# OBSCENITY - WHAT IS THE TEST?

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In *Regina v. Hicklin*[1] Chief Justice Cockburn laid down a test for obscenity in the following words:

> I think the test of obscenity is this: Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

Although this test was accepted and followed by courts in this country, acceptance was not always accompanied with approval,[2] and in *Roth v. United States*[3] the *Hicklin* test was rejected as unconstitutionally restrictive of the freedoms of speech and press. With this rejection it became necessary to formulate a new test.

## *The* Roth *Test*

The test adopted in *Roth* is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The constitutional requirement for a standard phrased in terms of the reaction of an average adult to the material rather than that of the most susceptible person had been forecast in *Butler v. Michigan;*[4] and in cases where a statute proscribes material "tending to the corruption of the morals of youth," a reversal of a conviction is usually based upon the authority of *Butler* rather than *Roth.*[5] It is now generally recognized[6] that a more stringent standard than that of the average adult would offend the constitutional guarantees.[7] The Oregon court, however, has said that material may be judged by its appeal to a special audience if it is clearly aimed at such an audi-

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[1] L.R. 3 Q.B. 360, 11 Cox C.C. 19 (1868).

[2] See, *e.g.*, United States v. Kennerley, 209 Fed. 119 (S.D.N.Y. 1913) (L. Hand, J.).

[3] 354 U.S. 476 (1957).

[4] 352 U.S. 380 (1957).

[5] See Goldstein v. Commonwealth, 200 Va. 25, 104 S.E.2d 66 (1958); State v. Miller, 145 W. Va. 59, 112 S.E.2d 472 (1960).

[6] *But see* City of Cincinnati v. Marshall, 15 Ohio Op. 2d 163, 175 N.E.2d 181 (Ct. App. 1960), *rev'd on other grounds,* 172 Ohio St. 280, 175 N.E.2d 178 (1961).

[7] *E.g.*, Zeitlin v. Arnebergh, 31 Cal. R. 800, 383 P.2d 152 (1963); State v. Miller, 145 W. Va. 59, 112 S.E.2d 472 (1960). The "average person" of the *Roth* test has been compared to the "reasonable man" of tort litigation. See State v. Nelson, 168 Neb. 394, 95 N.W.2d 678 (1959); State v. Mahoning Valley Dist. Agency, 86 Ohio L. Abs. 427, 169 N.E.2d 48 (C.P. 1960), *aff'd,* 116 Ohio App. 57, 186 N.E.2d 631 (1962).

ence,[8] and statutes in Illinois,[9] North Carolina,[10] and Oregon[11] have so provided.[12] As the predominant purpose of such statutes is to prevent the distribution of objectionable material to children, it seems that the same result could better be accomplished, without encountering delicate constitutional questions, through the medium of legislation on the subject of contributing to the delinquency of minors. For example, in *State v. Locks*,[13] a prosecution for contributing to the delinquency and dependency of a minor,[14] the Arizona court found it unnecessary to determine whether the publications involved were obscene so as to be unprotected by the First and Fourteenth Amendments.

Application of the "contemporary community standards" requirement presents two problems: First, what is the "community" whose standards are to be applied? Second, what are those standards? Where a federal statute is involved, the "community" in terms of whose standards of decency the issue of obscenity must be decided is not any local community but the national community as a whole.[15] Some state courts, looking to the local community,[16] have rejected the idea that a definitive contemporary standard of morality exists for the state as a whole. Thus, to the Pennsylvania court it appeared obvious that "the moral standards of the average resident of a metropolitan area are not the same as the moral standards of the average resident of a rural county."[17] Other state courts, however, doubt that the rele-

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[8] State v. Jackson, 224 Ore. 337, 356 P.2d 495 (1960): "Although material alleged to be obscene must generally be judged on the basis of its appeal to the average member of the community, we think it may be judged by its appeal to a special audience — for example, children — if it clearly is aimed at such an audience."

[9] ILL. ANN. STAT. ch. 38, § 11-20(c) (Smith-Hurd Spec. Supp. 1961).

[10] N.C. GEN. STAT. § 14-189.1(b) (Supp. 1961) ("children or other especially susceptible audience").

[11] ORE. REV. STAT. § 167.151(2) (1961) ("children under 18").

[12] Compare MODEL PENAL CODE § 251.4(1) (Proposed Official Draft, 1962): ". . . Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience. . . ." It has been suggested that the term "specially susceptible" includes not only those who are specially more susceptible, but also those who are specially less susceptible. See United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957).

[13] 382 P.2d 241 (Ariz. 1963).

[14] See ARIZ. REV. STAT. ANN. § 13-822 (1956).

[15] Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (Opinion of Harlan, J.): "We think that the proper test under this Federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." *Accord*, Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962).

[16] *E.g.*, Stengel v. Smith, 37 Misc. 2d 947, 236 N.Y.S.2d 569 (Sup. Ct. 1963), *rev'd on other grounds*, 18 App. Div. 2d 458, 240 N.Y.S.2d 200 (1963) ("this great community of the Niagara Frontier").

[17] William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 173 A.2d 59, 66 (1961), *cert. denied*, 368 U.S. 897 (1961).

vant standards differ significantly from one community to another.[18] It has thus been stated that questions of obscenity should uniformly be determined, at least on a statewide basis,[19] and no distinction ought to be made among the standards of different communities within a state.[20] This position has been adopted by statute in Texas[21] and Utah.[22] Although no error is committed in phrasing the test in terms of the community standards of a particular community[23] (the theory being that the standards of that community are presumptively representative of community standards throughout the state or nation,) clearly the better practice is to phrase the test in terms of society as a whole.[24]

The standards to be applied are not those of a particular portion of the community[25] but those generally accepted in the community. The standards must be those which are actually accepted, and not those which merely are professed; for the community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates.[26] The content of matter which has been generally accepted and tolerated by the public must be considered in determining contemporary community standards,[27] and failure of the trial court to allow a defendant to prove the contemporary community standards is a denial of due process.[28] On the other hand, if the de-

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[18] State v. Hudson County News Co., 78 N.J. Super. 321, 188 A.2d 444 (App. Div. 1963); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963).

[19] See MODEL PENAL CODE § 251.4, reporter's note (Proposed Official Draft, 1962).

[20] McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963). *Cf.* State v. Mahoning Valley Dist. Agency, 84 Ohio L. Abs. 427, 169 N.E.2d 48 (C.P. 1960), *aff'd*, 116 Ohio App. 57, 186 N.E.2d 631 (1962).

[21] TEX. ANN. PEN. CODE art. 527, § 3 (Supp. 1962): ". . . the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas."

[22] UTAH CODE ANN. § 76-39-11 (Supp. 1963): ". . . Community standards shall be the standards of the community of the state of Utah."

[23] State v. Hudson County News Co., 78 N.J. Super. 327, 188 A.2d 444 (App. Div. 1963).

[24] See Monfred v. State, 226 Md. 312, 173 A.2d 173, 181 (Ct. App. 1961) (Hammond, J., dissenting), *cert. denied*, 368 U.S. 953 (1962).

[25] People v. Richmond County News, Inc., 9 N.Y.2d 578, 216 N.Y.S.2d 369, 175 N.E.2d 681 (1961): "To be sure, there are some in the community who regard any realistic portrayal of sexuality, any form of erotic realism, as an insupportable threat to the social order."

[26] Smith v. California, 361 U.S. 147, 171 (1959) (Douglas, J., concurring); Yudkin v. State, 229 Md. 223, 182 A.2d 798 (Ct. App. 1962).

[27] Yudkin v. State, *supra* note 26.

[28] *In re* Harris, 16 Cal. R. 889, 366 P.2d 305 (1961); see Smith v. California, 361 U.S. 147, 166 (1959) (Frankfurter, J., concurring); Zenith International Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir. 1961). But unless the material offered to show what is acceptable under contemporary community stand-

fendant offers no evidence of contemporary community standards he cannot complain that the prosecution has offered no such evidence, and the character of the material may be determined by an examination of the material itself.[29]

Community standards are not static,[30] and obscenity must be defined by the community standards of the generation which applies the test,[31] for "no other rule would be tolerable in an age which endorses great sexual freedom in every means of expression."[32] As one court has said:[33]

> The fact that "The Carpetbaggers" is a best seller and that "Playboy" has one of the largest circulations among so-called men's magazines in America, outselling such old standards as "Popular Mechanics" and "Field and Stream," may be a commentary upon our times.

The requirement that the dominant theme of the material taken as a whole must be considered is a rejection of the rule that permitted material to be judged by the effect of isolated passages. The California court has commented on the "dominant theme" requirement as follows:[34]

> Thus in *Roth* the court gave constitutional recognition to the employment of the device of artistic shock often present in the myriad of art forms which our society demands for its intellectual and cultural growth. The insistence upon judgment of the material "as a whole" and by its "predominant appeal" also serves to alleviate, but not necessarily abolish, the dilemma which had been noted by several courts which have observed the coarseness of portions of recognized classics of art and literature although no rational person would condemn such works as obscene.
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> However, if a single item, story, article, or picture, considered

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ards is similar to that alleged to be obscene, it is inadmissible as being without probative value. Womack v. United States, 294 F.2d 204 (D.C. Cir. 1961), *cert. denied*, 365 U.S. 859 (1961).

[29] Rachleff v. Mahon, 124 So. 2d 878 (Fla. 1960). *Cf.* Kahm v. United States, 300 F.2d 78 (5th Cir. 1962).

[30] "[F]rom the days of ancient Greece and Rome through the period of English ecclesiastical court jurisdiction and common-law times until the present there have been many rises and falls, sudden or gradual, in the levels of community acceptance of sex-concerned books, illustrations and plays. Each change has in turn affected the contemporary law as to obscenity." Desmond, J., concurring in People v. Richmond County News, Inc., 9 N.Y.2d 578, 589, 216 N.Y.S.2d 369, 378, 175 N.E.2d 681, 687 (1961).

[31] "Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859?" Frankfurter, J., concurring in Smith v. California, 361 U.S. 147, 165 (1959).

[32] State v. Jackson, 224 Ore. 337, 356 P.2d 495 (1960).

[33] People v. Pocket Books, Inc., 38 Misc. 2d 1004, 239 N.Y.S.2d 631 (Sup. Ct. 1963).

[34] Zeitlin v. Arnebergh, 31 Cal. R. 800, 383 P.2d 152 (1963).

as a whole, is obscene, it is not protected merely because it is included in a collection of otherwise unobjectionable material;[35] thus it is not error to call the attention of the court to specified pages of a publication, where the material on these pages brings the whole book within the definition of obscenity.[36] Conversely, since the material is to be judged as a whole, it is not error to fail to specify the pages on which the alleged obscene matter appears.[37]

The final requirement of the *Roth* test is that the material must appeal to prurient interest.[38] The term "prurient interest" has received much of its current vitality from the Model Penal Code,[39] which defines it as a "shameful or morbid interest in nudity, sex, or excretion." Although "prurient" may be merely another addition to the existing catalog of "obscene, lewd, lascivious, indecent, filthy or vile,"[40] its true meaning and effect will have to be determined not by definition, but by a case-by-case approach.[41] For example, material is not obscene merely because the ideas advocated are contrary to law and morals, if the manner of presentation does not appeal to the prurient interest or amount to an incitement to illegal action.[42] Nor is material obscene merely because it is offensive to many citizens because violative of accepted standards of propriety and decent behavior.[43] Perhaps the best summation is contained in the words of the Court of Appeals for the Ninth Circuit:[44]

> And out of "prurient" it would seem that obscenity is shifting from the standard of distasteful to a majority of people to a standard of disgusting, really lewd, shameful, or excites mor-

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[35] Flying Eagle Publications, Inc. v. United States, 285 F.2d 307 (1st Cir. 1961): "An obscene picture of a Roman orgy would be no less so because accompanied by an account of a Sunday school picnic which omitted the offensive details." *Accord,* Kahm v. United States, 300 F.2d 78 (5th Cir. 1962); People v. Richmond County News, Inc., 9 N.Y.2d 578, 216 N.Y.S.2d 369, 175 N.E.2d 681 (1961).

[36] State v. A Quantity of Copies of Books, 191 Kan. 13, 379 P.2d 254 (1963).

[37] Flying Eagle Publications, Inc. v. United States, 273 F.2d 799 (1st Cir. 1960); Rachleff v. Mahon, 124 So. 2d 878 (Fla. 1960).

[38] "Obscene material is material which deals with sex in a manner appealing to the prurient interest. *I.e.,* material having a tendency to excite lustful thoughts." Roth v. United States, 354 U.S. 476 (1957).

[39] § 251.4(1) (Proposed Official Draft, 1962).

[40] See, *e.g.,* 18 U.S.C. § 1461 (1958).

[41] See Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328 (Mass. 1962).

[42] Kingsley International Pictures Corp. v. Regents of the Univ., 360 U.S. 684 (1959).

[43] Commonwealth v. Moniz, 338 Mass. 442, 155 N.E.2d 762 (1959) (mere nudity not obscene).

[44] Eastman Kodak Co. v. Hendricks, 262 F.2d 392 (9th Cir. 1958).

> bid interest in sex. . . . In short, there seems to emerge from the cases the proposition that obscenity in the standard of pruriency must really "smell," not just be of slight "odor."

The *Roth* test has been characterized as being "too dim a beacon by which to guess a course"[45] and as creating "an illusory sense of certainty;"[46] so it is not surprising to find that other tests have been relied upon both to aid in the interpretation of the *Roth* test, and to supplement it.

*The "Hard-core Pornography" Test*

It has never been seriously doubted that hard-core pornography may constitutionally be suppressed,[47] and the holding in *Roth* foreclosed this issue from further debate. The question which remains is whether only hard-core pornography may be suppressed, a question upon which the Supreme Court is as yet non-committal.[48] In the lower federal courts, there is a difference of opinion, the First Circuit indicating that it recognizes the "hard-core pornography" test,[49] and the Fifth and Ninth Circuits rejecting it.[50]

Several state courts have held that only hard-core pornography may be proscribed.[51] These decisions may be based solely upon Constitutional grounds[52] or, conversely, they may be based upon the construction of state statutes or constitutional provisions, independently of any First or Fourteenth Amendment requirements.[53] Other state courts hold that the category of the "obscene" includes material which is not hard-core pornography,[54] the reasoning being that obscenity and

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[45] Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328, 335 (Mass. 1962) (Wilkins, C.J., dissenting).

[46] Flying Eagle Publications, Inc. v. United States, 273 F.2d 799 (1st Cir. 1960).

[47] See, *e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Chaplinski v. New Hampshire, 315 U.S. 568 (1942).

[48] See Manual Enterprises, Inc. v. Day, 370 U.S. 478, 489 (1962) (Opinion of Harlan, J.): "Whether 'hard-core' pornography, or something less, be the proper test . . ."

[49] See Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962): "In short the pictures simply are not the kind of 'hard-core pornography' within the reach of the statute construed in the light of the constitutional guarantee of freedom of the press."

[50] See Kahm v. United States, 300 F.2d 78 (5th Cir. 1962); Eastman Kodak Co. v. Hendricks, 262 F.2d 392 (9th Cir. 1958).

[51] Zeitlin v. Arnebergh, 31 Cal. R. 800, 383 P.2d 152 (1963); Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328 (Mass. 1962); People v. Richmond County News, Inc., 9 N.Y.2d 578, 216 N.Y.S.2d 369, 175 N.E.2d 681 (1961).

[52] See Attorney General v. Book Named "Tropic of Cancer," *supra* note 51: "We rest our decision squarely on the First Amendment . . ."

[53] See People v. Richmond County News, Inc., 9 N.Y.2d 578, 216 N.Y.S.2d 369, 175 N.E.2d 681 (1961): ". . . although the *Butler* and *Roth* cases destroy the *Hicklin* Rule, they do not lay down a test of obscenity binding on our interpretation of this State's obscenity statute."

[54] Rachleff v. Mahon, 124 So. 2d 878 (Fla. 1960); State v. Hudson County News Co., 78 N.J. Super. 327, 188 A.2d 444 (App. Div. 1963).

pornography are synonymous terms, and that the addition of the phrase "hard-core" merely indicates a certain type of obscenity.[55] One state court has gone so far as to say that under certain circumstances hard-core pornography might not be obscene,[56] although it perhaps would be more accurate to say that under certain circumstances possession of obscene material might be privileged.[57]

The term "pornography" is not susceptible of any satisfactory definition,[58] and the courts which follow the "hard-core pornography" test have couched their decisions in terms of "redeeming social importance."

*The "Redeeming Social Importance" Test*

In *Roth v. United States*,[59] the Supreme Court made the following oft-quoted statement:

> All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, unless excludible because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

California has adopted the "redeeming social importance" test by statute,[60] and the California court, in reviewing the rulings of the Supreme Court and the decisions of the various state courts based thereon, has said:[61] "If the material, however, has literary value, if it is a serious work of literature or art, then it possesses redeeming social importance and obtains the benefit of the constitutional guarantees." The court went on to hold that Henry Miller's *Tropic of Cancer* was not hard-core pornography, but was "a kind of grotesque, unorthodox art-form." The Massachusetts court, speaking of the same book, voiced a similar opinion:[62] "We think that the book must be accepted as a conscious effort to create a work of literary art and as having significance, which prevents treating it as hard core pornography." On the other hand, the New York court, which also uses

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[55] State v. Hudson County News Co., *supra* note 54.

[56] State v. Andrews, 150 Conn. 92, 186 A.2d 546 (1962).

[57] In United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957), the court found it unnecessary to choose between the alternative theories.

[58] See generally Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 58 (1960).

[59] 354 U.S. 476 (1957).

[60] CAL. PEN. CODE § 311(a). The legislative history is given in Zeitlin v. Arnebergh, 31 Cal. R. 800, 383 P.2d 152 (1963).

[61] Zeitlin v. Arnebergh, *supra* note 60.

[62] Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328 (Mass. 1962).

the "hard-core pornography" test,[63] found *Tropic of Cancer* to be obscene, saying:[64]

> Defendants contend that even if "Tropic of Cancer" is obscene when judged by the established test, it is nevertheless, under the *Roth* case, *supra,* entitled to protection because it has "substantial literary merit." We do not interpret *Roth,* or any other authority, as establishing any such rule of law. . . . This court will not adopt a rule of law which states that obscenity is suppressible but that well-written obscenity is not.

The disagreement thus appearing may be explained on the basis that the California and Massachusetts courts use the lack of "redeeming social importance" as a definition of obscenity, while the New York court considers such lack merely a characteristic of obscenity.[65] It is submitted that, upon close reading, *Roth* tends more nearly to support the New York position.

Of course, the mere fact that a publication has no "redeeming social importance" does not make it obscene,[66] and it is only when the material under consideration is very close to the line separating the obscene from the not obscene that the "redeeming social importance" test is determinative.

*The "Patent Offensiveness" Test*

In *Manual Enterprises, Inc. v. Day*[67] the Supreme Court held that certain magazines, designed to appeal to homosexuals, could not be denied access to the mails. Mr. Justice Harlan, in an opinion announcing the judgment of the court, said:[68]

> Obscenity under the federal statute thus requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under § 1461. In most obscenity cases, to be sure, the two elements tend to coalesce, for that which is patently offensive will also usually carry the

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[63] See People v. Richmond County News, Inc., 9 N.Y.2d 578, 216 N.Y.S.2d 369, 175 N.E.2d 681 (1961).

[64] People v. Fritch, 13 N.Y.2d 119, 243 N.Y.S.2d 1, 6, 192 N.E.2d 713, 717 (1963).

[65] People v. Richmond County News, Inc., 9 N.Y.2d 578, 216 N.Y.S.2d 369, 175 N.E.2d 681 (1961): "It [obscenity, pornography] focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification."

[66] People v. Richmond County News, Inc., *supra* note 65: "The same protection applies even if the material which is subject to prohibition is a form of entertainment, rather than an exposition of ideas, and even if we conclude that it is lacking in all social value." *Accord,* Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962); United States v. Keller, 259 F.2d 54 (3d Cir. 1958).

[67] 370 U.S. 478 (1952).

[68] *Id.* at 486.

> requisite "prurient interest" appeal. It is only in the unusual instance where, as here, the "prurient interest" appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question of whether or not the material is patently offensive.

The "patent offensiveness" test is thus not an alternative to the *Roth* test, but is an additional requirement.[69] However, since patent offensiveness is to be determined on the face of the material itself, regardless of the audience for which it is intended, it seems clear that the application of the "patent offensiveness" test would, in many cases, nullify the effect sought to be accomplished by the "special audience" provisions contained in some obscenity statutes.[70]

### *Conclusions*

The *Roth* test, as a verbal formula, has imprinted itself upon the American law of obscenity. However, its interpretation and application have not been without difficulties. The cases involving *Tropic of Cancer* show that the same subject matter may receive disparate treatment in different courts which nevertheless profess to apply an identical test, and it is apparent that in those states which have little or no recent case law on the question of obscenity, prediction of the treatment a particular item will be accorded in the courts is a difficult and dangerous task.

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[69] *Ibid.* See also McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963); see MODEL PENAL CODE § 251.4(1) (Proposed Official Draft, 1962): "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters."

[70] *E.g.*, statutes cited notes 9-12 *supra.*