

Chapter 4000

Dominant Theme

Table of Contents

IN GENERAL.....	1
PRIOR TESTS	3
DOMINANCE OF PRURIENT APPEAL	4
ARTISTIC AND LITERARY VALUES	5
NUDITY	7
PANDERING	8
NEWSPAPERS.....	8
PRURIENT AND NON-PRURIENT DOMINANT THEMES	8

Chapter 4000

IN GENERAL

0.01 Prurient Appeal Must Be Dominant - The dominant theme of the material must appeal to the prurient interest.

Roth v. United States, 354 U.S. 476 (1957).

Ripplinger v. Collins, 868 F.2d 1043 (9th Cir. 1989).

Collier v. United States, 283 F.2d 780 (4th Cir. 1960), *cert denied*, 365 U.S. 833 (1961).

Flying Eagle Publication, Inc. v. United States, 273 F.2d 799 (1st Cir. 1960).

United States v. Brown, 328 F. Supp. 196 (E.D. Va. 1971).

United States v. Brown, 328 F. Supp. 196 (E.D. Va. 1971).

United States v. 25,000 Magazines Entitled "Revue", 254 F. Supp. 1014 (D. Md. 1966), *aff'd*, *United States v. Central Magazine Sales, Ltd.*, 381 F.2d 821 (4th Cir. 1967).

Wisconsin v. Kois, 188 N.W.2d 467 (Wis. 1971), *rev'd on other grounds*, 408 U.S. 229 (1972).

State v. Smith, 422 S.W.2d 50 (Mo. 1967), *cert. denied*, *Smith v. Missouri*, 393 U.S. 895 (1968).

Price v. State, 579 S.W.2d 492 (Tex. Crim. App. 1979).

Wagonheim v. Maryland State Board of Censors, 258 A.2d 240 (Md. Ct. App. 1969) *aff'd, sub. nom., Grove Press, Inc. v. Maryland State Board of Censors*, 401 U.S. 480 (1971).

State v. Mazes, 209 N.E.2d 496 (Ohio

Ct. App. 1965).

State ex rel. Beil v. Mahoning Valley Distributing Agency, Inc., 186 N.E.2d 631 (Ohio Ct. App. 1962).

State ex rel. Dowd v. "Pay The Baby Sitter", 287 N.E.2d 650 (Ohio Ct. Com. Pl. 1972).

State ex rel. Dowd v. "Pay The Baby Sitter", 287 N.E.2d 650 (Ohio Ct. Com. Pl. 1972).

Stengel v. Smith, 236 N.Y.S.2d 569 (N.Y. Sup. Ct. Erie Co. 1963), *rev'd on other grounds*, 240 N.Y.S.2d 200 (N.Y. Sup. Ct. App. Div. 1963).

0.01001 In order for the material, in this case a film, to be obscene the dominant theme of the material taken as a whole must appeal to a prurient interest in sex.

United States v. Marks, 520 F.2d 913 (6th Cir. 1975), *rev'd on other grounds*, 430 U.S. 188 (1977).

0.0101 Dominant Theme - Dominant theme means the prevailing, governing, influencing or controlling idea.

State ex rel. Dowd v. "Pay The Baby Sitter", 287 N.E.2d 650 (Ohio Ct. Com. Pl. 1972).

0.01011 **Origin** - The term "dominant theme" has long been employed in First Amendment law.

General Media v. Cohen, 131 F.d 273 (2d Cir. 1997), *cert. denied*, 525 U.S. 951 (1998), *rev'g, General Media v. Perry*, 972 F. Supp. 1072 (S.D.N.Y. 1997).

0.0102 Prurient Interest Defined - Prurient interest means a shameful or morbid interest in nudity, sex, or excretion, and goes substantially beyond customary limits of

Dominant Theme

candor in description or representation of such matters.

Grove Press, Inc. v. Christenbery, 175 F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

0.0103 Where a film portrays the sexual drive in an exaggerated and misshapen way, the film's dominant theme is prurient. Prurience is not determined by mere nakedness, nudity or sexuality.

Hewitt v. Maryland State Board of Censors, 254 A.2d 203 (Md. Ct. Spec. App. 1969).

0.0104 A work appeals to the prurient interest when it connotes a sense of debasement, subnormal furtiveness or guilt.

United States v. 35 MM Motion Picture Film "Language of Love", 432 F.2d 705 (2d Cir. 1970), *cert. denied*, *United States v. Unicorn Enterprises, Inc.*, 403 U.S. 925 (1971).

0.0105 Appeal to prurient interest is defined as material having a tendency to excite lustful thoughts.

Roth v. United States, 354 U.S. 476 (1957).

0.0106 We perceive no significant difference between the meaning of obscenity developed in the case law and the A. L. I. Model Penal Code *viz.* "a thing is obscene if, considered as a whole, its predominant appeal is to a prurient interest i.e. a shameful or morbid interest in nudity, sex or excretion. . . ."

Roth v. United States, 354 U.S. 476 (1957).

0.0107 Where the dominant theme appeals to voyeurism, an appeal to prurient interest exists.

State ex rel. Sensenbrenner v. Adult Book Store, 271 N.E.2d 13 (Ohio Ct. App. 1971), *vacated* 413 U.S. 911 (1973), *on remand*, 301 N.E.2d 695 (Ohio 1973), *cert. denied*, 421 U.S. 934 (1975).

0.0108 A work with a dominant theme of homosexual love need not appeal to prurency.

Duggan v. Guild Theater, Inc., 258 A.2d 858 (Pa. 1969).

0.0109 Where dominant theme is illicit often meretricious sexual intercourse which has taken place or is to take place, but is only hinted at and there is no description of the sexual act itself, the dominant theme does not appeal to the prurient interest.

Flying Eagle Publication, Inc. v. United States, 273 F.2d 799 (1st Cir. 1960).

0.011 Purpose of the Requirement that the Dominant Theme Appeal to Prurient Interest in Sex - The purpose of this requirement is that the legal standard of obscenity be concerned with the social effect of the language.

Big Table Inc. v. Schroeder, 186 F. Supp. 254 (N.D. Ill. 1960).

0.01101 The dominant theme or revealed purpose of a film is important in determining the existence of social value as well as the nature of the film's appeal.

United States v. 35 MM Motion Picture Film "Language of Love", 432 F.2d 705 (2d Cir. 1970), *cert. denied*, *United States v. Unicorn Enterprises, Inc.*, 403 U.S. 925 (1971).

0.0111 Believing that the dominant theme or effect is entitled to great weight in determining the character of an entire publication, the court will endeavor to ascertain the dominant theme or effect of

Chapter 4000

each publication although it will not attempt a detailed description of all of the publications.

State v. Vollmar, 389 S.W.2d 20 (Mo. 1965).

0.0112 The Dominant Theme as the Dominant Note or Dominant Effect - Obscenity is to be judged by the effect of the book read in its entirety.

United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

0.0113 When the presentation, objectively viewed, is sincere and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication, the book is not obscene.

United States v. One Book Entitled "Ulysses", 72 F.2d 705 (2d Cir. 1934).

0.01131 The question is whether the dominant note is erotic allurement.

Cambist Films, Inc. v. State of Illinois, 292 F. Supp. 185 (N.D. Ill. 1968).

0.0114 Only if the contents constitute the dominant theme or effect does it fall within the forbidden class.

People v. Richmond County News, 179 N.Y.S.2d 76 (N.Y. Ct. Spec. Sess. Richmond Cty 1958), *rev'd*, 205 N.Y.S.2d 94 (N.Y. 1960), *aff'd*, 216 N.Y.S.2d 369 (N.Y. 1961).

0.0115 Where, taken as a whole, the dominant effect is not that of exciting sexual desires, a book is not obscene.

American Civil Liberties Union v. City of Chicago, 121 N.E.2d 585 (Ill. 1954), *cert. denied*, 48 U.S. 979 (1955).

0.0116 Where the dominant effect of the

book as a whole and its main purpose is to stimulate sex feelings and act as an aphrodisiac the book is obscene.

People v. Fritch, 236 N.Y.S.2d 706 (N.Y. Sup. Ct. 1963), *rev'd*, 192 N.E.2d 713 (N.Y. 1963).

0.0117 Where it is stated on the front covers of the magazines that they are sex reviews and the purpose of the work is to shatter the fetters which inhibit individuals from fully enjoying sex in all its varied and manifold forms, the magazines are obscene.

People v. Buckley, 320 N.Y.S.2d 91 (N.Y. City Crim. Ct. N.Y. Cty. 1971).

0.0118 The dominance of the theme is a question of constitutional fact.

Kois v. Wisconsin, 408 U.S. 229 (1972).

0.0119 Where the phrase 'obscene language', as used in state disorderly conduct statute, was not intended to be limited to words whose dominant theme appeals to a prurient interest in sex, the statute violates the Oregon Constitution.

State v. Spencer, 611 P.2d 1147 (Or. 1980).

PRIOR TESTS

0.05 Tendency To Excite Lust Test - If the tendency of a book as a whole and its main purpose is to excite lustful desire, the book is obscene.

People v. Gotham Book Mart, 285 N.Y.S. 563 (N.Y. Mag. Ct. 1936).

People v. Viking Press, Inc., 264 N.Y.S. 534 (N.Y. City Mag. Ct. 1933).

0.0511 Where the tendency of the matter, considered as a whole, is to deprave and corrupt the minds of those it is likely to

Dominant Theme

reach, the material is obscene.

Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940).

0.055 Substantial Tendency Test - To be obscene, a book must have a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.

Commonwealth v. Isenstadt, 62 N.E.2d 840 (Mass. 1945).

Commonwealth v. Gordon, et al., 66 D&C 101 (Pa. Q.S. Phil. Cty. 1949), *aff'd*, *Commonwealth v. Feigenbaum*, 70 A.2d 389 (Pa. Super. Ct. 1950).

DOMINANCE OF PRURIENT APPEAL

0.1 Prurient Interest is Not the Dominant Theme - Where a work's prurient appeal is not its predominant theme, the work is not obscene.

Penthouse Interantional, Ltd. v. McAuliffe, 702 F.2d 925 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 1615 (1984).

0.1001 If the few vulgar and indecent paragraphs in a book are subordinate to, but form an essential part of the main theme, the book is not obscene.

People v. Gotham Book Mart, 285 N.Y.S. 563 (N.Y. Mag. Ct. 1936).

0.1002 Although sexual conduct is undeniably an important aspect of the film and may be thought of as constituting one of its principal themes, if the dominant theme is not a prurient interest in sex the film is not obscene.

United States v. A Motion Picture Entitled "I Am Curious Yellow", 404 F.2d 196 (2d Cir. 1968).

0.1003 Where the direct aim and net result of a pamphlet is to promote understanding and self-control regarding sex and any incidental tendency to arouse a sexual impulse is apart from and subordinate to its main effect, the pamphlet is not obscene.

United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).

0.1004 Where the episodes of sexual conduct in a film are neither explicit nor frequent, they do not impart an obscene flavor to the film.

Cambist Films, Inc. v. State of Illinois, 292 F. Supp. 185 (N.D. Ill. 1968).

0.1005 Where some scenes in a film are sexually stimulating in isolation but the identification of illicit sexual conduct with personal disaster and death renders the overall impact of the film depressing, the film is not obscene.

Cambist Films, Inc. v. State of Illinois, 292 F. Supp. 185 (N.D. Ill. 1968).

0.1006 A work is not obscene if in the context of the whole work, incidents of sexual misconduct are presented so as to arouse pity or revulsion rather than desire.

American Civil Liberties Union v. City of Chicago, 121 N.E.2d 585 (Ill. 1954), *cert. denied*, 48 U.S. 979 (1955).

0.1007 A work without apparent theme may still appeal to prurency.

State ex rel. Beil v. Mahoning Valley Distributing Agency, Inc., 186 N.E.2d 631 (Ohio Ct. App. 1962).

0.1008 Isolated Incidents or Illustrations - Where the several sexual episodes in a book do not dominate or flavor the book but rather are lost in the quickly

Chapter 4000

moving tempo of the story, the book is not obscene.

Attorney General v. A Book Named "Serenade", 94 N.E.2d 259 (Mass. 1950).

0.10081 Where the entire text is inoffensive and only a few of the twenty-three illustrations are questionable, it is obvious that the latter do not furnish the dominant note of the publication.

Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940).

0.1009 Although the eight magazines have some non-obscene articles or stories, consideration of the total contents of each of these magazines indicates that their dominant theme appeals only to the coarse and base in man's nature.

Gent v. State, 393 S.W.2d 219 (Ark. 1965), *rev'd*, *Redrup v. New York*, 386 U.S. 767 (1967).

0.101 The publication is within the obscenity statute if it contains prohibited matter in such degree or of such nature as to season the whole and bestow upon the whole any of the attributes of obscenity.

People v. Richmond County News, 179 N.Y.S.2d 76 (N.Y. Ct. Spec. Sess. Richmond Cty 1958), *rev'd*, 205 N.Y.S.2d 94 (N.Y. 1960), *aff'd*, 216 N.Y.S.2d 369 (N.Y. 1961).

People v. Wepplo, 178 P.2d 853 (Cal. App. Dep't Super. Ct. 1947).

0.1011 Neither the number of objectionable pages or passages nor the proportion they bear to the whole are controlling in determining whether a book is obscene.

Besig v. United States, 208 F.2d 142 (9th Cir. 1953).

People v. Richmond County News, 179 N.Y.S.2d 76 (N.Y. Ct. Spec. Sess. Richmond Cty 1958), *rev'd*, 205 N.Y.S.2d 94 (N.Y. 1960), *aff'd*, 216 N.Y.S.2d 369 (N.Y. 1961).

People v. Wepplo, 178 P.2d 853 (Cal. App. Dep't Super. Ct. 1947).

0.1012 In determining whether objectionable sections of a book will render the entire book obscene consider the impression likely to be created.

People v. Richmond County News, 179 N.Y.S.2d 76 (N.Y. Ct. Spec. Sess. Richmond Cty 1958), *rev'd*, 205 N.Y.S.2d 94 (N.Y. 1960), *aff'd*, 216 N.Y.S.2d 369 (N.Y. 1961).

People v. Wepplo, 178 P.2d 853 (Cal. App. Dep't Super. Ct. 1947).

0.1013 If an incident, integrated with the theme or story of a book, is word painted in such pornographic language that dirt, rather than the relation of a fact or adequate description of the incident, appear as the primary purpose, the book itself is obscene.

Besig v. United States, 208 F.2d 142 (9th Cir. 1953).

0.1014 One or more obscene photos in a magazine may heighten the prurient appeal of other photos in the magazine.

United States v. 25,000 Magazines Entitled "Revue", 254 F. Supp. 1014 (D. Md. 1966), *aff'd*, *United States v. Central Magazine Sales, Ltd.*, 381 F.2d 821 (4th Cir. 1967).

ARTISTIC AND LITERARY VALUES

0.15 **Elements To Be Weighed in Determining The Dominant Theme** - A motion picture film is obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this

Dominant Theme

effect is so great as to outweigh whatever artistic or other merits the film may possess.

Cambist Films, Inc. v. State of Illinois, 292 F. Supp. 185 (N.D. Ill. 1968).

0.1501 In determining whether a given work is obscene, the standard to apply is the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands. The obscenity statute does not cover works, of value and repute merely because their incidental effects may include some slight stimulation of the senses of the ordinary reader.

Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945).

0.1502 A balancing of factors is necessary and where a work of apparent serious purpose is involved, the scales will not readily be tipped toward the determination of obscenity.

McCauley v. Tropic of Cancer, 121 N.W.2d 545 (Wis. 1963).

0.1503 In art, literature and scientific works, the portrayal of sex is not in itself sufficient reason to deny constitutional protection.

Roth v. United States, 354 U.S. 476 (1957).

0.15031 Literary, scientific or artistic values are comprehended in the dominant theme of *Roth*.

State v. Shapiro, 300 A.2d 595 (N.J. Super. Ct. App. Div. 1973).

0.1504 Although health and art magazines frequently have pictures and drawings with sex, these magazines are not obscene because their dominant theme

relates to health or art.

Gent v. State, 393 S.W.2d 219 (Ark. 1965), *rev'd*, *Redrup v. New York*, 386 U.S. 767 (1967).

0.1505 **Social Value** - The dominant theme or revealed purpose of a film is important in determining the existence of social value as well as the nature of the film's appeal.

United States v. 35 MM Motion Picture Film "Language of Love", 432 F.2d 705 (2d Cir. 1970), *cert. denied*, *United States v. Unicorn Enterprises, Inc.*, 403 U.S. 925 (1971).

0.1506 Where there is a nexus between sexual activity and the legitimate purpose of a film and the film's dominant theme is the revelation and solution of sexual problems, the film is not obscene.

United States v. 35 MM Motion Picture Film "Language of Love", 432 F.2d 705 (2d Cir. 1970), *cert. denied*, *United States v. Unicorn Enterprises, Inc.*, 403 U.S. 925 (1971).

0.1507 Social importance is not an independent test of obscenity but is relevant only to determining the predominant prurient interest of the material.

State v. Hartstein, 469 S.W.2d 329 (Mo. 1971), *rev'd*, 404 U.S. 988 (1971).

0.1508 **A Dominant Theme That Appeals To Pruriency May Subordinate A Social Value Theme** - Where obscene aspects are emphasized and featured, political and social values may be obscured.

Papish v. Board of Curators of University of Missouri, 331 F. Supp. 1321 (W.D. Mo. 1971), *aff'd*, 464 F.2d 136 (8th Cir. 1972), *rev'd* 410 U.S. 667 (1973).

Chapter 4000

0.15081 A social value theme may be so disguised as to be hardly discernible and therefore not "dominant."

United States v. Brown, 328 F. Supp. 196 (E.D. Va. 1971).

0.1509 **Literary Merit** - Courts recognize the interest of the author, literary merit, style and setting when determining dominant theme. Dissection of the literary product may be necessary to determine whether an appeal is to non-prurient interests despite the use of many obscene words.

Big Table Inc. v. Schroeder, 186 F. Supp. 254 (N.D. Ill. 1960).

0.151 Where a poem bears some earmarks of an attempt at serious art, even though such earmarks are not a guarantee against a finding of obscenity, it is an element to be considered in assessing whether the "dominant theme" of the material appeals to the prurient interest.

Kois v. Wisconsin, 408 U.S. 229 (1972).

0.1511 Episodes which are incident to an artistic purpose do not make a book obscene if its dominant effect is not that of exciting sexual desires. The determination turns on whether the salacious aspects are so objectionable as to outweigh whatever affirmative values the work may possess.

American Civil Liberties Union v. City of Chicago, 121 N.E.2d 585 (Ill. 1954), cert. denied, 48 U.S. 979 (1955).

0.1512 In *Lady Chatterley's Lover*, the descriptions of physical relations and use of four-letter words are subordinate but highly useful elements to the dominant theme of the repression of the natural man. Since the author's central purpose is not prurient, the book is not obscene.

Grove Press, Inc. v. Christenbery, 175

F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

0.1513 The book *Tropic of Cancer* is a conscious effort to create a work of significant literary art, which is more likely to discourage than to excite lustful thoughts. Its predominant effect and purpose is not prurient and therefore it is not obscene.

Attorney General v. The Book Named "Tropic of Cancer", 184 N.E.2d 328 (Mass. 1962).

0.1514 The attempt to weigh literary, educational, artistic or scientific values of material against the amount of sex in it will lead to vagueness without marking sufficient boundaries. If the material has a sincere, not a prurient purpose, it is not obscene regardless of the subject matter with which it deals.

City of Cincinnati v. Walton, 145 N.E.2d 407 (Ohio Mun. Ct. 1957).

0.1515 Literary merit is not the criterion to determining whether the effect of a book is obscene.

American Museum of Natural History v. Keenan, 89 A.2d 98 (N.J. Super. Ct. App. Div. 1952).

People on Complaint of Sumner v. Dial Press, 48 N.Y.S.2d 480 (N.Y. City Mag. Ct. 1944).

NUDITY

0.2 **Nudity** - Where the dominant theme of the publication is to display the sex organs and nude bodies of attractive young people in a manner that will appeal to the prurient interest of the average person in this nation, the publication is obscene.

State v. Vollmar, 389 S.W.2d 20 (Mo. 1965).

Dominant Theme

0.201 Where the dominant purpose of nudity is to promote lust, it is obscene and indecent.

Sunshine Book Co., et al. v. McCaffrey, 112 N.Y.S.2d 476 (N.Y. Sup. Ct. N.Y. Cty. 1952).

0.202 The argument that pictures of nudes do not offend the obscenity statute because the human nude has been the subject of legitimate portrayal in various art forms, must be supported by proof that the pictures in the case at bar were designed for artistic appreciation or composed to promote or illustrate a particular thesis or idea.

Collier v. United States, 283 F.2d 780 (4th Cir. 1960), *cert denied*, 365 U.S. 833 (1961).

0.203 The nakedness of the natives is an inconsequential factor in an absorbing and instructive documentary.

American Museum of Natural History v. Keenan, 89 A.2d 98 (N.J. Super. Ct. App. Div. 1952).

0.204 Not all photographs of nudes are obscene even if the focus is on breasts or the pubic area. A photo is not obscene unless sexual activity is depicted.

United States v. 25,000 Magazines Entitled "Revue", 254 F. Supp. 1014 (D. Md. 1966), *aff'd*, *United States v. Central Magazine Sales, Ltd.*, 381 F.2d 821 (4th Cir. 1967).

0.205 **Occasional Nude Scenes** - While there are occasional scenes of nudity, nudity alone is not enough to make material legally obscene under the *Miller* standards.

Jenkins v. Georgia, 418 U.S. 153 (1974).

PANDERING

0.3 **Pandering** - In a close case the evidence of pandering and the method of distribution was relevant to the determination of the dominant purpose of the material and might be controlling or sufficient to tip the scales in favor of obscenity.

Ginzburg v. United States, 383 U.S. 463 (1966).

NEWSPAPERS

0.4 **Newspapers** - There is no individualistic dominant theme in a newspaper. "Taken as a whole" should be restricted to that part which is naturally associated with the alleged obscene matter.

Wisconsin v. Kois, 188 N.W.2d 467 (Wis. 1971), *rev'd on other grounds*, 408 U.S. 229 (1972).

PRURIENT AND NON-PRURIENT DOMINANT THEMES

0.5 **Obscene Books** - A book that portrays the life of an illiterate Southern white farm family, wherein peoples activities are largely sexual and savage passion is found close to the surface, has as its primary purpose the stimulation of immoral thoughts and is therefore obscene.

People v. Viking Press, Inc., 264 N.Y.S. 534 (N.Y. City Mag. Ct. 1933).

0.501 Where the author's central theme and the dominant effect of the whole book is that it is dangerous to the physical and mental health of a young woman to remain continent and that the most important thing in her life is the gratification of her sexual desire, the book is clearly obscene.

People on Complaint of Sumner v. Dial Press, 48 N.Y.S.2d 480 (N.Y. City Mag. Ct.

Chapter 4000

1944).

0.502 Although four-letter words are used in a novel about graduates of a military academy, since the work has sincerity of purpose and literary worth, it is not obscene.

People v. Vanguard Press, 84 N.Y.S.2d 461 (N.Y. City Mags. Ct. 1947).

0.503 A novel entitled *Orgy Club*, whose dominant, if not sole theme, aside from a most tenuous plot, deals with constant, casual and colorful fornication spiced here and there by bits of sadism is obscene.

State v. Mazes, 209 N.E.2d 496 (Ohio Ct. App. 1965).

0.5031 To be obscene, the materials, taken as a whole, must appeal primarily to the prurient interest of the average adult (or, if directed to deviants, to the prurient interests of the intended group.).

United States v. Palladino, 490 F.2d 499 (1st Cir. 1974).

0.5032 **Military Exchanges** - A federal law banning sale or rental of sexually explicit materials which have a dominant theme of nudity, sexual or excretory activities in a lascivious way at government PX's is valid.

PMG Int'l. v. Rumsfeld, 303 F.3d 1163 (9th Cir. 2002).

0.504 **Nonobscene Books** - 'Ulysses', a book which describes the thoughts and actions of the lower middle class in a European city in 1904, does not stir the sex impulses or lead to sexually impure and lustful thoughts and therefore is not obscene.

United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933),

aff'd, 72 F.2d 705 (2d Cir. 1934).

0.505 An interpretative autobiography by Andre Gide, which is a straightforward and sincere narrative of his early years, is not obscene.

People v. Gotham Book Mart, 285 N.Y.S. 563 (N.Y. Mag. Ct. 1936).

0.506 Book about the moral and physical disintegration of a young man living in Chicago between 1916 and 1922, which uses foul language, is not obscene because its dominant purpose and effect is not a calculated and effective incitement to sexual desire.

Commonwealth v. Gordon, et al., 66 D&C 101 (Pa. Q.S. Phil. Cty. 1949), *aff'd*, *Commonwealth v. Feigenbaum*, 70 A.2d 389 (Pa. Super. Ct. 1950).

0.507 *Tropic of Cancer*, a portrayal of a period of the author's life, including his sexual experiences, in the Montparnesse section of Paris, is not obscene.

People v. Fritch, 236 N.Y.S.2d 706 (N.Y. Sup. Ct. 1963), *rev'd*, 192 N.E.2d 713 (N.Y. 1963).

0.508 A book whose dominant theme is the revelation and solution of sexual problems is not obscene.

United States v. 35 MM Motion Picture Film "Language of Love", 432 F.2d 705 (2d Cir. 1970), *cert. denied*, *United States v.*

Unicorn Enterprises, Inc., 403 U.S. 925 (1971).

0.509 Where the dominant purpose of the photographs in the magazine is to attract the attention of the public by an appeal to their sexual impulses, the magazine is obscene.

Dominant Theme

Sunshine Book Co., et al. v. McCaffrey, 112 N.Y.S 2d 476 (N.Y. Sup. Ct. N.Y. Cty. 1952).

0.51 A magazine which constitutes propaganda for the cause of nudism and includes a series of twelve photos of a woman disrobing is obscene.

State v. Lerner, 81 N.E.2d 282 (Ohio Ct. C.P. Hamilton Cty. 1948).

0.511 Three groups of publications—a total of 48—were determined obscene under the *Roth* test. They were: 1) “Adventure” magazines, each of which includes one article dealing with an “informative” but actually very superficial and infantile theme and stories with themes of beatings and torture. 2) “For Men Only”, magazines, which contained short stories with illicit sexual relationships, feature articles on bland subjects and a few pages of color and black and white photos of young women in scanty attire. 3) “Girlie” magazines, which included pinup photos of women in various stages of dress and undress, exposed breasts, but no suggestion of sexual activity.

State v. Hudson County News Co, 183 A.2d 161 (N.J. Co. Ct Essex Co. 1962).

0.512 Two magazines, both of which contain photos of nude, seminude and indecently clad females, posed against backgrounds and in positions highly suggestive of lascivious activity are predominantly designed to appeal to the prurient interest in sex.

State v. Andrews, 186 A.2d. 546 (Conn. 1962).

0.513 Magazines, books and booklets with illustrations of nude and semi-nude women in different positions, either dramatizing invitation to sexual experience, or bound and tethered and describing the

sexual satisfaction from this erotic practice, booklets showing women being spanked or dealing with homosexuals, and 300 sets of 3 wallet size pictures of women physically abusing each other, all satisfy the *Roth* test for obscenity.

Stengel v. Smith, 236 N.Y.S.2d 569 (N.Y. Sup. Ct. Erie Co. 1963), *rev'd on other grounds*, 240 N.Y.S.2d 200 (N.Y. Sup. Ct. App. Div. 1963).

0.514 Where predominating all of the publications are close-up photos of attractive, shapely women posed in an alluring manner and “showing everything,” the publications are obscene.

State v. Vollmar, 389 S.W.2d 20 (Mo. 1965).

0.515 Where the contents of the publication are lurid drawings, phallic oriented cartoons and pictures of nude men and women, commercial ads for sexual material and personal ads for sexual partners, and the magazine purports to be a sex review, the court found that sex is the dominant theme.

People v. Buckley, 320 N.Y.S.2d 91 (N.Y. City Crim. Ct. N.Y. Cty. 1971).

0.516 Where a magazine contains photos of nude men and women, some of which completely expose the sex organs, numerous articles dealing with various topics all of which in some manner are designed to appeal to the sensualist, and ads for various sexual paraphernalia, the magazine is obscene.

Stroud v. State, 273 N.E.2d 842 (Ind. 1971), *vacated*, 413 U.S. 911 (1973).

0.517 The dominant theme of a magazine which has pictures displaying nude females in suggestive poses, depicting the female sex organs without any restriction,

Chapter 4000

appeals to a prurient interest in sex.

United States v. 77 Cartons, 300 F. Supp. 851 (N.D. Cal. 1969), *rev'd*, 444 F.2d 80 (9th Cir. 1971).

0.518 An honest, sincere, scientific and educational study and exposition of a sociological phenomenon, in which only a few of the twenty-three illustrations are questionable does not have the tendency to deprive and corrupt the minds of all those it is likely to reach and therefore is not obscene.

Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940).

0.519 Publication which contains two articles - one a dialogue between God and man in the contextual scheme of a critique of the world and the other which tells of the life of a narcotics addict and includes exacerbated, morbid and perverted sex which would fail to arouse a similar response-is not obscene.

Big Table Inc. v. Schroeder, 186 F. Supp. 254 (N.D. Ill. 1960).

0.52 **Nonobscene Films** - The mere fact that sexual life is the theme of the presentation or that the characters portray seamy side of life and play coarse scenes or use some vulgar language does not tender the presentation per se indecent.

Adams Theatre Co. v. Keenan, 96 A.2d 519 (N.J. 1953).

0.521 A work with a dominant theme of homosexual love need not appeal to pruriency.

Duggan v. Guild Theater, Inc., 258 A.2d 858 (Pa. 1969).

0.522 The dominant effect of a study of a son of a prostitute who murders prostitutes

is depressing and the antithesis of an arousal of sexual desire.

Cambist Films, Inc. v. State of Illinois, 292 F. Supp. 185 (N.D. Ill. 1968).

0.523 **Dildoes** - The predominant appeal of a dildo, which depicts a method of functioning, a construction and appearance, as well as electrical equipment and appurtenances which are clear indicators of sexual activity is to the prurient interest.

People v. Clark, 304 N.Y.S.2d 326 (N.Y. City Crim. Ct. N.Y. Cty. 1969).