

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 739

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House Judiciary Subcommittee on Courts

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Main Capitol Building
Room 60, East Wing
Harrisburg, Pennsylvania

Wednesday, February 18, 1998 - 9:30 a.m.

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BEFORE:

Honorable Daniel Clark, Majority Chairperson

IN ATTENDANCE:

Honorable Robert Reber
Honorable Thomas Armstrong
Honorable Kathy Manderino
Honorable Harold James
Honorable LeAnna Washington

KEY REPORTERS

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ALSO PRESENT:

Karen Dalton, Esquire
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Judy Sedesse
Majority Administrative Assistant

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(Written testimony submitted and attached hereto on behalf of: David Horowitz, The Media Coalition, Inc. Pennsylvania District Attorneys Association Hilary B. Rosen, Recording Industry Ass'n of America)	

1 CHAIRPERSON CLARK: Good morning.
2 This is the time and place advertised for the
3 Judiciary Committee's Subcommittee on Courts'
4 hearing on House Bill 739, which is prime
5 sponsored by Representative Armstrong from
6 Lancaster County.

7 I believe before we get into the
8 nuts and bolts of the legislation, what we will
9 do first is receive the testimony from
10 Representative Armstrong, the prime sponsor, and
11 then question him with regard to the content and
12 intent of this legislation.

13 By the way, I'm Representative
14 Daniel Clark. I'm the chairman of the Judiciary
15 Committee's Subcommittee on Courts. And I'm a
16 representative from the 82nd Legislative
17 District.

18 Representative Armstrong, good
19 morning.

20 REPRESENTATIVE ARMSTRONG: Good
21 morning. Thank you, Mr. Chairman.

22 I appreciate the opportunity to
23 offer some comments regarding House Bill 739. I
24 sponsored this bill last session -- and it was
25 known as House Bill 881 at that time -- and this

1 session, because I fear our Pennsylvania
2 children, that they inhabit a world which is
3 much coarser and meaner than the one in which we
4 grew up.

5 And quite frankly, you know, just as
6 a personal note, watching my own TV during prime
7 time, even the advertisements, sometimes it's
8 very difficult to shield one's children away from
9 this world that we are going up in.

10 The time during which they can
11 actually be children is growing far too short.
12 Exposed to influences and images which used to be
13 available only in adulthood, they grow old before
14 their time.

15 That is why I believe we need to
16 tighten the law which prevents obscene works from
17 getting into the hands of children. The House
18 passed my bill last session by a vote of 115 to
19 77. I introduced it again this session because
20 the Senate took no action and because there is
21 still a need to crack down on those who would
22 like to try to steal a child's innocence.

23 My bill amends the crimes code in
24 three ways. First of all, it puts more bite into
25 the penalties for distributing obscene materials,

1 be they books, magazines, films, or employing
2 children in obscene works.

3 No. 2, it at allows juries to apply
4 a local standard when applying contemporary
5 community standards in order to determine whether
6 a sexually explicit film, magazine, or other work
7 is actually obscene.

8 No. 3, it deletes the word
9 "educational" from the three-pronged definition
10 of obscenity: The subject matter, taken as a
11 whole, lacks serious literary, artistic,
12 political, educational, or scientific value.

13 Last session, before the full House
14 voted on my bill, I described in detail First
15 Amendment jurisprudence as it related to speech
16 in general and to obscenity in particular. I am
17 not going to repeat all of this this morning,
18 except to remind the members that obscenity is
19 not protected by the First Amendment and neither
20 is child pornography; states, under their police
21 power, can outlaw obscenity; and No. 3, the U.S.
22 Supreme Court, in the case of Miller v.
23 California, set down guidelines for states to
24 follow when outlawing obscenity.

25 My bill meets the legal standard for

1 regulating obscenity as an articulated -- or as
2 articulated by the U.S. Supreme Court in the
3 Miller case. Each of the three changes I have
4 proposed pass constitutional muster.

5 Further, my bill does not affect
6 cable TV, radio, or television.

7 Once again, thank you, Mr. Chairman,
8 for focusing the subcommittee's attention on this
9 important matter.

10 Before I actually wrap up, I would
11 also like to share with you some of the other
12 states' Supreme Court decisions that have ruled
13 in favor of the local community standard.

14 No. 1 would be the Virginia Supreme
15 Court in Price v. Commonwealth. And it's quoted
16 in this case that it's difficult, if not
17 impossible, for a Virginia jury to formulate a
18 statewide standard of obscenity, for our state
19 comprises communities with a vast diversity of
20 lifestyles. Materials which do not offend the
21 community standards of our metropolitan areas
22 might will be regarded as obscene from standards
23 of some of our rural communities.

24 In the Florida Supreme Court in
25 Davison v. State, they quoted that applying a

1 statewide standard in a state as diverse as
2 Florida might result of suppression of material
3 acceptable to the metropolitan area, such as
4 Miami Beach or Jacksonville, or in exhibition of
5 materials offensive in a community where
6 standards differ from those metropolitan areas.

7 To paraphrase the Court in Miller,
8 it is neither realistic nor constitutionally
9 sound to read the First Amendment as requiring
10 that the people of Marion County or Bay County
11 accept public depiction of conduct tolerable in
12 Miami Beach or Key West or Jacksonville. Each is
13 its own community with standards which may or may
14 not differ.

15 In the Missouri Supreme Court in
16 McNary v. Carlton, In our opinion, the diverse
17 attitudes and desires of different communities in
18 Missouri demands such a different result. We
19 doubt that residents in St. Louis County would
20 view a question of obscenity in the same light as
21 residents in Dade County. The residents of each
22 should be accorded the privilege, by utilization
23 of jury system within the Miller guidelines, of
24 determining themselves what materials should be
25 considered obscene by the average person in their

1 community.

2 In the Utah Supreme Court case with
3 State v. International Amusements, they quoted,
4 It is not reasonable to view otherwise since, as
5 a practical matter, how could any statewide
6 standard applied by a St. George, Utah, jury, for
7 example, be the same statewide standard applied
8 by an Ogden, Utah, jury?

9 The Utah Supreme Court went on to
10 say the case of Hamling v. U.S. had this to say,
11 "A juror is entitled to draw on his own knowledge
12 of the views of the average person in his
13 community or vicinage from which he comes for
14 making the required determination just as he is
15 entitled to draw on his knowledge of the
16 propensities of a reasonable person in other
17 areas of the law.

18 In the Louisiana -- and this should
19 be my last quote here. The Louisiana Supreme
20 Court in State v. Amato, Furthermore, in Miller
21 and the cases following it, the U.S. Supreme
22 Court has made clear that a state may choose to
23 define obscenity offense in terms of contemporary
24 community standards without further
25 specifications as Louisiana has done, thus

1 permitting juries to rely on the understanding of
2 the community which they come as to contemporary
3 community standards. Or a state may choose to
4 define the standards in more precise
5 geographical terms, as has been done in other
6 jurisdictions.

7 Finally, I just want to make a note
8 that we are going to hear from a diverse group of
9 organizations and groups of people today that are
10 going to raise, in my opinion, what I believe is
11 smoke and mirrors and try to diffuse and confuse
12 the issue. I think we have many solid principles
13 and arguments that have been stated in other
14 courts that have, as I have said before, have
15 upheld the Miller case and the constitutional
16 muster.

17 I also want to be on record at this
18 point that I have accepted a challenge at this
19 point to look into those states that have local
20 contemporary community standards and if they are
21 experiencing the problems that some of the folks
22 that oppose this bill say that would happen in
23 Pennsylvania. And quite honestly and frankly,
24 Mr. Chairman and committee, that is not the
25 case.

1 So I ask for you not to be confused
2 by the prospect of having 60-some juries, that
3 there will be 60-some standards. That is just
4 simply not so. So with that, Mr. Chairman, I
5 appreciate the opportunity to bring this before
6 you.

7 CHAIRPERSON CLARK: Thank you very
8 much.

9 Before we ask you some questions, I
10 would like -- we have had two additional members
11 join our panel. And I would like them to
12 introduce themselves, beginning at my right.

13 REPRESENTATIVE REBER: Thank you,
14 Mr. Chairman. I'm Representative Bob Reber from
15 Montgomery County.

16 REPRESENTATIVE MANDERINO: I'm
17 Representative Kathy Manderino, Philadelphia
18 County.

19 CHAIRPERSON CLARK: Now,
20 Representative Armstrong, my understanding of the
21 gist of this is that the Miller guidelines will
22 stay in place. However, when applying those
23 guidelines or interpreting to what situation
24 those guidelines apply, that would be done on a
25 community-by-community basis?

1 REPRESENTATIVE ARMSTRONG: According
2 to this bill, yes, sir.

3 CHAIRPERSON CLARK: Now, you
4 indicate that that standard would be set from the
5 political subdivision from which people are drawn
6 to serve as jurors in a criminal proceeding. And
7 my understanding of that, primarily from rural
8 Pennsylvania, would be that that is by county.

9 REPRESENTATIVE ARMSTRONG: That's
10 correct, mostly.

11 CHAIRPERSON CLARK: Mostly?

12 REPRESENTATIVE ARMSTRONG: Yes.

13 CHAIRPERSON CLARK: Do you
14 envision -- let's get into a larger county like
15 Montgomery where they would have various -- some
16 densely populated places, some rural places.

17 Would you envision that that
18 standard would be set by Montgomery County
19 jurors, or would that go down into townships to
20 set those standards?

21 REPRESENTATIVE ARMSTRONG: There is
22 no -- to my understanding, there would be no
23 attempt to actually sit down and write
24 standards.

25 CHAIRPERSON CLARK: Let's say that

1 you have a place that's open in a rural township
2 in Montgomery County.

3 Would the jurors come from
4 Montgomery County as a whole, or would they come
5 from that township where the problem has
6 occurred?

7 REPRESENTATIVE ARMSTRONG: They
8 would be coming from the county as a whole --

9 CHAIRPERSON CLARK: As a whole.

10 REPRESENTATIVE ARMSTRONG: -- as
11 juries are normally picked.

12 CHAIRPERSON CLARK: And you
13 indicated that this bill would not regulate
14 cable, radio, and TV. However, it would regulate
15 movie houses and theaters?

16 REPRESENTATIVE ARMSTRONG: It does
17 not regulate any area that deals with interstate,
18 because there are other federal regulations that
19 would regulate those. But it does have the
20 opportunity to regulate those areas that are
21 within those county confines.

22 CHAIRPERSON CLARK: And in your
23 research and talking with other states, has there
24 ever been any attempt by a local municipality to
25 zone certain -- these activities into certain

1 areas?

2 REPRESENTATIVE ARMSTRONG: Well, we
3 actually have in Pennsylvania where they started
4 to do such a thing. In Delaware County, we have
5 community -- there may be a couple of them; but I
6 know there is one community that has passed a
7 series of four ordinances locally.

8 CHAIRPERSON CLARK: And those
9 ordinances would regulate the type of activity or
10 material. But I was wondering if you have any
11 information on whether any township has tried to
12 zone these activities into one area to keep them
13 away from schools, hospitals, parks, places like
14 that.

15 REPRESENTATIVE ARMSTRONG: I can get
16 those ordinances for you. I think what one of
17 those ordinances probably does show is that it
18 cannot be within a certain hundred or thousand
19 feet of certain types of establishments. So to
20 that degree, yes, it would be pushing them into
21 certain neighborhoods.

22 CHAIRPERSON CLARK: I have no
23 further questions.

24 Representative Reber.

25 REPRESENTATIVE REBER: Thank you,

1 Mr. Chairman. Good morning, Representative
2 Armstrong.

3 Just a question, whenever this topic
4 comes up, I'm sort of reminded of the statement
5 of the former justice Potter Stewart in the case
6 *Yakabellis* (phonetic) v. Ohio back in 1962 when
7 he was trying to define obscenity and something
8 to the effect that I don't know if I can define
9 it, but I know it when I see it.

10 And I guess that overriding concern
11 or that overriding principle also always applies
12 to me when we are looking for something that is
13 regulated on a statewide basis vis-a-vis the
14 crimes code and then we try to narrow it down to
15 the local interpretation concept at least we are
16 talking about here.

17 My question is this: When the Court
18 in *Miller* was talking about contemporary
19 community standards, it obviously, at least in my
20 opinion, was talking about something that is
21 evolving, that has growth to it, that can be
22 expansive.

23 And if my recollection of
24 constitutional law is correct, I think that was
25 sort of consistent with Justice Brandeis and his

1 idea of a growing, expanding concept behind the
2 Constitution itself, which would allow for, you
3 know, this type of contemporary viewing of things
4 and that the expansiveness of the document when
5 enacted in the late 1700s certainly is able to
6 grow as the times change. And I suspect that's
7 how the phraseology found its way into the Miller
8 case.

9 But would you tend to agree with
10 that at least?

11 REPRESENTATIVE ARMSTRONG: Yeah.
12 The Miller case actually was based upon a
13 nationwide standard. And California brought a
14 case that said that they felt that they should be
15 able to have their own standard as a state. And
16 so the Supreme Court decided that they were
17 right, that they had the opportunity -- they
18 should have the opportunity to determine what was
19 obscene in their own state.

20 So the U.S. Supreme Court took it
21 away from being a nationwide standard to a state
22 standard and also at that time opened the door
23 for the states themselves to determine can we
24 take it a step further down to the local level,
25 local county level.

1 REPRESENTATIVE REBER: Right. And
2 that's my understanding. So I don't think
3 there's really a serious argument that if it can
4 meet constitutional muster in the manner in which
5 is it implemented and written, it certainly can
6 have that gradation down, if you will.

7 REPRESENTATIVE ARMSTRONG: And you
8 are right to the extent when we talk about
9 contemporary community standards. Today an adult
10 bookstore per se may be found to be obscene, and
11 they will close it down. But maybe a year from
12 now maybe the community -- I know that's rather
13 far reaching; but maybe a year from now it would
14 be determined to not be obscene.

15 REPRESENTATIVE REBER: I guess the
16 other angle, at least looking at this from a
17 statewide standpoint -- and that's the position
18 we all sit, you know, frankly -- is the
19 evolvement of this over the years and the fact
20 that we are dealing with, you know, different
21 works of art in different forms that take on
22 ramifications of interstate commerce, of moving
23 back and forth, don't necessarily seem to be
24 reflected on -- and I see you use the word
25 "political subdivision."

1 Is political subdivision supposed to
2 be equated to county, or is it breaking it down
3 to our municipalities, which at that point we
4 are into in excess of 2,600 different
5 jurisdictions?

6 REPRESENTATIVE ARMSTRONG: No. The
7 political subdivision from wherein the juries are
8 pooled from. So in most cases, that would be a
9 county from where the jury is pooled from.

10 REPRESENTATIVE REBER: In
11 Pennsylvania, isn't that always the way it's on,
12 a countywide basis?

13 REPRESENTATIVE ARMSTRONG: Right.
14 The reason I say in most cases is because I don't
15 know -- I guess there may be a case out there
16 where we have two counties that share the same
17 judges and juries. So if that's the case, it
18 would be two counties in that case.

19 REPRESENTATIVE REBER: That still
20 being said, let me ask this question. Would we
21 not be better off saying community means the
22 county or counties from which the persons are
23 drawn to serve, because -- and I may be wrong.
24 But I'm not familiar with a scenario where we
25 went out and attempted to develop a jury pool

1 from a municipality only. I always thought that
2 it was at least on a singular county or on a
3 multicounty fashion.

4 I'm just wondering if there might
5 be some ambiguity, some challenge, some
6 potential pitfalls or problems that might
7 ultimately flow in an appellate determination
8 following such a determination made with that in
9 statute.

10 So I just sort of throw that out.
11 It's not something that I have given a lot of
12 thought to. It sort of jumped out at me as you
13 were speaking and I was refreshing my
14 recollection to your legislation.

15 REPRESENTATIVE ARMSTRONG: I'm not
16 opposed to that. I would couch it in the terms
17 that Legislative Reference Bureau, that's
18 probably their language that they gave me. But
19 if we feel for our own clarity that we need to
20 say counties, we could do that.

21 REPRESENTATIVE REBER: Now, I have
22 much, much more comfort that it's not your words
23 but those of reference bureau. In my 18 years of
24 experience, I have certainly not relied upon
25 their authoritative worth on everything.

1 REPRESENTATIVE ARMSTRONG: Right.

2 REPRESENTATIVE REBER: All right.

3 Very good. Thank you very much. Thank you, Mr.
4 Chairman.

5 CHAIRPERSON CLARK: Thank you,
6 Representative Reber.

7 And I think that we will probably
8 change that word to a county, because I live in
9 a -- in a couple two-county judicial districts
10 and the place of the offense is the county that
11 they always draw the jurors from.

12 In your discussions with
13 Representative Reber, you brought up a point that
14 interested me. Let's say that you have -- let's
15 say you have a person who wants to establish an
16 adult bookstore and we have passed this
17 legislation and the community standards have
18 started to evolve.

19 How does that gentleman go about
20 testing the community standards without
21 subjecting himself to criminal prosecution and
22 having a criminal record?

23 And let's say that he does risk
24 that and he's permitted to put in his adult
25 bookstore.

1 What happens two years later? Can a
2 district attorney feel that maybe the community
3 has change? And if there's a new district
4 attorney and he wants to bring another
5 prosecution, is there a problem here, you know,
6 No. 1, establishing a business and, No. 2, being
7 a risk that the community standards will change?
8 And is that just a risk that someone is going to
9 have to bear?

10 REPRESENTATIVE ARMSTRONG: I would
11 assume it is an inherent risk. As deplorable as
12 obscenity can be and as distasteful as it can be,
13 I believe that, first of all, in order to bring a
14 case, it has to violate prurient interest. And
15 the Miller test is a rather, rather liberal test.
16 So we are not talking about something that can be
17 considered to be conservative versus liberal. We
18 are looking at a very liberal test with the
19 Miller test.

20 If I were such an individual who
21 owned an adult bookstore and I wanted to protect
22 my interests, I would do everything that I could
23 to prevent any offense to children, getting back
24 down to some of my arguments dealing with
25 children. I would make sure that I do not have

1 any material in my store that dealt with child
2 pornography, anything that could create that kind
3 of an attitude from the district attorney to come
4 in.

5 We are always going to have, in my
6 opinion -- and the laws are there to protect
7 pornography to a certain extent. So we are
8 always going to have that amongst consenting
9 adults.

10 But again, once we get into children
11 and we get into an obscenity which is a much
12 more flagrant and deplorable activity, then I
13 think one does risk that. But again, should an
14 adult bookstore want to look at those things, I
15 think they need to do whatever they can to
16 protect themselves from having those kinds of
17 materials that could cause a district attorney
18 to come in.

19 CHAIRPERSON CLARK: We thank you
20 very much, Representative Armstrong. And you
21 are certainly welcome to join us here on the
22 panel.

23 The next individual to testify is
24 Joseph C. Madenspacher. You can correct the
25 pronunciation of your name, if you would like.

1 MR. MADENSPACHER: You pronounced it
2 correctly.

3 CHAIRPERSON CLARK: He is the
4 District Attorney of Lancaster County. I
5 certainly want to welcome you this morning and
6 welcome your comments on House Bill 739.

7 MR. MADENSPACHER: Thank you, Mr.
8 Chairman and members of the committee.

9 Now, I'm here speaking as the
10 District Attorney of Lancaster County. My
11 association is opposed to this particular bill.
12 The Pennsylvania District Attorneys Association
13 is opposed to this.

14 And at our summer --

15 CHAIRPERSON CLARK: If you would
16 like to address -- we have a copy of the
17 District Attorneys Association's one-page letter.
18 And if you want to address some of those
19 concerns that they have, we would certainly
20 appreciate that.

21 MR. MADENSPACHER: Okay. I will do
22 that at the end of my prepared testimony, which
23 is not particularly long.

24 I'm here basically to speak on
25 behalf of two out of three amendments to this

1 particular bill and primarily with the areas that
2 deal with more my job, the criminal law
3 enforcement, which is, first, the amendment
4 dealing with the definition of changing what a
5 community is and, second, in which certain
6 violations of the act have the offense grading
7 raised to a felony of the third degree from a
8 misdemeanor of the first degree.

9 In any obscenity prosecution, it's
10 necessary to prove, among other things, that the
11 average person applying contemporary community
12 standards would find that the subject matter,
13 taken as a whole, appeals to the prurient
14 interest. Now, currently when we apply
15 contemporary community standards, community means
16 the state. House Bill 739 amends this to have
17 community mean the political subdivision from
18 which persons are drawn to serve as jurors in a
19 criminal proceeding.

20 If I could go off a little bit about
21 this, I think maybe Representative Reber is
22 correct that this is not the most articulately
23 drafted language. I think we are probably really
24 dealing with we have the county level.

25 Virtually -- there are 67 counties

1 in the state, and there are maybe like 64
2 judicial districts. There are some counties who
3 share a judge and they have a judicial district.
4 I'm not totally sure how they work, but those
5 counties have their own district attorneys.

6 So in a certain judicial district,
7 it might be two district attorneys and only one
8 judge. I believe that they still draw their
9 jurors from the county level, like Montour County
10 and another county. I don't think they pool -- I
11 may be wrong; but I don't think they pool those
12 jurors.

13 REPRESENTATIVE REBER: You are
14 correct.

15 MR. MADENSPACHER: So I think maybe
16 if it's rewritten to have that the county level
17 that that would probably reflect more accurately
18 what we are trying to do here.

19 The definition of what's a
20 community, I guess, was first done in the case of
21 Miller v. California where Miller, the Supreme
22 Court rejected the notion of a national community
23 standard and held that the definition of
24 community as the state of California was
25 constitutionally adequate.

1 I am just diverging a little bit
2 from my notes. I think that a lot of the states
3 have taken a conservative viewpoint at this
4 particularly point: Since the U.S. Supreme Court
5 said that the state was a good community, we'll
6 stick with the state. And a lot of them,
7 including Pennsylvania, have not gone on to
8 further redelegate or further more localize this
9 particular definition of community.

10 But there are a number of quotes
11 that were made in Miller that I think are
12 favorable to the idea of having a more local
13 standard. The first one being, "Our nation is
14 too big and too diverse for this Court to
15 reasonably expect that such standards should be
16 articulated for all 50 states."

17 Two, "The adversary system, with lay
18 jurors as the usual ultimate fact finders in
19 criminal prosecutions, has historically permitted
20 triers of fact to draw on the standards of their
21 community, guided always by limiting instructions
22 on the law. To require a state to structure
23 obscenity proceedings around evidence of a
24 national community standard would be an exercise
25 in futility."

1 Third -- and I believe
2 Representative Armstrong alluded to this -- the
3 Court said, "It is neither realistic nor
4 constitutionally sound to read the First
5 Amendment as requiring that the people of Maine
6 or Mississippi accept public depiction of
7 conduct found tolerable in Las Vegas or New York
8 City."

9 Miller does not mandate the state
10 standard. It simply states that this was a
11 community that would pass constitutional muster.
12 I, therefore, believe that each state is free to
13 provide its own definition of community. I think
14 just like the United States of America,
15 Pennsylvania is a big and diverse state. What's
16 acceptable in Philadelphia or Pittsburgh may not
17 be acceptable elsewhere.

18 I think the practical effect of this
19 amendment means that each county may apply its
20 own community standard of what is or what is not
21 a community. Since the basic criminal
22 prosecution community in Pennsylvania is a
23 county, I feel it would be entirely appropriate
24 for the legislature to adopt the definition set
25 forth in House Bill 739.

1 If I can just digress a little bit
2 from my prepared testimony, I think this is the
3 lowest level that you can get in dealing with
4 community standards. I think that a
5 prosecutorial unit, whether it's a judicial
6 district, which we don't have in this state as
7 such, but there are other states that actually
8 who have judicial districts where four counties
9 would pool their jurors.

10 I think this is probably the lowest
11 point that you can get in establishing a
12 community. You can't go down further to city or
13 borough or township. This, I think, is a
14 well-defined area of the criminal law, and I
15 think it's probably the lowest level we can get
16 in dealing with community.

17 Jurors have a tough job to do. And
18 I think requiring them to apply standards that
19 encompass areas of this Commonwealth that they
20 may know little or nothing about makes a
21 difficult job harder.

22 The second amendment I deal with
23 just basically increases all of the gradings from
24 misdemeanors of the first degree to felonies of
25 the third degree. I don't have a whole lot to

1 say about this. This enhancement (1) would
2 leave more opportunities for the sentencing
3 judge to fashion an appropriate sentence and
4 (2) would send a message that this is a serious
5 offense.

6 Although legally the distinction
7 between misdemeanors and felonies has been
8 largely eliminated -- at least in Pennsylvania, I
9 think it has been -- regarding to what impact a
10 conviction of a misdemeanor or felony can have on
11 you, however, it has not to the public. The
12 public still considers a misdemeanor to be a
13 minor crime and a felony to be a serious one.

14 Now, I read the District Attorneys
15 Association comments, and I think they have four.
16 No. 1, it would require 67 protracted and
17 expensive trials, one for each county, on the
18 issue of community standards.

19 Well, the funny thing about these
20 trials is even when you have a trial, the trial
21 is simply there to determine whether or not the
22 person who is charged with this crime is guilty
23 or not guilty. When it's all said and done, the
24 jury doesn't exactly publish standards. I mean
25 we could really have 67 trials in 67 different

1 counties and we still don't have a clear
2 definition of what the standards are.

3 So I mean I'm not really sure what
4 the point of that particular argument is. We
5 don't go to trial where the jurors give a list of
6 things as to what they feel are community
7 standards. It's a case-by-case basis.

8 No. 2, the judicial determination of
9 community standards is not entirely objective,
10 being affected by the subjective perspectives of
11 the judge or the 12 individual jurors.

12 Well, I think that's always true.
13 It's -- I don't think it's just in this area.
14 The jurors somewhere along the line, their own
15 lives or their own experiences -- in fact, the
16 courts generally -- the judge generally tells
17 them in their instructions that they are not
18 supposed to come in here and forget what happened
19 to them all the rest of their lives, that their
20 experiences are useful. So obviously, you are
21 always going to get a certain amount of
22 subjective determination depending upon whatever
23 jurors are used.

24 It will lead to differing standards
25 in neighboring counties.

1 Well, again, you know, I think that
2 what we are dealing with here is we are not
3 really setting standards. We are just trying
4 individual defendants on a given crime to
5 determine whether they are guilty or not guilty.
6 We are not out there, in the sake of the word,
7 setting standards.

8 When we talk about the community
9 standards, what we want is to give the jurors
10 some sort of guidance on the one particular case
11 that they are dealing with. We are not asking
12 them to set the standards for all future conduct
13 and for all other individuals that come into
14 Lancaster County or York County.

15 Even as we do now dealing with the
16 state standard, if these cases are tried under
17 the state standards, the jurors basically have
18 one of two things to do. They find the person
19 guilty, or they find them not guilty.

20 By virtue of finding them not
21 guilty, they have concluded that whatever -- this
22 particular motion picture or book or whatever it
23 was, was not obscene. By finding them guilty,
24 they found that it has; but that doesn't mean the
25 next book over there is going to be ruled the

1 same way or the next film is going to be viewed
2 the same way.

3 And I think that's, for instance --
4 the next point about this is that, you know, we
5 are really not going to have 67 different
6 standards. You are just not. Again, the point
7 is we are not publishing standards. We are
8 determining guilty or not guilty in a particular
9 case.

10 And four, I think the final thing is
11 that there are constitutional concerns to that.
12 I'm -- the Pennsylvania Supreme Court has never
13 ruled on what is the proper community. I'm
14 certainly not going to ever predict what they do.
15 Anytime you pass a statute, there's always the
16 possibility it's going to be declared
17 unconstitutional. But I don't feel that with
18 the -- under the Miller standards or a number of
19 other states have held this particular level of
20 local community or county level is an
21 appropriate -- is an appropriate standard and is
22 an appropriate community.

23 So I just don't really feel that
24 that is a -- it's a concern; but I don't think
25 it's an overwhelming concern.

1 CHAIRPERSON CLARK: Thank you very
2 much. Are there any questions?

3 Representative Reber.

4 REPRESENTATIVE REBER: I can't
5 understand why this topic has titillated my
6 desire to discuss it; but in any event, we will
7 pursue it a little bit further.

8 I'm always a little concerned about
9 this particular topic and the way it could unfold
10 and then the increasing of the penalties. And I
11 guess my concern always comes about if we have a
12 rather zealous police investigator, we have a
13 rather zealous prosecuting attorney, we have a
14 rather zealous judge, and we come from a rather
15 conservative area where the jury pool may be as
16 disposed as all these other individuals that I
17 have described, that they have concerns relative
18 to certain sexually explicit type things that
19 appear on your HBOs and some of your adult
20 channels on TV.

21 And in their mind, they may make
22 some determination individually. And, of course,
23 it would come out in the course of their public
24 official and public duties that they would have
25 to carry out throughout the judicial process,

1 that it, in fact, falls under, you know, one of
2 the existing obscenity statute sections of the
3 current law.

4 And I guess I get a little concerned
5 when we are always enhancing, which seems to be
6 an ongoing thing in the General Assembly -- at
7 least it's been in vogue over the last number of
8 years to increase penalties that have been on
9 the books in many instances from time in
10 memorial.

11 And I'm just wondering what kind of
12 risk we run if someone just happens to have in
13 his house the opportunity on some of these free,
14 unblocked stations and there are some
15 neighborhood children there visiting with the
16 children of the family in question and it could
17 be construed that the adult owners of that
18 property were in some way, shape, or form
19 disseminating or lending or otherwise showing
20 this.

21 What kind of safeguards do you feel
22 we have under our current system as we know it?
23 And with those kind of situations out there or
24 the potential for that to happen, what kind of
25 safeguards do you think we have to prevent, you

1 know, what would otherwise be a runaway railroad,
2 if you will, with -- if this type of mind-set is
3 set up?

4 And obviously, it's being rather
5 stretched; but when we are looking at these
6 things, we have an obligation to take a look at
7 some of those kind of scenarios.

8 MR. MADENSPACHER: Well, whenever we
9 try and prove one of these crimes, we have to --
10 the person who you are trying to convict has to
11 know that he is violating this.

12 I mean if you have, like you say, a
13 number of these channels that are coming in,
14 including the ones that might be explicit sexual
15 channels, I mean if the kids -- if they don't
16 have those little -- if we don't have any V-chips
17 or R-chips or whatever to block them off, if the
18 kids are looking at it themselves without the
19 consent or knowledge of the person, that's
20 clearly not a crime.

21 The only real crime would be if he
22 basically -- he or she, I guess, I should
23 speak -- that the person was showing something
24 that could be defined as obscenity under the
25 statutes and was actually showing it, whether

1 it's showing it off the television or playing a
2 videotape --

3 REPRESENTATIVE REBER: I don't want
4 to talk about the tape situation, because I can
5 envision relatively easily a situation developing
6 where coming over some of the immediate
7 off-the-air cable channels, if you will, the
8 opportunity for a scenario to develop as I have
9 talked about. And it would happen without the
10 knowledge or the overt act of an adult owner of
11 the property; and again, remembering, this is in
12 the confines of his home.

13 MR. MADENSPACHER: Right. Well,
14 that's clearly not a crime. That is clearly not
15 a crime.

16 REPRESENTATIVE REBER: And if there
17 are neighborhood children there visiting with the
18 children of the parents of the household --

19 MR. MADENSPACHER: It still is not a
20 crime. It may be poor judgment on the part of
21 the person to allow the access, but that is not a
22 crime.

23 REPRESENTATIVE REBER: Okay. That
24 was my concern. Thank you very much.

25 CHAIRPERSON CLARK: Why aren't more

1 prosecutions brought under our current statute?

2 I can envision taking these
3 standards or guidelines and running them past a
4 rural jury; and as they interpret those
5 guidelines, they may work very well now fine.
6 But something that's acceptable in the downtown
7 of a city isn't going to be acceptable there.

8 And do district attorneys not pursue
9 that course because there's enough case law that
10 is laid out, you know, what's acceptable and what
11 isn't? Are they concerned that appeals will
12 clearly fall in favor of the defendant, or does
13 the judge have summary judgment? What's the
14 current hands-on experience with a situation like
15 this?

16 MR. MADENSPACHER: We have -- since
17 I've been District Attorney, we have had
18 approximately six or eight of these
19 prosecutions. And they balked around the years
20 1992 and 1993.

21 One of the reasons we sort of
22 stopped doing -- well, actually, we have a couple
23 of reasons. No. 1 is a number of the adult
24 bookstores wound up closing up. So we didn't
25 have as much of a problem as we had before. But

1 (2) we lost one case with a jury verdict of not
2 guilty.

3 Now, again, who knows why the jury
4 voted not guilty; but it's not beyond the realm
5 of possibility for them to have tried to apply
6 the statewide standards and have concluded that
7 perhaps under the statewide standards, this
8 was -- even though we in Lancaster might have
9 thought it was obscenity, they did not. So we
10 did lose that particular case.

11 In the second case, the second
12 incident -- and there is nothing the legislature
13 can do about this -- is we had one case where the
14 conviction against the owner of this store was
15 reversed by the Superior Court of Pennsylvania on
16 the grounds that we were unable to show that he
17 had knowledge that the things in his bookstore
18 were obscene. I found that decision hard to be.
19 It's sort of like going to a men's store and the
20 owner saying, I can't believe we are selling
21 shirts and ties here.

22 But that was one of the principal
23 reasons right there. We weren't -- we didn't
24 just want to go out and get a bunch of clerks who
25 are there because they need a job and they are

1 selling things. If there was an owner or an
2 absentee owner or maybe an even semihands-on
3 owner, this case made it virtually impossible
4 for us to obtain convictions of the people who
5 were actually involved in the operation of the
6 store.

7 Now, I know there's nothing the
8 legislature can do about that, and we are not
9 here to talk about that. But that does make it
10 difficult to go after the people who are truly
11 responsible.

12 CHAIRPERSON CLARK: Thank you.

13 Representative Manderino.

14 REPRESENTATIVE MANDERINO: Thank
15 you, and thank you for your testimony.

16 At the onset, let me state my bias,
17 I guess. Ever the defender of and advocate for
18 my constituents in the city of Philadelphia, I
19 want to assure everybody that the folks that I
20 represent are no less moral or no more amoral
21 than folks elsewhere in the Commonwealth or in
22 the country as a whole. And I say that because
23 it gets to the points that I want to ask about.

24 I think it is fair to say that
25 within a large jurisdiction like the city of

1 Philadelphia, you will have a much more diverse
2 population. And you may have a more diverse
3 population on either end, meaning a segment that
4 is more conservative than the whole as well as a
5 segment that is more liberal as a whole. But I
6 think as a whole, Philadelphians are like other
7 Pennsylvanians.

8 And I can also envision -- trust me,
9 because I've been there -- that if somebody wants
10 to try to open an adult bookstore smack in the
11 middle of my community, even on my neighborhood
12 community strip -- business strip, not in the
13 middle of the houses per se, they are going to
14 have a much more difficult time and face a lot of
15 community opposition than they would if the
16 proposed establishment was downtown in a
17 neighborhood where there is no residential
18 community and where there are no schools and
19 there are no kids that walk on the streets
20 unattended without adults at any hour of the
21 day.

22 And that kind of brings me to the
23 points that I want to make a little bit about
24 these different sets of standards. And this is
25 what I am struggling with.

1 An adult bookstore on a side street,
2 back alley in downtown Philadelphia where there
3 are no residences, etc., and you have to seek it
4 out to go, I can very much imagine that there are
5 segments of my community that abhor that and just
6 the fact that it's there offends them. But right
7 now it is there, and it is not outlawed.

8 And I think the same thing, having
9 grown up in a small town in western Pennsylvania,
10 is true by way of different analogy. I may drive
11 down a rural deserted back street where there's
12 no houses that are around, that kids can't walk
13 to from school, and the fact that I have to drive
14 past that darn place and see these signs that say
15 adult bookstore offends me, okay, the same
16 scenario, except one is in a big downtown and one
17 is out in an isolated, rural area.

18 With both of those cases and with
19 local community standards, is it not possible and
20 is it not perhaps even likely that either one,
21 either the bookstore in downtown Philadelphia or
22 the bookstore out on a country road in rural
23 Pennsylvania can become outlawed or obscene or
24 offend the community standard in Philadelphia but
25 it won't offend the community standard out in --

1 I don't want to name any counties so that
2 somebody thinks I think their county is less.

3 And then we do end up with people
4 saying, again tying it back to the First
5 Amendment, Wait a minute, I'm an adult bookstore
6 owner and I can open the adult bookstore on a
7 rural road in Lancaster County, but I can't open
8 it in an equally kind of unaccessible-to-children
9 location in the city of Philadelphia. And if
10 that's possible, then don't we get to the point
11 where we do run into First Amendment problems
12 with our whole obscenity statute?

13 MR. MADENSPACHER: Actually, what
14 you are saying sounds like it may be an equal
15 protection/due process type of argument as
16 opposed to First Amendment.

17 I mean dealing with a local
18 standard, you could get different results
19 anywhere. And what you are saying, I think, is
20 absolutely correct. It might flip-flop exactly
21 opposite as to the way everybody thinks this is
22 going to work, but I don't know.

23 I think the one advantage of this --
24 of a local standard is primarily for jury
25 guidance. There was -- I'm sure there are many

1 people in this state that have probably never
2 been in Philadelphia. And I think there's
3 probably a lot of people in Philadelphia -- I can
4 remember my old law school professor once said,
5 he goes, Son, have you ever been west of the
6 Schuylkill?

7 So you are at least giving the
8 people some idea as to an area that they know
9 about. If they haven't been in Philadelphia,
10 they haven't been in Pittsburgh, they haven't
11 been in Lancaster, they don't know. They don't
12 know what's going in Philadelphia. The people in
13 Philadelphia don't know what's going on in
14 Lancaster. I mean they just don't know.

15 I think it just gives the jury some
16 sort of guidance rather than to have a state
17 standard. Even when you deal with a state
18 standard, what is the state standard? I mean
19 it's hard to say. Is it an average of all of the
20 counties put together? Is it the lowest common
21 denominator. I mean I don't know. It just makes
22 it more difficult for them to deal with.

23 I think just giving a local
24 standard, it gives the jurors an idea as to
25 where to go. It just gives them better

1 guidance.

2 And, of course, I meant no offense
3 to Philadelphia. It seems that whenever there
4 are any problems in the state, we always, oh,
5 let's blame Philadelphia, they probably caused
6 this whole problem. I just came back from
7 Philadelphia, and I love the city.

8 . REPRESENTATIVE MANDERINO: Let me go
9 to, again, the precedent of the different
10 standards. And again, right now I'm going to
11 stay with my example of the adult bookstore. And
12 maybe I'm getting a little bit -- mixing up
13 allowed uses versus obscenity of material, but I
14 actually think that so will jurors. So I'm just
15 going to talk like that.

16 . Right now, whether we like them or
17 not, whether we find them morally offensive or
18 not, there are adult bookstores in Pennsylvania.

19 MR. MADENSPACHER: Right.

20 REPRESENTATIVE MANDERINO: And I may
21 in a particular case -- like you say, the juries
22 decide the case in front of them -- decide at
23 this particular location, this particular city,
24 given these particular factors, an adult
25 bookstore doesn't belong in this location. And

1 so because you put it there, you have violated
2 this statute or whatever.

3 But now I have a local countywide
4 standard. And the first case comes, and we are
5 in Lancaster County. With Tom's permission, I
6 will use that example. And Lancaster County
7 says, No, we don't want this adult bookstore, and
8 this time we don't want it for these reasons.
9 And then the next time we don't want it for this
10 reason.

11 And pretty soon, I have two or three
12 county court cases that have now set a precedent
13 which basically says any adult bookstore in
14 Lancaster County violates community standard. So
15 now we don't have adult bookstores in Lancaster
16 County or we don't have R-rated movies in
17 Lancaster county, because we now have had two or
18 three cases where we have found that these
19 violate community standard. And so now we have
20 precedent that we tell the next jury you have to
21 apply and here is the precedent for applying the
22 already determined community standard.

23 Is that a possibility?

24 MR. MADENSPACHER: I don't think so.
25 I really believe that every case has to stand on

1 its own, because again, you know, when we deal
2 with the statute, everybody always seems to look
3 at the -- make it as broad as possible. As a
4 practical matter, it narrows down very simply to
5 is it criminal conduct, yes or no? Did this
6 person violate this statute at this particular
7 time? I think it's a very narrow focus.

8 I mean I think we would have real
9 problems putting into evidence other people who
10 were convicted to that particular jury. I don't
11 think it causes that problem. I just think we
12 focus on, is this criminal conduct? Is this jury
13 going to convict this particular person for this
14 particular object? What happened before or what
15 might happen in the future, I don't think that's
16 relevant in this in a jury trial.

17 Again, the jury is -- when they are
18 setting their standards, they are almost setting
19 them in the sense, I think, of giving direction
20 as to perhaps where they want their law
21 enforcement personnel to go, where they want
22 their prosecutor to go, to a degree what they
23 want their judiciary to do by finding the -- you
24 know, if they find several people guilty, I think
25 that maybe these jurors in the community are

1 sending a message of we want you to continue on
2 this.

3 If you get one or two that they are
4 saying not guilty, I think the message is, hey,
5 you know, we are not interested in these
6 particular cases. I think the standards come out
7 more in that particular way. It's almost the
8 verdict of guilty or not guilty is sending a
9 message to the people I had mentioned as to
10 whether or not the community wants you to
11 continue with this particular course of action or
12 telling you to back off.

13 REPRESENTATIVE MANDERINO: Okay.
14 Let me just try one other scenario, and I will
15 particularize it a little bit more like you just
16 stated.

17 About a year or so ago, there was a
18 movie that -- I don't remember the name of it;
19 but I remember the controversy around it, because
20 it was a movie that involved a Catholic priest
21 having sexual relationships. I can't even
22 remember whether it was with a woman or
23 whatever, but that was the subject matter of the
24 film.

25 And there were lots of folks within

1 the Catholic community and otherwise who were
2 very upset about that movie, the content of that
3 movie, and picketed opening nights at movie
4 theaters. So now we are talking about a
5 particular move. Okay?

6 If I'm a duly elected prosecutor of
7 the county of X and I'm running for re-election
8 and all of my constituents are up in arms about
9 this movie and they think it's obscene and they
10 want me to do something about it and I prosecute
11 it because they are all up in arms and it's --
12 using this as an example, it's a heavily Catholic
13 community and I get my jury pool that says,
14 Absolutely right, this is offensive, and that
15 movie is now outlawed from being shown in my
16 county and it may happen that is outlawed from
17 being shown in 20 counties and it's allowed in
18 the other 40 counties of Pennsylvania, is that an
19 okay result, from your perspective, of what we
20 are trying to accomplish with this House Bill
21 739?

22 MR. MADENSPACHER: Well, if you are
23 talking about a mainstream type of movie, I mean
24 I'm not totally sure we are interested in those
25 things. And I think we are more interested in

1 like some of the other earlier examples, the
2 adult bookstores.

3 The mainstream -- I mean I think any
4 mainstream movie that comes out is never going to
5 pass the obscenity standards. There's going to
6 be found that there is some sort of redeeming
7 value to this, even though, you know, say, your
8 Catholic community just despises this.

9 I mean you do roll into something.
10 You know, is there a message, or is there
11 something that this has some sort of artistic or
12 educational or -- I forget all of the particular
13 terms. I find it difficult to believe that you
14 could ever really get past the obscenity action
15 of this. Somewhere along the line, even though
16 this jury has convicted, this case is going to
17 get reversed on appeal. That would be my
18 particular guess.

19 I mean I don't think we are
20 interested particularly -- well, we are not; at
21 least, I'm not -- in going after mainstream
22 movies that may or may not be controversial, you
23 know, HBO movies that may or may not be
24 controversial. Frankly, I don't think any
25 prosecutors or law enforcement people that, you

1 know, are truly interested in their job are that
2 worried about those particular things.

3 REPRESENTATIVE MANDERINO: Thank
4 you. Thank you for your response.

5 CHAIRPERSON CLARK: Representative
6 Arm -- oh, by the way, I think the movie theater
7 man pulls the movie.

8 Representative Armstrong.

9 REPRESENTATIVE ARMSTRONG: For the
10 sake of the committee -- and Representative
11 Manderino was alluding to this, that should a
12 jury be able to decide something is obscene in
13 Philadelphia and a jury in Lancaster County find
14 that it's not obscene. Even in today's -- and
15 would you say so? Even in today's standard, that
16 can happen with a statewide standard.

17 MR. MADENSPACHER: Oh, yes. I think
18 it could happen.

19 REPRESENTATIVE ARMSTRONG: And in
20 fact, it actually has happened.

21 MR. MADENSPACHER: Well, it happened
22 to us, at least in my opinion, in Lancaster
23 County. Well, we had the not guilty in Lancaster
24 County. Now, I don't know what would have
25 happened in Philadelphia. Maybe the person would

1 have been found guilty in Philadelphia County. I
2 think that's possible.

3 REPRESENTATIVE ARMSTRONG: Thank
4 you.

5 I know to be fact that that did
6 happen.

7 MR. MADENSPACHER: Okay.

8 REPRESENTATIVE ARMSTRONG: A
9 Philadelphia bookstore was able to be shut down.
10 But as to, again, getting to the jury to itself,
11 was it because of the statewide standard? With
12 that, we don't know.

13 MR. MADENSPACHER: When juries come
14 back, they say one of three words, guilty or not
15 guilty. And that's it. You never really learn
16 why. I mean I think we speculate afterwards.
17 When we do the postmortems on our cases, we
18 come to a conclusion that's probably what it
19 was.

20 REPRESENTATIVE ARMSTRONG: But to
21 take away some of the cloud of the issue of the
22 State to a contemporary community from wherein,
23 the county does provide a little more guidance.

24 MR. MADENSPACHER: I think it
25 provides a lot more guidance. I think it makes

1 it a lot more clearer.

2 REPRESENTATIVE ARMSTRONG: Thank
3 you.

4 CHAIRPERSON CLARK: Seeing no more
5 questions, we want to thank you very much for
6 your insight.

7 MR. MADENSPACHER: Thank you for
8 having me.

9 CHAIRPERSON CLARK: The next
10 individual that will provide testimony for the
11 committee is Dorn Checkley. He is the director
12 of the Pennsylvanians vs Pornography.

13 Mr. Checkley.

14 MR. CHECKLEY: Thank you very much
15 for having me.

16 Mr. Chairman and committee members,
17 my name is Dorn Checkley. I am the state
18 director of Pennsylvanians vs Pornography. And I
19 shall refer to my organization as PVP for short,
20 if you don't mind.

21 PVP was started as a project of
22 Morality in Media, a national anti-obscenity
23 organization founded by the late Father Morton
24 Hill. In 1968, Reverend Hill was appointed to
25 the Presidential Commission on Obscenity and

1 Pornography. He, along with Dr. Winfrey Link,
2 produced the Hill-Link Minority Report of the
3 Presidential Commission, which was cited by the
4 United States Supreme Court in Kaplan v.
5 California and Paris Adult Theater v. Slaton.

6 PVP is a nonprofit organization
7 headquartered in Pittsburgh. It serves as an
8 umbrella organization facilitating the efforts,
9 on a statewide basis, of 47 antipornography
10 chapters located in Pennsylvania in 67
11 counties.

12 PVP's work is twofold, educating
13 communities and law enforcement on content and
14 content-neutral laws, which can be used to
15 regulate the hard-core pornography industry, and
16 educating the public on First Amendment protected
17 activities to combat the soft-core portion of the
18 industry via friendly complaint and boycott of
19 its distributors.

20 I come before this committee to
21 offer testimony in support of House Bill 739. We
22 believe that this bill is needed to combat a
23 growing hard-core pornography industry here in
24 the Commonwealth, an unwelcomed industry by many
25 of Pennsylvania's residents.

1 In a September 19 through 21, 1997,
2 Wirthlin national poll, 80 percent of respondents
3 wanted obscenity laws enforced against hard-core
4 pornography and 68 percent said government is not
5 doing the job in enforcing these statutes.

6 Pennsylvania has a long history of
7 combating obscenity, all the way back to
8 Commonwealth v. Sharpless, one of the first
9 obscenity cases in this country. The PA Supreme
10 Court has heard many challenges to the statute
11 but has never granted First Amendment protection
12 to obscenity.

13 Our PA Constitution makes it clear
14 that every person in the Commonwealth is
15 guaranteed free speech but goes on to say, quote,
16 being responsible for the abuse thereof, unquote.
17 Obscenity is, therefore, unprotected speech in
18 Pennsylvania as are other forms of expression
19 such as libel, slander, fighting words,
20 conspiracy, false advertising, perjury,
21 excitement to riot, etc.

22 The development of the hard-core
23 porn industry here in Pennsylvania started in the
24 1950s. Then the only type of hard-core
25 pornography in distribution were 8-millimeter

1 so-called stag films.

2 According to the FBI, these were
3 produced and distributed by the Colombo crime
4 family out of New York City. Prosecuting these
5 distributors was easy since the test for
6 obscenity prior to 1957 was the Hinklin rule,
7 that being the impact of the material on the most
8 susceptible person.

9 With the Roth decision in 1957, the
10 U.S. Supreme Court changed the test for obscenity
11 from the Hinklin rule to a new test, whether the
12 average person applying contemporary community
13 standards found that the dominant theme of the
14 material, taken as a whole, appeals to the
15 prurient interest.

16 As a result of the new test, the
17 Court reversed many obscenity convictions. This
18 served as a green light to an infant pornography
19 industry. Hard-core so-called adult bookstores
20 started to appear in major metropolitan areas
21 under the influence and protection of organized
22 crime.

23 Mickey Zaffarano, a capo of the
24 Colombo crime family, was named the overboss of
25 the Mafia's interests in hard-core pornography

1 after territorial disputes broke out among the
2 five families. Zaffarano worked with associates
3 like Reuben Sturman, who is now deceased; Teddy
4 Rothstein; Milton Luros; Teddy Gaswirth; and Mike
5 Thevis.

6 He and his successor, Robert
7 Dibernardo, were able to pyramid a series of
8 corporate takeovers into control of over 500
9 hard-core theaters and 15,000 hard-core
10 bookstores.

11 According to the Los Angeles Police
12 Department, organized crime infiltrated the
13 pornography industry in LA, Los Angeles, in 1969
14 due to its lucrative financial benefits. By
15 1975, organized crime controlled 80 to 90 percent
16 of the hard-core industry; and it is estimated
17 that the figure is between 85 and 90 percent
18 today.

19 Organized crime loves the
20 pornography business due to the tremendous markup
21 of the materials and the low level of risk from
22 the enforcement of obscenity laws. This fact is
23 proven when one considers that prior to the
24 passage of the 1977 -- prior to passage in 1977
25 of the Child Sexual Exploitation Protection Act,

1 hundreds of titles of child pornography were in
2 open distribution before legislators, police, and
3 the courts moved to protect children and drive
4 that portion of the industry underground.

5 Hard-core pornography went
6 mainstream here in the Commonwealth with the
7 release of the film Deep Throat in 1971. This
8 movie grossed over \$100 million, much to the
9 credit of the media. But what the media failed
10 to tell us was that this film was produced by
11 Damiano Productions, a Mafia controlled company
12 founded by Louis Peraino, a soldier of the
13 Colombo crime family.

14 To combat the growing pornography
15 industry and put an end to a docket full of
16 obscenity appeals, the Supreme Court again
17 changed the test for obscenity to the current
18 three-prong test in Miller v. California.

19 That test is that the material must,
20 first, appeal to the prurient interest in sex.
21 Secondly, the material must depict or describe
22 patently offensive hard-core sexual conduct. And
23 finally, the material, taken as a whole, must
24 lack serious value. Only the first two prongs
25 are judged by applying contemporary community

1 standards.

2 I'm going to shorten my testimony a
3 little bit, skip over some of this, because I
4 would like to get to some of the issues that were
5 raised in the questioning. I do go on in my
6 written testimony to elaborate on the harms of
7 pornography.

8 I think the shortest way to address
9 that issue, because it hasn't really been
10 addressed heretofore in this hearing, is to quote
11 Dr. Park Dietz, a member of the Attorney
12 General's Commission on Pornography. He said,
13 "Pornography is a medical and public health
14 problem because much of it teaches false,
15 misleading, and even dangerous information about
16 human sexuality.

17 "A person who learned about
18 pornography from the adults only pornography
19 outlets of America would be a person who had
20 never conceived of a man and woman marrying or
21 even falling in love before having intercourse,
22 who had never conceived of two people making love
23 in privacy without guilt or fear of discovery,
24 who had never conceived of tender foreplay, and
25 who had never conceived of procreation as a

1 purpose of sexual union.

2 "Instead, such a person would be one
3 who has learned that sex at home meant sex with
4 one's children, stepchildren, parents,
5 stepparents, siblings, cousins, nephews, nieces,
6 aunts, uncles, and pets and with neighbors,
7 milkmen, plumbers, salesmen, burglars, and
8 peepers; who had learned that people take off
9 their clothes and have sex within five minutes of
10 meeting one another; who had learned that about
11 one out of every five sexual encounters involves
12 spanking, whipping, fighting, wrestling, tying,
13 chaining, gagging, or torture; who had learned
14 that more than one in ten sexual acts involved
15 more than a party of two; who had learned that
16 the purpose of ejaculation is that of soiling
17 mouths, faces, breasts, abdomens, backs, and food
18 at which it is always aimed; learned that body
19 cavities were designed for the insertion of
20 foreign objects; who had learned that the anus
21 was a genital to be licked and penetrated; who
22 had learned that urine and excrement are exotic
23 materials -- erotic, excuse me; who had learned
24 that the instruments of sex are chemicals,
25 handcuffs, gags, hoods, restraints, harnesses,

1 police badges, knives, guns, whips, paddles,
2 enema bags, and disembodied vaginas, breasts, and
3 penises; and who learned that, except with
4 children where secrecy was required,
5 photographers and cameras were supposed to be
6 present to capture the action so that it could be
7 spread abroad."

8 That kind of sums up what hard-core
9 pornography is all about and what it's focus is.

10 Again, I'm going to skip over in the
11 interest of time and to address some of these
12 other issues.

13 To try to increase the level of
14 enforcement, Pennsylvanians vs Pornography looked
15 at how the existing statute might be
16 strengthened. House Bill 739 is a result of that
17 analysis. Representative Armstrong indicated an
18 interest in sponsoring the bill since a case had
19 just been lost in his county, which we believe
20 would have been won had the jury been allowed to
21 apply their knowledge of local standards rather
22 than trying to figure out what the community
23 mores were throughout the state.

24 It remains our belief that a
25 statewide standard serves no other purpose than

1 to give the porn bar a vague and confusing
2 concept that they can use to throw sand into the
3 eyes of juries.

4 It is hard enough to ask a jury to
5 figure out what is acceptable in their community
6 much less ask them to try to figure out what is
7 acceptable in Erie or Allentown or Pittsburgh or
8 Philadelphia. I have been following community
9 standards for ten years in this state, and I am
10 regularly surprised at where the biggest fights
11 are put up against the pornographers.

12 An example is what happened last
13 year in Concord Township, Delaware County; and,
14 Senator, you mentioned that earlier. The
15 community decided that if the pornographers were
16 going to move into their community, they were
17 going to have to abide by their community
18 standards.

19 At hearings to decide how to handle
20 the pornographer's decision to set up shop in the
21 township, an average of 700 people faithfully
22 came out. The community and local attorneys,
23 with the support of their local officials, passed
24 four ordinances to regulate adult uses and left
25 the pornographers know that they would obey the

1 law or be shut down.

2 The local standards provision of
3 House Bill 739 seeks to give communities like
4 Concord the same ability to fight illegal
5 hard-core pornographers using their mores in
6 applying the state obscenity statute. These
7 people are an example of the 75 percent of
8 Americans who have repeatedly said in national
9 polls that they feel that the pornographers have
10 gone too far and that they favor a toughening of
11 our antipornography laws.

12 We admit that there is a market for
13 these materials and the Community mores have
14 suffered, but we also know that in our history as
15 a country, we have seen our mores also change for
16 the better. And we have institutions like our
17 faith community with a message of redemption and
18 hope to offer to those who have put themselves
19 into bondage to this material.

20 Obviously, I go on to talk about --
21 or try to allay the fears of those opposed to
22 this law. Rather than read my testimony, again,
23 you can read it yourselves at some other time. I
24 would like to address some of the issues that
25 were raised.

1 Our opponents greatly fear that
2 applying or changing our state obscenity code to
3 a local standard will mean that they will have 67
4 different standards to try to figure out. I
5 think the District Attorney who spoke just
6 before me kind of allayed some of those fears
7 when he reminded us that that's pretty much the
8 case already. You could have 67 different
9 standards in the counties based on our current
10 law.

11 What we are trying to accomplish
12 here in this change is to help juries understand
13 what is obscene in their local area. Currently
14 they are faced with a rather confusing state
15 standard that the defendant's lawyer will
16 utilize to his best ability to confuse the
17 jurors.

18 You know, when he goes up in his
19 final argument and says, now, look, you have to
20 figure out what the average person in Pittsburgh
21 or Philadelphia or Allentown thinks, not just
22 Lancaster County, so to speak, and that can be
23 confusing.

24 Most jurors know what their
25 neighbors think, know what the people of their

1 municipality think, know essentially what their
2 county is like. And we would like to give those
3 jurors the benefit of the doubt to be able to
4 say, you know, we know what our neighbors think
5 about this. And it could be tolerant or, no, we
6 want this obscenity out of here. And that really
7 makes it easier for them to figure out what the
8 test is or whether or not the material in front
9 of them is, in fact, obscene.

10 Our opponents are also raising the
11 prospect that having more conservative
12 communities will mean that fine literature and
13 mainstream R-rated movies will be prosecuted and
14 that great works of art will suffer or what have
15 you. This is a great exaggeration of their case.
16 It's totally unfounded.

17 I have been fighting pornography now
18 for 12 years in this nonprofit capacity. I can't
19 think of a single case nationwide successfully
20 that has prosecuted an R-rated movie in over 20
21 years. It hasn't happened, successfully. It may
22 have started somewhere; but it got shot down
23 pretty quickly in the court system, because what
24 the U.S. Supreme Court has established in Miller
25 v. California is really great protection for

1 literature -- serious literature of educational
2 value, literature, fine arts, movies, what have
3 you.

4 Really, only hard-core pornography,
5 pornography that is absolutely only concerned
6 with sexual conduct, can be successfully
7 prosecuted in our nation today. R-rated movies
8 simply do not fit that criteria and never make it
9 through the court system. It's an exaggeration
10 to say that this law will suddenly mean that the
11 newspaper association, the movie association, and
12 the recording industry suddenly will fear
13 prosecution. It won't happen.

14 The target of the state obscenity
15 code is obscenity. And that is largely being
16 distributed in adult bookstores. It's conduct
17 performed in nude dancing establishments and
18 other kinds of places.

19 An argument was brought up, should
20 an adult business be worried about not being able
21 to be open. I think that question grew out of a
22 misunderstanding of obscenity law basically. In
23 obscenity law, adult bookstores or a person who
24 wants to open one has a perfect right to open up
25 an adult business.

1 When the Supreme Court passed
2 obscenity laws, what they were saying is that we
3 could not have prior restraint of materials.
4 That would be a violation of the First Amendment.
5 Therefore, adult materials, pornography, even
6 hard-core pornography, even what might be
7 considered obscene, has the same right to be
8 innocent until proven guilty.

9 In other words, you can open up shop
10 anywhere in the United States of America, fill it
11 with adult materials, and those materials are
12 innocent until proven guilty. They are not
13 obscene merely because they are hard-core
14 pornography. They have to be proven to be
15 obscene by a jury and hopefully one with local
16 standards. So that business can open up.

17 Then if he is prosecuted by an
18 attorney, he does not have to fear that his store
19 will be closed down willy-nilly by one case.
20 Each material, each magazine, every movie has
21 that same right to be innocent until proven
22 guilty basically. And the prosecuting attorney
23 has to prove the material in that store obscene
24 on a case-by-case basis.

25 Now, what happens is that an adult

1 bookstore kind of learns what the community
2 standards might be based on the success of the
3 case. If the prosecutor brings -- successfully
4 prosecutes violent hard-core pornography
5 implicating woman or children and what have you,
6 then he learns, oh, boy, the violent stuff might
7 get me in trouble. I'm going to pull that stuff
8 off my shelf. That's his business decision. He
9 could risk it or not, because the next jury might
10 not find that obscene.

11 It's really on a case-by-case basis,
12 as, I think, the District Attorney from
13 Lancaster pointed out very well in his last
14 testimony.

15 In other words, though, the adult
16 bookstore, it would be very difficult to close
17 him down based on obscenity laws. And if he
18 makes that choice to withdraw materials, it will
19 be his choice, not a community standard, because
20 a community standard can only be applied on a
21 case-by-case basis.

22 A couple other arguments were
23 raised, county versus municipality. I hope
24 that's being laid to rest here more or less. I
25 don't even think you need to amend this law. You

1 could if it really made you feel comfortable to
2 say specifically that it needs to be on a county
3 basis. But I think it should be clearly
4 understood, though, that the language and the
5 political subdivision means county basically,
6 because this is a criminal law and only the
7 district attorneys can bring criminal charges.

8 So, therefore, a district attorney,
9 when he brings charges, it's a countywide
10 standard. That's basically all there is to it.

11 If a township were to do it, it
12 would have to be a lesser standard, you know, a
13 spitting-on-the-sidewalk standard. That doesn't
14 even involve a jury. And if the pornographer in
15 question wanted to appeal it, he would -- the
16 next level would be the county anyway. And it
17 would be a jury trial; and therefore, it would be
18 a county standard.

19 So if you wanted to change it, I
20 don't think it would hurt anything; but I think
21 it would be redundant or unnecessary.

22 The zoning question was raised.
23 Congressman, I don't know if you got an adequate
24 answer or not. But, yes, a community may pass a
25 zoning ordinance to control where a business can

1 be located. They can't do it after the fact. If
2 the business was there prior to, they are
3 grandfathered in. So they can't be moved once
4 they are there; but before they are there, zoning
5 can control where they may be.

6 They do have the legal option of
7 opening, though. The Supreme Court has said that
8 any community that has commercial zoning, must
9 allow adult businesses. So it's not a question
10 that a zoning can exclude all adult businesses.
11 That's unconstitutional. They do have the right,
12 though, to control where. And usually it is
13 dispersal zoning, a thousand feet from a church,
14 school, what have you.

15 So zoning has a limited ability to
16 control adult businesses, although from my point
17 of view, what I advise townships and
18 municipalities all the time is kind of guess
19 where the pornographers want to be and don't let
20 them go there and generally, they won't come to
21 your township or municipality. And that tends to
22 be -- they want to be like any other business.
23 They want to be high visibility. So deny them
24 major access roads or interchanges off
25 interstates; and generally, they won't come to

1 your township.

2 So I hope -- if you have any further
3 questions about that, I hope I can answer it.
4 But what I want to close with is this thought.
5 Please give us the fullest protection that the
6 courts have constitutionally permitted.

7 The Supreme Court has given the
8 State permission to choose a statewide or a local
9 standard. It's not even a constitutional issue.
10 If this law passed, there's really no sense even
11 appealing to the Supreme Court. They have
12 decided the issue. I hope that you will do this
13 for the citizens of Pennsylvania to help
14 obscenity prosecutions get underway and be
15 effective in this state. Thank you very much.

16 CHAIRPERSON CLARK: We thank you.
17 And seeing no questions, why, we thank you for
18 your testimony today. And we will certainly
19 review it in full and submit your entire
20 testimony for the record.

21 I think what we will do now is give
22 our stenographer about five minutes.

23 (Brief recess from the record.)

24 CHAIRPERSON CLARK: I believe now
25 what we will do is reconvene the subcommittee's

1 hearing on House Bill 739. And the panel to
2 present testimony to the committee is what I call
3 the media panel.

4 MR. BULL: The good guys, Mr.
5 Chairman.

6 CHAIRPERSON CLARK: Pardon?

7 MR. BULL: The good guys, Mr.
8 Chairman.

9 CHAIRPERSON CLARK: Initially, I
10 would indicate that the representative from the
11 Recording Industry Association of America was
12 unable to be here today. However, they did send
13 their testimony, and we will make that part of
14 the record and distribute that to interested
15 members.

16 Here to testify is John V. Bull. He
17 is the assistant to the editor of the
18 Philadelphia Inquirer, and he represents the
19 Newspaper Publishers Association.

20 We also have Lewis A. Grafman. He's
21 counsel to the National Association of Theaters
22 Owners. And Karen Kruger, Director of State
23 Relations --

24 MS. ISBELL: Mr. Chairman, actually
25 it's Amy Isbell.

1 CHAIRPERSON CLARK: You're Amy.
2 Okay. Amy Isbell?

3 MS. ISBELL: Yes. Correct.

4 CHAIRPERSON CLARK: Director of
5 government relations for the Motion Picture
6 Association of America. And I believe we will
7 begin with Mr. Bull.

8 MR. BULL: Thank you, Mr. Chairman.
9 Could I get my name corrected on your agenda?

10 CHAIRPERSON CLARK: Yes.

11 MR. BULL: I use two middle
12 initials, but the name is John Bull.

13 Even though I am here -- even though
14 I am an editor with the Inquirer, I'm not here
15 representing my newspaper, but five state
16 newspaper organizations: the state publishers'
17 association, the state editors' society, the
18 Associated Press Managing Editors Association,
19 the Greater Philadelphia Chapter of the Society
20 of Professional Journalists, and the First
21 Amendment Coalition.

22 With rare unanimity for my
23 cantankerous industry, all five organizations
24 strongly oppose this legislation. I would like
25 to focus, if I could, on the practicalities or

1 impracticalities, as the case may be, under this
2 legislation.

3 Under this, we fear that newspapers
4 could become bland, watered-down bulletin boards,
5 carriers of meetings notices, local public events
6 and other noncontroversial items. For even with
7 the best of intentions, it would be virtually
8 impossible for newspapers to sanitize their news
9 and advertising enough to shield themselves from
10 possible prosecution.

11 The potential variation in standards
12 from one judicial district to another, as you
13 know, is enormous. In practice, we would have to
14 tailor our content, everything from allegations
15 against the President to bra advertising by local
16 department stores, to the community with the most
17 restrictive standards.

18 Clearly, that likely would mean that
19 significant news would be self-censored out of
20 newspapers, a chilling effect if ever there was
21 one. We might wonder how much reporting on the
22 current situation in Washington would be given to
23 citizens. Even newspapers that hold back the
24 specifics of the allegations against the
25 President might well be exposed, if you will

1 forgive me, to prosecution.

2 For larger papers such as the
3 Inquirer, with which I have some familiarity, the
4 task would be monumental. Our circulation goes
5 to some extent to 48 of the Commonwealth's 60
6 judicial districts. To effectively protect
7 itself from prosecution, the paper might have to
8 publish 48 separate editions every day, each
9 carefully tailored to local community tastes and
10 standards, presuming, of course, that those
11 criteria could even be determined.

12 Mechanically, let's not even
13 remotely possible. I have heard that the
14 Inquirer has all it can do just getting 8
15 locally-zoned editions off the presses every day,
16 much less 48.

17 Although smaller papers would have a
18 lesser problem, any publication that crosses
19 judicial district boundary lines would be exposed
20 to the same liability.

21 Moreover, changing news stories, as
22 well as display and classified advertisements, 48
23 times would not serve the public. For like it or
24 not, newspapers are, to some extent, the
25 institutional glue that binds together society

1 into one entity of common issues and concerns and
2 beliefs.

3 Without this commonality, it is easy
4 to envision 60 separate satrapies in this
5 Commonwealth, pockets of isolation in effect,
6 instead of the one reasonably cohesive political
7 and social entity we have today.

8 The same result would obtain from
9 any other legislation separating people like
10 this, but it is particularly troubling with
11 obscenity where individual definitions range
12 widely from one extreme to another. A general
13 circulation paper could not possibly accommodate
14 that vast range of opinion or legal definition.
15 Legal chaos would probably result.

16 Consider the abortion issue. Some
17 people view technical discussions of late,
18 partial-birth abortions banned by Congress 18
19 months ago to be obscene. But how can people
20 understand the legislation without
21 understanding the problem it is designed to
22 cure?

23 Similarly, with Washington today,
24 although no mainstream newspaper, as far as I
25 know, has published precise details of the

1 allegations against the President, we still have
2 to give enough hints and winks so that people
3 understand an issue that could have distract
4 consequences for the country.

5 And what about movie
6 advertisements? Are newspapers really the
7 appropriate guardians of public sensitivities?
8 Are they supposed to censor or change national
9 movie ads?

10 You may remember about 18 months ago
11 the advertisement which appeared in a few
12 newspapers selling O.J. Simpson's videotape. The
13 papers that published that ad -- and there were a
14 few -- were accused by many, many readers -- and
15 I got a lot of the phone calls. We were accused
16 of promoting pornography.

17 Does that mean that Simpson's
18 free-speech right to advertise should be denied?
19 If so, that seems to us to be a fundamental
20 constitutional change, certainly one that
21 should not be effected by legislation such as
22 this.

23 And remember the horrible
24 photographs of the bloody victims of terrorist
25 bombings in the Middle East, London, Oklahoma

1 City, New York Trade Center. Were they obscene?
2 Many readers thought so. Should they have been
3 censored? Would newspapers have to withhold from
4 some areas the stories about gays and lesbians,
5 abortions, drug use, singles clubs, child
6 pornography, rapes?

7 The difficult question is the degree
8 to which obscenity standards might obviate real
9 news, news a community needs to confront issues
10 and hopefully improve society.

11 And none of this considers changing
12 standards. And as you have already heard today,
13 we all know they do change.

14 At heart is our cherished tradition
15 of free speech and press. Despite what might be
16 an admirable motive, this bill could be a Trojan
17 horse, an initial step in curbing unpopular
18 speech in myriad areas: religion, politics,
19 education, literature, almost anything.

20 Surely, this committee would not
21 want to go that far. If so, now is the time to
22 put a stop to this. And we in the news industry
23 fervently hope you will agree. Thank you, Mr.
24 Chairman.

25 CHAIRPERSON CLARK: Thank you.

1 Mr. Grafman.

2 MR. GRAFMAN: Thank you, Mr.
3 Chairman. We would like to thank the members of
4 the subcommittee for providing us with the
5 opportunity to appear and testify today.

6 I serve as counsel to the National
7 Association of Theater Owners of Pennsylvania,
8 the trade association of motion picture
9 exhibitors in Pennsylvania. And the membership
10 of NATO of Pennsylvania runs the gambit of
11 feature motion picture theaters within the
12 Commonwealth, large and small, publicly traded
13 companies and independently owned family
14 enterprises, urban, suburban, and rural, and
15 eastern, central, and western in location. And
16 NATO of Pennsylvania represents over 500 motion
17 picture screens throughout the Commonwealth.

18 We appear here today in opposition
19 to the bill before the subcommittee.

20 In 1973, the Supreme Court
21 formulated the modern test for obscenity in
22 Miller v. California. And I won't repeat the
23 standards again.

24 In 1977, more importantly, our
25 General Assembly completely revised the obscenity

1 laws to incorporate the Miller test. The
2 provisions are now found in the criminal code at
3 18 Pennsylvania Consolidated Statutes 5903. And
4 while the provisions have been amended on several
5 occasions -- and I have in here 1990, but I
6 believe there was an amendment this year to
7 prohibit obscene materials from being sent to
8 prisoners -- throughout this entire time period
9 for purposes of applying contemporary community
10 standards, community has meant the state.

11 The feature motion pictures
12 exhibitors believe that the statewide definition
13 of contemporary community standards was sound
14 policy in the 1970s and remains sound policy
15 today.

16 As has been noted by Judge Nealon of
17 the United States District Court for the Middle
18 District of Pennsylvania, the obscenity offense
19 and most notably the community standards
20 component of the Miller test is intractably
21 subjective.

22 Nevertheless, the determination of
23 what constitutes contemporary community
24 standards, no matter how subjective and how
25 elusive, still needs to be made at several

1 levels, by the businessman in the First Amendment
2 industry in attempting to determine whether or
3 not the materials which are offered for sale are
4 protected by the First Amendment or fail under
5 the Miller test, by prosecutors exercising their
6 professional discretion in determining whether or
7 not to prosecute for violation of 18 Pennsylvania
8 Consolidated Statutes 5903, and by juries in
9 making the ultimate determination of guilt or
10 innocence in a criminal prosecution.

11 Given the relative uncertainty as to
12 what constitutes contemporary community
13 standards, each of these levels is best served by
14 the relative uniformity and predictability of
15 statewide standards.

16 There are definite practical
17 advantages for both sides in the obscenity
18 dispute in determining a statewide definition of
19 community. Initially, contemporary community
20 standards are not concerned with availability but
21 with acceptability. If contemporary community
22 standards are determined on a county-by-county
23 basis, availability rather than acceptability
24 will become the key factor and analysis of
25 contemporary community standards will be turned

1 on its head.

2 In initially determining whether or
3 not to present a feature motion picture,
4 exhibitors will be reluctant to make feature
5 motion pictures available in all areas of the
6 state.

7 Moreover, for those who favor
8 restrictions, statewide standards lead to
9 relative uniformity. The lack of uniformity in
10 county-by-county standards may ultimately
11 backfire, as a patchwork virtually assures that
12 overall standards will be eroded over time.

13 Feature motion picture exhibitors
14 certainly favor statewide standards. Different
15 standards for each county create considerably
16 uncertainty. Moreover, exhibitors of feature
17 motion pictures are the end result of a large
18 distribution system owned by the substantially
19 larger Hollywood studios such as Disney,
20 Paramount, and Time-Warner and from whom you are
21 about to hear.

22 Inability to assure service for the
23 feature motion picture of a supplier-distributor
24 on a uniform basis will undercut one of the most
25 basic tenets with respect to licensing of feature

1 motion pictures, a constant customer
2 relationship. And the same chilling effect will
3 apply to mass media across the board.

4 Moreover, there is nothing which
5 would indicate that the role of the prosecutor
6 will change in any manner. In fact, when the
7 standards are statewide, the role of the
8 prosecutor is made easier in both analyzing the
9 law and in exercising the discretion whether or
10 not to prosecute, as the impact of the shifting
11 tides of localized community pressures give way
12 to sound legal analysis.

13 To be more blunt, where the
14 community is the county, First Amendment
15 industries such as the local theaters become too
16 easy a target for ephemeral community witch
17 hunts or political interests.

18 I mean the question -- to diverge
19 for just a second, the question has already been
20 raised today about multiple prosecutions for the
21 same potential offense. And that's exactly the
22 problem that -- one of the major problems we
23 foresee with a community standard on a local
24 basis rather than statewide.

25 As a matter of policy, any

1 interpretation of community which would permit
2 the same act, exhibition of a feature motion
3 picture, to be criminal in one locality in the
4 Commonwealth and legal in another runs counter to
5 the concepts of fairness and the uniform
6 administration of justice.

7 And again, to divulge briefly, the
8 DAs, I think, bring this point out very clearly.
9 It may very well rise to constitutional levels as
10 a violation of due process.

11 In addition, it is fundamentally
12 unfair and counter the concept of uniformity for
13 the burden of feature motion picture exhibitors
14 to be heavier in one county than another.

15 We live in a modern, mobile society.
16 If our courts are to be organized and operated
17 in a uniform manner, our business people,
18 including feature motion picture exhibitors,
19 have the same right to expect the substantive
20 law to be applied in a uniform manner throughout
21 the state.

22 In addition, the very premise of
23 House Bill 739 appears to be that there is a
24 difference in the morals of the average citizen
25 of this state, depending upon where they live.

1 Why should one assume that materials which appeal
2 to the prurient interests and are patently
3 offensive to a rural resident have any different
4 impact on a city or suburban dweller?

5 Opinions are shaped and shared in a
6 very similar manner throughout the Commonwealth.
7 All of the citizens of the Commonwealth are
8 exposed to virtually the same mass media.
9 Citizens throughout Pennsylvania are exposed to
10 the same or similar news coverage; the same or
11 similar television; the same television networks;
12 the same cable channels; the same Internet,
13 computer bulletin boards, and other evolving
14 computer technology.

15 In addition, Pennsylvania citizens
16 are incredibly mobile. Given our highway system,
17 citizens often live in one area and work in
18 another. Rural dwellers will travel to cities or
19 major suburban office complexes for their jobs.
20 Citizens travel on a regular and frequent basis,
21 and opinions are exchanged as a result.

22 For 21 years, statewide contemporary
23 community standards have been feasible and have
24 worked well. Feature motion picture exhibitors
25 have been and remain comfortable in operating

1 their businesses within the current test.
2 Prosecutors have successfully charged and
3 convicted pornographers under current law. It's
4 the belief of NATO of Pennsylvania that the
5 current system works and should not be changed.

6 Thank you.

7 CHAIRPERSON CLARK: Thank you.

8 Amy Isbell.

9 MS. ISBELL: Thank you, Mr. Chairman
10 and members of the subcommittee.

11 On behalf of Jack Valenti and the
12 members of Motion Picture Association of America,
13 I am pleased to be here this morning to share our
14 views on House Bill 739.

15 My name is Amy Isbell. And
16 regardless of the generous promotion I was given
17 on the agenda, I am the manager of state
18 legislation for the Motion Picture Association of
19 America, which, as you may know, is the trade
20 association for the nation's major producers and
21 distributors of motion pictures on film,
22 television, and videocassette.

23 Our member companies have names that
24 you have all probably heard before: Disney,
25 Paramount, 20th Century Fox, Sony, Universal,

1 MGM, and Warner Brothers.

2 I would like to start by saying that
3 our members companies do not produce or
4 distribute movies or television programs or
5 videocassettes that are obscene under current
6 Pennsylvania law, nor do we have any intention
7 to do so in the future. We firmly believe that
8 if a jury in Pennsylvania finds material to be
9 legally obscene, then it should not be
10 available.

11 Of course, like the Pennsylvania
12 legislature, the motion picture industry is
13 concerned about the material that people view.
14 That's why we created many years ago and why we
15 strongly support the voluntary rating system that
16 you see in movie theaters all across the country:
17 G, PG, PG-13, R, etc.

18 We even have a very strict approval
19 process for all the movie advertising you see.
20 In fact, as far as I know, our industry is one of
21 the only industries around that voluntarily turns
22 away and discourages business.

23 As you know, House Bill 739 would
24 change from the entire state to the political
25 subdivision from which persons are drawn to serve

1 as jurors in a criminal proceeding as the
2 standard to be used by a jury when making an
3 obscenity determination in a criminal
4 prosecution.

5 So I guess the obvious question is,
6 Given the fact that our member companies don't
7 produce obscene materials and we have no plans of
8 doing so and we are okay with the current
9 Pennsylvania law, why am I here?

10 Our concern is very simple. This
11 dramatic change from statewide to a local
12 community standard has the potential to create an
13 impact so severe that it could inadvertently
14 restrict the kinds of mainstream popular motion
15 pictures and other creative works that are
16 currently available in Pennsylvania.

17 As has been discussed, it would be
18 virtually impossible for a national distributor
19 of motion pictures, sound recordings, books,
20 magazines, television programs, or other
21 audiovisual works to determine the community
22 standard for each county in the Commonwealth.
23 Guessing at a patchwork of inconsistent standards
24 for obscenity in each of the counties here is a
25 legal gamble that many distributors and small

1 businesses will not be willing to make, as Mr.
2 Grafman mentioned.

3 The cost of distributing a motion
4 picture or videocassette or TV program would
5 increase substantially, limiting the
6 availability of these creative works of free
7 expression.

8 To avoid the possibility of criminal
9 prosecution or the mere threat of prosecution,
10 movie theaters and video stores may simply refuse
11 to exhibit or carry a particular film that
12 contains any sort of depiction of sensuality. As
13 impossible as it is to imagine, if House Bill 739
14 were to pass, many popular mainstream movies like
15 Titanic, Pretty Woman, The Color Purple,
16 Schindler's List, Ghost, or Disclosure might not
17 be available in the Commonwealth.

18 Why? Small video store owners or
19 movie theaters or even folks that sell videos at
20 places like Wal-Mart, Kmart, Walgreens just
21 aren't going to take the chance that they may
22 end up in court in an expensive lawsuit for
23 making a mainstream popular movie available to
24 adults.

25 The U.S. Supreme Court has ruled

1 many, many times that laws that promote
2 self-censorship because of the fear of legal
3 consequences violate the First Amendment just as
4 much as laws that directly ban particular
5 speech.

6 While the logistics of interpreting
7 numerous local community standards is reason
8 enough to oppose this bill, our greatest concern
9 is that the bill could lead to threats and
10 intimidation by overzealous law enforcement
11 officials as was discussed earlier.

12 This dangerous potential of such
13 intimation is one reason that courts in other
14 states have overturned laws similar to House Bill
15 739. The application of local community
16 standards in obscenity applications has been
17 constitutionally flawed by, for example, both the
18 Michigan and Oregon Supreme Courts.

19 In 1977, the high court in Michigan
20 struck down an East Detroit ordinance, ruling
21 that the creation of an obscenity definition is
22 an area of law that demands uniform treatment on
23 a statewide level. The Court also said that a
24 local obscenity standard would chill the right to
25 free expression and raise serious due process

1 problems.

2 The Court ruled that a national or
3 statewide distributor of audiovisual works would
4 be subject to criminal prosecution and
5 incarceration, although there was little
6 opportunity to discover the nature of the
7 prohibited conduct.

8 Now, I'm not a lawyer. So I might
9 be tempted to ask upon some expert opinion here.
10 And I can't think of any better expert testimony
11 than what was presented by the Pennsylvania
12 District Attorneys Association. They said in
13 their statement that having different standards
14 in each of the 67 counties here will lead to
15 widespread public confusion about what the
16 standards are so that the public will be lacking
17 in fair notice as to what conduct is legal and
18 what is criminal.

19 In addition to raising due process
20 concerns, such confusion can only be harmful to
21 the laudable cause of having clear, strong
22 obscenity standards that let everyone know what
23 conduct will run them afoul of the criminal law.

24 Finally, House Bill 739 could have
25 some very unintentional and ironic effects. By

1 allowing local as opposed to statewide community
2 standards, you are allowing those jurisdictions
3 with a more lenient or liberal jury pool to set
4 a more lenient community standard regarding
5 obscenity. Of course, if this were to happen
6 right next door to a district with a very strict
7 interpretation of obscenity, there's a strong
8 potential for the development of so-called red
9 light districts.

10 At least uniform administration of
11 the law statewide permits material found obscene
12 in one jurisdiction to be found obscene in every
13 other jurisdiction in Pennsylvania. That's not
14 true at all with community standards, and this is
15 the very point that Representative Manderino made
16 earlier.

17 Potential problems such as these
18 have led states such as California, Colorado,
19 Oregon, and Illinois to defeat measures similar
20 to House Bill 739 over the past decade. Juries
21 in over 75 percent of all states apply statewide
22 community standards in obscenity prosecutions,
23 and like Pennsylvania currently, are able to
24 successfully prosecute obscenity.

25 In closing, the MPAA urges you to

1 maintain the existing Pennsylvania obscenity
2 statute and to oppose House Bill 739.

3 Thank you, Mr. Chairman and members
4 of the subcommittee. I would be happy to answer
5 any questions you might have.

6 CHAIRPERSON CLARK: Yes. And I
7 thank you. And maybe I will begin with the way
8 the testimony was presented.

9 I have had numerous complaints over
10 my years about the content of newspapers, but
11 none of them have ever gone to the obscenities
12 that are contained in them.

13 MR. BULL: We get it all the time.
14 Actually, we are getting it right now over
15 unposed photographs from the Olympics. A lot of
16 people see prurience in some of the pictures we
17 have of skaters. It's in the eye of the
18 beholder, as I know you know.

19 CHAIRPERSON CLARK: But I think as
20 you look at this situation realistically, you
21 go through some checks and balances as far as,
22 No. 1, you know, what kind of complaints and
23 what volumes are you getting them? No. 2, is
24 there going to be some police discretion
25 involved in investigating the case? No. 3, how

1 is the district attorney going to look at it?
2 No. 4, eventually, what's a jury going to do with
3 it?

4 And perhaps, you know, you could
5 tell us if you know of any newspapers that have
6 ever been taken to court for, you know, posed or
7 suggested obscenities that appear in any of
8 those newspapers, from your ads right down to --

9 MR. BULL: Movie ads are a problem
10 sometimes.

11 CHAIRPERSON CLARK: Have you ever
12 had a challenge to any of those?

13 MR. BULL: No. But we voluntarily
14 do not publish ads for adult movies or things
15 like that.

16 CHAIRPERSON CLARK: You do that on
17 your own?

18 MR. BULL: We do that on our own,
19 voluntarily. Right.

20 Our fear is that individual smaller
21 county standards would be a real serious
22 potential problem. The statewide standard which
23 we now live under does not seem to be, in
24 practice, a major problem. That's right.

25 CHAIRPERSON CLARK: So you do use

1 some self-restraint now as far as what you put in
2 the paper?

3 MR. BULL: Oh, absolutely.

4 CHAIRPERSON CLARK: And you may
5 think that you might have to restrain yourself
6 even further.

7 MR. BULL: Yes, exactly.

8 CHAIRPERSON CLARK: Mr. Grafman, the
9 theater owners who you represent, they -- do they
10 decide on an individual basis what movies they
11 are going to put in their theaters, or are they
12 required to contract to carry, you know, certain
13 movies?

14 MR. GRAFMAN: They, generally
15 speaking, purchase each individual picture on an
16 individual basis for each theater.

17 Now, if you are talking a national
18 chain such AMC or United Artists, both of whom
19 are members of this group and are in the
20 Harrisburg and Philadelphia metropolitan areas as
21 well as Lancaster, since Lancaster seems to be a
22 focal point here today, you know, they have to
23 make decisions on an individualized community
24 basis, even though they may be purchasing on a
25 national basis.

1 CHAIRPERSON CLARK: So the theater
2 owners or the manager of the theater will decide
3 what movies he is going to show or not?

4 MR. GRAFMAN: Yes. It's the owner.
5 It's not the individual manager. He may have
6 some input. Well, I shouldn't say that, because
7 if you are talking about an independently owned
8 theater and that's their only location, then it
9 is the owner and manager who is making the
10 decision. It really varies from company to
11 company.

12 CHAIRPERSON CLARK: And some people
13 run some movies, and some people don't run some
14 movies.

15 MR. GRAFMAN: That has been correct.
16 I mean since the mid to late '70s when feature
17 motion picture exhibitors stopped showing what
18 would generally be concerned obscene, the Deep
19 Throat type picture, the Pennsylvania law as now
20 enacted has not been a problem for motion picture
21 exhibitors. They have been able to live with it.
22 They have been able to make rational and
23 intelligent business decisions.

24 The fear is -- and whether you are
25 talking about a national buyer sitting at a

1 corporate headquarters in Denver if it's United
2 Artists, in Kansas City or California if it's
3 AMC, or down in Tennessee if it's Regal Theaters
4 or if it's someone -- a local business person in
5 Allegheny County who is making the decision, the
6 fear is if it's on a county-by-county basis, it
7 is going to be much more difficult to make the
8 decision whether or not to play what otherwise
9 would be a feature motion picture.

10 I mean Schindler's List, which was
11 mentioned earlier, is really one of the best
12 examples. I mean a picture that tries to show
13 the Holocaust as it actually was is, to me at
14 least, almost by definition an obscenity. And
15 certainly, there were a lot of things shown in
16 that picture that would not sit well with most
17 motion picture theater -- excuse me -- with a lot
18 of people who go to the motion pictures.

19 I mean there was a lot of nudity.
20 There was a lot of violence. It is not the type
21 of topic that, you know, a community may take
22 well to. Does that mean that Pennsylvania should
23 be in the business of telling, first of all, the
24 distributor and producer whether or not to make
25 the picture and then the exhibitor who has to

1 make the decision whether or not to show that
2 picture?

3 That was obviously an important
4 picture. It won an Academy Award as best picture
5 of the year. Yet it dealt with what is by
6 definition an obscenity.

7 CHAIRPERSON CLARK: But your local
8 theater owners didn't -- they didn't come under
9 attack for showing this movie that you know of?

10 MR. GRAFMAN: I am not aware of any
11 of them that came under attack for it under the
12 current law.

13 CHAIRPERSON CLARK: Under the
14 current law.

15 And the local theater owner, you
16 know, would have a checklist of whether he wanted
17 to show Schindler's List in his area and whether
18 he wanted to receive that movie or not.

19 MR. GRAFMAN: Well, that is correct.
20 But he also has to weigh the competitive
21 situation. If the other theater across the
22 street might try and show it, is he going to be
23 hurting himself competitively by not showing it
24 yet running a risk by exhibiting it? It makes
25 the decision that much more difficult for him as

1 a small businessman.

2 CHAIRPERSON CLARK: Could both of
3 those fellows show the same movies?

4 MR. GRAFMAN: Not usually.

5 CHAIRPERSON CLARK: Okay.

6 MR. GRAFMAN: Let me just put --

7 CHAIRPERSON CLARK: I never saw
8 that. I go in the line -- okay. Go ahead.

9 MR. GRAFMAN: Let me just put out
10 one other thought which has occurred to me as we
11 have been sitting here today. If -- and this is
12 purely a legal thought. But if, in fact, this
13 local community standard were to be passed into
14 law and this section were to be struck down as
15 unconstitutional, well, you would not have a
16 saving statute that could work here.
17 Pennsylvania would be without an obscenity law,
18 at least in the short term, because you wouldn't
19 have a community standard section.

20 So I mean in all fairness, from a
21 purely legal point of view, the General Assembly
22 better be very confident in passing this type of
23 a law, because it could really put Pennsylvania
24 in a much more difficult situation than it is
25 right now with a very workable standard.

1 CHAIRPERSON CLARK: Yeah. I was
2 thinking along the line with Ms. Isbell's
3 testimony that possibly the sponsor of this bill
4 might want to amend it to make it the tougher of
5 the state or the local community standard so that
6 you don't have these pockets of areas come up or
7 you do have something to fall back on.

8 MR. GRAFMAN: Yeah. But how do you
9 charge a jury on that? How does the judge charge
10 the jury on that? He's now presented with two
11 alternatives.

12 CHAIRPERSON CLARK: Judges present
13 alternatives to juries all the time.

14 Ms. Isbell, I'm assuming that as you
15 distribute these motion pictures, you distribute
16 them to theater owners or to companies within a
17 state or --

18 MS. ISBELL: Well, it's a little bit
19 complex, because our member companies make
20 television programs, they make videocassettes,
21 and they make major motion pictures. And you can
22 imagine in all three cases, the distribution is
23 very different. But I think, as Mr. Grafman
24 described, it's pretty straightforward.

25 The major studios will give a major

1 motion picture to a distributor. Typically,
2 those are regional offices. And I think our
3 concern is that if this law, the Pennsylvania
4 obscenity law, is to change from statewide to
5 local standards, we've got distributors in quite
6 a mess.

7 For many, many years, they have been
8 able to look at Pennsylvania as sort of a
9 homogeneous area. You've got a statewide
10 community standard in place, and you can be
11 relatively confident that you are safe in
12 distributing mainstream motion pictures.

13 If you go to local community
14 standards, you've got a big increase in
15 distribution costs, because, you know,
16 occasionally you are going to have to call in
17 brilliant lawyers who charge their due worth per
18 hour to analyze whether or not this is a risky
19 business decision.

20 Well, that increased cost is going
21 to be passed on to the consumers in Pennsylvania
22 or -- or still a local business person might make
23 the decision just it's not worth it. I can't
24 afford it. I'm a mom-and-pop-operated video
25 store. I just can't take the risk. So that

1 mainstream motion picture is not available to
2 that community.

3 CHAIRPERSON CLARK: But the
4 distributor holds whatever movies or videos they
5 have in an inventory, and then the purchase or
6 the decision to stock that or sell that comes
7 from the individual who owns or manages the
8 community store.

9 MS. ISBELL: I think in general
10 that's correct. Actually, Pennsylvania has some
11 pretty interesting trade practice that's
12 different than the rest of the country. So I
13 would actually defer to Mr. Grafman on that,
14 because I'm not in tune to those particular
15 laws.

16 But in general, I think that's
17 correct. It's a negotiation between the
18 distributor of the motion picture and the
19 particular theater or the chain of theaters.

20 CHAIRPERSON CLARK: Or the video
21 store owner?

22 MS. ISBELL: Or the video store
23 owner, correct.

24 CHAIRPERSON CLARK: Or whatever.
25 How have you operated --

1 Representative Armstrong indicated that some
2 states have gone to community standards. And
3 maybe if each of you could tell us what you have
4 seen in those states that has impacted your
5 business and how it has impacted your business.

6 MS. ISBELL: I think that's a very
7 good question, and I would love to pull together
8 some data for you, if I could.

9 Part of the problem is that no state
10 has changed their laws in so many years that it's
11 difficult to look back over the past couple of
12 decades and see a definitive change. The
13 business practices have been operating -- are
14 used to operating with particular states. If a
15 state has local standards -- there are about
16 eight to ten states that do in the country --
17 it's been that way for so long that they have
18 worked out a particular method of dealing with
19 it.

20 To say that it was a difficult
21 transition would probably be a very, very fair
22 statement. I notice that a lot of the states
23 that do have local community standards tend to be
24 very small states with fewer localities than
25 Pennsylvania. I think Pennsylvania

1 particularly -- would be a particularly
2 difficult state to deal with, because you have
3 so many different localities that you could
4 draw upon.

5 Do you have anything to add, John?

6 MR. BULL: No.

7 MR. GRAFMAN: First, I would not
8 like to think that Pennsylvania is that unique in
9 how we license or purchase feature motion
10 pictures. We do have a fair trade practices law,
11 but I'm not really sure what relevance --

12 CHAIRPERSON CLARK: I was going to
13 say this isn't the antitrust section.

14 MR. GRAFMAN: And I think you
15 accurately described. I mean each picture is
16 sold for each theater, and the decision is made.

17 I am counsel to the state trade
18 association, but I'm sure the national trade
19 association could provide us with information on
20 other states. I really do not have that
21 available and, quite frankly, have not looked
22 into it because the Pennsylvania experience --

23 MS. ISBELL: Has been good.

24 MR. GRAFMAN: -- I think we could
25 all agree -- has been workable. It really has

1 not presented a problem to the First Amendment
2 industries.

3 CHAIRPERSON CLARK: And I guess the
4 point I'm trying to make is that this process of
5 a community standard is being done every day
6 when that local theater owner or whatever, you
7 know, picks -- has his list and picks his movies
8 that he's going to show. You know, he wants to
9 show what's going to bring people into his
10 movie theater and not chase people away or
11 whatever.

12 And I'm thinking that when he sits
13 down, he is making a decision as to what is going
14 to go over, so to speak, or not go over or cause
15 him headaches or cause him adverse publicity or
16 picketers or whatever at his movie theater. And
17 he could care less what the state standard is or
18 what the standard for the rest of the state is
19 because he is selling tickets to that movie in
20 his area.

21 MR. GRAFMAN: He knows he doesn't
22 want to be prosecuted criminally. I can
23 certainly tell you that. And that's something
24 that the exhibitor and, for that matter, I think,
25 the producer and distributor has not had to

1 consider as a major threat in Pennsylvania,
2 because we have the statewide standard and we
3 know how to operate under it and we know what we
4 are looking for.

5 I mean I tried to point out in my
6 remarks it's a three-step process. First, the
7 businessman has to make the decision. The
8 prosecutor has to make the decision, and the jury
9 has to make the decision. I think other people
10 here today have pointed out the real fear is at
11 the prosecutorial level.

12 I mean, quite frankly, if want a
13 county-by-county basis, legal analysis goes down
14 and political analysis goes up and pressure
15 analysis goes up. And that is a major fear of my
16 clients. I have to be very blunt about it. And
17 I have to believe that the DAs, by reason of the
18 position they have taken here today, do not want
19 to be involved in making those type of decisions,
20 nor do they want to be in conflict with their
21 other DAs.

22 CHAIRPERSON CLARK: Gee, having been
23 a former DA, I have handled those situations in
24 my own way and have never had a problem with
25 them. But --

1 MR. GRAFMAN: I don't purport to
2 speak for the DAs obviously. They have expressed
3 their own opinion here today.

4 CHAIRPERSON CLARK: Representative
5 Armstrong. Oh, Representative Manderino.

6 REPRESENTATIVE ARMSTRONG: I would
7 like to ask some questions.

8 CHAIRPERSON CLARK: Okay.

9 REPRESENTATIVE ARMSTRONG: But I
10 will defer to Representative Manderino.

11 REPRESENTATIVE MANDERINO: I
12 actually just have one.

13 Ms. Isbell, at the end of your
14 testimony, you alluded to providing it -- when
15 the chairman asked questions going to who does
16 and who doesn't have a community standard as
17 compared to a statewide standard and how it is or
18 isn't applied, to the extent that you have
19 access to that information, I would find it very
20 useful.

21 I know -- I mean it first raised a
22 red flag in my mind. I had an impression from
23 Representative Armstrong that there were about 20
24 or so states that had it. You think there are
25 about eight. And I don't really know that the

1 number of states per se is the issue, but to be
2 able to see --

3 MS. ISBELL: How each state --

4 REPRESENTATIVE MANDERINO: Right.

5 MS. ISBELL: Sure.

6 REPRESENTATIVE MANDERINO: And how
7 their definition of community is and how their
8 definitions of some of these other things that
9 would impact that decision. And I also do think
10 that it is fair to say that it might be easier to
11 apply a community standard in a little state like
12 Rhode Island than it would in Pennsylvania.

13 So I don't know if those are the
14 kinds of states that are having it. To the
15 extent that anyone through the national
16 association that you represent have access to
17 that kind of information, I would find it
18 particularly helpful.

19 MS. ISBELL: We would be happy to
20 provide that.

21 REPRESENTATIVE MANDERINO: Thank
22 you.

23 CHAIRPERSON CLARK: Representative
24 Armstrong.

25 REPRESENTATIVE ARMSTRONG: Yes.

1 Thank you. And I want to thank the speakers for
2 coming today.

3 I also want to say this, that as the
4 prime sponsor of the bill that I don't think any
5 of the individuals who have been involved with
6 prosecuting obscenity ever had in mind the
7 newspapers publishers, NATO, and the movie
8 distributors who are the mainstream producers.
9 So I find it perplexing at this point that you
10 are here sharing your thoughts as fears when we
11 actually do have a track record of reality.

12 We are not establishing -- we are
13 not inventing the wheel. The wheel has already
14 been invented. It has been in place in a number
15 of states. States like Virginia, Florida,
16 Missouri, Utah, Louisiana are five that I have
17 here that I pulled out quotes from their own
18 Supreme Court rulings.

19 And I would get to this point, I
20 guess. When the United States went from a
21 nationwide standard to a statewide standard, that
22 probably did the same thing within your
23 organizations as what you are fearing that it's
24 going to create in your organizations today.
25 But yet in reality, when those were actually put

1 in place -- and you heard testimony earlier that
2 over the past 20 years, no major motion picture
3 main line type of film has ever been successfully
4 prosecuted.

5 And I have raised this question with
6 your organization already, Amy. Give me an
7 example of where this has been done.

8 MS. ISBELL: Sure, sure. I think
9 the disconnect here is with threat and
10 intimation. We can talk about court cases; but
11 quite frankly, I'm willing to bet that there are
12 many instances that never end up in court. And
13 the reason why is put yourself in the shoes of a
14 local mom-and-pop video store.

15 You are running a family business
16 here. You've got your customers around on a busy
17 Friday night and in walk two police officers in
18 uniform, flash their badges and say, There's a
19 movie on your shelves. We think it might be a
20 violation of the Pennsylvania obscenity laws.
21 You've got a choice. You can spend hundreds of
22 thousands of dollars hiring a lawyer and going to
23 court, fighting us on it. We can charge you. We
24 can embarrass you. You can lose your clientele,
25 or you can just take it off the shelves. No

1 problem. We will keep this nice and simple and
2 quiet for you.

3 Which do you think is going to
4 happen?

5 CHAIRPERSON CLARK: You put it under
6 the counter.

7 MS. ISBELL: Well, I can tell you
8 from experience, we do work very closely with the
9 Video Software Dealers Association of America.
10 And our conversations with them have told us
11 about several instances across the country where
12 this happened.

13 You might have seen the famous
14 Dateline story about Tin Drum in Oklahoma City.
15 It's not related to statewide versus local
16 obscenity standards, and I'm not claiming that it
17 does. But it's a good example of the local law
18 enforcement officials getting overzealous -- this
19 was discussed earlier -- and deciding to take it
20 upon themselves.

21 And luckily, this is one that ended
22 up in court; but there are many others across the
23 country -- and I would be happy to provide you
24 with some examples in writing -- where it doesn't
25 get to court and where the mom and pop just

1 self-censors themselves in violation of the First
2 Amendment and takes the video off the shelf.

3 REPRESENTATIVE ARMSTRONG: Maybe by
4 having this hearing and bringing the issue to the
5 forefront, it gives all of those individuals an
6 opportunity to look at the law and see what does
7 violate the law.

8 I think the definition here, that in
9 the Miller case as it's stated what is obscene,
10 we have a definition of what is obscene. People
11 may in their minds think what is obscene. We
12 actually have a definition of what is obscene.
13 And that's why when it comes down to the
14 courtroom, it has to pass this muster.

15 And even dealing with the comment
16 that was made about what's happening in
17 Washington, DC, within this definition, whether
18 the work taken as a whole lacks serious literary,
19 artistic, political, or scientific value,
20 personally I see an awful lot of political value
21 in that. And I see no danger whatsoever for the
22 newspapers to publish those kinds of stories.

23 So I raise those concerns. Again,
24 this bill was no attempt to regulate you folks,
25 because we don't have any history of you being

1 involved in obscene materials.

2 MR. BULL: I think we understand
3 that. I don't think there's any question about
4 it from our point of view; but the problem is, as
5 Ms. Isbell just expressed, we are potentially
6 liable for big problems. And that's the big
7 concern, I think, we have.

8 Perhaps -- may I suggest that
9 perhaps a statement of legislative intent with
10 this bill might allay a lot of our fears and also
11 allay any overzealous prosecutor that might want
12 to tread off into new territory. That might be a
13 way to help assuage the situation.

14 REPRESENTATIVE ARMSTRONG: And I
15 would also say that, again, the situation being
16 able to educate the people as to what is the
17 definition of obscene, using that opportunity,
18 whether we do it in a clarifying statement in
19 front of the legislation, I'm definitely open to
20 doing that, but also use this opportunity to use
21 for your own clients or people you are speaking
22 for as to what that definition is.

23 And, in fact, I also wanted to say
24 today, even today as our own statewide standard,
25 there is that possibility of harassment.

1 MR. BULL: Yeah.

2 REPRESENTATIVE ARMSTRONG: So
3 whether that's right or wrong, you know, I think
4 at that point, that's up for your own
5 organizations to pick up the ball.

6 MR. BULL: It would be broad-based
7 harassment as opposed to narrow-based harassment.
8 It think there's a big difference.

9 REPRESENTATIVE ARMSTRONG: Well, at
10 the same time, your organizations being able
11 to -- and you do this as newspaper publishers.
12 When you see a violation that someone is being
13 violated or threatened, you will take that issue
14 to heart, and you will push the issue and educate
15 and, you know, even to the sense of taking
16 somebody to court and making them, you know,
17 understand what the issue is about.

18 So that's where, I think, your
19 associations have to be responsible for educating
20 your own members as to what this definition is
21 here.

22 MR. GRAFMAN: Representative
23 Armstrong, if I could just respond actually to
24 your initial question and the way you framed it
25 that no one had been successfully prosecuted.

1 And that may very well be true; but none of our
2 members want to be prosecuted, want to face the
3 threat, want to have to deal with going to court,
4 want to have to deal with one increased -- let me
5 try and rephrase that -- with the threat of an
6 increased prosecutorial discretion.

7 I think that's the best way to put
8 it, and that's the invitation by changing this
9 law that you are bringing about. I mean I can't
10 make it any clearer than that, that it really
11 allows special interest groups or the police
12 department on a Friday night, whatever, to have
13 much greater influence over the prosecutorial
14 function than if it is on a statewide basis.

15 That is, quite frankly, the motion
16 picture exhibitors' greatest fear with this; and
17 I don't think it is answered by just putting
18 something in to a definition or a statement of
19 legislative intent. I mean, I think, it goes to
20 the heart of First Amendment analysis and,
21 skipping the businessman who is making it, to the
22 prosecutor's analysis of the law and whether or
23 not the prosecutor is going to attempt to try and
24 accomplish.

25 None of us knows what a jury does.

1 I agree with Mr. Madenspacher, the District
2 Attorney who was here before. The jury goes into
3 that room. It's totally their decision whether
4 it's under a statewide standard or a local
5 standard. It's at the prosecutorial level that
6 the balance will shift significantly, we believe,
7 perhaps even to the point of violating due
8 process. And that would remain to be seen if
9 this type of a change is allowed to happen.

10 My clients do not want to be faced
11 with prosecution, successful or not.

12 REPRESENTATIVE ARMSTRONG: Thank
13 you, Mr. Chairman.

14 CHAIRPERSON CLARK: Seeing no
15 further questions, we want to thank all of you
16 for your time and efforts and testimony.

17 MS. ISBELL: Thank you.

18 MR. BULL: Thank you.

19 MR. GRAFMAN: Thank you.

20 CHAIRPERSON CLARK: You're quite
21 welcome.

22 The next individual to provide
23 testimony before the committee -- and this is the
24 last gentleman before the lunch break -- is
25 Robert W. Peters. He is the president of

1 Morality in Media.

2 Mr. Peters.

3 MR. PETERS: I and Dorn Checkley
4 share a couple of things. We both have been
5 involved in pornography issues for 12 years plus.
6 And I happen to be the legal representative for
7 Morality in Media, who handled some of the
8 workshops in People vs Pornography in the late
9 1980s, specifically Scranton, Erie, and Allentown
10 that I remember.

11 Before I begin, I would just like to
12 make a couple of quick comments in regard to
13 previous speakers. I'm a bit of stand-in in
14 this. Bruce Taylor of the National Law Center
15 was supposed to be your expert witness from the
16 national end of this, and he couldn't come. And
17 Paul McGeady, our general counsel, has really
18 been working on this bill.

19 I had intended to bring a memo that
20 we had done and Bruce Taylor, which would show
21 what the various states do on the statewide
22 versus local community standards. I would be
23 happy to send that to you.

24 My recollection is that close to
25 half of the states permit local community

1 standards. And I would be -- I think the
2 previous speakers would be hard-pressed to show
3 the great restrictions on freedom of speech in
4 those states in regard to newspapers and major
5 motion picture films and whatnot in those
6 states; but I would be happy to see their
7 evidence.

8 Another matter that came up is the
9 difference legally between obscenity and
10 indecency. Specifically, for example, we
11 received a number of calls on the Clinton scandal
12 specifically with the sex talk. To me, it's a
13 sad affair in some respects what the mainstream
14 news media did on this, both in terms of rush to
15 judgment and their almost like teenage freedom to
16 discuss sex at all hours of the day on TV, even
17 when small kids are listening.

18 But since the conversations clearly
19 had serious value, I never thought that that
20 would rise to the level even of legal indecency
21 in the broadcast media. Wrong in my opinion,
22 yes; illegal, no.

23 So obscenity is a three-part
24 definition, which I am going to spend some time
25 going over. There is a difference between

1 indecency -- most, if not all, of what the
2 newspaper representative was talking about, if it
3 fell into any realm, would fall into the
4 indecency realm. Newspapers aren't covered by
5 the indecency standard.

6 Related to that is the difference
7 between an opinion, however vulgar, offensive,
8 rude, crude it may be, and what the Supreme Court
9 in its Miller case described as the crass,
10 commercial exploitation of sex. Opinions,
11 however degraded, depraved, or wrong-headed they
12 may be, are at the core of First Amendment
13 concern. To my knowledge, that's what newspapers
14 are about, mainstream and alternative.
15 Obscenity, uh-uh. Somebody has their legal
16 standards confused.

17 Another matter which -- just to make
18 a point from a legal perspective, when we are
19 talking about obscenity and child pornography,
20 for example, it is the hope that some people will
21 engage in, quote/unquote, self-censorship. The
22 argument that because there is self-censorship,
23 there is a violation of the First Amendment is
24 ridiculous when we are talking about speech that
25 isn't protected by the First Amendment.

1 The Supreme Court specifically dealt
2 with the issue of self-censorship in obscenity
3 cases and did so relatively recently in a RICO
4 obscenity case and dismissed it, as has
5 virtually every court that has been faced with
6 the issue.

7 I will stop with that comment. And
8 proceed to my written comments.

9 My name, again, is Robert Peters. I
10 am president of Morality in Media. We are a
11 national, interfaith organization devoted to
12 stopping traffic in illegal obscenity by
13 constitutional means. I am here to speak
14 specifically in support of the change regarding
15 statewide to local community standards. I really
16 wasn't familiar with some of the other provisions
17 of the bill, having gotten this task late in the
18 game.

19 The three-prong Miller obscenity
20 test -- and I tell you, having prepared this last
21 night, I thought, gosh in heaven, how could I
22 possibly summarize it? But try as best as you
23 can to see the protections that the Supreme Court
24 has tried to build in to its existing obscenity
25 test, which it set forth in 1973.

1 I have printed out the exact words.
2 I will go over it briefly. But in Miller, a
3 majority of the Supreme Court agreed on the
4 following concrete guidelines to isolate
5 hard-core pornography from expression protected
6 by the First Amendment: the first standard,
7 whether the average person, applying contemporary
8 community standards would find that the work,
9 taken as a whole, appeals to the prurient
10 interest; (2) whether the work depicts or
11 describes in a patently offensive way sexual
12 conduct specifically defined; and (3) whether the
13 work taken as a whole lacks serious literary,
14 artistic, political, or scientific value.

15 Now, I will go over these things
16 step by step. First, to be obscene, the material
17 must appeal to the prurient interest in sex.
18 This prurient interest requirement excludes
19 material from the reach of an obscenity law which
20 is simply vulgar.

21 A lot of AIDS education material is
22 grossly vulgar in the words that are used.
23 Instead of using a clinical definition of a sex
24 organ or sex act, they use a vulgarism. That is
25 not pornography. It's not an appeal to the

1 prurient interest. It may not be suitable for
2 children, but it's not obscenity.

3 In *Brockett v. Spokane*, a 1985
4 Supreme Court case, the Supreme Court also held
5 specifically that the prurient interest
6 requirement excludes material that provokes only
7 normal, healthy sexual desires.

8 We must ask what kind of sexual
9 desires does the newspaper industry in
10 Pennsylvania perhaps want to appeal to. But in
11 determining whether material appeals to the
12 prurient interest, the trier of fact must
13 evaluate the work as a whole.

14 Now, what this means is that, for
15 example, in a motion picture film, you could
16 actually have perhaps a couple of scenes -- I
17 shouldn't put numbers on it. You could have a
18 scene or scenes that would actually contain
19 hard-core obscenity; but the material has to be
20 evaluated as a whole. And if the film as a whole
21 does not appeal to prurient interest, it's not
22 obscene by definition.

23 Also in determining whether material
24 appeals to the prurient interest, the jury or
25 judge must evaluate the material from the

1 perspective of the average person. And the
2 purpose of the average person test was to correct
3 a defect in earlier law -- Dorn mentioned it --
4 which was that under the old law, it was obscene
5 if some particularly susceptible person might be
6 hurt or offended. That ended the issue. The
7 average person ended that test.

8 Under the prurient interest test,
9 contemporary community standards also have to be
10 applied. And in Hamling v. United States, the
11 Court stated that the purpose or certainly a
12 primary or the primary purpose of contemporary
13 community standards is so that jurors won't make
14 decisions on the basis of their personal
15 judgment or, practically speaking, by the
16 favored group in the community one way or the
17 other.

18 In Pinkus, another Supreme Court
19 case, 1978, the Supreme Court also said that
20 community includes all adults who compromise
21 it -- comprise it. Excuse me. And I think it's
22 safe to say that there isn't a county in
23 Pennsylvania or in any other part of the United
24 States where there aren't many people who don't
25 share traditional moral values. And those views

1 have to be balanced into the obscenity test.

2 I point out here that what I have
3 just all too quickly gone over once was the
4 obscenity test. And for a period of time, it was
5 deemed sufficient to prevent the abuses that were
6 being talked about here previously or the fear of
7 abuses. This was the obscenity test, prurient
8 interests, average person, contemporary community
9 standards, but today under the Miller we have two
10 other prongs.

11 Second, overall to be obscene, sex
12 material must depict or describe sexual conduct
13 in a patently offensive manner. The Pennsylvania
14 obscenity law is specifically limited to
15 materials which depict or describe ultimate
16 sexual acts, normal or perverted, actual or
17 simulated, including sexual intercourse, anal or
18 oral sodomy, sexual bestiality; and patently
19 offensive descriptions of masturbation, excretory
20 functions, sadomasochistic abuse, or lewd
21 exhibition of the genitals.

22 Now, from the above, I conclude, for
23 example, that Michelangelo's statue the David,
24 Matisse's portraits of nudes, National
25 Geographic's photos of nudity in primitive

1 societies, and Schindler's List's concentration
2 camp scenes, nudist magazines, and girlie
3 magazines, i.e., depicting topless women and bare
4 butt, are not obscene by definition because there
5 is no sexual conduct whatsoever.

6 If there is no sexual conduct, it
7 can't be obscene no matter how pornographic it
8 may be to all or many.

9 In Jenkins v. Georgia, a Supreme
10 Court case that specifically dealt with a motion
11 picture film -- I think it may have been R rated,
12 one of the first. And it's an example, I guess,
13 of a prosecution of an R-rated film. I'm not
14 personally aware of others.

15 But in that case, the Supreme Court
16 held that the film Carnal Knowledge was not
17 obscene. And it did so because even though it
18 was understood that sex acts were taking place,
19 the camera didn't focus on the bodies during
20 these scenes and it didn't show genitals. So
21 the Supreme Court said that in order to be
22 obscenity, we are talking about hard-core sexual
23 conduct, not mere leaving something to the
24 imagination.

25 Perhaps the motion picture industry

1 really is moving in the direction of real
2 hard-core pornography. And certainly, in my
3 opinion, it seems that the line between what once
4 was an organized crime controlled pornography
5 business and at least part of the motion picture
6 industry gets blurrier.

7 But so far I think it's safe to say
8 under the Miller test, Hollywood has not crossed
9 the line into adult obscenity, to my knowledge.
10 And there's a lot of garbage coming out of the
11 industry today, in my opinion.

12 In another '74 case, Hamling, the
13 Supreme Court stated that obscenity laws are
14 aimed at obnoxiously debasing portrayals of sex.
15 That has something to do with patently offensive.
16 It has to go beyond mere, you know, something
17 that's unsettling or may offend a few people.
18 It's patently offensive, obnoxiously debasing
19 portrayals of sex. This would presumably exclude
20 must legitimate sex education materials when
21 distributed for a bona fide purpose.

22 In a 1997 case, the Supreme Court
23 also held that the sexual conduct prong is to be
24 measured again by community standards. The
25 purpose of that is so that the jurors don't make

1 decisions based on their personal views or those
2 of a particular minority in the church, political
3 moral minority.

4 Now, in addition to this, in order
5 to be obscene, the material when taken as a
6 whole, must lack serious artistic, literary,
7 political, and scientific value.

8 Now, what this means practically is
9 that even though, for example, a motion picture
10 film depicted hard-core sexual conduct in a
11 patently offensive manner, did so repeatedly, and
12 even though, taken as a whole, this motion
13 picture film did appeal to the prurient interest,
14 it would not be obscene if the film, taken as a
15 whole, had artistic, literary, political, or
16 scientific value, serious of those, again,
17 raising the question, What exactly does the
18 motion picture industry plan to be sending out to
19 be so concerned about something like this?

20 Furthermore, as clarified in *People*
21 *v. Illinois*, the determination of what has
22 serious value is not made by applying community
23 standards. To reiterate, to be obscene, sex
24 material must, taken as a whole, lack serious
25 artistic, literary, political, or scientific

1 value. What newspaper fits that definition?

2 This determination is not made by
3 applying community standards. This issue
4 before -- in this legislation is irrelevant to
5 the determination of serious value.

6 The material must also depict or
7 describe hard-core sexual conduct, not just
8 nudity or leaving at least something to the
9 imagination. And they must do it in a patently
10 offensive manner. And the words "patently
11 offensive" have legal meaning. In addition,
12 taken as a whole, it has to appeal to the
13 prurient interest.

14 I have often thought, you know, I'm
15 not, I guess, an unequivocal fan of the Supreme
16 Court. But it's my honest opinion that with the
17 Miller definition, they really gave it their
18 best. Unfortunately, from a practical
19 perspective, a lot of this definition depends on
20 common sense determinations on the part of
21 jurors. And the defense lawyers are great at
22 confusing jurors. And of course, there are
23 always cases where jurors simply ignore the
24 law.

25 But I think in attempting to carve

1 out a category of materials called hard-core
2 pornography, if you look at the various
3 components of the obscenity definition as they
4 have been given life in various court cases,
5 you've got to conclude that what these people
6 were talking about prior to me was not what the
7 court was aimed at.

8 Could there be a prosecution against
9 Bambi? I guess so. Could there be a prosecution
10 against CBS for the Olympic prurience? Anything
11 is possible. Is it likely in this real world
12 when you can't even get prosecutors to go after
13 the worst of this stuff? Absolutely not.

14 I can probably point to about 4
15 cases that I am aware of in my 12 years where
16 somebody -- there was a borderline case and a
17 prosecutor, I guess, decided to take the risk.
18 In the cases that I am aware of, the prosecutor
19 lost.

20 The purpose of the Miller test was
21 to isolate a category of material called
22 hard-core pornography. By definition, if it has
23 serious value, it's not obscene. And that
24 determination is not made by applying community
25 standards.

1 I'll skip the rest of what I've got.
2 You can read it. I will go to a second point,
3 which is the statewide versus local community
4 standards issue.

5 Generally speaking, the Supreme
6 Court has not attached much significance to the
7 question, although I will hasten to add that it
8 has taken up some pages of its opinion, in terms
9 of which community standards should apply.

10 In Miller, the Supreme Court
11 approved use of a statewide standard in contrast
12 to a national. In Jenkins, the Supreme Court
13 approved use of local community standards,
14 stating specifically that the Constitution does
15 not require that juries be instructed in state
16 obscenity cases to apply the standards of a
17 hypothetical statewide community.

18 In Hamling, the Court indicated that
19 the federal district court below had erred
20 because it had applied national standards. But
21 what did the Court say: Whether petitioners were
22 materially prejudiced by references to national
23 standards is a different matter. This Court has
24 emphasized on more than one occasion that a
25 principal concern in requiring that a judgment be

1 made on the basis of contemporary community
2 standards is to assure that the material is
3 judged neither on the basis of each juror's
4 opinion, nor by its effect on a particularly
5 sensitive or insensitive person or group. The
6 District Court's instruction in this case,
7 including the reference to national standards,
8 which the Court didn't think were appropriate,
9 accomplish the purpose of the community standards
10 test.

11 I would add that in Hamling, a
12 federal judicial district standard was applied.
13 There are at least three and maybe four in
14 Pennsylvania. So in a federal obscenity case,
15 you are not going to have a statewide standard
16 apply. You are going to have the southern
17 district, eastern -- I think there are four
18 federal judicial districts in Pennsylvania.

19 REPRESENTATIVE MANDERINO: Three.

20 MR. PETERS: Three. So there are
21 three different community standards that will be
22 applied in a federal case. In California, which
23 the Hamling involved, there were four judicial
24 districts.

25 The only plausible explanation --

1 and I think its supported in the Court's
2 decisions. For the Court's apparent lack of
3 concern about whether the standards of the state
4 or of a federal judicial district or county
5 within the state are applied, the only practical
6 thing -- the only way the Court has minimized
7 this is because, as pointed out in Smith v.
8 United States, community standards are not
9 elements of an obscenity crime.

10 The elements in obscenity crime are
11 lack of serious value, patently offensive sexual
12 conduct, and prurient appeal. And in my opinion,
13 those elements have life in themselves
14 irrespective of what community standard applies.

15 I look at it as a threshold; and I
16 think I could -- interestingly, former Chief
17 Justice Earl Warren was a strong defender of
18 local community standards. You can find his view
19 points in a 1964 case, *Yakabellis v. Ohio*.

20 But the -- you know, in the talks
21 about -- you know, the Court is not -- if there's
22 no evidence of prurient appeal, for example, if I
23 use that F-word and somebody arrests me for
24 obscenity, that's not prurient. It may be
25 vulgar. It may be indecent in a certain medium,

1 but it's clearly not obscene. So there is a
2 threshold level which the courts will look at
3 irrespective of any particular community standard
4 that's applied.

5 Again, in the Court's mind, they
6 attempted to isolate a category of materials
7 called hard-core pornography. And in effect
8 what, I guess, the newspapers and cable companies
9 and the recording industry and MPA want to do is
10 distribute hard-core pornography into the
11 communities of Pennsylvania. And having made
12 that decision, they are concerned that local
13 community standards might make a juror's job
14 easier.

15 Well, if that's what -- whoever this
16 is that wants to do that, I have no sympathy with
17 them and, at least from my understanding of the
18 Supreme Court cases, neither does the Supreme
19 Court.

20 But to my knowledge, newspapers
21 don't publish obscenity. To my knowledge, I do
22 not know of any mainstream motion picture film
23 that would even come close to violating the
24 obscenity law. And I will say no more on that
25 point.

1 What are the advantages of local
2 community standards? First, and I think it's
3 clear, most people are familiar with what's going
4 on in their community. And I actually had some
5 contact, personal dealings in the late '80s in a
6 New York State obscenity case where -- juries do
7 sometimes tell why they do things.

8 And I have sat on a jury, and I was
9 asked by the lawyers why we did what we did. And
10 one of them was for the City of New York. So
11 jurors do talk sometimes about why they make
12 decisions. And the jurors didn't convict in
13 that case because they claimed or said they
14 didn't know what the statewide community
15 standards were.

16 Again, I mentioned that I have been
17 in Scranton and Erie and Pittsburgh and
18 Harrisburg and Allentown. I have some sense,
19 even though I'm a New Yorker, of what goes on in
20 Pennsylvania. I'm not sure that everybody in
21 Pennsylvania -- when I was a kid and I grew up in
22 north central Illinois, I was one of the few kids
23 that had ever been in Chicago. Well, not one of
24 the few, but I had many friends who had never
25 been there. So that is the purpose.

1 And in a 1960 case, the state
2 Supreme Court of Pennsylvania said, We cannot
3 agree that Pennsylvania is a single community.
4 And they cited a whole bunch of laws that
5 depended on local community standards. And that
6 happened to involve an obscenity issue. I don't
7 know what their view would be on this point, but
8 that's a statement from Goldman Theaters v. Dana
9 in 1960.

10 Second -- and this is a tough issue;
11 but another advantage of local community
12 standards is that each community will be able to
13 receive the maximum protection provided by the
14 Pennsylvania obscenity law instead of being
15 forced to tolerate what would otherwise be
16 illegal in its midst. There is no reason why all
17 Pennsylvania communities must tolerate what only
18 the most jaded accept.

19 By the way, I'm from New York City;
20 and I often argue, as you do, that the people of
21 New York, if you stick a hard-core publication in
22 their face, they are going to react pretty much
23 the same way they do in any other part of the
24 state.

25 But let's assume there are some real

1 jaded communities that somehow in effect lower
2 the community standards throughout the state.
3 The Constitution doesn't require it, and there's
4 no reason to force it on the people of
5 Pennsylvania.

6 But again, in talking about
7 obscenity, we are talking about a threshold of
8 materials that is hard-core pornography. It's
9 without serious value by definition irrespective
10 of any community standard that might apply. And
11 that to me is just why the Court, the Supreme
12 Court, has basically brushed aside questions of
13 community standards, because it doesn't see
14 community standards as the primary protection.

15 The primary protection is it's got
16 to appeal to the prurient interest; it's got to
17 lack serious value; and it has to depict patently
18 offensive hard-core sexual conduct. Two of those
19 prongs have to be taken as a whole. And there's
20 also some meat in terms of what patent
21 offensiveness means and prurient appeal in terms
22 of court decisions.

23 That's the protection, not which
24 community standard applies. And not one of the
25 speakers mentioned that there had been a couple

1 of -- where the people wanted, as in
2 Pennsylvania, a local community standard and it
3 was defeated. It was defeated because these
4 people -- their representatives were there with
5 their money and their influence with legislators
6 to defeat it. And that's the only reason it was
7 defeated.

8 A last point, and I will leave most
9 of this to your reading. While we do support a
10 change from state to local, we do oppose the bill
11 with a public school exemption. And I will tell
12 you -- I mean for one thing, the Pennsylvania law
13 does include an education, not that it's
14 necessary; but it's in there.

15 So basically, what this exemption is
16 saying is that material that by definition lacks
17 serious educational value can be distributed to
18 children under this and have a defense. I mean
19 maybe that will summarize what the exemption
20 means. By definition, the material must lack
21 serious educational value. That's already in the
22 law.

23 Now, what this defense would do is
24 say even though this pornographic material lacks
25 serious educational value, in Pennsylvania, it

1 can be shown to school children. It doesn't make
2 any sense. And I will stop. You have my written
3 testimony for further details, I guess.

4 CHAIRPERSON CLARK: Yes. We thank
5 you very much for your testimony.

6 And are there any questions of Mr.
7 Peters?

8 Representative Manderino.

9 REPRESENTATIVE MANDERINO: I don't
10 know if this a question more than a comment, but
11 you are welcome to comment on it after I do.

12 I have to admit I have a bit of a
13 problem with your trying to -- I didn't hear
14 anyone on the panel before us tell us that it was
15 their intent to distribute obscene material. So
16 I think to intonate that that must be what they
17 are about because they are opposed to this is
18 kind of unfair after they are already gone.

19 But what I really have a problem
20 with and that I'm struggling with is -- I could
21 put my lawyer's hat on. And I can agree with you
22 on the legal definition of obscenity under
23 Miller. But I also know darn tootin' exactly --
24 I can't remember what justice it was that
25 Representative Reber mentioned when it was first

1 decided who said, I can't tell you what obscenity
2 is, but I'll know it when I see it. And I think
3 that that is the problem.

4 I think that, yes, when we finally
5 get into court and get into the jury box and,
6 like you said, who knows what goes on in
7 juries -- and I am sure that juries, depending on
8 the composition of them, assume that how they
9 feel is the statewide standard. And I'm sure
10 there are juries who question whether or not how
11 I feel is the statewide standard, etc., etc. We
12 can't control or determine that.

13 But I also think that at the first
14 instance, when I as a community person who is
15 offended by what I see happening in the community
16 around me and/or I as a prosecutor are offended
17 by what I see happening in the community around
18 me or my constituents are offended by what they
19 see, they use the layman's test.

20 They use the "I'll know it when I
21 see it" test to decide whether or not it's
22 obscene and not does it appeal to the prurient
23 interest, does it depict or describe patently
24 offensive sexual conduct, does it lack any
25 serious literary, artistic, or political or

1 scientific value on the whole.

2 So I think that's the struggle that
3 we have and that's what I am struggling with,
4 because I really do think that we have both of
5 those definitions operating concurrently and
6 perhaps, stronger than one another depending on
7 which phase of -- I think the initial phase of
8 are you going to be charged with the violation of
9 the obscenity statute or, not even charged, are
10 you going to come under attack for displaying or
11 distributing obscene materials, I think that's
12 when you get the "I'll know it when I see it"
13 standard.

14 And then when you finally get down
15 to proving the case in court, that's where you
16 get the Miller standard. And I would be
17 interested in your thoughts on that observation.

18 MR. PETERS: Again, as a threshold
19 determination, it has to lack serious artistic,
20 literary, political or scientific and, in
21 Pennsylvania, educational value. That's not a
22 community standards' case.

23 I make a point sometimes I wish --
24 you know, there's a very important role for the
25 press in this issue, which is to be aware of what

1 the obscenity test is. And if someone does
2 genuinely cross the line because, you know,
3 maybe there is something that without question
4 has serious value but it's extremely offensive, I
5 mean the law is the law. And to me, the press
6 has a role to play in exposing excesses.

7 Instead of that, they run around and
8 defend obscenity, period. Taking the ACLU
9 perspective effectively, there should be no
10 regulation. That's the true position of most
11 newspapers in the United States today. And
12 that's why, I guess, I took advantage of giving
13 them a little bit of a hard time.

14 But, you know, there are two things.
15 From a juror's perspective, the tests to me are
16 pretty simple. Hey, it has to appeal to the
17 prurient interest, appeal to lust. Again,
18 somebody says the F -- the word or whatever,
19 that's vulgar, but it's not pornographic. It
20 doesn't appeal to lust.

21 The second question, does it depict
22 hard-core sexual conduct? You know, you've got
23 that threshold determination.

24 And thirdly, the serious value. And
25 to me, there are three protections. No. 1 is the

1 prosecutor, who's supposed to know what the
2 obscenity law is and abide by the law. The
3 second protection, and we learn by many
4 disappointments, is that the jury makes the
5 decision. In my opinion, they often make it for
6 the wrong reasons; and certainly, defense
7 attorneys are usually better prepared to handle
8 these cases than the typical prosecutor.

9 But the third level of protection
10 are the appellate courts at the state and federal
11 level. And I would say that from my experience,
12 the federal courts are much more capable of some
13 of the nuances of the obscenity definition, I
14 mean, in terms of what's patent offensiveness,
15 you know, the Brockett case, that the prurient
16 interest doesn't mean a healthy appeal to
17 sexuality.

18 I mean admittedly what does that
19 mean? But it's there. That's the law. And if
20 somebody rightly argues that this may offend this
21 particular group of people but this does not
22 appeal to the prurient interest, you've got
23 appellate review.

24 I mean with all of the -- it's
25 almost like, you know, the scare tactics. We

1 have had obscenity laws on the books in some form
2 or fashion, I think, since we have had a country.
3 The earliest published obscenity case was
4 Pennsylvania, the Sharpless case in 1812.

5 We have had federal obscenity laws
6 on the books since the 1840s; and up until 1958,
7 the test was much more broad.

8 In the Miller case, the Supreme
9 Court said, you know, all of the fears about
10 censorship and all that, there has never been
11 more freedom, political freedom, freedom of
12 speech in any country in the world than the
13 United States. And we have had obscenity laws on
14 the books for over a century.

15 Now, you know, can society go wacky
16 and decide, again, start throwing Mr. Spielberg
17 in prison because of Schindler's List? I guess
18 so. We have the right to do that ultimately.
19 But is it going to happen?

20 I mean where is the evidence? The
21 2 Live Crew case would have been a simple case if
22 it were harmful to minors. Lost on appeal, a
23 serious value issue.

24 The Maplethorpe case with bullwhips
25 being stuck in someone's orifice, the jury comes

1 back and acquits.

2 The young lady mentioned the Tin
3 Drum, a difficult case. It happens to involve a
4 child pornography question, not obscenity. But
5 where are all of these cases where these renegade
6 lawless and I almost have to say stupid
7 prosecutors are abusing the law?

8 I mean I don't know. Can it happen?
9 Yes. But basically, they don't have the facts.
10 It ain't there.

11 REPRESENTATIVE MANDERINO: Well, I
12 read -- and maybe I'm reading too much into it.
13 But I read the District Attorneys Association's
14 remarks, and you referred to the appellate
15 courts. I mean I view the district attorneys'
16 remarks as saying it helps us to have a statewide
17 standard because then the legal analysis becomes
18 much, much clearer than an emphasis on a local
19 standard.

20 And I understand what you are saying
21 about the local -- you are saying from a legal
22 point of view, the local standard doesn't come in
23 until you have met the definition. And all I'm
24 saying is that in a practical point of view, what
25 I think they are saying to us and what I fear is

1 that in the first instance when you heighten the
2 community standard, do you put the cart before
3 the horse? That's my fear.

4 I think, again, the same thing. I
5 mean we have seen appellate courts -- and again,
6 that's why I asked to see -- let's look at
7 exactly what states have those local community
8 standards and analyze it. But I think that
9 there -- that it is not at all unlikely to say
10 that the more localized the decision is, the more
11 a higher court is going to say, well, we can't
12 second guess what was in the minds of the
13 individual jurors on this, because it was within
14 their discretion to decide that way.

15 So if it was within their discretion
16 as the law was written to decide that way, then
17 we can't second guess and say we, the judges on
18 the appellate court, don't think it was prurient
19 because the law vests the discretion somewhere
20 else.

21 I guess that's -- I mean I'm hearing
22 everything you are saying, and I'm not
23 disagreeing with you on definition. I guess I
24 would, you know, feel more comfortable with this
25 whole discussion if I could figure out the cart

1 before the horse issue. And I really think that
2 that is the most troubling aspect to me of what
3 this is bringing up.

4 MR. PETERS: Well, one thing again,
5 it's just an honest opinion that there's a
6 threshold. I mean when we are talking about
7 variations with community standards and jury --
8 one jury can go one way, and another one can go
9 the other way. That could happen with statewide
10 community standards, and the Supreme Court
11 specifically said that does not violate the
12 Constitution.

13 But, you know, you are still dealing
14 with a threshold of materials, which the Supreme
15 Court intends to -- you know, this hard-core
16 pornography, some people might think that group
17 sex is just wonderful. Freedom, we finally
18 achieved freedom and status. And so, of course,
19 this, in their opinion, is not -- how can you say
20 this appeals to the prurient interest? These
21 lovely people engaging in anal and oral sex and
22 whatever else is going on, lovely stuff.

23 Now, admittedly, in a case like
24 that, the jury will have the decision; but that's
25 the kind of material we are dealing with. We are

1 not dealing with an offensive newspapers opinion
2 or with some hanky-panky in the latest motion
3 picture film in Hollywood. We are dealing with
4 hard-core pornography. And within that world of
5 hard-core pornography, juries have some
6 discretion.

7 Now, your previous speakers disagree
8 with that. But I'm saying there's a threshold
9 beyond which the -- if the courts do their job --
10 and so far, in my honest opinion, they have been
11 very zealous to do their job -- you are not
12 finding works with serious value being
13 successfully prosecuted under the obscenity law
14 or mainstream motion pictures or anything else.

15 One thing, you know, prosecutors are
16 political people. You learn that in my business.
17 They are our friends. And tragically, on this
18 issue, they are our enemies. In my honest
19 opinion -- you know, interestingly -- you know,
20 it's kind of interesting. Basically, I assume
21 the state district attorneys in Pennsylvania
22 stopped enforcing the obscenity law, I think,
23 maybe, two, three, four years ago with a couple
24 of exceptions.

25 So how with a straight face can they

1 talk about the value of a law they aren't even
2 enforcing? I mean, you know, I tell you -- I
3 don't want to drop names. But, you know,
4 prosecutors can be wonderful people. Don't get
5 me wrong. But on this issue, they are not the
6 friends of the people.

7 Now, I know I have never met your
8 colleague there. And I'm not -- I'm just saying
9 District Attorneys Associations make political
10 decisions just like the bar association makes
11 political decisions. And of course, they could
12 come out and say that, you know, local community
13 standards is going to solve all the problems. I
14 don't think that's true. I do honestly think it
15 makes a juror's job easier.

16 I think that's the bottom line. How
17 do you figure out what -- again, I participated
18 in a jury, because in New York State lawyers now
19 get the call. And I got called. It was a very
20 interesting experience. But the dialogue that
21 goes on, I would assume it would be certainly
22 easier for a group of jurors from a county to
23 talk about the various types of people and their
24 neighbors' experiences they have had than it
25 would be to try to share what's going on in

1 whatever number of counties throughout the
2 state.

3 But again, it's -- contrary to what
4 was said, I think there are experience -- many
5 states do have local community standards. And
6 speech has not been suppressed in those states
7 despite, you know, what was said previously.

8 REPRESENTATIVE ARMSTRONG: Mr.
9 Chairman?

10 CHAIRPERSON CLARK: Yes,
11 Representative Armstrong.

12 REPRESENTATIVE ARMSTRONG: I would
13 just like to ask briefly, since you do have a lot
14 of input into other states, How many other states
15 have you actually gotten into to assist in
16 prosecution of cases?

17 MR. PETERS: Well, part of our work
18 is we produce materials for prosecutors in
19 obscenity cases. We have a three-volume
20 obscenity law reporter. And we publish a
21 bimonthly update on obscenity law for
22 prosecutors. We have a handbook. So we do it
23 all the time.

24 And we certainly -- I happened to
25 write a brief in the state of Minnesota on local

1 community standards where they were upheld a few
2 years ago, which is where I kind of -- I didn't
3 go through every state. But my recollection is
4 that there are at least 20 states that have local
5 community standards, and they aren't all
6 geographically small.

7 REPRESENTATIVE ARMSTRONG: Can you
8 comment as to how long those 20-some states have
9 had these local standards, some maybe 20 years,
10 some have been -- has it been more than 20 years?

11 MR. PETERS: Well, the Jenkins case,
12 which the Supreme Court said that the
13 Constitution doesn't require a hypothetical
14 statewide standard -- and keep in mind that your
15 own Supreme Court said, We don't think there is a
16 statewide community standard. That's 1974.

17 I don't know if it was North
18 Carolina or South Carolina amended their
19 obscenity law in the late -- middle or late '80s.
20 And I know they switched to a -- in some cases,
21 they just don't say it. There's no
22 specification. And typically, what that means is
23 it's interpreted to mean that whatever judicial
24 district these jurors are sitting in, that
25 becomes the district, whether it's federal or

1 state.

2 But, you know, again, I'm a
3 proponent of the argument that people aren't that
4 different. And in an obscenity case, it's not
5 supposed to be politics. The question isn't
6 whether I agree with an obscenity law. If I go
7 into a case and I'm not willing to apply
8 community standards, I should dismiss myself or
9 be disqualified.

10 I tell you, interestingly, in New
11 York City, a young lady that we happen to know
12 personally has been arrested more often for
13 violating the state display law in New York City
14 than all of the pornographers put together. Her
15 name is Paige Mellish. And what she does is she
16 goes out on the street corner with these big
17 foldouts of women being fed into sausage machines
18 and bound up and gagged and things, and they
19 arrest her.

20 Now, if New York were as jaded as we
21 are told, you know, why would anybody be offended
22 by this high -- you know, depictions of bound and
23 gagged and whipped women hanging from meat hooks?
24 I mean why would this offend anybody?

25 It's amazing. To my knowledge,

1 since I have worked at Morality in Media, there's
2 been one prosecution under the New York State
3 display law in New York City, which we have
4 happened to have a hand in and assisted with
5 preparing the legal brief for the trial. I did
6 it. This young lady has been arrested more than
7 that. It's not that the police don't
8 occasionally threaten, but nobody ever
9 prosecutes.

10 I mean the average New Yorker isn't
11 a friend of hard-core pornography. If you
12 followed what happened when they started to move
13 the porno dumps into Greenwich Village, where I
14 live, and Chelsea and all these supposedly very
15 liberal political communities, rocks went through
16 the windows, landlords' homes were harassed, and
17 you name it. People didn't want it.

18 Politically, they think there should
19 be no law; but don't stick it in their face.
20 That's the obscenity test. It's patent
21 offensiveness, not, you know, whether I disagree
22 or agree with obscenity laws. That's not what
23 the juror is supposed to be doing.

24 REPRESENTATIVE ARMSTRONG: I want to
25 thank you for coming down today. I really do

1 appreciate it.

2 MR. PETERS: I'm sorry for shouting
3 so much.

4 CHAIRPERSON CLARK: Thank you very
5 much, Mr. Peters.

6 I believe now we will break for
7 lunch, and we will come back at 1:30 and hear
8 from our last individual to present testimony.

9 (A lunch break was taken from 12:45
10 p.m. to 1:30 p.m.)

11 CHAIRPERSON CLARK: Good afternoon.
12 We have been conducting the House Judiciary
13 Subcommittee on Court's hearing on Representative
14 Tom Armstrong's House Bill 739, which is commonly
15 known as an obscenity bill.

16 We had heard testimony all morning.
17 We broke for lunch, and now the last individual
18 to present testimony to the committee is Joanne
19 Sampey (phonetic).

20 MS. SAMPEY: Sampey.

21 CHAIRPERSON CLARK: Sampey. Joanne,
22 if you would like to come up and take a seat and
23 pull the microphone close to you.

24 MS. SAMPEY: Mr. Chairman and
25 members of the committee, I appreciate the

1 opportunity to testify today in opposition to
2 House Bill 739. My name is Joanne Sampey. I am
3 a resident of Cheltenham, testifying today as a
4 citizen and taxpayer of the Commonwealth of
5 Pennsylvania.

6 I am also an artist, a jewelry
7 designer by trade. I am very much concerned
8 about any proposal that invites a patchwork of
9 differing artistic standards in each of
10 Pennsylvania's 67 counties. However, I am here
11 only in part because HB 739 might threaten future
12 income from my business.

13 Primarily, I'm concerned as a
14 taxpayer who sees costly court confrontations
15 ahead in defending HB 739, if enacted. Divergent
16 and inconsistent standards for First Amendment
17 protected materials will become a lightening rod
18 for litigation, attracting into Pennsylvania the
19 well-financed attorneys from the entertainment
20 industry and from coalitions of artists,
21 educators, and civil libertarians.

22 I'll address HB 739 only briefly as
23 an artist, and I do so because I know there are
24 other artists in the hearing room who will not
25 have the opportunity to testify.

1 Let me say up-front that my own
2 designs are rarely exotic in nature. My
3 signature instead is in the abstract design of
4 objects and materials you find in nature or
5 generally in gold or silver or other naturally
6 occurring metals, leaves, twigs, precious gems
7 appearing to float on the surface of a still
8 pond. My work is popularly priced, although
9 pricey, and it can be found in retail stores
10 throughout the Commonwealth of Pennsylvania and
11 in a number of national catalogues.

12 Under HB 739, this work is simply
13 material. If specifically commissioned by a
14 client, this material may from time to time
15 depict the human form. It may be specifically
16 erotic, if that is the client's taste and
17 preference. It is difficult, I believe, in
18 working with such materials to create anything
19 that is truly obscene.

20 My fear, if HB 739 is enacted, is
21 that my freedom to express myself as an artist,
22 indeed my clients' freedoms as well, can be
23 seriously attacked as counties adopt stringent
24 standards and definitions related to nudity;
25 sexual content, not necessarily obscene; and

1 other expressions of human form or activity.

2 The Commonwealth of Pennsylvania is
3 being asked by authors of this legislation to
4 walk down a road that other states have wisely
5 avoided in recent years.

6 One thing I am not is a lawyer, but
7 I've learned enough to arm myself with the
8 knowledge any average citizen needs to know about
9 our laws. The Internet has become a powerful
10 tool for citizens who want some perspective on
11 actions proposed in their communities and in
12 state legislatures.

13 Once armed about the impact of HB
14 739 on our state's treasury, I learned that my
15 fears are not unfounded.

16 In Illinois, legislation similar to
17 HB 739 has been defeated twice, in 1995 and again
18 in 1997. The American Civil Liberties Union
19 organized and advised a coalition of librarians,
20 publishers, broadcasters, the state's
21 universities, the Illinois Press Association, and
22 the Motion Picture Association of America.

23 The ACLU said to this coalition, and
24 I quote, Recall that the Illinois bill threatens
25 the distribution of First Amendment protected

1 materials. National and statewide distributors
2 and wholesalers will curtail the deliveries of
3 material with sexual content, including
4 nonobscene works, rather than risk mistaking
5 local standards and distributing material later
6 found to be obscene. Both national and statewide
7 distributors would have no means of knowing what
8 the standards are in a particular county in which
9 their material might be sold.

10 While the curtailment of at least
11 some of these materials may be a legitimate goal
12 for some members of this committee, I think you
13 can all easily see that you are stepping across a
14 line in interstate commerce and constitutionally
15 protected freedoms of expression. Blurring that
16 line with a patchwork of conflicting local laws
17 governing what is obscene and what is not obscene
18 throughout Pennsylvania threatens segments of
19 giant industries who have the ability, the means,
20 and certainly enough at stake to fight back
21 vigorously in our courts.

22 In looking for other examples, I
23 found legislators chose to take no action
24 whatsoever on similar bills pending in the last
25 couple of years in North and South Carolina,

1 Vermont, New Hampshire, Texas, California, and
2 quite probably elsewhere. The bill you are
3 considering appears to be a boilerplate being
4 promoted by one or more arch conservative
5 organizations, but it has not proven to be a
6 popular boilerplate in the States in which it has
7 been introduced, neglected, or rejected.

8 Is this the costly, wasteful
9 direction taxpayers in Pennsylvania want to
10 travel?

11 I would like to recognize at this
12 point several friends, neighbors, and family
13 members who feel as I do about this legislation.
14 These people have accompanied me today, and I am
15 expressing their feelings. We could not all
16 testify, but these people cared enough to travel
17 to Harrisburg today to support my statement to
18 the committee. I'd like to ask them to stand.

19 I would also ask, Mr. Chairman, if I
20 might submit letters for the hearing record from
21 over 100 other Pennsylvanians who have taken time
22 to write to you about concerns that have led them
23 to oppose HB 739. I have those for you now. I
24 would like these entered into the record.

25 Like all of us who traveled to

1 Harrisburg today, these are ordinary people.
2 Some are professionally employed who are active
3 contributors to Pennsylvania's tax base. Others
4 have made their contributions over many years and
5 are now retired. Some are young adults who are
6 just getting a start in life, excited, I found,
7 to be able to play a role in the legislative
8 process by writing to you.

9 I hope you will give each of their
10 letters your attention as time allows in the next
11 few days.

12 If I may conclude, Pennsylvania
13 already has tough, enforceable laws that define
14 obscenity and penalize those who engage in the
15 production of obscenity or who participate in
16 obscene activities. I support those laws

17 Fragmentation of these statutes into
18 67 separate standards throughout Pennsylvania's
19 counties merely promises confusion and costly
20 litigation. Classic literature, classic
21 paintings, contemporary innocent expressions of
22 the human form, all threaten to become legally
23 indistinguishable from pornography if HB 739 is
24 enacted.

25 Most of us prefer, I think, that we

1 be governed under a single standard such as
2 exists today, a good, fair, and effective
3 definition of obscenity that already exists in
4 the Pennsylvania statutes.

5 Frankly, HB 739 invites people with
6 the narrowest moral criteria to control what
7 should be seen, read, or broadcast by other
8 Pennsylvania citizens. We are a culturally
9 diverse citizenry, open minded in our respect for
10 our neighbors and conservative in our
11 expectations of the manner in which the
12 Commonwealth spends our tax dollars.

13 The objectives of HB 739 do not fit
14 comfortably alongside the goals and expectations
15 we have set for ourselves, our communities, and
16 our state government.

17 I urge you to suspend further
18 consideration of HB 739 and invest the
19 Commonwealth's resources in enforcement of
20 obscenity laws found under Title 18 of the
21 Pennsylvania Consolidated Statutes. Thank you.

22 CHAIRPERSON CLARK: Thank you, Ms.
23 Sampey.

24 I believe through this morning's
25 session, why, we have heard a great deal of

1 testimony on just what the -- what is obscene by
2 way of definition as handed down by our Supreme
3 Court. We have also gone through items such as
4 whether this bill would apply to cable, radio,
5 television, etc.

6 And we have also been promised
7 various materials regarding laws that have been
8 passed in other states which have adopted a
9 community standard. And one representation to
10 the committee was that there may be up to 20
11 states that have community standards.

12 And we have asked people who are in
13 favor of this bill to provide us with information
14 on those states and their experience, you know,
15 once they pass such a bill. And the people who
16 have been opposed to this bill, we have asked
17 them to provide us with information of their
18 business dealings in those states to see how
19 their business activities have changed, not
20 changed, and how it has affected their
21 distribution of materials, etc.

22 So the committee has some
23 information to receive on some of the experiences
24 of other states, both for and against. And many
25 of those arguments against House Bill 739 that

1 you advance had been touched on a little earlier
2 today, and we have follow-up information to
3 receive regarding those.

4 MS. SAMPEY: Sir, it's my
5 understanding that normally you listen to people
6 who represent large segments like motion picture,
7 print, and whatever. You very rarely listen to
8 an individual.

9 I'm a member of the Pennsylvania
10 Guild of Craftsmen. There are many, many artists
11 like myself who depend on making a living through
12 their hands and their statements. And we walk a
13 fine line sometimes. And I know that we all
14 worry about our income, and we are concerned
15 about how this bill would affect us. And because
16 of that, pretty much of 99 percent of us are
17 opposed to this bill.

18 CHAIRPERSON CLARK: Yeah. And I
19 understand that. The reason I mentioned those
20 people is that they have the resources to provide
21 that kind of information --

22 MS. SAMPEY: We don't have the
23 resources.

24 CHAIRPERSON CLARK: I know. That's
25 why I --

1 MS. SAMPEY: We are the little
2 person.

3 CHAIRPERSON CLARK: That's why we
4 have asked them to provide us with their
5 experience, No. 1, because they deal in all 50
6 states with what they have encountered, not
7 theoretically, but actually encountered as they
8 work in different states and as they work in
9 states that have different community standards.
10 Plus they have the resources to compile that.

11 I don't want you to be under the
12 impression that we listen to large groups more
13 than we listen to individuals. The reason --

14 MS. SAMPEY: Sir, if I thought you
15 listened to just large group, I wouldn't be
16 sitting here. I'm honored to be here. Believe
17 me, I'm very honored.

18 CHAIRPERSON CLARK: Well, I wanted
19 to explain to you why we rely on them to provide
20 us with certain materials. And I don't think
21 personally that anything you do or anything you
22 could do by way of making a piece of jewelry
23 would be obscene; but as I sit here --

24 MS. SAMPEY: It would be very easy
25 to make an obscene piece of jewelry, believe me.

1 CHAIRPERSON CLARK: Not legally
2 obscene, maybe offensive to some people; but I
3 don't think legally obscene.

4 But in any event, that's my own
5 personal opinion, not having seen anything that
6 you have ever made.

7 MS. SAMPEY: No, you haven't.

8 CHAIRPERSON CLARK: Representative
9 Manderino.

10 REPRESENTATIVE MANDERINO: Thank
11 you.

12 I actually just have one comment;
13 and that is that through your guild, obviously,
14 you have collected letters for us.

15 MS. SAMPEY: It's almost 150
16 letters.

17 REPRESENTATIVE MANDERINO: And we
18 appreciate that. And just by way of suggestion,
19 I always tell constituents in my district that
20 it's important to get those -- that information
21 to the committee, but nothing works better than
22 those letters being directly written to the
23 legislators in whose district those folks
24 reside.

25 So by way of suggestion, by whatever

1 method you got the word out to get the letters to
2 bring here, I would suggest you get the word out
3 that folks also send the same letter to their
4 individual representative, because I think that
5 it's helpful to know that folks right in your own
6 back yard are concerned about the effect this is
7 going to have. It always makes a big impact.

8 MS. SAMPEY: Thank you. I was
9 overwhelmed at this. I never expected this many
10 letters. I would say at least 50 percent of
11 these people are also writing to their local
12 representatives.

13 REPRESENTATIVE MANDERINO: Great.

14 MS. SAMPEY: They care that much.

15 CHAIRPERSON CLARK: Representative
16 Armstrong.

17 REPRESENTATIVE ARMSTRONG: Yes.

18 Thank you.

19 Is your guild involved in hard-core
20 pornography?

21 MS. SAMPEY: Pardon me?

22 REPRESENTATIVE ARMSTRONG: Is your
23 guild involved with hard-core pornography?

24 MS. SAMPEY: No.

25 REPRESENTATIVE ARMSTRONG: Okay.

1 That's the essence of what this bill is.

2 MS. SAMPEY: There are laws on the
3 books that also protect us from that now on
4 Title 18, I believe.

5 REPRESENTATIVE ARMSTRONG: That's
6 right.

7 What I am saying at this point is
8 this bill does not change the definition of
9 obscene.

10 MS. SAMPEY: It lets each county
11 create its own definition of obscenity.

12 REPRESENTATIVE ARMSTRONG: No, it
13 doesn't.

14 MS. SAMPEY: And that's what bothers
15 me. Then it's a patchwork. We don't know if we
16 are going from one county into another, and I
17 think that's the problem. We need a state law
18 that we already have that has already worked that
19 seems to be functioning quite well.

20 Why do we need to disseminate this
21 to 67 counties to make up their own minds and
22 confuse everyone?

23 REPRESENTATIVE ARMSTRONG: I'm sorry
24 you weren't here for the earlier testimony,
25 because we had --

1 MS. SAMPEY: I wish I had been.

2 REPRESENTATIVE ARMSTRONG: -- a lot
3 of discourse on what obscene was, hard-core
4 pornography as well as indecency.

5 MS. SAMPEY: I'm not pro
6 pornography. I'm not pro anything like that.

7 REPRESENTATIVE ARMSTRONG: That's
8 what the obscene law, according to Miller -- we
9 are basing this bill on the Miller case that came
10 out of California in 1972. And we cannot change
11 that definition. That definition has to be the
12 same, and that's the threshold that has to be
13 violated in order to take a case to court.

14 The community standard is not to
15 change the definition. The community standard
16 that we are talking about is being able to tell a
17 jury wherein this case is brought to them that
18 would this violate your standards within your
19 area. There is no attempt whatsoever by the
20 jury, the judge, the prosecutor to sit down and
21 to write up standards and to say this is going to
22 be our standard.

23 So it goes by a case-by-case
24 prosecution as to what is going to be held to be
25 obscene. But first of all, it has to violate

1 this test. So I would encourage, if you can, get
2 this language. I can give you copies of it.

3 MS. SAMPEY: If you would give me a
4 copy, I would really appreciate it.

5 REPRESENTATIVE ARMSTRONG: That
6 might be helpful for your members to see that,
7 because we are not attempting to allow the
8 counties at this point to change the definition
9 that is there. That definition --

10 MS. SAMPEY: But you are letting it
11 up to each county to make their own laws dealing
12 with obscenity.

13 REPRESENTATIVE ARMSTRONG: No, we
14 are not.

15 MS. SAMPEY: That's what I take into
16 objection. I have a problem with that.

17 REPRESENTATIVE ARMSTRONG: That's
18 not true. It's only to the case where the juries
19 are to decide if this is obscene in their own
20 community. But nothing is being written. No
21 community is being told that they have to
22 establish standards.

23 MS. SAMPEY: No, of course not.

24 I object to the bill because it
25 fragments everything. We have state laws now

1 that address the issues that you are discussing.
2 They have worked very well. Why change them?

3 You are going to invite so much
4 opposition to this bill from the print media,
5 from cable TV, from filmmakers. This is -- my
6 tax bill is going to go to litigate these things
7 in court. I take offense in that.

8 I would much rather hear that my
9 community was able to hire two new police
10 officers, buy a new police car, update 911
11 services, provide help for the elderly. That's
12 how I want my tax dollars to be spent.

13 I don't want them fighting this
14 nonsense. Money is so strained as it is. Why
15 should I work hard to fight something that's
16 already on the books, you know, pay my taxes, try
17 and earn a living to see the elderly having
18 problems, the police not being able to hire a
19 new police officer or buy a new patrol car?
20 That's what my tax dollars should go for, I
21 believe.

22 REPRESENTATIVE ARMSTRONG: You don't
23 believe that if a community wants to fight
24 hard-core pornography that we should not be
25 involved in fighting hard-core pornography?

1 MS. SAMPEY: Representative

2 Armstrong, I believe they do have the right to
3 fight that with the laws that are already on the
4 books, already on the books. They are there.

5 REPRESENTATIVE ARMSTRONG: Let me --

6 MS. SAMPEY: And besides that, my
7 own thing is if I don't want to read hard-core
8 pornography or if I don't want to watch it, I
9 don't. I don't go to those stores. I don't use
10 their -- give them my business. I ignore them.
11 Dollars and cents is where it's at.

12 If people don't --

13 REPRESENTATIVE ARMSTRONG: Let me
14 raise an issue. I'm not going to belabor this at
15 this point. But in this definition is the
16 three-prong Miller test. And the third test is
17 that whether the work, taken as a whole, lacks
18 serious literary, artistic, political, and
19 scientific value.

20 For you as an artist, I do not see
21 that this would negatively impact you, even the
22 definition as it stands today or tomorrow or ten
23 years from now, if you can show that your work
24 has artistic value.

25 Now, if it has hard-core pornography

1 value and it doesn't test -- doesn't rely on the
2 basis of this test, then, yes, it can be
3 prosecuted under today's law as it would be ten
4 years from now.

5 MS. SAMPEY: Do you know what? I
6 don't do pornography. I don't do erotic art.
7 Maybe some of my friends do. Maybe there's
8 people in Pennsylvania that do do that. Maybe
9 they find a market for it. Who am I to say that
10 they can't express themselves and put their
11 feelings into something like that? That's not
12 for me to say.

13 If I don't like their work, I won't
14 buy it. If a gallery doesn't like their work,
15 they won't show it. But I don't deny them the
16 chance to do it.

17 REPRESENTATIVE ARMSTRONG: I'm just
18 saying I don't see how it's going to negatively
19 impact your industry if you are not involved in
20 hard-core pornography, because that's what this
21 issue is all about. It's about hard-core
22 pornography. It's not about your freedom of
23 expression.

24 MS. SAMPEY: No. I think there's a
25 lot more that can be encompassed in this

1 decision, and that is what concerns me,
2 Representative Armstrong. That is the thing.

3 You are not saying this is just this
4 far. You are giving people the option to make it
5 what they want to make it in their counties, and
6 I take issue with that. That I am against. That
7 will take my tax dollars to fight those
8 challenges in my county. And I resent that.

9 And these people that have written
10 to me also resent it. They feel that the laws we
11 have now are fine, that they work. And I don't
12 have a problem with that. That's why I'm here
13 representing them.

14 REPRESENTATIVE ARMSTRONG: Well,
15 again, I wish we had all of your --

16 MS. SAMPEY: We can agree to
17 disagree.

18 REPRESENTATIVE ARMSTRONG: No. I
19 wish I had all of your people here so -- and
20 especially if they were hear earlier, they could
21 have heard the discourse we had on hard-core
22 pornography.

23 Again, that's the essence, that is
24 the narrow scope of what this bill is all about.
25 It has nothing to do with anything else other

1 than hard-core pornography.

2 MS. SAMPEY: When I read HB 739
3 over, sir, I don't get that feeling from it. And
4 I read it time and time and time.

5 REPRESENTATIVE ARMSTRONG: That's
6 because this is the definition right here. The
7 United States Supreme Court has taken the time to
8 finally define what hard-core pornography is. It
9 doesn't say word for word hard-core pornography.
10 But this is the definition of what hard-core
11 pornography is in this definition. And this is
12 the test that's in this bill. It's a test that's
13 already on the books.

14 MS. SAMPEY: Sir, I will contest and
15 I will fight this bill from ad infinitum. I will
16 not stop. I am relentless.

17 REPRESENTATIVE ARMSTRONG: Then,
18 ma'am --

19 MS. SAMPEY: You did this two
20 years ago, and I fought it when it got to the
21 Senate.

22 REPRESENTATIVE ARMSTRONG: Then,
23 ma'am, you are in support of hard-core
24 pornography, and I find that abhorrent.

25 MS. SAMPEY: No. I'm willing to see

1 my tax dollars go to support the police, the
2 elderly, and whatever.

3 There are laws in Pennsylvania that
4 lay out the law for hard-core pornography, and I
5 follow those laws to this day. And the people
6 that I represent feel that those are sufficient.

7 We can agree to disagree on this,
8 Representative Armstrong, but I'm adamant in my
9 beliefs.

10 REPRESENTATIVE ARMSTRONG: Well, you
11 know where I stand. Thank you.

12 CHAIRPERSON CLARK: I have one
13 follow-up question. And I can understand your
14 position when you say if someone wants to go and
15 get hard-core pornography, they can go and do
16 that, but you don't do it. And we are not
17 interested in doing that, but there's a market
18 out there for that.

19 My question is, What happens when
20 they locate one of those shops across the street
21 from two little league fields and a little league
22 football field?

23 MS. SAMPEY: Okay. Very good. I'm
24 glad you asked that question.

25 CHAIRPERSON CLARK: How do we

1 address that situation?

2 MS. SAMPEY: I'm glad you asked that
3 question.

4 Then regulate where those shops go.
5 If you sell drugs -- is it within 1,500 feet of a
6 school yard, you go to jail for 10 years or
7 something like that? Make the same law for these
8 shops so that they can't locate them near
9 children.

10 I would find that offensive if I had
11 a child going to second grade and there was a
12 porno shop across the street. I would find that
13 very offensive. But that I don't mind you
14 regulating, but I do feel that each individual
15 has the pursuit to do what they do.

16 I am not going to inflict my
17 morality on them, and I don't want their morality
18 inflicted on me. But we should all have the
19 choice.

20 CHAIRPERSON CLARK: All right. And
21 we touched on that, again, this morning when I
22 asked one of the speakers about zoning, you know,
23 can you do that by zoning ordinance or something
24 like that to not permit certain establishments
25 within an area.

1 You brought up the drug situation.
2 And I think that it's illegal to use drugs and if
3 you are within so many feet of a school building
4 or playground or anything --

5 MS. SAMPEY: The drug free zone
6 sign.

7 CHAIRPERSON CLARK: -- what they do
8 is increase the penalty, okay, because it's
9 illegal regardless of where you do it. But they
10 increase the penalty if you are within a certain
11 area.

12 Now, what they are getting at in
13 this bill is, well, what is unacceptable or
14 obscene materials, you know, to make that illegal
15 to begin with. And in order to do that, you
16 apply a standard against that.

17 And currently the standard is
18 statewide, a statewide standard. So you will
19 have a jury sit there and try to imagine in their
20 mind what the state -- what the average statewide
21 citizen or what a statewide standard would be as
22 far as this material is concerned. And what this
23 bill does is it brings it down to, well, what
24 would this county feel would be appropriate.

25 MS. SAMPEY: What would this

1 neighborhood, what would this block feel?

2 CHAIRPERSON CLARK: No. We have
3 established earlier that the lowest you could go
4 is county. So at most, there would be 67
5 counties in the state, and there would be jurors
6 who would say what is acceptable given these
7 parameters in this county.

8 And I think that one of the ideas
9 behind this bill is to provide that local
10 determination as to how the test is applied and
11 what comes out when you apply the legal standards
12 to it. So I think that's one of the things that
13 the bill seeks to address.

14 MS. SAMPEY: I can understand what
15 you are saying, but I don't mind the zoning. I
16 just mind the obscenity laws being different from
17 county to county. What we have now works.

18 Work on zoning if you don't want
19 these things near a little league field or a
20 primary school, an elementary school. I don't
21 have a problem with that.

22 CHAIRPERSON CLARK: Anymore
23 questions?

24 (No response.)

25 CHAIRPERSON CLARK: We thank you

1 very much. And if you want to bring those
2 letters up here --

3 MS. SAMPEY: Certainly.

4 CHAIRPERSON CLARK: -- my --

5 MS. SAMPEY: They jammed my fax
6 machine.

7 CHAIRPERSON CLARK: They jammed your
8 fax machine. Well, I got a few calls this
9 morning myself. So apparently you hit a few
10 people to make phone calls as well.

11 We thank you very much for your
12 testimony. And that will conclude today's House
13 Judiciary Subcommittee on Courts' hearing on
14 House Bill 739. Thank you very much.

15 (Hearing adjourned at 2:10 p.m.)

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CERTIFICATE

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me during the hearing of the foregoing cause and that this is a correct transcript of the same.

Denise L. Travis (gs)

Denise L. Travis, Reporter

Notary Public in and for the
Commonwealth of Pennsylvania

My commission expires
April 20, 1998