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Losing the Battle on Obscenity, But Can We Win the War: The National Endowment for the Arts' Fight against Funding Obscene Artistic Works

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Notes

Losing the Battle on Obscenity, But Can We Win the War?: The National Endowment for the Arts' Fight Against Funding Obscene Artistic Works

Bella Lewitzky Dance Foundation v. Frohnmayer[1]

I. INTRODUCTION

Theater. Symphony. Ballet. Photography. Rap. These art forms have been enriching our culture for decades. Often considered the distinction between a sophisticated society and an uncivilized group, art has its roots in the human spirit of expression. Recognizing the need for the arts to flourish in our society, Congress established the National Endowment for the Arts (NEA).[2] This government agency promotes the arts through funding the creation and production of artistic works.[3] Recently, however, controversial

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1. 754 F. Supp. 774 (C.D. Cal. 1991).

2. The NEA was established in 1965. The primary goals and purposes of the NEA are listed in the following legislation:

> "The Congress finds and declares the following:
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> . . .
>
> (6) The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.
>
> (7) The practice of art and the study of the humanities require constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent."

20 U.S.C. § 951 (1988).

3. Artists receive funding from the NEA in the following manner:

> (c) The Chairperson, with the advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support—

artistic works have triggered debate over NEA funding. Some artistic works featuring images that go beyond the candor of nude figures have divided viewers into supporters of art and those who shield their eyes from the controversial scenes. The threshold of what art is acceptable and what art is improper has left artists explaining or defending their craft. After all, the hazy line separating art from obscenity is unquestionably difficult to define. But when government funded photographs depict one man urinating into the mouth of another man, and black-and-white prints feature other provocative subject matters of questionable merit, it is not surprising that legislators demand reform. In 1989, Congress passed a federal law prohibiting NEA funding for obscene artistic works.[4] Obscenity determinations were to be made exclusively by the NEA.[5] *Bella Lewitzky Dance Foundation v. Frohnmayer*[6], the first case interpreting this legislation, found the obscenity statute unconstitutional. This Note addresses the NEA's attempt to implement section 304(a) and its failure to do so. A discussion of the aftermath of *Bella Lewitzky* follows.

II. FACTS AND HOLDING

The United States District Court for the Central District of California consolidated two actions[7] containing essentially identical facts into one case, *Bella Lewitzky Dance Foundation v. Frohnmayer*.[8] The court found numerous facts and questions of law common to the two actions, and therefore found consolidation proper.[9]

> (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;

20 U.S.C. § 954 (1990).

4. Section 304 of the Interior and Related Agencies Appropriations Act of 1990, Pub. No. 101-121, 103 Stat. 701, 741 (1989) [hereinafter, Regulated Agencies Act]. *See infra* note 24 for the relevant textual portion of the statute.

5. Regulated Agencies Act, *supra* note 4, at 741.

6. 754 F. Supp. 774 (C.D. Cal. 1991).

7. In each action, the two named defendants were the National Endowment for the Arts (NEA) and its Chairperson, John E. Frohnmayer. *Id.* at 775.

8. *Id.* at 774.

9. *Id.* at 775. The cases were consolidated in accordance with FED. R. CIV. P. 42(a).

A. *The Plaintiffs in Bella Lewitzky*

The Bella Lewitzky Dance Foundation (Lewitzky) is a non-profit corporation operating as the Lewitzky Dance Company.[10] Lewitzky produces original modern dance works and performs its dance creations throughout the United States and foreign countries.[11] Since 1972, Lewitzky has received more than $1,400,000 in grants from the NEA.[12]

The second named plaintiff in the case was the Newport Harbor Art Museum (Newport).[13] Newport is a non-profit corporation that promotes the visual arts.[14] The museum houses a permanent collection of artwork in Newport Beach, California.[15] The museum also displays independent exhibits temporarily before they circulate to other art museums across the nation.[16] During the past eighteen years, the NEA awarded Newport $1,263,020 in grants.[17]

B. *The NEA Grant Process*

On January 12, 1989, Lewitzky[18] applied to the NEA for a 1990-1991 grant.[19] Lewitzky followed the identical grant process it had utilized for almost two decades.[20] The process consisted of a simple two-step procedure. First, applicants seeking NEA funding file an application with the NEA in the fiscal year prior to the year that grant funds are dispensed.[21] The NEA either grants or denies funding based on the application.[22] In the second step,

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10. *Bella Lewitzky*, 754 F. Supp. at 775.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 775-76.
17. *Id.* at 776.
18. Although only Lewitzky is cited, both plaintiffs are meant to be considered throughout.
19. *Id.* If awarded NEA funding, Lewitzky would use the money for the payment of salaries and the overall achievement and development of the artistic goals of the dance foundation. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* "No payment shall be made under this section except upon application. . . . [T]he Chairperson shall ensure that—

(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and

applicants chosen for NEA funding must submit a request form before actually receiving any money.[23]

On October 23, 1989, the United States Congress caused the NEA to alter the grant process by enacting section 304 of the Interior and Related Agencies Appropriation Act of 1990.[24] The enactment of section 304 was Congress's

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respect for the diverse beliefs and values of the American public; and
(2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts."

20 U.S.C. § 954(d) (1990).

23. *Bella Lewitzky*, 754 F. Supp. at 776. Although simple in nature, the entire grant process endures over a period of about six months to a year.

24. *Id.* at 776. The relevant portions of § 304 include:

Sec. 304. No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete: *Provided*, That—

(a) None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.

(b) It is the sense of the Congress:

(1) That under the present procedures employed for awarding National Endowment for the Arts grants . . . it is possible for projects to be funded without adequate review of the artistic content or value of the work.

(2) That recently works have been funded which are without artistic value but which are criticized as pornographic and shocking by any standards.

(3) That censorship inhibits and stultifies the full expression of art.

(4) That free inquiry and expression is reaffirmed. Therefore, be it resolved:

(A) That all artistic works do not have artistic or humanistic excellence. . . .

(B) That the Chairman of the National Endowment for the arts [sic] has the responsibility to determine

attempt to control the ultimate use of NEA funding by prohibiting recipients from using the money to produce or exhibit obscene materials.[25] According to section 304(a), determinations of whether an artistic work is obscene were left to the exclusive judgment of the NEA.[26]

As a result of this legislation, the NEA amended the second step of the grant process by adding a certification requirement.[27] The certification requirement mandated that pre-approved applicants, such as Lewitzky, agree in writing "in advance that none of the funds would be used 'to promote, disseminate, or produce materials which . . . may be considered obscene.'"[28]

On January 4, 1990, nearly one year after Lewitzky applied for an NEA grant, it was awarded $72,000.[29] By this time section 304(a) was in effect. Consistent with the change in the grant process, the NEA provided Lewitzky with a list of conditions that Lewitzky was required to abide by upon receipt of the grant.[30] One of the conditions required compliance with section 304(a).[31] Hence, Lewitzky was forced to condition its acceptance of the NEA funding by adhering to the obscenity ban.[32] Lewitzky, however, indicated its refusal to comply with the obscenity condition, by crossing out the conditional language.[33] The NEA, in response, cancelled all future funding to Lewitzky.[34]

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whether such an application should be funded.

Regulated Agencies Act, *supra* note 5, at 741.

25. *Id.*

26. *Id.*

27. *Bella Lewitzky*, 754 F. Supp. at 776.

28. *Id.* (quoting Regulated Agencies Act, *supra* note 5, at 741).

29. *Id.*

30. *Id.*

31. *Id.* at 777.

32. *Id.*

33. *Id.* The manager of the Lewitzky Dance Foundation filled out the certification requirement but crossed out the paragraph on obscenity before mailing it to the NEA. In response, the NEA wrote to Lewitzky explaining that funding was contingent on adherence to all conditions, including the obscenity requirement. *Id.*

34. *Id.* Bella Lewitzky was not alone in refusing to comply with the NEA's certification requirement. The following is a list of designated NEA grantees who also refused to sign the NEA's obscenity waiver. Included in this list is the amount of funding that was foregone:

1. Ferne Ackerman (Venice, CA) $7,000.
2. American Poetry Review (Philadelphia, PA) $10,000.
3. Arizona State University (Tempe, AZ) $9,965.
4. Art Institute of Southern California (Pasadena, CA) $15,000.
5. CCLM/Paris Review (New York, NY) $10,000.
6. Field Museum of Natural History (Chicago, IL) $ 21,600.

C. *The NEA's Policy on Obscenity*

The NEA provided Lewitzky and all other recipients of NEA funding with a statement of the NEA's policy on obscenity.[35] The policy statement explained how the NEA defines and evaluates obscenity.[36] The basis for making determinations of obscenity was identical to the standard established by the United States Supreme Court in *Miller v. California*.[37] The *Miller* court defined obscene artistic work as "art which: (1) when taken as a whole, the average person, applying contemporary community standards, would find appeals to the prurient interest (2) depicts or describes sexual conduct in a patently offensive way and (3) taken as whole, lacks serious literary, artistic, political, or scientific value."[38]

In addition to pronouncing the obscenity standard, the NEA stated the procedure for prosecuting grant recipients in violation of the obscenity standard.[39] The NEA would first send notice to grant recipients and then provide an opportunity for the grantee to "justify" the artistic work in question.[40] If the NEA ultimately found a section 304(a) obscenity violation, the agency would retrieve already disbursed grants, as well as withhold any future funding designated for the recipient.[41]

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7. Gettysburg Review (Gettysburg, PA) $4,550.
8. Jewish Community Centers of Greater Philadelphia (Philadelphia, PA) $10,000.
9. Jewish Community Museum (San Francisco, CA) $5,000.
10. Los Angeles Festival (Los Angeles, CA) $30,000.
11. National Book Foundation (New York, NY) $5,000.
12. New York Shakespeare Festival (New York, NY) $380,500.
13. Northern California Grantmakers (San Francisco, CA) $75,000.
14. Oregon Shakespeare Festival (Ashland, OR) $49,500.
15. Penn State University (State College, PA) $5,000.
16. Radio Bilingue (Fresno, CA) $15,000.
17. Time and Space, LTD (New York, NY) $10,000.
18. University of Iowa Press (Iowa City, IA) $12,000.

As of January 10, 1991, the total amount of grants rejected by these NEA grantees, including Bella Lewitzky, was $675,115. This information was provided by the National Endowment for the Arts.

35. *Bella Lewitzky*, 754 F. Supp. at 777.
36. *Id.*
37. *Id.*
38. *Id.* at n.4 (quoting Miller v. California, 413 U.S. 15, 24 (1973)).
39. *Id.*
40. All justifications were required to be in writing. *Id.*
41. *Id.*

Lewitzky and Newport brought suit against the NEA on two grounds. First, the plaintiffs alleged that the NEA's certification requirement banning obscene artistic works was "unconstitutionally vague" and therefore violated the Fifth Amendment Due Process Clause of the United States Constitution.[42] The plaintiffs asserted that grant recipients could only "speculate" as to how the NEA would measure obscenity because the determination of what constitutes obscenity was left to the judgment of a federal administrative agency.[43] The plaintiffs also alleged that the vagueness of the certification requirement violated the First Amendment by "creat[ing] a chilling effect on speech."[44] Plaintiffs contended that any bona fide attempt at obeying the ban on obscenity would result in overly cautious behavior on the part of NEA recipients that could lead to sacrificing the pursuit of legitimate artistic works for fear of crossing an ill-defined notion of obscenity.[45]

Upon motions for summary judgment by both parties to the suit, the district court granted plaintiffs' motion.[46] The court, implicitly agreeing with both claims of Lewitzky, held that the NEA's certification requirement was unconstitutionally vague because interpretations of obscenity could not be lawfully declared on a nation-wide basis by the NEA and, as such, the certification created a chilling effect on the plaintiffs' First Amendment freedom of speech rights.[47]

III. LEGAL BACKGROUND

The plaintiffs in *Bella Lewitzky* argued that the NEA certification requirement was unconstitutionally vague.[48] Because a federal agency made the obscenity determinations by applying a single, nation-wide standard of obscenity, Lewitzky contended that all grant recipients at best could merely guess as to how or what the NEA would find obscene.[49] Lewitzky argued that the concept of what constitutes obscenity is an unarticulated, uncertain notion that can not be legitimately observed.[50]

According to the modern analytical framework in *Miller v. California*,[51]

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42. *Id.* at 781.
43. *Id.*
44. *Id.* at 782.
45. *Id.*
46. *Id.* at 785.
47. *Id.* at 782-85.
48. *Id.* at 781.
49. *Id.*
50. *Id.*
51. 413 U.S. 15 (1973). The *Miller* court was the first court in nearly a decade to arrive at a majority opinion that established guidelines on obscenity cases. In so

obscenity determinations are made by juries applying contemporary community standards, not federal agencies such as the NEA. It is therefore inapposite for the NEA to make obscenity determinations as outlined in *Miller*.[52] The NEA, acting as a federal agency, is essentially powerless to access community standards, which vary from one community to the next, and apply those standards. As a result, Lewitzky had no notice of what the NEA would find obscene. Thus, Lewitzky maintained that the NEA's certification requirement, providing for a federal agency to make obscenity determinations, was unconstitutionally vague and violated the Due Process clause.[53]

A. The Vagueness Doctrine

The seminal United States Supreme Court case on the unconstitutional vagueness doctrine is *Grayned v. City of Rockford*.[54] In *Grayned*, a protestor attacked the constitutionality of a city ordinance on vagueness grounds after he was arrested for disrupting the normal activities of a public high school by making too much noise.[55] The plaintiff was demonstrating on school property in a protest calling for racial equality within the school system.[56] The ordinance in question prohibited protestors from making "any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ."[57]

The *Grayned* court set out the standards for determining whether the ordinance violated the unconstitutional vagueness doctrine:[58]

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doing, the court overruled the prior "utterly without redeeming social value" test of Memoirs v. Massachusetts, 383 U.S. 413 (1966). *Miller*, 413 U.S. at 24-25.

52. *Miller*, 413 U.S. at 24-25. Under *Miller*, the basic guidelines for the trier of fact to abide by when hearing obscenity cases are:

> (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 applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id.

53. *Bella Lewitzky*, 754 F. Supp. at 781.

54. 408 U.S. 104 (1972).

55. *Id.* at 105.

56. *Id.*

57. *Id.* at 108. The court found that the local ordinance in question was not "impermissibly-vague" after concluding that the prohibitions of the ordinance were made clear. *Id.* at 108-09.

58. *Id.*

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[59]

In its interpretation of the statute, the Court neither found nor required "mathematical certainty," but instead upheld the statute because it conveyed an overall clear sense of what was prohibited.[60]

1. Federal Obscenity Statutes and Vagueness

Other federal legislation outlawing obscenity has been challenged on the grounds of vagueness. These constitutional attacks, based on the argument that obscenity is too imprecise a term to be reasonably understood, have been rejected by the Supreme Court.[61] Despite these rulings, the perimeters surrounding obscenity, as opposed to indecency or provocation, remain difficult to ascertain.

Although inherently subjective, the term "obscenity" is not utterly incapable of definition. The precedent of *Miller* allows jurisdictions to invoke "contemporary community standards" to arrive at a definition of obscenity. One limit on defining obscenity under *Miller*, however, is that obscenity cannot be legally defined in terms of a broad-sweeping, national standard.[62]

Constitutional infringements can arise when administrative agencies attempt to enforce obscenity statutes. The United States Supreme Court faced the issue of federal agency regulation of obscenity in *Sable Communications of California v. Federal Communications Commission*[63] In *Sable*, a corporation providing sexually-explicit phone messages[64] for a fee brought

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59. *Id.* at 110. Interestingly, the court concluded that the antinoise statute was not unconstitutionally vague. *Id.* at 109.

60. *Id.* at 110. The Court went on to state: "[a]s always, enforcement requires the exercise of some degree of police judgment, but as confined, that degree of judgment here is permissible." *Id.* at 114.

61. *See* Hamling v. United States, 418 U.S. 87 (1974); Reidel v. United States, 402 U.S. 351 (1971).

62. *Miller*, 413 U.S. at 24.

63. 109 S. Ct. 2829 (1989).

64. *Id.* at 2832. These pre-recorded messages are commonly known as "dial-a-porn." *Id.*

suit in federal district court challenging the constitutionality of 47 U.S.C. section 223(b).[65] This statute criminalized the act of producing and making available to the public obscene communications via the telephone.[66]

The Supreme Court upheld the constitutionality of the statute's ban on obscenity.[67] The high court first noted that obscenity is not encompassed under the First Amendment as protected speech.[68] The court next determined that the main issue was not whether the statute could define obscenity on a nation-wide basis, but whether Congress has the power to proscribe obscenity.[69] The Court found that Congress is so empowered.[70]

Sable is distinguishable from *Bella Lewitzky* in a critical manner. The plaintiff in *Sable* solely contested the constitutionality of the statute, not the FCC's policies for implementing the statute. The district court specifically "reject[ed] the argument that the statute was unconstitutional because it created a national standard of obscenity."[71] On review, the Supreme Court affirmed.[72]

The *Sable* Court, flatly disagreeing with the argument that section 223 generated a nation-wide standard of obscenity, held that the statute did not infringe on the threshold "community standard" test of *Miller*.[73] "[T]he fact that 'distributors of allegedly obscene materials may be subjected to varying community standards in the various federal districts into which they transmit

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65. *Id.* Section 223(b) had sustained several amendments throughout the appellate stages of this case. The version in effect when Sable Communications brought suit read:

> (b) (1) Whoever knowingly—
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> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

Id. at 2834 n.4. (citing Pub. L. 100-297, 102 Stat. 424 (1988)).

66. *Id.*

67. *Id.* at 2835. *But see id.* at 2840-41 (Brennan, J., dissenting).

68. *Id.* The court cited Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973), as authority for this proposition of law. *Sable*, 109 S.Ct. at 2835.

69. *Id.*

70. *Id.*

71. *Id.* at 2832.

72. *Id.* at 2835.

73. *Id.*

the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.'"[74] Recognizing that jurisdictions disagree on what may be considered obscene, the court refused to completely roadblock Sable Communication's business.[75] However, the risk of anticipating how various communities would judge obscenity was passed on to the company.[76] Coupled with that risk was Sable's need to tailor its phone messages accordingly.[77]

The remainder of this Section centers on the reasons why federal agencies are unable to make obscenity determinations. Emphasis is placed on the processes of federal agencies. This focus in turn helps explain the district court's holding in *Bella Lewitzky* that the NEA's certification requirement is unconstitutionally vague.

2. The Policy Statement of the NEA

In response to section 304(a)'s limit on the use of NEA funding, the NEA created what essentially amounted to an obscenity-waiver. The NEA required grant recipients, before receiving funds, to sign a certification requirement in which recipients agreed not to use the grant money for obscene artistic works.[78] The NEA explained its position on obscenity by drafting a "Statement of Policy and Guidance for the Implementation of Section 304."[79] This statement of policy announced "that the NEA would essentially rely on the statement of *Miller v. California* . . . as a basis for making determinations regarding obscenity."[80] As a means of procuring notice of how the NEA would implement section 304(a), each recipient of NEA funding received a copy of the policy statement.[81]

Policy statements of administrative agencies are not the products of agency legislation. Policy statements, as defined by the court in *Pacific Gas & Electric Company v. Federal Power Commission*,[82] are "the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications."[83] Agency policy

74. *Id.* at 2835-36 (quoting Hamling v. United States, 418 U.S. 87, 106 (1974)).
75. *Id.* at 2836.
76. *Id.*
77. *Id.*
78. *Bella Lewitzky*, 754 F. Supp. at 776.
79. *Id.* at 777.
80. *Id.*
81. *Id.*
82. 506 F.2d 33 (D.C. Cir. 1974).
83. *Id.* at 38.

statements are legally significant because agencies are not bound by the positions expressed in the policy statement.[84] The *Pacific Gas* court went on to express this general proposition of administrative law. "A general statement of policy . . . does not establish a 'binding norm'. . . . The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy . . . [and] the agency's tentative intentions for the future."[85]

The court in *Vietnam Veterans v. Secretary of Navy*[86] emphasized the freedom of agencies to stray from an agency position expressed in the policy statement. "[T]he agency remains free in any particular case to diverge from whatever outcome the policy statement or interpretive rule might suggest."[87]

Agency policy statements must be distinguished from a substantive rule of the agency. The relevant distinction is that an agency is bound to follow its substantive rules, but not the policy statement. When an agency chooses to effectuate its functions through rulemaking, the agency must follow the governing procedures of the Administrative Procedure Act (APA).[88] This procedure, commonly known as the notice-and-comment period, requires the agency to give notice and an opportunity for interested persons to be heard before promulgating a valid, binding rule.[89]

Disputes over this distinction between policy statements and substantive rules often arise when an entity brings an action to contest the validity of an agency's written announcement. In these situations it is unclear whether the written announcement of the agency is a substantive rule or a policy statement. The challenging party alleges that the agency has mislabeled the announcement as a policy statement, but in actuality the agency has promulgated a rule. Because the agency failed to follow the necessary notice-and-comment procedures, the rule is void. Of course, the agency contests the challenge by pleading that the written announcement in question is a policy statement. The courts clarify the ambiguity.

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84. *See* Dyer v. Secretary of Health & Human Servs., 889 F.2d 682, 685 (6th Cir. 1989); Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin., 847 F.2d 1168, 1175 (5th Cir. 1988); Iowa Power & Light Co. v. Burlington N., Inc., 647 F.2d 796, 811 (8th Cir. 1981), *cert. denied sub nom.* Burlington N., Inc. v. United States, 455 U.S. 907 (1982). Limited authority has suggested that an agency policy statement could, in fact, bind the agency promulgating it. National Latino Media Coalition v. F.C.C., 816 F.2d 785, 788 n.2 (D.C. Cir. 1987).

85. *Pacific Gas*, 506 F.2d at 38.

86. 843 F.2d 528 (D.C. Cir. 1988).

87. *Id.* at 537.

88. 5 U.S.C. § 553(b) (1988).

89. *Id.*

The court in *National Latino Media Coalition v. FCC*[90] was faced with the issue of identifying a written statement of the Federal Communications Commission (FCC) as either a rule or a policy statement. In *Latino Media*, the FCC released a written announcement to the public that permitted the agency to conduct a lottery. The lottery allowed the FCC to break a tie over which of many equally qualified applicants should receive an FCC-issued license.[91] The court concluded that the announcement was a statement of policy, not a rule.[92] "These statements merely present an interpretation of the agency's governing statute. They do not bind the Commission ever to conduct a tie-breaker lottery."[93]

Two criteria guide courts in making the critical distinction between policy statements and substantive rules. The court in *American Bus Ass'n v. United States*[94] identified these factors. "First . . . unless a pronouncement acts prospectively, it is a binding norm."[95] In other words, agency rules presently affect parties, whereas policy statements have only future, if any, application. "The second criterion is whether a purported policy statement genuinely leaves the agency and its decision-makers free to exercise discretion."[96] Hence, the NEA's position on obscenity, as set out in its policy statement, could be changed at anytime, applied differently in any given instance, or disregarded.

3. Jury Trials in Federal Agencies

The Supreme Court, in interpreting the Seventh Amendment, has held that there is no right to a jury trial in federal agency hearings.[97] Federal agencies, including the NEA, do not provide juries at their proceedings. Compare this rule with the Supreme Court's holding in *Miller v. California*, where obscenity determinations are to be made by juries of average persons applying contemporary community standards.[98] The *Miller* court stressed the crucial role of the jury system in evaluating allegedly obscene material.[99]

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90. 816 F.2d 785 (D.C. Cir. 1987).

91. *Id.* at 787.

92. *Id.* at 787-88.

93. *Id.* at 789.

94. 627 F.2d 525 (D.C. Cir. 1980).

95. *Id.* at 529.

96. *Id.*

97. Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977).

98. *See supra* notes 52-54 and accompanying text.

99. "The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law." *Miller*, 413

The Supreme Court in *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*[100] reviewed the petitioner's claim to a Seventh Amendment jury trial right in an administrative hearing. Petitioner Atlas, charged with OSHA violations for maintaining hazardous worksites, sustained penalties at the agency hearing.[101] OSHA acted as the exclusive fact-finder during the hearing.[102] The Court upheld the constitutionality of an administrative agency acting as the sole fact-finder in agency proceedings.[103]

In *Atlas Roofing*, the court's analysis of the right to a jury trial in agency adjudications began with a textual interpretation of the Seventh Amendment.[104] The court reasoned that when Congress created new "statutory obligations" not in existence at common law, the Seventh Amendment right to trial by jury was not invoked at adjudications of these new obligations.[105] Therefore, agencies established by Congress to assess fines and penalties for alleged violations of the new statutory obligations need not provide a jury. "[T]he Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."[106]

The *Atlas Roofing* court next found support in a series of prior cases, consistent with its decision, addressing the absence of jury trials in agencies.[107] "In sum, the cases discussed . . . stand clearly for the proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction."[108]

B. First Amendment and Chilling Effects

The second argument brought by the plaintiffs in *Bella Lewitzky* was based on a claim of First Amendment freedom of speech violations.[109] The plaintiffs asserted that the vagueness of the NEA certification requirement

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U.S. at 30.

100. 430 U.S. 442 (1977).

101. *Id.* at 447.

102. *Id.* at 447-48.

103. *Id.* at 461.

104. *Id.* at 449-50. The Seventh Amendment reads as follows: "In suits at common law, where the value in controversy shall not exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. CONST. amend. VII.

105. *Atlas Roofing*, 442 U.S. at 450.

106. *Id.* (footnote omitted).

107. *Id.* at 450-55.

108. *Id.* at 455.

109. *Bella Lewitzky*, 754 F. Supp. at 782.

quashed the free flow of artistic expression of grant recipients by compelling conformity to the obscenity ban.[110] This, in effect, created a "chilling effect"[111] on the grant recipients' speech.

Several United States Supreme Court cases have addressed the chilling effect doctrine. For example, the Court in *Speiser v. Randall*[112] struck down a California statute that required veterans to promise under oath before receiving the benefit of a tax exemption not to advocate the overthrow of the government with force. The *Speiser* Court concluded that the statute violated the petitioner's Due Process rights. The court warned that "where particular speech falls close to the line separating the lawful from the unlawful, the possibility of mistaken factfinder . . . will create that the legitimate utterance will be penalized."[113] Similarly, the Supreme Court in *Baggett v. Bullitt*[114] held that a state "oath" statute violated a petitioner's Due Process rights. The statute conditioned employment with the state on a prospective employee's signing an oath that pledged not to advocate or advise the government's overthrow. "Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language . . . restrict their conduct to that which is unquestionably safe. Free speech may not be so inhibited."[115]

IV. THE INSTANT DECISION

A. *Lewitzky's Fifth Amendment Due Process Claim*

The Court held that the NEA's certification requirement was unconstitutionally vague, and therefore violated the Due Process Clause of the Fifth Amendment to the United States Constitution.[116] The NEA, acting in its capacity as a federal agency, can not alone make lawful judgments of whether or not an artistic work is obscene, despite its promise to adhere to the *Miller* standard.[117] Noting that a federal administrative agency is not bound to follow the positions the agency has declared in its policy statement,[118] the Court reasoned that the NEA was not constrained by the *Miller* standard.[119]

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110. *Id.*
111. *Id.*
112. 357 U.S. 513 (1958).
113. *Id.* at 526.
114. 377 U.S. 360 (1964).
115. *Id.* at 372 (footnote omitted).
116. *Bella Lewitzky*, 754 F. Supp. at 782.
117. *Id.*
118. *See supra* note 84 and accompanying text.
119. *Bella Lewitzky*, 754 F. Supp. at 782.

To the contrary, the NEA was free to disregard its policy and adopt any other perspective on obscenity.[120] The Court was skeptical of the NEA's pledge of reliance on *Miller*, in that the NEA could be unfaithful or inconsistent.[121]

Lewitzky's vagueness claim succeeded for another reason. Even if the NEA, *arguendo*, were to rigidly follow its policy statement, the NEA could never produce adjudications with the procedural safeguards that were essential to the holding of *Miller*.[122] The *Miller* court identified three procedural safeguards that must occur at prosecutions of obscenity violations.[123] There must be a statute defining forbidden depictions of sexual conduct, a full adversarial trial, and a jury of citizens applying community standards on obscenity.[124]

The court bypassed a critical analysis of the initial two safeguards and focused its attention on the third. The court emphatically concluded that the third safeguard was missing due to a federal agency's inherent inability to provide jurors.[125] "Simply stated, the NEA ia a national-level agency that, by hypothesis, is incapable of applying varying community standards for obscenity."[126]

B. Lewitzky's Chilling Effect Claim

Lewitzky continued its attack on the certification requirement of the NEA. Given the uncertainty of what the NEA might find obscene, Lewitzky argued that conscientious grant recipients, to avoid producing obscenity, would be stifled in their artistic creations.[127] Hence, this restriction would have a "chilling effect" on the recipient's First Amendment freedom of speech rights.[128]

The court outlined the danger that would occur if Lewitzky attempted to act in accordance with the certification requirement. "The creative expression of the plaintiff Dance Foundation would necessarily be tempered were it to sign the certification and then take seriously its pledge. . . ."[129]

The court then considered an extrinsic factor before concluding that the certification requirement created a chilling effect on speech; namely, the

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120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* *See supra* note 53.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 783.

significant influence NEA funding maintains in the United States art world.[130] An artistic organization or individual that is awarded NEA grants is practically guaranteed the receipt of private donations to follow the NEA funding.[131] Private individuals and organizations view initial NEA funding as the first step in selecting artistic works that are worthy of recognition and support.[132] Donations flow as a natural consequence.[133] If NEA funding were threatened, the court implied, private donations logically would also be threatened, and could equally likely be severed completely.[134]

V. ANALYSIS

Until 1990, the National Endowment for the Arts was a relatively invisible federal agency. Its causes and purposes went unchecked by the American public. That all changed when NEA-funded exhibits appeared in galleries across the nation and shocked their viewers with provocative subject matters that critics branded "obscene." Highlighted by the media's exploitive attention, these artistic works incited the public to take steps to hold the NEA accountable for its designations of federal grants. And who better to sound the battle cry than those footing the bill—the taxpayers.[135] After all, it is the taxpayer who, without knowledge, ultimately paid for the exhibits in question.

A. The Underpinnings and Legislative Intent of Section 304

Senator Jesse Helms, frustrated with tax dollars provided for the Robert Mapplethorpe and Andres Serrano exhibits, authored legislation designed to preclude NEA funding for obscene purposes. His legislation evolved into

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130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. NEA Chairperson John E. Frohnmayer appeared on the 700 Club for an interview with host Pat Robertson. Mr. Robertson posed the following question to his guest:

> I want you to know that I think I speak for the taxpayers of America, we're fed up to here with using our money for homo-erotic art and for anti-Christian diatribes by way-out fringe artists. And I think that's going to have to be stopped, and I, frankly, agree that the government has no part in getting engaged in that. It's unconstitutional.

700 Club: Interview of National Endowment for the Arts Chairperson John Frohnmayer (television broadcast, April 23 1990) (transcript on file with the MISSOURI LAW REVIEW) [hereinafter, *700 Club transcript*].

what appears presently as section 304.[136] During a Senate floor debate over the bill, Senator Helms described what flawed results could occur in the absence of his proposed legislation:

> "I called attention to Mr. Serrano's so-called work of art, which portrays Jesus Christ submerged in a bottle of the artist's urine, on May 18. [I] pointed out that the National Endowment for the Arts had not only supported a $15,000 award honoring Mr. Serrano for it, but they also helped promote and exhibit the work as well."[137]

Senator Helm's original proposal was broader in scope than the version of section 304 that was eventually passed by Congress. "Specifically, my amendment prohibits the use of the NEA's funds to support obscene or indecent materials, or materials which denigrate the objects or beliefs of a particular religion."[138]

Section 304 faced opposition at its inception on the floor of the Senate from lawmakers who cautioned about the wide reach of the statute. Obscenity traditionally has been a sensitive area in which to legislate. These warnings on the danger of proscribing obscenity foreshadowed litigation that would arise over the statute's interpretation. Senator Wirth expressed his hesitation in approving the legislation:

> "I am deeply concerned that this provision sets a very dangerous precedent of legislating a moral code on the value of particular works of art. This action could effectively censor all artists and museums for years to come. Museums will restrain or suppress their creativity in providing quality exhibits to the public, fearing the loss of Federal funds."[139]

Despite these warnings, section 304 was enacted on October 23, 1990.

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136. *See supra note* 25.

137. 135 CONG. REC. S8807 (daily ed. July 26, 1989) (statement of Sen. Helms). The Senator also described other NEA-funded exhibits:

> "One painting, entitled *First Sex*, depicts a nude woman on her back, legs open, knees up, and a little boy leaning against her leg looking into her face while two sexually aroused older boys wait in the background. Another work shows a man urinating on a boy lying in a gutter. Other, more despicable, works were included as well."

Id.

138. *Id.*

139. *Id.* at S8813 (statement of Sen. Wirth).

B. *The Bella Lewitzky Court's Decision*

Bella Lewitzky is the first case interpreting the validity of section 304. The court upheld the plaintiffs' claim that the statute was unconstitutional due to vagueness.[140]

The *Bella Lewitzky* Court began its analysis of the vagueness doctrine by expressing skepticism over the NEA's policy statement.[141] The court correctly noted that the NEA is not obligated to adhere to its policy statement.[142] The NEA, however, is bound to follow the United States Supreme Court precedent of *Miller*. Therefore, the danger that the NEA would stray from its policy statement and essentially establish an obscenity standard different than that illuminated under *Miller* is almost nil.

Not all of the reasoning of *Bella Lewitzky* was so attenuated. A convincing (and eventually debilitating) argument posed by the court was the NEA's inability to access community standards by way of a jury in its capacity as a federal agency.[143] This is a legitimate rationale that perhaps alone led to the ultimate collapse of the NEA's obscenity-waiver. Given the fact that a Missouri community could consider an artistic work obscene, but a New York community could consider the same work brilliant or *avant garde*, it would be nearly impossible for a federal agency to assess and to apply the sliding-scale of obscenity found in the myriad communities across our nation.[144]

Although the court properly articulated its reasoning, the result of the case, nonetheless, seems unsatisfactory. Essentially, the holding would allow future artists receiving NEA funds to continue producing sadomasochistic art works and present them in our nation's galleries, all at the taxpayers' expense.

C. *What Remains to be Finished Under Section 304*

Due to the public's outrage, the NEA was put on the defensive, rather than the individuals responsible for generating the allegedly obscene artistic works. The NEA was a logical target. Without the NEA funding, financially crippled recipients presumably would lack the necessary resources to actively

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140. *Bella Lewitzky*, 754 F. Supp. at 782.

141. *Id.*

142. *Id.*

143. *Id.*

144. "In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide . . . ." *Miller*, 413 U.S. at 26.

produce artistic works. NEA Chairperson John E. Frohnmayer[145] was summoned to defend his agency's funding of two of the most visible and controversial recipients, Robert Mapplethorpe and Andres Serrano. In a recent television interview, Frohnmayer explained the goals of his agency amidst a barrage of accusatory questions.

> [T]his agency can really provide a very valuable service to the American people. And I think you [Pat Robertson] do us a real disservice by focusing [on] about 20 photographs. They are, I think, if you take them by themselves, obnoxious and obscene by anybody's standards. I'm not here to defend those. I'm here to defend the record of this agency overall. . . . What the Endowment can do is really enhance the spirit of this country, and I think that's what we're really all about.[146]

Frohnmayer's argument has merit. Wide-spread attention focused solely on the extreme cases of NEA funding has yielded a misguided perception of the NEA. Public exposure of exhibits, such as Robert Mapplethorpe's exhibit, has chiefly erased the positive role played by the NEA in funding deserving artistic works. Instead, concentration should shift to the recipients of the funding. It is these recipients that cause and perpetuate the obscenity problem, not the NEA. The grant process introduced by the NEA, however, does not effectively prevent grant recipients from producing obscenity with government tax dollars. Only after applicants have been approved for NEA funding are they asked to sign the certification requirement.[147] Under this framework, prosecution for obscenity could only occur after NEA funds have been expended, the artistic work has been fabricated, and the obscenity has appeared in our museums.

The sensible alternative to granting after-the-fact relief is to authorize the NEA to implement preventative remedies. The NEA did, in fact, attempt to take one form of a preventive measure; namely, asking grant recipients to promise in writing not to use NEA funds to produce obscenity.[148] The obscenity-waiver included guidelines of what the NEA considered to be obscene, coupled with specific examples of what was outlawed.[149] These examples, drawn from the language of section 304, prohibited artistic works depicting "sadomasochism, homoeroticism, [and] the sexual exploitation of children, or individuals engaged in sex acts."[150] The NEA also issued a

145. Frohnmayer is also a defendant in *Bella Lewitzky*.
146. *700 Club transcript*, *supra* note 137, at 5, 7.
147. *Bella Lewitzky*, 754 F. Supp. at 776.
148. *Id.*
149. *Id.*
150. *Id.*

policy statement signifying its pledge to adhere to the *Miller* test in making determinations of obscenity. The *Bella Lewitzky* court, however, struck down this preventive alternative due to vagueness.[151]

Has the *Bella Lewitzky* court left the NEA with its hands tied, or can the government funding of obscenity be stopped? The present method, as it stands after *Bella Lewitzky*, is an ineffective device to achieve the goal of preventing obscene artistic works. Prior to the NEA's selection of grant recipients, applicants submit a brief description of the artistic work they seek to produce with the funding.[152] The NEA bases its decision whether to fund the applicant in part on the artist's description.[153] This leaves the door open for applicants to couch their true intended use of the money in neutral or favorable language to appear non-controversial.

Senator Helms cited the description of the Robert Mapplethorpe exhibit that was provided to the NEA as a basis for deciding to fund the project:

> 'To support a mid-career summary of the work of photographer Robert Mapplethorpe. Although all aspects of the artist's work—the still lifes [sic], nudes, and portraits—will be included, the exhibition will focus on Mapplethorpe's unique pieces where photographic images interact with richly textured fabrics within carefully design frames.' Mr. President [of the Senate], what a useless and misleading description. No legitimate panel of experts would know from this description that the collection included explicit homo-erotic photography and child obscenity.[154]

The NEA could implement an alternative remedy, also preventive in nature, by which the agency could more closely screen grant recipients. This technique could demand a more in-depth, detailed description of the subject matters, themes, messages, and purposes of the exhibit, thus allowing for a closer scrutiny of the proposed artistic work before dispensing government funds. Prior exhibits of the artist could also be reviewed as a determinative criteria. Such a heightened review, easily blended into the current grant process, could lead to the demise of government funded obscenity.

VI. CONCLUSION

Since the court in *Bella Lewitzky Dance Foundation v. Frohnmayer* found section 304 to be unconstitutional on January 9, 1991, the NEA has modified its grant process. No longer will the NEA make determinations of obscenity.

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151. *Id.* at 782.
152. *Id.* at 776.
153. *Id.*
154. 135 CONG. REC. S8807 (daily ed. July 26, 1989) (statement of Sen. Helms).

Instead, decisions of whether NEA-funded artistic works are obscene will be left to the court system and its accompanying provision for juries. The NEA's new position of restraint became effective February 8, 1991.

The NEA added the following language to its Grant Management Manual: "Accordingly, the Endowment will enforce this [obscenity] prohibition after a grantee has been convicted of violating a criminal obscenity or child pornography statute and all appeal rights have been exhausted."[155]

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155. This information was provided by the National Endowment for the Arts.