

## I Know it When I Look it Up

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To Appear in *California Lawyer*, September 2001

About a year ago I had a call from a lawyer working with a Bay Area public defender's office. His client J\_\_\_ had been arrested when he was stopped on the street late at night with a length of chain attached to a padlock in his pocket. The arrest was pursuant to a section of the penal code that makes it a felony to carry any of a long list of weapons including a "slungshot" -- a term that the 1951 *Dictionary of Americanisms* defined as "a weapon used chiefly by criminals consisting of a shot or other weight attached to a flexible handle or strap."

The attorney wanted to file a motion arguing among other things that inasmuch as the word *slungshot* was archaic, the statute clashes with a basic principle of interpretation: as the California Supreme Court put it in *People v. Payless*, "a criminal statute must define an offense with a certainty that affords fair and reasonable notice of the conduct prohibited."

I had no qualms about writing a declaration to support the claim that *slungshot* is an archaic term. My own *American Heritage Dictionary* dropped the word a couple of editions ago, and so have several others -- a telling point, since lexicographers generally like to retain rare words for the benefit of readers who encounter them in older texts (the most recent edition of the AHD still includes entries for *arquebus*, *dirk*, and *halberd*). And when I looked in a large database of newspaper stories, I found only four citations of *slungshot*, in contrast to over two thousand for *flintlock* and two hundred for *halberd*. Three of these recounted the language of criminal statutes, a fourth described a case that Abraham Lincoln argued in 1857.

The *slungshot* case is still under appeal, but I don't think many people would disagree with the linguistic principle at stake: when you're telling people what they can and can't do, it's only fair to use words they can be expected to understand. Of course someone might say that the wording of the penal code hardly matters in a case like this: people like J\_\_\_ don't ordinarily consult a statute book before they go out at night with a chain and lock in their pocket. But by that line of argument we may as well go back to

writing statutes in Latin. (My friends in the classics department would welcome the work.)

Sometimes, though, questions of reasonable notice can be harder to resolve. Take *prurient*. In its 1973 "Miller" rule, the Supreme Court held that one standard for judging obscenity is "whether, to the average person, applying contemporary community standards, the dominant theme of the material. . . appeals to prurient interest," a formula that has been repeated with minor variations in numerous opinions and statutes since then. It's an odd way to put things -- asking the average person to judge whether something "appeals to prurient interest" when the average person probably doesn't know the word *prurient* in the first place. I have an image of Larry Flynt standing on a street corner with the latest number of *Hustler* and asking passers-by: "What do you think? Not too prurient, is it?"

It's true that *prurient* is far from being an obsolete word like *slungshot*. But even people who know the word seem often to have no clear idea of its meaning (or for that matter, of its pronunciation -- at least, a lot of people give short shrift to that first *r*). Modern dictionaries define the word in terms of an "unusual," "unhealthy," or "inordinate" interest in sex (the word is originally from the Latin root for "itch"). Minds are prurient when they have that disposition, and things are prurient when they appeal to or arouse it. But a lot of people use *prurient* loosely, without reference to anyone's state of mind, so that it becomes just a synonym for "lewd" or "erotic." At the 2 Live Crew obscenity trial in St. Petersburg, the prosecutor charged that the rap group had "incited the crowd to prurient behavior." An online reviewer talks about movies that feature "men who manipulate dumb, prurient women." And Massachusetts Governor Edward King spoke in 1982 of the importance of protecting children from "perverted persons who would coerce them into committing prurient acts."

If these people are, as they say, unclear on the concept, it's probably because they guessed at the meaning of *prurient* when they saw it in the "prurient interest" clause of those obscenity definitions -- not surprising when you consider that the phrase "prurient interest" accounts for almost half the press citations of the word. And it's a safe bet that that's where eighty percent of our prosecutors and politicians first encountered the word, as well (though you hope that, unlike Governor King or that Florida prosecutor, most of

them looked it up before they tried to apply it). In fact the word owes a large part of its modern currency to its appearance in the Miller rule. If not for that one decision, *prurient* would probably be as rare as bower-bird treasures like *lucubrate* and *nugatory*.

The problem with building law and policy around obscure words like *prurient* isn't just that you fail to give fair and reasonable notice. The fact is that it's hard for *anybody* to say exactly what a word like *prurient* means, not excluding lexicographers. We tend to think that learned words are somehow more precise than everyday items like *lustful* or *dirty*. But the vague way people use *prurient* is typical of words that live in the margins of the language -- people don't get to see them in enough contexts to have a rich idea of their meanings. And the more closely an expression is associated with a unique context, like the Court's obscenity definition, the harder it is to pry out a general sense for it. Everybody has heard the words *caisson*, *madding*, and *petard*, but how many people can say with confidence what each of them means?

Asked to define obscenity, Potter Stewart famously responded "I know it when I see it." That's more-or-less what the Court wound up saying when it slipped that obscure word *prurient* into its decision. In the end, the Court's definition of obscenity would have been more precise -- and a lot more consonant with the standards of real communities -- if it had asked whether the average person, applying community standards, would say that the theme of the work appealed to people with dirty minds. But there was small chance of that.