ESe to the NEWS

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JURIES CAN DECIDE OBSCENITY

The U.S. Supreme Court has finally come around to the conclusion reached by the 113.te Senator Everett Dirksen and recommended in the last article he wrote before he died, namely, that the decision as to what is and what is not obscene should be made by juries rather than by judges.

In upholding the conviction of an Iowa smut peddler, Justice Harry Blackman stated the Court's position like this: "Con.temp?rary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community." The state law, according to the Court in a May decision, is a factor to be brought to the jury's attention, but it is not conclusive.

This month, the Supreme Court reaffirmed this policy by upholding an Illinois obscenity law which had been challenged as being unconstitutionally vague. Hereafter, a pornographer cannot escape prosecution just because he is more imaginative than the lawmakers in specifically describing sexual acts.

At least since the landmark Roth decision of 1957, it has been the law of our land that obscenity is not protected by the First Amendment, and that the test of obscenity is whether, to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. The more elusive question, however, remained: What are contemporary corrrnunity standards?

In the Fanny Hill case of 1966, the Court ruled that a book cannot be proscribed unless it is "utterly" without redeeming social value. Since under this rule even a modicum of social value would suffice, the Court would use a microscope to find some modicum a'nd then substitute the Court's opinion for the

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jury finding. When prostitute Fanny Hill got married in the last few pages, that provided the "social value" to excuse a whole book of pornography.

While Justice Potter Stewart once said that he knows obscenity when he sees it, the other Justices did not find obscenity so easy to define. Fanny Hill ushered in a seven-year period during which the Supreme Court was constantly second-guessing juries as to whether or not material was obscene.

Finally in the 1973 Miller case, Chief Justice Warren Burger let down the anchor of stability by enunciating a three-point test for obscenity based on community standards: (1) whether the average person would find that the work, taken as a whole, appeals to the prurient interest, (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Specifically opting for community rather than national standards, Justice Burger ruled: "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." The mere fact that juries may reach different conclusions does not render constitutional rights abridged.

Even so, the Miller case did not go all the way toward acceptance of juries as the final arbiter of community standards. The following year, in Jenkins v. Georgia, the Court again substituted its judgment for that of the jury's.

The purpose of the legislation proposed by Senator Dirksen in his November 1969 Reader's Digest article was to return to Juries the right to make the final determination as to whether a book, magazine, or movie is obscene. It appears that the latest two obscenity decisions of the U.S. Supreme Court have done precisely that,

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