# THE "TAKEN AS A WHOLE" STANDARD TO DETERMINE THE OBSCENE*

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BEFORE DELIVERING HIS PAPER, MR. PARRISH MADE THE FOLLOWING EXTEMPORANEOUS REMARKS:

*I am not a feminist, nor would I be identified as a feminist, but if I hear many more presentations like those which preceded mine, I might become one. I am a first amendment absolutist on the issues of expression and advocacy of ideas, and I do not think the Constitution should be interpreted to allow any restrictions on the expression or the advocacy of any idea, irrespective of how popular or repulsive it is. On the other hand, I do not think that that authorizes one to express any idea by any means available. To claim that the only way that certain ideas can be expressed is through the use of obscenity is absurd. This was recently recognized by the Supreme Court in F.C.C. v. Pacifica†—the "seven dirty words" case—where it was pointed out that there is a difference between the form of an idea and the expression of an idea.*

*I am finding it increasingly difficult to remain very cool and collected. But as I see the real life situation, when I get my nose out of the law books, when I stop theorizing, when I stop focusing on the strict interpretation of constitutional principles, it becomes a little difficult to remain totally unemotional. Just recently, I met with a little girl who between the ages of three and five had been sexually molested by her pedophiliac father. Seeing the trauma that she is going through and seeing that in spite of all efforts, the courts have awarded full custody of that child to the pedophiliac father makes it very difficult not to get emotional.*

*What I want to emphasize is that the pictures that you have seen on the screen are not just isolated remote instances. We're talking about things that occur in Memphis, Tennessee. We are talking about a serious problem. I think the Constitution allows us plenty of leeway to deal with this problem. If our society is so weak, if we are a big dog that can be wagged by such a little tail in the name of constitutionality, our Constitution is in serious trouble.*

*Now let's get very technical. The "taken as a whole" standard must be applied in determining whether or not a thing is obscene. I believe that the government has an obligation to restrict expression in the form of obscenity. It*



† F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).

*is ridiculous to expect people to take the law into their own hands, as vigilantes have done in the past. To encourage Ku Klux Klan-type methodology in which individuals take it upon themselves to create the law and then enforce it by very unofficial means is to invite an approach to government that I do not think is good. There is nothing more destructive than the message that is communicated when the policeman walking on his beat walks right by the porno shops and does nothing about it. The message apparently is, "Well, whatever is going on in there is okay." To a young person seeing that, it is a very devastating message.*

## I
## INTRODUCTION

The constitutional law applicable to obscenity is a very broad subject made up of many sub-topics, most of which are extremely confusing to the uninitiated. Most of the confusion results from the two extremely diverse philosophical inclinations of those who approach the subject. Unfortunately, those who comment on the law are often controlled by strong feelings on the issue and strain to interpret the law to reflect their personal views. The entrepreneurs, on the other hand, are primarily motivated by a desire for profit, find their interests completely at odds with the law, and seek to avoid its application to them. For such entrepreneurs, the question is whether the risks attendant to their definance of the law so far exceed the potential for profit that they must modify otherwise profitable endeavors.

If as a complete outsider, one were able to fully view and comprehend what occurs in society in relation to the problem of obscenity, one might observe a loud clamor by the majority to do away with obscenity, and resistance by some elected officials, academics, and journalists to applying the enacted law. The comments of the latter group always include a disdain for obscenity, and the inevitable "but." That "but" is followed by innumerable explanations, all of which attempt to convince why the prevailing law ought not be.

Purveyors of obscenity, in the meantime, reap as much profit as possible. By open violation of the law, by acting as if there were no law, pornographers seek to create the impression that there *is* no law. Some of the better-financed and more sophisticated purveyors pretend obedience to the law by presenting well-structured interpretations of it and, as a result, attain an undeserved respectability. They sometimes succeed in convincing persons responsible for enforcement of the law that their contorted interpretation is valid. In this manner, they for all practical purposes enact laws to their liking, and securely ply their trade with little or no risk of incurring punishment. Perhaps the most cogent example of this perversion of law is seen by a close study of the constitutional rule that "works" must be "taken as a whole."

## II
## THE "TAKEN AS A WHOLE" STANDARD

Until 1934, whether or not a work could be condemned by the law as obscene was dependent on whether the work contained an isolated excerpt that

would qualify as obscene. This analytical approach was adopted from the landmark holding in *Regina v. Hicklin*.[1] The creator of a work was held responsible for making certain that no part of the whole employed a means of communication which, if removed from its context, would be subject to characterization as obscene. The fact that the excised portion of the work might, in context, be endowed with a meaning that would not offend the law was immaterial.

In 1934, the reasoning of the *Hicklin* rule was effectively rejected by the holding in *United States v. One Book Entitled Ulysses*.[2] In that case, Judge Hand established a rule that courts must view a book in its entirety and analyze it as a single entity, rather than lift a sentence here and a chapter there to conduct a non-contextual analysis. In 1957, in *Roth v. United States*, a case involving convictions for dealing in obscene books, circulars, and advertisements, the Supreme Court adopted Judge Hand's rule and stated that it was constitutionally mandated.[3] In authoritatively establishing the taken as a whole concept as constitutionally mandated, however, the Court offered little elaboration. The Court merely commented that not to apply the taken as a whole rule might condemn protected materials and restrict freedom of speech and of the press.

The taken as a whole rule thus has become a fundamental premise of obscenity law. That it has a salutary purpose is generally accepted and is not here criticized. Nonetheless, the rule has been widely abused. Far too little care has been taken to reserve its use to its intended purpose.

Present day application of the rule is based on the three-pronged test established in *Miller v. California*.[4] *Miller* requires that before materials can be adjudged obscene they must (1) depict patently offensive hardcore sexual conduct; (2) appeal to the prurient interest of an average person, applying contemporary standards; and (3) lack serious scientific, literary, artistic, or political value. All three of these tests must be applied separately; the failure of material to satisfy any one of the three prongs requires a finding of non-obscenity. In addition, the material in question must be taken as a whole when evaluating it in light of the second and third prongs. It is constitutionally impermissible to excerpt particular portions of this material and separately determine that that portion, segregated from the whole, may appeal to prurience or lack serious value.

There are various aspects to the problem that arise when applying the taken as a whole approach. It is commonly stated, almost in passing, that that which must be taken as a whole is a "work." It is often ignored, however, that a serious question exists as to how to define the term "work." Related problems are how to detect a sham attempt to endow a work with value and how to consider illustrations as a whole with textual material. A final issue is how to interpret the law when a work, although totally composed of obscene parts, possesses some "social importance" when taken as a whole. Courts rarely indicate clearly which of the separate aspects of the problem is salient to a given

1. [1868] L.R. 3 Q.B. 360.
2. 72 F.2d 705 (2d Cir. 1934).
3. 354 U.S. 476 (1957).
4. 413 U.S. 15 (1973).

determination. Resolution of all these issues, however, is dependent on the answer to a single underlying question, whether the challenged material constitutes a work.

The defenders of pornography tend to ignore the presuppositions on which the taken as a whole standard is based. The taken as a whole analysis first presupposes what the Supreme Court rearticulated in *F.C.C. v. Pacifica Foundation* that, "[o]bscenity may be wholly prohibited."[5] There is but one exception to this rule: *Stanley v. Georgia*[6] held that a person may possess obscenity *within* his or her *own* home. Mr. Justice Douglas aptly observed that this exception to the complete prohibition of obscenity merely gives one the right to create and consume obscenity entirely within the confines of one's home.[7] There is no exception to the rule of constitutional law that "obscenity may be wholly prohibited," however that proscribes possession of obscenity *under any circumstance* outside the home of the possessor. For example, works which are obscene cannot derive any constitutional protection by being bound together with other works which are not obscene. If material is obscene, nothing in the Constitution gives anyone the privilege of possessing it outside the home of the possessor. It is that simple. Those who philosophically find this a bitter constitutional pill to swallow, however, cannot accept this presupposition. They will use any possible argumentation to avoid being compelled to enforce, apply, or comply with that simple rule. In this process, the taken as a whole rule has been eroded.

In addition, the taken as a whole analysis presupposes that every item questioned on obscenity grounds must be reviewed separately and either be taken as a whole or denied being taken as a whole on an *ad hoc* basis. One cannot reason that because a particular type of publication is a work and hence can be taken as a whole, that all other publications of the same type are similarly to be taken as a whole. For instance, the mere fact that one magazine is very susceptible to being taken as a whole says nothing about whether any other magazine, or any other issue of the same magazine, is equally susceptible. Also, although most books can be taken as a whole, that does not, *a fortiori*, mean that every book can. What about a book which is a compilation of several other books, such as the *Reader's Digest Condensed Books*?

The Supreme Court has said little to resolve the problems raised by the taken as a whole test. A synopsis of the Supreme Court authority appears in *Miller v. California*, in which a footnote explains the rejection of the "utterly without redeeming social value" test. It reads as follows:

> "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . . ." *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). See *Memoirs v. Massachusetts*, 383 U.S. 413, 461 (1966) (White, J., dissenting). We also reject, as a constitutional standard,

5. 438 U.S. 726, 745 (1978).

6. 394 U.S. 557 (1969).

7. United States v. 12-200 Ft. Reels of Super 8mm Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting).

the ambiguous concept of "social importance." See *id.*, at 462 (White, J., dissenting).[8]

Encompassed in that brief footnote is a reaffirmation of all the principles necessary to clarify the taken as a whole test. The significance of that authority, however, is often overlooked because of a failure to pay careful attention to the words used and the facts underlying them.

The Supreme Court has adopted Justice White's dissent in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al. v. Attorney General of Massachusetts*,[9] as the prevailing statement of the governing law. Justice White stated:

> If "social importance" is to be used as the prevailing opinion uses it today, obscene material, however far beyond customary limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way. Well written, especially effective obscenity is protected; the poorly written is vulnerable. And why shouldn't the fact that some people buy and read such material prove its "social value"?
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> *A fortiori*, if the predominant theme of the book appeals to the prurient interest as stated in *Roth* but the book nevertheless contains here and there a passage descriptive of character, geography or architecture, the book would not be "obscene" under the social importance test. I had thought that *Roth* counseled the contrary: that the character of the book is fixed by its predominant theme and is not altered by the presence of minor themes of a different nature . . . .
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> In my view, "social importance" is not an independent test of obscenity but is relative only to determining the predominant prurient interest of the material. . . .[10]

The material under consideration in *Memoirs* was a book that unquestionably constituted a single work. Under Justice White's analysis, when the dominant theme of a book is obscene, the fact that some parts of the book have social importance is insufficient to make the otherwise obscene book non-obscene.

Although Justice White's analysis is now the law, some lower courts have failed to follow it. In *United States v. 35mm Motion Picture Film*,[11] for example, the court of appeals emphasized that the film in question clearly contained what, independently considered, would be obscene. Because the court concluded that the film possessed some social importance, however, the film was not declared obscene. Under the rule articulated by Justice White, the film would have been declared obscene as a whole irrespective of the finding that some of its parts had social importance.

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8. 413 U.S. at 25 n. 7.
9. 383 U.S. 413 (1966) [hereinafter cited as *Memoirs v. Massachusetts*].
10. *Id.* at 461-62 (emphasis added).
11. 432 F.2d 705 (2d Cir. 1979), *cert. dismissed*, 403 U.S. 925 (1971).

## III
## ABUSES AND MISAPPLICATION OF THE STANDARD

There has never been any dispute in the law that sham claims of value are ineffectual devices to insulate works from being declared obscene.[12] Shams are patent attempts to infuse a quality into a work that the work does not possess. Shams are achieved by dividing an obscene work into parts, labeling each part a work, and investing each such work with some nominal social value, so as to prevent the whole from being declared obscene. A photographic essay that is a work and that taken as a whole is obscene cannot be made non-obscene by an occasional, or even frequent, photograph of the Parthenon interspersed among the other photographs under the law. An obscene book remains obscene even if, on every page of the book, there is quoted a passage from the Holy Bible. The inclusion of these value-laden parts within the obscene whole makes the whole no less obscene.

### A. *Combining Text and Illustration*

To discern the constitutional inquiry necessary to determine whether illustrations are to be judged separately from textual materials which they accompany, one must refer to the *Kois* decision.[13] A portion of that case dealt with the conviction of an underground newspaper distributor for publishing a photograph of a nude man and a nude woman embracing. The distributor's claim was that the photograph must be taken as a part of the whole together with the article that it illustrated. The article had to do with a photographer arrested on obscenity charges. The photograph was shown as an example of the defendant-photographer's obscene photographs.

With reference to that fact situation, the Supreme Court held that, where illustrations are "rationally related"[14] to the textual material they accompany, the text and illustration must be considered as a whole, and each judged in the context of the other. In *Kois*, the Supreme Court found that, when the illustration and article were taken as a contextual whole, the material was non-obscene. Had the photograph been taken out of context with the article, however, it would have been declared obscene.

On the other hand, illustrations need not be taken as the part of any whole, other than itself, where the particular illustration is not rationally related to that of which it is claimed to be a part. The fact that an illustration appears in the same volume with, or even in immediate proximity to, written materials does not govern whether those illustrations and written materials must be combined to be taken as a whole. Each must be separately considered to determine whether the two are rationally related. For example, a photograph appearing as an illustration to an article was found not rationally related to the

12. United States v. Ginzburg, 338 F.2d 12 (3d Cir. 1964), *aff'd*, 383 U.S. 463 (1966).
13. Kois v. Wisconsin, 408 U.S. 229 (1972).
14. *Id.* at 231.

article in *Flying Eagle Publications, Inc. v. United States*.[15] The court there stated:

> Defendant's final exception is to the failure of the court to instruct that in determining whether the criticized illustration (an ink drawing) came within the statute, the jury must consider the article which it accompanied and take them only as a whole. *This is the appropriate rule in the case of a single unit, such as a book or other writing*. But a jury is not compelled to regard illustrations as controlled by textual material. 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.[16]

The *Kois* decision is instructive in determining what is a work and hence, what must be taken as a whole. In *Kois* there appeared in the defendant's underground newspaper an entire page devoted to poetry. One of those poems had been determined to be obscene by the court below. Based on the finding that the singled-out poem was obscene, the defendant was convicted, and the Supreme Court reviewed the proceedings. The Supreme Court determined that that poem was not obscene because it did possess requisite social value. The value the Supreme Court attributed to the poem, however, was in no way derived from the other poems that appeared on the same page. In other words, the poem was the work which was separately evaluated apart from the format in which it appeared. Presumably, if other poems on the same page had been challenged as obscene, each of those poems would likewise have been separately evaluated.

Significantly, the Court did not take the entire newspaper as a whole as would have been the case had it been a publication with a single dominant theme. Taking the newspaper as a whole would have insulated its parts from separate scrutiny. Because the newspaper was merely a "vehicle"[17] for the delivery of its separate contents, those contents could be judged separately from the vehicle. Without this rule, the law would be totally helpless. The only prerequisite for disseminating obscene materials would be to prepare them for distribution in a format where the obscene works were bound together in a single volume with valuable works. By this means, the law would have created a monster fully capable of destroying the constitutional principle that "obscenity may be wholly prohibited." As Mr. Chief Justice Burger, in commenting on rules of law generally, stated:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end re-

15. 285 F.2d 307 (1st Cir. 1961).
16. *Id.* at 308 (emphasis added).
17. 408 U.S. at 231.

sult is one that would never have been seriously considered in the first instance.[18]

Despite the rules set down in *Kois*, there are certain well-known monthly magazines, widely circulated in the United States today, that month in and month out bind together works which are obscene. These separate works are contextually non-interdependent. Yet, they crouch under the taken as a whole rule and piously claim protection. They pervert that salutary rule by pretending that it operates quantitatively rather than qualitatively. The rule was created to protect books from being contextually torn apart. No one, however, seriously would have intended that the rule would be logically extended, step by step, to provide the means by which obscene works within magazines could be insulated from application of the obscenity laws.

Direct confrontation by the courts with this precise issue has been infrequent. One case, and one case only, directly addresses the issue of whether a magazine that is eclectic must have all of its contextually non-interdependent parts combined for analysis under the taken as a whole rule.[19] The case holds that the rule requires these parts to be combined, but offers no logical explanation why. The court perceived the rule as quantitative only. On the other hand, every other court required to grapple with application of the taken as a whole rule to such magazines or tabloid newspapers has reached an opposite conclusion usually with a rather extensive explanation.[20] The only scholarly material on this subject supports the conclusion reached in these latter cases.[21]

The taken as a whole rule, its purpose and intention, is not difficult to discern or apply. The rule is well-founded and should be preserved. This rule, however, like several others relating to obscenity, has been misapplied, distorted, and corrupted. Consequently, many purveryors of obscenity simply ig-

18. United States v. 12-200 Ft. Reels of Super 8mm Film, 413 U.S. 123, 127 (1973).

19. Penthouse International, Ltd. v. McAuliffe, 454 F. Supp. 289 (N.D. Ga. 1978).

20. City of Belleville v. Morgan, 60 Ill. App. 3d 434, 376 N.E.2d 704 (1978); Louisiana v. Gambino, 362 So.2d 1107 (La. 1978); Scherr v. Municipal Court, 15 Cal. App. 3d 930, 93 Cal. Rptr. 556 (1971); People v. Quentin, 58 Misc. 2d 601, 296 N.Y.S.2d 443 (1968).

21. F. SCHAUER, THE LAW OF OBSCENITY 108-09 (1976). One holding does declare a particular underground newspaper to be "taken as a whole" in spite of the fact that it was a newspaper. United States v. Head, 317 F. Supp. 1138 (E.D. La. 1970). In reaching that conclusion, however, the court observed that the particular newspaper in question was "remarkably uniform in its approach" and "is more thematically integrated than most magazines or newspapers of general circulation . . . much like a novel or a film." *Id.* at 1144. The court stated that its ruling was not, in any way, to be applicable to anything other than the particular tabloid newspaper before it.

The *Thevis* cases also bear mentioning. United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973), *rehearing denied*, 419 U.S. 886 (1974); United States v. Thevis, 526 F.2d 989 (5th Cir. 1976). In those cases the Fifth Circuit applied the rule announced in Miller v. California, 413 U.S. 15 (1973), to convictions occurring prior to that decision. In question was the obscenity of several magazines. The court reviewed each magazine separately, finding some obscene and some not obscene.

These cases are often cited as support for the proposition that magazines must be holistically evaluated. A reading of the cases indicates, however, that the litigants never raised an issue as to whether the magazines should or should not be so evaluated. Furthermore, the critical factor in each determination was whether the magazines possessed "social importance" which provided them with the necessary "value" to escape denunciation as obscene. As discussed above, *Miller* eliminated the "social importance" test; thus, the critical factor in those cases is now a non-factor.

nore it. If challenged, they justify their conduct with an interpretation of the rule that is nonsense, but that is apparently widely accepted. The reason such abuse of the taken as a whole rule has been permitted to continue is that the bench and bar, with the support of legal academicians and journalists, is crowded with persons who are so philosophically opposed to the simple proposition that "obscenity may be wholly prohibited" that they will go to any lengths to avoid being bound by that declaration from the Supreme Court. Because such persons know that our system demands some legal justification for not following the plain statement of constitutional law by the Supreme Court, they seek to cloak their non-acceptance or disobedience in legal jargon. Although absurd, such jargon is accepted as the law because the persons espousing it are persons such as judges, whose status demands respect. The taken as a whole rule, like many others in the area of obscenity law, has fallen prey to this means of emasculation.

Those who refuse to accept the proposition that obscenity may be wholly prohibited, and the Supreme Court's interpretation of the Constitution, fail to recognize the difference between prurient and non-prurient forms of expression about and of sexual matters. The essential constitutional difference is that the former is accorded peripheral, if any, protection while the latter is provided the protection of the full force of law.[22] The latest comment on the necessity for differentiation between forms of expression was made by the North Carolina Supreme Court in *North Carolina ex rel. Andrews v. Chateau X, Inc.*[23] The defendants in that case were claiming that the holding in *Near v. Minnesota*,[24] a case dealing with expression not even arguably obscene, had some bearing on the law prohibiting obscenity. In rejecting this notion, the North Carolina Supreme Court stated:

> The difference between trying to limit that type of expression and obscenity has been recognized. "[I]t is manifest that society's interest in protecting this type of expression [erotic material] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Young v. American Mini Theaters*, 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L.E.2d 310, 326 (1976). We agree with Justice Stevens when he said: "It seems to me ridiculous to assume that no regulation of the display of sexually oriented material is permissible unless the same regulation could be applied to political comment." *Smith v. United States*, 431 U.S. 291, 318-319, 97 S. Ct. 1756, 1773 (1977) (Stevens, J., dissenting on other grounds) (additional citation omitted).[25]

Anyone attempting an analysis of the taken as a whole rule who simultaneously and subtly rejects the fundamental premise of constitutional law that obscenity is due no constitutional protection sets out to achieve the impossible. On the other hand, attempting such an analysis with full recognition, if not ac-

22. F.C.C. v. Pacifica Foundation, 438 U.S. 726, 743 (1978).
23. 296 N.C. 251, 250 S.E.2d 603 (1979).
24. 283 U.S. 697 (1931).
25. 296 N.C. at 251, 250 S.E.2d at 612.

ceptance, of this basic tenet will pose no difficulty in either discerning or applying the rule.

## CONCLUSION

The first step in applying the taken as a whole rule is to make sure that that to which it is applied is a single whole. It is impermissible, if not impossible, to take as a whole that which is not a whole. Furthermore, no matter how closely together they are stapled, two wholes never equal one whole. For parts to be taken as a whole there must be a single and contextually interdependent dominant theme connecting them. The dominant theme must be legitimately recognizable. It is impermissible to concoct a theme connecting diverse material where none apparently exists in an attempt to make more than one whole into a single whole. Finally, a single whole can have social importance and still be obscene.

These rules of thumb, if applied, preclude perversion of the constitutionally mandated taken as a whole rule into a rule that permits obscenity outside one's home so long as it is published and bound together with a sufficient *quantity* of non-obscene material. Constitutional law does not require such a quantitative approach to the taken as a whole rule. In fact, the conclusion dictated by the quantitative approach is antithetical to the constitutional doctrine that obscenity may be wholly prohibited.

No person serious about giving substance to that fundamental tenet of constitutional law interprets the taken as a whole rule in a quantitative fashion. Those persons who are more interested in avoiding application of the law, however, often use a quantitative analysis as a means of legitimizing what would otherwise be condemned. The result of applying a quantitative analysis is creation of a rule that obscenity may be wholly prohibited only if it is not bound together with a sufficient amount of non-obscenity. The Supreme Court has rejected such an analysis. The rule established by the Court is that material questioned as obscene must be evaluated apart from other works bound in proximity to it, unless the material is a part of, or contributes to, a single dominant theme, and appears in the context of a work. If an illustration appears in proximity to and in context with written materials, it cannot be evaluated apart from the written material if it is rationally related to that material. The mere fact, however, that an illustration is included physically as part of a volume or publication does not require that it be judged along with the physical unit in which it appears.

A thing is not taken as a whole or denied being taken as a whole because it is or is not a sham. As used in obscenity law, sham refers to whether claimed value for a conceded work is real or only for the purpose of litigation. The same is true of feigned claims of non-prurient appeal. It is meaningless to say, for instance, that a magazine must be taken as whole because it is not a sham. The only determinant of whether a thing must be taken as a whole is whether it is a whole. Thus, a whole "sham" must be taken as a whole.

Finally, publications that bind together in the same volume contextually

non-interdependent works, some of which are obscene and some of which are not obscene, are mere "vehicles" for obscenity. The assertion that such obscene works must be insulated from laws prohibiting obscenity in order to protect the non-obscene communication bound therewith is hollow indeed. Obscenity entrepreneurs who bind the obscene with the non-obscene in a single volume and seek to justify the distribution of the volume with perverted interpretations of the taken as a whole rule perhaps can be excused in the name of ingenuity. Those in a position to know better, however, are justly faulted for not declaring such arguments unmeritorious. Even prosecutors who are sympathetic to laws prohibiting obscenity are often lax and fall directly into the trap set by the entrepreneurs.[26] Sometimes juries convict and courts affirm convictions in spite of this benign carelessness, but more often juries convict and courts reverse the convictions. Obscenity is thereby legitimized. Hopefully, this trend will be reversed by a new awareness of the law.

26. It is commonplace for indictments to be returned alleging that a particular issue of a particular magazine is obscene. For instance, an indictment might read that the January 1978 issue of *Penthouse* magazine is obscene. Obviously, this could not be true. That issue of *Penthouse* includes an article entitled "Why Carter Has To Give Away The Panama Canal In Order To Sell Out Taiwan." No interpretation of obscenity law ever known would permit that article to be declared obscene. The same issue, however, of the same magazine includes numerous photographs and photographic essays depicting lewd exhibition of the genitals which, under a relaxed interpretation of obscenity law, are obscene. However, an indictment charging the entire magazine as obscene forces an attempt at the impossible, i.e., combining the obscene works with the non-obscene works for a single evaluation of the entire volume. A proper indictment would charge, for instance, that the defendant distributed obscenity, to wit, an article entitled "The Sex Fantasists," using pages 171-77 of the January 1978 issue of *Penthouse* magazine as the vehicle for distribution thereof. Only one with tongue in cheek would claim that application of the governing law would yield anything other than an obscenity declaration as to that article. One might philosophically believe that the law ought not declare the article obscene, but, of course, that is a different subject.