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Pornography: An Obscene Clarification

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PORNOGRAPHY: AN OBSCENE CLARIFICATION

Miller engaged in a mass mailing campaign to advertise the sale of four adult books and an adult film.[1] The advertising brochures consisted primarily of pictures and drawings of explicit sexual couplings, with the genital organs of the participants prominently displayed. The brochures were received and opened by persons who had not requested them, some of whom complained to the police. Miller was arrested and charged with violating the California anti-obscenity law,[2] which prohibits sending or bringing obscene material into the state for sale or distribution.[3] He was convicted after a jury trial and the decision was affirmed, without opinion, by the Appellate Department, Superior Court of California, County of Orange. On appeal to the United States Supreme Court, *held*, vacated and remanded: Material is subject to state prohibition as obscene, where, taken as a whole, it appeals to the prurient interest; is patently offensive in its depiction of sexual conduct as defined by state law; and, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller v. California*, 93 S. Ct. 2607 (1973).

The pivotal issue in cases dealing with obscenity has been the necessity of establishing a viable test to determine whether a particular work is obscene. The establishment of such a test is mandated by the first amendment freedoms of speech and press. Obscenity has been held to be outside the ambit of first amendment freedoms;[4] therefore it is necessary to establish a test which will not suppress constitutionally protected material, not an easy task because of the unclear and hazy line between the obscene and the non-obscene.

Prior to *Miller*, there were three elements to the test for obscenity: The dominant theme of the material taken as a whole must have appealed to the prurient interest; the material was patently offensive in its depiction of sexual conduct and therefore affronts contemporary community standards; and, the material was utterly without redeeming social value. These three elements were set forth in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General.*[5] However, the three pronged test of *Memoirs*, was only accepted by three

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1. MAN-WOMAN; SEX ORGIES ILLUSTRATED; AN ILLUSTRATED HISTORY OF PORNOGRAPHY; INTERCOURSE; and the film MARITAL INTERCOURSE.

2. CAL. PENAL CODE § 311.2(a) (Deering 1971).

3. CAL. PENAL CODE § 311 (Deering 1969), *as amended*, CAL. PENAL CODE § 311 (Deering 1971), for the purposes of this act:

> "Obscene" means that to the average person applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without social importance.

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

5. 383 U.S. 413, 418 (1966) [hereinafter referred to as *Memoirs*].

members of the Court.[6] The other justices applied various elements of the test, or rejected the view that obscene material was outside the scope of the first amendment protection.[7]

The absence of a clear majority position provided little or no guidance to the states or lower federal courts as to the application of the proper tests, and to the ultimate determination of what, in fact, was obscene. In 1967, the Court, in *Redrup v. New York*,[8] reversed per curiam a group of obscenity convictions, acknowledging the confusion with an air of resignation. "Whichever of these constitutional views is brought to bear upon these cases before us, it is clear that the judgments cannot stand."[9] *Redrup* commenced a series of per curiam reversals of convictions for dissemination of materials which at least five members of the Court thought not to be obscene,[10] with each justice applying his own test. In *Miller*, the Court addressed itself to the previous lack of a majority position, determined to abandon the casual practice of *Redrup* and further attempted "to provide guidance to federal and state courts alike."[11]

Miller provides a three fold test to determine whether a work is obscene:

> (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[12]

To fully understand the *Miller* tests, it is necessary to examine them individually, with regard to the modifications they have made of the previous standards, and with regard to the problems and questions they raise.

The thrust of the first test, with insignificant changes in language, is identical to the first standard provided by the Court in *Roth v. United States*: "Whether to the average person applying contemporary com-

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6. Justices Brennan and Fortas and Chief Justice Warren.

7. Justices Black and Douglas adopted the position that allegedly obscene material should be constitutionally protected. Justice Stewart believed only "hard core" pornography was outside the scope of the first amendment. Justice Harlan concurred with Stewart as to federal violations, but adopted the view that there was some lower, yet undefined standard in regard to state obscenity cases. Justices Clark and White relied primarily on the prurient interest element of Roth v. United States, 354 U.S. 476 (1957).

8. 386 U.S. 767 (1967) [hereinafter referred to as *Redrup*].

9. *Id.* at 771.

10. Hoit v. Minnesota, 399 U.S. 524 (1970); Kois v. Wisconsin, 408 U.S. 229 (1972) (citations omitted).

11. 93 S. Ct. at 2618.

12. *Id.* at 2615.

munity standards, the dominant theme of the material taken as a whole appeals to a prurient interest."[13]

The Court, in *Roth*, held that obscenity was not protected speech, and thus, by analogy to the law of libel, it was not necessary to employ the "clear and present danger" test to prohibit its dissemination.[14] The Court was aware that any standards for determining whether a work is obscene must safeguard certain material dealing with sex, but not that which appeals to prurient interests, as sex and obscenity are not synonymous. *Roth* left several questions unanswered. The most important of these was whether a local, state, or national standard was to be applied in determining "contemporary community standards."

In *Jacobellis v. Ohio*,[15] the Court confronted the issue in reversing a lower court obsenity conviction, but could not muster a majority opinion. Three justices believed the film was not obscene and two others believed the conviction violated free speech, absent a showing of "clear and present danger." Chief Justice Warren, in a dissenting opinion, argued for a local standard. "I believe that there is no provable 'national standard' . . . . At all events, the Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."[16] In Warren's view, the scope of the Supreme Court's responsibility would be limited to a determination of whether there was sufficient evidence for an obscenity conviction. The state or lower federal courts would apply the tests on the basis of local or state attitudes, and the Supreme Court would not reverse a conviction unless there was insufficient evidence to support such a verdict.

Justice Brennan, joined by Justice Goldberg, rejected both the employment of a local standard and the sufficient evidence test. Brennan was of the opinion that limiting the scope of the Court's review to a determination of sufficient evidence would be an abrogation of the Court's duty to "uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question of whether a particular work is obscene necessarily implicates an issue of constitutional law."[17] Therefore, it would seem that the presence of a

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13. 354 U.S. 476, 489 (1957) [hereinafter referred to as *Roth*]. Material appealing to prurient interest was defined by the Court as "material having a tendency to excite lustful thoughts." *Id.* at 487, n.20 (1957).

14. In Schenck v. United States, the Court first propounded the "clear and present danger" test:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Schenck v. United States, 249 U.S. 47, 52 (1918).

15. 378 U.S. 184 (1964).

16. *Id.* at 200 (dissenting opinion).

17. *Id.* at 188.

constitutional question would require the Court to make an independent judgment on the merits.

Justice Brennan rejected the local standard argument on multiple grounds. He argued that the protected area of expression is delineated by the Constitution, and is, therefore, not subject to local definition and limitation. Communities differ in tolerance to concepts other than obscenity, and "such variances have never been considered to require or justify a varying standard for application of the Federal Constitution."[18] Justice Brennan also rejected the local standard on the grounds that suppression of a work in one area would ultimately lead to its suppression in other areas where it would not be considered obscene. "It would be a hardy person who would sell a book or exhibit a film after this Court had sustained the judgment of one 'community holding' it to be outside the constitutional protection."[19]

Thus, with no majority opinion having been issued by the Court in *Jacobellis,* there remained considerable conflict over the question of what the *Roth* decision meant when it referred to "contemporary community standards."[20] The controversy continued until *Miller,* where Chief Justice Burger, speaking for the five judge majority, held that a state standard was to be employed in determining whether a work is obscene.

Justice Burger relied heavily on former Chief Justice Warren's dissenting opinion in *Jacobellis.* The country is too diverse; according to Burger, "for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation . . . ."[21] Therefore, as there is no provable national standard, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[22]

In addition to the absence of a provable national standard, the Court went on to discuss the applicability of a national standard to the jury system. A national standard must be a hypothetical test, one which most jurors would find unascertainable. The jury acts as the collective conscience of the community and is to apply community standards. According to *Miller,* since a jury is unable to determine the national standard, attempting to apply one is an "exercise in futility."[23]

The second standard raised in *Miller* is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically

18. *Id.* at 194.

19. *Id.*

20. *See Annot.,* 5 A.L.R.3d 1158 (1966); Comment, *Application of a Local or National Standard of Decency in the Use of the Roth-Memoirs Obscenity Test,* 1971 WASH. U.L.Q. 691, and the authorities cited therein for an analysis of how the lower federal and state courts have dealt with the issue.

21. 93 S. Ct. at 2618.

22. *Id.* at 2619.

23. *Id.* at 2618.

defined by the applicable state law."[24] The progenitor of this test was first announced by Justice Harlan in *Manual Enterprises, Inc. v. Day*.[25] In that case, Harlan wrote that, in addition to appealing to prurient interest, works, to be deemed obscene, must be "so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.' "[26] The test basically requires that material go beyond the limits of candor, in the sense of explicitness. Although the "patent offensiveness" test was not raised by the majority of the Court, it generated little controversy and has become one of the accepted standards in determining whether a work is obscene.

In *Miller*, the Court endeavored to more carefully draft this test without altering its basic composition. *Miller* provides that the state law must confine itself to the regulation of works which depict patently offensive sexual conduct. "[N]o one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulatory state law as written or construed."[27] The Court proferred two examples of such patently offensive materials: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or description of masturbation, excretory functions, and lewd exhibition of genitals."[28] These two examples were intended to provide guidance to the states as to what type of work could reasonably be construed to be "patently offensive." However, it is vital that prohibited conduct not be defined in vague or obscure words, and be carefully limited so as not to infringe on protected freedoms of speech and press.[29]

The third of the *Miller* guidelines in determining obscenity is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[30] The adoption of this standard rejected the "utterly without redeeming social value" test, which first appeared in Justice Brennan's plurality opinion in *Jacobellis v. Ohio*.[31] Brennan wrote that in applying this test, "it follows that material dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection."[32] This

24. *Id.* at 2615.
25. 370 U.S. 478 (1962).
26. *Id.* at 482.
27. 93 S. Ct. at 2616.
28. *Id.* at 2615.
29. The Court indicated that examples of properly drawn statutes are: OREGON LAWS ch. 743, art 29 §§ 255-262 (1971); HAWAII PENAL CODE, tit. 37, §§ 1210-1216 (1972). 93 S. Ct. at 2615 n.6.
30. 93 S. Ct. at 2615.
31. 378 U.S. 184 (1964).
32. *Id.* at 191.

view rejected the idea of any constitutional balancing test of weighing social value against prurient appeal or patent offensiveness. Brennan clarified the application of this test two years later in *Memoirs*:

> A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness.[33]

While this test was proposed by only three members of the Court, it was generally accepted by the states and was written into state statutes, including the statute under which Miller was charged. The Court in *Miller* expressly rejected the "utterly without redeeming social value" test, believing that the use of this test was a misinterpretation of the original concept of *Roth v. United States*.[34] *Roth*, according to the *Miller* majority, presumed obscenity to be devoid of value, while the *Memoirs* plurality required affirmative proof. *Memoirs*, "called on the prosecution to prove a negative, *i.e.*, that the material was '*utterly* without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof."[35]

The *Miller* majority exhibited a marked change in emphasis, as well as a tightening of the obscenity standards. Justice Brennan, in *Memoirs*, believed that the three tests were to be applied independently and must all coalesce to deem a work obscene. The Court, in *Miller*, clearly altered this view. "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection."[36] Although this may seem to be merely a matter of semantics, it does indicate a change in attitude on the part of the Court and foreshadows less difficult convictions under existing or future obscenity laws.

The Court in *Miller* confined the regulation to works which depict or describe sexual conduct, specifically defined by applicable state law. It also limited state offenses to works which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[37] It was the Court's intention to create more concrete and workable standards than those used in the past. Unfortunately, *Miller*, as the cases before it, raises as many questions as it answers.

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33. 383 U.S. 413, 419 (1966).
34. 354 U.S. 476 (1957). See note 13 *supra*.
35. 93 S. Ct. at 2613.
36. *Id.* at 2616.
37. *Id.* at 2615.

The first questions concern the efficacy of a state standard. The *Miller* holding permits the states to determine whether material is to be prohibited within their borders. However, the same arguments offered by the Court in *Miller*, those of diverse tastes and tolerances, are equally applicable on a city-by-city or county-by-county basis. It is readily apparent that conduct which is tolerable in New York City may not be tolerable in a small town in upstate New York. *Miller* fails to shed any light on this problem. If, in fact, local communities are permitted to establish their own standards, one can envision a veritable plethora of tests more confusing than previous standards.

In the same vein, one must question the effect of state standards on the film making and publishing industries. In the weeks immediately following the *Miller* decision, the film *Carnal Knowledge*, which had been rated "R" by the Motion Picture Rating Organization and had won numerous awards was held to be obscene.[38] Such a decision indicates the uncertainty facing the film maker or publisher.

The publisher or movie producer is faced with four alternatives. He may forfeit a portion of his business by not disseminating his product where it might be deemed obscene, or he might produce several different versions of the work and distribute them accordingly. Neither of these alternatives produces a desirous result for the publisher, as they would severely decrease his profits. A third alternative is to publish the work and run the risk of its being deemed obscene. The result here is even less attractive, as the publisher would be forced to risk fine or imprisonment. The publisher's probable decision would be to produce the least controversial work possible.

If the publisher produces the least controversial work, the resultant effect on the public then comes into question. Chief Justice Burger's hypothesis in *Miller*, that the citizen of Mississippi should not be forced to read the same book or see the same film as the citizen of New York, is altered in a most undesirable way. Under the old tests, the citizen of Mississippi was not required to read or view what he would consider obscene material. Under the *Miller* guidelines, if the producer distributes the least offensive work, the citizen of New York City is unable to procure materials which are tolerable in New York, as they are no longer produced. Thus, instead of allowing the Mississippian a free choice as to what he wishes to read or view, the Court has in effect imposed a Mississippi standard on New York City.

A third question concerns the scope of review of local court decisions. Both the "prurient interest" and "patent offensiveness" standards are measured by local tolerances under the *Miller* tests. The question that must ultimately be answered is whether the appellate review at the Supreme Court level will be limited to the "sufficient evidence" test

38. Jenkins v. Georgia, ___ Ga. App. ___, 199 S.E.2d 183 (1973), *appeal docketed*, 42 U.S.L.W. 337 (U.S. Dec. 4, 1973) (73-557).

espoused by Chief Justice Warren in *Jacobellis*, or whether the Court will make an independent determination of the material's worth. An adoption of the "sufficient evidence" standard would permit the Supreme Court to refrain from being the ultimate censor of obscene materials. However, such a standard would allow the states to apply the first amendment as they see fit. An adoption of the view requiring an independent determination of the value of a particular work would undoubtedly lead to the subjectivity and confusion all too apparent in previous obscenity cases. If the Court adopts such a view, it is not difficult to postulate that the Court will once again fall into the familiar *Redrup* pattern of per curiam decisions, with little or no guidance as to what type of conduct is prohibited.

Another question concerns the inherent conflict of the various elements of the test for obscenity. The first element, "prurient interest," will, by the Court's definition, arouse the average person.[39] However, the second element of the test, "patent offensiveness," will tend to disgust the average person. Thus, in addition to lacking serious value, a particular work must both arouse and disgust the average person, which is, to say the least, quite a feat.

Finally, it is necessary to examine the *Miller* majority's contention that, "[w]hile *Roth* presumed 'obscenity' to be 'utterly without social value,' *Memoirs* required that to prove obscenity it must be affirmatively established that the material is '*utterly* without redeeming social value.' "[40] The *Miller* majority relied on the language in *Roth*, that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[41] However, the language referred to in *Miller* seems to bear more on the question of why obscenity is outside the ambit of first amendment protections than on the question of what is obscene. *Miller*, in reliance on the *Roth* language, obviates the requirement of proving a lack of value. This position apparently takes no cognizance of the *Roth* view that, "[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the guarantees, unless excludable because they encroach upon the limited areas of more important interests."[42] *Miller* seems to interpret the language of *Roth* in a manner inconsistent with the plain meaning of the words.

Despite the recent attempt to clarify the situation relating to obscenity, much confusion remains.

> Any effort to draw a constitutionally accepted boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and

39. Roth v. United States, 354 U.S. 476, 487, n.20 (1957).
40. 93 S. Ct. at 2613 (emphasis in original).
41. Roth v. United States, 354 U.S. 476, 484 (1957).
42. *Id.*

> the like. The meaning of these concepts necessarily varies with the experience, outlook, even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.[43]

The new standards raised in *Miller*, whether good or bad, leave questions unanswered. The present composition of the Court indicates that forthcoming decisions, which are needed to resolve the conflicts, will probably impose strict regulations on obscenity. Hopefully, the Court, in attempting to clarify these issues, will remember that the Constitution requires that the regulation of obscenity "conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line."[44]

MITCHELL R. BLOOMBERG

"THE RIGHT, JUSTICE AND WELFARE OF THE PURCHASING AND CONSUMING PUBLIC"?—NO LIABILITY FOR BREACH OF WARRANTY FOR DEFECTIVE SECONDARY CONTAINER

The plaintiff purchased a carton of Coca-Cola from a grocery store operated by the defendant Winn-Dixie Stores, Inc., Florida. When the plaintiff lifted the carton from the display rack of the store, the bottom of the carton allegedly failed and as a result, one bottle dropped to the floor, broke and caused injury to the plaintiff. Defendant, Winn-Dixie, admitted the purchase and the fact that the drinks were bottled, packaged and supplied to it for retail sales by the co-defendant, Coca-Cola Bottling Company of Miami. Coca-Cola denied all applicable elements of the complaint. The trial court granted defendants' motions for directed verdict on the counts of implied warranty and submitted the case to the jury only on issues of negligence. The jury returned a verdict for the defendants and final judgment was entered. On appeal, the District Court of Appeal, Fourth District, *held*, affirmed:[1] There is no warranty of merchantability by the bottler in favor of a remote buyer as to the carton.[2] *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901 (Fla. 4th Dist. 1973).

43. Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2647 (1973) (dissenting opinion) (citations omitted).

44. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

1. Affirmed only in respect to the issue of extension of implied warranty to manufacturer. Judgment as to defendant, Winn-Dixie Stores, Inc., was reversed and remanded.

2. There was no testimony which indicated who actually manufactured the paper