

DATE: November 6, 1985

TO: Sue Metzger, Legislative Analyst

FROM: City Attorney

SUBJECT: Penal Code 311 - Definition of Obscenity

By memorandum of October 18, 1985 you asked for our thoughts on Senate Bill 139 as now amended to redefine "obscene matter."

You correctly point out that the original purpose of the bill and its redefinition was to conform California law to the obscenity standard set out by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). Since the bill no longer does this, you ask whether this bill would still facilitate prosecution.

The present definition of "obscene matter" uses a three prong definition with the third prong being that the material must be "utterly without redeeming social importance" California Penal Code, section 311(a); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

This burden was found to be "virtually impossible to discharge" since it required the prosecution to prove a negative proposition. Miller, supra at 21-22. Hence Miller altered the definition to include works which taken as a whole lack serious literary, artistic, political or scientific value. Miller, supra at 24-25.

The court has rejected challenges to the definition of obscenity based on the argument that strict adherence to Miller was required. Hamling v. United States, 418 U.S. 87, 115 (1974) held:

The Miller cases, important as they were in enunciating a constitutional test for obscenity to which a majority of the Court subscribed for the first time in a number of years, were intended neither as legislative drafting handbooks nor as manuals of jury instructions.

Hence the definition permitted by Miller is not judicially mandated. Bloom v. Municipal Court, 16 Cal.3d 71 (1976). Substituting "without significant" for "utterly without" clearly is an attempt to eliminate the proof of a negative permitted by Miller without using the Miller phraseology. This is permissible

under Miller and Hamling and clearly lessens the burden on the prosecution.

While the "without significant social importance" standard contained in amended Senate Bill 139 remains untested in the courts, the Supreme Court retained the concept of social importance as an integral part of the test for obscenity.

It is clear to us that the focus of the court's decision was not on the ambiguity of "social importance," but rather on the change from works which are utterly without value or importance to works which lack serious value or importance. The court expressly has retained the concept of "value" as part of the test for obscenity permitted under Miller.

People v. Enskat, 33 Cal.App.3d 900, 911 (1973).

Hence we believe the new definition to be constitutionally permissible.

The reality of obscenity prosecution is such that any legislative change is going to be subject to constitutional attack. However since this definition does reduce the burden on the prosecution, we believe the amended version of SB 139 still should be supported. It does eliminate the "impossible burden"

of proving a negative which now exists. In short the proverbial
half loaf is better than none.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

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