P.S. to the NEWS
by PHYLLIS SCHLAFLY

Box 618, Alton, Illinois 62002
Phone: 618-462-5415

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A VICTORY OVER OBSCENITY

Americans who like to cheer for the underdog, for a David who wins his fight against a Goliath, have a new hero. Larry E. Parrish, a lawyer of Memphis, Tennessee, won a major court case this spring against 15 high-priced lawyers representing some of the most profitable pornographic magazines of the country.

The U.S. Court of Appeals reversed a lower court decision and held that "Penthouse" and "Oui" were obscene. The case involved the magazines published in January 1978. A glance at the newsstands will show that these magazines, and others like them, are no better today than they were in 1978, and are probably worse.

The publishers of pornographic materials always try to wrap themselves in the First Amendment, and they have had a lot of help from the U.S. Supreme Court. The Supreme Court in Miller v. California (1973) prohibits a court from finding anything obscene unless it satisfies all three parts of a three-part test: "(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."

The pornography lawyers usually zero in on the third part of the test and try to argue, because the magazine contains some serious articles, articles by "name" authors, and advertising by national concerns, that it cannot be labelled obscene. The lower court accepted this argument, but the Court of Appeals did not.

Whether or not a magazine is obscene is a matter of fact, not law, and findings of fact usually cannot be overturned by appellate courts. However, obscenity is different. As Supreme Court Justice Brennan stated in Jenkins v. Georgia (1974), "one cannot with certainty say that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."

(more)

The chief reason why obscenity exists on most newsstands is that the Supreme Court made the determination of obscenity so extremely difficult and demanding. It should not require a Supreme Court decision to determine if a photograph or cartoon is obscene. Furthermore, "community standards" should be set by the local communities, not by the Supreme Court.

The Supreme Court vested in itself and in other appellate courts the special power to view obscene materials and to make their own determination of whether or not they are obscene. As Justice Brennan stated in Jenkins v. Georgia, "there can be no doubt that Miller requires appellate courts -- including this Court -- to review independently the constitutional fact of obscenity." This means "independently" of the the jury's or lower court's finding of fact.

In case after case, especially during the 1960s, the Supreme Court used this special power to overturn obscenity convictions returned by local juries. Larry Parrish turned this special power into a double-edged sword. After the lower court found that "Penthouse" and "Oui" were not obscene, he persuaded the Court of Appeals to exercise its power of independent review, look at the magazines, and form its own conclusions.

The Court of Appeals then declared that, taken as a whole, "Penthouse" and "Oui" do appeal to the prurient interest, include patently offensive depictions or descriptions of sexual conduct, and taken as a whole lack serious literary, artistic, political or scientific value.

The one dissenting judge in this case in the court of appeals, fell hook, line and sinker for the pornographers' argument about "taken as a whole." She admitted that the magazines were "vulgar, crude and beyond the limits of acceptable taste, ... appeal to a prurient interest, are patently offensive depictions of proscribed conduct and lack serious literary and artistic value." But she argued that all that should be glossed over and forgotten because the magazines contained some unobjectionable articles.

Dozens of new federal judges will be confirmed by the U.S. Senate this year. Most judges are called upon to make determinations as to whether magazines, films and photographs are obscene or not. Each nominee should be carefully questioned as to his or her views on pornography. Those who do not favor strict enforcement of the laws against obscenity should not be confirmed. (end)