscenity statutes which incorporated the *Miller* standard.

In *State v. Manzo*, *supra* n. 5, the Hawaii Supreme Court rejected the defendant's claim that an obscenity statute which incorporated the *Miller* standard was unconstitutionally vague under the Hawaii Constitution. The court stated:

"Eloquent arguments have been advanced for the view that the independent judgment we are obligated to exercise in applying the due process requirements of the Hawaii Constitution requires us to discard as poorly reasoned the decisions of the United States Supreme Court on this question, and to hold that constitutionally acceptable notice is not given to affected individuals by the sort of definition contained in § 712-1210(5). A particularly forceful presentation of these arguments is contained in Justice Tobriner's dissent in *Bloom v. Municipal Court, [supra]*. As is said there, 'a civilized society does not imprison a person for violating prohibitions on conduct that cannot even be defined.' [127 Cal.Rptr. at 327, 545 P.2d at 239]. The joinder of four Justices in Justice Stevens' dissent in *Ward v. Illinois*, [431 U.S. 767, 97 S.Ct. 2085, 52 L.Ed.2d 738 (1977)], evidences the depth of disagreement on the Supreme Court. The somewhat mechanical reasoning in support of the conclusion suggested in the preceding paragraph is, without more, an insufficient response to this challenge. We are led to accept that conclusion, and to concur in the concededly unsatisfactory treatment of this problem by the Supreme Court and by the great majority of the state courts, by additional considerations which seem to us to be controlling.

"The problems of fair notice and the other aspects of the vagueness doctrine are inescapably linked to the status of obscenity as an exception from protected speech. Justice Tobriner contends that 'no definition of obscenity calculated to curtail the flow of material to consenting adults can be framed within the permissible scope of the vagueness doctrine.' [127 Cal.Rptr. at 330, 545 P.2d at 242]. But this is to say that the exclusion of obscenity from protected speech is a fallacy, because what is unprotected is undefinable. Whether such an exclusion should exist has been strenuously debated. The difficulty of defining what is unprotected is a weighty consideration in that debate. Once the debate has been resolved in favor of the exclusion, however, recognition has been given to a substantial interest of society in regulating the flow of obscene material, an interest of such importance that fundamental interests in freedom of speech have been subordinated to it.

"Vagueness is concededly a relative concept. When the First Amendment is not implicated, a notably less stringent

degree of specificity is commonly accepted, as is exemplified in the noise ordinance upheld in *Grayned v. City of Rockford*, [408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)]. The greater specificity demanded when First Amendment values are present cannot give those values such overriding importance as to destroy competing values which society is entitled to implement. The exclusion of obscenity from the protection given to speech establishes the social value implemented by regulations of obscenity on a level which secures it against erosion by a vagueness doctrine designed to protect the competing interest in freedom of speech. Thus in *Roth v. United States*, [*supra*] when the Court looked for a precedent which defined the standard of specificity to be applied to an obscenity regulation, it found it in *United States v. Petrillo*, [*supra*], in that case, no regulation of speech was involved and a statute forbidding the use of coercion to compel the employment of more persons than were 'needed * * *' to perform actual services' was held 'to give sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' [*United States v. Petrillo*, *supra*, 332 U.S. at 8, 67 S.Ct. at 1542]. The *Roth* court applied that standard, rather than the stricter standard of First Amendment cases, to the obscenity regulation before it. Similarly, in *Young v. American Mini Theatres*, [427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)], where the challenged ordinance regulated the exhibition of sexually explicit movies, the plurality opinion rejects a vagueness challenge on the authority of *Parker v. Levy*, [417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974)], in which the Court upheld a section of the Code of Military Justice as sufficiently specific and rejected as inapplicable the standards of First Amendment cases.

"In sum, *these considerations persuade us that, in appraising a vagueness challenge to a regulation of pornography in light of the due process requirements of the Hawaii Constitution, we should follow the same precedents as have been chosen by the United States Supreme Court in its determination of challenges under the Fourteenth Amendment.* The criteria by which we should judge the adequacy of the notice given by the statute are those applicable when First Amendment concerns are not present, rather than the stricter criteria which have been evolved for statutes which regulate speech. Whether or not there may be difficulty in determining whether marginal conduct is within the proscription of the statute under which Appellant has been charged, *the statute gave fair warning that Appellant would be subject to prosecution for distribution of the 'hard core' pornography to which it is limited by our construction in this case. Cf. State v. Taylor*, [49 Hawaii 624, 425 P.2d 1014 (1967)]. We conclude that *Appellant was given fair notice in satisfaction of the due process requirements of both the United States and the Hawaii Constitutions.*" 573 P.2d at 957-58. (Emphasis supplied, footnotes omitted.)

In *State v. Wrestle, Inc.*, 360 So.2d 831 (La.1978), *modified on other grounds sub nom Burch v. State*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), the Louisiana Supreme Court rejected the defendant's claim that an obscenity statute which incorporated the *Miller* standard was unconstitutionally vague under the Louisiana constitution. The court stated:

"The Louisiana obscenity statute, in the portions quoted in this opinion * * *, clearly complies with the federal constitutional requirements of regulating only specifically defined sexual conduct, limited to works which, taken as whole, appeal to the prurient interest in sex, which portray this conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value. *Miller v. California*, [*supra*, 413 U.S. at 25, 93 S.Ct. at 2615]. (Likewise, our statutory guidelines for the trier of fact comply with the federal constitutional standard for factu-

al determination of obscenity, including by the use of contemporary community standards. *Id.*)

"As *Miller* notes, compliance of a state statute with these constitutional prerequisites 'will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.' [413 U.S. at 28, 93 S.Ct. at 2616–17]. *We are satisfied that such notice not only satisfies federal due process and First Amendment requirements but also similar notice requirements of our state constitution.*

"We therefore reject the defendant's contention that the statute does not adequately inform the accused of the conduct proscribed by it.

"The defendant further contends that the community standard for determination of obscenity leaves protection of constitutional freedom of expression to the whim of each jury. In this regard, *Miller* states: 'If a state law that regulates obscene material is thus limited * * * [as is Louisiana's], the First Amendment values * * * 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, 93 S.Ct. at 2615].

"We have recognized our duty to conduct an independent constitutional review in the appellate court of constitutional claims. *State v. Amato*, [343 So.2d 698, 703–04 (La.1977)]. As we stated in *State v. Luck*, [353 So.2d 225, 230 (La.1977)]: '* * * the trial court's determination that material is or is not obscene presents an issue of law fully reviewable by this court. Even the factual determination of obscenity by a trial jury must be subject to full appellate review to meet constitutional standards designed to effectuate freedom of expression. *Jenkins v. Georgia*, [418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974)].'

"The trial court properly overruled the defendants' motion to quash the indictment. We find no merit to this assignment of error." 360 So.2d at 835. (Emphasis supplied, footnote omitted.)

In *Com. v. United Books, Inc.*, 389 Mass. 888, 453 N.E.2d 406 (1983), the Supreme Judicial Court of Massachusetts rejected the defendant's claim that an obscenity statute which incorporated the *Miller* standard was unconstitutionally vague under the Massachusetts constitution. The court stated:

"The defendant first argues that the definition of 'obscene matter' in § 31 is unconstitutionally vague because there are no contemporary standards of the Commonwealth. In particular, the defendant focuses on the 'patently offensive' requirement. Since § 31 was based on *Miller v. California*, [*supra*, 413 U.S. at 24–25, 33–34, 93 S.Ct. at 2614–15, 2619–20], we see no merit in the defendant's claim under the First Amendment. *See Commonwealth v. Trainor*, [374 Mass. 796, 798, 374 N.E.2d 1216 (1978)]. In *Commonwealth v. 707 Main Corp.*, [371 Mass. 374, 383, 357 N.E.2d 753 (1976)], we held that the statute 'is not unconstitutionally vague in its proscription of dissemination of obscene matter, because its definitions of *"obscene" matter* and "sexual conduct" * * * provide reasonably ascertainable standards of guilt' (emphasis supplied). *See District Attorney for the N. Dist. v. Three Way Theatres Corp.*, [371 Mass. 391, 394, 357 N.E.2d 747 (1976)]; *Commonwealth v. Thureson*, [371 Mass. 387, 389, 357 N.E.2d 750 (1976)]. We again rejected a claim that the Massachusetts Constitution requires 'greater specificity' in the statutory definition of obscenity in *Commonwealth v. Trainor*, [*supra*, 374 Mass. at 798–99, 374 N.E.2d 1216]. *See Bunker Hill Distrib., Inc. v. District Attorney for the Suffolk Dist.*, [376 Mass. 142, 145–46, 379 N.E.2d 1095 (1978)].

"* * *

"We believe that *our prior decisions establish that the definition of obscenity in G.L. c. 272, § 31, is not unconstitutionally vague under the Declaration of Rights* or the First Amendment, and

we once again 'see no reason to change that conclusion at this time.' *Commonwealth v. Trainor*, [*supra*, 374 Mass. at 799, 374 N.E.2d 1216]. 453 N.E.2d at 409–10. (Emphasis supplied, footnote omitted.)

In *City of Portland v. Jacobsky*, 496 A.2d 646 (Me.1985), the Maine Supreme Court rejected the defendant's claim that a local obscenity ordinance which incorporated the *Miller* standard was unconstitutionally vague under the Maine constitution. The court stated:

"In language unchanged since Maine achieved statehood the Declaration of Rights of our Constitution proclaims in pertinent part:

"'Every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty.'

"Me. Const. art. I, § 4. The impact of this provision on the publication of obscene materials has heretofore never been analyzed by this Court. On the other hand, the United States Supreme Court and other federal courts have had many occasions to determine the application of the First Amendment to such publications. We note the care with which the drafters of the Portland ordinance have followed the conjunctive three-element test that the United States Supreme Court set forth in *Miller v. California*, [*supra* 413 U.S. at 24, 93 S.Ct. at 2614–15], to delineate the scope of obscene expression *not* protected by the constitutional safeguards of the First Amendment. By tracking the *Miller* definition of obscenity, the Portland ordinance passes muster under the federal constitution. Any difference in language between the Maine Constitution and the United States Constitution is, in the context of this case, insufficient to justify striking out on our own to develop a unique answer to the difficult definitional problem that has been long and often litigated under the First Amendment. *We refuse to extend state constitutional protection to obscene expression that under the Miller test does not enjoy federal constitutional protection. Accordingly, we conclude that the Portland ordinance does not infringe upon the Defendants' freedom of expression guaranteed by Article I, Section 4, of our Maine Constitution.*

"* * *

"Nor do we agree with the suggestion of the Superior Court that the Portland obscenity ordinance may be void for vagueness. An ordinance or a statute may be void for vagueness when its language either forbids or requires the doing of an act in terms so vague that people of common intelligence must guess at its meaning. As we reiterated in *Maine Real Estate Commission v. Kelby*, [360 A.2d 528, 529, (Me.1976)], due process requires that the law provide reasonable and intelligible standards to guide the future conduct of our people. We conclude that the infirmity is not found in the Portland obscenity ordinance. *Indeed, it is difficult to see how an ordinance that so precisely follows the Miller definition of proscribable obscenity could be unconstitutionally vague.*

"In the context of this case we do not interpret the Maine Constitution to produce a result different from that which would be reached under the federal constitution." 496 A.2d at 648–49. (Emphasis supplied, footnotes omitted.)

In *State v. Hollins*, 538 S.W.2d 281 (Mo. App.1975), the Missouri Supreme Court rejected the defendant's claim that an obscenity statute which incorporated the *Miller* standard, was unconstitutionally vague under the Missouri constitution. The court stated:

"Defendant also contends that § 563.280 [Mo Rev Stat (1969)] is unconstitutionally vague and overbroad and that 'ACTION Vol 1 No 5' is not obscene and is protected expression under the First Amendment of the U.S. Constitution and *Article One, Section Eight, of the Missouri Constitution.*

"* * *

"Defendant contends Missouri's obscenity statute is vague and overbroad. The Missouri Supreme Court has held to the contrary. *State ex rel Wampler v. Bird*, [499 S.W.2d 780 (Mo.1973)] held the statute was in line with the U.S. Supreme Court obscenity guidelines of *Roth v. United States*, [*supra*] and *Miller v. California*, [*supra*]. *See also State v. Vollmar*, [389 S.W.2d 20 Mo. 1965)]. The judicial construction of statutory language becomes part of the statute, making the statute sufficiently specific to avoid challenge for vagueness. *State v. Crawford*, [478 S.W.2d 314 (Mo. 1972)]. In the light of its prior judicial constructions, *Missouri's obscenity statute is not vague or overbroad.*" 533 S.W.2d at 232–33. (Emphasis supplied.)

In *State v. Lesieure*, 121 R.I. 859, 404 A.2d 457 (1979), the Rhode Island Supreme Court rejected the defendant's claim that the obscenity statute which incorporated the *Miller* standard was unconstitutionally vague under the Rhode Island constitution. The court stated:

"We construe the provisions of article I, section 10 of the Declaration of Rights of the Rhode Island Constitution as adding no further guarantees to the right of a defendant to be informed of the nature and cause of a criminal accusation than are provided by the parallel due process terms of the Federal Constitution which were found to be met in *Hamling v. United States*, [*supra*].

"For the reasons stated, we answer the first certified question in the negative by holding that § 11–31–1 was not invalid or void for impermissible vagueness and overbreadth." 404 A.2d at 462.

In *Taylor v. State ex. rel. Kirkpatrick*, 529 S.W.2d 692 (Tenn.1975), *cert. den.* 429 U.S. 930, 97 S.Ct. 337, 50 L.Ed.2d 300 (1976), the Tennessee Supreme Court rejected the defendant's claim that an obscenity statute which incorporated the *Miller* standard was unconstitutionally vague under the Tennessee constitution. The court stated:

"Next, the defendants assert that the definitions contained in Section 2(H) of the Act are so vague and indefinite that they violate *Article I, § 19 of the Constitution of Tennessee* and the First and Fourteenth Amendments of the United States Constitution.

" • • •

"In our view, the contention that the foregoing definitions are unconstitutionally vague cannot be seriously maintained.

" • • •

"The words used give adequate warning of the conduct proscribed and set out boundaries sufficiently distinct for courts to fairly administer the law; no more is required. This statute represents a good faith effort by our General Assembly to comply with the standards recently announced by the Supreme Court of the United States in *Miller v. California*, [*supra*], and most of the language attacked as vague is taken *verbatim* from that opinion. We hold that the definitions here attacked comply with the applicable standards of substantive due process." 529 S.W.2d at 696–97. (Emphasis supplied.) [6]

In *Com. v. Stock*, 346 Pa.Super. 60, 499 A.2d 308 (1985), the Superior Court of Pennsylvania rejected the defendant's claim that an obscenity statute which incorporated the *Miller* standard was unconstitutionally vague under the Pennsylvania constitution. The court stated:

"Stock next argues that the obscenity statute unlawfully delegates legislative power to the several district attorneys of the Commonwealth by conferring on them the discretion whether to proceed against alleged violators by criminal prosecution or equitable injunction. *See* [18 Pa Cons Stat § 5903(g), (h)]. Stock contends that this prosecutorial option offends *Article 2, § 1 of the Pennsylvania Constitution* as well as the Fourteenth Amendment by confiding a standardless legislative discretion in district attorneys. We disagree. The statute defining the offense creates a clear, explicit standard in accordance with the definition of obscenity announced by the United States Supreme Court in *Miller*. The statute gives the district attorney no say in deciding what is or is not obscene; the only discretion provided is in the means of enforcement chosen to combat the evils identified in the legislation. This alleged 'delegation' of discretion is in reality not a delegation at all, but merely a particular manifestation of the inherent discretionary powers of district attorneys in our system of justice. A district attorney by the nature of his office is invested with broad discretion over how, whether, and when to prosecute criminal offenses. *See Commonwealth v. Malloy*, [304 Pa.Super. 297, 450 A.2d 689 (1982)] (Opinion by Cirillo, J.). This discretion is not lessened when the prosecutor is charged with deciding which of two legislatively authorized techniques of enforcement will more effectively accomplish the legislative program of stamping out commercial obscenity. Appellant's constitutional attack on the statute on delegation grounds must fail.

" • • •

"Stock's final constitutional claim is actually a dual attack on subsection (f) of Section 5903. This provision makes it illegal for any person to require as a condition of business dealings that any distributor or retailer purchase or take for resale any written or printed matter or article or instrument 'of an obscene nature.'

"The first prong of Stock's attack on 5903(f) is based on the asserted vagueness of the phrase 'obscene nature.' Stock points out that the Legislature has explicitly defined 'obscene materials,' the term used in subsection (a)(2) of the statute, yet has not defined materials of an 'obscene nature' as that term appears in subsection (f). Because of the disparity in wording, Stock apprehends that the Legislature sought to include a wider class of materials in (f) than in (a)(2), but since there are no standards for determining what falls within the supposed wider class, he argues that subsection (f) is fatally vague so as to exert an unconstitutional chilling effect on First Amendment rights.

"We reject Stock's reading of the statute, and determine that both subsections refer to the same class of materials. Although the difference in wording perhaps reflects imprecise drafting, we can readily ascertain the reason therefor. The obscenity statute as first passed by the Legislature in 1972 contained a blanket definition of 'obscene' which applied to all subsections of Section 5903. *See* [Act of Dec. 6, 1972, PL 1482, No 334, § 1]. However, our Supreme Court in *Commonwealth v. MacDonald*, [464 Pa. 435, 347 A.2d 290, *cert denied*, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1975)], determined that the definition of obscenity in the 1972 act did not meet the standards of *Miller, supra*, and hence struck down the statute. Thereafter the Legislature rewrote the statute and substituted the present definition of 'obscene materials' incorporating the language of *Miller*. [Act of Nov 5, 1977, PL 221, No 68, § 1; *see* 18 Pa Cons Stat § 5903(b)] ('Definitions'). However, through apparent oversight the Legislature failed to amend the wording of subsection (f) of the statute to take into account that the Act now defined the noun 'obscene materials' rather than the adjective 'obscene.' Nevertheless, we need not blind ourselves to the fact that the Legislature in amending the statute was clearly trying to come within the letter of the law as laid down in *Miller*. Thus, any interpretation of what the Legislature means by materials 'of an obscene nature' must

6. In *Leach v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn.1979), the Tennessee Supreme Court held the newly enacted 1978 Tennessee obscenity statute unconstitutional, finding which violated both the state constitution and the federal *Miller* standard. The state's *former* obscenity statute, that had been upheld in *Taylor v. State ex rel. Kirkpatrick, supra*, was then reenacted by the state legislature. The constitutionality of that statute again was upheld in *State v. Runions*, 654 S.W.2d 407 (Tenn. Cr.App.), *app. den.* (1983).

refer to the *Miller* standards quoted substantially verbatim in the statutory definition of 'obscene materials.' This result is compelled not only by the rules of statutory construction, but by ordinary precepts of common sense. We therefore decline to throw out the obscenity statute on the flimsy semantic grounds offered here." 499 A.2d at 314–15. (Emphasis supplied.)

See also Com. v. Croll, 331 Pa.Super. 107, 480 A.2d 266 (1984); *Com. v. Doe*, 316 Pa.Super. 1, 462 A.2d 762 (1983); *Long v. 130 Market St. Gift & Novelty, Etc.*, 294 Pa.Super. 383, 440 A.2d 517 (1982).

In sum, my research shows that every jurisdiction which has examined, under its state constitution, an obscenity statute or ordinance incorporating the *Miller* standard has upheld that statute or ordinance against a state constitutional vagueness challenge. That defendant has cited no case to the contrary is not surprising in the light of his reliance on Article I, section 8, and not on any vagueness challenge under Article I, sections 20 and 21.[7]

In addition to the above jurisdictions, several other jurisdictions have examined state obscenity statutes challenged for vagueness on federal constitutional grounds only. A few have held that their statutes were unconstitutional because they did not meet the *Miller* standard. However, my research shows that no state appellate court has ever hinted, not even in a footnote, that an obscenity statute which satisfies *Miller* would be vague under that state's own constitution.[8]

The majority simply fails to make a principled case for its conclusion that ORS 167.087 is unconstitutionally vague under the Oregon Constitution. There is nothing in the majority's opinion that explains or justifies our departure from federal authority; nothing explains or justifies our rejection of the analysis of the appellate courts of other jurisdictions that have considered post-*Miller* statutes and the vagueness issue under state constitutions and have reached the opposite conclusion. The majority points to nothing in the text, history or purpose of the Oregon Constitution that supports its conclusion. It cites no scholarly research to support its analysis or conclusion. It gives no practical or policy considerations demonstrating that its conclusion is not just a convenient vehicle to evade the decisions of the United States Supreme Court. Quite simply, that is not *principled* decision-making.[9]

7. *I am not surprised that, in a recent* Oregon State Bar publication on state constitutional law, the author of the section on Freedom of Expression did not even suggest a vagueness challenge to the statute. The author's only point was that obscenity was not one of the "historical exceptions" provided for at the time of the adoption of the Oregon Constitution, and, therefore, any anti-obscenity statute addressed to adults is flatly prohibited by Article I, section 8. Oregon State Bar, *Oregon Constitutional Law* (1985). That is the only claim defendant is making here.

8. *See Wild Cinemas of Little Rock, Inc. v. Bentley*, 499 F.Supp. 655 (E.D.Ark.1980); *Rhodes v. State*, 283 So.2d 351 (Fla.1973); *Dyke v. The State*, 232 Ga. 817, 209 S.E.2d 166 (1974); *Slaton v. Paris Adult Theatre*, 231 Ga. 312, 201 S.E.2d 456 (1973); *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976), *aff'd* 431 U.S. 767, 97 S.Ct. 2085, 52 L.Ed.2d 738 (1977); *400 E. Baltimore St. v. State*, 49 Md.App. 147, 431 A.2d 682 (1981), *cert. den.* 455 U.S. 940, 102 S.Ct. 1431, 71 L.Ed.2d 650 (1982); *People v. Neumeyer*, 405 Mich. 341, 275 N.W.2d 230 (1979); *State v. Walta*, 298 Minn. 402, 216 N.W.2d 641 (1974); *State ex rel. Wampler v. Bird*, 499 S.W.2d 780 (Mo.1973); *State v. Manchester News Co., Inc.*, 118 N.H. 255, 387 A.2d 324, *app. dismissed* 439 U.S. 949, 99 S.Ct. 343, 58 L.Ed.2d 340 (1978); *State v. Harding*, 114 N.H. 335, 320 A.2d 646 (1974); *State v. DeSantis*, 65 N.J. 462, 323 A.2d 489 (1974); *People v. Gilmore*, 120 Misc.2d 741, 468 N.Y.S.2d 965 (1983); *People v. Illardo*, 48 N.Y.2d 408, 423 N.Y.S.2d 470, 399 N.E.2d 59 (1979); *People v. Martin*, 100 Misc.2d 774, 420 N.Y.S.2d 318 (1979); *People v. Heller*, 33 N.Y.2d 314, 352 N.Y.S.2d 601, 307 N.E.2d 805 (1973); *State v. Bryant*, 16 N.C.App. 456, 192 S.E.2d 693 (1973), *aff'd* 285 N.C. 27, 203 S.E.2d 27, *cert. den.* 419 U.S. 974, 95 S.Ct. 238, 42 L.Ed.2d 188 (1974); *State ex rel Keating v. "Vixen"*, 35 Ohio St.2d 215, 301 N.E.2d 880 (1973); *Price v. Commonwealth*, 214 Va. 490, 201 S.E.2d 798 (1974); *State v. J-R Distributors, Inc.*, 82 Wash.2d 584, 512 P.2d 1049 (1973).

9. *See State v. Lowry*, 295 Or. 337, 351–52, 667 P.2d 996 (1983) (Jones J., specially concurring); *see also* Maltz, *The Dark Side of State Court Activism*, 63 Tex L Rev 995 (1985); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga L Rev 165 (1984); Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 Hastings Const L Q 1, 2 (1981); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 61 Va L Rev 873, 940–43 (1976); Deukmejian & Thompson, *All Sail and No Anchor-Judicial Review Under the California Constitution*, 6 Hastings Const L Q 975 (1979); Note, *Toward a Principled Interpretation of the State Constitution*, 29 Stanford L Rev 297 (1977).

The majority should bite the bullet and address the only issue preserved in the trial court and briefed and argued on appeal, *i.e.*, whether the legislature is flatly proscribed from enacting the statute under Article I, section 8.[10]

I concur with the majority that Deschutes County case # 31301 must be reversed.

WARDEN and ROSSMAN, JJ., join in this opinion.

10. The Legislature can now spend the next several months writing a new statute. In time, that new statute will be enforced; after that, this court again will be asked to decide whether the Legislature may legislate in the area of adult obscenity. Defendant has raised that issue in this case; we should decide it now.

78 Or.App. 505

Oliver N. GILL, Respondent,

v.

Hoyt C. CUPP, Superintendent, Oregon State Penitentiary, Appellant.

135,460; CA A36070.

Court of Appeals of Oregon.

Argued and Submitted March 21, 1986.

Decided April 9, 1986.

Following conviction for theft in the first degree, defendant brought petition for postconviction relief. The Circuit Court, Marion County, Val D. Sloper, J., entered order granting postconviction relief and state appealed. The Court of Appeals held that absence of evidence that value of stolen property was in excess of $200 did not preclude conviction under indictment alleging that defendant committed theft by selling the said property.

Reversed and remanded with directions.

Larceny ⇐59

Absence of evidence that value of stolen property was in excess of $200 did not preclude conviction for theft in the first degree under indictment alleging that defendant committed theft by selling the said property. ORS 164.055(1)(c).

Robert J. Jackson, Asst. Atty. Gen., Salem argued the cause for appellant. With him on brief were Dave Frohnmayer, Atty. Gen., James E. Mountain, Jr., Sol. Gen., and Scott McAlister, Asst. Atty. Gen., Salem.

No appearance for respondent.

Before WARDEN, P.J., and VAN HOOMISSEN and YOUNG, JJ.

PER CURIAM.

This is an appeal from an order granting post-conviction relief. The post-conviction court held that the evidence presented at petitioner's trial would not support a conviction for theft in the first degree.[1] We disagree.

The post-conviction court's holding was based on its finding that there was no evidence that the value of the stolen property was in excess of $200. Although that finding is correct, the court's conclusion of

1. Petitioner asserted numerous grounds for post-conviction relief. The post-conviction court found that, with one exception, his contentions either were not established from the evidence or did not entitle him to relief. Accordingly, the court denied his petition "as to all remaining allegations."